BEFORE THE INDIAN CLAIMS COMMISSION

MAKAH INDIAN TRIBE, a Corporation,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 60

Decided: Apr. 15, 1959

Appearances

J. Duane Vance, Attorney for the Plaintiff.

Maurice H. Cooperman, with whom was Mr. Assistant Attorney General, Perry W. Morton, Attorneys for the Defendant.

OPINION

Witt, Chief Commissioner, delivered the opinion of the Commission.

The Makah Indian Tribe, petitioner herein, filed an amended petition on September 15, 1952, setting forth two distinct claims. One claim calls for a million dollars as additional compensation for lands ceded by the petitioner tribe under the 1855 Makah Treaty (12 Stat. 939), the other asks ten million dollars as damages for alleged deprivations of fishing rights reserved by the petitioner tribe under Article IV of said treaty. In order to facilitate early determination of the issues involved in each claim, the Commission ordered severance and the assignment of separate docket numbers. Accordingly, the land cession claim

now bears Docket No. 60-A, while the present Docket No. 60 is concerned only with the question of defendant's liability, if any, for alleged deprivation of petitioner's right to take fur seals and halibut. 1/

Preliminary to determining the ultimate issue of liability, the question of petitioner's capacity to bring and maintain the action is also up for decision. We shall make special note of this as our decision in this regard will in like manner adjudicate the identical question in Docket 60-A, since severance of both claims occurred after hearing the evidence needed to resolve this point. Defendant in its answer and brief has not seriously challenged petitioner's legal capacity before the Commission.

It would seem that from the earliest recorded history of our country, there has always existed a certain group of American Indians closely identified with the extreme northwest portion of what is now Washington State. This group inhabited the region around Cape Flattery and the entrance to the Juan de Fuca Straits, and is singularly identified by its distinctive linguistic characteristics. The members of this tribe were well known for their sea faring prowess, earing great reputations as whalers and deep sea fishermen. These coastal Indians have at times been called Makahs, Classets, people of the Cape, and Cape Flattery Indians, among others.

1/ Petitioner has subsequent to the filing of its petition and the conclusion of the hearing thereon, abandoned any claim for violation of its fishing rights insofar as the taking of salmon is concerned. Petitioner's brief, pages 4,5,29. Petitioner's proposed finding VII.

From the early Spanish and English explorers we find first recorded contact with the Makahs of any worth. Of particular interest and historical value are the early visits of famed English explorer, George Vancouver, around the turn of the nineteenth century.

Later on toward 1850, men from the Hudson Bay Trading Company, American Government officials and ethnologists had increased the frequency of white contact with the Makah tribe.

George Gibbs, who served as secretary to Governor Isaac Stevens' treaty Commission and who was present and participated in the 1855 Makah treaty, made several pre-treaty visits to the Makahs, and as a result he wrote extensively on the life, customs, and habits of these Pacific Coast Indians. After the 1855 treaty the petitioner tribe retired to the reservation life at Neah Bay, Washington, where its members have continued a form of tribal organization ever since.

In the post treaty era James Swan, famous as an ethnologist and expert on Puget Sound Indians, spent a great deal of time with the Makahs, having taught among them at the reservation during the 1860's. Under the direction of the Smithsonian Institute he compiled and published in 1868 a comprehensive and scholarly report on the Makah Indians entitled, "The Indians of Cape Flattery."

In 1914 Edward P. Curtis, noted author of the twenty volume masterpiece, "The North American Indian", and another Indian expert, visited the tribe at their Neah Bay reservation.

Population wise, the best estimates at the time of the 1855 treaty place the number of Makahs at slightly less than 800 while the 1950 census sets the figure at 550 souls.

From all the evidence and facts as set out in more detail in the Commission's findings 1 through 4, the Commission finds that the petitioner tribe is an identifiable group of American Indians within the meaning of Section 2 of the Indian Claims Commission Act (60 Stat. 1050), and have the capacity to maintain this suit. In addition, we find that the petitioner tribe is the representative of those Makah Indians whose ancestors negotiated the Makah Treaty of January 31, 1855, at Neah Bay, Washington.

Turning now to the principal task of determining whether or not defendant is liable for alleged deprivations of petitioner's fishing rights, the Commission finds that the legal basis for this claim arises solely from the language of Article IV of the 1855 treaty. Thus as pleaded, petitioner's claim is properly before us under Clause (1) of Section 2 of our Act. 2/

Article IV, insofar as pertinent, reads as follows:

> "The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, * * *"

There is nothing new or unique in finding such a provision in the 1855 Makah treaty. More than a half dozen treaties contain substantially similar provisions for the benefit of other northwest Indian

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2/ 25 U.S.C. 70(a)... "(1) claims in law or equity arising under the constitution, laws, treaties of the United States . . ."

tribes, who, like the Makah tribe, enjoyed a maritime economy. 3/

Petitioner contends that since the 1855 treaty, the United States has entered into certain international agreements, and by so doing, has abridged and deprived the petitioner of its reserved treaty rights such as in this case, to take the fur seal and to deep sea fish for halibut. The international agreements relied upon are: the four power convention of 1912 between the United States, Canada, Japan, and Russia, as amended and implemented by legislation, which convention was concluded for the preservation and protection of the fur seals and sea otter which frequent the waters of the North Pacific; and, the convention of 1924 between Canada and the United States, as amended and implemented by legislation, which convention established the International Fisheries Commission to administer a program for the preservation of the halibut fishery of the Northern Pacific Ocean (37 Stat. 1538; 48 Stat. 648).

If we have judged petitioner's legal theory correctly in its brief, its argument is as follows. The fishing rights reserved under Article IV of the 1855 Makah Treaty are inviolable to such an extent that the Government cannot interfere with them in any manner even if it undertakes to enact or conclude a treaty or pass reasonable laws pursuant thereto for the avowed purpose of conserving and protecting the very subject matter upon which the exercise of the right depends. No one disputes the paramount right of the United States, when acting in its

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3/ See - Treaty with the Nisqually, Puyallup, etc. (1853) 10 Stat. 1132, Art 3; Treaty with the Duwamish, Suquamish, etc. (1855), 12 Stat. 927, Art. 5; Treaty with the Skallam (1855), 12 Stat. 933, Art. 4; Treaty with the Walla Walla, etc. (1855), 12 Stat. 945, Art. 1; Treaty with the Yakima (1855), 12 Stat. 951, Art. 3; Treaty with the Tribes of Middle Oregon (1855), 12 Stat. 963, Art. 1; Treaty with the Quinault, etc. (1855), 12 Stat. 971, Art 3; Treaty with the Flatheads (1855), 12 Stat. 975, Art. 3.

sovereign capacity, to take needed steps to protect and conserve game, wild life, and other natural resources, but petitioner contends that, if such action interferes in any manner with its treaty rights, then the defendant must respond in damages. Thus, the crux of petitioner's argument centers about a proper interpretation of the extent of the rights reserved, for petitioner states quite clearly in its brief:

> Basically the problem presented in this case is a legal one involving a determination of what the plaintiff's rights were under a proper construction of the Makah Treaty. (Pet. Brief, p. 2)

Needless to say, defendant argues quite the contrary, its position being that such fishing rights claimed by petitoner tribe under Article IV of the 1855 treaty were gratuitously given by the Government, that they are merely co-equal in extent with the rights of other citizens, and as such are subject to interference and control by necessary conservation measures.

With the aid of the bare judicial expressions on the subject which we can muster, the Commission is of the opinion that the answer to the question lies somewhere between the extreme positions taken by the party litigants, and, that petitioner's fishing rights reserved under the 1855 treaty are indeed superior in some respects, that they cannot be abrogated or cut off in toto, but nevertheless are not so unlimited and untouchable that they cannot be tempered, accomodated, or adjusted to fit changing circumstances such as when the Government finds it necessary to take reasonable steps to conserve and protect fish and wildlife and other natural resources which belong collectively to all the people.

In the case of United States v. Winans, 198 U.S. 371 (1905), the Supreme Court was presented an opportunity to construe the limitations of a substantially similar fishing right reserved by the Yakima Indians under their 1855 treaty (12 Stat. 951). The Court made it quite clear that such reserved fishing rights are indeed superior in many ways to any corresponding right enjoyed by the white citizenry; so much so, that they impose a servitude on lands subject to sale and even the future grantees and the State of Washington through its licensing regulations could not exclude these Indians from exercising those rights on lands ceded by them.

Of particular interest and pertinent to our discussion is the following language from the court's opinion in the Winans case:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence to which those rights had to be accomodated. Only a limitation of them, however, was necessary and intended, not a taking away, * * *. (198 U.S. p. 381)

And finally near the end of its opinion the Court made the following statement:

> And surely it was within the competency of the nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the state unreasonably, if at all, in the regulation of the right. (198 U.S., p. 384)

A few years later in the case of Seufert Bros. Co. v. United States, 249 U.S. 194 (1919), the Court reaffirmed the principle of the Winans case, and extended it with respect to places outside of a ceded area.

In 1942, the Yakima reserved fishing rights under its 1855 treaty were again before the Court in the case of Tulee v. State of Washington, 315 U.S. 681. The state had convicted a Yakima Indian for salmon fishing without first having obtained a license and paying the proper fee. His conviction was reversed and the state's licensing statute held invalid in this instance as violative of the Yakima's reserved fishing rights. The Court reasoned that imposing a license fee in this manner was a charge on the Yakima's exercise of his treaty rights, since such licensing provision smacked more of a revenue raising measure than a purely regulatory provision indispensable to the state's conservation program. Nevertheless, in approving its former holdings in the Winans and Seufert cases, the Court in clear, unmistakable language delimited to some extent such Indian fishing rights where state conservation programs are in effect:

> * * *that while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question, 315 U.S. 681, 684.

In 1951, in the case of Makah Indian Tribe v. Schoettler, 192 F. 2d, 224, the United States Court of Appeals, Ninth Circuit, applying the rule of the Tulee case passed upon the very Makah treaty fishing rights with which we are concerned. In that case the court held that

where by treaty the Makahs were guaranteed the right of taking fish at accustomed grounds and stations, the burden was on the State of Washington to show that the regulations promulgated by it which limited the right as to time and manner, were necessary for the conservation of fish.

The Commission has read with some interest the several state cases cited by petitioner in its brief. While they are informative, we fail to see their pertinency or in what manner they can possibly alter or change a Supreme Court decision clearly delimiting an Indian treaty right. Whether or not a state finds that its own conservation laws and regulations interfere with or even abrogate per se Indian fishing rights reserved under a treaty provision, such decision offers no challenge to the SupremeCourt's interpretation that the same treaty right may be limited to some extent by state regulations necessary to conserve fish. In the instant case there is no problem of possible conflict between state and federal law; nor is the Commission faced with any interpretative ambiguities surrounding this particular treaty provision. In our view the Supreme Court's language is clear in the Tulee case and we will follow it.

Having concluded that the Makah fishing rights reserved under the 1855 treaty can be limited to some extent by reasonable and necessary conservation measures we reach the question whether those international agreements, laws, and regulations adopted for the avowed purpose of protecting, conserving and rehabilitating seal and halibut are so offensive

and an unwarrented breach of petitioner's treaty rights that the defendant has incurred liability.

The historical growth of the Alaska fur seal industry and the great northern Pacific halibut fishing are akin in many respects. Both ran the gamut from early superabundance to massive, reckless exploitation bordering upon complete destruction of the species, to government intervention through international agreements and regulation to conserve and rehabilitate seal and halibut, and, finally, success through a carefully administered cooperative effort between the interested countries resulting in a marked increase in total yield, coupled with a noticeable improvement in the physiological development of both species.

Prior to and at the time of the 1855 Makah Treaty, petitioner's ancestors ahd hunted the Alaska fur seal for years with marked success. Annually the great seal herds would migrate northward off the Pacific coast toward their breeding grounds among the Pribilof Islands in the Baring Sea. Putting out to sea in their long canoes the Makah sealers would contact the herd and then with great stealth they would silently go among the animals as they slept on the ocean surface and kill them with spears and harpoons. This type of sealing, killing them on the ocean surface, is known as "pelagic sealing."

With the purchase of Alaska from Russia in 1867, the United States acquired jurisdiction and control of the Pribilof Islands and in like manner inherited the lucrative sealing industry. Thereafter, the Government executed exclusive long-term leases with private companies who took seals under fixed quotas. Sealing was then a Government monopoly and the annual yield of skins was most satisfactory in producing a sizeable revenue.

Around 1879, pelagic sealing was growing in intensity, conducted on a large scale by independent sealers operating with firearms from ocean-going vessels. British, Canadian, and even Japanese sealing vessels began to operate without restriction in the Bering Sea. Pelagic sealing was necessarily indiscriminate, and the slaughter of females cut seriously into the reproductive ability of the species. Usually her death resulted in the death of an unborn pup or that of the new born pup left alone upon the Pribilof Island rookeries to face inevitable starvation. By 1890 the fur seal breeding stock had suffered a serious decline. In 1893 efforts of the United States to unilaterally police and regulate sealing in the Bering Sea were successively challenged on jurisdictional grounds by Great Britain. In that year the special Paris Arbitration Board, to whom the important jurisdictional question had been certified by mutual agreement, ruled that the United States could exercise no sovereign authority over foreign nationals beyond the customary three mile limit; henceforward, the Bering Sea was no longer mare clausum.

Thereafter by convention Britain and the United States sought to restrict the number of seals taken by putting into effect a quota system. This failed simply because pelagic sealing, the real culprit, remained unchecked. Only absolute prohibition of this practice would save the rapidly diminishing seal herds.

Not until 1911 was there concluded a firm international agreement between Great Britain, United States, and Japan calling for a fifteen year suspension on pelagic sealing. It avowed purpose was the preservation and protection of the fur seals which frequent the waters

of the North Pacific Ocean. Notably exempt from the prohibition against pelagic sealing were the Pacific Coast Indians who could engage in the practice as traditionally conducted, that is, without firearms and from open canoes. This exemption has been carried forward in succeeding conventions and in all implementing legislation thereto and is in effect today. 4/

In the years that followed the ratification of the 1911 convention, the results achieved through suspension of pelagic sealing have been most gratifying. The annual yield of seal skins has increased steadily and the threat of extinction of the species, once so imminent, has been removed.

The Commission is convinced from all the evidence and facts as detailed in the Commission's findings 7 through 12 that the circumstances subsequent to the conclusion of the 1855 Makah Treaty have justified the defendant's action in entering into international agreements for the preservation and protection of the Alaska fur seal. The regulations so adopted pursuant to said agreements are reasonable and necessary conservation measures. Exemption has always been made for the Pacific Coast Indians, including the petitioner, to engage in pelagic sealing as traditionally practiced by their ancestors, namely without firearms and from open canoes. This was the approved method of the Makahs at the time of the 1855 Makah Treaty and as such does not appreciably interfere with or undermine the purpose of the regulations.

4/ 16 U.S.C. 634 - Natives permitted to carry on pelagic fishing. "The provisions of sections 632 and 633 of this title shall not apply to Indians, Aleuts, or other aborigines dwelling on the American coast of the waters mentioned in section 632 of this title who carry on pelagic sealing in canoes or undocked boats propelled wholly by paddles, oars, or sails, and not transported by or used in connection with other vessels, and manned by not more than five persons each, in the way hitherto practiced by said Indians, Aleuts, or other aborigines, and without the use of firearms.... "

Therefore such international agreements, laws, and regulations do not abrogate the petitioner's right to take seal as reserved under Article IV of the 1855 Makah Treaty as judicially interpreted by the Supreme Court.

We reach the same conclusion on the question of there being a violation of petitioner's treaty rights relative to halibut fishing, and for substantially the same reason.

Up until 1883 deep sea halibut fishing off of Cape Flattery and the Juan de Fuca straits was generally the occupation of the northwest coast Indians, halibut being a prime food item. The favorite Makah halibut fishing grounds were the Swiftsure Banks which lay offshore some eighteen miles.

With the completion of transcontinental railway communication and the development of refrigerated cars, needed impetus was given to commercial fishing, so much so that its rapid expansion extended coastwise over a two thousand mile area and up into the Bering Sea. In a short period of time many fishing vessels of various sizes and description, all equipped with modern, highly efficient gear, were clustered on the better known banks. It was not long before these highly productive areas felt the impact of their concerted efforts. With the increase in total yield of the number of halibut taken there was a resultant decrease in the number taken per unit of gear. In other words, it took more and more equipment to land the corresponding number of fish, a strong indication that depletion was setting in. Contributing to this decline was the important biological fact that the

Pacific halibut's rate of growth is painfully slow with the female reaching maturity at twelve years of age. It was quite possible then that by overfishing a given area total depletion could be accomplished within the maturation period of a fish while incapable of reproduction.

Mutual concern over the problem of conserving the rapidly expiring halibut fishery was expressed by Canada and the United States. Early attempts at completing a program of uniform regulation fell to the wayside due to Congressional inaction in adopting the recommendations of a joint study commission. Finally in 1924 Canada and the United States concluded a treaty establishing the International Fisheries Commission to administer a program for the preservation of the Northern Pacific halibut fishery.

The Commission's prime power aimed at restricting the total catch rests in its ability to limit the open season for taking the halibut. Artificial propagation of the species has proven scientifically unsound. Areas are fixed and annual quotas established therein. Enforcement of the regulations, which are applicable to all fishermen, Indians included, is left upto the individual governments. Subsequent conventions of 1930 and 1953 have continued and strengthened the regulatory powers of the halibut commission.

Over the years the results of the halibut commission's regulatory policy have been most gratifying. The trend toward depletion has been arrested, and replenishment of exhausted stocks has been progressing through normal reproduction to such an extent that the known fishing banks are steadily approaching the point of optimum yield. This growth in abundance has been accompanied by improvement in the overall physical condition of the species.

Having set out in detail in the Commission's Findings 13 through 21, the facts pertinent to the issue of petitioner's fishing rights, as they relate to halibut, we find and conclude that the international agreements and regulations adopted thereunto, designed to protect and conserve the Northern Pacific halibut fishery, do not per se breach the petitioner's reserved fishing rights under the 1855 Makah Treaty. The Makah fishing rights, as we have indicated earlier, are not so absolute and inviolate that they cannot be adjusted and limited by regulations which, as demonstrated to our satisfaction in this case, are reasonable and necessary to insure conservation of the species.

While the regulations on certain occasions might prove somewhat irksome and inconvenient to the Indians by regulating the time and manner in which they may fish for halibut, it has been the growth and sharp competition of commercial fishing more than anything else that has interfered with the Makah's ability rather than their right to fish. Customary "hand line" fishing methods as practiced by the Makahs with their present equipment cannot compete volume wise with the "long line" commercial fishing boats, and acquiring and outfitting a modern fishing vessel is prohibitively expensive to the petitioner tribe. 5/ See following page

Even if it is conceded that the present regulations restricting the length of the season make it more difficult for the Makah fisherman to fish halibut commercially, still petitioner has not proven a breach of treaty rights. Looking at all the evidence in a light most favorable to the petitioner we do not find, among other things, that

the present Makah's daily sustenance requirements depend wholly upon halibut, or even that the regulations in question have been enforced against those Indians who non-commercially fish for halibut, or that in complying with these regulations the Makah Indian is unable to take sufficient halibut to sustain his immediate wants or those of his family. This is not to say that proof of any one or all of the above facts would necessarily support petitioner's claim, but nevertheless such facts do picture a situation more compatible and consistent with the nature and substance of the fishing rights reserved under the 1855 treaty.

In reaching our decision the Commission has considered the provisions of the 1855 Makah Treaty in light of the conditions existing at that time. In so doing, we cannot attribute to the 1855 treaty officials, as petitioner seemingly would have us do, a prophetic knowledge of future events; the technical advances in the science of fishing, the tremendous growth of the commercial halibut fishery and the Indians' participation therein, and the acquisition and development of the Pribilof sealing industry. Certainly neither treaty participant in 1855 could have contemplated that the then superabundance of halibut and seals would undergo reckless and destructive exploitation in the years to come, and that this in turn would result in the adoption of

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5/ Contrary to the position taken by the petitioner tribe, the Commission is of the opinion that any question involving a breach of promise by the United States to supply periodically to the Makah Tribe new fishing gear and other equipment is strictly collateral to settling the present controversy of the extent of petitioner's fishing rights under Article IV of the 1855 Makah Treaty; and, as such, might be considered, if at all, as one of the issues in Docket 60-A relative to adequacy of the consideration paid for the Makah land cession under that treaty.

vital conservation measures through cooperative international agreements. The Commission, therefore, is of the opinion that the Makah fishing rights reserved under the 1855 treaty are in no sense commercial rights, and on the contrary mean simply that the Makah Indians, as in the case of other west coast fish eating Indians, were to continue to have the right of taking fish and other marine products from the usual and accustomed places in order to satisfy immediate wants and provide the necessary sustenance for themselves and their families consistent with their then subsistence economy.

For this Commission to go ahead now and supply a more expansive interpretation to the 1855 Makah fishing rights in the form of a license for the petitioner tribe to adopt and utilize without any restriction modern techniques for taking seal and halibut, would not only frustrate and defeat present applicable conservation measures but is not warranted or justified under either the facts or law in this case.

In view of the above, plaintiff's case is dismissed.

Edgar E. Witt
Chief Commissioner

I concur:

Wm. M. Holt
Associate Commissioner