

BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: June 18, 1975

FINDINGS OF FACT ON ATTORNEYS' FEE

Upon consideration of the petition for award of attorneys' fee, filed October 22, 1974, by Charles A. Hobbs, attorney of record for the plaintiff herein, on behalf of the contract attorneys, the law firm of Wilkinson, Cragun and Barker, the substantiation submitted in support of said petition and the record in its entirety, the Commission makes the following findings of fact:

1. On October 22, 1974, Charles A. Hobbs, the attorney of record for the plaintiff, on behalf of the contract attorneys, the law firm of Wilkinson, Cragun and Barker (hereinafter referred to as the Firm) petitioned pursuant to Section 15 of the Indian Claims Commission Act, 60 Stat. 1049, for the allowance of attorneys' fee in the amount of \$880,905.70, the same being 10 percentum of the final award of \$8,809,057.00 in this case entered herein on June 30, 1972, plus 10 percentum of all

interest required to be paid to the plaintiff on certain specified principal sums by the defendant from the date of judgment through the date of appropriation of sufficient money to satisfy the award. The fee petition set forth the applicable provisions of the attorney contracts between the Indian tribes and the Firm, the nature of the claim, facts concerning the professional and educational standing and experience of the attorneys of the Firm who were involved in the investigation, formulation, and presentation of the claim before the Commission, and a statement of the services rendered relative to the prosecution of this case before the Commission.

2. The Award. On August 23, 1972, a final award was entered herein as follows:

"IT IS THEREFORE ADJUDGED . . . the plaintiff shall have and recover from the defendant the sum of \$8,809,057.00, plus additional amounts of damages measured by simple interest at the rate of 3 percent per annum on the principal sum of \$2,765,067.00, and at 5 percent per annum on the principal sum of \$318,614.00 computed from June 30, 1972, to the date of payment of said principal sums." */

Funds to pay said award have been appropriated by the Congress pursuant to Public Law 94-32, June 12, 1975.

3. The Contract. The claim herein was originally prosecuted pursuant to a contract between the Three Affiliated Tribes of the Fort Berthold Reservation and the law firm of Wilkinson, Boyden and Cragun (now Wilkinson, Cragun and Barker), designated Contract No. I-1-Ind. 42492,

*/ 28 Ind. Cl. Comm. 335, 352.

dated June 28, 1951, and effective for a period of ten years beginning July 10, 1951. This contract was amended on May 7, 1964, effective June 17, 1964, to provide for the exclusion therefrom of the claims asserted in Dockets 350-B and 350-C. The contract was extended for succeeding periods of two years each through July 9, 1967.

On June 12, 1967, the Three Affiliated Tribes and Wilkinson, Cragun and 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-F was approved by the Bureau of Indian Affairs on September 9, 1967, retroactive to July 9, 1967, and it was designated No. A00C14200069. It had an original five-year term and has been extended for subsequent two-year periods to date.

4. Pertinent Contract Provisions. 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.

It has been acknowledged that 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 May 7, 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 relative to the \$3,000 of the retainer held by the Firm, 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 attorney fee awarded in the first claim or claims in which the firm had represented the tribes. 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.

5. Nature of Services. The original petition, docketed as "Docket No. 350," was filed August 11, 1951, and the claims asserted therein have occupied the attention of some 24 attorneys of the Firm for over 23 years. By order of the Commission dated January 14, 1958, the claims asserted in the original petition were severed and assigned separate dockets. The instant Docket 350-F involved the taking by the defendant of the plaintiff tribe's lands in North Dakota under the provisions of the Act of June 1, 1910, 36 Stat. 455, without the payment of "just compensation," or in some cases, any compensation.

Following the Commission's order severing the original Docket 350 the Firm began classifying its work in Docket 350-F. Initially, it was incumbent upon the plaintiff to prove (1) that it had a compensable interest in the Fort Berthold Reservation lands at the time of the passage of the 1910 act; (2) which lands were sold or otherwise disposed of; and (3) the date of each disposition.

Assemblage of the evidentiary proof required, among other things extensive research and study of voluminous records and historical data, and the careful development of a legal hypothesis favorable to plaintiffs.

On several occasions different members of the Firm appeared, presented and argued motions for the plaintiff, and in response to motions of the defendant. These motions dealt with a myriad of issues, such as land use, accounting, determination of taking date and Indian consent to the taking. The overall conduct of the litigation caused the Firm to research legal precedents, prepare, and file many memoranda of law, briefs, proposed findings of fact, objections and reply briefs.

The three prime issues cited above were tried in the hearing before the Commission on October 23, 1963. Following an adverse decision by the Commission of November 4, 1965, 16 Ind. Cl. Comm. 341 (1965), the Firm carefully studied the matter and the advisability of an appeal. Following authorization by the plaintiff's Tribal Business Council to appeal the Commission's decision, the Firm began an extensive and painstaking preparation of the required briefs, reply briefs, and other pleadings to be filed in the Court of Claims. Oral argument was heard before the Court of Claims on October 30, 1967. The Court of Claims rendered its decision on February 16, 1968, affirming the Commission in part, reversing or vacating in part, and remanding the case. 182 Ct. Cl. 543, 340 F. 2d 666 (1968).

Following the decision of the Court of Claims the Firm was engaged in determining appraisal elements necessary to argue before the Commission the use of land values. In connection therewith, it employed experts and technical assistance for research and mapping, engaged in extensive legal and factual research, and prepared briefs, proposed findings of fact, and reply briefs for presentation to the Commission following the trial which was held on November 8, 1969. At times during the course of the litigation, the Firm successfully engaged in efforts to negotiate a settlement of the issues then in conflict.

Through the efforts of the Firm, the record was reopened by the Commission to accept evidence and to hear arguments regarding the determination of a proper rate of interest to be assessed on the funds found to be due the plaintiff tribe. In support of this effort, the Firm prepared and filed briefs and exhibits and delivered an oral argument on July 21, 1972. Continuing efforts of the Firm culminated in a decision by the Commission,

28 Ind. Cl. Comm. 264 (1972), awarding the plaintiff a judgment as aforementioned.

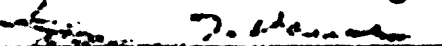
6. Notices. On October 25, 1974, copies of the petition for attorneys' fee were forwarded to the Department of Justice, representing the defendant; the Commissioner of Indian Affairs, Department of the Interior; Mr. Wayne Pachineau, Vice Chairman, and the Tribal Business Council of the Three Affiliated Tribes; requesting comments or information for the Commission's consideration in determining the amount of attorneys' fee to be allowed. No response to the communication has been received from the Vice Chairman or the Tribal Council.

7. Defendant's Response. The January 17, 1975, response of the defendant to the application for attorneys' fee enclosed a copy of a letter dated November 18, 1974, from the Office of the Solicitor of the Department of the Interior and an accompanying memorandum dated November 13, 1974, from the Bureau of Indian Affairs, and indicated, in line with the views expressed in this correspondence, that neither the Department of the Interior nor the Department of Justice takes any position as to the attorneys' fee requested in the application.


8. Conclusion. The attorneys for The Three Affiliated Tribes of the Fort Berthold Reservation undertook serious responsibilities and complex litigation under a contract which made the payment of compensation primarily contingent upon recovery. In resolving the issue now before us, the Commission has considered the contingent nature of the fee, the difficult problems of fact and law involved, the amount of the award achieved through the efforts of the attorneys of the Firm, and the factors pertinent to the determination of attorneys' fees established by prior decisions of the Indian Claims Commission.


The Commission finds that the law firm of Wilkinson, Cragun and Barker rendered valuable legal services to the plaintiff Indians and is entitled to an award of attorneys' fee in the sum of \$880,905.70, plus 10 percent of any interest to be awarded the plaintiff in accordance with the final award made herein through the date of appropriation. June 12, 1975, Public Law 94-32. Payment to the firm of Wilkinson, Cragun and Barker of the sum herein awarded as attorneys' fee will represent payment in full for all claims for legal services rendered in this matter.


Jerome N. Kaykendall, Chairman


John A. Vance, Commissioner


Richard W. Farberough, Commissioner


Margaret H. Pierce, Commissioner


Brancley Blue, Commissioner