

BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION,)	
)	
Plaintiff,)	
)	
v.)	Docket No. 169
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: December 14, 1970

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. Plaintiff is a tribe of American Indians, residing within the territorial limits of the United States.
2. By the Treaty of March 24, 1832 (7 Stat. 366), the Creek Nation ceded to the United States all its lands east of the Mississippi River and agreed to remove to lands set aside for it by the United States west of the Mississippi River.
3. The United States and the Creek Nation concluded a treaty on February 14, 1833 (7 Stat. 417). By this treaty the United States agreed to grant in fee simple to the Creek Nation certain described lands in what was then Indian Territory but which subsequently became a part of the State of Oklahoma. Pursuant to the treaty provisions, letters patent were issued to the Creek Nation on August 11, 1852, to the tract of land described in Article II of the treaty.
4. In Article IV of the Treaty of August 7, 1856 (11 Stat. 699), the United States solemnly agreed and bound themselves that no State

or Territory would ever pass laws for the government of the Creek Nation, and that no portion of the lands of the Creek Nation would ever be embraced or included within, or annexed to, any Territory or State, nor "erected" into a Territory without the full and free consent of the legislative authority of the Creek Nation.

In Article XV of the same treaty, the United States promised as follows:

So far as may be compatible with the Constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks ... shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their ... limits; excepting, however, all white persons, with their property, who are not, by adoption or otherwise, members of ... the Creek ... tribe; and all persons not being members of [the] tribe, found within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States agents ...; (assisted, if necessary, by the military)....

5. The Creek Nation thereafter resided on these lands. The Nation maintained a tribal organization consisting of the Executive or Principal Chief, a legislature, a system of courts; and a constitution or code of written laws, whereby the affairs of the Creek Nation and of its citizens were administered. Citizenship in the Nation was evidenced by certain documents known as the Town Rolls which were kept by the duly constituted authorities of the Nation.

6. In 1890, the Creek Nation assembled a census roll of the citizens of the Nation. This census roll was adopted as a correct census by the National Council of the Creek Nation, and was sent to the Secretary of the Interior as a "correct enumeration of the persons

entitled to participate in the payment of the Four Hundred Thousand Dollars appropriated by ... Act of Congress ... to be paid to the Creek Indians per capita as provided in ... the treaty [of June 14, 1866, 14 Stat. 785]."

7. In 1893, the United States discontinued its policy of isolating the Creek Nation and the other of the Five Civilized Tribes in Indian Territory, and by Act of March 3, 1893 (27 Stat. 612, 645), Congress provided that the President would appoint three commissioners to negotiate with the Five Civilized Tribes towards the cession to the United States or the allotment in severalty of the tribal lands of said Tribes for the ultimate purpose of creating a state or states out of the Indian Territory. The commission thus established was originally known as the Dawes Commission, and subsequently as the Commission to the Five Civilized Tribes.

8. On May 17, 1895, the National Council of the Creek Nation directed a committee of eighteen of its members to examine and correct the forty-seven Town Rolls of the Creek Nation. On June 8, 1895, the Committee reported to the National Council that it had examined the Town Rolls and had stricken 619 names from the rolls, leaving an aggregate of 13,841 names thereon. This census roll was approved by the National Council of the Creek Nation in 1896 and was the last authenticated roll of Creek citizens assembled by the Creek Nation.

9. By Act of June 10, 1896 (29 Stat. 321, 339-340), the duties of the Dawes Commission were extended to include the determination of claims of citizenship in the several tribes and the preparation

of tribal rolls. The Commission was empowered to conduct hearings and Congress provided that any tribe or person aggrieved by a decision of the Commission could appeal to the United States District Court.

10. By the Act approved June 7, 1897 (30 Stat. 62, 84), Congress made minor modifications in the functions of the Commission and provided certain procedures to help prevent improper enrollments.

11. The Creek Nation was opposed to the division of its land in severalty and was reluctant to turn over its tribal rolls to the Dawes Commission. Since the Commission was unable, prior to 1898, to secure from the Creek Nation its authenticated tribal rolls, little work was done on Creek enrollment matters under the Acts of June 10, 1896, and June 7, 1897. However, a census was taken without the benefit of the Creek tribal rolls, beginning in the fall of 1897. This census was not intended as a Creek citizenship roll but was later used to assist the Commission in making the roll of Creek citizens.

12. The Dawes Commission, pursuant to the authority vested in it under the Act of March 3, 1893 (27 Stat. 612, 645), reached an agreement with representatives of the Creek Nation on September 27, 1897, relating to the allotment of the lands of the Creek Nation. But the agreement was rejected by resolution of the National Council of the Creek Nation on October 18, 1897, and ratification was also rejected at an election in the Creek Nation on November 1, 1898. The reasons given by Isparhecher, who was then Principal Chief of the Creek Nation, for this rejection are set forth in his report to

the National Council of the Muskegee Nation dated October 8, 1897, in which he stated in part:

I am aware that the United States is urging us to change our relations with her, and has expended considerable money in surveying our country and for maintaining a Commission for the past three years. But all this had been done at the option of the Government, and not at our request. We have not asked for any of these things, but they have been asked for by the yelping, insatiable boomers who are always on the trail of the Indian, and will be until every foot of this land is opened up; and when we make this treaty, these will be the people that will first throng this country to scheme us out of our homes. (Defendant's Exhibit No. 4, Annual Report of the Department of Interior, House of Representatives Document No. 5, 55th Cong., 2d Sess., p. CXXXVII)

13. Because of the rejection by the Creek Nation and rejections of similar agreements by other of the Five Civilized Tribes, Congress, on June 28, 1898, enacted the Curtis Act (30 Stat. 495) which dispensed with the policy of negotiation with the Five Civilized Tribes set forth in the Act of March 3, 1893 (Finding 7, supra). Under the Curtis Act, the Dawes Commission was, insofar as here pertinent, authorized and directed to make correct rolls of the citizens by blood of the Creek Nation, eliminating from the tribal rolls such names as had been placed thereon by fraud or without authority of law, and to enroll only such citizens as had lawful right thereto and their dependents born after such rolls were made. The Act also directed the Commission to make a roll of the Creek Freedmen. The Commission was authorized to make the rolls descriptive of the persons thereon for purposes of identification and to take a census of each of the tribes. The Commission was given access to all rolls and records of the tribes and was given authority

to require all citizens of the tribes and persons who should be enrolled to appear before it. The Act further provided that the rolls so prepared would be final when approved by the Secretary of the Interior.

14. Dissatisfied with prospective allotment under the provisions of the Curtis Act, representatives of the Creek Nation executed an agreement, known as the Original Creek Agreement, with members of the Dawes Commission at Washington, D. C. on March 8, 1900. This Agreement was ratified by Act of March 1, 1901 (31 Stat. 861), and by the National Council of the Creek Nation on May 25, 1901. It authorized the Commission to allot one hundred and sixty acres of Creek National domain to each enrolled member of the Creek Nation, such allotments to be valued at six dollars and fifty cents an acre, and equalized, at that standard value, to \$1,040.00. It further provided for the enrollment of all citizens of the Creek Nation entitled to be enrolled under the provisions of section 21 of the Curtis Act (30 Stat. 495) who were living on April 1, 1899, and for the enrollment of all children born to citizens so entitled to enrollment, up to and including July 1, 1900, and then living. It was further provided that no person was to be added to the rolls after March 1, 1901. Under section 23 of the Agreement, the Secretary of the Interior was authorized to furnish the principal chief of the Creek Nation with blank deeds, and the principal chief was to execute and deliver to each allottee a deed conveying all right, title and interest of the Creek Nation and of all other Creek citizens in and to the lands so allotted.

15. In December 1901, the National Council of the Creek Nation passed a resolution requesting of the Dawes Commission a partial list of the Creek citizenship roll being prepared by the Commission in order to assist the Council in establishing that certain enrollments by the Commission had been obtained by fraud and without authority of law. This resolution was sent to the Secretary of the Interior who sent it to the Dawes Commission for consideration and an immediate report. On January 28, 1902, the Commission recommended to the Secretary of the Interior that the request be denied stating that "approval of said resolution would not only countenance an unjustifiable delay in closing the Creek rolls but would, also, give encouragement to those parties who, because of personal interests, have embraced every opportunity to retard the work of allotment." The request of the Creek Nation was denied. (Defendant's Exhibit No. 16, from The National Archives Record Group No. 48)

16. By the Act approved May 27, 1902 (32 Stat. 245, 258), it was provided "[t]hat all children born to duly enrolled and recognized citizens of the Creek Nation up to and including the twenty-fifth day of May, nineteen hundred and one, and then living, shall be added to the rolls of citizenship of said nation"

17. The Supplemental Creek Agreement, approved by Act of June 30, 1902 (32 Stat. 500), and ratified by the National Council of the Creek Nation on July 26, 1902, provided that certain children born subsequent to July 1, 1900, should be enrolled as citizens of the Creek Nation.

18. After the enactment of the Curtis Act, the Dawes Commission began the work of making rolls of the Creek Nation. During the course of the enrollment of citizens of the Creek Nation, the Commission utilized the census rolls obtained from the Creek Nation under the authority of the Curtis Act. The Commission examined claimants for citizenship at the general office of the Commission in Muskogee, Creek Nation, and also at interviews held at various places throughout the Creek Nation. While the great majority of the applicants for enrollment appeared personally before the Dawes Commission, there were many cases where enrollment was granted based upon the oral statements of third parties that a person was alive and entitled to enrollment.

19. In 1903, Messrs. Charles J. Bonaparte and Clinton Rogers Woodruff were appointed special inspectors by the Secretary of the Interior to report on alleged abuses and irregularities in the public service of the Indian Territory. This investigation was ordered because of the report of Mr. S. M. Brosius, Agent of the Indian Rights Association, an organization of private citizens, wherein Mr. Brosius made accusations of grave irregularities on the part of United States Government officials, including members of the Dawes Commission, in Indian Territory. The investigators found that "abuses have been very serious" in the activities of the land and trust companies in leasing Creek lands. The report by Bonaparte and Woodruff further confirmed the fact that officials of the Dawes Commission and some of its employees had organized and were officers and stockholders of companies dealing in Creek lands and that these facts were admitted by said officials. The latter report stated:

*** We find that Commissioner Bixby's notorious interest in the Canadian Valley Trust Company; the fact that, as stated by Mr. Brosius, two former employees of the Commission are now the principal officers of this corporation, and its occupancy of offices recently forming part of those of the Commission, undoubtedly tend to identify, in some sort, the company with the Commission, and to give the former a quasi-official status, which it is not entitled, and which may possibly afford it an illegitimate advantage in dealing with ignorant or otherwise incompetent persons. We are not to be understood as asserting that the company has been, in fact, dishonest or oppressive in its dealings; no evidence was produced before us tending to prove or suggest that it had been; but, after a careful consideration of all the circumstances, and in view of the very peculiar conditions now existing in the Territory, we find and report that, in our judgment, Commissioner Bixby's connection with this corporation impairs his usefulness as a public official, and, if he is to retain his present position, it should, in our judgment, be terminated without delay. (Defendant's Exhibit 19, Alleged Abuses and Irregularities in the Public Service of the Indian Territory, Senate Document No. 189, 58th Cong., 2d Sess., p. 22)

The report further stated, in connection with the leasing of allotted lands, that:

... we find some reason to suspect, without, however, any definite proof on the subject, that the confidence unavoidably reposed by ignorant and stupid Indians in ... minor officials may have been occasionally abused ... There is not, however, the slightest proof that the Commission encouraged or tolerated any such practices. (Ibid, p. 13)

20. In consequence of this investigation, the Secretary of the Interior advised the Dawes Commission that each of its employees had to cease all connection with corporations, firms or persons engaged in the purchase or sale of town lots or the leasing of lands in the Indian Territory.

21. On December 5, 1904, Mr. M. L. Mott, National Attorney for the Creek Nation, wrote as follows to the Secretary of the Interior:

The [Creek National] council of 1903 appropriated one thousand dollars to pay witnesses' per diem and mileage in the matter of investigation of fraudulent enrollments. Very little was done in this connection up to the time of my appointment as National Attorney. Upon final closing of applications for citizenship, September 1st, 1904, I found time to begin the investigation of those cases where citizenship had been established through fraud of the applicant by false swearing, etc. The limited time I had to give to it, before meeting of the council, demonstrated beyond all question that several hundred had succeeded in imposing upon the Daws' [sic] Commission and the Department in getting themselves upon the rolls by these fraudulent methods. I found that the crime of subordination [sic] of perjury had been carried on to considerable extent, and that the applicant's inducement to his witnesses was a division of the allotment in the event he succeeded in getting upon the rolls The investigation consists in the making of affidavits by two or more witnesses, setting out that the party enrolled is known to the affiants and that they know said affiant is not entitled to citizenship, setting out the different reasons for such knowledge on part of the affiant. These affidavits are forwarded to the Secretary of the Interior accompanied by application of National Attorney, that the Secretary direct the Daws' [sic] Commission to reopen the case for introduction of new and additional testimony, and if upon the rehearing the Secretary of the Interior is satisfied that a fraud was originally perpetrated by the applicant, then he directs the name stricken from the rolls. Application has been made to the Secretary and granted for the re-opening of twenty or more cases, and this appropriation is to be used for the payment of the per diem and mileage of each witness as the Nation may present in its behalf. The council appropriated five thousand dollars for this purpose which they hope may have your and the President's approval. I am sure that with vigilant work and a judicious expenditure of this money, a great number of imposters can be fixed upon and the rolls purged of their names. *** (Plaintiff's Exhibit No. 1, pp. 42-43, from The National Archives, Record Group No. 123)

22. During the fiscal years 1904 and 1905, 46 persons previously enrolled as citizens of the Creek Nation, and their enrollment approved by the Secretary of the Interior, were cancelled from the final roll. Evidence had been submitted by the Creek Nation to the Dawes Commission

and report made to the Department of the Interior that they were not entitled to have their names appear thereon or that they were duplicated on the roll under other names.

23. By the Act of March 3, 1905, 33 Stat. 1048, 1060, the Secretary of the Interior was directed to complete the work of the Commission to the Five Civilized Tribes (the Dawes Commission). Said Act provided, in part as follows:

For the completion of the work heretofore required by law to be done by the Commission to the Five Civilized Tribes, and the provisions for investigations herein contained two hundred thousand dollars. Said appropriation to be disbursed under the direction of the Secretary of the Interior: Provided, That the work of completing the unfinished business, if any, of the Commission to the Five Civilized Tribes shall devolve upon the Secretary of the Interior, and that all the powers heretofore granted to the said Commission to the Five Civilized Tribes are hereby conferred upon the said Secretary on and after the first of July, nineteen hundred and five.

In accordance with the provisions of the above Act, the Secretary of the Interior appointed Tams Bixby, formerly the Chairman of the Commission to the Five Civilized Tribes, as his representative to succeed the Commission and to perform the work formerly required of it. Mr. Bixby was thereafter designated "Commissioner to the Five Civilized Tribes."

24. In April 1906, an employee of Commissioner Bixby withdrew the Creek rolls from the Commissioner's office and the employee and another person copied them in a vacant building in the outskirts of Muskogee. The United States Attorney for the Indian Territory sought an indictment for malfeasance in office but the grand jury did not

return an indictment. These rolls soon after were in the hands of the land companies doing business in the territory comprising the Creek Nation.

25. On April 24, 1906, Commissioner Bixby advised the Secretary of the Interior of pending legislation having for its purpose changing the method of delivery of deeds to allottees of the Five Civilized Tribes. This legislation provided that all deeds to allottees were to be recorded in the office of the Commissioner to the Five Civilized Tribes, that when so recorded legal title would vest in the allottees, and the deeds would then be delivered under the direction of the Secretary of the Interior to the parties entitled to receive them. In his letter to the Secretary, Commissioner Bixby proposed that as soon as the legislation was approved by the President, public notice be given "that deeds and patents will be delivered to the persons entitled to receive the same, either in person at the general office of the Commission to the Five Civilized Tribes at Muskogee, Indian Territory, or upon written request therefor, such deeds or patents will be delivered by registered mail." The proposed legislation became section 5 of the Act of April 26, 1906 (34 Stat. 137).

26. The Principal Chief and the National Council of the Creek Nation vigorously objected to this legislation which changed the manner of delivery of deeds, as a violation of section 23 of the Original Creek Agreement. In a letter dated January 24, 1907, from Mr. M. L. Mott, National Attorney of the Creek Nation, to the Secretary of the Interior, Mr. Mott asserted that if Commissioner

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Bixby were to assume the responsibility for delivery of the deeds, the deeds would be delivered improperly. On January 30, 1907, the Secretary of the Interior denied the request of the Creek Nation.

27. On November 15, 1906, the United States Inspector for Indian Territory transmitted to the Secretary of the Interior a resolution of the National Council of the Creek Nation, requesting that the Creek Nation be furnished a copy of the roll of approved Creek citizens in order that the Creek Nation might "assist and aid in every way possible" in determining "who are and who are not legally and equitably entitled to citizenship in said Nation."

On December 13, 1906, the Acting Commissioner of Indian Affairs denied the request of the Creek Nation for a copy of the approved Creek roll, stating in part:

The resolution enclosed does not seem to require executive action, and this Office knows of no good reason why the Chief, National Attorney, and "each Town King" of the Creek Nation should be furnished with a copy of the approved roll of citizens of the Creek Nation.

The headquarters of the Commissioner are at Muskogee, Indian Territory, where the Chief and National Attorney resides, and no doubt they are at liberty at any time to examine the rolls on file with the Commissioner, in regard to any person they believe to have been enrolled without authority of law, and it is recommended that the Commissioner be not authorized to furnish the Chief, National Attorney and "Town Kings" with copies of the roll but that he be requested to advise the Chief and National Attorney that they may examine the roll on file in his office whenever they so desire, with reference to any person whom they believe has been unlawfully enrolled. (Plaintiff's Exhibit No. 1, p. 96, from The National Archives, Record Group No. 123)

28. In December 1906, Mr. M. L. Mott, the National Attorney for the Creek Nation, filed specifications of charges against Commissioner

Bixby before the Secretary of the Interior through the Commissioner of Indian Affairs.

Mr. Mott charged, in part, that Commissioner Bixby was still interested in the Canadian Valley Trust Company and other companies dealing in Indian lands, and that this was generally known among business and professional circles in Indian Territory; that these companies had access at all times to the data disclosed by the Creek rolls, and had used this information to great advantage in acquiring large holdings of Creek lands; that the change in the manner of delivering deeds to Creek allottees, and the vesting of title upon the recording of the deeds in the Commissioner's office, without delivery of the deeds, afforded great opportunities for fraud and overreaching in acquiring Creek lands; and that Commissioner Bixby had repeatedly refused to give to the Creek Nation a copy of the roll of Creek citizens although he knew that copies of such rolls were then in the hands of certain land-buying companies in the Territory.

On January 29, 1907, the Attorney General of the United States recommended that certain of these charges be investigated and developed. However, on June 30, 1907, Mr. Bixby resigned his position as Commissioner to the Five Civilized Tribes and it does not appear that any further action was taken with regard to these charges.

29. Under the Act of April 26, 1906 (34 Stat. 137), the Creek tribal rolls became final on March 4, 1907, without the Creek Nation ever having been given copies.

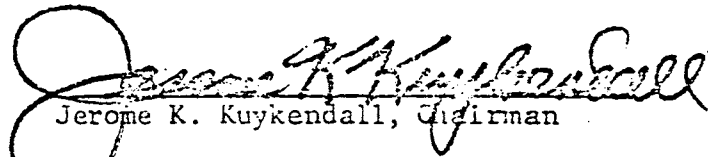
30. The Commissioner to the Five Civilized Tribes (Commissioner Bixby's successor), in his Report to the Secretary of the Interior for the fiscal year ended June 30, 1907, submitted a final report on the status of the enrollment work in the Creek Nation. He reported that of the 21,381 Creeks (including Freedmen) who had sought enrollment, 18,698 had been enrolled and 2,683 had been denied enrollment. He reported further that, as of June 30, 1907, a total of 102 persons previously enrolled as Creek citizens had been stricken from the rolls.

31. The Commissioner to the Five Civilized Tribes reported to the Secretary of the Interior in 1914 that the Commission had, since its inception, considered the applications of approximately 250,000 persons for enrollment as citizens of the Five Civilized Tribes and had enrolled 101,209 of these. It had heard 10,952 allotment contests and had accumulated voluminous records of these hearings. The Commissioner further reported that the work of the Commission "had been more complicated than any other work connected with the Indian Service in the history of the Government."

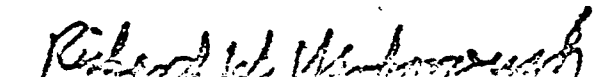
32. Copies of the approved Creek rolls, with notations thereon, establish that erroneous enrollees were included on said rolls as of March 4, 1907, the date said rolls became final.

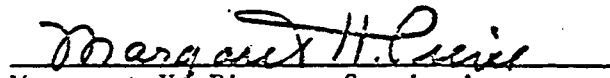
33. It is established by the record that the defendant acted unfairly and dishonorably toward the Creek Nation in refusing to give the Creek Nation copies of the approved Creek rolls during the enrollment period

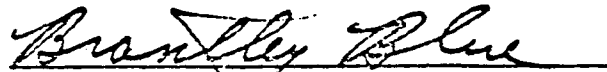
and, further, having knowledge of the conditions existing in the Creek Nation during the period of enrollment and allotment, in not taking other precautions, reasonable in light of its duty to the Creek Nation, to prevent erroneous enrollments.


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner