

BEFORE THE INDIAN CLAIMS COMMISSION

THE YAKIMA TRIBE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Docket Nos. 47 and 164
	)	Consolidated
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: OCT 29 1969

FINDINGS OF FACT ON AWARD OF ATTORNEY FEE

On August 1, 1969 Paul M. Niebell, counsel for the plaintiff, the Yakima Tribe of Indians of the State of Washington, filed herein an application for allowance of attorney fee outlining in detail the legal services performed in successfully prosecuting the claims in the above dockets. Copies of said application were forwarded to the Department of Justice, the Department of the Interior, and to the Yakima Tribe, and the replies therefrom have been received and given consideration. No claim is made herein for reimbursable expenses since these have been substantially reimbursed to counsel from Yakima tribal funds during the progress of the litigation.

Therefore, the Commission, having considered the entire record, makes the following findings of fact generally outlining the legal services rendered by counsel, and the results obtained for the Yakima Tribe:

1. The services of counsel in the Yakima boundary case, Docket No. 47, began in June 1938 and continued until the appropriation in payment of the final judgment rendered herein of \$2,100,000.00 was made by Congress in the Second Supplemental Appropriation Act of July 22, 1969, 83 Stat. 49, 62, and to date of the filing of the application for attorney fee, and covered a period of 31 years.

2. Counsel was employed by the Yakima Tribe to perform the services herein rendered under three separate contracts: (a) a formal assignment, dated February 8, 1939, of an interest in an attorney contract, dated April 6, 1938, approved by the Department of the Interior on July 27, 1938; (b) a contract, dated July 20, 1948, and duly approved by the Department of the Interior on February 14, 1949; and (c) a contract, dated December 10, 1958, approved by the Department of the Interior on April 16, 1959, and an extension of said contract for a period of two years beginning February 14, 1969 and approved on March 28, 1969. The three several contracts were for periods of 10 years duration, and contained the usual provisions that the recovery of fees and expenses were wholly contingent upon recovery on the claims, and were limited not to exceed 10 per cent of the amount of recovery. Thereunder, counsel was required to investigate, prepare and prosecute the claims of the Yakima Tribe through the Courts of last resort, unless authorized by the Commissioner of Indian Affairs to terminate the litigation at an intermediate stage; and thereunder counsel could not compromise a claim without the consent of the Yakima Tribe and the Commissioner of Indian Affairs.

3. Congress passed the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, and provided therein a broad forum for the adjudication of Indian tribal claims cases, including those of the Yakima Tribe. The legal services performed by counsel before the Commission and the United States Court of Claims in the Yakima boundary case, Docket No. 47, began with the preparation and filing of the petition with the Commission on June 21, 1949. This petition consisted of 16 printed pages, and an exhibit prepared by counsel in the form of a map setting forth the Yakima Reservation boundaries and the claimed additions to said boundaries. The petition embodied five separate claims for just compensation: (a) for Tract A along the eastern boundary of the Yakima Reservation; (b) for Tract B along the western boundary; (c) for Tract C along the northern boundary; (d) for Tract D along the southwestern boundary; and (e) for lands erroneously patented to white settlers in the Cedar Valley area within the southern boundary confirmed to settlers under the Act of December 21, 1904, 33 Stat. 595, without compensation to the Yakima Tribe. The litigation thereafter continued until finally settled by stipulation of the parties, approved by the Commission on November 14, 1968, a period of some 19 years of litigation.

4. Earlier counsel had sponsored and secured an appropriation of \$4,000.00 of Yakima tribal funds in the Act of May 10, 1939, 53 Stat. 685, 696, to pay the expenses of an investigation into the disputed boundary points of the Yakima Reservation. Through the efforts of counsel two civil engineers were secured to make this investigation:

E. D. Calvin, Cadastral Engineer of the General Land Office, and Ward P. Webber, an Engineer of the National Park Service, whose reports, plaintiff's exhibits 5 and 46, form a part of the record in this case. With the aid of these reports and the prior research of counsel in the files of the Interior Department and its Bureau of Indian Affairs and also in the records of the General Land Office and the National Archives, counsel formulated the claims presented in the petition in Docket No. 47.

5. The defendant's answer, filed with the Commission on February 17, 1950, was in the form of a general denial of liability of the defendant and pleaded res judicata in view of prior litigation in Northern Pacific Railway Company v. United States, 227 U. S. 355 (1913) and offset claims. The answer put in issue all of the claims presented in the petition and required counsel for the plaintiff to assume the full burden of proof of said claims.

