BEFORE THE INDIAN CLAIMS COMMISSION

THE QUILEUTE TRIBE OF INDIANS, on its own behalf and on behalf of the HOH TRIBE OR BAND OF INDIANS; HOH TRIBE OR BAND OF INDIANS, on relation of and represented by SCOTT FISHER, on its own behalf, Petitioners, v. THE UNITED STATES OF AMERICA, Defendant.	Docket No. 155

Decided: December 1, 1958

Appearances:

Kenneth R. L. Simmons,
Glen A. Wilkinson,
Donald C. Gormley, 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 Quileute Tribe of Indians, on its own behalf, and on behalf of the Hoh Tribe or Band of Indians, the latter also on relation of and represented by Scott Fisher, timely filed this suit under the provisions of the Indian Claims Commission Act of August 13, 1946. (C. 959, 60 Stat. 1049, 25 U.S.C. 70). Petitioners seek additional compensation for land ceded by the Quileute and Hoh Indians

under the terms of the Treaty with Quinault, etc., 1855, (12 Stat. 971; II Kappler 719). Petitioners allege that Quileute and Hoh Indians held aboriginal possession, use and occupancy of said lands and charge defendant obtained same by such treaty cession for a grossly inadequate and unconscionable consideration. In the alternative, petitioners charge defendant with unfair and dishonorable dealings in obtaining such cession of such lands. Petitioners allege said lands contained approximately 725,760 acres.

This Commission at the beginning of the trial of this case approved stipulations as presented by counsel for petitioner and defendant, and established the following order of procedure:

> a. This case, Docket 155, shall be tried and heard jointly with Docket 242, the Quinaielt Indian Tribe, et al., vs. The United States. All evidence adduced in either of such cases shall be available in the other.
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> b. Defendant's original answers shall be considered answers to all amended petitions as may be filed in either of said cases.
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> c. The issues for determination in this stage of these proceedings shall be limited to the questions of (1) capacity and rights of petitioners to maintain this action under the Indian Claims Commission Act (60 Stat. 1049) and, (2) what aboriginal areas, if any, did petitioners' ancestors exclusively use and occupy. (Tr. pp. 3-6)

The defendant admits that a "so-called Quileute Tribe and other tribes and bands entered into a treaty, known as the Quinaielt Treaty with the United States, on July 1, 1855 or January 25, 1856 (12 Stat. 971, II Kappler 719)." (Def. Ans. par. 9), sometimes called the "Treaty of Olympia".

Although it was not until 1855 when Territorial Governor Isaac I. Stevens entered into treaty negotiations at a council held between the United States and those tribes and bands living along the Pacific coast between Gray's Harbor and Cape Flattery that it was learned that there were some Indians residing there who were different from their Salishan speaking neighbors. There was a distinct dialectical difference in the speech of two young observers from the other Indians present. Governor Stevens directed further investigations be made and learned that these previously unknowns were Chimakuan speaking Indians residing mostly at the mouths of the Kwilleyute and Hoh rivers. (Our Fdgs. 1 and 3)

The natural barrier of their coast-line without land-locked harbors substantially prevented any further extended white contact with them until long after their treaty cession. As late as the twentieth century there were no roads and mail was brought by canoe and trail from Neah Bay on the Strait of Juan de Fuca. This area is one of the largest unspoiled areas of natural scenery in the United States.

The recognition of the petitioner tribe as an identifiable group of American Indians is established by the Government records introduced in evidence in this case. Furthermore, the Quileute and Hoh Indians were recognized by the defendant in the Treaty with the Quinaielt, etc., 1855, sometimes called the Treaty of Olympia (cit. Id), both in the preamble and among the Indian signatory parties of the Quinaielts, Queets, Hohs and Quileutes.

