BEFORE THE INDIAN CLAIMS COMMISSION

THE MAKAH TRIBE OF INDIANS, Plaintiffs,	)	
v.	)	Docket No. 60-A
THE UNITED STATES OF AMERICA, Defenant.	)	

Decided: May 4, 1977

Appearances:

Alvin J. Ziontz, Attorney for Plaintiff.

Craig A. Decker, with whom was Assistant Attorney General Peter R. Taft, Attorneys for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

Plaintiff has filed a motion for rehearing, requesting that the Commission reconsider its decision of October 15, 1976, 39 Ind. Cl. Comm. 88. Plaintiff asserts that the Commission erred, as a matter of law, in limiting plaintiff's recovery in this docket to $29,734.60. It is plaintiff's position that we should have allowed it the opportunity to prove the full extent of the damages it suffered by reason of defendant's breach of the Treaty of Neah Bay, 12 Stat. 939, including the loss of income the tribe would have earned had the treaty been fulfilled. For

the reasons indicated below, we hold that our ruling of October 15, 1976, setting defendant's liability for breach of the Neah Bay Treaty at $29,734.60, was in error. We shall grant plaintiff's motion for rehearing.

In our 1976 decision we determined that the treaty commissioner for the United States, Governor Isaac Stevens, made an oral promise to the Makahs that the United States would assist the Makahs in their fishing, sealing, and whaling pursuits by supplying them with necessary gear. We further determined that this promise acted as a refinement and modification of Article V of the written treaty to the extent that it restricted the President to expending the $30,000 promised to the Makahs in that article solely on fishing gear. The record indicated that the United States had expended only $265.40 on fishing gear under Article V of the treaty. We held this to be a breach of the treaty. We further held that plaintiff was entitled to recover only $29,734.60, the difference between the amount of gear promised and that actually delivered, as damages for the breach. It is the latter holding to which plaintiff objects.

Treaties, including those with Indian tribes, are contracts. See Foster v. Nelson, 27 U. S. (2 Pet.) 253, 314 (1829); Cherokee Nation v. United States, Docket 190, 12 Ind. Cl. Comm. 570, 631 (1963); Seminole Nation v. United States, Docket 152, 10 Ind. Cl. Comm. 450, 487 (1962). Thus the failure to fulfill promises made under a treaty is regarded as a breach of contractual obligation. See Te-Moak Bands v. United States, Dockets 326-A and 22-G, 31 Ind. Cl. Comm. 427, 541 (1973).

Damages for the breach of contract are generally calculated as the difference between what the plaintiff would have received had the defendant performed the contract according to its terms and what the plaintiff actually received. Seneca-Cayuga Tribe v. United States, Dockets 341-A and 341-B, 33 Ind. Cl. Comm. 436, 450 (1974). In some instances damages may include anticipated profits lost by the plaintiff because of the breach.

To recover lost profits the plaintiff must first show that the loss was a direct and proximate result of the breach. Story Parchment Co. v. Paterson Parchment Co., 282 U. S. 555, 562-63 (1921); Neely v. United States, 152 Ct. Cl. 137, 145-46 (1961); Locke v. United States, 151 Ct. Cl. 262, 267 (1961); Chain Belt Co. v. United States, 127 Ct. Cl. 38, 58 (1954); Needles v. United States, 101 Ct. Cl. 535, 618-19 (1944). This means that the plaintiff must show that but for defendant's breach it would have in fact enjoyed the profit it claims to have lost.

Secondly, the plaintiff must show that loss of profit in the case of breach was in the contemplation of the parties at the time they entered into the contract. Chain Belt Co. v. United States, supra. This can be established in two ways. First, it can be shown that loss of profits was natural and inevitable upon breach, in which case the defendant is presumed to have foreseen it. Second, if the loss was due to special circumstances, it can be shown that these circumstances were known to defendant at the time he entered into the contract. Id.

The third thing that is necessary to recover lost profits is for the plaintiff to provide a reasonable basis for estimating the amount of profit lost because of defendant's breach. Neely v. United States, supra; Chain Belt Co. v. United States, supra.

In this docket we have already determined that defendant breached its contractual obligation to provide plaintiff with fishing gear. Under the law of contracts, as set out above, plaintiff should now be given the opportunity to establish the extent to which it was injured by this breach. Damages may include loss of anticipated profits if plaintiff is able to satisfy the three requirements set out above.

[In its motion for rehearing, filed December 16, 1976, the plaintiff brought to the Commission's attention the decision of the United States District Court in United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 96 S. Ct. 877 (1976). In that case, the United States, on its own behalf and on behalf of several western Washington tribes, brought suit against the State of Washington and other defendants to enforce the treaty fishing rights of the tribes, among which was the Makah. In adjudicating that dispute the district court entered several findings of fact on the thriving Makah commercial fisheries and the Neah Bay treaty proceedings which are material to the issues in this docket.

These findings were entered by a court of competent jurisdiction after extensive litigation. As such they are entitled to a presumption of validity. See Gila River Pima-Maricopa Indian Community v. United States,

Docket 236-C, 29 Ind. Cl. Comm. 144, 166 (1972). Moreover, the district court's findings are consistent with the findings we entered herein on October 15, 1976. 39 Ind. Cl. Comm. 88, 97-101. We shall treat them as if they were findings in this docket.]

In its response to plaintiff's motion, defendant asserts that rehearing in this docket is unwarranted because "consideration credits and damages, whether involving money, goods, or services, are adjudicated in terms of the amount the parties agreed to rather than in terms of 'foreseeable damages.'" While we certainly agree with the defendant that in determining what is consideration under a treaty we must look to see what the parties agreed to (see Nez Perce Tribe v. United States, Docket 175, 24 Ind. Cl. Comm. 429, 433 (1971)), in this docket we are concerned with measuring damages for breach of a contractual obligation, not with measuring consideration. In this instance we must follow the law on contract damages, as set out above.

The Commission shall enter an order granting plaintiff's motion for rehearing. This case shall proceed to a determination of the full extent of damages suffered by plaintiff by reason of defendant's breach of the 1855 treaty.

Because of the limited life remaining to the Commission, it is imperative that a trial on the damages issues, if required, be set for

the earliest posssible date. We shall therefore order the parties to decide on the necessity for a trial and, if one is necessary, to have an early trial date set.

Richard W. Yarborough, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner