

BEFORE THE INDIAN CLAIMS COMMISSION

THE CROW TRIBE OF INDIANS,)	
)	
Petitioner,)	
)	
v.)	Docket No. 54
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: November 17, 1961

Appearances:

Ralph G. Wiggernhorn and
John M. Schiltz of Wiggernhorn,
Hutton, Schiltz and Sheehy

Glen A. Wilkinson, John W.
Cragun and Robert W. Barker
of Wilkinson, Cragun and Barker,
Attorneys for Petitioner.

Donald A. Paddock, on behalf of
Heirs of Kenneth R. L. Simmons,
deceased.

Maurice H. Cooperman with whom
was Mr. Assistant Attorney General,
Ramsey Clark,
Attorneys for Defendant.

OPINION OF THE COMMISSION

Holt, Associate Commissioner, delivered the opinion of the Commission.

On September 14, 1961, there was filed in the instant case an Amended Petition for Allowance of Attorneys' Fees. By the Amended Final Judgment entered herein on May 29, 1961, petitioner, The Crow Tribe of Indians, was awarded \$10,242,984.70.

Under the contract, as amended and extended, between the tribe and the attorneys the compensation for legal services was stipulated in paragraph 5 of said contract as nine percent of any recovery. Claim is made for \$921,868.62, which is nine percent of the final award of \$10,242,984.70. The amended petition for allowance of attorneys' fees requests:

1. That the aggregate attorneys' fees be allowed and awarded.

2. That the Commission determine and fix the amount of such aggregate fee to be allowed the heirs of Kenneth R. L. Simmons, deceased, as a fair proportion thereof for the services rendered by said decedent, the balance of said aggregate fee to be awarded to petitioner, Ralph G. Wiggenhorn, attorney of record, and his associates as attorneys for the Crow Tribe.

3. That, in the alternative, should the Commission refuse to accept jurisdiction on the fixing of said deceased attorney's share of the fee, that said total aggregate be then awarded to petitioner, as the attorney of record as trustee for all attorneys who have an interest in this proceeding, including petitioner, their heirs and assigns.

The attorneys' contract dated April 7, 1949, was entered into by the Crow Tribe with Kenneth R. L. Simmons and Ralph G. Wiggenhorn, Attorneys at Law, and approved as required by law by the Assistant Commissioner of Indian Affairs on February 2, 1950. On January 9, 1950, Wiggenhorn and Simmons assigned to Attorney Ernest L. Wilkinson a one-ninth (1/9) interest in the aforesaid contract, which assignment was approved by the Commissioner of Indian Affairs on May 1, 1950. Also on January 9, 1950, Simmons and Wiggenhorn assigned to the Brigham Young University a two-ninths (2/9) interest in and to all fees and compensation to be received by them under the aforesaid contract

of April 7, 1949, which assignment was approved by the Commissioner of Indian Affairs on November 7, 1950.

Kenneth R. L. Simmons died on April 13, 1953.

By an agreement, dated April 30, 1955, entered into by Wiggernhorn, Ernest L. Wilkinson, and Brigham Young University, the said University assigned to Ernest L. Wilkinson its two-ninths ($2/9$) interest in fees payable under the agreement of April 7, 1949, and Wiggernhorn assigned to Wilkinson a full one-half ($1/2$) interest at all times after the death of said Simmons. This agreement was approved by the Commissioner of Indian Affairs on August 25, 1955, upon acceptance by the parties to the agreement of certain conditions required by the Bureau of Indian Affairs.

By an agreement, dated October 22, 1958, Ernest L. Wilkinson, with the consent of Wiggernhorn and his law firm, assigned Wilkinson's interest in the April 7, 1949, contract to his law firm of Wilkinson, Cragun and Barker. By an agreement, dated November 3, 1958, the said Ralph G. Wiggernhorn, with the consent of Wilkinson and his law firm, assigned Wiggernhorn's interest in the aforesaid 1949 contract to his law firm of Wiggernhorn, Hutton, Schiltz and Sheehy, stipulating, however, that the assignment should not serve to assign Wiggernhorn's share of the fee earned by him under said contract prior to the organization of said law firm in August of 1954, and that in the event fees were earned Wiggernhorn and his law firm would divide their share of such fee between them in such proportion and would fairly measure their respective contributions

in services rendered. These two assignments were approved separately on February 5, 1959, by the Commissioner of Indian Affairs.

We encounter no difficulty in granting the request that the aggregate attorneys' fee be allowed and awarded since the contract specifically provides that the amount of such fee is nine percent of any and all sums recovered. The contract attorneys who represented the Crow Tribe in this litigation are therefore allowed the sum of \$921,868.62 for legal services, and accordingly an order to that effect will be entered. The request, however, that the Commission determine and fix the amount of such aggregate fee to be allowed the heirs of Kenneth R. L. Simmons, deceased, as a fair proportion thereof for the services rendered by Simmons presents a different story.

As to the Simmons' interest in the fee, the petitioner calls our attention to paragraph 9 of the 1949 attorneys' contract which reads:

"It is agreed that in the event of the death of either one or more of the parties of the second part or their associate or associates, the estate of each deceased attorney shall be allowed compensation in such sum as the Commissioner of Indian Affairs, if no suit is instituted, or if suit be instituted the Tribunal, Commission, or Court in which said suit has been filed, finds equitably to be due for the services theretofore rendered by the decedent under this contract, such compensation to be a fair proportion of the aggregate fee or fees awarded under this contract."

On September 28, 1961, a brief in opposition to the amended petition for allowance of attorneys' fees was filed in behalf of heirs of Kenneth R. L. Simmons, namely Newton Day Simmons and Sara Simmons Hertz. While no objection is made to the allowance of the aggregate attorneys' fees, counsel for these heirs in said brief urge that this Commission does not have jurisdiction to determine a division of attorneys' fees.

This Commission has consistently held that it does not have jurisdiction to divide fees among attorneys. The Shoshone Tribe v. United States, 6 Ind. Cl. Comm. 636; Coeur d'Alene Tribe v. United States, 6 Ind. Cl. Comm. 684; Chickasaw Nation v. United States, 121 C. Cls. 41; and see unpublished per curiam "Opinion and Findings Concerning Attorneys' Fees * * *" in Docket No. 154, The Kootenai Tribe v. United States, decided August 16, 1960, by this Commission. In the Coeur d'Alene case the attorneys petitioning for allowance of attorneys' fees asked the Commission to determine the value of Mr. Simmons' services up to the time of his death, Mr. Simmons having been the original contract attorney in that case also. The Commission, as stated, held it had no jurisdiction to divide fees among attorneys.

Petitioning attorneys in this case contend that the prior holdings of this Commission which hold that it does not have jurisdiction to apportion fees rely solely upon the decision of the Court of Claims in Chickasaw Nation v. United States, 121 C. Cls. 41. That case, counsel points out, concerned the claim for services for deceased attorneys who were never parties to the contract under which litigation was instituted and prosecuted before the Indian Claims Commission. Petitioner, the attorney of record in the present case, contends that the Chickasaw case presented an entirely different fact situation. In the instant case, it is urged, the question involves jurisdiction to divide fees among attorneys under contract to prosecute the claim before the Commission, and that the Commission does have such jurisdiction under Section 15 of the Indian Claims Commission Act, 60 Stat. 1049. In support of this

contention, great stress was placed in the hearing on allowance of attorneys' fees in the decision of the Court of Claims in Beddo v. United States, 28 C. Cls. 69. The attorneys in the instant case contend that the decision of the Court of Claims in the Beddo case is precedent for determining that under language such as is found in Section 15 of the Indian Claims Commission Act there is the inherent power to apportion fees. In the Beddo case the Court was concerned primarily with motions filed by assignees or creditors of the claimants' attorneys therein who were attempting to become parties to proceedings which were to be had with respect to the allowance of attorneys' fees in a claim brought under the Indian depredation act of March 3, 1891. The Court in dismissing the motions held that under the depredation act it could make allowances of fees only to claimants' attorneys who had actually appeared and could take no notice of their assignees or creditors. The court also stated that "Where several attorneys have, at different times, appeared for claimants, their fees will be apportioned on the entry of judgment in proportion to the value of their services to the claimants." (Underscoring supplied). The Beddo case did not divide any fees. It is true the Court stated it would apportion fees where several attorneys appeared at different times but this was obiter dicta since the question of division of fees was not then before the court. It would appear that the Court probably was speaking of attorneys who had worked upon a claim under separate contracts at different times or as in the Beddo case itself where the original attorney had received a power of attorney from the claimant with power of substitution which was invoked in that

case with the resulting appearance at different times of several attorneys.

In any event, the decision of the Court of Claims in the Chickasaw case, supra, is the latest pronouncement of that Court and it deals specifically with the Indian Claims Commission Act. In deciding the Chickasaw case the Court did review the cases pertaining to jurisdiction to allow fees including the Beddo case. This Commission believes the language of the Court of Claims in the Chickasaw case is clear, and controlling in the instant case. The Court of Claims decided:

Neither the Indian Claims Commission nor this court has jurisdiction to apportion fees among disputing attorneys or to make allowances for fees for anyone except the attorneys of record. /citing cases/

The paragraph in appellee's 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. (Underscoring supplied)

In commenting further on the jurisdiction of the Commission the Court of Claims stated:

The Commission was authorized to make allowance of fees only to attorneys of record, but in doing so is permitted to make the determination sufficient to cover compensation for all the services rendered in the preparation and prosecution of the case. Apparently because of the complications and delays that would arise the Commission has no jurisdiction to settle disputes between attorneys. That question is left to the good faith and sense of fairness of the attorneys of record, or for action in a forum having jurisdiction. (Underscoring supplied)

Admittedly, if Simmons had lived, this Commission would have had no jurisdiction to have settled a dispute among the contract attorneys in

This case and the fact of his death does not endow the Commission with jurisdiction it did not formerly possess. The Commission has no jurisdiction to divide the fee as requested in this case. Nor does the Commission, for the reasons already stated, have authority to award the aggregate fee to Wiggenghorn as the attorney of record as trustee for all attorneys who have an interest in this proceeding as requested by petitioner. Section 15 of the Indian Claims Commission Act does not grant the Commission jurisdiction to divide fees. The duties of the Commission in making an award of attorneys' fees where the contract calls for a stipulated per cent of recovery are in reality ministerial in character.

Wm. M. Holt
Associate Commissioner

We concur:

Arthur V. Watkins
Chief Commissioner

T. Harold Scott
Associate Commissioner