

BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: October 15, 1976

Appearances:

Alvin J. Ziontz of Ziontz, Pirtle, Morisset,
Ernstoff & Chestnut, Attorney for Plaintiff.

Clarence E. Martin, III, with whom was Assistant
Attorney General Wallace H. Johnson, Attorneys
for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

Statement of the Case

The case before us, Docket 60-A, is a claim for additional compensation for lands ceded by the plaintiff Makah Tribe to the defendant under the Treaty of Neah Bay. On May 20, 1970, the Indian Claims Commission ruled that the plaintiff had Indian title to land described in the findings of fact, 23 Ind. Cl. Comm. 165 (1970), aff'd, 195 Ct. Cl. 539 (1971). The issue before us now deals with the extent of defendant's promised consideration for the ceded land.

On April 30, 1971, the Commission issued an opinion and order denying plaintiff's motion for leave to amend its petition. Plaintiff then filed an amended motion for leave to amend the petition for damages, a motion

to reopen the record for additional evidence, and a motion to clarify. The Commission upon consideration, after hearing from defendant, granted plaintiff's first two motions and denied the motion to clarify, 34 Ind. Cl. Comm. 14 (1974).

On July 24, 1972, the plaintiff filed a motion for partial summary judgment with respect to the issues of consideration and offsets. On May 1, 1974, the Commission issued an order denying plaintiff's motions. The plaintiff, at the same time it filed its motion for partial summary judgment, also filed a motion for leave to inspect the defendant's appraisal report of the lands ceded under the Treaty of Neah Bay. The Commission denied this motion since the parties' stipulation of the fair market value of the subject lands made the issue moot. On January 29, 1973, the parties stipulated a value on the land ceded of \$107,377.00 less \$20,197.00 to be deducted as a result of returns of ceded land to the Makah.

Defendant filed a motion on May 13, 1974, for partial summary judgment dismissing the plaintiff's claim of unconscionable consideration. The Commission denied the motion, holding that, although the parties had stipulated the fair market value of the land and presented evidence indicating the defendant had probably paid more for the land than the stipulated value, the motion was premature and there remained the question of the consideration on the oral promise claim as raised by plaintiff.

The Commission in an order issued on August 14, 1974, granted the motions of both parties to set the trial in two stages: (1) a trial to

determine liability, and (2) if liability is found, a trial to determine the amount of that liability. The liability trial was held on October 15, 1974, with both parties filing briefs in timely fashion.

Plaintiff contends that it is entitled to recovery on any of four different theories. First, it claims that under Article IV of the 1855 Makah treaty the Makah Indians were promised aid for their fisheries, and the promise was an oral one made in conjunction with, but separate from, the written promises contained in the treaty. The second theory, under Section 2 (5) of the Indian Claims Commission Act, is based on fair and honorable dealings: that relief would be applicable if it were found that the Makah were misled by Stevens into believing that their fisheries aid would be received separately from, and over and above, the consideration for their land, when in fact this was not intended. Third, it is asserted that a claim under Section 2 (3) of our act would result if the treaty between the Makah and the United States were revised on the ground of "fraud, duress, or unconscionable consideration, mutual or unilateral mistake, whether of law or fact," a situation existing if there was a misunderstanding between the parties, or by either party, in believing that the promise of fisheries aid would be legally binding on the United States. The last theory is based on Section 2 (1) of our act and is a claim in law and equity under which a determination is sought that the fisheries aid would be subsumed under Article V of the treaty, that the United States failed to provide the aid as requested by the Makah and their agent, and that the United States had substantially failed to perform what was required to be done under Article V of the treaty.

In response, defendant contends that the amount of fishing gear Governor Stevens promised to provide is not specified by either the negotiating record or the treaty itself. However, defendant infers from the context of Stevens' dealings with the Northwest Indians generally, and with the Makahs specifically, that the agreement contemplated only a small allowance for fishing gear. Defendant further contends that it has satisfied this obligation with the amount of gear it actually provided the plaintiff.

These contentions may be resolved by an examination of the 1855 treaty language, the circumstances of its negotiation, including any oral promises, and the subsequent dealings of the parties.

In the course of his tour of treaty-making with the western Washington tribes, Governor Isaac Stevens made his initial contact with the Makahs on the evening of Monday, January 29, 1855, when his schooner reached Neah Bay. The treaty party had already sent messengers to bring in representatives from the other Makah villages.

On the following day, Stevens and George Gibbs, his secretary, surveyed the Cape Flattery area while the Indians of the other Makah villages were arriving. That evening Stevens called a meeting of the Makah chiefs on board his schooner to hear the details of the proposed treaty. When Stevens had finished, the Makah speakers immediately raised the question of their fishing rights, and stated their unwillingness to

leave their village sites along the ocean and Straits of Juan de Fuca. Stevens responded to their resistance by advising them that ". . . so far from wishing to stop their fisheries, he wished to send them oil kettles, and fishing apparatus." These assurances did not satisfy the Makahs. They continued to resist the idea of leaving their fishing villages and abandoning their control of beach rights. Again, Stevens assured them that he wanted them to fish, but together with the whites. He further assured them that they would retain ownership over whales they brought ashore and warned them that if they did not agree to the treaty, they might be crowded out by the whites. Unconvinced, the Makahs reiterated their fears of losing their fishing rights.

On the third day, Stevens addressed the assembled Indians and again warned them that the whites were "crowding in upon you." He told them that the United States ". . . wants to buy your land and give you a fair price." He further explained that the United States would send them "barrels in which to put your oil, kettles to try it out, lines and implements to fish with . . ." This offer represented a departure from Stevens' customary practice of promising the Northwest Indians only education and agricultural assistance. However, as Stevens had been given broad discretion in dealing with the Indians, it was not inappropriate for him to depart from the normal guidelines and procedures. It was only after Stevens had finished this last speech that the Makahs were willing to accept the treaty. One of the Makah chiefs, Kalchote, is recorded as saying: "What you have said was good and what you have written is good."

The change of heart by the Makahs after bargaining with Stevens suggests the very great emphasis which the Makahs placed on what Stevens had orally told them rather than the written words of the treaty. In addition, the circumstances at the council were probably such that Stevens would have been unable to conclude the treaty unless he assured the Makah of being able to continue fishing, whaling and sealing, and promised to provide assistance in the form of fishing gear. Given these unique circumstances at the Makah negotiation and Stevens' discretionary powers, there is no reason to doubt his willingness to make such special commitments to the Makah, commitments not made to other tribes. Moreover, Stevens' intention that his promise of fishing assistance be recorded as an integral part of the understanding between the United States and the Makah, is further evidenced by his request that the treaty minutes be published along with the treaty.

Article V of the 1855 treaty called for a \$30,000 consideration in the form of annuities to be paid to the Makah Tribe over a twenty year period,

all of which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto. [12 Stat. 940]

The written treaty made no mention of fishing gear. However, when we consider such factors as Governor Stevens' unqualified oral promises of fishing gear and related apparatus to the Makahs, the logical need of the Makahs for fishing gear rather than agricultural or educational assistance, the Indians' understanding that the principal monetary consideration in the treaty was the \$30,000 provided for in Article V, the publication of the negotiating transcript along with the treaty, and the fact that after the agreement the resident agents repeatedly asked for fishing gear and apparatus, the Commission believes that the net effect of Stevens' oral promise to the Indians was a refinement and modification of the specific language in Article V, and, as such, restricted the President's discretion to selecting "beneficial objects" which were requested by the Makah through their resident agents.

Plaintiff, however, would have the Commission go further, and hold that Governor Stevens' promise of fishing gear was an open-ended one, not related to or limited by the \$30,000 referred to in Article V. Such a construction of the treaty would contradict Stevens' general policy of offering a fixed dollar amount based entirely on the number of chiefs and members of the tribe. The transcript of the treaty negotiations shows the Makahs expressing concern over their fishing rights, not coaxing Stevens to increase the amount of consideration offered. The Makahs were experienced in trade and commerce, and were not likely to expect that a promise of goods would have no stated limits. The Commission concludes

that the understanding of the parties to the treaty was that Article V called for the eventual delivery of \$30,000 worth of fishing gear.

The evidence of record in the form of vouchers shows a total expenditure under Article V of the Makah treaty of \$265.40 for fishing gear. This is a breach per se of the promise subsumed under Article V, evidenced by the repeated post-treaty requests and demands made for performance. The promise for fishing gear having been breached, there is a failure of consideration under Article V of the treaty. At this juncture of the case, the plaintiff tribe is entitled to recover from the defendant \$29,734.60.

This still leaves open the question of conscionability of the overall treaty consideration for the lands ceded by the Makah. There is evidence in the GAO report that additional consideration was paid under the treaty, especially under Article 11. Some payments under similar provisions of Governor Stevens' treaties have been credited as consideration in other cases. See Duwamish v. United States, 79 Ct. Cl. 570 (1935); Upper Skagit Tribe v. United States, Docket 92, 13 Ind. Cl. Comm. 583 (1964). The Commission is of the opinion that the parties should have an opportunity to brief the question of the overall treaty consideration. We will accordingly set this matter for further briefing and will withhold final decision until the briefs have been received.

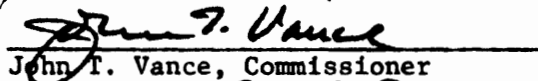
Finally, we note in passing that an order was signed granting the defendant's motion for trial in two stages, and plaintiff's motion for continuance, 34 Ind. Cl. Comm. 413. The purpose of that order was to

allow a hearing on the issue of liability, and, should liability be found, a subsequent hearing to determine its extent. Since the findings of fact and opinion rendered herein establish defendant's liability to the plaintiff and the extent of liability, the need for a second hearing has been obviated. Accordingly, the Commission's order of August 14, 1974, providing for a trial in two stages will be vacated with respect to that provision.


Richard W. Yarborough, Commissioner

We concur:


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Margaret M. Pierce, Commissioner


Brantley Blue, Commissioner