

BEFORE THE INDIAN CLAIMS COMMISSION

THE KIOWA, COMANCHE AND APACHE)	
TRIBES OF INDIANS,)	
)	
Petitioners,)	
)	
v.)	Docket Nos. 258 and 259
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: July 31, 1968

FINDINGS OF FACT RE: ATTORNEY FEES

Upon the entire record the Commission makes the following findings of fact relevant to attorney fees:

1. This Commission has jurisdiction to award attorney fees by virtue of Section 15 of the Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. 70n, which reads in part:

" . . . The fees of . . . 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. . ."

2. On May 16, 1947, Thomas P. Gore and W. C. Lewis, attorneys, entered into a contract with the Kiowa, Comanche and Apache Tribes of Indians whereby they agreed to advise and represent said tribes in investigating and prosecuting all tribal claims against the United States as may arise by virtue

of the provisions of the Indian Claims Commission Act (60 Stat. 1049).

This contract was approved by the Acting Commissioner of Indian Affairs on August 1, 1947 for a period of 10 years. On March 16, 1949, Thomas P. Gore died. On May 7, 1949, W. C. Lewis assigned one-half (1/2) interest in the aforesaid contract to J. Roy Thompson, Jr. subject, however, to an obligation on the part of J. Roy Thompson, Jr. to satisfy any fee found due to the Gore estate out of said half interest, and also assigned to Frank Miskovsky, attorney, Oklahoma City, Oklahoma, a one-quarter (1/4) interest in said contract. This assignment was formally approved by the Commissioner of Indian Affairs on June 16, 1949. W. C. Lewis died on March 23, 1965, and Frank Miskovsky died on June 13, 1968. W. C. Lewis, Jr. was duly appointed Executor of the Estate of W. C. Lewis, and Goldie B. Miskovsky was duly appointed Administratrix of the Estate of Frank Miskovsky.

3. The contract described above provided for contingent compensation to the attorneys at the rate of seven and one-half percent (7-1/2%) of any recoveries. On October 17, 1949, the three tribes and the attorneys amended the contract to provide a flat contingent fee of ten per cent (10%) of any recoveries but this amendment was never approved by the Commissioner of Indian Affairs. On April 17, 1950, an amendment to said attorney contract was entered into between the parties which insofar as it related to compensation provided:

"1. In consideration of the services to be rendered under the terms of this contract, the parties of the second part [the attorneys] shall receive a sum equal to not less than seven and one-half (7 1/2) per centum but no more than ten (10) per centum of any and all sums recovered or procured through their efforts, in whole or in part, for the said Tribes, parties of the first part, whether by suit, action of the Congress of the United States, or otherwise; the amount of

the fee, if any, in excess of seven and one-half (7 1/2) per centum shall be fixed by the Indian Claims Commission at such amounts as the Commission, in accordance with the 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, in any event, shall not exceed ten (10) per centum of the amount recovered."

This amendment was formally approved by the Commissioner of Indian Affairs on August 9, 1950, and is presently in effect. The original contract has been extended twice, the last extension being for a period of 10 years, beginning August 1, 1967.

4. The Executrix of the estate of Thomas P. Gore, by document duly entered as an exhibit in the record of Docket No. 32, The Kiowa, Comanche and Apache Tribes of Indians, et al., v. United States, disclaimed - any interest in this litigation. The Commission takes due notice of this disclaimer and makes it a part of the record herein.

5. Since the amount of the fee is not stipulated in the pertinent contract except that it shall not be less than 7-1/2% nor more than 10%, the Commission has jurisdiction to determine "adequate compensation" to be awarded considering the "results obtained," the "contingent nature of the case" and "in accordance with standards obtaining for prosecuting similar contingent claims in courts of law."

6. When the attorneys commenced work under the attorney contract no one knew of the existence of these claims. The claims here settled were originally developed ancillary to the proceedings in Docket No. 32 before this Commission where the Kiowa, Comanche and Apache Tribes were petitioners. During the course of that litigation and on July 24, 1951, the General Accounting Office submitted to petitioners' counsel a statement of tribal

accounts which had been prepared for purposes of off-sets. Counsel, being aware of the statutory expiration of time for filing claims on August 13, 1951, examined this document with care in order to determine whether other claims might be recognized. This examination led counsel to believe that the United States might have violated the principles laid down in the case of Menominee Tribe v. United States, 101 Ct. Cls. 10, decided February 7, 1944, and accordingly counsel prepared and on August 9, 1951 filed a petition as Docket No. 258 before this Commission on behalf of petitioners. This petition alleged only that the defendant had violated the principles of the Menominee case to the detriment of petitioners. The defendant answered this petition on March 18, 1957, and generally denied any liability to the tribes and in addition set up affirmative defenses.

On August 9, 1951, counsel also filed a petition on behalf of these tribes as Docket No. 259, which requested that the United States account to petitioners for the manner in which it had handled petitioners' funds and property; in other words, a petition for a general accounting.

7. The accounting claims developed and the application of the Menominee principle to those claims were the result of the sole efforts of the attorneys. The members of the tribes could not and did not render any assistance in discovering or developing these claims. The claims were, for the most part, relatively sophisticated and involved. The application of Menominee to the various funds was extremely complicated. Because of such complexities counsel made every effort to assure that individual tribal members understood what was involved so that intelligent assent could be given to the settlement. The inherent complexities when combined with the relative

difficulty of establishing the exact damages to the tribes by the use of tribal funds by defendant in ways that were established to be improper, laid upon counsel an unusual professional burden to procure for the tribes a disposition of these cases by trial or settlement that would be fair to the clients.

8. The undertaking involved research into all pertinent Governmental, state, institutional and private records available. All of this required counsel to have knowledge and skills necessary to make the investigation, conduct the research, and prosecute the litigation to a successful conclusion.

During the course of their representation of these tribes counsel investigated and studied all treaties, agreements, statutes, executive orders and administrative regulations pertaining to the three tribes. Counsel searched records in the files of the Indian Agency at Anadarko, Oklahoma, the Indian Office of Washington, D. C., Geological Survey, the General Land Office (Bureau of Land Management), Senate and House Committees of Indian Affairs, the National Archives, the General Accounting Office, Oklahoma State Corporation Commission, Oklahoma State School Land Commission, Oklahoma Historical Society, Library of Congress, Smithsonian Institution, United States Court of Appeals for the District of Columbia Circuit and the United States Supreme Court.

The records of the General Accounting Office and the Treasury Department relating to these claims were examined on many occasions and voluminous documents were photostated, some of which were subsequently used in evidence and some of which provided only background material.

9. The liability phase of this case was tried before the Commission on November 2, 3, 4, and 5, 1964. The parties offered a most complete statement of details concerning the financial dealings between petitioner tribes and the United States. In all, the transcript totaled 446 pages.

After the conclusion of the trial petitioners' counsel undertook the arduous and painstaking work of proposed findings and briefing. Study of the transcript disclosed errors which were discussed with defendant's counsel. On February 5, 1965, petitioners' proposed findings of fact and brief in support of liability was filed. The proposed findings were 18 in number and covered 9 pages, and the brief was 50 pages in length, supported by an appendix.

Thereafter, on August 12, 1965, defendant filed its requested findings of fact, comments on petitioners' proposed findings, and its brief (50 pages in all).

Examination of the defendant's filing indicated that extensive work would be required of counsel to analyze and answer the contentions of defendant. This was done and on June 7, 1966, petitioners' counsel filed its objection to defendant's requested findings of fact (36 pages), comments on objections to petitioners' proposed findings (22 pages) and reply brief (10 pages).

10. Settlement negotiations between counsel commenced in 1963, well before the trial of the liability phase of Docket No. 258 in November, 1964. These negotiations were with government trial counsel as well as with the chief of the responsible division of the Department of Justice. Initially, tribal counsel attempted to persuade government counsel that it was

practicable to settle Docket No. 258, reserving the trial of the general accounting case (Docket No. 259) for the future. Much time was consumed in fruitless efforts to convince government counsel of the soundness of this position. Various memoranda were presented to government counsel proposing formulae to accomplish this.

After the trial and briefing on liability in Docket No. 248, settlement discussions were renewed, but the approach was that efforts should be made to settle the financial aspects of both Docket Nos. 258 and 259. Many conferences were held with government counsel and their accounting representatives to explore all avenues of accord.

After January, 1967, counsel for both parties intensified settlement efforts. During the settlement negotiations the accounting officers of defendant and the petitioners' accountants made various schedules showing the result if certain basic assumptions were made. As these schedules differed materially, even on the same assumptions, petitioners' accountants, under direction of counsel, undertook to and did analyze the presentations made by defendant's accountants and as a result of this analysis petitioners' counsel were able to find the differences in approach which led to these differing results. By isolating these factors in the defendant's accounting presentations and by careful analysis of the procedures utilized by defendant's accountants, counsel was able to persuade government counsel to gradually increase their valuation of the cases for settlement purposes. [Intensive work by counsel in conjunction with tribal accountants and government representatives was necessary during this stage of the negotiations.]

On July 27, 1967, petitioners' counsel made a formal written offer to the Attorney General of the United States to settle Docket Nos. 258 and 259 for \$6,000,000 under the conditions therein set out. On October 24, 1967, the Acting Assistant Attorney General accepted the offer subject to conditions therein contained.

11. As the approval of the three tribes was necessary to effect a settlement, counsel initiated a request that the three tribes have formal meetings. All necessary procedures required by the Indian Claims Commission as set out in Omaha Tribe of Nebraska v. United States, 8 Ind. Cl. Comm. 392, were explained to the area superintendent and they were followed. Such meetings were called for November 18, 1967, after due publicity. Counsel for the tribes attended these meetings held in Oklahoma. Prior to each meeting there was distributed to each adult participant a 28-page memorandum dated November 13, 1967, which contained all of the documents heretofore described in the memorandum, together with a copy of the proposed stipulation of settlement and for entry of final judgment. Counsel appeared at the meetings held in Oklahoma for the purpose of considering settlement and made full explanations of the proposed settlement. The details of the action of the three tribes in respect to the settlement are contained in Petitioners' Exhibit No. 1 filed in the consolidated Dockets 258 and 259 before this Commission at the settlement hearing. This document, consisting of 82 printed pages, recites in full the activities leading up to and the action of the three tribes, acting individually, upon the settlement proposal. The tribes voted to accept the settlement proposal.

On the 17th day of January, 1968, a hearing was held before this

Commission on the proposed settlement of the consolidated dockets.

Counsel prepared and filed with the Commission a printed document of 82 pages which set out in full all the necessary settlement procedures and activities.

This Commission approved the proposed settlement and entered judgment in favor of the petitioners on January 29, 1968, for \$6,000,000. The judgment was accompanied by written findings and opinion (18 Ind. Cl. Com. 640, 658).

12. This award represents the largest single financial transaction the petitioner tribes have had so far. Thus the results obtained were substantial. Maximum professional skill and effort was applied by counsel in this matter. While the end result in the case was ultimately obtained through settlement after trial, no greater result could reasonably have been anticipated if the matter had been litigated further. In view of the novel and unique aspects of this litigation, settlement of the claims in these dockets resulted in a distinct and immediate benefit to the tribes, while at the same time eliminating the hazards of further litigation. Settlement therefore was the proper course in successfully terminating this litigation and the Commission has so indicated by its approval thereof.

13. Because of the peculiar attorney-client relationship involved in representation of an Indian tribe, present counsel have emphasized and discharged the duty to keep the tribal members advised of all developments in connection with the progress of their claims.

Counsel has constantly maintained a mailing list of tribal members and has added to this list the name of any member who desired information

on their claims. Each significant development in the prosecution has been reported to the tribes by means of a report sent by counsel to all on the mailing list. In addition, many letters have been sent to tribal leaders, all respecting developments in the claims litigation. Telephone calls and personal visits to and with tribal members have been constant. With a tribal attorney located in Washington, D. C. and one in Oklahoma, tribal members have had access to current and informed status reports on progress of their claims.

During the settlement negotiations counsel had kept interested tribal members apprised of their activity. Early in November, 1967, counsel prepared a 20-page memorandum to the tribes which was circulated to all interested tribal members. This memorandum contained an explanation of the background and history of the claims proposed to be settled, described in general the settlement negotiations, set out arguments both for and against accepting the settlement and the recommendation of counsel that the settlement be accepted. The document contained a table showing the petitioners' tribal funds involved through June 30, 1946, copies of the letters to the Attorney General making the offer of settlement and extending the time in which the same might be acted upon, and the conditional acceptance of the offer by the Acting Assistant Attorney General.

14. On June 27, 1968, a hearing on counsel's attorney fee petition was held before this Commission. Evidence was introduced to show that on May 2, 1968 the tribal council had advised members of the tribes involved through their regular mailing list that they would request a fee of 10% of the judgment. Prior to the hearing, the petition for award of attorney


fees and affidavit and exhibits in support thereof had been forwarded by the Commission to tribal leaders in accordance with the Rules of this Commission, including each of the individual tribal representatives who testified at the hearing.


At the hearing, the Commission received a statement from J. Roy Thompson, Jr., the attorney of record, in support of the request for a 10% fee and, in addition, received the testimony of the following representatives of the three tribes: for the Kiowas, Vincent Bointy and Dennis Belindo; for the Comanches, Lee Motah and Julia Mahseet; and for the Apaches, Claude Jay and Houston KlineKole. All of the representatives of the tribes testified that the matter of quantum of the fee had been discussed at regularly called meetings of the three tribes and that the tribes had agreed that the attorneys should receive a fee of 10% of the judgment.


The attorney representing the defendant called the attention of the Commission to the letter on file from the Department of Justice dated June 13, 1968, in which was enclosed copy of letter from the Deputy Solicitor of the Department of the Interior dated June 7, 1968, and a memo from the Deputy Commissioner of Indian Affairs dated May 28, 1968. The substance of this letter and the enclosures was that the Executive Department took no position with respect to the amount of the claim for attorney fees. The representative of the Department of Justice, however, made statements at the hearing which were laudatory to the manner in which petitioners' attorneys had handled the litigation.

15. Based upon the foregoing findings of fact and all the evidence of record in these dockets, the Commission concludes that petitioners' counsel

have rendered valuable legal services to these tribes which resulted in the successful termination of this prolonged litigation. Counsel has demonstrated to this Commission consummate professional skill and industry throughout all phases of this litigation including the preparations for and actual trial of the issues involved, the preparation of the proposed findings of fact, briefing and replies to defendant's pleadings and documents, and in the final settlement negotiations. Accordingly the Commission concludes that J. Roy Thompson, Jr., W. C. Lewis, Jr., Executor of the Estate of W. C. Lewis, and Goldie B. Miskovsky, Administratrix of the Estate of Frank Miskovsky, are entitled to an attorney fee of ten percent (10%) of \$6,000,000; the final judgment recovered by the Kiowa, Comanche and Apache Tribes, or a fee of \$600,000. An appropriate order to this effect will be entered herein.


John T. Vance, Chairman


Jerome K. Kuykendall, Commissioner


Richard W. Yarborough, Commissioner