



INTERIOR BOARD OF INDIAN APPEALS

Muscogee (Creek) Nation v. Muskogee Area Director, Bureau of Indian Affairs

13 IBIA 211 (07/22/1985)

Also published at 92 Interior Decisions 309

Judicial review of this case:

Summary judgment for defendant, *Muscogee (Creek) Nation v. Hodel*,

670 F. Supp. 434 (D.D.C. 1987)

Reversed, 851 F.2d 1439 (D.C.Cir. 1988)

Certiorari denied, 488 U.S. 1010 (Jan. 9, 1989)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

MUSCOGEE (CREEK) NATION

v.

ACTING AREA DIRECTOR, MUSKOGEE AREA OFFICE,

BUREAU OF INDIAN AFFAIRS

IBIA 84-15-A

Decided July 22, 1985

Appeal from a decision of the Bureau of Indian Affairs denying funding for appellant's courts and law enforcement agency.

Affirmed.

1. Indians: Law and Order: Civil Jurisdiction--Indians: Law and Order: Criminal Jurisdiction

The general civil and criminal judicial authority of the Muscogee (Creek) Nation was abolished by act of Congress, and was not restored by the Oklahoma Indian Welfare Act of 1936.

APPEARANCES: Geoffrey Standing Bear, Esq., Jenks, Oklahoma, for appellant; David C. Etheridge, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee; Susan Work Haney, Esq., Oklahoma City, Oklahoma, for amicus curiae, Tookparfka Tribal Town. Counsel to the Board: Kathryn A. Lynn.

## OPINION BY ADMINISTRATIVE JUDGE LEWIS

On January 27, 1984, the Board of Indian Appeals (Board) received a request from the Muscogee (Creek) Nation (appellant) to assume jurisdiction over an appeal filed with the Deputy Assistant Secretary--Indian Affairs (Operations). Appellant sought review of a decision issued by the Bureau of Indian Affairs (BIA) denying funding for its courts and law enforcement agency. The stated basis for the denial was an April 20, 1978, memorandum issued by the Associate Solicitor, Division of Indian Affairs, U.S. Department of the Interior, which concluded that the Curtis Act of 1898, 30 Stat. 495, precluded appellant's exercise of civil and criminal jurisdiction within the former Indian Territory. For the reasons discussed below, the Board affirms the BIA decision.

Background

Prior to 1707, the Creek Nation occupied a large territory in what is now the States of Georgia, Alabama, and Florida. Between 1707 and 1773, tracts of this territory were ceded to Great Britain and the American colonies. Treaty cessions to the newly independent United States began in 1790. Under the Creek Removal Treaty of March 24, 1832, 7 Stat. 366, that portion of the Creek Nation to which appellant belongs was removed to an area in the present State of Oklahoma. Under the 1832 Treaty, appellant was guaranteed the right to perpetual self-government in the new territory. Similarly, the Creek Treaty of August 7, 1856, 11 Stat. 699, provides:

Article IV. The United States do hereby solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians, and that no portion of either of the tracts of country defined in the first and second articles of this agreement shall ever be embraced or included within, or annexed to, any Territory or State, nor shall either, or any part of either, ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same.

\* \* \* \* \*

Article XV. 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 and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits; excepting, however, all white persons, or their property, who are not, by adoption or otherwise, members of either the Creek or Seminole tribe; and all persons not being members of either tribe, found within their limits, shall be considered intruders.

Because of appellant's support of the Confederacy during the American Civil War, it was forced in 1866 to cede the western half of its territory to the United States. The Creek Treaty of June 14, 1866, 14 Stat. 785, however, still protected the integrity of the tribal government:

Article X. The Creeks agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian territory: Provided, however, [That] said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs.

In 1867, appellant formed a constitutional government, with defined executive, legislative, and judicial branches.

In 1887, Congress passed the General Allotment Act, Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. §§ 331-358 (1982). This Act provided for the allotment of lands within Indian reservations to individual Indians. Section 8 of the General Allotment Act, 25 U.S.C. § 339 (1982), specifically excluded the Creeks, among other tribes, from its provisions:

The provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in Oklahoma, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by Executive order.

These exclusions show congressional recognition that the named tribes and areas were considered to be different from other Indian tribes and reservations.

In apparent recognition that the "full and free consent" provisions of the treaties with the Five Tribes (i.e., Cherokee, Creek, Chockaw, Chickasaw, and Seminole) required approval from those tribes before allotment of their reservations could be achieved, Congress enacted numerous laws specifically addressed to the allotment of their lands. See Act of Mar. 1, 1889, 25 Stat. 783; Act of May 2, 1890, 26 Stat. 81; Act of Mar. 3, 1893, 27 Stat. 612, 645; Act of Mar. 1, 1895, 28 Stat. 693; Act of June 10, 1896, 29 Stat. 321, 329; Act of June 7, 1897, 30 Stat. 62, 83; Act of June 28, 1898, 30 Stat. 495; Act of June 6, 1900, 31 Stat. 657; Act of Feb. 18, 1901, 31 Stat. 794; Act of Jan. 21, 1903, 32 Stat. 774; Act of Feb. 19, 1903, 32 Stat. 841; Act of Apr. 28, 1904, 33 Stat. 573; Act of Apr. 26, 1906, 34 Stat. 137; Act of June 16, 1906, 34 Stat. 267. In 1893,

Congress created the Dawes Commission (Commission) and gave it the responsibility of negotiating allotment agreements with the Five Tribes.

In 1897, Congress passed the Indian Department Appropriations Act for fiscal year 1898, Act of June 7, 1897, 30 Stat. 62. This Act gave Federal courts in Indian Territory original and exclusive jurisdiction to try all civil causes instituted after the passage of the Act and all criminal causes for any offenses committed after January 1, 1898. The jurisdiction of the Federal courts applied to both non-Indians and Indians.

The congressional debates over this bill indicated that the provisions usurping Indian civil and criminal jurisdiction would take effect only if the tribes did not ratify the allotment agreements negotiated with the Commission:

I will state to the Senator, that we do not take away the right or the power to treat, but, on the contrary, we provide that if at any time they make a treaty [i.e., allotment agreement], which is ratified by a tribe, this act [i.e., the provision usurping civil and criminal jurisdiction] shall no longer apply to that tribe.

29 Cong. Rec. 2246 (1897, remarks of Senator Pettigrew).

As I said before, if this provision is retained in regard to the courts, I have no doubt but what within six months or a year treaties will be made in regard to allotments and all the rights of the Indians will be protected; but if this legislation be defeated, the Senator will find that there will be no agreement of any kind with the Dawes Commission. If the Senate desire a suitable settlement of this matter, to which both sides agree, it will keep this provision in the bill in regard to the abolition of the Indian courts.

29 Cong. Rec. 2323-24 (1897, remarks of Senator Berry).

The Seminole Nation ratified an allotment agreement in late 1897. Seminole Agreement, Act of July 1, 1898, 30 Stat. 567. The Commission meanwhile continued to negotiate with the remaining four tribes. Agents of the Creeks, Choctaws, and Chickasaws negotiated agreements. The Cherokee Nation refused to negotiate even a tentative agreement. Consequently, Congress passed the Curtis Act of 1898, 30 Stat. 495. Section 28 of the Curtis Act states:

That on the first day of July, eighteen hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be transferred to the United States court in said Territory by filing with the clerk of the court the original papers in the suit: Provided, That this section shall not be in force as to the Chickasaw, Choctaw, and Creek tribes or nations until the first day of October, eighteen hundred and ninety-eight.

Again, the legislative debates concerning this act reveal Congress' intent:

The question of allotment comes up and the bill endorses the action of the Dawes Commission. It takes away from those Indians the courts that they have had under treaties, and every right almost they have of a political and legal character has been denied them. The bill goes on to approve the action in the past in that regard. I think the Senators owe it to themselves to look into it and to see to it, because the course of the Government toward those Indians has certainly been a source of much reprehension, and justly so.

29 Cong. Rec. 5582 (June 7, 1898, remarks of Senator Bates).

Mr. President, the bill, beginning with Section 28, provides for the submission of the agreement which has heretofore been made between the Dawes Commission and the Indian tribes and for a settlement of all of these difficulties. The bill before us \* \* \* looks to a disposition of all of these questions by the government of the United States. The Indians have not ratified this agreement. Their agents made the agreement with the Dawes Commission, and this provision of Section 28 is that in case they do ratify the agreement, then the terms of the agreement shall supersede the others and shall be enforced; but if it is not ratified, then the provisions of the bill before Section 29 shall become the law and be operative in that Territory.

29 Cong. Rec. 5588 (June 7, 1898, remarks of Mr. Jones).

The allotment agreements negotiated with the Choctaws and Chickasaws were ratified prior to the October 1, 1898, deadline established in section 29 of the Curtis Act. The Creek allotment agreement had been rejected by the Creek National Council prior to the passage of the Curtis Act. In rejecting the agreement, the Council had apparently followed the recommendation of Isparhecher, the Creek Principal Chief: "I think it far better for us to stand firm by the treaties we have, and plead the justice of our cause by all lawful and honorable means, than enter into this agreement." Resolution of the Creek National Council, Oct. 18, 1897, S. Doc. No. 34, 55th Cong., 2d Sess. (1897) at 11.

The Creeks continued to negotiate, and entered into a new agreement with the Commission on February 1, 1899, 4 months after the Curtis Act's deadline for the abolition of tribal courts. Commissioner Dawes refused to sign this agreement, and it was not ratified by Congress.

Negotiations continued, with the Creeks demanding protection and preservation of their courts and the Commission refusing to include such protections. A new agreement sent to Congress did not protect the tribal courts. The Creeks requested that an amendment protecting their courts be added in committee:

But if this provision [protecting tribal courts] should not be incorporated in the agreement, it might be difficult to secure its ratification, and even if ratification were secured there would still be an element of discontent among the people by reason of the fact that they had been deprived of the limited jurisdiction which had been promised them \* \* \*; and this would be a discrimination against the Creeks as to their capacity for self-government.

S. Doc. No. 324, 56th Cong., 1st Sess. at 13 (1900). The protection sought through amendment was not provided, and the agreement as ratified by Congress specifically retained the abolition of the Creek courts: "47. Nothing contained in this agreement shall be construed to revive or reestablish the Creek courts which have been abolished by former Acts of Congress." Act of March 1, 1901, 31 Stat. 861; ratified by the Creek National Council on May 25, 1901; proclaimed law by President William McKinley on June 25, 1901.

The present controversy essentially began in 1976 with the decision of the United States District Court for the District of Columbia in Harjo v. Kleppe, 420 F. Supp. 1110 (D.D.C. 1976), aff'd sub nom., Harjo v. Andrus, 581 F.2d 949 (D.C. Cir. 1978). <sup>1/</sup> After reviewing the history of Federal

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<sup>1/</sup> Harjo specifically considered whether the Creek executive and legislative branches had both survived, and found that they had. Creek judicial authority was not at issue in Harjo.

relations with the Creek Nation, the court held that Congress had not disestablished the tribe, and that it would be allowed to reorganize under a new constitution. In accordance with the Oklahoma Indian Welfare Act (OIWA), Act of June 26, 1936, 49 Stat. 1967, 25 U.S.C. §§ 501-509 (1982), the Creeks held a constitutional election in 1979, and formed a new constitutional government. The Creek constitution, establishing a three-branch form of government, was approved by BIA the same year. The Creek Nation presently operates under this constitution.

In 1982, the Creek Nation began efforts to develop its court system. A judicial code was adopted, and funding was sought from BIA for its courts and law enforcement program. Through a letter dated April 6, 1983, the Department's field representative, Okmulgee Agency, BIA, informed the Nation that its law enforcement program would not be funded. The Nation's appeal of that decision, under 25 CFR Part 2, was transferred to the Board in accordance with 25 CFR 2.19(b). After initial briefing by the parties and by the amicus curiae, Tookparfka Tribal Town, oral argument was held before this Board on November 15, 1984.

### Discussion and Conclusions

The issues raised in this appeal are narrow legal questions: Did Congress deprive the Creek Nation of general civil and criminal judicial authority, and, if so, has such authority been returned to the tribe? The Board has carefully reviewed in depth the extensive statements of history, legislation, precedents, and arguments made by the parties and the amicus

curiae. The Board is unable to find convincing legal support for the position of appellant. Therefore, while fully aware that the policies expressed in the Curtis Act and similar legislation have long been abandoned in favor of Indian self-determination, and that this decision will have an adverse and discriminatory effect on the Muscogee (Creek) Nation, the Board is constrained to find, as set forth in detail in the discussion below, that the Nation's civil and criminal judicial authority was abolished by acts of Congress and has not been restored.

[1] From the preceding review of the circumstances and congressional debates surrounding the passage of the fiscal year 1898 Appropriations Act and the later Curtis Act, it appears clear that Congress understood and intended that the acts would destroy both the then-existing and future civil and criminal judicial authority of the Creek Nation, and would abrogate earlier treaties guaranteeing full tribal self-government. Although Congress' goal was to force allotment, not to destroy tribal judicial systems, the Creeks failed to reach an allotment agreement before the deadline established by Congress in the Curtis Act. The general jurisdiction of the Creek Nation over civil and criminal causes was, therefore, abolished in accordance with the 1898 Appropriations Act and the Curtis Act. Congress could have reestablished the Nation's civil and criminal jurisdiction when an allotment agreement was later reached, but, choosing retribution over amnesty, specifically declined to do so in section 47 of the 1901 act ratifying the Creek allotment agreement. The Board, therefore, holds that the general civil and criminal judicial authority of the Creek Nation was abolished by act of Congress.

The next question is whether that Nation's general judicial authority was ever restored. Appellant first suggests that its full judicial authority, including civil and criminal jurisdiction, was either restored or again recognized through the court's decision in Harjo, *supra*. The issue in Harjo, however, was only whether the Creek legislative and executive branches had been destroyed. Therefore, although the court discussed the general effect of the Curtis Act, it did not construe that Act or similar legislation as related to the abolition or modification of judicial authority. Harjo did not directly address the issue of Creek judicial authority and therefore cannot be relied upon as binding authority for appellant's proposition.

Appellant also contends that BIA's approval of its 1979 constitution, which included a court system, constitutes recognition of its general judicial authority. Appellee argues that appellant is limited to a court system capable of reviewing acts of its legislative and executive branches, but not capable of hearing general civil and criminal cases. Appellee alleges that its approval of appellant's constitution merely recognized the formation of a court system of limited jurisdiction.

The BIA does not have authority administratively to grant powers that Congress has removed. However misguided later generations may believe earlier congressional policy to be, that policy was embodied in specific acts of Congress, 2/ and may be changed only through another act of Congress. The effect of earlier congressional enactments cannot be overcome simply through BIA approval of appellant's constitution.

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2/ This Board is not the proper forum in which to question the constitutionality of an act of Congress. Zarr v. Acting Deputy Director, Office of Indian Education Programs, 11 IBIA 174, 90 I.D. 172 (1983); Estate of Stowhy, 1 IBIA 269, 79 I.D. 428 (1972).

The question, then, is whether Congress has restored appellant's full judicial authority. Appellant argues that the Curtis Act was repealed by section 9 of the OIWA, 25 U.S.C. § 509 (1982), which states: "The Secretary of the Interior is authorized to prescribe such rules and regulations as may be necessary to carry out the provisions of this subchapter. All Acts or parts of Acts inconsistent with this subchapter are hereby repealed." Appellant argues that the Curtis Act, by abolishing Creek tribal courts, is inconsistent with the OIWA, which allows the reorganization of Indian tribal governments, including court systems. Because tribal government must inherently include judicial authority, appellant contends the inconsistent Curtis Act was repealed by the OIWA.

The Board has carefully considered the arguments and authorities for and against repeal of the Curtis Act by the OIWA, and has concluded that although the two Acts are opposite in theory and practice, they are not legally inconsistent. The OIWA allows Oklahoma tribes to reorganize whatever existing governmental powers they legally possess; it is not a grant of new powers. The Curtis Act limits appellant's governmental powers by depriving it of civil and criminal judicial authority. A government lacking power to adjudicate civil and criminal disputes among its citizens is obviously weakened, but its existence is not thereby rendered impossible. Cf. Harjo. Because the Curtis Act is not legally inconsistent with the OIWA, it was not repealed by section 9 of that Act. 3/

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3/ Because of these holdings, it is unnecessary to reach the remaining issues raised by the parties.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Anne Poindexter Lewis  
Administrative Judge

I concur:

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//original signed  
Bernard V. Parrette  
Chief Administrative Judge

## ADMINISTRATIVE JUDGE MUSKRAT SPECIALLY CONCURRING

Although I am forced to agree with the majority on the legal issue raised in this case, I do so with serious reservations. The court in Harjo recited the contemptible history of Federal dealings with the Creek Nation, noting that the official "attitude, which can only be characterized as bureaucratic imperialism, manifested itself in deliberate attempts to frustrate, debilitate, and generally prevent from functioning" the tribe's legislative and executive branches. Harjo, 420 F. Supp. at 1130. The case before us demonstrates the continuation of this bureaucratic imperialism against the tribe's judicial branch. This, in my judgment, constitutes a serious violation of the United States' trust responsibility to the Muscogee (Creek) Nation.

In Roger St. Pierre and the Original Chippewa Cree of the Rocky Boy's Reservation v. Commissioner of Indian Affairs, 9 IBIA 203, 89 I.D. 132 (1982); disapproved, in part, on other grounds, Robert Burnette v. Deputy Assistant Secretary--Indian Affairs (Operations), 10 IBIA 464, 89 I.D. 609 (1982), this Board conducted an extensive review of the history, purpose, wording, and structure of the Indian Reorganization Act of 1934 (IRA), and concluded that Congress intended to impose a specific trust responsibility on the Secretary of the Interior and the Bureau of Indian Affairs with respect to tribes organized under the Act. More specifically, the Board found that the government-to-government relationships between the United States and Indian tribes organized under the IRA are governed by the trust responsibility

established by the IRA and therefore are "subject to the limitations inhering in \* \* \* a guardianship and to pertinent constitutional restrictions." I believe a similar trust responsibility applies to tribes organized under the Oklahoma Indian Welfare Act.

Consequently, in its relations with the Creek Nation, the actions of the United States as trustee and BIA as its agent must be judged in accordance with general principles of trust law. In an analogous situation, a private trustee has a duty to disclose or provide information to the beneficiary which the trustee knows, or should have known, affects the beneficiary's interests. See Restatement (Second) of Trusts § 173, comment d (1959).

Under the circumstances of the present case, BIA knew or should have known that the policy formulated in the late 1800's toward the Five Tribes and, in particular, the Creek Nation, was intended to subvert tribal government. Whatever the rationale for this strategy at the turn of the century, subsequent Federal policy has been to encourage and foster Indian self-determination and self-government. In the case before us however, the actions of BIA have only served to frustrate that policy. The BIA has known since 1976 that the Creek Nation was attempting to reorganize its government, and since 1979 that it intended to include its judicial branch in the reorganization. Under the Oklahoma Indian Welfare Act, the BIA has an affirmative duty to aid in this reorganizational effort. Its failure to do so results in a violation of the trust responsibility.

As trustee, the United States is duty bound to enhance and protect the governmental interests of the Creek Nation. In the present case, the trustee should seek an immediate end to the "bureaucratic imperialism" which has stifled the self-determination and self-government of the Nation. Instead of permitting a situation to arise where the BIA finds itself arguing before this Board that the Creek Nation cannot possess full judicial authority over its own people because of an anachronistic law, the trustee was on notice and should have sought a legislative solution to this injustice.

I am fully aware of the probability that the Federal Government now, as in the 1800's, is receiving and responding to political pressure from non-Indians in Oklahoma. As the courts and this Board have stated many times, however, the Federal Government owes no trust responsibility to non-Indians. See, e.g., Bailess v. Paukune, 344 U.S. 171 (1952); Chemah v. Fodder, 259 F. Supp. 910 (W. D. Okla. 1966); Estate of Douglas Leonard Ducheneaux, 13 IBIA 169, 92 I.D. 247 (1985). It, therefore, appears that the Government's responsibility is to deal with non-Indian political pressure without sacrificing the rights of the trust beneficiary.

In my opinion, the United States, through its agents, has and continues to inexcusably violate its trust responsibility to the Muscogee (Creek) Nation. With great reluctance then, of necessity, I concur with the result reached by the Board.

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//original signed  
Jerry Muskrat  
Administrative Judge