

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

ADDITIONAL FINDINGS OF FACT

The Commission makes the following findings of fact supplemental to Findings 1 through 7 entered May 20, 1970, 23 Ind. Cl. Comm. 171:

8. Scope of the Makah Fisheries Prior to the Treaty of Neah Bay of 1855. Historically, the Makah have maintained an extensive fishing industry in the area of the Pacific Ocean and the Straits of Juan de Fuca. Their villages were along the coast south and east of Cape Flattery. In the early 1790's, Spanish and English sailors recorded the purchase of salmon and halibut from the Makahs as well as oil obtained from dogfish, whales, seals and codfish. This oil was important for its use as a lubricant in machinery, especially the sawmills, as well as for domestic use by settlers.

Because of the Makahs favorable position at the entrance of the Straits of Juan de Fuca, they came in contact with significant numbers of sailing vessels entering the Straits, prior to the Treaty of Neah Bay. The importance of their maritime activities enabled them to amass greater wealth than other tribes in the Puget Sound area. This wealth

resulted in large part from their activities in the production and sale of dogfish and whale oil as well as the sale of dried halibut and whale blubber.

The Makahs also served as middleman in an extensive trade based on marine products in which they disposed of these products through trades and sale to the Indians on Vancouver Island and to the Hudson Bay Company at Victoria. Their sales of processed oil ranged from 2,000 to 30,000 barrels annually.

The extent of this commerce appears to have been known to at least two of the participants in the subsequent treaty talks. Col. Michael T. Simmons, who was the Indian Agent, and Frank B. Shaw, who was the interpreter, had both resided in the Puget Sound area for a decade prior to the making of the treaty and had contact with the Makah.

9. Interest by the United States in Negotiating a Treaty With the Makah. Prior to 1855, the United States was desirous of extinguishing Indian title among all the tribes in the Washington Territory in order to avert problems between the Indians and the settlers who were moving into that area. Additionally, with respect to the Makah, there was concern for the safety of shipwrecked persons and property, since the Makah claimed ownership to anything wrecked on their shores.

10. Status of Governor Stevens Regarding His Authority and Instructions Relative to Treaty Negotiations. When Isaac I. Stevens took office as Governor of the Washington Territory on March 21, 1853,

he simultaneously became ex-officio Superintendent of Indian Affairs under an Act of March 2, 1853 (10 Stat. 172-179). At the time the Washington Territory was created, no treaties had been concluded with the Indians residing within its boundaries. Governor Stevens was advised on August 30, 1854, that he had been designated to negotiate treaties to extinguish title with the Indians.

In a letter from the Acting Commissioner of Indian Affairs, Charles E. Mix, dated August 30, 1854, Stevens was given general guidelines and specific instructions. His specific instructions related to the order in which the treaties were to be negotiated in the event it was not feasible to negotiate with all tribes, and the general guidelines had to do with the number of treaties and reservations to be provided. Generally, he was given ample latitude within which to negotiate. He was provided with recently concluded treaties to serve as guidelines.

11. Origins of the Provisions Contained in the Treaties Negotiated by Governor Stevens. Based upon the provisions contained in treaties with the Rogue River and Cow Creek Indians, and the Omaha, Otoe and Missouri Indians, Governor Stevens, commencing December 7, 1854, began to prepare a draft of a uniform treaty to be used with all the tribes of Puget Sound and the coast. On December 10, 1854, the form of the treaty was concluded. From December 26, 1854, through January 1855, Stevens and his party procured the agreement of the Puget Sound tribes to the standard form treaty. The only distinction between the treaties

was the compensation for the land, which was based on a standard formula allowing a specific dollar amount per person and for chiefs.

12. Purposes and Intentions of Stevens in His Dealings With the Makahs. Governor Stevens and the other officials of the treaty party knew, prior to their negotiations, of the Makah's extensive maritime trade. The continuation of this maritime trade was as important to the white population as it was to the Makahs. Stevens intended to grant the Makahs a small shoreline reservation which would serve primarily as a trading and fishing base, and only incidentally as an agricultural base. (See Pl. Ex. C-33, p. 7-8; Pl. Ex. C-40.)

13. Treaty Negotiations With the Makahs. The Stevens' party arrived at Neah Bay by ship on the evening of January 28, 1855. The following morning they set up camp at the village and made contact with the Makahs. One of the members of the treaty party, Frank B. Shaw, interpreted for Governor Stevens. Although he spoke no Makah, he would translate the English into Chinook jargon, and a Makah who spoke Chinook translated it into the Makah language. (Chinook jargon was a commercial language of a few hundred words, taking its origin from all the languages used in the area.)

On Tuesday, January 30th, the third evening of their stay at Neah Bay, the treaty party called a meeting of the Makah chiefs aboard ship to hear the details of the proposed treaty. After Stevens had described the benefits which would accrue to them under the treaty,

the Makah chiefs expressed reservations about the treaty. They were afraid of losing access to their fisheries. George Gibbs, acting as secretary for the negotiations, reports Stevens' next remarks: "Governor Stevens informed them that so far from wishing to stop their fisheries, he intended to send them oil kettles, and fishing apparatus." The chiefs repeated their wishes to remain in their houses by the ocean and to fish in common with the whites. Stevens then adjourned the meeting until the next day, asking the Makahs to consider the matter during the night.

On the following day, January 31, 1855, Stevens addressed the Makahs who were assembled and repeated his promises from the previous night with respect to aiding the Makah fisheries:

He [Great Father] knows what whalers you are, how you go far to sea, to take whales. He will send you barrels in which to put your oil, kettles to try it out, lines and implements to fish with-- the Great Father wants your children to go to school and learn trades and this will be done if we sign today. I am now about to read you a paper. If you like it, we will sign it. If it is good I shall send it to the Great Father, and if he likes it he will send it back with his name . . . When it is agreed to, it is a bargain.

Stevens seems to have made these promises regarding fishing aid to Makahs by the United States to induce the Makahs to sign the treaty. According to the transcript of the proceedings, the treaty was read to the Makahs, interpreted and explained. The Makahs signed the treaty, and the Stevens party departed that evening.

14. Post-Treaty Conduct of the Parties Concerning Fisheries Aid.

Within a year after ratification of the treaty, requests began to be forwarded to Washington for fisheries aid for the Makahs. For three decades, from 1860 to 1891, the official reports record repeated requests by the United States agents, superintendents and inspectors for funds to aid and support the fishing interests of the Makah Tribe. These requests frequently reflected the specific wishes of the Makahs themselves. The requests were for houses for salting and drying fish, for furnishing of fishing seines and iron and steel for hooks and spears, for instruction in methods of preservation and preparation of fish for market and the making of barrels, for provision of schooners and seaworthy vessels. Michael Simmons, who was active in the 1855 treaty negotiations as Indian agent, five years later requested funds for construction of houses for salting and drying fish. In 1867 agent H. A. Webster requested the sum of \$6,000 for the purchase of a schooner and forwarded his request to Washington as an estimate of sums necessary to fulfill treaty stipulations. The fact that such requests began with Simmons, who had actually helped negotiate the Makah treaty, and persisted for over three decades, indicates an understanding on the part of government agents that the Government had undertaken to supply such aid.

15. Amount of U.S. Aid to Makah Fisheries Actually Delivered.

Defendant's Exhibit C-1, the General Accounting Office Report, reflects the following disbursements under the category of hunting and fishing equipment:

Disbursements Made Pursuant to Art. 5 of the Makah Treaty (Ex. C-1, p. 14)	\$ 236.79
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Disbursements Made Pursuant to Art. 11 of the Makah Treaty (Ex. C-1, p. 15)	\$ 673.56
Disbursements Made for the Benefit of the Makah Tribe Other Than Treaty Appropriations from January 31, 1855 to December 31, 1949 (Pl. Ex. C-1, p. 20)	473.33
Disbursements Made for the Benefit of the Makah Tribe Under the Appropriation "Incidental Expenses of Indian Service in Washington" (Pl. Ex. C-1, p. 34)	15.55
	<hr/> \$1,399.23

The Government offered vouchers numbered as Exhibits No. V-100 through V-102; V-200 through V-210 and V-300 through V-301. The Government's witness testified that these vouchers were all the vouchers and claims settlements pertaining to treaty expenditures for hunting and fishing. These vouchers and claim settlements disclosed the following claimed disbursements for items identifiable as useful in fishing activities:

<u>Exhibit No.</u>	<u>Description of Item</u>	<u>Amount</u>
V-100	One large seine	\$ 200.00
V-200	Three fish lines, one half-dozen fish hooks, two pounds of wire, three-quarter pound shot	1.50
V-102	Fishing equipment including five fish barrels and five hundred pounds salt	18.25
V-202	One-half dozen fish hooks	.25
V-203	One cod line, two pound brass wire	3.25
V-204	8 hooks, one fish line	1.25
V-205	4 pounds seine twine	14.00
V-206	14 fathoms hemp cable, one row lock for boat	11.50

<u>Exhibit No.</u>	<u>Description of Item</u>	<u>Amount</u>
V. 207	Two barrels; 210 pounds of salt (voucher includes item of three pairs of oars for boat. This is considered unlikely to have been intended for Indian use as Indians were using canoes at this time)	\$ 14.40
V-208	Two paddles	<u>1.00</u> \$ 265.40

The Government offered no other evidence of supplying fishing equipment, implements, barrels, lines, or kettles.

There is no showing by the Government that any of the amounts shown in Exhibit C-1 to have been expended for hunting and fishing equipment were in fact expended entirely for fishing equipment or what portion actually reached the Makahs. The Government's witness conceded that Exhibit C-1 does not establish that disbursements shown under Article 5 ^{1/} were

1/ Article 5 of the treaty of Neah Bay provides:

Article 5. In consideration of the above cession the United States agree to pay to the said tribe the sum of thirty thousand dollars, in the following manner, that is to say: During the first year after the ratification hereof, three thousand dollars; for the next two years, twenty-five hundred dollars each year; for the next three years, two thousand dollars each year; for the next four years, one thousand five hundred dollars each year; and for the next ten years, one thousand dollars each year; all of which said sums of money shall be applied to the use and benefit of 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 superintendant of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

made pursuant to the express wishes of the Makahs, nor does it contain any evidence that the money disbursed went to goods actually delivered to or used for the benefit of the Makah Indians.

Conclusion

Based upon the foregoing findings of fact and all the evidence of record, the Commission concludes as follows:

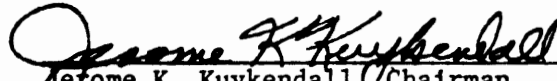
(a) The Makah have engaged in fishing, whaling, and sealing on an extensive basis for several hundred years. Their production of marine products was used extensively by white settlers as well as other Indians.

(b) Governor Stevens, as head of the treaty negotiating team, had broad latitude in making a treaty with the Makahs. It is clear that Stevens promised the Makah fishing gear as an inducement to sign the treaty.

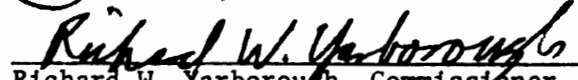
(c) The promise of fishing gear was an integral part of the written treaty. The stated consideration of \$30,000 was construed by the Makah to be paid in the form of fishing equipment. Stevens would not have been able to successfully negotiate the treaty had he not promised the Makahs assistance for their fisheries.

(d) The post-treaty conduct of the parties tends to indicate that the Indian agents wanted to provide fishing implements and the Makah wished to receive them. However, repeated efforts on the part of the agents and the Makah were generally unsuccessful in achieving any significant results. The treaty made no mention of fishing gear, and the oral

promise to provide such gear was breached. Vouchers submitted by defendant indicate the Makah actually received \$265.40 in useful fishing gear. Therefore, the plaintiffs are entitled to the difference between \$30,000 and the \$265.40 worth of gear actually received.


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner