BEFORE THE INDIAN CLAIMS COMMISSION

THE LUMMI TRIBE OF INDIANS, Plaintiff,	)	
v.	)	Docket No. 110
THE UNITED STATES, Defendant.	)	

Decided: February 18, 1966

Appearances:

Frederick W. Post, Attorney
for Plaintiff

Frederick C. Ward, with whom
was Mr. Assistant Attorney General,
Edwin L. Weisl, Jr.,
Attorneys for Defendant

OPINION OF THE COMMISSION

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

The Lummi Tribe of Indians was one of the signatories to the Point Elliott Treaty of January 22, 1855 (12 Stat. 927), which was ratified on March 8, 1859. By Finding No. 16 of October 30, 1957 (5 Ind. Cl. Comm. 525, 541), this Commission determined that there had been a taking by the defendant from the plaintiff under the cited Treaty. By Finding No. 19 of March 2, 1962 (10 Ind. Cl. Comm. 286, 287), this Commission determined that the gross area consisted of 107,500 acres, of which the land /excluding the reservation and the bodies of water/ amounted to 72,560 acres. In Finding No. 30 of the same date (id. p. 293), this

Commission found that "the Lummi tract as a whole had a fair market value as of March 8, 1859, of $52,067.00." Neither party moved for reconsideration of these determinations, nor was any appeal taken.

By an order of consolidation dated February 20, 1963, the instant suit and various other Point Elliott Treaty suits were consolidated ". . . for the limited purpose of determining all issues as to the consideration paid or allocable to each petitioner in said cases . . ." Subsequently, this Commission issued findings and an opinion in Upper Skagit Tribe of Indians, et al. v. United States, 13 Ind. Cl. Comm. 583 (1964). Finding No. 4 thereof (id. p. 587) was:

> 4. The Commission finds that, in the absence of proof of how much of the monetary consideration each petitioner received, it is proper to allocate the monetary consideration in proportion to the approximate tribal populations on the effective date of the Treaty . . .

On that basis, this Commission there determined that the total consideration attributable to the now plaintiff [phrased in Finding No. 14, id., p. 590, as "paid by the defendant to . . ."] amounted to $33,634.13 (id., p. 605).

On December 1, 1964, the defendant filed a Motion for Judgment, contending that consideration of $33,634.13 for land which had a fair market value of $52,067.00 was not unconscionable within the contemplation of Clause (3) of Section 2 of the Indian Claims Commission Act of 1946 (25 U.S.C. 70a). In a response filed on May 7, 1965, the plaintiff did not dispute the contention that the attributable consideration was not unconscionable. Rather, the plaintiff chose to urge the Commission to

raise the Lummi valuation to some unspecified level sufficient to insure that there would be a recovery. It is not the function or mission of the Indian Claims Commission to manipulate the facts so as to assure every plaintiff of a recovery, nor did the organic act guarantee that every tribe would have a recovery on every cause of action alleged. The plaintiff has urged no cogent ground for upward revision of the valuation determination and this Commission perceives none which would compel the act. See Nooksack Tribe v. U. S., 162 C. Cls. 712, 718.

The plaintiff's reasoning does not assist this Commission in reaching a determination, nor can the Commission, as the defendant urges (Reply, filed May 17, 1965), take the absence of unconscionable consideration as confessed, or conceded.

As originally pleaded, the plaintiff contended that consideration was unconscionable (Clause (3) of Section 2 of the Act) and that the treaty negotiations amounted to dealings that were neither fair nor honorable (Clause(5) of Section 2 of the Act). Alternative pleading of this nature is accepted and the standards are not identical. Osage Nation v. United States, 119 C. Cls. 592 (1951) pp. 670, 671. "Unconscionable" consideration may be shown by very gross disparity of price, alone, or by a lesser disparity coupled with evidence of overreaching and the like, but facts sufficient to prove a case under Clause (5) may be insufficient when coupled with price disparity to prove a case under Clause (3). Hence the permissible alternative pleading.

The issue of fair and honorable dealings in the case at bar is not a wholly new subject. In Duwamish, et al., Indians v. United States,

79 C. Cls. 530 (1934), the Court had occasion to examine the treaty negotiations in some detail. The Court's special findings numbered 7, 8, and 9 (id., pp. 536, 537) are of particular relevance:

> VII. All the above treaties were negotiated and concluded by Governor Isaac Stevens, acting under the authority given by the act of July 31, 1854 (10 Stat. 315, 330), and the instructions of the Commissioner of Indian Affairs. Governor Stevens was assisted by George Gibbs, a surveyor; Colonel B. F. Shaw, an interpreter; and Colonel M. T. Simmons, Indian agent, all of whom were familiar with Indian affairs, and all of whom participated with Governor Stevens in conducting Indian councils. Colonel Shaw, the interpreter, spoke several of the Indian languages and was decidedly familiar with the Indian language known as Chinook jargon.
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> VIII. The various councils with the Indians were conducted in the usual way. Presents were distributed to induce good feeling and attendance. Speeches were delivered, couched in plain, simple language, explaining the terms of the treaties, and patience displayed to effect agreements. The interpreter employed the Chinook jargon language in most instances in interpreting the speeches and the articles of the treaties. Chinook jargon was a mixed language made up of English, French, and Indian words, and was not generally understood by the Indians. There was no language common to all the tribes and bands available.
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> IX. The treaties were interpreted to the Indians, and they understood that the reservations set apart for them by the treaties were not to be permanent and that whenever conditions warranted the President might establish a larger and general reservation to which they could be removed, and obtain allotments in accord with the provisions of the sixth article of the treaty with the Omaha Indians (10 Stat. 1043). Governor Stevens in his speeches to the Indians assured them that the purpose of the treaties was to give the Indians homes where they could cultivate the soil, schools for the education of their children, a doctor to administer to their sick, and other facilities to promote their welfare. The Government contemplated a change of conditions in the future, established by the article of the treaties, and the treaties were concluded with that purpose in view. The Indians so understood, No general reservation was ever established by the President for the Indians. Some of the reservations were enlarged and allotments made, as will hereafter appear.

> Governor Stevens was frank with the Indians and neither sought nor practiced any means to take advantage of them.

No evidence had been adduced which would lead this Commission to the conclusion that the Point Elliott Treaty negotiations were tainted by unfair or dishonorable dealings, or that the scrupulous conduct found by the Court of Claims was to any degree absent.

This Commission concludes that there is no justification for revision of the Lummi segment of the Point Elliott Treaty under Clause (5) of Section 2 of the Act.

There remains the question of unconscionable consideration. As observed above, evidence of overreaching, fraud, and like activities stronger than that required to make out a case under Clause (5) may overbalance a slight disparity of price. There being insufficient evidence in the case at bar to make out a case under Clause (5), a fortiori there is no nefarious activity strong enough to couple with disparity of price under Clause (3). Consequently, the only remaining issue is whether the disparity of price, alone, is sufficient to justify a revision of the Lummi segment of the Point Elliott Treaty under Clause (3).

In Osage Nation (supra), this guide to assessment of the effect of price disparities was offered (id. p. 666):

> . . . but it appears that only where the inequality of the bargain is very gross, does disparity of price alone justify a conclusion that the consideration was unconscionable. As to what is "very gross", the courts have provided no exact formula and each case must be carefully considered on its own particular facts and circumstances.

In the case at bar, the attributable consideration -- $33,634.13 -- amounts to about 65% of the fair market value of $52,067.00. Far from "very gross", the disparity is comparatively slight and, the conscience of the Commission remaining unshocked (Nez Perce Tribe v. United States, 13 Ind. Cl. Cpmm. 184 (1964), we conclude that the attributable consideration ought not be regarded as unconscionable within the contemplation of Clause (3) of Section 2 of the Indian Claims Commission Act of 1946.

In view of the foregoing discussion, this Commission concludes that it may not regard the Lummi segment of the Point Elliott Treaty as if revised, either on the ground of unconscionable consideration or on the ground of unfair and dishonorable dealings. It follows that the defendant's motion for judgment must be granted and that there will be no recovery in Docket No. 110.

An order dismissing the petition will be entered.

Wm. M. Holt
Associate Commissioner

We concur:

Arthur V. Watkins
Chief Commissioner

T. Harold Scott
Associate Commissioner (See concurring opinion)

Scott, Associate Commissioner, concurs with the following opinion.

This matter presents similar problems to those considered in our decision in Docket No. 175-B, The Nez Perce Tribe of Indians v. United States, 13 Ind. Cl. Comm. 184, 238. My position herein is the same as that expressed in my concurring opinion in that case.

My personal conscience as to the relationship of our valuation of $52,067.00 for the Lummi lands to the consideration of $33,634.13 would permit recovery of the difference to the tribe. For example, the difference is $18,432.87, which, if it had been paid at treaty time in 1859 when the value of the dollar was much greater, it would no doubt have been of great assistance to the Lummi Indians. That amount of money in 1859 would have made possible substantial assistance to these good people. If it had been deposited in the U. S. Treasury at that time with four percent simple interest per annum of $737.31 and left for the ensuing 107 years, the accumulated interest would equal $78,892.17 which, with the principal sum, would equal $97,325.04 in today's dollars or, expressed in another way, $44,258.04 more than the total valuation we have placed on these lands.

