BEFORE THE INDIAN CLAIMS COMMISSION

THE LUMMI TRIBE OF INDIANS, Plaintiff,	)	
v.	)	Docket No. 110
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: July 31, 1974

OPINION ON ATTORNEYS' FEE AND EXPENSES

Kuykendall, Chairman, delivered the opinion of the Commission.

The Commission has before it a petition by Frederick W. Post, attorney of record for the Lummi Tribe, for payment of compensation and reimbursement of litigation expenses. Mr. Post requests the award of an attorney fee in the amount of $5,700, and the reimbursement of a total of $3,643.20 in litigation expenses. Defendant has indicated that it has no objection to the allowance of Mr. Post's fee or those claimed expenses which are adequately supported by documentary evidence. Plaintiff, however, objects to the granting of Mr. Post's petition on the ground that Mr. Post has not adequately represented it. For the reasons indicated below the Commission holds that Mr. Post is entitled to an attorney fee of $5,700, plus $2,299.01 in reimbursement of litigation expenses.

In finding of fact 9, entered herein today, we indicate the factors we consider in determining the fee, if any, to which Mr. Post is entitled. These are consistent with the criteria generally considered in determining the compensation to which attorneys are entitled. See, e.g.,

Confederated Band of Ute Indians v. United States, 120 Ct. Cl. 609, 667 (1951). As applied to this docket these criteria indicate the following:

Responsibility Undertaken - Mr. Post took on a great responsibility in agreeing to prosecute the claim of a tribal plaintiff, a litigation which past experience indicated would take a substantial length of time to complete;

Legal and Factual Problems - The issues presented by plaintiff's claim are set out in finding of fact 8. The litigation of these issues presented novel and difficult problems;

Time Involved - The litigation of this case covered a period in excess of twenty years;

Work Involved - In litigating plaintiff's claim, Mr. Post resisted the defendant's res judicata defense, established plaintiff's standing to present its claim, proved the extent of plaintiff's aboriginal title, established the value of plaintiff's land, participated in the determination of the consideration received by the parties to the Point Elliott Treaty, prosecuted an appeal from the Commission's order dismissing the claim, reevaluated plaintiff's land, defended against the defendant's claimed offsets, and, against his own advice to the plaintiff, prosecuted a second appeal to the Court of Claims, which prosecution he continued after his employment contract had expired.

Contingent Fee - The employment contract provided that Mr. Post's fee was to be entirely contingent on recovery by plaintiff. At the

time the contract was executed there was a real question whether aboriginal title was compensable under the Indian Claims Commission Act. Thus Mr. Post began this litigation without any clear indication that he would ever be paid.

Award - Mr. Post's efforts resulted in plaintiff recovering a judgment in the amount of $57,000. 24 Ind. Cl. Comm. 21, aff'd, 197 Ct. Cl. 789 (1972).

On the basis of the foregoing it is clear that Mr. Post has earned a fee of $5,700, 10% of the amount of plaintiff's judgment. The question remains whether anything alleged by the plaintiff should cause the Commission to deny Mr. Post's petition.

In finding of fact 6 we have set out in full plaintiff's response to Mr. Post's petition. In essence, the plaintiff makes two contentions:

1. By failing to consolidate the land claims of the various Puget Sound tribes which he represented, Mr. Post did not establish title to the true area occupied by these tribes.

2. By relying to a great extent on documentary evidence and testimony presented by the defendant, Mr. Post failed to establish plaintiff's title to the San Juan Islands and substantial portions of the mainland. Neither of these contentions has any merit.

We assume that in its first contention plaintiff is asserting that the area of aboriginal title would have been greater, and thus the tribe's recovery greater, if Mr. Post had attempted to present all the Puget Sound tribes, or at least the parties to the Point Elliott Treaty, as a single aboriginal landowning entity. At this time, with the record before us, it is impossible for the Commission to determine

whether the adoption of the theory now suggested by plaintiff would have increased the amount of recovery in this docket. In any event, in presenting the Puget Sound tribes as separate landowning entities, Mr. Post was following the policy established in earlier Court of Claims litigation. In Duwamish v. United States, 79 Ct. Cl. 530 (1934), cert. denied, 295 U.S. 755 (1935), each of the plaintiffs asserted that it had title to a separate tract of land. The Commission does not believe that Mr. Post should be deprived of his fee because he chose to present plaintiff and other Puget Sound tribes as separate landowning entities.

At the hearing on Mr. Post's petition, held in Seattle, Washington, on August 7, 1973, Mr. Post responded to the plaintiff's second contention. He stated that in preparing plaintiff's case he was aware that the recovery would be small and therefore attempted to minimize plaintiff's costs of litigation. Accordingly he decided to merely make a prima facie case for plaintiff and then rely upon the documents and testimony supplied by defendant to support his case. Mr. Post stated that he used an anthropologist as an expert witness and placed in evidence certain documents, which sustained plaintiff's burden of proof. Thereafter he used many of the documents placed in evidence by defendant and parts of defendant's expert testimony as evidence for plaintiff. Mr. Post stated that by this method he saved the plaintiff thousands of dollars in expenses, and that plaintiff was in no way harmed by his decision. He added that he had informed plaintiff at the time that this was the way he intended to litigate the claim.

We have reexamined the evidence of record relating to title and our title opinion in this docket. It is apparent that we denied plaintiff's claim of title to the San Juan Islands and portions of the mainland of Washington State not because of a lack of evidence that plaintiff's ancestors used these areas, but rather because of an abundance of evidence that other tribes also made extensive use of these areas. We do not believe that any additional evidence of Lummi use of this area, which Mr. Post may have placed in evidence, would have enlarged the area which we found to have been owned by plaintiff. In sum, we do not believe that Mr. Post's decision to rely on defendant's evidence was in any way prejudicial to plaintiff.

We shall now explain more fully why we are denying certain of the litigation expenses claimed by Mr. Post.

In paragraphs XIV and XV of his petition Mr. Post requests reimbursement for expenses incurred during two trips to Washington D. C. In each instance he apportions the expenses equally between plaintiff and the Suquamish Tribe, plaintiff in Docket 132. For each of these trips Mr. Post claims an expenditure of $50, which in one instance he designates as per diem expenses for 5 days, and in the other as meals for 5 days. Mr. Post does not submit any receipt or voucher to support these claimed expenditures.

Rule 34b of the Commission's Rules of Procedure, 25 C.F.R. §503.34b, provides that each claimed expense item must be supported by receipts or other evidence of payment. The Commission's Policy Statement §102 states that with respect to minor expenses, for which it is not practicable

to obtain receipts, the Commission will accept as evidence of payment the sworn statement of the attorney that the expenditure was made. "However, such costs must be itemized and adequately explained." Policy Statement §102. In our opinion, designations such as per diem expenses for five days or meals for five days are not sufficiently itemized to satisfy the requirements of the policy statement. We must therefore deny these expenses.

In paragraph XIII of his petition Mr. Post requests reimbursement of expenses incurred during a trip to Washington, D. C., in September 1951. He claims that he incurred an airplane fare of $324.19, and also claims a per diem expense of $10 per day for 2 days. Mr. Post does not submit any receipt or voucher to support these claimed expenditures.

As we have stated above, Rule 34b of the Commission's rules requires that all claimed expenditures be supported by some evidence of payment. Mr. Post has not submitted a receipt, cancelled check or even a ledger entry to support his claimed air fare. Moreover, this is not the type of expense which can be claimed without evidence of payment under Policy Statement §102. As to the claimed per diem expenses, we have indicated above that these must be denied.

In paragraph XI of his petition Mr. Post claims $900 as a fee for Dr. Wayne Suttles, who was employed as an expert witness for plaintiff. By letter dated June 18, 1974, Mr. Post informed the Commission that, because of the small amount of the award in this docket, Dr. Suttles

had waived his claim for further compensation. Accordingly, Mr. Post has withdrawn his claim for $900.

Jerome K. Kuykendall, Chairman

We concur:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner