BEFORE THE INDIAN CLAIMS COMMISSION

THE STILLAGUAMISH TRIBE OF INDIANS,)
)
Petitioner,)
)
v.) Docket No. 207
)
THE UNITED STATES OF AMERICA,)
)
Defendant.)

Appearances:
Warren J. Gilbert and
Frederick W. Post, Attorneys
for Petitioner

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

Decided: Feb 26 1965

OPINION OF THE COMMISSION

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

Petitioner herein, the Stillaguamish Tribe of Indians, alleges ownership of a portion of land located in the State of Washington and ceded by the Point Elliott Treaty of January 22, 1855 (12 Stat. 927) to the defendant. The overall area of land ceded by the various Indian tribes who were parties to the Point Elliott Treaty was described as follows:

> Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north lines of lands heretofore ceded to the United States by the Nisqually, Puyallup and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west along said parallel to the middle of the gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca and crossing the same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between

> Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet and thence around the foot of Vashon's Island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries ***. (Pet. p.4)

Petitioner described that portion of the above lands ceded by it as follows:

> *** certain portion of the above described land and territory around and including the Stillaguamish River and the watershed thereof, from its headwaters to is mouth.

Petitioner alleges that it received an unconscionable consideration for said lands and that the defendant well knew and fully understood that the said lands and territory were at the time of the said treaty of Point Elliott, worth such an amount as to cause the sum of one hundred fifty thousand dollars ($150,000) to be an unconscionable consideration therefore, and that the defendant, in treating the petitioner and the other Indian tribes, parties to the treaty, in such a manner as it did acted unfairly and dishonorably, and against the standards of equity and conscience. Petitioner's contention is that the sum of $150,000 set forth above represented the consideration paid by the defendant for all the lands ceded in the Treaty of Point Elliott.

Petitioner prays that it be awarded judgment against defendant, the United States, after the allowance of all just credits and offsets, for an amount which will provide just compensation for the lands so ceded and surrendered to defendant, as herein alleged, and for such further relief as to the Commission may seem fair and equitable.

Defendant in its answer alleges that the claim is barred by the decision of the United States Court of Claims in Duwamish, 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 a similar case where defendant also urged the same plea (Lummi Tribe of Indians v. United States, Dkt. 110, 5 Ind. Cl. Comm. 543). Although the court in the Duwamish case allowed the petitioning Indians nothing for loss of land through Congressional action, a reading of the Duwamish decision convinces the Commission that the reason for not allowing recovery for the land taken was because the court was of the opinion the jurisdictional act did not permit an adjudication for the land appropriated by white settlers or granted the states, through Congressional action. In the Lummi case the Commission stated:

> It is, of course, true, as defendant's counsel has pointed out and as we have set forth above, that the court in its findings determined the acreage taken from the various claimants, including the Lummi, in the respective areas claimed by them, but it also found that the boundaries of the respective areas occupied by them was not established (Finding XIII), and that fact was declared in the opinion as an impediment to recovery. It seems to us that all the court intended was to show that even if it had jurisdiction to consider the land claims -- the ones pleaded as well as those not pleaded but upon which evidence was offered -- it could make no award therefor because of the failure of proof as to boundaries.
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> We conclude, therefore, that the Government's defense of res judicata must be denied.

Clearly, the Duwamish decision did not adjudicate the liability issue involved in the present claim which is based upon alleged taking of land held by aboriginal Indian title and paying therefor an unconscionable consideration, since such an issue was not recognized prior to the Indian Claims Commission Act of 1946.

Since we have made findings in considerable detail in this case, we see no need to paraphrase them in this opinion, except as it shall be necessary to give our reasons as the claims statute requires, for the adoption of these findings.

We have found that the petitioner is an identifiable group of American Indians within the meaning of the Indian Claims Commission Act of August 13, 1946 and entitled to maintain this action. The defendant denied this status. The defendant in the Point Elliott Treaty conference and in the resulting treaty dealt with the petitioner as an aboriginal Indian tribe and the testimony of Miss Snyder, anthropologist; James Dorsey, tribal chieftain; Esther Allen, the tribe's secretary; and others, support our position on this subject. Also, the Court of Claims in the Duwamish case found that the Stillaguamish tribe was a proper party to that proceeding (Finding IV, Duwamish et al, Indians v. United States, supra).

On the issue of aboriginal title to the lands claimed in the petition we have held with the petitioner, but for a greatly reduced area from which that was claimed.* For the purpose of this opinion we shall discuss this issue in two parts: First, the presence generally of the Stillaguamish Indians as an identifiable group in the Stillaguamish River area, and second, the extent of the area to which the petitioner had Indian title in 1855 when the treaty was signed and 1859 when it became effective.

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* "*** certain portion of the above-described land and territory around and including the Stillaguamish River and the watershed thereof, from its headwaters to its mouth." (Finding 2)

(1) Although the evidence is very general in nature, we think it firmly supports the claim of the petitioner that the Stillaguamish Indians when first mentioned by white people, and thereafter, were residing in the area of the Stillaguamish River drainage. Miss Sally Snyder, anthropologist who testified for petitioner gave her opinion to that effect and supported it by listing a number of historians, United States officials, writers, anthropologists and individual Stillaguamish Indians and Indians of other tribes whose statements she relied upon in forming her opinion. The record shows that almost without exception those who did write, talk, or report on this matter in the early history of Washington Territory, generally designated the Stillaguamish Indians as dwellers on the Stillaguamish River. We detailed the list of people above mentioned in our Finding 10 and have given the gist of their statements there.

Dr. C. W. Riley, defendant's expert anthropologist who has testified in a number of cases involving Point Elliott Treaty Indians, conceded that the Stillaguamish Indians were living in part of the area described by Miss Snyder, but contended that a number of other tribes were also using the Stillaguamish area during the times in question for subsistence purposes and that the petitioner therefore could not have occupied and used it exclusively. Also, there is the testimony of James Dorsey who identified himself as a long time chief of the Stillaguamish Indians in July 1926, and who testified in the case of Duwamish Tribe of et al., Indians, v. United States, supra. Miss Snyder also relied on his testimony. We obtained his testimony and made it a part of our record,

(Comm. Ex. 3). Mr. Dorsey was very definite in his claim that the Stillaguamish Indians had lived in the claimed area for a long time and he was living there himself at the time he testified. With respect to the past he said he had obtained information from older Stillaguamish Indians. The evidence shows that Mr. Dorsey was about 5 years old at the time of the Point Elliott Treaty.

It should also be noted that the Point Elliott Treaty listed the Stillaguamish Indians as one of the participants. It was one of the customs in those times to name Indian tribes, whose correct names were unknown, after the area in which they lived. So it must have been known to the officials at the time of the treaty that these Indians lived in the Stillaguamish River area, because they called them the Stillaguamish Indians for want of more accurate information.

(2) To determine the extent of the area to which the petitioner had Indian title at the critical times in this case presents difficulties It appears from the testimony of a number of witnesses, expert and lay, that in the subject area neighboring tribes claimed some of it as their own, and other parts of it they used in common with other Puget Sound tribes including petitioner.

Although petitioner originally claimed all of the drainage area of the Stillaguamish River, petitioner, through its counsel Frederick Post, abandoned its claim to an estimated 16,000 acres near the mouth of the Stillaguamish River, which area is designated "Quadsak" on defendant's Exhibit A and petitioner's Exhibit 4. In connection with this abandonment the evidence showed very clearly that the so-called "Quadsak"

area was used in common at critical times by many tribes so that the relinquishment of this area seemed to be well advised.

Miss Snyder was not at all sure in her testimony on the extent of the exclusively occupied and used territory claimed by the petitioner. She seemed to rely heavily on the testimony of James Dorsey who testified in the Duwamish case (supra). An examination of his testimony shows that he was actually testifying about areas as he knew them many years after the Point Elliott Treaty. For instance he describes the dwellings of the Indians which were constructed out of lumber and that the Stillaguamish had fields of potatoes. Neither lumber nor potatoes were available to these Indians, so far as is known, prior to the coming of the white man. Lumber became available in quantity as a result of the efforts of early white settlers.

Miss Snyder made admissions with respect to other tribes using much of the area in common with the Stillaguamish which she said was petitioner's land. These are detailed in Finding 11.

James Dorsey also admitted that other Indian groups fished, hunted, and gathered in the claimed area which was not a part of that which we have awarded to petitioner in Finding 18. The preponderance of the evidence establishes the area on the Stillaguamish River, in and around the present town of Arlington, Washington, as the location of the principal village of the tribe. There were other camp sites and one or two small villages within the area awarded. The Stillaguamish Indians were friendly Indians and had intermarried extensively with neighboring tribes. Their friends and relatives visited with them frequently. This situation

accounts for the fact that other Indians were seen in the area we have found belonged to the petitioner. As visitors their presence would not invalidate the Indian title the petitioner had acquired to its village and subsistence areas. Food, especially fish, was very plentiful in the awarded area. Roots and berries and small game existed in abundance and were available within the area belonging to the petitioner, so a larger area than we have awarded would not have been necessary for economic reasons. But as a matter of fact the Stillaguamish Indians also fished and hunted in common with other tribes in parts of the claimed area which we did not award to petitioner.

We have the same difficult problem in this case that existed in the Nooksack (1 Ind. Cl. Comm. 333) and Muckleshoot (2 Ind. Cl. Comm. 424; 3 Ind. Cl. Comm. 658) cases of defining the area to which the Stillaguamish tribe had Indian title, and since the general situation in these cases was very similar to that of the instant case, we have taken the same approach used in those cases and also in Snake or Piute Indians v. United States, which was approved on appeal by the Court of Claims (125 C. Cls. 241-254). In reviewing the above cases the Court of Claims in Upper Chehalis et al., v. United States, (140 C. Cls. 196-197) approved our approach in the Nooksack, Muckleshoot and Piute cases. In that case the Court made this statement:

> "On the matter of defining the area used and occupied exclusively by the village Indians, the Commission stated in the Nooksack case and repeated in the Muckleshoot case, at page 677, as follows:
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> > It is perhaps not required that the boundary lines be as accurately defined as a surveyor would like them but some general boundary lines of the occupied territory

> must be shown, and it must be shown that the occupant had the possession to the exclusion of other tribes; constructive possession is not sufficient.
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> * * * * *
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> *** it is extremely difficult to establish facts after the lapse of time involved in matters of Indian litigation. In attempting to establish boundaries and occupancy on the basis of fragmentary facts and often uninformed opinions and the work of ethnologists who must of necessity base their conclusions upon much the same information, it becomes necessary to take a common sense approach based upon experience with matters of this nature. *** Snake or Piute Indians v. United States, 125 C. Cls. 241, 254: ***
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> We are of the opinion that the approach of the Commission to the problems in the Nooksack and Muckleshoot cases was a sound and reasonable one, and that the problems in the instant case, being nearly identical, would seem to be amenable to a similar approach."

Thus in taking such a "common sense approach" we arrived at the area as described in Finding 18.

This case shall now proceed to a determination of the acreage described in Finding 18, the value of said acreage as of March 8, 1859, the amount of consideration paid by the United States to the Stillaguamish Tribe of Indians for their lands, and all other matters bearing upon the question of liability of the United States to those Indians represented by the petitioner herein.

/s/ Arthur V. Watkins
Chief Commissioner

We concur:

/s/ Wm. M. Holt
Associate Commissioner

/s/ T. Harold Scott
Associate Commissioner