

## BEFORE THE INDIAN CLAIMS COMMISSION

THE THREE AFFILIATED TRIBES	)	
OF THE FORT BERTHOLD RESERVATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Docket No. 350-D
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: July 8, 1976

FINDINGS OF FACT ON AWARD OF  
ATTORNEYS' FEE

On May 17, 1976, Charles A. Hobbs, attorney of record for the plaintiff in the above-captioned docket, filed a petition, together with supporting statement, for award of attorneys' fee. Having considered said petition and supporting statement, the defendant's response thereto filed July 1, 1976, the contracts under which legal services have been performed on behalf of the plaintiff with respect to the claims under the above-captioned docket, and the entire record of all proceedings under this docket, the Commission makes the following findings of fact:

1. Award. On March 17, 1976, the Commission entered a final award in the amount of \$3,200,000.00 in favor of the plaintiff (37 Ind. Cl. Comm. 502, 519). This final award was entered upon the joint motion of the parties for entry of final judgment under this docket, pursuant to a stipulation between the parties for entry of final judgment. Funds to pay this award have been appropriated by the Congress pursuant to Public Law 94-303, June 1, 1976.

2. Contractual Authority and Compensation. On June 28, 1951, the plaintiff entered into a contract (No. I-1-Ind. 42492) with the law firm of Wilkinson, Boyden & Cragun pursuant to which the attorneys were to advise and represent the plaintiff ". . . in investigating, formulating and prosecuting any and all claims of The Tribe against the United States which may be prosecuted under the provisions of the Indian Claims Commission Act. . . ." As provided for in that contract, the law firm of Wilkinson, Boyden & Cragun received a retainer of \$5,000.00 with additional compensation contingent upon recovery. This contract, as extended, was in effect until March 19, 1964, when an amendment to it became effective whereby the law firm of Wilkinson, Cragun & Barker (the successor firm to Wilkinson, Boyden & Cragun) resigned as claims attorneys for the plaintiff in Dockets 350-B and 350-C.\*/ As part of the same amendment, Wilkinson, Cragun & Barker agreed to pay to other attorneys selected and designated by plaintiffs to represent them as claims attorneys in Dockets 350-B and 350-C the amount of \$2,000.00 which was agreed to constitute a fair, pro-rata share allocable to Dockets 350-B and 350-C of the \$5,000.00 retainer originally paid to the law firm of Wilkinson, Boyden & Cragun. The contract was extended for succeeding periods of two years each through July 9, 1967.

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\*/ Originally the plaintiff filed a petition wherein several causes of action were pleaded, and this petition was assigned Docket No. 350. On January 14, 1958, the Commission entered an order severing the several causes of action into separate dockets, among them Dockets 350-B, 350-C and 350-D.

On June 12, 1967, the plaintiff and the law firm of Wilkinson, Cragun & Barker entered into separate contracts for each of the claims then pending before the Indian Claims Commission being handled by the firm. Each of the new contracts was actually a restatement and continuation of the original 1951 contract, but was limited to the claims in a single docket. The contract for the claims in Docket 350-D was approved by the Bureau of Indian Affairs on September 9, 1967, retroactive to July 10, 1967, and it was designated Contract No. A00C14200067. It had an original five-year term and has been extended for subsequent two-year periods through June 30, 1976.

3. Contractual Provisions as to Compensation. Paragraph 4 of the original 1951 contract between the parties, relative to attorney compensation, provided:

The Attorneys shall receive a retainer of \$5,000, to be paid immediately following the execution of this contract. Additional compensation to The Attorneys for services rendered under the terms of this contract shall be contingent upon a recovery for The Tribe, and in the event a recovery is obtained, the retainer herein provided for shall be deducted from the total amount ultimately awarded to The Attorneys. 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 or 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 Tribe, whether by suit, action of any department of the Government or of the Congress of the United States, or otherwise.

The tribe paid \$5,000 to the firm as required by the terms of the 1951 contract. On or about the time the contract was amended on March 19, 1964,

to exclude the claims subsequently asserted in Dockets 350-B and 350-C, \$2,000 of the \$5,000 was delivered to the attorneys who were to represent the tribe in said dockets as a pro rata portion of the retainer fee.

The 1967 contract between the parties also provided for compensation contingent upon recovery in an amount not to exceed 10% of any and all sums recovered. Relative to the \$3,000 of the retainer held by the firm, the 1967 contract provided that:

. . . 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.

This contract provision was changed by the Bureau of Indian Affairs as a condition precedent to its approval of the agreement to provide that the \$3,000 was to be repaid out of the attorneys' fee awarded in the first claim or claims in which the firm had represented the plaintiff. In the consolidated Dockets 350-A, 350-E, and 350-H, the firm was awarded a fee less \$3,000 as compensation for services rendered (22 Ind. Cl. Comm. 456, 465 (1970)). As a result of the deduction of such sum from the award in that case, the \$3,000 has been repaid and need not be deducted from the attorneys' fee awarded in this docket.

4. Requested Fee. The petition is for award of an attorneys' fee of \$320,000 which is ten percent (10%) of the award of \$3,200,000.00.

5. Statutory Provision on Fees. The authority to make the requested award in the amount of ten percent (10%) of the judgment is set forth in Section 15 of the Indian Claims Commission Act, 60 Stat. 1049, 1053 (1946),

as follows:

The fees of . . . attorneys for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, unless the amount of such fee 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 reimbursement for actual expenses, shall not exceed 10 percentum of the amount recovered in any case. . . .

6. Defendant's Response. The defendant responded to the notice of the petition by letter dated June 30, 1976, from the Department of Justice. The letter stated that the Department of Justice takes no position as to allowance of attorneys' fee.

7. Notice to Plaintiffs. On May 18, 1976, copies of the petition for attorneys' fee were forwarded to Mrs. Rose Crow Flies High and Mr. Wayne Packineaux, Chairperson and Vice Chairman, respectively, Business Council, Fort Berthold Reservation, requesting comments and information for the Commission's consideration in determining the amount of attorneys' fee to be allowed. No response has been received from the Business Council of the Fort Berthold Reservation.

8. Attorneys' Services in Prosecution of the Claim. The claims in Docket 350-D arose out of the effect of two Executive orders in 1870 and 1880 that defined plaintiff's reservation boundaries. Plaintiff claimed compensation for the difference in value between lands lost under the Executive orders and lands added by the same Executive orders.

Prior to separation of the original petition into separate dockets, defendant challenged each of the several claims with a plea of res judicata based upon the decision of the United States Court of Claims in Indians of the Fort Berthold Reservation v. United States, 71 Ct. Cl. 308 (1930). Members of the firm successfully briefed and argued that issue and on March 24, 1955, the Commission dismissed the defendant's challenges as to this and other claims. (3 Ind. Cl. Comm. 444.) Again, in 1970, the firm defended a claim against a motion for summary judgment of dismissal on the basis of the prior Court of Claims decision. That motion was fully briefed and argued to the Commission, which on June 17, 1970, handed down its opinion denying the motion (23 Ind. Cl. Comm. 236). The firm thereupon assembled the evidentiary proof required to establish in a valuation proceeding the exact sum by which the value of the lands taken from the plaintiff exceeded the value of those added to the reservation as of the dates of two separate forced exchanges.

The preparation of the valuation proof in this case was extremely complicated because both lands "taken" and lands "added" had to be separately appraised so that their comparative values could be considered. Moreover, since the lands involved in the exchange were but a small, undivided and unidentified portion of a much larger taking area, appraisal of lands "taken" required an appraisal of the entire area taken in each of two years (1870 and 1880) and in the alternative a valuation of the number of acres involved in the exchange chosen from the best lands of the taking area. Members of the firm participated in the trial on June 7, 1971, and in the complete briefing and argument of the issues which arose therefrom. In the

course of the briefing, the firm took advantage of the decision of the Indian Claims Commission issued March 30, 1971 (25 Ind. Cl. Comm. 179) in Docket 350-C, holding as to a great portion of the lands "added" that they were within the aboriginal title lands of the plaintiff, and argued a complete failure of consideration as to that portion of the lands so added. This new position made relevant the issue of date of extinguishment of the plaintiff's aboriginal title to lands outside of its reservation. Final determination was delayed pending decision on this issue in Docket 350-C.

At this juncture, the firm entered into settlement negotiations which had been theretofore progressing between the defendant and the attorney for the plaintiff in Docket 350-C, which negotiations resulted in the stipulation of a final judgment in the two dockets.

In this case the firm was faced with legal and factual questions of uniqueness and complexity. By careful analysis the firm was able to develop a legal hypothesis which maximized the possible recovery which could be received by the plaintiff, while at the same time preparing for lesser alternatives. The negotiation of compromise settlement avoided further delay by plaintiff in receipt of its award.

9. Conclusion. On the basis of the entire record in this docket and considering the responsibilities undertaken, the difficult problems of fact and law involved, the contingent nature of the compensation, the award obtained, and all appropriate factors pertinent to the determination


of attorneys' fees under the standards established by the Indian Claims Commission Act, the Commission concludes that the contract attorneys have rendered valuable legal services in successfully prosecuting their client's claim and ultimately obtaining judgment. Under the terms of their contracts and the above-enumerated standards, including those standards obtaining in the prosecution of similar claims in courts of law, the contract attorneys have earned an attorneys' fee of \$320,000, representing ten percent (10%) of the award to plaintiff. Accordingly, payment of the amount of \$320,000, to Charles A. Hobbs, attorney of record, on behalf of the contract attorneys, the firm of Wilkinson, Cragun & Barker, will represent payment in full of all claims for legal services in this docket. Such payment will be out of funds appropriated to pay the award.

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Jerome K. Kuykendall, Chairman

  
John F. Vance, Commissioner

  
Richard W. Yarborough, Commissioner

  
Margaret H. Pierce, Commissioner

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Brantley Blue, Commissioner