

BEFORE THE INDIAN CLAIMS COMMISSION

THE YAVAPAI and the groups and bands)	
thereof, ex rel.)	
Calloway Bonnaha, Harry Jones)	
Fred Beauty and Warren Gazzam;)	
)	
THE YAVAPAI-APACHE INDIAN COMMUNITY;)	
)	
THE FORT McDOWELL MOHAVE-APACHE)	Docket Nos. 22-E and 22-F
COMMUNITY,)	
)	
Plaintiffs,)	
)	
v.)	
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: Sept 17, 1969

FINDINGS OF FACT ON AWARD OF ATTORNEY FEES

On July 16, 1969, the attorney of record for the plaintiffs, tribes and groups of Yavapai Indians, in Docket Nos. 22-E and 22-F, filed an application for allowance of attorney fees. On August 20, 1969, the response of the defendant, with attached letter from the Office of the Solicitor of the Department of the Interior and an accompanying memorandum, was filed with the Commission. By letter dated August 22, 1969, the Commission transmitted to the head officers of the plaintiff tribes copies of the application for fees and the statement accompanying the application. 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 Docket Nos. 22-E and 22-F in favor of the plaintiff tribes was entered on March 13, 1969, in the amount of \$5,100,000.00. The funds in payment of the Commission's final award were appropriated by Congress by the Act of July 22, 1969 (P.L. 91-47) and were deposited in the United States Treasury.

2. The claims in Docket No. 22-E were for compensation for the Indian title lands of the Yavapai and the groups thereof, located in Arizona, which were taken by the United States. The claims in Docket No. 22-F were for damages for trespasses on said lands and for a general accounting by the United States.

3. The Indian Claims Commission Act contains the following provision pertaining to the fixing 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.***

As hereinafter noted, the approved current attorney contracts with the plaintiff tribes do not contain a stipulation fixing the amount of attorney fees. Rather, the contracts provide that the compensation of the attorneys is to be wholly contingent upon a recovery

on the claims, and is to be determined by the Commission in an amount equitably due, but in no event in excess of 10 percent of the recovery.

4. The attorney contracts are with two organized Indian tribes recognized by the Secretary of the Interior, namely, the Yavapai-Apache Indian Community and the Fort McDowell Mohave-Apache Community.

Eight attorneys were parties to the contracts with the two tribes requiring performance of services in the prosecution of the claims in these cases. Of the eight attorneys, five, namely, I. S. Weissbrodt and Abe W. Weissbrodt, of Washington, D. C. and Jay H. Hoag and Rodney J. Edwards, of Duluth, Minnesota, and C. M. Wright, of Tucson, Arizona, are parties to contracts which are presently in force. The other three attorneys, namely, David Cobb and James E. Curry, of Washington, D. C. and Clarence G. Lindquist (deceased), formerly of Duluth, Minnesota, performed duties under superseded or replaced contracts.

5. The original contract with the Yavapai-Apache Indian Community was made in October 1947 and, as amended, was conditionally approved in August 1949 (Symbol No. I-1-Ind. 42188). James E. Curry and C. M. Wright were parties to the contract. This contract, as amended, was terminated and replaced by a contract, made as of December 1952, with I. S. Weissbrodt, David Cobb, Jay H. Hoag, Clarence G. Lindquist, Rodney J. Edwards and C. M. Wright (Symbol 14-20-550, Contract No. 154). Jay J. Hoag, Clarence G. Lindquist and Rodney J. Edwards made assignments transferring a portion of their interests in

the net fees to be received under the December 1952 contracts to six attorneys: J. Allan Lind, Denis McGinn and James R. Fitzharris as McGinn and Fitzharris, Henry J. Grannis, John B. Halloran and John A. Spellacy.

6. As pertains to the claims in Docket No. 22-E, the 1952 contract with the Yavapai-Apache Indian Community was superseded by a new contract, made in July 1966, with I. S. Weissbrodt, Abe W. Weissbrodt, Jay H. Hoag, Rodney J. Edwards and C. M. Wright (Symbol 14-20-0450, Contract No. 5834); and, as pertains to the claims in Docket No. 22-F, the 1952 contract was superseded by a new contract, also made in July 1966, with the latter five attorneys (Symbol No. 14-20-0450, Contract No. 5838). The term of the two 1966 contracts with the Yavapai-Apache Indian Community extends through June 24, 1974.

7. The original contract with the Fort McDowell Mohave-Apache Community was made in 1949 with James E. Curry and C. M. Wright (I-1-Ind. 42229). This contract was replaced by a contract, made in December 1952, with I. S. Weissbrodt, David Cobb, Jay H. Hoag, Clarence G. Lindquist, Rodney J. Edwards, and C. M. Wright (Symbol No. 14-20-650, Contract No. 116). Jay H. Hoag, Clarence G. Lindquist, and Rodney J. Edwards made assignments transferring a part of their interest in this 1952 contract with the Fort McDowell Mohave-Apache Community to the same attorneys to whom they had made assignments with respect to the 1952 contract with the Yavapai-Apache Indian Community, as stated above.

8. As pertains to the claims in Docket No. 22-E, the 1952 attorney contract with the Fort McDowell Mohave-Apache Community was replaced by a new contract, made in June 1966, with I. S. Weissbrodt, Abe W. Weissbrodt, Jay H. Hoag, Rodney J. Edwards, and C. M. Wright (Symbol 14-20-0450, Contract No. 5837); and as pertains to the claims in Docket No. 22-F, the 1952 attorney contract with the Fort McDowell Mohave-Apache Community was replaced by a new contract, also made in June 1966, with these same five attorneys (Symbol 14-20-0450, Contract No. 5835). The term of said two 1966 contracts extends through June 24, 1974.

9. Each of said contracts, currently in force, contains an identical provision, in paragraph 8 thereof, pertaining to attorney fees, as follows:

It is agreed that the compensation of the ATTORNEYS for the services previously rendered and to be rendered under the terms of this CONTRACT is to be wholly contingent upon a recovery for the TRIBE. The ATTORNEYS shall receive such compensation as the court or tribunal awarding a recovery to or for the TRIBE shall determine to be equitably due the ATTORNEYS, or, if the matter be settled without submission to a court or tribunal resulting in a recovery to or for the TRIBE, as the Secretary of the Interior or his authorized representative may find to be equitably due the ATTORNEYS, but in no event shall the aggregate fees exceed ten percentum of any and all sums recovered or procured, through efforts, in whole or in part, for the TRIBE, whether by suit, action of any department of the Government or of the Congress of the United States, or otherwise.

10. In the instant proceedings, application is made for an award of attorney fees in the amount of \$510,000.00, being 10 percent of the final tribal award of \$5,100,000.00.

The applicant is I. S. Weissbrodt, who, as noted, is one of the contract attorneys and the attorney of record in these cases. He seeks an award of attorney fees on behalf of himself and all other present and former attorneys having a contract interest in the attorney fees in the proceedings. The obligations to the other attorneys who were engaged by the contract attorneys to perform services have already been paid by the contract attorneys or will be met from the award.

11. Six of the contract attorneys, namely, Abe W. Weissbrodt, Jay H. Hoag, Rodney J. Edwards, C. M. Wright, James E. Curry, and David Cobb have signed and filed with the Commission a formal consent and request that the attorney fees in these cases be paid to I. S. Weissbrodt, the attorney of record. Pursuant to authority granted by a judgment of the District Court of the Sixth Judicial District, County of St. Louis, State of Minnesota, entered August 28, 1967, in proceedings involving the Estate of Clarence G. Lindquist, a formal consent and request has been signed and filed with the Commission on behalf of the Estate of Clarence G. Lindquist, also requesting that the attorney fees be paid to I. S. Weissbrodt.

J. Allan Lind, James R. Fitzharris, John B. Halloran and John A. Spellacy, to whom Jay H. Hoag, Rodney J. Edwards and Clarence G. Lindquist assigned portions of their interests in the net fees, have similarly signed and filed with the Commission consents requesting that the attorney fees be paid to I. S. Weissbrodt. Also, formal consents have been signed and filed with the Commission, on behalf of the Estate of Denis McGinn and the

Estate of Henry J. Grannis, similarly requesting that the attorney fees be paid to I. S. Weissbrodt.

The Commission has received from the Clerk of the United States District Court of the District of Columbia an order of that Court dated February 11, 1969, entered in the case of Ceil Bryson Cohen, Ancillary Executrix of the Estate of Henry Cohen, Deceased v. James E. Curry, Civil Action No. 86-69. The order provides that any share of the attorney fees payable by I. S. Weissbrodt to James E. Curry in these dockets shall be deposited by I. S. Weissbrodt, pursuant to an escrow agreement between the parties to said case, in an account in a depository mutually satisfactory to the parties.

12. By a letter dated August 7, 1969, the Solicitor of the Department of the Interior advised the Honorable Shiro Kashiwa, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, that the Department did not have sufficient information upon which to make a recommendation regarding the size of the attorneys' fee in this case. That letter enclosed a memorandum from the Commissioner of Indian Affairs to the Solicitor of the Department of the Interior, which reads as follows:

The Indian Claims Commission sent to us, pursuant to 25 CFR 503.34b(b), copies of a petition filed in Indian Claims Commission dockets numbered 22-E and 22-F by the Attorney of Record for allowance of attorneys' fees in the sum of \$510,000.00. A member of your staff informally requested our comments on the petition.

The claims in dockets numbered 22-E and 22-F were completed with the granting of an award by the Indian Claims Commission on March 13, 1969, in the amount of \$5,100,000.00 in favor of the Yavapai and groups thereof. Funds to cover the award were appropriated on July 22, 1969 (P.L. 91-47).

We have reviewed the fee petition and the statement which accompanied it. The data set out in the statement identifying the claims contracts under which the claims in the two dockets were prosecuted naming all of the attorneys who have an interest thereunder in attorneys' fees, and the provisions of the contracts regarding compensation to the attorneys were found to be correct.

This Bureau did not participate in the litigation of dockets numbered 22-E and 22-F and we do not have sufficient detailed information upon which to make a recommendation as to the amount of compensation earned by the attorneys.

13. In support of the application for an award of compensation, the attorneys rely primarily on (1) the nature of the services performed and responsibilities undertaken by them in the cases; (2) the results accomplished and benefits flowing to the clients; (3) the customary compensation of attorneys for similar services; (4) the risk assumed by the attorneys in that compensation for their services and efforts was contingent; (5) the burden on the attorneys in that they have performed services for a period of twenty years without any compensation; (6) the burden placed upon the attorneys in advancing substantial sums of money required for costs and expenses of investigating and prosecuting the claims, and the risk undertaken by the attorneys in that reimbursement of moneys advanced by them was contingent upon a recovery for the Indians.

14. The final determination of these claims 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 full investigation, lengthy trial proceedings pertaining to the liability of the defendant, and the decision of the Commission in Docket No. 22-E

on the issues of the extent and boundaries of the Indian title lands of the aboriginal Yavapai groups located in Arizona and the date of the taking of such lands by the United States. During the course of the negotiations on settlement with respect to Docket No. 22-E, it was suggested that consideration be given to the inclusion of the claims in Docket No. 22-F, so that a settlement of both cases could be arranged. Following investigation and analysis, the attorneys for the Yavapai concluded that, if Docket No. 22-F was litigated to final conclusion, it was not reasonable to believe that there would be any recovery in that case which might appreciably exceed the costs and expenses of the litigation. Accordingly, when the negotiations with respect to Docket No. 22-E arrived at a figure which the Yavapai attorneys considered to be within a range favorable to the Yavapai, the attorneys assented to the inclusion of the claims in Docket No. 22-F as part of an overall settlement of both dockets.

15. The claims set forth in Docket Nos. 22-E and 22-F were originally presented, along with various other claims, in a petition, filed on February 3, 1948, in Docket No. 22, on behalf of the so-called "Apache Nation." The lands claimed in this petition were located by reference to Royce Cessions 688 and 689, which encompassed the aboriginal lands of the Yavapai as well as various Apache tribes. On October 18, 1950, a first amended petition was filed in Docket No. 22 which specifically added as parties: (a) various present-day organized Apache and Yavapai

tribes, including the Yavapai-Apache Indian Community and the Fort McDowell Mohave-Apache Community; (b) various aboriginal Apache and Yavapai tribes, including the Yavapai; and (c) various individual representative plaintiffs, including certain individuals of Yavapai descent.

