

BEFORE THE INDIAN CLAIMS COMMISSION

THE OSAGE NATION,)	
)	
Plaintiff,)	
)	Docket Nos. 105, 106, 107
v.)	and 108
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: May 26, 1971

FINDINGS OF FACT ON AWARD OF ATTORNEYS' FEE

On February 17, 1971, counsel for the plaintiff, the Osage Nation or Tribe of Indians of the State of Oklahoma, filed herein an application for allowance of attorneys' fee, together with statements by Paul M. Niebell, Esquire, Delmas E. Martin, Esquire, George E. Norvell, Esquire and Warren S. Watkins, Esquire, outlining in detail legal services performed in successfully formulating, prosecuting and settling the claims of the Osage Nation in the above-numbered dockets. Having considered the said application and statements; the defendant's response to the application, filed on March 15, 1971; the contracts of employment under which the attorneys served the Osage Nation; and the evidence in support of the application, including the entire record and all proceedings in the dockets involved herein, the Commission makes the following findings of fact:

1. Award. On September 15, 1970, in consonance with an approved compromise settlement agreement between the parties, the Commission entered a final judgment herein in the sum of \$13,250,000.00 in favor of the Osage Nation (23 Ind. Cl. Comm. 492). Funds to satisfy the judgment were appropriated by Public Law 91-665, approved January 8, 1971 (84 Stat. 1981).

2. Contractual Authority. The representation herein of the Osage Nation was under three formal contracts.

(a) The first of these contracts, assigned No. I-1-ind. 42443, was entered into by the Osage Tribe of Indians of Oklahoma on January 15, 1951, with Delmas E. Martin and George E. Norvell of Tulsa, Oklahoma and Guy Martin of Washington, D. C. This contract was approved on April 11, 1951, and had a specified initial term of 5 years beginning with its date of approval. An extension of its term for an additional 2 years beginning on April 11, 1956, was approved on April 26, 1956.

(b) The second contract, assigned No. 14-20-0650-0545, was entered into by the Osage Tribe of Indians of Oklahoma on March 3, 1958, with Delmas E. Martin and George E. Norvell of Tulsa, Oklahoma. It was approved on June 9, 1958, for a period of 5 years beginning on April 11, 1958. Mr. Guy Martin was not named as an attorney party in this contract or in the third contract mentioned next below.

(c) The third contract, assigned No. 14-20-0406-0012, was entered into by the Osage Tribe of Indians of Oklahoma on May 23, 1963, with Delmas E. Martin and George E. Norvell of Tulsa, Oklahoma, Warren S. Watkins of Claremore, Oklahoma, and Paul M. Niebell of Washington, D. C.

This contract was approved on August 20, 1963, for a term of 5 years beginning on April 11, 1963. By an amendment approved on July 5, 1967, its term was extended to April 10, 1972.

3. Duties Required. Among other things, the aforementioned contracts imposed upon the attorneys the duty of advising and representing the Osage Tribe of Indians of Oklahoma in properly investigating and formulating the claims of the Tribe against the United States under the Indian Claims Commission Act, and the further duty of representing the Tribe before all courts, commissions, departments, tribunals, committees of Congress, and other officers having any duty to perform in connection with the investigation, consideration, or final settlement of the Tribe's claims under the said Act.

The contracts also provided that the attorneys in performing the duties required of them "shall be subject to the supervision and direction of the said Tribe, and shall make no compromise, settlement, or other adjustment of the matters in controversy without the approval of the Commissioner of Indian Affairs and the said Tribe; and the said Attorneys shall also pursue the litigation in question to and through the court of final resort unless authorized by the Commissioner of Indian Affairs to terminate the proceedings at an intermediate stage thereof."

4. Compensation Under The Contracts. With respect to the attorneys' compensation for services rendered, all of the aforementioned contracts provide, among other things, for a contingent fee of not to exceed 10 per cent of the recovery for the Indians. Relevant compensation

provisions currently in effect in the 1963 contract, as amended, read as follows:

"It is agreed that the compensation of the parties of the second part [the attorneys] for the services to be rendered under the terms of this contract is to be wholly contingent upon a recovery for the Tribe. 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 settled without submission to a court or tribunal, or in the event it is submitted to such court or tribunal, then such sum as may be determined by the said court or tribunal equitably to be due for the services theretofore rendered under this contract but in no event shall the aggregate fee exceed ten per centum of any and all sums recovered or procured, through efforts, in whole or in part, for the said Indians, whether by suit, action of any department of the Government, or otherwise; the said sum to be distributed among the parties of the second part as they may agree.

. . . .

"It is further agreed that of the funds heretofore advanced parties of the second part by party of the first part [Osage Tribe of Indians of Oklahoma] in the amount of \$24,557.88, that \$13,200 of said amount was paid as research fees to Warren Watkins, who is one of the parties of the second part, and that said sum of \$13,200 should be considered as an advance payment of attorneys' fees in fixing the attorneys' fee due parties of the second part under this contract.

. . . .

"Any fee for services which Guy Martin may be entitled to under the attorneys' contract of January 15, 1951, and any extension or renewal thereof, shall be considered in allowing the fee to parties of the second part, and Guy Martin's interest in said fee shall not increase the obligation of the party of the first part."

5. Statutory Provisions On Fees. The Indian Claims Commission Act (60 Stat. 1049), under which the claims herein were prosecuted, contains the following provisions (at page 1053) pertaining to the allowance of attorneys' 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, 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. . . ."

6. Requested Fee. As originally filed herein, the attorneys' application requested allowance of an attorneys' fee in the amount of \$1,325,000.00, representing 10 per cent of the amount of the final judgment, less the sum of \$13,200.00 advanced by the Osage Nation to pay a research fee that is considered as an advance payment of attorneys' fees under the above-quoted provisions in the attorneys' 1963 contract, or a net fee of \$1,311,800.00. As modified by the consent of counsel, quoted below in finding 10, the requested fee is in the amount of 10 per cent of the award herein, less the full amount of \$24,557.88 heretofore advanced to the attorneys by the Osage Tribe of Indians of Oklahoma, or the net sum of \$1,300,442.12.

7. Defendant's Response. The defendant's response was in the form of a letter dated March 12, 1971, which reads in part as follows:

"Re: Osage Nation v. United States, Docket Nos.
105, 106, 107 and 108 before the Indian
Claims Commission

"We enclose a copy of a letter from the Associate Solicitor of the Department of the Interior dated March 6, 1971 with an attached memorandum from the Acting Associate Commissioner of Indian Affairs dated February 26, 1971.

"The Acting Associate Commissioner states that the Bureau of Indian Affairs does not have sufficient detailed knowledge of the litigation to make a recommendation as to the fee earned by the attorneys and the Department of the Interior concurs in this view. This Department [United States Department of Justice] concurs in this view. This Department expresses no view as to the amount of the fee."

8. Notice to the Osage Nation. A notice of the filing of the attorneys' application, which enclosed a copy of the said application, was duly sent on February 18, 1971, to Sylvester J. Tinker, Chief of the Osage Nation of Indians. Chief Tinker responded to the notice in a letter dated March 3, 1971, addressed to Mr. Norman E. Timko, Deputy Clerk, Indian Claims Commission. The letter reads in part as follows:

"Reference is made to your letter of February 18, 1971, which was received by the Osage Tribal Council on February 22, 1971, relative to the application for allowance of attorney fee in The Osage Nation, Plaintiff, v. The United States, Defendant, Docket Nos. 105, 106, 107, and 108.

"On March 2, 1971, the Osage Tribal Council conferred with Mr. Delmas E. Martin relative to the requested attorney fee. The Council does not object to the Indian Claims Commission allowing an attorney fee, provided such fee and expenses do not aggregate more than 10 percent of the judgment, less advanced attorney fee of \$13,200, and requests that any attorney fee due Mr. Guy Martin be paid from the attorney fee received by the attorneys of record."

9. Powers of Attorney. On April 16, 1971, Mr. Niebell filed herein the two powers of attorney described below:

(a) The first power, executed on March 8, 1971, by Delmas E. Martin, George E. Norvell, and Warren S. Watkins conferred upon Paul M. Niebell, their colleague in the representation of the plaintiff herein, "full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done" with respect to "the processing,

collecting and finalizing our respective interests in claims for attorney fees earned and allowed in Docket Nos. 105, 106-107, and 108, before the Indian Claims Commission", including authority for Mr. Niebell to receive payment from the Treasury of the attorneys' fee herein for subsequent distribution by him to the contract claims attorneys.

(b) The second power, executed on April 14, 1971, by Guy Martin of Washington, D. C., one of the attorneys employed by the Osage Nation under the contract mentioned above under finding 2(a), conferred upon Paul M. Niebell "full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done" with respect "to the processing, collecting and finalizing my respective interest in the claim for attorney fees earned and allowed the attorneys in Docket Nos. 105, 106-107, and 108, before the Indian Claims Commission", including authority for Mr. Niebell to receive payment from the Treasury of the attorneys' fee herein and for his subsequent distribution to Guy Martin of his interest in the same.

10. Consent of Counsel. On May 17, 1971, Mr. Niebell filed herein a signed statement expressing the following consent of counsel:

"CONSENT OF COUNSEL RE
APPLICATION FOR ATTORNEY FEE

"Under authority of the general powers of attorney granted to the undersigned, filed herein, the undersigned, for himself and all of associate counsel in the above entitled Osage cases, hereby consents to the allowance of attorney fee and expenses in accordance with the terms of the letter of Sylvester J. Tinker, Principal Chief of the Osage Nation, dated March 3, 1971, and addressed to Mr. Norman E. Timko, Deputy Clerk, Indian Claims Commission.

/S/ Paul M. Niebell"

11. Claims Involved. The subject matter of each of the claims in Docket Nos. 105, 106, and 107 was land to which the plaintiff claimed Indian title. In Docket No. 108, the claim was concerned with certain legal costs.

The petition in Docket No. 105 sought additional compensation for lands ceded to the United States by the Treaty of November 10, 1808, ratified on April 28, 1810 (7 Stat. 107, 2 Kapp. 95; Royce Cession 67), alleging that the terms of the cession were unconscionable.

The petition in Docket No. 106 sought additional compensation for lands ceded to the United States by the Treaty of September 25, 1818, ratified on January 7, 1819 (7 Stat. 183, 2 Kapp. 167; Royce Cession 97), alleging that the terms of the cession were unconscionable.

The petition in Docket No. 107 sought additional compensation for lands ceded to the United States by the Treaty of June 2, 1825, ratified on December 30, 1825 (7 Stat. 240, 2 Kapp. 217; Royce Cession 123), alleging, in effect, that the consideration for the cession was unconscionable.

The petition in Docket No. 108 asserted a claim for the recovery of legal fees and expenses incurred by the Osage Indians in preventing the ratification by the United States Senate of the so-called Drum Creek Treaty of May 27, 1868, alleging, in effect, that the treaty was fraudulent and that the legal costs incurred by the Osages would not have been necessary but for the negligence of the defendant in permitting the perpetration of such fraud.

12. Services. The petitions in the dockets herein were filed on May 14, 1951. Those in Docket Nos. 105, 106, and 107 invoked provisions in Section 2 of the Indian Claims Commission Act with respect to revision of treaties on the alleged ground that unconscionable consideration was paid by the United States under the aforementioned Osage treaties for the cession of large areas of Osage lands located in the present States of Missouri, Arkansas, Kansas and Oklahoma. These cases required proof of the plaintiff's Indian title to said lands. Such cases are considered to be among the most complex and most difficult to prove of all Indian claims cases.

The defendant's answers in Docket Nos. 105, 106 and 107, filed on October 2, 1956, August 23, 1957, and August 16, 1956, respectively, asserted defenses amounting to general denials of liability. They alleged, in effect, among other things, that the petitions failed to state causes of action under any section of the Indian Claims Commission Act; that the plaintiff was not the successor in interest to the Osage tribal entities with whom the Osage treaties involved were made; that the claims were based upon immemorial possession or aboriginal occupancy of certain lands, which did not constitute a compensable estate or interest against the United States; and that the Osages under the terms of later treaties or agreements released to the United States all claims and rights which they might have had under the said Osage treaties.

These answers required the plaintiff to prove the basic allegations in the petitions. The record shows that the plaintiff's attorneys

effectively met this challenge. Prior to the settlement herein, on the basis of the proof adduced, the Commission had:

(a) Determined in Docket No. 105 that the plaintiff had aboriginal title to a tract of land in Missouri and Arkansas (a portion of Royce Cession 67) containing 12,113,000 acres having a value of \$7,000,000.00 when taken under the 1808 treaty of cession; that the United States paid \$56,833.79 to the Osages under that treaty; and that the plaintiff was entitled to judgment on this claim in the net amount of \$6,943,166.21, less any allowable offsets (21 Ind. Cl. Comm. 67).

(b) Determined in Docket Nos. 106 and 107 that the plaintiff had aboriginal title to an area of land in Missouri, Arkansas, Oklahoma and Kansas (Royce Cession 97, and a portion of Cession 123) ceded by the Osages under the aforementioned 1818 and 1825 treaties that was said to contain about 16,000,000 acres; and directed the cases in Docket Nos. 106 and 107 to proceed with the production of evidence to show the acreage of the ceded lands, the value of the same as of the dates of ratification of the said treaties, and the value of the consideration received for them (19 Ind. Cl. Comm. 447).

The Osage case in Docket No. 108 presented a unique claim for the recovery of funds alleged to have been disbursed by the United States from Osage tribal funds for payment of the fees and expenses of counsel retained by the Osages to prevent the ratification of the so-called Drum Creek Treaty of 1868. As originally stated in the petition the principal amount of this claim amounted to \$70,000.00. It was later reduced to the

total amount of \$55,669.34. In this case the plaintiff invoked the Commission's jurisdiction under Clauses (2) and (5) of Section 2 of the Indian Claims Commission Act.

The defendant's answer in Docket No. 108, filed on January 11, 1957, amounted, in effect, to a general denial of the essential allegations in the petition and made it necessary for the plaintiff to prove those allegations. On October 27, 1965, the Commission entered an opinion and order in this case denying motions for summary judgment filed by the defendant and the plaintiff, and holding that the petition stated a cause of action against the defendant that the Commission had jurisdiction to hear (16 Ind. Cl. Comm. 190). At the time of the compromise settlement herein the claim in Docket No. 108 had been tried and briefed and was awaiting a Commission decision.

On December 1, 1969, the defendant filed its notice of appeal to the Court of Claims from interlocutory orders of the Commission in Docket Nos. 105, 106 and 107. Appeals from those orders were pending in that Court as Appeal Nos. 9-69, 10-69 and 11-69, respectively, until they were dismissed in accordance with provisions in the compromise settlement agreement.

The services of the plaintiff's attorneys in connection with the settlement commenced at the instance of the Osage Tribal Council soon after the filing of the notice of appeal and covered a period of some 8 months. In successfully concluding the negotiations for the settlement of the Osage claims in Docket Nos. 105, 106, 107 and 108 the attorneys saved


the Osage Nation the considerable time and costs that further litigation of the claims might have involved (see findings of fact on the compromise settlement at 23 Ind. Cl. Comm. 447-461).

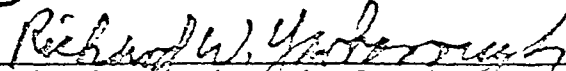
The plaintiff's attorneys were seasoned and experienced in Indian Claims litigation. They knew how to investigate the relations and transactions between the Osages and the United States and where to obtain the source materials. They possessed and utilized the judgment and skill needed for evaluating and selecting from such materials the important documents required in the successful prosecution of their client's claims. With due diligence and fidelity to the interests of the Osage Nation they rendered valuable services in the dockets herein over a period of more than 19 years.

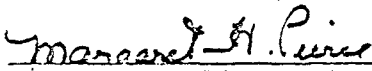
On the basis of the entire record in the dockets herein and considering the responsibilities undertaken, the difficult problems of fact and law involved in the cases, the contingent nature of the compensation, the substantial award obtained for the benefit of the Osage Nation, all appropriate factors pertinent to the determination of attorneys' fees under the standards established by the Indian Claims Commission Act, and the foregoing findings, including the aforementioned powers of attorney and the above-quoted consent of counsel regarding the application for attorneys' fee, the Commission finds that the attorneys for the plaintiff herein are entitled to an attorneys' fee in the amount of \$1,325,000.00, less the sum of \$24,557.88 heretofore advanced to them for payment of research fees and expenses by the Osage Tribe of Indians of Oklahoma, or

the net sum of \$1,300,442.12, and that the payment to Paul M. Niebell of this net sum out of the funds appropriated to pay the aforementioned Osage award, for appropriate distribution by him among the participating attorneys, will represent payment in full of all claims for legal services rendered and unreimbursed attorney expenses incurred in the dockets herein.

Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner