BEFORE THE INDIAN CLAIMS COMMISSION

SIMON PLAMONDON, ON RELATION OF THE COWLITZ TRIBE OF INDIANS, Plaintiff,	)	
v.	)	Docket No. 218
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: June 25, 1969

Appearances:
Abe W. Weissbrodt and Ruth W. Duhl, Attorneys for Plaintiff. Keith, Winston & Repsold, Lyle Keith and Weissbrodt and Weissbrodt were on the briefs.

Howard G. Campbell, with whom was Mr. Assistant Attorney General Edwin L. Weisl, Jr., Attorneys for Defendant.

OPINION OF THE COMMISSION

Chairman Kuykendall delivered the Opinion of the Commission.

This case is now before the Commission on plaintiff's claim that the United States, without payment of any compensation, took lands within the State of Washington to which the Cowlitz Tribe held Indian title. We have entered findings of fact dealing specifically with the evidence of record respecting the areas of Indian use and occupation during the material period. And, based on that evidence we have concluded that the

plaintiff Cowlitz Tribe did have aboriginal or Indian title to an area of land, albeit lesser than that claimed, which lands were taken from the plaintiff by defendant on March 3, 1855, without payment of compensation therefor.

The earliest recorded observations of the native inhabitants within the claimed area were made by Lewis and Clark during their famed expedition in 1806. While the Lewis and Clark writings do establish the presence of Indians within the general area, the Commission finds it difficult to resolve the confusion of names and positively identify the tribal bands or groups to which the explorers referred. We have entered a rather detailed finding on Lewis and Clark, not because their writings have significantly assisted the Commission in our ultimate determinaton of the plaintiff's Indian title, but rather because the Lewis and Clark Journals constitute one of the few references relied upon by plaintiff to support its expert's opinion as to Cowlitz use and occupancy of the southern portion of the claimed area. That area was the drainage of the Lewis River which plaintiff's expert, Dr. Verne F. Ray, testified was exclusively used and occupied by "Lewis River Cowlitz." In Dr. Ray's opinion Lewis and Clark identified the Indians living on both the Cowlitz and Lewis Rivers as Hul-lu-et-tell which were Cowlitz. However, we can find no other authority for equating Hul-lu-et-tell with Cowlitz and, in fact, even the reference to the Lewis River is not entirely clear. We have

noted, too, that John R. Swanton in The Indian Tribes of North America, published by the Smithsonian Institute, Bureau of American Ethnology, wrote that the Hullooetell reported by Lewis and Clark on the Cowlitz and Lewis River may have been a subdivision of the Skilloot Indians (a division of the Chinookan linguistic family).

In the years following the Lewis and Clark explorations there were a number of reports of other explorers, trappers, missionaries, government officials and others. We have entered findings on their pertinent observations. And we have considered the ethnographic mapings relating to the locations of the aborigines in the area in question. We have considered the writings of eminent anthropologists, ethnologists and historians dealing with the Indian occupants of the area. And of particular importance has been the testimony and reports of the two expert witnesses, Dr. Ray for the plaintiff, and Dr. Carroll Riley for the defendant.

Based on all the evidence presented in this case and the findings of fact entered, we have concluded that the Cowlitz Tribe exclusively used and occupied the area as described in our Finding 15, which might be generally described as the entire drainage of the Cowlitz River and extending to the south to include the Toutle River drainage. The lands along the lower and middle Cowlitz River constituted the main areas of Cowlitz occupation. There is no dispute as to these lands, the defendant agreeing that the plaintiff held Indian title to them.

The defendant, however, disputes the plaintiff's claim to the upper Cowlitz River lands. Admittedly the evidence is not as clear with respect

to the upper reaches of the Cowlitz River. The white contacts in this more remote area were infrequent. But the Commission is satisfied that the plaintiff has supported its claim to the area, and we have concluded that the Cowlitz Tribe did in fact exclusively use and occupy the entire Cowlitz River area as far east as the southern slopes of Mount Rainier.

There are, however, two areas which we have found were not exclusively used and occupied by the plaintiff Indians. One of these is the Lewis River area. Plaintiff's expert, Dr. Ray, identifies the aborigines along Lewis River as "Lewis River Cowlitz." However, virtually all of the contemporary as well as the historical and anthropological reports have identified the aborigines on the Lewis River as belonging to other tribal groups--specifically the Chinook and the Klickitat. As Dr. Ray himself has stated the "Roving Klikitats" started moving into the general area in the first half of the nineteenth century. And the evidence indicates that the Klickitats were not just visitors or travelers passing through. They lived in the area and, as reported by Herbert Beaver, were farming the land in 1836-1838. In Dr. Ray's Handbook he wrote "The 'Roving Klikitats' being very well known, the Lewis River Cowlitz known almost not at all, it became quite customary for the Lewis River country to be called 'Klikitat' country" (Pl. Ex. 161, p. A-10). Explaining that the early writers were confused and used linguistic designations, Dr. Ray equates all references to Klikitat, or Taitnapan, or Sahaptin to "Lewis

River Cowlitz", whenever such references occur in descriptions of the Lewis River Indians. We cannot accept Dr. Ray's view. The overwhelming weight of the evidence indicates that the Lewis River area was used by various Indian groups throughout the first half of the nineteenth century. It could perhaps be described as a transitional area of shifting Indian use. But certainly it was not one of Cowlitz exclusive use and occupation. Near the mouth of the Lewis River the Chinook Indians were often observed. Dr. Ray concedes the area along the Columbia River and at least 5 miles from the mouth of the Lewis River to have been held, prior to the 1830's, by Chinookan-speaking peoples. The Lewis River area has been excluded from the lands to which we have found the plaintiff held Indian title.

The other area which we have found the Cowlitz did not use and occupy was in the northwest, referred to as the Willapa Hills area. The evidence clearly establishes that these lands were not occupied by Cowlitz but rather were the territory of the Athapascan-speaking Indians known as the Kwalhiokwas. Plaintiff's contend that, when the Kwalhiokwas' population declined in the early 1800's the Cowlitz moved in and became "amalgamated" with their neighbors. But even under this theory Dr. Ray found such "amalgamation" was not accomplished until the middle of the nineteenth century which is about the time the Cowlitz lands were taken by defendant. This supposed amalgamation cannot be a basis upon which the Commission could find Cowlitz Indian title to the Willapa Hills area. Further, there

is no evidentiary basis for concluding that such an amalgamation occurred. In fact Dr. Ray is virtually the sole authority for the claim of Cowlitz occupancy of these lands. There is no evidence to support the Cowlitz tribe's claim that it had exclusively used and occupied the Willapa Hills area for a long time prior to the taking of its lands.

There remains only one matter of controversy to be resolved and that concerns the taking of the aboriginal lands of the plaintiff. There was no ratified treaty by which the Cowlitz ceded their aboriginal lands.

Plaintiff contends the lands were taken on:

(1) March 3, 1899 - as to those lands within the Mt. Rainier National Park. This is the date of the act setting aside the National Park.

(2) January 3, 1900 - as to the remaining lands. This is the date of a sale by the Northern Pacific Railroad to the Weyerhaeuser Timber Company involving some 900,000 acres.

Defendant contends the lands were taken as of January 1, 1855, which is a "mid point" between the dates of the Treaty of Medicine Creek (December 26, 1854) and the Treaty of Point Elliott (January 22, 1855).

There have been a number of decisions involving the numerous Indian tribes in the Pacific Northwest. Those cases wherein the Indians signed one of the treaties of cession have not presented any problem. However, like this case there have been other decisions in which the Indian tribes involved did not participate in any treaty.

Typical of one type of situation was the case of the Nooksack Tribe. The lands for which the Nooksack sought compensation were within the boundaries of the area ceded to the United States by the Treaty of January 22, 1855 (12 Stat. 927), referred to as the Point Elliott Treaty. However, the Nooksack were not a party to that treaty and never received any of the consideration paid under it. In fact the Nooksack never made any treaty with the United States. In the Nooksack case the Commission found that "although the lands exclusively used and occupied by that tribe in 1859 were included within the territory ceded by the Point Elliott Treaty, the tribe was not a party to the treaty and has never ceded nor relinquished its original title to the lands. . . ." However, the United States officials considered that the original title to all lands ceded under the treaty had been terminated and extinguished, and the lands were so treated as public lands to be fully disposed of by the United States as it saw fit. By such action on the part of the United States the Nooksack lands were held to have been taken by the United States, without payment of compensation, as of March 8, 1859, the ratification date of the Point Elliott Treaty. Nooksack Tribe of Indians v. United States, 3 Ind. Cl. Comm. 479 (1955).

The Nooksack appealed to the Court of Claims and the date of taking determination was one of the issues on that appeal. In affirming the Commission the Court stated:

> "The appellant tribe urges that since they were not a party to the Point Elliott Treaty of 1855 (12 Stat. 927) their rights remained unimpaired, and there was no taking of their lands until the United States citizens first came into the area as homesteaders in 1890. However, the lands ceded to the Government

> by the Treaty included all of the area involved in this case. In all of the claims of neighboring tribes, the time of taking was established by the Commission in 1859, which was the year of ratification of the Point Elliott Treaty. The United States has continued to regard and to treat all the lands ceded to it by the Treaty as public lands to be fully disposed of by the Government as and when it saw fit to do so. We conclude that the time of taking by the United States of lands claimed by the Tribe, has been correctly determined by the Commission to have been March 8, 1859." (162 C. Cl. 712, 715 (1963), cert. denied 375 U.S. 993.

The date of taking was also determined to have been as of the Point Elliott Treaty ratification date in the case of Muckleshoot Tribe of Indians v. United States, 3 Ind. Cl. Comm. 658 (1955) affirmed by order, Court of Claims dated February 23, 1966, (174 C. Cl. 1283, cert. denied 385 U.S. 847.) The Muckleshoot were also non-treaty Indians.

But the situation in this case is really the same as that involving the Upper Chehalis Tribe. In that case Governor Stevens in February, 1855, commenced treaty negotiations with the Upper and Lower Chehalis, Cowlitz (the plaintiff herein), Lower Chinook, Quinault, and Queets Indians. The Indians were not satisfied with the proposed reservations and no treaty was consummated. We held that the Chehalis' Indian title was "extinguished for all intents and purposes on March 3, 1855, the day on which negotiations looking to a treaty terminated, since from and after that date the United States dealt with such lands as part of the public domain. In this manner, and as of that date, the lands aboriginally occupied by said tribes were taken from them without their consent and without compensating them for such lands." (8 Ind. Cl. Comm. 436, 473 (1960)) The Chehalis were the Cowlitz neighbors to the northwest.

We also found that the lands of the Chinook Indians were taken as of the dates of the unratified treaties at which time "the defendant assumed definite control over the areas of land . . . disregarding the aboriginal rights of said Indians" (6 Ind. Cl. Comm. 177, 207 (1958)). The Chinook are neighboring Indians to the Cowlitz to the southwest.

In this case the lands of the Cowlitz were dealt with by the United States as public lands after the unsuccessful treaty negotiations in 1855. The lands were surveyed and much of the area was settled. We have found, therefore, that the United States deprived the plaintiff Cowlitz Tribe of its original Indian title as of March 3, 1855, without payment of any compensation therefor. Accordingly, plaintiff is entitled to a recovery under the provisions of Clause 4, section 2 of the Indian Claims Commission Act.

This case will now proceed to a determination of the acreage and the fair market value, as of March 3, 1855, of the lands described in Finding 15.

Concurring:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner