

deprived petitioner of the use and benefit thereof. Petitioner has received no compensation for this tract.

(b) As an alternative, petitioner claims the tract of land, if ceded by treaty or agreement, was ceded for an unconscionable consideration. No ratified treaty or approved agreement, however, was made with petitioner, and the tract of land involved was never included in a treaty or agreement of cession with any other tribe of Indians. Petitioner's remaining alternative basis for recovery is that the tract was taken by conduct of defendant not conforming to fair and honorable dealings.

3. The Kalispel Indians were known to the fur traders who operated for the Northwest Company in Canada and in what are now the States of Montana, Idaho and Washington. David Thompson, one of the traders (1807-1812), located the "Kullyspel Lake Indians" on a map in the vicinity of the present Pend d'Oreille Lake in Idaho. Alexander Henry, the younger, at about the same period of time wrote: "The Kullyspell [Pend d'Oreille] or Earbob Indians, are also a tribe of the Flat Heads [i.e., of the Salishan family], and speak the same language. They dwell on and about Kullyspell [Pend d'Oreille] Lake, and frequently accompany the Saleeish to the plains to procure buffalo." (Def. Ex. 9; Pet. Ex. 12).

4. The missionaries became acquainted with the Kalispel Indians in 1841. Father de Smet, famed missionary to the Indian tribes, wrote in 1846 that "The usual place of residence of the Kalispels--that in which the Reduction of St. Ignatius is now established--is an extensive prairie called the Bay of Kalispels, thirty or forty miles above the mouth of Clark or Flat-Head River." This mission was located near what is now Dusick, Washington, on the Pend d'Oreille River and continued to serve

the Kalispel until moved to its present site in western Montana on

Jocko Reservation in 1854. Father de Smet (about 1845) wrote as follows:

The upper Kalispels or Pend d'Oreilles. The country of these Indians consists principally in forests and plains. The upper valley above the great Flathead lake appears to be very rich in soil and very productive and contains a great number of beautiful plains, among which the Camas and Horse plains are the most conspicuous. From below the latter to the head of the Kalispel lake, a distance of about 100 miles, Clark's river is lined with almost impenetrable forests, inaccessible rocks and mountains, and runs on over many ledges of rocks, forming falls and rapids, rendering its navigation very dangerous even to small skiffs and canoes, and impossible to larger crafts.

Father de Smet reported they spoke the same language as the Flathead and that they numbered about 600 souls. These Indians of which he wrote were the Pend d'Oreilles, a tribe separate and distinct from the Lower Kalispel, or Kalispel Tribe proper. Father de Smet stated that the Kalispel "of lower country" numbered "as many souls as their brethern from above." (Pet. Exs. 15, 22).

5. In 1853 Governor Isaac Stevens was undertaking a survey and exploration for the best route for a railroad from the Mississippi to the West Coast. Dr. George Suckley, an army surgeon and a member of the expedition traveled through Kalispel country. From Father Hoecken at St. Ignatius Mission the army surgeon reported he had learned that the Kalispels:

* * * lived mostly from the Pend d'Oreille or Kalispelm Lake, down the Clark River, to this point (the mission); they speak nearly the same language as the Flathead or Selish Indians. Another mission (St. Mary's) was at the same time opened among the last-mentioned tribe. Between these two, in the vicinity of the Horse and Camas plains, on the Clark River, another band, calling themselves

Kalispelms, has since been formed, of which Ambrose is the chief; this band consists of a number of floating and wandering families, composed of Spokanes, Kalispelms proper, and Flatheads, who, having intermarried, have formed a habit of sojourning at this locality during their annual migrations to and from the buffalo hunting grounds. In all, the two bands of the Kalispelms number about one hundred lodges--say sixty of the Kalispelms proper, or those who recognize Victor as their chief--and have their headquarters at the mission, and about forty of the new band already alluded to, who look up to Ambrose and who live above Lake Pend D'Oreille. * * *

George Gibbs, who was also a member of the exploration party, reported (March, 1854) that the "Kalispelms, or Pend d'Oreilles of the Lower Lake, inhabit the country north of the Coeur d'Alenes and around the Kalispelm Lake. Dr. Dart gives their population as five hundred and twenty, * * *." Gibbs stated that the Pend d'Oreille of the Upper Lake occupied jointly with the consent of the Selish (Flathead) the country of the latter and numbered about 480. (Pet. Ex. 17; Def. Ex. 4).

6. Governor Stevens on his exploration and survey of a route for a railroad to the West Coast made many treaties of cession with the Indian tribes with which he came in contact, including the Flathead, Pend d'Oreille and Kootenai who were neighbors of the Kalispel. Indian hostilities, however, prevented Stevens from holding a contemplated treaty with the Kalispel. In December of 1855, Stevens who was Governor and Superintendent of Indian Affairs of Washington Territory, reported to the Commissioner of Indian Affairs that the Lower Pend d'Oreille (Kalispel) could not be gathered together to treat with them and that he had left with Agent Lansdale "the program of the treaty to be entered into with them." Lansdale held a council with the Kalispel in March 1856. The agent reported that Victor "head chief and others, headmen and delegates of the

Lake or Lower Pend Oreille Tribe of Indians" represented the Indians. Mansdale's instructions were to obtain the cession of a specified area of land and to secure the removal of the Kalispel to the Flathead Reservation. Chief Victor refused to sell any lands unless the Government permitted the Indians to keep their lands north of the Clark Fork River as a reserve. The agent having no authority to agree to such a proposition no treaty was entered into between the parties. (Pet. Exs. 8, 9, 10).

7. Government reports in the years following still located the Kalispel in the same general vicinity where they were first contacted by the fur traders and the missionaries. In 1870, they were said to be located on both sides of the Pend d'Oreille River from its mouth up to the Idaho line but principally at the Camas Prairie and numbered in population 403. (Pet. Ex. 23). In 1875, they were reported still residing "in their original homes" on the Pend d'Oreille River and near Kalispel Lake. (Pet. Ex. 24). With the passage of time the whites began to advance into Kalispel country and as a result it became apparent that some agreement would have to be made with the Kalispel whose lands were being taken over by the whites.

8. On April 15, 1887, the Northwest Indian Commission representing the Government opened a council with the Kalispel Tribe at Sand Point, Idaho. The Commissioners informed the Indians that they desired the Indians to release any claim they had to lands and to remove either to the Colville, Coeur d'Alene or Jocko reservations. Chief Victor, and Chief Marcella who had replaced Victor as head chief of the Lower Kalispel,

expressed reluctance to leave their lands. Victor said:

We are now talking about our country, not our land. Our land is not for sale. I will tell you about our land. It follows the Pend d'Oreille River to Salmon River and then goes on the top of the mountains between here and Colville to the Steam boat landing; goes over the top of the ridge to the Missoula River at the Ferry; down the Missoula to its mouth to Pend d'Oreille line, runs through the lake near Horse Plains, up towards the Kootenai Country, then up to head of Pack River to Salmon River. That is my country. It is a big country. * * *

Victor insisted upon a reservation in Kalispel country. The Commissioners informed the Indians they had no power to set aside a reservation. Marcella, head chief and son of Victor, refused to sign the agreement. Chief Michael of the Kalispel agreed that he and his people would remove and signed the agreement. Although the agreement was never ratified, Chief Michael and his people moved to the Jocko Reservation and remained there. Chiefs Victor and Marcella and their people remained in the vicinity of Kalispel Valley and their descendants are still there today. It was 1914 before a small reserve (4629 acres) at Usk, Washington, was set aside for these Indians by Executive order. (Pet. Exs. 31, 32, 34, 45. Def. Ex. 3).

9. As is evident from Finding 8 there appears to have been at least two divisions with the Kalispel Tribe. An early study of the tribe (1904, 1908, 1909) by James A. Teit indicates that such was the case. Teit found with respect to their use and occupancy and organization as follows:

The Kalispel occupied a rather narrow strip of country following Pend d'Oreille River, up to Plains and thence north, taking in Thompson Lake and Norse Plains. They divided the Kutenai from the Coeur d'Alene. This included most of Sanders County, Montana; the country around Pend d'Oreille Lake and Priests Lake in Idaho; and nearly all of Pend d'Oreille River within the State of Washington. A small corner of their

hunting country extended into the Salmon River district in British Columbia.

* * *

The Kalispel, it seems, were at one time in three divisions: (1) The Upper Kalispel, sometimes called Ntsemtsi'ni ("people of the confluence," from ntsemtsin, "entrance, outlet, or confluence," a place at the outlet of Pend Oreille Lake, where a considerable band of them formerly wintered). (2) The Lower Kalispel, often called "The Kalispel" or "Real Kalispel", and sometimes "camas people" and "Kalispe'm." They are said to have occupied the Kalispel country proper, the district around Kalispe'lem or Kalispe'm, the name of the large camas prairie west of the Pend Oreille River, near Calispell Lake, Washington. (3) The Chewelah, generally called Slate'use, and sometimes Tsent's. * * * Some people considered these people a tribe different from the Kalispel, as they spoke a slightly different dialect and lived by themselves. However, they recognized their very close relationship to the Kalispel. I did not succeed in getting a full list of Kalispel bands, but it seems that there were several in each division. * * * The Lower Kalispel country was also nearly all in the State of Washington, where they occupied the Lower Pend Oreille River from about Newport down. This division is said to have had their headquarters on the east side of the Pend Oreille River, near Usk and Cusiek * * *. There were other winter camps on the river, most of them on the east side, and all within a radius of about 9 miles of this place. The present-day Lower Kalispel, consisting of Chief Marcellin's band, still live in this neighborhood. * * * The Upper Kalispel occupied all the tribal territory now within Idaho and Montana. Besides the band that formerly wintered at the outlet of Pend Oreille Lake, a band had headquarters * * * at Albang falls, and another * * * near Sand Point; and there are said to have been smaller bands at other places. In later times a band called "Camas Prairie" Kalispel, numbering about fifteen lodges, had their headquarters near the confines of the Pend d'Oreilles. A few descendants of this band are now on the Flathead Reserve. In later years the Pend Oreille Lake band often shifted their winter camps to various places within their territory and occasionally many of them wintered with the Lower Kalispel. * * * (Pet. Ex. 44).

10. Anthropologists such as Leslie Spier in his "Tribal Distribution in Washington" found the Kalispel were in three divisions, (1) the Lower Kalispel who occupied the district west of Pend d'Oreille River near Calispell Lake, Washington, and held the lower Pend d'Oreille River from

Newport down the river with principal settlements about Usk and Cusik; (2) the Chewelah who occupied the country west of Calispell or Chewelah Mountains in the upper part of the Colville Valley and (3) the Upper Kalispel, in Idaho and Montana. (Def. Ex. 18). Edward Curtis in his "North American Indian," Vol. 7, wrote "The Kalispel lived in northeastern Washington, in the valley of Clark fork (Pend d'Oreille river) of the Columbia, from about the place where the Idaho boundary crosses the stream down to Box canon."

11. A study of the ethnography of the Kalispel Indians was made in 1936, 1937 and 1938 by Dr. Allan H. Smith, a professor of anthropology at Washington State College. Dr. Smith testified for petitioner (Tr. 66-170) and a copy of his manuscript prepared from his research with the Kalispel is in evidence as petitioner's Exhibit 65. Dr. Smith testified (Tr. 73) that the Kalispel were divided into two units or divisions-- an Upper Kalispel and a Lower Kalispel and possibly a third division if the Chewelah Indians were considered part of the Kalispel Tribe. The Chewelah territory, however, was not included within the bounds of the lands Smith found to have been used and occupied by the Kalispel (Tr. 77). Smith testified the two divisions of the Kalispel were separately organized groups or political entities and each had its own head chief and subchiefs. The witness testified that one division did not claim a specific territory as its own as distinguished from the other division but rather that they had joint use and occupancy of the same territory (Tr. 84). Dr. Smith prepared a map, petitioner's Exhibit 63, on which he has enclosed in red the lands he found by his study to have been used and occupied by the

Kalispel. On an overlay map, petitioner's Exhibit 64, he has located within the same territory the winter and summer villages, and the hunting, fishing and gathering areas he found to have been utilized by the Kalispel. The area found by Dr. Smith to have been used and occupied by the Kalispel may be described generally as follows:

Commencing on the Flathead River just east of Paradise Montana; thence north along the crest of the range between Horse Plains Valley and Flathead Lake region, to a point just west of Hubbard Reservoir; thence northwest encircling Thompson Lakes area to the Cabinet Range; thence northwest along the crest of the Cabinet Range and in that general direction to the southeastern extremity of the Selkirk Mountains; thence northwest to the Canadian boundary; thence west to a point on Clark Fork or Pend d'Oreille River where the Salmon River joins it; thence south along the crest of western arm of the Selkirk Mountains, passing along the west shore of Sacheen Lake; thence southeast to Mt. Spokane; thence east to south tip of Pend d'Oreille Lake; thence along the crest of the Bitter Root Mountains southeasterly to a point about west of Superior, Montana; and thence northeast to place of beginning.

The lands so described are located in northeastern Washington, northwestern Idaho, and in western Montana. Dr. Smith was of the opinion that in spite of the divisions of the Kalispel they constituted a tribe. The witness stated that several factors in his opinion are taken into account in determining "what constitutes a tribe in the identification of a group of Indians." These factors, he said, would be "common territory, an idea of oneness, a single identity, a common language, common culture, strong friendships, a very frequent pattern of communication, frequent bonds of intermarriage." In the Plateau area, to which the Kalispel are considered to belong, the witness testified the political organization of a tribe may be taken into consideration as a factor "but because of the rather special sort of political structure which the Indians of the Plateau possessed, political unity

is not regarded as being essential to a single tribal entity." (Tr. 73, 74, 114). Dr. Smith testified that the Kalispel believed "that all the Kalispel territory belonged to all the Kalispel and that they felt free to use this territory." (Tr. 137-139). He further testified that the reason they were designated Upper Kalispel and Lower Kalispel was "because the people who lived in the villages of these two areas regarded themselves as being politically beneath the chiefs of these two separate areas" and that the Lower Kalispel had their winter villages in the so-called lower part of the area which would be on the Pend d'Oreille River with Cusick, Washington, being in the "heart of their area" while the Upper Kalispel correspondingly had their winter locations in the upper part or upriver portion of the area claimed. (Tr. 157). Dr. Smith urged that "These two political units with regard to these two political structures were regarded as being localized, if you like, to these two parts of the Kalispel territory. It wasn't thought of in this way. This chief and his subchief were not thought of as being the chief and subchief of a specific group of people. The people moved, and when they moved they fell under him." (Tr. 169).

12. Stuart A. Chalfant, ethnologist, expert witness for the defendant, testified that the Kalispel consisted of two divisions. Each division, he stated, comprised several local bands under the leadership of their own headmen or chiefs and that out of these local bands or village groups at times larger "band clusters" might be found with a prominent local chief for a general geographic unit or division. These divisions, according to the witness, were not necessarily political groups but were rather

"geographic groups of political units, clusters of political units."
(Tr. 242). Chalfant stated that based on his research he found that the Kalispel were divided into two generally politically autonomous divisions with one, or at least part of one, under the leadership of Chief Victor in 1855, and part of the other, if not all, under Chief Michael. (Tr. 240-241). The witness testified that in terms of land use the divisions did make use of more or less the same territory. (Tr. 243-244, 251). On a map, defendant's Exhibit 21-B, Chalfant depicts (within black lines) an area of land which he describes as the "primary subsistence area" of the Lower Kalispel. The Indians, however, he testified, were not exclusively confined within such boundaries in their subsistence rounds nor does the area so designated show all the areas which they may have used in their subsistence rounds but rather the area which he believed they had consistently used to a greater degree than did any other groups of Indians. Chalfant made no effort to outline any territory from which the Upper Kalispel received their subsistence. (Tr. 236-238). The witness testified that it was his opinion that the Lower Kalispel had exclusive control of the Priest Lake watershed and the Clark Fork watershed almost as far north as the Canadian boundary to the north and west, and on the south and east, he believed they occupied lands a little farther east of the Idaho-Montana border boundary as found by Curtis (Tr. 250-251). Any lands to the east of that point he excluded because of the use of the area by the Pend d'Oreille Tribe (Tr. 252-254).

13. The southeastern portion of the area claimed by the petitioner contains lands in western Montana bordering on both sides of the Clark

Fork River in the vicinity of Plains, Paradise and Thompson, Montana. The ethnologists for petitioner and defendant were cognizant of the use of this area by other than the Kalispel. Dr. Smith, witness for petitioner, testified (Tr. 141-144) that the Pend d'Oreille Tribe, which was closely allied with the Flathead Tribe, and lived in the vicinity of Flathead Lake, Montana, hunted occasionally in the overlap area but that he assigned it to the Kalispel "for two reasons: first * * * because they too hunted in the area and made extensive use in that way of their territory. But more specifically, I have allotted it to the Kalispel because * * * within this area were sites of Kalispel winter villages." Chalfant, witness for defendant, testified (Tr. 244, 249-254) that he had learned from the Pend d'Oreille and Flathead Indians that the Pend d'Oreille claimed they had equal use rights to the Clark Fork region in Montana. In Docket No. 61, The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Carling Malouf, anthropologist, testified for the Flathead, and submitted a report on the "Economy and Land Use by the Indians of Western Montana, U. S. A.," which is petitioner's Exhibit 5 in that case. On page 11 of his report, Mr. Malouf indicates upon a map what he considered to be the domain of the Upper Pend d'Oreille Tribe. Malouf's boundaries for the Upper Pend d'Oreille encompass the lands on both sides of the Clark Fork River in Montana and over what is now the state line into eastern Idaho. On page 51 of his report he locates main camps and migratory camps of the Upper Pend d'Oreille Tribe within the same aforesaid area from about Plains, Montana, all the way across the Idaho-Montana border.

14. Doctor Allan H. Smith, one of petitioner's ethnologists, in his manuscript compiled in his study of the ethnography of the Kalispel Indians (Pet. Ex. 65, Part One, pages 16-18) wrote regarding the southeastern portion of the claimed area in part as follows:

At only two points, one in the extreme east and the other around the foot of Lake Pend Oreille, is there any question from my evidence about the validity of the Kalispel claim to this territory. With regard to the first locality, the Kalispel maintained that they sometimes wintered in the Plains area and, on occasion, even somewhat farther to the east in the Paradise district. The presumption is strong that they considered both of these areas as theirs. Furthermore they are reported unequivocally to have hunted southward up the Missoula River as far as Saint Regis and northward to the Thompson Lakes district, where, in fact, they even sometimes passed the winter. The assigning of these areas to them implies the yielding to them of the intervening region from Plains to Paradise as well. But it was also stated that the Lower Pend Oreille [Pend Oreille?] also occasionally passed the winter in the Paradise region and sometimes even in the neighborhood of Plains. Hence both the Kalispel and the Pend Oreille may have at times used this area about the junction of the Missoula and Flathead Rivers but the evidence suggests, without being conclusive, that the Kalispel probably found themselves in this region somewhat more frequently than did their neighbors to the northeast. On this assumption this district is here included within the bounds of Kalispel territory. It seems evident from Stevens data that the Flatheads made no use of the Saint Regis region at least, for they are specifically reported to have been completely unfamiliar with this portion of the stream.

Although no definite information on this point was secured, it is possible that in the 18th century before their trek to the buffalo country carried them annually up the Clark Fork, the Kalispel may have ranged over a somewhat more restricted area to the east. Their territorial limits may have extended only slightly east of the delta of the Upper Clark Fork, possibly only as far as Cabinet Gorge. There was in fact no locality in this long stretch of river from Plains to its mouth at Pend Oreille Lake which was capable of supporting a group of any size for any length of time; it was clearly the least economically productive portion of the territory which they claimed in the 19th century and it was that part which was least used. At an earlier period than this region may have been essentially unoccupied both by Kalispel and other peoples. Only the fact that the Kalispel are linguistically one with the Pend d'Oreilles and Flathead to the east argues against

a virtual separation of the two areas at this early period. It is certain however that by the beginning of the last century this eastern strip along the Upper Clark Fork was commonly used by the Kalispel and the evidence adduced above indicates that the Kalispel tribal boundary then fell as it has here been described.

15. On July 2, 1957, petitioner, through its attorney of record, filed a disclaimer to two small areas within the area originally claimed as described in Finding 11. The modified description of the area claimed excludes one small area around present-day Saint Regis and the other near McGregor Lake in what is now the State of Montana. The claimed tract as modified is described as follows:

Commencing at a point on the Flathead River east of present-day Paradise, Montana, and just east of the confluence of the Flathead and Clark Fork Rivers; thence northerly along the divide separating the watersheds of the Thompson and Little Bitterroot Rivers to the point thereon nearest McGregor Lake; thence northwesterly south of McGregor Lake across the stream connecting McGregor and Thompson Lakes to the divide to the north of Thompson Lakes; thence northwesterly along said divide; thence southerly across Fisher River to the west of Thompson Lakes to the divide separating the watersheds of Clark Fork (and Pend d'Oreille) and Kootenai Rivers; thence following said divide to the Canadian boundary; thence west along said boundary, across Priest River to the divide to the west thereof; thence westerly along said divide dividing the headwaters of Priest River and the Canadian tributaries of Pend d'Oreille River to the Canadian boundary; thence west along said boundary to the divide west of Pend d'Oreille River; thence south on said divide, separating the watersheds of the Pend d'Oreille and Columbia Rivers to Mt. Spokane; thence east to the most southerly tip of Lake Pend d'Oreille; thence easterly to the crest of the Bitterroot Range; thence southeasterly on said crest, and along the crest of the northern watershed of the St. Regis and Clark Fork Rivers to the point of beginning.

Petitioner's exclusion of these two small portions of the area originally claimed is based upon a report and affidavit accompanying the disclaimer prepared by petitioner's ethnologists in this case, Verne F. Ray and Allan H. Smith, and Carling I. Malouf (see Finding 13) who appeared as

ethnologist for the petitioners in the Confederated Salish and Kootenai
se, Docket No. 61, before the Indian Claims Commission. The purpose
of the report and affidavit was to reconcile the overlap in areas claimed
by the petitioners in Docket Nos. 61 and 94 (see Finding 13).

16. The Commission finds that from time immemorial and until gradu-
ally dispossessed thereof, the Kalispel Tribe (composed of Upper Kalispel
Indians and Lower Kalispel Indians), used and occupied a tract of country
within the United States in what are now the States of Washington, Idaho
and Montana, described as follows:

Commencing at the town of Noxon on the Clark Fork River in
the State of Montana; thence in a direct northerly direction
to the divide separating the watersheds of Clark Fork (and
Pend d'Oreille) and Kootenai Rivers; thence following said
divide to the Canadian boundary; thence west along said boundary,
across Priest River to the divide to the west thereof; thence
westerly along said divide dividing the headwaters of Priest
River and the Canadian tributaries of Pend d'Oreille River to
the Canadian boundary; thence west along said boundary to the
divide west of Pend d'Oreille River; thence south on said divide,
separating the watersheds of the Pend d'Oreille and Columbia
Rivers to Mt. Spokane; thence east to the most southerly tip
of Lake Pend d'Oreille; thence easterly to the crest of Bitter-
root Range; thence southeasterly on said crest to a point on
said crest directly south of Noxon; thence in a direct northerly
direction to the place of beginning.

The boundaries of the tract described above are as set forth on the map
introduced by petitioner as Exhibit No. 63, except those lands in the
southeastern portion not included in the above description are found not
to have been exclusively used and occupied by petitioner.

17. The Commission finds that while the Kalispel Tribe during the
time pertinent to the issues herein may have consisted of two divisions
(The Upper Kalispel Tribe and The Lower Kalispel Tribe), there is sub-
stantial evidence that for all intents and purposes there was but one

land-holding entity composed of all Kalispel Indians and known officially as The Lower Pend d'Oreille or Kalispel Tribe to the agents and representatives of the United States.

18. From time immemorial and until lost, as hereinafter stated, the petitioner, the Kalispel Tribe, exclusively used and occupied the lands described in Finding 16 hereof and had original Indian title thereto.

19. That long prior to August 13, 1946, the United States, without petitioner's consent, began acquiring or disposing of said lands for its own use and benefit, or for the use and benefit of its citizens, until the petitioner was deprived of the entire tract prior to August 13, 1946, and the petitioner received no compensation for any part of the same.

20. The evidence does not show when the petitioner was deprived of its lands except as set forth in the last preceding finding.

Edgar E. Witt
Chief Commissioner

Louis J. O'Marr
Associate Commissioner

Wm. M. Holt
Associate Commissioner