BEFORE THE INDIAN CLAIMS COMMISSION

THE LUMMI TRIBE OF INDIANS,	)	
Petitioner,	)	
v.	)	Docket No. 110
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Appearances:

Frederick W. Post and Donald C. Gormley,
Attorneys for Petitioner.

Donald R. Marshall, with whom was
Mr. Assistant Attorney General
William Amory Underhill,
Attorneys for Defendant.

O P I N I O N

PER CURIAM. The petitioner, Lummi Tribe of Indians, submits a claim for $30,000,000, plus interest, being the value of 249,800 acres of land described in the petition and located in what is now the State of Washington. The alleged basis for this claim is that petitioner exclusively possessed, owned and held immemorially said lands until January 22, 1855, when petitioner, and ten other tribes, ceded a large area of land including petitioner's, to defendant (12 Stat. 927) for the completely inadequate and unconscionable consideration of $150,000, of which amount petitioner was entitled and, we presume, received only $13,636 for its lands worth $30,000,000. The treaty of January 22, 1855, is known as the Point Elliott Treaty.

Defendant answered the petition and as an affirmative defense alleged that the claim here asserted is barred by the decision of the Court of Claims in the case entitled Duwamish et al v. United States, No. F-275, reported in 79 C. Cls. 530.

On August 24, 1951, the Commission made an order reading:

> IT IS HEREBY ORDERED That on the 24th day of September, 1951, at the hour of 10 o'clock in the forenoon of said day, at Room 778, Apex (Federal Trade) building, Pennsylvania Avenue at 6th Street, Northwest, in the City of Washington, D.C., the Commission will hear the parties hereto on the sole defense interposed by the defendant raising the issue of law and fact as to whether the judgment of the Court of Claims in the case entitled Duwamish, et al against the United States, No. F-275 (79 C. Clms. 530) constitutes a bar to the consideration of this case by the Commission; that at such time and place the parties may offer such evidence on the issue so raised as they may deem necessary.

The case was heard on the question as to whether the judgment of the Court of Claims was res judicata on September 24, 1951, and argued by counsel for the parties. Thereafter, and on October 15, 1951, defendant filed its brief, and petitioner filed its reply brief on December 3, 1951. At the hearing evidence was offered by defendant which will hereafter be referred to.

We shall now discuss the Duwamish case, supra.

By an act of Congress, approved February 12, 1925, 43 Stat. 886, it was provided, in so far as applicable here:

> * * *, That all claims of whatsoever nature, both legal and equitable, of the tribes and bands of Indians, or any of them, except the S'Klallams, commonly known as the Clallams, with whom were made any of the treaties of

> Medicine Creek, dated December 26, 1854, Point Elliott, dated January 22, 1855, Point-no-Point, dated January 26, 1855, the Quin-ai-elts, dated May 8, 1859, growing out of said treaties, or any of them, and 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.

Some nineteen tribes filed separate petitions pursuant to said act and the Court of Claims consolidated the petitions and heard all cases at one time. The Lummi Tribe was one of the claimants which filed a separate petition and whose claim was disposed of in the consolidated action.

In its petition (Def. Ex. 2) the Lummi tribe set forth eight causes of action. Seven of said causes of action were based upon the defendant's failure to comply with its treaty obligations and did not involve the taking of any of the lands involved in the pending case. One of said causes of action, the seventh, did involve the taking of land here alleged to belong to petitioner and it is the action of the Court of Claims on that claim that is principally relied upon as establishing res judicata.

The seventh cause of action (par. XV, Def. Ex. 2), was for damages resulting from the taking of Lummi lands by white settlers under the

Oregon Donation Act (9 Stat. 496), prior to the cession of Lummi and other lands by the treaty of January 22, 1855, 12 Stat. 927. Thus it would appear that whatever of the Lummi lands were taken under said act were those aboriginally held by that tribe.

The Court of Claims considered the Lummi claim in connection with similar claims made by other tribes and bands who were parties to the three treaties mentioned in the jurisdictional act and by its Finding XIII, found that the boundaries of the territory occupied by the tribes were not established by the record, and then proceeded to find that in the areas claimed by the tribes who were parties to the three treaties' quantities of land were settled upon by white settlers, and with respect to the Lummi tribe, it made this finding (Def. Ex. 3):

> In the country claimed to have been occupied by the Lummi tribe, settlements were made upon 2,406.05 acres prior to the conclusion of this treaty and upon 926.26 acres between the dates of the conclusion and ratification of the treaty. The settlement certificates and patents for these lands were all issued subsequent to the date of the ratification of the treaty.

It is not clear from the finding whether this land was settled on under the Oregon Donation Act or under that Act and others mentioned in Finding XII of the court, but we assume it was taken under that Act since the court seems to so regard it in its opinion. In any event, the court disposed of the Lummi claim, and the others, by these statements contained in the opinion of the court found in 79 C. Cls. 530:

At pages 569-70 (Def. Ex. 4) the court said:

> The Duwamish, Lummi, Whidby Island Skagit, Samish, Snohomish, Puyallup, and Squaxin Tribes insist that a proven claim exists for payment at the rate of five dollars an acre for 64,965.24 acres patented to applicants under the Oregon Donation Act. It is established that portions of the lands occupied and roamed over by the plaintiff Indians were taken as claimed. The impediment to a recovery is not only confined to an impossibility of ascertaining with any degree of accuracy the extent of the loss suffered by each tribe, but to the additional fact that the boundaries of the tribes are incapable of being definitely or approximately fixed so as to enable the Interior Department to ascertain what if any portion of the patented lands falls within the lands occupied by the respective tribes.

And after discussing a map offered to show boundaries of the tribal lands and concluding it was inadequate, the court at the bottom of page 570 said:

> A careful and deliberate study of the record exhibits the necessity of basing the claimed loss upon an approximation which would of itself be simply a finding without a basis of fact. This we cannot do.

And on page 571 the court in discussing its jurisdiction stated:

> The defendant challenges our jurisdiction to adjudicate any of plaintiffs' claims which arose prior to the execution of the treaties of 1855. * * * The act (jurisdictional act) * * * is limited to claims growing out of the three treaties mentioned, and omits a provision for a recovery of any sums growing out of acts of Congress.

The acts of Congress thus referred to obviously include the Oregon Donation Act, in fact, that is the only act the court had discussed prior to the statement quoted above. Following the last quotation, the court cites and quotes from Price v. United States, et al, 174 U. S. 373, which case held that the Court of Claims' jurisdiction was limited by the jurisdictional act and that the Government's liability cannot be extended beyond the plain language of the statute

authorizing the suit. So it is apparent that the court concluded that it had no jurisdiction to determine the alleged losses due to the taking of the claimants' lands under the Congressional Act known as the Oregon Donation Act.

The final determination of the court was to allow the Indian tribes for breaches of the treaty and nothing for the loss of land through Congressional action. A reading of the opinion convinces us that the reason for not allowing recovery for the land taken was because the court was of the opinion the jurisdictional act did not permit an adjudication for the land appropriated by white settlers or granted the states, through Congressional action. It is, of course, true, as defendant's counsel has pointed out and as we have set forth above, that the court in its findings determined the acreage taken from the various claimants, including the Lummi, in the respective areas claimed by them, but it also found that the boundaries of the respective areas occupied by them was not established (Finding XIII), and that fact was declared in the opinion as an impediment to recovery. It seems to us that all the court intended was to show that even if it had jurisdiction to consider the land claims — the ones pleaded as well as those not pleaded but upon which evidence was offered — it could make no award therefor because of the failure of proof as to boundaries.

We conclude, therefore, that the Government's defense of res judicata must be denied. Smith v. McNeal, 109 U. S. 426.

Dated this 30th day of January, 1952.