6. The litigation of these claims involved difficult, complicated and novel issues of fact and law relative to the boundaries of the Yakima Reservation as defined in the Yakima Treaty of June 9, 1855 and required the services of counsel experienced and seasoned in the prosecution of large and complicated Indian claims litigation. Counsel necessarily had to familiarize himself with the terms of the Yakima Treaty of June 9, 1855 and its history. The difficulties arose because the description of the Yakima Reservation boundaries as defined in the Yakima Treaty by natural objects did not fit the natural objects on the ground, and the intent of the treaty parties had to be

determined from the contemporaneous data. The responsibility thus undertaken by counsel required versatile skills and required the services of counsel who knew how to investigate the tribal relations between the Yakima Tribe and the United States, and where to obtain the source material.

7. The research in this case made by counsel was done in the records of the National Archives, the Old Indian Office records, the Legislative, War and State Department files, the Executive Documents of Congress, the records of the General Land Office, now designated the Bureau of Land Management, the records of the Yakima Indian Agency, and the printed annual reports of the Commissioner of Indian Affairs from 1850 through 1914. The extracts therefrom totaled 970 pages, plaintiff's exhibits 98a and 98b. The field notes and plats of the various surveys and boundary maps were found in the records of the General Land Office and in the Cartographic Section of the National Archives. As a result of this extensive research of many documents, counsel selected and secured copies of the important documents, records and maps which were introduced in evidence in this case in support of the plaintiff's claims.

8. Counsel also studied the record in the decided cases relating to the Yakima Tribe and the boundary issues, and particularly the record and the several decisions in United States v. Northern Pacific Railway Company, 191 Fed. 947, affirmed in 227 U. S. 355, dealing with the boundaries of the Yakima Reservation, and which played an important

part in the determinations and ultimate conclusions in this case on the issue of res judicata raised by the defendant's answer.

9. In preparing the boundary claims for trial, counsel, while on several trips to the Yakima Reservation in the State of Washington, visited the areas along the reservation boundaries in dispute and familiarized himself with the topography and the natural objects on the ground.

10. In prosecuting the claims in Docket No. 47 counsel arranged and prepared for nine separate hearings before the Commission which are set forth as follows: At Yakima, Washington, on August 21-23, 1950; at Washington, D. C. on April 23-24, 1951; at Washington, D. C., on October 1, 1951; at Yakima, Washington, on August 17, 1953; at Seattle, Washington, on August 23-24, 1954; at Washington, D. C., on September 17, 1964; at Washington, D. C., on June 15, 1965; at Washington, D. C., on June 8, 1967; and at Washington, D. C., on October 16, 1968, the last being on the compromise settlement.

11. In Docket No. 47 counsel for the plaintiff researched and had reproduced and introduced into the record of said case a total of 109 separate exhibits on behalf of the plaintiff. Counsel for the defendant introduced into the record a total of 117 exhibits on behalf of the defendant, which counsel for the plaintiff was required to study and analyze. Counsel for both parties filed in the record 13 joint exhibits on the compromise settlement which finally disposed of this case and Docket No. 164. Counsel for the plaintiff secured and presented the reports and/or testimony of four expert witnesses

on liability and value, four civil engineers, and two expert foresters. The defendant's counsel presented the testimony of four expert witnesses, two civil engineers, one forester, and one expert appraiser, who submitted an appraisal report of 162 pages and a map. The plaintiff's counsel prepared for and cross-examined the defendant's expert witnesses and studied and analyzed the appraisal report of the defendant's appraiser in preparing to cross-examine said appraiser. The plaintiff's counsel also presented seven other witnesses in support of the plaintiff's claims, and the defendant presented four other witnesses on behalf of the defendant. The transcripts of testimony of the hearings before the Commission cover 1,009 pages. The plaintiff's counsel also prepared two large initial briefs and two involved reply briefs. The defendant's counsel prepared and presented two large printed briefs, which the plaintiff's counsel had to study, analyze, research and analyze the citations therein, in preparing the plaintiff's reply briefs.

12. The services of counsel herein included a study and analysis and reply to the defendant's amended answer, filed herein on January 26, 1954, claiming offsets against the plaintiff in the total amount of \$1,394,962.92, an analysis of a supporting General Accounting Office report dated October 30, 1951 of 186 pages of facts and figures, a study and analysis and reply to the defendant's second amended answer, filed herein on October 30, 1957, increasing the defendant's offset claims to \$1,458,576.38, and an analysis of a supporting General Accounting Office report dated March 28, 1957 consisting of 461 pages of facts and figures.

13. Throughout the litigation the defendant was represented by able and skillful counsel who forcibly presented the contentions of the defendant.

14. The settlement of the complicated questions of fact and law involved in this case required the following decisions of the Commission: (a) 2 Ind. Cl. Comm. 433-460 (1953); (b) 2 Ind. Cl. Comm. 481-499 (1953); (c) 5 Ind. Cl. Comm. 636-679 (1957); (d) 15 Ind. Cl. Comm. 456 (1965); (e) 16 Ind. Cl. Comm. 536 (1966); (f) 18 Ind. Cl. Comm. 426 (1967); and (g) 20 Ind. Cl. Comm. 76 (1968); and also the prosecution of an appeal to the United States Court of Claims resulting in the decision of that Court on October 3, 1962, 158 Ct. Cl. 672.

15. Counsel in the exercise of his judgment and experience decided to prosecute an appeal to the United States Court of Claims from the decisions of the Commission on liability and value, which services covered the period from December 30, 1960 to October 3, 1962. Counsel prepared and filed a notice of appeal of some 23 typewritten pages, listing 102 issues of fact and law, and prepared and filed in the United States Court of Claims an extensive brief of 274 printed pages raising issues of liability and value. In this brief counsel analyzed the decision of Northern Pacific Railway Company v. United States, 227 U. S. 355, 57 L. Ed 544, 112 C. C. A. 359, 191 F. 947, the principal of res judicata held by the Commission to apply to Tracts B and D, and the issues of fact and law raised in the Government's extensive brief of 127 printed pages. Counsel also researched the



59 court decisions and other citations contained in said brief and prepared and filed a reply brief of 40 printed pages. In addition, counsel prepared for and argued the issues orally before the United States Court of Claims. In said appeal proceedings counsel convinced the United States Court of Claims that the Northern Pacific Railway Company case was not res judicata of Tracts B and D, and the Court's decision of October 3, 1962, 158 Ct. Cl. 672, covering 25 printed pages, affirmed the Commission's decision on Tracts A, C and the Cedar Valley area, and reversed and remanded the case to the Commission for further proceedings on Tracts B and D. By said appeal counsel preserved to the plaintiff the largest claim of the plaintiff to the Tract D area, which led to the ultimate recovery in Docket No. 47.

16. The proceedings before the Commission on the remand of the case covered the period from October 3, 1962 to June 19, 1967 and involved an analysis by counsel of some 34 additional exhibits filed by the defendant, the securing and presentation of seven additional exhibits on behalf of the plaintiff, three hearings before the Commission, the preparation and filing of an extensive initial brief on behalf of the plaintiff presenting involved issues of fact and law relative to the Tract B and D claims, analyzing and answering the extensive brief of the defendant of 70 pages of printed material, and the filing of a large reply brief on behalf of the plaintiff. These efforts of counsel resulted in the Commission's findings of fact, opinion and interlocutory order of February 25, 1966 (16 Ind. Cl. Comm. 536), upholding the plaintiff's claim to Tract D of 121,465.69 acres, and denying the plaintiff's claim to Tract B.

17. The work of counsel in consummating the compromise settlement of Docket Nos. 47 and 164 claims covered a period from June 1967 to November 14, 1968 and required three trips to the Yakima Indian Reservation for attendance at councils of the Indians to explain said proposed settlement and to secure their consent to the amount agreed upon, the preparation of a stipulation embodying the terms of settlement, the preparation of a joint motion requesting the Commission's approval of said settlement, securing the consent of the Commissioner of Indian Affairs to said settlement, presenting said settlement to the Commission at a hearing on November 14, 1968, and therein presenting five members of the Yakima Tribe who testified that the terms of said settlement were fully explained to and approved by the Yakima Tribe in general council, and the preparation of requested findings of fact and an order for consideration and adoption by the Commission in approving said settlement. The work also included the preparation and presentation to the Commission of 13 joint exhibits of the parties relative to said compromise settlement. The stipulation of settlement was unique in that 2,548.06 acres of vacant and unpatented lands of Tract D were returned to the Yakima Tribe in kind, and 21,008.66 acres of Tract D lands included within the Gifford Pinchot National Forest were to be set up in a separate petition to permit the Yakima Tribe and counsel to seek restitution to the Yakima Reservation of these lands. These matters were provided in addition to the payment of \$2,100,000.00 for 97,908.97 acres of Tract D lands which had been patented to white settlers, the Cedar Valley lands,

and for the claim embodied in Docket No. 164. The Commission approved said settlement on November 14, 1968 and entered its final judgment herein in favor of the Yakima Tribe in the amount of \$2,100,000.00 (20 Ind. Cl. Comm. 76). Thereafter, counsel followed the course of the presentation of this judgment to Congress, and in the Second Supplemental Appropriation Act of July 22, 1969, 83 Stat. 49, the amount of \$2,100,000.00 was appropriated in payment of said judgment.

18. Docket No. 164 claim included in the compromise settlement involved a claim developed by counsel on behalf of the plaintiff for the value of lands of the Yakima Reservation allotted to persons erroneously enrolled by the defendant's enrolling officers on the Yakima tribal allotment rolls. This claim was discovered and developed by counsel through research in the records of the Yakima Indian Agency, Toppenish, Washington, during an extended trip to the Yakima Reservation. Some 411 persons were found to be thus erroneously enrolled, who had received an allotment of Yakima lands of approximately 80 acres each. Several motions were made in this case by the defendant, and one short hearing was held. The petition was prepared and filed by counsel on behalf of the plaintiff on July 24, 1951, and the services of counsel in this case covered a period from that date until consolidated with Docket No. 47 and included in the compromise settlement approved on November 14, 1968 (20 Ind. Cl. Comm. 76).

19. The compromise settlement saved much litigation on the value of the Tract D lands in Docket No. 47 and litigation of the issues of liability and value of the lands in Docket No. 164, along with the

commensurate expenses of said litigation. The settlement also permitted the Yakima Tribe to secure entry of the final judgment and payment thereof, and accrued interest thereon, at a much earlier date than if the litigation had continued on the above issues.

20. In the performance of his duties, counsel made nine extended trips to the Yakima Indian Reservation in the State of Washington during the period 1948 to 1968 covering a total of 274 days. Counsel also made numerous long-distance and local telephone calls, prepared and answered many motions filed before the Commission, and in working out the compromise settlement, arranged and prepared for 44 conferences between counsel and other concerned parties. Counsel also made annual reports to the Yakima Tribe on the progress of the litigation of the Yakima claims. These reports were either in written form or given orally by counsel while in attendance at the Yakima general council and Yakima Tribal Council meetings.

21. In response to the Commission's request for comments on the application of counsel filed herein, the Associate Solicitor, Indian Affairs, United States Department of the Interior, on August 21, 1969 forwarded a communication to Assistant Attorney General, Honorable Shiro Kashiwa enclosing a memorandum of the Acting Deputy Commissioner of Indian Affairs to the Solicitor dated August 15, 1966 confirming the dates of the several contracts between the Yakima Tribe and Attorney Paul M. Niebell and stating that that office did "not have sufficient detailed information to make a recommendation as to the amount of compensation earned". The Associate Solicitor confirmed

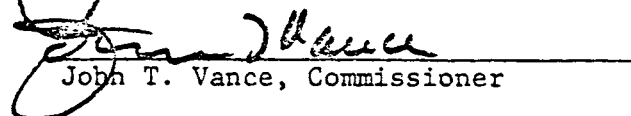
this view of the Commissioner's Office. On August 28, 1969 counsel for the defendant responded to the petition for the allowance of attorney fee, transmitting the communications of the Department of the Interior, and stating that "defendant interposes no objection to the allowance of attorney's fee in the sum of \$210,000".

22. In response to the Commission's request for comments on the said application sent to the Yakima Tribe, Toppenish, Washington, the Yakima Tribal Council advised the Commission that on September 22, 1969 the Yakima Tribal Council unanimously approved the application for allowance of attorney fee of said Paul M. Niebell in said Docket Nos. 47 and 164.

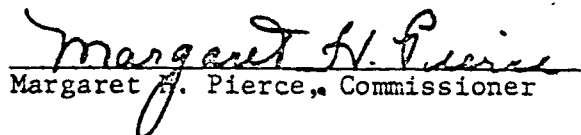
23. Counsel for the plaintiff herein, Paul M. Niebell, is a recognized expert in the specialized field of Indian claims litigation (17 Ind. Cl. Comm. 439, 440-441). The services of counsel covered all phases of Indian claims litigation: litigation before the Indian Claims Commission on questions of liability and also on value, a successful appeal to the United States Court of Claims, and a compromise settlement on the value of certain of the acreage involved herein. Based upon the entire record in the above cases, the difficult problems presented in this litigation, the contingent nature of the compensation, the responsibility undertaken by counsel and the risks assumed by counsel over a period of 31 years, and the other factors to be considered in the determination of attorney fees in contingent fee cases under the Indian Claims Commission Act, and the decided cases relative thereto, the Commission finds that the legal services performed by

counsel in the above-entitled dockets were faithfully and skillfully performed and resulted in large benefits to the Yakima Tribe and for such services counsel is reasonably entitled to 10 percent of the final judgment of \$2,100,000.00 entered in these cases, or an attorney fee of \$210,000.00

  
Jerome K. Kuykendall, Chairman

  
John T. Vance, Commissioner

  
Richard W. Yarborough, Commissioner

  
Margaret H. Pierce, Commissioner

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Brantley Blue, Commissioner