

BEFORE THE INDIAN CLAIMS COMMISSION

THE STEILACOOM TRIBE OF INDIANS)	
)	
Petitioner,)	
)	
v.)	Docket No. 208
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: September 21, 1962

Appearances:

Frederick W. Post and
Malcolm S. McLeod,
Attorneys for Petitioner.

Craig A. Decker, with whom was
Mr. Assistant Attorney General
Ramsey Clark,
Attorneys for Defendant.

OPINION OF THE COMMISSION

Scott, Associate Commissioner, delivered the opinion of the Commission.

Petitioner herein, the Steilacoom Tribe of Indians, is an identifiable group of American Indians within the meaning of the Indian Claims Commission Act and as such has the right to maintain this action on behalf of the descendants of those Steilacoom Indians who it is alleged exclusively used and occupied certain territory in what is now the State of Washington at the date of the Medicine Creek Treaty of December 26, 1854 (10 Stat. 1132). Petitioner further alleges that such lands were taken by the United States under the terms of this treaty and that the compensation called for by the treaty was not paid

and in any event such consideration was so inadequate as to be unconscionable. It is also alleged that at the time of the treaty the ancestors of petitioner tribe were in possession of certain established fishing rights, which rights were secured to them under Article 3 of the treaty in common with all citizens of the Territory and that these rights have been taken from them by the defendant or by its citizens without protest from defendant. There is also an allegation that under Article 6 of the treaty the defendant promised to make certain allotments to the Steilacoom Indians and that such allotments were not made. It is also alleged that defendant failed to carry out the provisions of Article 10 of the treaty whereby there was promised certain educational, medical and social benefits to petitioner's ancestors. Petitioner alleges damages in the amount of \$37,900,000 as a result of the conduct of defendant as set forth above.

It was stipulated by the parties hereto at the beginning of this case that the issues to be determined herein would be (a) whether petitioner had at the time of the alleged wrongful acts by defendant, aboriginal or Indian title within the meaning of the Indian Claims Commission Act, to all or any part of the lands described in the petition, and if so (b) whether defendant unlawfully deprived petitioner's ancestors thereof. Proof as to value or as to any other question of fact raised by the pleadings and not heretofore determined by the Commission was postponed until the determination of the above questions.

On October 26, 1960, defendant filed a motion to reopen the record for the purpose of submitting additional documentary evidence and for

summary judgment. Argument on this motion was had on December 9, 1960, and on December 15, 1960, an order was entered reopening the case and admitting the documentary evidence offered by defendant. By the same order the motion for summary judgment was denied. Petitioner was given until September 1, 1961, to submit rebuttal evidence if it desired. On February 10, 1962, petitioner not having submitted any further evidence, the proof on the issue of original Indian title was closed by order of that date.

The issue raised by defendant in its motion referred to above goes to the question of the occupancy of the area claimed by petitioner by the Puget's Sound Agricultural Company from 1840 to and through the date of the Medicine Creek Treaty of December 26, 1854. It is the position of defendant that it should not be held liable for any alleged injury committed against petitioner prior to the time defendant acquired the land from Puget's Sound Agricultural Company in 1869. Since this contention is basic to the primary question involved, it will be discussed at this time.

As indicated by the findings made herewith, there existed a dispute between Great Britain and America concerning the boundary between the two countries, particularly with reference to the portion west of the Rocky Mountains. By the Convention of October 20, 1818 (8 Stat. 248-350), the boundary from Lake of the Woods to the Rocky Mountains were settled and at the same time it was agreed, among other things, that the territory west of the Rocky Mountains would be free and

open for a period of ten years until October 20, 1828. The Convention specifically stated in Article 3 that there was to be no prejudice to the claims of either of the high contracting parties to the area west of the Rocky Mountains as a result of the agreement. The third article of this Convention, which declared the area west of the Rocky Mountains to be free and open for a period of ten years, was extended indefinitely by the Convention of August 6, 1827 (8 Stat. 360-361). It was provided that the extension could be terminated by either party upon notice of twelve months given after October 20, 1828.

The question of the sovereignty and government of this area was finally settled by the parties under the treaty proclaimed August 5, 1846, which settled the boundary at the forty-ninth parallel of north latitude and placed the possessions of the Hudson's Bay Company and the Puget's Sound Agricultural Company south of that line under American jurisdiction. However, it was provided that the possessory rights of the Hudson's Bay Company and of all British subjects who might be already in the occupation of land should be respected. It was also provided that the land and all other property of the Puget's Sound Agricultural Company would be confirmed to that company, with the proviso that the United States might have the right to purchase the land at a proper valuation to be agreed upon between the parties.

The Hudson's Bay Company, whose rights were the subject of the Conventions and the Treaty of Oregon, was chartered in 1670 as Prince Rupert's Company by King Charles of England. The charter gave the

company a monopoly of trade in an area which eventually included the territory west of the Rocky Mountains. In addition to an exclusive right of trade the company was given governmental rights which included the power to legislate for the territory and to administer justice in both civil and criminal cases. It was given military authority, the right to build fortifications, and to defend them, and to choose and commission officers.

When the Puget's Sound Agricultural Company was formed as a subsidiary of the Hudson's Bay Company in 1839, Hudson's Bay Company transferred to it two farms located at Nisqually and Cowlitz, both places being in the present State of Washington. These farms were to serve as a further source of revenue to supplement the trading of Hudson's Bay Company. The farm at Nisqually covered all or part of the area here claimed by petitioners.

After the treaty of August 5, 1846, the Congress of the United States enacted certain measures which affected the status of the area west of the Rocky Mountains. The first of these was the Act of August 14, 1848 (9 Stat. 323), which created the Territory of Oregon. Section One of the Act provided that nothing therein contained "shall be construed to impair the rights of persons or property now pertaining to the Indians in said territory so long as such rights remain unextinguished by treaty between the United States and such Indians * * *."

By the Act of June 2, 1850 (9 Stat. 437), Congress authorized the negotiation of treaties with the Indian tribes in the Territory of

Oregon for the extinguishing of their claims to lands lying west of the Cascade Mountains.

The Act of March 2, 1853 (10 Stat. 172), organized the Territory of Washington out of the North half of Oregon Territory, and by Section 12 of said Act provision was made that all laws of Congress relating to Oregon Territory, not inconsistent with said 1853 Act, were continued in force in the newly created Washington Territory.

It is defendant's contention that the Hudson's Bay Company and its subsidiary, the Puget's Sound Agricultural Company, were in possession of the area claimed by petitioners prior to the date on which defendant acquired sovereignty and that under settled law defendant is not liable to petitioner for the actions of Great Britain, or its instrumentalities in dispossessing it. Defendant cites in support of this contention those cases wherein it has been held that the United States is not liable to the Indians where the land which they claim has been previously granted by a sovereign to a third party and those grants are valid in fact and law. (The Texas Cherokees v. United States, 2 Ind. Cl. Comm. 516; Wichita Indians v. United States, 89 C. Cls. 378, 530; Pueblo de Conchiti v. United States, 7 Ind. Cl. Comm. 422; Pueblo de Isleta v. United States, 7 Ind. Cl. Comm. 619, 645, 646). This argument presupposes a sovereign with authority to make such grants and which has in fact made them, thereby removing the land permanently from the public domain.

Great Britain did not make a grant of the land held by the Puget's Sound Agricultural Company. The Hudson's Bay Company along with Puget's Sound Agricultural Company as its subsidiary was a quasi-governmental agency of the British government with jurisdiction over British citizens within its territory and held the exclusive privilege among British citizens of trading with the Indians. There was no other attempt by the British government to exercise any dominion over the area outside of the limits of the Convention of October 20, 1818, and its renewal of August 6, 1827, wherein it was agreed that the territory should remain free and open to the citizens and subjects of both countries. The Hudson's Bay Company and Puget's Sound Agricultural Company were the bulwark of the British claim to the area. It was the presence of these companies which kept alive and expanded whatever claim Britain might have had to the territory. For this reason it behooved the British government to protect those interests in order to prevent any prejudice to its claims of sovereignty. Beyond this, the British government owed the normal protection of a government to its nationals wherever located. In protecting the rights of the Hudson's Bay Company and Puget's Sound Agricultural Company the British government was both protecting its claim to sovereignty and discharging its governmental obligation to protect the rights of its citizens and subjects.

Had the British government not made provision in the Treaty of August 5, 1846, there would have been no reason why the American government could not have dispossessed both the Hudson's Bay Company

and the Puget's Sound Agricultural Company without compulsion to make reparations of any kind. The American government, just as the British government, had never relinquished its claim to sovereignty over this area and so would have had no reason to treat the British interests as vested in the absence of an agreement to do so.

It cannot be doubted that the American government would have protected the rights of its citizens had the compromise in the treaty of August 5, 1846, resulted in a boundary line which would have left American citizens and their property under British sovereignty. We think that this attitude on the part of the American government is amply demonstrated by the Act of August 14, 1848 (9 Stat. 323), whereby the rights of person and property of the Indians were expressly protected so long as they remained unextinguished by treaties. The whole history of the relation of the American government with its citizens demonstrates this fact beyond any doubt.

Furthermore, the Congress must be presumed to have been well aware of the existence of the claim of Hudson's Bay Company and Puget's Sound Agricultural Company, not only on the legal theory of presumption of knowledge of its own acts, but also because the area claimed was of such an extent that the Treaty of August 5, 1846, clearly recognizes in Article IV that it was of such potential public and political importance that the United States would undoubtedly wish to purchase it and provision was made for such purchase. Despite this knowledge the Congress passed the Act of August 14, 1848, and specifically protected

the rights of all Indians in the territory.

It must be noted, too, that the acquisition of the area held by Puget's Sound Agricultural Company came after the Conventions of 1818 and 1827, wherein the disputed sovereignty was openly recognized by both governments. For this reason any acquisition made was subject to the final settlement of the dispute between the countries. This fact alone would, in our opinion, be sufficient reason to distinguish this situation from that in which a sovereign with undisputed possession makes a grant to one or more of its citizens. Then, too, as noted above, there was never an actual grant of land to either Hudson's Bay Company or Puget's Sound Agricultural Company by Great Britain.

Based upon the particular facts involved in this situation, it is the opinion of this Commission that the acknowledged ownership by Puget's Sound Agricultural Company, as shown by Article IV of the Treaty of August 5, 1846, of all or part of the area claimed by petitioner herein, is not a bar to petitioner's claim. It is the further opinion of this Commission that had that ownership been held to be a bar to such claim on the facts, then such bar would have been removed by the action of Congress in specifically providing in Section One of the Act of August 14, 1848 (9 Stat. 323), that the rights of persons and property pertaining to the Indians should not be disturbed by the creation of Oregon Territory and the application of the land laws of the United States to that territory, so long as those rights remained unextinguished by treaty. The actions of defendant in treating these lands as public

domain open for settlement and in carrying out the provisions of the above act by entering into treaties with the Indians for the cession of these lands serves to confirm this opinion.

We think that the same reasoning would apply to the claims of the Hudson's Bay Company insofar as they might be construed to exclude any valid claims by petitioner, or any other of the parties to the Medicine Creek Treaty of December 26, 1854 (10 Stat. 1132).

Before proceeding with the consideration of the other issues of the case, it should be noted that the stipulation referred to in the beginning of this opinion goes beyond the scope of the hearing on title and this opinion will be confined to the first part thereof which contemplates the determination as to whether petitioner's ancestors had aboriginal or Indian title to any part of the area described in Paragraph III of the petition on March 3, 1855, the date of the ratification of the Medicine Creek Treaty of December 26, 1854 (10 Stat. 1132).

Defendant makes several contentions in its brief with regard to petitioner's right to recover. The first of these is that the aboriginal village tribe, known as the Steilacoom Tribe, is not a party petitioner. This claim is presented by the Steilacoom Tribe of Indians, a presently existing identifiable tribe or group of Indians, and as such existing tribe or group it is entitled to bring the claim on behalf of the descendants of those Indians who comprised the aboriginal entity known as the Steilacoom Indians on December 26, 1854, the date of the

Medicine Creek Treaty.. This meets the jurisdictional requirements of our act. The only other contention which is not answered by the holding of the following opinion is that petitioner is not the successor in interest to the Indians who it is alleged aboriginally occupied part of the area claimed. The answer to this is, we think, implicit in the above statement as to the right of petitioner tribe to bring this suit in a representative capacity, on behalf of the descendants of the aboriginal entity who comprised the Steilacoom Indians as of the date of the Treaty of Medicine Creek. As stated heretofore by this Commission, and in keeping with the statement of the Court of Claims in the Upper Chehalis Tribe, et al. v. The United States, 140 C. Cls. 192, 199, the administrative task of identifying the descendants in the event of an ultimate recovery is beyond the scope of the responsibility of this Commission.

The area claimed by petitioner is a part of the total area set out by Governor Isaac I. Stevens in the treaty of Medicine Creek. Petitioner's ancestors were listed in the preamble to the treaty as being one of the several parties thereto. The area described in the treaty is as follows:

Commencing at the point on the eastern side of Admiralty Inlet known as Point Pulley, about midway between Commencement and Elliot Bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Duwamish, or White rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck

Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to the Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon's Island, easterly and southeasterly, to the place of beginning.

The area described above lies in the present State of Washington around the head or southern end of Puget's Sound and the adjacent inlets.

The Indians in this area were originally contacted by Vancouver in 1792. It was not until 1824 with the establishment of Fort Vancouver that any but passing comment was made concerning them. When Fort Nisqually was established in 1832 the employees of the Hudson's Bay Company furnished the first fairly extensive and complete references to the Indians of the Puget's Sound area. Dr. W. F. Tolme and Dr. John McLaughlin, who were Factor and Chief Factor of the Hudson's Bay Company, respectively, made reference to the Steilacoom. In 1853 an officer at Fort Steilacoom noted the presence of Steil-a-qua-mish and placed their number at 175. Governor Stevens, as well as Schoolcraft, listed the Steila-coom-amish who lived along Steilacoom Creek. The 1854 population of this group was placed by Stevens at 25.

George Gibbs, who made a study of these Indians in 1854-55, listed the Steilacoom as a part of the Nisqually. J. A. Costello refers to a number of small tribes who lived along some portions of the streams or lakes which bear their names and among these are listed the Stillacooms.

J. Neilson Barry listed the Steila-coom-a-mish as living on Steilacoom Creek and being closely related to the Nisqualli.

Edward S. Curtis, in his work The North American Indians listed the Stelakubalish (Steilacoomamish) as being on the shore of Puget Sound near the site of Steilacoom, Washington.

Leslie Speir, in Tribal Distribution in Washington, appears to accept Curtis' description of the Steilacoom as being separate and apart from the Nisqually and living on the sound in the vicinity of Steilacoom, Washington.

Marian Smith, in her work The Puyallup-Nisqually, listed certain village sites as being Steilacoom, but the archaeological survey of Dr. Taylor, petitioner's witness, did not confirm these sites. In fact, the only site which was confirmed was the one on the north side of Steilacoom (Chambers) Creek. The village site listed by Smith as being south of Steilacoom Creek was determined to be a summer gathering place which was occupied only briefly and in historical times. These findings of Dr. Taylor were later confirmed by an informant.

The Handbook of American Indians makes a brief mention of the Steilacoomamišh as being a band of Salish on Steilacoom Creek and closely related to the Nisqually.

Dr. Swanton in Indian Tribes of North America lists Steilacoom as a village on Steilacoom Creek and the neighboring beach, with the main village on the present site of Steilacoom, Washington.

Dr. Carrol L. Riley, defendant's expert witness, placed the Steilacoom Indians at the village on or near Steilacoom or Chambers Creek prior to and subsequent to the Medicine Creek Treaty. He listed

their subsistence area as being Anderson, McNeil and Fox Islands, through the lower Nisqually River drainage and in the region around Steilacoom and Sequallitchew Creeks. He agreed with Dr. Taylor's conclusion as to the main and only village being on the north side of Steilacoom or Chambers Creek. He found the Steilacoom to have been a distinct ethnic group more closely related to the Nisqually than the Puyallup, particularly in the orientation of their economic life. His conclusion as to their autonomous political unity is in keeping with the normal pattern of the area.

The entire pattern of life of these Indians conforms to the generally accepted conditions of Indian life as it existed along the shores and rivers of the northwest coast and Puget's Sound. The primary political and land holding unit was the village. The villages were predominantly exogamous and patrilocal, at least in the north. The summer season was spent in the company of other villagers while occupied with the task of food gathering for the winter.

All of the Puget's Sound tribes were originally sea oriented. The Steilacoom remained so until a very late date, even though some other Indians in the area became horse Indians much earlier. When the Steilacoom went inland to hunt they did so on land which was used by other tribes and groups. In conformity with the general pattern of non-exclusive use of subsistence areas, the Islands of Anderson, Fox and McNeil, as well as the Nisqually River, were shared in common with other groups, particularly the Nisqually and Puyallup.

The epidemics which swept the northwest coastal area in the late eighteenth and early nineteenth centuries affected the Puget's Sound groups to the extent that an estimated one-half to three-fourths of the Indians were wiped out. These epidemics would account for the small population figure of 175 given by Jones in 1853 and the figure of 25 reported by Stevens and Schoolcraft in 1854 for the Steilacoom.

The facts cited above are typical of the history of the northwestern groups with regard to the mode of subsistence, area occupied, joint use of subsistence areas, and political structure. The inclusion of this small group in the Medicine Creek Treaty (10 Stat. 1132) is also typical of the course pursued by Governor Stevens in carrying out the orders of Congress to negotiate treaties with all of the Indians in the area for the purpose of taking cessions of their land. See, among other cases, The Nooksack Tribe v. United States, 1 Ind. Cl. Comm. 333; Muckleshoot Tribe v. United States, 2 Ind. Cl. Comm. 424; Snohomish Tribe v. United States, 4 Ind. Cl. Comm. 549; Duwamish Tribe v. United States, 5 Ind. Cl. Comm. 132, and Suquamish Tribe v. United States, 5 Ind. Cl. Comm. 140.

When Governor Stevens executed the Treaty of Medicine Creek he found the Steilacoom Indians living within the area and they were made parties to the treaty. In view of this fact and the other evidence presented in the Findings of Fact made herewith it is the conclusion of this Commission that the ancestors of petitioner exclusively used and occupied the area described in Finding 19 made herewith on December 26, 1854, the date of the Treaty of Medicine Creek, and that the

United States acquired said land as of March 3, 1855, the date upon which the treaty was ratified.

The questions as to consideration, lands retained, if any, acreage, value, and such other questions as may remain undecided as a result of the stipulation entered into by the parties will be decided at future hearings wherein evidence, if any, as to these questions may be introduced.

T. Harold Scott
Associate Commissioner

We concur:

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner