

BEFORE THE INDIAN CLAIMS COMMISSION

THE KIKIALIUS TRIBE OF INDIANS,)	
Petitioner,)	
v.)	Docket No. 263
THE UNITED STATES OF AMERICA,)	
Defendant.)	

Decided: April 13, 1959

Appearances:

Warren J. Gilbert, with whom was Harwood Bannister, Frederick W. Post, Malcolm S. McLeod, Attorneys for Petitioner.

Donald R. Marshall, with whom was Mr. Assistant Attorney General Perry W. Morton Attorney for Defendant.

OPINION OF THE COMMISSION

Witt, Chief Commissioner, delivered the opinion of the Commission.

Petitioner herein, the Kikiallus Tribe of Indians, alleges ownership of certain land ceded by the Point Elliott Treaty of January 22, 1855, (12Stat. 927, II Kapp. 669). That it received an unconscionable consideration therefor, and it asserts claim for its value as of the date of cession, less the consideration received.

The defendant alleges that the claim is barred by the decision of the United States Court of Claims in Duwanish, et al., Indians v. United States (Docket F-275, 79 C. Cls. 530, 1934) because petitioner was a party in that case. We have overruled

defendant's plea of res judicata in similar cases where defendant also urged the same plea (Lummi Tribe of Indians v. United States, Dkt. 110, 5 Ind. Cls. Comm. 543).

Clearly, the Duwamish decision did not adjudicate the liability issues involved in the present claim which is based upon alleged aboriginal Indian title established by exclusive use and occupancy. Moreover, petitioner brings this suit under provisions of the Indian Claims Commission Act, which authorizes the judicial consideration of Indian rights that were not recognized at the time of the judgment plead in bar.

The Kikiallus was one of the Indian bands, who were one of the parties to the Treaty of Point Elliott, named both in its preamble, as such, and also as a signatory thereto. The defendant denies that petitioner is successor in interest of the treaty-signing Kikiallus (Dft. Br., p. 7). There were no boundaries set out in the Point Elliott Treaty, as to individual groups or tribes. Defendant, in the Point Elliott Treaty, simply took a cession of a large area of land in what is now the northwestern part of the State of Washington from some twenty-two or twenty-three Indian tribes, bands and/or groups of that area. This petitioner claims a certain portion of that cession as the lands to which they (Kikiallus) held aboriginal, or Indian title, "or such smaller portion as conforms to the proof offered."

The petition described the land so claimed as follows:

Beginning at Point Demock on the northwest tip of Camano Island in Township 32 North, Range 2 E.W.M.; thence in a northeasterly direction to the northwest corner of Section 17, Township 37 North, Range 3 E.W.M.; thence East along said section line to the Northeast corner of Section 14, Township 33 North, Range 3 E.W.M.;

thence in a Northeasterly direction in a straight line to center point of Section 35, Township 34 North, Range 4 E.W.M.; thence in a Southwesterly direction in a straight line to the Northwest corner of Section 18, Township 31 North, Range 3 E.W. M.; thence in a Northwesterly direction in a straight line across Point Susan Flats and on across Livingston Bay and Camano Island to point of beginning, situate in Island, Skagit and Snohomish Counties, State of Washington (Petition, Par. IV)

Petitioner alleges the amount received by it for its cession was unconscionable and that the fair and reasonable value of lands "occupied by claimants" and taken by defendant was the sum of thirty million dollars.

The issues for determination at this stage of the case are limited by stipulation of the parties to the questions of (1) capacity of petitioners to maintain this action and (2) what area, if any, did petitioner's ancestors or predecessors in interest exclusively use and occupy.

The circumstances surrounding the negotiation and execution of the Treaty of Point Elliott of January 22, 1855, have been set forth in several prior cases (See Snohomish, Dkt. 125, 4 Ind. Cls. Comm. 549).

The Kikiallus Indians were in aboriginal times variously estimated to have a population from 75 to 160. The large tracts of land on northern Camano Island and on the mainland claimed by the petitioner appear to be in excess of reasonable bounds of need for use, by this admittedly small tribe or band of fish-eating Indians. The Kikiallus, like other fish-eating Indians of this area, ranged over rivers, bays and inlets and lands contiguous in their canoes

in their quest for salmon, clams, berries, roots, fowl and small game. The subsistence habits and social life of the Kikiallus were, in fact, characteristic of tribes in the Puget Sound area, except they apparently were not slave-holders. Their subsistence area, exclusively used and occupied by Kikiallus, seems to us to not extend greatly beyond their immediate village area, as we have set out in Finding 10; which area includes land along the shore on the north part of Camano Island as well as the South Fork of the Skagit River.

In determining the aboriginal boundaries of petitioner lands from the evidence in this record, we are almost entirely limited to testimony of modern Indians and data compiled from informants of modern times, since the earlier records are of such fragmentary character and mention little more than a village tribe or band of Indians "on the Kikiallus River." The small size of this band of Skagit-speaking Indians was apparently such as to cause missionaries and government men to ignore them entirely or, at most, to make bare mention of them.

The Kikiallus were principally situated in a village on the south fork of the Skagit River and spoke the same Skagit dialect as Skagits. Many ethnological writers classify them as a "Skagit subtribe." However, these classifications were of a broad and general nature and the ethnologists mentioning Kikiallus and Skagit plainly qualify this classification as having no political implications. (Dr. C. L. Riley, III Tr. 5)

Dr. George Gibbs, in his Report of Explorations at page 432 stated:

. . . .Steilaguamish, whose country is on a stream bearing their name; and still north of them the Kikiallus. No opportunity has afforded itself for accurate inquiry into the numbers of either. The first are said by some to amount to two hundred, while the latter may perhaps be set down at seventy-five.

E. A. Starling's earlier report, in 1852, of Puget Sound Indians listed "Kick-u-al-lis a group of 160 members" that lived at the mouth of the "Kikuallis River and vicinity." In 1877, Mallet quoted the above population figure of Gibbs and called "Ki-kia-loos, a subtribe of Skagit", as did Missionary Myron Eells in quoting from Gibbs a few years later. Spier and Curtis mention Kikiallus as a sub-tribe of Skagit. Marion Smith lists them as a sub-tribe of Swinomish but the Handbook of American Indians and Curtis point out no political unity is implied by "Skagit" and all seem to agree that the village constituted the basic political unit of these Indians.

The north portions of Camano Island, claimed by petitioner is candidly discussed by petitioner's expert witness, Miss Sally Snyder (II Tr. 57-58). She states the south boundary line of the Kikiallus claim across Camano Island was plotted by "some kind of a square that was laid over the territory of North Camano." However, specific locations of plank dwellings are shown on petitioner's map of Kikiallus locations (Pet. Ex. A). This map was drawn by Miss Snyder to represent the locations of Kikiallus, not at the time of Point Elliott treaty cession of 1855-1859, but in about 1800. The approximate locations of their principal village, Kikua'-losa'-le, was on the south fork of the Skagit River about five miles due south of Mt. Vernon, the south fork being, in treaty times, sometimes called the "Kikiallus River". (Map, Pet. Ex. A; Def. Ex. 1) Also the Kikiallus had a village on northern Camano Island, Utsaladdy (Pet. Ex. A). The defendant's map, Exhibit 2, describes this area as a "fishing or other temporary camp" of the Kikuallis.

The record establishes that the Kikiallus Indians were an aboriginal band with one principal village situated on the mainland with use areas on adjacent islands, especially the north coast of Camano Island. We have noted in all of the cases presented by the fish-eating Indians of the Puget Sound area that they commingled freely with their neighbors as a general practice and roamed in their canoes over a wide expanse of rivers, bays and inlets. The Kikiallus food gathering activities extended northwestwardly to Deception Pass between Fidalgo Island and Whidbey Island, southward around Camano Island. Some modern informants state they roamed overland some eight or ten miles, eastward to McMurray's Lake, and northward up the Skagit River past Mr. Vernon. The areas north of their village were also used by the Skagits, Nookachamps and Bsigwigwilts. They shared the use of areas eastward with the Bsigwigwilts, the Nookachamps, and also the Stillaguamish. Joint use of Deception Pass, Whidbey Island and parts of Camano Island was made by the Skagit, Snohomish, Swinomish, Samish and Stillaguamish Indians (Sally Snyder. 2 Tr. pp.60-73). (These jointly used areas are excluded from the lands found as belonging to petitioner).

The defendant treated with the Kikiallus as a separately named group in the Point Elliott Treaty. The Kikiallus were a single autonomous village which constituted their essential land using unit. They roamed along the south fork of the Skagit River (formerly called "Kikiallus River"), Skagit Bay, and adjoining waterways. We find no mention in the record in this case of any political control exercised by the Skagits over the Kikiallus. We conclude the Kikiallus were a separate identifiable group of American Indians.

The boundaries of Kikiallus areas of land exclusively used and occupied by them in aboriginal times are determined in Finding No. 10. The area of their principal village site is at the uppermost confluence of the numerous tributaries (or sloughs) branching off from the south fork of the Skagit River (Dft. Ex. 2) The village site and land circumscribed by the sloughs form a heart-shaped tract of land particularly described in Finding No. 10. In Docket 125, Snohomish Tribe (Finding No. 9) we mentioned the separate use and occupancy of Camano Island by Kikiallus and Snohomish Indians as reported by Upchurch in the Pacific Northwest Quarterly.

Upon the issue of successorship of petitioner, we have summarized the evidence under Finding 2 of petitioner's members and of early writers as to their ancestors constituting the aboriginal band of Kikiallus Indians. This is not refuted by any testimony offered by defendant. Defendant's expert, Dr. Riley, stated, "The group of modern Indians that forms the Kikiallus are presumably the descendants" (Dft. Ex. 1, Ch. II). But defendant in its objections to the petitioner's Requested Finding 6 on its successorship, admonishes that no presumption is available to petitioner. We conclude, however, since the testimony of petitioner's witnesses stands unimpeached by any testimony offered by defendant, and although the record is not voluminous with evidence on the point, this is due to the smallness of this band, by reason of which their successorship to the rights and interests of their forebears was not formalized by such records as were kept by the larger tribes of Indians whose chiefs often included men who had the benefit of a formal education or whose larger population attracted more attention of the ethnologists and government men than did the small band of Kikiallus.

The date of ratification of the Treaty of Point Elliott by the the United States Senate, March 8, 1859, constitutes the date of taking of the Kikiallus lands described in Finding No. 10.

The question of unconscionable consideration for land ceded by the treaty, and other credits or of reservation lands set aside under the treaty, or of any other lands which may have been allotted or acquired by petitioner or by their ancestors and predecessors in interest from the defendant, shall be the subject of further hearing and evidence, together with the question of the value of said lands as of March 8, 1859.

Edgar E. Witt
Chief Commissioner

I concur:

Wm. M. Holt
Associate Commissioner