The attorneys were persuaded, as a matter of cautious procedure, to present the claims of the various tribes of Apache and Yavapai descent in a single petition for a number of reasons, including (1) the considerable confusion in historical documents with respect to the names applied to the Indian groups of the American Southwest, including the designation of groups of Yavapai as Apache Indians; (2) the history and terms of the Treaty of July 1, 1852 (10 Stat. 979), which was made with the so-called "Apache Nation of Indians" whose lands were described in some historic documents to encompass extensive areas in New Mexico and Arizona, including the aboriginal lands of the Yavapai; (3) the actions of the Government in placing a number of the Apache and Yavapai tribal groups on the same reservation; and (4) because of other evidence of interrelationships between certain of the Apache and Yavapai groups.

16. 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 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 Yavapai for compensation for the taking of their aboriginal lands in the present state of Arizona, and the assertion of such claims in a

second amended petition designated as Docket No. 22-E. The claims for damages for trespasses on said lands and for a general accounting on behalf of the Yavapai were separated from Docket No. 22 and set forth in a second amended petition in Docket No. 22-F.

17. The attorney contracts imposed upon the attorneys the duty, among others, of investigating the claims. In carrying out this duty, the contract attorneys met and consulted with their clients and 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. Complete sets of these documents and writings, comprising the great bulk of plaintiffs' exhibits, which were offered and received in evidence at the main trial proceedings, were furnished by the attorneys to the expert witnesses who were engaged by the attorneys, on behalf of the plaintiffs, to testify at the trials.

18. The original hearings before the Commission, at which evidence was presented with respect to the Indian title claims of the Yavapai, were held on January 15, 1951, at Phoenix, Arizona, and on January 16 and 17, 1951, at Prescott, Arizona, where the testimony of twenty-eight Indian witnesses was taken as well as the testimony of the Superintendent of an Agency of Bureau of Indian Affairs having jurisdiction over Yavapai Indians. Most of these Indian witnesses were well-advanced in age. They presented testimony as to the history, land use and cultural patterns of, and areas occupied by, the aboriginal Yavapai.

19. The main trial with respect to liability issues in Docket No. 22-E was held from October 19 through October 28, 1959. The plaintiffs

presented the testimony of three experts: Dr. Philip Drucker, who had been employed as an ethnologist with the Bureau of American Ethnology, Smithsonian Institution, for over ten years; Dr. Harry T. Getty, who had taught courses in ethnology at the University of Arizona, at Tucson, for more than ten years; and Dr. Alfred B. Thomas, Professor of History at the University of Alabama. The defendant presented the testimony of Mr. Albert Schroeder, an archeologist employed by the National Park Service. The transcript of testimony covered some 970 pages. An extensive documentary record was presented, a total of more than 780 numbered exhibits being received in evidence. Thereafter, the plaintiffs in Docket No. 22-E filed their proposed findings of fact, evidence in support thereof, and brief. Following the filing by defendant of its proposed findings, objections and brief, plaintiffs filed their objections to defendant's proposed findings and an accompanying reply brief.

20. The Commission issued its findings of fact, opinion, and interlocutory order in Docket No. 22-E on March 3, 1965 (15 Ind. Cl. Comm. 68), determining the extent and boundaries of the area of land which the Yavapai and the groups thereof aboriginally used. On March 24, 1965, the Commission entered an order amending its finding of fact relating to the description of the award area (Id., 193).

By planimetry, it has been calculated that this award area, located in west-central Arizona, covered a total of 9,238,600 acres. The Commission also decided that the United States took said lands from the

aboriginal Yavapai on May 1, 1873, without payment of any compensation; and that the plaintiffs were entitled to recover the fair market value of said lands, 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 award area, and for the determination of the value of the lands as of May 1, 1873, and the amount of offsets.

21. The record before the Commission establishes the character and extent of the services of the attorneys and the results achieved. The record shows that in addition to the main issues and hearings pertaining to proof of Indian title and the date of taking, there were a variety of other time-consuming proceedings involving subsidiary issues, including, inter alia, those related to the capacity and identity of the plaintiffs, complex problems arising out of overlapping claims of other tribes and attempted interventions and other proceedings in connection therewith, and issues pertaining to the separation of the claims of the Yavapai from other tribal groups.

22. The attorneys for the Government vigorously and ably defended against plaintiffs' claims in Docket No. 22-E, presenting several issues designed to defeat the claims in their entirety, as well as alternative defenses aimed to reduce defendant's liability to a small portion of the claimed area. Also, conflicting claims to various portions of the

claimed Yavapai area were asserted by seven other tribes. However, the Yavapai prevailed, winning recovery for the great bulk of the area claimed on their behalf.

23. Following the Commission's decision of March 1965, the attorneys commenced the investigation of the economic, geographic and historic materials pertinent to the determination of the value of the awarded lands, including the various resources thereof. The firm of Shenon and Full was employed to appraise specially the mineral resources of the Yavapai lands, and the firm of Coldwell, Banker & Company was engaged to make an overall appraisal of the Yavapai surface lands and the resources thereof.

The attorneys then studied and analyzed the valuation data and the reports of the experts. Also, the attorneys analyzed the valuation decisions of the Court of Claims and this Commission in comparable Indian claim cases. 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 cases. Further, the attorneys reviewed and analyzed the facts and issues pertinent to the Yavapai trespass and accounting claims in Docket No. 22-F.

24. Thereafter, the Yavapai attorneys engaged in negotiations with the attorneys for the defendant for a consolidated compromise settlement of the claims in Docket Nos. 22-E and 22-F. These negotiations

culminated in a revised offer dated July 18, 1968, made by the attorneys on behalf of the Yavapai, which was conditionally accepted on August 21, 1968, by the Assistant Attorney General, Clyde O. Martz, acting for the United States. Then the attorneys for the Yavapai took steps to obtain the necessary approvals of the proposed compromise settlement by the tribal governing bodies, the tribal members and the Commissioner of Indian Affairs, in accordance with the settlement procedures and requirements established by the Commission. On January 8, 1969, a hearing was held before the Commission on a joint motion of the parties to approve the compromise settlement and, on March 13, 1969, the Commission entered its order and findings approving the compromise settlement of the claims (20 Ind. Cl. Comm. 361).

25. The Commission has knowledge of the various factors, circumstances and precedents in connection with the history of litigation of Indian title cases, which establish that at the time the attorneys undertook their contract duties as well as for many years thereafter, the claims presented in Docket No. 22-E were highly contingent and the litigation entailed specially serious hazards and risks.

None of the plaintiff tribes had funds or available sources from which to meet any costs and expenses of the litigation prior to the year 1963, when loan funds for the limited purpose of employment of expert witnesses were provided by act of Congress. Accordingly, and in order for the Yavapai to have the opportunity to present and prosecute their

claims, the attorneys undertook the obligation of advancing the monies to meet the necessary costs and expenses. The attorneys have paid out substantial sums for necessary costs and expenses under stipulations in the attorney contracts that reimbursement would be made to the attorneys only out of the recovery, if any. Accordingly, under the circumstances involved here, the attorneys have invested and risked in the prosecution of the Yavapai claims not only their services, but also their own funds which have been tied up over a period of twenty years.

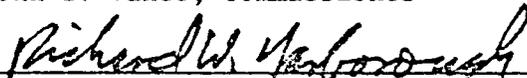
26. The attorneys conducted the litigation skillfully, resourcefully and in the best interests of their clients. As a result of the efforts of the attorneys, which efforts extended over a period of twenty years, a fund of \$5,100,000.00, comprising a tribal asset, has been produced.

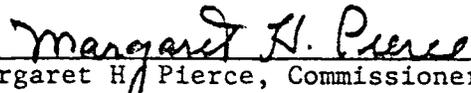
27. Based on the entire record in these cases, and considering the difficult problems peculiar to this litigation, as well as all appropriate factors pertinent to the determination of attorneys' fees in contingent cases under the standards established by the Indian Claims Commission Act, it is the conclusion of the Commission that the contract attorneys should be awarded and they are hereby awarded a fee of \$510,000.00 to be paid out of the recovery for the plaintiff tribes. In accordance with the consents and requests by or on behalf of each and all of the contract attorneys, which have been filed with the

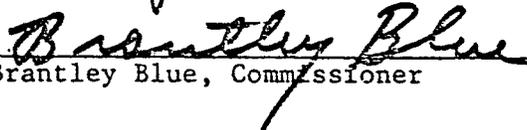
Commission, the said fees are to be paid to I. S. Weissbrodt, the attorney of record, for appropriate distribution in accordance with the agreements of the attorneys.


Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner