BEFORE THE INDIAN CLAIMS COMMISSION

THE SEMINOLE NATION,)
)
Plaintiff,)
)
v.) Docket No. 204
)
THE UNITED STATES OF AMERICA,)
)
Defendant.)

Decided: May 31, 1972

Appearances:

Roy St. Lewis and Paul M. Niebell,
Attorneys for the Seminole Nation
[of Oklahoma].

Clifford R. Stearns, with whom was
Mr. Assistant Attorney General
Kent Frizzel, Attorneys for Defendant.

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

The claims of the Seminole Nation in this case have been brought under Clauses 1, 4 and 5 of Section 2 of the Indian Claims Commission Act (60 Stat. 1049, 1050), it having been alleged that the United States actionably wronged the Seminole Nation by certain actions of the Dawes Commission relating to the allotment of Seminole land and by terminating the interest of the Seminole Nation in an "equalization fund" to be financed by one-half of all oil or mineral royalties accruing to the allotments. In its previous decision in this case[1/] the Commission

1/ Seminole Nation v. United States, 17 Ind. Cl. Comm. 67 (1966).

found that the Dawes Commission had not acted wrongfully in its division of the allotments, but the Commission did find that the Commissioner of Indian Affairs had actionably wronged plaintiff in the process of securing legislation in 1908 which terminated the Seminole Nation's equalization fund. The Commission concluded that the United States had violated the concept of fair and honorable dealings and was therefore liable to plaintiff for actual damages suffered by the Seminole Nation resulting from the termination.

At the hearing on the issue of the damages suffered by the Seminole Nation, plaintiff presented evidence of the actual value of one-half of the royalty interest in all the oil and gas produced within the original Seminole lands from 1923 through 1968.[2/] That value was computed by plaintiff at over 95 million dollars. Defendant objected to the evidence on the ground that it was immaterial and irrelevant to the issue of damages. While not conceding the correctness of the Commission's initial decision, it was defendant's position that any damages should be measured by the value of the rights terminated as of the date of deprivation. That date would be May 27, 1908, in this case. Since plaintiff did not offer any evidence relating to the 1908 value of the terminated rights, defendant moved to dismiss on the ground that plaintiff failed to show any actual damages as of 1908. This motion was denied on July 7, 1971, and defendant was ordered to file requested findings of fact, objections and

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2/ Plaintiff could not present "any reliable data" on production of oil and gas from 1908 to 1923.

briefs on the issue of damages to which order defendant complied on January 12, 1972. Plaintiff filed a reply brief on January 26, 1972.

In examining the question of damages we have reconsidered the entire record in this case and the initial Commission decision. In reviewing those materials, especially in the light of two significant court decisions, we have now determined that the 1966 decision of the Commission should be set aside.

The Seminole Nation was one of the Five Civilized Tribes all of which were removed from their aboriginal lands in the eastern part of the United States to lands purchased and set apart for them in Indian Territory, in what is now the State of Oklahoma. The United States had agreed that the Seminole lands would never be included in any territory or state and the Seminoles would be secured in the unrestricted right of self-government and full jurisdiction over all persons and property within their lands. 3/ However, by the early 1890's, with the expansion of the United States, whites had crowded into the Indian Territory and actually outnumbered the Indian population. The United States considered it desirable, if not imperative, that the tribal governments in the Indian Territory be terminated and the area be brought under the dominion of the laws of the United States.

For a number of years it had been the general policy of the Federal Government to allot Indian tribal property among the tribe's members and

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3/ Treaty of August 7, 1856 (11 Stat. 699); Treaty of March 21, 1866 (14 Stat. 755); Act of August 5, 1882 (22 Stat. 265).

to confer citizenship upon the allottees. To this end the General Allotment Act had been enacted on February 8, 1887 (24 Stat. 388). However, since the Five Civilized Tribes were considered to have vested property rights in their communal lands, there was doubt as to the legality of any allotment, and the Five Civilized Tribes were specifically excepted from the provisions of the General Allotment Act.

In an effort to encourage the Five Civilized Tribes to voluntarily end their communal system of land ownership, the Congress, by Section 15 of the Indian Appropriation Act of March 3, 1893 (27 Stat. 612, 645), gave express consent to allotments, not to exceed 160 acres to any one individual, and declared that the allottees should be deemed to be citizens of the United States and that the reversionary interest of the United States in the allotted lands should cease. By Section 16 of the same act provision was made for the appointment of a commission to enter into negotiations with each of the Five Civilized Tribes

> for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cessions of the same . . . or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively as may be entitled to the same . . .

This was the origin of the Commission to the Five Civilized Tribes, familiarly known as the Dawes Commission.

The Dawes Commission entered into negotiations with the several tribes but found them quite reluctant to accede to the wishes of Congress. Despairing of securing the voluntary acceptance of the allotment of communal land, Congress, by the Act of June 10, 1896 (29 Stat. 321, 339),

directed the Dawes Commission to begin formulating citizenship rolls, preliminary to mandatory allotment. Believing that a voluntary agreement would be preferable to mandatory allotment, the Seminole Nation began serious negotiations with the Dawes Commission. On December 16, 1897, an agreement was signed by the Dawes Commission and the Seminole Nation's negotiating committee. The agreement was ratified by the Seminole General Council on December 29, 1897, and approved by Congress without amendment by the Act of July 1, 1898 (30 Stat. 567).

The Seminole Agreement provided that all the lands belonging to the Seminole Nation should be divided among its members so that each should have an equal share thereof in value. It was provided that the tribal lands should be divided into three classes based upon fixed values of $5.00, $2.50, and $1.25 per acre and that each allottee would receive, as far as possible, land equal in value based on those classifications. Certain tracts to be used for school, church and tribal government purposes were excepted from allotment. The agreement provided that leases of any coal, mineral, coal oil, or natural gas within the Seminole Nation should be made with the tribal government, by and with the consent of the allottee and approved by the Secretary of the Interior. The "equalization fund" was created by the following paragraph of the agreement:

> Should there be discovered on any allotment any coal, mineral, coal oil, or natural gas, and the same should be operated so as to produce royalty, one-half of such royalty shall be paid to such allottee and the remaining half into the tribal treasury until extinguishment of tribal government, and the latter shall be used for the purpose of equalizing the value of allotments; and if the same be insufficient therefor,

> any other lands belonging to the tribe, upon extinguishment of tribal government, may be used for such purpose, so that each allotment may be made equal in value as aforesaid. (30 Stat. 567.)

Since it was then anticipated that the Seminole tribal government would be terminated shortly upon the eventuality of statehood, the agreement stipulated that the allottees should receive their deeds from the principal chief "[w]hen the tribal government shall cease to exist." Such deed would convey

> . . . all the right, title, and interest of the said Nation and the members thereof in and to the lands so allotted . . ., and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. (Id. at 568.)

By the Act of March 3, 1903 (32 Stat. 982, 1008), it was provided that the Seminole tribal government should terminate no later than March 4, 1906. However, before that date was reached, Congress altered the plan and extended, with certain limitations, the tribal governments of the Five Civilized Tribes, including the Seminole Nation.[4/] Congress also provided, in Section 6 of the Act of April 26, 1906 (34 Stat. 137, 139), for the execution of deeds to allottees "prior to the time when the Seminole government shall cease to exist."

The Seminole equalization fund was abolished pursuant to Section 11 of

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4/ Joint Resolution of March 2, 1906 (34 Stat. 822) and the Act of April 26, 1906 (34 Stat. 137, 148).

the Act of May 27, 1908 (35 Stat. 312, 316), which read as follows:

> That all royalties arising on and after July first, nineteen hundred and eight, from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong; and no such lease shall be made after said date except with the allottee or owner of the land: Provided, That the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June thirtieth, nineteen hundred and eight.

Plaintiff contends that by the Seminole Agreement of 1898 a vested interest in one-half of the mineral royalties from Seminole allotted lands was reserved to the Seminole Nation. By the Act of May 27, 1908, supra, it is alleged, defendant took the said one-half royalty interest from the Seminole Nation, without its knowledge and consent, and without compensating the Seminole Nation therefor. The Commission now concludes that there was no compensable property right created and vested in the Seminole Nation pursuant to the Seminole Agreement of 1898.

The Seminole equalization fund was created for the special purpose of equalizing the value of the allotments. And the payments of one-half the royalties from allotted lands were to cease when the conveyances were made to the allottees. These two events were to occur when the tribal government should be extinguished. It is clear from the negotiations and the agreement itself, particularly those provisions requiring per capita payments of all remaining tribal funds, that the intent of all

the parties was that all property interest would vest in the allottees and that the allottees would in return relinquish any interest in other tribal lands. To have vested any mineral estate in the tribe would have been contrary to the manifest intent of dissolving the tribal government and ending the communal system of land ownership.

The subsequent determination to continue the tribal government indefinitely required that some provision be made for the final conveyances of the allotment deeds. This was done by permitting the conveyances to be made forthwith (as provided in the Act of April 26, 1906, supra) and by fixing June 30, 1908, as the date for ceasing payment of half the royalties to the tribal treasury (Act of May 27, 1908, supra). These provisions were enacted for the purpose of carrying out the intent of the 1898 Agreement.

The provisions of the 1898 Agreement were considered by the Attorney General in an opinion of March 22, 1928 (35 Op. Att'y Gen. 421, 424-25), in which he concluded:

> The essence of the [Seminole] agreement was that the payment into the tribal treasury of one-half the royalties from allotted lands should cease when conveyances were made to the allottees. That was plainly contemplated by the agreement because it stated that the deeds would operate to convey to the allottees complete title to the land and their acceptance should be a relinquishment of the interest of the allottees in other tribal lands, results inconsistent with the idea that the tribe should continue to have an interest in the minerals in the conveyed lands, or that any allottee should have any right to participate in royalties derived from the lands conveyed to other members of the tribe. The statement in the agreement of 1898 that payment into the tribal treasury of one-half the royalties

> should continue until the extinguishment of tribal government was only another way of saying that the payments should continue until the time arrived for making the conveyances. . . . When altering the plan, to provide that conveyances of allotments should be made prior to the end of tribal government, Congress might have provided that the payment of royalties to the tribe should cease as to each allotment when a deed should issue to the allottee, but it resulted in more uniformity and was more in accordance with the 1898 agreement to fix a date as of which all such payments should cease. The agreement of 1898 contemplated early termination of the tribal government and the time for making deeds to allottees. The Act of 1903 confirmed that by fixing March 4, 1906, as the end of tribal government and the time for making deeds to allottees. In fixing June 30, 1908, as the date for ending royalty payments to the tribal treasury Congress allowed the tribal treasury all that was contemplated by the original plan.

This matter has also been before the courts. In the case of Fish v. Wise, 52 F.2d 544 (10th Cir. 1931), cert. denied, 284 U.S. 688 (1932), it was stated at page 546:

> We gave careful consideration to the Seminole Agreement (30 Stat. 567) in Moore v. Carter Oil Co. [43 F.2d 322 (10th Cir. 1930), cert. denied 282 U.S. 903 (1931)] and reached the conclusion, for the reasons there stated, that Seminole allottees acquired full equitable title to their allotments when they were made, and that thereafter when they received deeds for them, which the agreement promised and said they should have, they thus acquired, as the agreement intended they should acquire, legal title in fee to said allotment, free from any claim on the part of the tribe as such or on the part of any other member of said tribe, his heirs, or grantees; and we adhere to that conclusion. . . .

Cf. Goat v. United States, 244 U.S. 458 (1912).

Assuming arguendo that the Seminole Agreement did create a vested property right in the Seminole Nation, we could not agree with plaintiff's contention that the subsequent termination of the equalization fund was in contravention of the 5th Amendment to the U. S. Constitution. The equalization fund was created for a very limited period of time. It was to end upon termination of the tribal government. At the time of the 1898 Agreement, the tribal government was to be extinguished when Oklahoma was admitted to statehood. Thus any property right in the Seminole Nation was subject to divestment. In the exercise of its plenary power over Indian property, Congress may decide to distribute tribal property among its members. Where the distribution is made in good faith no recovery is possible because Congress has merely transmuted one form of asset into another form. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Three Tribes of Fort Berthold Reservation v. United States, 182 Ct. Cl. 543; 300 F.2d 686 (1968). The 1906 Act, supra, and the 1908 Act, supra, provided for the distribution and conveyance of any communal tribal interest in one-half of the royalties to the individual Seminole allottees.

Plaintiff has contended that Sections 11 and 16 of the Curtis Act (Act of June 28, 1898, 30 Stat. 495, 497, 501) separated the surface and subsurface property interests and reserved the minerals to the tribes. However, the said provisions of the Curtis Act did not apply to Seminole Nation allotments made pursuant to the 1898 Seminole Agreement. The Curtis Act, in its application, concerned the allotment of tribal lands

of those of the Five Civilized Tribes which had not come to agreement with the United States. The Seminoles had reached their agreement, and the allotments were as provided by the specific terms of that agreement which made no provision for reserving subsurface mineral rights in the Seminole Nation. See Woodward v. De Graffenried, 238 U.S. 284 (1915); Moore v. Carter Oil Co., 43 F.2d 322 (10th Cir. 1930), cert. denied, 282 U.S. 903 (1931).

Plaintiff has also contended that the passage of Section 11 of the 1908 Act, supra, was a violation of the rules of fair and honorable dealings. In its previous decision the Commission concluded that the Commissioner of Indian Affairs had actionably wronged the Seminole Nation in securing the passage of Section 11 of the 1908 Act and that, therefore, the defendant was liable under Clause 5, Section 2 of the Indian Claims Commission for such "wrongful action . . . inconsistent with the concept of fair and honorable dealings." Upon reconsideration of the record in this case we do not believe that the actions of the Commissioner of Indian Affairs were such as to give rise to a cause of action under clause 5, section 2 of the Act. The evidence does not support our previous findings and conclusions of impropriety and evil intent on the part of the Commissioner. The Commissioner was in no manner involved in improper conduct, and, we are convinced, he was merely acting in a ministerial capacity to provide the means for accomplishing that which had always been intended by the 1898 Seminole Agreement. Section 11 was added to the 1908 Act for the purpose of clarifying the payment of royalties. The United States received absolutely no benefit

from the 1908 Act and, as stated in Fish v. Wise, supra, and Moore v. Carter Oil, supra, the Seminole Nation was not deprived of any property right.

We can agree with the Commission's concern expressed in the 1966 decision with respect to the secretive aspects of a congressional enactment affecting the Seminole Nation's royalty fund without the Nation's knowledge. But any such impropriety alone cannot give rise to a cause of action under Clause 5, Section 2 of the Indian Claims Commission Act. Under the facts in this case the enactment of Section 11 of the 1908 Act did not result in the deprivation of any property right owned by the Seminole Nation, and there can be no recovery under clause 5, section 2 of the Act.

We agree with the conclusions made in the previous decision that the Dawes Commission had not acted wrongfully when it divided the Seminole allotments by value without taking into consideration the latent value of oil deposits within some of the allotments. The Dawes Commission could not have known that any of the allotments included oil deposits. Every effort was made to provide for allotments which were equal in value. Further, any failure to allot each member a mathematically equal share would merely affect the personal property interests of the individual Seminole allottees. Such individual claims are beyond this Commission's jurisdiction, which is limited to "claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians." 25 U.S.C. §27a; see Minnesota Chippewa Tribe

v. United States, 161 Ct. Cl. 258, 315 F.2d 906 (1963); Cherokee Freedmen v. United States, 161 Ct. Cl. 787 (1963).

We have concluded that the plaintiffs' petition should be dismissed, and we have, accordingly, vacated our previous findings and conclusions in this case and entered new findings of fact.

Jerome K. Kuykendall, Chairman

I concur:

Margaret H. Pierce, Commissioner

Yarborough, Commissioner, concurring in the result

If any right or interest of the Seminole Nation was taken by the 1908 Act, the deed was complete, under the terms of the Act, as of June 30, 1908. If, under the plaintiff's view of the case, tribal property was wrongfully taken, the taking was done as of June 30, 1908 and no vestige of tribal ownership or United States trust responsibility or accountability to the tribe remained thereafter in regard to this contested interest. To recover, plaintiff must prove as damages the value of the interest taken as of the date it was taken.

The value of a mineral interest could be shown by evidence of profitable production or expectation of profitable production as seen by the hypothetical purchaser in 1908. Plaintiff's only relevant evidence of mineral discovery prior to the taking date consists of references to two oil wells in the Seminole country, one completed in 1904 and one in 1908, no profitability being shown for either (Plaintiff's expert witness testified that the Seminole area's first commercial oil production was obtained in 1923). Although it is greatly to be doubted, it may be possible that a properly qualified and gifted expert witness could construct a credible opinion as to the 1908 value of the mineral interest of the whole tract from the scanty data on the two oil wells. However, there is no such opinion in the record, and altogether no evidence upon which a 1908 value

finding can be based.[1/] Plaintiff has proved no damages and I concur in the result reached.

Richard W. Yarborough

Richard W. Yarborough, Commissioner

1/ It is to be hoped that my dissenting colleagues' studied silence on the valuation evidence will raise no expectations that a different result could be reached even were their theory of liability to be accepted.

Blue, Commissioner, dissenting:

In its opinion dated June 24, 1966, this Commission held that the defendant,

> by reason of the wrongful act of its representative, the Commissioner of Indian Affairs, is liable for actual damages suffered by the plaintiff resulting from the termination of the equalization fund, which wrongful action was inconsistent with the concept of fair and honorable dealings contained in Clause 5 of Section 2 of the Indian Claims Commission Act of 1946 (25 U.S.C. 70a).

The majority opinion is now vacating the 1966 interlocutory order and is dismissing the petition.

In my opinion the findings of fact and opinion expressed by this Commission in 1966, in this case, are proper and justified, and should not be vacated or set aside.

The 1898 Agreement between the Seminole Nation and the Dawes Commission, solemnly entered into, provided for a division of the lands among the members of the tribe, but it also contained several very important safeguards for the tribe, that may be summarized:

1. Alienation of allotted lands prior to issuance of patents was prohibited.

2. All leases by allottees required approval by the tribal chief.

3. There could be no leases for coal, minerals, coal oil, or natural gas except by the tribal government with the consent of the allottee and approval of the Secretary of the Interior.

4. Should coal or other minerals be discovered and produce royalties, one-half of the royalties should be paid to the allottee and the other half should be paid into the tribal treasury until the extinguishment of the tribal government to be used for the purpose of equalizing the value of the allotments (emphasis supplied).

5. No deed could issue to an allottee until extinguishment of the tribal government.

6. Each allottee was to designate one tract of forty acres, which was to be made inalienable and non-taxable as a homestead in perpetuity.

The above were important provisions envisioning the allottees holding separate property, but maintaining a certain portion in perpetuity. Thus the establishment of the equalization fund, to be fully administered by the tribal government. These provisions, no doubt, were insisted upon and contained in the same instrument wherein the Seminole Nation agreed to a division of its property among its members. I regard them as conditions.

As important as those conditions were, entered into by agreement, they were completely changed, not by agreement, but by unilateral Act of Congress passed in 1908, and in earlier acts, without extinguishing the tribal government and in violation of the agreement. The result was that in a few years the Seminole Indians held no land in perpetuity. In fact, many held none at all.

Congress, no doubt, had the plenary power to do what it did. But in doing so, were the actions fair and honorable? I agree with the Commission's 1966 conclusion wherein the answer was, no. I do not think that that conclusion is dependent on the nature of the motive for the exercise of the Congressional power.

Perhaps, as argued, the defendant received no monetary or physical benefits, but I am not at all certain that others did not do so, at the ultimate expense of the Seminole Nation and its members, due to governmental actions and in violation of the defendant's agreement.

Whether the Seminole Nation lost any compensable interest is a matter which should be determined by further trial. The fact of the matter is that the Seminole Nation, in effect, lost everything. The Seminole Nation owned all of the land prior to the 1898 Agreement. In that agreement it agreed to divide the lands among its people, portions to be held in perpetuity, but subject to the other provisions in the agreement. The agreement was revised, unilaterally, setting the stage for all sorts of exploitation. The intent of the Seminole Nation, that its members would always own a portion of the land, so clearly set out in the 1898 Agreement, was not protected.[1/] Congressional action defeated that intent.

It is somewhat strange for the defendant, in effect, to be saying to the Seminole Nation:

1/ Section 8 of the Act of March 3, 1903, restricted the inalienability to the lifetime of the allottee, not exceeding 21 years from the date of the deed for the allotment. (32 Stat. 982, 1008)

"You did own the land. We agreed for you to allot it among your members, partly in perpetuity, and to provide for you to make certain that all of your members would be equally treated. We could unilaterally change the provisions of that agreement, stripping you of any and all remaining power or authority, but you cannot recover because of your (emphasis supplied) agreement. You are bound by the agreement. We are not. You were not really harmed."

In entering into the 1898 Agreement, the Seminole Nation was acting for itself and its members, with a certain clear intent, for its members to retain the land and receive equal value, through the equalization fund. The fact is, the Seminole Nation did not cede its land in the 1898 Agreement. The 1908 Act and other acts following the 1898 Agreement unilaterally took away the vested rights of the Seminole Nation and its members. Every form of government is damaged if its people are damaged and to the extent they are damaged. This is uniquely true when the damage results from violating an agreement entered into with that government, under which agreement certain acts were taken because of the provisions that certain other actions would be maintained.

The majority relies to some extent on the two Court cases: Fish v. Wise, 52 F.2d 544 (10th Cir. 1931), cert. denied, 284 U.S. 688 (1932), and Moore v. Carter Oil Co., 43 F.2d 322 (10th Cir. 1930), cert. denied, 282 U.S. 903 (1931).

I don't think either of the above cases is applicable in the case before this Commission. Both cases were decided prior to the establishment of the Indian Claims Commission.

The 1966 Commission's opinion followed an extensive inquiry; it was well reasoned and just. I do not think it should be vacated or set aside. We should proceed to consider the extent of the actual damages, if any, the Seminole Nation suffered.

Brantley Blue, Commissioner

I concur:

John T. Vance, Commissioner