

BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: June 7, 1972

Appearances:

E. L. Crawford, Attorney for
 the Plaintiff.

Richard L. Beal, with whom was
 Mr. Assistant Attorney General
 Shiro Kashiwa, Attorneys for
 the defendant.

OPINION

Chairman Kuykendall delivered the opinion of the Commission.

On October 30, 1970, the defendant filed a "Motion for Rehearing and for Amendment of Findings" directed at the Commission's additional findings, opinion, and interlocutory order of October 1, 1970. The Commission heard argument on the motion on January 7, 1971.

In its 1970 decision the Commission found that the lands which were ceded to the United States by the plaintiff tribe under the 1855 Point-No-Point Treaty had a fair market value of \$440,000 as of March 8, 1859, the effective date of said treaty. We also concluded that the consideration for the cession was unconscionable, and, after

deducting that portion of the treaty consideration allocable to the S'Klallam Tribe, \$39,180, the Commission entered an interlocutory award in the amount of \$400,820 subject to allowable offsets. In its motion the defendant argues that we should have included as additional consideration and as "payment on the claim" \$399,277.68 which was appropriated and paid out per capita to individual S'Klallam Indians pursuant to the Act of March 3, 1925, 43 Stat. 1102, 44 Stat. 173. ^{1/} In the event that we find that the 1925 payment is not additional consideration for the 1855 land cession the defendant has asked that the above amount be considered as a gratuity.

The 1925 Act which is entitled "An Act Appropriating money for the relief of the Clallam Tribe of Indians in the State of Washington, and for other purposes.", insofar as it is pertinent reads as follows:

That there is hereby authorized to be appropriated, out of moneys in the Treasury not otherwise appropriated, the sum of \$400,000, to be paid per capita to the Clallam Indians of the State of Washington upon enrollment of said Indians to be made under the direction of and to be approved by the Secretary of Interior: Provided, That before payment to the individual Indians they shall relinquish in writing all claims of any nature against the United States under any treaty, agreement, or act of Congress, and agree to accept such payment in full satisfaction of any and all claims whatsoever against the United States: . . ."

The crux of defendant's argument is that by virtue of the above quoted proviso, and in view of the fact that plaintiff's claim for additional compensation for the cession of its aboriginal title is based upon the

^{1/} While the 1925 Act called for an appropriation of \$400,000, only \$399,277.68 was actually disbursed.

1855 Treaty of cession, the S'Klallam Indians have been additionally compensated under the provisions of the 1925 Act. In the words of the defendant, the 1925 Act

. . . indicates a congressional intent to make belated compensation to the S'Klallam (Clallam) Indians of the State of Washington for any wrongs done to them under any treaty, agreement or act of Congress, else why condition payment upon a release for those claims. ^{2/}

In support of its view the defendant cites our decision in Ponca Tribe v. United States, ^{3/} as properly disposing of an analogous situation.

In considering the issue before us, it is appropriate to review briefly some of the events which we believe led to the passage of the 1925 S'Klallam relief act, as well as the Act of February 3, 1925, 43 Stat. 886, that conferred jurisdiction upon the Court of Claims to adjudicate the legal and equitable claims of certain Puget Sound tribes arising out of the several 1855 treaties, including the Point-No-Point Treaty.

Apart from accomplishing a cession of their aboriginal lands, the 1855 Point-No-Point Treaty also established for the S'Kokomish and S'Klallam tribes a small reservation of 6 sections of land at the head of Hood's Canal. This small reserve was situated in the S'Kokomish area and was known as the S'Kokomish Reservation. Initially, both tribes were hesitant to accept the new reservation, the S'Klallams, because it was well outside their ceded lands and geographically favored the S'Kokomish; the latter, because they were outnumbered by the S'Klallams

^{2/} P. 3, Defendant's "Motion for Rehearing and Amendment of Findings."

^{3/} 17 Ind. Cl. Comm. 162 (1966), affirmed in part with modifications, reversed in part, and remanded, 183 Ct. Cl. 673 (1968).

and there had been friction between the two tribes. Under Article 3 of the 1855 Treaty, the two tribes were not required to remove to the S'Kokomish Reservation until one year after the ratification of the treaty.

The S'Klallam Indians availed themselves of the privilege of remaining off the S'Kokomish Reservation, and the four year hiatus between the date of the 1855 Treaty and the March 8, 1859, ratification date encouraged permanent absenteeism, a condition in which the Government seemingly acquiesced. In any event, the annual reports by the Indian agents in the ensuing years show that the S'Klallam Indians never lived on the S'Kokomish Reservation but were scattered in small villages along Hood's Canal, Puget Sound and the Straits of Juan De Fuca at distances of 50 to 150 miles from the reservation. Some of them had acquired land by purchase or by homestead entry. A small group of S'Klallam Indians had purchased 200 acres of land at Jamestown which they managed as a communal venture. A less ambitious village site was established at Port Gamble. Many of the S'Klallam Indians found gainful employment at the various saw mills. Others operated fisheries. The Indian agents pictured these Indians as being independent and self-supporting, quite industrious and relatively prosperous. Available figures up until 1914 indicate the average S'Klallam population at Jamestown to be about 240 with another 90 or so living at Port Gamble.

It is not clear just when the S'Klallam and the other Puget Sound tribes began to press the Congress for redress of their grievances arising from the several 1855 treaties. This was done, however, and high on the list of complaints was the fact that the President had never set aside

or allotted any additional land to the Indians other than the small reserves established under the respective 1855 treaties. The common belief of these tribes was that, in negotiating the 1855 treaties of cession, Governor Stevens had promised the Indians that later on they, individually, would be given sufficient land for a home. As evidence of these promises of future allotments, the S'Klallam and S'Kokomish Indians relied upon certain language in Article 7 of the 1855 Point-No-Point Treaty:

The President may hereafter, when in his opinion the interests of the Territory require, and the welfare of said Indians be promoted, remove them from said reservation to such other suitable place or places within said Territory as he may deem fit, And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or such other lands as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate thereon as a permanent home, etc. . . .

Excerpts from the report of the House of Representatives accompanying the 1925 jurisdictional bill conferring jurisdiction on the Court of Claims, point out that, while the President never exercised his discretion in making any allotments to the Indians under the respective 1855 Treaties, it was intended that the small treaty reservations were to be only temporary measures, and that,

. . . it was intended that they [Indians] should later be moved to some place where they could be provided with a reasonable amount of land. We feel that they have been shabbily treated by the Government, and that they should have an opportunity to have these equities properly presented to the Court of Claims. (Parenthetical matter added.) ^{4/}

^{4/} House Report No. 456, Sixty-eighth Congress, first session.

An identical theme is found in the legislative history of the 1925 S'Klallam relief act. Senate Report No. 308, 68th Congress, 1st Session, incorporates extracts from a letter of the Secretary of Interior dated January 26, 1924, to the Chairman, Committee of Indian Affairs, wherein he states that 300 to 400 S'Klallam Indians are in need of immediate assistance, that these Indians had refused to remove to the reservation provided for under the 1855 Point-No-Point Treaty because they could not live peaceably with the S'Kokomish Indians, and, that at the time of the 1855 Treaty, they were promised a reservation at Jamestown, Clallam County, Washington, where their largest settlement is located. The Senate report concludes by adopting an earlier recommendation from the Interior Department, to wit:

The Clallam should be provided with homes near the waters of the Strait of Juan de Fuca and Puget Sound, their ancient habitat, and near the large sawmills and logging camps where they can obtain work.

The S'Klallam Indians were excepted from the provisions of the 1925 Act conferring jurisdiction on the Court of Claims since they were to receive direct assistance from Congress via the 1925 relief act. The S'Kokomish Indians along with the other Puget Sound tribes filed claims against the United States in the Court of Claims, including the specific claim for allotments under Article 7 of the 1855 Point-No-Point Treaty. After lengthy proceedings, the Court handed down its decision on June 4, 1934, in the case of Duwamish, et al., v. United States, 79 Ct. Cl. 530. Contrary to the contentions of the S'Kokomish Indians, the Court found

that the allotment provisions of Section 7 of the 1855 Point-No-Point Treaty were not mandatory, and that, until the President exercised his discretion in setting aside land for the purposes intended, no liability was imposed upon the Government to provide 80 acre allotments or additional reservation land to members of S'Kokomish (or S'Klallam) tribes. Since the President had never taken any action under the allotment provisions, the S'Kokomish Indians had no justiciable claim.

After giving consideration to all the circumstances leading up to the enactment of the 1925 S'Klallam relief act, the Commission is convinced that the \$399,277.68 distributed per capita thereunder to the S'Klallam Indians does not qualify, under the Indian Claims Commission Act, as a payment on plaintiff's present tribal claim. We also are of the opinion that the payment does not constitute a gratuitous offset under the Act.

As we read the proviso in the 1925 S'Klallam relief act, upon which the defendant so heavily relies, it is broad enough to cover a multitude of potential claims, both individual as well as tribal. Such being the case, the defendant has not demonstrated just what portion of the \$399,277.68 was intended to be for the ceded S'Klallam lands. The Commission has found nothing in the legislative history of the 1925 act indicating that Congress had specified the entire 1925 payment as such. The fact that defendant now desires to charge the entire amount against the instant award, does not ipso facto make it a payment on this particular claim. We are not dealing with gratuities, wherein the defendant may

pick and choose just when and where and in what amount it may assert any particular item, nor has the Commission any discretion in allowing or disallowing any or all of the asserted legal offsets. If it qualifies as a legal offset, it must be deducted in toto from the award.

The Commission finds that the Ponca case, supra, cited by the defendant illustrates the "something for something" concept with respect to payments on the claim. In Ponca, the United States had erroneously taken from the Ponca Tribe the Ponca reservation lands in Nebraska without the payment of any compensation. The forced removal of the Ponca tribe from its Nebraska lands to a new home in Oklahoma brought much suffering and misery to these Indians. Congress soon acknowledged its wrongful act and sought to indemnify the Ponca Tribe by appropriating \$165,000 to cover the losses sustained by the Poncas as a result of their unlawful removal. Of the above amount \$50,000 was allocated for the purpose of purchasing from the Creek Nation the Oklahoma land upon which the Poncas were then living.

The Ponca Tribe ultimately brought suit before the Commission to recover just compensation from the United States for the loss of its Nebraska reservation. Upon review, the Court of Claims allowed as a payment on the Poncas' "taking" claim only the amount actually expended by Congress to acquire the Oklahoma land, to wit, \$48,389.36. The Court reasoned that the balance of the \$165,000 appropriation was indemnification for all the consequential wrongs the United States had visited upon the Poncas as a result of their removal and was not intended as a payment on the Ponca "taking" claim. In this case we are unable to identify the

specific quid pro quo with respect to defendant's assertion that the \$399,377.68 per capita payment qualifies as an offset against the tribal award. The offset will not be allowed.

If our reasoning above appears to assume the validity of defendant's offset, we wish to make it clear that we do not find it to be valid. Upon review of the legislative history of the 1925 S'Klallam relief act (as well as the 1925 jurisdictional act in the Duwamish case, supra), it seems clear to the Commission that Congress, in an exercise of conscience and moral responsibility, intended to make amends to the individual S'Klallams for the fact that they never obtained any individual allotments pursuant to Article 7 of the 1855 Treaty even though the Indians had misconceived the extent of the Government's legal obligations in this matter. Apart from the extent of defendant's legal or moral responsibility in this situation, it is our view that the allotment features under Article 7 of the 1855 Treaty were never intended to confer a tribal benefit, but rather were intended to and did inure to the benefit of individual members of the S'Klallam Tribe. Article 7 states that allotments would be made only

. . . to such individuals or families as are willing to avail themselves of the privilege, and locate thereon as a permanent home.

Thus we find that the choice to take allotments was not a tribal or communal decision wherein all the tribe would take allotments, but rather an individual or family one. If the 1925 payment represents a quid pro quo payment in lieu of the supposed individual allotments under the 1855 Point-No-Point Treaty (and we think it does), then it does not qualify

as a legal offset against plaintiff's tribal claim in this case. ^{5/}

Finally, we are of the opinion that the proviso in the 1925 S'Klallam relief act, requiring individual S'Klallam Indians to relinquish all possible claims against the United States before receiving any payment, forecloses defendant's alternative contention that Congress intended the 1925 payment to be a gratuity. Defendant's claim in this regard is disallowed.

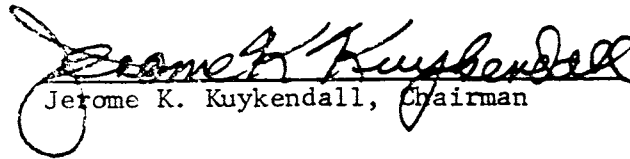
With respect to other gratuities, the defendant has now submitted to the Commission a memorandum setting forth in some detail gratuitous expenditures in favor of the S'Klallam tribe totalling \$78,538.02. Of this amount, defendant claims \$73,701.45 was expended for land acquisitions pursuant to Section 5 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, and \$4,826.54 was expended for subsistence, clothing, and other supportive items.


As soon as the plaintiff tribe, if it so desires, responds to the defendant's pending gratuity claims, this case can be set for an immediate hearing and a final disposition of all remaining matters. The Commission will this day enter an order denying the defendant's

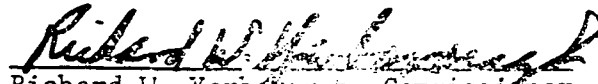
^{5/} In the aforesaid Ponca case the Court of Claims, ~~faced with an~~ analogous situation with respect to allotments under the Act of April 30, 1888, 25 Stat. 94, decided that allotments made to the Ponca Indians did not inure to the benefit of the Ponca Tribe.

"Motion for Rehearing and for Amendment of Findings", and, on its own motion, will amend its findings of October 1, 1970, to reflect its disposition of defendant's request to include either as additional consideration for the 1855 cession of the subject lands and as a payment on the claim, or as a gratuity, the \$399,277.68 per capita payment to the S'Klallam Indians under the Act of March 3, 1925.

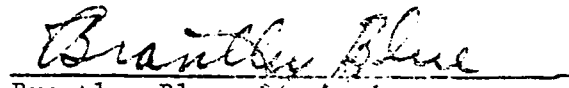
Concurring:


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Richard W. Yarbrough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner