

BEFORE THE INDIAN CLAIMS COMMISSION

THE MESCALERO APACHE TRIBE, et al.,)	
)	
Plaintiffs,)	
)	Docket No. 22-B
v.)	
)	Docket No. 22-G
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: May 11, 1967

FINDINGS OF FACT ON AWARD OF ATTORNEYS' FEE

On May 2, 1967, the attorney of record in Docket Nos. 22-B and 22-G, Mescalero Apache Tribe, et al., filed an application for an allowance of attorneys' fee. The response of the defendant having been filed, and a hearing on the application having been held before the Commission on May 11, 1967, the Commission, after considering the entire record in these cases, including the contracts of employment of the attorneys, makes the following findings of fact:

1. The final determinations in these cases were made on April 27, 1967, based on a stipulation of settlement entered into by the parties, whereby the Commission entered (a) a final award on the claim in Docket No. 22-B in favor of the plaintiff, the Apache Tribe of the Mescalero Reservation, in the amount of \$8,500,000, and (b) a final consent order dismissing the claim of the plaintiffs in Count I of the petition in Docket No. 22-G. The claim in Docket No. 22-B was for compensation for the Indian title lands of the aboriginal Mescalero

Apache Tribe located in New Mexico, which were taken by the United States. The claim in Count I of the petition (Second Amended Petition) in Docket No. 22-G was for damages for trespasses on said lands.

2. As pertinent to attorney fees, Section 15 of the Indian Claims Commission Act provides as follows:

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, 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.

3. The approved attorney contracts, pursuant to which said claims were brought to final judgment, are (1) a contract made with the Apache Tribe of the Mescalero Reservation on January 17, 1958, identified on the records of the Bureau of Indian Affairs as Contract No. 679, Symbol 14-20-0650, applicable to the claims in Docket No. 22-B, and (2) a contract made with the Apache Tribe of the Mescalero Reservation on January 17, 1958, identified on the records of the Bureau of Indian Affairs as Contract No. 682, Symbol 14-20-0650, applicable to the claims in Docket No. 22-G. The attorneys who were named as parties to each of said contracts are I. S. Weissbrodt, Abe W. Weissbrodt, Jay H. Hoag,

Rodney J. Edwards, David Cobb, and Clarence G. Lindquist (deceased April 11, 1964). The term of each of said contracts was a period of ten years commencing January 17, 1958. Each of said contracts contains an identical provision in paragraph 7 thereof pertaining to attorney fees, as follows:

7. It is agreed that the compensation of the parties of the second part for the services rendered and to be rendered under the terms of this Contract is to be wholly contingent upon a recovery for the Tribe or the aboriginal groups of the Tribe or the members thereof. The parties of the second part shall receive such compensation as the Commissioner of Indian Affairs may find equitably to be due, if the matter be determined otherwise than by a court or tribunal, or in the event that it is decided by a 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 and the aforesaid expired attorney's contract, but in no event shall the aggregate fee exceed ten per centum of any and all sums recovered or procured on the claims covered by this Contract, whether by suit, action of any department of the Government or of the Congress of the United States, or otherwise.

4. Prior to the making of the aforesaid contracts, an attorney contract was entered into on September 13, 1947, by and between the Apache Tribe of the Mescalero Reservation and attorneys James E. Curry and Roy T. Mobley. On or about November 1, 1948, Mr. Mobley accepted employment by the United States Government (Department of the Air Force) as one of its attorneys, and accordingly became incapacitated to perform services in the prosecution of the claims of the tribe against the United States under the contract and to hold any interest in the contract. On September 16, 1949, the Apache Tribe of the Mescalero

Reservation adopted a Resolution terminating the employment of Roy T. Mobley, Esq., under the contract. On January 5, 1952, the Apache Tribe of the Mescalero Reservation entered into a formal amendment of the said attorney contract whereby the employment of Roy T. Mobley was terminated and Jay H. Hoag and I. S. Weissbrodt were employed as additional attorneys. The amendment of January 5, 1952, was approved by the Commissioner of Indian Affairs on January 8, 1952. The attorney contract of September 13, 1947, as amended, expired by its own terms on or about January 16, 1958. Thereafter, the aforementioned attorney contracts of January 17, 1958, which are currently in effect, were made by the Apache Tribe of the Mescalero Reservation.

5. The applicant in this proceeding is I. S. Weissbrodt, of Washington, D. C., one of the contract attorneys and the attorney of record in Docket Nos. 22-B and 22-G. The application is made on behalf of all contract attorneys interested in the litigation, including I. S. Weissbrodt, 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 obligations to other attorneys who were associated and performed services in this case will be met from the award. The amount of the attorneys' fee for which application is made is \$850,000 based on ten percent of the final judgment of \$8,500,000 entered in Docket No. 22-B.

6. The claims set forth in Docket Nos. 22-B and 22-G were originally presented, along with various other claims, in a petition, filed on

February 3, 1948, in Docket No. 22, on behalf of the Apache Tribe of the Mescalero Reservation and on behalf of the "Apache Nation." On October 18, 1950, a First Amended Petition was filed which added as parties five present-day organized tribes in addition to the Apache Tribe of the Mescalero Reservation, and thirteen aboriginal tribes. The attorneys were persuaded, as a matter of cautious procedure, to present the claims of the various tribes of Apache descent in a single petition in this manner by reason, inter alia, of the terms of the Treaty of July 1, 1852 (10 Stat. 979), which the United States made with the "Apache Nation of Indians," and the actions of the Government in placing a number of the Apache tribes on the same reservation, and because of the evidence of interrelationships between the Apache tribes. The defendant filed a motion to dismiss the "Apache Nation" as a party plaintiff. This motion was overruled by the Commission.

7. Subsequently, as precedents developed under the Indian Claims Commission Act, and when events made it desirable and advantageous for the disposition of the claims, the attorneys obtained leave of the Commission to separate the various claims in Docket No. 22. By order entered May 25, 1959, the Commission permitted the separation from Docket No. 22 of the claims of the plaintiffs herein for compensation for the taking of their aboriginal lands in the present State of New Mexico and the assertion of such claims in a Second Amended Petition designated as Docket No. 22-B. The claims for damages for trespasses on said lands were separated from Docket No. 22 and set forth in Docket No. 22-G.

8. The plaintiffs herein also claimed in Docket No. 22 that their aboriginal lands extended into the present State of Texas. The claim for compensation for said lands located in Texas were involved in complex legal problems arising out of the circumstances of the admission of Texas into the Union as well as other difficulties. This claim to compensation for lands in Texas was separated from Docket No. 22 and presented in Docket No. 22-C. By arranging for separate proceedings with respect to the claim as to the Texas lands, the attorneys were able to expedite the disposition of the claims in Docket No. 22-B as to the lands in New Mexico and to achieve entry of final judgment thereon.

9. The attorney contracts imposed upon the attorneys the duty, among others, of investigating the claims. In carrying out this duty, the contract attorneys exhaustively investigated and assembled, from a wide variety of sources, published and unpublished, historical documents and ethnological writings for purpose of the trial of the Indian title and taking issues in Docket No. 22-B. Complete sets of these documents and writings, composing the great bulk of plaintiffs' exhibits, which were later offered and received in evidence at the trial proceedings, were furnished by the attorneys to the expert witnesses who were engaged on behalf of the plaintiffs to testify at the trial.

10. A hearing was held before the Commission in Docket No. 22-B on May 13, 15, 16, 1950 at Mescalero Reservation, at which the testimony of a number of aged Indian witnesses as well as the testimony of the Superintendent of the Mescalero Reservation was taken. Thereafter, a

series of unfortunate events took place which delayed subsequent trial proceedings on issues of Indian title and taking, and the completion of findings and briefs by the parties. These events included the death of the expert anthropologist originally employed by defendant, the illness and resignations of several of defendant's attorneys assigned to defense of the claims, the resignation of plaintiffs' contract attorney who was directly in charge of the prosecution of the claims and the extended illness and subsequent death of the associate attorney assigned to the prosecution of the claims on behalf of the plaintiffs.

11. The trial proceedings in Docket No. 22-B on issues of Indian title and date of taking took place from October 24 to November 3, 1960. The plaintiffs presented the testimony of two expert witnesses, namely, Dr. Harry W. Basehart, Professor of Anthropology at the University of New Mexico, and Dr. Alfred Barnaby Thomas, Professor of History of the University of Oklahoma. The defendant presented the testimony of two experts, namely, Albert H. Schroeder, an archeologist employed by the National Park Service, and Dr. Avram B. Bender, Professor of History at Harris Teachers College. The transcript of testimony covered some 1,370 pages. An exhaustive documentary record was presented, a total of more than 1,600 exhibits being received in evidence. Subsequently, the parties respectively presented their proposed findings of fact and briefs.

12. On July 6, 1966, the Commission issued its findings of fact, opinion, and interlocutory order in Docket No. 22-B, determining the

extent and boundaries of the area of land which the Mescalero Apaches aboriginally used in New Mexico. By planimetry, it has been calculated that this awarded area covered a total of 19,328,896 acres, including an estimated 467,335 acres comprising the present Mescalero Reservation. The Commission also decided that the United States took said lands from the aboriginal Mescalero Apache Tribe on May 29, 1873, without payment of any compensation; and that the plaintiffs were entitled to recover the fair market value of said lands, less any acreage therein which the parties may prove was within confirmed Spanish or Mexican land grants, as of May 29, 1873, less such offsets, if any, to which defendant may be entitled under the provisions of the Indian Claims Commission Act. By its interlocutory order, the Commission directed that the case proceed for the determination of the acreage of the awarded area, and for the determination of the value of the lands as of May 29, 1873, and the amount of offsets.

13. Commencing shortly after the Commission's decision of July 7, 1966, the contract attorneys investigated and collected a substantial body of economic, geographic and historic materials pertinent to the determination of the value of the awarded lands, including the various resources thereof. The attorneys then carefully studied and analyzed this data and consulted with experts qualified in valuation of surface and subsurface lands in Indian claims cases. Also, the attorneys analyzed the valuation decisions of the Court of Claims and this Commission in comparable Indian claim cases. Similarly, with respect to offsets, the attorneys made a detailed study and analysis of the

gratuity accounting report prepared by the General Services Administration and also reviewed the decisions of the Court of Claims and the Commission on pertinent points of law relating to the issues of offsets presented in the instant case.

14. The immediate purpose of the attorneys in undertaking and performing the above-described work pertaining to valuation and offsets issues was to enable them to enter into informed discussions and negotiations with the Government in an effort to reach a compromise settlement of the claims. However, the attorneys considered that if such negotiations did not prove to be successful, the material that they had collected and the analysis which they had performed would be required for the purposes of the valuation and offset trial proceedings.

15. Following the investigation, assembling and analysis of the data pertinent to the valuation and offset issues, the contract attorneys undertook settlement discussions and negotiations with the Government attorneys. These discussions and negotiations ultimately proved to be successful. By letter dated March 15, 1967, the contract attorneys submitted a formal offer of a proposed compromise settlement, which was accepted by letter of April 12, 1967, of Assistant Attorney General Edwin L. Weisl, Jr. Thereafter, the contract attorney promptly took steps to obtain the necessary approvals of the proposed compromise settlement by the tribal governing body, the tribal members and the Commissioner of Indian Affairs, in strict accordance with the settlement procedures and requirements established by the Commission. On April 27,

1967, a hearing was held before the Commission on a joint motion of the parties to approve the compromise settlement and, on the same day, the Commission entered its order and findings approving the compromise settlement of the claims.

16. The attorneys received the letter of the Assistant Attorney General accepting the offer of proposed settlement on April 14, 1967. By unremitting efforts over a two weeks period, the contract attorneys, with the cooperation of all concerned including the attorneys of the Department of Justice, the office of the Commissioner of Indian Affairs, and this Commission, were able to accomplish all of the steps leading to approval of the settlement by the Commission. The contract attorneys undertook these concentrated efforts because there was pending in Congress at the time a supplemental appropriation bill and the attorneys estimated that if the final award in this case could be included in the pending appropriation bill, an additional fund in the approximate amount of \$150,000, representing interest on the appropriated principal amount of the award, would be credited for the tribe. Promptly following the entry of final judgment award by the Commission on April 27, 1967, the judgment was submitted to Congress and has been included in the pending appropriation bill.

17. There are a variety of factors and circumstances which establish the unusually high contingent nature of the claims and the serious hazards and risks as of the time the attorneys undertook their employment in these cases. Of major importance among these factors

was that the liability of the Government to compensate the plaintiffs for their aboriginal title lands depended upon an interpretation of the Indian Claims Commission Act. The issues as to this interpretation were vigorously contested and were not judicially established finally until the Supreme Court of the United States denied certiorari in Otoe and Missouri Tribe v. United States, 350 U.S. 848, in October of 1955. In addition to the contingent nature of the compensation, the contract attorneys advanced all costs of the investigation, research, and litigation, except the fees of the two expert witnesses which were borne by the tribe. At the time of the making of the attorney contracts, very little information as to critical facts pertaining to the tribe's relationship and course of dealings with the United States was available in published materials. This circumstance presented the risk that archival research might prove events which eliminated any liability on the part of the United States. Also, data were not available at the time of the making of the contracts as to the amount of gratuities provided over the years by the Government to the tribe which might be offset against any recovery that might be made.

18. The compromise settlement eliminated not only the necessity for valuation proceedings which, in the normal course of events, would have taken considerable time and involved substantial expense, but also the proceedings for the determination of offsets which is often a cumbersome and protracted proceedings. Counsel for plaintiffs stated that, based on his analysis of the report of the General Services

Administration and making allocations which he considered to be reasonable, the total amount of gratuities provided by the United States to the tribe within allowable categories amounted to approximately \$1,000,000. However, he further stated that, in his view, a substantial part of this amount would not have been permissible as offsets against the recovery. The amount that might have been offset was eliminated by the compromise settlement. This, of course, reduced the recovery.

19. The attorneys for the Government vigorously and ably defended against plaintiffs' claim for the taking of its aboriginal lands, raising a number of serious and novel defenses. However, the plaintiffs prevailed, winning a recovery for the great bulk of the territory claimed by them. The plaintiffs' attorneys have produced for the tribe a tribal fund in the principal amount of \$8,500,000. Appreciable time and effort was saved by reason of the fact that the compromise settlement made it unnecessary to litigate the valuation and offset issues. There were special problems and complexities which were involved in the litigation of the Indian title and taking issues as well as a variety of other subsidiary issues. A large extent of the area claimed was included in our decision on title. There was a great volume of evidentiary material presented in this case. The attorneys undertook their responsibilities with diligence and skill in this inherently difficult and protracted type of aboriginal title claim case. Among the special problems, some of which involved complex and time-consuming

issues, were the separation of the claims of the Mescalero Apache Tribe to its lands in New Mexico from other claims asserted in the original Docket No. 22, overlapping land claims in other cases, admissibility of expert testimony and exhibits in support of the testimony, and alleged Spanish and Mexican grants within the claimed territory. Further, the record shows that the work involved in the pre-settlement investigation, study and analysis of the valuation and offset issues which was made by the contract attorneys, along with the work in the conduct of the settlement discussions and negotiations, extended over a period of more than eight months. Further, it appears that these attorneys, who are thoroughly experienced in Indian claim litigation and are skilled and resourceful lawyers, achieved substantial benefits for their clients.

20. The Commission, however, finds that not only were the Mescalero Indians benefitted by an early settlement of the case; but that the attorneys themselves are the beneficiary thereof. The Commission has made a small differential between the maximum attorney fee of ten percent (10%) authorized under the aforesaid contracts and Section 15 of the Indian Claims Commission Act and the fee awarded here because of the savings of time and expense to them in fully prosecuting the case through the normal stages of litigation. Thus, having been relieved of a substantial amount of work which they might have been required to perform, we feel it is fair to make this small reduction in the compensation allowed.

21. Each of the contract attorneys having an interest in the litigation, namely, Abe W. Weissbrodt, David Cobb, James E. Curry,

Jay H. Hoag, Rodney J. Edwards, and A. Blake MacDonald, Executor of the Estate of Clarence G. Lindquist, have signed and filed with the Commission a formal stipulation and consent that the attorneys' fee in these cases be paid to I. S. Weissbrodt, the attorney of record, all of said attorneys having reached an understanding among themselves as to the division of the fee.

22. The Commission, having considered the application of the attorney of record, I. S. Weissbrodt, in behalf of all the contract attorneys interested in the litigation, and considering the facts and circumstances peculiar to these cases as well as all appropriate factors involved in the determination of the attorneys' fee under the standards of the Indian Claims Commission Act, and in view of the foregoing findings and the entire record in said dockets, finds that the said attorneys should be awarded and they are hereby awarded a fee of \$807,500.00, or 9.5% of the judgment entered in Docket No. 22-B, said sum to be paid to I. S. Weissbrodt, attorney of record, in accordance with the stipulation and consent of each and all of said attorneys filed with the Commission.

/s/ Arthur V. Watkins
Arthur V. Watkins
Commissioner

/s/ Wm. M. Holt
Wm. M. Holt
Commissioner

/s/ T. Harold Scott
T. Harold Scott
Commissioner