Our valuations preclude conversion of the difference in the current value of the dollar and its treaty date value. We cannot take into consideration the effect of inflation. The Miami Tribe of Indians v. United States, 9 Ind. Cl. Comm., 1, 12; Tillamook Tribe of Indians v. United States, 4 Ind. Cl. Comm., 57, 62. In other words, we must find our valuations as of the treaty date in terms of the value of today's dollars.

We cannot include interest on the difference between value and consideration (see above illustration) in our judgments unless it is shown that the taking of the land by the defendant was in violation of the Fifth Amendment to the Constitution. United States v. Creek Nation, 295 U. S. 103, 110.

In this matter, as in most of those involving treaty cessions of Indian lands to the United States, it was the defendant which sought the transaction; and, although we find no fraud or unfair and dishonorable dealings, the fact that the United States was the moving active party in bringing about the conferences and dealings with the Indians, in which the parties were not of equal bargaining ability, is another factor which disturbs my personal conscience.

However, I feel bound by the precedents which have been established both as to "very gross" differences as between consideration and value and as to fair and honorable dealings and feel it necessary to write this separate opinion.

In Osage Tribe of Indians v. United States, 113 C. Cls. 666, the Court held the price and value must be "very gross" to support a conclusion of unconscionable consideration without evidence of fraud or overreaching. In the Otoe and Missouria Tribe of Indians v. United States, 131 C. Cls. 593, the Court held that a disparity of more than 50%, if not conclusive of unconscionable consideration, is evidence of same if coupled with evidence of lack of fair and honorable dealings in the negotiation of the treaty.

As to fair and honorable dealings, the Court of Claims in the Otoe case held that the belief of the Federal agent conducting

negotiations with the Indians that he was acting in their best interests in obtaining consent to modification of contracts for the purchase of tribal land from individuals instead of in open council indicates fair and honorable dealings. The Court stated (id. pp. 642, 643):

> * * * The Indians did not agree to the settlement at that council which was accordingly adjourned for a few days. Being persuaded that the settlement represented the best terms for the Indians that the delinquent purchasers would agree to, and also that the Congressional representatives of the delinquent purchasers would never permit a forfeiture of the lands held by them, the Government inspector spent several days talking to individual Indians and procuring their signatures. The Act of March 3, 1893, does not specify that the consent of the Indians had to be obtained "in open council in the usual manner" as had the acts discussed in the fifth and sixth causes of action, and the Commission concluded that the inspector's method of obtaining the consent was a sufficient compliance with the 1893 Act. In view of the fact that the record establishes that the terms of the settlement were explained to and understood by the Indians in open council, we agree that the inspector's method of securing signatures was not illegal or irregular to such a degree as to nullify the effect of the consent.

There is one other point of similarity herein with the Nez Perce matter. Although the petitioner did not raise the point in the proposed findings, I have also considered whether the fact that the land was worth $52,067.00 instead of the $33,634.13 we find as consideration might be construed under Clause 3 of Section 2 of our organic act to fall within the provision for claims which would result if the relevant agreement was revised on the ground of mutual or unilateral mistake. The petitioner herein has not included a specific prayer in the petition on this point; but has included a prayer for "all other and further relief that is equitable and just." I find no precedent on this point. However, we have found herein that there were no unfair or dishonorable

dealings by the defendant. Therefore, in my opinion, it must be assumed that the defendant was honestly attempting to determine the fair value of the lands; and that the question might very well be relevant as to whether the consideration arrived at was the result of mutual or unilateral mistake. Certainly, the Indians had no training in arriving at such valuations. The representatives of the United States, on the other hand, were men of ability, serving high positions of trust. As I stated in my concurring opinion in the Nez Perce case, this is the type of question which I would personally favor for certification to the Court of Claims under the applicable provisions of Section 20(a) of our organic act. On July 6, 1964, we received notice of appeal to the Court of Claims of our decision in Docket 175-B, the Nez Perce case. Therefore, the question is now before the Court for decision in that matter, as well as the question of whether the amount of consideration therein was unconscionable. It would be unfortunate, in the event the Court should decide this and other questions which are similar as between these cases in favor of the Nez Perce Indians, if the Lummi Tribe should not thereafter have the benefit of reconsideration from our decision herein.

T. Harold Scott
Associate Commissioner