BEFORE THE INDIAN CLAIMS COMMISSION

THE SEMINOLE INDIANS OF THE STATE OF FLORIDA,	)	
Plaintiff,	)	Docket No. 73-A
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: March 24, 1971

Appearances:
Charles Bragman, Roy L. Struble, and Effie Knowles
Attorneys for Plaintiff.

Marvin E. Schneck with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

This case includes two distinct claims which were pleaded in the original petition filed in Docket 73 but subsequently severed by order of the Commission and designated Docket No. 73-A.[1/] The hearing before the Commission on December 1, 1969, was limited to the reception of documentary evidence.

The first claim seeks to recover just compensation for the alleged taking by the United States of some 5 million acres of land located in southern Florida, the boundaries of which are set out in Finding No. 8. The subject lands are referred to variously herein as Macomb's area or "Reservation". Plaintiff's claim is based on its contention that by

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1/ Cause three and four of Docket 73 were removed and separated therefrom by orders dated August 13, 1968, and January 22, 1953, respectively.

virtue of two military orders and certain related Executive orders issued during the course of the Second Seminole War the United States recognized the Seminoles' right to occupy permanently the land in suit, and that the United States subsequently deprived the Seminoles of their lands without payment therefor. Plaintiff relies substantially on Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 182 Ct. Cl. 543; 390 F.2d 686 (1968), reversing in part 16 Ind. Cl. Comm. 341 (1965), where it was held that Executive Order title is compensable. We have no dispute with that holding. As is explained hereafter, we are of the opinion, however, that the evidence relied upon by plaintiff does not establish a clear and definite basis upon which we can find title by Presidential Executive order. The taking of the subject lands is alleged to have occurred as a result and under the authority of the Swamp Land Acts of 1850 (9 Stat. 519) and 1856 (11 Stat. 251).

The standards for determining recognized or reservation title have been set forth in numerous decisions of this Commission, the Court of Claims and the Supreme Court. The source of recognition is the Congress of the United States. There must be a clear and definite intention evidenced by Congressional action or authority to grant, accord, acknowledge or recognize legal rights of permanent occupancy of the land in question. The Sac and Fox Tribe of Indians of Oklahoma v. United States, 161 Ct. Cl. 189, 315 F.2d 896 (1963), cert. denied, 375 U.S. 921.

Plaintiff's claim to recognized or "recognized executive order" title is based principally on two military orders and certain related Executive pronouncements. These military orders were issued during that conflict with the Seminole Indians, known as the Second Seminole War. Although both parties have detailed the historical background of the Second Seminole War (1835-1842 c.), it is adequate for our purposes to state that

in 1835 a small group of Seminole Indians, who were opposed to emigration west as provided under the terms of the 1832 Treaty of Payne's Landing (7 Stat. 368, 2 Kapp. 344), engaged in open hostilities with Federal troops.

An examination of the military orders and other official documents upon which plaintiff bases recognized title indicates that they were not intended to be grants of legal rights of permanent occupancy to the Seminole Indians. Rather, these agreements, which plaintiff has chosen to call "treaties" were nothing more than military truces. In the form issued, these military orders were intended to bring about an early cessation of hostilities in pursuance of a policy of conciliation without creating any new rights in lands for the benefit of the hostiles. At most, they were in the nature of a modus vivendi to secure a temporary regulation of an extremely difficult military matter pending negotiations for a permanent settlement. The instructions for treating with the hostile Seminoles directed to General Alexander Macomb on March 18, 1839, by the Secretary of War make this abundantly clear.2/

> You will proceed with as little delay as practicable to Florida, and after full examination of the State of that territory and of the war carrying on there, you will adopt such measures as may seem to you most

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2/ General Macomb did not assume command in Florida and his mission remained special and limited during his approximately three-month stay. Macomb's mission followed General Jessup's (the then Commander) unsuccessful attempt to convince the Secretary of War to seek a compromise solution with the dissident Seminoles. In his letter to the Secretary of War dated March 14, 1838 (Pl. Ex. 13: 25 National Archives, Territorial Papers of the United States, 494 (1960)), Jessup questioned whether there could be a point of honor between a great nation and a "band of naked savages, now beaten, broken, dispirited, and dispersed?" Jessup was replaced by Brig. Gen. Taylor on May 18, 1838, who remained in Command during Macomb's mission.

> expedient to secure the protection of the settlers in middle and East Florida, to prosecute the War with vigour, and to bring it to speedy and successful termination.*** Congress having by making appropriations for that purpose, signified a desire that another effort should be made to treat with the Seminoles, you will use your best endeavors to open a communication with their Chiefs, and if they show a willingness to enter into a negotiation with you for their peaceful removal, you are at liberty to make a truce with them until the terms can be finally arranged, confirming them to that portion of the Peninsula South of 27° 30^{m} latitude, until they can be finally removed according to the terms of the treaty of Paynes Landing.*** (Pl. Ex. 13: 25 National Archives, The Territorial Papers of the United States, 597 (1960)).

Within the limits of his authority General Macomb secured an armistice and entered into an agreement with the dissident Seminoles in which the Indians would retire to the area marked out by General Macomb and would remain there until other arrangements could be made. A reading of the military order issued two months later on May 18, 1839, announcing the termination of hostilities shows that General Macomb did not exceed his authority as has been contended. It reads, in part:

> . . . that sixty days be allowed the Indians north and east of that boundary to remove their families and effects into said district where they are to remain until further arrangements are made, under the protection of the troops of the United States . . . 3/

In his transmittal letter to the Secretary of War dated May 23, 1839, enclosing the armistice, General Macomb assured the Secretary that no encouragement had been given the Indians that they would be permitted to remain in Florida permanently. That General Macomb's arrangement was

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3/ Def. Ex. 101: J. Sprague, The Origin, Progress and Conclusion of the Florida War, 228 (1848). The full text of the armistice entitled "General Orders. Head Quarters of the Army of the United States, Fort King, Florida, May 18, 1839," appears in Finding No. 8.

considered as a temporary measure by the Government was further indicated by the orders subsequently issued to General Taylor on June 4, 1839, two weeks after the armistice, wherein Taylor was instructed to adopt efficient measures ". . . to protect them [Seminoles] in the quiet possession of the district of county thus set apart for their temporary residence . . ." (Pl. Ex. 13: 25 National Archives, The Territorial Papers of the United States 615 (1960)).

Plaintiff contends nevertheless, that the language of the three aforementioned documents, i.e., Macomb's instruction, the general order announcing the armistice and the transmittal letter are in conflict with the so-called "Everett Amendment" and the talks with the Indians and their understanding. The Everett Amendment, adopted and made part of the military appropriation Act of March 3, 1839 (5 Stat. 357), entitled "An Act making appropriations for preventing and suppressing Indian hostilities," consisted simply of an item of $5000 "for the purpose of holding a treaty with the Seminole Indians." (5 Stat. 358) Its congressional sponsors wanted peace in Florida through negotiation both as an economic expedient and as a humane gesture, and the necessary funds for that purpose were accordingly provided. 4/ Plaintiff argues that this amendment, tacked on to an ordinary military appropriations measure, is authority for the granting of recognized title to the Seminoles to the Macomb area carved out of the Territory of Florida in pursuance of the peaceful objectives expressed in the amendment. As we view the plain language of the Everett Amendment it evidences no congressional intent or authority to grant

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4/ Rep. H. Everett of Vermont was the most outspoken of a number of northern and middle Atlantic legislators vigorously opposed to the Indian removal policy of the Government. Everett was particularly critical of the 1832 Treaty of Payne's Landing which was a removal treaty.

anything to the dissident Seminoles.

To render more effective the 1839 truce arrangement, the President of the United States declared the Macomb area to be Indian territory, thus making applicable thereto the provisions of the Trade and Intercourse Act of June 30, 1834, 4 Stat. 729, entitled "An Act to regulate trade and intercourse with Indian tribes and to preserve peace on the frontiers." Contrary to the plaintiff's position, the mere extension of the provisions of the 1834 Trade and Intercourse Act by Presidential order 5/ did not vest in the dissident Seminoles "executive order title" to the Macomb area or grant any other title or Indian right of occupancy that did not already exist. See United States v. Santa Fe R.R., 314 U.S. 339 (1941). The real purpose of extending the provisions of the 1834 Trade and Intercourse Act was precautionary, and designed to discourage white contact with the Indians that might tip the delicate balance of peace in the area.

The parties, according to Macomb's order, agreed to a truce, the terms of which were that hostilities cease immediately, with the Seminoles retiring to a specified area under military protection until final arrangements could be made. The truce period was short lived and if there was any misunderstanding as to what General Macomb had promised or did not promise the issue became moot when hostilities were resumed in July 1839.

5/ The record does not contain the text of the Presidential order. The order is referred to in a letter dated June 4, 1839, from the Secretary of War to General Taylor. (Pl. Ex. 13: 25 National Archives, The Territorial Papers of the United States 615 (1960)).

By 1842 the war, in a military sense, had for all practical purposes ceased. In July of 1842 Colonel Worth, now in command of U.S. military forces, took a census showing that there were some 301 Seminoles still "remaining out", 189 of which were women and children. Informed of this situation, President Tyler ordered Colonel Worth to declare hostilities at an end, and to bend every effort in persuading the few remaining Indians to go west. Colonel Worth thereupon issued an order on August 11, 1842, which insofar as pertinent reads as follows:

> ". . . By Arrangement with the few Indians remaining in the Southern portion of Florida, between whom and the whites hostilities no longer exist, they are permitted for a while to plant and hunt on the lands included within the following boundaries, to wit: [description of boundaries omitted]. Within the boundaries herein described no settlement can with safety or propriety be formed, and any persons making settlements within those limits will be subjected to removal in conformity with the laws in reference to Indians and their places of residence.
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> II. . . <u>The foregoing temporary arrangement being in conformity with the instructions of the President of the United States</u> is communicated for the information of all whom it may concern." 6/ (emphasis supplied)

Following the termination of open warfare in 1842, the United States undertook no further direct negotiations with the Florida Seminoles respecting the Macomb area. It seems clear, however, that there was

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6/ Pl. Ex. 13a: 26 National Archives, The Territorial Papers of the United States 519 (1962)).

no change in the Government's removal policy toward these Indians. 7/

In our judgment, the political and military actions taken by the United States in dealing with the obdurate Seminoles who had refused to emigrate west in accordance with the provisions of the 1832 Treaty of Payne's Landing, were intended to stabilize a dangerous and hostile situation and that this was accomplished by negotiating a truce and establishing a temporary sanctuary for these Indians pending final determination of the removal problem. Plaintiff has failed to establish that the actions taken by the United States in this regard did, or were ever intended to, vest or create in the Florida Seminoles any compensable right, title, or interest in the 5 million acre Macomb area. Accordingly, this claim should be dismissed.

We turn now to the plaintiff's second cause of action, the material facts concerning which do not appear to be in dispute.

On October 11, 1917, under the provisions of a Law of the Florida Legislature, 12 Fla. Stat. Ann. §§ 285.01, 285.02, a deed was executed

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7/ As late as the Creek and Seminole Treaties in January 5, 1845, 9 Stat. 121, and August 7, 1856, 11 Stat. 699, the United States was still opting for the removal of the Florida Seminoles. The Preamble of the 1856 Treaty states in part:

> "Whereas the United States desire by providing the Seminoles remaining in Florida with a comfortable home west of the Mississippi River, and by making a liberal and generous provision for their welfare, to induce them to emigrate and become one people with their brethren already west. . . ."

Earlier, on March 2, 1841, Congress had enacted legislation (5 Stat. 514) whereby $15,000 was appropriated to defray the expenses of an Arkansas delegation of Seminoles whose sole purpose was to attempt pacification of the hostile Seminoles in Florida.

by the Trustees of the Internal Improvement Fund, a state agency, conveying in trust to another state agency -- the Board of Commissioners of State Institutions -- title to 99,200 acres of everglades lands in Monroe County as a "reservation" for the perpetual use and benefit of the Seminole Indians of Florida. The deed provided that the lands in question would revert to the Trustees-donors if the land should ever cease to be used as contemplated. In this connection, the evidence, contraverted to some extent by plaintiff, indicates that few if any Seminoles actually removed to the lands so reserved. Instead, they chose to live on privately owned land or state lands in the nearby swamps to which their antecedents had receded nearly a century before.

Federal interest in the Florida everglades area crystalized with the passage of the Act of March 1, 1929, whereby the Secretary of Interior was authorized to investigate and report to the Congress on the desirability and practicability of establishing a national park, ". . . to be known as the Tropic Everglades National Park, in the everglades of Dade, Monroe, and Collier Counties of the State of Florida, . . ."[8/]

On May 25, 1929, the Florida Legislature created the Tropic Everglades National Park Commission, which state agency was ". . . empowered to acquire title in name of the State of Florida to any lands that the Interior Department may designate, in Dade, Monroe, and Collier Counties, as an area for national park, . . ."[9/]

8/ 45 Stat. 1443

9/ 12 Fla. Stat. Ann. §§ 264.01-264.05

Pursuant to the authorization given to the Secretary of Interior the National Park Service, the Secretary, and certain designated officials conducted an on-the-spot investigation of the Florida everglades during the week of February 11, 1930. The Secretary of Interior reported back to the Congress strongly recommending the establishment of the Everglades National Park. He noted further in his report that there might then exist a specific reservation for the Seminole Indians situated within the proposed park area, which matter would have to be investigated further. Thereafter Congress, by the Act of May 30, 1934 (48 Stat. 816), authorized the Secretary of Interior to accept on behalf of the United States title from the State of Florida to those lands selected by him within that portion of the everglades covered by Dade, Monroe and Collier Counties. Section 3 of the 1934 Act further provided that nothing in the Act ". . . shall be construed to lessen any existing rights of the Seminole Indians which are not in conflict with the purposes for which the Everglades National Park is created." Subsequent acts of the Florida legislature provided for the purchase and exchange of lands and the conveyance of title thereto to the Secretary of Interior for the creation of the park. On December 23, 1936, pursuant to the Law of May 30, 1935, 12 Fla. Stat. Ann. §§ 285.04, 285.06, the Trustees of the Internal Improvement Fund took action by which the 99,200 acre State Seminole Reservation in Monroe County was withdrawn and lands aggregating 104,800 acres in nearby Broward County were substituted and dedicated as the new State Seminole Indian Reservation. On December 28, 1944, the Trustees of the Internal Improvement Fund deeded the 99,200 acres in Monroe County to the United States and these lands were incorporated into the Everglades

National Park.

The plaintiff contends that, if the consideration (the exchange of Broward County lands) was unconscionable, or constituted dealings which were not fair and honorable, the defendant, by sanctioning the transaction and accepting title to the original Monroe County lands, is liable to the plaintiff for additional compensation. Plaintiff alleges that the consideration was unconscionable because the substituted lands in Broward County were swampy, uninhabitable, and wholly lacking the excellent fishing and hunting grounds and access to the sea that characterized the Monroe County Seminole Indian Reservation. On the other hand, the defendant argues that the plaintiff tribe never acquired a compensable interest in subject lands as a result of the actions of the State of Florida, and that the United States Government never assumed a fiduciary or other obligation to protect an interest that did not, in fact, exist.

We do not see how the defendant can seriously allege that the plaintiff tribe did not acquire a compensable interest in the 99,200 acre Monroe County Indian Reservation. The statutory words of grant from the State of Florida are explicit; the lands being given in trust ". . . for the perpetual use and benefit of the Seminole Indians and as a reservation for them."[10/] It matters not that the legal title to said reservation was to be retained by a state agency; the beneficial use and interest was given exclusively to the Indians. The type of interest granted to the Florida Seminoles is substantially identical with that awarded to other tribes

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10/ 12 Fla. Stats. Ann. §§285.01, 285.02

under federally created reservations wherein the United States retains the fee title. Such beneficial or equitable interest is compensable under our Act. Furthermore, the validity of the Florida grant cannot be challenged simply because the state may have acted gratuitously.

The defendant's further contention that alleged Indian nonuse of the Seminole Reservation terminated the plaintiff's interest therein under the "reverter" clause in the original deed of conveyance is also not well taken. Our attention has not been directed to any action taken by the State of Florida to recover full ownership of the subject reservation because of alleged Indian nonuse. The very act complained of herein, to wit, the exchange of the Broward County lands for the Monroe County Indian Reservation seems in our view to be a clear recognition and acknowledgement by the State of Florida at that time of a Seminole interest in the subject area.

Our next question is whether or not the United States had entered into a special relationship with the plaintiff that imposed a duty or obligation to see that these Indians were treated fairly in this exchange transaction in which the United States was to be the ultimate recipient of the plaintiff's lands. Plaintiff relies on the provisions of the Trade and Intercourse Act as supplying the legal responsibility needed in this instance to hold the United States liable.[11/] We do not reach this question, however, since we feel that the Government's paramount role and the actions taken by the United States in the establishment of the Tropic Everglades

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11/ 25 U.S.C. 177 (1964). This section is not applicable against the United States when it acts to acquire or affect ownership of land. Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1959).

National Park creates the requisite duties and obligations toward the Indians that could sustain ultimate liability under our Act.

The record seems clear. From the very beginning the United States was never a mere bystander or an incidental recipient of donated lands from the State of Florida. From its inception the United States was both the principal partner in the everglades park project and the intended ultimate beneficiary of any and all land exchanges needed to create the park. The defendant not only sanctioned or gave its approval to the land acquisition program of the State of Florida, but it fixed and approved the boundaries and limits of the new Tropic Everglades National Park, determined the character of the lands to be acquired, and it dictated all the terms and conditions under which it would accept title to said lands. In fact the State of Florida occupied a subsidiary role, akin to that of agent, whose sole function was to acquire the lands for its principal. In addition, the United States was fully aware that the Seminole Indians had an interest in certain lands that were to be included with the proposed Everglades National Park. The fact that the United States obligated the offices of the State of Florida to acquire plaintiff's Monroe County reservation lands, does not lessen the defendant's responsibility and duty to the plaintiff tribe to see that the Indians were not the victims of an unconscionable bargain or dealt with in an unfair manner. Under the circumstances the Commission concludes that the United States entered into a special relationship with the plaintiff tribe, and we see no valid reason for not treating the 1936 exchange of the

Seminole lands as a transaction between the Indians and the United States. Thus, defendant's liability, if any, may be predicated either under clause 3 of section 2 of our Act, if the exchange was unconscionable, or under clause 5 of section 2, if the transaction did not comport with "fair and honorable dealings."

Accordingly, this matter shall be set for a further hearing at which time the plaintiff may introduce evidence to determine the question of the adequacy or fairness of the 1936 exchange of the plaintiff's 99,200 acre Monroe County reservation for the 104,800 acres in Broward County, and to resolve the question of defendant's liability to the plaintiff tribe.

Jerome K. Kuykendall, Chairman

We concur:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner