BEFORE THE INDIAN CLAIMS COMMISSION

THE SNAKE OR PIUTE INDIANS OF
THE FORMER MALHEUR RESERVATION,
IN OREGON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Defendant.

Docket No. 17

Mr. C. E. McConnell, with whom
was Mr. Bernard J. Long,
Attorneys for Petitioners.

Messrs. Ralph A. Barney and
Leland L. Yost, with whom was
Mr. Assistant Attorney General
A. Devitt Vanech,
Attorneys for Defendant.

DEC 29 1950

OPINION OF THE COMMISSION

Holt, Commissioner, delivered the opinion of the Commission:

The petitioners are a group of Snake or Piute Indians who bring
this action to recover the sum of $3,500,000.00, with interest, as
compensation for the value of certain lands that were included within
the area of the former Malheur Reservation in eastern Oregon. They
also seek an award for the alleged failure of the defendant to properly
care and provide for them, the amount of the award to be determined by
this Commission.
The petitioners base their claimed right to recover for the lands in question upon two separately stated claims which are set forth in Counts I and II in the petition, as amended. The first claim made in Count I is that the lands included in the Malheur Reservation were a part of an area in eastern and southeastern Oregon that was held and claimed under original Indian title by petitioners' ancestors, and was taken from them by defendant on September 13, 1882 (the date the major portion of the Malheur Reservation was restored to the public domain) without their consent or the payment of compensation therefor. A second claim for the same Malheur Reservation lands is made in Count II, and is based on certain Executive orders which established the Malheur Reservation, later enlarged it, then diminished and redefined the reservation area, and finally restored the land to the public domain. A third claim in Count II is for the alleged failure of the defendant to provide homes, food, clothing and education for petitioners as provided in an unratified treaty dated December 10, 1868.

It is clear from the petition, the petitioners' requested ultimate findings, and brief that the land for which they seek compensation in both Counts I and II is that area of land in the Malheur Reservation described in the Executive order of January 28, 1876. This order is set forth in finding No. 9. Counsel for petitioners have stated in the record that the three bands or groups who lived in that particular country when the Malheur Reservation was established, and were placed on the reservation, were those bands under Chiefs Wo-you-wo-we, Z-hi-gant,
and Ou-its.

It appears that after Oregon had been established as a territory in 1848, among the first treaties concluded with Indians east of the Cascade Mountains in Oregon was the one with the Walla Walla, Cayuse and Umatilla tribes on June 9, 1855 (12 Stat. 945) in which they ceded a tract of land in northeast Oregon and the Umatilla Reservation was established. On June 25, 1855 another treaty (12 Stat. 963) was concluded with the Confederated Tribes and Bands of Middle Oregon, ceding to the United States an area in north central Oregon, which included a small part of the lands later included in the Malheur Reservation. The Klamath Reservation was also established out of this cession.

Later Congress passed the act of March 25, 1864 (13 Stat. 37), under which act the President was authorized to conclude a treaty with the Klamath and Modoc and Snake Indians in southeastern Oregon. On October 14, 1864 a treaty (16 Stat. 707) was concluded with the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians in which they ceded a tract of land in south central Oregon and northern California, which tract also contained a small part of the lands later included in the Malheur Reservation.

On August 12, 1865 a treaty (14 Stat. 683) was also concluded with the Woll-Pah-Pe Tribe of Snake Indians in which they ceded a tract of land in east central Oregon. This cession included the western one-third of the lands in the Malheur Reservation, and overlapped in part both of the prior cessions made by the Confederated Tribes of Middle
Oregon and the Klamath, Modoc and Yahooskin Band of Snake Indians.

There remained in southeast Oregon a number of other roving bands or groups of Snake or Piute Indians who were not under any treaty relations with the United States. They had been determinately hostile towards the whites from the time Oregon was established as a territory. In 1866 an aggressive campaign was undertaken against these Indians which resulted in the majority of them surrendering in the latter part of 1868 and being collected in camps near the Army posts in southeast Oregon under military surveillance.

In the fall of 1868 the Superintendent of Indian Affairs in Oregon, J. W. P. Huntington, made an expedition among the Indians in eastern Oregon, the chief object of which, as he stated in his report, was "to visit these subdued Snake Indians and ascertain by personal inspection their precise condition, and take such measures as were in my power to secure a continuance of the peace recently inaugurated." Superintendent Huntington visited the various camps of these Snake Indians and on December 10, 1868 gathered their leaders together in council at Camp Harney where he negotiated a treaty with them which was signed by him on behalf of the United States and on behalf of the Indians by Wo-you-wo-wa, Gaha-noo, E-hi-gant, Po-noo, Chow-wat-na-no, Ow-its and Tash-o-go, who were referred to in the treaty as chiefs and headmen representing the Snake or Shoshone Indians. This treaty as its terms show was intended to be a treaty of peace and amity, with the Indians agreeing to reside upon such reservations as might thereafter be allotted to them,
and the United States agreeing that future provisions would be made for the permanent location of the Snake Indians and for their education, food, clothing and for allotment of lands in soverignty to them when their advancement warranted it. The treaty declared it was only preliminary to a more complete treaty to be made thereafter under the direction and authority of the Government of the United States. This treaty was never ratified by the Senate of the United States and no other treaty negotiations were ever had with these Indians.

In November, 1869 Superintendent of Indian Affairs in Oregon, H. B. Meacham, and Colonel Otis of the U. S. Army met in council with the Indian leaders, which included six of the Snake or Piute chiefs or headmen who had signed the foregoing unratiﬁed treaty, and tried to persuade them to move to the Klamath Reservation in south central Oregon, but they would not agree to move.

In March, 1871 Superintendent Meacham recommended to the Commissioner of Indian Affairs that the area in eastern Oregon located between the 42nd and 44th parallels of latitude and from the 117th to the 120th degree of longitude be withdrawn from sale as public lands, "with a view of selecting an Indian reservation, on which to consolidate Indians east of the Cascade Mountains in said State—". The recommendation was approved by the Commissioner of Indian Affairs and by the Secretary of the Interior and the withdrawal of the lands as recommended was directed by Executive order dated March 14, 1871.

After a period of investigation as to the best location for the
reservation, the Commissioner of Indian Affairs on September 4, 1872 wrote a letter to the Secretary of the Interior enclosing a report of T. B. Odeneal, Superintendent of Indian Affairs in Oregon, dated August 22, 1872, reciting the action taken by Odeneal relative to the establishment of a proposed reservation on the headwaters of the Malheur River in Oregon for the Snake or Piute Indians. The boundaries of the tract of land selected for the proposed reservation were set forth in the letter. The Secretary of the Interior forwarded the Commissioner's letter to the President, recommending that it be carried into effect, and on September 12, 1872 the President signed an order directing that said lands that were described in the letter of the Commissioner of Indian Affairs be set apart as a reservation for the Snake or Piute Indians.

An additional area of land was added to the Malheur Reservation on the northeast by Executive order of May 15, 1875; however, by Executive order of January 28, 1876 the reservation area was redefined and the greater portion of the land that had been added by the Executive order of May 15, 1875 was restored to the public domain. It is the reservation lands as they were described in the January 28, 1876 order for which compensation is asked by petitioners.

The Malheur Reservation was opened some time in 1873 and the various bands or groups of Indians in southeast Oregon, as well as some from adjacent areas in Idaho and Nevada, were collected on the reservation by the defendant. Those Indians were classified as Snakes,
Bannocks, and Piutes by the Indian Agent in charge of the reservation. The June 30, 1877 Indian census for the Malheur Reservation lists 759 Indians on the reservation, of which 204 were classified by the Indian agent as "Snakes" under Chief Egan, who came from the valley of the Weiser, east of Snake River, and were mixed with Shoshones. The others were classified as Piutes, which included Chief Winnemucca's band and the followers of Wo-ow-wa-wa, listing them in the census as 150 under Chief Oits, 238 under Chief Tanwahita, and 141 under Chief Winnemucca.

By February 14, 1878 there were 87 Shoshone Indians newly arrived at the Malheur Agency, making a total population of 846 on that date.

In June, 1878 the Bannock War started, and all the Indians belonging to the Malheur Agency left the reservation, and with the exception of about 100 Piutes known as "Loggins band," the majority of them joined the Bannocks in their hostilities against the white settlers and the Army. In the winter of 1878-79 at the close of the war, these Indians who had taken part in the hostilities, together with Loggins' band, were removed with their families to the Yakima Reservation in Washington to reside. The Malheur Reservation was used by the military during the Bannock War, but was re-opened by the Indian Department in September, 1878, and as efforts of Indian agents to resettle the reservation with Indians in the area were unsuccessful, the agency was discontinued by direction of the President in December, 1880.

Thereafter, by Executive order of September 13, 1882 the greater portion of the reservation was restored to the public domain, and the
It is contended by petitioners that not only did their ancestors hold original Indian title to this area of land included in the reservation, but that said reservation established by the Executive orders was for the use and occupancy of petitioners in fulfillment of the unratified treaty of 1868 which was made pursuant to the act of Congress of March 25, 1864, and that its cancellation by the defendant and return to the public domain, without consent of or payment of compensation to the petitioners was inequitable and unconscionable, and contrary to fair and honorable dealings with them, and they are entitled to recover the value of said land in the sum of $3,500,000, with interest.

The petitioners also contend that under the unratified treaty of December 10, 1868 the defendant became obligated to provide their ancestors with homes, food, clothing and education, which defendant failed and neglected to provide, and they are now entitled to damages because of this failure in an amount to be fixed by the Commission.

The United States defends on several grounds: First, that the petitioners have failed to establish by the evidence that a particular tribe, band or group of Indians aboriginally and exclusively held and occupied any specific and definable area of land in eastern and southeastern Oregon, or that the defendant ever recognized petitioners as exclusive owners and occupants of the lands included in the Malheur Reservation. Second, that the Executive orders creating and continuing the reservation did not convey to the Snake or Piute Indians any
compensable interest in said lands, and that under the circumstances the restoring of these lands to the public domain by Executive order was not inconsistent with fair and honorable dealings. Third, that the treaty of December 10, 1868 was unratified, and even if ratified, the obligations created thereunder were breached by petitioners' ancestors and not by the defendant.

On the issues thus presented, the first question is whether the petitioners have established their original Indian title to the lands claimed by them.

Count I. Original Indian Title

The evidence bearing on the question of the aboriginal ownership of the lands in eastern Oregon is principally documentary, and is conflicting, particularly as to the origin and prehistoric distribution of Indians in the area. It appears from an examination of early reports and maps that in about 1750 the extreme southeastern section of Oregon was inhabited by a Shoshonean tribe or band of Indians classified as Northern Pantes, with the north boundary of their territory being a line extending from the Snake River on the east to the Klamath Indian country on the west, and running just north of the Malpigh and Harney Lakes. The territory just to the north of this was occupied by the Salapitin speaking tribes, which would have included the major part of the Malpigh Reservation as it was later established. During the late eighteenth and early nineteenth centuries Snake and Bannock tribes of Shoshonean Indians from eastern Idaho invaded the Salapitin tribes and
forced them north and west, although later some of them re-occupied portions of their original area. There are later reports however that disagree with this version of the origin and prehistoric distribution of these Indians, and which classify all of these Indians in east central and southeast Oregon, at least by 1840, as "Northern Piutes."

The earliest historic account of white man's contact with these Indians was a brief reference in the journal of Peter Ogden who made an expedition down the Silvies River to the Harney and Malheur Lakes region in 1825, noting that he met a large number of "Snake Indians" in the area whom he described as "Upper" and "Lower" Snakes, distinguishing the former as warlike and the latter as timid. This distinction between those in the north of the area and those in the south appears to have been recognized by others, as those in the north were later referred to as "Upper Snakes," or "Snakes" and "Bannocks," and those bands in the south as "Lower Snakes" or "Northern Piutes," and as late as 1868 they were all referred to collectively as the "Snakes" and the "Snakes or Shoshones."

In any event, by 1848 when Oregon was established as a territory, this area in east central and southeast Oregon (where the land in question is located) was inhabited by a number of separate bands or groups of Shoshonean Indians, who have been identified by the latest reports as Northern Piutes, and who were scattered throughout the entire area. They did not have a strong central organization but each band or group operated more or less independently of the others, having
its own chief or leader, and being bound together by linguistic ties, the bands maintained a friendly intercourse with each other and with the adjoining Shoshonean Indians. They did not have permanent villages or camps but each band or group usually had its favorite wintering site or sites to which the members returned after the hunting and gathering seasons. They did not till the soil but were primarily nomadic, with each band or group ranging over whatever territory as was necessary to furnish a livelihood. There does not appear to have been any clear recognition of rigid territorial boundary lines between the territory of the different bands, or of other tribes or bands of Shoshonean Indians.

This question of what proof is necessary to establish original Indian title in land claimed by Indians was before this Commission in the case of Pawnee Indian Tribe of Oklahoma vs. United States, Docket No. 10, decided July 14, 1950, and we held that original Indian title could be established only by proof of the Indians' exclusive occupancy and use of a definable area of land. The Commission reached this conclusion after an analysis of a number of decided cases in which the courts have considered this question. United States vs. Santa Fe Railroad Co., 314 U.S. 339, 66 L. ed. 260; Choctaw Nation et al., vs. The United States, 77 Ct. Cls. 377; Wichita Indians et al., vs. The United States, 89 Ct. Cls. 378; Alcoa Band of Tlliamocks vs. United States, 103 Ct. Cls. 494. In the case of the United States vs. Santa
Fe Railroad Co., supra, the court, in interpreting what constitutes "Indian title," said (p. 345):

"Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had 'Indian title' which unless extinguished survived the railroad grant of 1866.

In the instant case the petitioners claim to be descendants of the bands of Chiefs We-you-we-wa, E-hi-gant, and Ow-its, who they contend were the bands of Indians that inhabited, used and possessed the lands when the Malheur Reservation was established in the manner necessary to establish aboriginal title. We do not believe there is sufficient evidence in the record to show that any definable area of land in southeast Oregon was exclusively occupied and used by any band or group of Snake or Piute Indians.

There are a number of general statements in the record by the Indians themselves as well as Government agents in which they refer to the territory in southeast Oregon as "Snake country" or some similar term, but the only reference to the location of any particular band, as distinguished from the entire southeastern area of Oregon, was in the report of Major Otis of the U. S. Army in Oregon when he was enumerating the principal bands of non-reservation Indians in the area. He named "Wo-ah-was" band "as principally roaming on the headwaters of the Malheur river and Stein Mountain country," but in the same report he
further stated his contact with them dated only from October, 1867 and that the "Pluie band of Snake Indians" were scattered over a large area in southeast Oregon and that he did not mean that they occupied the whole of the country but that they ranged through it. This would identify "We-you-was" band as roaming in the vicinity of the land claimed in this action, and his band was on the reservation after it was established, but this is not sufficient evidence to sustain a claim that the area of land in the reservation was continuously occupied and used by petitioners' ancestors to the exclusion of other Indian tribes or bands who also roamed and hunted in the same area, and even claimed and ceded portions thereof to the United States, as was done by the Confederated Tribes of Middle Oregon, the Yahooskin Band of Snakes and the Wellpahpe Tribe of Snake Indians.

The argument is made by counsel for petitioners that Government officials were fully aware of the fact that petitioner Indians were the original exclusive occupants of the territory in which the Malheur Reservation was established, and those officials charged with the duty of selecting the reservation site recommended its location within this territory that had at all known times been inhabited and claimed by these Indians as their own. They contend the Malheur Reservation which was established by Executive order of the President was specifically established for these Snake or Pluie Indians who were recognized as having inhabited the area so designated for them. We do not believe that the evidence sustains this contention. In March, 1871
when Superintendent Meacham recommended an area in southeastern Oregon be withdrawn from the public domain, his recommendation was that it be done "with a view of selecting a site for an Indian reservation on which to consolidate Indians east of the Cascade Mountains in Oregon, excepting those who may select lands in severalty from the reservation on which they are now located," and when the reservation was established and opened there were Snake or Piute Indians from Idaho and Nevada collected and placed on the reservation, as well as the roving bands of Indians in southeast Oregon. It is also clear from the evidence that when the Government officials were selecting a site for the reservation they were concerned solely with the problem of choosing an area of land that would be adaptable for reservation purposes, rather than determining the ownership of land which had theretofore been considered a part of the public domain. We think the evidence fails to establish that the Government recognized or intended to recognize or acknowledge the original Indian title of any tribe or band or group of Indians to the lands in the Malheur Reservation.

The Commission therefore concludes that the petitioners are not entitled to recover on their first claim in Count I of the petition as amended, for the reason that it has not been satisfactorily established by the evidence with any degree of certainty that any tribe, band or group of Snake or Piute Indians actually occupied and exclusively used and possessed any definite portion of the claimed area of land.
at any time prior to September 13, 1882, the date the major portion of the Malheur Reservation was restored to the public domain, nor, was the Indian title of any tribe, band or group of Indians therein recognized or acknowledged by the defendant.

COUNT II

The two claims in Count II are for the value of the Executive order reservation lands and damages for the alleged failure of defendant to comply with the provisions of the unratified treaty of 1868.

The Executive Order Claim

This claim is presented as an alternative claim to recover for the same land claimed under original Indian title in Count I. It is petitioners' position that should the Commission find that petitioners' original Indian title to the lands claimed had not been satisfactorily established, there is still a moral obligation on the part of the defendant to compensate them for a taking of the reservation lands, on account of the reservation having been located in territory claimed by them, and it being established for their exclusive use and occupancy in fulfillment of promises made by the defendant in the unratified treaty of December 10, 1868.

The question of the rights acquired by an Indian tribe in an Executive order reservation was determined by the United States Supreme Court in the case of the Sioux Tribe of Indians vs. United States.
316 U.S. 317. In that case it was held that an Indian tribe had no compensable interest in lands that were simply set apart for them by an Executive order of the President, without congressional authoriza-
tion and ratification, and that, therefore, they had no claim in
either law or equity for the value of the lands when they were re-
stored to the public domain. In a recent case (1949) Hynes vs. Grimes
Packing Co., 337 U.S. 86, the Supreme Court in discussing the rights
acquired by an Executive order reservation used this language (p. 103):

An Indian reservation created by Executive Order
of the President conveys no right of use or occupancy
to the beneficiaries beyond the pleasure of Congress
or the President. Such rights may be terminated by the
unilateral action of the United States without legal
liability for compensation in any form even though
Congress has permitted suit on the claim, Sioux Tribe
vs. United States, 316 U.S. 317; * * *

The decision in the Sioux case would appear to foreclose any
legal or equitable right of recovery by the petitioners on their Ex-
ocutive order claim. We understand, however, from an examination of
the pleadings and brief, that the petitioners, recognizing the effect
of the Sioux case, take the position that the defendant was under a
moral obligation to compensate them for a taking of these reservation
lands that were set aside for the use and occupancy of the Piute and
Snake Indians, and as such claim would be one not recognized by any
existing rule of law or equity, the Commission should therefore
determine it under clause (5) of section 2 of the Indian Claims Com-
mision Act (60 Stat. 1049; 25 U.S.C. 70a) which confers jurisdiction
upon this Commission to determine "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."

The question then in the alternative claim for the land is whether, under the facts and circumstances shown, the action of the defendant in cancelling the Malheur Reservation and restoring it to the public domain, was contrary to "fair and honorable" dealings and therefore placed the defendant under a moral obligation to compensate the Indians for those Malheur Reservation lands.

The petitioners argue that the defendant signed a treaty with their ancestors, and although it was unratified, yet the Malheur Reservation was initiated in consequence of that treaty and they were established upon this reservation in their own country, but were forcibly removed therefrom to the Yakima Reservation and the Malheur Reservation cancelled without their consent and without payment of compensation. These are the facts and circumstances which petitioners say constituted a course of conduct on the part of the United States which, on the basis of "fair and honorable" dealings, placed the United States under a moral obligation to compensate them for the land.

As to the contention that the Malheur Reservation was established in fulfillment of the provisions of the unratified treaty of December 10, 1868, we are unable to find in the record sufficient evidence to support the conclusion that by issuing the various Executive orders establishing the reservation, the Government was fulfilling any express or implied
The treaty of December 10, 1868 never legally bound the Government because it was not ratified by the United States Senate. Blackfoot et al Nations vs. United States, 81 Ct. Clms. 101. In that case the Court of Claims, in considering the question of the validity of an unratified treaty, said (p. 126, 127):

We can find no precedent which would warrant a departure from the reason for the necessity of formal ratification of Indian treaties. Indian treaties were negotiated by duly accredited commissioners of the United States, and Congress in no legislation pointed out to the court ever indicated an intent to entrust the finality of the agreements and surrender the superior right of supervision, amendment, and approval, by way of ratification of the same, until 1871. Until 1871 the Congress refused to expose the Government to the errors of a single person; and ratification of a treaty to render it obligatory was uniformly recognized. * * *

We have yet to find a single instance in the whole course of the relationship between tribal Indians and the Government where the latter has surrendered, either in dealings between itself and the tribes or in dealings of third parties with the tribes, its sovereign right of supervision, control, and approval. All the Indian legislation with which this court is familiar has either directly and expressly determined Indian and governmental rights involved therein or taken the form of agreements between the parties which became effective after submission for approval of the tribe and later ratified by Congress. The doctrine of governmental ratification has been firmly entrenched during the entire course of the Indian relationship.

But even if this treaty of 1868 had been ratified it did not contain any express or implied promise by the defendant to grant these petitioners the Malheur Reservation lands. In fact, we find nothing in the unratified treaty of 1868 that can be construed as an obligation
on the part of the defendant to grant the petitioners exclusive occupancy rights in any specific area of land, much less the lands for which this action is brought.

The facts as described by the official correspondence both before and after the dates of the Executive order of March 14, 1871 first setting aside the large area of public land and the subsequent Executive orders establishing the reservation, indicate that all actions thorouly treated the reservation land as public land, and the sole purpose and reason for creating the reservation was to provide a suitable location where all the various roving and unsettled bands and groups of Indians in southeastern Oregon and adjacent areas, including those Indians who were parties to the unratified treaty of 1868, could be consolidated and controlled. It is true that the Malheur Reservation was designated in the Executive order creating it as a reservation for the "Snake or Piute Indians," but we believe such designation was descriptive only. It created no title to the land but only the right of the Indians to reside thereon during the pleasure of the Government, which right would have undoubtedly continued had they not left the reservation. See The Crow Nation vs. The United States, 81 Ct. Clas. 238, 279.

It is reasonable to assume that all the Indians placed on the Malheur Reservation, including petitioners' ancestors, could have continued to reside there had they not on their own initiative elected to abandon it in June, 1878 at the outbreak of the Nez Percé War, and
with the majority of them under Chiefs Ots and Egan joining the
hostile Bannocks in their war against the white settlers and the
United States Army. So it was unquestionably the actions of these
"hostile" Piutes in that war that were the cause of their being re-
moved by the Government to the Yakima Reservation in Washington, and
not permitted to return to the Malheur Reservation.

It must be admitted that the policy adopted by the Government
with reference to keeping the Piutes at Yakima or permitting their
return to the Malheur Reservation is somewhat obscure. However, it
may be said in justification of the course the defendant pursued in
first granting and then rescinding permission for those at Yakima to
return to the Malheur that it was considered unsafe for the Indians
themselves to return to an area where there was such a strong feeling
of hostility towards them as existed in the vicinity of the Malheur
Reservation. There were also the reports of the Indian Agent at
Yakima to the effect that many of the Piutes there, with the exception
of Leggins' band who claimed not to have taken part in the Bannock War,
had no expectation of returning to the Malheur Reservation, considered
they had forfeited the reservation because of their actions during the
war, and were reconciled to remaining at Yakima permanently. This
attitude seems to have changed when they learned of the efforts being
made by Chief Winnemucca and daughter, Sarah, to procure their return
to the Malheur, and thereafter the majority of those Piutes appear to
have taken no further interest in remaining at Yakima, and began leaving
there in groups and drifting back to Nevada and southeastern Oregon. The record shows that many of them settled on other established Indian reservations in those areas.

As for those Piutes who were not taken to Yakima and were still located in the Malheur area, the Government never did rescind the permission granted them to return and make the Malheur Reservation their home. The record shows that the Malheur Reservation was re-opened in 1878 right after the close of the Bannock War and preparations were made by the Indian Department for its occupancy by the Indians. Every effort was made by Indian Agent Reinhardt to persuade these former Malheur Indians in the area to return and occupy the reservation, but he was unsuccessful, and as a result the Malheur Agency was discontinued on December 23, 1880. And, although the Malheur was continued as an Indian reservation until September 13, 1882, it was never occupied by Indians subsequent to June, 1878, the date all of its Indian occupants abandoned it at the outbreak of the Bannock War, or a period of four and one half years that the reservation was available but not occupied by any Indians. This was the situation with respect to the status of the Malheur Reservation when the President issued the Executive order of September 13, 1882 cancelling the reservation and restoring the lands included in the reservation to the public domain.

We have already decided that the petitioners' claim of original Indian title to the lands included in the Malheur Reservation was not
established by the evidence. And the Executive orders creating the Malheur Reservation did not vest an exclusive use and occupancy or possessory title to the reservation lands in those Snake or Piute Indians who went on the reservation after it was established, but only a right to reside there. So when the Indians all abandoned the reservation at the outbreak of the Bannock War, with most of them joining the war against the Government, and those Malheur Indians who had not been in the war refused to return and occupy the reservation, we are of the opinion that under those circumstances the Government cannot be charged with unfair and dishonorable dealings when the reservation was cancelled and restored to the public domain without compensating the Indians for the value of the land.

The Unratified Treaty

We will next consider the right of petitioners to recover damages for the alleged failure of the United States to carry out certain obligations created under the unratified treaty of December 10, 1868 with the "Snake or Shoshone Indians." Since the Government was never legally bound by the treaty of 1868, because it was never ratified by the United States Senate, we will discuss this question from the standpoint of the position taken by the petitioners in their brief.

The petitioners maintain that although the United States may not have been legally obligated to comply with the provisions of the unratified treaty, nevertheless it was morally obligated to deal fairly and honorably with respect to fulfilling the promises made the Indians
in the treaty, within the meaning of clause (5) of section 2 of the Indian Claims Commission Act, supra. It is contended that the treaty was entered into at the close of a war in which the Indians signing the treaty had been subjugated and driven from lands claimed by them, and the promises were made by the defendant to induce them to keep the peace and they would in turn be furnished a reservation, permanent homes, food, clothing and assistance towards civilization. Those promises they claim were not kept by the defendant, and cite the record presented here as showing that the petitioners were established on the Malheur Reservation, but in consequence of the Bannock War in 1878 they were removed to the Yakima Reservation in Washington where they were improperly cared for by the Government and refused permission to return to their Malheur Reservation, with the result that some of them left Yakima and went on other reservations to live without tribal funds or lands, while those who returned to Burns, Oregon in the vicinity of the former Malheur Reservation were wholly neglected until recent years.

The Government's position is that even if the treaty of 1868 had been ratified and created obligations upon the United States, the evidence fails to show a breach of those obligations, and insists that the Indians breached the treaty by their actions, at least those identified with Chiefs Wo-yu-wah, Egan and Ots.

The evidence shows that prior to the time of the treaty negotiations, the Government had practically no knowledge with reference to these
Indians, or of any particular area or areas being occupied by the various sub-tribes or bands of these Snake or Shoshone Indians, as they were named in the treaty. It was known that they had roamed and hunted in the territory in southeastern Oregon and adjacent areas, and had been continuously hostile to the whites from the time Oregon was established as a territory in 1848.

The treaty was negotiated at the close of an extended war between these Indians and the United States, and it is quite evident that Superintendent Huntington's main objective in making a treaty at that time was to establish and continue amicable relations between these recently hostile Indians and the United States, pending their permanent settlement and civilization. There was no mention made in the treaty of any land as belonging to these Indians, nor does there appear to have been any discussion at that time relative to any land as being occupied and owned by them. The treaty appears to have been simply a solution of a troublesome situation, with both the Government and the Indians making promises designed to be mutually beneficial.

The unratified treaty provided by Article 2 that the Snake Indians acknowledged the dominion of the United States and agreed thereafter to submit to its authority and obey such laws as might be enacted for their government. By Article 4, the Indians agreed that they would reside upon such reservation as might be thereafter allotted to them and obey the authorities placed over them, with the United States guaranteeing protection to the Indians in person
and property while upon such reservation. It was provided in Article 5 that future provisions would be made by the Government for the permanent location of the Snake Indians and for their education, government, food, clothing and for allotments of land in severalty when their advancement warranted it.

While the petitioners rely upon the foregoing provisions of the treaty as expressing the promises made and not kept by the defendant, we think the record discloses that subsequent to the negotiation of the treaty the Government attempted in good faith to establish these Indians on reservations, and its efforts were unsuccessful principally because of the conduct of the Indians themselves. The first attempt to settle then was made by Superintendent Meacham in November, 1869 when he held a long council meeting with seven Snake or Piute Chiefs and tried to persuade them to settle on the Klamath Reservation in southern Oregon, but five of the Chiefs who had signed the 1868 treaty refused to move as requested, declaring they wanted to remain in southeast Oregon. This would be understandable because they were familiar with that area, and yet when the Malheur Reservation was established in this territory, they resided on the Malheur and appear to have been getting along satisfactorily, but they voluntarily abandoned that reservation in June, 1878 at the beginning of the Bannock War and joined the Bannocks in fighting against the United States in violation of their promises under the treaty of 1868. After that war it was the resentment resulting from the part they had taken in the hostilities and depredations against the
whites under the leadership of their Chiefs Egan and Oits, that caused the Government to remove them to Yakima, Washington and settle them on that reservation. At Yakima they were provided with the same care and opportunities of civilization offered on Indian reservations at that time, and at first they appear to have been satisfied and of course could have remained at Yakima had they desired to do so, but they became dissatisfied and began leaving, and by 1884 all of them had voluntarily left Yakima to roam through the country, or had settled on other Indian reservations. A large group of them was received at the Western Shoshone or Duck Valley Reservation located in Nevada and Idaho, where they were assigned lands, and where they or their descendants appear to be living at the present time. One other group entered the Warm Spring reservation in Oregon where they or their descendants also reside at the present time. There is a group of Piutes located near Burns, Oregon which petitioners claim received the poorest treatment. However, in recent years, it is admitted, they have been receiving care and assistance from the Government.

The former Malheur Indians who were not taken to Yakima after the Bannock War could not be persuaded by the Government to return to the Malheur Reservation to reside and the evidence does not disclose where they settled and lived after the Malheur Reservation was abandoned.

It is obvious that the petitioners could not expect to receive the benefits promised under the unratified treaty until they were willing
to reside on reservations and obey the authority established for their government and welfare. It would have called for the use of force on the part of the Government to have placed these Indians on the Klamath Reservation, or to have retained them on the Malheur or Yakima Reservations, and the Government did not attempt that method. It has been held that when the conduct of Indians has been such that compliance with treaty obligations becomes impossible or useless, the Government should be relieved from liability for failure to perform. See Sioux Tribe of Indians vs. United States, 84 Ct. Cls. 16. However, when the petitioners, or their ancestors, finally located on the various reservations in Oregon, Nevada and Idaho, as the record shows most of them did, there is no evidence that they have not received the usual and customary benefits provided by the Government on Indian reservations.

We do not believe the evidence submitted will sustain the petitioners' contention that the Government did not deal fairly and honorably with them in its compliance with any obligations created under the provisions of the unratified treaty. On the contrary, there is shown to have been persistent efforts on the part of the Government to locate these Indians on reservations where they would receive care and support from the Government, and if the Government's efforts were not entirely successful, it was due principally to the conduct of the Indians themselves in not observing the provisions.
of the unratified treaty. In our opinion the petitioners have not established a right to recover on their claim for damages based on the failure of the Government to comply with the provisions of the unratified treaty of December 10, 1868.

It is the conclusion of the Commission that the petitioners are not entitled to recover on any of the claims set forth in Counts I and II of the petition; therefore, the petition is dismissed. It is so ordered.

Chief Commissioner Witt and Commissioner O'Marr concur in the above opinion.

December 29, 1950