BEFORE THE INDIAN CLAIMS COMMISSION

THE SOUTHERN PAIUTE NATION, ET AL.,)
Petitioners,)
v.) Docket Nos. 88, 330, and 330-A
THE UNITED STATES OF AMERICA,)
Defendant.)

FINDINGS OF FACT ON AWARD OF ATTORNEYS' FEES

On April 6, 1965, attorneys for the petitioners in Docket Nos. 88, 330 and 330-A, the Southern Paiute Nation, et al., filed an application for an allowance of attorneys' fees. On May 7, 1965, the response of the defendant with attached letter and memorandum from the office of the Solicitor of the Department of the Interior was filed. A hearing on the application was held before the Commission on May 13, 1965. The Commission having considered the entire record in these cases, including the contracts of employment of the attorneys, makes the following findings of fact:

1. The final judgment in these cases in favor of the Southern Paiute Nation was entered on January 18, 1965, in the amount of $7,253,165.19. The amount of the judgment has been appropriated by Congress by the Act of April 30, 1965 (P. L. 89-16), and is now held in the United States Treasury.

2. The Indian Claims Commission Act (60 Stat. 1049), under which the claims in these cases were prosecuted, contains the following provision pertaining to the allowance of attorney fees:

> Sec. 15. *** 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 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, ***; 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. ***

3. The applicants in this proceeding are I. S. Weissbrodt of Washington, D. C., one of the contract attorneys and the attorney of record in Docket No. 88, and John S. Boyden of Salt Lake City, Utah, contract attorney and attorney of record in Docket Nos. 330 and 330-A. They seek an award of attorneys' fees on behalf of themselves and all other present and former contract attorneys in these cases, including Abe W. Weissbrodt, David Cobb and James E. Curry of Washington, D.C., and Jay H. Hoag, Rodney J. Edwards and Clarence G. Lindquist (deceased) of Duluth, Minnesota. The obligation to other attorneys who were associated and performed services in these cases under the contracts will be met from the award. The amount of the attorneys' fees for which they apply is $725,316.51 based on 10 percent of the said final judgment of $7,253,165.19.

4. Any attorneys' fees in these cases are payable to the following contract attorneys; John S. Boyden in Dockets 330 and 330-A, and I. S. Weissbrodt, Abe W. Weissbrodt, David Cobb, James E. Curry, Jay H. Hoag, Rodney J. Edwards, and A. Blake MacDonald as Executor of the Estate of

Clarence G. Lindquist contract attorneys in Docket No. 88. However, each of said contract attorneys and A. Blake MacDonald as Executor of the Estate of Clarence G. Lindquist have signed and filed with this Commission a formal consent and request that the attorneys' fee in these cases be paid to John S. Boyden and I. S. Weissbrodt, the attorneys of record, all the contract attorneys having reached among themselves an amicable understanding as to division of the fee.

5. Seven separate bands or groups of Southern Paiute Indians, residing in different scattered communities, in the States of Utah, Arizona and Nevada, engaged the services of the foregoing attorneys to prosecute their claims under the Indian Claims Commission Act. Four attorney contracts were made and approved.

6. Five of these bands namely, the Indian Peaks Paiute Indians of Utah, the Paiute Indians of Koosharem, Utah, the Kanosh Band of Paiute Indians of the Kanosh Indian Community, Utah, the Paiute Indians of Cedar City, Utah, and the Kaibib Indians of Arizona engaged the services of John S. Boyden, Esq., pursuant to a contract dated June 9, 1951 which was approved July 10, 1951 for a ten year term commencing with the date of approval. An extension of this contract for a period of ten years beginning July 10, 1961 was approved on September 17, 1964. A second attorney contract dated August 4, 1951 was made between John S. Boyden and various individual Southern Paiute Indians on behalf of the Southern Paiute Tribe of Indians. This contract was approved on August 10, 1951 for a term of ten years from the date of approval. With the approval of the Bureau of Indian Affairs, John S. Boyden associated partners

and various associates of the law firm of Wilkinson, Cragun & Barker of Washington, D. C., under the contract. Pursuant to said contracts made with John S. Boyden, the petitions in Docket Nos. 330 and 330-A were filed on behalf of the Southern Paiute Nation and on behalf of the individual Paiute groups.

7. The Moapa Band of Indians of the Moapa River Reservation engaged the services of James E. Curry, Esq., by a contract dated January 2, 1948, which was approved on April 29, 1949. The contract provided for a term of five years from the date of approval or until final determination of the claims. James E. Curry, Esq., associated with him under this contract the law firm of Cobb and Weissbrodt (now Weissbrodt, Weissbrodt & Liftin) of Washington, D.C., and Jay H. Hoag and Clarence G. Lindquist of Duluth, Minnesota; and by instrument which was approved by the Bureau of Indian Affairs on April 6, 1953, James E. Curry made an assignment of a one-third interest in the contract to said law firm of Cobb and Weissbrodt, and a one-third interest to Jay H. Hoag and Clarence G. Lindquist. The petition in Docket No. 88 on behalf of the Southern Paiute Nation and its constituent bands and groups was filed pursuant to this contract.

8. The Shivwits Band of Paiute Indians entered into a contract dated May 11, 1954 with I. S. Weissbrodt, Abe W. Weissbrodt and David Cobb of Washington, D.C., and Jay H. Hoag, Rodney J. Edwards and Clarence G. Lindquist of Duluth, Minnesota. This contract, which was approved on October 6, 1954, provided for a term of ten years from the

date of approval. An extension of the contract for a period of one year beginning October 6, 1964, was approved on October 7, 1964. Clarence G. Lindquist died on April 11, 1964. A. Blake MacDonald is the Executor of the Estate of Clarence G. Lindquist duly appointed by the Probate Court, County of St. Louis, State of Minnesota. The Shivwits Band was not joined as a party petitioner in Docket No. 88 because, being a constituent part of the Southern Paiute Nation, its interest was already covered by the petition.

9. Each of said contracts provided, in substance, that any compensation received by the attorneys for services rendered thereunder was to be wholly contingent upon a recovery on the claims, but in no event was the attorneys' fee to exceed ten percent of any recovery or settlement which was realized; and further that the attorneys were to be reimbursed from the amount of any judgment received such actual expenses incurred by them as may be fixed by the Commission.

10. The final judgment in these dockets was entered by the Commission based on a stipulation of settlement which was negotiated by the attorneys for the parties. This settlement was worked out after a variety of complex subsidiary proceedings, including problems of overlapping claims in other cases (among them, the California case), and after a hearing of the issues of Indian title and identifiability of the claimants, and after the filing of proposed findings of fact and brief by the attorneys for the petitioners. No findings on title were made by the Commission and no hearings were held with respect to issues of value or offsets, these having been the subject of the compromise settlement.

Despite the fact that it was not necessary for the attorneys to litigate the issues of value and offsets, the record shows, and the Commission is aware, that by reason of certain unusual factors involved in the nature of the undertaking in these particular docket numbers and the series of extraordinary complications which arose during the litigation, the burdens on the attorneys during the litigation that took place were more onerous than are generally involved in this complex and protracted type of litigation involving aboriginal title claims. Also, the record shows that by reason of special difficulties which were inherent in these cases, greater than usual responsibilities were undertaken by the attorneys in investigating and analyzing the basis for the settlement, in negotiating its terms, and in obtaining the approval of the eight bands of Southern Paiute Indians. Further, it appears that these attorneys who are skilled and resourceful lawyers, achieved substantial results and benefits for their clients in these cases.

11. One of the difficulties and hazards faced by the attorneys at the outset of their employment was the fact that at the time of the original acceptance of employment by the attorneys very little was known about the claimant Indians as they existed prior to the coming of the white man other than that there were small groups or bands of ethnically similar Indians who aboriginally roamed within a vast area in southwestern Utah, northeastern Arizona, southern Nevada and southeastern California. In recent times, these Indians had been gathered into eight small bands or groups and were located in separate communities, five in southern Utah, two in Nevada and one in Arizona. Following the passage of the

Indian Claims Commission Act, seven of these bands, who knew only that they had lost the lands which their ancestors occupied, sought to obtain the services of attorneys to investigate and prosecute their claims against the United States.

12. William S. Palmer, a white citizen of Utah, who had a strong interest in the Paiute and in their history and customs, with the help of Spencer S. Kimball, a leader in the Church of the Latter-Day Saints, sought to interest John S. Boyden and Ernest L. Wilkinson in undertaking the representation of the Utah and Arizona groups. These friends of the Indians convinced Messrs. Boyden and Wilkinson that if they did not file the claims of the Southern Paiute Bands, the claims of these Indians would be wiped out by the statute because no other attorneys had agreed to represent them. Mr. Boyden thereupon entered into a contract with five of the Utah-Arizona groups.

13. The Moapa Band, being located in Nevada, believed that its interests lay with other "Paiute" Indians in Nevada. This led to their employment of James E. Curry who had contracted to represent certain Northern Paiute tribes and bands in Nevada. As noted, the Weissbrodt firm and Messrs. Hoag and Lindquist became associated with Mr. Curry under this contract. The Shivwits Band, although located in Utah, felt that its interests lay with the Moapa Band and employed the Weissbrodt firm and the Hoag firm and Mr. Lindquist.

14. Following investigation and analysis, the two groups of attorneys working independently for their separate clients, but of necessity covering much the same ground, came to the common conclusion that the seven

separate clients plus an eighth group in Las Vegas, Nevada, which had not sought representation, were in fact a single identifiable group or nation separate from the Northern Paiute of Nevada and that their interests would best be served by pursuing a common claim to a single large physiographic area, on behalf of the Southern Paiute Nation, as an alternative to separate claims of the individual bands or groups to separate areas.

15. Having concluded that they represented segments of a single ethnic tribe or nation of Indians, the separate sets of attorneys determined that the interests of their clients would be best served if the attorneys pooled their investigation and research and prosecuted the claims in the separate dockets cooperatively and unitedly for all the clients. In 1956, the Weissbrodt firm associated John S. Boyden and the Wilkinson firm under the attorney contracts with the Moapa and Shivwits and John S. Boyden associated the Weissbrodt from under the contracts with the other five contract bands. Also the attorneys negotiated a cooperative agreement among themselves as to the division of work in the future prosecution of the claims. This cooperation among the attorneys, as well as other events in the litigation, establishes the fidelity of the attorneys to the interests of the clients and contributed to the successful negotiation of the settlement. By this agreement among the attorneys, the separate clients obtained the benefit of the joint skills, advice and services of a number of attorneys of demonstrated ability in the field of Indian claims litiagation.

16. Until the cooperative agreement of 1956 was made, the Weissbrodts functioned as chief attorneys in Docket No. 88. In this capacity, with the assistance of Hoag and associates, they conducted investigation and research of the facts underlying the claims in Docket No. 88, they drafted the petition and amended petition filed in that docket, collected and evaluated certain documents, took the testimony of elderly members of the Southern Paiute Nation at a hearing before the Commission held in 1951 in Las Vegas, Nevada, participated in negotiations and proceedings before the Commission relative to overlaps and prepared all necessary motions and answers to motions filed by the Government. Both prior and subsequent to the cooperative agreement, they prepared all necessary motions, replies and briefs for the Southern Paiute Nation in its capacity as one of the many "splinter groups" consolidated with the California case, Docket Nos. 31-37.

17. Prior to the 1956 agreement, John S. Boyden instituted the research on the Southern Paiute claims with assistance of the Wilkinson firm in 1949. He prepared the petition in Docket No. 330 with that firm's assistance. Mr. Boyden aided in locating and obtaining copies of pertinent documents in the State of Utah. Both prior and subsequent to the 1956 agreement he served as liaison between the attorneys and his clients, the Southern Paiute groups of Utah and Arizona, in the manner required by the ordinary attorney-client relationship, taking matters that had to be decided by the clients to them for decision, keeping them informed by regular reports and replies to inquiries. The confusion within the individual Southern Paiute bands as to their own identity and their relationship to other Southern Paiute bands complicated this

work. From time to time individual members of one of the groups, thinking themselves unrepresented, would seek to employ other attorneys to present claims. Mr. Boyden invested much effort in convincing these people and their attorneys that they were already represented. In the case of the Kanosh Band of Paiute Indians of the Kanosh Indian Community, Utah, he performed research into the genealogy of the leading families of the band, to determine that the Kanosh were properly classified as Southern Paiute and not Ute. This action resulted in protecting the rights of the Kanosh, who on the mistaken advice that they were Utes, had planned to abandon their claim as Southern Paiutes.

18. After the 1956 agreement, the documents and exhibits which had been collected by the two sets of attorneys were combined, assembled and valuated and the earlier research performed by the attorneys was pooled. Thereafter, each of the attorneys proceeded to perform the services which had been assigned under the cooperative agreement with the primary objective of obtaining a single recovery for the benefit of all of the clients. In Washington, D.C., these services included additional investigations in order to complete the collection and assembling of documentary evidence, research and analysis of points of law, negotiations and proceedings before the Commission relating to alleged overlaps between the clients and adjoining tribes, consultations with expert witnesses, preparation of motions and answering motions and preparation of memoranda of law, the conduct of the two separate trials on aboriginal Indian title and identifiability, the

preparation of proposed findings of fact and brief on those issues, the conduct of negotiations of settlement with the Department of Justice, the investigation and analysis, with aid of experts, of all issues pertaining to the settlement, including value, offsets, and date of taking, the conduct of the hearing before the Commission on the proposed settlement and the preparation of all necessary documents to formalize the settlement. In the field, these services included the continuation of maintenance of liaison and contact with the seven separate client bands in the manner required by the ordinary attorney-client relationship, additional investigation and collection of documents and exhibits from sources outside of Washington, D.C., the arrangements for, and the conduct of, the meetings with the eight Southern Paiute bands for purpose of explaining the terms of the settlement and obtaining the vote of the members of the eight bands on the settlement.

19. Among the variety of factors and circumstances which establish the unusually high contingent nature of the claims and the peculiar hazards and risks involved as of the contract dates are:

(a) As above noted, before any other issue could be investigated, the attorneys had to determine the identity of their clients.

(b) Little was known of the nature of the claims. Besides the confusion as to the identity of the client, there were no treaties, no well-known studies, and no fixed traditions which might have served as basis for roughly defining the claims.

(c) The entire cost of investigation, research and litigation would have to be borne by the attorneys since there were no funds among the seven client groups.

(d) A successful conclusion of the claims depended upon an interpretation of the Indian Claims Commission Act that aboriginal title was compensable - an interpretation that was not judicially established finally until the Supreme Court of the United States denied certorari in Otoe and Missouria Tribe v. United States, 350 U.S. 848, in October of 1955. Even after that the attorneys found it necessary to appear before Congressional Committees and argue that the Indian Claims Commission Act should not be amended to deny compensability of aboriginal title.

20. As the litigation progressed, it took on additional complications which had not been anticipated: an unusual number of overlaps between the Southern Paiute Nation claims and those of other tribes was alleged by the Department of Justice. Each allegation resulted in a proceeding within a proceeding involving motions, answers, hearings, negotiations, settlements and contracts with the clients. Since a small portion of the area claimed reached into California, the Southern Paiutes were consolidated as a "splinter group" with the Indians of California, Docket Nos. 31-37. This consolidation involved additional motions, answers, briefs and hearings as well as analysis of the claims to determine whether consolidation was in the best interests of the Southern Paiute clients.

A period of five years elapsed between the time that the attorneys demanded the right to cross-examine the defendant's expert witness on a report he had prepared and the opportunity to complete the cross-examination. In the interim, the expert had been out of the continental

confines of the United States and unavailable to the defendant as a witness. During the interim, while the record remained open, a large number of additional exhibits were filed by the parties. The delayed cross-examination evolved into a two-day trial.

21. The clients had no central government or clearing house. Each of the eight movern groups is an entity unto itself. The Kanosh, Koosharem, Shivwits, Indian Peaks, Moapa and Kaibab groups had organized as Indian tribal corporations under the Indian Reorganization Act. Of these, under the Act of September 1, 1954, 68 Stat. 1099 (the "Utah Termination Act"), the Kanosh, Koosharem, Shivwits and Indian Peaks groups gave up their charters and their special status as Indians except in regard to claims. The Las Vegas and Cedar City groups had no formal organization. This diversity in the status of the individual clients made it difficult, if not impossible, to treat them as a single client. Forms had to be tailored to the structure of each. Every action requiring client consent or client knowledge had to be performed in octuplicate.

22. The attorneys were especially diligent and meticulous in the collection of information relating to the Southern Paiute Nation, bringing together materials published and unpublished from a wide variety of sources. They presented their testimony and their voluminous documentary evidence to establish identity and aboriginal title at three separate hearings, one in 1951, the second in 1956, and a third in September, 1961. On December 11, 1963, the attorneys filed their proposed findings

of fact and brief. These findings consisted of 190 closely documented pages, including a critical analysis of the report prepared by the defendant's expert witness.

23. Negotiations leading to possible settlement of the cases were instituted thereafter between the attorneys for the petitioners and the attorneys of the Department of Justice. To inform themselves properly for intelligent negotiation, the attorneys collected and studied information relative to the date of taking, the amount of land involved, data relative to the value of the lands involved, prior determinations of the Commission relative to the value of similar types of land, records in the Government Accounting Office relative to offsets chargeable against a Southern Paiute award, and the probable value of an accounting claim asserted in Docket No. 330-A. The attorneys negotiated from time to time over the greater portion of the year 1964 with the attorneys of the Department of Justice and consulted with each other in an attempt to reach an agreement based upon the probable determination that the Indian Claims Commission would reach based upon all the facts and circumstances in the cases and the application of the proper law.

24. In the settlement negotiations, the attorneys for the Southern Paiutes were joined by attorneys for the Chemehuevi Tribe of Indians, an offshoot of the Southern Paiute Nation which had filed its separate claim in Docket No. 351. The attorneys, before proceeding with negotiations for settlement with the defendant, had to negotiate with the attorneys for the Chemehuevi to reach a fair distribution of any award as between these two petitioners.

25. During the course of the settlement negotiations, the Court of Claims, on April 17, 1964, handed down a decision in Zia Pueblo v. United States which could have been interpreted as setting a date of taking of the Southern Paiute lands as of the early date of 1848, which would have prejudiced the Southern Paiutes. Negotiations were held in abeyance while the attorneys through an amicus proceeding before the Court of Claims obtained a modification of the decision limiting its scope to the Zia case.

26. The negotiations culminated in an agreement by which the Government treated the entire Southern Paiute Nation including the Chemehuevi, as a single unit for purposes of settlement but agreed to separate judgments and a specific division of the award between the Chemehuevi and the Southern Paiute Nation as theretofore amicably agreed upon between the Chemehuevi Tribe and the eight Southern Paiute bands through their respective attorneys.

27. The settlement agreement was subsequently submitted to the Indian groups at eight separate meetings attended by the attorneys at which time the proposed settlement was explained in detail and discussed by the Indians and approved unanimously by the Southern Paiutes. A hearing was held before the Commission on December 17, 1964, at which the Indian leaders who had attended these meetings testified that their people had understood the settlement and had approved it. Thereafter, on January 18, 1965, the Commission approved the compromise settlement and awarded the Southern Paiute Nation, a total of $7,253,165.19. The detail is shown in our findings and opinion, 14 Ind. Cl. Com. 618, 647.

28. We find with reference to the statement of the Commissioner of Indian Affairs on the matter of allowance of attorney fees, and the interpretation of this by the Acting Solicitor of the Department of the Interior, H. E. Hayden, "*** We concur in the Bureau's position, which neither endorses nor opposes the 10% request", that the Acting Solicitor was correct in his interpretation of the statement. We also find that only the first stage of the adjudication had made progress, but not quite to completion; there yet remained the filing of the defendant's Request for Findings and their Brief, with a possible reply brief from the petitioners. Also, appeals might have been taken from any interlocutory order which might have been entered.

We further find that under the circumstances in this case the odds, on balance, were favorable to a substantial recovery by the Indian litigants because the overall identifiable group of Southern Paiute Indians appeared to have been in the exclusive use and possession of a substantial area within the bounds of the claimed area from time immemorial. There seemed to have been no Indian competitors. This became apparent when claimed overlaps were disposed of in a conference with attorneys representing the parties herein, the neighboring tribes and the defendant.

It is further found that proof of the välue of the area and the date of taking, had the case proceeded normally, would have taken considerable time and would have been rather expensive.* The matter of offsets, ofttimes a cause of delay, was eliminated by the compromise. It

* Counsel for the defendant, when querried at the hearing on the instant petition as to the time it would take to make an appraisal said it would take about two years.

also appears that the attorneys and their clients were both benefitted in different degrees by the early stttlement of the cases.

29. We find with respect to precedents cited by the attorney petitioners that the cases of the Uintah Utes v. United States, Docket Nos. 44 and 45, more nearly resemble in a number of particulars, the instant case than do the others cited in their tabulation. In Dockets 44 and 45 there were two claims for the taking of lands from the same petitioner. The title stages of both dockets were consolidated for trial but separate findings, opinion and interlocutory orders were entered for each in favor of the petitioner. No hearings had been held on valuation because, as in the instant case, a compromise settlement of both claims in the sum of $7,770,000 was approved by the Commission. Services by the contract attorneys on these claims had been rendered through a period of approximately 25 years pursuant to terms of the contract. After a full hearing an attorney fee of 9.5 per cent of the recovery was allowed, or the sum of $731,500.00. The record also shows that unusually difficult problems arose in both of the above docket numbers.

In the preceeding findings we have detailed special problems that are present in the instant cases and shall not repeat them here.

30. Based on the entire record in these dockets, and considering the facts peculiar to these cases as well as all appropriate factors involved in the determination of a reasonable attorneys' fee under the standards established by the Indian Claims Commission Act, it is the conclusion of the Commission that the contract attorneys in these cases

should be awarded, and they are hereby awarded, a fee of $652,784.86, said sum to be paid to I. S. Weaisbrodt and John S. Boyden, attorneys of record, in accordance with the request and consent of each and all of the contract attorneys which have been filed with the Commission.

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner