

BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: May 18, 1976

FINDINGS OF FACT ON AWARD OF ATTORNEYS' FEE

On March 25, 1976, Jonathan C. Eaton, Jr., attorney of record for the plaintiffs in the above-captioned docket, filed a petition, together with supporting documents, for award of attorneys' fee. Having considered said petition and supporting documents, the defendant's response thereto filed April 28, 1976, the contract under which legal services have been performed on behalf of the plaintiffs with respect to the claims under the above-captioned docket, and the entire record of all proceedings under this docket, the Commission makes the following findings of fact:

1. Award. On March 17, 1976, the Commission entered a final award in the amount of \$6,500,000.00 in favor of the plaintiffs (37 Ind. Cl. Comm. 502). This final award was entered upon the joint motion of the parties for entry of final judgment under this docket, pursuant to a stipulation between the parties for entry of final judgment.

2. Contractual Authority and Compensation. On June 28, 1951, the plaintiffs entered into a contract (No. I-1-Ind. 42492) with the law firm of Wilkinson, Boyden & Cragun pursuant to which the attorneys were to advise and represent the plaintiffs ". . . in investigating, formulating and prosecuting any and all claims of The Tribe against the United States which may be prosecuted under the provisions of the Indian Claims Commission Act. . . ." As provided for in that contract, the law firm of Wilkinson, Boyden & Cragun received a retainer of \$5,000 with additional compensation contingent upon recovery. This contract, as extended, was in effect until March 19, 1964, when an amendment to it became effective whereby the law firm of Wilkinson, Cragun & Barker (the successor firm to Wilkinson, Boyden & Cragun) resigned as claims attorneys for the plaintiffs in Dockets 350-B and 350-C.^{*/} As part of the same amendment, Wilkinson, Cragun & Barker agreed to pay to other attorneys selected and designated by plaintiffs to represent them as claims attorneys in Dockets 350-B and 350-C the amount of \$2,000 which was agreed to constitute a fair, pro-rata share allocable to Dockets 350-B and 350-C of the \$5,000 retainer originally paid to the law firm of Wilkinson, Boyden & Cragun.

*Originally the plaintiffs filed a petition wherein several causes of action were pleaded, and this petition was assigned Docket No. 350. On January 14, 1958, the Commission entered an order severing the several causes of action into separate dockets, among them Dockets 350-B and 350-C.

On February 26, 1964, the plaintiffs entered into a contract with Jonathan C. Eaton, Jr., of the law firm of Funke and Eaton (referred to in said contract and hereinafter as the "Attorneys"). The contract provided that it was ". . . the duty of The Attorneys to advise and represent The Tribe in investigating, formulating, and prosecuting claims, designated as docket nos. 350-B and 350-C, of The Tribe against the United States which shall be prosecuted under the provisions of the Indian Claims Commission Act. . . ." The contract, Symbol No. 14-20-0100-5883, was approved on March 18, 1964, by Morton N. B. Holm, Area Director of the Aberdeen Area Office. The contract was for a term of ten years beginning with the date of its approval and provided for extensions with the approval of the Commissioner of Indian Affairs at the request of the Attorneys for individual two-year periods during the pendency of the claims.

On May 6, 1974, Jonathan C. Eaton, Jr., on behalf of the law firm of Funke and Eaton, wrote to the Area Director, Bureau of Indian Affairs, at Aberdeen, South Dakota, requesting a two-year extension of the contract. On July 16, 1974, the plaintiffs' Tribal Business Council adopted Resolution No. 74-188 authorizing extension of the contract for three years. On August 9, 1974, the Acting Area Director of the Aberdeen Area Office approved an extension of the contract for the two-year period March 18, 1974, through March 17, 1976.

3. Contractual Provisions as to Compensation. The Attorneys' contract provides as follows with respect to attorneys' fees:

4. The Attorneys shall receive a retainer of \$2,000, 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 the 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 [sic] 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.

The \$2,000 retainer provided for in the above-quoted portion of the contract was received by the Attorneys from the law firm of Wilkinson, Cragun & Barker.

4. Requested Fee. The petition is for award of an attorneys' fee of \$648,000 which is ten percent (10%) of the award of \$6,500,000.00, less the \$2,000.00 retainer previously received.

5. Statutory Provision on Fees. The authority to make the requested award in the amount of ten percent (10%) of the judgment is set forth in Section 15 of the Indian Claims Commission Act, 60 Stat. 1049, 1053 (1946), as follows:

The fees of . . . 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, plus all reasonable expenses incurred in the prosecution of the claim; but the amount so fixed by the Commission, exclusive of reimbursements for actual expenses, shall not exceed 10 percentum of the amount recovered in any case. . . .

6. Defendant's Response. The defendant responded to the notice of the petition by letter dated April 28, 1976, from the Department of Justice. The letter stated that the Department of Justice takes no position as to allowance of attorneys' fees.

7. Notice to Plaintiffs. On March 29, 1976, a copy of the petition for attorneys' fees was forwarded to Mrs. Rose Crow Flies High, Chairman, Business Council, Fort Berthold Reservation, requesting comments and information for the Commission's consideration in determining the amount of attorneys' fees to be allowed. No response has been received from the Business Council of the Fort Berthold Reservation.

8. Attorneys' Services in Prosecution of the Claim. The claim in Docket 350-C was for the loss of aboriginal lands north and east of the Missouri River in North Dakota. In addition, plaintiffs presented a separate claim (subsequently dismissed) in Docket 350-B based upon breach of fair and honorable dealings for lands located within the boundaries of the lands claimed in Docket 350-C. Because numerous overlapping claims of either aboriginal ownership or recognized title to the same portions of North Dakota were filed with the Commission, several claims were

consolidated for trial with Docket 350-C (and Docket 350-B). Thus, pursuant to Commission order of September 9, 1960, claims filed by the Turtle Mountain Band of Chippewa Indians (Docket 113), the Little Shell Band of Chippewa Indians (Docket 191), the Chippewa Cree Tribe (Docket 221) and the Red Lake and Pembina Bands (Docket 246) were consolidated for trial with the claims of the Three Affiliated Tribes of the Fort Berthold Reservation in Dockets 350-B and 350-C to the limited extent that they overlapped or were in conflict. Subsequently, by order of April 5, 1962, the Commission directed that the plaintiffs' claims in Dockets 350-B and 350-C be consolidated with claims brought by the Sioux Nation in Docket 74 and the Chippewa Cree Tribe in Docket 221-A. At the time the Attorneys entered Docket 350-C, the Chippewa and Sioux cases had been tried on the issue of title, the Commission having directed that Docket 350-C be tried and decided separately.

Upon employment the Attorneys sought out and employed historical and anthropological experts to prepare for the trial on title in this case. The Attorneys also filed and argued certain motions relating to the progress of the consolidated litigation. In order to finance the employment of two expert witnesses, the Attorneys assisted in securing a loan for the plaintiffs. At the same time and in preparation for the trial the Attorneys researched for and interviewed witnesses, analyzed the transcripts and documentary evidence in the overlapping Sioux and Chippewa cases, and evaluated and organized evidence for the trial.

The Attorneys tried the issue of title before the Commission in a four-day trial that commenced on February 28, 1966, at which plaintiffs' claims were contested by the defendant and several of the Chippewa and Sioux plaintiffs. At the trial the Attorneys introduced 165 documentary exhibits. The Attorneys then digested and indexed the massive record in preparation for filing of proposed findings of fact and a brief on the issue of title.

Thereafter, the Commission decided that the plaintiffs had aboriginal title to a large tract of land north and east of the Missouri River until the United States took the lands in 1870. The Attorneys were convinced that the date of taking determined by the Commission was in error and accordingly, a motion was filed to rehear the Commission's determination of the taking date. The Commission granted this motion, over defendant's objections, on October 15, 1971, whereupon the Attorneys employed the services of an expert witness to assist in gathering evidence on the date of taking issue, in which connection the Attorneys assisted plaintiffs in securing a second government loan to finance employment of the expert witness. The Attorneys conferred with the expert witness and analyzed the evidence gathered, conducted an independent investigation of historical materials and did extensive legal research. The Attorneys reviewed the exhibits submitted by the expert witness and submitted 91 of these exhibits, together with various briefs, in support of plaintiffs' contentions with respect to the date of taking. On January 2, 1975, the Commission entered a decision holding that the correct date of taking was in 1891, a decision

very favorable to plaintiffs as compared with the prior determination of a taking date in 1870.

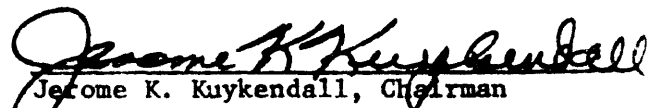
During the pendency of plaintiffs' motion for rehearing the defendant and certain of the Chippewa plaintiffs had appealed the Commission's title decisions on the consolidated cases. The Attorneys represented the plaintiffs, as appellees, before the Court of Claims.

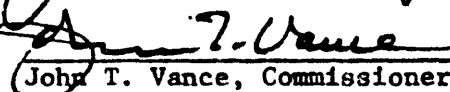
In preparation for the valuation trial in Docket 350-C, the Attorneys obtained the services of an expert appraiser, again assisting the tribe in securing a third government loan for this purpose. The Attorneys conferred with the expert appraiser and also made its own investigation.

After the Attorneys reached a tentative appraisal of the plaintiffs' lands, defendant's counsel was approached regarding the possibility of settling this docket before the valuation trial. Negotiations were entered into, during the course of which the Attorneys found it necessary to utilize the services of an independent engineer to resolve a dispute over the acreage of the plaintiffs' aboriginal lands. After lengthy negotiations involving travel to Washington, D. C., and meetings with defendant's counsel, as well as meetings with the tribal members, the parties reached agreement to settle Docket 350-C for \$6,500,000.

9. Conclusion. On the basis of the entire record in these dockets and considering the responsibilities undertaken, the difficult problems of fact and law involved, 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 the contract Attorneys have rendered valuable legal services in successfully prosecuting their clients' claim and ultimately obtaining judgment. Under the terms of their contract and the above-enumerated standards, including those standards obtaining in the prosecution of similar claims in courts of law, the contract Attorneys have earned an attorneys' fee of \$650,000, representing ten percent (10%) of the award to plaintiffs. Accordingly, payment of the amount of \$648,000 (representing ten percent (10%) of the final award less the \$2,000 retainer previously received) to Jonathan C. Eaton, Jr., attorney of record, on behalf of the contract Attorneys, the firm of Funke and Eaton, for distribution by Mr. Eaton in accordance with whatever interests in said award of attorneys' fee may exist, will represent payment in full of all claims for legal services in this docket. Such payment will be out of funds appropriated to pay the award.


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner