BEFORE THE INDIAN CLAIMS COMMISSION

The NOOKSACK TRIBE OF INDIANS on relation of Joseph Louis, Chairman of the General Council, Claimant,	)	
vs.	)	Docket No. 46
THE UNITED STATES OF AMERICA, Defendant.	)	

Kenneth J. Selander, with whom was Frederick W. Post, Attorneys for Claimant.

Ralph A. Barney, with whom was Mr. Assistant Attorney General A. Devitt Vanech, Attorneys for Defendant.

JUL 14 1950

MEMORANDUM OPINION

O'Marr, Associate Commissioner, delivered the opinion of the Commission:

The petition, as amended, sets forth a claim of the Nooksack (also spelled Nook-Sack) Tribe of Indians, by Joseph Louis, a member of that tribe and as the representative of all its members. Louis is also described in the petition as Chairman of the General Council of the Tribe, but such allegations have no bearing on his capacity to bring this action.

An answer has been filed by the defendant in which, among other things, there has been set up (1) a defense to the effect that the claim herein asserted is barred by the decision of the Court of Claims in case

No. F-275 (79 C. Cls. 530), and (2) that the claimant is not a tribe, band or other identifiable group of Indians under the Act creating the Indian Claims Commission, (60 Stat. 1049; 25 U.S.C. 70).

Because of the nature of those two defenses the Commission agreed with the parties that they should be disposed of before the case is heard on its merits, so a hearing was had on the 8th day of June, 1950, solely upon the two defenses.

RES JUDICATA

This claim was presented to the Court of Claims under a special jurisdictional act, presently to be considered, in case F-275 (79 C. Cls. 530). In that case nineteen Indian tribes, including the claimant herein, joined in an action against defendant to recover the value of certain described lands located in the State of Washington. The claimant herein filed a separate petition therein alleging it had resided from time immemorial on 498,080 acres of described land which had been taken from the tribe by defendant without compensation and without its consent, and it asked judgment for the sum of $3,735,600. (Def. Ex. No. 7).

The identical claim is here presented and the defendant pleads the judgment of the Court of Claims as a bar to the present claim.

The first suit was brought under the jurisdictional act of February 12, 1925 (43 Stat. 886), which authorized the parties to certain named treaties and six other named tribes, including the Nooksack, with whom no treaties had been made, to submit their claims to the Court of Claims for adjudication. The act applying to the Nooksack and the five other

nontreaty Indians reads as follows:

> "* * * that all claims of whatever nature, both legal and equitable, which the Muckelshoot, San Juan Islands Indians; Nook-Sack, Suattle, Chinook, Upper Chehalis, Lower Chehalis, and Humptulip Tribes or Bands of Indians, or any of them (with whom no treaty has been made), may have against the United States shall be submitted to the Court of Claims with right of appeal by either party to the Supreme Court of the United States for determination and adjudication, both legal and equitable, and jurisdiction is hereby conferred upon the Court of Claims to hear and determine any and all suits brought hereunder and to render final judgment therein; Provided, That the court shall also consider and determine any legal or equitable defenses, setoffs, or counterclaims including gratuities which the United States may have against any of said tribes or bands."

As proof of the former adjudication of the Nooksack claim by the Court of Claims the defendant has offered excerpts from the findings of fact and the opinion of that Court in F-275 (79 C. Cls. 530). (See Defendant's Ex. No. 9). Since the exhibit does not include the final decree of the Court, we have examined the whole record of the Court of Claims in order to determine how the Court disposed of the Nooksack claim.

Case No. F-275 was instituted in the Court of Claims by nineteen Indian tribes under the Jurisdictional Act mentioned above. Thirteen of the tribes asserted claims based upon treaties specified in the Jurisdictional Act and the Court decided they were entitled to recover $71,496.45 (see Findings of Fact Nos. XI, XVI, XXI and XLVI, 79 C. Cls. 530, 538, 541, 548, 567.) These tribes are referred to in the findings and opinion of the Court as Treaty Indians. Six of the tribes, with whom no treaties had been made, including the Nooksack tribe, were parties to the same action and referred to in said opinion as nontreaty

Indians, but the Nooksack filed a separate petition. The final order of the Court of Claims, after setting forth its findings, reads as follows:

> "Conclusions of Law. Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law herein, that the plaintiffs are entitled to recover $71,496.45. The defendants counter-claim exceeds this amount, and the petition is therefore dismissed."

The nineteen parties to the suit filed separate petitions but the petitions were bound together and the cover named the nineteen tribes and designated the pleading as "Consolidated Petition." (Def. Ex. No. 7). While the judgment set forth above considered by itself is confusing, a reference to the opinion of the Court shows that what the Court intended by its order was to dismiss the Nooksack petition (as well as the others), and for the reason hereafter stated.

In its opinion (79 C. Cls. 530 at pp. 597-600) the Court first discussed generally the claims of the nontreaty Indians, which included the Nooksack, and the failure of the proof to show sovereign recognition of the Indian rights or titles to the lands for which compensation was sought, and then observed:

> "Tribal Indians claimed by right of occupancy such vast unlimited areas of lands, encompassing in many instances the greater and better portions of what are now States of the Union, that had it ever been the political policy of the Government to accord them the same proprietary right that attaches to a title superior to that of occupancy, and open the courts to suits as and for their taking when thrown open to public settlement by the United States, Congress and the courts would have left open no doubts upon the subject."

and concluded with this statement respecting the claims of all the nontreaty tribes:

"We are of the opinion that this court is without jurisdiction in a case between tribal Indians and the United States for the recovery of the alleged value of lands thrown open to public settlement by an act of Congress, in the absence of a treaty or an act of Congress recognizing the Indians' title by right of occupancy to the same. The special jurisdictional acts do not confer such jurisdiction (Mille Lac Indian case, supra), and the issue is a political and not a judicial one."

In specifically discussing the Nooksack claim (pp. 605-6) the Court said:

"The Nooksacks were never a large tribe; they were as a rule peaceable and industrious, they cultivated the soil to some extent, and preferred the chase to fishing or exploiting the adjoining bays and streams as most of the so-called 'Sound' Indians did. Why no treaty was made with them is not important in this case. Whatever may have been their original status, the Government's relationship with them appears as stated, and unfortunately for the tribe no governmental recognition of its claimed rights to occupancy of lands appears, and judgment may not be awarded."

Thus, it will be seen, that what the Court decided with respect to the Nooksack claim, was that the claim was based upon the aboriginal rights of those Indians and since they had never been recognized by defendant the Court, under the Jurisdictional Act, had no power to make an award therefor. This position of the Court was reaffirmed in Alcea Band of Tillamooks v. United States, 103 C. Cls. 494, 556, where the Court, in referring to its holding in the Duwamish et al. Tribes v. United States, 79 C. Cls. 530, said:

"The Duwamish case did not hold or intend to hold that an Indian tribe could not recover compensation on the basis of original Indian use and occupancy title as for a taking if the jurisdictional act authorized the bringing of a suit and rendition of judgment for compensation on the basis of such original title."

And when the Alcoa case, supra, came before the Supreme Court, that Court discussed the Duwamish case and reached the same conclusion as the Court of Claims as to what was decided in that case. (329 U. S. 40, 50-51).

It is obvious, therefore, that the Court of Claims did not dismiss the Nooksack petition in F-275 (79 C. Cls. 530) on the merits, but because it had no jurisdiction under the Jurisdictional Act to entertain a claim for the value of land based upon original Indian title. The rule is settled that a former adjudication does not bar the prosecution of a second action between the same parties on the same cause of action unless the first action was determined on its merits, and a dismissal of the former action for want of jurisdiction is not a determination of a case on its merits. Hughes v. United States, 71 U. S. 232, 18 L. Ed. 303; Smith v. McNeal, 109 U. S. 427, 27 L. Ed. 986.

It accordingly follows that the defense of res judicata must be denied.

Capacity of Claimant to Sue

As we have stated above, the defendant claims the Nooksack Indians is not a tribe, band or identifiable group (par. 3 of First Defense), and in the Third Defense the defendant alleges they are a subordinate band of the Lummi Tribe.

The Nooksack (Nooksak) means mountain men. This small tribe was located east of the Lummi tribe along the Nooksack river and in the Mount Baker region. These Indians were not a subordinate band of the Lummi but, according to Coleman (cited by Leslie Spier in Defendant's Ex. No. 3), a

tribe distinct from the Lummi and differing in language, manner and modes of life. There is a statement in Defendant's Ex. No. 13 to the effect that the Nooksack were allied with the Lummi and Skagit but the character or purpose of the alliance is not shown or in anywise explained, so we cannot say that such a statement may be accepted as proof that the Nooksack are a part of the Lummi. The fact is that in all of the documents offered by the defendant (Exhibits Nos. 3, 4, 5, 6, 10, 11, 12, 13, 14), consisting of a general series in Anthropology, reports of Indian agents, superintendents of Indian Affairs, the Nooksack were spoken of as a tribe. Following such reports the jurisdictional act of 1925 authorized a suit by the Nooksack tribe and the Court of Claims in its findings of fact and opinion treated the claimant herein as a tribe. True, the authorization to sue the Government is not conclusive on the question of the tribal status of an Indian claimant, yet when given the right to sue as a tribe there is a strong presumption at least that the Congress considered it a group of Indians coming within the designation of a "tribe," and when that presumption is considered in connection with the administrative references to the Nooksack as a tribe in practically every document offered by the Government, we must conclude that at the time complained of in the petition herein the Nooksack was an entity known and considered as a tribe of American Indians coming within the meaning of the term "tribe" authorized to submit a claim to the Indian Claims Commission.

Our conclusion is that (1) the claim set forth in the petition is not barred by the judgment of the Court of Claims in said case No. F-275, and (2) that the Nooksack Tribe of Indians is a "tribe" of American Indians

as that term is used in Section 2 of the Act creating the Indian Claims Commission.

The Commission is of the present opinion that the formal order determining the matters now under consideration should be postponed until the case is heard on its merits, however, if counsel for either of the parties hereto have a contrary opinion the Commission will consider such views as counsel may wish to present.

Chief Commissioner Witt and Commissioner Holt concur in the above opinion.

July 14, 1950