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, Hoague & Bayless were on the Brief.

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

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

This opinion deals with the amount of offsets to be allowed against the interlocutory award previously entered in favor of the plaintiff against the United States. The Commission has determined that the plaintiff ceded its aboriginal land to the defendant as of March 8, 1859, by the Treaty of Point-No-Point, dated January 26, 1855, 12 Stat. 933, (5 Ind. Cl. Comm. 657 (1957)).

On October 1, 1970, the Commission determined that the 438,430 acres ceded to the United States by the plaintiff had a fair market value of $440,000.00 as of the effective date of the above treaty, that $43,098.00

was the amount of the promised consideration allocable to the S'Klallam Tribe under the treaty, and that this consideration was unconscionable under Section 2 (3) of the Indian Claims Commission Act,[1/] 60 Stat. 1049, 1050 (23 Ind. Cl. Comm. 510).

On October 30, 1970, the defendant filed a motion for rehearing and amendment of findings in which it alleged that the sum of $399,277.68 that was paid by the United States to the S'Klallam Indians under the Act of March 3, 1925, should be treated as additional consideration and as a payment on the claim in this case. This motion was denied by our order of June 7, 1972. (28 Ind. Cl. Comm. 146, 157.)

On February 3, 1971, the defendant filed a detailed memorandum relative to gratuitous offsets and attached thereto Defendant's Exhibit G-1, a supplemental report of the United States General Accounting Office setting out gratuitous land acquisitions in 1937 and 1938 for the plaintiff in the amount of $73,701.45, plus $4,836.57 in gratuitous expenditures for the years 1881-1896, 1941 and 1945, for clothing, household equipment and supplies, provisions, and funeral expenses.

On August 16, 1972, the defendant filed an amended answer formally claiming the above offsets in this case, less $65.00 for funeral expenses for the years 1941 and 1945. The plaintiff in its reply, filed on

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1/ Defendant was credited with $39,180 as the actual treaty consideration paid to the S'Klallam Indians. We have this day denied the plaintiff's motion of November 24, 1975, for rehearing and for amendment of findings which challenged the correctness of the Commission's determination of that portion of the Point-No-Point Treaty consideration allocable to the plaintiff tribe.

August 15, 1975, denied that the defendant is entitled to any of the offsets claimed.

The defendant in its proposed findings of fact and brief, filed on October 6, 1975, concluded that it was unable to prove that the gratuitous expenditures for clothing, household equipment, supplies and provisions as set forth in the accounting report were in fact for the benefit of the plaintiff tribe. Accordingly, the Government has declined to pursue any claim for those gratuities and such claim will be dismissed.

We turn now to consideration of the defendant's contention that it gratuitously expended the sum of $73,701.54 pursuant to Section 5 of the Indian Reorganization Act of 1934 (48 Stat. 984) for the purchase of 1,604.44 acres of land in trust for the S'Klallam Indians in 1936 and 1937.

Section 2 of the Indian Claims Commission Act shows that Congress intended that the Government should be allowed to offset all amounts actually expended under Section 5 of the Indian Reorganization Act if the Commission ". . . finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action." 60 Stat. 1050. United States v. Emigrant New York Indians, 177 Ct. Cl. 263, 287 (1966).

We are satisfied from the record in this case that the course of dealings between the plaintiff and the defendant has not been such as to preclude the United States from receiving credit for such gratuitous offsets as may be allowable. The plaintiff, however, has objected to the

Commission allowing as an offset the defendant's expenditures in 1936 and 1937, totaling $58,701.64, for the purchase of some 372.74 acres of land in trust for the plaintiff tribe. These land purchases, which we have identified in our findings as "the Lower Elwha Tract", were located on lands that this Commission had previously determined aboriginally belonged to the S'Klallam Indians and in turn were ceded by the plaintiff to the United States under the 1855 Treaty of Point-No-Point. The plaintiff contends that these particular land transactions arise from the fact that land formerly belonging to plaintiff had been taken and held by the United States for a period of years and then returned to plaintiff, resulting in a temporary taking by the Government.

In the case of Pueblo de Zia v. United States, 26 Ind. Cl. Comm. 218 (1971), the Commission held that where an offset claim involves the temporary taking of Indian land as is the case here, the value of the offset is its fair rental value. In Zia, the temporary holding of Indian lands in excess of 20 years (using a capitalization rate of 5%) cancelled out the offset, since the value of the use of the lands which the tribe lost exceeded the value of the offset. In the instant case, the Government has deprived the S'Klallam Tribe of the use of 372.74 acres of its former lands for 77 or 78 years, with the result that the loss to these Indians far exceeds the value of the defendant's claimed offset. In approving our decision in Zia the Court of Claims had this to say:

> At the heart of the matter the Commission was seeking to avoid the absurd result of permitting the Government virtually

> free use of Indian lands for periods varying from 20 to 32 years. This result would have obtained because these five offsets sought by the Government would have canceled out any award for the initial taking of these same lands under any valuation theories advanced in this case. 2/

The court then went on to say,

> We cannot say that in the exercise of its discretion the Commission erred in this limited use of the theory of temporary taking in valuing and finding inappropriate these five claimed offsets of aboriginal land. 3/

For the reasons stated above, we agree with the plaintiff that the defendant's claimed offset of $58,701.54 for the 372.74 acres in "the Lower Elwha Tract" should be disallowed.

In 1936, the United States, without any obligation to do so, purchased in trust for the plaintiff tribe 1,231.7 acres of land for $15,000. This tract is located across a small inlet from Port Gamble, Washington, and we have referred to it in our findings as "the Port Gamble Tract." While "the Port Gamble Tract" may have been situated in the aboriginal area claimed by the S'Klallam Tribe as being ceded to the United States in 1855, the Commission's determination of the extent of the S'Klallam aboriginal land area places this tract outside of the ceded lands. We are therefore not faced with the problem of the subsequent return of aboriginal lands as was the case with "the Lower Elwha Tract". The defendant's claim of $15,000 for the gratuitous purchase of "the Port Gamble Tract" for the benefit of the plaintiff tribe will be allowed.

2/ United States v. Pueblo de Zia, 200 Ct. Cl. 601, 615 (1973).

3/ Id. at 620.

It being the Commission's opinion that the gratuitous offsets in the amount of $15,000 are allowable under Section 2 of our Act, the interlocutory award previously entered herein will be reduced by that amount and the plaintiff shall have a final award for $385,820.

Jerome K. Kuykendall, Chairman

We concur:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner