

BEFORE THE INDIAN CLAIMS COMMISSION

THE NORTHERN PAIUTE NATION AND THE BANDS)
 THEREOF, EX REL. WALTER VOORHEES, AVERY)
 WINNEMUCCA, MARK JONES, FRANK JOHN,)
 ANDREW DICK, DEWEY SAMPSON, HASTINGS)
 PANCHO, WILLIE STEVE, FRANK KAISER,)
 ALBERT ALECK, HARRY SAMPSON, ANN)
 DOWINGTON, ROSS HARDIN, OCHO WINNEMUCCA;)
 THE WALKER RIVER TRIBE OF THE WALKER RIVER)
 RESERVATION; THE PYRAMID LAKE TRIBE OF THE)
 PYRAMID LAKE RESERVATION: THE YERINGTON)
 PAIUTE TRIBE OF THE YERINGTON RESERVATION;)
 THE RENO-SPARKS INDIAN COLONY; THE PAIUTE)
 SHOSHONE TRIBES OF THE FALLON RESERVATION;)
 THE FORT McDERMITT PAIUTE SHOSHONE TRIBE,)

Petitioners,)

v.)

Docket No. 87)

THE UNITED STATES OF AMERICA,)

Defendant.)

Decided: June 14, 1962

Appearances:

Robert W. Barker of
 Wilkinson Cragun & Barker
 Amicus Curea

I. S. Weissbrodt, and
 Abe W. Weissbrodt,
 Attorneys for Petitioners.

Bernard M. Newburg and
 Mr. Assistant Attorney General,
 Ramsey Clark, Attorneys
 for Defendant.

OPINION OF THE COMMISSION

Watkins, Chief Commissioner, delivered the opinion of the Commission.

On March 23, 1962, the Attorney of Record for the tribal petitioners
 in the above docket filed a "Petition For Allowance of Compensation for
 Expert Services." In this petition we are asked to order a deduction

and payment from the final award of the sum of \$20,000, which sum

" . . . has been incurred for compensation of Robert R. Nathan Associates Inc., for its services rendered on behalf of the petitioners, in accordance with a certain contract made and entered into by Robert R. Nathan Associates, Inc., with the petitioner tribes, as approved by the authorized representatives of the Secretary of the Interior."

Attached to this petition is a lengthy statement in justification of the allowance of the sum sought to be charged against this award, as well as a detailed argument by counsel against applicability of the rule laid down in the Commission's recent Crow decision covering contracts of similar purpose and content.^{1/} There is also attached to this petition the affidavit of Robert R. Nathan in which he sets forth in detail the services rendered by him and his group under their contract with the petitioners.

The Nathan contract was concluded and approved by the governing council of the six tribal petitioners in July of 1959. Thereafter the Nathan contract was submitted to the Interior Department for approval and validation pursuant to the statutory requirements of Section 2103 of the United States Revised Statutes, 25 U.S.C. 81.

By letter to the Area Director at Phoenix, Arizona, dated September 18, 1959, the then acting Commissioner of Indian Affairs reviewed the proposed Nathan contract, noting among other things that "The proposed agreement

^{1/} The Crow Tribe of Indians v. United States, 10 Ind. Cl. Comm. 228.

The Commission would like to point out that, although we decried the use of contingent witness fee contracts in the Crow case as being against public policy and unenforceable, we did not wish to imply that expert witnesses who have such contractual arrangements are in any manner disqualified in testifying before the Commission. However, the Commission believes further that it is entitled to a full disclosure of any expert witness' fee arrangements in order to weigh against his credibility any interest such witness may have in the final outcome of the litigation.

provides that the compensation of the appraisers is contingent upon a recovery for the groups," and then stated in conclusion,

We have carefully considered the matter and believe it to be to the best interest of the Indians to approve the proposed contract between the various bands of Paiute Indians and Robert R. Nathan Associates. The original of the agreement bearing our approval is enclosed for the records of your office. 2/

As set forth in the affidavit accompanying the petition herein, Robert R. Nathan stated that he rendered services under that contract in behalf of the six tribal petitioners during the two year period from July 1959 to July 1961. During the summer of 1961 a settlement was accomplished concerning all issues between the parties with respect to "Area III" or the "Snake" tract, and on July 3, 1961, this Commission entered a final judgment awarding the tribal petitioners the sum of \$3,650,000 as additional compensation for said "Snake" tract. 3/ Under Public Law 87, 332, approved September 30, 1961, Congress appropriated the sum of \$3,650,000 to satisfy the judgment, and said monies were thereafter credited in the Treasury of the United States to the account of the "Snake or Paiute Indians of the Oregon Area."

Due to the events leading up to and culminating in our recent Crow decision, this Commission has entertained a growing concern with the general subject of expert witness fee arrangements. We are reminded that in the past this Commission has approved, rightly or wrongly, certain procedures which

2/ Pet. Ex. No. 1

3/ This "Area III" or "Snake" tract, is that area identified in Nathan Associates' "Contract of Employment" on p. 2(2), p. 4(1-A), and on p. 8(c) as the "Northernmost Area."

have been developed over the years and which have been considered by the tribal attorneys as the most expeditious way for handling collateral matters that are brought before us for consideration. The manner in which the payment of expert witness fees and expenses has been handled in the past is considered by these attorneys as the routine and customary way to proceed. Indeed, the efficacy of these methods may well rest upon custom and expediency and nothing more, and it is this latter possibility which has raised the question in the Commission's mind whether or not we have the statutory right to award witness fees and expenses under such an arrangement as provided in the Nathan contract.

A fair reading of the Nathan contract shows clearly that it is concerned exclusively with the contractual rights and duties of the tribal petitioners herein, the parties of the first part, and Nathan Associates, the party of the second part. In no way, shape or form, are the contract or tribal attorneys liable to Nathan Associates for these expert witness fees and expenses.

Payment of the expert fees and expenses is sought under the provisions of Section 15 of the Indian Claims Commission Act which section on its face seems to deal exclusively with matters involving the attorneys and their fees and reimbursable expenses, that is, their own personal monies actually advanced or obligated by them for the benefit of their clients. Counsel admits that attorneys for Indians should be compensated for such advances, but also takes the position that all other reasonable fees and expenses incurred in the prosecution of the claim, either expressly or

impliedly, are recoverable under Section 15 of our Act. For convenience, we shall quote in full the one sentence of Section 15 which refers to the attorney fees and expenses.

"Attorneys of Claimants; selection, practice and fees . . .

. . . The Fees of such attorney or attorneys for all service rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, unless the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, be fixed by the Commission at such amount 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, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim; but the amount so fixed by the Commission exclusive of reimbursements for actual expenses, shall not exceed 10 per centum of the amount recovered in any case . . ."

(60 Stat. 1053, 25 U.S.C.A. 702)

The Commission sought further enlightenment on the matter by calling for additional argument from counsel of record in this case, with special emphasis on the question of the Commission's jurisdiction and authority to award the Nathan Associates' fees and expenses under their tribal contract, since these fees and expenses were not the tribal attorneys' expenses but those of their client, and said attorneys are not liable in any way for their payment. Apart from citing the past acts of the Commission and the decisions of the Court of Claims in construing certain jurisdictional acts covering the payment of fees and expenses, no new matters were brought to the attention of the Commission. The gist of counsel's argument in support of the Commission's jurisdiction to award the Nathan Associates' fees and expenses is simply that Section 15 of the Act lends itself to

such a broad interpretation as to include, besides attorney's fees and out-of-pocket expenses advanced, all other reasonable expenses incurred in the prosecution of the claim.

Our jurisdictional doubts that Section 15 is subject to counsel's interpretation is predicated on several factors. Besides the language in Section 15 and its legislative history, the Commission considered the existing law governing contracts with Indian tribes as set forth in Sections 2103 and 2104 of the Revised Statutes (25 U.S.C. 81, 82), which statutes considerably antedate the enactment of the Indian Claims Commission Act. We also considered the applicability of our recent decision and order in the case of The Pottawatomie Tribe of Indians v. United States, Docket 15-J (In re claim of Lucile Bailey Mahieu for services and expenses), and the Court of Claims order of January 22, 1962, dismissing the appeal from the Commission order of February 10, 1961 (Ct. Cls. App. No. 8-61), wherein the Court of Claims apparently approved this Commission's dismissal of the petition of an expert witness for fees and expenses against the Pottawatomie Tribe on grounds that we lacked jurisdiction over the claim under Section 15 of our Act. We shall discuss this case in greater detail later on.

The Commission, of course, appreciates the fact that it is a tribunal of limited jurisdiction. Congress has given it statutory authority to do a specific job and in a specific way. Its authority being exclusively statutory, it has no legal right to engage in extra judicial exercises which are not clearly sanctioned by Congressional authority. It is elementary that, if this Commission has no jurisdiction of the subject matter upon which it assumes to act, then the proceedings are absolutely void in the

strictest sense of the word.

We therefore cannot agree, as counsel would apparently have us do, that, because this Commission has assumed jurisdiction over such matters in the past and the jurisdictional question has never been previously raised, such assumption on our part in some way is conclusive on this entire question whereas now the Commission for the first time is not satisfied that it does have the requisite jurisdiction. A wrongful assumption of jurisdiction over a period of time may be somewhat habit forming, but certainly does not validate any of the proceedings. The Commission is competent to decide its own jurisdiction in a given case, and can recognize a want of jurisdiction over the subject matter even if no objection is made by the parties.

At this point we wish to state, that the Commission finds no compelling reason to be bound by the decision of the Court of Claims in the case of The Alcea Band of Tillamooks et al., v. United States, 121, C. Cls. 173 (1951), in which the Court was passing upon the jurisdictional requirements of the particular jurisdictional act that brought the Alcea matter before the Court and not any of the provisions of the Indian Claims Commission Act. Counsel has placed a great deal of emphasis on the Court's interpretation of Section 3 of that act as in some way binding upon this Commission in construing the meaning of Section 15 of our Act. ^{4/} As we previously said, this commission feels that at least ab initio it is competent to perform that

^{4/} This Commission believes that the language in Section 3 of the Jurisdictional act in the Alcea case lends itself to a much broader interpretation than Section 15 of our Act, and that the Court of Claims took full advantage of such interpretation.

"Sec. 3. That upon final determination of such suit, or suits, the Court of Claims shall decree such fees not exceeding 10 per centum of the amounts recovered as it shall find reasonable to be paid the attorney or attorneys employed therein by said Indians or bands of Indians under contracts negotiated and approved as provided by existing law, together with all necessary and proper expenditures incurred in the preparation and prosecution of the suit or suits." (Act of July 26, 1936, P.L. 332, 49 Stat. 801)

task in this case, and can do so based upon what is presently before us.

Turning once more to the pertinent provisions of Section 15 of our Act, which we have set out above, the language in the judgment of this writer is plain and unambiguous in that this section concerns itself only with the fees and actual expenses advanced by the attorney out of his own funds in the prosecution of the case. If these attorney's expenses are actually paid or firmly obligated to be paid by the attorney, and are reasonable, they should come out of the final award, along with his fee for services under his contract of employment. There seems to be no dispute on this point. This is now established procedure in all applicable cases.

After a fair reading of all the pertinent language in Section 15, we cannot see how this portion of our Act impliedly, as counsel argues, deals with more than the fees and actual reimbursable expenses advanced by the attorneys. For it can only be by necessary implication that such authority to deal with other than attorneys fees and expenses so advanced can be read into Section 15, and specifically into the phrase,

" . . . , plus all reasonable expenses incurred in the prosecution of the claim; . . . "

The Commission in determining the abstract question of its jurisdiction over the present subject matter, did not limit its inquiry to the above phrase alone. Indeed, it is improper in the art of statutory construction, to take a few words from the context of the statute, and, with them thus isolated, attempt to determine their real meaning.^{5/} The Commission considered the whole Act, as well as existing law, in construing this particular section in order not

^{5/} See United States v. American Trucking Association, 310 U.S. 534.

to give undue effect and meaning to particular words or phrases. The Commission sought further aid in the legislative history of the Indian Claims Commission Act. While little was said concerning Section 15, it was clear and emphatic enough in our judgment to support the Commission's final determination.

Before delving into the legislative history the Commission examined the existing law governing generally the writing of contracts for services rendered Indian tribes. We have referred to Sections 2103 and 2104 of the Revised Statutes, now codified into Sections 81, as amended, and 82 of Title 25, U.S. Code. Section 81 of Title 25 insofar as pertinent reads as follows:

"§ 81. Contracts with Indian tribes or Indians

No agreement shall be made by any person with any tribe of Indians or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, . . ." 6/

Historically, the above statute was derived from a provision of Section 3 of the Act of March 3, 1871 (16 Stat. 570), which act was the Indian Appropriation Act for the fiscal year 1872, and also from the provisions of Sections 1, 2 and 3 of the Act of May 21, 1872 (17 Stat. 136, 137) entitled "An Act Regulating the Mode of Making Private Contracts with Indians."

Section 82 of Title 25 governs the payment of monies under the contracts approved under Section 81. The provisions of Section 82 also derived from Section 3 of the Act of May 21, 1872, which we have cited above, read as follows:

"§ 82. Payments under contracts restricted.

. . . .; and no money or thing shall be paid to any person for services under such contract or agreement, until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact in detail, and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied

6/ The amendment of August 27, 1958, P. L. 85-77, 72 Stat. 927 deleted from the original act the requirement that contracts with Indian tribes be executed before a judge and the required certification by the judge to certain contractual elements.

with or fulfilled; if so, the same may be paid, and, if not, it shall be paid in proportion to the services rendered under the contract."

It goes without saying, the Nathan Associates needed the prior approval of the Secretary of Interior pursuant to provisions of Section 81 of Title 25, before they in fact had a valid contract with the tribal petitioners. This they obtained on September 18, 1959. Now that said contract apparently has been performed, do not the provisions of Section 82, Title 25, relating to payment for services equally apply, or does Section 15 or our Act by implication now control?

By the enactment of Sections 2103 and 2104 of the Revised Statutes, Congress primarily intended to protect the Indians from entering into improvident contracts, but nevertheless, without prejudicing any of the other contracting parties. As the Court of Claims commented in an early case,

"It will be observed that under the provisions of this statute /S. R. 2103/ resort to the courts and further legislation is unnecessary to obtain payment of fees as herein provided." (Parenthetical matter added) ^{7/}

The courts have also acknowledged the fact that Congress at times has legislated to remove particular cases from the control of the existing law governing Indian tribal contracts. ^{8/} This it has a perfect right to do, but, in so doing, it has the effect of repealing the existing law where applicable. Where these things have taken place the Courts have noted the clear manifestations of Congressional intent to accomplish such an end.

^{7/} Butler v. United States, 43 C. Cls. 497 (1908)

^{8/} Butler v. United States (supra)
United States v. Crawford, 47 F. 561

Such Congressional conduct is only consistent with the general rule that repeals by implication are not favored in the law.

The Commission therefore views Section 15 of our Act as a further instance where Congress has expressly sought to remove, to large extent, but not altogether, the fixing of attorney fees and the expenses he has paid, or bound himself to pay for his client, from the control and operation of the existing law and place it under the Indian Claims Commission.

To support counsel's argument, we must find further in Section 15 the requisite Congressional intent by implication to accomplish the same thing with respect to the contracted fees and expenses of others that are customarily expenses of the litigants. We shall now turn to the legislative history of the Indian Claims Commission Act.

The Commission has carefully reviewed the legislative history of our Act, and quite frankly has found nothing in support of the contention of petitioner. From our study we found first of all, that in the course of the hearings upon the several bills which had been introduced before the enactment of our present law, Congress was apprised of the fact that quite often the tribal litigants were unable to finance their claims against the government, and that it fell to the lot of their attorneys to advance the necessary costs and expenses out of their personal funds. Such costs and expenses were reimbursed to the attorneys if the litigation was successful. During the first session of the 79th Congress two bills, H. R. 1198 and H. R. 1341, were introduced in the House of Representatives by Congressmen Stigler and Robertson, respectively, designed to create an Indian Claims

Commission. They were substantially similar in content. With respect to fees and expenses of the Indian attorneys they merely stated that "Such attorney shall be limited to a fee of 10 per centum of the recovery plus disbursements."

Hearings were held on these two measures before the House Committee on Indian Affairs on March 2, 3 and 28; June 11, and 14, 1945. Present at the June 11th hearing were eight members of the Committee, including Congressmen Stigler and Robertson, authors of the bills under consideration. Hearings were then being conducted by the Committee on these two bills. Also present were Felix Cohen, well known authority on Indian law and Associate Solicitor, Department of Interior, representing that Department, and Ernest L. Wilkinson, a specialist in Indian claims litigation for more than 10 years, and who for many years had been appearing before Congress as the representative of numerous Indian tribes who were seeking the enactment of an Indian Claims Commission Act.

Mr. Wilkinson was the first witness at the June 11th hearing. He analyzed various sections of the bills before the Committee and then with reference to the section dealing with "Representation by Attorneys," and providing for the compensation of those representing Indian claimants, the following colloquy took place:

"Mr. Wilkinson: . . .

Now on page 7, under the heading 'Presentation by Attorneys,' I have no comment on the first sentence. I would substitute something for the second sentence and I would substitute this:

Valid existing attorneys' contracts for the prosecution of claims against the United States shall constitute sufficient authority for the presentation of claims before the Commission. Attorneys' con-

tracts partially or wholly contingent on recovery shall be limited to a fee of 15 per centum of the recovery plus disbursements.

Many of us already have contracts approved by the Secretary of the Interior under which we have been working for years, and I think we want to be able to continue right along under those contracts to represent the Indians. This may contemplate the securing of new contracts and I think that is unnecessary.

Mr. Arnold: What do you mean by 'plus disbursements'? What do you mean by that?

Mr. Wilkinson: Under existing law most of these tribes have nothing and the attorneys have to pay out the money themselves, advance the cost, and if they do not win they do not get the cost paid back. As I said, in the Northwestern Shoshone case I am out \$12,000. Now certainly if the attorney wins he should get back his out-of-pocket expenses.

Mr. Arnold: What do you mean by 'get out-of-pocket expenses'? Pay Indian expenses?

Mr. Wilkinson: Moneys I have paid investigators, moneys I have paid reporters for the taking of testimony, and things of that kind.

Mr. Arnold: Is the Bureau of the Budget concerned in regard to the payments of moneys made by this Commission? Is there no chance for the Budget Bureau to investigate a fee paid or anything else? Does the Commission set itself up to pay its own bills without being supervised?

Mr. Schwabe: The court approves the attorney fees. The Commission, I assume, would approve the fees and disbursements.

Mr. Wilkinson: We have to prepare a statement of all the disbursements we have made.

Mr. Arnold: Who passes on your disbursements and decides whether they are just or not?

Mr. Wilkinson: At the present time the Secretary of the Interior.
... " 9/

In analyzing the meaning and significance of that colloquy, it should be noted that part of the amendment offered by Mr. Wilkinson to the two bills under consideration dealing with compensation for attorneys representing Indian litigants, was so vague and general in nature, especially the last two words "plus disbursements," that an explanation was immediately requested by Mr. Arnold, a member of the Committee. Understandable was the limitation on the contingent fee the attorney was to receive out of the recovery, but "plus disbursements" appeared to be adding something new to the attorney's compensation. Quite naturally the Committee wanted an explanation and Mr. Wilkinson responded with a very definite, concrete answer.

"Most of the Indian tribes have nothing", he said, (we repeat for emphasis) "and the attorneys have to pay out the money themselves, advance the cost, and if they do not win they do not get the cost paid back." And then he proceeded to give a concrete illustration from his own experience in prosecuting Indian claims before the Court of Claims. Said he,

"As I said, in the Northwestern Shoshone case I am out \$12,000. Now certainly if the attorney wins he should get back his out-of-pocket expenses."

This statement very logically provoked another question by Mr. Arnold:

"What do you mean by 'get out-of-pocket expenses'?
Pay Indian expenses?"

The answer:

"Moneys I have paid investigators, moneys I have paid reporters for the taking of testimony, and things of that kind."

Again Mr. Wilkinson clearly and decisively provided definite and concrete examples of what was meant by "plus disbursements" in his proposed amendment to the bills before the Committee. Can there be any doubt on this score?

We think not.

Again, Mr. Arnold came up with another question which would naturally follow:

"Is the Bureau of the Budget concerned in regard to the payment of moneys made by this Commission? (Moneys ordered paid) Is there no chance for the Budget Bureau to investigate a fee paid or anything else . . .?"
(Parenthetical material supplied)

Another Congressman, Mr. Schwabe, broke in with an answer:

"The court approves the attorney fees, the Commission, I assume, would approve the fees and disbursements."

Then Mr. Wilkinson (evidently referring to his Indian claims practice before the Court of Claims) added:

"We have to prepare a statement of all disbursements we have made."

Can there be any doubt that he was still talking about his own personal money he had disbursed because, "the Indians were without funds"?

Then the final question by Mr. Arnold:

"Who passes on your disbursements and decides whether they are just or not?"

Mr. Wilkinson:

"At the present time the Secretary of the Interior."

That was in accord with the law in effect in 1945 when the hearing was held. Section 15 of our Act expressly relieves the Secretary of the Interior of the responsibility of passing upon the type of disbursements described by Mr. Wilkinson, where the same are made in connection with tribal claims before this Commission. Furthermore, it appears to be the only explanation offered at any time during the hearings on the bill which finally became law.

It is also worthy of note that neither the authors of the two bills under consideration by the Committee, nor Mr. Cohen, Assistant Solicitor for the Interior Department, took exception to the interpretation placed on the clause "plus disbursements" by Mr. Wilkinson. Later at the same hearing Mr. Cohen testified for the Department of the Interior. He stated:

" . . . We have a report recommending a number of minor amendments in the bill. In a large part those amendments have been covered by Mr. Wilkinson's suggestions. I think a good many of the points that I have are points which have been covered, perhaps in slightly different language; but the points that he has made are in large part points with which the Department would agree." 10/

In a report filed during the same hearing, the Interior Department offered a series of amendments to the proposed legislation. Among the suggested changes was an amendment striking out the aforementioned language concerning attorney fees and expenses, and substituting in lieu thereof the following:

" . . . The fees of such attorney or attorneys shall be determined by the Commission, but shall be limited to a reasonable amount not exceeding, in the aggregate, 10 per centum of the recovery, plus the expenses necessarily incurred in representing the Indians . . ." 11/ (Under-scoring supplied)

According to the Interior Department the substitute language was for classification purposes and was intended to,

. . . increase the precision of the definition of the allowances that may be made to attorneys for their fees and expenses . . .

10/ p. 114, Ibid.

11/ p. 122, Ibid.

Thereafter on October 25, 1945, Chairman Henry Jackson of the House Indian Affairs Committee introduced a substitute bill, or "clean bill," H. R. 4497, which measure incorporated some of the suggested amendments proposed during the hearings on two measures previously introduced, H. R. 1198 and H. R. 1341. Section 15 of H. R. 4497 contains the following language with respect to attorney fees and expenses:

. . . The fees of such attorney or attorneys for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall unless the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, be fixed by the Commission at 10 per centum of the amount recovered, plus all reasonable expenses incurred in prosecution of the claim, except that the Commission may award a lesser sum if, in accordance with standards obtaining for prosecuting similar contingent claims in a court of law, it finds such to be adequate compensation for services rendered and results achieved, considering the contingent nature of the case. 12/

The bill was referred to the House Committee on Indian Affairs and reported out favorably on December 20, 1945. The Committee report made no mention of attorney fees or expenses.

On May 20, 1946, H. R. 4497 came up for passage on the floor of the House. At that time Chairman Henry Jackson offered from the floor an amendment to Section 15 of the bill. Beginning after the word "at" in the phrase "be fixed by the Commission at," he suggested striking all the language to the end of the sentence (supra) and substituting in lieu thereof the following:

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, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim; but the amount so fixed by the Commission, exclusive of reimbursements for actual expenses, shall not exceed 10 per centum. 13/

Chairman Jackson's only comment in support of his amendment is that,

It strengthens the provision relating to allowance of attorneys' fees and places the burden of proof on the attorney in making the necessary allowance.

The amendment was agreed to without further debate, and immediately thereafter H. R. 4497, as amended, was passed by the House of Representatives and sent to the Senate.

On June 1 and 12 and July 13, 1946, hearings on H. R. 4497 were conducted before the Committee on Indian Affairs, United States Senate. The only suggested amendment to Section 15 of H. R. 4497 in the course of the hearings was put forth by Mr. Ernest Wilkinson. His proposed amendment sought to obtain prior Congressional approval to expend tribal funds to cover the costs of litigation to the extent they are needed. Such moneys could be used for such things as in the words of Mr. Wilkinson's amendment,

. . . for reimbursing attorneys for such costs and expenses already paid. 14/

The amendment was rejected by the Senate Committee.

On July 15, 1946, the Senate Committee reported out H. R. 4497 with amendments thereto but Section 15 of the bill was not amended. On July 17,

13/ P. 5322 Congressional Record -- House, May 20, 1946

14/ Tr. 14, Hearings before Committee on Indian Affairs, United States Senate, June 1, 1946.

1946, H. R. 4497 as amended, was passed by the Senate. Thereafter the bill was sent to conference and was reported out on July 27, 1946. This conference report was read and adopted in the Senate on July 22, 1946 and in the House it was read and adopted on July 29, 1946. The President signed it into law on August 3, 1946.

We find, therefore, that Chairman Jackson's amendment on the floor of the House to H. R. 4497 survived intact from the time the bill passed the House and until it finally became the law. As far as this Commission is concerned, there is nothing to be found in the legislative record preceding passage of the Indian Claims Commission Act, that would indicate that Congress in considering the purposes of Section 15 of the Act, had anything else in mind that the fees plus actual expenses advanced by the attorneys to aid their impecunious clients.

We see no valid legislative reason to accept any broader interpretation of Section 15 than what is necessary to include what we find to be expressly provided for therein. To reach out beyond the clear Congressional expression in attempting to fix in the hands of this Commission those duties and obligations which have for years been the clear responsibility of the Secretary of Interior under existing law, is in our judgment an unnecessary and unwarranted implication of jurisdiction. Also, there is no necessity of any kind to have such an interpretation in order to make the Indian Claims Act workable and equitable.

Much has been said by counsel herein with respect to what this Commission has done in the past in permitting payment of expert witness fees and expenses out of the final award, and where apparently the attorneys were not obligated to meet these fees and expenses. We can only confess error

if we have made any unwarranted assumption of jurisdiction over these matters. As has been pointed out, the jurisdictional question was never raised as a direct issue in any of the cases cited by petitioners' counsel. Ordinarily reasonable expenses advanced by counsel have been allowed without question and such reasonable allowances will not be questioned in this proceeding.

There is one case to which no reference was made at the recent hearings, and which counsel may have overlooked. We refer again to Docket 15-J, The Pottawatomie Tribe of Indians et al., v. United States (In re: the claim of Lucile Bailey Mahieu for Services and Expenses).

The matter cited above involved the claim of one Lucile Bailey Mahieu for compensation for services rendered and for reimbursement of expenses in Docket 15-J. A petition was filed May 6, 1960, on her behalf by an attorney who was not the attorney of record in the case. Her petition was captioned as follows:

"Claim of Lucile Bailey Mahieu against The Pottawatomie Tribe of Indians et al., Claimant vs. The United States of America, Defendant, Docket No. 15-J, Consolidated With Docket No. 71-A, For Services Rendered and Expenses Advanced and Paid Out By Her For Them Under A Contract of Employment For The Same With Robert Stone, Their Attorney of Record, Which Contract of Robert Stone Was Accepted and Acted Upon By O. R. McGuire, His Associate Counsel and Other Attorney in The Said Docket No. 15-J."

We now state in some detail the principal allegations of her petition insofar as pertinent:

. . . that in October 1949 Robert Stone, attorney for the Claimants did enter into a contract with her whereby she was employed to research and study and to report to him on the history and claims of the claimant tribe herein. . .

That he and his associates and the claimants herein were with-

out funds or means to compensate her by cash for her services and necessary expenses incident thereto, that he as their attorney was authorized to employ her and authorized to agree to compensate her adequately for the value of her services rendered and to reimburse all monies expended and advanced by her in connection with her investigations including her traveling and living expenses while engaged in such work. . .

Claimant states that she accepted and performed the contract of employment made with Robert Stone for and in behalf of the Claimants in Docket 15-J and other Dockets . . .(and) . . . did render services in relation to the employment during the years of 1949 and up to and including June 18, 1953

Claimant states that Robert Stone at the time of her employment did advise her that he would file a claim for her covering such compensation and expenses as would be adequate compensation and full reimbursement of expenses, in any awards made in and on behalf of the claimants the Pottawatomie Tribe of Indians et al.,

Notwithstanding the agreement and promises of payment for services rendered by Mrs. Lucile Bailey Mahieu in support of said claims of said Indians in Docket Nos. 15-B and 15-J, neither Robert Stone nor O. R. McGuire filed or presented her claims as a part of the expenses as they had promised to do for her research done and expenses expended for services rendered on the behalf of said Indians, in Docket Nos. 15-B and 15-J. . .

Mrs. Mahieu then closes her petition with a prayer asking total reimbursable expenses out of the final award in the amount of \$4,312.43, and total compensation for services at a rate of \$30.00 per day for a total of 505 days work.

In simple terms, the allegations in Mrs. Mahieu's petition, if taken as true, indicate her employment as a researcher by the tribal attorney pursuant to provisions of his contract with the Pottawatomie Indians. Mrs. Mahieu's contract for services was oral, and since it was made with the attorney and not with the tribe, it did not need the prior approval of the

Interior Department under the provisions of 25 U.S.C. 81. It appears also that the tribe was impecunious, that the attorneys could not advance her expenses and fee, and that a claim covering her expenses and services would be presented to the Commission for payment out of the final award.

A hearing was conducted on December 19, 1960, before this Commission with respect to the attorney's expenses in Docket 15-J. The item covering Mrs. Mahieu's expenses was presented by Robert Stone Johnson, attorney for the tribal petitioners, who asked that Mrs. Mahieu be compensated out of the award in the amount of \$766.00. It was admitted by petitioners' counsel at the hearing that Robert Stone, now deceased, had apparently hired Mrs. Mahieu, and, although counsel argued that Mr. Stone had no personal obligations to pay Mrs. Mahieu and the obligation was with the Indians to pay Mrs. Mahieu's expenses, this writer, speaking with the approval of his fellow Commissioners, indicated rather strongly that the Commission believed that it was without jurisdiction to entertain the fees and expenses of others than attorneys, which expenses the attorneys had paid or had committed themselves to pay. We would like to quote from the record of that hearing the relevant portions which clearly state our views on this matter. On pages 106 and 107 of the transcript there is the following:

Chief Commissioner Watkins: I think that the position of the Commission with respect to items of this kind is that if you or your predecessor in interest, your grandfather, in this case, authorized this expenditure and employed this person, that you might properly submit that as a voucher owing to you, but as far as we are concerned, we don't recognize any third party before this Commission.

Mr. Johnson: Well, that is precisely what we have done.

Chief Commissioner Watkins: Well, then, if you have taken that position -- because it is important with respect to other claims such as matters which have already been filed with this Commission.

We don't think we have jurisdiction over these matters such as the one you are speaking of.

And then beginning on page 109 and continuing through page 111 there is the following colloquy between this writer and attorney Johnson:

Chief Commissioner Watkins: Well, as I say, we take the position that whatever application may be made, that if there is an obligation it would be between counsel and Mrs. Mahieu. She may have expended time or effort because she had some contract or relationship with the attorneys in behalf of the Indians, but we are not going to pass directly on her claims here at all because we don't think we have the jurisdiction. She has no standing here as a lawyer, asking for attorney's fees or anything of that type.

That is the position we have been compelled to take because in these cases counsel have a right, in behalf of the Indians, to employ these people where necessary, as witnesses, and have them do special or extra work for them, if they want to do so, and, if work has been rendered by this person and she has not been paid, in order to get a remedy for that, she would have to proceed against the attorney or his estate, who hired her.

Now, we are willing to allow fees -- I don't mean fees; I mean expenses that the attorneys incurred and the attorney is the one who is primarily responsible as the person who employed her and he has to assume that liability and present it to the Commission and we will allow any fair expense.

Mr. Johnson: We have done that, Mr. Chairman.

Chief Commissioner Watkins: You have gone so far as the \$766 and you assume it?

Mr. Johnson: That is correct.

Chief Commissioner Watkins: And the check would be made out to you to cover that amount if it is finally allowed?

Mr. Johnson: And that check would, of course, be immediately sent to Mrs. Mahieu.

Chief Commissioner Watkins: That is part of your whole expense and there would be no special check made to Mrs. Mahieu.

Mr. Johnson: No, but the amount of her check would immediately be forwarded by us to her.

Chief Commissioner Watkins: You would have to do that and if you didn't she would have a case against you for failure to pay.

We want to make that clear because we are not taking jurisdiction for something we don't think we have any jurisdiction over -- to recognize her as counsel or some sort of special witness in an investigation. If we should have any special witnesses for investigation purposes, we would hire them ourselves and they would be paid out of our regular appropriation but, if counsel will not approve her work or claim for any more than a certain sum, then, as far as we are concerned, that is binding and the person then has a right, of course, to recover from the attorneys if she can establish her case as a matter of contract.

However, we are not going to be put into the position where we recognize people independently of counsel, such as any employee who comes in here to file a petition and ask us to pass on matters that are beyond the jurisdiction of this Commission -- except, probably, to dismiss a petition of that sort.

Now you may proceed.

Mrs. Mahieu was represented at this hearing by Mr. Paul M. Niebell, an attorney of considerable experience before this Commission. Mr. Niebell argued contrary to the ruling of the Commission that we did in fact have jurisdiction to hear and decide the claim of Mrs. Mahieu, and that we had awarded similar expert fees and expenses in the past. The Commission however, adhered to its ruling and refused to entertain Mrs. Mahieu's claim on jurisdictional grounds.

In his motion for rehearing, filed January 16, 1961, Mr. Neibell made the identical argument which counsel has made at the hearings on this matter presently before us. ^{15/} In fact, Mr. Niebell recited the same litany of cases from the Court of Claims and this Commission in support of his position, that under Section 15 of our Act this Commission has the requisite jurisdiction to hear and pass upon Mrs. Mahieu's claim as a part of the reasonable expenses incurred in the presentation of the tribal claim.

By order of this Commission dated February 10, 1961, the motion for rehearing was denied. Among other things the Commission stated in its order:

After hearing the argument of counsel, the Commission held that the attorneys for the Prairie Band were the proper parties to present for allowance any claims for expenses incurred in the prosecution of the Prairie band's claim; that the Commission had authority to consider for allowance only the claim of \$766.07 presented by said attorneys for the Prairie Band to pay for the services and expenses of Lucile Bailey Mahieu, and did not

^{15/} The principal point made in Attorney Niebell's "Statement in Support of Motion for Rehearing" is identical with the argument advanced by counsel, if we have read it correctly.

(p.4) "Section 15 of the Indian Claims Commission Act provides that the fees of the attorneys be fixed by the Commission at amounts not exceeding 10 per centum of the amount recovered in any case, and in addition the Commission is authorized to make an allowance for expenses in the following language: 'plus all reasonable expenses incurred in the presentation (prosecution) of the claim.'"

(p.5) "We submit that under this broad language the Commission has full authority and jurisdiction to fix the value of Mrs. Mahieu's services rendered in these Pottawatomie cases and to allow her proper expenses in carrying on this work, under her employment by the original attorney for the Indians, and as Mr. Stone requested to Commission to do as part of the reasonable expenses incurred by said attorney in the prosecution of these claims. Whether the allowance is made directly to Mrs. Mahieu, or paid to the attorney of record for and on her behalf, is wholly immaterial to the right of the Commission to determine the value of her services and make an allowance for her expenses in accordance with the agreement between Mrs. Mahieu and Mr. Stone."

have jurisdiction under Section 15 of the Indian Claims Commission Act to determine the expense claim presented in the petition filed by said Lucile Bailey Mahieu.

Notice of appeal from the final order of the Commission denying the aforementioned motion for rehearing was perfected on June 9, 1961, said appeal from the Commission's holding,

"that it did not have jurisdiction under Section 15 of the Indian Claims Commission Act (60 Stat. 1049) to determine the amount due claimant for services and expenses as a part of the proper and reasonable expenses incurred by Robert Stone (now deceased), the original attorney of record, in the prosecution of the claim of the Prairie Band of Pottawatomie Nation of Indians . . ."

Thereafter the government moved in the Court of Claims to dismiss the appeal and, after the matter was briefed and argued, the Court entered its order of January 22, 1962, dismissing the appeal. The order stated in part that,

Upon consideration thereof, it is concluded that the Court lacks jurisdiction over the appellant's alleged claim. . . 16/

This case would be of singular importance if only for the fact that it had afforded the Court of Claims, the appellate tribunal, the first opportunity to pass upon the requirements of Section 15 of our Act. The Court's brief order dismissing the appeal without qualification shows strong approval of the Commission's jurisdictional stand. As we see it now, this Commission is venturing out on the same jurisdictional limb, but this time with more confidence that the position we have taken herein is sound.

One might argue that the issues surrounding the Mahieu claim were not

16/ United States Court of Claims App. No. 8-61

the same, or that the jurisdictional questions concerning Section 15 of the act were not as clearly defined or presented as they have been by counsel herein in support of the Nathan contract. We think our detailed appraisal of the Mahieu claim shows substantial similarity.* We therefore feel bound to our previous ruling, which was approved by the Court of Claims as has been stated.

In summation, the Commission would like to make it abundantly clear that its action taken this day on this present matter is not to be construed as an instance in which the Commission seeks to avoid any of its important responsibilities under the Indian Claims Commission Act. We are only trying to follow the law. By doing so we can avoid needless time consuming collateral matters that should not rightly be the concern of this body.

It is our considered judgment that our ruling today in no way leaves the petitioner and Nathan Associates without a remedy. As we see it, the Nathan contract is subject to the existing law governing all contracts of this nature with particular reference at this stage to the applicable provisions of 25 U.S.C. 82.

As this Commission sees it, there was never any need, when the Indian Claims Commission Act was enacted, or even now, to change legislatively the present authority for the approval and allowance of expert witness fees from being within the province of the Secretary of the Interior, and to turn that responsibility over to this Commission. There is therefore no necessity to read broad implications into our Act in order to prevent any

* We have recited considerable detail in reporting this proceeding for the reason that the decision was not corcolated generally but only to the parties to the action.

crying injustice. 17/

In this particular case the tribal petitioners and not the tribal attorneys made the contract. The Indians have now obtained a favorable judgment and it has been paid and satisfied. The Indians' judgment money which is now available, is in the custody control of the Secretary of Interior. The Secretary, under 25 U.S.C. 82 has the power and authority to determine whether or not Nathan Associates has performed according to the terms of their approved contracts. If they have, then the Secretary can direct payment out of the judgment funds. 18/ It is then only a ministerial act for the Treasury Department to make the final payment. For 90 years now the Secretary has been charged with the responsibility of carrying on this type of activity, and that office must have gained a great deal of knowledge, experience, and know how to perform this function in the most expeditious and satisfactory manner.

17/ It is this lack of necessity because of the existing law which fully answers counsel's further contention that the Commission's power to award the Nathan fees and expenses lies in its "implied" or "ancillary" authority, which authority is incidentally necessary to the Commission's proper execution of primary powers as directly conferred upon it by Congress.

18/ We note with interest the recent ruling from the office of the Solicitor, Department of Interior, in which he has supplied a broad interpretation of the Secretary's authority under existing rules governing the use of tribal funds for such purposes as may be authorized by the Tribal Governing Board and approved by the Secretary of the Interior. This ruling would apparently relax any existing policy restraints which have been adopted by the Commissioner of Indian Affairs concerning the payment out of tribal funds of fees or expenses due under approved contracts such as the Nathan contract. There certainly seems to be no legal basis for a refusal which would hold up such payment. (See Memorandum of September 21, 1961, Re: Authority of Secretary to Authorize Use of Tribal Funds.)

" It should also be noted that the Senate on June 12 adopted an amendment to the Interior Appropriations bill placing a limitation on the use of Indian Claims judgment funds by Indian tribes. In explaining his amendment Senator Anderson said, "The amendment is not intended to preclude the Secretary of Interior from paying the costs of litigation in accordance with the terms of approved contracts." (Cong. Rec. June 12, 1962, p. 9510)

We therefore conclude that the provisions of Section 15 of the Indian Claims Commission Act, which empower this Commission to fix the attorney fees and to allow all reasonable expenses advanced by the attorney, or for which he is personally liable, are the clear exceptions to the existing law governing contracts made with the Indian tribes. These exceptions in Section 15 were permitted where the attorney had made advances or personal commitments because of the fact that the impecunious condition of the majority of Indian tribes prevented them from bearing miscellaneous legitimate costs of their litigation prior to judgment. These legitimate expenses incurred in the prosecution of the lawsuit (which were described to the Congress by Mr. Ernest Wilkinson during hearings on the proposed legislation) could be borne by the tribal attorneys, and if reasonable, recouped from the final judgment if the lawsuit was successful. Since the fees and expenses of the Nathan Associates, do not qualify as reimbursable items under our interpretation of Section 15 of our Act, this Commission is without jurisdiction to hear and pass upon the allegations of the instant petition, and therefore said petition should be dismissed. An order will be entered to that effect.

Arthur V. Watkins
Chief Commissioner

We concur:

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner