

## BEFORE THE INDIAN CLAIMS COMMISSION

THE CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Docket No. 173-A
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: December 28, 1973

FINDINGS OF FACT ON ATTORNEYS' FEE

Upon consideration of the petition for award of attorneys' fee in the above entitled docket and the statement in support thereof, filed on October 5, 1973, by Paul M. Niebell, Earl Boyd Pierce, George E. Norvell, and Christine Bushyhead, Administratrix of the Estate of Dennis W. Bushyhead, and upon consideration of the entire record herein, including the several approved contracts of employment under which said attorneys served the plaintiff, the Commission makes the following findings of fact:

1. The Award.

On May 30, 1973, the Commission entered a final award in this docket in the sum of \$3,887,557.57 in favor of the Cherokee Nation (27 Ind. Cl. Comm. 34A-34B). This award was made in compliance with the decision of the United States Court of Claims in the matter of United States v. Cherokee Nation, Appeal No. 10-72, decided on February 16, 1973.

## 2. The Petition for Attorneys' Fee.

On October 5, 1973, Paul M. Niebell, Earl Boyd Pierce, George E. Norvell, and Christine Bushyhead, Administratrix of the Estate of Dennis W. Bushyhead, deceased, attorneys for the Cherokee Nation, plaintiff herein, made application for an award of attorneys' fee for legal services rendered herein in the amount of \$388,755.75, or 10 percent (10 %) of the final net judgment of \$3,887,557.57 entered in favor of the Cherokee Nation.

## 3. Notice of Filing to Plaintiffs and Executive Departments.

By letter of October 10, 1973, the Deputy Clerk of the Commission notified Mr. W. W. Keeler, Principal Chief of the Cherokee Nation, of the filing of the subject petition for attorneys' fee, inviting comments or information the Commission should consider. Notice of the filing of the petition was also sent to the Department of the Interior and to the Department of Justice.

The Commission received from the Principal Chief of the Cherokee Nation a telegram dated October 23, 1973. With regard to the attorneys' fee, the telegram contained the statement that Mr. W. W. Keeler has served as Principal Chief of the Cherokee Nation for practically all of the time that the lawyers herein have worked on this case. Furthermore, Mr. Keeler stated that he was thoroughly familiar with the attorneys' contract herein and that he approved and concurred in the application for allowance of attorneys' fees.

The response, dated December 3, 1973, of the Department of Justice to the petition for award of attorneys' fee enclosed a letter from the Associate Solicitor of Indian Affairs, Department of the Interior, and a copy of an accompanying memorandum signed by Mr. F. T. W. Taylor for the Assistant to the Secretary of the Interior. He stated that the Department of the Interior did not have sufficient information to make a recommendation as to the amount of attorneys' fee earned herein. The response of the Department of Justice concluded that the Department takes no position with reference to the amount of the attorneys' fee, provided the combined fee does not exceed 10 percent and that the Commission determines that the fee allowed is reasonable for the services rendered.

#### 4. Contracts.

Claims in Docket 173-A were prosecuted under two approved contracts and extensions thereof. The first contract, No. I-1-ind. 42130, was entered into by the Cherokee Nation with Houston B. Teehee, Woodson E. Norvell, George E. Norvell, Dennis W. Bushyhead, and Earl Boyd Pierce on August 4, 1948, and was approved on December 30, 1948, for a period of ten years beginning with the date of approval.

On February 8, 1952, counsel assigned an undivided 25 percent interest in the above 1948 contract to Paul M. Niebell of Washington, D. C., which assignment was approved on December 24, 1952. Under this assignment Paul M. Niebell became one of the attorneys for the Cherokee Nation, agreeing to act as attorney of record in the cases filed or to be filed on behalf of the Cherokee Nation.

Prior to the expiration of the 1948 contract, the Cherokee Nation entered into a second contract, Symbol 14-20-650, No. 582, dated July 7, 1958, with attorneys Dennis W. Bushyhead, George E. Norvell, Earl Boyd Pierce, and Paul M. Niebell. This contract was approved on October 30, 1958, for a period of five years beginning on December 30, 1958.

An extension of the second contract for an additional period of five years from December 30, 1963, was approved on October 21, 1963. The second extension of this contract, until April 10, 1972, was approved on January 31, 1968. The final extension, which was approved on May 3, 1972, is for a period of five years beginning on April 10, 1972.

The contracts cited above provide that compensation to the attorneys for services rendered by them is wholly contingent upon recovery for the plaintiff, and shall be in an amount not to exceed 10 percent of the plaintiff's recovery. Counsel have indicated that no petition for reimbursement of attorneys' expenses will be filed with the Commission because such expenses have been substantially paid from Cherokee tribal funds.

##### 5. Deceased Counsel.

Woodson E. Norvell died on January 1, 1950. His estate was administered by the County Court of Tulsa County, Oklahoma, and on September 19, 1952, that court entered an order declaring that George E. Norvell, his son, was the "sole and only heir at law and in equity of the state of the deceased, Woodson E. Norvell." (Order of March 27, 1968, 19 Ind. Cl. Comm. 105-106.)

Houston B. Teehee died on November 19, 1952, and on April 3, 1963, the County Court of Cherokee County, Oklahoma, appointed John Teehee Administrator of the Estate of Houston B. Teehee, deceased. By an agreement entered into between surviving counsel and said John Teehee, Administrator of the Estate of Houston B. Teehee, deceased, approved by the County Court of Cherokee County, Oklahoma, full settlement was made with the Estate of Houston B. Teehee, for any interest said Houston B. Teehee had under the attorneys' contracts of August 4, 1948, and July 7, 1958. (Order of March 27, 1968, 19 Ind. Cl. Comm. 105-106.)

Dennis W. Bushyhead died on March 10, 1966, and on March 12, 1966, the County Court of Rogers County, Oklahoma, appointed his wife, Christine Bushyhead, Administratrix of the Estate of said Dennis W. Bushyhead, deceased. (Order of March 27, 1968, 19 Ind. Cl. Comm. 105-106.)

6. Attorneys' Services.

The record before the Commission in this docket and the appeal proceedings in the Court of Claims indicates that the services performed by the attorneys were substantial.

The main services of the attorneys are reflected in (1) the extensive record before the Commission, including the proposed findings of fact and the briefs filed by the attorneys, the exhibits received in evidence at the trial on valuation, and the transcripts of the trial proceedings and other hearings; and (2) the record in the appellate proceedings before the Court of Claims.

The claim for 2,121,928.74 acres of deeded lands of the Cherokee Outlet, constituted the subject matter of Docket 173-A and was part of the original claim of the Cherokee Nation for 8,144,692.91 acres of land set forth in the petition filed in Docket 173 on June 30, 1951. Counsel prepared and on February 15, 1962, filed with the Commission the petition in Docket 173-A. In negotiations continuing after the date of final judgment in Docket 173, counsel for the parties entered into a stipulation settling the Government's offset claims of \$1,432,084.17 for \$425,000.00.

On March 30, 1964, plaintiff in Docket 123 filed a motion for permission to intervene in Docket 173-A. Counsel in Docket 173-A opposed this motion by a special appearance filed in Docket 123 on May 5, 1964. The motion to intervene was granted, and counsel for plaintiff in Docket 173-A attempted to settle this case by stipulation of the parties. Although a number of conferences were held with counsel for the defendant, no agreement could be reached. Thereafter, on March 22, 1966, counsel for plaintiff in Docket 173-A filed with the Commission a motion to dismiss the intervening petition. This motion was denied by the Commission on October 5, 1966 (17 Ind. Cl. Comm. 331-337).

Thereafter, counsel for the Cherokee Nation prepared for the trial in Docket 173-A. In furtherance thereof, counsel filed over 20 exhibits in addition to an appraisal report. Counsel represented the Cherokee Nation at the valuation trial held before the Commission

from June 5, 1967, through June 8, 1967. On December 6, 1967, counsel herein filed plaintiff's proposed findings of fact and brief. This brief consisted of 139 pages of mimeographed material and contained 40 requested findings of fact and arguments on six issues of law.

Counsel herein agreed with the counsel in Docket 123, at a conference held before the Commission on May 8, 1968, that Docket 173-A should proceed independently to final judgment, irrespective of the issue of intervention, while counsel in Docket 123 reserved the right of intervenors to contest their right to participate in the distribution of the judgment.

After defendant filed its proposed findings of fact and brief on value, counsel herein filed a reply brief on February 10, 1969, which consisted of 147 pages.

On April 14, 1969, intervenors, plaintiffs in Docket 123, filed a motion for summary judgment in Docket 173-A. Counsel for the Cherokee Nation responded to this motion on June 9, 1969, and on January 27, 1970, represented the Cherokee Nation at a hearing on this motion. The Commission denied intervenors' motion for summary judgment.

On February 4, 1970, the Commission awarded the Cherokee Nation \$4,268,589.00, less allowable offsets, if any. Thereafter, Paul M. Niebell appeared on behalf of the Cherokee Nation at a hearing on offsets held before the Commission on May 19, 1970. The defendant then filed its brief and requested findings of fact on offsets and counsel herein responded with its own proposed findings of fact and brief on offsets.

Further action before the Commission was stayed by the intervenors' appeal to the Court of Claims. On December 18, 1970, counsel herein filed a brief before the Court of Claims. On June 11, 1971, the Court of Claims rendered its decision affirming the Commission's decision of February 9, 1970. On February 2, 1972, the Commission entered its opinion and additional findings of fact on offsets and its final award. The United States appealed this decision and counsel herein filed its brief before the Court of Claims on September 5, 1972, and also represented the Cherokee Nation at an oral argument held before the court on December 4, 1972. On remand, the Commission entered its order amending opinion and findings of fact and amended final award, in accordance with the Court of Claims decision.

In summary, since the filing of Docket 173-A, on February 15, 1962, the legal services rendered by counsel have continued over a period of 11 years. Such legal services involved representation in an unconscionable consideration case, intervention, a trial on offsets, and two appeals to the Court of Claims.

Furthermore, the Commission is advised that the attorneys and the Administratrix of the Estate of Dennis W. Bushyhead, deceased, have agreed among themselves upon a division of the attorneys' fee. Powers of attorney have been executed by Earl Boyd Pierce, George E. Norvell and Christine Bushyhead, Administratrix of the Estate of Dennis W. Bushyhead, deceased, which authorize Paul M. Niebell to receive payment of the attorneys' fee, the said Paul M. Niebell being responsible for

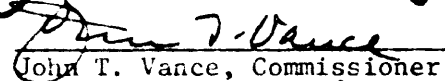


distribution of the amount due to each of said attorneys and to the deceased attorneys' estate.

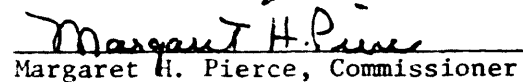
7. Conclusion

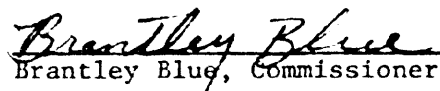
After full consideration of the entire record in these dockets, the appellate proceedings in the Court of Claims of which the Commission has taken notice, the results achieved, the risks involved, the services performed, and all appropriate factors pertinent to the determination of attorneys' fees in contingent cases under the standards established by the Indian Claims Commission Act, it is the conclusion of the Commission that the attorneys for the plaintiff are entitled to a fee in the total sum of \$388,755.75, which sum shall be full compensation for services rendered the Cherokee Nation in the prosecution of its claim in Docket 173-A.

  
Jerome K. Kuykendall, Chairman

  
John T. Vance, Commissioner

  
Richard W. Yarborough, Commissioner

  
Margaret H. Pierce, Commissioner

  
Brantley Blue, Commissioner