

BEFORE THE INDIAN CLAIMS COMMISSION

THE NOOKSACK TRIBE OF INDIANS )  
 ON RELATION OF JOSEPH LOUIS, )  
 CHAIRMAN OF THE GENERAL COUNCIL, )  
 Claimant, )  
 v. )  
 THE UNITED STATES OF AMERICA, )  
 Defendant. )

Docket No. 46

Decided: May 9, 1955

Appearances:

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

Ralph A. Barney, and Donald R.  
 Marshall, with whom was Mr.  
 Assistant Attorney General,  
 Perry W. Morton, Attorneys for  
 Defendant.

OPINION OF THE COMMISSION

Holt, Associate Commissioner, delivered the opinion of the Commission.

This is a claim of the Nooksack Tribe of Indians presented by Joseph Louis as a member of said tribe, and as the representative of all its members, to recover against the United States for the value of approximately a half million acres of land. These lands, as described in the preceding Finding of Fact No. 4, are a portion of the lands lying west of the Cascade Mountains in the former Territory and present State of Washington, ceded to the United States by certain named Indian tribes under the Point Elliott Treaty of January 22, 1855 (12 Stat. 927).

Claimant asserts the right to recover on the ground that the Nooksack Tribe held aboriginal Indian title to the claimed lands from

time immemorial until they were taken by defendant and disposed of to white persons or made into a forest reserve, without payment to or treaty with the tribe. Claimant asks judgment in the sum of \$3,735,600 as the alleged value of their interest in the land at the time of taking.

The Commission in a prior hearing in this case determined and denied two special defenses of defendant (1) that the judgment in the case of *Dwamish et al., v. United States* (79 C. Cls. 530) is a bar to the claim here presented, and (2) that the claimant Nooksack Tribe is not a tribe or group of American Indians entitled to present the claim asserted.

At this time, by agreement of parties and the order of this Commission, the issue now before the Commission is limited to the determination of the question of whether the claimant tribe, at the time of the alleged appropriation thereof by defendant, held aboriginal Indian occupancy and use title to the claimed lands, or any part thereof and, if so, whether defendant unlawfully deprived claimant thereof.

On this question, claimant has the burden of proving that the Nooksack Tribe actually and exclusively occupied and used all or some definite part of the claimed lands. See the *Quapaw Tribe v. The United States*, Doc. 14 Indian Claims Commission, aff'd 128 C. Cls. 45; *United States v. Santa Fe Railroad Co.* 314 U. S. 339; *Choctaw Nation v. United States*, 34 C. Cls. 7; *Assiniboine Indian Tribe v. United States*, 77 C. Cls. 347; *Wichita Indians v. United States*, 89 C. Cls. 378.

In connection with the proof of such original Indian title, it appears from the defendant's proposed findings of fact and brief that counsel for defendant is willing to concede the evidence submitted

establishes that certain Indians, later identified as the Nooksacks, were living during and prior to 1855 in at least three separate autonomous villages located along the Nooksack river within the claimed area. Counsel contends, however, the record shows that the claimed lands were not held and used aboriginally by all of said Indians as a group or tribal entity, but each autonomous village occupied and used an indefinite area around the village, thus, the village is the only entity to assert a claim for the loss of the particular area of land so occupied and used by it.

As to their tribal status, we point out that this Commission determined in the prior hearing in this case that in 1855 these Nooksack Indians constituted what was considered and known as a tribe of American Indians. It is true, at least in pre-white times, the ancestors of claimant Indians may have existed as separate villages which were largely autonomous in a political sense, but throughout their aboriginal existence there appears to have been ties of kinship, a common culture and dialect of the Salish language different from that of a neighboring village groups, and with the individual Indians of one village being free to utilize the lands within the area occupied by all the Nooksack villages. In late aboriginal times, and from the time of their first contact with the officials of the Government whose duty it was to deal with and report on said Indians, the Nooksack village groups were recognized, designated and dealt with as a separate and distinct tribe by said Government officials. It is certainly evident that the policy of the Government at that time was to consolidate, recognize and deal with

groups of Indian villages in Washington Territory, such as the Nooksacks, as a tribe. While the Nooksacks were not so recognized by a treaty, it is our opinion that the Indians living in the villages along the Nooksack river were recognized by the officials of the Government as a tribal entity, and treated as having collective rights in the area aboriginally occupied and used by all the village groups.

It then becomes a question of the character and extent of the Nooksack Tribe's occupancy and use of the claimed lands at and prior to the time of the alleged taking in 1859. We note that the evidence submitted bearing on this question is somewhat limited in that most of the early historical accounts and maps of the area mentioning the Nooksacks refer to the period just prior to 1859. The time of first white contact with the Nooksacks is uncertain, but so far as the record shows, it appears that the name Nooksack was first applied by officials of the Government in 1853-54 to identify the Indians then living in villages along the upper part of the Nooksack river located in northwestern Washington Territory. The first such report on the location of the Nooksacks was made to the Secretary of War in 1853-54 by Dr. George Gibbs who explored and surveyed the Puget Sound area for a railroad right of way. In 1854, Isaac Stevens, Governor and Ex-officio Superintendent of Indian Affairs of Washington Territory, was duly authorized to negotiate treaties with Indian tribes residing west of the Cascade Mountains in said Territory, and he was directed to investigate and report on their location and the boundaries of the regions claimed by each. In September, 1854, Stevens found and reported that the "Nooksahk"

tribe was located on the main fork of the Nooksack river "which is said to rise in and carry off the water of Mount Baker." Governor Stevens also prepared and submitted a map of Washington Territory lying west of the Cascade Mountains (Def. Ex. 15) showing the boundaries of land ceded at a treaty of December 26, 1854 (a treaty not involved here), and "also Indian tribes to be treated with and lands to be ceded at future treaties." On this map Stevens shows the location of the "Nooksahk" Indians in the region along the upper part of the Nooksack river within the territory he designates is "to be ceded by future treaties." On a later map (Def. Ex. 16) of the same area made and submitted by Stevens in 1857 after he had negotiated the Point Elliott treaty but prior to its ratification, the Nooksacks are again shown in the same location and within the territory ceded by that treaty. We also have the testimony of defendant's witness, Dr. Carroll L. Riley, anthropologist, in connection with a recent investigation and study he had made of the history of the Indians in the Puget Sound area in Washington, which included the Nooksack river area. According to Dr. Riley, aboriginally and at the time of the first white contact there were probably three main Nooksack villages located along the valley of the Nooksack river, all within a span of approximately ten miles along the main river in the northwest portion of the claimed area. Dr. Riley locates as the probable aboriginal villages, the village at the mouth of the south fork of the river near the present town of Demin, Washington, one village down the main river near the present town of Goshen and one village further down the river near the present town of Everson, Washington. Other documentary and historical evidence in the record

confirms the location of the Nooksacks as found and reported by Governor Stevens, and as testified to by Dr. Riley. So, while there can be no doubt but that in 1855 and 1859 claimant's ancestors were occupying an area of land along the Nooksack river valley within the claimed territory, it is difficult to determine from the record what the limits were of such area exclusively occupied and used by them. This may be due primarily to the fact that most of the evidence relates to the period subsequent to 1855.

In considering the problem of determining boundary lines of lands claimed by tribal Indians by right of occupancy, this Commission in the case of the Quapaw Tribe v. The United States, *supra*, made the following statement with respect to the rule relating to the sufficiency of the evidence to establish aboriginal title: "It is perhaps not required that the boundary lines be as accurately defined as a surveyor would like them but some general boundary lines of the occupied territory must be shown, and it must be shown that the occupant had the possession to the exclusion of other tribes; constructive possession is not sufficient."

We have carefully examined all the evidence submitted in this case, and we are of the opinion that claimant tribe has not satisfactorily established original Indian title in 1859 to all of the claimed lands described in Finding No. 4. It appears from the evidence that the economy of these Indians, numbering approximately 450 in 1855, was centered around the valley of the Nooksack river where there was an abundance of fish, game, root crops and berries. This made it possible for them to obtain most of their subsistence from the areas in the

vicinity of the three above named villages occupied by them. There is, however, substantial evidence that they used the valley of the Nooksack river to the northwest of their villages as far as the present town of Lynden, also to the south along the south fork of the river as far as the town of Acme, and to the east along the north fork of the river as far as the town of Maple Falls. These sites are shown on the map which is Defendant's Exhibit 51. There is also evidence that the Nooksacks made infrequent hunting excursions into the mountains east of their villages towards Mount Baker, but the record indicates that other Indian tribes from the north and south also hunted in the same area, and it appears doubtful whether the Nooksacks occupied and controlled this area any great distance from these villages.

We do not believe the proof submitted establishes with any degree of certainty that in 1859 claimant's ancestors exclusively occupied and used more than a comparatively small portion of the claimed lands. From a careful study of the entire record, we are of the opinion that the evidence shows that at that time the only part of the claimed territory occupied and exclusively used by claimant tribe was a triangular shaped area along the Nooksack river and its three forks, the approximate limits of which may be described as follows:

Commencing at the present town of Lynden, Washington, on the Nooksack river in the northeast corner, then east along the north fork of the Nooksack river to the present town of Maple Falls, then southwest across the middle fork of the river to a town named Acme, Washington, located on the south fork of the river, and then northwest along the river to the place of beginning.

This area includes their three village areas in the Nooksack river valley of Demin, Goshen and Everson, above mentioned, together with

the surrounding area that is quite clearly shown by the evidence to have been used by them for subsistence purposes.

In reaching this conclusion we recognize the difficulty of obtaining the essential proof necessary to establish Indian title in a tribe at such an ancient date, and as a result a liberal approach has been made by the Commission in weighing the limited evidence submitted in order to determine whether such conclusion as to the approximate limits of the area actually occupied by claimant tribe can be fairly said to be supported by substantial evidence. We think that it is. In this connection, we direct attention to the case of the Snake or Piute Indians v. The United States, 125 C. Cls. 241, 254, wherein the Court of Claims made the following statement in its opinion with respect to the sufficiency of the evidence to support a finding of Indian title in a tribe:

The problem of establishing such exclusive occupancy title by immemorial possession as of a date too remote to admit of testimony of live witnesses, and where no deeds or patents exist, is not a simple one. At best, the ultimate fact of beneficial ownership by exclusive possession and occupancy can only be inferred and found from many separate events and a variety of documentary material \* \* \*

It is urged by counsel for claimant this Commission should find that the Nooksack tribe exclusively occupied all the territory they now claim, with only slight modification, because of the statement made by the Court of Claims in its opinion in the case of Dwamish Indians et al., v. United States, 79 C. Cls. 530, 605, that "there is no doubt that the Nooksack Tribe lived within the territory of the now State of Washington upon an area of land extending from Mt. Baker in what is now



Whatcom County, to the International boundary line." We believe the answer to this contention is that, in denying recovery because there had been "no governmental recognition of its (Nooksack Tribe) claimed rights to occupancy of lands," nor jurisdiction granted it to determine the extent and value of such rights, the Court of Claims did not find it necessary to determine what portion of the area claimed was actually occupied by the Nooksacks. The Court merely found (Finding No. 25) that no treaty had been made with the Nooksack Tribe, and, that at the time of the Point Elliott treaty the tribe "inhabited that part of the Territory of Washington stretching from Bellingham Bay northeastwardly to Mount Baker" within the area ceded by that treaty, with "the country north of them up to the international boundary" being "inhabited by a number of smaller tribes." (Finding 28). It is true, this establishes the location of the Nooksacks within the claimed territory, as we have found, but it does not prove that they held original Indian title to all of it, as we find nothing in the opinion or findings of fact in that case disclosing any attempt on the part of the Court of Claims to determine the extent of the area actually occupied by the Nooksacks.

It is therefore the conclusion of the Commission that the only definite part of the claimed lands to which claimant has established by substantial evidence the Nooksack Tribe held original Indian title through exclusive use and occupancy in 1859, and for an indeterminate time prior thereto, are the lands specifically described in Finding 14.

Having reached this conclusion, the next question is whether defendant wrongfully deprived the Nooksack Indians of their right of occupancy and use of these lands, and, if so, when such action occurred.

The lands so occupied by the Nooksacks were included in the area ceded to the United States by the Indian parties to the Point Elliott treaty, and the defendant alleges said lands were not taken by defendant, but that the Nooksacks as a subordinate band of the Lummi Tribe ceded their lands as a party to that treaty. We agree the treaty would have effected a cession in 1859 of all the Nooksacks' occupancy rights in the lands had they been parties to the treaty, and, while there is some evidence in the record indicating the officials of the Government considered they were, we think the evidence as a whole shows that the Nooksacks were not parties to the treaty, either as a tribe or as a subordinate band of the Lummi Tribe. The defendant apparently bases its allegation upon statements taken from certain reports of Government officials in the area made subsequent to the treaty, which tend to connect the Nooksacks with the treaty as a part of the Lummi tribe who was a party, and upon the finding of the Court of Claims in the Dwamish case, supra, to the effect that following the ratification of the treaty the Nooksacks came under the charge of the Indian agent for the Lummi Reservation, and participated in the distribution of benefits set forth in the treaty.

The statements, referred to by defendant, when considered alone, may to some extent support the defendant's contention, but for the most part they merely indicate an uncertain concept of those officials making them as to the Nooksack Indians relationship to the Lummi Tribe. Although the two tribes lived in adjoining territory, the Nooksack Tribe is shown by the evidence to have been a tribe distinct from the Lummi

and differed in language, manner and modes of life. The record contains a number of reports of Government officials in the area, beginning with the report of September 16, 1854, made by Governor Stevens prior to the Point Elliott treaty negotiations, which refer to the Nooksacks as a separate tribe. It should also be noted that the Point Elliott treaty contains no reference to the Nooksacks, either in the body of the instrument or in the designations of the numerous signers thereon, although, without doubt, Governor Stevens who conducted the treaty negotiations was fully aware of the fact that the Nooksacks as a tribe had a right of occupancy in a portion of the lands ceded by that treaty, and such right would remain unextinguished unless they joined in its execution.

The determination by this Commission that the Nooksack Tribe was not a party to the Point Elliott Treaty and has never by treaty stipulations relinquished its rights in the lands occupied by it in 1859, finds support in the findings made by the Court of Claims on these questions of fact in the Dwanish case, *supra*, wherein the claimant tribe asserted the same claim that is presented here. The findings of the Court in that case, in pertinent part, are as follows:

XXV. The United States endeavored to, but did not conclude or ratify treaties with the Upper Chehalis, the Muckleshoot, the Nooksack, the Chinook, and the San Juan Islands Indian Tribes. A large area of lands over which the above tribes roamed, and within portions of which they had their villages, was by acts of Congress thrown open as part of the public domain to white settlers and taken up by them. \* \* \*  
Neither by act of Congress nor treaty were anyone of the tribes given a delimited reservation for their occupancy, although public appropriations were from time to time made and disbursed for their benefit. The above tribes have no claim growing out of a treaty with the United States. A large portion of the areas claimed by some of the tribes

was included within land reserved under treaties to other tribes, or included within the boundaries of lands ceded to the United States by other tribes. (Emphasis supplied.)

And, as to lands occupied by the Nooksacks, the Court further found:

XXVIII. At and prior to the time of the treaties involved in this case, the Nooksack Tribe numbered approximately 450 individuals and inhabited that part of the Territory of Washington stretching from Bellingham Bay northeastwardly to Mount Baker within the area ceded to the United States by the tribes parties to the treaty of Point Elliott. The country to the north of them up to the international boundary was inhabited by a number of smaller tribes. \* \* \*

Thus, we see from the foregoing findings of fact that the Court of Claims definitely found that the Nooksack Tribe occupied lands within the area ceded by the Point Elliott treaty and that the United States had never made a treaty with the tribe. And while recovery was denied for lack of jurisdiction to adjudicate such a claim for unrecognized Indian title, the Court evidently considered it necessary to determine these facts in disposing of the case.

It also appears that Congress intended to make the extinguishment of all original Indian title to lands in Oregon and Washington Territories the subject of a treaty. This, we think, is shown by the provisions of the Act of August 14, 1848 (9 Stat. 323) creating the Territory of Oregon, which made all land laws of the United States applicable to said Territory, and in Section 1 stated that nothing therein contained "should be construed to impair the rights of persons or property now pertaining to the Indians in said territory so long as such rights remain unextinguished by treaty between the United States and such Indians. \* \* \*"

Later, when Congress organized Washington Territory out of a part of Oregon by the Act of March 2, 1853 (10 Stat. 172), it was provided by Section 12 of the Act that all laws of Congress relating to Oregon were continued in force in Washington Territory.

Since the Nooksack Tribe was not a party to the Point Elliott Treaty, it is obvious that by no acts of the tribe did it surrender any rights in the lands occupied by it at the time of said treaty. It is plain, however, that the United States considered that by virtue of said treaty it had extinguished such rights of occupancy held by the Nooksack Tribe in the lands ceded, and thereafter treated such lands as public lands to be fully disposed of by the Government. Moreover, the treaty was negotiated pursuant to congressional direction to extinguish occupancy rights of all Indian tribes in the lands ceded, and said treaty was later ratified by the Senate.

So, it is our conclusion that the original Indian title of the claimant tribe in the lands exclusively occupied and used by it as specifically described in Finding 14, was terminated and taken by the defendant, without payment of compensation, as of the date of the ratification of the Point Elliott treaty on March 8, 1859.

Having established as a fact that it held original Indian title to said lands in 1859, the claimant had an interest therein of which it was deprived in 1859 by the defendant without payment of compensation, and claimant is entitled to recover compensation for such interest. *Otoe and Missouria Tribe of Indians v. The United States*, 2 Ind. Cl. Com. 335, aff'd by Court of Claims on May 3, 1955.

It is noted that there is evidence in the record indicating that subsequent to 1859 some of the Nooksack Indians may have acquired rights in at least a portion of the land within the area described in Finding 14, but the character and extent of such rights and the manner in which they were acquired are not clearly shown. However, this can be determined when a further hearing is held to determine the acreage of the tract of land described in Finding 14, and the amount of compensation to which claimant tribe may be entitled to recover.

Wm. M. Holt  
Associate Commissioner

Concurring:

Edgar E. Witt  
Chief Commissioner

Louis J. O'Marr  
Associate Commissioner