

BEFORE THE INDIAN CLAIMS COMMISSION

THE YAKIMA TRIBE OF INDIANS,)
)
 Petitioner,)
)
 v.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 47

Filed: November 6, 1953

AMENDED FINDINGS OF FACTSTATEMENT

On July 8, 1953, the petitioner filed its motion requesting the Commission to amend its findings of fact in certain respects, and thereafter defendant filed an opposition to petitioner's motion. In both the motion and opposition the parties agree that the findings of fact filed herein on May 29, 1953, should be amended to set forth additional basic findings in support of the ultimate findings. We agree with counsel for both parties and, accordingly, make the following findings of fact which shall supersede the findings filed herein on May 29, 1953:

The Commission makes the following amended findings of fact:

1. The Yakima Tribe of Indians, the petitioner, is comprised of fourteen separate bands or groups of Indians which confederated together and negotiated the treaty of June 9, 1855, 12 Stat. 951, II Kapp. 698, ratified March 8, 1859. It is authorized to institute these proceedings under the Indian Claims Commission Act. By the terms of said treaty and for the purposes thereof said groups were to be considered one nation under the name "Yakima."

2. The United States desiring to negotiate a treaty with said tribes for the cession of a large area of land from said tribes, to confederate them into one tribe of Indians to be known as the Yakama (Yakima) Nation or Tribe, and to confine said tribe to a smaller area, called a treaty council at Walla Walla, Washington Territory, and invited the chiefs of said tribes to attend (Cl. Ex. 15). Governor Isaac I. Stevens and General Joel Palmer represented the United States at this treaty council. The negotiations covered a period from May 28, 1855 to June 12, 1855 (Cl. Ex. 14).

At this treaty council Governor Isaac I Stevens outlined the wishes and desires of the United States, and on June 4, 1855 defined the area to be reserved to the Yakima Tribes as follows (Cl. Ex. 14, p. 23, proceedings):

"The Yakama Reservation to extend from the Attanum river--to include the valley of the Pisco river-- and from the Yakama river to the Cascade Mountains. * * *"

3. At the treaty council, on June 5, 1855, Governor Isaac I. Stevens defined the Yakima Reservation as follows (Cl. Ex. 14, p. 26):

"Here is the Yakama Reservation, commencing with the mouth of the Attanum river, along the Attanum river to the cascade mountains, thence down the main chain of the Cascade mountains south of Mount Adams, thence along the Highlands separating the Pisco and the Sattass river from the rivers flowing into the Columbia, thence to the crossing of the Yakama below the main fisheries, then up the main Yakama to the Attanum where we began."

4. The proceedings culminated in the execution of a treaty between the United States and said Yakima Tribes, dated June 9, 1855, ratified on March 8, 1859, and proclaimed on April 18, 1859 (12 Stat. 951; II Kapp. 698).

By Article 1 of this treaty the Yakima tribes ceded to the United States a large area of land, and by Article 2 thereof, there was reserved for said Indians an area described therein as follows:

"There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to-wit: Commencing on the Yakama River, at the mouth of the Attahnam River; thence westerly along said Attahnam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along 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 Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

"All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; * * *"

The above description of the Yakima reservation at some points along said boundaries did not conform to the topography of the country intended to be reserved to the Yakima tribe (Cl. Ex. 35, p. 5).

5. On June 14, 1855 Governor Isaac I. Stevens transmitted said Yakima Treaty to the Commissioner of Indian Affairs, stating in part that (Cl. Ex. 14, Letter June 14, 1855, Stevens to Comr. Ind. Affs.):

"The large reserve selected is in every respect adapted to an Indian reservation. It is separated from a fine region of country on the Columbia river by a series of divides extending from the Yakima River to the Cascades. It is off from the wagon route to the South over the Cascades---It backs up against the Cascades, affording a fine range for roots, berries, and game. It has almost inexhaustible Salmon fisheries. The reserve furnishes

excellent land for farms, abundance of pine for buildings, good sites for mills, and large ranges for horses and cattle through the entire year. * * * A map of the country ceded and of the reservation accompanies this report."

6. A sketch map of the Yakima Reservation dated June 12, 1855, and signed by Isaac I. Stevens, Governor and Superintendent of Indian Affairs, Washington Territory, one of the Treaty Commissioners for the United States, was prepared and submitted with the Treaty of June 9, 1855. (Cl. Ex. 2). This treaty map became misplaced in the records of the United States soon after it was submitted, and was not discovered until 1930, after attempts were made by the United States to survey and fix the boundaries of the Yakima Reservation in accordance with Article 2 of said Treaty of June 9, 1855, as hereinafter outlined (Cl. Ex. 35, p. 5).

7. The boundary of the lands reserved by the treaty of June 9, 1859, was not surveyed until long after the consummation of the treaty and then only in sections and at different times. The first survey was made in 1861 by Berry and Lodge and was limited to the easterly and southerly part of the boundaries. About 1890 another survey was completed by George A. Schwartz, a deputy surveyor, and accepted by the Commissioner of the General Land Office on October 21, 1891. By this survey the south and west boundaries were established as running from a point on the range line between ranges 22 and 23 E. about a mile north of the town of Mabton and extending southwesterly and westerly to milepost 51 and from there northwesterly along a divide to what he considered to be the headwaters of the South Fork of Ahtanum Creek.

The next survey was made by E. C. Barnard in 1899, who extended the

southerly line established by Schwartz from milepost 51 to Grayback Peak, thence to the Hump (east of Mt. Adams), from there northerly to Spencer Point, thence easterly to the headwaters of the South Fork of the Ahtanum. This westward extension was approved by the General Land Office on April 7, 1900 (See Cl. Ex. 35, p. 4). But Barnard in his report of January 12, 1900 (Cl. Ex. 31, pp. 6-9) found that under the treaty calls the Yakima reserve extended west of the Hump-Spencer Point line to the summit of the Cascade Mountains. This line was marked by an official survey made by Cadastral Engineer Chester W. Pecore and accepted by the General Land Office on August 6, 1926. (Cl. Ex. 31, pp. 4-5).

8. As a result of the above surveys and other official acts, court decisions, etc., the boundary of the Yakima Reservation, at the time of filing this claim, as recognized by defendant, was and now is:

Commencing at the mouth of the Ahtanum Creek down the Yakima River to the range line between ranges 22 and 23 East; thence south along the range line to the southeast corner of Tp. 9 N. R. 22 E.; thence on a line south 38° west to the summit of the Horse Heaven Hills; thence along said summit west to Grayback Peak; thence in a direct line to Goat Butte on the east slope of Mt. Adams, thence northwesterly to the summit of the Cascade Mountains and north along that summit to Goat Rocks; thence east along the summit of the Klickton Divide to Spencer Point; thence easterly in a straight line to the headwaters of Reservation Creek; down Reservation Creek and the South Fork of the Ahtanum Creek to its mouth, and then down the main Ahtanum Creek to the point of beginning.

For a more definite description of such boundary reference is hereby made to Defendant's Exhibit No. 2, in which the boundary is bordered by blue shading, and Claimant's Exhibit No. 1, in which the boundary line is shown by a black broken line.

MAELON AREA - TRACT A

9. In 1861 the Superintendent of Indian Affairs for Washington Terri-

tory made an agreement with Thomas F. Berry and James Lodge (Cl. Ex. 21) to survey that portion of the boundary of the reservation from "the 'divide' between the waters of the Klickitat and Pisco rivers" to a point on the Yakima River, defined in the treaty as follows:

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

In making their survey, Berry and Lodge attempted to find a point eight miles down the Yakima River below the mouth of Satus Creek ("Satass River") and to proceed from that point by surveying in the reverse direction from that of the description in the treaty.

10. The only survey that Berry and Lodge were to make was that of the southern boundary from a point "on the Yakima River, where the 'divide' separating the waters of the Satus River from those flowing into the Columbia River juts against said Yakima river," southerly and westerly until the "divide" between the Klickitat and Pisco Rivers should be reached. However, the instruction given by the Superintendent of Indian Affairs for Washington to Berry and Lodge stated that if "the intersection of the said "divide" with the Yakima River was not "plain and apparent" they should start at the "mouth of Satus River, and run thence eight miles down the Yakima river and from this point proceed as previously directed." (Cl. Exs. 20 and 21, Def. Ex. 7).

The course down the Yakima River from the mouth of Satass River (or Satus Creek) was not to form a part of the boundary survey. It was run for the purpose of determining the starting point of the boundary survey.

11. In reporting the courses and distances on the survey of the southern boundary that they were requested to make, Berry and Lodge also listed the courses and distances of a purported survey down the Yakima River from the mouth of Satus Creek for the purpose of determining the starting point for their boundary survey. (Cl. Ex. 20; Def. Ex. 7; R. 338-350). However, no physical evidence of the starting point, turning points or ending point of the Berry and Lodge survey has existed for many years, and the alleged courses and distances cannot be harmonized with any reasonable interpretation thereof as related to the known course of the Yakima River. There is nothing in the Berry and Lodge field notes that shows a connecting line from the mouth of Satus Creek to any natural object that can be identified today. There is no convincing evidence of the location of the point that Berry and Lodge considered to be the appropriate starting point for this survey of the southern boundary of the reservation. The most satisfactory determination of the initial point on the Yakima River for the southern boundary of the Yakima Reservation was made by Surveyor Harry A. Clarke in 1885. (Cl. Exs. 26-28; Def. Ex. 16; R. 393-397).

12. The natural habit of minor tributaries entering a river through a flood plain is to migrate downstream, not upstream. (Kidder, R. 566-568). The witness Calvin apparently failed to take this fact into consideration in formulating his theory regarding the location of the mouth of Satus Creek in 1861 (Kidder, R. 567), whereby he placed it further downstream in 1861 than it is known to have been in 1874 and 1885, when it was in Section 8 of T. 9 N., R. 22 E. (Def. Ex. 1; Calvin, R.

181-183).

13. The first survey of the west or right bank of the Yakima River under the direction of the General Land Office was made in 1874 by T. M. Reed under a contract of June 27, 1874. This contract authorized a survey and subdivision of the part of T. 9 N., R. 22 E. lying west of the Yakima River. This survey involved the meandering of a portion of the west or right bank of the Yakima River. The field notes of this survey, which are a part of the records of the General Land Office, show that after Reed had determined the point where the eastern boundary of T. 9 N., R. 22 E., intersected the Yakima River, he made a meander survey of the west bank from the said intersection to the mouth of Satus Creek, which he located near the center of Section 8 of the said township, and found such meandered distance to be 994.70 chains or 12.43 miles. Reed had no instructions to ascertain a point eight miles down the Yakima River and apparently made no effort to determine the location of such a point. (Def. Ex. 1, 11, 12, 15; R. 183; 386-387, 391-393).

14. In 1885 Harry A. Clarke made a sectionalized survey of T. 9 N., R. 22 E., and also meandered the west or right bank of the Yakima River, under instructions from the General Land Office. He submitted complete field notes of the survey and also a plat of the township. Clarke found the mouth of Satus Creek just north of the center of Section 8, T. 9 N., R. 22 E., at substantially the same point where it was found by T. M. Reed in his survey in 1874. Starting from the point where the eastern boundary of township 9 was intersected by the Yakima River, Clarke meandered the course of the Yakima River,

following the west or right bank of the stream. He found the distance from the said intersection to the mouth of Satus Creek to be 793.35 chains or 9.91 miles. The fact that Clarke found the distance between the mouth of Satus Creek and the point on the east boundary of T. 9 N., R. 22 E., to be only 9.91 miles, wherein Reed, in 1874, found the distance between the same points to be 12.43 miles was apparently due to the fact that Clarke took longer "shots" and did not meander the river as accurately as Reed had. (Cl. Ex. 12; Def. Exs. 13, 14, 16; R. 390-394).

15. The instructions to Harry A. Clarke provided also for the survey of the southeastern and southern boundary of the reservation, starting from a point eight miles down the Yakima River from the mouth of Satus River (or Creek), which point was stated by the general Land Office to be located near the common corner of Sections 21, 22, 27 and 28 of T. 9 N., R. 22 E. Clarke found that if the distances of all meander lines were added, the eight miles from the mouth of Satus Creek would fall at the point described by the General Land Office letter of instruction--more than three miles in a direct line west of the east boundary of the township. However, he stated that if only the general courses were taken and some of the bends in the river ignored, the eight miles down stream from the mouth of Satus Creek would end 12.2 chains (or 805.2 feet) west of the east line of the township. Since Clarke found that this range line between Townships 22 and 23 West, had for some time been considered the east boundary of the reservation (or at least the whites had not settled west of it), he recommended that the range line, which was 8 miles, 12.2 chains down the river

from the mouth of Satus Creek, be accepted as the starting point for the southeastern and southern boundary. Clarke therefore began his boundary survey at the corner of fractional sections 25 and 30 between Ranges 22 and 23. (Cl. Exs. 27-28; Def. Ex. 16; R. 363-364).

16. From a point in the western part of T. 6 N., R. 16 E., there is a divide that separates the waters flowing into Satus Creek, a tributary of the Yakima River, from the waters flowing southward toward the Columbia River which do not flow into the Yakima River. This divide extends easterly to about the center of T. 7 N., R. 21 E., where this ridge, known as Horse Heaven Hills, ceased to form the divide between the Satus Creek and streams flowing southerly into the Columbia River. From about the center of T. 7 N., R. 21 E., the main ridge extending northeasterly becomes a divide between waters that flow northerly into the Yakima River east of the Satus Creek watershed and the waters flowing in a southerly direction to the Columbia River. The drainage of the major portions of T. 8 N., R. 22 E., is into the Yakima River east of the watershed of Satus Creek. Only a small portion of the southwestern quarter of T. 9 N., R. 22 E., and a small area in the northwestern part of T. 8 N., R. 22 E., lie within the Satus watershed.

17. The straight lines extending south slightly more than a mile from the intersection of the line between Ranges 22 and 23 and the Yakima River and thence southwesterly to a point near the center of Section 6, T. 7 N., R. 22 E., as established by Harry A. Clarke in 1885 for the southeastern boundary of the Yakima Indian Reservation are located some distance east of the easterly limit of the watershed of Satus Creek. This location of the boundary represents an interpre-

tation of the treaty of 1855 favorable to the Yakima Tribe. (Calvin, R. 194-195; Kinney, R. 371-374, 380-384, 391-398; Kidder, R. 571-572. See Cl. Exs. 11, 12, 26, 27, 28; Def. Exs. 8, 9, 10, 15, 16, 17).

We, therefore, find that the present boundary as it affects Tract A is in conformity with the treaty description and that Tract A is not within the boundaries of the Yakima Reservation.

AHTANUM AREA - TRACT C

18. The northern boundary of the Reservation is fixed by the treaty as:

"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 southern tributary to the Cascade Mountains; * * *"

The "Attah-nam" river is now spelled "Ahtanum", and is generally referred to as a creek on modern maps.

The Ahtanum river at a point some distance west of its mouth has two main forks designated on modern maps as the North and South Forks of the Ahtanum. The natural flow of the North Fork has always been much greater than that of the South Fork and, accepting the well established definition of the term "tributary" as being a feeder of a larger stream, the South Fork fits the treaty call: "thence along the southern tributary to the Cascade Mountains." The treaty map of June 12, 1855 (Cl. Ex. 2) plainly shows two un-named forks of the Ahtanum, one extending northwest and the other southwest, and the treaty boundary, shown by a dotted line, as plainly shows the boundary line to extend along the southernmost fork to two branches of that Fork, one extending northwesterly and the other extending southwesterly,

and thence along the northwesterly of such branches to the Cascade Mountains, thus clearly eliminating the southwesterly of such branches, now known as Reservation Creek, as a boundary line.

Neither the North Fork nor the South Fork of the Ahtanum reaches the summit of the Cascade Mountains, however, the treaty makers evidently thought the South Fork did, for the treaty map shows that both prongs or branches of the South Fork extended into spurs of the Cascades. The North Fork, however, is not shown by the treaty map to extend to those mountains. A natural boundary is indicated by both the treaty call and the treaty map for the boundary extending from the Yakima (Yakama) river to the Cascade Mountains.

19. Engineer E. C. Barnard made an official examination of the western boundary of the reservation and made his report on January 12, 1900. (Cl. Ex. 31, pp. 6-9 and map No. 1689 attached to the exhibit). Concerning the northern boundary from the head of the South Fork (tributary) of the Ahtanum, he stated:

From the head of the South Fork of the Ahtanum 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; * * *

The area lying north of the headwaters of the South Fork-Spencers Point line is shown by a green broken line on his map (No. 1689) and follows a natural boundary between those points, and then to Goat Rocks on the Cascade Mountains. The area between the present line of the reserve and the line determined by Barnard comprises 16,448 acres which are outside the present boundary. The northwest corner of the western

boundary of the reservation as established by Schwartz in 1890 was the headwaters of the stream then designated by him as the South Fork of the Ahtanum. It seems probable that what he and the Interior officials (and Barnard) have referred to as the South Fork was in reality Reservation Creek (now shown on the maps as the south tributary of the South Fork), for the present boundary runs along Reservation Creek to its headwaters and thence to Spencers Point. (Def. Ex. 25, p. 3). Some administrative officials of Interior refer to the headwaters of the South Fork of the Ahtanum as the northwesterly corner of the reserve as fixed by Schwartz (see Def. Exs. 23 and 28) while others refer to the headwaters of Reservation Creek as such point (see Def. Ex. 25, pp. 2-3), and the Indians as late as 1929 referred to Reservation Creek as forming part of the then northern boundary, although they disputed its correctness. (Def. Ex. 29). The treaty map shows that the "southern tributary" of the Ahtanum forks a short distance west of the 121st meridian. (Cl. Ex. 2). Modern maps (Def. Ex. 2) show these same forks (west end of the South Fork and Reservation Creek) branching at a point about 1½ miles west of the 121st meridian. So the north boundary was intended to follow the northern of those two branches, and not Reservation Creek, the southern of the two branches. We, accordingly, find that the boundary line should have been established along the stream now known as the South Fork of the Ahtanum River to its source, thence along the divide around the headwaters of the Klickitat River over Spencer's Point; that it should not have been established as running along Reservation Creek.

p. 4).

The line from the Hump (Goat Butte) northwesterly to the summit, or perhaps along the summit, of the Cascades was officially marked in 1920-24 by Engineer Chester W. Pecore and accepted by G.L.O. on August 6, 1926. So the entire line questioned by the Indians and which forms the northerly boundary of Tract D has been approved by the administrative officials of the Government and by the Congress.

24. The boundary line above referred to was involved and determined by the Circuit Court, Eastern District of Washington, 112 C.C.A. 359 (Def. Exs. 33, 34), the Circuit Court of Appeals, 191 Fed. 947, and the Supreme Court, 227 U.S. 355, in the case brought by the United States v. Northern Pacific Railway Company to annul patents issued to the Railway Company for lands in the reservation belonging to the Yakima. The Supreme Court in affirming the decision of the Circuit Court of Appeals, which had affirmed the decree of the Circuit Court, said this:

"The special controversy in this case is the location of the western boundary of the reservation."

And with respect to the Barnard Survey, the Court said:

"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."

Thus, said courts necessarily determined the southwest boundary of the reservation as running in the straight line from Grayback Peak to the Hump (Goat Butte).

and by virtue of said act and the issuance of such patents petitioner has been deprived by defendant of its land to the extent conveyed by said patents. The lands so conveyed are set forth and described in Claimant's Exhibit No. 70.

28. After the passage of the 1904 Act and before the Pecore Survey officially marked the western boundary of the reservation along the summit of the Cascade Mountains, the defendant conveyed by patent to the Northern Pacific Railway Company 346.44 acres of land belonging to petitioner lying in the area between the summit of the Cascade Mountains and the Spencer Point -- Hump (Goat Butte) line, and thereby deprived petitioner of that much of its lands. (See Cl.Ex. 71).