BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: October 8, 1969

Appearances:

Frederick W. Post, Attorney
for Plaintiff

Frederick C. Ward, with whom
were Craig A. Decker and Mr.
Assistant Attorney General,
Clyde O. Martz,
Attorneys for Defendant.

OPINION OF THE COMMISSION

Chairman Kuykendall delivered the opinion of the Commission.

This claim of the Lummi Tribe of Indians involves that tribe's aboriginal lands in the State of Washington which lands were included in the cession of Indian lands made under the Point Elliott Treaty of January 22, 1855 (12 Stat. 927), ratified on March 8, 1859. In 1957 this Commission determined the boundaries of those areas of land which had been taken from the Lummi Tribe (5 Ind. Cl. Comm. 525, which areas were later found to have contained 107,500 acres (10 Ind. Cl. Comm. 286) including 12,440 acres set aside as the Lummi Reservation. Of

the remaining 91,100 acres, the waters of Bellingham Bay and fresh water lakes accounted for 22,500 acres, leaving a net land area of 72,560 acres. The Commission determined that the fair market value of the Lummi tract, as of March 8, 1859, was $52,067.00.

Thereafter, in a consolidated proceeding the Commission held that it was proper to allocate the total monetary consideration paid by the defendant for the Point Elliott Treaty cession among the respective tribes involved in proportion to the tribal populations as of March 8, 1859 (13 Ind. Cl. Comm. 583). Accordingly, the proportionate amount allocated to the Lummi Tribe was computed to be $33,634.13.

Subsequently, the Commission found there was no evidence that the treaty negotiations were unfair or dishonorable under clause (5) section 2 of the Indian Claims Commission Act, 60 Stat. 1049, 1050; 25 U.S.C. §70a; (16 Ind. Cl. Comm. 526). And it was also decided that the consideration paid for the cession of the Lummi tract was not unconscionable under clause (3), section 2 of the Act. The defendant's motion for judgment was granted and the petition dismissed.

The plaintiff appealed to the Court of Claims alleging three main points of error:

1. insufficient evidence upon which to exclude large portions of land from the area claimed by the Lummi Indians,

2. insufficient evidence upon which to determine the value per acre of the tribal lands, and

3. failure to apply a uniform principle of value estimation as between the Lummi Tribe and its neighboring tribes.

The plaintiff did not prevail on any of those points. However, the Court of Claims found that the consideration attributed to the Lummi Tribe was unconscionable and that the valuation of $52,067.00 was "the bare minimum" fair market value. Accordingly, the Commission's decision was reversed and the case remanded for further proceedings in conformity with the Court's opinion.

Defendant has moved for entry of a judgment in the amount of $18,432.87 (the difference between the previously determined value and the consideration), arguing that the Court of Claims' reversal was limited to the single issue of the unconscionability of the payment of $33,634.13 for land worth $52,067.00. Plaintiff argues that the Commission should reconsider the valuation and find a larger fair market value "somewhere between the minimum value and the maximum value" (plaintiff's response of April 1, 1968, p. 2). And, at the same time, plaintiff urges the Commission to reconsider the entire record with a view to enlarging the area for which the Lummi tribe may recover and, in effect, to reconsider all phases and aspects of this case.

While we feel that defendant may technically have a basis for its argument concerning the valuation of the Lummi tract, we cannot permit the valuation to remain as previously determined. The Court of Claims has found the valuation to have been a "minimum" fair market value. The Court stated that ". . . the fair market value of $52,067.00 found by the Commission for the Lummi lands is a bare minimum. 181 Ct. Cl. at 768. And further the Court has mentioned certain

aspects of the valuation which were not adequately covered in the commission's findings or considered in arriving at the fair market value.

Without making a wholesale revision of the Commission's previous findings on value, which we do not consider necessary or desirable, we have vacated several findings and substituted findings which we believe will correctly reflect the record on the questions of accessibility, highest and best use, and the inclusion of farm and pasture lands in our consideration of the value of the entire tract. In arriving at our ultimate conclusion on value we have considered these factors as well as the evidence of the coal lands and all the other items covered in the previously entered findings.

As we have stated, we must reconsider the valuation determination. We cannot permit a "bare minimum" fair market value to serve as the measure of damages for which any Indian tribe will recover on its claim before this Commission. So we agree with plaintiff that it is necessary that we look to a value somewhere between the minimum and the maximum value. Clearly such a reconsideration is within the Commission's authority under the remand, and, we believe, the determination on value which we make herein is in conformity with the Court's opinion and is supported by the record.

We must, however, reject all of plaintiff's other requests. We cannot entertain a reargument of the entire case. On the issue of title the Court of Claims stated "We conclude that the ultimate finding (No. 16, 5 Ind. Cl. Comm. 525) by the Commission as to the extent of

the aboriginal area of the Lummi tribe is supported by substantial evidence." 181 Ct. Cl. at 760. The deduction of the Lummi Reservation acreage was likewise approved by the Court of Claims. These questions are all closed matters as far as this case is concerned on the remand now before us. There are no other matters raised by plaintiff which require further consideration or discussion by this Commission.

We have considered the entire record on value in this case and all of the findings as revised. We have concluded that the fair market value of the Lummi tract, as of March 8, 1859, was $90,634.13. The consideration of $33,634.13 for the cession of lands having a fair market value of $90,634.13 was so grossly inadequate as to make the consideration unconscionable.

The plaintiff is entitled, under the provisions of clause (3), section 2 of the Indian Claims Commission Act, to an award in the amount of $57,000.00, less allowable offsets, if any.

Jerome K. Kuykendall, Chairman

We concur:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

Yarborough, Commissioner, concurs with the following opinion:

I agree with the result reached here, but I regret that it is still found necessary to speak in the vocabulary of "unconscionable consideration" and "grossly inadequate" sums. The prudence of the majority in reciting the judicially approved catch phrases cannot be faulted, but I submit the Commission should move to different grounds and terminology in these cases of inadequate consideration paid to the Indians.

The history of this case, and of the Nez Perce case,[1/] now also before the Commission on remand from the Court of Claims, are illustrations of situations where the plaintiffs were found to have been paid less for their lands than the then value (as determined by the Commission), but were denied recovery by the Commission because the disparity was not deemed "unconscionable." In both cases, the Court of Claims, after making various relative and absolute comparisons of the value and the consideration, reversed; under all the circumstances it deemed the disparity "unconscionable." It is submitted that the juggling of the percentages and amounts to determine "unconscionable" is not required under the Indian Claims Commission Act to allow plaintiffs to recover for any failure of consideration received to match the value of the lands.

1/ Nez Perce v. United States, 13 Ind. Cl. Comm. 184; reversed and remanded, 176 Ct. Cl. 815 (1966); cert. denied 386 U.S. 984.

As was suggested by former Commissioner Scott in individual views in both the Lummi and the Nez Perce cases,[2/] these inadequate consideration cases should be determined under the Commission's jurisdiction to determine claims as if treaties were revised on the ground of "mutual or unilateral mistake, whether of law or fact." 25 U.S.C. §70a (3). Certainly the most common occurrence of a unilateral mistake of fact would be the ~~Ind~~ians' being mistaken as to the true market value of the land, and any such treaty should be revised to correct that mistake and allow the recovery of any amount of difference between value and consideration.

In any case where it is shown that less consideration was given for the land than the fair market value, three possibilities exist:

1. The Indians made a mistake of fact as to the true market value and should be allowed recovery through revision of the treaty for that unilateral mistake.

2. Both the Indians and the United States were mistaken as to true market value, and recovery should be allowed for revision because of mutual mistake.

3. If both the Indians and the United States knew the true market value, but agreement to a lesser consideration was secured, prima facie duress and a lack of fair and honorable dealings was involved, and recovery should be allowed.

It is greatly to be hoped that the Commission will not soon find itself considering some case in which the consideration comes even closer to matching the value than it did in this case. If such

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2/ Lummi Tribe v. United States, 16 Ind. Cl. Comm. 526, at 535C-535D; Nez Perce v. United States, 13 Ind. Cl. Comm. 184 at 270-1.

occurs, it is further to be hoped the Commission will not be attempting to rationalize at what percentage "unconscionability" begins. Recovery should be allowed in any case where the Indians did not receive the fair market value of their lands.

Richard W. Yarborough

Richard W. Yarborough, Commissioner