

BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: October 30, 1957

Appearances:

Frederick W. Post and
Malcolm S. McLeod,
Attorneys for Petitioner.

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.

Petitioners herein, the Lummi Tribe of Indians, assert a claim against defendant for an undetermined amount of land based upon the claim of aboriginal possession and an unconscionable consideration paid by defendant for said land under the terms of the Point Elliott Treaty of January 22, 1855 (12 Stat. 927, II Kapp. 669).

By order of this Commission, dated May 12, 1953, this Docket No. 110 was consolidated for purposes of trial with Docket No. 214, The San Juan Tribe of Indians vs. The United States. Pursuant to that order

the cases were heard together and proof introduced in each case made applicable.

It has been determined by this Commission upon a previous hearing on the special defense of res judicata asserted by the defendant that the Lummi Tribe is not barred by said defense as a result of a claim pursued by said Tribe in the case of Duwamish, et al. vs. United States, 79 C. Cls. 530.

Petitioner alleged certain boundaries of the area to which they make claim in their original petition. On October 24, 1955, petitioners filed a motion to amend the description. By order of this Commission, dated November 3, 1955, the motion was granted and the description amended to read as follows:

Commencing at the town of Blaine; thence around the town of Semiamoo to the west; thence southwestward to Alden Point on Patos Island; thence to Turn Point on Stuart Island; thence to English Camp on San Juan Island; thence along the center length thereof to Cattle Point; thence to Davis Point on Davis Bay; thence northeastward across Lopez Island through Fort Stanley to Humphrey Head; thence northeastward around Blakely Island through Obstruction Island and north of Sinclair Island to Carter Point on Lummi Island; thence to Chuckanut Island; thence to the northwestern end of Lake Whatcom; thence to the town of Laurel on Guide Meridian Road; thence north along said road to the Canadian Border; thence west along the Canadian Border to Blaine, the place of beginning.

The above described land lies within boundaries of the cession of land made in the Point Elliott Treaty of January 22, 1855 (12 Stat. 927).

Petitioners maintain that they had aboriginal possession of the above described area and that they ceded that amount of land under the Point Elliott Treaty of January 22, 1855. The Lummi Indians were not listed in the preamble to that treaty but certain Indians signed

the treaty as Lummi Indians and it has been accepted by the Court of Claims in the Duwamish case that the Lummi were a party to the treaty and defendant has so admitted. (See Duwamish, et al. vs. The United States, 79 C. Cls. 530, 533; Answer, par. 8). There were no boundaries set under the Point Elliott Treaty so far as individual groups were concerned. Defendant simply took a cession of a large area of land in what is now the northwestern part of the State of Washington and petitioners claim that the foregoing description covers the area within that cession to which they held aboriginal title. The consideration under the treaty was a total of \$150,000 and the share of the Lummi Indians would have been some \$13,636, which it is presumed they received.

The issues for determination in this case are limited by stipulation of the parties to the questions of (1) capacity of petitioners to maintain this action under the Indian Claims Commission Act (60 Stat. 1049) and (2) what area, if any, did petitioner's ancestors exclusively occupy (Tr. 2, p. 3).

The circumstances surrounding the negotiation and execution of the Treaty of Point Elliott on January 22, 1855 are well known, having been set forth in several previous cases. Suffice it to say that the defendant has admitted the participation of the Lummi Indians in that treaty and thereby admits a cession of whatever area they occupied, if any.

Defendant does contend, however, that there was only one village of Lummi Indians and that petitioners are trying to recover for an area belonging aboriginally to several village tribes. This contention is based upon the well known village autonomy which existed in the Puget

Sound area. Defendant does not, we believe, contend that certain villages were not Lummi locations; but that by virtue of the village autonomy mentioned above, they were not a single tribe, band, or group of Indians so as to entitle them to sue as an entity under the Act. In order to determine whether defendant is correct in its position that petitioners are not entitled to sue as a group and that they are attempting to recover for land used and occupied by other groups of Indians as distinguished from the individual Lummi villages, we must determine who the Lummi were and what part of the general area, if any, they occupied.

To state again a general fact with regard to the situation of the Indians of the Puget Sound area, it must be said that the cultural and economic life of these people cannot be ignored by attempting to fit them into a pattern similar to that of some eastern Indians. Were there an attempt to do so, we would be applying a false standard under the Indian Claims Commission Act and doing an injustice to the petitioners and the other groups of the area. The criteria for determining group entity in this area must be something less than the political cohesion as known to the tribes of the east. If a group of village entities speak the same dialect, move about more or less together in search of subsistence and retain a hold on the same general area of land for their homes, then by the standards of the Puget Sound Area they should be considered an entity capable of prosecuting a claim and establishing their right thereto as a group.

It may be stated as a conclusion at this time that the ancestors of petitioners meet the above criteria and as a result we feel that

their right to maintain this action as an entity has been established. The ethnological and historical evidence as cited in the findings supports the above conclusion.

Taking first the ethnological evidence, it has been shown that the first mention of the Lummi by an ethnologist was the map of Gibbs in 1853-1854 which places them on the Lummi Peninsula, the northern part of Bellingham Bay, and east thereof. He mentions them in a report in 1854 as living on a river emptying into the northern part of Bellingham Bay and on the (Lummi) peninsula. He estimates their numbers as from four to five hundred. Again in 1856 Gibbs' map shows the Lummi on the peninsula at the mouths of the Lummi or Nooksack River and on the southern tip of Orcas Island. Gibbs gives the name of their chief in 1854 as Sah'hopkan. On another map Gibbs shows the Lummi on the mainland as before and also on the northern tip of Orcas Island.

In 1863 Dr. Gibbs published a book called "Vocabularies" and in it he states that the Lummi Tribe live on the lower part of the Nooksack River, but that they are intruders because they formerly lived on the islands between the continent and Vancouver Island and that they still resorted to the islands. He definitely names them as a distinct group and gives the names by which they are known to other tribes. In another report published in 1873 Dr. Gibbs again shows the Lummi around Bellingham Bay and the Lummi River.

Dr. Hodge in the "Handbook of American Indians" quotes Gibbs and lists the Lummi as being on an inland from Bellingham Bay. He states that the Klalakamish of Orcas Island were a former band.

Dr. Curtis in "The North American Indian" wrote that the Lummi at the time of their first accurate observation by white men, held Lummi Island and the mainland about Bellingham Bay and Lummi Bay, extending inland as far as the site of Ferndale, Washington. He also stated that an unusually clear tradition related by a man born about 1820 showed that the Lummi Tribe had been pushing slowly eastward during the last two centuries. He says that even as late as 1830 the Lummi claimed, in addition to the mainland from Chuckanut Bay to Birch Bay, the following islands: Orcas, Blakely, Lopez (on the north and west coast), Shaw, San Juan (except the west coast, and even that they held in earlier days), Spieden, Stuart, Waldron, and all of the many islets in the waters thus defined.

Many other ethnologists place the Lummi in the same general area. All agree as to the Bellingham Bay area but not all agree as to the islands upon which they may have lived or utilized.

Dr. Suttles, petitioner's expert witness, testified in substance that the Lummi Indians occupied an area consisting of a portion of the mainland from Chuckanut Bay on the south to Birch Point on the north and including Lummi Island, Orcas Island, Shaw Island, the western part of Lopez Island, the eastern half of San Juan Island, about half of Waldron Island and all of the small islands enclosed within the above boundaries. These boundaries curve inland as far as Ferndale.

When Dr. Suttles placed a boundary on petitioner's Exhibit 10 while testifying to the above area, he stated that it was a "vague sort of a

boundary, because people were more concerned with the shorelines." Dr. Suttles said that his boundaries were an attempt to show what he believed to be Lummi territory as of about 1850 (Fdgs. 10).

Nearly all of the contemporary reports of the Lummi Indians during the period of their first mention in 1844 by W. F. Tolmie of the Hudson's Bay Company, through the time of the negotiation of the Point Elliott Treaty in 1855 places them primarily along the mainland around Bellingham Bay and Lummi Peninsula (Fdgs. 4, 5, 13).

Dr. Riley, who testified for defendant, in his report (Def. Ex. 1) placed the Lummi primarily along the mainland, although he also listed two villages on Orcas Island. In his footnotes he mentions that the Lummi witnesses in the Duwamish case (79 C. Cls. 530) testified to 19 villages and that one of his informants spoke of 23 inhabited places at the time of the treaty (Fdgs. 11, 12).

The historical reports of the Lummi start in 1844 with the census of the Puget Sound Indians by W. F. Tolmie of the Hudson's Bay Company, who listed the "Nook-lum-mi" with a population of 244. This was followed in 1849 by a report from Joseph Lane, Superintendent of Indian Affairs for Oregon Territory, who spoke of the "Nooklulumic" Indians who lived about "Bellingham's" Bay, and numbered about 220.

Governor Stevens reported in 1854 that the Lummi lived "on a river emptying into the northern part of Bellingham Bay and the peninsula." Their population was given as from four to five hundred and their chief as Sah-hop-kan.

On January 22, 1855 "Chowitshoot, Chief of the Lummi and other tribes" signed the Point Elliott Treaty. One of the reservations created under the treaty was located on the Lummi Peninsula and is the present Lummi Reservation.

Indian Agent E. C. Fitzhugh reported in 1856 that the Lummi Indians under his charge numbered 510 and lived about the mouths of the Lummi River.

In 1857 Agent Brown reported 540 Lummi Indians living about the mouth of the Lummi or Nooksack River, seven miles from the town of Whatcom.

During the trial of the Duwamish case the Lummi Indians claimed only the Lummi Peninsula, Lummi Island, and part of the mainland from Chuckanut Bay to Canada. They claimed none of the San Juan Islands.

In considering the proof in the record as set out in part above and in the findings, it does not appear that the petitioners have proven their claim to all of the area set out in Finding 2.

There is no reasonable doubt that the Lummi existed. They were undoubtedly composed of autonomous villages, as were all the other groups in the Puget Sound area. By the same token they were culturally and economically similar to all other groups of salt water oriented Indians around them. Their ties between villages were those of necessity more than choice, but they were ties of the type mentioned previously and are sufficient to entitle them to be called an entity for purposes of suit under our act.

In addition to the question of capacity is that of area used and occupied. Proof of exclusive use and occupancy of a definable area in

order to entitle an identifiable group to recover as of the alleged date of taking is necessary. That requirement as to a portion of the land claimed has been satisfactorily met by the petitioners.

The evidence regarding the use of the islands has been all of an ethnological nature. The contemporary contacts of explorers and agents of defendant make little or no mention of the islands as being the home of the Lummi. The ethnological data indicates that other Indians also used the various islands, especially San Juan and Lopez. The only islands which can be considered as having been Lummi territory are Lummi Island, Orcas Island, and Shaw Island. The Lummi villages on Orcas Island were at least two in number and probably more. The historical background of the Lummi indicates that they originated there and they still utilized it more at treaty times than any other group. The same is true of Lummi Island and to a lesser degree of Shaw Island.

The mainland area is fairly well agreed upon both by ethnological and historical data. The hunting done inland and the fishing on the Nooksack River took them as far inland as the present town of Ferndale and the length of their range on the shoreline is reasonably clear under the evidence as being from the area of Chuckanut Bay on the south to the vicinity of Cherry Point on the north.

The non-exclusive use of outlying areas is well illustrated by the common usage of fishing areas, especially about Point Whitehorn and Point Roberts. The same pattern is evident on Lopez and San Juan Islands. The situation in the interior is not so clear. It is to be reasonably assumed that the usage of the area of the lower Nooksack

River was shared, just as the Lummi did some hunting in the Nooksack country. As stated in the previous cases dealing with this area, the land in the near vicinity of any group was shared with relatives and permissive visitors. This does not, however, keep it from being considered as the territory of the group adjacent to it. The evidence in this case, however, justifies the claim of the Lummi to the area described in Finding 16, and the Commission so holds.

It is the opinion of this Commission that the Lummi Tribe of Indians, petitioners herein, are the descendants and successors in interest of the Lummi Indians who aboriginally and at the time of the negotiation of the Treaty of Point Ellicott on January 22, 1855, exclusively used and occupied the area described in Finding 16, and that the effective date of the cession of said area to defendant was March 8, 1859, the date of ratification of the treaty by the Senate.

Any question of credits or offsets by reason of the reservation set aside under the treaty and any other lands which might have been allotted or acquired by petitioners or their ancestors shall be the subject of further hearings and evidence, along with the questions of consideration paid at the time of the treaty, value of said lands as of March 8, 1859, and other offsets to which defendant may be entitled under the Indian Claims Commission Act.

Edgar E. Witt
Chief Commissioner

We concur:

Louis J. O'Harr
Associate Commissioner

Wm. H. Holt
Associate Commissioner