

BEFORE THE INDIAN CLAIMS COMMISSION

THE S'KIALLAM TRIBE OF INDIANS,)	
)	
Plaintiff,)	
)	
v.)	Docket No. 134
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: October 1, 1970

Appearances:

Frederick W. Post, Malcolm S. McLeod and E. L. Crawford, Attorneys for Plaintiff.

Donald R. Marshall with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for the Defendant. Richard L. Beal and A. Willard Carlson were on the brief.

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

The Commission has previously determined in this case that the plaintiff ceded its aboriginal land to the defendant by the January 26, 1855 Treaty of Point-No-Point (12 Stat. 933) as of March 8, 1859. (5 Ind. Cl. Comm. 697 (1957)) The case is now before the Commission for the determination of the acreage and the fair market value of that tract described in Finding No. 19 of our prior decision, and whether the amount paid by the defendant pursuant to the 1855 Treaty was unconscionable within the meaning of Section 2(3) of the Indian Claims Commission Act. (60 Stat. 1049, 1050)

The S'Klallam tract is located in the present State of Washington, principally in Clallam County. About one-sixth of the subject land is in Jefferson County, lying in that part of the county bordering on the western shore of the Admiralty Inlet and north of the present town of Port Gamble. The S'Klallam tract is a strip of land, varying five to eighteen miles in width, stretching 85 miles along the southern shore of the Strait of Juan de Fuca from the west shore of Puget Sound to within 20 miles of the Pacific Coast. A bluff extends along most of the coast of the strait which varies in depth to 200 feet from the shore line. Hills, rising to more than 2000 feet elevation, are located south of the flat land and are cut by defiles and steep water courses. The weather is mild and there is an abundance of rainfall except in the northeastern portion of the subject land where farm irrigation is necessary during the summer months.

Development of the Olympia Peninsula, including the S'Klallam tract, was retarded by Indian wars and its physical isolation. The lack of accessibility to the interior and western regions of the subject land resulted in a limitation upon its industrial growth. The economy, in 1859, evolved around lumber and was centered, relative to the S'Klallam tract, in the eastern part. In 1860 platted and township land amounted to only .03 percent of the subject land. There was only one town and small agricultural settlements located in the eastern part of the tract at Dungeness Bay, Port Angeles and Sequim Bay. The town, Port Townsend,

at the time had a permanent population of approximately 50 persons, although it was the county seat and the custom port of entry where ships called to replenish supplies and take on cargo transhipped from the eastern shores of the Sound. The total number of settlers in the area now comprising Jefferson and Clallam Counties, an area of 2,281,600 acres, was 680 persons. There were no railroads in the entire Puget Sound area and few overland roads within the S'Klallam tract as of the date of valuation. In 1859, the predominant mode of travel between points of the subject land was by water, foot trails and along the shoreline.

Based upon the determination of the Cadastral Engineer, Bureau of Land Management, we find the area of the S'Klallam tract to be 438,430 acres.*

The S'Klallam tract is located within a band of heavy timber

* Plaintiff claims 440,939 acres of land are included in the subject tract, including 10,939 acres of tidelands, where, it is alleged, the Indians fished and stored logs. As a result, the area claimed by the plaintiff is 1509 acres greater than the size acknowledged by the defendant. The tidelands are a part of the Strait of Juan de Fuca, a navigable waterway which, under ordinary circumstances, is not subject to private possession. Tlingit and Haida Indians of Alaska v. United States, 182 Ct. Cl. 130, 389 F.2nd 778 (1968). In any event, the Commission finds it unnecessary to add the acreage of the tideland or to consider the question of their ownership in order to evaluate the S'Klallam tract as a whole consistent with the 1859 highest and best use; i.e., the production of timber. In addition, there has been no treaty extinguishment by the defendant of any of the plaintiff's rights to fish in the tidelands. Article 4 of the 1855 Treaty specifically secured to the plaintiff the right to take ". . . fish at usual and accustomed grounds and station. . . in common with all citizens of the United States..."

extending west from the Cascade Mountains to the Pacific Coast. Douglas fir constituted seven-eighths of this forest stand. As in the whole Puget Sound region, land in the S'Klallam tract was predominantly used for timber production and lumber related industries. Approximately 3 percent of the land in the subject tract was used for agricultural purposes. The cost of clearing the heavy timber and dense undergrowth made other land practically valueless for agricultural uses other than subsistence farming. Likewise, there was no mining industry as there were no known mineral deposits in the subject land as of the 1859 date of valuation and no mineral deposits in marketable quantities have been discovered west of the Puget Sound to the present time.

The record is devoid of timber land sales within the S'Klallam tract on or near the valuation date. In the absence of an actual market the plaintiff's expert witnesses evaluated separately, according to the highest and best use of each, several categories of land in the tract, which then were aggregated to determine the value of the whole. The value of the timber land was determined to be the potential profit derivable from the standing timber. The plaintiff's experts concluded that the value of the S'Klallam tract as of March 8, 1859, was \$1,530,000.00, or \$3.47 per acre. The defendant's expert witness utilized the market data approach, using sales of timber land considered by him to be reasonably comparable in location and uses. He totaled the value of the separate parcels for the purpose of evaluating the

entire tract, and considered the possible factors that would be apparent to a hypothetical purchaser. Mr. Miller was of the opinion that the value of the subject land as of March 8, 1859, was \$44,252.80 for 438,430 acres or slightly more than \$0.10 per acre.

The highest and best use of the S'Kallam tract in 1859 was for timber production. This being the case, the Commission is not in accord with the value methods pursued by the respective expert witnesses. As noted above, they have sought to isolate and value separately certain small segments of the subject tract that have a particular use. The separate appraisals are then totaled in order to attain an overall value for the entire tract. The Commission has valued the S'Kallam tract as a whole consistent with its highest and best use. In doing so, we have considered the extent to which the subject lands have been enhanced by the presence of smaller parcels having a greater usefulness for purposes other than the production of timber. The principle of valuing as a whole land areas having a single or highest best use is hardly a novel approach. We have done this repeatedly in the past and with the approval of the Court of Claims. Citizens Band of Potawatomi Indians of Oklahoma v. United States, 179 Ct. Cl. 473 (1967), cert. denied, 389 U.S. 1046, Yakima Tribe v. United States, 158 Ct. Cl. 672 (1962). The Commission is also of the opinion that the value conclusions of the respective expert witnesses represent the extremes of a high and low appraisal for the subject tract, neither of which are supported by the record.

Where, as in this case, there was not a market to which the subject land could have been exposed within a reasonable time of the date of valuation, the determination of value is predicated upon the factors a hypothetical purchaser would have considered in purchasing the land from a hypothetical seller. The principles and factors which would have been taken into consideration are summarized by the Court of Claims in Otoe and Missouri Tribe of Indians v. United States, 131 Ct. Cl. 595, 131 F. Supp. 265 (1955). The Court stated at page 633 that the factors to be considered in the absence of evidence of "market value" were:

" . . . the natural resources of the land ceded, including its climate, vegetation, including timber, game and wildlife, mineral resources and whether they are of economic value at the time of cession or merely of potential value, water power, its then or potential use, markets and transportation -- considering the ready markets at that time and the potential market."

Applying this standard, we find that in 1859, there were great quantities of Douglas fir as well as other less marketable species of timber, located within a maximum of two miles of streams, some of which were drivable for limited parts of their length. The cutting, milling and fabrication of lumber products were the principal industries of the entire Puget Sound region. The forest of the eastern part of the S'Klallam tract bordering on or near the Sound participated proportionately in supplying raw material to these industries whose

products at the time were being exported all over the world in competition for markets. There were 17 sawmills located around the Puget Sound in close proximity to the principal logging areas. Two of the sawmills were located at Port Ludlow and Port Discovery in the extreme eastern part of the S'Klallam tract. These mills had the advantage of a favorable location and water for loggers to raft logs to the mills, for log storage and for the operation of the machinery. In 1860, the sawmills of the Puget Sound produced more than 69,000,000 board feet of lumber.

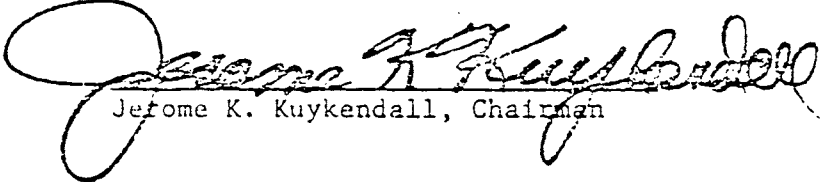
There were certain factors that tended to diminish the 1859 value of the subject land. The lumber production of the S'Klallam tract competed with land selling for \$1.25 per acre and containing lumber more accessible for logging and more suitable for water transport. In addition, a large percentage of the timber available within the S'Klallam tract was a species other than fir, for which there was a limited market. In view of the slowness of development, a prospective purchaser had to anticipate a long holding period before a profit could be realized while at the same time rejecting the attractiveness of competing investments yielding a more immediate and certain return.

Upon consideration of all of the evidence, the Commission has concluded that the 438,430 acres constituting the S'Klallam tract had a fair market value on March 8, 1859, of \$440,000.00, or roughly \$1.00 per acre.

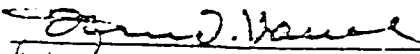
The amount specified under Article 5 of the 1855 Treaty to be paid to the S'Klallam tribe and the other signatory tribes for the land ceded to the defendant was the sum of \$60,000.00. In addition, Article 6 of the 1855 Treaty required the defendant to pay the sum of \$6,000.00 to enable the Indian treaty parties to move and settle upon the reservations established by the said treaty. The 1855 Treaty did not designate the specific amount to be paid to each of the tribes involved. We therefore allocate the total monetary consideration provided by the 1855 Treaty in proportion to the approximate population that each tribe had to the total combined population of the Indian treaty parties as of the time of the treaty. We have determined that the population of the combined S'Klallam-Chimakum tribe numbered 875 persons, which equalled 65.3% of the total population of 1340 Indians. Therefore, that part of the treaty consideration attributable to the plaintiff tribe as the amount payable for the cession of its land is the sum \$43,098.00, which consideration, when compared to the 438,430 acres having a fair market value of \$440,000.00, is unconscionable within the meaning of Section 2(3) of the Indian Claims Commission Act. The plaintiff tribe is therefore entitled to judgment from the defendant of the sum representing the difference between the value of the ceded land and the consideration actually paid.

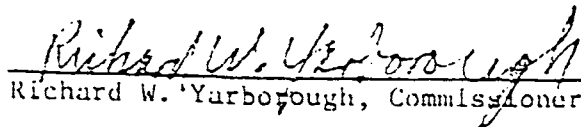
The record shows the United States paid to the 1855 Treaty parties the sum of \$60,000.00 as stipulated under Article 5 of the

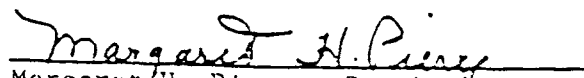
treaty. Of this amount, the sum of \$39,180.00 is allocated to the S'Klallam tribe. However, the record fails to show the S'Klallam tribe received any additional sum for removal as required under Article 6 of the 1855 Treaty. Therefore, the plaintiff tribe is entitled to recover the sum of \$400,820.00 from the defendant less any allowable offsets.


Jerome K. Kuykendall, Chairman

Concurring:


John F. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner