

BEFORE THE INDIAN CLAIMS COMMISSION

THE SAMISH TRIBE OF INDIANS,)	
)	
Plaintiff,)	
)	
v.)	Docket No. 261
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: July 28, 1971

Appearances:

Malcolm S. McLeod and Frederick W. Post, Attorneys for the Plaintiff.

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

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

The Samish Tribe of Indians has been decreed aboriginal owners of two parcels of land in the northern part of Skagit County, Washington. 6 Ind. Cl. Comm. 159 (1958). The parcels are Guemes Island, in Puget Sound, and a small portion of the mainland across Padilla Bay from the island.

By the Point Elliott Treaty of January 22, 1855 (12 Stat. 927), the plaintiff tribe ceded its lands to the United States. The treaty was ratified on March 8, 1859, which is considered the date of taking of plaintiff's lands.

By an earlier decision the Commission decided that the plaintiff tribe's share of the consideration paid by defendant to the different signatories to the 1855 treaty was \$11,245.04. Upper Skagit Tribe v. United States, 13 Ind. Cl. Comm. 583 (1964).

The issues now before the Commission are: (1) the acreage and fair market value of plaintiff's tribal lands as of March 8, 1859, and (2) whether the payment plaintiff received from defendant for its lands was so inadequate as to constitute an unconscionable consideration within the meaning of Clause 3, Section 2 of the Indian Claims Commission Act (60 Stat. 1049, 1050).

The parties have stipulated that the records, exhibits and testimony in the case of Skagit Tribe v. United States, 22 Ind. Cl. Comm. 28 (1969), and nine other similar Puget Sound cases, would be incorporated by reference into the record of this docket.

Testimony was taken and exhibits were admitted into evidence at hearings in this docket on value and consideration held at Seattle, Washington, on July 18-22, 1960. Since that time the plaintiff's contract with its attorney expired, and has not been renewed.

On March 11, 1968, the defendant filed a motion to dismiss for failure to prosecute. The Commission, noting that plaintiff did not have an approved contract with an attorney, held the motion in abeyance by an order dated June 14, 1968. Since trial had been held on the issue of value, the Commission ordered the defendant to file its requested findings of fact and brief on value, in accordance with Rule 23(b) of the General Rules of Procedure of the Commission, 25 C.F.R. §503.28(b) (1968).

Inasmuch as the Commission has already rendered value decisions in cases involving neighboring tribes of Puget Sound Indians, involving similar issues and on the same consolidated record now before it, the Commission has determined that it can resolve the present issues with no prejudice to the plaintiff's rights although without benefit of plaintiff's brief.

The parties to this action were in dispute concerning the acreage to be valued. Plaintiff argues that the tract contains a total of 13,633 acres, including 4,400 acres of tidelands. Defendant argues that tidelands cannot be included in the acreage to be valued, and that the total area in the tracts is 9,495 acres.

The Commission dealt with the question of tidelands in Chinook Tribe v. United States, 24 Ind. Cl. Comm. 56 (1970), and ruled that tidelands need not be valued on a per acre basis, but that the value placed on the tract as a whole should include any enhancements by reason of access to tidelands. In this case, the Samish tidelands contained shellfish. The Commission in arriving at an 1859 value of the subject tracts has taken this into account in assessing the incremental value to the dry land.

The subject tracts contain a total of 9,233 acres. The tracts consist of 6,033 heavily wooded acres of Guemes Island, and 3,200 acres of dry land on the mainland, of which 1,200 acres are heavily wooded and the remainder is low-lying, fertile land with excellent agricultural potential.

The record indicates that there were no sales of comparable lands in the area during or before 1859. Lacking such conventional evidence of market value, the Commission has considered the various elements that a **hypothetical willing seller and willing buyer** would take into account in

negotiating for the subject lands. Such elements include the natural resources of the area, the climate, transportation and accessibility, settlement patterns, the local economy, and also the demand and actual and potential uses for the lands. Otoe and Missouri Tribe v. United States, 131 Ct. Cl. 593, 131 F. Supp. 265, cert. denied, 350 U. S. 848 (1955).

The Puget Sound region attracted settlers in 1859 primarily for its rich timber supplies. The region was heavily timbered, enjoyed a moderate climate with abundant rainfall, had rich soils for agriculture to support the growing population, an excellent natural transportation system built around the extensive waterways of the Puget Sound, and abundant fish and wild life.

The local economy at the time was based on lumbering. Saw mills were operating by 1859 and lumber was being exported from the region.

Plaintiff's timberlands were predominantly forested in Douglas fir, the timber in greatest demand at the time. All of plaintiff's timber was within one and one-half miles of water, which is to say, all of it was commercially marketable at that time. Sawmills were within reasonable proximity of plaintiff's lands. Despite a slump in the timber market in 1859 the prospects for the industry in the region were still excellent.

Pope and Talbot, then the largest timber company, began buying timberlands in 1861 with the purchase of 225 acres in Snohomish County at \$1.50 per acre. Subsequent purchases from the government of additional lands were made in Kitsap County during the next three years with military scrip at \$1.25 per acre. Numerous other purchases of select 160 acre sites

were made from 1875 through the 1880's by Pope and Talbot throughout the Puget Sound area at a price averaging about \$3.12 per acre.

That portion of plaintiff's mainland tract containing the low-lying fertile terrain was well-suited for agriculture, given the favorable climatic conditions. Portions of plaintiff's agricultural lands were in fact being cultivated by 1869.

The Samish tidelands, access to which could be gained from the mainland tract, were rich in shellfish. There was no commercial market for shellfish at that time, but they were a present source of food and possessed a potential for future exploitation.

There were no settlers on the Samish lands in 1859, but there were settlements nearby, to the north at Whatcom and to the south on Whidbey Island, with every expectation that the region would experience continuing growth and prosperity.

Plaintiff's expert witness, Mr. H. B. Nelson, a former Skagit County assessor, used the "market valuation" method, based on the commercial value derived from the marketing of products, to arrive at an assessment of plaintiff's tracts, and concluded that plaintiff's lands had an 1859 fair market value of \$119,600. Mr. Nelson's valuation theory has been rejected in previous cases. See Skagit Tribe v. United States, supra.

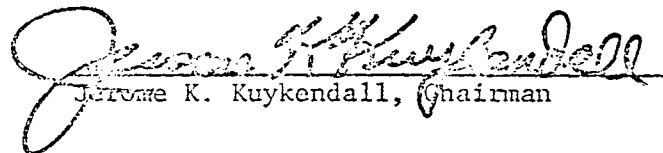
Mr. C. Marc Miller, an experienced land appraiser, was defendant's expert witness. Mr. Miller took into consideration in reaching his conclusion all the value factors that he estimated would be apparent to a willing buyer. Mr. Miller's assessment was that the Samish lands had an 1859 fair market value of \$1,250.

Our review of the record leads us to the conclusion that the Samish tracts were attractive to potential buyers in 1859 and that they contained

a good stand of readily accessible, easily exploitable, and commercially desirable timber, all of it adjacent to waterways and close to sawmills. The small stretch of agricultural land also would have been potentially attractive as supporting future Puget Sound settlement. The rich shell fisheries in the tidelands added value to plaintiff's lands, and the relative small size of the tracts made their disposal comparatively easy.

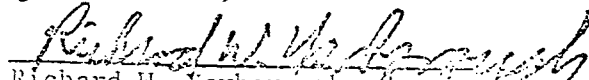
After considering the entire consolidated record in this case, incorporated by reference, the Commission is of the opinion that, as of March 8, 1859, the effective date of the 1855 Point Elliott Treaty, the 9,233 acres of plaintiff's lands had a fair market value of \$17,000, or approximately \$1.84 per acre.

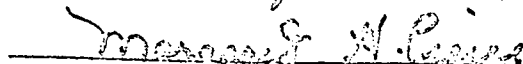
We further conclude that the consideration which the plaintiff received for its lands, \$11,245.04, was unconscionable, and that plaintiff is entitled to recover from defendant \$5,754.96, less gratuitous offsets, if any, which may be allowable under the Indian Claims Commission Act.

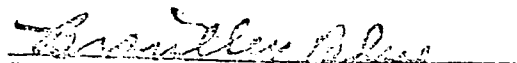

 Jerome K. Kuykendall, Chairman

We concur:


 John T. Vance, Commissioner


 Richard W. Yarborough, Commissioner


 Margaret H. Pierce, Commissioner


 Brantley Blue, Commissioner