

BEFORE THE INDIAN CLAIMS COMMISSION

THE NEZ PERCE TRIBE OF INDIANS, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 THE UNITED STATES OF AMERICA, )  
 )  
 Defendant. )

Docket No. 175

Decided: March 29, 1972

FINDINGS OF FACT ON AWARD OF ATTORNEYS' FEE

On February 7, 1972, Angelo A. Iadarola, Esquire, attorney of record for the above-named plaintiff and a partner in the law firm of Wilkinson, Cragun & Barker, filed a petition in this docket for allowance of an attorneys' fee for all legal services rendered in connection with the successful prosecution of the said plaintiff's claim, together with a statement in support of the petition setting out the extent and nature of those legal services. Having considered the said petition and statement; the defendant's response to the petition, filed on March 10, 1972; the contracts of employment under which the attorneys performed their services; and the evidence in support of the petition, including the entire record and all proceedings in this docket, the Commission makes the following findings of fact:

1. Award. On August 25, 1971, the Commission entered a final judgment approving a proposed compromise settlement in this case in favor of the Nez Perce Tribe of Indians in the amount of \$3,550,000.00

(26 Ind. Cl. Comm. 177-192). Funds to satisfy the judgment were appropriated by the Act of December 15, 1971 (85 Stat. 627).

2. Contractual Authority and Compensation Thereunder.

a. Attorneys' services for the plaintiff in this case were initially performed pursuant to a contract between the Nez Perce Tribe of Idaho and Kenneth R. L. Simmons. This contract, assigned No. I-1-ind. 42432, was entered into on September 29, 1950. It was approved on January 8, 1951, and had a specified term of 10 years commencing with the date of its approval. In respect to attorneys' compensation, the Simmons contract, as amended, provided that compensation shall be wholly contingent upon the recovery of a money judgment or settlement for the tribe and shall not exceed ten percent of such recovery.

b. Prior to the death of Mr. Simmons, he assigned an interest in contract No. I-1-ind. 42432 to the law firm of Wilkinson, Boyden & Cragun (now Wilkinson, Cragun & Barker). This assignment was approved on November 16, 1951, and provided authority for the Wilkinson firm to continue prosecution of the Nez Perce claim under the Simmons contract after the death of Mr. Simmons.

c. The Simmons contract was replaced with a new contract, assigned Symbol 14-20-0650 No. 977, dated January 7, 1961, that the Nez Perce Tribe entered into with the law firm of Wilkinson, Cragun & Barker. This contract was approved on October 16, 1961, for an initial term of 10 years, effective as of January 7, 1961. An extension of this contract, effective January 1, 1971, for a period of two years was

approved on October 13, 1970. In regard to attorneys' compensation, the contract provides that the attorneys shall receive compensation for services rendered, which shall be wholly contingent upon and out of any recovery for the Tribe, whether by way of judgment or settlement by compromise, in an amount not to exceed 10 percent of such recovery or settlement. Provisions are included for the estate of Kenneth R. L. Simmons, deceased, to receive an equitable share out of such compensation for services performed in this case by Mr. Simmons prior to his death on April 13, 1953.

3. Statutory Provisions on Fees. Section 15 of the Indian Claims Commission Act (60 Stat. 1049, 1053), under which the claim in this case was prosecuted, contains the following provisions 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, . . .; 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. . . ."

4. Requested Fee. The petition of the attorney of record requests allowance of \$355,000.00 for the attorneys' fee, an amount equal to 10 percent of the final award to the Nez Perce plaintiff.

5. Response of Defendant. The defendant's response to the petition by the attorney of record was in the form of a letter dated March 10, 1972, which reads in part as follows:

"Re: Nez Perce Tribe of Indians v.  
United States, Docket No. 175,  
before the Indian Claims  
Commission.

"In response to the petition for award of attorneys' fees filed in the above-entitled case on February 7, 1972, we asked the Solicitor of the Department of the Interior for an expression of his views in connection with the application for attorneys' fees.

"There are enclosed a copy of the letter dated March 6, 1972 from the Associate Solicitor of Indian Affairs with a memorandum from the Deputy Commissioner of Indian Affairs dated February 28, 1972.

"You are also advised that this Department takes no position with reference to the amount claimed as attorneys' fees."

The letter from the Associate Solicitor of Indian Affairs and the memorandum from the Deputy Commissioner of Indian Affairs indicated that neither the Department of the Interior nor the Bureau of Indian Affairs had sufficient detailed knowledge to make a recommendation as to the amount of compensation earned by the attorneys in this case. The letter from the Associate Solicitor concludes by stating:

"Although we are therefore not in a position to make a positive recommendation with respect to the amount of the attorney fee which should be allowed, we are aware of nothing to cause us to recommend that you object to the allowance of the 10 percent fee requested by the tribal attorneys."

6. Notice to Tribe. A notice of the filing of the petition for allowance of an attorneys' fee was mailed to Mr. Richard A. Halfmoon, Chairman of the Nez Perce Tribal Executive Committee, on February 8, 1972, by the Deputy Clerk of the Commission. No response to this notice was received.

Because the Confederated Tribes of the Colville Reservation as representative of the Joseph Band of the Nez Perce Tribe will share in the judgment funds in this case (see finding 7 below, and the Act of April 24, 1961 (Public Law 87-24, 75 Stat. 45)), their Business Council was notified of the petition for allowance of an attorneys' fee by letter of February 16, 1972, from Wilkinson, Cragun & Barker. This letter, a copy of which was supplied for the record, included a copy of the petition by the attorney of record together with a copy of the above-mentioned statement in support thereof. Among other things, the letter stated:

"If there are any comments on the Petition or Statement which you feel deserve mentioning, you should put them in writing directly to the Indian Claims Commission."

No response to this notice was received.

7. Services. In the preparation and prosecution of this case, the attorneys did extensive research to establish the aboriginal holdings of the Nez Perce Tribe. The original petition on behalf of the Nez Perce Tribe was filed with the Commission by Mr. Kenneth R. L. Simmons on July 30, 1951. Three claims founded on allegations of land cessions to

the United States for unconscionable consideration were asserted in this petition.

The first claim was for additional compensation for lands ceded by the Treaty of June 11, 1855, ratified by the Act of March 8, 1859 (12 Stat. 957). This is the claim now involved in this docket.

The second claim was for additional compensation for lands within the reservation established under the 1855 Treaty that were ceded by the Treaty of June 9, 1863, ratified by the Act of April 17, 1867 (14 Stat. 647). This claim was later assigned Docket No. 175-A and was disposed of by a final judgment in favor of the plaintiff in the sum of \$4,157,605.06 entered in Docket No. 175-A in accordance with a compromise settlement agreement between the parties on June 17, 1960 (8 Ind. Cl. Comm. 759-780).

The third claim was for additional compensation for lands ceded by the Agreement of May 1, 1893, approved by the Act of August 15, 1894 (28 Stat. 286, 326-332). This claim was later severed and assigned Docket No. 175-B in which it is pending before the Commission.

On July 31, 1951, the next day after the filing of the petition assigned Docket No. 175, a petition was filed by I. S. Weissbrodt and others for certain named individuals resident on the Colville Reservation in the State of Washington as representatives of the Nez Perce Tribe. This petition, assigned Docket No. 180, contained claims identical to the first two claims mentioned above in the original petition in Docket No. 175. In addition to those claims, it also contained a claim for

damages for trespasses by non-Indians upon the Nez Perce Reservation established under the 1855 Treaty and the unlawful removal of gold from the reservation lands by trespassers. This claim was later separated from Docket No. 180 and assigned Docket No. 180-A by the Commission's order of May 1, 1953. It was disposed of by a final judgment in the sum of \$3,000,000.00 entered in Docket No. 180-A on July 5, 1960.

Upon commencement of the prosecution of the claims in Docket Nos. 175 and 180, conflict resulted from the identical claims asserted in both dockets. After a series of Commission proceedings and negotiations between counsel, the attorneys and the plaintiffs involved in the two dockets entered into an agreement in 1956 to control the future prosecution of the claims covered in both dockets, which agreement was approved by the Commissioner of Indian Affairs on September 6, 1956. A copy was filed with the Commission. Among other things, this agreement resulted in the elimination of the prosecution of duplicate claims, and, in respect to the identical land claims in Docket Nos. 175 and 180, the assignment to the Wilkinson firm of the exclusive right and responsibility of prosecuting those claims, such prosecution to be controlled in all respects by the attorney contract between the Wilkinson firm and the Nez Perce Tribe, with claims counsel for the Confederated Tribes of the Colville Reservation serving as of counsel in this prosecution. Provisions for the sharing by the Indian claimants of any judgments recovered on these identical claims and the sharing of the cost of related attorneys' fees and expenses were included in the agreement.

In consonance with the aforementioned 1956 agreement, and with the agreement of counsel for all parties, defendant included, the Commission issued a consolidation and severance order on December 4, 1957, that effected, among other things, the severing from the original petitions in Docket Nos. 175 and 180 and the combining into one suit of the identical land claims under the 1855 Treaty, such suit to be filed in an amended petition assigned Docket No. 175; the severing from the original petitions in Docket Nos. 175 and 180 and the combining into one suit of the identical land claims under the 1863 Treaty to be set forth in a separate petition assigned Docket No. 175-A; the severing from the original petition in Docket No. 175 of the land claim under the 1893 Agreement to be set forth in a separate petition assigned Docket No. 175-B; and the dismissal of the original petitions in Docket Nos. 175 and 180. Another petition was subsequently filed in Docket No. 175 for the Nez Perce Tribe of Indians denominated as "SEVERED AND AMENDED PETITION (Claim of Unconscionable Consideration for Cession of Lands under Treaty of June 11, 1855, Ratified by Act of March 8, 1859, 12 Stat. 957, II Kapp. 702)".

During May 1962 a trial was held before the Commission in the newly designated Docket No. 175 on issues involved in the question of the extent of the area to which the Nez Perce Tribe had aboriginal title. The Commission's decision on those issues was entered on March 21, 1967 (18 Ind. Cl. Comm. 1-131).

While attempting to settle the claim and, at the same time, preparing for trial on valuation and consideration issues, the attorneys filed a motion on September 22, 1970, for partial summary judgment for the plaintiff in advance of the valuation trial on two significant issues relating to consideration under the 1855 Treaty. This motion was filed by the attorneys in order to obtain a legal resolution of those issues in the hope of consummating a settlement, or of expediting the trial, of the remaining issues. The Commission issued an opinion and order on February 18, 1971, granting in part and denying in part the motion for partial summary judgment (24 Ind. Cl. Comm. 429-449).

Thereafter, although prepared to proceed to trial, the parties reached agreement on a compromise settlement of the case requiring the entry of a final award in favor of the Nez Perce plaintiff in the amount of \$3,550,000.00. The attorneys rendered the usual administrative and legal services in gaining approval of the settlement by the Nez Perce Tribe of Idaho, the Confederated Tribes of the Colville Reservation as representative of the Joseph Band of the Nez Perce Tribe, the Department of the Interior and this Commission. On August 25, 1971, the Commission entered in Docket No. 175 its findings of fact on the compromise settlement and final award in favor of the plaintiff in the sum of \$3,550,000.00 (26 Ind. Cl. Comm. 177-192). The entry of this award climaxed more than 20 years of legal services rendered in behalf of the plaintiff.

Although the claim under the 1855 Treaty was included in two separate original petitions that were separately prosecuted for some time by two



