BEFORE THE INDIAN CLAIMS COMMISSION

THE KOOTENAI TRIBE OR BAND OF INDIANS OF THE STATE OF IDAHO, Petitioners,	)	
v.	)	Docket No. 154
THE UNITED STATES, Defendant.	)	

Decided: August 9, 1957

Appearances:

Robert W. Barker, with whom was Donald C. Gormley, Attorneys for Petitioner.

John D. Sullivan, with whom was Mr. Assistant Attorney General Perry W. Morton, Attorneys for Defendant.

OPINION OF THE COMMISSION

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

The claim here asserted is for the recovery of the value of an area of land located in northeast Idaho and northwest Montana extending south of the Canadian border. It is described in Finding 8 and comprises lands aboriginally possessed by the petitioner tribe.

The claim is predicated upon a treaty concluded between the defendant and the Confederated tribes of the Flathead, Kootenay and

Upper Pend d'Oreilles Indians on July 16, 1855, 12 Stat. 975, by which the lands of petitioners were (although the petitioners were not a party to the treaty) ceded to defendant.

A word about the present status of the petitioners. The original petition was filed July 23, 1951, and was consolidated for trial with another Kootenai case, Docket No. 61, and evidence was submitted in the consolidated hearings by which it was shown that the petitioners here were a group of Kootenai entirely separate from the Kootenai in Docket No. 61 and at the time of the 1855 cession held their lands independently of those so-called Upper Kootenai who are claimants in Docket No. 61.

Over defendant's objections we allowed petitioners to file an amended petition to conform to the evidence, removed them from the consolidation, and permitted them to proceed independently of the other group. So the instant case is to be determined on the amended petition which was filed on April 4, 1954.

In the amended petition the petitioners seek recovery for the value of their land ceded to defendant by the 1855 treaty or, in the alternative, to recover their proportionate share of the consideration that should have been paid the Confederated Tribes which ceded the lands in 1855. Petitioners' alternative claim is novel to say the least, but aside from its novelty, we think this case can and perhaps must be decided upon the petitioners' right to the lands claimed by them and the value thereof at the time they lost them.

Before considering the merits of the claim here made we must dispose of the jurisdictional question raised by defendant. It is claimed that the amended petition sets up a new cause of action which was not filed

within the five-year period fixed by the Indian Claims Commission Act and that we, therefore, have no power to entertain it.

It is true, as the defendant states, that in the original petition--which was filed within the five-year period--it is alleged that the petitioners had a joint interest in the lands ceded by the 1855 treaty with the confederated tribes which executed it. A cursory reading of it would lead to the opinion that the alleged claim is for a share of the consideration paid or to be paid, apportioned in accordance with the petitioners' rights as joint owner of the ceded lands.

It is apparent that the original petition was prepared without a clear knowledge of the facts upon which the claim was based. However that may be, there are allegations of fact contained in the original petition that justify and provide the bases for the amended pleading.

It is quite plain from the original petition that the petitioners are suing for the loss of whatever lands they had in the area ceded by the Confederated Tribes in 1855. To be sure it is alleged (Par. 5) that the petitioners were "a joint owner of the lands which were ceded to the United States" by the 1855 treaty, but it should be patent to any one, especially the Government, acquainted with Indian land use that joint use of Indian lands is uncommon and the Indians generally occupy and jealously defend their aboriginal lands. This habit is particularly true of sedentary Indians, as was the petitioner group. So to prove the claim as pleaded in the original petition it was necessary to show occupation of lands by the petitioner group in the area ceded. The fact that the evidence shows they separately had Indian title to specific lands in the area ceded and that no other tribe had an interest in such

lands would not be more than a technical departure from the pleading and should not require a dismissal of the claim. Pleadings must be liberally construed in order to give the Indians their day in court, and where the defendant has not been prejudiced by the amended petition and was given full opportunity to meet the proof offered by petitioners, we believe it would work an injustice on petitioners to dismiss their petition since we believe the original petition was broad enough to permit a recovery for lands acquired by defendant which were exclusively aboriginally possessed by petitioners.

The petitioners in this case are actually the Bonners Ferry Band of Kootenai Indians. Petitioners claim that they have from time immemorial used and occupied in Indian fashion certain described lands in northern Idaho and Montana. These lands are described in Finding 6.

The so-called Kootenai Tribe never existed within the memory of man as an entity. The Kootenai Indians are divided by the authorities into two cultural groups -- the Upper Kootenai who were composed of the eastern bands which were more under the influence of the plains traits, and the Lower Kootenai bands who were more sedentary, canoe people, and located farther to the north and west and thus less in contact with plains traits. (Fdg. 2).

These two cultural groups were separate and distinct bands, politically autonomous and independent of each other and held their lands to the exclusion of each other. (Fdg. 2). The Lower Kootenai consisted of two and possibly three bands known as the Bonners Ferry Band, estimated to consist aboriginally of some 350 persons, the Creston Band and possibly the Nelson Band. The last two bands were located in Canada

and held no lands in the United States. (Fdg. 3).

Since the first white contact by the fur traders such as Thompson, Alexander Henry (the younger), and Work, Kootenai Indians have been living in the vicinity of Bonners Ferry and even today there are still some families of Bonners Ferry Indians living there on lands allotted to them by the Government. (Fdg. 5). Ethnological studies such as made by Turney-High and Schaeffer place the Bonners Ferry Kootenai within the lands claimed by petitioners during historical times.

The Bonners Ferry Kootenai being culturally part of the Lower Kootenai were, ethnologically speaking, a sedentary people. They seldom left their territory except to trade or visit, or on rare occasions some of them joined in the buffalo hunts east of the Rockies. Their principal source of food was fish but this diet had to be supplemented with berries, roots, meat and other foods and to obtain these the band had to scour their territory in season, either individually, in family groups or in communal efforts depending on the activity engaged in at the time. (Fdg. 6).

A unique feature of the Lower Kootenai was the concept of property ownership by extended family groups and each reportedly could point to a certain section of their country as their own. This was first pointed out in the writings of Baille-Grohman (Pet. Ex. 66), and Schaeffer reports that he was able to confirm the same type of land holding by families in the Bonners Ferry Band itself. (Pet. Ex. 62-A). Besides these individual holdings, Schaeffer testified that there were also tribal lands on which all of the band could hunt.

To prove what lands the petitioners held exclusive use and occupation of aboriginally, the petitioners presented a formidable array of expert witnesses and introduced much documentary material. The expert witnesses appearing for petitioners were Dr. Verne Ray, a recognized authority on the plateau tribes, Dr. Nancy Oestreich Lurie, an anthropologist whom Dr. Ray secured to assist him in collecting and considering the historical and ethnological material pertaining to the Lower Kootenai, and Dr. Claude E. Schaeffer, curator of the museum of the Plains Indians at Browning, Montana, an anthropologist and employee of the Bureau of Indian Affairs, Department of the Interior, whose deposition was taken under subpoena issued by this Commission.

Dr. Ray's testimony in brief dwelt upon the plateau tribes in general, their political composition, their cultural and linguistic differences and the methods he employed in securing the ethnological material upon which his published works were based. Dr. Ray did not in his earlier research study the Lower Kootenai but did work with the Upper Kootenai, and that work plus his study of adjacent tribes, their culture, political organization and territory, he testified, was of great assistance to him in formulating his opinions with respect to the Lower Kootenai. (T. 344). In addition, he had available the material obtained by Dr. Lurie and her assistance. Dr. Ray was of the opinion that there was only one tribe of Lower Kootenai in the United States and that was the Bonners Ferry Kootenai (T. 340), that it was an identifiable group at the first white contact in the area (T. 340) and that it was politically and culturally distinct from any other group of peoples in the plateau area. (T. 341). Dr. Ray concluded that the land owned,

used and occupied by the Bonners Ferry Band of Indians was as follows: (T. 372).

> The line follows the Selkirk Mountains from a point in Canada north of the international boundary down to the international boundary itself, continuing along the crest of the Selkirk Mountains to the point at which these mountains merge with the Cabinet Mountains, forming a continuous crest, and then following that crest in a southerly direction to the point at which the Purcell Mountains merge with the Cabinet Mountains.
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> Now, in a northeasterly direction along the crest of the Purcell Mountains to the international boundary, and then across the boundary for a considerable distance to the north along the crest.

This description has been drawn in red by Dr. Ray on a map, petitioners' Exhibit 7. His testimony did not go into the questions of location of villages and sources of sustenance of the Bonners Ferry Kootenai which he said would be testified to by Dr. Lurie. On cross-examination, Dr. Ray stated that he had not investigated the political composition of the Lower Kootenai in Canada but that he suspected that they were one tribally "with the people in the United States."

Dr. Nancy Lurie, anthropologist, did not do any field work with the Bonners Ferry Kootenai (T. 431) but reached her conclusions on the basis of her research into anthropological documentary material, historical material, and government records. During her testimony much of this material was introduced as evidence for petitioners and forms the bases for many of the findings that have been made in this case. (T. 441-541). Dr. Lurie testified that her examination of the ethnological writings disclosed that there were two distinct tribal entities, the Upper Kootenai and the Lower Kootenai, and each had their own political identity, and that the areas occupied by these two groups were separate and

immediately adjacent to one another. (T. 489-491, 499). Dr. Lurie said it was her opinion based upon her research that the Bonners Ferry Kootenai, petitioners herein, were a separate entity, distinct from neighboring groups and an autonomous political unit at the time of the coming of the whites and have remained such till the present time. It was her opinion that the Bonners Ferry Kootenai exclusively occupied the area delineated in red on petitioners' Exhibit 7 south of the international boundary line until the whites entered the area and disrupted the possession of the tribe subsequent to the treaty of 1855 (T. 535-538).

On cross-examination, Dr. Lurie testified that it was her opinion, based upon a study of the material she had perused, that there was but "one definitely established band of Lower Kootenai, as such, enjoying its own political autonomy," with Bonners Ferry as their main camp. (T. 558-559). Defendant's counsel had urged that petitioners' exhibits of studies made by Turney-High and Schaeffer indicated there were several independent bands of Lower Kootenai, i.e., the Bonners Ferry, the Creston and the Nelson bands.

The deposition of Dr. Claude E. Schaeffer was taken by petitioners and appears as petitioners' Exhibit 62-A, and extracts of his field notes on the Kootenai are to be found in petitioners' Exhibit 34 and defendant's Exhibits 37-41, inclusive. Dr. Schaeffer did field work with the Upper Kootenai in the 1934-36 period, and in 1937 did field work with the Bonners Ferry Kootenai. In 1947 and 1948, he again did ethnological field research with the Lower Kootenai. Of the ethnologists appearing for petitioners, Dr. Schaeffer is the only one who worked directly with the Lower Kootenai. His testimony and field notes are of extreme importance in this

case and his knowledge of the Kootenai makes him a recognized authority on said Indians.

Dr. Schaeffer testified that the Bonners Ferry or Lower Kootenai in the United States has existed as a tribe since prior to the coming of the whites, that the tribe was unique in that extended family groups held land individually although there were also tribal lands, and that in their cycle or pattern of land use in their economic activities such as hunting, fishing, root gathering, etc., they used and occupied the area outlined in red on petitioners' Exhibit 7, with one exception, in that he believed their lands extended further west to the eastern shore of Priest Lake (Pet. Ex. 62-A, pp. 87-88).

Dr. Schaeffer testified that the Canadian Lower Kootenai or Creston Band was a distinct band of the Lower Kootenai with its own tribal area distinct from the Bonners Ferry Band. (Pet. Ex. 62-A, pp. 94-95). In this conclusion, Schaeffer does not appear to agree with Doctors Ray or Lurie who testified that there was but one tribe or band of Lower Kootenai. On cross examination, the witness testified he had not made a study of the land holdings of the Creston Band of Canada, and that there being no distinctive land mark which set off its land from that of the Bonners Ferry, he would be willing to grant that perhaps at times there were "tensions" between the two areas near the Canadian border and that he had no information with respect to the use and occupation of a small area in the northwestern part of the area near the Canadian border claimed by the Bonners Ferry Kootenai. (Pet. Ex. 62-A, pp. 99-100). Schaeffer further testified that the Tobacco Plains Kootenai hunted at times somewhere to the east in the Yaak River Valley as did the Bonners Ferry Kootenai and

that he could not say what was the division line between the two groups.

Counsel for the Government agrees that the Bonners Ferry Kootenai was an independent band of Indians, autonomous and independent of any other group of Indians. (T. 595). Defendant does not contend that the Bonners Ferry Kootenai did not use and occupy some lands within the area claimed from the time of the first white contact but would limit the land holdings of the band.

In support of its position defendant called Richard G. Forbis, ethnologist, to testify as an expert witness and introduced in evidence (Def. Ex. 54) a written report prepared by Mr. Forbis pertaining to the political organization, subsistence pattern, population, ethnological studies and historical material dealing with the Bonners Ferry Kootenai. In essence, Forbis concluded that the primary subsistence area of the band would be enclosed within the area below the 4000 feet contour line as shown in cross hatching on the map prepared by Forbis. (Def. Ex. 53-A). Defendant contends that this area shows the maximum amount of land really used and occupied by petitioners. (T. 633). Forbis testified that he found that a majority of their subsistence was obtained in areas under 4000 feet (T. 619) and, on cross examination, he stated that he did not mean that the Bonners Ferry did not go above the 4000-foot contour at times. (T. 670). The witness further testified that the 4000-foot line does not represent the boundary of their area (T. 670) but shows the principal areas from which the band obtained its support (T. 679). The area he delineates in cross hatching is the territory in his opinion within which they obtained their sustenance and he did not express an opinion as to what lands they actually owned and exclusively occupied (T. 686-687).

In conclusion, the testimony and evidence of record establishes that the Bonners Ferry Kootenai, the petitioners herein, an independent and autonomous band, exclusively used and occupied the area of land within the boundaries drawn in red on petitioners' Exhibit 7, except for the eastern boundary which is changed to run directly north from Kootenay Falls to the International Boundary, rather than have the line follow the crest of the Purcell Mountains in a northeastwardly direction to the International Boundary. (Fdg. 8).

Date Indian Title Passed

Counsel for the parties are in complete disagreement as to the date upon which the lands in controversy passed to defendent free of Indian title, the latter insisting that the Indian title passed on March 8, 1859, when the Senate ratified the treaty of July 16, 1855, 12 Stat. 975, while petitioners contend the title of the Indians passed only when there was actual disposition of the lands by defendant under the public land laws of the United States or the conversion of the lands to the use of the Government. The date of the extinguishment of Indian title is important because of the necessity of determining the value of the lands.

The 1855 treaty was concluded with the Flathead, Kootenay and Upper Pend d'Oreille Indians, a confederacy of those tribes. It is agreed or the evidence shows that the petitioners here were not members of that confederacy and did not join in the treaty, although the lands of the petitioners were included in the cession without their consent. These facts seem to have been generally recognized by officials of the Government throught the years following the 1855 treaty.

That the defendant had the power to take the petitioners' lands cannot be denied. Lone Wolf v. Hitchcock, 187 U.S. 553, 556; Sioux Tribe v. United States, 136 C. Cls. (Appeal No. 4-55, decided November 7, 1956). Nor is the manner of taking important, given a purpose or intent to acquire Indian lands. Such lands may be taken through mistake in surveys, as in the Creek Case, 302 U.S. 620; or by placing Indians of one tribe on the lands of another without the latter's consent, as was done in the Uintah case, 5 Ind. Cl. Com. 47, or by treaty which ceded lands of tribes not parties to the treaty, as was done in the Nooksack case, 3 Ind. Cl. Com. 479, and the Muckleshoot case, 3 Ind. Cl. Com. 669.

The intention of defendant to extinguish the Kootenai title by the 1855 treaty is evidenced by the fact that their lands were included in the area ceded. The treaty also provided and required the Indians in the territory ceded to move to the reservation set aside for them and as to the ancestors of members of the petitioner tribe, negotiations extended over several years for giving them allotments in the area they now and did then claim as their ancestral home, under section 4 of the allotment act of February 8, 1887, 24 Stat. 388. Apparently such allotments were made. Section 4 of said act provided for allotments on lands to which Indian title had been extinguished and is therefore evidence of the Government's view that the lands on which the allotments were made had been ceded by the 1855 treaty.

In these circumstances, we must consider the date, March 8, 1859, on which the July 16, 1855, treaty was ratified as the time the defendant acquired the Indians' aboriginal rights to the lands involved here.

Article 12 expressly provides that the treaty "shall become obligatory upon the contracting parties as soon as the same shall be ratified by the President and the Senate * *." On March 8, 1859, the treaty freed the lands from the possessory rights of the petitioners. Cf. Nooksack and Muckleshoot cases, supra.

Counsel for petitioners base their position that the dates of the actual disposals of the Indian lands should fix the time that the Indian title passed on the Uintah case (Doc. 44, decided February 21, 1957), 5 Ind. Cl. Com. 1, in which we held that the Ute Indians were deprived of their lands as and when disposed of or converted by the Government. In that case, however, there had been no treaty which even purported to extinguish Indian title to Ute lands (a treaty known as the Spanish Fork treaty had been negotiated in 1865, but was rejected by the Senate). Hence the Utes were not deprived of their lands except as the Government disposed of them or used them for governmental purposes. In that situation there seemed no alternative but to take the times of actual disposals of the Ute lands as the dates of taking.

The Creek Nation case, 302 U.S. 620, also relied on by petitioners, presented a similar problem in that the Government disposed of in parcels to settlers certain lands of the Creeks. It had no right to make the disposals and nothing had been done prior to the disposals which could be considered as fixing a date on which the entire area in which the disposals were made, was taken. Under those conditions the Supreme Court held the taking took place as and when the several parcels were patented to entrymen.

We think the Ute and Creek cases are not pertinent to the facts here where a treaty extinguished the Indian title of the petitioners even though they were not a party to the cession, the 1855 treaty.

Therefore, for the purpose of proving the value of the lands involved the parties shall consider March 8, 1859, as the date on which defendant acquired the Indian title to the lands described in Finding 8.

Louis J. O'Marr
Associate Commissioner

We concur:

Edgar E. Witt
Chief Commissioner

Wm. M. Holt
Associate Commissioner