

BEFORE THE INDIAN CLAIMS COMMISSION

THE SNAKE OR PIUTE INDIANS OF)
 FOR FORMER MALHEUR RESERVATION,)
 IN OREGON,)
)
 Petitioners,)
)
 vs.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 17

Decided: December 28, 1956

Appearances:

Mr. C. B. 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
Perry W. Morton,
Attorneys for Defendant.

OPINION OF THE COMMISSION

Holt, Commissioner, delivered the opinion of the Commission.

This case is now before us a second time. When originally considered, this Commission held that petitioners were not entitled to recover on either Count I or II in the petition filed therein because it had 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 area in southeast Oregon claimed by petitioners; and that we did not believe the evidence submitted would sustain petitioners' contention

that the Government did not deal fairly and honorably with them in its compliance with any obligation created under the provisions of the unratified treaty of December 10, 1868, and entered an order dismissing the petition. The petitioners appealed to the Court of Claims and in an opinion filed on June 2, 1953, that Court set aside our final determinations on both Counts I and II and remanded the causes to the Commission for further consideration and the making of additional findings of fact. (125 C. Cls. 241).

The Court of Claims, as did this Commission, construed the allegations of the petition as presenting a claim in Count I asserting the right to recover on the ground that the defendant had taken in 1882 without the consent of the Indians or payment of compensation, certain lands in southeast Oregon which petitioners allege were exclusively used and occupied by their ancestors at that date and for a long time prior thereto. In the alternative, petitioners alleged in Count II that they were entitled to relief under the provisions of Section 2, Clause 5 of the Indian Claims Commission Act of August 13, 1946 (6 Stat. 1049), in that the Government's course of dealings with these bands of Snake or Piutes, at the time of and subsequent to the negotiation of the unratified treaty of December 10, 1868, was not fair and honorable. (125 C. Cls. 241, 243, 244). In remanding the case to the Commission for further consideration, the Court of Claims with respect to Count II stated as follows (125 C. Cls. 241, 253):

* * * If, upon reconsideration of the whole record and the making of additional evidentiary and basic findings, the Commission decides that appellant has established Indian title by exclusive occupancy and possession, to some or all

of the land in question, the question raised in Count II on fair and honorable dealings will not be pertinent, for appellant can have but one recovery. (See also pp. 269, 270).

In view of the determination herein made by the Commission we will discuss only the issues pertaining to Count I of the petition.

Subsequent to the remand of this case, a further hearing was held before the Commission at which time additional evidence was received and the proof is now closed.

The petitioners herein are a group of Indians known as the Snake or Piute Indians of the former Malheur Reservation in Oregon who presented this claim as descendants and on behalf of all descendants of members of the bands or tribe of Snake or Piute Indians who were parties to an unratified treaty under date of December 10, 1868, and resided upon the former Malheur Reservation. The petitioners claim in Count I that their ancestors held aboriginal Indian title to a large area of land in southeastern Oregon described in Finding No. 3, consisting of approximately 1,778,560 acres of land, at the date of an unratified treaty of December 10, 1868, made with petitioners' ancestors. Petitioners contend that they and their ancestors were deprived of their right of use and occupancy of said lands in either 1879, 1880 or 1882 without their consent and without the payment of compensation therefor. It is noted that while petitioners urge that there is some evidence of exclusive occupancy and use by their ancestors at the time of the 1868 unratified treaty and prior thereto, of a larger area of land in the vicinity of Malheur and Harney Lakes in southeastern Oregon, they have now limited their claim to the land within the boundaries of the

Malheur Reservation "as it was established by the Executive Order of September 12, 1872, and as modified by Executive Orders of May 15, 1876 and January 26, 1876" (Pet. Req. Find. No. 101(1)), the boundaries of which are set forth in our Finding No. 3. We shall therefore consider the claim as applying only to that tract of land. The amount claimed as compensation for the value of the land taken was \$3,500,000 with interest thereon from 1882.

The defendant contends that there is no satisfactory proof that petitioners are the descendants of the Indians with whom the unratified treaty of December 10, 1868 was entered into; that petitioners have failed to prove exclusive aboriginal Indian title to any definable area of land from time immemorial to the date of the alleged taking on September 13, 1882; and, that there is no proof that petitioners constituted an aboriginal land-holding or other type of group or groups.

It is not seriously questioned by counsel for defendant that certain groups of Snake Indians, now classified by some anthropologists as Northern Piutes, were living in eastern and southeastern Oregon at the time Oregon was established as a Territory by the Act of August 14, 1848 (9 Stat. 323). According to the evidence the first recorded white contact with Snake or Piute Indians living in the Harney and Malheur Lakes region in southeastern Oregon is that of Peter Ogden in 1826. There seems to be little doubt among the authorities that in earlier aboriginal times these Snake or Piute Indians comprised small groups or clusters of families which ranged over wide areas in search of food. Those Indians who ranged within an area where a particularly important

food was available were designated by other Indians as "Eaters" of such food. The Indians inhabiting the Harney and Malheur Lakes area and on the Malheur river and its tributaries in aboriginal times have been classified as the "Wadatoda" or "Wadatika" band of Northern Piutes by anthropologists. According to Dr. Beatrice Blyth Whiting in her study "Paiute Sorcery" the Piutes now living outside Burns, Oregon (where some of petitioners' ancestors settled on returning to Oregon in 1882) are remnants of the "Wadadika" (Wada-Eaters). In these earlier aboriginal times there seems to have been no real political organization among these Indians and the basic socio-economic unit was said to be the individual family or groups of families. Political organization to any degree and land consciousness were apparently lacking until there was increased white contact.

White emigration and settlement in southeast Oregon around 1845 appears to have caused a gradual change in the native way of life of the Snake or Piute Indians in that area. Bands of Indians in the area were formed and with their expansion between 1845 and 1868 certain of the Snake or Piute chiefs became prominent in southeast Oregon and were recognized by Government Agents and Military Officers in the area as chiefs and leaders of bands bearing their name, and living in certain areas. Among these leaders one We-you-We-Wa became known as the principal chief of the bands or "tribe" of Snake or Piutes inhabiting the country around Malheur and Harney Lakes and on the tributaries of the Malheur river in eastern Oregon. It is clear that white emigration and settlement, the destruction of native vegetable foods, the resulting

hostilities with the whites, and the necessity of having leaders to negotiate with Government officials resulted in the formation of bands and loose, but evident, political organization. The growth of land consciousness is also apparent such as We-you-We-Wa's followers refusing to leave their own country for a reservation elsewhere following the 1868 unratified treaty. (Findings 3, 4 and 5). This land consciousness will be shown as we now discuss the Government's dealings with the Snake or Piute Indians of this area, as set forth fully in our findings and as disclosed by the voluminous historical material of record.

That Congress intended the extinguishment of all original Indian title to lands in Oregon Territory was to be made the subject of a treaty is shown by the Act of 1848, supra, which made all land laws of the United States applicable to said Territory, and provided in Section 1 that nothing therein contained "should be construed to impair the rights of persons or property now pertaining to the Indians in said Territory so long as such rights remain unextinguished by treaty between the United States and such Indians."

The first authorization by Congress to treat with the bands of Snake or Piute Indians in southeast Oregon was contained in the Act of March 25, 1864 (13 Stat. 34), which provided for the negotiation of a treaty with the Klamath, Modoc and Snake Indians "for the purchase of the country occupied by them." The language of the Act indicates that Congress considered these Indians had possessory rights to lands occupied by them, and since petitioners' ancestors, who were parties to the

1868 unratified treaty, were among the bands of Snake Indians covered by the Act and resided at that time in the area where the Malheur Reservation was later established, we believe that Congress intended their occupancy rights should only be extinguished by purchase. It is quite plain, however, from the letter of treaty instructions issued pursuant to the Act to the Superintendent of Indian Affairs in Oregon Territory, J. W. Huntington, on June 22, 1864, by Acting Commissioner of Indian Affairs, C. E. Mix, the pertinent parts of which are set forth in Finding 12, that at the time the Government wanted to avoid admitting Indian title in lands occupied by these Indians, unless the lands were needed for immediate white settlement or development. It preferred, if possible, the treaty "be one of peace and friendship, and an agreement on the part of the Indians to reside upon a proper reservation to be selected and distinctly marked," rather than a treaty of cession requiring purchase of the occupied lands.

The Indians covered by the 1864 Act were too scattered to include in a single treaty so Superintendent Huntington first concluded a treaty on October 14, 1864 (16 Stat. 707) with the Klamath, Modoc and Yahooskin Band of Snakes, obtaining a cession of land in south-central Oregon and northern California and established a treaty reservation for these Indians on Klamath Lake in southern Oregon; and on October 14, 1864 (14 Stat. 683) concluded a treaty with the Woll-Pah-Pe Tribe of Snakes, obtaining a cession of a tract of land in central Oregon, with the Indians agreeing to reside on the Klamath Reservation. Apparently in justification of negotiating the treaties as treaties of cession, Superintendent

Huntington reported to the Commissioner of Indian Affairs the country ceded in each treaty was rich in minerals and contained fine grazing lands that would be available to the whites for mining and agricultural purposes.

There were small parts of the lands ceded under both of these treaties which were later included within the boundaries of the Malheur Reservation in 1872. We agree with the statement of the Court of Claims in its opinion in this case that this does not necessarily establish non-ownership of such lands by petitioners' ancestors since land was often purchased by the Government from one band of Indians during the early days of the Government's contact in an area which was later found to have belonged to a neighboring tribe and on some such occasions it was found necessary by the Government to purchase the possessory title of some part of the same land from that neighboring tribe.

The evidence discloses that the remaining bands of Snake or Piutes in southeast Oregon had resented the intrusion of the whites in their country and they were continuously hostile after 1848 so Superintendent Huntington was unable to treat with them until after an aggressive military campaign had been undertaken against them under General Crook in 1866 which resulted in their being finally subdued in the summer of 1868. After their surrender, General Crook held a council on June 30, 1868 with the Indians whom he described "as the principal bands of hostile Indians infesting the vicinity of Malheur river, Castle Rock, Owyhee and Stein's mountains, under their principal Chief Wee-ah-we-wa," and agreed that they return "to their own country" and establish their

