

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

FINDINGS OF FACT ON ATTORNEY'S FEE AND EXPENSES

On July 3, 1972, Frederick W. Post, attorney of record for the Lummi Tribe of Indians, plaintiff in this docket, filed a petition for payment of compensation and expenses. This petition contains a statement of the legal services performed, and the moneys expended, in the formulation and prosecution of the plaintiffs' claim in this docket. Having considered this petition, the responses of the plaintiff tribe and the defendant, the contract of employment under which Frederick W. Post served the plaintiff, and the entire record in this docket, the Commission makes the following findings of fact.

1. The Award.

On October 22, 1970, the Commission entered final judgment in this docket, entitling plaintiff to recover from defendant the sum of \$57,000. 24 Ind. Cl. Comm. 21, 33. This award was affirmed by the Court of Claims on March 17, 1972. 197 Ct. Cl. 789.

2. Attorneys' Contracts.

Attorneys' services in this case were performed initially under a contract dated July 20, 1950, identified as I-1-ind. 42430, between the Lummi Tribe of Indians and attorneys Frederick W. Post and Kenneth J. Selander. The contract was effective for a period of seven years beginning November 13, 1950, the date of its approval by the Bureau of Indian Affairs.

On September 25, 1950, Kenneth J. Selander assigned his entire interest in the contract to Frederick W. Post. This assignment was approved by the Bureau of Indian Affairs on February 26, 1951.

A second contract, identified as Symbol 14-20-650 No. 581, was entered into between the Lummi Tribe of Indians and Frederick W. Post on November 12, 1957. This contract was effective for a period of seven years beginning November 13, 1957. An extension of the contract for a period of two years beginning November 13, 1964, was approved by the Bureau on March 5, 1965. Another extension for a period of five years beginning November 13, 1966, was approved on August 10, 1967. The contract expired November 12, 1971, while appeal of the Commission's judgment was pending before the Court of Claims. At the request of the tribe, Mr. Post completed prosecution of the appeal.

3. Contractual Provisions for Compensation and Reimbursement of Expenses.

The 1950 contract provided that compensation of the attorneys was to be wholly contingent upon plaintiff's recovery, and at the fixed rate of 10% of the amount of that recovery. The contract also provided that

the attorneys should be reimbursed from any judgment recovered by plaintiff the expenses of litigation incurred by them in prosecuting the claim. A modification of the contract, retroactively effective as of November 13, 1950, and providing that plaintiff pay Mr. Post \$750.00 toward the expenses of litigation, was approved April 13, 1956.

The second contract provided that compensation of Mr. Post was to be wholly contingent upon plaintiff's recovery, and was not to exceed 10% of the amount of that recovery. The contract provided that Mr. Post should be reimbursed from any judgment recovered by plaintiff for the expenses of litigation he incurred in prosecuting the claim. However, the contract also provided that plaintiff advance Mr. Post an additional \$750.00 toward litigation expenses.

4. Requested Fee and Expenses.

Mr. Post's petition requests the award of an attorney's fee in the amount of \$5,700, which is equivalent to a full 10% of the judgment entered by the Commission in this docket.

Mr. Post also requests reimbursement of a total of \$3,643.20 in litigation expenses incurred in prosecuting plaintiff's claim. The petition breaks down these expenses as follows:

1 - Balance due on expense voucher approved	
by B.I.A. on November 5, 1956	\$114.16
2 - Balance due on expense voucher approved	
by B.I.A. on February 29, 1960.	164.12

3 - Mileage expenses of trips to tribal meetings.	\$192.00*
4 - Expert witness fee of Dr. Wayne Suttles.	900.00
5 - Proportionate share of expenses incurred in attending trial in Billings, Montana, May 10, 1956.	128.00
6 - Expenses incurred in attending hearing in Washington, D. C. September 24, 1951.	344.19
7 - Expenses incurred in prosecuting appeal to Court of Claims, April 22, 1966, to November 9, 1968.	868.65
8 - Expenses incurred in prosecuting second appeal to Court of Claims, July 27, 1971, to Feb. 7, 1972.	432.08
9 - Expert witness fee of Dr. James R. Crutchfield.	500.00

5. Response of the Defendant.

The response, dated August 31, 1972, of the Department of Justice to Mr. Post's petition advised the Commission that "[t]his Department takes no position with reference to the fees and expenses claimed." Enclosed with the response was a letter from the Assistant Solicitor, Division of Indian Affairs, Department of the Interior, and a memorandum from the Acting Commissioner of Indian Affairs. The Assistant Solicitor

* Mr. Post has deleted his request for reimbursement of mileage expenses of \$40.00 incurred in traveling to Bellingham, Washington, for the purpose of validating his contract with the tribe.

indicated that the Department of Interior concurred in the views expressed in the Acting Commissioner's memorandum. That memorandum indicated that the Bureau had no objections to allowance of the full \$5,700 fee.

With regard to expenses of litigation, the Bureau had no objection to the payment of the balances due under Mr. Post's vouchers of 1956 and 1960. As to the remaining expenses, the memorandum indicated that Mr. Post had failed to properly document many of his claims, and that some of his claimed travel expenses were not allowable under the contract. The Bureau indicated that it had no views on whether the claimed expert witness fees were reasonable or proper.

6. Notice to and Response of the Plaintiff.

On July 5, 1972, the Clerk of the Commission notified Mr. Samuel Cagey, Chairman of the Lummi Tribe, that Mr. Post had filed his petition. By letter dated July 18, 1972, plaintiff responded to Mr. Post's petition as follows:

We have reviewed Mr. Frederick Post's petition for payment of his attorneys fees and expenses in connection with our claims case, and this is to inform the Commission that the Lummi Tribe wishes to go on record as objecting to the granting of this petition.

Our reasons are that we have been seriously dissatisfied with Mr. Post's handling of this case, and under the circumstances do not feel that his claim for attorneys fees and expenses is justified.

We are aware that Mr. Post has been acting as Claims Attorney for a number of Puget Sound tribes. As such, it is our opinion that he failed to properly consolidate the land claims so as to establish title to the true area occupied by the Indians of the Puget Sound region.

In fact, he boasted to us that he had managed to get by with minimum expenditure of money by relying on the government witnesses and records. It seems to us that this was a serious dereliction of duties to us. By reason of his failure

to properly and aggressively assert our rights, we ended up with an award which completely disregarded our true title to the San Juan Islands and substantial areas of interior lands. The result is a monetary award which is more of an insult than an award.

Unfortunately, as a result of the substantial period of time which has elapsed and the final and binding decision that has been made, we have not been able to secure any other attorney to undertake the handling of these claims; and so we have had no alternative but to allow Mr. Post to continue to the end. Under the circumstances, we cannot approve an award of fees to him for services which were detrimental to our interests; and we object to any such award.

Very truly yours,

LUMMI INDIAN BUSINESS COUNCIL

/s/ Samuel M. Cagey

By: Samuel M. Cagey, Chairman

7. Hearing.

On August 7, 1973, a hearing on Mr. Post's petition was held in Seattle, Washington. Mr. Post appeared in support of his petition. Mr. James G. McKay, Chairman of the Lummi Business Council, appeared on behalf of the Lummi Tribe.

At the hearing Mr. Post described the legal services he had performed on behalf of the tribe. He also introduced in evidence vouchers to support some of his claimed expenditures.

At the hearing Mr. McKay again stated the tribe's dissatisfaction with Mr. Post's performance as attorney, and its objection to his receiving any fee.

8. Attorney Services.

The claim in this docket was for additional compensation for plaintiff's aboriginal title lands acquired by the defendant under the Point Elliott Treaty of January 22, 1855, 12 Stat. 927. Plaintiff's petition and defendant's answer presented legal and factual issues which included the following:

- a. Whether plaintiff's claim was barred by the decision of the Court of Claims in Duwamish v. United States, 79 Ct. Cl. 530 (1934), cert. denied, 295 U.S. 755 (1935);
- b. Whether plaintiff had standing to prosecute the claim;
- c. The nature and extent of plaintiff's land title,
if any;
- d. The value of the land owned;
- e. The amount of consideration, if any, received by plaintiff;
- f. The allowability of gratuitous offsets claimed by defendant.

The res judicata issue was heard by the Commission on September 24, 1951. After briefing by the parties, the Commission, on January 30, 1952, decided that the 1934 Court of Claims decision did not bar plaintiff from asserting its claim. 2 Ind. Cl. Comm. 1

The issues of plaintiff's standing to sue and title were tried in June 1952 and August 1955. Both parties filed proposed findings of fact and briefs, and on October 30, 1957, the Commission issued its decision holding that plaintiff had the right to prosecute its claim, and that

it held aboriginal title to a certain area of land. 5 Ind. Cl. Comm. 525. Defendant moved for rehearing and amendment of the boundaries of plaintiff's title area, which motion was denied by the Commission on December 19, 1957.

Trial on the value of plaintiff's aboriginal lands was held in August 1959. The Commission issued its value decision on March 2, 1962. 10 Ind. Cl. Comm. 286.

This docket was consolidated with dockets involving claims of other tribes arising under the Point Elliott Treaty for the purpose of allocating the treaty consideration among the tribes. On August 13, 1964, the Commission issued its decision allocating consideration among the participants to the Point Elliott Treaty. Upper Skagit Tribe of Indians v. United States, Docket 92, et al., 13 Ind. Cl. Comm. 583.

Defendant then filed a motion for a judgment of dismissal. On February 18, 1966, the Commission decided that the consideration received by plaintiff for its lands was not unconscionable, and that the Point Elliott Treaty did not amount to a lack of fair and honorable dealings, and accordingly dismissed plaintiff's petition.

On April 26, 1966, plaintiff filed its notice of appeal from the Commission's order. The Court of Claims, on December 15, 1967, reversed the Commission's decisions on valuation and conscionability of consideration, and remanded the case to the Commission. 181 Ct. Cl. 753. On October 18, 1969, the Commission revalued the Lummi tract, and entered an interlocutory award in favor of plaintiff in the amount of \$57,000. On October 22, 1970,

the Commission disallowed all gratuitous offsets claimed by defendant and entered final judgment in favor of plaintiff. 24 Ind. Cl. Comm. 21. The Court of Claims affirmed this award. 197 Ct. Cl. 780 (1972).

Plaintiff's attorney prepared and filed the petition in this docket. At each stage of the litigation of this claim he presented documentary evidence and expert testimony, filed motions, responses to motions, proposed findings of fact and briefs, and appeared before the Commission on behalf of the tribe. In prosecuting two appeals to the Court of Claims, he filed briefs, and argued plaintiff's cause before the court.

9. Conclusion on Attorney's Fee.

On the basis of the entire record in this docket, including the attorney's contract, and considering the responsibilities undertaken, the difficult problems of fact and law involved, the time and work involved in the litigation, 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 Frederick W. Post, attorney for plaintiff, has rendered valuable legal services in prosecuting his client's claim and ultimately obtaining a judgment. Under the terms of his contract and said standards, including those obtaining in the prosecution of similar claims in courts of law, Mr. Post has earned an attorney fee of \$5,700, representing ten percent of the award to the plaintiff. Payment of this amount to Mr. Post will represent payment in full of his claim for compensation for legal services rendered in this docket.

10. Denial of Certain Claimed Expenses.

Based on its review of the entire record, including the evidence introduced at the hearing August 7, 1973, the Commission finds that the following claimed expenses are not allowed for the reasons indicated:

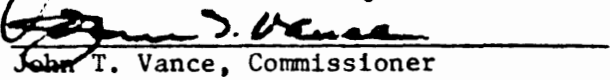
<u>Paragraph</u>	<u>Amount Claimed</u>	<u>Amount Disallowed</u>	<u>Reasons</u>
XIII	\$344.19	\$344.19	The claim is not adequately supported by documentary evidence.
XIV	\$868.73	\$ 75.00	Per diem expenses not adequately supported by documentary evidence, nor in conformity with requirements of Commission's Policy Statement §102.
XV	\$432.08	\$ 25.00	Per diem expenses not adequately supported by documentary evidence, nor in conformity with requirements of Commission's Policy Statement §102.

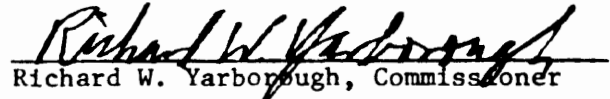
11. Conclusion.

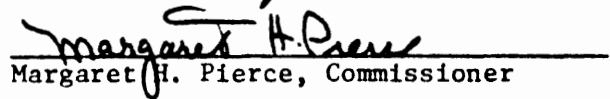
The Commission concludes that Frederick W. Post is entitled to

receive \$5,700.00 as an attorney fee, plus \$2,299.01 in reimbursement of litigation expenses, or a total of \$7,999.01.


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner