

BEFORE THE INDIAN CLAIMS COMMISSION

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|---------------------------------|---|----------------|
| THE NISQUALLY TRIBE OF INDIANS, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Docket No. 197 |
| |) | |
| THE UNITED STATES OF AMERICA, |) | |
| |) | |
| Defendant. |) | |

Decided: February 7, 1973

Appearances:

Frederick W. Post, Attorney
for the Plaintiff.

Joseph S. Davies, Jr., with whom was
Assistant Attorney General Kent
Frizzell, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

The plaintiff tribe in the instant case claims that the consideration paid by the defendant for its aboriginal lands, located in the State of Washington, was unconscionable within the meaning of Clause 3, Section 2 of the Indian Claims Commission Act (60 Stat. 1049, 1050).

The Nisqually Tribe was one of nine Indian tribes which ceded lands to the United States by the Treaty of Medicine Creek (10 Stat. 1132), which was ratified on March 3, 1855. On June 25, 1969, the Commission entered its decision that as of the time of the ratification of the Treaty of Medicine Creek, supra, the Nisqually Tribe of Indians had aboriginal title to a specific area of land in the lower Puget Sound region described

in finding 9, Nisqually Tribe of Indians v. United States, 21 Ind. Cl. Comm. 173, 185 (1969). The Commission ordered that the case proceed to a determination as to the exact acreage contained within that area, its fair market value as of March 3, 1855, the consideration, if any, paid by the United States to the Nisqually Tribe or Band of Indians for the ceded lands, and all other questions bearing upon the defendant's liability to plaintiff herein. Pursuant to the Commission's order of June 25, 1969, a hearing was held in Seattle, Washington, on April 13 and 14, 1971, on all of these issues.

The subject tract lies in Pierce, Thurston, and Lewis Counties in the State of Washington and extends from a narrow opening on Puget Sound up the lower reaches of the Nisqually River in a southeasterly direction to the town of Mineral. The tract contains 152,500 acres and is approximately 10 miles wide and 35 miles long at its longest and widest points. Elevations vary greatly, ranging from sea level at the mouth of the Nisqually River to 2,600 feet in the southeastern portion.

The evidence, as outlined in our findings of fact, discloses that the lower or northerly 20 miles of the Nisqually tract is generally rolling land, except for several level prairies. In the southern and eastern part of the tract, the land becomes hilly with narrow valleys containing small amounts of bottom land and high hills or bluffs rising sharply from the creek bottoms. This area is generally covered with brush and trees but occasionally a flat valley or

prairie occurs. The southwestern portion of the tract is rough country, leading into mountains, with elevations to 2,600 feet. Approximately one-fourth of the area is prairie and bottom lands, with forest covering the remainder thereof.

The land to be valued is drained by the Nisqually River, rising in what is now Alder Lake (an artificial lake built about 1930) at the junction of the county lines of Pierce, Thurston and Lewis Counties in the southeastern portion. The climate in the northern portion is moderate, while the southeastern mountainous area has a more rigorous climate. There is an abundance of rainfall. An inferior quality of coal was discovered in Thurston County, but the Nisqually tract was not considered as potentially mineral-bearing land on the valuation date. While fishing had not attained the status of an industry, fish and shellfish were a major source of food supply, and their potential as a future factor in the region's economy was apparent.

The economy of the Puget Sound region was inextricably tied to the lumber industry. Although in 1855 the lumber supply was thought to be virtually endless, labor was limited and the difficulty of processing timber under crude conditions made the lumber itself expensive. Lumbering operations in the Oregon-Washington area did not achieve importance until the decade of 1890 to 1900, although shipments of timber from Puget Sound had begun around 1850.

Prior to 1855 Congress had passed public land laws to dispose of the territory or property of the United States, including land in the present

State of Washington. A prospective purchaser of lands in this area in 1855 had, under various statutes, several methods by which he could acquire land then in the public domain. The Act of April 24, 1820 (3 Stat. 566), offered a minimum of 80 acres of land for \$1.25 per acre payable in cash only. Between the years 1854 and 1862 it was possible to purchase land that had been available under this act for less than \$1.25 per acre through the Graduation Act of 1854 (10 Stat. 574). Under this act purchasers received a discount in the price of land depending upon the length of time the land had been available for acquisition.

The Preemption Act of 1830 (4 Stat. 420, as amended) was enacted to protect the claims of squatters occupying and improving public land by giving them an opportunity to purchase the land prior to public auction. The squatters could purchase the land for \$1.25 per acre under the Act of April 24, 1820, supra. Under the Oregon Donation Act of September 27, 1850 (9 Stat. 496), settlers were able to acquire a right to land in the Oregon Territory, which included the present State of Washington. The act provided for grants to white settlers who had settled on the claimed land prior to December 1, 1850, and who had lived there for four years and improved the land for their own use. After a settler proved compliance with the terms of the act and the Government surveyed the land, a patent would be issued in the name of the settler.

Bounties, in the form of land warrants, were given to veterans of military service as early as 1847 pursuant to the Military Bounty Land Acts and Military Land Warrant Acts (2 Stat. 728, and successor

statutes). These military bounties and land warrants were transferable and often acquired at discounts up to 60%. The United States, however, accepted the warrants at face value for payment of land purchased.

In 1854 the Territory of Washington was granted 46,080 acres of land for university purposes. In 1861 the territorial legislature authorized sale of this land for \$1.50 per acre.

As of March 3, 1855, there had been no sales or acquisitions of land comparable in size, location, or character to the Nisqually tract. Less than one-half of 1 percent of the subject area had been claimed as of that date. During the fifteen-year period subsequent to the valuation date, only 7.11 percent of the land in the tract (or 10,846.70 acres) was acquired from the United States by individuals or firms.

Both parties' witnesses reported isolated instances of sales close to the valuation date, acknowledging that they could not be viewed as comparable for our evaluation purposes, but rather indicated the scarcity of land transactions at the time.

The Pope and Talbot firm, which was the largest lumber company and one of the early purchasers of timberland in the Puget Sound area, made its first purchase in 1861 at \$1.50 per acre. It continued purchasing some lands from 1863 to 1866, using military scrip, which made the cost less than the listed \$1.25 per acre. From 1875 through the 1880's Pope and Talbot purchased numerous 160-acre tracts in the Puget Sound area at about \$3.12 per acre, many of which involved timberlands located within one and one-half miles of waterways. The bulk of the lands involved

in these early purchases had Douglas fir and some cedar trees growing on them.

The transactions shown in the appendix to the report of plaintiff's expert, Mr. John D. Sanwick, are of little assistance in reaching a determination of the subject area's fair market value. As indicated in finding 22, many sales of small acreages which were in choice locations and included improvements or involved special situations were listed. Many of the sales occurred a number of years after the valuation date and the list contained a number of resales.

Mr. Sanwick concluded that the tract had a value based first on its timber production, and settlement and cultivation of the large prairie lands by a substantial investor or group, and second on its natural attributes which could sustain a relatively large tribe of natives. His opinion was that the tract contained 167,350 acres and had a market value of \$177,849.00. This is an average of \$1.06 per acre. While Mr. Sanwick did not elaborate his reasons or method at arriving at his conclusion, the Commission is in substantial agreement with his appraisal of approximately \$1.06 per acre.

Plaintiff contends for a figure of \$2.69. We find that neither the evidence nor the argument of plaintiff's counsel supports this amount, which as we have seen, is greater than the value found by plaintiff's own expert.

The defendant's appraisers, Messrs. Frank R. Raney and Chase-W. Raney, arrived at a figure of 0.618 cents per acre, which for reasons hereinafter stated, we find to be too low. Mr. Frank Raney, who testified for the defendant, cited the Indian hostility, crude logging

technology, and the lack of developed industries which tended to depress land sales and, thus, to lower the market value. The evidence shows, however, that one-fourth of the tract was agricultural land and that the abundant supply of fish in Puget Sound was readily accessible. Numerous lakes dotted the land, and streams flowed into the sound from the south, including the Nisqually River and its tributaries, providing potential methods of transporting logs to mills. Furthermore, boats on Puget Sound furnished transportation to many other settlements, including Olympia. The climate was moderate in the northern portion of the tract where there were good bottom lands for agricultural use and settlement. Although accessibility was a problem, defendant's expert concluded that all the forest land could be made accessible in the foreseeable future, and, thus, eventually could be logged.

After considering all of the evidence of record, and having made its findings of fact therefrom, the Commission finds and concludes that on March 3, 1855, the effective date of the Treaty of Medicine Creek, the ceded area had a fair market value of \$160,000.00 or an average value per acre of about \$1.05.

We have found that the monetary consideration paid by the defendant to the nine Indian tribes pursuant to the Treaty of Medicine Creek was \$173,936.85. This treaty provided for the establishment of three reservations for the exclusive use of the Indians. They comprised a small Island called Klah-che-min (now known as Squaxin Island), two

sections of land on Puget Sound near the mouth of the She-nah-nam Creek (now known as the Nisqually Reservation), and two sections on the south side of Commencement Bay (now known as the Puyallup Reservation).

The Squaxin Island Reservation contained 1,494.15 acres and its boundaries have never been changed. The other two reservations were subsequently enlarged by the President pursuant to authority given him by Article VI of the treaty. The Nisqually Reservation ultimately contained 4,718 acres while the Puyallup Reservation was enlarged to 18,062 acres. The three reservations were created for the use and benefit of the nine tribes and bands which signed the Treaty of Medicine Creek, and the United States is entitled to a credit for the value of the reservation land, which was part of the consideration given for the cession.

The defendant claims that the value of the three reservations was \$19,005.00. Having found this figure to be supported by the evidence, we have added it to the monetary consideration previously paid and thus determine that the total consideration paid by the defendant was \$192,941.85.

The Squaxin Island Reservation was located about three miles south of the Squaxin tract. The entire 1,494.15 acres were forested, thus giving the island a highest and best use for timber production. Defendant's expert appraiser, Mr. Raney, testified that it had a fair market value of about 85 cents per acre, or a total of \$1,270,00.

The Nisqually Reservation was located in the northern portion of the subject area about four miles from Puget Sound. The Nisqually River flowed through the tract. It consisted mainly of choice

prairie land, with smaller amounts of bottom land and forest land. The valuations which Mr. Raney placed on each of the land use areas resulted in a total valuation of \$5,825.00^{1/} or an average value of about \$1.24 per acre. The preponderance of valuable prairie land, the favorable location of the reservation close to Puget Sound and along both sides of the Nisqually River, and the accessibility of the timber on the reservation were factors that enhanced the fair market value of the Nisqually Reservation and support Mr. Raney's valuation.

The Puyallup Reservation was located along the Puyallup River on the south side of Commencement Bay. It contained about 7,500 acres of bottom land and peat areas, which Mr. Raney valued at \$1.00 per acre. Approximately 8,821 acres were forest lands, which he valued at 50 cents an acre. The remaining 1,740 acres were tidal flats, to which Mr. Raney gave no value. The resulting total value of \$11,910.00 represents an average value of about 66 cents per acre.

The plaintiff did not present any evidence concerning the fair market value of the reservation lands. We have concluded that the valuations which Mr. Raney placed upon the three reservations and the evidence in this case support the defendant's claim that it is entitled to a credit of \$19,005.00 for the three reservations.

1/ Mr. Raney's valuation was:

| | |
|---|-------------------|
| 3500 acres - prairie land @ \$1.50/acre | \$5,250.00 |
| 950 acres - bottom land @ 0.50/acre | \$ 475.00 |
| 267 acres - forest land @ 0.40/acre | \$ 100.00 |
| Total | <u>\$5,825.00</u> |

In addition to the value of the three Medicine Creek Treaty reservations, the United States contends that it is entitled to an additional credit of \$1,410.00, representing the fair market value of the Muckleshoot Reservation. However, we have concluded that the Muckleshoot Reservation was not created pursuant to the provisions of the Treaty of Medicine Creek and that it was not part of the consideration paid for the cession under that treaty. When it was recommended that the Misqually and Puyallup Reservations be enlarged, it was also recommended that a new reservation be established on Muckleshoot Prairie. The recommendation was approved by President Pierce on January 20, 1857 (I Kapp. 919). On April 9, 1874, President Grant by Executive order delimited a described acreage and "set apart" the same "as the Muckleshoot Indian Reservation, for the exclusive use of the Indians in that locality, the same being supplemental to the action of the Department approved by the President January 20, 1857." (I Kapp. 918-19).

Shortly after its establishment, Indians from various tribes were placed upon the Muckleshoot Reservation. However, no Indians who were members of the tribes or bands that signed the Treaty of Medicine Creek were placed thereon. With the exception of the Muckleshoot Tribe (which was not a party to any treaty with the United States), all of the Indians placed upon the reservation were parties to the January 2, 1855, Treaty of Point Elliott (12 Stat. 927). See Duwamish Indians v. United States, 79 Ct. Cl. 530, 555-56, 603-04 (1934). The establishment

of the Muckleshoot Reservation was in keeping with the wording and intent of the Treaty of Point Elliott which, like the Treaty of Medicine Creek, contained a provision authorizing the President to remove the Indians from either or all of the special reservations created in that treaty to a general reservation, or to such other suitable place within the territory as he might deem fit.

We have noted that the defendant in asserting offsets to the claim of the Muckleshoot Tribe, Docket No. 98, alleged that it was entitled to an offset against the Muckleshoot award based upon the value of the Muckleshoot Reservation, which had been set apart for the benefit of those Indians "pursuant to the Point Elliott Treaty or the Point-No-Point Treaty" (Amended Answer, Docket No. 98, filed July 1, 1960, p. 12). It further appears that the value of the Muckleshoot Reservation was considered by the parties when they agreed on a compromise settlement of the offsets in the Muckleshoot case. Muckleshoot Tribe v. United States, Docket 98, 12 Ind. Cl. Comm. 743, 753 (1963), affirmed, 174 Ct. Cl. 1283, cert. denied, 385 U.S. 847 (1966).

Under the circumstances we see no basis for concluding that the Muckleshoot Reservation was part of the consideration for the cession under the Treaty of Medicine Creek. Accordingly, the reservation cannot be considered as an offset against any claim arising under the Treaty of Medicine Creek.

All nine of the Indian tribes and bands which signed the Treaty of Medicine Creek shared the monetary consideration paid by the

defendant and benefited from the three reservations created by the treaty. The total value of that consideration was \$192,941.85. The Nisqually share of the consideration is based on the proportion which their population bore to the total population of the nine participating tribes.

The parties are not in agreement concerning the population figures to be applied in this case. Plaintiff contends that the total population of the Indian parties to the Medicine Creek Treaty was 1,200, while defendant maintains that 566 was the correct number.

The plaintiff's source for the 1,200 estimate is a map and letter dated April 30, 1857, to the Commissioner of Indian Affairs, George W. Manypenny, from Governor Isaac Stevens, the map bearing the label "Map of the Indian Nations and Tribes of the Territory of Washington," and a "tabular statement of the Indians west of the Cascade Mountains showing tribes, population, parties to several treaties, reservations provided for in the treaties and temporary encampments."

The map and tabulation names three tribes, the Qnaksn-amish, Nisqually, and Puyallup as signatories to the Treaty of Medicine Creek, which is only a partial listing of the signatories, and also lists their population as 1,200 on December 26, 1854. No population breakdown is given by tribes, nor is any information given which would provide a reasonable estimate of the respective populations. Furthermore, the western district of Washington Territory was much larger than the area involved in the Medicine Creek Treaty, and the population of that area

would be much greater than the population of the nine signatory tribes.

