BEFORE THE INDIAN CLAIMS COMMISSION

THE UPPER SKAGIT TRIBE OF INDIANS,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
Defendant.

Docket No. 92

Decided: March 25, 1960

Appearances:

Donald C. Gormley and
Charles A. Hobbs, of
Wilkinson, Cragun and Barker,
Attorneys for Petitioner.

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

OPINION

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

The petition, as amended, presents the claim of the Upper Skagit Tribe of Indians which includes the Suiattle Sauk, an allied village band. Petitioner is an identifiable group of American Indians within the meaning of the Indian Claims Commission Act (60 Stat. 1049). Said Indians were in aboriginal times ten separate allied villages. Petitioner has the legal capacity to maintain this action (Finding 1).

Petitioner contends that the United States in the Treaty of Point Elliott of January 22, 1855 (12 Stat. 927, II Kapp. 669) secured a cession of the aboriginal Indian lands which belonged to said petitioner and for an unconscionable consideration for which relief is here prayed under the

provisions of Section 2 of the Indian Claims Commission Act. The land ceded to the government in the Point Elliott Treaty by some twenty-two, or more, tribes and bands of Indians consisted of a large area of land without including any description of interior boundaries between the tribes and bands within the ceded tract. This cession lay generally northeast of the Puget Sound in what is now the northwestern part of the State of Washington (Royce, Wash. I, No. 347). Petitioner's claim, as amended, is for a specified portion of the lands so ceded to the United States, which is the drainage system of the Upper Skagit River from about Mt. Vernon, Washington, to the Canadian boundary (Finding 7).

The petitioner originally filed its claim herein as "The Skagit Tribe of Indians." By leave of this Commission, and over objections of the government, this Commission allowed an amendment of petitioner's name to read "The Upper Skagit Tribe of Indians" to avoid confusion with that tribe of Coast Salish Indians of Whidbey Island, sometimes called Lower Skagits or Whidbey Island Skagits, or the Skagit Tribe (Finding 6).

The basic issues to be determined at this time are (1) whether petitioner has the legal capacity to maintain this action, and (2) whether petitioner held Indian title to the lands described in its petition, as amended (Findings 8 and 9).

From first white contact with the native inhabitants of the Puget Sound area until treaty times no specific mention is made by the historical records of the "Upper Skagits." The term "Upper Skagit" is of modern origin. The early references to petitioner's antecedents were by their village names, often with the comment "a division of the Skagit Tribe." The Treaty of

Point Elliott of January 22, 1855, lists four of petitioner's aboriginal villages: Sah-ku-mehu, Nook-wa-chab-mish, Mee-see-qual-guilch, Cho-bah-ab-bish, "and other allied and subordinate tribes and bands" (Finding 3). O. C. Upchurch, Indian Supervisor, in an article in the Pacific Northwest Quarterly (1936) under a sub-title "Upper Skagits," stated there were as many as nine independent Upper Skagit villages in aboriginal times. Upchurch mentioned only four of these, one of which is not enumerated in our Finding 3, Spa-mee-hwu, because it is not shown in Dr. Collins' complete village list (Pet. Ex. IR), which was based upon specific studies of petitioner's antecedents, nor is "Spa-mee-hwu" mentioned by this name in the Point Elliott Treaty. Both George Gibbs and Governor Isaac I. Stevens mentioned by name four villages situated on the upper reaches of the Skagit River (Finding 10).

With the growing pressure of white settlements in the country west of the Cascades in the early 1850's the United States sought to extinguish Indian title in that region. Governor Isaac I. Stevens of Washington Territory, also ex-officio Superintendent of Indian Affairs for the territory, was instructed to contact the various tribes, bands, and fragments of tribes in preparation of extinguishment of their Indian title to this territory and their removal upon reservations. Dr. Collins stated Colonel Simmons, a treaty agent of Stevens, did not travel up the Skagit River to contact or take a census of these Indians in preparation for the Treaty of Point Elliott, possibly because the log jam above Mount Vernon made canoe travel more difficult. However, there are four villages separately named in the treaty preamble situated on the Upper Skagit River and three signatory parties to the treaty, namely, "Dahtl-de-men, Sub-chief of Sah-ku-meh-hu; Sd'zek-du-mum,

Me-sek-wi-guilse, Sub-chief; Ch-lah-ben, Noo-qua-cha-mish band." It is not established whether or not any of the treaty-signers who represented bands on the Upper Skagit River may have been among the several Sub-chiefs who signed the treaty for "Skagit Tribe." However, the villages on the Upper Skagit River are often referred to as "Skagits" (Findings 2-5), or as a "division of Skagit Indians" (see Hodge Handbook of American Indians, 1906, Part I, p. 870, Miseekwigweelis). The Point Elliott Treaty cession included all of the land for which this petitioner now seeks compensation. (Royce, Wash. No. I, Tract 347; Finding 7).

Defendant contends that petitioner is an improper party to bring this action (Dft's. Br., p. 208), because each village in the area claimed was an independent, economic, dialectal, social, political, land-using unit, the only unit that could be designated as a "tribe" (Dft's. Br., pp. 5-6).

Petitioner seeks to prove its ancestry was identifiable as a tribal entity because of the activities of its first overall self-appointed leader, a Catholic Prophet Cultist named "Slaybebtkud." Dr. Collins related a great many details about this religious leader of the Upper Skagits, Slaybebtkud. In her testimony and reports she stated that this religionist developed a sort of police force to administer corporal punishment to "sinners" and otherwise exercised powers beyond the scope of the usual religious leader. She concludes Slaybebtkud, a follower of the Catholic missionary, Father Eugene Casimer Chirouse, developed into a strong chieftan over all Upper Skagits (Pet. Req. Fdgs. 37-40; Pet. Ex. 2, pp. 55-67). Dr. Collins, in her dissertation for Master's Degree (1946), stated that Chirouse came through the Sauk Pass to the Snohomish in 1857 and that

this contact with Chirouse "provides the only means by which the arrival of Sk'ubebt'kud (Slaybebtkud) among the Skagit may approximately be dated."

While the facts related by Dr. Collins seem to establish that Slaybebtkud became something of a central political authority among the independent villages on the Upper Skagit River, such authority appears not to have been acquired until after the date of the Treaty of Point Elliott, at least not in the scope or status of an overall Chieftan, and cannot be considered as evidence of a tribal unity antedating the Point Elliott Treaty. It appears that his powers as a political leader were attained after the Treaty of January 22, 1855 (Pet. Ex. 2, pp. 55-67) and therefore was not evidence of a political merger of the ten extended village bands (Finding 3) then inhabiting the Upper Skagit River and its tributaries, the Sauk and Suiattle Rivers. Slaybebtkud did not sign the Treaty of Point Elliott.

The premise upon which the parties predicate their respective contentions of tribal entity, or not, are both supported by some credible evidence. At least, the villages were originally separate and independent and they were soon after treaty times in a process of submitting to the powers of the prophet Slaybebtkud, said to be a brother of the famous Chief Moses of the Columbia River Basin. However, the issue of tribal entity, or not, is not the controlling issue, nor in Puget Sound claims is evidence of political unity necessarily an essential element of the proof of their capacity to sue or even to the proof of Indian title. Rather the issue, a statutory requirement, is proof of their aboriginal existence as an identifiable tribe, band or group of American Indians. In several previous decisions the issue has been extensively discussed and it has been uniformly

held that existence of village autonomy did not deprive an otherwise identifiable group of Indians of their capacity to sue. (The Nooksack Tribe v. The United States, 3 Ind. Cl. Com. 479, 483; The Muckleshoot Tribe v. The United States, 3 Ind. Cl. Com. 658, 662; The Snohomish Tribe v. The United States, 549, 561.

The language, social, ceremonial, and economic relations of these villages were all homogeneous in nature. Dr. June McCormick Collins, anthropologist, testified there were slight dialectical differences between villages as one proceeded up-river to the mountains from the saltwater marshes at its mouth. These villages extracted their principal sustenance from the same areas, fish from the Skagit River, berries and roots from common gathering areas, and game from the mountains around the Upper Skagit River. The mere fact their political structure was a quite simple village autonomy, and did not apparently comprehend a central council or aboriginal chieftan, does not negate the fact that such villages were one people, speaking one language, and living in like fashion together in one river valley. Therefore, we have concluded that said villages are "an identifiable group of American Indians" (Finding 1) whose successors in interest, the Upper Skagit Tribe (Finding 18) have legal capacity to bring this suit.

Dr. June McCormick Collins has made several studies of the Indians whose villages were located on the Upper Skagit River. Collins has written "A Study of Religious Change Among Skagit Indians of Western Washington" (Dissertation for Masters Degree, University of Chicago, 1946, Pet. Ex. 2), "The Influence of White Contact on Class Distinction and Political Authority Among the Indians of Northern Puget Sound" (Dissertation for Ph. D. Degree, 1949, Pet. Ex. 3), "Differences Between Upper Skagit and Lower Skagit"

"ture" (Pet. Ex. 5), and "Growth of Class Distinctions and Political Authority Among the Skagit Indians During the Contact Period" (Pet. Ex. 4). Her research and field work among members of petitioner tribe was prior in time to her employment as an anthropological expert for petitioner and were primarily based on the aboriginal period 1792-1800, except as otherwise indicated. Apparently her conclusions as to boundaries and population of villages on the Upper Skagit River were incidental to broader studies of religion, culture, and political change. The limited source of materials necessarily required a greater reliance on native informants by this writer than would perhaps be necessary with Indians more widely known and reported in treaty times.

The necessity for a determination of what villages comprised the aboriginal group is necessary before a determination of the lands exclu-sively used and occupied by such Indians can be made. The names and locations of the ten extended villages of petitioner's antecedents, as reported by Dr. Collins (Pet. Exs. I, IR), are set out in Finding 3.

The total population of these villages at treaty times and whether or not their numbers, between 1792 and 1855, were substantially reduced by epidemics of smallpox and other diseases bear upon the amount of land occupied and used by such Indians (Pet. Br. pp. 23-24; Dft. Br. pp. 157-174).

Dr. George Gibbs in a description of the fourth division of the "Niskwalli Nation," namely, the Skagits, including Kikiallu, Nūkwatsamish, Tow-ah-ha, Smali-hu, Sakumehu, Miskaiwhu, Miseekweeglis, Swinamish and Skwonamish, stated this division occupied the remaining country between the Snohomish and Bellingham Bay and thought the Skagit Division (apparently meaning the linguistic group) altogether numbered 1475 (Dft. Ex. 6, p. 180). Thus, Gibbs concluded

that a much larger group, including five or six other bands, numbered less than double Dr. Collins' estimate of 880 Upper Skagits. Gibbs estimated the total population of the bands on the Upper Skagit River at 300 (Finding 10). However, Gibbs stated only the islands and shore had been explored and further cautioned that Indian population estimates were often highly speculative, apparently because Indian concept of numbers was poor at best and also because the Coast Salish were almost always "in locomotion."

Defendant's expert anthropologist, Dr. Carroll Riley, differed with Dr. Collins' population estimate because he thought the severe decimation of the Indian population of from 70 to 90 percent in this region included the aboriginal villages on the Upper Skagit River (R. 362). Since Riley's opinion is supported by a number of writers as to the epidemics of smallpox among the neighboring bands to the Upper Skagit River, we have considered the general references of Dr. George Gibbs compiled in 1853 (Dft's. Ex. 6), together with Dr. Collins' estimated figure, and Dr. Riley's opinion of decimation, and conclude petitioner's antecedents were about 300 in total numbers at treaty times (Findings 15).

Population is, of course, only one of several matters relevant to the determination of the extent of aboriginal land used and occupied by petitioner's antecedents. In the Quapaw case, the Court of Claims quoted with approval our Finding 3 in that case on the proposition that where an identifiable group of American Indians, in the absence of a treaty reservation, have only a use and occupancy title, or "Indian title," the fee being in the United States and when an Indian tribe ceases for any reason, by reduction of population or otherwise, to actually occupy and use an area of land, such Indians lose their right or claim of a full beneficial interest in same (The Quapaw Tribe v. U. S., 128 Ct. Cls. 45, 49).

A strongly controverted fact issue is the extent upon which subject Indians relied upon hunting as a means of subsistence. Petitioner contends that a scarcity of fish and other foodstuff along the Skagit River stimulated hunting activities as an essential means of survival. Defendant insists that food along the river was so abundant that only the indigent went hungry and that plentiful game came down to the prairies from the mountains to escape the cold of winter and rendered their capture easily made, with the exception of mountain goat. Defendant contends hunting was limited to areas in near proximity to the river (Pet. Br. pp. 40-44; Dft. Br., pp. 176-184).

The villages of petitioner's ancestors were all situated near to the banks of the Skagit River and its tributaries (Map, Pet. Ex. I; Village List, Pet. Ex. IR; Finding 3). Their life was oriented about the river. It furnished the mainstay of food supply, the salmon. It held sole prominence as the highway of travel because the thick underbrush made land movement difficult. East and west, the direction of river flow, were the important compass points, while north and south were relatively insignificant (Findings 10, 13, 16).

Dr. Gibbs described food west of the Cascades as primarily salmon, roots, and berries, with hunting to a certain extent chiefly by bands nearest the mountains. In discussing Indian population west of the Cascades, Gibbs cautioned to regard "not merely actual facts of increase or mortality known to us but the capacity of the country to furnish subsistence" (Dft. Ex. 6, pp. 193, 182; Finding 10). The relative scarcity of food in the claimed area would suggest a similar condition as to Indian population. However, subject aboriginal villages were situated "nearest the mountains" with hunting to a certain extent, according to Gibbs, but that mountain goat, the only game that

remained the year round on the higher ground, never constituted an important item of food, but a source of wool for blankets.

Among the neighboring riverine Indians, also Coast Salish tribes, as are Upper Skagits, this Commission has found a rather consistent subsistence use pattern centered on the river, limited to surrounding prairies, and with only sporadic use of the mountains for hunting (The Muckleshoot Tribe of Indians v. The United States, 3 Ind. Cl. Com. 658, 663-666; The Nooksack Tribe v. The United States, 3 Ind. Cl. Com. 479, 497, 498). The same use pattern was found even more emphatically concentrated among "saltwater" Coast Salish (The Lummi Tribe v. The United States, 5 Ind. Cl. Com. 525; The S'Klallam Tribe v. The United States, 5 Ind. Cl. Com. 680; The Skokomish Tribe v. The United States, 6 Ind. Cl. Com. 135).

On the lower South Fork of the Skagit River below Mt. Vernon this Commission found that deer were corralled by a fence leading to the water driven into the river and shot by Kikiallus hunters from their canoes (The Kikiallus Tribe v. The United States, 7 Ind. Cl. Com. 456, 466, Fdg. 9A). No such evidence of this hunting method appears in the instant record involving the contiguous claim farther up the same river.

Dr. Leslie Spier reported that "it is probable that all of the high ground eastward of Mount Baker was common hunting territory of Nooksack, interior Skagit, Northern Okanagon, Methow and Chelan" (Finding 16; Dft. Ex. 23, p. 39; The Nooksack Tribe v. U. S., 3 Ind. Cl. Com. 479, 398).

This Commission found in the Kikiallus case that McMurray Lake area was roamed over by Kikiallus and various villagers of the Upper Skagit and was often used by young Indians of that tribe to capture their "guardian spirits" (7 Ind. Cl. Com. 456, 474). The boundaries defined in Finding 17

exclude the territory around McMurray Lake and the high ground of those claimed areas remotely located from the river. The omission of such areas is made not only because of their above mentioned free-use by other Indians, but also because the petitioners did not regularly use the high mountain areas to supplement salmon, the mainstay of their diet (Finding 16). Another free use area was the root digging and berry grounds of Sauk Prairie used by Stillaguamish, Skykomish, and others (1926, Nels Bruseth, Indian Stories and Legends of the Stillaguamish and Allied Tribes, Dft. Ex. 11, pp. 6-8).

Petitioner's identification of the drainage system of the Upper Skagit River, from the crest of the Cascade Mountains on the east, the Canadian boundary on the north, to the foot of Mount Baker on the west and extending down around Mt. Vernon, McMurray Lake, continuing around the headwaters of the Stillaguamish River to, but not including, the areas drained by the Skykomish River on the south, encompasses a large expanse of land aggregating approximately 1,769,804 acres (Pet. Ex. I, Map; Finding 6).

In summary, petitioner's ancestors undoubtedly occupied definite areas within the claimed tract. They depended upon salmon as the mainstay of their food supply, were sometimes straitened for food, and did some seasonal hunting on the high ground above the river. Such hunting was done in the fall after the salmon had ceased to run and the larger game came down to the lower areas for winter. In attempting to establish boundaries and occupancy from this record it is quite apparent that the historical data is all of a fragmentary and general nature. Also a long period of time has passed since the treaty cession. With careful consideration and evaluation of all of the evidence presented, including subsistence sources, methods, culture, habits, and needs of the aboriginal inhabitants of the Upper Skagit River, as related

by the testimony of the expert witnesses, and the exhibits of record, we have determined such boundaries, based upon the record as a whole of exclusive use and occupancy, and have described same in Finding 17. The record does not justify finding the exclusive use and occupancy by petitioner's ancestors of the entire segment of the Skagit River drainage system as claimed, aggregating about 1,769,804 acres.

Defendant alleges (Answer, par. 3, as amended Feb. 3, 1959) that this claim is barred by the decision of the Court of Claims in Duwamish, et al v. The United States, 79 C. Cls. 530 (cert. den. 295 U. S. 755). This Commission has denied this plea in bar in the Nooksack case, the Lummi case, the S'klallam case, the Samish case, and others, for the reason that such decision was rendered under a particular Jurisdictional Act (43 Stat. 886) and is not here applicable. The plea is denied.

In conclusion, the Commission is of the opinion that as of the date of the ratification of the Point Elliott Treaty of January 22, 1855, to-wit, March 8, 1859, the ancestors of petitioner held Indian title to the land described in Finding 17. Such questions as the consideration paid to petitioner, the acreage and value of said lands, and the rights of said ancestors retained or acquired in such or other lands shall be the subject of further hearing and additional evidence.

Edgar E. Witt
Chief Commissioner

I concur:

Wm. M. Holt
Associate Commissioner

Commissioner Watkins did not participate in this Opinion.