BEFORE THE INDIAN CLAIMS COMMISSION

THE UPPER SKAGIT TRIBE OF INDIANS,	)	Docket No. 92
THE SNOQUALMIE TRIBE OF INDIANS on its own behalf, and on relation of THE SKYKOMISH TRIBE OF INDIANS,	)	Docket No. 93
THE DUWAMISH TRIBE OF INDIANS,	)	Docket No. 109
THE LUMMI TRIBE OF INDIANS,	)	Docket No. 110
THE SNOHOMISH TRIBE OF INDIANS,	)	Docket No. 125
THE SUQUAMISH TRIBE OF INDIANS,	)	Docket No. 132
THE STILLAGUAMISH TRIBE OF INDIANS,	)	Docket No. 207
THE SWINOMISH TRIBE OF INDIANS,	)	Docket No. 233
THE SAMISH TRIBE OF INDIANS,	)	Docket No. 261
THE KIKIALLUS TRIBE OF INDIANS,	)	Docket No. 263
THE SKAGIT TRIBE OF INDIANS, also known as THE LOWER SKAGIT TRIBE OF INDIANS, also known as WHIDBEY ISLAND SKAGITS,	)	Docket No. 294
Petitioners,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: August 13, 1964

Appearances:

Donald C. Gormley of the firm of Wilkinson, Cragun & Barker, Attorney of Record for Petitioners in Docket Nos. 92 and 93.

Frederick W. Post, Attorney of Record for Petitioners in Docket Nos. 109, 110, 125, 132, 263 and 294.

Warren J. Gilbert, Attorney of Record for Petitioners in Docket No. 207.

Malcolm S. McLeod, Attorney of Record for Petitioners in Docket Nos. 233 and 261.

Walter J. Muir, with whom was Mr. Assistant Attorney General, Ramsey Clark, Attorneys for Defendant.

OPINION OF THE COMMISSION

Holt, Associate Commissioner, delivered the opinion of the Commission.

These cases involve claims arising out of the Treaty of Point Elliott executed January 22, 1855, 12 Stat. 927, hereinafter referred to sometimes as "the Treaty," whereby petitioners and other groups ceded certain lands in the present State of Washington. As consideration for the cession, the treaty provided for the payment of certain sums to the signatory parties thereto and to create certain reservations for them, but did not provide that the payments should be made in specific proportions to the respective tribes and groups.

The cases are now in various procedural phases but in none of them has the Commission determined the consideration received by the petitioning tribe or tribes. Therefore, pursuant to motions of the defendant, the Commission on February 20, 1963, ordered all the above-entitled cases consolidated for the limited purpose of determining all issues as to consideration paid or allocable to each petitioner in said cases

under the treaty, and thereafter a hearing was held and evidence submitted on April 23, 1963.

Following said hearing on the limited issues involved, the petitioners in all the consolidated cases, excepting Docket Nos. 92, 93, and 233, filed a brief but requested no findings. In response thereto, the defendant filed its requested findings of fact and brief, following which petitioners in Docket Nos. 92 and 93 filed objections to defendant's requested findings and a reply to defendant's brief. Since the monetary and reservation consideration specified to be paid and created in the Treaty was not allocated to any one tribe but ran to all of them collectively, and the monetary consideration having been disbursed and the reservations created for the treaty tribal claimants collectively, the question for determination at this time is the part of the treaty consideration which should be allocated to each of the petitioning tribes and groups in these cases.

It appears that in 1934, all the petitioners herein joined other Puget Sound tribes in a suit in the Court of Claims, Duwamish, et al., v. U. S., 79 C. Cls. 530, wherein they sued the defendant on legal and equitable claims arising out of the Puget Sound Treaties, including the Treaty of Point Elliott. The suit was brought under the Act of February 12, 1925 (43 Stat. 836, Ch. 214). The Court of Claims ordered the petitions dismissed on the ground that the sums appropriated and disbursed by the Government for the Indians exceeded their valid legal and equitable claims. In that case, however, the Court did determine the total amount of the monetary consideration as will be hereafter

discussed. That Court also indicated the proper manner of allocation (ibid, p. 612). The land (reservation) consideration will be discussed first and then we shall move to the implementation of that Court's allocation of the monetary consideration.

Land Consideration

When the Commission evaluated the Lummi (Docket 110) and Suquamish (Docket 132) aboriginal lands, it did not include in either award any valuation of the Lummi or the Suquamish Reservation. The Swinomish claim, Docket No. 233, appears to be a duplication of a portion of the Lower Skagit claim, Docket No. 294. It has not been determined whether or not the Swinomish Reservation is part of the Swinomish aboriginal lands. In any case, the Commission will not include in its evaluation of either the Lower Skagit claim, Docket No. 294, or the Swinomish claim, Docket No. 233, any award for the Swinomish Reservation. Therefore we hold that no land consideration is chargeable against any petitioner for any part of the Lummi Reservation, the Suquamish Reservation, or the Swinomish Reservation.

So far as these three reservations are concerned, counsel for the Upper Skagit, Snoqualmie, and Skykomish Tribes (Docket Nos. 92 and 93) strongly urge that no consideration should be charged for any reserved land.

Counsel for the defendant agrees that no consideration is chargeable for the Lummi and Suquamish Reservations. At the same time, counsel agrees to any equitable arrangement on the Swinomish Reservation. But the last stated position is qualified by a provision that the United

States should be credited with the non-Swinomish interests in the Swinomish Reservation.

The Commission holds that none of the Swinomish Reservation land is compensable under the Lummi doctrine (Lummi Tribe v. U. S., 10 Ind. Cl. Comm. 294). Under the circumstances, we are of the opinion that the qualification by counsel for defendant is untenable.

The Snohomish Reservation presents an entirely different situation from that of the other three reservations. A decision, Snohomish Tribe v. U. S., 7 Ind. Cl. Comm. 768, has been made in favor of the petitioner, the Snohomish Tribe, for $180,700.00, about $1.10 an acre, for its entire aboriginal area of 164,268 acres, including the 24,320 acres of the Snohomish Reservation. We did, at the time, hold that the award would be reduced by an amount based on the ratio of the average Snohomish population to the average Snohomish Reservation population. These average populations, however, have proved to be unobtainable, as we shall discuss more fully below.

For our present purpose, it is enough to repeat that the United States, without further clarification of the Snohomish decision, is now committed to pay the Snohomish Tribe for the Snohomish interest in the Snohomish Reservation, and to pay the Snohomish Tribe in addition for the non-Snohomish interests in the Snohomish Reservation.

The Commission believes that the inherent inequity of the above situation is self-evident. We think it equally clear that this inequity must be removed, in fairness to all parties. The correct method to bring fair treatment to all in these circumstances, the Commission

believes, is to charge against the Snohomish and each non-Snohomish petitioner the fair value of the allotments received by its members in the Snohomish Reservation, so that each petitioner will eventually credit the United States as consideration an amount measured by the proportional interest actually received by its members.

Counsel for petitioners have urged that the allotments in the Snohomish Reservation to non-Snohomish interests were individual rather than tribal. This argument ignores the plain language of Article 2 of the Treaty: "There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts . . ." (emphasis supplied). Since the allotments were made on the basis of tribal membership, the Commission holds that they were tribal, and not individual, in nature. Saginaw Chippewa Indian Tribe v. U. S., 2 Ind. Cl. Comm. 380, 394-395.

The position of the Commission as to the tribal character of the reservation allotments was stated candidly at the hearing on the motion. The transcript discloses at page 435:

> COMMISSIONER HOLT: You must remember that this reservation was set aside to these tribal groups.
>
> They went on it and then it was broken down into allotments.
>
> It was the tribal interest in it that gave the individuals allotments, so it seems to me that it is tribal property that was being divided up, and this is the only way of proving where it went.
>
> CHIEF COMMISSIONER WATKINS: The only way that the tribe could take advantage of the Act at all, would be through its own individual members.

We were in agreement then, as we are now, with the defendant's general view on the Snohomish Reservation. Again, the transcript discloses at page 436:

> MR. MUIR: I want to clear up one thing concerning the Snohomish reservation.
>
> The Commission determined the aboriginal area. It evaluated the entire aboriginal area, including the reservation and made an award to the Snohomish tribe for the entire thing, including the reservation.
>
> However, the Commission said that the interest that the Snohomish retained in the reservation should be deducted from the award.
>
> * * *
>
> MR. MUIR: In other words, the Snohomish are going to be paid for the land -- for the interest that they did not receive, but we feel that the Government is entitled to a charge against these other tribes for that interest, because those tribes could have gone on there and were directed to go on there.

At the time we evaluated the Snohomish tract, we indicated that the award would be reduced by an amount based on the ratio of the average Snohomish population on the Snohomish Reservation to the average of the tribal population on the reservation (7 Ind. Cl. Comm. 782). These population figures are unobtainable (Def. Ex. M-4).

Counsel for defendant, trying to comply with the Commission's statement, has taken the Snohomish allotment percentage as fairly comparable to the ratio of the average Snohomish reservation population to the average total reservation population. Then counsel for defendant has divided the non-Snohomish reservation interests in the proportions of tribal populations.

The Commission believes that the defendant's method of computing the Snohomish land consideration is substantially correct. We cannot, however, overlook the unavailability of data concerning average reservation populations. The fact is that the defendant computed the Snohomish land consideration in the proportion of allotments received, and we believe this to be a valid method.

To be consistent, however, the non-Snohomish land consideration should be computed in the same manner: that is, by the allotments received by the non-Snohomish tribes. In other words, the Commission is of the opinion that allocation of consideration is properly done by population ratios when there is no other method, as in the Court of Claims (Duwamish, et al. Indians v. U. S., 79 C. Cls. 530, 612). However, we have evidence in this case of the actual allotments received by petitioners in the Snohomish Reservation; and that seems to the Commission to be the proper basis for allocating land consideration among the petitioners.

Counsel for the Upper Skagit, Snoqualmie, and Skykomish, Docket Nos. 92 and 93, urges that land consideration should be figured on an acre-for-acre basis, deducting the acreage received by any petitioner from whatever acreage that petitioner has received or may receive an award for. It seems to the Commission that this suggestion is untenable: it casts unwarranted confusion on the matter at hand, not to mention the confusion that it would add to valuation cases for these petitioners yet to be tried. We are not alone in our espousal of the allotment proportion method: counsel for the same three petitioners, as well as counsel

for the Duwamish, Lummi, Snohomish, and Suquamish tribes (in all, representing over 76 percent of the allotments in the Snohomish Reservation) agreed at the hearing on the motion that the allotment method would be the least distasteful.

As the Superintendent, Western Washington Indian Agency has explained (Def. Ex. M-4), where the sources he searched were in conflict on allotments, his report was hyphenated: for example, Snohomish-Snoqualmie, 8; or Snoqulamie-Wenatchee, 1. In such a case, counsel for the Snoqualmie Tribe felt that these allotments should be completely cut out of our computations. The Commission considers this device of ignoring source material completely and grossly unfair to the defendant: if there was conflict in the records as to whether Tribe A or Tribe B got the allotments, there is no doubt that the defendant lost them, or their equivalent. Our method, with the objective of fairness to all, has been to divide these hyphenated allotments into equal fractional shares, and to charge each petitioner with its fraction.

To sum up, then, the Commission holds that no consideration is chargeable for interests of any of the petitioners in the Lummi, the Suquamish, or the Swinomish Reservation. We hold that portions of the $26,752.00 [1/] value of the Snohomish Reservation are chargeable as land consideration as follows:

1/ Finding No. 11

Docket and Tribe	Allotments	Percent	Consideration
93 Snoqualmie	31.0	18.9	$ 5,056.13
Skykomish	17.0	10.4	2,782.21
109 Duwamish	3.5	2.2	588.54
110 Lummi	1.0	.6	160.51
125 Snohomish	71.0	43.3	11,583.62
132 Suquamish	1.5	.9	240.77
207 Stillaguamish	4.5	2.7	722.30
263 Kikiallus	3.0	1.8	481.54
294 Lower Skagit	19.0	11.6	3,103.23
Other	12.5	7.6	2,033.15
Totals	164.0	100.0	$ 26,752.00

Monetary Consideration

In the prior litigation by the instant petitioners before the Court of Claims in the Duwamish case, supra, the United States furnished the court with a meticulous accounting of the amounts spent by the Government in carrying out the Treaty. These figures have been incorporated in the General Accounting Office Supplemental Report (Def. Ex. M-1, pp. 41 and 42). This report allocates expenditures under the Point Elliott Treaty as follows:

Article 6	$172,243.80
Article 13	13,340.02
Article 14	134,630.04
Total	$320,213.86

The Court of Claims held, and we are bound by that holding, that the Government had allocated certain expenditures, some $22,118.86, to Article 6, which were properly attributable to Article 14. They were:

Agricultural aid	$ 3,545.37
Agricultural implements and equipment	12,860.51
Medical attention and supplies	1,146.21
Pay of miscellaneous employees	2,246.07
Pay of skilled employees	2,030.70
Total	$22,118.86

The Court of Claims subtracted this amount of $22,118.86 from the amount allocated to Article 6 and added it to the amount allocated to Article 14, resulting in the following:

Article 6	$150,124.94
Article 13	13,340.02
Article 14	156,748.90
Total	$320,213.86

Article 6 of the Treaty provided for payment by the United States of $150,000.00 over a period of twenty years. There was disbursed for the benefit of the Point Elliott Treaty Indians a total sum of $150,124.94, or $124.94 in excess of Treaty stipulations. The subtraction of this excess leaves as a remainder the total monetary consideration paid by the Indians under the Treaty, the sum of $320,088.92 (Duwamish, et al. Indians v. U. S., 79 C. Cls. 530, 583, 584). As to the manner of distributing the consideration among the participants, that court said, at page 612:

> With numerous tribes and bands, some residing on treaty reservations and others on nontreaty lands, at one time attached to one Indian agency and at other times to another and different one, we know of no other way to apportion the benefits to all the Indians except upon a pro rata basis, predicated upon percentages of population.

The very same evidence has been furnished the Commission in the instant case. Counsel for the Skagit, Snoqualmie and Skykomish Tribes, Docket Nos. 92 and 93, in criticizing the United States for charging the Indians with disbursals, and alleging the defendant had not sustained the burden of proof, cites several Court of Claims decisions (Pet. Br. 8/20/63, p. 9), stating: "Those cases happen to deal with gratuitous

offsets, rather than legal offsets, but there is no reason to distinguish the two."

The Commission believes that there is a very good reason to distinguish between monetary consideration and gratuitous offsets. Only in this way may we decide whether the consideration was unconscionable, a duty imposed upon the Commission under Section 2 of the Indian Claims Commission Act (25 U.S.C. 70a).

The attitude of the Commission was clearly stated during the hearing on the motion. The transcript, at pages 461-462, discloses the following:

> MR. POST: Then we have this problem of other gratuities, outside of the treaty.
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> COMMISSIONER HOLT: I don't think those come up, now. That is what I mentioned earlier: gratuitous offsets are not involved.
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> MR. POST: I would like to be clear on this: Is the Government resting on M-1, as proof of the other items?
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> COMMISSIONER HOLT: Those are all treaty items, in M-1.
>
> CHIEF COMMISSIONER WATKINS: They are not general gratuities.
>
> MR. MUIR: That is correct.
>
> Our Exhibit M-1 is a Zerox copy of that portion of the General Accounting Office report which deals with the consideration or payment on the claim, pursuant to the Treaty of Point Elliott.
>
> Now, we are not concerned in these motions with the gratuities.
>
> We are merely concerned with what the Government paid under the treaty of Point Elliott as the consideration for the cession of these aboriginal areas.

Counsel for petitioners argues at length that the disbursements were not always free gifts to the Indians, that the benefits were in

some instances mismanaged, that the Indians didn't get what was promised, and other allegations of imperfection in the disbursements.

These complaints were all considered by the Court of Claims in the Duwamish case, supra. At page 583, the Court stated:

> * * * The policy of establishing agencies to look after tribal affairs, whatever the results, was intended for their benefit. The authority conferred upon the Superintendent of the agency was directed towards a beneficial administration of the tribal estate and the welfare of its inhabitants, protect the Indians against exploitation and loss of property rights from designing traders, and advise the authorities at Washington as to the wisdom or inadvisability of proposed proceedings affecting their interests, and in the absence of a specific provision to the contrary, we think these expenses are properly allocable to article VI of the treaty.

Counsel for petitioners casts doubt on the defendant's sustaining the burden of proof, implying that the defendant has not affirmatively proved that any particular Indian or group of Indians got everything promised in the Treaty. On this topic, the Court of Claims said, at page 542:

> The treaty did not provide that the amounts due under articles VI and XIII should be expended in specific proportions for the benefit of the respective tribes, and the records show that the amounts appropriated were expended for the benefit of the tribes generally.

The Commission is of the opinion that the arguments raised by the instant petitioners are generally arguments that were raised before and settled by the Court of Claims in the prior litigation. We are of the opinion that we are bound by the prior holding, and also by the court's directive, on page 612, quoted above, to apportion the benefits to all the Indians upon a pro rata basis, predicated upon percentages of the population.

In following the formula of the Court of Claims, our first step is to determine on the effective date of the Treaty, the total population of petitioners, the total population of all participants to the Treaty including the petitioners, then the ratio of the former to the latter, and finally to apply that ratio to the monetary consideration.

The total population of the petitioners on the effective date of the Treaty was 3511, the total population of all the participants was 4300, the ratio of the former to the latter 81.7%, and 81.7% of the monetary consideration of $320,088.92 is $261,512.65, the monetary consideration attributable to the petitioners.[2/]

Our second and final step in determining the monetary consideration attributable to each petitioner in accordance with the Court of Claims formula is to allocate part of the $261,512.65 in the case of each petitioner in that ratio that the population of that petitioner bears to the total petitioner population, as follows:

Docket and Tribe	Population	Percent	Consideration
92 Upper Skagit	300	8.5	$ 22,228.58
93 Snoqualmie	348	9.9	25,889.75
Skykomish	450	12.8	33,473.62
109 Duwamish	312	8.9	23,274.63
110 Lummi	450	12.8	33,473.62
125 Snohomish	441	12.6	32,950.59
132 Suquamish	485	13.8	36,088.74
207 Stillaguamish	200	5.8	15,167.73
261 Samish	150	4.3	11,245.04
263 Kikiallus	75	2.1	5,491.77
294 Lower Skagit	300	8.5	22,228.58
Totals	3,511	100.0	$261,512.65 [3/]

2/ Finding No. 5
3/ Finding No. 6

In accordance with the above discussion, our decision is that the total consideration attributable to the petitioners is as follows:

Docket and Tribe	Total Consideration
92 Upper Skagit Tribe	$22,228.58
93 Snoqualmie Tribe	30,945.88
Skykomish Tribe	36,255.83
109 Duwamish Tribe	23,863.17
110 Lummi Tribe	33,634.13
125 Snohomish Tribe	44,534.21
132 Suquamish Tribe	36,329.51
207 Stillaguamish Tribe	15,890.03
261 Samish Tribe	11,245.04
263 Kikiallus Tribe	5,973.31
294 Lower Skagit Tribe	25,331.81
	$286,231.50 4/

As this opinion and the findings of fact upon which it is based involve the same question of consideration applicable to all the dockets, it is not thought necessary to render separate opinions or make separate findings of fact for each, but this opinion and said findings of fact are applicable to all said docket numbers here consolidated.

4/ Finding No. 14

The determination of gratuitous offsets attributable to the petitioners, and the resolution of other aspects of their claims, will be made at later proceedings.

Wm. M. Holt
Associate Commissioner

We concur:

Arthur V. Watkins
Chief Commissioner

T. Harold Scott
Associate Commissioner