

## BEFORE THE INDIAN CLAIMS COMMISSION

MAKAH INDIAN TRIBE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Docket No. 60-A
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: April 30, 1973

Appearances:

Alvin J. Ziontz, Attorney for the Plaintiff.

Joseph S. Davies, Jr., Maryellen A. Brown,  
Attorneys for the Defendant.

OPINION ON MOTION FOR LEAVE TO AMEND PETITION

Yarborough, Commissioner, delivered the opinion of the Commission.

On July 24, 1972, the Makah Indian Tribe filed a motion to amend the petition herein in order to plead additional damages in the sum of \$2,100,000. In support of its motion the plaintiff tribe has charged the defendant with additional acts of "malfeasance and non-feasance." Plaintiff contends, among other things, that, at the time of the 1855 Makah treaty of cession, 12 Stat. 939, the United States well knew that the Makah Indians derived their livelihood from the sea; that, in response to the Makah Tribe's willingness to cede its land to the United States in consideration of the protection, support, and maintenance of its maritime economy, Governor Stevens, the principal treaty negotiator,

. . . gave the Indians direct assurance that the United States would guarantee and support their right to maintain a fishery and would furnish them with fishing apparatus, including whaling apparatus, barrels in which to put whale oil, kettles to try it out, and lines on implements for fishing.

Plaintiff further contends in its motion <sup>1/</sup> that the "formal treaty" omitted any reference to defendant's obligation to furnish the Makah Indians with the promised fishing equipment, but instead the treaty limited itself to a bare guarantee of the non-exclusive right of the Indians to fish at their usual and accustomed places. Thus, plaintiff argues, defendant's failure to furnish the promised consideration, combined with its failure and refusal to protect the Makah Treaty fishing rights from international, federal and state interference, with respect to seals, halibut and salmon, have all caused damage to the plaintiff in the amount of \$2,100,000.

Defendant opposes the granting of plaintiff's motion on the grounds that the proposed amendment not only asserts a new claim not contained in the petition in this docket, but raises an issue which has or should have been raised in Docket No. 60, in which final judgment has been entered. <sup>2/</sup>

After the motion was filed, a trial was held on January 15, 1973, on the issue of consideration, at which much evidence was received. Subsequently,

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<sup>1/</sup> Page 2, Plaintiffs' "Motion for Leave to Amend Petition for Damages."

<sup>2/</sup> Defendant's "Responses to Plaintiff's Motion for Leave to Amend Petition" of August 4, 1972, citing therein Makah Tribe v. Indian States, 7 Ind. Cl. Comm. 477 (1959), aff'd 151 Ct. Cl. 701 (1960), cert. den. 365 U.S. 879 (1961).

plaintiff filed an amended memorandum in support of its motion for leave to amend the petition herein. Defendant filed a reply to plaintiff's amended memorandum on April 4, 1973.

The petition in this docket, which plaintiff now seeks to amend, was filed as a "Second Amended Petition" pursuant to the Commission's order of September 27, 1957. This amended petition contains but one cause of action, an unconscionable consideration claim for \$1,000,000 for the Makah tribal lands ceded under the 1855 Treaty. In order to place plaintiff's motion to amend in proper perspective it is necessary to trace the metamorphosis of the instant petition over the years. This will require a somewhat detailed history of the Makah litigation before this Commission, beginning on March 17, 1950, when the plaintiff filed the original petition in Docket No. 60.

As filed, the original petition was an admixture of land and fishing claims. With respect to fishing and related activity, the plaintiff alleged generally that the Makah Indians were solely dependent upon their fisheries for their existence and livelihood, and that the fisheries involved consisted of seals, halibut and salmon. More specifically it was alleged in paragraph IV of the original petition in Docket No. 60 that during the treaty negotiations the Makahs insisted on the perpetuation of their rights to the products of the sea and expressed fear that otherwise they would become destitute, and further, that

These head men were assured by Governor Stevens and by other representatives of the Government that far from wishing to interfere with the taking of their livelihood

from the sea, the white man desired to assist them in these matters and to furnish them from time to time with better apparatus for use in their fisheries. 3/  
(Emphasis added)

Paragraph IV of the original petition then goes on to say that, "because of these solemn assurances," a treaty was concluded wherein the Makahs ceded their tribal lands except for a small reservation, and

. . . the Makah Indians were secured of the right to take fish and whales and seals at their usual and accustomed grounds and stations. 4/

Paragraphs "VII," "VIII," and "IX" of the original petition alleged that the United States, pursuant to its solemn compact with the Makah Indians, has not secured their rights to take seals, halibut and salmon, but has virtually destroyed the same by permitting the restriction and regulation of Makah fishing activity through international agreements and the interference of state law. The original petition asked for damages in the sum of \$10,000,000 because of the alleged failure and refusal of the United States

. . . to secure to the said Makah Indians their rights of sealing and catching halibut and salmon in accordance with its solemn compact. 5/

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3/ Petition, Docket No. 60, page 5.

4/ Ibid, pp. 5, 6.

5/ Ibid, p. 10.

On October 25, 1950, defendant filed a motion requiring plaintiff to state separately and number its several causes of action. On December 5, 1950, plaintiff responded in opposition to defendant's motion.

On January 4, 1951, the Commission ordered plaintiff to file an amended petition wherein it would set forth two distinct causes of action, one based upon unconscionable consideration for the lands ceded under the 1855 Treaty, and the second based upon "breaches" of the 1855 Treaty.<sup>6/</sup> In the opinion accompanying its order, the Commission agreed with plaintiff that the allegations in paragraphs VII, VIII, and IX of the original petition, "and perhaps allegations in other parts of the petition," charging violations of the Makah fishing rights under the 1855 Treaty with respect to seals, halibut, and salmon,

do not constitute separate causes of action but are several breaches of the same treaty and may be included in a single count. . . . <sup>7/</sup>

On September 15, 1952, plaintiff tribe filed an "Amended Petition" in Docket No. 60. By rearranging several paragraphs in the original petition, and with the addition of more specific language, plaintiff's "Amended Petition" set forth two distinct causes of action; a one million dollar unconscionable consideration claim for Makah lands ceded to the United States under the 1855 Treaty, and a ten million

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<sup>6/</sup> Ind. Cl. Comm. "Order Directing Separation of Causes of Action."

<sup>7/</sup> 1 Ind. Cl. Comm. 466, 468.

dollar damage claim for loss of Makah fishing rights to take seal, halibut, and salmon as guaranteed under the 1855 Treaty. On January 22, 1953, issue was joined when the defendant filed its answer to the "Amended Petition." Docket No. 60 went to trial on June 22, 1955.

At the trial of Docket No. 60, plaintiff's then counsel identified the case as consisting of two causes of action. The first cause of action was described as "the usual and customary claim for inadequate compensation for lands taken," and the second cause of action was described as an alternative claim, to wit,

. . . either that the United States has not fulfilled its bargain with these people, that it has either by itself or by its sufferance permitted them to be deprived of their fishing, their sealing and their halibut and their sea otter, and one thing or another and either this conduct is one in violation of the Treaty or two; it is so unconscionable as to constitute a claim under the Fifth Section of the Act. 8/

In his preliminary remarks plaintiff's counsel had alluded to earlier allegations in the petition that, during the 1855 Treaty negotiations,

. . . Governor Stevens assured them that not only would they be secure in their rights to the whale, the seal and fish but that indeed the white man would bring out better equipment for them to pursue these things. 9/

Following the 1955 hearing but prior to briefing, the parties decided that it would expedite matters to further refine the pleadings

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8/ Tr. p. 17.

9/ Tr. p. 16. See also p. 27.

in Docket No. 60 by severing the two causes of action into separate petitions. This agreement between plaintiff tribe and defendant was finalized in a stipulation filed before the Commission on September 25, 1957. The stipulation evidences the understanding of the parties concerning the posture of the two claims in Docket No. 60, and the manner in which future proceedings would be conducted before the Commission in order to adjudicate both claims. We quote the stipulation in full:

#### STIPULATION TO SEVER CAUSES OF ACTION

WHEREAS, the plaintiff tribe has instituted suit in the above-entitled cause seeking to recover from the defendant damages in the aggregate amount of 11 million dollars, upon the following two causes of action asserted in the petition:

(a) First Cause - A claim for damages in the amount of one million dollars based upon an alleged unconscionable consideration, arising out of the cession and relinquishment of 500 square miles of land assertedly occupied by immemorial possession.

(b) Second Cause - A claim for damages in the amount of ten million dollars, attributable to international agreements allegedly resulting in deprivation by the Government of the plaintiff's treaty-rights to hunt seals at sea and to fish for halibut and salmon; and

WHEREAS, the first cause will require first, a determination by the Commission of the area aboriginally occupied and second, a valuation of such area as of the treaty date; and

WHEREAS, the proof relating to the second cause respecting seals, halibut and salmon could be completed and submitted to the Commission for decision at a much earlier date if it were not encumbered by the delay inherent in the first cause;

IT IS HEREBY STIPULATED by the parties through their attorneys undersigned, subject to the approval of the Indian Claims Commission:

1. That the second cause shall be regarded as if it were the sole cause embodied in the petition - Docket No. 60; that all of the proof pertaining to such cause shall be expeditiously adduced by the parties; that upon completion, it shall be submitted to the Commission for decision solely upon the issue of the defendant's liability, and that the question of damages, if any, shall be reserved for subsequent consideration.

2. That the first cause involving the land claim shall be severed from the present petition (Docket No. 60), shall be filed in the form of a typewritten petition as a separate suit, shall proceed as an independent action before the Commission designated as Docket No. 60-A, with the same effect as if it had been so filed originally, and that upon the filing with the Commission of such independent suit, the first cause shall be stricken from the petition in Docket No. 60.

By its order of September 27, 1957, the Commission approved the above stipulation and ordered that second cause of action in the amended petition in Docket No. 60 involving seals, halibut, and salmon "be considered the sole cause of action in that petition," and further that,

. . . all proof pertaining to such cause shall be expeditiously adduced by the parties and that upon completion it shall be submitted to the Commission for decision upon the issues of the defendant's liability. 10/

The Commission then ordered that the first cause of action in the amended petition in Docket No. 60 involving the land claim be severed from that petition and be

. . . made the subject of a separate petition designated 'Docket No. 60A,' and shall proceed as an independent suit, with the same effect as if it had been filed originally. 11/

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10/ Ind. Cl. Comm. "Order Separating Causes of Action."

11/ Id.



In compliance with the above order, plaintiff, on November 1, 1957, filed a "Second Amended Petition" in this docket (i.e., No. 60-A) setting forth all allegations dealing exclusively with the single cause of action involving plaintiff's claim that it received an unconscionable consideration for lands ceded under the 1855 Treaty.

On September 2, 1958, plaintiff filed its proposed findings of fact in Docket No. 60. Defendant filed its requested findings of fact, objections to plaintiff's proposed findings, and its brief on October 15, 1958. Plaintiff followed with a reply brief on December 8, 1958, and defendant was permitted to file a response to plaintiff's reply brief on January 11, 1958.

In its proposed findings, plaintiff first asked for a finding by the Commission that at the time of the 1855 Treaty Governor Stevens had given the Indians a clear understanding.

. . . that their right to take their subsistence from the sea would be fully protected and that far from infringing upon their fishery, the great white father would assist them in obtaining better equipment and doing it in a better manner.<sup>12/</sup>

This was followed by a request for a more complete finding, namely

Since the United States clearly led the Indians to believe at the time of signing the treaty that they not only would be allowed to improve the methods of their fishery, but that the United States would assist them in modernizing their method of fishery, the United States has breached its contract (the treaty) with the Makah Indians by entering into international treaties and by passing laws restricting their right to

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<sup>12/</sup> "Plaintiff's Proposed Findings of Fact," Finding VIII, September 2, 1958, Docket No. 60.

seal to the methods and means employed by them in 1855, and making violations thereof criminal. <sup>13/</sup>

In its reply brief plaintiff again alluded to purported promises made by Governor Stevens at the 1855 Treaty negotiations to furnish the Indians with better fishing gear and equipment. <sup>14/</sup>

After due consideration the Commission, on April 15, 1959, entered its findings of fact, opinion, and final order dismissing the plaintiff's petition in Docket No. 60. <sup>15/</sup> The Commission's ultimate decision in Docket No. 60 turned on its determination of the extent of plaintiff's fishing rights as guaranteed under Article IV of the 1855 Treaty. The Commission found no breaches of the Treaty.

Plaintiff immediately appealed our ruling to the Court of Claims, and on November 2, 1960, the Court by an order, with one judge dissenting, affirmed the Commission's decision. <sup>16/</sup> Plaintiff's writ of certiorari to the Supreme Court was denied. <sup>17/</sup> By letter dated August 13, 1964, the Commission, as required under our Act, reported to Congress the final decision in Docket No. 60.

Controlling here is the extent of the issues litigated in Docket 60. Of special interest in that decision was a footnote referring

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<sup>13/</sup> Ibid., Finding XII.

<sup>14/</sup> "Plaintiff's Reply Brief," December 8, 1958, pp. 1, 17.

<sup>15/</sup> 7 Ind. Cl. Comm. 477.

<sup>16/</sup> 151 Ct. Cl. 701.

<sup>17/</sup> 365 U.S. 879 (1961).

to one of the issues sought to be added by amendment here. We quote the complete text of the footnote:

Contrary to the position taken by the petitioner tribe, the Commission is of the opinion that any question involving a breach of promise by the United States to supply periodically to the Makah Tribe new fishing gear and other equipment is strictly collateral to settling the present controversy of the extent of petitioner's fishing rights under Article IV of the 1855 Makah Treaty; and, as such, might be considered, if at all, as one of the issues in Docket 60-A relative to adequacy of the consideration paid for the Makah land cession under that treaty.<sup>18/</sup>

The Commission's rules and policy freely allow amendment to petitions when justice so requires. Since the first petition in this case plaintiffs have claimed damages based on an alleged promise of fishing gear that was not incorporated into the text of the Treaty of Neah Bay. Since there has been adequate notice, and since the Commission has previously determined this is an appropriate issue for disposition in this docket, plaintiff may consider the petition amended to support his issues relating to the promise of fishing gear and other equipment at the treaty negotiations, as related to the adequacy of consideration for the value of the land ceded.

Plaintiff's motion to amend, however, goes beyond that possible failure of consideration promised for the cession. Plaintiff also apparently seeks, inter alia, to reinstate a claim relating to interference with salmon fishing by the State of Washington in violation of its asserted treaty rights. This claim was waived by plaintiff in the proceedings in Docket 60 (see 7 Ind. Cl. Comm. 477, 510). Such a

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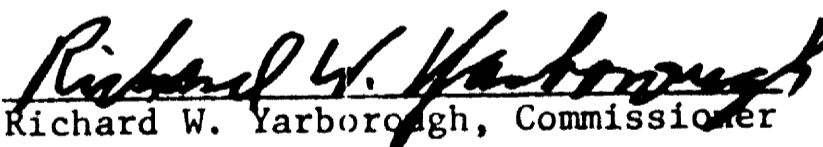
<sup>18/</sup> 7 Ind. Cl. Comm. 477, 524, n. 5.

claim would clearly be based on a violation of Article IV of the Treaty of Neah Bay, and is thus an issue that was or should have been litigated in Docket 60. Therefore plaintiff's proposed amendment to the petition is overbroad, and as offered must fail. To the extent the amendment is allowable, the issue has been tried; if the evidence supports a favorable finding no formal amendment will be necessary.

As the Commission sees it at this stage there remains to be determined in this case these issues:

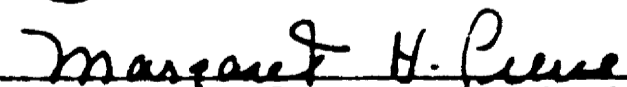
- (1) The amount of consideration promised by the United States for the treaty cession,
- (2) The amount of consideration which can be considered to have been delivered to the plaintiffs, and
- (3) Whether such consideration for their lands was unconscionable.

The parties may proceed with the preparation of briefs and proposed findings relating to these issues.

  
Richard W. Yarborough, Commissioner

We Concur:

  
John T. Vance, Commissioner

  
Margaret H. Pierce, Commissioner

  
Brantley Blue, Commissioner