

the Coeur d'Alene Tribe has claimed, possessed, used and occupied exclusively the territory as described in Finding 11. The area claimed would amount to approximately four million acres less some 600,000 acres set aside as a reservation for the tribe by executive order in 1873. (Pet. Ex. 95).

Since the first white contact in 1806, when Lewis and Clark were making their western exploration, the Coeur d'Alene have always been located by fur traders, explorers, missionaries and government agents in the vicinity of Coeur d'Alene Lake and its tributaries. In 1842, Father de Smet ordered a mission established among the Coeur d'Alene and Father Point, the first missionary to reside with them, found them occupying twenty-seven different localities within the area of the lands now claimed by the tribe. Father de Smet in 1858 described the territory of the tribe from north to south and east to west as embracing 100 miles in each direction. In 1859, the same missionary said that taking Coeur d'Alene Lake as a central point their country extended fifty miles to every point on the compass. (Finding 4).

Governor Isaac Stevens, in 1854, while on his expedition to locate a railroad from the Mississippi to the west coast, reported the tribe as living "on the upper part of the Coeur d'Alene River, above the Spokanes, and around the lake of the same name." Governor Stevens on this journey made many treaties with the neighboring tribes but due to an Indian outbreak failed to negotiate a contemplated treaty with the Coeur d'Alene. As the years passed, whites began to settle in Coeur d'Alene country. In 1867, an executive order reservation was set side for the Coeur d'Alene

but the Indians did not learn about this for several years. In 1873, an agreement was entered into with the tribe (Finding 6) under which the tribe agreed to relinquish all right and title to the lands claimed by the tribe outside of the reservation agreed to be established by said agreement. This agreement was never ratified but the reservation was set aside by executive order of November 8, 1873 (Def. Ex. No. 3). Nothing further was done to secure a cession of the lands claimed by this tribe, which in 1885 petitioned the Government to send a commission to treat with them for their lands outside the 1873 executive order reservation (Finding 7), until an agreement was concluded with the tribe by the Northwest Indian Commission on March 26, 1887. (Finding 8). By this agreement, the tribe, under Article 2, ceded, granted, relinquished and quitclaimed all right, title and claim to all lands outside the reservation. Unlike the unratified agreement of 1873, the 1887 agreement did not describe the lands ceded but the Commission referred to the 1873 agreement and the tribe's petition of 1885 for the description of the lands in reporting the 1887 agreement. (Finding 8).

In the early part of the twentieth century, James A. Teit made a study of the Coeur d'Alene. Although Teit was not an ethnologist by education, his work was edited by Franz Boas who became known as "the father of American Anthology." Teit wrote that the country occupied by the tribe was almost entirely in what is now the State of Idaho, with a small part extending into Washington. He said "they held all the waters of Spokane River from a little above Spokane Falls to the sources, including Coeur d'Alene Lake and all its tributaries. To the southeast

their territory extended across the head of the Clearwater, a tributary of the Snake River. Their eastern boundaries were the Coeur d'Alene and Bitter Root Mountains." (Finding 5).

Petitioner contends it has proven Indian title in two ways to the lands claimed by the tribe and described in the tribe's petition of 1885 (Finding 7). First, petitioner urges that it has shown that it has proven title by a factual showing that the tribe used or occupied a definable area, and secondly, by showing a recognition or acknowledgment of aboriginal title by the United States that the tribe had such title. Defendant, on the other hand, urges that the proof does not sustain Indian title to all the lands claimed by the tribe and that there was no recognition of Indian title in the tribe by the United States to the area claimed.

Use and Occupancy

In support of the claim that the Coeur d'Alene Tribe had exclusively used and occupied the area described in Finding 7, petitioner introduced into evidence historical documents, such as the writings of the missionaries, fur traders, explorers and government agents. Many of these documents and maps are cited in the findings. All of these prove beyond doubt that the Coeur d'Alene were a semi-sedentary people with a tribal organization and that the tribe from time immemorial held, used and occupied a given area of land within what are now the States of Idaho and Washington. Nor does the defendant deny that the Coeur d'Alene were using and occupying lands in the vicinity of Coeur d'Alene Lake at the first white contact and ever since -- but would limit the tribe to the area within the 1873 reservation.

In addition to historical documents and maps which were introduced through the testimony of Father William N. Bischoff (Tr. 12-149, 292-392), historian, the petitioner called upon Dr. Verne F. Ray, a recognized authority on the plateau tribes, and Dr. Alfred William Bowers, anthropologist.

Dr. Ray, an authority on the tribes in the plateau area, has had published several ethnological works on the area including "Tribal Distribution in Eastern Oregon and Adjacent Regions," (1938), (Pet. Ex. 120-extracts): "Cultural Relations in the Plateau of Northwestern America" (1939), (Pet. Ex. 121 - extracts). In Petitioner's Exhibit 119, at page 103, Dr. Ray has a map showing the native territorial distribution in the northern plateau about 1850. On this map the Coeur d'Alene territorial boundaries are shown and they appear to conform generally with the boundaries on petitioner's Exhibit 122, a map showing Ray's boundaries in red and Bowers' boundaries in green. Dr. Ray testified that the only change he made on petitioner's Exhibit 122 as compared to his early map appearing in petitioner's Exhibit 119, was with respect to the southwestern boundary. Dr. Ray testified that the area enclosed on petitioner's Exhibit 122 has a natural boundary only on the eastern side where the Bitterroot Mountains are found. The witness stated his conclusions were based primarily on ethnological research conducted among informants of the Coeur d'Alene and neighboring tribes. (Tr. 524-525).

Dr. Bowers, an anthropologist, also testified for the petitioner. On petitioner's map, Exhibit 122, Bowers' boundary lines appear in green and conform to Ray's line, generally, with one major exception -- the

southern boundary line. In response to a question by petitioner's counsel regarding this difference, (Bowers' line is considerably north of Ray's line) Dr. Bowers testified (Tr. 560-561) that in studying the Nez Perce Tribe he found that those Indians recognized the difference between the drainages from the St. Joe River and the drainages to the Clearwater.

With respect to this southern boundary line, Spinder (Def. Ex. 13, p. 33) in his writing "The Nez Perce Indians" gave the northern boundary of the Nez Perce as following "the divide at the heads of the short streams flowing into Snake and Clearwater rivers till it reached the Bitterroot Mountains." Although Ray's map in petitioner's Exhibit 119 at page 103 shows the southern boundary to cut across far down the North Fork of the Clearwater River, his maps in his later publications, petitioner's Exhibits 120 and 121, appear to show the Coeur d'Alene southern boundary north of the Clearwater watershed. The Commission has before it a claim of the Nez Perce Tribe for its aboriginal lands, Dockets Nos. 175 and 180, and a claim by the Kalispel, Docket No. 94, which include areas conflicting with those of the Coeur d'Alene, however, as stated in Finding 9, the Coeur d'Alene have removed the conflicts by correcting the boundaries of the area claimed by them.

Although the Indians in the unratified agreement of 1873 indicated Steptoe Butte as the landmark for their southwestern boundary. Dr. Ray, on his map, (Pet. Ex. 122) bends the line further to the west to Colfax, Washington. The tribe in its petition in 1885 (Finding 7) claimed west of Steptoe Butte. There is evidence, however, to indicate that the area around Colfax was not exclusively used and occupied by the Coeur d'Alene.

Spier, in his "Tribal Distribution in Washington" (1936), quoted Teit: "Colfax was considered to be in Palous country, at least, in later days, but was to some extent within both Coeur d'Alene and Nez Perce spheres of influence." (Def. Ex. 13, p. 39). Petitioner's witness, Dr. Bowers, also placed the southwestern boundary to the east of Colfax. (Pet. Ex. 122 - green line).

Dr. Ray and Dr. Bowers in drawing the northern boundary line on the map, (Pet. Ex. 122) includes a portion of the lower tip of the foot of Pend Oreille Lake. Petitioner's witness Ray (Tr. 480) testified that it would be ridiculous to say that the Coeur d'Alene came to the tip of the lake and made no use of it and that the Kalispel Indians recognized the utilization of the lower tip of the lake by the Coeur d'Alene. In Docket 94 before this Commission, however, the Kalispel Tribe has presented evidence in support of their claim of aboriginal possession which includes to the foot of Pend Oreille Lake. (See Pet. Ex. 63 in that case -- a map outlining the alleged boundaries of the Kalispel). In the Kalispel hearing, Dr. Allan H. Smith, ethnologist, testified (Tr. 113 of that case) that the Kalispel's had an important winter village at the southern tip of the lake and that the Coeur d'Alene "used to hunt up to the lake but they never wintered there and had moved southward back into their own territory, more deeply into their own territory. The overlap map indicates that the Kalispel claimed territory to the south of the southern tip of the lake. The Coeur d'Alene hunted up to that point in the winter and turned and went back. However, the Upper Kalispel did have a winter village at that point as indicated on the overlap map, Exhibit 64." Dr. Ray also

testified in the Kalispel case that "the degree to which that exhibit [showing the boundaries of the Kalispel] differs from my earlier mapping, I would accept, and it is my opinion that this is accurate, the more accurate of the two." Mooney's map (Def. Ex. 13, following p. 41), would indicate that the Kalispel territory extended south of the foot of Pend Oreille Lake. As stated above, these conflicts have been removed by the Coeur d'Alene.

In the northwestern corner of the Coeur d'Alene territory the limit of the tribe's use and occupation may be set with reasonable accuracy. The petitioner claims westward to the point on the north bank of the Spokane River where Antoine Plant formerly resided and operated a ferry. The most westerly permanent camp of the tribe on the river was near Spokane bridge about twenty miles from Spokane City, and Teit placed the boundary between the Spokane and Coeur d'Alene a few miles below the most western camp which would be in the vicinity of Plant's ferry. (Def. Ex. 13, p. 126). Defendant's ethnologist, Chalfant, locates Plant's place as being five miles east of the town line of the city of Spokane near Millwood, Washington. (Def. Ex. 13, p. 108).

The eastern boundary, according to Ray, is the only natural boundary involved in this case. Teit (Finding 5) said "their [Coeur d'Alene] eastern boundaries were the Coeur d'Alene and Bitter Root Mountains."

Defendant would limit the concept of "use and occupancy" to "the area to which they went consistently and which they exploited nearest to their permanent villages." (Def. Br., p. 43). In support of its position defendant introduced the written report of Stuart A. Chalfant,

ethnologist, (Def. Ex. 13) and Mr. Chalfant testified as an expert in support of his conclusions. Briefly, Mr. Chalfant prepared a map, Def. Ex. 13-A, on which he located the villages of the Coeur d'Alene tribe. On this map he designated with red cross-hatching what he called "nuclear areas" which were the more accessible areas adjacent to the permanent villages. There are three such "nuclear areas," so-called, shown on Chalfant's map. Counsel for defendant states (Def. Br., pp. 44, 45) that these areas contain "238,000 acres or about 500 acres to each Indian, even women and children." Defendant's counsel urges: "Most of their food, the fish and the small game were found near the villages, in the lakes, rivers and valleys. Under these circumstances, it would seem preposterous that this small group of people could use and occupy (using any reasonable interpretation of those terms) any greater area than that outlined by the solid red lines on defendant's Exhibit 13-A. Since this area is much less extensive than the area which was assigned to them as a reservation by the March 26, 1887 agreement there is no basis for the claim asserted herein."

Defendant's ethnologist, however, testified (Tr. 654) that the villages within the nuclear areas were not the only villages of the tribe. Chalfant said they did have summer camps such as at Desmet and Tekoa, Washington, outside the nuclear areas. Chalfant also indicates in his map (Def. Ex. 13-A) by a broken red line the subsistence area of the Coeur d'Alene which encompasses much more territory than the nuclear area. It is these "primary subsistence areas," according to the witness, "which determine the lands held in common by all the Coeur d'Alene and define the extent

of their aboriginal territory. By that I mean it defines the extent of the territory they used in their yearly rounds, and it is the same territory lying not only within their nuclear areas of habitation, but the areas lying between these areas of habitation that were used in common by the bands of all these various groups." Chalfant further testified "this is not to be construed as implying that they never ranged beyond these basic subsistence areas, but it is ethnologically sound to limit their territory to those regions which have been, in the course of their known history, essential to their existence as a unified ethnic group." So, we see that witness Chalfant recognized that the Coeur d'Alene's aboriginal territory included more than just the nuclear areas and on cross-examination (Tr. 736) he testified: "I am not stating that the dotted red line that I made is indicative of the extreme range of the Coeur d'Alene. I am pointing out that it was the interrelation of many factors and since they trapped and fished up to head navigation and around the rapids [of St. Joe River], that that is a very feasible point we could see in relation to the terrain and topography of the mountains surrounding the St. Joe River, from there, or to assume that is about the extent of their continual use and occupation. This does not mean they never used areas beyond that." (Underscoring supplied).

To limit the Coeur d'Alene Indian title to the so-called nuclear areas, as contended for by defendant, based upon the testimony of defendant's witness, would, without even considering petitioner's experts and documentary material, result in adopting a theory of use and occupancy which is unrealistic and contrary to the weight of the evidence.

Based upon the documentary material, the writings of the ethnologists and others of record, and the testimony of the witnesses, it is reasonable to say that the Coeur d'Alene Tribe has proven that it has from time immemorial exclusively used and occupied the area of land set forth within the boundaries fixed in Finding 11.

Defendant further contends that the petitioner does not constitute an aboriginal entity insofar as the use and occupation of land is concerned. Defendant's position is that the Coeur d'Alene Indians as an ethnic group was made up of separate autonomous villages or bands which in themselves held tenure, if it existed, and that the present Coeur d'Alene Tribe was not a legal or political entity and therefore it was incapable of holding an interest in property.

This theory is based upon the testimony of witness Chalfant (Tr. 661-672), wherein he interprets the works of Teit and Ray to conclude that the villages were politically autonomous except in times of crisis when they would band together to form a larger division. Cohesion, he felt, among the Coeur d'Alene was more social or ethnic than political.

There is no merit to this theory advanced by the defendant and its witness. Teit, with whom Chalfant disagrees, found a tribal organization existed (Tr. 669) and Dr. Ray in his "Cultural Relations in the Plateau of Northwestern America" (1939), (Pet. Ex. 121, p. 11) ascribed to the Coeur d'Alene a tribal organization. It is noted also that all the documentary evidence of the record bearing upon the subject indicates that the Coeur d'Alene was a tribal entity capable of holding Indian title by use and occupancy and that it was such entity that the agents and commissioners of the United States dealt with over a long period of time.

Recognition or Acknowledgment of Aboriginal Title

Petitioner further urges that it has proven Indian title to the lands contended for by showing a recognition or acknowledgment of such title by the United States in the tribes. Counsel for petitioner states that governmental "recognition" of Indian title may be established by a common-sense consideration of all transactions between the parties and that it is not necessary "that the government wave a formalized sovereign wand as a basis for recognition," citing Crow Indians v. United States, 3 Ind. Cls. Comm. 147, and Miami Tribe v. United States, 2 Ind. Cls. Comm. 617.

Defendant in its brief objects to the petitioner's requested finding that there was a recognition of aboriginal title in the tribe. Defendant points out that the agreement of March 26, 1887, upon which the claim is based, contains no description of a ceded area. Article 2 of said agreement provided that the tribe "hereby cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have, or ever had, to all lands in said territories and elsewhere, except * * * their present reservation * * *." (Finding 8). This article, defendant urges, indicates a quitclaim and is in no way a recognition or acknowledgment of interest in any specific area of land. Defendant's counsel seeks to distinguish the Crow case, supra, since in that treaty the territory involved had been described in the Fort Laramie Treaty and therein designated as the land of the Crows. As to the Miami case, supra, defendant points out that the treaty contained a provision whereby the United States engaged to consider the Indians as joint owners of all the country on the Wabash and its waters.

As previously noted, no effective agreement was made with the Coeur d'Alene Tribe until the Agreement of March 26, 1887 (26 Stat. 939). Earlier, an agreement had been made, but never ratified, with the Indians on July 28, 1873, whereby the tribe therein agreed to relinquish all their right and title to all lands claimed by the tribe outside the reservation within boundaries described therein. (Finding 6). In 1885, the tribe petitioned the Government to send a commission to treat with them for their lands outside of the 1873 reservation established by executive order and in the petition set forth the boundaries of the lands they claimed to own. (Finding 7).

In March 1886, the United States Senate passed a resolution (Pet. Ex. 101, p. 2) directing the Secretary of the Interior to furnish the Senate with all correspondence dealing with the Coeur d'Alene, and other Indians, in regard to the cession or quitclaim by any of said Indians to the United States of any lands "alleged to be heretofore owned or claimed or occupied by them * * *." The Commissioner of Indian Affairs inferred that only recent correspondence bearing upon the Indians' claim for indemnification for lands formerly held and occupied by them which the Indians claimed they had never relinquished, was desired by the Senate. The Secretary of the Interior forwarded papers dating from 1883 in which various persons urged a settlement of the land claims of the Indians, including the petition of the Coeur d'Alene of 1885. (Pet. Ex. 101).

The result of the action of the Senate was the inclusion of an item in the Act of June 30, 1887, (24 Stat. 44) authorizing a treaty to be made with the Coeur d'Alene Indians and others as cited in the act.

Under the provisions of this act, commissioners were appointed who negotiated the Agreement of 1887 with the Coeur d'Alene. The commission was known as the Northwest Indian Commission.

On March 23, 1887 (Pet. Ex. 106, p. 60), the council with the Coeur d'Alene opened. In addressing the tribe, Judge Wright, one of the commissioners, said: "It is also known that you claim to have possessed a large body of land, that much of it has been settled by white people, that you had never ceded it away, and that you have received nothing for it." A little later, Judge Wright had this to say:

The paper which I hold in my hand [Senate Document] sets out fully your claim; in that petition you say your boundary was as follows: Commencing at Steptoe Butte, runs northwest to Antoine Plants on the Spokane River, thence to the Pend d'Oreille Lake, thence to the summit of the Coeur d'Alene Mountain, thence south to the most southern thereof whence flows the waters of the Palouse River, thence west along the southern rim of the water-shed of the Palouse River to the beginning.

We wish to do right about the claim; that was one purpose for which we were sent to you. * * * (Pet. Ex. 106, p. 62).

In reporting the agreement, the Commission, however, said that "the lands which they [the Coeur d'Alene] claimed, and held by occupancy, contained about 4,000,000 acres. They had the same title to it which other Indians had, that is, the fee in the United States, and the occupancy, with all its incidental rights, in the Indians. The right of the Indians to their occupancy is as sacred as that of the United States to the fee." (Finding 8). The Commission also reported that it had before it during the negotiations the 1885 petition and the unratified agreement of 1873, in which the description of the boundaries substantially agreed.

In transmitting this report to the President, the Secretary of the Interior said: "The Coeur d'Alene Indians, in the agreement made with them, relinquish to the United States, for the consideration of \$150,000, to be expended for their benefit, etc., all right, title, and interest they now have or ever possessed to and in any lands outside the limits of their present reservation in the Territory of Idaho; * * *." The Commissioner of Indian Affairs report on the agreements made by the Northwest Indian Commission accompanied the letter of the Secretary, and said in part:

These Indians [Coeur d'Alene] also lay claim to a large tract of country in Washington, Idaho, and Montana Territories, by right of original occupancy, and, as we have seen, the act authorized negotiations with them "for the cession of their lands outside the limits of the present Coeur d'Alene Reservation to the United States."

By the terms of the agreement made with them, the Indians cede and relinquish to the United States all right, title, and interest they now have or ever possessed in any lands outside the limits of their present reservation.

Prior to ratification of the 1887 agreement, Congress authorized (25 Stat. 1002) another negotiation to be made with the tribe for the purpose of purchasing some 184,960 acres on the northern part of the reservation. The Senate had previously directed the Secretary of the Interior to ascertain the feasibility of throwing open any portion of the reserve to occupation and settlement under the mineral laws of the United States. The Secretary referred the matter to the Commissioner of Indian Affairs who advised that the reservation might be materially diminished but only with the full and free consent of the Indians and the payment of proper compensation to them. In so advising the Secretary, the Commissioner

said: (Pet. Ex. 109, p. 24).

In conclusion I will state that in my opinion these Indians have all the original Indian rights in the soil they occupy. They claimed the country long before the lines of the reservation were defined by the executive order of 1873, and the present reservation embraces only a portion of the lands to which they laid claim. This claim has been recognized in various ways and at sundry times, and the last Congress authorized the Secretary of the Interior to negotiate with them 'for the cession of their lands outside the limits of the present Coeur d'Alene Reservation to the United States.' Pursuant to that authority negotiations were conducted with them in March last and an agreement concluded, which is now before Congress for ratification. The agreement is published in House Ex. Doc. No. 63, Fiftieth Congress, first session, pp. 53-56.

Defendant contends that the above-quoted remark refers only to the land they occupied -- that is, the reservation as established by executive order in 1873. It refers also to the entire area claimed by these Indians outside the 1873 reserve.

A Commission appointed to secure the cession of the northern part of the reservation concluded an agreement with the tribe on September 9, 1889. In reporting this cession to the Secretary, the Commissioner of Indian Affairs said, with respect to the 1887 agreement: "The Coeur d'Alene Indians laid claim to a vast area outside of their present reservation, including the site of the present flourishing city of Spokane Falls and other populous communities. Their claim was based upon original possession and occupancy."

In 1890, the House Committee on Indian Affairs, in reporting favorably on a bill to ratify and confirm the 1887 and 1889 agreements with the Coeur d'Alene Tribe, stated in the report:

On August 14, 1848, and for generations long prior thereto, the tribe of Coeur d'Alene Indians were in possession of and claimed to own the lands described in this bill and in said two treaties. * * * (Def. Ex. 7, p. 1)

The Agreement of March 26, 1887, as ratified by the Act of March 3, 1891, 26 Stat. 989, Section 19, itself recognizes the Indian title to a large area of land, that is, the land ceded by that agreement outside the Coeur d'Alene reservation, for in the preamble of that agreement it is recited:

Article 1. Whereas said Coeur d'Alene Indians were formerly possessed of a large and valuable tract of land lying in the Territories of Washington, Idaho, and Montana, and whereas said Indians have never ceded the same to the United States, but the same, with the exception of the present Coeur d'Alene Reservation, is held by the United States and settlers and owners deriving title from the United States, and whereas said Indians have received no compensation for said land from the United States: Therefore,

True, the specific boundaries of the area so acknowledged to have been possessed are not stated in that agreement, yet it cannot be denied that all persons, officials of the Government and civilians alike, were agreed that the Coeur d'Alene occupied a large territory outside their reservation, an area specifically described by boundary lines in the documents hereafter referred to.

Prior to the 1887 agreement, a commission was directed by the Interior Department to obtain the extinguishment of the tribe's title to all lands claimed by them and for the purpose of establishing a reservation for them. An agreement was concluded on July 28, 1873, (Pet. Ex. 94). This agreement, although submitted, was not ratified but it contained a description of the boundaries of the lands claimed by the Indians. Again, and in 1885, (Pet. Ex. 109, p. 40), these Indians petitioned the President to have a Commission to treat with them for their lands outside their reservation and in the petition described the lands they claimed to "own." This and

the 1873 agreement were before Congress as the exhibits show. In fact, these, with a mass of other documents, were submitted to the Congress pursuant to an act of Congress (May 15, 1886, 24 Stat. 44) and were before that body at the time of the ratification of the Agreement of March 23, 1887, by the Act of March 3, 1891. (Pet. Ex. 106, pp. 36-37 and Pet. Ex. 109, pp. 40-41). It is reasonable, therefore, to presume that the "large and valuable tract of land" possessed by the Coeur d'Alene Indians referred to in the preamble of the 1887 agreement, were the lands within the boundaries described in the unratified agreement of 1873 and the petition of 1885. In truth, the only evidence of the boundaries claimed by these Indians was that supplied by Government agents who were familiar with the area claimed, and were apparently agreed as to the boundaries thereof.

We consider the fact that specific boundaries were not set forth in the treaty, of no importance here, because such a description was unnecessary to convey title.

We, accordingly, conclude that the Coeur d'Alene have proved aboriginal Indian title to the lands described in Finding 11, and also, that defendant had by the Agreement of March 26, 1887, recognized such title in said Indians.

Louis J. O'Marr
Associate Commissioner

We concur:

Edgar E. Witt
Chief Commissioner

Wm. M. Holt
Associate Commissioner