

## BEFORE THE INDIAN CLAIMS COMMISSION

THE NEZ PERCE TRIBE OF INDIANS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Docket No. 175-B
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: June 6, 1973

FINDINGS OF FACT ON AWARD OF ATTORNEYS' FEE

On May 9, 1973, Charles A. Hobbs, 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 June 5, 1973; 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 November 1, 1972, the Commission entered a final award approving a compromise settlement in this case in favor of the Nez Perce Tribe of Indians in the amount of \$1,387,911. 29 Ind. Cl. Comm. 127.

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 would be wholly contingent upon the recovery of a money judgment or settlement for the tribe and would not exceed 10 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. Another extension of the contract, effective

January 17, 1973, for a period of two years was approved January 26, 1973. 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 (25 U.S.C. § 70n), 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 \$138,791.10 for the attorneys' fee, an amount equal to 10 percent of the final award to the Nez Perce plaintiff.

5. 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 May 10, 1973, by the Deputy Clerk of the Commission. No response to this notice was received.

6. Origin of the Claim. 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 claim was finally left designated Docket No. 175. Final award for the plaintiff was entered on August 25, 1971, in the amount of \$3,550,000. 26 Ind. Cl. Comm. 177.

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 award 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.

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 is the claim presently involved here, Docket No. 175-B.

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 these claims, it also contained a claim for damages for trespasses by non-Indians upon the Nez Perce Reservation established under the 1855 treaty, and for the unlawful removal of gold from the reservation lands by trespassers. (This claim was later separated from Docket No. 180, designated Docket No. 180-A by the Commission, and disposed of by a final award entered on July 5, 1960.)

7. Agreement on Prosecution. 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 awards 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, the 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. A new petition was subsequently filed in Docket No. 175-B for the Nez Perce Tribe of Indians denominated as "SEVERED PETITION (Claim Under Agreement of May 1, 1893, Approved August 15, 1894, 28 Stat. 286, 326-332, 1 Kapp. 536)".

8. Services by Counsel. Following the filing of this severed and amended petition, the tribe's attorneys obtained the services of an expert and prepared for trial before the Commission on the issues of the value of the lands ceded by the 1893 agreement. Trial was held before the Commission during October 1959. Following the trial, the attorneys for the parties explored possibilities of settlement. Oral argument was held on the briefs in January of 1964. On April 7, 1964, the Commission rendered its decision holding that although there was a disparity between the consideration received by the plaintiff for the ceded lands and what the Commission found to be a fair market value, the disparity was not great enough to be considered unconscionable. The Commission, therefore, dismissed the petition. 13 Ind. Cl. Comm. 184.

The plaintiff's attorneys appealed the decision to the United States Court of Claims. In July 1966 the Court of Claims reversed the Commission decision and remanded it for further proceedings. 176 Ct. Cl. 815. The court held that the Commission's finding of value was only the minimum

fair market value and, further, that considering the nature of the negotiations over the price, in 1893, the disparity between the price paid and the fair market value was sufficient to be considered unconscionable. Id. at 822-829. The court also indicated that the United States had not agreed in the 1893 document to payment of interest on the higher sum which the plaintiff should have received for the cession. Id. at 829-830. The tribe's attorneys unsuccessfully sought rehearing before the court for its treatment of some of the appraisal evidence. Following denial of that rehearing, the plaintiff's attorneys, in 1967, unsuccessfully petitioned the Supreme Court of the United States for a writ of certiorari. Upon that denial, 386 U.S. 984, the attorneys moved for clarification of the order denying the petition. That motion was also denied. 386 U.S. 1015.

Upon remand to the Commission, the plaintiff's attorneys attempted to establish legal foundation for the principle that the plaintiff was entitled to interest on the amount of money it should have received by the 1893 agreement. Toward this end, they filed a brief amicus curiae with the Commission in Docket No. 100-A, involving a similar claim of the Klamath and Modoc Tribes. After filing briefs with the Commission on the questions for remand, the parties in Docket No. 175-B entered into a stipulation that the defendant would present no claim for gratuitous offsets in the docket for specified periods. The Commission's decision on remand, in November 1969, amended its earlier findings and found the fair market value of the plaintiff's ceded lands in 1894 was \$5.50 per



acre rather than the maximum \$4.00 per acre previously found. Furthermore, the Commission now agreed with the plaintiff and held that the tribe was entitled to simple interest on the judgment from 1894 to date of the Commission's award, plus simple interest on the principal sum of the award of \$1,387,911 from November 15, 1969, to the date of payment of said principal sum. 22 Ind. Cl. Comm. 53.

Following that decision and further settlement negotiations, the defendant appealed the decision to the Court of Claims. The Court of Claims rendered its decision in March 1971, 194 Ct. Cl. 490, holding that there was no express authority in the 1893 agreement or in any possible rewriting of it by the Commission for the payment of interest to the plaintiff by the defendant. The court denied all interest on the award that had been granted by the Commission. Id. at 494-499. The court also held that the plaintiff was not entitled to recover on the claim involving \$274,780 for trespassing by whites upon land of the Nez Perce Tribe. Id. at 499-501. Finally, the court held that the \$5.50 per acre fair market value figure awarded by the Commission in its second decision was more realistic than the Commission's initial finding, but without additional specific findings by the Commission, the court was unable to determine whether the figure was supported by substantial evidence. Id. at 502-503. Accordingly, the court reversed the Commission on the question of interest and remanded the case to the Commission for specific findings to support the award. Id. at 503.

The plaintiff's attorneys petitioned the United States Supreme Court for a writ of certiorari on the question of awarding interest on the ward. The petition was denied in 1971. 404 U.S. 872.

On remand, the Commission filed its amended findings and opinion on November 1, 1972. The findings supported the figure of \$5.50 per acre as fair market value for the cession under the 1893 agreement. The Commission entered its final award of \$1,387,911 on that date. 29 Ind. Cl. Comm. 127.


9. Defendant's Response. The defendant's response to the petition for attorneys' fee was a letter dated June 5, 1973, which enclosed a letter dated May 31, 1973, from the Acting Associate Solicitor, Division of Indian Affairs, Department of Interior. The defendant's letter concludes with the advice that the Department of Justice "takes no position with reference to the attorney fees being claimed". The letter from the Associate Solicitor recites the details of the tribal claims attorney contracts described hereinabove, and indicates that the Department of Interior does "not have sufficient detailed information upon which to make a recommendation as to the amount of compensation earned by the attorneys in prosecuting the case to a conclusion".

10. Conclusion. On the basis of the entire record herein and considering the responsibilities undertaken, the difficult problems of fact and law involved in this case, the numerous appeals, the contingent nature of the compensation, the substantial award obtained for the benefit of the plaintiff herein, all appropriate factors pertinent to the

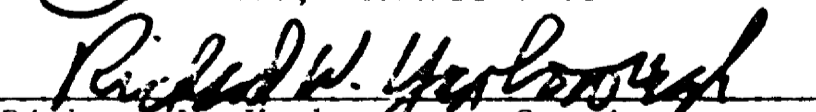
determination of attorneys' fees under the standards established by the Indian Claims Commission Act, and the foregoing findings, the Commission finds that the attorneys for the Nez Perce plaintiff herein have rendered valuable legal services in successfully prosecuting their client's claim and ultimately obtaining its settlement. Under the terms of their contract and the pertinent standards fixed by Section 15 of the Indian Claims Commission Act, supra, including those obtaining in the prosecution of similar claims in courts of law, the attorneys have earned an attorneys' fee of \$138,791.10, representing 10 percent of the award to the plaintiff, and they are entitled to receive a fee in that amount. Accordingly, the payment of this sum to Charles A. Hobbs, Esquire, the attorney of record in this case for the said plaintiff and a partner in the law firm of Wilkinson, Cragun & Barker, out of the funds appropriated to pay the aforementioned award, for appropriate distribution among those entitled to participate in the sharing of the fee, will represent payment in full of all claims for legal services rendered in this case in behalf of the Nez Perce Tribe of Indians.

  
Margaret H. Pierce, Commissioner

  
Brantley Blue, Commissioner

  
Jerome K. Kuykendall, Chairman

  
John T. Vance, Commissioner

  
Richard W. Yarborough, Commissioner