BEFORE THE INDIAN CLAIMS COMMISSION

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, Petitioner,	)	
v.	)	Docket No. 61
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: March 10, 1967

FINDINGS OF FACT ON AWARD OF ATTORNEYS' FEE

On January 26, 1967, attorneys for the petitioner in Docket No. 61, Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, filed an application for allowance of attorneys' fees, together with affidavits relative to the services of the respective attorneys involved. The response of defendant, dated February 17, 1967, with attached letter and memorandum from the Office of the Solicitor of the Department of the Interior, was filed with the Commission. A hearing on the application was held before the Commission on February 24, 1967. The Commission having considered the entire record in the case, including the contracts of employment of the attorneys, makes the following findings of fact:

1. The final judgment in this case in favor of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (hereinafter called "the Confederated Tribes"), was entered on August 5, 1966, in the amount of $4,431,622.18. The funds to satisfy the judgment were appropriated by Congress by the Act of October 27, 1966 (P.L. 89-697), and are

now held in the United States Treasury for the benefit of the Tribes.

2. The Indian Claims Commission Act (60 Stat. 1049), under which the claim in this case was prosecuted, contains the following provisions pertaining to the allowance of attorneys' 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 in 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. . ." (p. 1053).

3. The Confederated Tribes contracted initially with attorneys George M. Tunison of Omaha, Nebraska, and Charles J. Kappler, of Washington, D. C., to investigate and prosecute their claims. Mr. Kappler died on January 20, 1946. Mr. Tunison continued to represent the Confederated Tribes until his own death on December 3, 1954. Thereafter, the Confederated Tribes contracted with the firm of Wilkinson, Cragun & Barker (then Wilkinson, Boyden, Cragun & Barker) to continue and complete the prosecution of their claims. Compensation under that contract was made subject to the just claims for services of claims attorneys earlier engaged by the tribes.

4. The applicant in this proceeding is Robert W. Barker, a partner in the firm of Wilkinson, Cragun & Barker and Attorney of Record in Docket No. 61. He seeks an award of attorneys' fees on behalf of the Wilkinson, Cragun & Barker law firm, the Estate of George M. Tunison,

and the sole surviving heirs of Charles J. Kappler, deceased. The amount of the attorneys' fees for which they apply is $443,162.22, less $27,833.33, or a net fee award of $415,328.89. This is based on ten per cent of the final judgment of $4,431,622.18, less certain unreimbursed amounts paid periodically to Messrs. Tunison and Kappler under their contracts as annual payments by the terms of the applicable contracts which are to be deducted from the fees awarded herein.

5. Any attorneys' fees in this case are payable to the following contract attorneys: Wilkinson, Cragun & Barker, Nellie Manoli, Administratrix with the Will annexed of the Estate of George M. Tunison, and Charles T. Kappler and Suzanne Kappler Palmer, sole heirs of Charles J. Kappler, deceased. However, all interested parties have signed and filed with this Commission a formal request that the attorneys' fees in this case be paid to Robert W. Barker, the attorney of record, and a partner in the law firm of Wilkinson, Cragun & Barker, contract attorneys.

6. The Confederated Tribes engaged the services of George M. Tunison and Charles J. Kappler by contract dated February 13, 1941, which was approved on May 9, 1941. Under the contract these attorneys obligated themselves (1) to look after general matters of the Tribes and (2) to represent the Confederated Tribes in investigating and formulating claims against the United States Government and to prosecute said claims against the government. The contract provided that compensation to the attorneys should be:

> ". . . Five Thousand ($5,000) Dollars per annum, payable quarterly, and in addition thereto ten per centum, wholly contingent, of any recovery made for the Tribes in the Court of Claims, the Supreme Court of the United States,

> or elsewhere, less any sum or sums which may have been paid to said attorneys as annual compensation; . . . /or/ such compensation as the Secretary of the Interior may find equitably to be due, if any 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 of any department of the Government or of the Congress of the United States, or otherwise."

The 1941 contract provided for a term of six (6) years. Mr. Kappler died on January 20, 1946. Pursuant to the terms of the 1941 contract, which provided that the death of one of the attorneys leaving the other surviving should not terminate the contract, Mr. Tunison continued to perform services to the end of the term of the 1941 contract at which time by Agreement of April 16, 1947, approved May 5, 1947, the contract between the Confederated Tribes and Mr. Tunison was extended for an additional six (6) years. At the end of that contract period the Confederated Tribes authorized and entered into a second six (6) year extension of the contract with Mr. Tunison, executed March 31, 1953, and approved June 10, 1953.

7. On January 8, 1951, Mr. Tunison and the surviving Kappler heirs were allowed fees in the amount of $54,964.80 for the recovery by the Tribes of $549,648.00 in compensation for certain rights as a result of work performed on behalf of the Confederated Tribes by Messrs. Tunison and Kappler. At the time of this award $40,000.00 was deducted from the fees awarded and reimbursed the Confederated Tribes pursuant to the provisions of their contracts requiring deduction of annual

payments from any such fee award. Subsequently, the Tribes continued to pay to Mr. Tunison the annual payments provided in the contract. Mr. Tunison died on December 3, 1954, leaving no approved associate to carry on his obligation under the contract and the contract was thus terminated.

8. The total sum received by Messrs. Tunison and Kappler under the annual payment provision of their contracts from the approval of the original contract in May, 1941, to the death of Mr. Tunison in December, 1954, was $67,833.33. At the time of the death of Mr. Tunison, $40,000.00 of the sum had been reimbursed and the balance of $27,833.33 remained and remains due to the Confederated Tribes from the Tunison Estate and Kappler heirs in complete satisfaction of their obligation to reimburse from any contingent fees all fees paid periodically.

9. By contract executed March 4, 1955, and approved conditionally May 12, 1955, and finally August 11, 1955, the Confederated Tribes engaged the law firm of Wilkinson, Boyden, Cragun & Barker, now Wilkinson, Cragun & Barker, to complete the work undertaken by Messrs. Tunison and Kappler. The contract provided for a term of ten (10) years with provision for extension of the contract for additional two (2) year periods by the Commissioner of Indian Affairs at the request of the attorneys. The contract provided, in substance, that any compensation received by the attorneys for services rendered thereunder was to be wholly contingent upon recovery on the claims, but in no event was the attorneys' fee to exceed ten per cent (10%) of any recovery or settlement which was realized, that out of any such compensation the Estates of the prior attorneys should be compensated as their interests might appear. No provision was made in this contract for annual payments to be made

to the attorneys. In 1965, the contract was extended for a two (2) year period, pursuant to its terms.

Under the original contract between the Confederated Tribes and Wilkinson, Cragun & Barker, the attorneys, in addition to continuing the prosecution of the claim of the Confederated Tribes based upon aboriginal occupancy, Docket No. 61, had continued to prosecute additional separate claims of the Confederated Tribes. On July 6, 1966, the Confederated Tribes and the firm entered into several agreements, each pertaining to separate pending claims of the Tribes. One of these was a restatement and continuation of the employment stated in the prior agreement, entered into on March 4, 1955, as approved and extended, but provided that the compensation for services in Docket No. 61 should be separate from compensation for services in the other cases involving other claims of the Confederated Tribes. This contract was approved by the authorized representative of the Secretary of the Interior on October 14, 1966, and is still in force and effect.

10. By letter dated February 17, 1967, the Assistant Attorney General forwarded to the Commission a copy of a letter dated February 14, 1967, from Edward Weinberg, Acting Solicitor, Department of the Interior, together with a copy of a memorandum dated February 2, 1967, from the Deputy Assistant Commissioner of Indian Affairs commenting on the request for fees filed herein.

The Acting Solicitor's letter reads as follows:

> "There are enclosed two copies of a memorandum dated February 2, 1967, from the Deputy Assistant Commissioner of Indian Affairs relative to the petition for award of attorney fee filed by Wilkinson, Cragun & Barker in the

case entitled Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. United States, Docket No. 61, before the Indian Claims Commission.

"The attorneys ask a fee of 10 percent of the $4,431,622.18 awarded the Confederated Salish and Kootenai Tribes of the Flathead Reservation in settlement of claims in Docket No. 61, less $27,833.33, the total of remaining deductible fees paid by the Indians to their claims attorneys. The Deputy Assistant Commissioner reports that under the applicable tribal claims attorney contracts $27,833.33 is the correct amount to deduct from any fee awarded the attorneys in Docket No. 61. With respect to the amount of the fee which should be awarded the attorneys, the Deputy Assistant Commissioner states that the Bureau of Indian Affairs does not have sufficient information to make a recommendation. We concur."

The Deputy Assistant Commissioner's memorandum reads as follows:

"To: Solicitor

"From: Commissioner of Indian Affairs

"Subject: Petition for allowance of attorneys' fees in the case of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Docket No. 61 before the Indian Claims Commission

"The Indian Claims Commission sent to us on January 26, 1967, pursuant to 25 CFR 305.34b(b), a copy of a petition filed in Docket No. 61 for allowance of attorneys' fees. A member of your Staff informally requested our comments on the petition.

"An award was granted on August 5, 1966, in the sum of $4,431,622.18 to the petitioner, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, in settlement of claims in Docket No. 61. Funds to cover the award were appropriated by Congress on October 27, 1966 (80 Stat. 1057). The attorneys request allowance of fees in the amount of $443,162.22, or a full ten percent of the award, less $27,833.33 reimbursable to the tribes pursuant to their contract with Attorneys Tunison and Kappler.

"Authority to prosecute the claims in Docket No. 61 are in three contracts between the Confederated Salish and Kootenai Tribes of the Flathead Reservation and attorneys.

"The tribes engaged Attorneys George M. Tunison and Charles J. Kappler under contract No. I-1-ind. 17491, dated February 13,

1941. This contract was approved on May 9, 1941, for a period of six years beginning with the date of approval. It was extended twice, the last extension was for a period of six years beginning May 9, 1953, This contract provided that the tribes make an annual payment of $5,000.00 to the attorneys and that the tribes would be reimbursed from any fees allowed the attorneys for prosecuting claims of the tribes. It further provided that the attorneys were entitled to fees at the fixed rate of ten percent of sums recovered for the tribes, less the total of the annual payments.

"Mr. Kappler died on January 20, 1946. Mr. Tunison died on December 3, 1954, and the tribes had no claims attorney under contract.

"The tribes engaged the law firm of Wilkinson, Boyden, Cragun and Barker (now Wilkinson, Cragun and Barker) under contract 14-20-0650 No. 335, dated March 4, 1955. This contract was approved on May 12, 1955, for a period of ten years beginning with the date of approval. It was extended for a period of two years beginning May 12, 1965. This contract recognized the prior contract with Attorneys Tunison and Kappler and provided that attorneys' fees not exceed ten percent of sums recovered for the tribes for prosecution of their claims. Before the contract expired, the law firm entered into a new and separate contract with the tribes for prosecution of Docket No. 61.

"Contract 14-20-0250 No. 3592, dated July 6, 1966, between the tribes and the law firm of Wilkinson, Cragun and Barker, was approved on October 11, 1966, for a period of two years beginning with the date of approval. This contract was in effect when the award was granted in Docket No. 61. The contract recognizes the prior contracts and provides that attorneys' fees shall not exceed ten percent of the amounts recovered for the tribes for prosecution of their claims.

"Our records agree with the statements on page nine of the petition that a total of $67,833.33 was paid by the tribes as annual payments under their contract with attorneys Tunison and Kappler, that $40,000.00 was reimbursed to the tribes when that amount was deducted from fees of $54,964.80 allowed for services of the attorneys which resulted in recovery for the tribes under the Act of May 24, 1948 (62 Stat. 260), and that $27,833.33 should be deducted from the fees allowed in Docket No. 61 in full satisfaction of the balance now reimbursable to the tribes. We are satisfied that the figures as set out in the petition are correct. We approve the procedure set out by the attorneys in the petition for reimbursing the tribes for the balance of $27,833.33 not heretofore reimbursed to the tribes.

"This Bureau did not participate in the litigation of the claims in Docket No. 61 and does not have sufficient information to make a recommendation as to the amount of fees earned by the several attorneys prosecuting the case under the approved contracts." */

11. Each of the contract attorneys as well as the law firm who participated in the favorable prosecution of this claim were attorneys of great experience and high repute in the field of Indian affairs. The Commission has heretofore noted the general competence of Mr. Tunison and of the firm of Wilkinson, Cragun & Barker in other proceedings which they have handled before this Commission. Although Mr. Kappler died before the creation of the Indian Claims Commission, the Commissioners are familiar with his competence through his publications which are standard reference works in the libraries of attorneys dealing with Indian rights.

12. The final judgment in this docket was entered by the Commission based on a stipulation of settlement which was negotiated by the attorneys for the parties. The settlement, however, concerned only the issue of offsets. The issues of title and value were litigated to decisions by this Commission and the decision on value was appealed to the Court of Claims. This appeal was dismissed pursuant to the stipulation of the parties as a part of the compromise settlement.

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*/ The Solicitor's letter and the Bureau's memorandum erroneously used $4,431,662.18, instead of $4,431,622.18 as the amount of judgment and $443,166.22 instead of $443,162.22 as the fee requested. Based on informal permission from the Bureau we have corrected this quotation to accord with intent.

13. At the outset of the employment of Tunison and Kappler no forum existed for the prosecution of a claim based upon aboriginal occupancy against the United States. Mr. Tunison, with the help of Mr. Kappler, and after the death of the latter, with the help of Ernest L. Wilkinson, of the firm of Wilkinson, Cragun & Barker, lent his efforts to obtaining from Congress legislation authorizing the creation of the Indian Claims Commission. During that same period, the attorneys performed research into the history of the Confederated Tribes which became the basis for the petition in Docket No. 61.

14. Among the variety of factors and circumstances which established the unusually high contingent nature of the claim and its peculiar hazards and risks as of the contract date involved are:

(a) As above noted, at the time employment was first accepted, no forum existed for the prosecution of a claim against the United States based upon aboriginal title.

(b) Even after the statute was enacted, it was not judicially established finally that aboriginal title was compensable under the terms of the Indian Claims Commission Act until the Supreme Court of the United States denied certiorari in Otoe and Missouria Tribe v. United States, 350 U.S. 848, in October of 1955 (subsequent to acceptance of employment by Wilkinson, Cragun & Barker). 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.

15. As litigation progressed, it took on additional complications which had not been anticipated:

(a) The Hell Gate Treaty of 1855, under which the Confederated Tribes ceded their interest in the lands involved in Docket No. 61 included in the cession not only the lands used and occupied by the Flathead, the Upper Kootenai, and the Upper Pend d'Oreilles, which were merged into the Confederated Tribes, but also lands used and occupied exclusively by the Lower (or Bonner's Ferry) Kootenai and included an area used jointly by the Confederated Tribes with the Lower Pend d' Oreilles. The Lower Kootenai Band filed its separate claim as Docket No. 154; the Lower Pend d'Oreilles Band filed its claim, Docket No. 94. This posed problems of possible "overlaps" which had to be resolved.

(b) The death of first one and then the other of the original contracting attorneys required the employment of an entirely new group of attorneys who necessarily had to duplicate some of the work already done by their predecessors.

(c) A change in policy making the contracts entered into between Mr. Tunison with certain expert witnesses "contrary to public policy" required re-negotiation of those contracts, an effort greatly complicated by the death of two of the expert witnesses one prior to a re-negotiation and one during said negotiation.

(d) Inaccurate maps and surveys of both the area ceded and the area reserved as the Flathead Reservation required additional research and work with cartographers to make maps to obtain a determination of the actual number of acres involved in the claim.

16. After receiving a favorable decision on title on August 3, 1959, the attorneys prepared and tried the case on the issue of value. After the issue had been fully briefed by the attorneys and attorneys for the Department of Justice, the Court of Claims handed down a decision in another claim filed therein by the Confederated Tribes. The award in that proceeding was claimed by the government as a payment on a claim in the instant case, a position which the attorneys answered by an additional full set of briefs. On September 29, 1965, the Commission entered an interlocutory judgment in the amount of $4,706,622.18 in favor of the Confederated Tribes, subject to offsets. The attorneys appealed this decision to the Court of Claims. While the appeal was pending the defendant filed an amendment to its answer setting forth claimed offsets totaling $4,316,090.31 which, if allowed, would have left the Confederated Tribes a net judgment of only $390,531.87. At this juncture, after much study, negotiation with the attorneys for the government, and conferences with the governing body of the Confederated Tribes, the attorneys agreed with the government attorneys upon a compromise settlement in the amount of $4,431,622.18. The settlement offer was presented formally by the attorneys to the Confederated Tribes through their governing body and approved formally by that body and informally by a majority of the members of the Tribes in a procedure carefully worked out by the attorneys to satisfy both the requirements of the Commission that the total membership of the Tribes be allowed opportunity to participate and of the Tribes that its tribal government should be recognized.

17. We find that all of the attorneys acted with due diligence in the best interests of their clients. Based upon the entire record in the case and considering the facts peculiar to this case, 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, the Commission finds that the contract attorneys in this case should be awarded, and they are hereby awarded, a fee of $443,162.22, less $27,833.33 as a deduction for reimbursement due the Tribes under their contracts with Messrs. Tunison and Kappler, or the net sum of $415,328.89, said net sum to be paid to Robert W. Barker, Attorney of Record, in accordance with the request and consent of each and all of the contract attorneys or their estates or heirs which have been filed with the Commission.

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner