BEFORE THE INDIAN CLAIMS COMMISSION

UPPER CHEHALIS TRIBE, ET AL., Plaintiffs, v. THE UNITED STATES, Defendant.	)	Docket No. 237

Decided: June 25, 1956

Appearances:

Garland S. Ferguson, III,
Joseph W. Creagh and
E. L. Crawford,
Attorneys for Plaintiff

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.

This claim was filed with the Indian Claims Commission by the Upper Chehalis Tribe, Lower Chehalis Tribe, Satsop Tribe, Humptulip Tribe, Upper Chinook Tribe, Lower Chinook Tribe, Chinook Tribe, Hoquiam Tribe, Clatsop Tribe, Confederated Tribes of the Chehalis Reservation and portions and descendants of such tribes and bands as plaintiffs. Plaintiffs were permitted by this Commission to omit the Upper Chinook, Lower Chinook, Chinook and Clatsop tribes as plaintiffs and to add "Ralph A. Heck,

Frank F. Pete and Murphy Secana, who are members of the Chehalis Tribe individually and on behalf of all other members of the Chehalis Tribe and subordinate bands not members of the Confederated Tribes of the Chehalis Reservation" as plaintiffs. The Confederated Tribes of the Chehalis Reservation is organized and recognized by the Secretary of the Interior. The other named plaintiff tribes are not organized. In the original and amended petitions, it is alleged that the Confederated Tribes of the Chehalis Reservation is "composed of a confederation of the other plaintiffs named above, and as such confederation of Indian tribes, said plaintiff has capacity to maintain this proceeding and to prosecute the claims hereinafter named." (Par. I). In the original petition, plaintiffs alleged joint and several occupancy of certain lands in what is now the State of Washington (Par. VI). In the amended petition, plaintiffs apparently allege joint ownership by Indian title to a large area of land in northwestern Washington (Fdg. 2), bordering the Chehalis River and its tributaries (Par. VII), totaling an estimated 1,444,480 acres (Pl. Reply Br., p. 22). Plaintiffs contend that the alleged taking of their tribal lands occurred on March 3, 1855 (Pl. Req. Fdg. 22).

Plaintiffs admit that they must prove that they are entitled to prosecute this claim through the Confederated Tribes of the Chehalis Reservation (Pl. Br., pp. 25-26); that is, in effect that said organization is the successor in interest to the tribes they claim were the original owners of the lands for which plaintiffs seek compensation. The failure to prove the existence today of the other named plaintiff

tribes and the failure to prove tribal affiliation of the individual plaintiffs, leaves the Confederated Tribes of the Chehalis Reservation as the only plaintiff.

Plaintiffs further allege, as a second claim, that the Chehalis reservation consisting of 4,224.63 acres was set aside for plaintiffs by the Secretary of the Interior on July 8, 1864; that by Executive Order, dated October 11, 1886, a total of 3,753.63 acres of said reservation was taken from plaintiffs and opened to the public domain and that following said Executive Order defendant removed plaintiffs from the reservation lands, opened said land for settlement, and authorized patents and land grants by which persons other than plaintiffs were put into possession thereof to the exclusion of plaintiffs and without plaintiffs' consent. (Amended Pet., paragraphs V - VII, inclusive).

In his opening statement, counsel for plaintiffs asserted that the plaintiffs were "claiming tribal lands of the Upper and Lower Chehalis and those tribes which have become known by names such as Clatsop, Humptulips and other tribes which in reality are not distinguishable from the Chehalis as such." Plaintiffs' counsel also stated: "The Chehalis Tribe in our theory of the case and from our research is made up of two segments, that is, the Upper Chehalis and the Lower Chehalis. And the evidence will show that the Upper Chehalis was referred to by the early historians and visitors to the coast as being inland, and the Lower Chehalis are those nearer the coast as around Grays Harbor." (Tr. 9-10).

Plaintiffs in their brief contend that, aboriginally, the Chehalis were divided into two separate, but closely affiliated tribes--the Upper

Chehalis Tribe and the Lower Chehalis Tribe (Pl. Br. 8), at the time this claim allegedly arose in 1855, and that through the passage of time and the process of amalgamation these two tribes have been confederated "into one identifiable group at the present time, namely, the Chehalis tribe." Plaintiffs' counsel in their brief contend that in view of the Muckleshoot decision, 3 Ind. Cl. Comm. 658, the Chehalis tribe as such is today the identifiable group in whose favor judgment should be rendered. (Pl. Br. 25). In their reply brief (page 26), counsel for plaintiffs contend that in view of this Commission's decision in the Tillamook case, 3 Ind. Cl. Comm. 526, it is probable separate judgments should be entered in favor of the Upper Chehalis and the Lower Chehalis.

Defendant's chief contentions on the other hand are that the term "Chehalis" does not designate an aboriginal tribe, band or group of Indians other than a village, and that the terms "Lower Chehalis" and "Upper Chehalis" are general geographic terms and do not designate an aboriginal tribe, band or group of Indians, other than a village (Def. Req. Fdg. 24). Defendant further contends that each village in the area involved was politically autonomous and each village had its own section of territory (Def. Req. Fdg. 16); that there is no evidence that aboriginally and prior to 1850 or 1855, there was a merger of the autonomous villages within the claimed area (Def. Req. Fdg. 18); and that according to the best ethnologies concerning the area the village was the only entity "which could be designated as a 'tribe.'" (Def. Req. Fdg. 28).

The issues of this case which are before this Commission for determination are stated by plaintiffs to be as follows:

1. Aboriginally, were the Upper Chehalis and Lower Chehalis tribes, bands, or identifiable groups of American Indians within the meaning of section 70a of the Indian Claims Commission Act?

2. What were the boundaries of the lands owned or occupied by such tribes of Indians?

3. Did the Chehalis Indians as a group become an identifiable group within the meaning of section 70a of the Indian Claims Commission Act following their being consolidated together upon the reservation?

4. Is this proceedings properly prosecuted on behalf of the Upper Chehalis tribe, Lower Chehalis tribe, and the present day consolidated Chehalis tribe through the Confederated Tribes of the Chehalis Reservation, a duly organized and recognized Indian group?

5. Did the Chehalis Indians have, or acquire, an interest in the original reservation set aside for them by the Department of the Interior in 1864 for which they should be compensated?

6. Is the taking of the Chehalis tribal and reservation lands contrary to the Fifth Amendment to the Constitution of the United States, to entitle claimants to interest on the value thereof from the time of taking to the time of payment.

Defendant contends that the questions presented to this Commission for determination are:

1. Whether one or more of the plaintiff tribes or the Confederated Tribes has established by a preponderance of the evidence that a particular historical tribe, band or group of Indians aboriginally and exclusively held and occupied any specific and definable area of land in western Washington.

2. Whether one or more of plaintiff tribes or the Confederated Tribes has established by a preponderance of the evidence that any one of them was aboriginally a tribe, band or identifiable group, of American Indians.

3. Whether one or more of plaintiff tribes or the Confederated Tribes is a real party in interest entitled, by legal succession or continued existence as an entity of some recognizable sort, to maintain the claim of aboriginal occupancy.

4. Whether one or more of plaintiff tribes or the Confederated Tribes of Indians is a presently existing tribe, band, or identifiable group of American Indians.

5. Whether plaintiffs' petition states a claim or claims upon which relief can be granted.

6. Whether this suit is barred by the judgment in Duwamish v. United States, 79 C. Cls. 530.

The main questions to be determined therefore are (1) What was the political composition of the Indians residing within the area claimed at or near the time of the alleged taking in 1850 or 1855; (2) If there were two or more tribes within the claimed area at said period, was there a later merger of said tribes?; (3) Are the plaintiffs herein the successors in interest to the claims of the tribe or tribes who used and occupied the lands at or about the time of the alleged taking?; and (4) Have the plaintiffs proved exclusive use and occupancy by them of a definable area of the claimed land as of the date of the alleged taking? Other issues in view of the decision herein become immaterial.

In support of their position, plaintiffs called as an expert witness, Doctor Herbert C. Taylor, Jr., assistant professor of anthropology at Western Washington College of Education. Plaintiffs' witness testified

that from his study of the historical, documentary and ethnological material he found that there were two recognized tribal entities on the Chehalis river--the Upper Chehalis and the Lower Chehalis. (Tr. 136). Taylor stated that the Lower Chehalis seem to have been made up of at least five bands, the Satsop, the Wynoochee, the Humptulips, the Copalis and the Lower Chehalis proper. The Upper Chehalis, according to the witness, consisted of four bands. (Tr. 82, 86). These bands, Taylor testified, for most purposes were semi-autonomous and that in any form of emergency the Lower Chehalis were apt to band together and the Upper Chehalis were apt to band together. (Tr. 83). These bands, according to the witness, were in turn divided into villages which were semi-autonomous. (Tr. 139). Generally speaking, this witness stated, the Chehalis villages did what they pleased. He knew of only two instances when the Chehalis got together beyond the village level--one being the abortive treaty negotiations of 1855 and a tradition of a war party of Upper Chehalis in the middle of the 19th century, uniting with other Indians for a grand raid against the Snohomish. (Tr. 144, and 82). Witness Taylor agreed that other ethnologists such as Dr. Verne Ray, Dr. A. L. Kroeber and Dr. Ruth Underhill all stated in their writings that village autonomy existed in the area, (Tr. 146) but he believed this could be so if the definition of a tribe as adopted by him was used (he selected a definition formulated by the Royal Anthropological Institute which says the word tribe applies to "a nomadic or sedentary social entity occupying a given area of land, speaking a common language and capable of uniting under some crude form of a government for warfare

or other emergencies"). (Tr. 147 and 76). Taylor further testified that during peaceful times there was no one chief over all of the villages of either the Upper or Lower Chehalis. (Tr. 176). Taylor prepared a map (Pl. Ex. 12) and placed thereon the boundaries of Chehalis territory both Upper and Lower as he believed they were in 1800. (Tr. 199).

Dr. Jacob Fried, anthropologist, appeared as a witness for defendant. Defendant's witness testified that, based upon his research, the largest social political land-using unit in the claimed area was the village. He further testified that the word "Chehalis" is a name (Tshels) of a major village at Hanson's Point at Gray's Harbor which word has become a generic term used by map-makers for an entire stretch of land from the Pacific beach north of Gray's Harbor all the way inland to past the Newaukum River. (Tr. 223).

In addition to Dr. Fried's testimony, defendant introduced several hundred exhibits consisting of historical accounts, government documents, ethnological studies of the Indians of northwestern Washington, maps and journals. All of these, together with the exhibits introduced by plaintiffs and the written reports of each expert witness, were carefully analyzed in reaching a determination of the questions enumerated previously. All of this evidence was either considered or incorporated into the extensive findings of fact whereon the determination of these issues rest.

The record in this case justifies holding that the word "Chehalis," meaning "sand," was taken from the name of a village at the entrance

of Gray's Harbor, near Westport, Washington, and the name has been extended by the whites as a collective designation to include all the Indians living in the vicinity of Gray's Harbor, the Chehalis river and its affluents, such as the Copalis, Humptulip, Wynoochee, Black, Hoquiam and Satsop rivers. (Fdgs. 12, 14, 16).

It is clear also that village autonomy prevailed in the claimed area and that the largest land-using entity, therefore, was the village tribe. (Fdgs. 17, 18, 19). The aboriginal inhabitants of the area were fish-eating Indians and their main source of subsistence was from the sea, making limited use of other areas for berries, roots, and occasional hunting. (Fdg. 22). The villages of the Indians were located at or near the mouth of the rivers and on the shores of Gray's Harbor. Apparently, potatoes were raised by these Indians prior to 1850. Travel was mostly by water, the lands away from waterways being covered by dense undergrowth, except for small prairies along the upper Chehalis river. It is evident from a study of the 1855 council notes (Fdg. 7) that these village-tribes considered the lands near their villages as their own and the desire of some to remain on their own lands, rather than consolidate, resulted in no treaty being made with them.

The exact location of these village-tribes in the claimed area in 1855 is not readily ascertainable from the record. Plaintiffs' anthropologist, Dr. Taylor, has mapped what he believed to be the lands used and occupied by these Indians as of 1800 (Pl. Ex. 12) at a time when he estimates the Indians known collectively as Chehalis

numbered between 1500 to 2000 souls, which was before their number appreciably declined due to fever and disease and which was also before a southerly movement out of the claimed area of these Indians into lands previously occupied by the Chinook, Willipa and Cowlitz Indians. According to the evidence the Lower Chehalis, collectively speaking, numbered but 217 in 1855, while the Upper Chehalis totaled 216. It is readily apparent that such a reduced population would not be using and occupying at the date of the alleged taking (1855) the same amount of territory that an Indian population four or five times that number was utilizing in 1800, especially in view of their marine economy. (See The Quapaw Tribe v. United States, 1 Ind. Cl. Comm. 469). Indian title is based on use and occupancy and there must be clear proof as to the lands actually used and occupied as of the date of the alleged taking by the United States. The use of the 1800 date as a basis for defining their territory would be misleading because of the population decline and the southerly movement into lands not claimed by these plaintiffs. There is no substantial evidence as to the lands exclusively used and occupied by these village-tribes as of the date of the alleged taking in 1855.

Plaintiffs admit (Pl. Reply Br., p. 22) that "The issue before the Commission is what lands were actually used and occupied by these people on the date of the taking, * * *" (which date is allegedly March 3, 1855, Pl. Req. Fdg. 22).

Plaintiffs' proof, however, is pointed to what lands these Indians allegedly used and occupied in 1800, as previously indicated

above. Plaintiffs further admit that they must establish the boundaries of the lands owned and occupied by their predecessors in interest. (Pl. Br., p. 17). To fix the boundaries, plaintiffs submitted in evidence their Exhibit 12, which is a map prepared by Dr. Taylor showing said boundaries as found by him as of 1800 for plaintiffs. On cross-examination, the following testimony of Dr. Taylor, plaintiffs' expert witness, is enlightening: (Tr. 163, 164, 165).

Q. There is another thing by Kroeber in the "Handbook of the Indians of California," Bureau of Ethnology, Bulletin 75 (1925), page 891, in which he makes this statement, "In short, the Indian did not think of territory in terms of plane area as we do. Every representation of group lands as filling area on the map is therefore misleading and must be considered a makeshift tolerable only as long as our precise knowledge of the facts remain inadequate for most regions."

Now, if I understand what he is saying there, he is saying that some anthropologists are prone to put a line around the whole territory of let's say, Oregon--

A. Yes.

Q. --and that that is not a correct thing to do. Would you comment on that?

A. I agree with that unequivocally. Map 12 does not represent truth. It represents truth so far as I can arrive at it from the data that are available and make it clear to a western European audience. (Underscoring supplied).

I am quite convinced, for instance, that while the Chehalis regarded the upper regions of the Satsop as theirs, they did not regard it as theirs in the same sense that they regarded the lower regions of the Satsop as theirs. And I am quite convinced that they did not give a goll-darn who occupied the peak of the hills in between, let us say, the Satsop and the Wynoochee. This wouldn't mean anything to them. Therefore, land in terms of plane areas from a map

such as this is only an approximation of the truth. It is unfortunately, however, the best that we can do with the data that we have and with the nature of the problem presented.

The many maps pertaining to the general area under consideration are discussed at length in defendant's brief, pages 151-160. It is sufficient to say that many of these maps were made to locate the Indians of the region in a general way without boundaries being shown; or were basically made for linguistic or military reasons; or arbitrarily assigned specific territory to geographical groups; or assigned parts of the lands claimed to other Indians; and are not consistent in locating the Indians of the region. (See also Def. Ex. 2).

As hereinbefore mentioned, the plaintiff, The Confederated Tribes of the Chehalis Reservation, allegedly is a confederation of the other named plaintiff tribes. There is no substantial proof that the Satsop Tribe, the Copalis Tribe, the Humptulip Tribe, the Wynoochee Tribe, the Lower Chehalis (proper) Tribe and the Upper Chehalis Tribe ever merged or confederated; or that plaintiff members of Confederated Tribes are their descendants. There is some proof that some Chehalis and other Indians went on the Chehalis reservation. The record indicates that the Chehalis reservation was established in 1864, but that as late as 1873 the Humptulips still refused to leave their country and go on the reservation. In 1879, the Gray's Harbor Band (no doubt Chehalis), numbering 164 souls, were still living on Gray's Harbor and its tributaries. In 1885, Satsop, Hoquiam, Humptulips, Cyhut, and Chehalis Indians were reported under the jurisdiction of the Quinaielt agency. Some Chehalis were also on the Shoalwater Bay reservation. (Fdg. 10).

Plaintiffs' expert, Taylor, testified that today there is now no living Satsop Indian. (Fdg. 16).

At first glance the reports of some Government agents and officials would seem to indicate that all Chehalis Indians were brought together and settled on the Chehalis reservation. (Fdgs. 9 and 10). A study of all the evidence indicates quite the contrary, however, as hereinabove set forth. These reports also speak of the large country claimed or possessed by the Indians of this area when first discovered by the white man, but are of little value in determining the actual lands exclusively used and occupied by the various village-tribes in 1855.

Adding further to the confusion respecting the Indians of this area are the comments of certain ethnologists who would link the village-tribes north of the Chehalis, such as the Copalis, Humptulip and Hoquiam with the Quinaielt. (Fdg. 16). Other ethnologists find these same village-tribes and the Satsop to be distinct entities. (Fdgs. 12, 13, 14). The intermixing of the Chehalis people with the Chinook and the Cowlitz Indians and the resulting movement into the areas occupied by these Indians also makes it difficult to ascertain clearly the location of the villages, the lands they used and occupied and the aboriginal composition of such due to intermingling. Some parts of the lands claimed were undoubtedly used by other Indians from outside the area claimed such as the Quinaielt using Gray's Harbor (Fdg. 16), the Cowlitz using the valley of the Newaukum river (Fdg. 15) and some Nisqually reportedly being on Grand or Mound Prairie (Fdg. 14). With

respect to the Nisqually, Doctor Taylor testified in setting their southern boundary as the northern Chehalis boundary (see testimony in consolidated Dockets 197, 203, 206, 208, Aug. 26-27, 1954) that "this shadowed area between 1820 and 1850 was occupied by the Indians who properly could not be called Nisqually or Chehalis, but were a mixture of Shahaptin-speaking peoples, Nisqually and Chehalis." Thus, we have the Chehalis mixing with the Nisqually as well as the Chinook and Cowlitz Indians. Other claimants are claiming parts of the area contended for by plaintiffs such as the Quinaielt are claiming the area of the "peninsula or arm" on the north side of Gray's Harbor (Fdg. 16) and the Cowlitz are claiming the Skookumchuck river as their northern boundary (Fdg. 15). As stated by the Court of Claims in the Duwamish case, 79 C. Cls. 530, at page 573, (in which the court was considering the claims of various claimants from the region now under consideration including the claims of the Upper Chehalis) "No possible means exist by which the court may ascertain the landed boundaries of the Indian plaintiffs and award one tribe a judgment which may not do an inexcusable and palpable injustice to another." This statement is applicable to the situation developed in this case where not only does the evidence disclose that village-tribes were the land-using entity (though no proof of the lands exclusively occupied), but also discloses that there is no substantial proof that plaintiffs are the successors in interest to the claims of such village tribes. The evidence further reveals common use of territory by others outside the area and such intermixture of the various groups that it is impossible to determine who was actually using and occupying the area at the date of the alleged taking.

With respect to the claim for the taking of 3,753.63 acres of land from the Chehalis reservation by the Executive Order of October 11, 1886, which restored said acreage to the public domain, it is clear from the record that no recovery may be had on said claim. It appears that in 1860 a piece of land was selected by Indian agent Simmons of Washington Territory on which he thought it advisable to have the Cowlitz and Upper Chehalis tribes settle. The Superintendent of Indian Affairs directed the setting aside of 5,000 acres in 1860. The Commissioner of Indian Affairs in 1864 recommended the setting aside of a reservation for the Chehalis Indians and on July 8, 1864, the Secretary of the Interior approved setting aside 4,224.63 acres as a reservation. In 1885, Agent Eells stated the lands on the reservation had been allotted to the Indians, but that there being no way for them to get patents he recommended that the executive order establishing the reserve be so changed that the Indians residing thereon could take the lands they occupied under the Indian homestead laws. In 1889, Eells reported that the Indians on the Chehalis reservation had received patents for their allotments. (Fdgs. 8, 9, 10, 11).

The Court of Claims in the Duwamish case, supra, at pages 554, 555, found with respect to the reservation that:

> Finding XXVI: * * *
> As thus established the reservation consisted of 4,224.63 acres. By the Executive order of October 1, 1886 (I Kapp. 903), 3,753.63 acres of the reservation were restored to the public domain for Indian homestead entry and 471 acres set aside for school purposes. Thirty-six of the Indians upon the reservation made homestead selections covering all the land with the exception of the amount reserved for school purposes.

As previously stated, Agent Eells in 1889 reported the Indians had received patents for their allotments. Plaintiffs have offered no proof to rebut this evidence. In any event the land was included in an executive order reservation and plaintiffs have shown no damage because of the allotting and patenting of said lands to the individual Indians living thereon.

Based on the foregoing and the findings of fact herein made, and the record as a whole, it is the conclusion of this Commission that the claims of plaintiffs should be dismissed, and it will be so ordered.

Edgar E. Witt
Chief Commissioner

Concurring:

Louis J. O'Marr
Associate Commissioner

Wm. M. Holt
Associate Commissioner