

## BEFORE THE INDIAN CLAIMS COMMISSION

THE THREE AFFILIATED TRIBES OF THE	)	
FORT BERTHOLD RESERVATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Docket Nos. 350-A, 350-E
	)	and 350-H
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: June 18, 1969

FINDINGS OF FACT

1. The Three Affiliated Tribes of the Fort Berthold Reservation, plaintiff herein, filed a single petition, Docket No. 350, incorporating nine separate claims. On March 4, 1955 a plea of res judicata was sustained as to one count, the other eight counts were separately docketed as Docket Nos. 350-A through 350-H. Of these eight dockets, only three are directly involved in settlement: Docket Nos. 350-A, 350-E and 350-H. The settlement disposes of all offsets up to June, 1965 and to that extent would benefit all of the other dockets--judgments hereafter obtained in those dockets will be free of offsets unless the tribes have received or shall receive gratuities between June 19, 1965 and the time the new judgments are awarded. The settlement of Docket No. 350-E will also have a slight effect on the accounting, Docket No. 350-G.

2. Docket No. 350-A, the 1886 Cession Claim. This claim arises from an agreement made by the tribes in 1886 and ratified by the Congress

in 1891 by which the tribes ceded some 1,800,000 acres of land lying on both sides of the Missouri River in Montrail and McKenzie Counties, North Dakota. The Government paid the tribes \$800,000 for this land, or approximately \$.45 per acre. On October 29, 1968 the Commission found that the value of the lands as of 1891 was about \$1.45 per acre, or \$2,585,105.88, and, subtracting the compensation theretofore paid, awarded a judgment for plaintiff in the amount of \$1,785,105.88, subject to offsets.

3. Docket No. 350-E, the Agency Claim. In 1930 the Three Affiliated Tribes won an award against the Government in the Court of Claims for the taking of their lands south of the Missouri River by a series of executive orders in 1868, 1870 and 1880 (Three Affiliated Tribes v. United States, 71 Ct. Cls. 308). The jurisdictional act authorizing the suit allowed almost unlimited offsets against the award for any federal expenditure that could be traced to the benefit of the Three Affiliated Tribes. The Court allowed as offsets against the claim, among other things, funds used for the building and maintenance of agency buildings. The tribes asserted that since they had paid for the agency buildings by having the cost offset from their judgment, they owned the buildings and the Government owed rent for their use over the years.

4. Docket No. 350-H, the Buffalo Claim. The plaintiff alleged that the defendant, either through its agents or through failing to protect the Indians of the Fort Berthold Reservation against the depredations of non-Indians as promised in the Treaty of Fort Laramie, deprived the Three

Affiliated Tribes of buffalo on which they depended in great part for their subsistence and asked for damages for the loss.

5. After the Commission handed down its decision on October 29, 1968 in Docket No. 350-A, the parties entered into serious negotiations for the settlement of offsets. In the course of the negotiations it was agreed that plaintiff would make "a package" offer of settlement for Docket Nos. 350-A, 350-E and 350-H. Docket No. 350-A had been tried on the issue of value and fully briefed on the issues of title and value; Docket No. 350-H had been thoroughly researched by expert anthropologists employed by both parties in the preparation for hearing set in the spring of 1969; Docket No. 350-E, set for hearing in May, 1970, had not been prepared for hearing.

6. After preliminary negotiations by counsel for the plaintiff and the defendant, attorneys for the plaintiff sent to the Attorney General of the United States, under date of January 13, 1969, a letter (Joint Exhibit No. 1) offering to settle Fort Berthold Docket Nos. 350-A, 350-E and 350-H for the net sum of \$1,850,000 on the terms and conditions set forth in an enclosed stipulation. The said stipulation reads as follows:

"BEFORE THE INDIAN CLAIMS COMMISSION

THE THREE AFFILIATED TRIBES OF THE	)	
FORT BERTHOLD RESERVATION,	)	
	)	
Plaintiffs,	)	Dockets 350-A
v.	)	350-E
	)	350-H
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

"STIPULATION FOR COMPROMISE  
SETTLEMENT AND ENTRY OF FINAL JUDGMENT

"WHEREAS, there are now pending before the Indian Claims Commission claims on behalf of The Three Affiliated Tribes of the Fort Berthold Reservation, relating to unconscionable consideration for the cession of land in 1891 (Docket 350-A), the rental value of certain agency buildings (Docket 350-E) and compensation for loss of buffalo (Docket 350-H), and

"WHEREAS, on October 29, 1968, the Indian Claims Commission found that The Three Affiliated Tribes were entitled to a judgment of \$1,785,105.88 prior to consideration of offsets (20 Ind. Cl. Com. 1), in Docket 350-A, and

"WHEREAS, the parties desire to compromise and settle (a) the question of offsets in Docket 350-A, (b) the agency building claim ( Docket 350-E, which claim is also relevant to the accounting claim, Docket 350-G), and (c) the buffalo claim (Docket 350-H),

"NOW THEREFORE, it is stipulated and agreed by the parties hereto as follows:

"1. The Indian Claims Commission shall enter judgment for The Three Affiliated Tribes in the amount of \$1,850,000 as a final judgment. No appeal shall be taken from the final judgment to any court.

"2. The entry of judgment in such amount shall finally dispose of all claims and demands which The Three Affiliated Tribes have asserted or could have asserted against defendant in Dockets 350-A, 350-E and 350-H, and the said Three Affiliated Tribes shall be barred from asserting all said claims or demands in any future action. Further, The Three Affiliated Tribes waive all claim in Docket 350-G, the accounting claim, for refund or credit in connection with the following items spent by the United States in connection with agency buildings and charged as gratuities to The Three Affiliated Tribes or paid from tribal funds:

Old GAO Rept. p.

27	1866 Unrat. Treaty	\$29,711.99
30	1868-91, other than Treaty	14,874.47
40	1886 Treaty	16,781.15
43	1892-1910 other than Treaty	.6,676.82
62	1911-24 other than Treaty	29,842.21
96	(New GSA Report)	4,698.09
		\$102,584.73

"3. This stipulation and entry of final judgment shall finally dispose of all offsets, claims or demands which defendant has asserted or could have asserted in Dockets 350-A, 350-E and 350-H against The Three Affiliated Tribes, from July 1, 1924 to June 30, 1965.

"4. This stipulation and entry of final judgment shall not affect one way or the other such right as the United States may have to collect from the proceeds of timber sales any expenses of managing, protecting and selling timber as authorized by the Act of February 14, 1920, as amended, 25 U.S.C. § 413, nor shall it affect the right of The Three Affiliated Tribes to have credited to their trust funds all or a portion of such administrative deductions by reason of such trust funds having borne expenses of management, protection and the sale of timber to the extent provided by 25 U.S.C. §413.

"5. This stipulation and entry of final judgment shall not be construed as an admission of any party as to any issue, nor used for purposes of precedent, in any other case except to the extent described above.

"FOR THE PETITIONERS:

/s/ Charles A. Hobbs

Charles A. Hobbs  
Attorney of Record for Petitioners

FOR THE DEFENDANT:

/s/ Glen E. Taylor

Acting Assistant Attorney General

/s/ Edwin B. Hatch

Attorney, Department of Justice

/s/ Milton E. Bander

Attorney, Department of Justice"

7. By letter of February 25, 1969 (Joint Ex. 2), Mr. Glen E. Taylor, Acting Assistant Attorney General, accepted the offer to settle the claim for the Three Affiliated Tribes of the Fort Berthold Reservation as outlined in the letter of January 13, 1969:

"DEPARTMENT OF JUSTICE  
WASHINGTON

February 25, 1969

"Charles A. Hobbs, Esquire  
Wilkinson, Cragun and Barker  
1616 H Street, N. W.  
Washington, D. C. 20006

Dear Mr. Hobbs:

"The offer to settle the claims of The Three Affiliated Tribes of the Fort Berthold Reservation, petitioners in Docket Nos. 350-A, 350-E and 350-H, before the Indian Claims Commission, for the sum of \$1,850,000, as outlined in your letter of January 13, 1969, is accepted, subject to the following conditions:

"1. That the proposed settlement be approved by appropriate resolution of the governing bodies of the Three Affiliated Tribes of the Fort Berthold Reservation.

"2. That approval of the settlement, as well as the resolution of the tribes, be secured from the Secretary of the Interior or his authorized representative.

"3. That one or more responsible officials of the tribes-- e.g., Chairman of the Business Council, etc.--be present to testify at the hearing before the Indian Claims Commission.

"The Department of Justice will be happy to work out with you the terms of the stipulation and the appropriate motion and order necessary to carry into effect the offer of settlement subject to the conditions specified above.

"In drawing the Joint Motion for entry of judgment, please list the documents which will be introduced in support of the settlement, such as (1) the stipulation, (2) the tribal resolution or resolutions, (3) the letter of approval of the settlement by the Department of the Interior, and (4) such other papers as will be offered in evidence at the hearing on the settlement. Copies of these papers should also be furnished to the defendant, xeroxed if you so desire.

Sincerely,

/s/ Glen E. Taylor  
Acting Assistant Attorney General"

8. The Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Reservation, the governing body of plaintiff tribes, having been kept informed of the status of the settlement negotiations (Tr. p. 10) called a meeting of the General Council of the Three Affiliated Tribes for April 2, 1969 to consider the proposed settlement. To give notice to members of the settlement meeting, the Council caused letters to be sent to all members living off the reservation informing them of the meeting (Tr. pp. 11, 17-18; Joint Ex. 4-5). They also circulated the notice to news media and radio stations in the five counties surrounding the reservation and to the news media in the major towns in the vicinity of the reservation (Id.). Widespread coverage of the notice is indicated by the mailing list used by the Tribal Clerk (Joint Ex. 5) which indicates that not only were notices sent to members in many states distant from North Dakota, but that members in the Armed Services with APO addresses were also kept informed. The effectiveness of this widespread notification was established by the fact that some members came from Georgia, Colorado, Ohio and California to attend the April 2 meeting (Tr. p. 18), and that others who could not attend made their wishes known through some thirty or more long-distance telephone calls and numerous letters, all favoring the proposed settlement (Tr. p. 15).

9. Notification of members on the reservation was complicated by the fact that the reservation is divided into five segments separated by the Garrison Reservoir (Tr. p. 10). The on-reservation members were notified in a way the Tribal Council has found the most effective: principals of

the schools attended by the children of the five segments, at the request of the Council, distributed to the children, to be carried to their parents, copies of the notice as well as copies of a report prepared by the attorneys explaining the proposed settlement (Tr. pp. 11-12). In addition, the councilmen representing each segment were made responsible for discussing the settlement with members of the tribes living in the segment or community that they represented (Tr. p. 10).

10. The Commission finds that the members of the Three Affiliated Tribes of the Fort Berthold Reservation received sufficient notice of the meeting of April 2, 1969 to allow all who had an interest in the claim to participate in the General Council meeting if they so desired.

11. A meeting of the General Council of the Three Affiliated Tribes of the Fort Berthold Reservation was held April 2, 1969 at New Town, North Dakota. Some 300 people attended the meeting including representatives of the Bureau of Indian Affairs and other persons who are not enrolled members of the Three Affiliated Tribes including such persons who are married to members (Tr. p. 12). A registration sheet was signed by 247 adult voting members who attended the meeting (Joint Ex. 7). This was the best attended meeting the General Council of the Three Affiliated Tribes has had in recent years (Tr. p. 12). Three members of the tribes who were present and participated in the meeting testified at a hearing held May 20, 1969 before the Indian Claims Commission relative to the proposed compromise settlement.

12. The Chairman of the meeting of April 2, 1969, Mr. Nathan Little Soldier, was elected to his present office in September of 1968, but



previously served as a member of the tribal governing body, the Tribal Business Council, for the periods 1947-1949 and 1955-1957 (Tr. pp. 8-9). He testified as to the familiarity of the members of the Three Affiliated Tribes with their claims and the status of their claims prior to the settlement (Tr. pp. 9-10), as well as to the method of keeping the isolated people in the five segments informed and notified of the meeting and the nature of the problems to be discussed there (Tr. pp. 10-11). He noted that the attendance and participation at the General Council meeting was very good and that "this was the best attended General Council meeting that we have ever had on the Fort Berthold Reservation" for as long as he could remember (Tr. pp. 12-13). He further testified that the proposed compromise settlement was fully explained to the members at the meeting by Messrs. Charles A. Hobbs and Jerry C. Straus of the law firm of Wilkinson, Cragun & Barker, the tribes' claims attorneys (Tr. p. 13); that the issues were translated into the Indian language for the benefit of those who could better comprehend them in that language (Id.); that many questions were asked and answered and that the membership adopted a resolution approving the settlement by a vote of 208 in favor and 21 opposed and that he was satisfied from the questions and answers and from the discussion of the meeting immediately following it and thereafter that this vote reflected the informed desires of his people (Tr. pp. 13-15).

13. Vincent Malnourie, the Chairman of the Tribal Business Council and formerly a 30-year employee of the Bureau of Indian Affairs, testified that he was present at the meeting of April 2, and that he agreed with

Mr. Little Soldier's testimony and had nothing to add to it (Tr. p. 17). He testified from personal knowledge (Tr. pp. 17-18) that at least two notices had been sent to all persons on the mailing list (Joint Ex. 5; Tr. p. 10).

14. Mr. Ralph Wells, present Secretary of the Tribal Business Council who has served on the Council from time to time since 1950, testified that he was present at the April 2 meeting, that he agreed with the testimony of Mr. Little Soldier, and he had nothing to add (Tr. p. 20). Three additional members of the Three Affiliated Tribes were present in the hearing room: Mrs. Rose Crow Flies High, Treasurer of the Tribal Business Council, Mr. Philip Ross, a member of the Tribal Business Council, and Mr. Hans Walker. They were invited by the Commission to testify, but none did (Tr. pp. 20-21).

15. The resolution by which the General Council made known its approval of the proposed settlement is as follows:

"Resolution No. 69-26

"RESOLUTION OF THE THREE AFFILIATED TRIBES  
OF THE FORT BERTHOLD RESERVATION

"WHEREAS, the Three Affiliated Tribes of the Fort Berthold Reservation are the petitioners in a number of the claims before the Indian Claims Commission against the United States, including Docket No. 350-A, based upon the government's failure to pay true market value in 1891 for approximately 1,800,000 acres of land ceded by the Tribes lying on both sides of the Missouri River in Montrail and McKenzie Counties, North Dakota; Docket No. 350-E, arising from the government's failure to pay the Tribes for use of agency buildings which were built and maintained with funds deducted from an award granted the Tribes by the Court of Claims in 71 Court of Claims 308 (1930);

and Docket No. 350-H, arising from the government's failure to protect the buffalo on the lands of the Three Affiliated Tribes against extermination by the non-Indian citizens of the United States; and

"WHEREAS, with respect to Docket 350-A on October 29, 1968, the Indian Claims Commission handed down a decision holding that the value of the lands ceded by the Tribes by agreement in 1886, ratified in 1891, was \$1.45 an acre as of 1891, the date of valuation, and that the consideration which the Government paid the Tribes for the land (which was \$800,000, or approximately 45 cents an acre) was 'unconscionable consideration,' and ordered that the government should pay to the Tribes the net amount of \$1,785,105.88, the award however being subject to any offsets due the government; and

"WHEREAS, the Attorneys after examining the list of offsets in Docket 350-A claimed by the government (totalling over \$2,000,000, but most of which are not proper offsets), have concluded that it would be in the best interest of the Tribes to conclude the offsets question by settlement rather than by litigation, and

"WHEREAS, with respect to Docket 350-E following investigation of the facts and the law relating to the claim, the Attorneys came to the conclusion that it would be in the best interests of the Tribes to conclude this claim by settlement rather than by litigation; and

"WHEREAS, with respect to Docket 350-H after studying the documentary evidence available and the facts as remembered by elderly Indians on the Reservation who were interviewed by an expert anthropologist employed by the Tribes, and after studying the law pertaining to such claims the Attorneys came to the conclusion that it would be in the best interests of the Tribes if the Buffalo claim were to be concluded by settlement rather than by litigation; and

"WHEREAS, after consideration of all of the factors in the three claims, and after discussing them with the attorneys for the government the Tribal Attorneys have recommended that these three claims be compromised and settled for net judgment of \$1,850,000 on the terms and conditions set forth in the Stipulation attached to this Resolution, which settlement has been accepted by the United States Department of Justice; and

"WHEREAS, the General Council of the Three Affiliated Tribes has received both a written report and an oral report from attorneys Charles A. Hobbs and Jerry C. Straus of Wilkinson, Cragun & Barker, the Tribes' attorneys, concerning all the facts relevant to the litigation and the proposed settlement, and the members of the General Council have had an opportunity to question the Attorneys on all aspects of said settlement; and

"WHEREAS, a full discussion has been had with respect to possible advantages and disadvantages in the further prosecution of the cases or accepting the proposed settlement; and

"WHEREAS, representatives of the Bureau of Indian Affairs, Department of the Interior have been present at this meeting of the General Council and have observed the discussion and presentation concerning the proposed settlement and the questions and answers thereto; and

"WHEREAS, the General Council believes that it is fully informed in the premises and that a settlement of the claims in Docket Nos. 350-A, 350-E and 350-H for the final amount of \$1,850,000 is advisable under all the circumstances and that it is a fair and reasonable settlement of said claim;

"NOW, THEREFORE, BE IT RESOLVED, by the Fort Berthold General Council meeting at New Town, North Dakota, this 2nd day of April, 1969, that the proposed settlement of the claims in Docket Nos. 350-A, 350-E and 350-H is hereby approved and the claims attorneys are authorized to enter into such stipulations on behalf of the Tribes as may be necessary to accomplish the same;

"BE IT FURTHER RESOLVED, that the Chairman is authorized to designate two tribal members, including himself if he sees fit, to appear and testify at a hearing before the Indian Claims Commission with respect to the proposed settlement and the action taken by the General Council of the Three Affiliated Tribes with respect thereto; and

"BE IT FURTHER RESOLVED, that the Secretary of the Interior or his duly authorized representative and the Indian Claims Commission are hereby requested to approve the proposed settlement and stipulation for entry of final judgment as set out above.

"CERTIFICATION

"The foregoing Resolution was approved this 2nd day of April, 1969, at a duly called meeting of the Three Affiliated Tribes of the Fort Berthold Reservation, by a vote of 208 in favor and 21 opposed, a quorum being present.

/s/ Ralph Wells, Jr.  
Secretary, Tribal Council

Noted:

/s/ Vincent Malnourie  
Chairman, Tribal Council

/s/ James R. Keaton  
James R. Keaton,  
Superintendent

"AUTHENTICATION OF SIGNATURES

"I certify that the Chairman and Secretary of the Three Affiliated Tribes Tribal Business Council, all who are personally known to me, subscribed their names to the foregoing resolution.

Date: April 2, 1969

/s/ O. K. Walkingstick  
O. K. Walkingstick  
Tribal Operations Specialist  
Bureau of Indian Affairs  
Aberdeen Area Office"

16. Representatives of the Bureau of Indian Affairs attended the meeting and one or more of these reported to the Washington Office of the Bureau concerning the meeting. On the basis of this report, as well as information on the merits of the proposed settlement supplied to the Commissioner of Indian Affairs by attorneys for the plaintiff and from other sources, the Department of the Interior, by letter of April 25, 1969 (Joint Ex. 4) approved the settlement:

"UNITED STATES DEPARTMENT OF THE INTERIOR  
BUREAU OF INDIAN AFFAIRS  
WASHINGTON, D. C. 20242

April 25, 1969

"Wilkinson, Cragun and Barker  
1616 'H' Street, N. W.  
Washington, D. C. 20006

Gentlemen:

"You requested our approval of a proposed compromise to settle Indian Claims Commission dockets numbered 350-A, E, and H for a net final judgment of \$1,850,000.00 in favor of the Three Affiliated Tribes of the Fort Berthold Reservation.

"Prosecution of the dockets is governed by various contracts. Contract numbered I-1-ind. 42492, dated June 28, 1951, between the Three Affiliated Tribes of the Fort Berthold Reservation and Wilkinson, Boyden and Cragun (now Wilkinson, Cragun and Barker) was approved on July 10, 1951, for a period of ten years beginning with the date of approval. The contract was extended twice, the last extension being for a period of two years beginning on July 10, 1965. This contract covered all three dockets. However, it was superseded by separate contracts for each docket.

"The Three Affiliated Tribes of the Fort Berthold Reservation entered into several contracts dated July 9, 1967, with Wilkinson, Cragun and Barker. Each was approved on September 9, 1967, for a period of five years beginning on July 10, 1967. The contracts for the three dockets are numbered as follows:

<u>Docket number</u>	<u>Contract number</u>
350-A	A00C14200066
350-E	A00C14200068
350-H	A00C14200071

"The contracts provide that the attorneys shall not make any compromise of the matters in controversy unless with the approval of the Commissioner of Indian Affairs.

"You made an offer to the Department of Justice on January 13, 1969, to compromise the three dockets and the Acting Assistant Attorney General accepted your offer on February 25, 1969, with conditions. Two of the conditions are that the proposed settlement









