BEFORE THE INDIAN CLAIMS COMMISSION

THE SEMINOLE NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Docket No. 247
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: March 24, 1972

Appearances:
Paul M. Niebell, Attorney
for the Plaintiff.

M. Edward Bander, 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.

The Seminole Nation has brought this suit under Clause (5), the "fair and honorable dealings" clause, of Section 2 of the Indian Claims Commission Act, 60 Stat. 1049, 1050, alleging that the United States acted unfairly and dishonorably towards the Seminole Nation in failing to enforce against three railroad companies the rights reserved to the Seminole Nation by certain acts of Congress authorizing said railroad companies to construct lines through the lands of the Seminole Nation in Indian Territory, now a part of the State of Oklahoma.

The three railroads that maintain and operate lines across the former lands of the Seminole Nation in what is now Seminole County,

Oklahoma, are the Chicago, Rock Island and Pacific Railway (the Rock Island); the St. Louis and San Francisco Railroad (the Frisco); and the Atchison, Topeka and Santa Fe Railway (the Santa Fe). The right-of-way of the Rock Island was originally granted to the Choctaw Coal and Railway Company by the Act of February 18, 1888, 25 Stat. 35, and construction took place during 1889 and 1890. The right-of-way of the Frisco was originally granted to the St. Louis, Oklahoma and Southern Railway Company by the Act of March 30, 1896, 29 Stat. 80, and construction took place during 1900 and 1901. The right-of-way of the Santa Fe was originally granted to the Enid and Anadarko Railway Company by the Act of February 28, 1902, 32 Stat. 43, and construction took place during 1905 and 1906. The parties, by agreement, have limited their proofs to facts relating to the right-of-way and one station reservation (at Seminole, Oklahoma) of the Rock Island with the right reserved to the plaintiff to present the facts relative to the other two railroad companies and the remaining Rock Island station reservations if the Commission should decide the issue of liability in plaintiff's favor.

By Article V of the Treaty of March 21 1866, 14 Stat. 755, the Seminole Nation granted a railroad right-of-way through its lands "*** to any company which shall be duly authorized by Congress***." Id., at 757. Such authorization was granted to the Choctaw Coal and Railway Company by the Act of February 18, 1888, supra. This act granted to the company a right-of-way 100 feet wide on which to place its railroad

tracks, a strip of land 200 feet wide and 3000 feet long every 10 miles of track for stations, and additional lands along the line where cuts or fills were necessary. Any lands so taken were not to be leased or sold. The company was to pay to the Secretary of the Interior for the benefit of the Seminoles fifty dollars for each mile of road constructed plus fifteen dollars per mile every year for as long as Indian Territory was owned and occupied by the Indians. In 1889 and 1890 the company constructed its track across Seminole lands and in 1896 paid to the Secretary $920.50, thereby discharging its obligation to pay $50 for each mile of track constructed. The company also paid the Secretary $15.00 for each mile of its track (a total of $288.00) for each fiscal year from 1897 through 1907. 1/ The railroad paid to the Secretary $108 for the portion of the 1908 fiscal year beginning July 1, 1907, and ending November 15, 1907, the last day before the admission of Oklahoma as a state of the Union. This $108 was paid pursuant to order of the United States District Court for the Eastern District of Oklahoma, issued on December 28, 1923, in a suit brought by the United States against the Rock Island to recover the amounts due the respective tribes within whose lands the Rock Island was operating during the above period.

During the last decade of the nineteenth century the United States adopted the policy of dissolving the tribal status of the Seminole

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1/ There is conflicting evidence in the record as to the actual mileage of the track. The single payment of $920.50 represents $50 per mile for 18.3 miles of track. The annual charge of $288 represents $15 per mile for 19.2 miles of track. However, this is not an issue in the case.

Nation by allotting the tribal lands to individual tribal members. This policy was implemented by the Act of March 3, 1893, 27 Stat. 612, 645, and by the Seminole Agreement of December 16, 1897, ratified on July 1, 1898, 30 Stat. 567. Under the Seminole Agreement all lands (with certain exceptions not relevant here) belonging to the Seminole Nation were to be allotted as equally in value as possible among the members of the tribe. The final Seminole tribal roll was approved by the Secretary of the Interior on April 5, 1901. Land allotments among the Seminoles commenced on June 1, 1901, and were completed by June 30, 1908. This policy resulted in the extinguishment of tribal title to the previous Seminole domain (and that of the other Civilized Tribes) and the incorporation of the former Indian Territory as part of the State of Oklahoma. The tribes, however, were never dissolved.

In 1902 Congress enacted legislation, 32 Stat. 43, authorizing railroad construction by the Enid and Anadarko Railway Company through the Seminole lands and, in addition, containing provisions constituting a general statute concerning future railroad construction in Indian Territory. Section 14 of said act permitted the railroads to take lands for station grounds and for other railroad purposes. Any railroad so taking lands was to make full compensation to the individual owner, occupant or allottee of any such lands and to the tribe or nation in which such lands were located. In the event of controversy referees were to determine the amount due the Indians for their land taken or used. For enforcement by the Indians against the railroads of any

payments specified by the statute and settlement of any controversy in relation thereto, jurisdiction was conferred on the United States courts.

On April 26, 1906, Congress enacted legislation, 34 Stat. 137, authorizing the Secretary of the Interior (1) to collect "all revenues of whatever character accruing to" the Seminole Nation, id. at 141, and (2) to bring suit in the name of the United States on behalf of the Seminole Nation for the collection of any moneys or recovery of any land claimed by the nation. This act and the regulations promulgated thereunder further provided that title to right-of-way lands reserved from allotment and used by the railroads could be acquired by the railroad companies at a valuation determined by the Secretary, but that failure to make payment for these lands by March 1, 1909, or ceasing to use such lands for railroad purposes, would result in the vesting of title to such lands in the owner of the legal subdivision of which such land was a part or in the municipality if such lands were within a municipality.

In 1906, the Rock Island, under the authority of section 14 of the 1902 Act, 32 Stat. 43, 47, designated 13.76 acres at the town of Seminole, Indian Territory, as station grounds. The Rock Island did not acquire title to this land as it could have under the Act of April 26, 1906, supra, nor was compensation for this land ever paid to the Seminole Nation. The Rock Island has, however, continued to hold this acreage and currently leases twenty-two tracts on these grounds to private companies and individuals.

In prior litigation between the Seminole Nation and the United States the plaintiff brought suit in the Court of Claims under the special jurisdictional act of May 20, 1924, 43 Stat. 133. In that suit the plaintiff alleged that the United States by the Acts of February 28, 1902, supra, and April 26, 1906, supra, had promised to indemnify the plaintiff for losses alleged to have been suffered when the railroads took and held station reservations unnecessary for railroad purposes, received rents and profits for the use of these lands, and failed to pay the annual charge of $15.00 per mile which plaintiff alleged was compensation for the lands. The Court of Claims, at 97 Ct. Cl. 723 (1942), sustained a demurrer to the complaint and dismissed the petition on the basis of its companion decision in Creek Nation v. United States, 97 Ct. Cl. 591 (1942). In its opinion in the Creek case, the court held that under the Act of February 28, 1902, supra, the railroad companies were solely accountable to the Indians for the land taken and used under that act for station reservations; that the United States was under no obligation to supervise and insure the payment by the railway companies to the Indians; that the act provided a full and complete remedy on behalf of the Indians against the companies in the event of controversy over the taking and use of lands; and that by enactment of this statute, the United States satisfied whatever duties it may have owed the Indians growing out of the construction of the railways. The Court of Claims also determined that, under section 18 of the Act of April 26, 1906, supra, the Secretary had

discretionary and not mandatory authority to bring suit for the use of the Indians for any moneys or for the recovery of any lands claimed by the Indians and that this act made no provision for liability on the part of the United States in case the Secretary did not bring suit.

The Supreme Court, at 318 U.S. 629 (1943), affirmed the decision of the Court of Claims making specific determinations in its opinion that section 16 of the Act of February 28, 1902, supra, authorized the Secretary to receive from the railroads the $15.00 annual charge which constituted a "form of tax", id. at 637, that under the Act of March 21, 1906, supra, the Indians retained their own independent remedy for wrongs done them, and that under section 18 of the 1906 Act the Secretary of Interior was given wide discretion to determine what suits were worth bringing on behalf of the Indians.

Plaintiff's action here is based upon the theory that the United States, cast by the 1906 Act, supra, as a guardian of the Seminole Nation, failed in its duty to protect the Nation's property rights against the railroad companies. For this failure, asserts plaintiff, the United States is liable based upon its obligation to deal fairly and honorably with the Indians.

The plaintiff's specific claims are as follows:

1) The Seminole Nation is entitled to recover from the United States the annual $15 per mile charge due but not paid from November 16, 1907, through the present because such charge was compensation for

the use of tribal lands and the United States failed and refused to collect it from the railroads;

2) The Seminole Nation is entitled to recover from the United States the total amount to date collected by the railroads for rental of the station grounds because the United States failed to enforce the reversion of said station grounds when the lands were never used for railroad purposes and the United States permitted the railroads to be enriched at the plaintiff's expense through the rental of the station grounds to third parties and failed to collect such rentals for the plaintiff's benefit; and

3) The plaintiff is entitled to recover from the United States the fair market value of the station grounds because the United States, by enacting section 14 of the Act of April 26, 1906, supra, without the consent of plaintiff, permitted title to plaintiff's lands to vest in third parties, abutting landowners and municipalities, upon abandonment by the railroads, without providing compensation for such lands, and as a consequence of which the plaintiff was prevented from recovering said lands when no longer used for railroad purposes.

Plaintiff's first claim that it is entitled to recover from the United States the annual $15 per mile charge from November 16, 1907, to the present is based upon plaintiff's allegation that this $15 payment constituted compensation for use of the tribal lands. However, the nature of the $15 annual payment has already been conclusively determined in the prior litigation between the parties. In the

opinion of the Supreme Court, 318 U.S. at 637, it was held that the $15 annual charge was a tax rather than compensation for the use of the land. As a consequence of this holding, the plaintiff is collaterally estopped in this suit before the Commission from showing that the $15 annual payment constituted compensation for use of the land. See Creek Nation v. United States, 168 Ct. Cl. 512 (1964) (aff'g Docket 168, 12 Ind. Cl. Comm. 123 (1963)) and United States v. Creek Nation, Appeal No. 5-71 (Ct. Cl., December 10, 1971)(rev'g. Docket 273, 20 Ind. Cl. Comm. 484 (1970)). Accordingly, we conclude that plaintiff's first claim is without merit.

It has been held that the United States assumed obligations to protect the rights of the Five Civilized Tribes in their tribal lands during the allotment thereof by the Dawes Commission. The case of Hitchcock v. United States, 187 U.S. 294 (1902), held that under the Curtis Act, 30 Stat. 495, the United States practically assumed full administrative control, custody and management over the property of the Cherokee Tribe incident to the enrollment of Cherokee citizens and the allotment of tribal lands. In the case of Chickasaw Nation v. United States, Docket 269, 7 Ind. Cl. Comm. 64, 89 (1959), this Commission stated as follows in connection with the Government's obligations to the Chickasaws who, like the Seminoles, had entered into an allotment agreement (the Atoka Agreement) prior to the enactment of the Curtis Act and who were, therefore, like the Seminoles, not subject to the Curtis Act:

> The Government thereby assumed direct control over the property of the Indians, not for its own direct benefit, but for the benefit of the owners [i.e., the tribe], to liquidate and otherwise distribute same. Defendant thereby assumed such powers and functions and we think, duties and obligations over petitioner and its property as to become in the nature of a trustee for liquidation purposes. . . .

We think it clear that the Seminole Agreement of December 16, 1897, 30 Stat. 567, did impose obligations upon the United States to protect the property of the Seminoles during the allotment process. We are, however, unable to find in either the terms of the applicable statutes or in the subsequent actions of the United States, grounds sufficient to support the claims by plaintiff that the United States unfairly and dishonorably failed to fulfill its obligations to the Seminoles.

As we interpret the course of relevant events here, the Seminole Nation agreed in the Seminole Agreement of December 16, 1897, 30 Stat. 567, that all Seminole lands (with certain exceptions not relevant here) would be allotted to individual tribal members. Under the Act of February 28, 1902, 32 Stat. 43, Congress granted authority to the railroads to take certain lands needed for their operations. The 1902 statute provided ample protection of the rights of the tribes and allottees as against the railroads in the event of controversy over the taking and use of any lands by the railroads under the statutes. (In the prior litigation between the parties it has been conclusively determined that by enactment of the 1902 statute the United States satisfied whatever duties it may have owed the Seminoles

growing out of the construction of the railroads, and this conclusion may not be relitigated here. See 97 Ct. Cl. at 601.) In 1906, Congress passed another statute, 34 Stat. 137, providing that the fee to any right-of-way lands held by the railroads under the 1902 Act could be acquired by purchase at a valuation determined by the Secretary and that upon either abandonment of the lands or failure to purchase by March 1, 1909 (the date set by the Secretary of Interior in regulations promulgated pursuant to the 1906 Act), title to said lands would vest in abutting allottees or in the municipality of which any such lands were a part. The 1906 Act further authorized the Secretary of Interior to bring suit for the use of the Seminole Nation for any moneys or for the recovery of any lands claimed by the Seminole Nation. The Supreme Court in prior litigation between the parties construed the latter provision in the statute as granting wide discretion to the Secretary in determining what suits were worth bringing on behalf of the tribe.

As early as 1910, section 14 of the 1906 Act was construed by the Secretary (see Finding of Fact 13) to mean that title to any of these right-of-way lands which the railroads had not purchased vested in abutting allottees or municipalities as of March 1, 1909. The Secretary's interpretation in 1910 was quite reasonable, particularly since it was perfectly consistent with the Seminole Agreement of 1897 wherein the Seminoles agreed that all the tribal lands would be allotted to individual tribal members.

This interpretation of section 14 of the 1906 Act has more recently been confirmed in the case of Seminole Nation v. White, 224 F. 2d 173 (10th Cir.), cert. denied, 350 U.S. 895 (1955). In White, the Seminole Nation brought suit against both Nelly White, a Seminole allottee, and the Rock Island to quiet the nation's alleged title to a strip of land in Seminole County under the railroad's right-of-way. The trial court held that title to the strip of land in question vested by allotment from the Seminole Nation in Nelly White, subject only to the railroad right-of-way. The Court of Appeals affirmed, adopting the following statement of the trial court:

> '. . . To say that on failure of a railroad company to make payment ot a narrow strip reserved for a right-of-way or on its abandonment for such purpose, title rests in the tribe, would be inconsistent with the purpose and intent of the statute as a whole, would be out of harmony with the manifest purpose of section 14, and would be at variance with the rule against retention of title in remote dedicators. It would be an interpretation not warranted by the language or history of the section.' (224 F. 2d at 175)

In White, the tribe also argued that construing the 1906 Act as vesting title to the strip of land in the allottee, resulted in taking of the tribe's property and giving it to the allottee without due process. In answer to this argument, the court stated that ". . . it is sufficient to say that we construe the language of the deed from the tribe as vesting title in the allottee under the general rules of construction quite apart from the incidence of Section 14." (Id. at 175)

If any rights to these lands had remained in the Seminole Nation after March 1, 1909, the Commission would have jurisdiction to find that a failure by the Secretary to bring suit on behalf of the Seminoles to recover the lands, as he was given discretion to do by the 1906 Act, might have been grounds for recovery under the "fair and honorable" dealings clause. However, allotments within the Seminole Nation having been completed by June 30, 1908, any right to these lands after March 1, 1909, had vested in the individual allottees or municipalities, and the Commission has no jurisdiction over such non-tribal claims.

In light of the discussion set forth above, the Commission concludes that the provisions in the Acts of 1902 and 1906 relating to the railroad right-of-way lands did not constitute any failure on the part of the United States to fulfill obligations the Government assumed towards the Seminoles by virtue of the Seminole Agreement of December 16, 1897. Plaintiff's allegations of such failure in its second and third counts herein do not support a claim based upon fair and honorable dealings. Furthermore, the Secretary's failure to bring suit on behalf of the Seminole Nation under section 18 of the 1906 Act was not, for the reasons set forth above, an abuse of discretion actionable under the "fair and honorable" dealings clause. Finally, since title to the right-of-way lands vested in the abutting allottees and in the respective municipalities as of March 1, 1909, the Seminole Nation has no standing under the Indian Claims Commission Act to sue on any cause of action which may have accrued thereafter with respect to said lands.

An order will therefore be entered dismissing the plaintiff's claims herein.

Jerome K. Kuykendall, Chairman

Concurring:

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

Commissioner Vance dissenting:

Like the blind men who attempted to describe the totality of the elephant by feeling its several parts the Indian Claims Commission has in this case felt through the various transactions, statutes and cases which affected the Seminole Tribe and arrived with legal felicity at a conclusion that is entirely wrong under the clear mandate from the Congress embodied in Clause 5 of the Indian Claims Commission Act. ....

Treaties were entered into between the plaintiff Indians and the defendant United States which presumably assured the security of the Seminole Indians while at the same time permitting the westward expansion of the dominant white society by means of the railroads. A special relationship was created between the tribe and the United States and the Secretary of Interior was the chosen agent to see that the Indians were protected in their treaty rights. The acts and legal determinations referred to in the majority opinion occurred prior to the Indian Claims Commission Act. In the Cherokee Indians, et al. v. United States, 114 Ct. Cl. 716, 720 (1949), the Court of Claims reversed the decision of the Indian Claims Commission. The government had urged that the matters under litigation had been previously adjudicated by the Court of Claims. The Commission agreed. The court pointed out that Clause 5 of the Indian Claims Commission Act permitting recovery for claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity "change the law and, if the facts warrant it, permit recovery in cases where no recovery could have been had under the former law."

Plaintiffs here specifically brought this action under Clause 5 of the Indian Claims Commission Act. The findings of fact supporting the majority opinion ably support recovery under Clause 5 rather than the denial of the majority opinion.

Alexis DeTocqueville in Democracy in America contrasted the savagery of the Spaniards to the attitude of the Americans toward the Indians in 1831.

> "The conduct of the Americans of the United States toward the aborigines is characterized, on the other hand, by a singular attachment to the formalities of law. Provided that the Indians retain their barbarous condition, the Americans take no part in their affairs; they treat them as independant nations and do not possess themselves of their hunting grounds without a treaty of purchase; and if an Indian nation happens to be so encroached upon as to be unable to subsist upon their territory, they kindly take them by the hand and transport them to a grave far from the land of their fathers."

All of the events, transactions under the statutes, acts of agency by the Secretary indicate a course of dealings which lead inescapably to the conclusion that the United States acted unfairly and dishonorably to the tribe. And yet the Commission, singularly attached to the formalities of the law, has once again resolved all doubts against the Indian tribe and refused to accord recognition to the broad power for indemnifying the Indians for past transgressions embodied in Clause 5 of the Indian Claims Commission Act.

John T. Vance, Commissioner