

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 23, 1971

Appearances:

Abe W. Weissbrodt, and I. S. Weissbrodt,
Attorneys for Plaintiff. Ruth W. Duhl
was on the brief.

Howard G. Campbell, and A. Donald Mileur,
with whom was Mr. Assistant Attorney General
Shiro Kashiwa, Attorneys for Defendant.

OPINION ON REHEARING

Kuykendall, Chairman, delivered the opinion of the Commission.

The Commission is faced with a motion arising out of its opinion, findings of fact, and interlocutory order entered herein on June 25, 1969 (21 Ind. Cl. Comm. 143). In that decision the Commission found that the Cowlitz Indians had aboriginal title to a tract of land in southwestern Washington. The Commission further found that the defendant had deprived the Cowlitz Tribe of its aboriginal title on March 3, 1855, by thereafter dealing with the tribe's lands as public lands. Plaintiff has moved for a rehearing requesting that the Commission reconsider its Finding 14, entered June 25, 1959, as to the manner and date of taking of the aboriginal lands of the Cowlitz Tribe, and that the Commission make appropriate amendments to

Finding 14 and the other findings which relate to the same issue. The plaintiff in its motion alleged that the Cowlitz lands were taken under different circumstances and at different times than it had urged prior to our decision of June 25, 1969. Accordingly, by order of December 10, 1969, the Commission granted plaintiff's motion for rehearing for the purpose of receiving additional evidence relating to the manner and date of taking of the Cowlitz aboriginal lands. For the reasons stated below, we now hold that the United States deprived the Cowlitz Tribe of its aboriginal title on March 20, 1863.

In its original proposed findings of fact and brief, filed herein on June 1, 1967, plaintiff contended that Cowlitz title had been extinguished on three separate dates: (1) February 20, 1893, on which date a portion of Cowlitz land was incorporated in the Pacific Forest Reserve by proclamation of the President; (2) February 22, 1897, on which date an additional portion of Cowlitz land was placed in the Rainier Forest Reserve by proclamation of the President; and (3) January 3, 1900, on which date the Northern Pacific Railroad sold to the Weyerhaeuser Timber Company lands granted to it by the defendant in 1864 and 1870. Defendant, on the other hand, argued that Cowlitz title had been extinguished on January 1, 1855, a date approximately midway between the dates of execution of the Treaty of Medicine Creek (December 26, 1854) and the Treaty of Point Elliott (January 22, 1855). Defendant contended that by that date the Cowlitz way of life was sufficiently disrupted so as to constitute a taking. Faced with these two contentions and the limited amount of evidence then in the record relating to the date and manner of taking, the

Commission found that Cowlitz title had been extinguished on March 3, 1855, on which date unsuccessful treaty negotiations between the Cowlitz Tribe and representatives of the United States were terminated. In so ruling we relied primarily on the holdings in Upper Chehalis Tribe v. United States, 8 Ind. Cl. Comm. 436 (1960), and in Nooksack Tribe of Indians v. United States, 3 Ind. Cl. Comm. 479 (1955), aff'd, 162 Ct. Cl. 712 (1963), cert. denied, 375 U.S. 993 (1964).

In its motion and brief filed in support thereof plaintiff contended that the Commission had failed to make any evidentiary findings to support its conclusion that after March 3, 1855, the United States treated Cowlitz land as public land. Plaintiff argued that the Commission's sole indication as to the nature of this treatment -- "The lands were surveyed and much of the area was settled." (21 Ind. Cl. Comm. at 151) -- was unsupported by any evidence in the record. Furthermore, plaintiff argued that even if there were evidence of surveying and settlement, such activities alone would be insufficient to constitute an extinguishment of Indian title. In accordance with the Commission's order granting the motion for rehearing, plaintiff submitted twenty-six additional exhibits which were admitted into evidence. In its proposed findings of fact and brief on dates of taking, plaintiff argued for five separate dates of taking as follows: (1) February 22, 1889, for 35,934.22 acres in sections 16 and 36 of each township granted to the State of Washington by Act of Congress of that date; (2) February 20, 1893, for 209,942.77 acres included in a forest reserve by Presidential proclamation of that date; (3) February 22, 1897,

for 226,015.02 acres placed in a forest reserve by Presidential proclamation of that date; (4) March 2, 1907, for 123,805 acres placed in a forest reserve by Presidential proclamation of that date; and (5) May 13, 1895, the average date of taking for the remaining 1,124,501.69 acres which were taken over many years by the issuance of patents to entrymen, selection of lands by the State of Washington, and by Government approval of lands selected by railroads.

An examination of the evidence now in the record leads the Commission to conclude that Cowlitz title was not extinguished on March 3, 1855, as previously determined. There is insufficient evidence to conclude that after that date the United States appropriated Cowlitz land to its own use. Rather, the evidence indicates that the Government's activities in Cowlitz territory and its relationship with the Cowlitz Tribe were not significantly affected by its failure to obtain a formal cession of Cowlitz lands in March 1855.

By the Act of September 27, 1850 (9 Stat. 496), Congress created the office of Surveyor General of Oregon Territory and directed him to survey the lands located west of the Cascade Mountains. In 1850 all of the lands west of the Cascades were still Indian lands. Congress had expressed its intent in the Act of June 5, 1850 (9 Stat. 437), that the claims to land of all tribes west of the Cascade Mountains should be extinguished by treaty. Since the Act creating the office of Surveyor General did not state that surveying should be delayed until Indian title on the land was extinguished, but rather was to begin as soon as practicable,

it follows that Congress did not intend the mere act of surveying to in any way affect Indian title to the lands west of the Cascades. Surveying in Oregon Territory was begun first in the river valleys which had already attracted early settlers. Thus the surveying in the lower Cowlitz Valley was merely part of a pattern that extended over all of Oregon and later Washington Territory. The four surveys that had been or were being conducted in Cowlitz territory by March 3, 1855, no more indicated a taking by the United States than did similar surveying in the territories of the other tribes west of the Cascades which were parties to the many treaties executed in 1854 and 1855.

Similarly, the limited settlement which had occurred on Cowlitz land by 1855 was insufficient to constitute an extinguishment of Cowlitz title. Settlement within the Cowlitz Valley had begun prior to the treaty with Great Britain which established United States sovereignty over Oregon Territory. In the Act of September 27, 1850 (9 Stat. 496), Congress declared that present settlers in Oregon Territory, as well as those who would settle in Oregon prior to December 1, 1853, would be entitled to a grant of a tract of land if they cultivated the tract for four consecutive years. In the Act of February 14, 1853 (10 Stat. 158), the donation provision was extended to December 1, 1855. By March 3, 1855, no more than 150 settlements had been made in Cowlitz territory under the provisions of the Donation Act. Thirty-five additional settlements were made between March 3, and December 1, 1855. No further settlements were made on Cowlitz land until after the land was opened to public sale in 1863. These settlements under the Donation Act were all concentrated in the lower Cowlitz Valley and extended over less than 5% of all Cowlitz land. Such limited

settlement did not sufficiently disrupt the Cowlitz way of life or sufficiently interfere with their use of the land so as to constitute a Government taking of the entire area. On numerous occasions this Commission has refused to find that such limited encroachments by white settlers acted to extinguish Indian title. See, e.g., Havasupai Tribe of the Havasupai Reservation v. United States, 20 Ind. Cl. Comm. 210, 233-35 (1968) ; Hualapai Tribe of the Hualapai Reservation v. United States, 11 Ind. Cl. Comm. 447, 453-57 (1962); Quechan Tribe of the Fort Yuma Reservation v. United States, 8 Ind. Cl. Comm. 111, 136-37 (1959). The United States had not issued any patents or any other final certificate of title to donation claimants on Cowlitz land prior to March 3, 1855, and did not do so for several years thereafter.

The defendant contends that the March 3, 1855, date of taking is supported and required by the four cases cited by the Commission in its opinion of June 25, 1969. 21 Ind. Cl. Comm. at 149-151. Upon reconsidering these decisions, the Commission is no longer of the opinion that they are binding upon us in this case. The Nooksack and Muckleshoot cases are similar and may be dealt with together. In each case the claimant's aboriginal lands were located within the metes and bounds of the territory ceded to the United States by the Treaty of Point Elliott of January 22, 1855 (12 Stat. 927). In each case the claimant tribe did not participate in the treaty. Yet, in each case the Commission found that the tribe's aboriginal title was extinguished on the effective date of the Point Elliott Treaty. Relying specifically on Nooksack, the defendant states

in its brief, "The only factual difference in that case and this one is that in Nooksack there was a treaty consummated with neighboring tribes but the Nooksack did not sign it, while here there was no treaty at all. That difference is not material." Defendant's Brief of September 4, 1970, p. 36. It is this factual difference, however, which brings this case out of the rule in Nooksack. In both Nooksack and Muckleshoot the aboriginal lands of the claimant were purportedly ceded to the United States by the terms of the treaty. After the consummation of the treaty the United States considered all of the lands purportedly ceded to be public lands. The fact that there was a treaty which ceded claimants' land to the United States was the basis for the Commission's decision that title was extinguished upon ratification of the treaty. In this case, on the other hand, there is no treaty which purports to cede the Cowlitz' land to the United States. It follows that the reasoning in Nooksack does not apply.

In Chinook, the claimant tribe signed a treaty of cession which was never ratified. We found that following the execution of the treaty the United States, anticipating ratification by the Senate, assumed control over the aboriginal title area thus depriving the Chinooks of their aboriginal title. Chinook does not apply to the present dispute because the Cowlitz Tribe never signed a treaty. The United States never assumed control of Cowlitz land in anticipation of Senate ratification.

The defendant contends that this case is factually on all fours with Upper Chehalis Tribe v. United States, 8 Ind. Cl. Comm. 436 (1960). The Upper Chehalis were present at the unsuccessful negotiations conducted by Governor Stevens in February and March of 1855. (Finding 14.) Like the Cowlitz, the Upper Chehalis refused to sign the treaty proposed by Governor Stevens. Furthermore, like the Cowlitz, the Upper Chehalis never entered into a treaty of cession with the United States. In Upper Chehalis we decided that claimant's 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." 8 Ind. Cl. Comm. at 473. In contending that this case is controlled by Upper Chehalis the defendant overlooks one crucial difference between the cases. In Upper Chehalis the issue of date of taking was never contested before this Commission. The claimants in that case not only did not contest the March 3, 1855 date, but actually requested that date. 8 Ind. Cl. Comm. at 466. A holding in a former case involving a different plaintiff on an issue that was not fully litigated should not be binding on the plaintiff in this case, and we therefore choose not to follow Upper Chehalis.

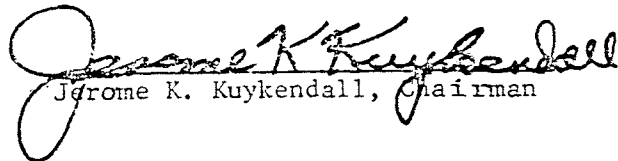
Although we have decided not to adhere to our former finding as to the date of taking of the Cowlitz lands, we are unable to agree with plaintiff as to the proper date(s) of taking. All of the actions alleged by plaintiff to be takings of its lands would ordinarily constitute

extinguishment of title. However, we have found that Cowlitz title was extinguished several decades prior to the events relied upon by plaintiff as takings. As we stated above, it was the original intent of Congress that all Indian title west of the Cascades should be extinguished by treaty. However, there seems to have been a gradual change in the attitude of Congress. In the Act of February 14, 1853, Congress declared that in two years, on April 1, 1855, all the lands west of the Cascades were to become subject to public sale. It is probable that Congress delayed the possible sale of these lands for two years to allow time for treaties of cession to be entered into with the tribes west of the Cascades. It is clear that Congress anticipated that Indian title would be extinguished by 1855, because offering lands for public sale is totally inconsistent with the continued existence of Indian title in that land. Treaties were entered into with most of the tribes west of the Cascades in 1854 and 1855. By 1860 all of these treaties had been ratified and the participating tribes were being moved onto their reservations. In its Indian appropriation act for Fiscal Year 1861 Congress for the first time appropriated money for the expenses of removing non-treaty Indians in Oregon and Washington Territories. The Cowlitz were one of many non-treaty Indians, and there is no indication that any sum was actually used for their removal. Yet the appropriation reveals a change in congressional policy. Rather than negotiating treaties with these tribes, Congress now intended that their aboriginal title be extinguished by their removal from their

lands. The evidence indicates that within the Office of Indian Affairs the tract of land at the fork of the Blackwater and Chehalis Rivers had been chosen as early as 1860 as a reservation for the non-treaty Indians of Southwest Washington, among which were the Cowlitz. The Cowlitz' refusal to move onto this reservation does not alter the fact that this reservation was intended for them.

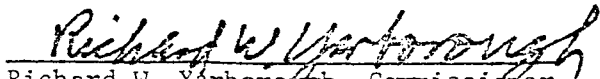
Although neither the change in congressional intent alone nor the establishment of the Chehalis Reservation were sufficient to extinguish Cowlitz Title, when to these was added the public offering for sale of Cowlitz land by the defendant, as evidenced by the Presidential Proclamation of March 20, 1863, an extinguishment of title did take place. In offering the Cowlitz lands for sale, defendant was taking an action which indicated that it no longer considered that Indian title existed on the land. Advertising the land for sale under the circumstances of this case is such an exercise of dominion and control over the land as to preclude the continued existence of Indian title. This taking for sale of the townships stipulated in the 1863 proclamation -- these townships covering the entire area of Cowlitz permanent settlement -- so substantially interfered with the Cowlitz way of life as to constitute an extinguishment of their title to the entire area described in our Finding 20. Therefore, the United States deprived the Cowlitz Tribe of its aboriginal Indian title as of March

20, 1863, without the payment of any consideration therefor. Plaintiff is thus entitled to recover under Section 2, Clause 4 of the Indian Claims Commission Act.


Jerome K. Kuykendall, Chairman

Concurring:


John F. Vance, Commissioner


Richard W. Yarbrough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner

