

BEFORE THE INDIAN CLAIMS COMMISSION

MAKAH INDIAN TRIBE,)	
)	
Plaintiff,)	
)	
v.)	Docket No. 60-A
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: May 20, 1970

Appearances:

Alvin Ziontz, Attorney for Plaintiff.

Howard G. Campbell, with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION

Commissioner Yarborough delivered the opinion of the Commission.

The plaintiff filed an amended petition in Docket No. 60 on September 15, 1952, wherein the Tribe set forth two claims, one of which dealt with lands ceded by the Tribe to the United States under the Makah Treaty of January 31, 1855 (12 Stat. 939), also known as the Treaty of Neah Bay. On September 27, 1957, the Commission ordered that the land claim should be severed and designated Docket No. 60-A. ^{1/}

^{1/} The disposition of the other claim will be found in Makah Indian Tribe v. U.S., 7 Ind. Cl. Comm. 477 (April 15, 1959), aff'd, 151 Ct. Cl. 701 (1960).

In this claim the plaintiff tribe is seeking additional compensation for the 1855 cession to the United States of approximately 500 square miles of land in the State of Washington to which it claimed aboriginal ownership at the time of cession. Specifically the plaintiff alleges that as a result of the treaty entered into between the tribe and the United States on January 31, 1855, the Makah ceded land to the United States commencing at the mouth of the Hoko River on the Strait of Juan de Fuca, running westward with the Strait to Cape Flattery, thence southward along the coast to Ozette, thence eastward along the line of lands occupied by the Quileutes and northward along the line of lands previously ceded to the United States by the S'Klallam Tribe. A smaller tract on Cape Flattery was reserved out of the ceded area, and according to the Treaty, \$30,000 was to be paid for the territory ceded. The plaintiff now complains that the ceded land was of a value so far in excess of the treaty sum that the plaintiff was paid an unconscionable consideration and sustained damages in the amount of one million dollars.

It is not contested that the Makah Tribe has occupied villages on the northwestern tip of the Olympic Peninsula for a long time. The issue before the Commission at this time is a limited one: How much land did the plaintiff tribe exclusively use and occupy in Indian fashion as of March 8, 1859, the date of ratification and the effective date of the 1855 treaty of cession?

Most Makah villages were in the vicinity of Cape Flattery; defendant has challenged whether the Indians at Ozette Village, some ten miles south of the Cape, were a part of the Makah Tribe in 1855. The representatives of the United States at the time of the Treaty of 1855 recognized them as such since it was stated in the preamble of the Treaty that the articles of agreement were being concluded as between the United States and delegates from the several villages of the Makah Tribe, including "Osett."

Dr. Herbert Taylor, one of plaintiff's expert witnesses, testified at the hearings in Docket Nos. 60 and 60-A, and on both occasions he discussed the Indians who, in 1855, lived in the village called Ozette south of Cape Flattery. He indicated that the Makah, known as the Indians of Cape Flattery, had five major villages in the vicinity of the Cape: Neah Bay, Tatoosh Island, Waatch, Tsu-yess (or Tsues) and one abandoned in 1852. At the time of the 1855 Treaty, the Indians at Ozette, who spoke the same language as the Makah (with only minor variations) joined with them in social as well as military activities. It was Dr. Taylor's view that, politically, the Indians at Ozette belonged to the Makah Tribe and were only a separate band. We accept this view.

All the testimony and evidence in the record support the fact that the Makah exclusively used and occupied land around their settlements. They had been known in Neah Bay and Cape Flattery as early as

1780 when explorers from Spain and England landed in the area. Defendant concedes that the Makah Tribe had Indian title to a coastal strip of land beginning at the mouth of the Hoko River on the Strait of Juan de Fuca, all along the coast, around Cape Flattery and down the Pacific Coast to the site of the Makah Village of Ozette. We believe that use and occupancy for purposes of establishing Indian title can be stated as extending reasonably to Sand Point, somewhat southerly of Ozette.

The plaintiff claims that the tribe should be considered as occupying land as far south as Cape Johnson. This is contrary to findings made by the Commission in regard to use of this area by a neighboring tribe, the Quileutes. In the case of The Quileute Tribe of Indians, et. al. v. United States, Docket No. 155, 7 Ind. Cl. Comm. 31, 59 (findings 10-a, b, c, d, e, f, g and h), the Commission held that the Quileutes did not exclusively use and occupy Lake Ozette to the exclusion of other tribes, including the Makah. To reverse the roles for purposes of this case means that although the Makah Indian Tribe probably used the southern part of Lake Ozette at times, such was not to the exclusion of other tribes, particularly the Quileutes.

The more difficult boundary to establish in this case is the interior and easternmost area regularly used and occupied by the Makah at the time of the 1855 Treaty. How far inland into the interior did the ancestors of plaintiff range to fulfill the wants and needs of the Makah communities so as to establish Indian title thereto?

There was testimony on behalf of plaintiff concerning the use by the Makah of the land as far east as Lake Pleasant. Plaintiff's witnesses attempted to establish that the Makah roamed many miles from the Pacific Coast looking for skins, game, berries and roots, and conducted religious ceremonies there. It is certainly possible such use did occur occasionally. However, even plaintiff's expert, Dr. Taylor, was uncertain as to the extent of the Makah's use of the interior. In response to a question concerning the Makah's occupation of the territory he said:

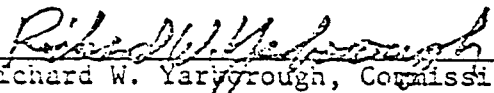
Well, along the coast the occupation was very thorough, and as far back as Lake Ozette, let's say, four or five miles or more inland the occupation was pretty thorough. The Indians knew the territory quite well. When you get back into the southeastern interior of this area, however, there are only legendary connections, but occasionally they will get back into there, but it was not a constant matter. (Tr. p. 135, Docket No. 60, June 22, 1955.)

Dr. Taylor's maximum estimate of the amount of sustenance the tribe drew from land based game and vegetable matter was twenty-five percent, which meant that the Makah relied upon marine hunting for at least three-fourths of their diet. The major portion of their time and efforts therefore were concentrated in the coastal areas. The evidence also revealed that some of the mammals hunted by the Makah, many berries and roots and cedar for boats and houses were accessible on the coast or no further inland than Lake Ozette so that there was no regular need for sojourns deep into the interior. A first hand

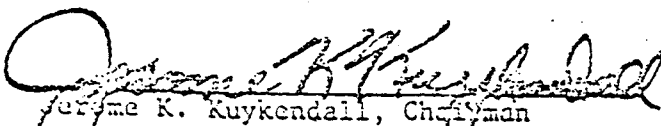
observer, James Swan, lived with and taught the Makah over a period of ten years. In 1868 he characterized this whole portion of Washington Territory as being covered with an almost "impenetrable" forest. On the whole, there is scant evidence or likelihood of Makah use further inland than the perimeter we have determined.

Therefore, based on all the acceptable evidence, as of the effective date of the 1855 Makah Treaty, March 8, 1859, the Commission finds Indian title in the Makah Tribe to the land area described in Finding No. 7.

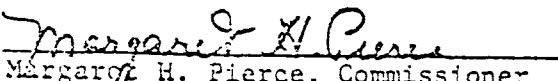
This case may now proceed to a determination of the exact acreage of the land awarded herein, the value of this property as of March 8, 1859, the consideration received, and all other issues determinative of the defendant's liability, if any, to the plaintiff.


Richard W. Yaryrough, Commissioner

We Concur:


Jerome K. Ruykendall, Chairman


John T. Vance, Commissioner


Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner