

BEFORE THE INDIAN CLAIMS COMMISSION

THE LOWER PEND D'OREILLE OR
KALISPEL TRIBE OF INDIANS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 94

Decided: June 9, 1958

Appearances:

John W. Cragun, Ralph G. Wiggerhorn,
Kenneth R. L. Simmons, Donald C. Gormley,
Leonard S. Strahan, Bruce L. Beatty,
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, Commissioner, delivered the opinion of the Commission.

The petition in this action was duly filed with the Commission by the Lower Pend d'Oreille or Kalispel Tribe of Indians. Petitioner alleged therein that prior to, and on or about the year 1890, the United States wrongfully and forcibly, seized and took from the petitioner certain lands described in the petition, with full knowledge that the lands were the property of, and exclusively held, owned and possessed by petitioner. Petitioner further alleged that no consideration was ever paid to, or

received by, said petitioner for the lands so taken (Petition, page 2). The petition was amended to more fully describe the lands claimed by petitioner and such description was again amended to eliminate two small areas in the southeastern portion of the claimed tract following the filing of a disclaimer to said small areas (see Finding 15).

Defendant concedes that petitioner is an organized group of Indians presently residing upon the Kalispel Indian Reservation in the State of Washington and its corporate charter under the name of Kalispel Indian Community Reservation, dated May 28, 1938, has been recognized and approved by the Secretary of the Interior (Def. Req. Fdg. No. 1). Defendant contends, however, that petitioner represents only the Lower Kalispel Indians as distinguished from the Upper Kalispel Indians (the distinction as shown by the evidence will be discussed hereinafter) and that the question for consideration is only the area of land, if any, exclusively used and occupied by the Lower Kalispel. Defendant further contends that the substantive evidence supports the conclusion that petitioner did not exclusively use and occupy any area to the exclusion of other tribes or groups, and, in any event, the Kalispel Indians - including both the upper and lower divisions - did not use and occupy more consistently than other groups an area more extensive than outlined by defendant's ethnologist on a map, defendant's Exhibit 21 B.

Pursuant to a stipulation filed by the parties with the Commission, it was agreed that the initial hearing of the case should be confined to the question of title or ownership of the territory claimed by petitioner, or owned or occupied by it, and the area thereof, all other issues of law or fact to be postponed until the determination of said question.

Petitioner contends in its brief that it has proven Indian title to the tract claimed in its second amendment to the petition (Fdg. 15) by two methods, (1) factual proof of exclusive use or occupancy of a definable area and (2) recognition of title in petitioner by the United States.

The tract of country claimed to have been immemorially in the exclusive use and possession of petitioner is located along the Pend d'Oreille River in what are now the States of Washington and Idaho, around Lake Pend d'Oreille and Priest Lake in the State of Idaho, and along the Clark Fork River in the western part of what is now the State of Montana.

Beginning with the fur traders and missionaries, two tribes of Pend d'Oreille Indians are mentioned in the letters and journals of these men. The Upper Pend d'Oreille, a tribe closely associated with the Flathead Tribe in Montana, were considered a tribe separate and distinct from the Lower Pend d'Oreille or Kalispel Tribe. For the purpose of clarity, the Lower Pend d'Oreille will hereinafter be referred to as The Kalispel Tribe. There is little dispute between the parties that from the first recorded history of the Kalispel they have been mentioned as inhabiting the country about Pend d'Oreille Lake and along the Pend d'Oreille River in what are now the States of Idaho and Washington. As to the lands claimed by petitioner in the States of Washington and Idaho, the ethnologists for both petitioner and defendant are in substantial agreement. As to these lands, defendant's ethnologist considered them to be lands "to which the Lower Kalispel bands had indisputable

aboriginal claim." It should be noted that the boundaries of the ethnologists vary slightly as to these indisputable lands but not sufficiently to cause any material disagreement. So it is only with respect to the lands in the southeastern part of the claimed tract which are along the Clark Fork River in the State of Montana that the parties actually are in disagreement as to exclusive use and occupancy of the Kalispel Tribe.

While documentary evidence of a historical nature is meager as to the existence of a division of the Kalispel Tribe into two divisions or units, that is, the Upper Kalispel who are said to have had headquarters at or about the outlet of the Clark Fork River and the Lower Kalispel who appear to have concentrated for the most part on the Pend d'Oreille River west and north of Pend d'Oreille Lake, all ethnologists agree to this division. A third division is often mentioned, the Chewelah, but their lands are not included within the area claimed. Doctor Allan H. Smith, a professor of anthropology, who conducted an intensive field study of the Kalispel Indians in 1936, 1937 and 1938, testified as an expert witness for petitioner. Doctor Smith's manuscript of the ethnography of these Indians was introduced as petitioner's Exhibit 65 and his map of the boundaries of the Kalispel Tribe, as found by him, are delineated by a red line on petitioner's Exhibit 63, with an overlap map, petitioner's Exhibit 64, showing villages and hunting, fishing and gathering areas of these Indians.

With respect to the divisions or units of the Kalispel Tribe, Doctor Smith testified that the two divisions were separately organized groups or political entities and each had its own chief and subchiefs; 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. This witness testified that in spite of the divisions of the Kalispel he believed they constituted a tribe.

Defendant's ethnologist, Stuart A. Chalfant, also testified that the Kalispel consisted of two divisions. These divisions, defendant's expert stated, were not necessarily political groups but rather were "geographic groups of political units, clusters of political units." Chalfant testified that in terms of land use the divisions did make use of more or less the same territory.

There is little doubt that the Kalispel, both upper and lower, considered themselves to be one people. All agree that they made use of more or less of the same territory. The Kalispel were but one land-holding entity as we have found, and the documentary evidence demonstrates that the agents and representatives of the United States so considered them. Since the land-holding and using entity was the Kalispel Tribe, petitioner has the capacity and authority to maintain this claim since any award will be for the benefit of the Kalispel Tribe, including therein all the descendants of upper and lower divisions.

As previously stated, the only real controversy with respect to Indian title in this case concerns the lands in the southeastern part of the cession along the Clark Fork River in Montana. Both Doctor Smith and Mr. Chalfant agree that the Kalispel Indians used the area in the vicinity of Paradise and Plains in Montana and that the Kalispel had several winter villages in this extreme eastern portion of the claimed tract. These

ethnologists also agree that the Pend d'Oreille Tribe also occasionally used the disputed area. Doctor Smith, petitioner's ethnologist, included the disputed area as Kalispel territory for two reasons, first, because the Kalispel also hunted in the area and made extensive use in that way of the region and, secondly, because they had winter villages there.

The eastern portion of the claimed tract from the town of Noxon on the Clark Fork River eastward is excluded from Kalispel territory. The excluded area was not exclusively used by petitioner. Exclusive use and occupancy is the standard established by the Supreme Court of the United States to establish Indian title to an area of land. United States v. Santa Fe Pacific Railroad, 314 U. S. 399. While the Kalispel may have occasionally wintered in the area following their migrations to the buffalo country, they did not exclusively use the area. In addition, the evidence shows that much of the disputed area was rough and unsuited for use and occupancy and little utilized for either purpose (see Finding 4 and 14; and Smith's overlay map, Pet. Ex. 64). It may be noted from other cases containing studies of the Indians of the plateau culture that the greater the distance from population centers the more vague the boundary lines for a tribe may become (cf. The Confederated Tribes of the Colville Reservation, et al., v. The United States, 4 Ind. Cl. Comm. 151, 194). This observation applies equally as well in this case as to the southeastern portion of the claimed area. Another instance that may be mentioned is the Priest Lake area of the claimed tract. While both ethnologists for petitioner and defendant describe the Priest Lake region as definitely Kalispel territory, and for this

reason it was so found to be by the Commission, the testimony of a qualified ethnologist in Docket No. 154, The Kootenai Tribe or Band of Indians of the State of Idaho v. United States, 5 Ind. Cl. Comm. 456, was to the effect that he believed the lands of the Bonners Ferry Kootenai, petitioner in that case, extended to the eastern shore of Priest Lake. The witness, Doctor Claude E. Schaeffer, who had made a thorough study of the Kootenai and was then employed by the Bureau of Indian Affairs, had been subpoenaed by petitioner in the Kootenai case to testify therein. The Kootenai claimed area, however, did not include the lands along the eastern shore of Priest Lake.

As is obvious from the above discussion, the studies of the ethnography of neighboring tribes by different ethnologists often show conflict of claims to certain areas between the tribes, or areas of tension or common use. This fact is also clear when one studies the report and testimony of Carling Marlouf, anthropologist for petitioner in The Confederated Salish and Kootenai Tribes of the Flathead Reservation v. United States, Docket No. 61, before this Commission (see Fdg. 13; and Report and Affidavit of petitioner's ethnologists Verne H. Ray and Allan Smith, and Mr. Marlouf's accompanying disclaimer filed by petitioner on July 2, 1957).

Petitioner's counsel urges that there was a recognition of title by defendant in the Kalispel Tribe to the lands claimed herein. Counsel states "in this case, the officers and agents of defendant itself did the pleading and expressed the recognition plainly and clearly." Counsel relies on the decision of this Commission in Coeur d'Alene Tribe v. The United States, 4 Ind. Cl. Comm. 1, with regard to recognition as being

comparable to the situation in the instant case. The recognition in the Cocur d'Alene case was based on congressional recognition of Indian title in the ratification of the agreement of cession. In the instant case there was no treaty of cession nor any congressional action and therefore no recognition of title in petitioner. In a more recent case The Miami Tribe of Oklahoma, et al., v. The United States, 5 Ind. Cl. Comm. 198, this Commission discussed at length the question of recognition, or recognized title, and the need for congressional action to establish such recognition.

The Commission concludes, based on the record as a whole and the findings of fact herein made, that the Kalispel Tribe had aboriginal Indian title to the lands described in Finding 16. The parties stipulated that the initial hearing would be limited to only the issue of Indian title and the area thereof.

All other issues, such as when the defendant acquired the subject property, are not in issue. As to the time the defendant acquired the subject lands, it is not possible from the record now before the Commission to determine such time, although the evidence does show that the Indians were deprived of their lands long prior to August 13, 1946, and without compensation. The time the Indians lost their lands must necessarily be determined at a later hearing unless the parties agree on an average date for purposes of valuation.

Louis J. O'Marr
Associate Commissioner

We concur:

Edgar E. Witt
Chief Commissioner

Wm. M. Holt
Associate Commissioner