

THE CONFEDERATED SALISH AND KOOTENAI
TRIBES OF THE FLATHEAD RESERVATION,
MONTANA,

Petitioner,

v.

Docket No. 61

THE UNITED STATES OF AMERICA,

Defendant.

Decided: August 3, 1959

Appearances:

Robert W. Barker. with whom were
Donald C. Gormley and Frances L.
Horn, Attorneys for Petitioner.

John D. Sullivan, with whom was
Mr. Assistant Attorney General,
Perry W. Morton.
Attorneys for Defendant.

OPINION OF THE COMMISSION

Holt, Commissioner, delivered the opinion of the Commission.

The petition in this case was filed by the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana. Petitioner, an identifiable group of American Indians duly organized under the Act of June 18, 1934, 48 Stat. 984, includes descendants of the Flathead, Upper Pend d'Oreille and Kootenai tribes parties to a treaty with the United States on July 16, 1855, 12 Stat. 975, II Kapp. 722, at Hell Gate, Montana (see Def. Req. Fdg. 1) whereby these Indians ceded, relinquished, and conveyed to the United States all their right, title and interest in

and to the country occupied or claimed by them. The area ceded is described in Finding 3 as is the area reserved for the Indians. The gross area of the cession was estimated to be some 16,400,000 acres and the area of the reserve, known as the Jocko Reservation, was estimated to be 1,256,000 acres. By stipulation of the parties the hearing in this case was limited to the question of petitioner's right to the lands claimed, the identifiability of petitioner and as to whether there was presented a common or group claim.

The case was ordered consolidated for the purpose of trial with Docket No. 154 on April 2, 1953, in which case the petitioner, the Kootenai Tribe or Band of Indians of the State of Idaho claimed to be joint owners of the lands ceded by the Treaty of July 16, 1855, to which they had not been a party. Upon completion of the proof in Docket 61, the counsel for the petitioner therein entered into a stipulation with the counsel in Docket No. 154 wherein it was agreed that petitioner in Docket No. 154 was a separate and independent band or tribe of Kootenai Indians known as the Bonners Ferry Tribe, which exclusively used and occupied certain lands in the northwestern part of the ceded area and that said tribe was not a party to, nor represented at, the Treaty of July 16, 1855. During the hearings of the evidence in Docket No. 154, upon the request of counsel, Docket No. 61 was separated therefrom, there being no objection from the other parties. (Tr. 576) This Commission has determined in 5 Ind. Cl. Comm. 456 that the Bonners Ferry Kootenai Band, petitioner in Docket No. 154, did exclusively use and occupy certain lands (Finding 14 herein) in the

northwestern portion of the cession of 1855, and that said band was not a party to, nor represented at, the Treaty of July 16, 1855. Petitioner herein filed with this Commission a disclaimer to the lands in the extreme northwestern portion of the ceded area claimed by the Bonner's Ferry Kootenai. The area so disclaimed is estimated to contain 1,396,000 acres. A disclaimer was also filed to certain lands in the west central part of the ceded area claimed by the Lower Pend d'Oreille, or Kalispel Tribe, before this Commission in Docket No. 94, estimated to contain 787,410 acres. Eliminating the disclaimed areas and the reservation area petitioner now contends the total area of land allegedly "owned by petitioner under original Indian title" and ceded to defendant by the 1855 treaty amounted to 12,806,000 acres of land.

In the petition filed in this action before the Commission it is alleged that "From time immemorial * * *, petitioner and the members of petitioner tribe held, occupied, possessed and owned the land and territory * * *" ceded by the Treaty of July 16, 1855. The petition was amended following the hearing to eliminate from the claimed area, as described in the treaty, the areas disclaimed by petitioner. As previously pointed out petitioner herein is the organization known as the Confederated Salish and Kootenai Tribes of the Flathead Reservation, which was duly organized under the Wheeler-Howard Act of June 18, 1934. Defendant admits that petitioner is at the present time an identifiable group of Indians organized under the Indian Reorganization Act of June 18, 1934 and has among its membership descendants of the three tribes, Flathead, Upper Pend d'Oreille and Upper Kootenai. Defendant contends,

however, that the only claim asserted in the petition is a claim by the named petitioner; that there are no separate claims asserted on behalf of the Flathead, Upper Pend d'Oreille or Upper Kootenai tribes of Indians; and that petitioner has submitted no evidence in support of a joint claim by these three groups. Defendant further contends that petitioner is not the successor to any separate claims of the Flathead, Upper Kootenai or Upper Pend d'Oreille tribes. Defendant admits that petitioner is recognized by the Secretary of the Interior as having authority to represent the Indian tribes located on the Flathead Reservation in Montana.

Petitioner contends that it has authority to present the claim; that joint use by the three tribes and their confederation makes this a joint claim; that defendant by the Hell Gate Treaty of 1855 and ratification thereof by Congress created a Confederation as a legal entity; that petitioner, in any event, is entitled to recover on behalf of its constituent tribes; and that defendant recognized petitioner's Indian title.

We will first consider defendant's contention that the only claim asserted is a claim by the named petitioner. It is defendant's position that, although petitioner being a presently identifiable group has the right to present a claim, petitioner did not have aboriginal title and therefore does not have a valid claim. Defendant's stand on this point is bottomed on the grounds that (a) petitioner as such never held Indian title to any lands, (b) petitioner is not the successor in interest to the three tribes parties to the 1855 treaty and (c) petitioner did not make any claim of ownership by any of the three individual tribes. A

presently existing identifiable group of American Indians has the right to present a claim before this Commission on behalf of its constituent tribes, bands or groups. Clyde F. Thompson, et al., v. United States, 122 C. Cls. 348; Confederated Tribes of the Colville Reservation v. United States, 4 Ind. Cl. Comm. 151; Peoria Tribe of Oklahoma v. United States, 4 Ind. Cl. Comm. 223; The Northern Paiute Nation, et al., v. United States, 7 Ind. Cl. Comm. 381. For jurisdictional purposes only it is immaterial to this Commission whether the identifiable group presenting the claim was the land-using entity or whether the land-using entities were the constituent tribes, bands or groups thereof. The Commission, however, has been careful to point out that the presently existing identifiable group does not necessarily become the successor in interest to its constituent units and that proof is necessary to show the existence of descendants of the tribe, band or group for which claim is made. Peoria case and Colville case, supra. A present day identifiable group, such as petitioner, may be the successor in interest to the claims of its constituent tribes. This may be possible where there was a merger or consolidation of certain tribes, bands or identifiable groups into a single land-using entity prior to a deprivation or cession of the lands aboriginally used and occupied by them. Of course it follows that the present day identifiable group must be traceable to the land-using entity. The present day identifiable group may also be the successor in interest if it can trace itself back to a merger or consolidation of tribes, bands or identifiable groups which took place by treaty at the time of the cession of the lands and it is

clear by the terms of the treaty that the intent and purpose was to create a new entity which thereby in law and fact became the successor in interest to the formerly separate tribes, bands or groups.

Petitioner herein is the successor in interest to the claims of the Flathead, Upper Pend d'Oreille and Kootenai Indians parties to the 1855 treaty. Prior to the 1855 treaty the Flathead and Pend d'Oreille Tribes were separate tribal entities and the Agiyinik, or Libby-Jennings Band of Kootenai Indians was an independent band (Finding 6 and 7). By the terms and provisions of said treaty these three, closely allied tribal entities agreed to consolidate on the lands reserved from the ceded area under the common designation of the Flathead Nation with Victor, the head chief of the Flathead tribe, to be head chief of said nation (Finding 3). By the terms of the Treaty the United States agreed to pay to the newly created entity \$120,000.00 to be expended under the direction of the President over a number of years, to provide certain facilities such as blacksmith and carpenter shops and to furnish the services of certain employees to the consolidated tribes for a given number of years. Following the treaty the three separate tribes all eventually, for the most part, went upon the reservation and it is admitted that their descendants today are upon said reservation and that petitioner is recognized as having the authority to represent them.

As previously stated petitioner contends strongly that there was joint use by the three tribes of the claimed area and that their confederation makes this a joint claim. Defendant urges that the evidence shows the three tribes had separate areas and that no claims have been

filed on behalf of the separate tribes. The evidence, as set forth in detail in the findings of fact herein made and as will be discussed hereinafter, clearly shows that up to the time of the treaty of 1855 there existed separate tribes exclusively using and occupying their own respective areas. The fact that the petition sets forth a claim to the ceded area in which it is alleged (Par. 4) that "petitioner and the members of petitioner tribe held, occupied, possessed and owned" the lands and thus implies joint ownership is not sufficient reason for holding petitioner is not entitled to recover where petitioner's predecessors in interest held the lands separately. Cf. Kootenai Tribe or Band of Indians v. United States, 5 Ind. Cl. Comm. 464, 465-467. Although the petition herein would seem to infer joint use there are certain allegations which point to lands separately used and occupied by the respective tribes (Petition, par. 7).

The findings in this case completely cover the historical, ethnological and documentary material dealing with the Flathead, Upper Pend d'Oreille and Kootenai tribes which ceded the lands to the Government by the 1855 treaty. These tribes have resided in western Montana, west of the Rocky Mountains from time immemorial.

Linguistically, the Flathead and the Upper Pend d'Oreille are of Salish stock while the Kootenai form a "linguistic island" speaking a language which has not been related to any other stock. Culturally, these Indians belong to the Plateau culture area but being the nearest tribes to the Plains area they acquired many plains characteristics after the acquisition of the horse and the resulting dependence on the buffalo hunt on the plains, which placed them in direct contact with the plains tribes

such as the Blackfoot, Crow and Assiniboine. (Fdg. 5)

The Flathead Tribe in historic, pre-treaty times had been a single political entity. The Upper Pend d'Oreille, or Pend d'Oreille, as distinguished from the Lower Pend d'Oreille, or Kalispel, had also been a separate and distinct political entity during the period in question. The Kootenai Tribe, so-called, on the other hand, never, in the historic period, existed/^{as} a single tribe with the capacity to represent all Kootenai Indians or to hold Indian title to lands as such. The Kootenai consisted culturally of two divisions, the Upper Kootenai in the United States and Canada and the Lower Kootenai also located in the United States and Canada. The cultural distinction is made on the basis of the Upper Kootenai being more influence by plains traits and more dependent on the buffalo hunt while the Lower Kootenai were in less contact with the plains Indians and depended more on fishing than they did on the bison hunt. Dr. Claude Schaeffer lists seven bands of Upper Kootenai and three of Lower Kootenai. According to Turney-High, an anthropologist who made an early study of the Kootenai, the bands were independent. The Jennings band, according to Schaeffer, or the "Libby-Jennings" band, according to Turney-High (Def. Ex. 42), is the Kootenai band which held lands above Flathead Lake and it is from this band that the Kootenai Indians on the Flathead reservation descended. (Fdg. 6).

The bulk of petitioner's documentary and historical material was introduced in the form of written reports by two witnesses, Dr. Paul C. Phillips (Pet. 1), historian, who was a professor of history at Montana State University, and Mr. E. O. Fuller, (Pet. Ex. 7), an investigator of Indian

affairs. The depositions of these witnesses were introduced into evidence as petitioner's Exhibit A-1. Dr. Phillips in his report and in his testimony reviews the history of the Flathead, Upper Pend d'Oreille and Kootenai Tribes, their contacts with the fur traders, explorers, missionaries and government agents and other tribes, and was of the opinion that they had used and occupied the whole of the area claimed by petitioner in the half century before 1855. (Pet. Ex. A-1, pp 83-85). Dr. Phillips, however, was of the opinion that the Kootenai was but one tribe. He testified that the Kootenai and Flatbaws (Lower Kootenai) were the same tribe (Phillips Deposition, Pet. Ex. A-1, pp. 54 and 64). In this respect he disagrees with the other authorities of record in this case such as Turney-High and Schaeffer, anthropologists who studied the Kootenai, and with defendant's ethnologist Chalfant whose report and testimony in this case revealed the facts pertaining to the ethnological separation of the Kootenai into independent bands. Not only do these authorities recognize such a political independence but so did petitioner's counsel and defendant's counsel who both agreed in the record that the Bonner's Ferry Kootenai Tribe or Band was an independent and autonomous group of Kootenai Indians. The historical and ethnological material gathered by Dr. Phillips and Mr. Fuller has been extremely useful and much of it has been the source of the findings made herein.

Petitioner also introduced in evidence the deposition of Professor Carling I. Malouf (Pet. Ex. A-1, pp. 126-214) and a written report (Pet. Ex. 5) by this anthropologist who was assistant professor of anthropology at Montana State University. In determining the lands used

in winter, villages at Thompson Falls, one just east of that point on the Clark Fork River, and another at Plains. He includes the Plains village area within the Upper Pend d'Orcille primary subsistence area because he believed the Plains site was primarily a Pend d'Orcille camp site even though Kalispel wintered there. In the north, he testified; (Tr. 43 and 44) independent and now extinct Kootenai groups were known to have their permanent camp sites in areas that "lie immediately adjacent to, if not immediately within the area designated for the Jennings Band of the Kootenai" (in green on map - Def. Ex. 22).

The Kootenai, Chalfant testified, were a group of loosely organized bands which were never completely under a single tribal authority but rather shown to have comprised several major band groupings. (Tr. 25, 27). The Bonners Ferry band of Lower Kootenai was not a party to the treaty of 1855 although lands ceded by said treaty included lands on which they resided, according to the witness, (Tr. 28) and the Commission has so found in Docket No. 154. Chalfant relies on anthropologists Turney-High (Def. Ex. 42) and Schaeffer (Def. Ex. 37-41) to show the political organization of the Kootenai Indians into separate and independent tribes or bands such as the Bonners Ferry Band of Lower Kootenais, the Tobacco Plains band, the Tweed-Marland band and the Libby-Jennings band of Upper Kootenais. The true ancestors of the Flathead reservation Kootenai, according to Turney-High, was the group that lived at Libby and Jennings, Montana, which moved to the Somers-Elmo-Dayton area at Flathead Lake prior to the 1855 treaty. With this observation, Schaeffer seems to agree. (Def. Ex. 40, p. 78). There is no substantial evidence

