BEFORE THE INDIAN CLAIMS COMMISSION

CITIZEN BAND OF POTAWATOMI INDIANS OF OKLAHOMA, et al., Plaintiffs,	)	Docket No. 146
THE PRAIRIE BAND OF THE POTTAWATOMIE TRIBE OF INDIANS, et al. Plaintiffs,	)	Docket No. 15-M
HANNAHVILLE INDIAN COMMUNITY, et al., Plaintiffs,	)	Docket No. 29-K
v.	)	
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: February 25, 1976

Appearances:

Louis L. Rochmes, Attorney of Record in Docket 146, Robert S. Johnson, Attorney of Record in Docket 15-M, Jack Joseph, Attorney for Fee Applicants in Dockets 146 and 15-M.

Robert C. Bell, Jr., Attorney of Record in Docket 29-K, and Attorney for Fee Applicants in Docket 29-K.

D. Lee Stewart, with whom was Assistant Attorney General Wallace H. Johnson, Attorneys for Defendant.

OPINION OF THE COMMISSION

Pierce, Commissioner, delivered the opinion of the Commission.

This matter is now before the Commission on the application of the attorneys of record in dockets 146, 15-M and 29-K, to have the Commission award an attorneys' fee and to apportion that fee among the attorneys for the three dockets.

On April 19, 1974, the Commission entered a judgment in the amount of $2,296,870.70 for the plaintiffs in the above three dockets, jointly on behalf of the Potawatomi Tribe or Nation. 34 Ind. Cl. Comm. 1. This judgment was not appealed, and funds to satisfy it were appropriated by Public Law 93-554, approved December 27, 1974, 88 Stat. 1771.

In a decision dated March 28, 1972 (Dockets 71 et al.), 27 Ind. Cl. Comm. 187, issued pursuant to an order of remand of the Court of Claims in Hannahville Indian Community v. United States, 180 Ct. Cl. 477 (1967), the Commission concluded that the party with whom the United States dealt in the treaties under consideration in the remanded dockets, including the Treaty of August 29, 1821, 7 Stat. 203, involved in the three consolidated dockets herein, was the Potawatomi Tribe or Nation as it existed between 1795 and 1833, and that the Potawatomi Tribe during that period was a single land-owning entity having overall ownership of the Potawatomi lands ceded under such treaties. Accordingly, although each of the plaintiffs herein is presently an identifiable tribe or group of Potawatomi Indians entitled to bring suit and retain separate counsel under the Indian Claims Commission Act, and each has in fact done so, none is the full successor to the original 1795-1833 Potawatomi Tribe, and the award is a single joint award to the three plaintiffs. In view of these circumstances, there can be only one attorney fee to be paid from the joint award. The attorneys of record in dockets 146 and 15-M have come to an agreement as to the division of their share of the total fee which may be awarded, but have been unable to agree with

the attorney of record for Docket 29-K as to the division of that fee between them and the latter attorney.

On June 20, 1974, Louis L. Rochmes and Robert Stone Johnson, attorneys of record for plaintiffs in Docket 146 and Docket 15-M, filed a joint petition for the award of attorneys fees asserting that although three sets of counsel have appeared for the three plaintiffs in these proceedings, counsel for plaintiffs in dockets 146 and 15-M performed substantially all of the services resulting in the successful determination and that as a consequence they should receive the entire fee awarded in the requested amount of 10% of the final judgment.

On July 5, 1974, Robert C. Bell, Jr., attorney of record for plaintiffs in Docket 29-K, filed a similar petition on behalf of himself and the estate of Walter H. Maloney, Sr., contending that 50% of the attorney fee should be apportioned to him and the Maloney estate.

On July 31, 1974, the Commission consolidated for trial the fee apportionment petitions in these three dockets with three other Potawatomi dockets, i.e., dockets 217, 15-K and 29-J, in which latter three dockets a similar fee dispute existed between the same attorneys. A trial was held on September 23, 1974, and oral argument was heard on April 4, 1975. The fee problem in the latter three dockets has been dealt with in a separate decision, 36 Ind. Cl. Comm. 498 (1975).

A detailed account of the legal representation of all three dockets is set forth in our findings of fact numbered 2, 3, 4 and 5. Finding 6 recites the statutory fee provision in the Indian Claims Commission Act, 60 Stat. 1049, Findings 7 and 8 contain information concerning

the notice to the parties of the fee applications and the response of the parties to such applications.

The final award in the three dockets represents additional compensation for lands identified as Royce Area 117 lying in the southern part of Michigan and the northern part of Indiana, ceded to the United States under the Treaty of August 29, 1821, supra, for a consideration which the Commission held to be unconscionable within the meaning of the Indian Claims Commission Act, supra. Under Section 15 of the Act, the Commission is required to fix the fees of claims attorneys in such amounts as the Commission, in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, finds to be adequate compensation for services rendered and results obtained, unless the amount of such fees is stipulated in the approved contract between the attorneys and the claimants.

The attorney contracts in Docket 146 provided for a fee to the attorneys equivalent to 10% of the final award. In Docket 15-M and Docket 29-K, the contracts provided that the fee for attorney services should be determined by the Commission in an amount not in excess of 10% of the final award. On the basis of the entire proceedings in all of these dockets and in the light of the responsibilities undertaken by counsel, the difficult problems of fact and law, the appeal on the entity question, the extensive briefings, oral arguments, and pretrial proceedings, and based on the findings of fact made herein, the Commission is of the opinion that the attorney fee in these three dockets should be 10% of the final award, or $229,687.07.

In Sisseton and Wahpeton Bands or Tribes v. United States, 191 Ct. Cl. 459, 423, F. 2d 1386 (1970), the Court of Claims determined that the Commission has jurisdiction to apportion fees between attorneys operating under separate contingency fee employment contracts if they are unable to agree on an apportionment.

The criterion for apportioning the allowable attorney fee is basically set out in the Indian Claims Commission Act, 25 U.S.C. §70n, but has been further explained by the Court of Claims. The Act, supra, states that attorneys are to be compensated for ". . . all services rendered in prosecuting the claim in question . . ." It is clear that to participate in any fee award an attorney must have participated in "promoting the particular claim for which recovery has been allowed." Red Lake and Pembina Bands v. Turtle Mountain Band of Chippewa Indians, 173 Ct. Cl. 928, 933, 355 F. 2d 936 (1965).

Further, when the claim in question is joint, "the services for which an attorney is to be compensated . . . consist of efforts to create and preserve that fund, not of unsuccessful attempts to capture it for one entity." Red Lake, supra, 937-938.

The criterion to be used in any apportionment decision was further defined in Godfroy v. United States, 199 Ct. Cl. 487 (1972), aff'g on rehearing, Docket 124-D, et al., 24 Ind. Cl. Comm. 450 (1971), rehearing denied, 200 Ct. Cl. 728, 473 F. 2d 892 (1973), cert. denied, 414 U.S. 825 (1973). There the court made the following statement which is pertinent herein:

> Where two law firms representing two descendant branches of an Indian tribe succeed in obtaining awards from the Indian Claims Commission, the maximum attorney fees allowed are to be apportioned between the two firms . . . in proportion to the relative contribution of each firm in rendering services for the benefit of the common cause of the two descendant groups. Supra, at 488.

In support of their contention that the entire attorneys' fee should be awarded to counsel for dockets 146 and 15-M, the attorneys of record in those dockets assert that substantially all of the litigation on the merits of title, consideration, value and other substantive issues which produced the final award of April 19, 1974, were conducted on behalf of the Potawatomi Indians by counsel for plaintiffs in dockets 15-M and 146 and that substantially none of the litigation on the merits was conducted by counsel for the 29-K plaintiffs. Counsel also urged that what work was done by counsel for Docket 29-K related to advancing the cause of only a portion of those Indians who participated in the 1821 treaty, to the exclusion of the Prairie and Citizen Bands of Potawatomi Indians.

In support of this argument counsel rely on the decision of the Court of Claims in Red Lake and Pembina Bands, supra. In that case the court held that where one of the attorneys to whom the Commission had awarded a fee had done none of the work on the "claim in question" although he was one of the attorneys of record, he was not entitled to a fee. In the Red Lake case the efforts of the attorney in question were not in support of the joint or mutual interests of all of the involved groups but rather were directed at furthering the interests of only one party at the expense of the other claimants. Counsel for plaintiffs

in Docket 146 and Docket 15-M appear to feel that the efforts of counsel in Docket 29-K in establishing the so-called single land owning entity theory, i.e., that at the time of the treaty in suit the United States was dealing with the Potawatomi Tribe or Nation and not with several autonomous bands of Potawatomi Indians as the owner of the land being ceded, was an attempt to benefit the plaintiffs in Docket 29-K at the expense of the plaintiffs in the other dockets. It appears that the ultimate adoption by the Commission of the single land owning entity theory as distinguished from the "Band" theory espoused by Docket 146 and Docket 15-M, 27 Ind. Cl. Comm. 187 (1972), had the effect of allowing all petitioning Potawatomi Indians to participate in the award, whereas the "Band" theory, if it had prevailed, would have required the dismissal of the petition in Docket 29-K, as in fact, it did at one point in this litigation. See Finding 39.

The determination of the proper Indian parties to the treaty or treaties under consideration is a legitimate aspect of the title phase of a claim in considering whether the attorneys' services for this work are compensable. When the Court of Claims remanded these dockets, among others, for precisely such a determination, Hannahville Indian Community v. United States, 180 Ct. Cl. 477 (1967), we stated in our subsequent decision on remand the following:

> . . . the nature of the political structure of the Potawatomis must be answered in order to determine who the United States considered the owner of the Potawatomi lands during the times under consideration, for the purposes of transferring to the United States the entire Indian

> interest in these lands. The answer to that question will also determine what group or groups are entitled to share in an award being sought as additional compensation for lands ceded to the United States by the Potawatomi Indians during the treaty period under consideration [27 Ind. Cl. Comm. 187, 191-192]

There was no appeal from our so-called "entity decision", but several of the dockets consolidated for the purpose of determining the entity question did file appeals. In Pottawatomie Nation of Indians v. United States, 205 Ct. Cl. 765, 502 F. 2d 852 (1974), involving our dockets 29-N, 15-P and 306, the Commission's single entity holding was affirmed as to the treaties involved in those dockets. By order of March 7, 1975, 206 Ct. Cl. 867, similar action was taken on the appeals of several of the other dockets consolidated in the entity proceeding (dockets 128, 309, 310, 15-N, 15-O, 15-Q, 15-R, 29-L, 29-M, 29-O, and 29-P). No appeal was taken in the three dockets here under consideration.

Since it is clear that determining who was the Indian owner of the land in suit is as much a part of the title phase of these proceedings as what land is involved in the particular transaction, it appears that the counsel for plaintiffs in all three dockets are entitled to compensation for their efforts in this regard.

Another contention made by counsel in dockets 146 and 15-M is that the fee should be apportioned in proportion to the size of the present day plaintiff groups. This theory was expressly rejected by the Court of Claims in Godfroy v. United States, supra. The court again stated that the fee should be apportioned in proportion to the relative contributions of each set of attorneys in rendering services for the

common concern of all sharing in the award. Accordingly, we shall now turn our attention to the services so rendered by the three sets of counsel.

On September 30, 1953, the three dockets were consolidated for trial with dockets 13-M, 18-Q and 40-K. The three additional dockets involved claims of Chippewas and Ottawas to the same land. On September 11 and 12, 1956, the trial was held on the issue of title to Royce Area 117. Defendant took the position that the plaintiffs in the six consolidated dockets had neither recognized nor aboriginal title to any definable portion of the ceded area. Unlike the title phase in dockets 217, 15-K and 29-J where defendant conceded that plaintiffs had recognized title to much of the land in suit, 1/ in the instant cases defendant vigorously maintained this position throughout the trial and thereafter.

Counsel for dockets 146 and 15-M acting cooperatively, introduced 109 exhibits on title and the testimony of an expert witness, Dr. Anthony Wallace, an anthropologist. In his testimony and through the documents introduced in evidence, plaintiffs in these two dockets sought to establish that in the area south of the Kalamazoo River in Michigan, the Potawatomi Indians exclusively used and occupied the land for many years prior to the 1821 Treaty and that the Ottawas similarly used and occupied the northern part of Royce Area 117.

1/ Dockets 217, 15-K and 29-J were the subject of a similar fee dispute between the same attorneys. A decision apportioning the fee therein was issued October 23, 1975, 36 Ind. Cl. Comm. 498. Because the general arguments of the parties to the fee contest were the same in those dockets as in the present three dockets, much of the same language will appear in this opinion. For the convenience of the parties, and the court in the event of an appeal, the pertinent passages in the 1975 opinion have been repeated rather than referred to, since the latter course would put the reader to the inconvenience of repeatedly turning to the earlier decision.

Counsel for dockets 13-M, 18-Q and 40-K introduced 113 exhibits in evidence and the testimony of Dr. Omer C. Stewart, an anthropologist, who testified that the Ottawa Indians exclusively occupied the area in Area 117 north of the Kalamazoo River, locating thereon a number of Ottawa villages. Dr. Stewart stated that he was in substantial agreement with the testimony of Dr. Wallace concerning the division of the area between Potawatomi and Ottawa Indians, and also that his research had not indicated that the Potawatomi Indians had been a single political entity for the purpose of owning and ceding this land.

Counsel for defendant cross-examined both Dr. Wallace and Dr. Stewart in an attempt to show that Indian occupancy to the ceded area was not exclusive in any one group. He also was critical of Dr. Stewart's use of "secondary source" material in locating Ottawa villages in the area.

Counsel for Docket 29-K did not have an expert witness but did offer for admission in evidence 36 exhibits. The exhibits were admitted by the Commission, giving defendant's counsel and the other counsel, 30 days in which to examine them and make any objections they felt appropriate since counsel had not, as the rules of the Commission required, submitted the exhibits to counsel in advance of the trial day. The exhibits consisted of documents relative to the 1821 treaty of cession, several maps, congressional reports concerning private legislation conferring on the Court of Claims jurisdiction to adjudicate the claims of Wisconsin Potawatomi Indians for their alleged share of unpaid annuities, and other material intended to establish counsel's position that at the

time of the signing of the 1821 Treaty, the Potawatomi Indians constituted a single land-owning entity rather than five separate autonomous bands of Indians. Counsel offered no evidence, documentary or otherwise, on the issue of the extent of Potawatomi aboriginal use and occupancy of the area in suit. Counsel did examine Dr. Stewart but solely for testing his conclusion that he had not found evidence of the Potawatomi Indians being a single land-owning entity in 1821.

Defendant introduced 65 exhibits and the testimony of Dr. Erminie Wheeler Voegelin, an anthropologist and historian. Also introduced in evidence was a lengthy and detailed report prepared by Dr. Voegelin. The report contained no material relating to events subsequent to 1821 and she concluded in the report and in her testimony that although Potawatomi and Ottawa Indians were in the subject area at various times prior to and in 1821, she could not find any rigid boundaries between the two groups of Indians and that their occupation did not meet the standards necessary to establish exclusive use and occupancy title. She also gave as her opinion that the Potawatomis were divided into several autonomous bands for land owning purposes. In the course of her direct examination, Chief Commissioner Witt asked her a number of questions and ultimately Dr. Voegelin conceded that the Ottawas probably had exclusive occupancy of the northern part of the subject area for some time prior to the treaty date, and that the Potawatomis similarly used and occupied the southern portion. It seems fair to infer that as a result of Dr. Voegelin's responses to Commissioner Witt's questions, counsel for plaintiffs decided not to cross examine her and

did not do so.

On December 5, 1956, counsel for plaintiffs in dockets 146 and 15-M jointly filed proposed findings of fact and a brief. Some of the findings dealt with the entity issue and with plaintiffs' claim of recognized title. The bulk of the findings dealt with the evidence of exclusive use and occupancy of the ceded area based on the testimony of Dr. Wallace and Dr. Stewart, documents admitted in evidence, and also on the report and testimony of Dr. Voegelin. In the accompanying brief, counsel did not discuss the entity issue, but concentrated solely on the matter of aboriginal use and occupancy title to the lands in suit.

On February 1, 1957, counsel for plaintiffs in Docket 29-K filed proposed findings of fact, a brief, and objections to the proposed findings of dockets 146 and 15-M on the entity issue. Of the 22 proposed findings of fact, only one, No. XVIII, dealt with the issue of exclusive use and occupancy of the ceded area by the Potawatomi Indians and it was in the nature of an ultimate finding, unsupported by any primary findings, concluding that the Potawatomi Tribe or Nation was the predominant land owner in the area, was the most numerous of the Indians of the three groups living in the area, and that the record did not support Chippewa exclusive ownership of any of the ceded lands. For a detailed discussion of these proposed findings, see our finding No. 16. The accompanying brief was devoted almost solely to arguing the single entity theory of Docket 29-K.

On May 20, 1957, defendant filed extensive proposed findings of fact, objections to the proposed findings of all plaintiffs, and a brief.

Defendant asserted that only the plaintiffs in dockets 146 and 15-M were proper parties in interest in the litigation; that no definable part of the Royce Area 117 was exclusively used and occupied by those parties, and that there had been no United States recognition of title in any Indians to this area. The proposed findings and brief disputed the single entity theory of Docket 29-K.

On September 20, 1957, counsel for plaintiffs in 146 and 15-M filed a reply brief and objections to defendant's proposed findings of fact. On the single entity theory, counsel for dockets 146 and 15-M merely stated that this issue had been litigated before the Commission in dockets 15-J and 71-A and the decision, adverse to the single entity theory in those cases, was pending on appeal before the Court of Claims. In the brief, counsel noted that since the filing of defendant's brief on May 20, 1957, the Commission had issued its opinion in Miami Tribe, et al., v. United States, 5 Ind. Cl. Comm. 180, and had held therein that the Treaty of Greenville recognized tribal ownership in the treaty Indians to certain lands relinquished by the United States in the Northwest Territory. On the matter of exclusive use and occupancy, counsel found much to support their cause in the report of Dr. Voegelin.

On September 20, 1957, counsel for plaintiff in Docket 29-K filed a reply brief again asserting recognized title to the ceded area by virtue of the Treaty of Greenville, and devoting most of the rest of the brief to arguing the single entity theory of ownership of Potawatomi lands east of the Mississippi River. The issue of aboriginal use and

occupancy was virtually ignored.

On June 2, 1957, the Commission ordered the dismissal of the petition in Docket 15-Q (Chippewa Indians). On January 28, 1958, the other five plaintiffs filed a joint statement asking that their proposed findings of fact be considered amended to resolve the overlapping claims between them and suggesting a dividing line between Potawatomi and Ottawa lands. Defendant objected strenuously to this proposal.

On June 30, 1958, the Commission issued its title decision. 6 Ind. Cl. Comm. 414. The Commission stated that it did not need to pass on the issue of whether or not the Indians had recognized title to the area in suit since the record was sufficient to show that the Potawatomi Indians and the Ottawa Indians each had exclusive use and occupancy title to definable areas of land in the ceded tract. In reaching this conclusion the Commission relied on the evidence of the expert witnesses produced by counsel for dockets 146, 15-M and 40-K, and also to a large extent on the testimony and report of defendant's expert witness, Dr. Voegelin. The Commission also found that the evidence supported the dividing line proposed by the parties on January 28, 1958, in their joint statement. The Commission rejected the single entity theory of Docket 29-K and held that as of 1821 the Potawatomis were divided into five autonomous bands; that the ancestors of the three groups of Potawatomi parties to this litigation exclusively used and occupied the southern two-thirds of the ceded area, while the Ottawas had similar aboriginal title to the northern one-third. The Commission concluded that there was no Chippewa exclusive use and occupancy of any part of the ceded area in 1821.

On August 15, 1961, counsel for Docket 29-K filed a motion asking the Commission to amend certain of its June 30, 1958 findings of fact on the entity issue and requested permission to submit in evidence in the title phase proceedings certain "newly discovered evidence" in support of the requested amendments. On August 24, 1961, defendant objected to this motion as untimely. On August 29, 1961, counsel for Docket 146 responded to the motion by noting that the entity issue had been decided adversely in another Potawatomi case, 4 Ind. Cl. Comm. 473, affirmed, 143 Ct. Cl. 131 (1958), cert. denied, 359 U.S. 908 (1959), and asked that the Commission separate the "parties issue" from the main issues in the instant Potawatomi cases so that they could proceed to final judgment more expeditiously. On September 5, 1961, counsel for Docket 29-K filed documents explaining why he had not previously submitted the evidence he wished introduced in the title proceedings which had been completed several years previously, and objected to the request of counsel in Docket 146 for separate handling by the Commission of the "parties issue". He argued that the adverse decision by the Commission and the Court of Claims referred to by defendant, was a case involving Potawatomi lands west of the Mississippi whereas the instant case involved the cession of lands located east of the Mississippi and ceded before the tribe was broken up and part of it forced to move west. The Commission admitted the proposed exhibits in evidence but denied the motion of 29-K to amend the Commission's findings of fact on entity entered in the title phase of the case.

We have found (finding 24) that the primary and most vigorously contested issue in the title phase of the case was the exclusive use and occupancy of the ceded are by the plaintiff Indians. On that issue nearly all of the work which resulted in the title decision favorable to the Potawatomi Indians was done by counsel for dockets 146 and 15-M. The efforts of counsel for Docket 29-K were almost exclusively devoted to establishing the fact that in 1821 the Potawatomi Indians were a single land owning entity and that all Potawatomi Indians were entitled to share in any award resulting from claims under the 1821 treaty. In advancing or establishing the exclusive use and occupancy of the Potawatomi Indians to the ceded area, counsel for Docket 29-K can be given no credit.

Insofar as the relative contribution of counsel to the results achieved, the value phase of these dockets followed much the same pattern as the title phase. The trial on value was held September 5 through 8, 1961. Counsel for plaintiffs in dockets 146, 15-M and 40-K acted cooperatively and introduced many exhibits, detailed reports of two expert witnesses, and minutely cross examined the expert witness on value presented by defendant. (See findings 24, 25, 26 and 27.) Counsel for Docket 29-K offered no evidence on value either by way of documents or expert witness testimony, and he did not cross examine the expert witness for defendant. Counsel's only activity at the value trial was to move for the introduction in evidence of a number of exhibits having to do with his single entity theory, which exhibits were not received in evidence at that time. Many of these

exhibits were already in evidence in other pending Potawatomi cases.

At the briefing stage of the value phase, counsel for dockets 146 and 15-M proposed excellent primary and ultimate findings of fact with the necessary references to the exhibits or reports on which they were based. In the accompanying brief, counsel argued that the decision of the Court of Claims in Miami Tribe, et al. v. United States, 146 Ct. Cl. 421 (1959), was authority for the Commission to reach an "estimated" or "imputed" value for the land, under the circumstances which prevailed at and for several years after the 1821 treaty of cession. On April 13, 1962, counsel for Docket 29-K filed a remarkable document which is described in some detail in our finding 31. It dealt mostly with the single entity issue. When counsel reached the matter of value, his proposed findings were not primary findings based on record evidence of value, but were rather in the nature of arguments directed at establishing the unconscionability of the consideration received in the light of defendant's admission that the Government had paid 4 cents an acre for land which in 1821 was worth, according to defendant's expert witness, 20 cents an acre, and that in any event in valuing the land as of 1821, the Commission was required to consider the land worth no less than $1.25 per acre, the prevailing price for public lands in 1821, under the circumstances of this case and applicable decision law. In such value findings counsel made general statements concerning the high quality of the land with footnote reference to the testimony of Dr. Knuth, the expert witness for Dockets 146 and 15-M. Although defendant

had not yet filed its proposed findings of fact on value, counsel for Docket 29-K objected in advance to any findings defendant might file which would prove to be in conflict with the Docket 29-K proposed findings. In connection with the issue of whether or not 84,480 acres of land in the cession area granted to individuals under section 3 of the 1821 treaty should be deducted from the amount of land to be valued, counsel argued that no such deduction should be made for the reason that the individuals in question never received the land.

Defendant filed extensive proposed findings of fact on value and objections to the proposed findings of all plaintiffs. Defendant objected to the proposed amendments counsel for Docket 29-K wished to make in the title phase of the case on the ground that such proposals were untimely and that the evidence which plaintiff wished to rely on was not, as claimed, "newly discovered" but had already been offered by the same counsel in other Potawatomi dockets. Defendant made no response to the proposed findings of Docket 29-K on the matter of value.

On August 31, 1962, counsel for Docket 29-K filed objections to defendant's requested findings of fact on value, a reply to defendant's objections to plaintiff's proposed amended findings of fact on title, and a brief. On the value issue, counsel pointed out that defendant had interposed no objection to Docket 29-K's finding of fact No. XXVI which related to the value of Area 117 and repeated the unconscionable consideration argument referred to above. Counsel's objections were general in nature and his response to defendant's arguments on the

entity issue contained nothing new.

On September 3, 1962, counsel for dockets 146, 15-M and 40-K filed joint objections to defendant's requested findings of fact, a reply to defendant's objections to plaintiffs' requested findings of fact and a reply brief on the value issue. The objections were specific, giving record references. The elements of value about which there was the greatest controversy between defendant and counsel for these three dockets 146, 15-M and 40-K, were (1) how much was generally known concerning possibilities of the land as an excellent area for farming and settlement, and (2) to what extent the value of the land was enhanced by its timber resources. Counsel objected specifically to the reliance by defendant on land sales by speculators more than 30 years prior to the 1821 treaty, stating that the record showed that such sales were in no way comparable to the prospective sales of the land in Area 117 where the purchasers were largely individual settlers who wanted to acquire land on which they intended to live. With respect to the deductability of the 84,480 acres of land granted to individuals by the terms of the 1821 treaty, counsel objected to such deduction on the ground that the grants were made for the benefit of defendant and not the Indians, i.e., they were made to influence prominent members of the Indian parties to the treaty to perusade the other Indians to execute the treaty.

At the oral argument on value held on October 11, 1962, counsel for dockets 146, 15-M and 40-K argued from the record and their briefs,

contesting with specificity the positions taken by defendant on value and on the deductability of the 84,480 acres of grant land. Counsel for Docket 29-K participated in the oral argument but did not at any time address himself to the value issue. Instead, counsel urged the Commission to take a fresh look at the arguments he had advanced on the single land-owning entity theory which he claimed was applicable to all Potawatomi land cessions from 1795 through 1833. He also argued (rightly, as it later developed) that the 1958 decision of the Court of Claims in the so-called western lands case (143 Ct. Cl. 131, cert denied, 359 U.S. 905 (1959)), dealt only with the right of the Potawatomi Indians remaining east of the Mississippi to share in awards made by the Commission for Potawatomi lands acquired west of the Mississippi, and that the decision was not a bar to the further litigation of the single vs. multiple entity structure of the Potawatomi Indians between 1795 and 1834 in connection with claims involving cessions of eastern Potawatomi lands.

On December 2, 1964, the Commission dismissed the petition in Docket 29-K and amended its 1958 title findings by concluding that the Hannahville Indian Community and the Forest County Potawatomi Community (Docket 29-K plaintiffs) did not have such a connection with the St. Joseph Band of Potawatomis as would entitle them to maintain or participate in claims brought on behalf of the St. Joseph Band. The Commission also amended its 1958 title opinion to hold that plaintiffs in Docket 29-K were descendants of Wisconsin Potawatomis who had remained in the east without Government permission when the rest of the

Potawatomis moved west. In another order of that same date, the Commission denied the motion of Docket 29-K to amend the June 30, 1958, findings of the Commission. A per curiam opinion was issued with the order, and Commissioner Scott dissented on the ground that the political structure of the Potawatomi Indians as a land-owning entity prior to the move west after 1833 had not been decided in the 1958 Court of Claims decision in the western lands case and was therefore no bar to litigation of that question in the instant dockets.

On December 23, 1964, the Commission issued its findings of fact and opinion on value in Dockets 146, 15-M and 40-K, the petition in Docket 29-K having been dismissed. The details of this decision are contained in our finding 37. In summary, the Commission relied to a great extent on the evidence and arguments of counsel in dockets 146, 15-M and 40-K. In arriving at a value per acre of 85 cents, the Commission explained why it was not persuaded that a prospective purchaser in 1822 or for several years thereafter would have been as aware of the great desirability of the area as counsel for plaintiffs believed the record showed. The Commission also concluded that the lumber value to which the expert witness for dockets 146, 15-M and 40-K had testified (Mr. Trygg), was too speculative around the time of cession to appreciably enhance the value of the lands ceded. The Commission expressly rejected the argument of counsel for Docket 29-K that under the circumstances of this case the Commission could not find a value of less than $1.25 per acre, pointing out that the record in this case contained abundant evidence

from which an estimated or imputed value could be arrived at. In rejecting the argument of all plaintiffs that the 84,480 acres of granted land should be included in the acreage to be valued, the Commission concluded that in the absence of any showing of wrongdoing by defendant in making the grants, the grants appeared to be part of the overall cession agreement and there was thus no reason not to exclude those lands in valuing the area in suit. The Commission held that the consideration paid for the lands worth 85 cents per acre in 1822 was clearly unconscionable and concluded that plaintiffs were entitled to an award computed on that basis less allowable offsets.

As in the title phase of this case, counsel for dockets 146 and 15-M did all of the significant work in establishing the value of the Potawatomi ceded lands. As we stated in finding 38, counsel for Docket 29-K contributed nothing of help in the matter of the value of the lands either at the trial or later at the briefing stage. Again, counsel's proposed findings of fact contained no primary findings but only ultimate ones. Most of the work done by counsel for 29-K related to matters concerned with the political structure of the Potawatomi Indians as a land-owning and land-ceding entity and was of no assistance to the Commission in reaching its decision on the value of the ceded lands. Even counsel's argument regarding the inclusion or exclusion of the 84,480 acres of granted land had little to recommend it on the facts or the law, the true issue being whether or not the grant was a legitimate part of the treaty-making process, or represented an exercise of undue influence on the part of defendant in procuring the execution by the

Indians of the treaty ceding their lands. In conclusion, we are unable to assign any credit to counsel for Docket 29-K for work contributing to the final result in the value proceedings.

ENTITY PHASE

Prior to the offset phase of the case, the entity issue began to receive considerable serious attention. Mr. Robert Bell, Jr., had become attorney of record in Docket 29-K in late 1964. He filed motions for rehearing and reconsideration of the orders of the Commission wherein the Commission had denied motions of Docket 29-K petitioners to admit additional exhibits, and to amend the petition to specify other parties plaintiff in Docket 29-K. When the motion was denied on December 1, 1964, counsel, on March 1, 1965, filed a notice of appeal to the Court of Claims from two orders of the Commission of December 2, 1964, which denied plaintiff's motion to amend the 1958 title findings of fact with respect to the political organizations of the Potawatomi Indians, and the order of the same date dismissing the petition in Docket 29-K. On May 12, 1965, the Commission by order stated that defendant should file its amended answer on offsets 60 days after the Court of Claims decision on the appeal became final, stating that while the appeal was pending the Commission did not have jurisdiction to proceed with the case. The Citizen Band and the Prairie Band of Potawatomi Indians, were made appellees in the appeal along with the United States. The appellants included plaintiffs in this and all other pending dockets in which the eastern Potawatomi Indians were plaintiffs.

On June 9, 1967, the Court of Claims rendered a decision (180 Ct. Cl. 477) reversing the Commission's holding that the decision of the Commission in the western lands case, affirmed by the Court of Claims (143 Ct. Cl. 131, supra)was a bar to the litigation of the Potawatomi entity question in cases involving eastern Potawatomi lands ceded between 1795 and 1834, and remanded the cases for a new trial on the entity issue.

Hearings on the political structure of the Potawatomis from 1795 through 1833, were held on January 18 and December 6, 1968, with counsel for all plaintiffs herein participating. On March 28, 1972, 27 Ind. Cl. Comm. 187, the Commission issued an opinion and order which, among other things, required that plaintiffs in Docket 29-K be reinstated in these proceedings for the purpose of sharing in the final award for Royce Area 117. The Commission ruled that from 1795 through 1833, Potawatomi land was owned and ceded by a single land-owning entity, i.e., the Potawatomi Tribe or Nation. The order reinstating Docket 29-K as a party in this proceeding was not appealed to the Court of Claims, but several other plaintiffs in the consolidated dockets affected by the 1972 decision did appeal and the rulings of the Commission on the entity question were affirmed. 205 Ct.Cl. 765 (1974) 507 F. 2d 852; Order of March 7, 1975, 206 Ct.Cl. 867.

The record indicates that counsel for Docket 29-K spent far more time on the entity issue than did counsel for the other dockets. However, it appears to us that a great deal of the work done by counsel on this issue in Docket 29-K was duplicative of the work done by the same counsel in this and other Potawatomi dockets and was concentrated

on largely at the expense of doing any productive work on the vital issues of title and value in this consolidated proceeding which primarily involved a claim for an award based on unconscionable consideration received for land ceded by the plaintiffs to the Government in the treaty of 1821. After taking into consideration the amount and kind of work done which was actually necessary and helpful in assisting the Commission to resolve the conflicting positions on the entity question, we conclude that attorneys for each of the three Potawatomi dockets contributed equally to this phase of the litigation.

OFFSET PHASE

On June 7, 1972, defendant filed an amended answer asserting a total of $1,566,432.05 in alleged allowable offsets to be deducted from the gross award for the Potawatomi plaintiffs in the amount of $2,320,370.70. Counsel for dockets 146 and 15-M joined in filing one set of objections to such alleged offsets, and counsel for Docket 29-K filed separate objections. On March 1, 1973, counsel for Docket 29-K moved the Commission to enter summary judgment disallowing all the claimed offsets on the ground that the payments asserted by defendant were made gratuitously by the Government from public funds and were unrelated to the Government's liability to the plaintiffs in the instant case. Noting that the above mentioned final award had been entered eight years previously, counsel argued that the issue of the allowability of these payments as offsets should not be tried by the Commission because to do so would further delay the payment of the award due plaintiffs. Counsel did not make any specific objections to any of the asserted offsets.

In response to the above motion of Docket 29-K, defendant on March 26, 1973, argued that the allowability of the offsets did not depend upon there being a connection between the facts supporting the judgment for the plaintiffs and the nature of the alleged offsets, and that the lack of such a connection could not deprive defendant to its right to trial on the matter of offsets. Defendant asserted that there existed material issues of fact to be tried in connection with the allowability of the alleged offsets, which precluded the granting of Docket 29-K's motion for summary judgment. In a reply filed April 8, 1973, counsel for Docket 29-K again cited the long delay since the final award as a ground for denying defendant its trial on offsets. On April 12, 1973, the Commission issued an order denying the motion of Docket 29-K for summary judgment.

On May 29, 1973, counsel for plaintiffs in dockets 15-M and 146 moved the Commission for an order setting a pretrial conference on offsets. Counsel pointed out many of the offsets asserted in the amended answer had already been adjudicated in other Potawatomi dockets and should not have been asserted in the instant dockets. On June 21, 1973, Counsel for dockets 15-M and 146 filed a pretrial memorandum in accordance with the direction of the Commission, pointing out that although the judgment in this case was based upon a claim made under the Treaty of August 29, 1821, effective March 25, 1822, the defendant had included in its amended answer expenditures made prior to the effective date of the treaty. Counsel specified the expenditures claimed as allowable offsets which had already been asserted and litigated in other Potawatomi

dockets. Finally counsel for dockets 15-M and 146 pointed out that offsets had been allowed and deducted from the judgment for the Citizen and Prairie Potawatomi Indians in the western lands case, but that in spite of this defendant had included in its amended answer offsets claims based on expenditures made for the benefit of the Potawatomi Indians who had remained east of the Mississippi after the Citizen and Prairie Bands had moved west. Counsel urged that whether or not those claims were otherwise valid, they should not be offset against the amount of the award due the Citizen and Prairie Potawatomis who had already been charged for the expenditures made for their special benefit.

On June 25, 1973, counsel for Docket 29-K filed a pretrial memorandum relative to defendant's amended answer claiming offsets. Counsel questioned many of the specific expenditures claimed as allowable offsets, contending that some were clearly not allowable under the terms of the Indian Claims Commission Act, and that others were not allowable because unidentified portions of certain expenditures obviously went to Indians who were not Potawatomis.

On June 29, 1973, the pretrial conference was held with a reporter present. Counsel for Docket 146 referred to defendant's amended answer and supporting exhibits and pointed out a number of expenditures claimed as allowable offsets which had been made prior to the effective treaty date. As the conference progressed it became apparent that the amended answer should have eliminated many of the expenditures listed in the GAO report on which it was based, and that the pretrial statement of defendant should have eliminated those expenditures asserted in the amended answer but clearly not allowable as offsets. Finally it was

agreed that the trial on offsets would take place on November 15, 1973, with the Government serving representative vouchers with backup records on the parties by October 15, 1973.

On November 15, 1973, the trial on offsets was held. The Government's exhibits in support of the claimed offsets were introduced in evidence and the accountant who was responsible for preparing the exhibits was cross examined by counsel for all three dockets. By this time defendant's claimed offsets had been reduced from $1,566,432.05 to $26,484.42. On January 30, 1974, the briefing time of the parties was set by order of the Commission with defendant required to file its requested findings of fact and brief on or before March 14, 1974. On March 13, 1974, because a new attorney in the Department of Justice had just been assigned to these dockets, defendant requested an extension of time for the filing of the requested findings of fact and brief on offsets. Counsel for all three plaintiffs objected strenously to the granting of any such extension of time pointing out that the loss of interest on their judgment was far in excess of the amount of offsets at stake. On March 29, 1974, counsel for all parties appeared before the Commissioner to whom the case was assigned, and with a reporter present discussed the progress which had been made towards settling the matter of the amount of allowable offsets. As a result of that conference, defendant's counsel proposed a finding of fact stating that defendant was entitled to offsets totaling $23,500.00 to which proposed finding counsel for the three plaintiffs made no objection. On April 19, 1974, the Commission entered a final award in which it found and concluded as a matter of law

that $23,500.00 was properly allowable as an offset under Section 2 of the Indian Claims Commission Act and $2,296,870.70 was due plaintiffs in the three dockets.

Although counsel for Docket 29-K delayed the offset proceedings by his motion for summary judgment on grounds which were legally untenable, he did participate effectively in the pretrial conference, the offset trial and the post offset conference which resulted in reducing the amount of offsets to $23,500.00, and the entry of final judgment without awaiting further briefing by defendant or the parties. It appears fair to the Commission to conclude that at this phase of the case, counsel for all three dockets contributed equally in reducing the claimed offsets from $1,566,432.05 to $23,500.00.

TIME EXPENDED

Counsel for Docket 29-K produced certain time records kept by Mr. Maloney, Sr., one of the original attorneys of record, now deceased. The details of those records are set forth in Finding 50. As we stated in our decision involving the fee apportionment between these same attorneys in dockets 217, 15-K and 29-J (36 Ind. Cl. Comm. 498 (1975)), in Indian claims litigation, such time records are not of great assistance to the Commission in determining the value of an attorney's service for fee purposes, or the apportionment of such fee between participating attorneys in consolidated dockets where there is but one award made jointly to all plaintiffs. This is particularly true in this, as in the other case just mentioned, where it is clear from the whole record of proceedings that an enormous amount of time has been spent by counsel

for all parties in bringing the case to its final conclusion. If all counsel had kept accurate records of the time actually spent on these dockets from the filing of the petitions to final judgment, it is quite likely that the fee of 10% of the final award would not begin to equal what those attorneys would have earned had they charged the hourly rates for attorneys prevailing during the course of the litigation.

In summary, our review of the records in these dockets as reflected in our findings of fact herein, support the following conclusions as to the relative contributions of the attorneys for the three consolidated dockets with respect to the amount of significant and helpful work performed at each phase of the litigation. During the title phase and the value phase, counsel for dockets 146 and 15-M contributed all of the significant work which resulted in the final award for the Potawatomi land ceded in 1821 at a consideration which the Commission found to be unconscionable. The efforts of counsel for Docket 29-K were devoted almost exclusively to establishing his position relative to the Potawatomi entity question. In this particular case, counsel appeared to be obsessed with this issue to the exclusion of all other issues present in the title and value proceeding. The entity question was properly before the Commission, but it was only one of several issues. The primary issues which, favorably resolved for plaintiffs would lead to a money judgment in their favor, were the establishment of aboriginal title to all of the ceded land, and persuading the Commission that the land had the highest value possible on the basis of a carefully prepared record. To these two vital issues counsel for Docket 29-K contributed

nothing. The importance of a proper resolution of the entity issue was to insure that the award should go to those truly entitled to it. This was not a simple issue and, as is apparent from the opinions of the divided Commission, it was a close question. The sheer volume of work poured into this issue by counsel for Docket 29-K was overwhelming, but viewed in the light of how much of it was a help to the Commission and the court, we conclude that all counsel contributed equally to this phase of the proceedings.

In the offset phase, for the first time, counsel for Docket 29-K addressed himself exclusively to the issue before the Commission and his contribution to reducing the amount of offsets claimed by defendant was equal to that of the other counsel for dockets 146 and 15-M.

Having thus assessed the contributions of each plaintiff's counsel in each phase of the case leading to the final result, it is necessary to evaluate the importance of the work in each phase as it contributed to the final money judgment for the plaintiffs. In weighing how much each phase of these consolidated dockets contributed to the final result, we are of the opinion that the entity phase contributed approximately 25% to such result; that the title phase contributed approximately 25% to the result; that the value phase contributed approximately 30% to the result, and the offset phase contributed about 20%.

On the basis of the record in these proceedings, our findings of fact, and for the reasons stated above, we conclude that the attorneys in each of the dockets involved are entitled to the following percentage

allocation of the fee for the services each have rendered in prosecuting these claims:

Docket 146 and 15-M	85%
Docket 29-K	15%

Counsel in Docket 146 and 15-M have asked that the Commission not make any apportionment of the fees payable to them in those dockets. The record indicates that certain agreements may exist between present counsel and the estates of deceased counsel relative to the award of fees. The Commission, however, is not required to take into account such agreements in awarding the attorney fees to the present attorneys of record beyond stating that the awards are made to such attorneys for distribution to those entitled to share in the fee award.

Accordingly, we are awarding a fee of $195,234.01 to counsel in dockets 146 and 15-M, and a fee of $34,453.06 to counsel in Docket 29-K. These sums are to be paid to the attorneys of record in the respective cases on their own behalf and on behalf of all contract attorneys having an interest in the fees in these cases. The attorneys of record are to make appropriate distributions of the fees to all interested attorneys or their representatives.

Concurring:

Margaret H. Pierce, Commissioner

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Brantley Blue, Commissioner