

## BEFORE THE INDIAN CLAIMS COMMISSION

THE CONFEDERATED TRIBES OF THE	)	
UMATILLA INDIAN RESERVATION	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket Nos. 264, 264-A and 264-B
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: August 1, 1966

FINDINGS OF FACT

A petition having been filed on June 28, 1966, by the Attorney of Record, Frank E. Nash, for an award of attorney fees in the above entitled docket numbers, and the defendant having responded on July 22, 1966, stating that it has no information to indicate that the request for the 10% fee is improper, and accordingly takes no position with respect to the claim, the Commission makes the following findings of fact:

1. On April 23, 1951, the Confederated Tribes of the Umatilla Indian Reservation made attorneys contract No. I-1-Ind. 42525 with Charles F. Luce, then of Walla Walla, Washington, and Eugene Gressman of Washington, D. C. It was approved by the Commissioner of Indian Affairs June 5, 1951. On December 16, 1952, certain of the expense provisions were amended and the amendments were approved by the Commissioner of Indian Affairs April 8, 1953.

Thereafter, Eugene Gressman tendered his resignation as an attorney for the tribe and on September 24, 1956, the contract was further amended to provide that all references to the contract attorneys in said contract thereafter would be construed to refer to Charles F. Luce, and said

Charles F. Luce would "individually assume all of the rights, duties, and obligations" of the contract attorneys under the contract. This 1956 amendment stated that the firm of Wilkinson, Cragun, Barker and Hawkins (now Wilkinson, Cragun & Barker) had, with the permission of the Tribe, agreed to become associated with Charles F. Luce under the contract. The expense provisions of the original contract were also further modified at that time. The 1956 amendment was approved by the Commissioner of Indian Affairs February 15, 1957, effective November 6, 1956.

Thereafter, Charles F. Luce and the firm of Wilkinson, Cragun & Barker prepared, tried and briefed Docket No. 264 on the segregated issues of title and capacity to sue. The Commission entered an interlocutory decision on those issues June 10, 1960 (8 Ind. Cl. Comm. 513), and the Tribe moved for rehearing and amendment of the findings. Just prior to the time of filing of defendant's brief in opposition to the motion for rehearing and amendment of findings, Charles F. Luce was appointed Bonneville Power Administrator, effective February 15, 1961, and by reason thereof determined to divest himself of all interest in the contract. As a result of discussions commenced about mid-January, 1961, the attorney contract No. 42525, with the approval of the Board of Trustees and the General Council of the Tribe, was completely assigned by Charles F. Luce to the firm of King, Miller, Anderson, Nash & Yerke as of February 4, 1961. The assignment of February 4, 1961, was approved by the Solicitor of the Department of the Interior February 14, 1961.

Under the assignment of February 4, 1961, a formula was provided for the division of any compensation for attorneys under the contract arising from a recovery in Docket No. 264, whereunder (with certain limitations) the total fee awarded would be allocated according to the time expended prior to February 4, 1961, and that expended subsequent to that date.

With respect to Docket Nos. 264-A and 264-B, the assignment of February 4, 1961, provided that all attorneys' fees attributable thereto should belong entirely to the firm of King, Miller, Anderson, Nash & Yerke.

Effective the same date, February 4, 1961, Charles F. Luce, as trustor, entered into a trust indenture with the Seattle-First National Bank, Seattle, Washington, as trustee, whereunder, and in accordance with the terms of said assignment of February 4, 1961, the portion of the compensation of attorneys attributable to the time devoted prior to February 4, 1961, as above described (less that portion attributable to the time devoted thereto by the firm of Wilkinson, Cragun & Barker), was irrevocably assigned and transferred to said trustee for the purpose of assisting needy members of the Confederated Tribes of the Umatilla Indian Reservation to obtain college or vocational education and for other charitable purposes.

Pursuant to the provisions of paragraph 4(d) of the assignment of February 4, 1961, the firm of King, Miller, Anderson, Nash & Yerke assumed the responsibility for computing and subdividing that portion of the fee attributable to services performed prior to February 4, 1961.

Thereafter, on April 15, 1963, by supplemental agreement of that date and approved by authority of the Commissioner of Indian Affairs on June 12, 1963, the firm of King, Miller, Anderson, Nash & Yerke assigned to the firm of Wilkinson, Cragun & Barker 12.5 percent of that portion of any compensation to be received in Docket No. 264 attributable under the above mentioned formula to the services of all contract attorneys and their associates subsequent to February 4, 1961. Accordingly, the award should be to the firms of King, Miller, Anderson, Nash & Yerke and Wilkinson, Cragun & Barker.

The term of the original contract of April 23, 1951, was ten years and the same was renewable for two-year periods by resolutions of the Board of Trustees of the Tribe. The contract has been successively extended with the last extension being for a period of two years, beginning June 5, 1965. (See Exhibit C to stipulation for entry of final judgment in all three of the above named dockets.)

The contract of April 23, 1951, the approvals thereof, the above mentioned amendments and assignments and certified copies of the resolutions extending the same have all been filed with the Commission. All extensions have been approved by the Secretary of the Interior as required by law.

2. Docket No. 264 consisted of what were designated in the original petition filed by the attorneys as Claims 1 and 4. Claim 1 sought additional compensation for the aboriginal title lands alleged to have been owned by the Tribes here involved from time immemorial up to the ratification of the treaty of June 9, 1855. Under that treaty the treaty tribes had ceded approximately 6,400,000 acres in northeastern Oregon and southeastern Washington and had agreed to reside thereafter on a reservation

of approximately 290,000 acres. The petition alleged that the amount paid by the government to the tribes for those lands in the light of their then known value was so low as to constitute "unconscionable consideration" and that the treaty was induced and compelled by the fraud and duress of government agents. The petition sought the difference between the amount paid under the treaty and the fair value of the lands at the time of taking.

Claim 4 sought compensation for approximately 3,840,000 acres of additional lands outside of the ceded lands alleged to have been owned by Indian title at the time of the treaty and to have been taken without any compensation whatsoever.

3. The claim in Docket 264-A, known as the Umatilla River Fish Run Claim, alleges that the salmon, steelhead and eel runs in the Umatilla River system were destroyed as a result of (1) the construction of several water diversion dams in the Umatilla River and (2) an adjudication in about 1916 entered in state court determining the rights of use of the waters of the Umatilla River and its tributaries. The tribes had reserved fishing rights in these streams by their treaty. It was alleged that the United States participated in the diversion by constructing some of the dams and failed to intervene on behalf of the tribe in the water adjudication proceedings, and thereby depreciated the value of the treaty fishing rights.

In 1951 and until the present time there was and is no judicial precedent to establish either the liability of the United States or the measure of damages for such claim. There are no records of the extent of the original runs or of the fish taken from the river system.

4. The petition in Docket No. 264-B alleges that the United States erroneously surveyed the original Umatilla Indian Reservation reserved in the treaty of June 9, 1855, by erroneously excluding some 85 square miles therefrom. The reservation was surveyed in 1871. By 1951 there were no living witnesses to testify as to what had been promised at the time of the treaty and the language of the treaty seemed to be in conflict with the Indians' understanding of the proper boundary. However, the attorneys discovered records from the 1880's of protests made by the Indians of the original survey. These records coupled with the physical facts indicated a substantial possibility of showing that perhaps as much as 19,000 acres had been erroneously excluded by the survey.

Any lands recovered in this docket would in effect reduce the lands for which compensation might be obtained in Docket 264. The value of Docket 264-B rested in the facts that (1) probably interest is allowable for the erroneous exclusion of lands from a treaty-promised reservation whereas no interest was allowable in Docket 264, and (2) a substantially later date of taking might be established so that the value of the lands taken was higher than at the time of the treaty.

5. Relative to compensation for the petitioning attorneys for their services in behalf of the Confederated Tribes of the Umatilla Indian Reservation, in Dockets 264, 264-A and 264-B, the contract of employment provided:

"It is agreed that the said attorneys, subject to the approval of the Tribe and the Commissioner of Indian Affairs, may associate with them in said work hereunder such attorneys as they may select; provided, that neither the Government nor the Indians, party of the first part, is to be at any expense

by reason of the aforesaid employment of such associate attorneys, all expenses thereof to be paid by Charles F. Luce and Eugene Gressman, said party of the second part, out of any compensation which they may receive for their services.

"It is agreed that the compensation of the party of the second part for the services to be rendered under the terms of this contract is to be wholly contingent upon a recovery for the tribe. The party of the second part shall receive such compensation as the Commissioner of Indian Affairs may find equitably to be due, if the matter be settled without submission to a court or tribunal, or in the event it is submitted to said court or tribunal, then such sum as may be determined by said court or tribunal equitably to be due for the services theretofore rendered under this contract, but in no event shall the aggregate fee exceed ten per centum of any and all sums recovered or procured, through efforts, in whole or in part, for the said Indians, whether by suit, action or any department of the Government or of the Congress of the United States, or otherwise."

6. The Commission is aware of the criteria generally considered in the award of attorney fees for services rendered by counsel for Indian litigants in claims filed with the Commission. We note now, without going into detail, that all of the prescribed basic criteria has been considered in making the present award. We also find that the contract attorneys are able lawyers with excellent reputation and have rendered successful service to their clients in all the docket numbers involved for a period of more than 15 years, and have well earned the fees awarded.

7. We find that the award of the entire amount is to be paid to the firms of King, Miller, Anderson, Nash and Yerke and Wilkinson, Cragun and Barker. In accordance with the request of the attorneys, the amounts to be allowed as between the three docket numbers and the two firms of attorneys are not to be segregated in our award.

8. Relative to "usual and necessary expenses" incurred in rendering their services to the Umatilla Indians, we find that such expenses have either been fully reimbursed or are expected to be reimbursed by the Indians from other tribal funds, so that no claim will be filed with the Commission for reimbursement of such expenses.

9. The Commission under its Rules of Procedure set a hearing on the petition for the fixing and allowance of attorney fees in the above entitled docket numbers. Due notice, under said rules was given as provided in said rules, and said hearing was held at the time and place designated.

10. The Commission, having considered the application of the Attorney of Record, Frank E. Nash, in behalf of all the contract attorneys named in these findings, and it appearing that no opposition to the granting of said petition has been filed or made, now finds, in view of the foregoing findings and the entire record in said docket numbers, that the said attorneys have earned and are entitled to the full sum, allowed by said attorneys contracts of employment, of \$245,000.00, which is ten per cent of the judgment of \$2,450,000.00 entered in the above docket numbers on February 11, 1966, in favor of the Confederated Tribes of the Umatilla Indian Reservation. An order to that effect will be entered.

Arthur V. Watkins  
Chief Commissioner

Wm. M. Holt  
Associate Commissioner

T. Harold Scott  
Associate Commissioner

