BEFORE THE INDIAN CLAIMS COMMISSION

THE MUCKLESHOOT TRIBE OF INDIANS on relation of Napoleon Ross, Chairman of the General Council, Claimant,	)	
v.	)	Docket No. 98
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: August 25, 1955

Appearances:

Frederick W. Post, with whom was
Malcolm S. McLeod,
Attorneys for Claimant.

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

OPINION OF THE COMMISSION

Witt, Chief Commissioner, delivered the opinion of the Commission.

The petition herein was filed by the Chairman of the General Council of the Muckleshoot Tribe of Indians and alleges that the defendant deprived the Muckleshoot Tribe of its lands, with the exception of 3,491 acres, without compensation. The defendant's answer set forth, among others, the following defenses: (1) "That the claim of the claimant herein is barred by the decision of the Court of Claims in the case entitled Duwamish, et al., v. The United States, No. F-275, reported in 79 C. Cls. 530 (cert. den. 295 U. S. 755)" and (2) That the claimant

herein is not a "tribe, band, or other identifiable group of American Indians" within the meaning of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U. S. Sec. 70(a).

Defendant then filed a motion for a preliminary hearing on the above defenses. As a result of that hearing it was determined by this Commission that the defenses should be denied and it was so stated in the opinion and order of the Commission filed on May 14, 1953. The order states in part as follows:

> THEREFORE, for the reasons set forth in the opinion of the Commission, this day rendered, IT IS HEREBY ORDERED AND ADJUDGED that the judgment of the Court of Claims in said Cause No. F-275, reported in 79 C. Cls. 530, does not constitute a bar to the prosecution of the above-entitled cause before this Commission, and that the special defense based upon said judgment is hereby denied; that the claimant, The Muckleshoot Tribe of Indians, is a tribe of American Indians entitled to present its claim to the Indian Claims Commission under the provisions of the Act creating such Commission, and said defense of the defendant relating to the capacity of the claimant to assert its claim, is hereby denied.

Pursuant to a motion filed by claimant and consented to by defendant, the Commission entered an order on January 31, 1952, limiting the hearing on the merits to the determination of the questions of (1) whether claimant, under the law and facts to be adduced, had aboriginal or Indian title to the lands described in the petition at the time of the alleged appropriation thereof by defendant, and, if so, (2) whether defendant unlawfully deprived claimant thereof, postponing until after such determination, should it be favorable to claimant, the proof as to the value of the land or as to any other questions of fact raised by the pleadings and which had not been previously determined by the Commission. There-

after evidence was concluded by both the claimant and defendant, and said issues were submitted to the Commission for determination.

Claimants herein, the Muckleshoot Tribe of Indians, claim the following area of land by right of aboriginal possession:

> Commencing at the southwest corner of Township 21, Range 5 EWM; thence north through the western edge of the town of Auburn to the town of Pialachie; thence to the northwest tip of Lake Cow; thence to the north tip of Lake Sawyer; thence to the town of Kangley; thence to the peak of Mt. Lindsay; thence to the peak of Goat Mountain; thence to Stampede; thence along the crest of Cascade Mountains to Naches Pass, to Chinook Pass to the peak of Mt. Rainier; thence north to the headwaters of the West Fork of White River; thence along the divide between tributaries to the White River and tributaries to the Puyallup River to a point one mile south of the town of Buckley; thence to the place of beginning, consisting of 491,520 acres more or less.

These lands are a part of those ceded by various tribes or groups of Indians in the Treaty of Point Elliott of January 22, 1855 (12 Stat. 927) and lie west of the Cascade Mountains in the present state of Washington. Claimant alleges their value to be $3,500,000.00 and that they were taken by the defendant in 1855. It is further alleged that the ancestors of the claimants did not participate in the Treaty of Point Elliott since they did not sign it, although they, or a part of them, were included in the preamble thereof. With the issues for trial being limited to (1) Indian title and (2) unlawful appropriation by defendant, the claimant was placed under the burden of showing first that the Muckleshoot tribe, or an identifiable entity or entities presently represented by the Muckleshoot Tribe, had used and occupied the area claimed to the exclusion of other Indians. As indicated previously, this Commission had already determined in its former findings and opinion of May 14,

1953, that the claimants herein are presently an identifiable group. Essentially, the same proof relied upon in that opinion along with more detailed proof adduced in the later hearing serves to further convince this Commission that the ancestors of claimants were identifiable groups using and occupying in the manner peculiar to the Indians of the Puget Sound reasonably definable areas of land over which they exercised such control as to indicate an exclusive occupancy.

When the Indians of this area were first contacted by white men, it was found that certain groups of Indians were living in the area of the Green and White Rivers. These same groups were mentioned consistently as being in that area. Admittedly, these reports are comparatively late because of the fact that the area was settled so late. There is no indication, however, that these groups were at any other location at a previous time. In the absence of any proof to the contrary, we may assume that these same groups had occupied that area from time immemorial. Governor Stevens, in pursuance of his instructions to report on the location and boundaries of the various groups of Indians, locates the Smal-ka-mish at the head of White River, the Skop-ah-mish on the upper White River, and the Stakahmish on the main White River. Dr. George Gibbs mentions these same groups in his estimate of their population in 1854 and locates them in the same relative area. These three groups are listed in the preamble of the Point Elliott Treaty, although none of them signed the treaty. They are again located by Governor Stevens' map of 1857 as being around the area of the Muckleshoot Reservation which had been established by that time. These Indians were also known

as Green River Indians and White River Indians. Both of these designations were geographical terms and the ones called Green River Indians were also known as Skopamish, Sko-pabsh, or Skopeamish, and the Niskap, Neccope, Nescope, or Nooscope, while the White River Indians were also called Smulkamish, S'Balahco, Smalk-kah-mish, Smulcoe, or Sobal-Ruck, Klikitats, Niskaps, and Skopamish. It appears that it is quite likely that it was possible to find members of the same group on both the White and Green Rivers. Mr. Arthur C. Ballard, claimant's witness, testified that after considering all the above-named groups and possibly other spellings of the same names, the names Skopamish and Smulkamish represented all of the groups and that these groups are identifiable as present day Muckleshoot Indians.

During the period when the Indians of this area were being treated with by Governor Stevens it was the policy of the Governnent to create and consolidate Indian groups wherever possible. Such is indicated in the correspondence of Governor Stevens. It was a necessary corollary of the movement of Indians to the reservations. The process was also hastened in this case by the hostilities between the whites and Indians. It appears from contemporary reports that possibly as early as 1855 certain hostile Indians were gathered up by the military and held at what was known then as Fort Muckleshoot and was at the Fox Island conference of August, 1856, decided upon as another reservation site. On January 20, 1857, the President approved the recommendation, and the former military post became Muckleshoot Reservation.

When the reservation was established, certain of the Indians in the surrounding area were placed on it. The reports of the Indian agents

in the area, despite what appears to be confusion on their part with regard to the names of the groups, indicate that the White and Green River Indians were consolidated on the Muckleshoot Reservation. It wasn't until approximately 1868 that these Indians were referred to as Muckleshoots, and not until 1870 that the first designation as Muckleshoot Tribe was used.

It has been conceded by the defendant that there existed aboriginally three villages in the Muckleshoot area. One was located on the Green River above the present town of Auburn, one near the junction of the Green and White Rivers around Soos Creek, and one on the White River near the southeast corner of what was to be Muckleshoot Reservation. However, the defendant contends that these villages followed the accepted political pattern of the Puget Sound area in that they were politically autonomous and each constituted a single land-using unit. It is evident that this is basically correct and it has been so found. However, this Commission cannot agree with defendant's further contention that as a result of the autonomous nature of the villages in this case that it must necessarily follow that each of the villages would be obliged to maintain its own action to recover for the value of its particular area. The evidence indicates that the Indians of this area consisted of separate, distinct and autonomous villages, each such village or settlement having the exclusive use (in the sense that members of other villages could use same only with the permission of the permanent occupants thereof) of their village settlement area, and that outlying territories such as berry picking and root gathering spots

or fishing waters were used in common by the occupants of all the villages. The practice of exogamy, which was so prevalent among these people, created ties of kinship and friendship among them which led to a natural tendency to share with each other. As a result of this way of life there developed close cultural ties among these people. All these ties existed prior to 1857 when these Indians were consolidated by the defendant at Muckleshoot reservation. From 1857 or possibly a little earlier these Indians were treated as an entity by the defendant and as a result gradually became completely merged until by 1868 or 1870 they were designated as a unit by the Indian agents and others who dealt with them. It appears to this Commission that to deny the Muckleshoot Tribe the right to recover for lands occupied by the villages whose people were so closely associated economically and culturally on the grounds of lack of political cohesion would be to misconstrue the beneficent purpose of Congress in enacting the legislation under which this claim is maintained. This seems particularly true when considered in the light of the type of cultural and economic structure existing among the Indians of the Puget Sound area. The heretofore mentioned practice of exogamy and the subsequent ties of kinship and cultural life and more or less economic cohesion warrants the assertion by the descendants of this day and time, as an entity, of the claim for the losses sustained by the original groups of which they are descendants. This being true, it becomes a question as to what area they jointly and severally occupied.

As previously indicated these three villages and many single

dwellings housing more than one family were located between the Green and White Rivers at and immediately above their confluence. It has been testified that they also used and occupied an area running east to the top of the Cascade Mountains and roughly bounded on the north by the divide between the Green River and Cedar River and on the south by the White River and on the west by the White River where it turns north after being joined by the Green. A preponderance of the evidence, however, points to a use area considerably smaller than the area described immediately above. Bearing in mind the estimated number of Indians as being from 88 to 130 and the admittedly abundant subsistence afforded by nature in this time and area, it does not seem that these Indians were obliged to roam far beyond their village area for their living. As was common in the country around Puget Sound the economy of the Indians was primarily marine whether based on the ocean, bays or rivers. Such was the case with these Indians. They depended upon salmon runs for a major portion of their subsistence and supplemented that with roots, berries, and potato patches. Such hunting as was done in the mountains was minor, and more particularly, in conformance with the accepted practice of the area, was done over the same areas as many other groups. These Indians did occupy definite sections of the country, and such occupancy was controlled by their need for subsistence area. As stated above they had a small population and abundant fish, roots, berries and game, when they hunted it. Such hunting as they did was in the fall of the year when the larger game animals had come down from the mountains to the prairies for the winter.

As stated in the Nooksack case, Docket No. 46 of this Commission, as was held by this Commission in the Quapaw case, Docket No. 14, "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."

The facts in this case fall within that situation. The claimants have not been able to satisfactorily maintain their claimed boundaries in the face of the non-exclusive use pattern followed by the Indians with regard to the area outside of the subsistence area surrounding their villages. In other words, claimants' ancestors did not exclusively use and occupy the area claimed in their petition or their requested findings, as mentioned before, however, they did use and occupy a part of the area claimed and based upon the record in this case the Commission feels that the occupancy of that part was exclusive. To state again a fact which is apparent to all, it is extremely difficult to establish facts after the lapse of time involved in matters of Indian litigation. In attempting to establish boundaries and occupancy on the basis of fragmentary facts and often uninformed opinions and the work of ethnologists who must of necessity base their conclusions upon much the same information, it becomes necessary to take a common sense approach based upon experience with matters of this nature. The Court of Claims has expressed this in the following language in the case of the Snake or Piute Indians v. The United States, 125 C. Cls. 241, 254:

> 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 the feeling of this Commission that the evidence introduced and the testimony of the witnesses heard warrants finding 22 made herein with regard to the area aboriginally used and occupied exclusively by the ancestors of claimants from time immemorial. The area described in that finding is as follows:

> Beginning at the southwest corner of the town of Auburn and running southeasterly along the White River to the place where Red Creek joins said White River; thence in a northeasterly direction to the town of Kangley; thence westerly to the town of Kent; thence south to the point of beginning.

Claimants allege that the area claimed by them was appropriated by defendant in 1855. We are unable to agree with that contention for the following reasons. In the first place the date alleged by claimants was January 26, 1855. It would appear that this is a mistake and the date meant was January 22, 1855, which was the date of the signing of the Point Elliott Treaty by the other tribes and bands in the area who were affected by that treaty. However, the treaty itself provides that it shall become effective only when ratified by the Senate and proclaimed by the President. This was not done until March 8, 1859. Admittedly the ancestors of the Muckleshoot Indians did not sign the Point Elliott Treaty. However, the lands claimed by them lay within the

area ceded by that treaty and it seems that sufficient action on the part of defendant to constitute a taking of claimants' lands would have to be said to have occurred only when the treaty became effective. Certainly the defendant did not single out the lands of claimants and appropriate them alone prior to the ratification of the treaty. The action of the military in placing certain of these Indians on Fort Muckleshoot during hostilities could not be said to be a taking. It was necessary protective action on their part. The defendant's contention that the taking should date from the time of the Oregon Donation Act of 1850 (9 Stat. 496) is not tenable for the reason that Congress obviously did not construe that as an attempt to appropriate the Indians' land in view of the enactment of previous legislation (9 Stat. 437) calling for the negotiation of treaties with the Indians of what was at that time the Territory of Oregon. Nor would they have provided in the legislation creating the Territory of Oregon (9 Stat. 323) that nothing therein should be construed to impair the rights of persons or property of the Indians so long as those rights remained unextinguished by treaties.

Based upon the above reasoning the date upon which the defendant can be said to have officially deprived the claimants' ancestors of their right to the use and occupancy of the area delineated in finding 22, was March 8, 1859. In view of the decision in the Otoe and Missouria Tribe of Indians v. The United States, 2 Ind. Cl. Comm. 385, aff'd by Court of Claims on May 3, 1955, the claimants herein are entitled to compensation for the deprivation by defendant of their ancestors' interest in the above area as of March 8, 1859.

Any allotments made to claimants from the reservation lands or other lands in the area may be shown at the time of the hearing on acreage and valuation, along with any other offsets which defendant may be able to establish.

Edgar E. Witt
Chief Commissioner

Concurring:

Louis J. O'Marr
Associate Commissioner

Wm. M. Holt
Associate Commissioner