Dr. George Gibbs' estimate, in tabular form, shows the total population of the Indian tribes of Washington Territory to have been 7,559, and gives a breakdown by tribe and population. The tabulation is corroborated by an 1854 estimate of Governor Isaac I. Stevens, who negotiated the Treaty of Medicine Creek. The Commission believes Dr. Gibbs' tabulation to be the best available evidence of the population of the Medicine Creek Treaty signatories.

While Dr. Gibbs has listed the Nisqually population as 184, defendant urges that a figure of 300 be used. This is based on the Commission's prior finding that the "total population of the Nisqually Tribe of Indians as of the date of the Treaty of Medicine Creek ranged between 250 and 300 persons." 21 Ind. Cl. Comm. 173, 183 (1969). This finding was entered when the Commission was considering the title phase of this case, and a precise population figure was not material to that decision. The 1969 decision did not refer to the 1854 population tabulations made by Governor Stevens and Dr. Gibbs, but rather cited earlier population listings in 1838 and 1844, when the populations of all Puget Sound tribes were higher. When the title issue was under consideration, defendant proposed a finding that the treaty date population of the Nisqually Tribe was 184, citing both Stevens and Gibbs. ^{2/} We agree that this is a more

^{2/} Defendant's request for findings of fact, Finding 11, pp. 49-50, filed July 10, 1964.

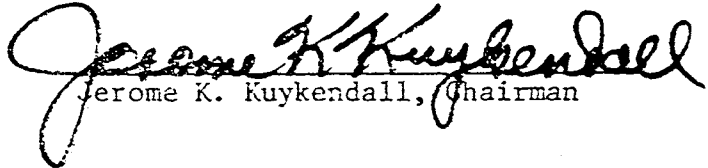
appropriate estimate and should be used in our calculations of the proration of the consideration payments.

Dr. Gibbs did not include an estimate of the population of the T'Peekskin who were a party to the treaty. We find it reasonable to accept the defendant's estimate of 30 as the population of this small tribe. Thus, Dr. Gibbs' estimate of the population of eight of the tribes plus the estimate of 30 for the T'Peekskin produce the following tabulation:

| <u>Tribe</u> | <u>No. of Indians</u> | <u>Percent of All Indians</u> |
|---------------|---------------------------|-----------------------------------|
| Nisqually | 184 | 40.89% |
| Puyallup | 50 | 11.11% |
| Squaxin | 40 | 8.89% |
| Steilacoom | 25 | 5.56% |
| S'Homanish | 33 | 7.33% |
| Steh chass | 20 | 4.44% |
| Squi-aitl | 45 | 10.00% |
| T'Peekskin | 30 | 6.67% |
| Sa-Hah-Wamish | <u>23</u> | <u>5.11%</u> |
| | 450 | 100.00% |

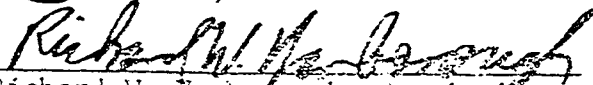
Since the Nisqually Tribe was 40.89% of the total population of the 450 members of all the signatory tribes, its share of the consideration of \$192,941.85 paid to the Indian tribes for the land ceded under the treaty was \$78,893.92. Thus the Nisqually Tribe received \$81,106.08 less than the fair market value of its land. The tribe was paid only about 49% of the true value of its lands. We conclude that the payment of \$78,893.92 as consideration for the cession of lands worth \$160,000.00 was unconscionable within the meaning of Clause 3, Section 2 of the Indian Claims Commission Act.


The plaintiff is entitled to recover \$81,106.08, less gratuitous offsets, if any, allowable under Section 2 of the Indian Claims Commission Act.

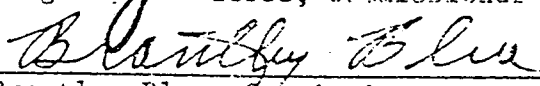

Jerome K. Kuykendall, Chairman

We Concur:


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner