BEFORE THE INDIAN CLAIMS COMMISSION

PRAIRIE BAND OF POTAWATOMI INDIANS, et al.,	)	Docket Nos. 15-F and 15-G
Plaintiffs,	)	
CITIZEN BAND OF POTAWATOMI INDIANS OF OKLAHOMA, et al.,	)	Docket No. 307 (as amended)
Plaintiffs,	)	
HANNAHVILLE INDIAN COMMUNITY, et al.,	)	Docket Nos. 29-D and 29-E
Plaintiffs,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: July 15, 1976

Appearances:

Robert S. Johnson, Attorney for the Applicants, Prairie Band of the Potawatomi Indians, et al.

Louis L. Rochmes, Attorney for the Applicants, Citizen Band of Potawatomi Indians of Oklahoma, et al.

Robert C. Bell, Jr., Attorney for the Plaintiffs, Hannahville Indian Community, et al.

James M. Upton, with whom was Assistant Attorney General Wallace H. Johnson, Attorneys for Defendant.

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

We are concerned here with a joint motion, filed on February 2, 1976, by the Prairie Band of the Potawatomi Indians, Dockets 15-F and 15-G, and the Citizen Band of Potawatomi Indians of Oklahoma, Docket 307, as amended, to reinstate their respective petitions. For reasons stated below, we shall

treat the motion as one for leave to intervene in Dockets 29-D and 29-E.[1/] Opposition thereto was filed by the plaintiffs in Dockets 29-D and 29-E on February 13, 1976. The merits of this motion have been developed through the briefing process. At a hearing on this matter held on June 24, 1976, the defendant took the position that the Commission does not have jurisdiction to reinstate the said petitions. The legal question of whether leave to intervene should be granted is now ripe for decision.

The petition in Docket 15-F, filed by the Prairie Band of Potawatomi Indians on September 20, 1949, asked additional compensation for certain lands that were ceded to the United States by representatives of several Indian tribes at the Treaty of Fort Industry, July 4, 1805, 7 Stat. 87. The ceded lands are officially designated as Royce Areas 53 and 54 on Royce's Map of Ohio in Part II of the 18th Annual Report of the Bureau of American Ethnology, 1896-1897. The petition in Docket 15-G, filed by the Prairie Band on September 23, 1949, asked additional compensation for certain lands that were ceded to the United States by representatives of several Indian tribes and bands at the Treaty of Detroit, November 17, 1807, 7 Stat. 105. The area ceded is officially designated as Royce Area 66 on Royce's Maps of Michigan and Ohio in Part II of the 18th Annual Report of the Bureau of American Ethnology, 1896-1897.

The petition in Docket 307, as amended, was filed by the Citizen Band of Potawatomi Indians of Oklahoma on August 10, 1951. The claims therein,

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1/ The Commission notes that the plaintiffs in Dockets 15-F, 15-G, and 307 (as amended) served the plaintiffs in Dockets 29-D and 29-E with the motion to reinstate their respective petitions and that in their reply thereto, the Hannahville plaintiffs responded as if the motion were one to intervene in Dockets 29-D and 29-E. For this reason, the Commission is including the Hannahville Indian Community, et al., as parties to this motion.

requesting additional compensation, were based on the cession of the above cited areas under the Treaties of 1805 and 1807.

In Docket 29-D the plaintiffs are asking additional compensation for Royce Areas 53 and 54 that were ceded to the United States under the Treaty of July 4, 1805. In Docket 29-E the plaintiffs are seeking additional compensation for Royce Area 66 that was ceded to the United States under the Treaty of November 17, 1807. In both of the dockets the plaintiffs are two Potawatomi Indian communities, the Hannahville Indian Community of Wilson, Michigan, and the Forest County Potawatomi Community of Crandon, Wisconsin. There are four individual plaintiffs, who are members of these two communities. Hereinafter, we shall refer to the plaintiffs in Dockets 29-D and 29-E as either the Hannahville group or plaintiffs, and the plaintiffs in Dockets 15-F, 15-G, and 307, as amended, as applicants.

The Commission dismissed the petitions in Dockets 15-F and 15-G on November 3, 1959; the proceedings in these two dockets were reported to Congress on January 6, 1965, and January 5, 1965, respectively. The petition in Docket 307, as amended, was dismissed on May 11, 1959, and the proceedings reported to Congress on November 27, 1963. The orders of dismissal were based on the defendant's motion for dismissal, the applicants' responses thereto, and the decision of the Commission in Prairie Band of Potawatomi Indians v. United States, Docket 15-J, et al., 4 Ind. Cl. Comm. 473 (1956), aff'd, 143 Ct. Cl. 131 (1958), cert. denied, 359 U. S. 908 (1959), wherein the Commission found that the provisions of the Treaties of July 4, 1805, and November 17, 1807, made it apparent that the lands were not ceded by the Potawatomi Nation but only by the Huron Band. In dismissing the petitions in Dockets 15-F, 15-G, and 307, as amended, the Commission found that the plaintiffs therein had no interest in the claims arising under the said treaties.

In Dockets 29-D and 29-E the defendant filed identical motions to dismiss the respective petitions on the grounds that the Hannahville group had no genuine interest in the subject matter of these lawsuits because (1) the 1805 and 1807 treaty participants were not the Potawatomi Nation, as plaintiffs contended, but rather the Potawatomi of the Huron, a separate tribal land-owning entity, and (2) the Hannahville group could show no ancestral, legal, or other connection with the Potawatomi of the Huron or descendants thereof. Subsequently, by order of October 14, 1964, 14 Ind. Cl. Comm. 204 (1964), the Commission dismissed the claims of the Hannahvilles and Michael Williams, an individual plaintiff, on the ground that their ancestors' bands were not signatories to the Treaties of 1805 and 1807.

The Hannahville group appealed to the Court of Claims the Commission's dismissal of the petitions in Dockets 29-D and 29-E, among others, seeking recognition of a right to share in awards being sought from the Commission as additional consideration for lands ceded to the United States by the Potawatomies, or groups thereof, in several treaties, including those of 1805 and 1807. The plaintiffs contended that during the Indian treaty period of the nineteenth century, all Potawatomi Indians were members of a single political entity which held title to all lands occupied by Potawatomies. Therefore, they argued that all descendants of Potawatomies are entitled to share in the awards arising from the unconscionable terms of these treaties, regardless of which band signed the treaty; further,

that the dismissal of their petitions in Dockets 29-D and 29-E was erroneous.

On June 9, 1967, the Court of Claims reversed and remanded Dockets 29-D and 29-E, among others, to the Commission with instructions to make a de novo determination of the political structure of the Potawatomi Indians at the times when the United States negotiated the various treaties involved in the appeal. See Hannahville Indian Community v. United States, Prairie Band of the Potawatomi Tribe of Indians, and Citizen Band of Potawatomi Indians of Oklahoma, 180 Ct. Cl. 477 (1967).

On remand the Commission determined that from 1795 to 1833, during which time the Potawatomies were ceding their lands in the Great Lakes region east of the Mississippi River in Ohio, Michigan, Indiana, Illinois, and Wisconsin, they were negotiating the treaties as a single land-owning entity. See Citizen Band of Potawatomi Indians of Oklahoma v. United States, Docket 71, et al., 27 Ind. Cl. Comm. 187 (1972), aff'd, 205 Ct. Cl. 765 (1974).

Subsequently, the Potawatomies were found to have had recognized title to an undivided one-fifth interest in Royce Areas 53 and 54, excluding a six mile square enclave in northwestern Royce Area 53 which had been previously ceded to the United States at the 1795 Greeneville Treaty. See James Strong v. United States, Docket 13-E, et al., 30 Ind. Cl. Comm. 8, 21-22 (1973), aff'd, 207 Ct. Cl. 958 (1975), cert. denied, 423 U. S. 115 (1976).

Regarding Royce Area 66, the Commission determined that the Potawatomi Tribe held recognized title to a separate, segregated and identifiable portion of said area. See Saginaw Chippewa Indian Tribe of Michigan v. United States, Docket 59, et al., 30 Ind. Cl. Comm. 388, 402 (1973), aff'd, 207 Ct. Cl. 960 (1975).

Applicants now contend that in light of the above outlined case law the dismissal of their petitions was erroneous. Applicants argue they are entitled to have their petitions reinstated in order to safeguard their interests.

The Hannahville group opposes the subject motion on the grounds that (1) the claims of the applicants are res judicata; (2) applicants consented to the dismissal of their petitions in Dockets 15-F, 15-G, and 307, as amended, and are now attempting to assert an original cause of action which is barred by Section 12 of the Indian Claims Commission Act, 60 Stat. 1049; (3) if allowed to intervene in Dockets 29-D and 29-E, it would be a "hostile" intervention in violation of the rule in Kiowa, Comanche and Apache Tribes v. United States, Docket 257, 24 Ind. Cl. Comm. 405 (1971), rev'd, 202 Ct. Cl. 29 (1973); and (4) as any award will be to the Hannahville Indian Community on behalf of the Potawatomi Tribe as it existed in 1805 and 1807, applicants' interests are protected.

The Commission concludes that it no longer has jurisdiction of the subject matter of the applicants' claims in Dockets 15-F, 15-G, and 307, as amended. Accordingly, the motion to reinstate must be denied. Our determination is based on Section 22(b) of the Indian Claims Commission Act, 60 Stat. 1049, 1055, which states:

EFFECT OF FINAL DETERMINATION OF COMMISSION

> (b) A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

Our conclusion, based upon the above statute, that the Commission no longer h s jurisdiction of the applicants' claims pretermits any of plaintiffs' contention that applicants' claims are res judicata.

Although we are proscribed from reinstating the subject claims, we believe that the applicants meet the criteria for intervention and that as a matter of justice they should be allowed to do so.

In suits before the Commission, intervention may be granted where it can be established that the applicant's claim relates back to the timely filing of the plaintiff's original petition. In order to establish this relation back, the applicant must show a common interest in the claim of the original plaintiff, that the defendant had sufficient notice of the applicant's possible claim, and that intervention will not unduly delay the progress of the case.

That the applicants have a common, undivided and non-conflicting interest in the claims presented in Dockets 29-D and 29-E seems indisputable, since both the Prairie and Citizen Bands constituted a portion of the Potawatomi Tribe or Nation as it existed from 1795 to 1833, during which period the Potawatomies were negotiating treaties as a single land-owning entity. (Citizen Band of Potawatomi Indians of Oklahoma, Docket 71, et al., supra.) The claims in Dockets 29-D and 29-E were

presented within the period specified in Section 12 of the Indian Claims Commission Act.[2/] The applicants are not asserting a new or separate claim which would be untimely under section 12 of the act, nor does their intervention introduce any material issues of law or fact of which the defendant and the Commission were not already apprised. Their intervention after expiration of the statutory period relates back to the filing of the original petitions in Dockets 29-D and 29-E on March 14, 1950, and is not barred by limitation.

Plaintiffs have cited the Kiowa case, supra, in support of their opposition to applicants' motion. In that case the intervenors, the Wichita Indian Tribe of Oklahoma and Affiliated Bands, and the original plaintiffs were claiming title to the same areas of land (Royce Areas 510 and 511); however, the intervenors did not timely file their claim with the Indian Claims Commission, nor did they make a showing of a common interest in the claim of the Kiowas and their group. In fact, the Court of Claims found that evidence produced by the intervenors could easily demonstrate that no one had exclusive control of the tract to which

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2/ Section 12 of the Indian Claims Commission Act, 60 Stat. 1049, 1052, provides that:

> Sec. 12. The Commission shall receive claims for a period five years after the date of the approval of this Act and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by Congress.

the Kiowas and their group were claiming aboriginal title, thus resulting in the defeat of the Kiowas' claim, and of any claim. In commenting on the cases of Blackfeet and Gros Ventre Tribes v. United States, 162 Ct. Cl. 136 (1963), and Snoqualmie Tribe v. United States, 178 Ct. Cl. 570, 372 F. 2d 951 (1967), among other cited cases, the Court of Claims stated:

> These cases do not show that a late intervenor may intervene in a claim where his interests are in direct conflict with those of the original claimant. In both the Blackfeet and the Snoqualmie cases we took pains to show that no intervenor was claiming adversely to the timely claimant. In both cases the litigation involved Treaties to which the intervenors were joint parties. (Kiowa, supra, at p. 44)

The above examination of the Kiowa case clearly reveals that it is not applicable to the facts in the case at bar.

The Court of Claims recently applied the rule in the Kiowa case in Saginaw Chippewa Indian Tribe of Michigan v. United States, 207 Ct. Cl. 960 (1975). On July 14, 1971, the Potawatomi of the Huron, et al., filed a motion to intervene in Docket 29-E, among others, relating to Royce Area 66 ceded by the Treaty of November 7, 1807. Petitioners state they "are an autonomous group of Potawatomi Indians who dealt separately with the United States and whose claim herein is separate and independent of all other Potawatomi Indians." The Commission granted the motion to intervene for the purpose of testing the validity of their claim and determining the position of the intervenors in relation to the other parties in Docket 29-E. See Citizen Band of Potawatomi Indians of Oklahoma v. United States, Docket 71, et al., 27 Ind. Cl. Comm. 187, 326 (1972). The Court of Claims reversed the Commission's decision, stating:

> We conclude that an error of law was committed by the Commission in allowing the Potawatomi of the Huron, et al., to intervene in this case 20 years, more or less, after their claim was barred by limitations and such claim was adverse to that of the other Potawatomi Tribes whose claim was timely filed. This is contrary to our decision in Kiowa, Comanche and Apache Tribes v. United States, 202 Ct. Cl. 29, 479 F. 2d 1369 (1973), cert. denied, 416 U. S. 936 (1974). However, in fairness to the Commission, it should be pointed out that the decision of the Commission was entered one week before our decision in the above case was handed down. The plea in intervention aforesaid must be dismissed. (Saginaw Chippewa Indian Tribe of Michigan, supra.)

The plaintiffs have further contended that intervention is unwarranted because applicants' interests in the claims in Dockets 29-D and 29-E are protected. With this argument we cannot agree. The Commission finds that the applicants' interests are inadequately represented and that unless allowed to intervene, their interests could be adversely affected. An important consideration in this determination is the fact that the value and offset stages have not been tried, and we believe that the applicants have a right to be represented by counsel of their choice at these important junctures in the litigation of their claims.

Finally, the Commission would like to call attention to the following proposition. When a court grants a motion to intervene, the intervenor is as much a party to the action as the original parties with the same right to control and to participate in the proceedings as the original parties, subject to the authority of the court reasonably to control the proceedings in the case. 59 Am. Jur. 2d Parties §177 (1971). In light of the above, the Commission strongly suggests that the parties herein seek full cooperation on all sides so that these pending claims can be adjudicated as expeditiously as possible.

Accordingly, we shall this day enter an order granting intervention.

Brantley Blue

Brantley Blue, Commissioner

We concur:

John T. Vance

John T. Vance, Commissioner

Richard W. Yarborough

Richard W. Yarborough, Commissioner

Margaret H. Pierce

Margaret H. Pierce, Commissioner

I concur in the result:

Jerome K. Kuykendall

Jerome K. Kuykendall, Chairman