

BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: May 1, 1974

Appearances:

Alvin J. Ziontz, Attorney for the Plaintiff.

MaryEllen A. Brown, with whom was Assistant Attorney General Wallace H. Johnson, Attorneys for the Defendant.

OPINION ON PLAINTIFF'S MOTION TO AMEND THE PETITION, FOR CLARIFICATION OR REHEARING, AND TO REOPEN THE RECORD FOR ADDITIONAL EVIDENCE

Yarborough, Commissioner, delivered the opinion of the Commission.

On May 21, 1973, plaintiff filed three related motions, namely -- "Petitioner's Amended Motion For Leave To Amend Petition For Damages," "Petitioner's Motion To Clarify Or In The Alternative For Rehearing," and "Plaintiff's Motion To Reopen Record For Additional Evidence." Plaintiff accompanied its motions with a brief and a statement of points and authorities in support thereof. On June 6, 1973, the defendant filed a single response opposing the granting of all three motions.

These three motions have been filed by the plaintiff as a result of the Commission's April 30, 1973, decision denying plaintiff's prior

motion for leave to amend its petition. ^{1/} The plaintiff had contended, as it does now, that at the time of the 1855 Makah treaty negotiations, and in response to the Makah Tribe's willingness to cede its land to the United States, 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 and implements for fishing. ^{2/}

While this alleged oral promise was not incorporated into the 1855 Treaty in so many words, the plaintiff insists that it was indeed part of the consideration that moved the Makah Tribe to cede its aboriginal lands to the United States. As a result of the defendant's failure to perform as promised above, the plaintiff alleges additional damages in the sum of \$2,100,000. In denying plaintiff's motion the Commission limited the remaining issues at this juncture of the case to

- "(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." ^{3/}

^{1/} 30 Ind. Cl. Comm. 220.

^{2/} Page 2, Plaintiff's "Motion For Leave to Amend Petition For Damages".

^{3/} 30 Ind. Cl. Comm. 220, 231.

At the same time we also stated that

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.^{4/}

Except for deleting several superfluous items and making a few grammatical changes, the plaintiff's amended motion to amend the petition is substantially identical with its prior motion to amend which we denied last April 30th. The defendant has challenged the granting of the plaintiff's present amended motion to amend on grounds that plaintiff's claim for damages resulting from an alleged breach of an oral promise on part of the United States to supply the Makah Indians with fishing gear and other equipment is either res judicata as a result of our earlier decision in Docket 60,^{5/} or is a new claim barred by Section 12 of the Indian Claims Commission Act, 25 U.S.C. 70(k).

After due consideration the Commission is of the opinion that we should have granted plaintiff's prior motion to amend the petition in our April 30, 1973, decision, and that plaintiff's instant claim for breach of an oral promise is neither res judicata nor a new claim that is barred under the limitations imposed in Section 12 of the Indian Claims Commission Act.

In our April 30th decision, the Commission extensively detailed the history and development of the Makah litigation since the

^{4/} Id., p. 230.

^{5/} 7 Ind. Cl. Comm. 477 (1959).

filing of the original petition. We pointed out that early in the proceedings an orderly disposition of the plaintiff's claims dictated a refinement of the pleadings. In line with a stipulation between the parties, the Commission ordered that all those allegations charging violations or "breaches" of the plaintiff's reserved fishing rights under Article 4 of the 1855 Treaty would be incorporated in an amended petition and refiled as a single cause of action in Docket 60. Plaintiff's other cause of action, which was readily identified and described by counsel as ". . . the usual and customary claim for inadequate compensation for lands taken,"^{6/} was filed under a new petition as Docket 60-A. Following a full hearing and briefing by the parties, the Commission on April 15, 1959, issued its findings of fact, opinion, and final order dismissing the plaintiff's petition in Docket 60. Plaintiff's subsequent appeal of our decision to the Court of Claims was unsuccessful.^{7/}

Despite what the defendant contends was a final adjudication in Docket 60 of all issues relative to violations or "breaches" of Makah reserved fishing rights, the plaintiff insists, as it did in its previous motion to amend, that the Commission clearly reserved for future consideration the distinct cause of action founded upon the Government's allegedly broken promise to furnish aid and support for the Makah fisheries.

^{6/} P. 17 -- Transcript of Proceedings Before The Indian Claims Commission, June 22, 1955.

^{7/} 151 Ct. Cl. 701 (1960), cert. denied, 365 U.S. 879 (1961).

According to the plaintiff, the excision of this particular fishing claim from the overall fishing rights claim that was tried in Docket 60 was accomplished by means of the following footnote which is found in our 1959 opinion at 7 Ind. Cl. Comm. 477, 524:

Contrary to the position taken by the petitioner tribe, the Commission is of the opinion that any question involving a breach of a 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 60A relative to adequacy of the consideration paid for the Makah land cession under that Treaty.

We think the plaintiff's view is the correct one. It could be argued that the Commission on its own motion amended the petition herein by including the above quoted footnote in its opinion in Docket 60, reserving the contested issue to this docket. In any event, it was a clear invitation to the plaintiff to move for such an amendment.

The defendant's contention that res judicata applies is untenable. Having reserved for future consideration the matter of the breach of the alleged oral promise, the Commission never decided the issue in Docket 60. Equally untenable is defendant's further argument that the instant claim is barred under the provisions of Section 12 of our Act which limits the time for the presentation of claims before the Commission.^{8/} The claim

^{8/} "The Commission shall receive claims for a period of five years after August 13, 1946, . . ." 25 U.S. C. §70k.

in question is not a new claim, having been substantially pleaded in the original as well as the amended petitions in Docket 60. In addition, there is no evidence to date that the plaintiff ever abandoned this particular claim.

Accordingly, the Commission will grant the plaintiff's amended motion to amend the petition herein, but not without reservations. Our reservations are directed at the ultimate issue of damages, assuming, of course, that the plaintiff successfully carries the burden of proving the validity and extent of the alleged oral promise by the defendant and its breach. The Commission would hope to avoid onerous and expensive proceedings in the future resulting from giving any hint now that plaintiff's apparent theory of damages meets our approval.

At times, the plaintiff has alluded to the measure of its damages in this particular claim as being the "full value of the promises made by the defendant . . .," or "the full value of the performance due from the defendant." Plaintiff's contemplated damages are reckoned in the millions and cover a period of many years extending from 1855 to the present time.^{9/} If, as contended, the defendant has breached a binding oral promise made

^{9/} I.e., "It is submitted that the value of the promises to furnish fishing and implements alone, will be found to be many times that amount [the value of the ceded lands]. If there is also added the value of the fish which could have been landed and processed, if such promise had been kept, the total damage suffered by the Makahs dwarfs the stipulated value of their land." P. 4, Plaintiff's Brief And Statement of Points and Authorities, etc. May 21, 1973.

during the 1855 Makah treaty negotiations to supply the plaintiff tribe with fishing gear and other equipment as a part of the quid pro quo for the cession of the Makah aboriginal lands to the United States, then such promise is undoubtedly part of the 1855 Makah treaty consideration. As such, this additional consideration must be valued as of the effective date of the 1855 Treaty in a manner consistent with the intent, purposes and conditions laid down in the treaty. Not being able to define those conditions now, we can only say that plaintiff's proof may show it to be entitled to those damages that are direct and proximate, but not those damages that are remote, consequential, and purely speculative.

As the Commission sees it, the current posture of this case is as follows. There are now open to the plaintiff two alternative avenues leading to a possible recovery against the defendant. If the evidence shows that the overall treaty consideration, which would include the value of the alleged oral promise to supply the Makah Tribe with fishing gear and other equipment, exceeds the \$88,000 stipulated 1855 value of plaintiff's ceded land, there would no longer be an unconscionable consideration claim. Rather, plaintiff's claim would be for the difference, if any, between the value of this overall treaty consideration and the consideration actually received. On the other hand, should the overall treaty consideration, as described above, total less than the stipulated value of the ceded lands, then recovery will depend on whether such disparity constitutes unconscionable consideration within the meaning of Section 2(3) of our Act.

Since we are now granting the plaintiff's amended motion to amend the petition herein, we shall deny the plaintiff's alternative motion to clarify our previous order of April 30, 1973, or for rehearing. We do so because plaintiff's motion to clarify would be meaningful only if we had denied plaintiff's amended motion to amend the petition.

Finally, we reach the matter of the state of the record herein and the plaintiff's motion to reopen the record for additional evidence. Plaintiff's motion to reopen embodies two requests.

1. To submit evidence pertaining to the value of the promise of the United States to furnish the Makah's with economic support for their fishery.

2. For introduction of an exhibit, to be plaintiff's exhibit 10/ 56.

Defendant opposes the reopening of the record for any purposes.

Passing for the moment plaintiff's initial request to reopen, we think the plaintiff's second request with respect to proposed exhibit "56" is reasonable and should be granted. The proposed exhibit is nothing more than a verbatim transcript of certain portions of the proceedings of the Presidential Commission that was organized to negotiate treaties with the Indians in the Washington Territory and Blackfeet country. The excerpted portions cover December 7, 1854, and

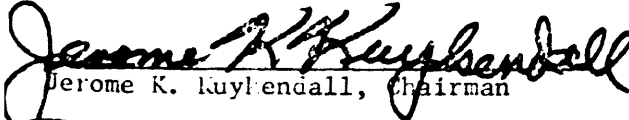
10/ Plaintiff's Motion To Reopen Record For Additional Evidence, May 21, 1973.

December 10, 1854, and the subject matter relates directly to testimony given before the Indian Claims Commission on January 15, 1973, by Dr. Barbara Lane, plaintiff's expert witness. Under these circumstances we fail to see how the defendant would be prejudiced by the admission of this piece of evidence for the limited purposes indicated in the plaintiff's motion.

Since the Commission will this day grant the plaintiff's amended motion to amend the petition herein, it is apparent that further proceedings will be required for the reception of such additional evidence as is needed to resolve the remaining issues. The Commission will therefore grant the plaintiff's initial request to reopen the record and we will also set an immediate trial date for the reception of such additional evidence.

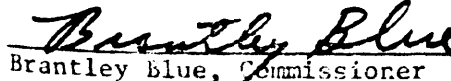

Richard W. Yarborough, Commissioner

We concur:


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner