

BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: August 14, 1974

Appearances:

Alvin J. Ziontz, Attorney for Plaintiff.

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

OPINION OF THE COMMISSION ON DENYING THE DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Yarborough, Commissioner, delivered the opinion of the Commission.

On May 13, 1974, the defendant filed a motion for partial summary judgment dismissing plaintiff's claim of unconscionable consideration. In support of the motion the defendant shows that the parties have stipulated that the 1855 fair market value of plaintiff's lands, ceded by the Treaty of January 31, 1855, 12 Stat. 939, was \$88,000. The defendant has introduced into evidence a General Accounting Office Report which it alleges shows that the consideration actually paid for the ceded land was \$169,124.21. The defendant further alleges that the plaintiff has not disputed the defendant's evidence, and that there is no issue of fact on the question of conscionability of the consideration paid for the ceded lands.

The defendant cites our opinion of May 1, 1974, wherein we stated in effect, that if the evidence shows that the overall treaty consideration promised by the defendant, including the value of an alleged oral promise to supply the Makah Tribe with fishing gear and other equipment, exceeds the \$88,000 stipulated 1855 value of the plaintiff's ceded land, there 1/ would no longer be an unconscionable consideration claim.

In fact the issue of the overall treaty consideration promised by the defendant has not yet been litigated, and the defendant's motion must accordingly be denied. By our decision of May 1, 1974, we granted the plaintiff's motions to reopen the record and to amend its petition to include damages for breach of the alleged oral promise of the defendant to supply the plaintiff with fishing gear and other equipment. This matter was set 2/ for hearing before this Commission on September 10, 1974.

Without reference to the amount of consideration promised, the defendant seeks to eliminate the unconscionable consideration claim by alleging that the defendant paid more than the land was worth.

1/ We stated, in effect, that in such event the plaintiff's claim would be for the difference, if any, between the value of the overall treaty consideration promised by the defendant, and the consideration actually received. 34 Ind. Cl. Comm. 14, 20.

2/ The defendant has since moved, on July 5, 1974, that the matter be set for trial in two stages, with the liability issues to be heard first, and a hearing on damages to be scheduled subsequently in the event liability is shown. Simultaneously the defendant served the plaintiff with interrogatories relating to the alleged oral promise. On July 25, 1974, the plaintiff moved that the trial be set over until after October 10, 1974. These motions are granted by a separate Commission order of this date.

The plaintiff responded to the subject motion on June 10, 1974. In its response the plaintiff contests the defendant's allegations that \$169,129.21 has been paid as consideration for the 1855 cession, that the plaintiff has not heretofore disputed the defendant's evidence, and that there is no issue of fact on the question of conscionability of consideration.

The plaintiff alleges that it has submitted voluminous evidence in support of its contention that the defendant should not be allowed credit for the amount shown as "disbursed" as treaty consideration under its schedules. Plaintiff maintains that the alleged consideration fails to qualify as consideration for the reasons, inter alia, that:

1. There was such a lengthy and pervasive history of fraud, graft and corruption in the management of the Neah Bay Agency, and in particular in the disbursement and payment of treaty funds, or treaty goods, that the burden should shift to the Government to demonstrate what amount of funds or goods were actually received by the Makahs.

2. The Makahs were made to work in exchange for treaty funds, and the Government should therefore not be given credit for funds paid in exchange for labor.

3. The Makahs were subjected to a fraudulent system of fines conducted by Government agents, which resulted in their having to surrender back to the agents, goods received by them as treaty consideration.

4. A number of the items recited as "consideration" in the treaty, were not bargained for and were actually part of the scheme envisaged by the Federal Government for assimilation of Indians.

5. Many of the categories of goods, particularly those relating to farming and costs of maintaining a farm establishment, should be disallowed because they were in violation of the alleged treaty assurance that the request of the Indians would be honored in determining what goods to furnish.

6. Many of the expenditures were for agency, administrative, educational, health, highway, and removal purposes, and as such, are not properly credited as consideration.

It appears from the plaintiff's contentions that there exist one or more genuine issues of material fact on the question of the amount (and hence the conscionability) of the consideration actually bargained for and received by the plaintiff in exchange for its land. Summary judgment may be granted only if there is no dispute as to any material fact.

In its June 19, 1974, reply to the plaintiff's response to the subject motion, the defendant cites the general rule that in response to a motion for summary judgment, an adverse party may not rest upon unsupported allegations but must set forth specific facts showing that there is a genuine issue for trial.^{3/} It does not follow that if the adverse party does not set forth such facts, that summary judgment will be granted as a matter of course. It is granted only if appropriate. Here the plaintiff states that its contentions are supported by the undigested

^{3/} See Blackfeet and Gros Ventre Tribes v. United States, Dockets 279-C and 250-A, 32 Ind. Cl. Comm. 65, 105-106 (1973), citing Commission General Rule of Procedure 11(c)(v). See also Fed. R. Civ. P. 56(e) to same effect.

mass of evidence of record in this proceeding. We agree that the plaintiff's allegations coupled with the evidence of record leave little doubt as to the existence of genuine issues of material fact. Any doubt must be resolved against the movant for summary judgment, and the motion for summary judgment must be denied.

In its memorandum in support of the subject motion, the defendant further contends that if the plaintiff wishes to challenge the General Accounting Office Report submitted by the defendant, the plaintiff's remedy is to file exceptions to specific disbursements. This is not an accounting case, and the remedy suggested by the defendant accordingly is inapposite.

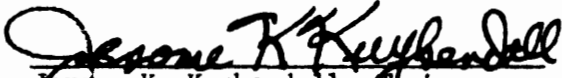
In sum, defendant's pending motion for partial summary judgment dismissing the plaintiff's claim of unconscionable consideration is premature for the reasons that:

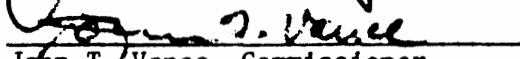
- (1) the amount of overall treaty consideration promised by the defendant, including the value of the alleged oral promise to supply the Mekan Tribe with fishing gear and other equipment, has not yet been tried or determined, and
- (2) there appears to exist one or more genuine issues of material fact on the amount (and hence the conscionability) of the consideration actually bargained for and received by the plaintiff in exchange for its land.

The defendant's motion is denied by the accompanying order.


Richard W. Yarborough, Commissioner

We concur:


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner