

BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: March 17, 1976

FINDINGS OF FACT ON COMPROMISE SETTLEMENT

The above-captioned dockets are now before the Commission for approval of separate compromise settlements and entry of separate final judgments in the amounts of \$6,500,000 in Docket 350-C and \$3,200,000 in Docket 350-D. A hearing having been held before the Commission on January 30, 1976, on these proposed compromise settlements, the Commission makes the following findings of fact:

1. The plaintiffs are an identifiable group of American Indians within the meaning of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049.

2. The claim in Docket 350-C is for the loss of aboriginal title to lands north and east of the Missouri River in North Dakota. On March 30, 1971, the Commission decided that the tribes had aboriginal title to a large tract of land north and east of the river. (See 25 Ind. Cl. Comm. 179, aff'd., 203 Ct. Cl. 426 (1974).)

Later, the Commission decided that the date of taking was May 20, 1891. (See 35 Ind. Cl. Comm. 269 (1975).) The matter is presently on motion for rehearing filed by defendant as to the taking date. The parties then entered into settlement negotiations and eventually agreed to settle Docket 350-C for \$6,500,000.

3. By letter dated June 4, 1975, to James M. Mascelli, Land and Natural Resources Division, Department of Justice, the plaintiffs, through their counsel, Jonathan C. Eaton, Jr., offered to compromise and settle the claims in Docket 350-C for \$6,500,000.

4. By letter dated July 18, 1975, the defendant, by Assistant Attorney General Wallace H. Johnson, accepted the proposal, subject to the following conditions:

1. That the proposed settlement be approved by appropriate resolution of the governing body of the Three Affiliated Tribes.

2. That the approval of the settlement be secured from the Secretary of the Interior, or his authorized representative.

3. That a copy of the tribal resolution and the approval of the terms of the settlement by the Department of the Interior be furnished to this Department.

4. That the judgment shall finally dispose of all claims or demands which the plaintiffs have asserted, or could have asserted in Docket No. 350-C.

5. That the Government's acceptance of the settlement is conditioned upon the acquiescence of plaintiffs and the Commission that the Commission's determination of the 1891 extinguishment date shall not be binding on the Government in any other case and that the Government shall be free to re-litigate such issue in any other case without the bar of res judicata or collateral estoppel.

6. That the United States does not claim any gratuities as offsets in this settlement but reserves its right to claim them in other active dockets.

The defendant, after tentative agreement was reached to settle Docket 350-D, indicated at the settlement hearing that the 5th condition of its acceptance was no longer of consequence, and that condition is not a part of the Stipulation for Entry of Final Judgment in Docket 350-C.

5. The Stipulation for Entry of Final Judgment affecting Docket 350-C agreed to by all parties reads as follows:

It is hereby stipulated by the parties, through their counsel, as follows:

1. All claims asserted in Indian Claims Commission Docket No. 350-C shall be settled by entry of final judgment in the Indian Claims Commission in the amount of \$6,500,000.

2. The final judgment shall be in favor of the Three Affiliated Tribes of the Fort Berthold Reservation, plaintiffs, and against the United States of America, defendant, no review to be sought or appeal to be taken by either party.

3. The final judgment shall finally dispose of all claims or demands which the plaintiffs have asserted, or could have asserted in Docket No. 350-C.

4. The final judgment shall dispose of any right the defendant may have to claim credit for the value of land north of the Missouri River added by Executive Order in 1870 or 1880, but shall not dispose of any gratuities, as to which the defendant expressly reserves its right to claim as offsets in Docket No. 350-G or in any other case litigated by plaintiffs before the Indian Claims Commission.

5. The Stipulation for Entry of Final Judgment, set out herein, shall not be construed as an admission of any party as to any issue for purposes of precedent in any other case or otherwise.

6. This Stipulation shall be of no effect unless a settlement is entered in Docket No. 350-D simultaneously with the settlement in Docket No. 350-C.

Respectfully submitted,

/s/ Walter Kiechel, Jr.
Walter Kiechel, Jr.
Acting Assistant Attorney General

Approved and joined in
by: Three Affiliated
Tribes of the Fort
Berthold Reservation

/s/ Rose Crow Flies High

/s/ Thomas Eagle, Jr.

/s/ Wayne Packineau

/s/ Austin H. Gillette

/s/ A. Donald Mileur
A. Donald Mileur, Esquire
Attorney for Defendant

/s/ James M. Mascelli
James M. Mascelli, Esquire
Attorney for Defendant

/s/ Jonathan C. Eaton, Jr.
Jonathan C. Eaton, Jr., Esquire
Attorney of Record for Plaintiff
Three Affiliated Tribes of Fort
Berthold Reservation (No. 350-C)

6. The claims in Docket 350-D arise out of the effect of two Executive orders in 1870 and 1880 that defined plaintiffs' reservation boundaries. Plaintiffs claimed compensation for the difference in value between lands lost under the Executive orders and lands added by the same Executive orders.

The claims are presently pending before the Commission after a trial on value. The parties entered into negotiations after the trial on value and have now reached a tentative settlement of the docket for \$3,200,000.

7. By letter dated September 18, 1975, the attorneys in Docket 350-D, Wilkinson, Cragun and Barker, sent a letter to the Honorable Edward H. Levi, Attorney General of the United States, offering to settle the claims in Docket 350-D. The letter reads in part as follows:

On behalf of the Three Affiliated Tribes of the Fort Berthold Reservation for which we are claims counsel, and subject to the approval of the Tribes and the Secretary of the Interior or his authorized representative, we offer to accept in final settlement of all claims that were or could have been litigated in the above-captioned claim (exclusive

of offsets) the net sum of Three Million Two Hundred Thousand (\$3,200,000) Dollars. We agree that any claim for offsets against the Tribes may be reserved for litigation in the still-pending Docket No. 350-G.

The above offer results from discussions heretofore held with Donald Mileur, Chief, Indian Section, Lands Division, and James Mascelli, Attorney, during which the facts and issues involved in the case were thoroughly explored.

This offer shall remain open to and including October 18, 1975, at which time it shall automatically stand withdrawn unless accepted by you or your authorized representative.

In the event you accept the foregoing offer, we will recommend approval by the Three Affiliated Tribes and by the Secretary of the Interior or his authorized representative, which approvals will be necessary before the settlement becomes final. We will also be pleased to cooperate with your Department in preparing and submitting appropriate stipulations, joint motions and other documents necessary to make final the compromise settlement and obtain a final judgment.

8. By letter dated October 22, 1975, the defendant, by Acting Assistant Attorney General Walter Kiechel, Jr., accepted the proposal, subject to certain conditions. The letter reads as follows:

The offer to settle all claims in Three Affiliated Tribes of the Fort Berthold Reservation v. United States, Docket No. 350-D, for the sum of Three Million Two Hundred Thousand Dollars (\$3,200,000), as outlined in your letters of September 18, and October 18, 1975, is accepted subject to the following conditions:

1. That the proposed settlement be approved by appropriate resolution of the governing body of the Three Affiliated Tribes.
2. That the approval of the settlement be secured from the Secretary of the Interior, or his authorized representative.
3. That a copy of the tribal resolution and the approval of the terms of the settlement by the Department of the Interior be furnished to this Department.

4. That the judgment shall finally dispose of all claims or demands which the plaintiffs have asserted, or could have asserted in Docket No. 350-D.

5. That the Government's acceptance of the settlement is conditioned upon the tribe also approving a pending proposed settlement in Docket No. 350-C. Should plaintiffs reject either proposed settlement in Docket Nos. 350-C and 350-D, both acceptances will be automatically of no effect and the Government may pursue its motion for rehearing in Docket No. 350-C.

6. That the United States does not claim any gratuities as offsets in this settlement but reserves its right to claim them in Docket No. 350-G or in any other case litigated by plaintiffs before the Indian Claims Commission.

7. That the Commission shall approve of this settlement and the stipulation before the judgment is entered.

The Department of Justice will be happy to work out with you the terms of the stipulation and the appropriate motions and orders necessary to carry into effect the offer of settlement subject to the conditions specified herein.

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 shall also be furnished to the defendant.

9. A stipulation for entry of final judgment affecting Docket 350-D was agreed to by all parties. The stipulation reads:

It is hereby stipulated by the parties, through their counsel, as follows;

1. All claims asserted in Indian Claims Commission Docket No. 350-D shall be settled by entry of final judgment in the Indian Claims Commission in the amount of \$3,200,000.

2. The final judgment shall be in favor of the Three Affiliated Tribes of the Fort Berthold Reservation, plaintiff[s], and against the United States of America, defendant, no review to be sought or appeal to be taken by either party.

3. The final judgment shall finally dispose of all claims or demands which the plaintiffs have asserted, or could have asserted in Docket No. 350-D.

