

BEFORE THE INDIAN CLAIMS COMMISSION

THE YAKIMA TRIBE OF INDIANS)	
)	
Petitioner,)	
)	
v.)	Docket No. 47
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: May 29, 1953

Appearances:

Paul M. Niebell,
Attorneys for Petitioner.

Leland L. Yost, with whom was
Mr. Assistant Attorney General
Wm. Amory Underhill,
Attorneys for Defendant.

OPINION OF THE COMMISSION

O'Marr, Commissioner, delivered the opinion of the Commission.

The petitioner, The Yakima Tribe of Indians, seeks recovery for the value of four tracts of land allegedly wrongfully excluded by the defendant in fixing the boundary of the area reserved to said Indians by the treaty of June 9, 1855, 12 Stat. 951. These tracts are referred to in petition and briefs as A, or Mabton Area, lying east and south of the east end of the reservation; B, or Walupt Lake Area, lying west of the west line; C, or Ahtanum Area, lying north of the north boundary; and D, lying southwest of the line extending between Mount Adams and Grayback Mountain.

In addition to the above, the Indians demand recovery for the value of the lands within their reserved area, which had been patented to non-Indian settlers and purchasers who had acquired rights under the public land laws prior to March 5, 1904, these rights having been validated by the act of December 21, 1904, 33 Stat. 595, and a small area of land outside the area covered by the 1904 act.

TRACTS B AND D

We shall first consider and dispose of tracts B, the Walupt Lake Area, lying west of the west boundary, and D, lying southerly of the southwest boundary line, since, as we believe, the boundary line affecting these two tracts has been judicially settled.

Prior to the investigation and report of E. C. Barnard, a Government engineer (Cl. Ex. 31), the defendant considered the west boundary of the reservation to be a line starting at milepost 51 on the southern boundary and running northerly along a divide to the headwaters of Reservation Creek on the northern boundary. This line became known as the Schwartz line because it was established by an engineer of that name in 1890, and excluded from the reservation an area west of that line 357,878 acres reserved to said Indians by the 1855 treaty, as will be seen later.

Because of the dissatisfaction of the Indians as to the location of the Schwartz line E. C. Barnard was directed to make an investigation of the boundary of the western part of the reserve and his field investigation was begun in 1898, concluded in 1899, and his report was completed on January 12, 1900. (Cl. Ex. 31). In this

report, as a reference to the map he prepared and which accompanies his report will show, he extended the western boundary in two ways, (1) by a straight line (red) running from the head of the South Fork Ahtanam river to Spencer Point, thence in a straight line to the Hump, east of Mt. Adams, thence in a straight line to Grayback Peak, and from there in a substantially straight line to milepost 51. Within this area lying west of the Schwartz line are 293,837 acres. It apparently was in this area that lands patented to the Northern Pacific Railway Company were located. The Barnard report as to this area was approved by the Interior Department on April 7, 1900, and was located on the ground by the survey of Campbell, Germond and Long, of 1907, and, according to the Secretary of the Interior, it was this area that was claimed by the Indians when Barnard made his investigation (Cl. Exs. 35 and 36 at p. 4 in each), but Barnard thought they were entitled to an additional 64,041 acres. This additional acreage must have been the 16,448 acres in the Ahtanam area and the 47,593 acres west of the Spencer Point - Hump line, shown on the Barnard map.

The other way (2) he extended the line west of the Schwartz line as shown by a green broken line which starts at the head of South Fork Ahtanam River, thence around Klickitat Divide to Spencer Point, thence to Goat Rock, thence along the summit of the Cascade Mountains to the Hump, east of Mt. Adams, and from there on substantially the same line to milepost 51, as previously shown. The lands within the Barnard green boundary line, which he determined to be the correct boundary of the reservation, excluded by the Schwartz line, included the 293,837 acres mentioned above, plus 47,593 acres

lying west of his Spencer Point - Hump line and 16,448 acres in the Ahtanam area, or a total of 357,878 acres.

While the lands lying between the line of the Schwartz survey and the red line of the Barnard survey were considered public lands and passing under the act of July 2, 1864, 13 Stat. 365, the defendant issued patents to the Northern Pacific Railway Company for a large part of those Indian lands, and in 1907 defendant brought suit to cancel all such patents, and the same were cancelled (Def. Exs. 33 and 34; Northern Pacific Railway Co. v. United States, 191 Fed. 947, and 227 U.S. 355), because they conveyed Indian lands and therefore not subject to the railroad grant under the 1864 act.

In this case the Circuit Court, the Circuit Court of Appeals, and the Supreme Court approved the Barnard survey, for, as said by the Supreme Court in its opinion at page 358:

The circuit court accepted the Barnard survey and entered a decree canceling the patents. The decree was affirmed by the circuit court of appeals.

And at page 365 the court further stated:

There is evidence which may be adduced in corroboration of the testimony of the respective witnesses, but we have referred to enough to indicate the character and relative strength of that which makes for or against the contentions of the parties, and, considerately weighing it, we think it establishes the correctness of the Barnard survey. And we have arrived at and announce this conclusion with full sense of the weight which should be given to the action of the Land Department in approving the Schwartz survey and the issue of the patents.

This language in our opinion determined the western boundary line to be along the summit of the Cascade Mountains, which clearly excluded Tract B, the Walupt Lake Area, and the line from the Hump, or from a

point on the Cascades north of Mt. Adams through the Hump, to Grayback Peak, as plainly and effectively excluded tract D as a part of the reserve, since both tracts are outside the green line shown on the Barnard map (Cl. Ex. 31) and which he stated in his report in said exhibit as being the "only logical one,"--that is, the only logical line, that meets the calls of the treaty, which are, as to boundary of the reservation covered by the Barnard report:

Along the south tributary (of Ahtanam or A tah - nam River) to the Cascade Mountains; thence southerly the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satas River from those flowing into the Columbia River; * * *.

Barnard, in his deposition (Def. Ex. 34, pp. 81 and following) taken in the railroad case, testified that the green line shown on his 1900 map was the true line of the reservation and that the straight line between Grayback Peak and the Hump (this is sometimes referred to as Goat Butte) was the correct boundary and that indicated by responsible Indians.

TRACT C - AHTANAM AREA

The treaty call as respects tract C reads:

Commencing on the Yakima River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southerly tributary to the Cascade Mountains. * * *.

The present northern boundary of the reservation after leaving the Yakima River to the forks is not in dispute, for all parties agree that the Ahtanam (Attah-nam) River as far as the forks is the

boundary according to the treaty call. The controversy arises as to what should be considered as the "southern tributary," the petitioner insisting that the defendant erroneously followed the branch shown on modern maps as South Fork Ahtanam Creek (River) when the line should have followed the fork shown on modern maps as the North Fork Ahtanam by way of Darling Mountain to Spencer Point, the argument being that when the North Fork is considered in connection with its junction with Nasty Creek, a small and relatively unimportant tributary of the North Fork, the North Fork becomes the "south tributary" of the Ahtanam and meets the call of the treaty.

A study of the treaty map, that is, the 1855 map (Cl. Ex. 2), will show that the Ahtanum River, after branching off from the Yakima River, continues several miles westerly, and then northwesterly, to a short distance east of a north and south line we assume to be the 121st meridian, west longitude. This stream is clearly designated as "A tah nam R." Just below the letter "n" in the above name is shown a tributary (not named) extending southwesterly through the 121st meridian and there forming two forks which extend into what appears to be the foothills of the Cascade Mountains shown on the map. This tributary conforms fairly well to that shown on modern maps (Def. Ex. 2) which now bears the name "South Fork Ahtanum Creek" and is shown as extending up the northerly of the two forks mentioned above, while the southerly of such forks is now known and designated as "Reservation Creek." There is no doubt in our minds, when the call of the treaty is considered in connection with the treaty map, but that the "southern tributary" of the Atahnam River

is that now known as South Fork Ahtanum Creek. The northern boundary of the reservation which is indicated by dots on the map, plainly follows along that creek to its source, as shown on modern maps (Def. Ex. 2), and does not follow the southern fork, Reservation Creek, as the engineers, Schwartz (Cl. Ex. 31, p. 12) and Barnard (Cl. Ex. 31, pp. 6-9, and maps attached), mistakenly thought. Their error in this respect is understandable since they did not have before them the treaty map because it had been misplaced and was not located until 1930. (Cl. Ex. 5 Sup., p. 6). However, while Barnard, in making his 1900 survey (Cl. Ex. 31, pp. 6-9) seemed to consider the head of Reservation Creek as the head of the "South Fork of the Atanum River," he stated in his report:

Now, in regard to what the Indians expected, they had for several years previous to the treaty been in the habit of hunting in the valley of the Klickitat and in the vicinity of Goat Rocks, which are prominent points, 8,200 feet high, and a good landmark, and where mountain goats were numerous; also of making annual excursions to the vicinity of Walp to gather berries, and a berry patch is considered a very valuable possession by the Indians. The Indians would therefore naturally desire to have these localities included in their reservation.

From the head of the South Fork of the Atanum River, as it does not reach the summit of the Cascade by some 20 miles, the boundary line should then follow the divide around the headwaters of the Klickitat River, passing over Spencers Point to Goat Rocks, which is on the main summit of the Cascade Mountains.

(Spencer's Point is at the end of the present straight boundary line extending westward from the head of Reservation Creek on Cl. Ex. No. 1, and east of Goat Rocks). While Chief Spencer seems to have indicated the straight line, Barnard considered the Klickitat divide as the proper boundary to Spencer's Point, since that divide is a natural

boundary from either the headwaters of Reservation Creek or the South Fork of the Ahtanum River by way of Darling Mountain. The Klickitat Divide does not appear as such on modern maps (Def. Ex. No. 2) but is an extension of the Klickton Divide by way of Mount Darling to the headwaters of Reservation Creek and is plainly shown on Government topographic maps (Def. Ex. 2) as the part of the divide which extends west from Spencer's Point to the summit of the Cascade Mountains at Goat Rocks.

It is, of course, true that all engineers agree that there is a distance of about 20 miles between the headwaters of the south tributary and the summit of the Cascade Mountains, yet the treaty call "thence along the southern tributary to the Cascade Mountains" requires reaching those mountains and this can be done, as we have stated, by following the divide between the headwaters of the South Fork of the Ahtanum, on the east side of the divide, and the headwaters of the Klickitat River (which would include the tributaries thereof), on the west and southerly side of the divide, by way of Darling Mountain and Spencer's Point to Goat Rocks, as stated by both engineers, Barnard in 1900 and Wilkes in 1932 (Cl. Ex. No. 63). The call just quoted does not require a straight line from the head of the south tributary of the Ahtanum to Spencer's Point any more than from that Point to Goat Rocks which, according to engineers, Barnard, Wilkes, Calving and Pecore, follows the divide around the headwaters of the Klickitat River to Goat Rocks. This is a natural boundary, and since the treaty-makers believed, as the map shows, that the "south tributary" of the Ahtanum headed in the Cascade

Mountains it would be a natural and realistic presumption of an intent to follow a natural boundary to close the gap between the headwaters of the south tributary and the main ridge of the Cascades, in fact, the treaty map shows that neither of the two forks of the south tributary of the Ahtanum extend to the summit of the Cascades, so in any event, it was necessary to close a gap and that was to be accomplished, as the treaty map fairly shows, by following a spur of the Cascades to the summit.

We conclude, therefore, after consideration of the evidence, that with respect to the Ahtanum Creek area, Tract C, the boundary line of the land reserved for petitioner by the treaty of June 9, 1855, should have been placed along the stream now known as the South Fork Ahtanum Creek, from its junction with Reservation Creek, to its headwaters, thence along the crest of the divide by way of Darling Mountain to Spencer's Point; that by fixing the present boundary, extending from the junction of Reservation Creek with the South Fork of Ahtanum Creek, thence up Reservation Creek to its source, and thence on a straight line to Spencer's Point, the petitioners have been deprived of a large area of land reserved for them by said treaty for the value of which they are entitled to recover. The part of this area lying north of the present boundary line, extending from the source of Reservation Creek to Spencer Point, was determined by Engineer Barnard to contain 16,448 acres (see map attached to Cl. Ex. 31). To this acreage should be added the acreage of the area lying between the forks of the South Fork of Ahtanum Creek and Reservation

Creek. If the entire area can best be determined by a computation of the entire area, Barnard's computation may be ignored.

TRACT A

That portion of the treaty description involved in the claim concerning the Mabton area, Tract A, reads:

thence (east) along said divide (separating the waters of the Satass River from those flowing into the Columbia River) to the main Yakama, eight miles below the mouth of the Satass River, * * *.

The Satass-Columbia River divide becomes the Columbia-Yakima Divide near the town of Empire, Washington, drainage east of the line between Ranges 21 and 22 flowing into the Yakima River. The range forming this divide, known as the Horse Heaven Hills, extends eastward to strike the Yakima River about 23 miles below the mouth of Satass Creek. It is possible to draw a line south from the Yakima River to the Horse Heaven Hills passing about two miles east of Mabton situated on the township line between Ranges 22 and 23, without cutting across drainage, and it is this line claimant says conforms to the treaty description. The present boundary line runs south from the Yakima River on the range line between Ranges 22 and 23 to the township corner, and then along a line south 38° west to the Horse Heaven Hills.

The dispute centers about the location of the mouth of Satass Creek in 1855. The Yakima River overflows its western bank in the northwest portion of Township 9, Range 22, and for centuries Satass Creek has flowed into it through the resultant flood plain. Both streams have by avulsion changed their channels numerous times, and there exists no positive evidence of where Satass Creek emptied into

