

BEFORE THE INDIAN CLAIMS COMMISSION

THE THREE AFFILIATED TRIBES OF THE	)	
FORT BERTHOLD RESERVATION,	)	
	)	
Plaintiffs,	)	Docket Nos. 350-A,
v.	)	350-E, and 350-H
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: March 4, 1970

FINDINGS OF FACT ON AWARD OF ATTORNEYS' FEE

On December 1, 1969, Charles A. Hobbs, Esquire, of the law firm of Wilkinson, Cragun & Barker, the attorney of record herein for the above named plaintiffs, filed an application for allowance of an attorneys' fee in the amount of ten percent of the final judgment of \$1,850,000.00 entered herein in June of 1969, less a \$3,000.00 retainer that the law firm received from the plaintiffs. Having considered the said application, the defendant's response of February 16, 1970, filed herein on February 17, 1970, the contracts under which the attorneys served the said plaintiffs and the remainder of the record herein, the Commission makes the following findings of fact:

1. Claims Involved. The original petition, filed August 11, 1951, in Docket No. 350, was a general one encompassing a number of claims in separate counts. Thereafter, by order of January 14, 1958, Docket No. 350 was severed into seven separate dockets. On January 21, 1963, a claim was severed from the petition in Docket No. 350-F and redesignated as Docket No. 350-H.

The dockets involved in this proceeding are Docket Nos. 350-A, 350-E, and 350-H. Claims in Docket Nos. 350-B, 350-C, 350-D, 350-F, and 350-G are still pending before the Commission.

The petition in Docket No. 350-A alleged payment of unconscionable consideration for the cession by the plaintiffs by an agreement of December 14, 1886, approved March 3, 1891 (26 Stat. 1032), of a certain portion of their Fort Berthold Indian Reservation in the present State of North Dakota containing approximately 1,800,000 acres. Somewhat less than half of the area ceded was recognized by the Treaty of Fort Laramie of September 17, 1851 (2 Kappler 594, 4 Kappler 1065) as belonging to the plaintiffs. The remaining portion of the ceded area was made a part of the Fort Berthold Reservation by the Executive Order of July 13, 1880 (1 Kappler 883) in exchange for other of the plaintiffs' Fort Laramie lands.

The petition in Docket No. 350-E alleged that by reason of use of tribal funds for the construction, erection, maintenance, repair, and upkeep of certain agency buildings on the plaintiffs' reservation and by application of a portion of the sum due and owing to the plaintiffs under the decision of the Court of Claims in Fort Berthold Indians v. United States (71 Ct. Cl. 308) to reimburse the defendant for further expenditures for agency buildings, the plaintiffs became owners of the buildings and were entitled to their use, benefit, rents, issue, and profits.

The petition in Docket No. 350-H asserted that the defendant was responsible for the extinction of buffalo from the Fort Berthold

Reservation and other hunting areas used by the Fort Berthold Indians and claimed damages for that loss.

2. Contractual Authority. Contract No. I-1-ind. 42492 dated June 28, 1951, between the Three Affiliated Tribes of the Fort Berthold Reservation and the law firm of Wilkinson, Boyden and Cragun for prosecution of the tribal claims was approved by the Commissioner of Indian Affairs on July 10, 1951. The contract provided for a term of ten years from the date of approval with the provision that two-year extensions might be granted by the Commissioner. The contract, amended in matters not herein pertinent, was extended several times. On June 9, 1967, while the said contract was in full force and effect, the law firm (now Wilkinson, Cragun & Barker) entered into several separate contracts with the tribes, each being a restatement and continuation of employment under Contract No. I-1-ind. 42492, but each limited to a separate claim then pending before the Indian Claims Commission and being handled for the tribes by the firm. Except for this limitation, these contracts were identical in form and each provided for a term of five years beginning July 9, 1967. Contract No. A00C14200066 is limited to the tribes' separate claim in Docket No. 350-A. Contract No. A00C14200068 is limited to the tribes' claim in Docket No. 350-E. Contract No. A00C14200071 is limited to the tribes' claim in Docket No. 350-H. These contracts were approved retroactively by the Director of the Aberdeen Area Office of the Bureau of Indian Affairs on September 9, 1967. Contract No. I-1-ind. 42492 is hereinafter referred

to as the original contract. The individual contracts of July 9, 1967, are hereinafter referred to as the new contracts.

3. Compensation Under the Contracts. Paragraph 4 of both the original contract and the new contracts defines the compensation to be paid to the attorneys for the work to be performed thereunder. The paragraphs are identical in effect with exception of the amount of a retainer to be recouped by the tribes. Under paragraph 4 of the original contract a \$5,000.00 retainer was to be deducted from the fee awarded to the attorneys. Under paragraph 4 of the new contracts a \$3,000.00 retainer is to be deducted from the fee awarded to the attorneys. The change in the amount of the retainer is explained in the first part of paragraph 4 of the new contracts, which paragraph reads as follows:

"4. Under Paragraph 4 of the contract of June 28, 1951, The Attorneys originally received a retainer of Five Thousand Dollars (\$5,000) of which pursuant to a Resolution No. 64-20 of the Tribal Business Council dated May 7, 1964, they transferred the sum of Two Thousand Dollars (\$2,000) to Funke & Eaton, successor attorneys, when The Attorneys resigned from representation on behalf of the Tribes in Docket Nos. 350-B and 350-C, before the Indian Claims Commission. The amount of the retainer transferred was a pro-rata share of the retainer allocable to the claims under Docket Nos. 350-B and 350-C. Aside from the retainer, any additional compensation to The Attorneys for services rendered under the terms of this contract shall be contingent upon a recovery for The Tribes. In the event a recovery is obtained, the balance of the retainer kept by The Attorneys, in the amount of Three Thousand Dollars (\$3,000), shall be deducted from the total amount ultimately awarded to The Attorneys, for all claims in which they represent The Tribes. The Attorneys shall receive such compensation as the Commissioner of Indian Affairs may find equitably to be due, if the matter be settled without submission to a court or other tribunal, or in the event it is submitted to a court of other tribunal, then such sum as the court or tribunal finds to be adequate compensation in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, considering the contingent nature of the

agreement, services rendered and results obtained, but in no event shall the aggregate fee exceed ten per centum (10%) of any and all sums recovered or procured, through the efforts, in whole or in part, for The Tribes, whether by suit, action of any department of the Government or of the Congress of the United States, or otherwise."

4. Award. Pursuant to the said contracts, the attorneys prosecuted, in Indian Claims Commission Docket No. 350-A, the claim of the tribes arising from the Agreement of 1886, approved by Act of March 3, 1891 (26 Stat. 1032), ceding certain lands of the Fort Berthold Reservation and fully investigated and prepared for trial in Docket No. 350-B, the buffalo claim. They further investigated, but did not prepare for trial in Docket No. 350-E, the agency buildings claim. The three dockets were consolidated for settlement with the result that on June 18, 1969, a final judgment was entered in the consolidated case adjudging that the plaintiffs should recover the sum of \$1,850,000.00.

5. Services. The plaintiffs' attorneys have rendered valuable legal services in the successful prosecution and settlement of these three claims. The major portion of the work was undertaken by Messrs. Donald C. Gormley and Charles A. Hobbs and Mrs. Frances L. Horn, all of the firm of Wilkinson, Cragun & Barker, and all known to this Commission as experienced attorneys in the preparation and trial of Indian claims.

6. Difficulties Presented by the Claims. At the outset, because the Three Affiliated Tribes of the Fort Berthold Reservation were late in retaining counsel to present their claims to the Indian Claims Commission, the attorneys' contract to represent the tribes was not

approved until July 10, 1951. The petition was nevertheless filed August 11, 1951, and amended August 13, 1951, to include additional claims, including the buffalo claim, discovered as a result of interviews by Mr. John W. Cragun on the Fort Berthold Reservation on August 11, 1951. The defendant moved to dismiss all counts of the petition on the grounds that the prior decision of the United States Court of Claims in Fort Berthold Indians v. United States (71 Ct. Cl. 308) had disposed of all issues. The attorneys successfully opposed the motion by briefs and oral arguments (3 Ind. Cl. Comm. 444).

A major problem of first impression in the Indian Claims Commission arose in litigation of the claim in Docket No. 350-A that required extensive research and briefing. This was the issue of the compensability of executive order lands. It was decided adversely to the plaintiffs in Docket No. 350-F in accordance with then existing legal precedents. The attorneys appealed the decision in Docket No. 350-F to the United States Court of Claims on a number of issues including the compensability of executive order lands. Although the latter issue was of minor importance in Docket No. 350-F, the attorneys carefully briefed it to the Court of Claims to receive an expeditious ruling primarily for the benefit of the case in Docket No. 350-A. The favorable ruling thus obtained from the Court of Claims was followed by the Commission in its decision on value in Docket No. 350-A (20 Ind. Cl. Comm. 1, 37). The proof in Docket No. 350-A involved the valuing of a tract of approximately 1,800,000 acres of land in an

unsettled but potentially valuable area as of 1891. After obtaining judgment for the plaintiffs in the amount of \$1,785,105.88, subject to offsets, the attorneys successfully negotiated a settlement of the offsets.

In Docket Nos. 350-E and 350-H the attorneys were confronted with well-established legal precedents contrary to the position taken by them for the plaintiffs. After studying the factual data available -- said to be based in the case in Docket No. 350-E upon the General Accounting Office reports filed in the proceedings herein and in the prior proceedings in the United States Court of Claims, and in Docket No. 350-H upon documents collected and interpreted by an ethnohistorian employed for the purpose by the tribes -- and reviewing the legal issues, the attorneys arranged for the consolidation of these two claims with that in Docket No. 350-A for the purpose of settlement. By effecting a successful settlement of the claims in Docket Nos. 350-E and 350-H and thereby avoiding the further expenditure of time and money that would have been involved in the complete litigation of these claims, they served the best interests of their clients.

7. Tribal Approval. The governing body of the Three Affiliated Tribes of the Fort Berthold Reservation on April 2, 1969, adopted a resolution requesting the Indian Claims Commission to approve a fee for the attorneys of ten percent of the joint award in Docket Nos. 350-A, 350-E and 350-H, or a total of \$185,000 less \$3,000, or \$182,000 all told for the work performed by the attorneys, Wilkinson, Cragun &

Barker, on behalf of The Three Affiliated Tribes of the Fort Berthold Reservation in those three claims.

Notice of the filing of the application for allowance of attorneys' fee, which enclosed a copy of the application, was duly sent to the Chairman of the Business Council of The Three Affiliated Tribes of the Fort Berthold Reservation on December 2, 1969. No response to the notice was received.

8. Defendant's Response. The response of the defendant to the application for allowance of attorneys' fee enclosed a copy of a letter dated December 24, 1969, from the Office of the Solicitor of the Department of the Interior and an accompanying memorandum dated December 19, 1969, from the Bureau of Indian Affairs and indicated, in line with the views expressed in this correspondence, that neither the Department of the Interior nor the Department of Justice takes any position as to the attorneys' fee requested in the application.

9. Conclusion. The attorneys for The Three Affiliated Tribes of the Fort Berthold Reservation undertook serious responsibilities and complex litigation under a contract which made the payment of compensation primarily contingent upon recovery. They rendered services in the cause of the plaintiffs herein during a period of some 18 years. They were required to deal with issues of first impression before the Indian Claims Commission and to overcome legal precedents of long standing. They achieved results that were beneficial to the tribes. Tested by the standards fixed in Section 15 of the Indian Claims

Commission Act (25 U.S.C. 70n), including those obtaining for prosecuting similar claims in courts of law, and considering the complex and contingent nature of these claims and the results obtained, the plaintiffs' attorneys have earned and are entitled to an attorneys' fee of \$185,000.00, representing ten percent of the award herein to The Three Affiliated Tribes, less the \$3,000.00 heretofore paid to the attorneys as a retainer.

Jerome K. Kuykendall, Chairman

*John T. Vance*  
John T. Vance, Commissioner

*Richard W. Yarborough*  
Richard W. Yarborough, Commissioner

*Margaret H. Pierce*  
Margaret H. Pierce, Commissioner

*Brantley Blue*  
Brantley Blue, Commissioner