4. The final judgment shall dispose of any right the defendant may have to claim credit for the value of land north of the Missouri River added by Executive Order in 1870 or 1880, but shall not dispose of any gratuities, as to which the defendant expressly reserves its right to claim as offsets in Docket No. 350-G or in any other case litigated by plaintiffs before the Indian Claims Commission.

5. The Stipulation for Entry of Final Judgment, set out herein, shall not be construed as an admission of any party as to any issue for purposes of precedent in any other case or otherwise.

6. This Stipulation shall be of no effect unless a settlement is entered in Docket No. 350-C simultaneously with the settlement in Docket No. 350-D.

Respectfully submitted,

/s/ Walter Kiechel, Jr.
Walter Kiechel, Jr.
Acting Assistant Attorney General

/s/ A. Donald Mileur
A. Donald Mileur, Esquire
Attorney for Defendant

/s/ James M. Mascelli
James M. Mascelli, Esquire
Attorney for Defendant

/s/ Charles A. Hobbs
Charles A. Hobbs, Esquire
Attorney of Record for Plaintiff
Three Affiliated Tribes of Fort
Berthold Reservation in Docket
No. 350-D.

Approved and joined in by:
Three Affiliated Tribes of the
Fort Berthold Reservation

/s/ Rose Crow Flies High
Rose Crow Flies High

/s/ Thomas Eagle, Jr.
Thomas Eagle, Jr.

/s/ Wayne Packineau
Wayne Packineau

/s/ Austin H. Gillette
Austin H. Gillette

10. The proposed compromise settlements in Dockets 350-C and 350-D were submitted to the Business Council of the Three Affiliated Tribes of the Fort Berthold Reservation, which is the governing body of the tribes and which has authority to approve claims settlements, and to the General Council of the Three Affiliated Tribes composed of all members of the tribes. Notices of a special meeting of the General Council for November 29, 1975, called to consider the settlements, were published in local newspapers both on the reservation and in towns in and around the reservation. Public postings of the notice were made in public buildings such as post offices, agency and subagency offices, community centers, and other prominent places throughout the area of the Fort Berthold Reservation. Approximately 500 special notices of the meeting were mailed and these notified over 1,100 members of the Three Affiliated Tribes living on and off of the reservation.

11. On the morning of November 29, 1975, the tribal Business Council convened at the Tribal Office in New Town, North Dakota, pursuant to notice. There were seven Business Council members in attendance. Four members were absent. Also in attendance were the tribal claims attorneys, Mr. Jonathan Eaton, representing the tribes in Docket 350-C, and

Messrs. Charles A. Hobbs and Stephen A. Hildebrandt of Wilkinson, Cragun & Barker, representing the tribes in Docket 350-D. Members present had copies of a report on the proposed settlements which had been sent to all members of the Business Council prior to the meeting. Mr. Hobbs and Mr. Eaton explained the proposed settlements in detail and answered numerous questions posed by members of the Business Council. The meeting lasted approximately two hours, from 11:00 a.m. to 1:00 p.m., and all members of the Council were given an opportunity to express their feelings about the settlements and to ask all questions which they wanted to ask. The Business Council deferred voting on the proposed settlements at this meeting, however, because they desired to hear the views of the people at the General Council meeting and wanted to represent the will of the people in their vote. Therefore the meeting was recessed until after the General Council meeting.

12. On the afternoon of November 29, beginning approximately at 3:00 p.m., the time set for the General Council meeting, a general meeting of the members of the Three Affiliated Tribes of the Fort Berthold Reservation forming the General Council was held at New Town, North Dakota. Approximately 160 persons attended the meeting. Copies of the written report to the tribes reviewing the proposed settlements prepared by their attorneys were distributed to all Indians in attendance. The attorneys of record in both dockets presented the proposed settlements to the meeting, explained the meaning of the settlements, and the advantages and disadvantages of acceptance. Opportunity was given to all in attendance to ask questions regarding the settlements. A lengthy discussion of the

proposed settlements followed, during which the attorneys were asked numerous questions, all of which were answered satisfactorily. Portions of this discussion were translated into the Indian language. Many tribal members spoke individually concerning the settlements, asked questions, and gave opinions. Members of the Business Council gave their opinions and recommendations regarding the settlements. The meeting lasted approximately three hours. After concluding the discussions those in attendance, by a standing vote, voted to accept the settlements by a vote of 79 in favor and 36 against.

13. At the conclusion of the General Council meeting, the Business Council reconvened on the same afternoon to continue considering the proposed settlements. There were nine members of the Business Council present at this meeting, and two were absent. The Business Council voted seven in favor and two against approving a resolution accepting the settlements and authorizing tribal representatives to act on behalf of the tribes in executing a stipulation accepting the settlements and in testifying before the Indian Claims Commission in Washington, D. C. The resolution read as follows:

WHEREAS, the Three Affiliated Tribes of the Fort Berthold Reservation are and have been prosecuting two cases before the Indian Claims Commission, identified as Docket Nos. 350-C and 350-D; and

WHEREAS, after consideration of the evidence that has been assembled in these claims and the legal precedents applying to them, and after long and detailed negotiations with the attorneys for the government, the claims attorneys for the Tribes have recommended a compromise settlement of the claims in Docket No. 350-C for a net judgment of \$6,500,000 and a compromise settlement in Docket No. 350-D for a net judgment of \$3,200,000; and

WHEREAS, the government's acceptance of each compromise settlement is conditioned upon the Tribes' approval of both settlements; and

WHEREAS, the Business Council of the Three Affiliated Tribes of the Fort Berthold Reservation has met to consider said compromise settlement which was fully explained by the attorneys for the Tribes; and

WHEREAS, a full and complete opportunity for discussion and questions from members of the Business Council was given and a discussion was held with respect to the possible advantages and disadvantages to be realized from further prosecuting this claim as compared to accepting the proposed settlement; and

WHEREAS, a representative of the Bureau of Indian Affairs, Department of the Interior, has been present at this meeting of the Business Council of the Three Affiliated Tribes of the Fort Berthold Reservation and has observed the discussion and presentation concerning the proposed settlement and the questions and answers thereto; and

WHEREAS, the Business Council of the Three Affiliated Tribes of the Fort Berthold Reservation believes that it is fully informed in the premises and that settlement of the claim in Docket No. 350-C for the final amount of \$6,500,000 and settlement of the claim in Docket No. 350-D for the final amount of \$3,200,000 is advisable under all the circumstances and that it is a fair and reasonable settlement of said claims.

NOW, THEREFORE, BE IT RESOLVED, that the proposed settlement of Docket Nos. 350-C and 350-D as outlined above and explained by the claims attorneys is hereby approved and the following individuals Rose Crow Flies High, Wayne Packineau, Thomas Eagle, Jr., and Austin H. Gillette or any of them are hereby authorized and directed to sign a stipulation for compromise settlement and entry of final judgment, in the form attached hereto, and file the same with the Indian Claims Commission; and

BE IT FURTHER RESOLVED, that the same individuals or any of them are hereby authorized to appear before the Indian Claims Commission to testify in any hearing which may be held on said settlement and take such action as is necessary to complete said settlement in accordance with the rules of the Indian Claims Commission and decided cases of that Commission in connection with such settlements or compromises; and

BE IT FURTHER RESOLVED, that the authorized representatives of the Secretary of the Interior and the Indian Claims Commission are hereby requested to approve said settlement in the amount of \$6,500,000 for Docket No. 350-C and \$3,200,000 in Docket No. 350-D.

CERTIFICATION

The foregoing resolution was duly adopted at a meeting of the Business Council of the Three Affiliated Tribes of the Fort Berthold Reservation at New Town, North Dakota on November 29, 1975, by a vote of 7 FOR and 2 AGAINST, a quorum being present.

/s/ Rose Crow Flies High
Rose Crow Flies High, Chairman
Business Council of the Three
Affiliated Tribes

ATTEST:

/s/ Austin H. Gillette
Secretary, Business Council of
the Three Affiliated Tribes

RATIFIED AND ENDORSED BY THE General Council of the Three Affiliated Tribes of the Fort Berthold Reservation at a meeting held at New Town, North Dakota on November 29, 1975, at which the compromise settlement was fully explained by the attorneys for the Tribes and a full opportunity for discussion and questions by members of the Tribes was given, by a vote of 79 FOR and 36 AGAINST, a quorum being present.

/s/ Wayne Packineau
Chairman of the Meeting

ATTEST:

/s/ Austin H. Gillette
Secretary of the Meeting

AUTHENTICATION OF SIGNATURES

I certify that the foregoing signatures of the Chairman and Secretary of the Business Council of the Three Affiliated Tribes of the Fort Berthold Reservation, who also served as Chairman and Secretary of the General Council meeting, are

genuine and that the resolution was approved by both the Business Council and the General Council in my presence in accordance with the recitals therein.

Dated: /s/ 11/29, 1975.

/s/ Anson Baker
Anson Baker, Superintendent
Fort Berthold Agency
Bureau of Indian Affairs

14. The Superintendent of the Fort Berthold Reservation attended the meetings of the Business Council and General Council on November 29, 1975, and submitted a report to the Bureau of Indian Affairs regarding the settlement meetings. On the basis of that report, as well as information on the merits of the proposed settlements supplied to the Commissioner of Indian Affairs by the attorneys for the plaintiffs, the Honorable Morris Thompson, Commissioner of Indian Affairs, as the authorized representative of the Secretary of the Interior, approved the proposed settlements by letter dated January 16, 1976, to Wilkinson, Cragun & Barker. In pertinent part, the Commissioner's letter stated:

We are satisfied that the general tribal meeting was well publicized and that the tribal members had an opportunity to attend. The meeting was satisfactorily conducted, with the voting held after the members had the opportunity to consider the proposed compromise. The meeting of the Business Council of the Fort Berthold Reservation was also satisfactorily called and conducted with the resolution approving the settlement being duly adopted. The resolution reflects the views of the tribal membership. It is hereby approved.

In light of information which you have furnished to us, that which has been submitted by our Field Offices, and that obtained from other sources, we are satisfied that the proposed settlement of the claims Dockets 350-C and Docket 350-D is fair and just. The proposed settlement is hereby approved.

15. A hearing was held by the Commission on January 30, 1976, with regard to the proposed settlements. At the hearing, Mr. Charles A. Hobbs, attorney of record for the plaintiffs in Docket 350-D, and Mr. Jonathan C. Eaton, attorney of record for plaintiffs in Docket 350-C, gave their opinions that the settlements were just, fair and beneficial to the Three Affiliated Tribes of the Fort Berthold Reservation and recommended approval. Mr. James M. Mascelli, attorney for defendant, stated that he considered the settlements fair to plaintiffs and defendant and also recommended approval.

16. The following witnesses testified at the hearing concerning the meetings on November 29, 1975, and the reasonableness of the settlements.

- (1) Anson Baker, Superintendent of the Fort Berthold Reservation;
- (2) Rose Crow Flies High, Chairman of the Business Council of the Three Affiliated Tribes of the Fort Berthold Reservation;
- (3) Wayne Packineau, Vice Chairman of the Business Council of the Three Affiliated Tribes of the Fort Berthold Reservation, and Chairman of the General Council meeting;
- (4) Sam Little Owl, a member of the Business Council of the Three Affiliated Tribes of the Fort Berthold Reservation, testifying on his own behalf and not as a representative of the Tribes.

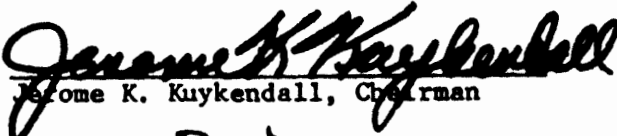
17. The first three witnesses testified that full and complete notice had been given to members of the tribes of the meeting held on November 29, 1975, and that a majority of the Indians knew of the meeting and its purpose. They also testified that the settlement proposals were fully and clearly explained at the meetings of the Business Council and

General Council held on November 29, 1975, by the claims attorneys, that members of the tribes asked numerous questions regarding the settlements, and that these questions were all answered satisfactorily by the attorneys and that, after discussion ended, the tribes voted to accept the settlements. Each of these three witnesses testified that the resolution approving the settlements represented the wishes of the majority of the members of the Three Affiliated Tribes.

18. In addition, the fourth witness listed above, Mr. Sam Little Owl, testified on his own behalf as one who was opposed to the settlements. He stated that he was opposed to the settlements because he felt that the two dockets should not have been presented as a package deal and that if the cases were continued separately in litigation the tribes might gain more money. He agreed with the first three witnesses, however, that the meetings of November 29, 1975, were regularly called, with adequate notice given, and that the settlement proposals were fully and clearly explained and discussed at these meetings.

19. The Commission finds, based upon the testimony of the witnesses, the record at all stages of the litigation, the representations of counsel, and all other pertinent facts before us, that these proposed compromise settlements are fair to the parties and have been freely entered into by the Three Affiliated Tribes of the Fort Berthold Reservation and duly approved by the Commissioner of Indian Affairs.

The Commission hereby approves the proposed compromise settlements and will enter final judgments in favor of the plaintiffs, the Three Affiliated Tribes of the Fort Berthold Reservation, in the amount of \$6,500,000 in Docket 350-C and in the amount of \$3,200,000 in Docket 350-D, subject to the terms and provisions of the separate Stipulations for Entry of Final Judgment.


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner