

BEFORE THE INDIAN CLAIMS COMMISSION

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| ROBERT DOMINIC, et al., as the |) | |
| Representatives and on behalf |) | |
| of all members by blood of the |) | |
| OTTAWA TRIBE OF INDIANS, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | Docket No. 40-K |
| |) | |
| THE UNITED STATES OF AMERICA, |) | |
| |) | |
| Defendant. |) | |

Decided: August 13, 1975

FINDINGS OF FACT AND ORDER ALLOWING
ATTORNEYS' EXPENSES

1. Preliminary Statement. On March 27, 1968, the Commission entered a final award in this docket in the amount of \$932,620.01 in favor of the Grand River Band of Ottawa Indians as such band was constituted on March 25, 1822 (19 Ind. Cl. Comm. 95). Funds to satisfy this judgment were appropriated by the act of October 21, 1968 (82 Stat. 1190). An order allowing attorneys' fees in this docket was issued by the Commission on September 1, 1971 (26 Ind. Cl. Comm. 200).

2. Expense Application. The application for the reimbursement of expenses was filed on May 21, 1974, by James R. Fitzharris, attorney of record, on behalf of all the attorneys having an interest in the reimbursement of expenses in this case. The application requests allowance of reimbursable expenses in the total amount of \$24,748.80

to Mr. Fitzharris for distribution by him of any amounts of said total expenses due to each of the attorneys and the estates of deceased attorneys entitled to participate in the sharing of the reimbursement.

3. Attorneys' Contracts

(a) This claim was prosecuted under various contracts. Contract No. I-1-ind. 42078, dated June 5, 1948, between the Ottawa Tribe and Nation of Indians of Michigan and northern Wisconsin and Attorneys Charles B. Rogers and Arthur B. Honnold, was approved by the Commissioner of Indian Affairs on September 23, 1948, for a period of 10 years beginning with the date of approval.

Contract No. I-1-ind. 42488, dated May 7, 1951, between Robert Dominic, as an individual of Ottawa descent and as a representative of the Ottawa Tribe of Michigan and northern Wisconsin, and Attorneys Charles B. Rogers and Arthur B. Honnold, was approved on June 15, 1951, and incorporated by reference the provisions in Contract No. I-1-ind. 42078, supra.

Attorneys Rogers and Honnold entered into an agreement dated August 10, 1953, with Attorneys Jay H. Hoag, Rodney J. Edwards, Clarence J. Lindquist, Denis McGinn, James R. Fitzharris, and Col. O. R. McGuire, under which Attorneys Rogers and Honnold assigned to the other attorneys a 50 percent interest in any fee resulting from this claim. The agreement was approved on May 27, 1955.

Contract No. 14-20-0350-196 dated August 29, 1959, between the Ottawa and Chippewa Indians in the State of Michigan and Attorneys Jay H. Hoag, Rodney J. Edwards, Clarence G. Lindquist, Denis McGinn, and James R. Fitzharris, was approved for a period of 10 years beginning September 23, 1958.

Contract No. F50C14200360 dated June 17, 1967, between the Ottawa and Chippewa Indians in the State of Michigan and Attorneys Jay H. Hoag, Rodney J. Edwards, and James R. Fitzharris, was approved on February 8, 1968, for a period of 10 years beginning with the date of approval. This contract provided that any compensation payable to the estates of the deceased attorneys Arthur B. Honnold, Charles B. Rogers, Dennis McGinn, Clarence G. Lindquist, and O. R. McGuire shall be paid by Attorneys Hoag, Edwards, and Fitzharris. Attorney Jay Hoag subsequently died in September 1971.

(b) The contract of June 5, 1948, (No. 42078) which was in effect until September 23, 1958, provided for the reimbursement of actual and necessary expenses incurred in the prosecution of claims before the Commission. The contract of August 29, 1959 (No. 14-20-0350-196) allowed the contracting attorneys to be reimbursed for expenses reasonably necessary and incurred in connection with the investigation, preparation for trial and prosecution of claims before the Commission. Travel expenses were also reimbursable, and if such travel was by automobile, the rate of reimbursement was set at \$0.07 per mile, and meals and lodging or \$11.00 per diem in lieu of subsistence. This contract covered the period from September 23, 1958, to February 8, 1968.

The current contract of June 17, 1967 (No. F50C-14200-360) which has been in effect since February 8, 1968, contains terms similar to those in the contract of August 29, 1959, regarding reimbursable expenses, except that the mileage rate was increased to \$0.10 per mile for automobile travel and the per diem rate was increased to \$25.00.

4. Notice to Parties. The Clerk of the Commission has notified the appropriate parties including the tribal client herein (Ottawa Tribe), and the United States Departments of Justice and the Interior. On June 15, 1974, Robert Dominic, the tribal representative, informed the Commission that the tribal council had given approval to the reimbursement claim.

On September 5, 1974, the Department of Justice filed a response to the application under consideration. That response included a copy of comments respecting the application made by the Commissioner of Indian Affairs of the Department of the Interior on June 14, 1974. The Department of Justice took no position regarding the application except to note several questions raised in the examination of June 14, 1974, conducted by the Department of the Interior. These questions, relating to certain witness expenses and several travel items incurred by Attorney Hoag and Fitzharris, are discussed specifically under findings 6 and 7, infra.

5. Claimed Expenses. The schedule of expenses lists the expenses in several categories as follows:

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| (a) Compensation and Expenses of Experts: | \$13,485.50 |
| (b) Duplication and Printing: | 997.91 |
| (c) Phone, Telegraph, and Postage (Hoag-Edwards): | 206.36 |
| (d) Phone, Telegraph, and Postage (McGinn-Fitzharris): | 170.20 |
| (e) Special Stenographic and Clerical (Hoag-Edwards): | 277.50 |
| (f) Special Stenographic and Clerical (McGinn-Fitzharris): | 924.66 |
| (g) Printed Transcripts (Hoag-Edwards): | 42.35 |
| (h) Printed Transcripts (McGinn-Fitzharris): | 350.61 |
| (i) Travel Expenses (Hoag-Edwards): | 2,330.31 |
| (j) Travel Expenses (McGinn-Fitzharris): | 4,453.72 |
| (k) Expenses in 40-B (prior to dismissal by Commission and removal of cause to 40-K): | <u>1,509.68</u> |
| Total All Expenses Claimed | <u>\$24,748.80</u> |

6. Determination of Expenses. Pursuant to Section 15 of the Act, Rule 34(b) of the Commission's Rules of Procedure (25 CFR §503.34(b)), as amended, 39 Fed. Reg. 41173, (1974), the Commission's Policy Statement §102 issued July 15, 1968, and upon examination of the application, the supporting documentation, and the entire record of expenditures incurred in the prosecution of this claim, the Commission concludes that the claimed expenses in this application are reasonable and proper expenses of litigation and should be allowed with the exception of the following items:

(a) Stenographic services - Mabel P. Hoag

Included in the claim for stenographic and clerical costs (item e above) are payments totaling \$160.50 to Mabel P. Hoag. The services were rendered in 1960 and include 8 days from May 17, 1960, through May 27, 1960, when Mrs. Hoag worked a total of 49 1/2 hours, for which she was paid \$74.25. However, it appears that Mrs. Hoag was in Washington, D. C. at that time on a trip with her husband which extended from May 12, 1960, until May 30, 1960. Mr. and Mrs. Hoag's travel and living expenses for that trip

(\$568.98) are claimed in the expense petition in the matter of the claims of the Minnesota Chippewa Tribe, et al., Docket 18-B (Item number 369). Those travel and living expenses of Mrs. Hoag are claimed under an approved arrangement ^{1/} whereby her living expenses are charged in lieu of direct compensation for her services as a researcher and stenographer. Since Mrs. Hoag's travel and living expenses are being claimed for reimbursement from the Minnesota Chippewa Tribe in lieu of direct compensation, she cannot properly claim direct payments for services during the same period from the plaintiffs in this case. The sum of \$74.25 is disallowed for reimbursement.

(b) Travel expenses - Jay H. Hoag

The travel expenses of Jay H. Hoag total \$2,330.31 (item i above). However, some of the claimed items cannot be allowed or can only be allowed in part. In a number of instances the claimed expenditures have not been itemized and are not supported by any receipts or other evidence of their incurrence. In a few cases the Commission has relied on itemizations submitted in other claims for the data necessary for allowance

^{1/} In claim number 492455, submitted directly to the Bureau of Indian Affairs, Jay H. Hoag presented expenses incurred during the period from 1945 to 1949 for the Minnesota Chippewa Tribe. Among the items allowed for reimbursement from tribal funds were travel and living expenses of Mrs. Hoag. The approval, dated July 24, 1950, stated:

Claim for Mrs. Hoag's expense for transportation and subsistence are recommended for approval in view of sworn statement made by Mr. Hoag, dated March 17, 1950, filed with Claim No. 492625. Mr. Hoag stated that during this time it was very difficult to procure stenographic assistance in Washington; that stenographic services would reasonably have cost more than \$50.00 per week; that the service of a trained investigator and stenographer were necessary and reasonably worth more than \$15.00 per day; and, therefore, the use of Mrs. Hoag's services resulted in a saving to the tribe.

of the expenses involved. We have also allowed the reasonable expenses for appearances at hearings before the Commission. This is permitted, in the absence of further substantiation, under the Commission's recently adopted addition to rule 503.34b(a).

The following items are disallowed because (1) the expenditures are neither itemized nor supported by a receipt or other evidence of incurrence or (2) the mileage computations do not comply with the provisions of the attorneys' contract:

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| September 29 to October 2, 1957, expenses in Washington, D. C. | \$ 55.16 |
| January 8 to May 2, 1959, expenses in Washington, D. C. | 12.24 |
| April 13 to April 19, 1960, expenses in Washington, D. C. | 189.40 |
| May 23, 24, 1961, meals and lodging in Ely, Minn. | 6.95 |
| The automobile expense item for this 230 mile trip is reduced from \$23.00 to \$16.10 (a disallowance of \$6.90) to comply with the contract then in effect which provided for 7 cents per mile | 6.90 |
| July 20-23, 1961, meals and lodging in Chicago, Ill. | 94.39 |
| The automobile expense item is reduced from \$101.60 to \$71.12 (a disallowance of \$30.48) to comply with the 7 cents per mile proviso. | 30.48 |
| August 1-3, 1961, meals and lodging in Ely, Minn. | 52.70 |
| The automobile expense item is reduced from \$27.00 to \$18.90 (a disallowance of \$8.10) to comply with the 7 cents per mile proviso | 8.10 |

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| August 12-13, 1961, meals and lodging Ely, Minn. | \$ 30.87 |
| The automobile expense item is reduced from \$27.10 to \$18.97 (a disallowance of \$8.13) to comply with the 7 cents per mile proviso. | 8.13 |
| August 27 to October 16, 1961, expense of trip to Washington, D.C. All of the travel (1731 miles) expense was charged to this docket. The automobile expense item is reduced from \$173.10 to \$121.17 (a disallowance of \$51.93) to comply with the 7 cents per mile proviso. | 51.93 |
| December 26-28, 1961, expenses in Chicago, Ill. | <u>132.12</u> |
| Total | \$679.37 |

The following items are disallowed because the stated purpose for the trip indicates that it was not necessary for the prosecution of this claim and therefore the costs of travel and living expense are not proper items for reimbursement. When an attorney is engaged in such work as preparing requested findings and brief or filing a motion at the Commission, his personal travel and living expenses are not reimbursable costs of the litigation. The attorney is rendering those services which are normally performed in his own office, and the fact that he chose to live in Washington, D.C., for extended periods and carry on his Indian claims practice here does not create a situation in which he may claim his living expenses as a cost of the litigation. Of course where a trip is undertaken for such purposes as attending hearings before the Commission, researching Government documents located in Washington, D. C., or conferring with Justice Department officials on the claim, the trip was required and the reasonable travel and living expenses are allowable for reimbursement.

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| February 6 to May 4, 1962, expenses in Washington, D. C., review of evidence in final preparation of requested findings and brief | \$31.44 |
| March 4 to April 28, 1964, expenses in Washington, D. C., filing of motion | 28.14 |
| March 26 to May 22, 1965, expenses in Washington, D. C. -- no purpose stated | <u>18.22</u> |
| Total | \$77.80 |

(c) Travel expenses - McGinn and Fitzharris

The travel expenses of Attorneys Dennis McGinn and James R. Fitzharris total \$4,453.72 (item (j) above). A number of the claimed expense items are not itemized or are not supported by receipts or other evidences of payment. Accordingly, those items must be disallowed, as follows:

- (1) October 27 to 29, 1955, Mr. Fitzharris travel expense for 3 days for 2 persons (Mr. Fitzharris and Dr. Stewart). The claimed amount \$66.00 appears to represent a per diem claim of \$11.00 per day. However, the contract then in effect did not contain a per diem provision but rather provided for reimbursement of actual expenses. Since cancelled checks have been submitted for hotel payments of \$50.43 that sum will be allowed, and the remaining sum of \$15.57 is disallowed \$15.57
- (2) November 5-6, 1955, Mr. McGinn travel expense for 2 days (\$22.00). Since per diem was not provided for in the contract and there is no evidence of the actual expenses incurred, this sum is disallowed. 22.00
- (3) July 25-26, 1956, Mr. Fitzharris railroad fare and travel expense \$50.00. There is no itemization for this claim and no receipts or other evidence of payment of any items for this trip. The claim is disallowed. 50.00

(8) July 29, 1960, travel by Mr. Fitzharris to Bay Mills. As the Department of the Interior, noted in its comments of June 14, 1974, supra, this trip is listed in Mr. Fitzharris' petition as having been made to the Bay Mills Chippewa Board and therefore cannot be allowed as an expense in this Ottawa Indian claim. \$ 35.60

(9) July 21-23, 1961, travel expenses of Mr. Fitzharris to Chicago. Cancelled checks covering hotel and plane fare accounts for \$91.16. An expenditure of \$50.00, evidenced by a check to "cash", is not itemized or supported by receipts or other evidence and is therefore disallowed. 50.00

(10) December 26-28, 1961, travel expenses of Mr. Fitzharris to Chicago. Counsel's exhibit reference to daybook or calendar sheets contains no entries supporting the amount claimed. There are no receipts or other evidence of the payment of the expenses. Accordingly, the total amount claimed of \$93.43 is disallowed. 93.43

(11) July 25-27, 1962, travel expenses of Mr. Fitzharris to Chicago. Daybook entries account for \$54.67 plane fare and \$53.60 in living expenses of the total \$144.27 claimed. There are no receipts or other evidence of the payment of the balance claimed for this trip. Accordingly, \$36.00 is disallowed. 36.00

(12) March 23-25, 1964, travel expenses of Mr. Fitzharris to Chicago. The supporting evidence accounts for \$52.50 plane fare and \$46.08 hotel expense. A claimed expenditure of \$100.00 evidenced by a check to "cash" is not itemized or supported by receipts or other evidence and is therefore disallowed. 100.00

(13) November 19-21, 1964, travel expenses of Mr. Fitzharris to Chicago. The supporting evidence accounts for \$52.50 plane fare and \$57.83 hotel charges. A claimed expenditure of \$50.00 evidenced by a check to "cash" is not itemized or supported by receipts or other evidence and is therefore disallowed. 50.00

Total \$922.70

(4) Two separate claims have been made for expenses of travel in 1956 by Mr. McGinn to Washington, D. C. However, the dates overlap. The first claim, for a November 15, 1956, trip is for \$53.89. It is supported by itemized entries in the attorneys' daily journals. The second claim, in the amount of \$115.76, lists a trip on November 15, 16 and 17, 1956. There is no evidence to support the claim of \$115.76 and it appears to be, at least in part, a duplication of the \$53.89 claim. The claim for \$115.76 is disallowed.

\$115.76

(5) February 15-22, 1959, travel expenses to Washington by Mr. Fitzharris. Supporting exhibits include journal pages with entries covering the plane fare (\$128.81), and three unexplained entries totalling \$369.21 (\$200, \$100, and \$69.21). Two \$50 items (Burlington Hotel, February 20) are also listed in the petition without supporting evidence. The amount claimed, however, is \$328.81 (plane fare plus \$200 in "travel expenses"). Rule 34(b) as amended, allows reasonable expenses without supporting records whenever claimant makes an appearance before the Commission in proceedings of record. Since Commission records do not disclose an appearance of record during this trip the unsupported travel expenses of \$200 are disallowed.

200.00

(6) May 9 to 14, 1959, travel expenses to Lansing, Michigan, by Mr. Fitzharris. The amount claimed is \$172.62. Supporting evidence covering meals, hotels, car rental, and plane fare accounts for \$142.52. The balance claimed, \$30.10, is not itemized or documented and is, accordingly, disallowed.

30.10

(7) November 23, 24, 25, 1959, travel to Washington by Mr. McGinn. The total amount claimed is \$124.24 (\$64.24 plane fare and \$60 travel expenses). Exhibit reference cites pages to the attorneys' daily journal. The journal pages, however, do not contain any dollar entries or breakdown of the claimed expenditures. Since there are no receipts or other evidence of payment of any items for this trip the claim is disallowed.

124.24

(d) Travel Expenses, McGinn-Fitzharris, 1950-1954

Appendix B of the application covers travel expenses of Attorneys McGinn and Fitzharris advanced for plaintiff tribe in Docket 40-B in 1950, 1953, and 1954, prior to the dismissal of that docket. Subsistence or living expenses for the trips listed in Appendix B are claimed on a per diem basis (\$11.00 per day). The attorneys' contract under which services were performed (No. 42078) did not provide for per diem reimbursements. In addition, the evidence cited in support of the claimed living expenses, consisting mainly of journal entries, does not include an itemization of the expenses. In the few instances where amounts are entered in the journal, the amounts so entered do not relate in any manner to the amounts claimed in the application. Accordingly, all living expenses, covering the following trips will be disallowed in the amounts indicated:

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| (1) Mr. Fitzharris, to Wash., D. C., 4/29-5/1, 1950: | \$ 33.00 |
| (2) Mr. McGinn, to Duluth, Minn., 4/15-4/17, 1953: | 33.00 |
| (3) Mr. Fitzharris, to Duluth, Minn., 5/6-5/7, 1953: | 22.00 |
| (4) Mr. Fitzharris, to Duluth, Minn., 8/28-8/29, 1953: | 22.00 |
| (5) Mr. Fitzharris, to Petoskey, Mich., 12/5-12/7, 1953: | 33.00 |
| (6) Mr. Fitzharris, to Duluth, Minn., 3/10-3/11, 1954: | <u>22.00</u> |
| Total Disallowed This Item: | \$165.00 |

(e) Error in Calculation

The claimed items of expense in item 5(d)--Phone, Telegraph, and Postage (McGinn--Fitzharris) total \$159.00 and not \$170.20 as listed in the petition. (The miscalculation appears to have been made in totaling the listed expenses in Appendix A6-8 for postage and delivery charges.) The difference of \$11.20 is disallowed.

(f) Summary, Disallowed Expenses

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| (a) | \$ 74.25 |
| (b) | 757.17 |
| (c) | 922.70 |
| (d) | 165.00 |
| (e) | <u>11.20</u> |

Total \$1,930.32

7. Other Expenses Claimed.

(a) In its examination of this application of June 14, 1970, the Department of the Interior noted that the claimed expenses for stenographic help was supported only by ledger entries and cancelled checks in the case of the items listed in Appendix A or item 5(f) supra. The Department, however, did not recommend disallowance. The Commission finds that the ledger entries and cancelled checks endorsed by the persons supplying the services meets the requirements of Rule 34(b), as amended, and Commission's Policy Statement 102. Accordingly, no adjustments will be made in this category of expenses.

(b) The application states a claim for \$13,485.50 covering the expenses and compensation of expert witnesses. Included in this amount is the sum of \$8,686.04 representing the Ottawa Tribe's share

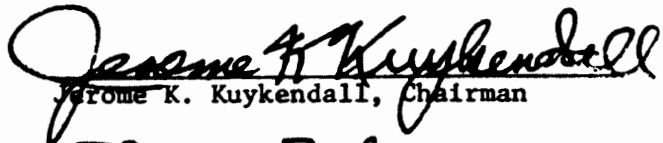
of the compensation and expenses "paid and to be paid" Mr. J. W. Trygg, one of the appraisers in this claim. The late Mr. Trygg was employed jointly by counsel in this case and by counsel in Dockets 146 and 15-M under a firm obligation by said counsel to pay amounts still due Mr. Trygg after deducting any advances made to Mr. Trygg during the course of his employment.

The principal statements in support of Mr. Trygg's expenses and compensation were filed in this docket and satisfactorily audited by the Department of the Interior on June 14, 1974. Our examination of the entire record in this docket and Dockets 146 and 15-M disclose that, from the total \$8,686.04 claimed for this item, there is still due and owing the Estate of J. W. Trygg, deceased, the sum of \$4,384.05 to be paid by petitioning counsel herein.

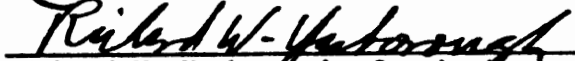
8. Conclusion. On the basis of all the evidence of record, the Commission finds that all claimed items of expenses not specifically treated in the foregoing findings are reasonable and proper expenses of litigation and should, therefore, be allowed. Accordingly, the Commission concludes that, after deducting the disallowed items of expense summarized in finding 6(f), supra, totaling \$1,930.32, the sum of \$22,818.48 is reasonable and proper for reimbursement.

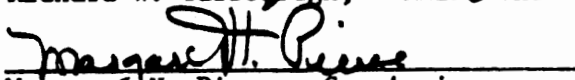
IT IS THEREFORE ORDERED that out of the funds appropriated to pay the final award entered herein on March 27, 1968, there shall be disbursed to James R. Fitzharris, attorney of record, the sum of \$22,818.48 as reimbursement in full for expenditures made in the prosecution of

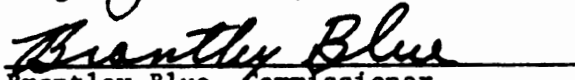
this claim, said sum to be distributed by James R. Fitzharris to all parties having an interest in this application.


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Richard W. Yarbrough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner