

Indian claims litigation which were inherent in the instant matter, its successful handling required the services of experienced and competent counsel. Counsel having a familiarity with the necessary historical background of the Five Civilized Tribes of Indians, of which the Creek Tribe was one, had an advantage in rendering the necessary legal services herein. This is apparent since the matter involved the treaties and agreements and the historical record of dealings between the United States and these Creek Indians in relation to 2,037,414.62 acres of land in the present State of Oklahoma which were ceded to the United States by the plaintiff in the Treaty of August 7, 1856.

2. Counsel of record, Paul M. Niebell, Esq., whose law offices are at 1201 - 19th Street, N. W., Washington, D. C., assumed the complete responsibility referred to in Finding No. 1 above pursuant to duly executed and approved contracts. Mr. Niebell has had extensive experience in such matters. In fact, almost his entire legal practice since 1930 has been devoted to the prosecution of Indian tribal claims against the United States. He has successfully served as counsel for a number of Indian tribes, and has represented the plaintiff herein in a number of other claims against the defendant in the Court of Claims and before this Commission.

3. Mr. Niebell's legal services for the plaintiff herein commenced in February of 1930 and have continued since then. His early service involved matters before the Court of Claims and any other legal problems of the tribe. Since the passage of the Indian Claims Commission Act in

1946, he has filed a number of claims before the Commission as attorney of record for the plaintiff. The instant matter is one of these so filed.

4. Insofar as claims before this Commission are concerned, the original attorney's contract between the Creek Nation of Oklahoma and Paul M. Niebell of Washington, D. C., was entered into on August 28, 1946, and approved on November 12, 1947, for a ten year period beginning from date of approval thereof. This contract was supplemented by another contract dated October 30, 1957, between the same parties, approved on January 8, 1958, for a 10-year period beginning November 12, 1957, and provided for extensions for periods of 5 years each. This contract provides for an attorney fee wholly contingent on recovery to be fixed in an amount not to exceed ten percent of the amount of recovery.

5. The background of this claim was developed by Mr. Niebell through his research in the old records of the Department of the Interior, the Indian Office, and General Land Office, beginning in February, 1930, and continuing daily for a period of more than two years thereafter. These records were then in the basement of the Old Interior Department Building, located at 19th and F Streets, N.W., before they were transferred to the National Archives. Counsel was assigned an office in which to do this research in the basement of this building. At that time these old records were poorly kept, and in many instances were covered with dust, and rat infested, and this research was then a difficult and dirty work. Counsel examined all of the old records of the government relating to the Creek Nation, beginning with 1790, the beginning of

our government, noted all of the important documents, and copied many of the more important documents, or made abstracts of them, for future reference. The original of one of these of great value to the case was lost during the transfer to the Archives. The contents of the document written by Albert Pike were, therefore, only available for litigation in this matter by reason of counsel's research and copy resulting therefrom. Counsel during this period, and thereafter, continued his research on Creek matters in the executive documents of Congress, and other historical data, and visited the Interior Department Library and the Indian Office records therein, the Senate Library in the U. S. Capitol, and the Library of Congress. As a result of this extensive research the claim presented in this case was discovered and developed solely by counsel.

6. Counsel was then working on litigation authorized to be filed in the United States Court of Claims under the Act of May 20, 1924, (43 Stat. 139), which limited claims to those arising under and growing out of the terms of the treaties and agreements, and acts of Congress; and this Act did not authorize the filing of claims which required the revision of a treaty of agreement between the Creek Nation and the United States. The claim herein was not filed in the prior litigation for that reason. A broader forum such as the Indian Claims Commission with greatly enlarged jurisdiction was necessary in order to present claims such as the one involved in this case.

When the bills having for their purpose the creation of the Indian Claims Commission to settle finally the claims of the Indian tribes were

under consideration by Congress, on March 3, 1945, Mr. Niebell, then attorney for the Creek Nation, and presently serving both as their claims and general attorney, appeared with other attorneys before the House Committee on Indian Affairs, 79th Congress, 1st Session, at hearings on H.R. 1198 and H.R. 1341, pp. 28-47, explained the limitations of the 1924 and similar jurisdictional acts, and recommended broader jurisdictional provisions which would permit going behind the written terms of treaties and agreements, and the presentation of claims which would call for the revision of treaties and agreements on equitable grounds. As enacted by Congress, the Indian Claims Commission Act contained this broad jurisdiction which permitted the final determination of such claims as the one herein presented.

7. The claim of the Creek Nation of Oklahoma in this case concerned 2,037,414.62 acres of Creek tribal lands located in what was originally called Indian Territory, now within the State of Oklahoma, owned in fee simple by the Creek Nation, and ceded by the Creek Nation to the United States in the Treaty of August 7, 1856 (11 Stat. 699, 2 Kapp. 756).

8. The services in this docket performed by Mr. Niebell before the Commission began with the preparation and filing of the petition on August 9, 1951. The petition set forth a claim for the fair market value of said 2,037,414.62 acres of Creek national domain in the then Indian Territory, now a part of the State of Oklahoma, which the Creek Nation ceded to the United States for the consideration of \$1,000,000.00 in said Treaty of August 7, 1856, or approximately 46 cents an acre. The plaintiff alleged that the consideration paid by the United States was

grossly inadequate and unconscionable in that the lands were alleged to be worth at least \$1.25 an acre at the time of the cession; and sought relief under Section 2, Clause 3 of the Indian Claims Commission Act; or in the alternative, under Section 2, Clause 5 of said Act, that this transaction was in violation of fair and honorable dealing between the parties.

9. The case involved complicated and novel issues of fact and law relative to the value of the lands ceded, and a general release of claims executed by the Creek Nation in the Agreement of March 1, 1889 (25 Stat. 757). The issue of value was complicated by the fact that the consideration of \$1,000,000.00 paid by the United States for the 2,037,414.62 acres of Creek lands ceded on August 7, 1856, or about 46 cents an acre, placed upon counsel for plaintiff the burden of producing evidence to support the claim of unconscionable consideration.

10. On April 24, 1956, the United States filed its answer in this case. The answer raised the following issues: (1) that the petition fails to state a claim upon which relief can be granted; (2) that the consideration paid by the United States for the lands ceded by the Creek Nation in the Treaty of 1856 was adequate, and was not unconscionable; (3) that the United States paid consideration for the general release of claims executed by the Creek Nation and contained in the Agreement of March 1, 1889, and said release barred recovery on this claim; (4) that the United States dealt fairly and honorably with the Creek Nation in this transaction; and (5) in event of recovery the United States has expended gratuitously for the benefit of the Creek Nation certain amounts

which it would assert against any recovery awarded by the Commission.

11. With the issues thus determined, Mr. Niebell began the work of preparation of the evidence necessary to prove affirmatively the validity of this claim. He reviewed the notes relative to this claim made during the period of his early research in the Interior Department records, and the Congressional documents, etc., and selected from the data the documents which, in his opinion, were necessary by reason of their relation to the issues in this claim.

12. Mr. Niebell reviewed the published annual reports of the Commissioner of Indian Affairs from 1830 through 1892, and abstracted therefrom the important facts relative to the location, climate, nature of the lands, the fertility of the soil, the crops raised by the Indian farmers on the Creek lands in Indian Territory, and similar contiguous lands, soon after the removal of the Creeks to these lands in Indian Territory; and the abstracts included other factors which had an important bearing on the issues involved in this case, and particularly the issue of value. Other exhibits were secured and reproduced for presentation to the Commission at the trial.

In further preparation for the trial plaintiff's counsel reviewed at the National Archives the appraisal report of W. D. Davis, dated September 20, 1952, on the value of the Osage ceded lands in Kansas on September 29, 1865, extracted portions of it, and had parts of it reproduced. He reviewed the findings of fact and opinion of the Commission in the Osage case (3 Ind. Cl. Comm. 217); reviewed the appraisal report of defendant's land appraiser, J. F. Sandford, dated April 14, 1950, filed in the Choctaw and Chickasaw

Leased District Case, Docket Nos. 16 and 23, and the other evidence of value therein presented, which involved the leased district lands, contiguous and immediately south of the lands in this case, and reviewed and reproduced the findings of fact and opinion of the Commission in that case (1 Ind. Cl. Comm. 291); reviewed the appraisal report and evidence of value presented in the Cherokee Outlet Case, Docket No. 173, and the findings of fact and the opinion of the Commission in that case (9 Ind. Cl. Comm. 162); reviewed the report of Mr. W. D. Davis, appraiser in the Kiowa case, and the findings and opinion of the Commission in that case (4 Ind. Cl. Comm. 95); reviewed and had reproduced the 1868 appraisal of the Cherokee Neutral lands in Kansas; and reviewed the findings of fact and opinion in the Miami case (6 Ind. Cl. Comm. 513), and the Shawnee case, Docket No. 334 (6 Ind. Cl. Comm. 377). Mr. Niebell secured a copy of the publication Dynamic Factors in Land Values, Technical Bulletin 37, Urban Land Institute, 1200 18th Street, N. W., Washington, D. C., prepared by Dr. Homer Hoyt. He also reviewed the reports of the Governor of Kansas Territory, located in the published annual reports of the Secretary of the Interior, in the Library of the Department of the Interior, for further evidence relative to the issue of value. Mr. Niebell supplied the appraiser with the results of his research and the documents, notes, etc., which he had secured, as well as other necessary requested materials for use in making an appraisal of the lands in question.

13. The issue of unconscionable consideration, and hence the market value of the lands involved, was probably the most important in

the case. Therefore, Mr. Niebell procured the services of Mr. E. A. Tucker, an experienced appraiser. Mr. Tucker had served as an appraiser in the Cherokee Outlet case before this Commission (our Docket No. 173), which involved lands only a short distance to the north of the lands involved herein in the State of Oklahoma. The arrangement with Mr. Tucker for his employment was at first informal. However, in view of the decision of the Commission in the Omaha case, counsel prepared a formal contract for execution by Mr. Tucker and the Chief of the Creek Nation, formalizing the terms of Mr. Tucker's employment directly with the Creek Nation, and providing for payment from Creek tribal funds on deposit to the credit of the Creek Nation in the Treasury of the United States. This contract was executed by the parties in February, 1962, and approved by the Commissioner of Indian Affairs in March, 1962, before the trial of this case before the Commission. Mr. Tucker's services were, therefore, not contingent on the outcome of this litigation.

14. Since Mr. Tucker had lived in the vicinity of the lands involved and traveled across them for many years, and had done farm appraisal work in the areas contiguous to them, and had performed the aforesaid appraisal work in the Cherokee case, he had a familiarity with the lands which proved to be of great value in connection with his appraisal. He had also for some years taught farm appraisal and farm management and agricultural economics courses at Oklahoma State University (then Oklahoma A. & M. College), Stillwater, Oklahoma, and was associated for years with the U. S. Agricultural Experiment Station

at said College doing farm research work on lands in Oklahoma, and was therefore eminently qualified to do the appraisal work in this case. In 1957 Mr. Tucker, accepted a full time teaching assignment at California State Polytechnic College at Pomona, California, teaching agricultural economics courses; farm management, farm products prices, and farm marketing, and some appraisal practice in the farm management courses. In the spring of 1959 he resigned his teaching assignments, and became associated with the Roy C. Seeley & Company, Los Angeles, California, a real estate brokerage and appraisal firm, as a full time appraiser.

15. After an unsuccessful attempt to settle the matter, hearings were held for a period of four days starting March 6, 1962. The transcript consisted of 535 pages and included the testimony of three expert witnesses: one appraiser for the plaintiff; and two for the defendant.

16. During the trial plaintiff's counsel presented 28 selected exhibits, and at the request of the Commission, Mr. Tucker, plaintiff's appraiser, prepared for the record an additional map of the area, to be presented after the close of the hearings, which when filed became Plaintiff's Exhibit 29. These exhibits consisted of maps and records of the Indian Office files reproduced from records on file at the National Archives, developed from the research of counsel; also Executive Documents of Congress, extracts from the published reports of the Commissioner of Indian Affairs, and particularly the reports of the United

States Indian Agents for the Creek Nation, and others, covering the period 1836-1868, and 1891, extracts from histories, and the Eleventh Census of the United States, plats from Royce's Indian Land Cessions, 18th Annual Report, Bureau of American Ethnology, and a copy of the Soil Survey of Cleveland County, Oklahoma, the only one within the area involved that could then be obtained.

During the trial defendant, represented by able and skillful counsel, presented 21 exhibits of a similar nature in support of its contentions. A total of 50 exhibits were presented by both parties.

At the trial plaintiff's appraiser, Mr. E. A. Tucker, testified at length on the fair market value of the Creek lands in question. Mr. Tucker presented his appraisal report on the fair market value of the lands, which consisted of 115 pages of maps, statistics, graphs, and text relative to the lands in question.

Defendant presented the testimony of two expert witnesses, Mr. Roscoe H. Sears, and H. J. Garrett, both of Oklahoma City, Oklahoma, expert real estate appraisers, who testified at length. These appraisers prepared a joint appraisal report of 103 pages, which was introduced in evidence as Defendant's Exhibit No. 17, in support of their opinion of the fair market value of these Creek lands.

On June 5, 1962, the defendant filed with the Clerk of the Commission, and served on plaintiff's counsel, Defendant's Exhibit No. 21, a map showing the value of certain lands determined by the Commission in Nebraska, Kansas and Oklahoma, which were not shown to be comparable or

contiguous to the lands in question, and too remote to be of value. With the filing of this exhibit, by order of the Commission the evidence on both sides was closed on June 5, 1962, and the briefing period began to run from that date.

17. On August 27, 1962, plaintiff's counsel filed plaintiff's requested findings of fact and brief, outlining in detail the facts and issues of law presented in the case. Defendant's brief was filed on February 4, 1963. This brief was expertly prepared, and contained 163 printed pages, embodying 22 requested findings of fact documented by references to the record, objections to plaintiff's 40 requested findings of fact, and 12 subheads in opposition to plaintiff's position.

On May 3, 1963, plaintiff's reply brief was filed with the Commission. It consisted of 79 mimeographed pages.

18. By agreement of counsel the case was thereafter submitted to the Commission for decision on February 25, 1964, without oral argument.

On November 25, 1964, the Commission entered a Notice to the Parties taking judicial notice of the soil conservation reports of Dewey and Canadian Counties, Oklahoma, official publications of the United States Department of Agriculture, in connection with the issue of value.

19. On December 15, 1965, this Commission rendered its Interlocutory Decree holding that the 2,037,414.62 acres of Creek lands ceded to defendant in the Treaty of August 7, 1856, and for which defendant had paid \$1,000,000.00, had a fair market value of \$2,037,414.62 or \$1.00 per acre; that the consideration paid was unconscionable, and that

plaintiff was entitled to recover from defendant the sum of \$1,037,414.62, less any credits due defendant as offsets. In support of our decree we made 34 findings of fact, and rendered a supporting opinion, which are set forth and reported in 16 Ind. Cl. Comm. 431-478.

20. Plaintiff, after a review of our findings and opinion, decided not to appeal the matter to the Court of Claims.

21. Plaintiff's counsel then turned to the consideration of the issue of the defendant's offset claims.

Plaintiff's counsel requested defendant's counsel to make an early inquiry and disclosure of defendant's offset claims. Counsel for plaintiff reviewed a report of the General Accounting Office submitted in this case (Def. Ex. 20), consisting of 38 pages of figures and text relative to the disbursements of defendant under the Treaty of August 7, 1856, and found no claims which in his opinion defendant could properly present against the Creek Nation of Oklahoma in this matter. In his opinion, all offsets against that Nation had been settled in prior litigation.

Accordingly, on February 25, 1966, plaintiff's counsel filed "Plaintiff's Motion for Entry of Final Judgment", calling the Commission's attention to a stipulation of the parties, dated and filed September 15, 1959, in Creek Nation, et al v. United States, Docket 21, and approved by the Commission on September 28, 1959, which counsel contended had settled the offset claims of defendant; and attached thereto a copy of the stipulation, and order of the Commission approving it.

On March 8, 1966, defendant filed its objections to motion for entry of final judgment and motion for extension of time of 60 days, or until May 1, 1966, in which to file its amended answer. On April 1, 1966, the Commission entered its order extending to May 1, 1966, the time in which defendant could file its amended answer on offsets.

Defendant's amended answer was filed on April 29, 1966, and set up disbursements from June 30, 1956 for the entire Five Civilized Tribes generally, claiming that the United States was entitled to offset against the Creek Nation 2.7 per cent of the total disbursement of \$1,789,496.30, or \$48,316.40, expended for management of Indian trust property during the period June 30, 1956 to June 30, 1965.

After investigation, plaintiff's counsel filed with the Commission on April 29, 1966, plaintiff's response to defendant's answer on offsets, objecting to defendant's offset claims. In preparing the defense to the Government's offset claims, plaintiff's counsel had personal conferences with the Indian Claims Section, General Services Administration and officials of the Bureau of Indian Affairs. The latter office, after a thorough review, advised that the sums involved in the defendant's claim for offsets were administrative in nature, and also involved individual Indian moneys, as distinguished from tribal expenses. The attorney for the defendant was then so advised by Mr. Niebell. This material was then confirmed by supplemental investigation at the Muskogee, Oklahoma, branch of the Bureau of Indian Affairs.

Fortified with the results of this investigation plaintiff's counsel requested defendant's counsel to withdraw defendant's offset claims from this Creek case; and if defendant desired to investigate further the claimed offsets, it could assert them in another pending Creek case and litigate them there. Counsel for defendant agreed to this suggestion.

22. Counsel for the parties agreed upon and filed their "Joint Motion For An Order To Enter Final Judgment And To Postpone Assertion Of Offsets To Other Creek Nation Claims Cases" on August 11, 1966. On August 17, 1966, we issued our Order entering final judgment in favor of the Creek Nation in the amount of \$1,037,414.62. In this order we postponed the determination of the claimed offsets which may be again claimed in other cases of the Creek Nation pending before the Commission and not yet fully adjudicated.

23. The final judgment in this matter was entered on August 17, 1966, pursuant to the said joint motion of the parties, and in accordance with the findings of fact, opinion, and interlocutory decree of the Commission dated December 15, 1965 (16 Ind. Cl. Comm. 431-478), awarding to the Creek Nation of Oklahoma, plaintiff, the sum of \$1,037,414.62. The amount of the judgment has been appropriated in the "Supplemental Appropriation Act, 1967", approved on October 27, 1966 (Pub. Law 89-697, 89th Cong., H. R. 18381, 80 Stat. 1057, Chapter VIII, p. 1065; H. Doc. No. 522, 89th Cong., 2d Sess., pp. 3, 19), and is now on deposit in the United States Treasury to the credit of the Creek Nation of Oklahoma and draws four percent interest per annum in favor of said Indians.

24. Counsel for the plaintiff has requested a fee of ten percent of the final judgment in this matter in his application which was filed on November 14, 1966.

On November 17, 1966, the Department of Justice wrote the Department of the Interior and requested that it indicate whether it had any objection to the allowance of the attorney fee filed by Mr. Niebell.

The matter was referred to the Solicitor and the Bureau of Indian Affairs.

The Bureau of Indian Affairs stated in its memorandum dated November 21, 1966, to the Solicitor that since it did not participate in the litigation of the case it does not have sufficient detailed information upon which to make any recommendation as to the amount of compensation to be awarded. However, it was pointed out that the approved contract authorizes the percentage claimed. On this basis the Solicitor on behalf of the Department of the Interior advised the Department of Justice by letter dated November 28, 1966 that, in effect, no position could be taken in the matter. The Department of Justice then advised the Commission by letter dated December 1, 1966 that it had received the aforesaid information from the Department of the Interior; that the Department of Justice takes no position on the allowance or disallowance of the percentage claimed; but that the fee requested is within the limits of Mr. Niebell's contract with the petitioning tribe.

25. On December 9, 1966, the Commission transmitted Mr. Niebell's application by air mail to the principal chief of the Creek Nation of Oklahoma. No objection to the allowance of the requested fee has been filed by the said Creek Nation.

26. The Commission finds that, based on the facts set out in the above findings, counsel for the plaintiff herein is entitled to a fee of ten percent of the amount of the final judgment in this matter of

\$1,037,414.62 recovered by the Creek Nation of Oklahoma, which in figures in \$103,741.46. An appropriate order to this effect will be entered herein.

Arthur V. Watkins
Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Wm. M. Holt
Associate Commissioner

T. Harold Scott
T. Harold Scott
Associate Commissioner

BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION,)
)
 Plaintiff,)
)
 v.) Docket No. 276
)
 THE UNITED STATES,)
)
 Defendant.)

ORDER ALLOWING ATTORNEY FEES

Upon consideration of the "Application for Allowance of Attorney Fee" filed herein on November 14, 1966, by the attorney of record in this matter, Paul M. Niebell, Esq., and the Commission's Findings of Fact this day entered herein, which Findings of Fact are made a part of this order, the Commission concludes that in view of the valuable legal services that have been rendered to the Creek Nation of Oklahoma in the successful presentation and prosecution of the claims in the above docket, attorney fees in the sum of \$103,741.46, representing ten percent of the final judgment herein of \$1,037,414.62, made on behalf of the said Indian tribe, are awarded in this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that there shall be awarded as the attorney fee from the final judgment previously entered in this docket the sum of \$103,741.46 to Paul M. Niebell, Esquire.

Dated at Washington, D. C., this 16th day of December, 1966.

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner