

## BEFORE THE INDIAN CLAIMS COMMISSION

THE S'KLALLAM TRIBE OF INDIANS, )  
 )  
Plaintiff, )  
 )  
v. ) Docket No. 134  
 )  
THE UNITED STATES OF AMERICA, )  
 )  
Defendant. )

Decided: November 5, 1976

## Appearances:

Frederick L. Noland, Attorney for  
Plaintiff; MacDonald, Hoage and  
Bayless were on the Brief.

Richard L. Beal, with whom was  
Walter Kiechel, Jr., Acting Assistant  
Attorney General and Peter R. Taft,  
Attorneys for Defendant.

OPINION OF THE COMMISSION ON PLAINTIFF'S MOTION FOR REHEARING,  
FOR AMENDMENT OF FINDINGS AND FOR EXTENSION OF TIME

Kuykendall, Chairman, delivered the opinion of the Commission.

On November 24, 1975, the plaintiff filed a motion for rehearing and for amendment of findings and for extension of time directed at the Commission's additional findings, opinion, and interlocutory order of October 1, 1970. The plaintiff's attorney, in an affidavit filed with the motion, states that the plaintiff does not propose to call any witnesses nor does it intend to submit an additional brief beyond the points set out in support of the motion. This motion is filed more

than five years after the entry of the order to which it is directed and plaintiff has requested an extension of time beyond the thirty day period set out in Rule 33 of the General Rules of Procedure of this Commission for the filing of such a motion.

Plaintiff's motion requests that the opinion, additional findings of fact, and interlocutory order in this case, dated October 1, 1970 (23 Ind. Cl. Comm. 510), be amended to find that the United States paid consideration of \$15,000.00 rather than \$39,180.00 as previously found. The plaintiff further requests that the interlocutory award previously entered herein be increased from \$400,820.00 to \$425,000.00.

In support of the motion plaintiff urges that documents filed by the defendant and admitted into evidence in the offset phase of this case are "newly discovered evidence" and of such significance as to materially affect our October 1, 1970, determination of the extent to which the S'Klallams shared in the consideration paid under the 1855 treaty; that this "newly discovered evidence" compels the conclusion that very few or less than one half of the tribe participated in the distributions under the treaty; and that "the amount of Fifteen Thousand Dollars (\$15,000) rather than the Thirty Nine Thousand One Hundred Eighty Dollars (\$39,180.000) previously found, would be an appropriate 'payment on the claim'".

On December 4, 1975, the defendant filed a response in opposition to the motion of the plaintiff and pointed out among other things the untimeliness of the motion, that the matter of consideration was expressly conceded by plaintiff in an earlier pleading, that plaintiff's allegations are not factual, and that the documentary material cited by the plaintiff does not constitute "new evidence".

Section 33 of the Commission's "General Rules of Procedure" permits either party to challenge the Commission's conclusion on its findings of fact by filing a motion to rehear within thirty days after said findings have been entered. Only three grounds are available to the movant in a motion for rehearing; error of fact, error of law, and newly discovered evidence. In this instance the plaintiff has opted for "newly discovered evidence."

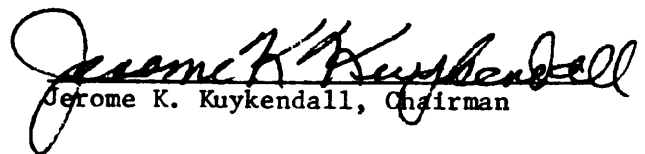
Apart from its obvious lateness, the Commission fails to see how documentary evidence of record, originally gathered and introduced by the defendant, qualifies as "newly discovered evidence" under Section 33 of our rules, simply because plaintiff's counsel had no prior knowledge of the material. What the rule contemplates is the proffer of proposed evidentiary material that has been newly discovered by the moving party within the meaning of the term as set forth in the rule.

What is fatal to the plaintiff's position, however, is that excerpts from practically all these same annual reports were placed in evidence by the

defendant during the early years of this litigation, and were considered by the Commission in its 1958 title decision. 5 Ind. Cl. Comm. 680, 684. In fact, excerpts from the 1873 and 1879 annual reports, specifically cited by the plaintiff in the instant motion, were originally admitted into evidence as "Def. Ex. 224" and "Def. Ex. 71". The material quoted by the plaintiff from these two reports may be found in part in the "Appendix" to "Defendant's Request For Findings of Fact, Objections to Findings of Fact by Petitioner, and Brief", filed herein on June 20, 1957.

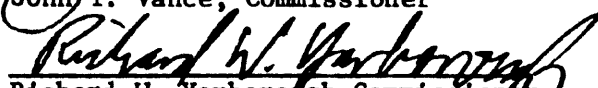
The Commission decides each phase of an Indian case on the entire record as it stands. The record in this case included the relevant evidence cited by the plaintiff when we decided the matter of the amount of the 1855 Treaty consideration which is allocable to the S'Klallam Indians. On our own initiative we have again reviewed the record on this issue in the light of the matters raised in the plaintiff's motion to rehear, and we find the preponderance of the evidence more than adequately supports our 1970 decision. 23 Ind. C. Comm. 510.

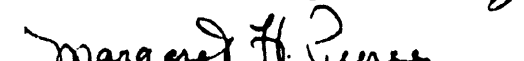
Plaintiff's motion for rehearing and amendment of findings is denied.

  
Jerome K. Kuykendall, Chairman

We concur:

  
John T. Vance, Commissioner

  
Richard W. Yarborough Commissioner

  
Margaret H. Pierce, Commissioner

  
Brantley Blue, Commissioner