Some record of the census of their membership has been reported by the Government's Indian agents and tribal officers from treaty times to recent decades. The Interior and Insular Affairs Committee

of the House of Representatives (82d Congress) authorized and directed a study of the bureau of Indian Affairs. On page 168, the records of Quileute are described in the report of this study, as follows:

> * * *Quileute: - There is no up-to-date collection of tribal documents. Each council officer keeps those records pertaining to his office. Currently minutes are fully kept. Previously they were not. There is no established procedure for keeping records and no safe place for their preservation.* * *.

The Government records in evidence here show the existence of the Quileute and Hoh Indians. Gibbs estimated their population as not more than 300 in 1855, Mooney reported their total as 295 in 1907 (Fdgs 1c and 2f). These records show repeated efforts of the Government to remove the Quileute, and also the Hoh were removed, to reservations and away from their ancestral habitations concentrated along the mouths of the respective rivers bearing their names since treaty times. The first discovery of this identifiable group of American Indians, the Quileute and Hoh, is discussed in the journals of the Government negotiations for a cession of their lands. (Fdg. 1c)

Defendant's plea of res judicata is not a valid defense to petitioners' claim, first, because neither petitioners here were a party to such case in the Court of Claims styled (Duwamish, et al. vs. United States. (No. F-275,79 C. Cls. 530). This defence has been raised on numerous other occasions against other claimants who were party litigants in the Duwamish case and afterwards brought suit before this Commission under the Indian Claims Commission Act. This Commission has consistently rejected such plea of res judicata. The

Skokomish Tribe v. United States, 6 Ind. Cl. Com. 154, The Sucuamish Tribe v. United States, 5 Ind. Cl. Com. 158, The Snokomish Tribe v. United States, 4 Ind. Cl. Com. 549, The Muckleshoot Tribe v. United States, 2 Ind. Cl. Com. 424, The Nooksack Tribe v. United States, 1 Ind. Cl. Com. 424. Because of the reasons set forth in those prior cases, and the similarity of the claim asserted here, the judgment rendered in the Duwamish case is not a bar to the present claim.

Petitioners alleged certain boundaries of the area to which they made claim in their original petition. On January 6, 1953 petitioners filed a motion to amend their petition, which amendment included amendment of their boundary description. By order of this Commission, dated February 12, 1953, the motion was granted and the description in their amended petition reads as follows:

> Commencing at a point on the Pacific Coast approximately 6 miles south of the Ozette River; thence easterly to the west shore of Ozette Lake; thence easterly across Ozette Lake following the crest of the watershed between Big River and Crooked River; thence easterly along the crest of the watershed between Herman Creek and Ellis Creek; thence easterly along the crest of the watershed between Pysht River and Beaver Creek; thence southerly along the crest of the watershed between West Twin River and the Sol Duc River to Mount Miller; thence southeasterly along the crest of the watershed between Crescent Lake and the North Fork of Sol Duc River to Boulder Peak; thence southerly along the crest of the Olympic Mountains to Bear Pass; thence westerly to the crest of Mount Olympus; thence westerly along the crest of the watershed between the south fork of Hoh River and Queets River; thence westerly along the crest of the watershed between Hoh River and Clear Water River to Mount Octopus; thence westerly along the crest of the watershed of Hoh River to the mouth of Steamboat Creek on the Pacific Coast; thence northwardly along the Pacific coast to the place of beginning.

These petitioners maintain they were defenseless, dependent, ignorant American Indians, who, at the time of the treaty cession

of their lands, July 1, 1855, were uneducated, unable to read and write, and without knowledge of the nature and legal effect of the agreement which they entered into with defendant; that, without any knowledge or understanding of money or market values of land, petitioners' predecessors in interest relied at all times with implicit confidence upon the fairness and honesty of the United States and its agents as their guardian and trustee. Under such alleged circumstances they, together with the Quinaielt Tribe of Indians, ceded their land to defendant for the alleged unconscionable total sum of $25,000.

Alternatively, petitioners allege such cession of their lands was procured by duress in that defendant's treaty representative and agents lead them to believe there was no alternative but to sign such treaty.

There is no evidence of any treaty language or Act of Congress which expressly creates a fiduciary relationship between defendant and petitioners. We conclude, therefore, that such legal relationship of guardian and ward, or other duties and obligations as a trustee were not created between the defendant and these Indian parries, and has never existed.

In the opinion of Gila River Pima Maricopa Indian Community vs. United States, 140 F. Supp. 776, the applicable principle here was firmly stated:

> Whether or not the legal relationship of guardian and ward exists between a particular Indian Tribe and the United States depends, we think, upon the express provisions of the particular treaty, agreement, executive order, or statute under which the claim presented arises.

The same principle was again asserted by the Court of Claims in The Sioux Tribe of Indians, et al. v. United States, 146 F. Supp.229 The same principle was controlling on the fiduciary question in the opinion of this Commission in The Omaha Tribe of Nebraska, et al. v. United States, 6 Ind. Cls. Com. 68

We further note in passing upon petitioners' alleged grounds of recovery that whatever may have transpired in the minds of the respective signers to the treaty cessions, no evidence of acts or other conduct amounting to duress is shown from the journal and other accounts of the negotiations. However, the petitioners' allegations of right or recovery on the basis of unfair treatment and/or unconscionable consideration may or may not be established by reason of substantial disparity, if any, between the $25,000 consideration and the market value of the land when ceded to defendant. (12 Stat. 971, II Kapp. 719)

There is no doubt in our minds that the Quileute and Hoh Indians spoke a common language distinct from their neighbors, that they constituted a land-using unit of American Indians subsisting upon fish, roots and berries, along the environs of the Quillayute and Hoh rivers, respectively, in pre-treaty times. (Findings 1, 2, 3 and 12)

The substantial controversy arising in this case concerns the use and occupancy of three separate portions of the tract of land to which petitioners claim Indian title, namely: the area around Lake Ozette on the north (Finding 10); the area of the Olympic Mountains on the east (Finding 11); and the heavily forested land areas upland and between such river valleys (Finding 12). The evidence establishes that the Quileute and Hoh Indians lived, fished, hunted and gathered roots and

berries in the Quillayute and Hoh River valleys and along the contiguous river valleys which bear their names. Their winter lodges were concentrated at the mouths of the Quillyute and Hoh rivers, respectively. (Finding 12)

We shall take up first that area of land north of the Quillayute river valley extending some twelve miles up to the middle of Lake Ozette. We held special hearings upon this question of the "overlap area" between Makah and Quileute land. Petitioners' able anthropologist, Dr. Verne R. Ray, prepared some 85 pages of research material consisting of 14 maps dated from 1838 to 1955 and some 20 documents, letters, and extracts from ethnological publications. (Pet. Ex. 125) Dr. Ray concluded that Dr. Herbert Taylor, ethnologist who testified in Docket 60, Makah Tribe v. United States, was in error in his conclusions that the whole of Ozette Lake area was occupied by Ozette Indians, a sub-tribe of the Makah. Dr. Ray admitted that his findings were unusual in that as a general proposition only one tribe or group of Indians used a lake to the exclusion of others, except permissive users, in this region, but that while there were some tensions over the use and occupancy of Lake Ozette and its prize blue-back salmon, yet he found that the Quileutes utilized all but the north end of Lake Ozette, very near to the aboriginal Ozette village which was situated on the Ozette River, a comparatively short river connecting Lake Ozette with the Pacific Ocean.

The documentary evidence bearing on this question is indeed fragmentary. Such material as does exist, fails to treat precisely with

the controversy before us; that is, did Quileute Indians during and before treaty times, 1855-1856, exclusively use and occupy that area or strip of land about ten to twelve miles in width between the middle of Lake Ozette and the Quillayute River Valley south of Cape Johnson?

This northern portion of the claimed tract has been excluded from our finding of Quilleute territory. (Finding 14). We conclude that the cession boundary between Makah-Ozette and the Quilleutes in all probability referred to Ozette, the village, north of Lake Ozette and was included within the tract of land ceded by petitioners to defendant.

The prime purpose of Governor Stevens was to extinguish Indian title to the whole of the area north of Gray's Harbor and west of the Cascades except that designated for Indian reservations. Such was the stated policy of the defendant's Office of Indian Affairs. (Pet. Ex. 12). The method employed by Governor Stevens in accomplishing this purpose is evident upon examination and comparison of the land descriptions contained in the several treaties affecting such extinguishment. He adroitly avoided leaving any vacancy by simply quoting verbatim the common boundary used in the treaty cession with the adjoining tribes. The expedience of accomplishing this purpose of extinguishing all Indian title undoubtedly accounts for his use of the ambiguous description of "Ozett" as the common corner of the Makah-Ozette south boundary end in identical language, the Quileutes north boundary. Neither Governor Stevens nor his advisors had reported any knowledge of the existence of Lake Ozette. Such ambiguous description gave rise to controversy as [illegible]

the true aboriginal boundary between the Makah and Quileute tribes was above, below, or through Lake Ozette and is evidence that the usually thorough Stevens was not well informed on the locations of the aboriginal boundaries between the Makah and Quileute Indians.

Although the Osetts are referred to as a "village of the Makah Tribe" in the preamble of the Treaty with the Makah, 1855, (12 Stat. 939, II Kapp. 682) and such village is situated at the north end of Lake Ozette, while the principal winter village of the Quileute, LaPush, is 17 miles south of the Ozette village and more than 7 miles from Lake Ozette, yet in both the treaty with Makah and the treaty with Quileute, such lake area was included within the Quileute territory, notwithstanding that the Osett village, associated with the Makah Tribe, were the only Indians with a permanent winter village on Lake Ozette.

Lake Ozette was not shown on Dr. Gibbs' map of the area in question although it is a much larger lake than the Quinault Lake which was shown by Gibbs' map. Gibbs was present at the negotiations and was a principal adviser to Governor Stevens. Lake Ozette was in, at least, the near proximity of the Makah-Quileute boundary. We can only conclude that the size and locations of Lake Ozette were not definitely known to Stevens and his advisers, (if even vaguely known to him).

Dr. Ray's compilation, contained in Petitioners' Exhibit 125, points up the fact that the respected authorities are in sharp disagreement as to what group of Indians, if any, maintained possession of this area in aboriginal times.

The treaty cession boundaries define this area as Quileute territory. However, the area's physical location, near Osset Village, tends to show it in Makah territory. The prized blue-back salmon found only in Lake Ozette was a choice fish of the Indians of this region according to Dr. Verne Ray's testimony. We conclude that Lake Osette was not an isolated, but a much used subsistence area in aboriginal times. There is evidence of tension over the use of Lake Ozette between the Makah and the Quileute. All of the fish-eating Indians of this area were by habit and custom generous in nature as to sharing with neighboring groups and tribes.

We conclude that the Quileute Indians did not exclusively use and occupy Lake Ozette during treaty times, which is the only time pertinent to this inquiry. The treaty cession boundary was of expediency and not based on fact. The great weight of the evidence is almost entirely based upon events long subsequent to the time of the treaty cessions. Such evidence fails to establish that the southern part of Lake Ozette, to which petitioners lay claim, was an area used and occupied exclusively by Quileute Indians. Exclusive use and occupancy is the standard required to establish Indian title to an area of land. While the Quileute seasonally fished on Lake Ozette they did not use this lake to the exclusion of other tribes, expecially the Makah and Ozette Indians. (Findings 10a, b, c, d, e, f, g and h)

Secondly, petitioners claim their aboriginal areas, exclusively used and occupied by the Quileute and Hoh Indians includ

sizeable portion of the Olympic Mountains on the west side of such lands. We have noted in the S'Klallam, Skokomish and other cases that this Olympic range was used by all the tribes and bands of Indians to hunt deer, elk and bear. Ethnologist Erna Gunther and others have noted that this area was a free range for any who would use it. (Finding 11)

Thirdly, defendant urges that petitioners did not hold Indian title to "non-village areas"; that all the Indians of this region had, at most, a very loose sense of property ownership and no concept of land boundaries whatever outside their respective villages.

Defendant further contends that the ease of fishing prevented them from engaging in the arduous pursuit of game, that the root and berry gathering areas were free to all who would use them and the forests of this area were among the most dense in the world, traversed only by a limited use of game trails. (Dft. Req. Fdg. 19) It is a fact that the major portion of their livelihood and sustenance was drawn from the sea and the rivers. But they also depended upon roots and berries from the prairies and supplemented this diet with elk, deer and bear killed or driven from the upland areas into the prairies and river valleys. These were the primary purposes for which Indians of this region used land in aboriginal times. This constitutes use and occupancy in the sense of "Indian title".

Defendant contends that these non-village areas were "free-use areas" to all Indians and that such use and occupancy was not exclusive as to Quileute and Hoh Indians as they had no concept of land

ownership. It is sufficient to observe that the government men experienced considerable difficulty and delay in removing these Indians from their ancestral river valleys onto Indian reservations (Finding 7) and their reluctance to be joined with other tribes and bands on other reservation lands. (Finding le) Also, the Quileute and Hoh spoke the Chimakuan language which was unintelligible to their neighboring Indians. (Finding lc)

In our Finding 13 we have defined the natural boundaries encompassing the several use areas of the Quileute and Hoh Indians, including not only their winter villages but also the rivers, valleys and prairies used and occupied by them.

Thus, we find and conclude to defendant's first question, listed at page 203 of its brief, affirmatively, that petitioners have established that a particular historical tribe, the Quileute Tribe, of American Indians did aboriginally and exclusively hold and occupy from time immemorial, a specific and definable area of land in western Washington. (Finding 13)

As to defendant's question 2, whether any of the petitioners have established that anyone of them was aboriginally a tribe of American Indians, we find and conclude that defendant recognized and treated with them as such, both in the treaty cession and that government men and writers have described their existence as an ethnic group in their journals, reports, correspondence and maps for a century. (Finding 1)

Defendant's question 3, with reference to the legal succession or continued existence of petitioners as a recognized entity, is not easily answered from this record. We have noted that the Quileute

Tribe was incorporated under the Wheeler-Howard Act, 1934 (Finding 3g), and such Charter, Constitution and Bylaws were approved by the Secretary of the Interior after ratification by the required number of members. Reservations were established for the aboriginal tribe. Defendant has approved their charter. We conclude that petitioners have established by prima facie evidence that petitioners are the legal successors and representatives of the aboriginal Quileute and Hoh Indians, and in the absence of evidence to the contrary, we affirmatively answer defendant's question 4, that petitioners are successors in interest of an identifiable tribe of American Indians.

Defendant's question 5, as to whether the petition states a claim upon which relief can be granted, we find that such demurrer is not well taken since petitioners have alleged jurisdiction, capacity,liability and damages, the necessary allegations to properly plead their cause of action.

Based upon the record as a whole, and upon the findings of facts herein made, this Commission concludes that the Quileute Tribe of Indians, including their subdivision, the Hoh Indians, had aboriginal Indian title to the lands described in Finding 13.

The treaty with the Quinaielt, etc. (including Quileute), 1855, was ratified by the United States Senate on March 8, 1859. Such ratification date constitutes the date of taking by defendant.

The parties stipulated that initial proceedings would be limited to issues of capacity and rights of petitioners to bring this action

and to what aboriginal areas, if any, were petitioners vested with Indian title. Further hearings will be required on the questions of the adequacy of the consideration paid, the acreage and value of said lands and the rights retained in said lands by petitioners or their ancestors.

Edgar E. Witt
Chief Commissioner

Concurring:

Louis J. O'Marr
Associate Commissioner

Wm. M. Holt
Associate Commissioner