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ATTORNEYS' REPORT ON
PROPOSED \$15,000,000 COMPROMISE

TO

GENERAL COUNCIL MEETING

CHEYENNE AND ARAPAHO TRIBES
OF INDIANS OF OKLAHOMA

CITY HALL, WATONGA, OKLAHOMA

September 18, 1965

1:00 P.M.

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INTRODUCTION

From May 24 - 27, 1965, your attorneys tried the question of value of the 1869 Executive Order Reservation before the Indian Claims Commission in Washington, D.C. On June 23rd, 1965, we formally offered to settle all claims of the Cheyenne-Arapaho Tribes for \$15,000,000, subject to the approval of the Tribes and the Commissioner of Indian Affairs. On August 12, 1965, the Attorney General of the United States formally accepted our offer. It is now necessary for the Tribes to approve or reject the \$15,000,000 compromise.

The information that follows is calculated to inform the members of the Tribes of the issues involved so that they might vote intelligently on a resolution to approve the compromise.

BRIEF HISTORY OF INDIAN LEGISLATION AND TREATIES

Ft. Laramie Treaty, 1851

Prior to 1851 the Cheyenne and Arapaho Tribes lived together on the great plains north of the Arkansas and south of the Platte Rivers. In September of 1851 the United States called the Cheyenne, the Arapaho, and other plains Tribes to a meeting at Ft. Laramie in what is now Wyoming. After the meeting a treaty was drawn up which divided the plains among the Tribes. In that treaty the United States recognized the ownership of the Cheyenne and Arapaho, Northern and Southern, to 51,210,000 acres of land located between the North Platte and Arkansas Rivers, and East of the Rocky Mountains into Western Kansas and Nebraska.

Ft. Wise Treaty, 1861

In 1861 at Ft. Wise, Kansas Territory, the government entered into another treaty, this time with the Southern Cheyenne and Southern Arapahoes.

By this treaty the Southern Cheyenne and Arapaho gave up their interest in the 51,210,000 acre tract in exchange for a reservation in Southeastern Colorado on the Arkansas.

Treaty of the Little Arkansas, 1865.

Again in 1865 at a camp on the Little Arkansas in Kansas the U.S. treated with the Southern Tribes and this time the Tribes gave up their Colorado reservation for a big reservation in Kansas and what is now Northern Oklahoma. The United States Senate amended this treaty by providing that no part of the reservation should be in Kansas. The Tribes never got this reservation.

Treaty of Medicine Lodge Creek, 1867.

Finally in 1867 at Medicine Lodge Creek in Kansas the United States got the Southern Tribes to give up their right to all other lands and gave them a reservation in what is now north central Oklahoma. This reservation contained 5,184,640 acres. It is referred to as the 1867 Treaty Reservation. The Tribes never occupied this reservation.

Executive Order Reservation, 1869.

Without the benefit of any treaty the United States put the Southern Cheyennes and Arapahoes on a reservation in west central Oklahoma in 1869. This reservation was created by Executive Order of President Grant, and contained 5,138,560 acres. It is called the Executive Order Reservation.

Jerome Agreement of 1891.

By agreement with the United States concluded in October, 1890, ratified March 3, 1891, the Tribes gave up the Executive Order Reservation except for 529,682 acres which were allotted to individual Indians, a net cession of 4,608,878 acres. They were paid \$1,500,000 for this cession.

Indian Claims Commission Act, 1946.

In 1946 the U.S. passed a law creating a commission to hear and adjudicate the claims of Indian Tribes against the United States.

BASIS FOR CLAIMS AGAINST THE U. S.
UNDER THE
INDIAN CLAIMS COMMISSION ACT

Unconscionable Consideration Claims.

The chief ground on which the Indian Claims Commission has made awards to Indian Tribes is for the surrender of lands by Indian Tribes to the United States for inadequate money. That is, it has been held in effect that the United States had an advantage over the Indians and should in good conscience have paid what the lands were worth. Stated another way, in order for the Indians to recover from the United States on this kind of claim they must show that their lands were worth more than the government paid the Indian Tribes for them. But the difference between what the government paid and what the lands were worth must be great enough to shock the Commission's conscience. If that is so, the Commission will award the Tribe the difference between what was paid and what the lands were worth. If the difference is not great enough the Commission will not make an award. For example, if the government paid the Indians 25¢ per acre for land worth \$1 it would be unconscionable. If the government paid 75¢ for land worth \$1 it would not be unconscionable.

Accounting claims.

If an Indian Tribe can show that the government mishandled the tribe's money in the treasury the Commission will make an award for the amount the government cannot account for.

Tribe, Band, or Identifiable Group.

The Indian Claims Commission will not adjudicate (decide) the claims of individual Indians, or of a group of individual Indians. It will only decide cases involving the rights of an entire Tribe, Band or Identifiable Group having a common claim.

Offsets and Deductions.

Under the Indian Claims Commission Act the United States is entitled to a deduction from any award of certain monies given to or spent for the Indian Tribe over the years. It is also entitled to deduct whatever was paid as consideration to the Tribe for the land taken.

STATEMENT OF SOUTHERN CHEYENNE-ARAPAHO CLAIMS

Your claims as pleaded in the petition before the Indian Claims Commission and as testified to by your expert witnesses are the following:

1. Ft. Laramie Lands: A claim for the value of the lands when taken, less what was paid for them by treaty and less off-sets.
2. 1867 Treaty Reservation or 1869 Executive Order Reservation: A claim for the value of one of these reservations when taken, less what was paid under the agreement of March 3, 1891.
3. Accounting Claim: A claim requiring the United States to account for all Cheyenne and Arapaho monies and to pay over any amounts found to have been mishandled.

ANALYSIS OF SOUTHERN CHEYENNE-ARAPAHO CLAIMS

Sand Creek Massacre: Although the Sand Creek massacre incident was pleaded in the petition in paragraphs 14 and 30, no specific claim was made for a dollar and cents award on account of the Sand Creek massacre. Rather it was pleaded to establish that the Indians were expelled from their 1861 Treaty lands by the Sand Creek attack. It is the opinion of your attorneys that no part of the \$15,000,000 settlement is for the Sand Creek massacre and that the Southern Cheyenne and Arapaho Tribes have no compensable claim for the Sand Creek massacre because of the following principles of law:

(a) The massacre did not involve all of the Southern Cheyenne-Arapaho Tribes. It involved a small part of the tribes. Article 6 of the Treaty of 1865 refers to: "the gross and wanton outrages perpetuated against certain bands of Cheyenne and Arrapahoe Indians; on the twenty-ninth day of November, A. D. 1864, at Sand Creek." If the Southern Cheyenne-Arapaho Tribes could recover for the massacre, all the members of the tribes must share in the award. All of the members of the tribes were not injured by the massacre. Therefore the tribes, as an entity bringing suit, do not have a valid claim for the massacre. It is clear and unmistakable that the "Sand Creek Massacre Claims" are individual in nature and must be brought by descendants of those Cheyenne-Arapaho Indians killed at Sand Creek. Their remedy is solely through Congress. Over the years several bills have been introduced in the Congress dealing with these claims. On August 29, 1949, the Secretary of the Interior made a report to Congress on H. R. 4627 (to confer jurisdiction on the Court of Claims to hear, determine and render judgment) recommending enactment thereof. The Bill H. R. 6178, 85th Congress, was reintroduced in 1957. All of these bills were introduced subsequent to the enactment of the Indian Claims Commission Act, and some, including a pending bill, were introduced after the present petition (Docket Nos. 329, 329-A, 329-B) was filed.

(b) The descendants of the Sand Creek massacre have formed a group to recover for the massacre, and have had Congressman John Jarman introduce a bill (H. R. 5513) in the present Congress for that purpose. If anyone has a claim for the massacre it is this group. Not the entire tribes.

(c) The Indian Claims Commission has no jurisdiction to hear and try the Sand Creek massacre claim: (1) Because the entire Cheyenne-Arapaho Tribes do not have a valid claim for the massacre; and (2) Because the decisions of the Indian Claims Commission indicate that the massacre is not a common claim but a violation of individual rights. (1 Ind. Cls. Comm. 143; 1 Ind. Cls. Comm. 180). It has also held that a common incident leading to injuries does not convert what were individual claims into a group claim. (10 Ind. Cls. Comm. 135). The Court of Claims has held that where the

Commission has before it claims which could be prosecuted singly without involving other members of the supposed group, the claims are individual and not common claims. (Cherokee Freedmen Case). In the opinion of your attorneys that would be true in the case of the Sand Creek massacre.

Accounting Claim

The General Accounting Office has satisfactorily accounted for all trust funds belonging to the Southern Cheyenne-Arapaho. Accounting claims have proven to have more nuisance value than real value. It is your attorneys opinion that the accounting claim has no real value.

Fort Laramie Claim

The Indian Claims Commission has held that the Fort Laramie lands were worth \$23,500,000 when they were ceded to the United States, and that the Southern Cheyenne-Arapaho share of the lands was worth \$11,893,350. The Commission also decided that the Southern tribes were given \$1,434,131.38 plus the 1869 Executive Order Reservation for the Fort Laramie lands, and that the 1869 value of the reservation would have to be determined before it could decide whether or not the United States took the Fort Laramie lands for an unconscionably small consideration. Neither we nor the government has offered any evidence of the 1869 value of the Executive Order Reservation - 5,138,560 acres.

On April 10, 1965, the tribes adopted a resolution to settle the Fort Laramie claim for \$4,000,000. The government has never agreed to this proposal. The basis of that proposal was as follows:

| | |
|------------------------|--|
| \$11,893,350.00 | Value of Fort Laramie lands |
| - 1,434,131.38 | Cash consideration paid |
| \$10,459,218.62 | Sub-total |
| - 4,367,776.00 | Reservation at 85¢ per acre |
| \$ 6,091,442.62 | Sub-total |
| + 2,091,442.62 | Compromise of \$6,364,280.15 of claimed offsets |
| <u>\$ 4,000,000.00</u> | |

We based that \$4,000,000 proposal on the assumed basis that the government had appraised the Executive Order Reservation at 85¢ per acre. Our own appraiser has appraised it at 85¢ to \$1 per acre. The Indian Claims Commission has found a value of \$1 per acre for similar Choctaw and Chickasaw lands as of 1866. Thus there is a good chance that if we tried the case the Commission might find the reservation to have been worth \$1

per acre in 1869. If it did it would reduce the Fort Laramie claim by 15¢ per acre on 5,138,560 acres or \$770,784. On this basis it is the opinion of your attorneys that the Fort Laramie claim is worth \$3,229,216 ~~Net~~.

As previously explained to the Tribes on April 10, 1965, a compromise of \$6,364,280.15 of claimed offsets for \$2,091,442.62, (or 33¢ on the dollar) is a favorable compromise and is in line with offsets settlements in other cases. We see no reason to adjust that figure and consider the offsets to be \$2,091,442.62.

Executive Order Reservation Claim.
1867 Treaty Reservation Claim.

After all the treaties the Southern Cheyenne-Arapaho Tribes wound up with either the 5,184,640 acre Treaty Reservation in north central Oklahoma or the 5,138,560 acre Executive Order Reservation in west central Oklahoma. The Commission has held that the tribes abandoned the Treaty Reservation and got the Executive Order Reservation instead of the Treaty Reservation. For the purpose of this discussion we shall agree to that.

In 1891 the tribes gave up the Executive Order Reservation except for 529,682 acres allotted to individual Indians. Therefore, the government got 4,608,878 acres for which it paid \$1,500,000.

In the trial in May our appraiser appraised the Executive Order Reservation at \$6.50 per acre. The government appraised it at \$1.00 per acre. The Commission has held in other cases that the Cherokee lands to the north were worth \$3.75 per acre in 1891; that the Sac and Fox and Potawatomi lands to the east were worth \$3.00 per acre in 1890; and that the Kiowa, Comanche and Apache lands to the south were worth \$2.00 per acre in 1900. It is reasonable to expect that the Commission would find the value of the Executive Order Reservation to be between \$2.00 and \$3.75.

Our appraiser and the government appraiser both found our lands to be less valuable than the Cherokee lands.

Assuming that the Fort Laramie claim has a value of \$3,229,216, a settlement of \$15,000,000 leaves \$11,770,784 for settlement of the reservation claim. This means that before the deduction of consideration of \$1,500,000 the reservation lands had a value of \$13,270,784. The settlement then would be for \$2.87+ per acre for the reservation claim.

(\$13,270,784 divided by 4,608,878 acres.) Reversing the process the computation is as follows:

| | |
|---------------------|--|
| 4,608,878 | acres ceded |
| x 2.87+ | per acre |
| <u>\$13,270,784</u> | Value of Executive Order Reservation lands, 1891 |
| - <u>1,500,000</u> | Consideration paid for cession |
| \$11,770,784 | Settlement value of Reservation claim. |

Recapitulation both claims:

| | |
|------------------------|--|
| \$11,893,350.00 | Value Fort Laramie lands 1865 |
| <u>13,270,784.00</u> | Value Executive Order Reservation 1891 |
| \$25,164,134.00 | Value all lands |
| | |
| \$ 1,434,131.38 | Cash paid for Fort Laramie lands |
| 1,500,000.00 | Cash paid Executive Order Reservation |
| 5,138,560.00 | Value of Executive Order when acquired |
| <u>2,091,442.62</u> | Compromise \$6,364,280.15 offsets |
| \$10,164,134.00 | |
| | |
| \$25,164,134.00 | Compromise value all lands |
| - <u>10,164,134.00</u> | Compromise all deductions |
| \$15,000,000.00 | |

RECOMMENDATION

It is the recommendation of your attorneys that the tribes authorize the compromise of their claims for \$15,000,000. We believe it should be accepted for the following reasons: