

BEFORE THE INDIAN CLAIMS COMMISSION

THE SHOSHONE TRIBE OF INDIANS
OF THE WIND RIVER RESERVATION,
WYOMING,

Petitioner,

v.

THE UNITED STATES OF AMERICA,
Defendant.

Docket No. 63

Decided: August 20, 1958

Appearances:

Glen A. Wilkinson, with whom
was Marvin J. Sonosky,
Attorneys for Petitioner

Donald R. Marshall, with whom
was Mr. Assistant Attorney General
Perry W. Morton,
Attorneys for Defendant

OPINION OF THE COMMISSION

O'Marr, Commissioner, delivered the opinion of the Commission.

We have before us a petition, filed by the attorneys for petitioner, for the allowance of attorneys' fees for legal services rendered in the prosecution of the Shoshone claim against defendant and for the allowance for services of two expert witnesses who testified in the above case. This petition was filed on April 16, 1958.

On April 24, 1958, the petitioner, the Shoshone Tribe, filed its response to the attorneys' petition in which they assert that from whatever allowance is made for the services of George M. Tunison

rendered during his lifetime in the prosecution of the case there be deducted the sum of \$36,095.19.

The defendant on June 13, 1958, filed its answer to the petition in which it did not object to the allowance of the attorneys' fees claimed but did object to an allowance of the amounts claimed by the two expert witnesses who testified in the case.

Allowance for Legal Services

The Shoshone claim was presented and prosecuted by George M. Tunison under a contract dated July 10, 1947, which contained this provision:

In consideration of the services to be performed by the attorney [Tunison], he shall receive a fee of ten per cent of any judgment or amount recovered.

This contract was extended to February 17, 1958, by the parties thereto.

On August 20, 1954, this Commission entered an order awarding the Shoshone Tribe the sum of \$533,013.60, less offsets later to be determined. And on September 16, 1954, the Shoshone filed a motion for rehearing which was overruled on June 10, 1955.

Mr. Tunison died on December 3, 1954.

It will be seen from the above that Mr. Tunison performed important and valuable legal services for the petitioner during his lifetime in the prosecution of the case.

After the death of George M. Tunison and on January 26, 1955, the Shoshone Tribe employed the law firm of Wilkinson, Boyden, Cragun and Barker to complete the case. The Shoshone contract with this firm, unlike their contract with Tunison, provided that the firm's fee shall

not exceed ten percent of all sums recovered for the tribe. The name of that firm is now Wilkinson, Cragun and Barker.

At the time the law firm took over the case under its contract of January 26, 1955, there was pending in the case the motion for rehearing mentioned above, and a similar motion filed by defendant on September 20, 1954. Both of these motions were argued by the law firm on June 7, 1955, and on June 10, 1955, both motions were overruled.

On January 11, 1956, the defendant filed as an amendment to its former answer claiming offsets in the sum of \$157,886.73. A hearing was had on these offsets on May 10, 1956, at Billings, Montana, and on June 15, 1956, the parties to the suit stipulated as to part of the claimed offsets.

On September 4, 1956, the defendant amended its original offset claim and increased the amount thereof to \$1,949,613.28, and a rather extended hearing was had on this increased claim on September 5, 1956, and numerous documents relating thereto were admitted in evidence.

After extended negotiations between representatives of the law firm, referred to above, and the attorneys for the defendant, an agreement was reached as to allowable offsets which was in the sum of \$100,000. This settlement was approved by the Commission and on April 22, 1957, the Commission entered its final order awarding petitioner the sum of \$433,013.60.

We have set forth in some detail the legal services rendered the Shoshone Tribe in this case in bringing it to a final determination by the law firm of Wilkinson, Cragun and Barker for the reason that the record is plain that that firm also rendered important and valuable

legal service in the case and we see no basis for allowing less than the full ten percent for the services of all the attorneys representing the tribe.

While we encounter no difficulty in making an allowance of \$43,301.36 for legal services rendered by all the attorneys who represented the tribe in this litigation, the petitioning attorneys ask us to divide the attorneys' fees between them on the basis of \$2,165.07 for the Chas. J. Kappler Estate, \$9,959.31 for the firm of Wilkinson, Cragun and Barker, and \$31,176.98 for the George M. Tunison Estate.

As to the Tunison share the Shoshone Tribe calls our attention to paragraph 10 of their contract with Mr. Tunison dated July 10, 1947, as extended, which reads:

10. This contract is supplemental to the existing contract for general legal services between the tribe and the attorney. Any amounts which the tribe may pay the attorney under the existing contract and extensions thereof, from the time of the approval of this supplemental contract, shall be deducted from any amount which may become payable to the attorney under the ten per cent contingent compensation provided in this contract.

At the time of this contract there existed a contract between Tunison and the tribe for general counsel services for which the tribe paid Tunison after the date of the July 10, 1947, contract and until his death the aggregate sum of \$36,095.19. The general counsel services contract does not cover legal service rendered by Tunison in the prosecution of the Shoshone claim disposed of by us but because of the provisions of the 1947 contract, quoted above, the tribe claims a credit on any amount awarded Tunison for his services in the case before us.

The desire of the petitioning attorneys to have us make a division of the fees between themselves, the George M. Tunison Estate and the Charles J. Kappler Estate and a disposition of the credit claimed by the tribe on the share of the attorneys' fee going to Tunison is quite understandable in the circumstances, however, we find no authority granted us by the Indian Claims Commission Act to make a division of fees between attorneys representing the tribe or to resolve issues between the tribe and an attorney concerning the amount payable for legal services.

In the case, Chickasaw Nation v. United States, Docket No. 23, we were asked by the heirs at law of a deceased attorney to allow them a share of the fees that we might allow the attorneys who prosecuted the case, although the ancestor of the applicants had died before the case had been filed, but in the prosecution of the case before us much evidence assembled by the ancestor in other litigation by the same tribe had been used in the case before us. We denied the application on the ground that we had no jurisdiction to determine the rights, if any, of the applicants to fees awarded the attorneys of record.

The applicants appealed to the Court of Claims and that court (121 C. Cls. 41), in affirming the action of the Indian Claims Commission, stated the law relating to the jurisdiction of the Commission as follows, at pages 44 and 45:

Neither the Indian Claims Commission nor this court has jurisdiction to apportion fees among disputing attorneys or to make allowance for fees for anyone except the attorneys of record. Robertson v. Gordon et al., 226 U.S. 311; William Beddo v. United States, 28 C. Cls. 69; Creek Nation v. United States, 79 C. Cls. 778.

The paragraph in appellees' contract undertaking to authorize the Commission to determine the amount, if any, due to appellants for services rendered is ineffective in the instant proceeding since jurisdiction not otherwise had cannot be conferred by consent of the parties. Elgin v. Marshall, 106 U.S. 578.

Any dispute or claim by attorneys other than attorneys of record for services rendered whether by private contract or other obligation must be settled between the parties themselves or in another forum.

It will be seen from the above, that we cannot make a division between attorneys of the amount due them for legal services rendered. Nor can we include as entitled to fees the estate of Charles J. Kappler (who died on January 20, 1946) and was never an attorney of record in the Shoshone case.

The reasons for not dividing fees between attorneys apply with equal force to the dispute between the tribe and their counsel as to balance of fees due and payable.

We are, therefore, constrained to hold that we can make an award to the Estate of George M. Tunison, deceased, and the firm of Wilkinson, Cragun and Barker, the applicants herein, for the sum of \$43,301.36, such sum to be apportioned between said estate and said attorneys as they may agree or as may be determined by any court to which the matter may be submitted, and those credits on a part of such fees, claimed by the tribe, shall likewise be left to the agreement of the parties or submitted to a court for determination.

Compensation for Services
of Expert Witnesses

E. O. Fuller

E. O. Fuller has presented a claim in the sum of \$17,200.00 which he had divided into the sum of \$15,000.00 for what he designates as "active services and results achieved from October 31, 1947, to December 3, 1954." These services are those usually performed by appraisers in examining the property involved, assembling facts pertinent to the inquiry, testifying before the Commission on the question of value, etc. While the charge is for services rendered beginning long before February 16, 1951, when the suit was instituted, such services were necessary and proper for the preparation of the claim and according to his contract with Mr. Tunison, the attorney for the tribe, the work of Mr. Fuller began on October 31, 1947.

The record shows that Fuller prepared a voluminous report of his work, which was admitted in evidence, and also testified as a witness. The record also shows that the tribe obtained an interlocutory award on its claim on August 10, 1954, however, the evidence in the case on the merits was closed and all parties rested on February 20, 1953, so there was little or no need for the Fuller services after the case was closed, if he performed any, and after the award on August 10, 1954, the only matters to be determined concerned offsets about which Fuller performed no services.

Moreover, a comparison of the report received in the instant case with that prepared by Mr. Fuller in a former case of the tribe involving adjoining lands, we find that much of the material he assembled and

used in the former case was used in this case, a fact we consider as bearing upon the amount of time needed in preparing the report in evidence here. We find no justification for including in our allowance for services the period between August 10, 1954, and December 3, 1954, when Mr. Tunison died.

From an examination of the Fuller claim, his report admitted in evidence and his testimony at the trial, and taking into account the fact that payment for his services was contingent upon recovery and that he had been reimbursed by the tribe for all expenses incurred in the work, we believe an allowance in the sum of \$6500.00 amply compensates him of his so-called "active services" in the case.

As to the "standby services," claimed in the sum of \$2200.00, we understand from his statement that under his employment contract Mr. Fuller had to keep himself available for services until the case was concluded and judgment rendered. The contract provides: "You are to go ahead and prepare evidence to prove the allegations of the Petition and testify thereon," and "In the event of a recovery you are to apply to the Court for an allowance of a fee for your services." Neither this language nor any other contained in the contract contemplates other than the ordinary services rendered by an appraiser. It is reasonable to assume, we believe, that if the witness and the attorney Tunison had in mind payments of \$50.00 per month in addition to the usual compensation for appraisers' services the contract would have made such an intent clear.

We conclude, therefore, that the claim for "standby services" must be denied.

Thomas S. Harrison

Mr. Thomas S. Harrison testified as a witness in the case and prepared a lengthy report on the presence and development of oil in the lands involved in the case. He had been employed by the then attorney in the case, George M. Tunison, as an expert on mineral values and worked under the direction of Mr. Tunison and performed valuable services for the Indians. He "suggests" a fee of \$12,500.00 for the services of himself and his son, John Harrison, now deceased, who was associated with him in the work. No showing has been made as to the time consumed in assembling the data necessary in the preparation of the mineral features of the case but from his report and testimony received in evidence at the trial it is plain that much time was expended in research and travel and in the preparation of his lengthy and comprehensive report and in testifying in the case.

Taking into consideration all such matters and the fact that payment for his services was contingent upon recovery and the further fact that he has been paid by the tribe for all expenses incurred by him in connection with his work in the case, we believe the sum of \$5,500.00 will fairly compensate Mr. Thomas S. Harrison for his services in the case, which sum includes the services of John Harrison, now deceased.

We, accordingly, conclude the attorneys for the Shoshone Tribe are entitled to a fee of \$43,301.00; that the witness, E. O. Fuller, is entitled to a fee of \$6,500.00, and that the witness, Thomas S. Harrison, is entitled to a fee of \$5,500.00, to be divided between himself and the estate of John Harrison, deceased, as may be agreed upon.

Proof of Claims for Witness Fees

The witnesses, Fuller and Harrison, submitted their claims in the form of affidavits in which they setforth in considerable detail the work they performed and the time consumed in preparing their reports and in preparation for testifying at the trial.

At the hearing before the Commission on the application for the allowance of attorneys' fees and fees for the expert witnesses, the government objected to our consideration of the affidavits of the witnesses on the general ground that in the absence of an agreement or consent of the government such evidence is inadmissible, primarily because the government would be deprived of the right of cross-examination.

Applications for the allowance of attorneys' fees, witness fees and other reimbursable expenses of Indian cases do not affect the matter in controversy, but are collateral thereto. Hence, the rule contended for by the government does not apply to such application.

The Indian Claims Commission Act does not prescribe the procedure for applying for and proving such fees and reimbursable expenses, so the Commission can, as it has frequently done in the past, consider affidavits submitted by the interested parties in support of their claims for fees and expenses. This does not mean, however, that the Commission may not in its discretion require testimony relating to such claims, but for the purposes of the instant application the affidavits objected to are admitted in evidence and considered by the Commission.

We concur:

Louis J. O'Marr
Associate Commissioner

Edgar E. Witt
Chief Commissioner

Wm. M. Holt
Associate Commissioner