

APPENDIX A

SETTLEMENT AGREEMENT

PREMISES

1. Anne Pearse-Hocker is the plaintiff in an action under 28 U.S.C. § 1498(b) and 28 U.S.C. § 1491(a), filed April 30, 2010, in the United States Court of Federal Claims and styled *Anne Pearse-Hocker v. United States*, Ct. Fed. Cl. No. 10-0269 C ("the Action"). In the Action, plaintiff seeks recovery of reasonable and entire compensation for alleged infringement of her copyright in a collection of photographs donated to the Smithsonian Institution in 1997 ("Pearse-Hocker Collection") and damages for an alleged breach of contract relating to the terms of the agreement ("Deed of Gift") by which these photographs were donated.

2. The parties to the Action desire to eliminate all uncertainties, claims, or controversies relative to the alleged liability of defendant, the United States. By way of summary, in return for a certain payment and other consideration by the United States, plaintiff agrees to settle this action by agreeing to a stipulation for an entry of judgment, which fully releases defendant from all of plaintiff's claims relating to the reproduction, publication, distribution, adaptation, display and/or use by or for the defendant of the Pearse-Hocker Collection, and further, fully releases defendant from all claims which were, or could have been asserted in the Action or any other proceeding with respect to the Pearse-Hocker Collection.

3. This Settlement Agreement has been executed concurrently with a Stipulation for the Entry of Judgment in the Action. A copy of this Stipulation is attached as Appendix A.

IN CONSIDERATION OF A TOTAL LUMP SUM OF \$40,000 to be paid by the defendant to plaintiff pursuant to a final judgment entered by the United States Court of Federal Claims in the Action, and other consideration set forth in Article IV, the parties agree to the following:

ARTICLE I-DEFINITIONS

A. The term “plaintiff” refers to Anne Pearse-Hocker.

B. The term “defendant” means the legislative, judicial, and executive branches of the United States of America, and all departments, administrations, agencies, authorities, boards, bureaus, corporations, independent commissions, offices, services, other instrumentalities and other independent establishments, wholly or partly controlled or owned by the United States, including, without limitation, the Smithsonian Institution.

C. The terms “Smithsonian” and “Smithsonian Institution” both refer to the Smithsonian Institution in its entirety, which includes 19 museums and galleries, the National Zoological Park and nine research facilities.

D. The term “NMAI” means the National Museum of the American Indian, which is a Smithsonian museum.

E. The term “Pearse-Hocker Collection” means the collection of photographs that was donated by plaintiff to the Smithsonian Institution in 1997, which includes: (a) 2,212 35mm (black and white) negatives bearing catalog numbers N44530-N46727 and N56571-N56578; (b) (15) contact sheets (8x10) of 35 mm negatives [no catalog numbers]; and (c) 58 prints made from the 35 mm negatives [no catalog numbers].

F. The “Deed of Gift” refers to the document executed in December 1997, by which plaintiff donated the Pearse-Hocker Collection to the Smithsonian Institution.

G. The term “the Action” means the lawsuit under 28 U.S.C. § 1498(b) and 28 U.S.C. § 1491(a) filed by plaintiff on April 30, 2010, in the United States Court of Federal Claims and styled *Anne Pearse-Hocker v. United States*, Ct. Fed. Cl. No. 10-0269 C.

ARTICLE II-WARRANTIES

A. Plaintiff represents and warrants that she is and has been the exclusive owner of all right, title, and interest, in any copyrightable work incorporated in the Pearse-Hocker Collection, which was registered with the U.S. Copyright Office under Registration Certificate No. Ju 13546.

B. Plaintiff represents and warrants that she has the sole right to grant the releases and covenants set forth in ARTICLE III.

C. Plaintiff further warrants that the copyright license granted to defendant under the terms of the Deed of Gift and all other terms of the Deed of Gift remain in full force and effect, and are not altered by this Agreement.

ARTICLE III-RELEASES, GRANTS, AND COVENANTS

A. Plaintiff fully releases defendant, the United States, from any and all claims relating to the reproduction, publication, distribution, adaptation, display, and/or use by or for the defendant of the Pearse-Hocker Collection up to and including the date of execution of this Agreement, and further, fully releases defendant from all claims that were, or could have been asserted against defendant in the Action or any other proceeding, up to and including the date of execution of this Agreement, with respect to the Pearse-Hocker Collection.

B. Plaintiff covenants not to sue, seek further compensation from, or seek injunctive relief against defendant for infringement or use of any subject matter for which a release has been granted under paragraph A above of this ARTICLE III.

ARTICLE IV-ADDITIONAL CONSIDERATION TO PLAINTIFF

In addition to monetary consideration of \$40,000 from defendant to plaintiff, the Smithsonian will provide the following additional consideration to plaintiff:

A. The Smithsonian will provide plaintiff a letter, signed by the Director of the NMAI, as shown in Appendix B.

B. Within thirty days of the execution of this Agreement, defendant will provide plaintiff with a DVD containing contact sheets that include images of the 35 mm negatives in the Pearse-Hocker Collection and catalog numbers. With this information, plaintiff will choose 100 images for which the Smithsonian will provide a DVD containing high resolution digital images in grayscale, tiff format, no smaller than 3000K x 3000K pixels (fit to) per image, and low resolution jpeg images at 700K x 700K pixels (fit to) of each selected image. The plaintiff will provide her 100 choices of images at one time to the Smithsonian, no later than one calendar year after the execution of the Agreement. The Smithsonian, in turn, will provide the requested images within six months of the date of receipt of plaintiff's choices of 100 images. The DVD shall be delivered to plaintiff's attorneys at the address listed in Article V(E), below.

C. If plaintiff requests additional high-resolution images from her collection, she will do so through the procedures available to the public and at her own expense. Should she have questions about these procedures, plaintiff may contact Jane Sledge, the NMAI's Associate Director for Museum Assets & Operations, or her successor in that position. If such contact does not prove satisfactory to plaintiff, the attorneys for plaintiff may contact Lauryn Guttenplan, Associate General Counsel for the Smithsonian, or her successor in that position, by electronic mail or letter, with a copy of such communication simultaneously provided to counsel for the defendant at the address listed in Article V(E) below.

ARTICLE V-CONDITIONS

A. Each party agrees to bear its own costs and attorney's fees.

B. This Settlement Agreement shall become effective upon the entry in the United States Court of Federal Claims of a final judgment in the Action in favor of plaintiff and against defendant in the total lump sum of Forty Thousand Dollars (\$40,000) in accordance with the accompanying Stipulation for the Entry of Judgment. In the event that the Court declines, in whole or in part, to enter judgment in accordance with this Stipulation, this Settlement Agreement and the Stipulation attached hereto as Appendix A shall be null, void, and without prejudice to any party.

C. This Settlement Agreement shall bind each successor in interest, assignee, heir, and licensee of plaintiff as to any interest or right in any copyright or right of use in the Pearse-Hocker Collection that hereafter may be conveyed, granted, or transferred.

D. This Settlement Agreement is not intended as, and shall not be deemed, an admission by defendant of the merit or lack of merit of plaintiff's allegations or claims in the Action. Without limiting the generality of the foregoing, this Settlement Agreement does not constitute, and shall not be construed as, an admission that defendant (1) violated any of plaintiff's rights or any laws or regulations, (2) breached any contract with plaintiff, or (3) as an admission of any contested fact alleged by plaintiff in connection with the Action.

E. Communications regarding this Settlement Agreement shall be addressed to:

For plaintiff:

Christopher "Kip" Schwartz
Eric N. Heyer
THOMPSON HINE LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036

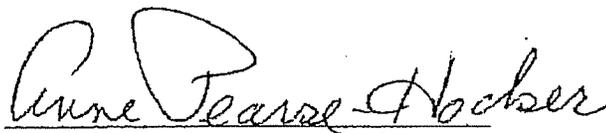
For defendant:

Director, Intellectual Property Section
Commercial Litigation Branch
Civil Division
Department of Justice
Washington, D.C. 20530

The foregoing Settlement Agreement is hereby executed on behalf of the parties by plaintiff and by the authorized representatives of the Attorney General and the Smithsonian Institution.

FOR PLAINTIFF

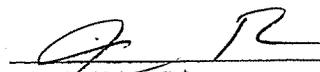
Dated: 6/09/ 2011


Anne Pearse-Hocker

FOR DEFENDANT, THE UNITED STATES

TONY WEST
Assistant Attorney General

Dated: 6/09 2011


JOHN FARGO
(Authorized Representative of the Attorney General)
Director, Intellectual Property Section
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 514-7223

APPENDIX A

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ANNE PEARSE-HOCKER,)
)
 Plaintiff,)
) No. 10-269 C
 v.) Judge Edward J. Damich
)
 THE UNITED STATES,)
)
 Defendant.)
)

STIPULATION FOR ENTRY OF JUDGMENT

For purposes of settling and compromising the above action, plaintiff and defendant stipulate to the following:

1. Plaintiff warrants that she is and has been the exclusive owners of all right, title, and interest, in any copyrightable work incorporated in a collection of photographs that plaintiff donated to the Smithsonian Institution in 1997 (the Pearse-Hocker Collection). This collection was registered with the U.S. Copyright Office under Registration Certificate No. Ju-13546.

Plaintiff brought this action to recover reasonable and entire compensation for alleged infringement of her copyright in the Pearse-Hocker Collection as well as damages for an alleged breach of contract relating to the Deed of Gift, the document by which plaintiff donated the Pearse-Hocker Collection to the Smithsonian Institution.

2. Plaintiff has submitted a written offer to defendant to settle this action by:

(a) fully releasing the United States from any and all claims relating to the reproduction, publication, distribution, adaptation, display and/or use by or for the defendant of the Pearse-Hocker Collection up to and including the date of entry of judgment, and further, fully releasing

the United States from all claims which were, or could have been, asserted against the United States in Court of Federal Claims Action No. 10-269 or any other proceeding, up to and including the date of entry of judgment with respect to the Pearse-Hocker Collection.

(b) Executing a separate Settlement Agreement (attached as Appendix A) setting forth the detailed terms of releases, agreements, and covenants that will become effective only upon entry of the stipulated judgment provided herein.

3. Defendant has duly agreed to accept this offer.

4. In consideration for this Stipulation for Entry of Judgment and the Settlement Agreement, plaintiff and defendant have agreed to allow final judgment in this action to be entered in favor of plaintiff and against defendant for the total lump sum of Forty Thousand Dollars (\$40,000). A Proposed Order is attached as Appendix B.

5. In accordance with the terms of the offer and acceptance and to secure the performance thereof, defendant, by its authorized representative of the Attorney General, and plaintiff hereby enter into this Stipulation to be filed in the above-identified action for the purpose of causing a final judgment to be entered against defendant in accordance with the terms set forth in paragraphs 2 and 4 above.

6. The parties agree to bear their own costs and attorney's fees.

7. In the event that the court declines, in whole or part, to enter judgment in accordance with this stipulation, it shall be null, void, and without prejudice to any party.

Respectfully submitted,

THOMPSON HINE LLP

Dated: June __, 2011

By: _____
Eric N. Heyer
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
Telephone: (202) 331-8800
Fax: (202) 331-8330
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Counsel for Plaintiff Anne Pearse-Hocker

TONY WEST
Assistant Attorney General

Dated: June __, 2011

JOHN FARGO
Director
(Authorized Representative
of the Attorney General)

Dated: June __, 2011

WALTER W. BROWN
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Commercial Litigation Branch
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Attorneys for the United States

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ANNE PEARSE-HOCKER,)	
)	
Plaintiff,)	
)	No. 10-269 C
v.)	Judge Edward J. Damich
)	
THE UNITED STATES,)	
)	
Defendant.)	
)	

[PROPOSED] ORDER

In accordance with a Stipulation for Entry of Judgment submitted by the parties in the above action, the Court directs the Clerk to enter final judgment in favor of plaintiff in the total lump sum of Forty Thousand Dollars (\$40,000).

Each party shall bear its own costs and attorney's fees.

Dated: _____, 2011

Judge Edward J. Damich
U.S. Court of Federal Claims

APPENDIX B

[National Museum of the American Indian Letterhead]

[Date]

Dear Anne,

I am writing regarding your collection of photographs taken during the siege of Wounded Knee, South Dakota, in 1973, as well as other events from that tumultuous era, which were donated to the Smithsonian's National Museum of the American Indian ("NMAI") in 1997, following a solicitation of the collection by a former member of the NMAI's Board of Trustees, and discussions with museum staff. These photographs were donated pursuant to the terms of a deed of gift between you and the NMAI that generally provided that the NMAI could use and reproduce the images for the museum's educational purposes, but you would continue to hold the copyright in the donated photographs.

In 2008, NMAI was contacted by an outside production company, Firelight Media, Inc. ("Firelight"), and asked to provide several images from your collection for a documentary then being produced by Firelight and ultimately broadcast on the PBS series "American Experience." Regrettably, the NMAI did not contact you prior to the museum providing copies of the photographs to Firelight.

Eventually, three photographs from your collection were included in the documentary "We Shall Remain: Wounded Knee," which began airing on PBS in May 2009. During the course of the production process, your name was omitted from the documentary's credits, when you should have been credited.

The museum greatly appreciates the efforts and extreme risk to your personal safety that you endured to capture these photographs. Likewise, it greatly values your collection of photographs and artifacts related to Wounded Knee and the American Indian Movement and is grateful for your generosity in donating the collection to the museum.

Sincerely,

Kevin Gover, Director

National Museum of the American Indian