

BEFORE THE INDIAN CLAIMS COMMISSION

THE CONFEDERATED TRIBES OF THE WARM)
SPRINGS RESERVATION OF OREGON,)

Petitioner,)

v.)

THE UNITED STATES OF AMERICA,)

Defendant.)

Docket No. 198

Decided: June 10, 1960

Appearances:

Frank E. Nash, with whom were
Mark C. McClanahan, T. Leland
Brown and Sam Van Vactor,
Attorneys for Petitioner.

Walter A. Rochow, with whom was
Mr. Assistant Attorney General
Perry W. Morton, Attorneys for
Defendant.

OPINION OF THE COMMISSION

Watkins, Commissioner, delivered the opinion of the Commission.

The petitioner, The Confederated Tribes and Bands of the Warm Springs Reservation of Oregon, brings this action to recover additional compensation for certain lands in north central Oregon ceded to the United States on June 25, 1855, by Indian parties who were referred to in the cession treaty as confederated tribes or bands. The petitioner presents a claim of recognized title to all the ceded area and contends that a portion of that area was also held by original Indian title.

It is conceded the petitioner is entitled to present its claim in a representative capacity on behalf of the tribes, bands or groups who were parties to the 1855 treaty of cession, but petitioner also asserts that it is a new entity created by that treaty through merger or confederation of original entities, and that as such it is a successor in interest and thus entitled to present this action in its own right. Its position in this respect has been challenged by defendant.

We have for determination then the nature of petitioner's capacity to sue, whether defendant has recognized petitioner's title to the area ceded June 25, 1855, and if not, then the area to which petitioner has established original Indian title.

The first question for consideration is petitioner's capacity to sue in its own right as successor in interest to the Indian entities signatory to the June 25, 1855, treaty of cession upon which the present causes of action are based. Petitioner's Constitution discloses that its membership extends to every person whose name appears upon the allotment roll of the Warm Springs Reservation of Oregon, to every child of at least 1/4 Indian blood born to an Indian residing upon that reservation and to any child of 1/8 or more Indian blood born to a member or former member of the organization who has been adopted into the Confederated Tribes of the Warm Springs Reservation of Oregon. Qualifications for enrollment upon the allotment roll do not appear. About 1878 a number of Paiute Indians took up residence upon the Warm Springs Reservation and petitioner says they are "largely intermarried" with petitioner's members. There

are presently enrolled as members of petitioner organization 207 Indians of whole or mixed Paiute Indian blood.

It is not apparent that each member of the several entities signing the treaty of June 25, 1855, went upon the Warm Springs Reservation. The Report of the Subcommittee of the House Committee on Public Lands published June 13, 1950, discloses that Wasco Indians were then residing upon the Yakima Indian Reservation (p. 551), so it seems that Petitioner's membership does not include all the descendants of the original entities. Furthermore, the treaty entities became known as the Confederated Tribes and Bands of Middle Oregon; later suit was instituted in the Court of Claims by the occupants of the Warm Springs Reservation as The Warm Springs Tribe of Indians of Oregon. The present corporation may or may not include all members of the former named groups. While petitioner may sue in a representative capacity we do not think that its right to do so as a successor in interest has been established. Certainly the benefits of any recovery by petitioner as successor in interest would flow to all its members, including Paiutes of the whole blood, a circumstance clearly beyond the intent of Congress when it created the Indian Claims Commission.

Petitioner asserts a claim of recognized Indian title to all the land described in the June 25, 1855, treaty because the Organic Act of 1848 and the Indian Intercourse Act which was extended to Oregon in 1850 each protected the Indians' rights of person and property, and it is the petitioner's position that such protective provisions recognized the Indian title to lands which subsequent treaties of cession identified.

Petitioner points out that extinguishment of Indian title west of the Cascade range was authorized in 1850 and the public land there was authorized to be sold on February 4, 1853; that treaties of cession of land east of the Cascades were authorized July 31, 1854, and public land laws were extended to that region on May 29, 1858. Petitioner says this differentiation between land east and land west of the Cascade Range was "to protect only one thing - the Indian title;" that an administrative interpretation (Attorney General's Opinion, Aug. 2, 1854, and June 22, 1855; General Land Office Opinion, Nov. 23, 1858; Pet. Exs. Nos. 141, 165, 265) that the public land laws applied only where Indian title had been extinguished must be presumed to have been known to the Congress, and Congress ratified the treaty of 1855 so that legal settlement could be made upon the ceded land. Petitioner says: "The effect of the ratification of the treaties of 1859 was then to define the lands of the various tribes, the title to which had been previously recognized."

In other words, the Intercourse and Organic Acts are said to have recognized title, and the treaty of cession is said to have identified the land to which such title applied.

We think petitioner has misconstrued the Acts relied upon. The principle of recognized title is the right to hold land permanently as distinguished from only a permissive occupancy. It was only this permissive occupancy, subject to the dictates of Congress, which our American Indians held, and which the Organic Act and the Intercourse Act preserved to them. Both these Acts were worded similar to the Northwest Ordinance of July 13, 1878, so far as the preservation of Indian rights are con-

cerned, and that act has never been interpreted as a Congressional intent to recognize Indian title when coupled with a later treaty of cession for identification purposes. Quapaw Tribe vs. United States, Dkt. 14, 1 Ind. Clms. Comm. 469, 644.

Nor do we think the official correspondence, the instructions to the treaty commissioners or other documents and transactions culminating in and the circumstances surrounding the negotiations and ratification of the June 25, 1855, treaty disclose any intent to give to that treaty any greater effect than that of the usual treaty of cession of whatever interest the signatory Indian parties might hold or claim. Quapaw Tribe vs. United States, Supra. The treaty makes this abundantly clear in the wording preceding the description of the tract ceded, that is: "The country claimed by them and included in the following boundaries."

Petitioner places much reliance upon the Haller map of 1854 which was submitted with Agent Thompson's response to Superintendent Palmer's instructions that he ascertain the location, number, condition and means of subsistence of the Indians within his District. Thompson forwarded that map as an aid in forming a correct idea of the "locality" of the Indians, some of whom he had not yet contacted, and it was only the topographical accuracy of the map that he commended (Pet. Ex. 305). The variance between the description of the ceded area and the tracts assigned the Indians upon this map, as well as the question of when and by whom additional data was imposed upon the map as disclosed by three photostatic copies which are in evidence, Pet. Exs. 73(1), 73(2), 148;

Def. Ex. 80, all argue effectively against giving much consideration to the Haller map as evidence that the subsequent treaty was meant to be a recognition of Indian title. A subsequent letter by Haller, written while a Captain in the U. S. Army stationed at The Dalles, contains a statement by him to the effect that the Cayuse Indians owned the country west to the Cascades, and further militates against assigning much weight to this earlier map (Pet. Ex. 172).

The government's policy was not to recognize title to land to rest in the Indians of the western coastal region (Pet. Ex. 311), and there is no evidence that Congress when ratifying this 1855 treaty possessed any information or had any knowledge that anything more than the ratification of the usual Indian treaty of cession was involved. The treaty commissioner's comment in his forwarding letter respecting a possible conflict between this and a prior cession obtained by him from the Cayuse Indians discloses his indifference to the actual territorial limits of the ceding Indians (Pet. Ex. 168), and the record is void of any evidence that any effort was made to learn the actual territorial claims of the various Indian entities confederated under the June 25, 1855 treaty, either before, during or after that treaty council. We think, also, that the treaty reference to a reservation cannot be interpreted as recognizing original Indian title to the reservation tract but that it shows instead a grant to the treaty entities by the government of land for their use as a reservation thereafter. This must be so for original title land could be reserved only by the entity holding such title. The Wasco chief, Mark, stated during the council that the reservation land was unknown to him and that he had

never seen it, nor is there evidence of the Wasco coming this far south for any purpose so the Wasco can scarcely be said to have held the reservation tract under original Indian title. It does not appear that any one or more of the several entities executing the 1855 treaty received any consideration for agreeing to share with the others a tract of land reserved by them from the cession area, and it appears to be a logical conclusion that none of them believed they were reserving a tract to which they held original Indian title but upon which the other entities would reside with them thereafter.

A study of the treaty language convinces us that the Indians ceded all the interest they owned or claimed in the entire ceded area, and that the reservation was a granting or a setting aside by the government of a tract for their use as an Indian reservation rather than a reservation by the Indians of a small tract within the cession.

Since we have found no sound reason in fact or in law sustaining petitioner's claim of recognized title, and since we believe that the evidence clearly discloses there was no intent to recognize Indian title to any of the land within the ceded area, we conclude the petitioner's claim of recognized Indian title is not supported by a preponderance of the evidence and have found against it in this respect.

The remaining questions are: What was the nature of the land-using units signing the cession of June 25, 1855, and what portion, if any, of the claimed area was held by original Indian title by either of such entities upon that date? The area so claimed is described in Petitioner's Proposed Finding of Fact No. 20 and is outlined in red upon its Exhibit No. 401.

The evidence discloses that the Indians signing the 1855 treaty were divided into two wholly separate linguistic groups. The Wasco Indians who were divided into three groups known by the geographic names of Cascades Wasco, Dog (Hood) River Wasco, and Dalles Wasco, spoke a Chinookan dialect and the Wayampum Indians consisting of four separate divisions known as the Tonino, Wyam, Tygh, and John Day River Indians, spoke the Walla Walla dialect of the Sahaptin linguistic family. The two groups were friendly and had a similar culture, mutually intelligible languages and a common living pattern except that the Wayampum occupied well constructed dwellings in villages near their fisheries and wintered in nearby more sheltered areas in less well constructed buildings, whereas the Wasco groups appear to have wintered in their principal villages near their main fishing stations. Both practiced exogamy and polygamy. Their economy was linked to the streams from which they obtained a variety of fish but principally the salmon which was their primary item of food and, in dried form, their medium of barter in the extensive trade they carried on at their villages along the Columbia river with Indians of other tribes and nations visiting there during the fishing season. Their fishing stations were individually owned and passed by inheritance, but ownership involved a sort of stewardship of the right to exploit the fishery under an established order of precedence, i.e., the immediate family, the village group, the ethnic group and then friendly Indians. Visiting Indians paid tribute for fishing privileges (Pet. Ex. 8, p. 95). Both Wasco and Wayampum supplemented their diet with wild game, borrios

and roots which they obtained in dried form through trade with other Indians and for which they went inland each spring and fall. Some members appear to have, however, remained at the villages during these foraging trips. (Pet. Ex. 382).

Petitioner claims that each of the three Wasco entities were separate tribes. The defendant maintains that they possessed an autonomous village status. The petitioner claims that the four Wayampum entities each enjoyed complete local autonomy but that there was an over-all political unity formed by a chief from each of the four Wayampum entities serving upon an over-all council which, however, was without power to enforce its decisions and which no individual or village was bound to obey. This ineffectual advisory council petitioner contends bound the Wayampum into a tribal entity. Defendant's position is that separate, independent, autonomous dual villages without any political unity are the only land-holding entities shown to have existed among the Wayampum.

Petitioner's position is bottomed upon the testimony of its expert witness, Dr. Verne F. Ray, both with respect to the land using entities of the Wayampum and Wasco and with respect to the area it is said each held under original title. Accordingly we have examined with care Dr. Ray's testimony given before this Commission and his earlier publications. Dr. Ray testified that his field work among the Plateau Indians, including the Wayampum, was done between 1928 and 1940 (Trans. p. 50), and that he has done ethnohistorical work since 1953, all historical data relied upon by him being in evidence in this docket (Trans. p. 213). Dr. Ray's first

publication reflects field work among the Plateau Indians while he was an undergraduate. Based upon that work and about $2\frac{1}{2}$ to 3 months work among the Wayampum in 1935 (Trans. 232-240), Dr. Ray published other articles during 1938, 1939 and 1942. He participated in a large-scale culture element study conducted by Dr. A. L. Kroeber during 1936-7, working with petitioner Indians among others, and in 1954 co-authored an article with Nancy Oestreich Lurie discussing the Lewis and Clark Journals of 1804-1806. Additional field work during 1935 to 1940 is not reflected in his publications, but is, he testified, the basis of his testimony before this Commission (Trans. p. 277). This must, however, exclude the culture element study since he testified his report thereon was based upon the research he performed for that specific work.

(a) In his "Native Villages and Groupings of the Columbia Basin" which was published in 1936, Dr. Ray said the Columbia Basin is north of the Blue Mountains in Oregon and between the Cascades and Rocky Mountains. He said he found "notorious unreliability of native verbal traditions when they (the Indians) refer to history a few generations or more removed;" that "political affiliations of any kind between one and another village of any of the social and geographical units here treated was entirely lacking. In other words, the political unit was the village itself, any political entity of greater embrace being wholly unknown." He cited with approval Dr. Leslie Spier's observation that local communities within this region and particularly among the Wishram were usually autonomous and added that intermarriage between the villages was common; that common hunting, berrying and root gathering grounds were used by several villages

at which time village affiliations were largely forgotten; that:

"Boundaries between groups of the Columbia Basin varied greatly in exactitude, as might be anticipated under the conditions outlined above. Almost all villages were located on waterways, resulting in boundaries being most definite at points where streams or rivers were crossed. The greater the distance from population centers the more vague the lines of demarcation grew. Thus, far back in the hunting territory or far out in desert root digging ground, boundaries sometimes faded completely out. * * * But during the gathering of this material every group in the Basin was visited and the maps were first drawn in the presence of informants as information was given, bit by bit, including village locations as well as lines of boundary. This procedure permitted a degree of accuracy and completeness which could not have been achieved through reconstruction from notes." (Underscoring supplied)

In the accompanying sketch on page 119 of that publication the eastern boundary claimed for the Wayampum is represented by a line shown as running south a short distance west of the John Day River.

(b) In 1938 Dr. Ray published his "Tribal Distributions in Eastern Oregon and Adjacent Regions," based upon field work completed around 1936, including a few weeks with the Wayampum, in refutation of claims advanced by Joel V. Berreman, James M. Teit and Leslie Spier respecting an early northern movement of Shoshonean people within Oregon (Trans. p. 227-232). In discussing a Wayampum-Umatilla division line, Dr. Ray then wrote:

"In Oregon a much greater area was held, reaching south to the John Day River. * * * Umatilla families sometimes camped as far west as the John Day River; reciprocally the Wayampum or Tenino enjoyed free movement eastward to Willow Creek. Even on the Columbia River, where lines of demarcation were usually very definite, several villages were jointly occupied by Umatilla and Tenino."

On page 386 of this publication Dr. Ray platted the Wayampum-Umatilla division line as running south between John Day River and Willow Creek drainage. He wrote that the tribal territories outlined by him at that time had persisted without material change since time immemorial, that the

southern Wayampum boundary was indefinite, that his Umatilla-Wayampum line was a division by him of overlapping use areas. Referring to the Wayampum collectively, he said the Tenino had a "rigid village composition."

(c) Dr. Ray's thesis for a Doctor of Philosophy degree from Yale University in 1937 was published during 1939 as "Cultural Relations in the Plateau of Northwestern America." In it he quoted George Peter Murdock's 1938 publication concerning the Wayampum (Ray's Tenino) having been divided "into four sub-tribes or rather pairs of villages," and commented:

This unique arrangement of pairs of villages illustrates the depth of the village concept and indicates a persistent village allegiance.

and continued to say that many significant units of larger compass such as dialectical and cultural groups were found but that "the essential point is that the larger unit is invariably ethnic or social, or linguistic in nature, never political." He wrote that the typical Plateau organization had highly specific territorial segmentation along river courses which was determined with regard to fishing rights, but the hunting territory was invariably used in common; that the political attitude toward hunting and fishing territorial rights differed essentially; that if he was a member of an ethnic group a man was only exercising his rights when he made use of any part of that group's hunting territory.

(d) During 1936 Dr. Ray did field work in connection with a culture element study directed by Dr. A. L. Kroeber. During July, 1937, he extended that work to the Coeur d'Alene, Umatilla and Wayampum. His report appears as Chapter XXII of "Culture Elements Distributions," published in 1942. For this work Dr. Ray's principal Wayampum informant

was a Tenino Indian who had been born during 1896 and who consulted with more aged Wayampum during Ray's interviews with him. The resultant report recites that prior to reservation days the Wayampum had a village autonomy but no tribal organization and no unit larger than the village; that each village ordinarily had one leader, known as a chief, who appointed temporary assistants and whose functions were those of an arbiter or adviser; that an accomplished warrior was chosen for military functions; and that there were village and individual territorial rights but no recognized tribal rights among the Wayampum.

(e) Dr. Ray testified that his research subsequent to 1935 has caused him to reverse his former conclusions of rigid village composition among the Wayampum or Tenino; that he now considers it a high probability but not a certainty (Trans. p. 283), that the Wayampum placed great emphasis on a hierarchial arrangement under which each sub-tribe had two capital villages and perhaps others, each possessing complete local autonomy but each having one or more chiefs and with one chief from each village forming a tribal council having an over-all political unity, although he testified that individual Indians or separate villages could refuse to be governed by that council's decisions (Trans. p. 152). He said the bulk of the people rotated between winter and summer villages but that individuals might go to any village within the ethnic group at will, and that all territory was tribally owned.

Dr. Ray testified also that he now believes the Wasco formed three separate tribes in pre-reservation times; that they had a bi-lateral system of government; that relatives of a tribal chief had a great deal

of influence but that each tribe had only one chief; that they had no over-all political unity or tribal council; that by 1855 they possessed a sense of Upper Chinookan unity but still retained their early territorial boundaries (Trans. p. 110-115); that each of the three tribes used and exclusively controlled an area as outlined in red by him upon Petitioner's Exhibit No. 401; that the broken lines on said exhibit represented pre-white trails; that each of the three Wasco tribes and the Wayampum entity exclusively used and occupied their separate areas in such manner as to constitute original Indian title thereto.

We think the most dependable accounts by Indians of their pre-reservation land-using entities and subsistence areas are those taken from Indians living as near the date in question as possible; that the possibility of error increases in ratio to the number of intervening generations. Pitt River Indians of California vs. United States, Dkt. 247, 7 Ind. Clms. Comm. 815, 856. We find support in Dr. Erminie Wheeler-Voegelin's statement in "The Northern Paiute of Central Oregon" that "by 1945 the possibility of doing 'memory ethnographies' of so-called aboriginal North American cultures was generally recognized as a thing of the past;" in a comment by Messrs. Leslie Spier and Edward Sapir in "Wishram Ethnography" that early political and territorial units within the present area were not sharply defined in 1930 (Def. Ex. 61), and James M. Teit's remark that in 1909 he found his informants from this region were "rather vague" about territorial boundaries (Def. Ex. 67).

There is substantial evidence identifying the Wasco as a tribal unit within the sense of that word as used in the Indian Claims Commission

Act, and we are persuaded this is the rightful identification. The Wasco were geographically separated from all other Chinookan Indians by either the Cascade Range or the Columbia River. They possessed a common culture, a common economy and except for a slight inflection in the speech of the Cascade Wasco, they had a common language. They occupied separate independent villages, but recognized close ties of kinship between the inhabitants of such villages, and individuals moved freely from one village to any other within the entire Wasco group. Hunting and food gathering areas were available to all without regard to village affiliation. Only their fishing sites were privately owned, yet each such site was nevertheless available to all, private ownership being only a right to regulate the order of use. They had separate chiefs within the several villages and retained separate chiefs even after going upon the Warm Springs Reservation and following the election of a head chief for the confederated Indian entities as provided by the 1855 treaty. A sense of over-all Wasco unity is disclosed in the testimony given before a Congressional Committee on February 18, 1891, by various Indians who attended the 1855 treaty council and who each referred to the Wasco as a tribe. The specific word 'tribe' was undoubtedly adopted from the English, but we find it significant that the reference is to the Wasco as a unit (Pet. Ex. 389). The same is true with respect to testimony before the Court of Claims in Warm Springs Tribe of Indians of Oregon vs. United States, 95 Ct. Clms. 23, by residents of the Warm Springs Reservation, given at a time when aboriginal tribal status was not a matter of concern (Pet. Ex. 379-B).

The record contains a number of references to the three Wasco groupings

from which it may be inferred they were considering to be independent entities but we think the predominating documentary evidence indicates they were considered one people, one Indian entity or tribe, by many of the government officials and other whites coming in early contact with them. Travelers such as Thomas J. Farnham (1843) called them all Chinooks (Pet. Ex.12); George Gibbs referred to them as the "Tsinuk" nation (Pet. Ex. 15); Gustavus Hines called them Wasco Indians (Pet. Ex. 21). James Mooney in his "Ghost Dance Religion" (1896) wrote the name Wasco was sometimes used for cognate groups near The Dalles and the Cascades of the Columbia and indicated there was only one Wasco entity within this region on his map of 1894 (Pet. Exs. 30a, p. 741; 81). Official references to the Wasco as a unit include Captain Pleasenten's map of August, 1859, prepared from maps of Father DeSmet, and showing only Walla Walla and Wasco Indians west of Willow Creek and south of the Columbia River (Pet. Ex. 68); Major G. O. Haller's map of 1854 showing only Wasco Indians west of the DesChutes (Pet. Exs. 73, et al.); the Oregon Military Departmental map of 1855 showing only Wasco Indians west of the John Day River (Pet. Ex. 89); Superintendent Palmer's recommendation of July 8, 1853; that treaties be negotiated with the "Wascopans", the Cayuse, the Nez Perce and others (Pet. Ex. 124); Palmer's letter of April 5, 1855, referring to Agent R. R. Thompson's district as containing John Day, DesChutes and Wasco Indians (Pet. Ex. 154), and his report of July 6, 1855, that he had treated with the John Days, all bands on the DesChutes River, and the Wascopans or Dalles Indians (Pet. Ex. 167); Agent Thompson's report during November, 1855, that there were 403 Wasco Indians, 150 of them temporarily

on Dog River and 250 near his own residence (Pet. Ex. 180), at encampments designated for friendly Wasco treaty Indians by Superintendent Palmer (Pet. Ex. 177); and Agent Thompson's report on March 2, 1856, that the Wasco treaty bands had gone to the Warm Springs Reservation (Pet. Ex. 193).

We believe in view of the facts that (a) the Wasco were geographically separated from other Chinook, (b) that their villages were confined to a space only about 40 miles long along the banks of the Columbia River, and (c) that Indians speaking another basic language were both south and east of them, it was a natural reaction for the Wasco to regard themselves as one people. Joint usage of hunting and gathering areas, a ready interchange of members between villages, and the later references to the Wasco as a tribe by individuals living on the Warm Springs Reservation all indicate a recognized over-all unity. Defendant has introduced excerpts from Edward S. Curtis' article concerning Chinooks wherein Curtis said they lacked tribal instinct to a remarkable degree. We believe the peculiar circumstance surrounding the Wasco reduces the efficacy of this statement as to them, although it may be quite applicable to Chinookan tribes to the northwest. So we have concluded that the Wasco at the time of the 1855 cession were and had been for some years there-fore a group of autonomous village Indians having sufficient unity to qualify as a tribe within the intent of the Indian Claims Commission Act. Muckleshoot Tribe vs. United States, 2 Ind. Clms. Comm. 424.

With respect to the Wayampum, Dr. Ray's earlier position that there

existed separate, autonomous villages among all the Wayampum groups finds support among the writings of other scientists and observers. Dr. James Mooney, writing in 1893, referred to the Wayampum as independent tribes (Def. Ex. 43). Defendant's witness, Mr. Suphan, who did field work for six months among petitioner and other Indians and spent another six months in literary research preparatory to testifying herein, said his Indian informants concurred that each Wayampum group was independent of the other; that no paramount tribal entity existed among them prior to reservation times (Def. Ex. 17, and Trans.). Dr. George Peter Murdock whose research among Indians on the Warm Springs reservation was conducted during 1934-1935, called them "originally independent sub-divisions" or sub-tribes and "pairs of villages" (Def. Ex. 52). Plateau Indians of whom they were a part, were usually independent autonomous village Indians according to Ruth Murray Underhill, author of "Red Man's America."

Wayampum dual-village groups appear to have acted singly and in concert in attacking and defending themselves from the Snake Indians. Their villages were much farther apart than those of the Wasco, thus encouraging independent action. The John Day River Indians were also closely associated with other Walla Walla speaking Sahaptin Indians to the east and they went north of the Columbia to Mt. Adams for berries. The Tygh, Tenino and Wyam went berrying to Mt. Hood, but all four hunted together in the area south of their villages.

The minutes of the 1855 treaty council disclose the Wayampum divisions or groups were treated with as independent tribes or bands; they did not

act in concert but the treaty was signed by Tenino and Tygh one day and by the John Day and Wyam on another date. Thereafter a few John Day River Indians went upon the reservation, but a band of them living about Clarno, Oregon, did not do so until 1878. Other documentary references to their independent status include the January 29, 1854, report of Major G. J. Raines, commanding the 4th Infantry at Fort Dalles, that the Indians near by were the DesChutes and Wasco. He did not mention Tenino, John Day River or Wayampum Indians. Governor Stevens' report of 1854 mentions John Day River and DesChutes River Indians. Pleasanten's map of 1859 lists only "WallaWalla;" Haller's map shows the DesChutes Indians along that river; the Tygh, and the John Day River Indians; James Mooney's 1894 map shows "Waiam" on the DesChutes River, "Tuckspush" on the John Day River, and "Taliaq" in the region of Tygh Creek. Agent A. P. Dennison on August 1, 1857, advised the Superintendent of Indian Affairs that the DesChutes had formerly "occupied that section of country between the Dalles and the Ty-ich River;" that the Ty-ich "formerly occupied the Ty-ich valley and the country in its vicinity, which lies about thirty miles south of Fort Dalles;" and that the John Day River Indians "occupy the country in the immediate vicinity of the river bearing that name."

The same witness before the Court of Claims in Warm Springs Tribe of Indians of Oregon vs. United States, supra, and before the Subcommittee of the House Committee on Public Lands referred to hereinbefore, when referring to all the Wasco divisions as the Wasco tribe, referred to the

Wayampum as several separate entities, the Tygh, the Lower DesChutes and the Upper DesChutes. These statements are illustrative of the manner in which the Indians themselves regarded their relationship. It is true the references omit the John Day River Indians, yet there is nothing to equate the John Day Rivers with any one of the other three Wayampum divisions; their actual existence cannot be denied; and they were considered by persons familiar with them, both before and after the treaty date, as a separate division of the Wayampum.

We think the weight of the evidence supports our finding that in pre-reservation days the four Wayampum groupings were autonomous village Indians, having no over-all political unity; that the largest land-holding unit was the dual-village within each separate grouping, and that such unit exclusively held, used and occupied an area within the immediate vicinity of the villages; that beyond such restricted area the land was exploited by all the Wayampum entities without respect to village affiliation. Within these areas of joint user by separate land-using entities no aboriginal Indian title could develop, the necessary ingredient of exclusive use being absent.

Defendant urges that original title cannot be found for land used by the Tygh Indians because such title requires exclusive occupancy from time immemorial whereas Tygh occupancy of the region about Tygh valley and Shrear's Bridge on the DesChutes River originated about 1820. George Peter Murdock's Tenino informant who was born in 1859 reported to Professor Murdock that his grandfather told him of participating in the expulsion

of the Molala from this region when a lad of 19 or 20 years of age (Def. Ex. 52, p. 398). James M. Teit also found evidence of this later expulsion (Def. Ex. 67, P. 107), and we have accordingly found that Tygh occupancy of this section solidified during the first decade of the 19th century, long before defendant's sovereignty was indisputably extended over Oregon territory by the treaty with Great Britain in 1846.

This Commission said in Citizen Band of Potawatomi Indians vs. United States, 6 Ind. Clms. Comm. 461, that it was a present right of exclusive use, occupancy and possession which had continued over thirty-five years that the Government intended to and did acquire by the treaty involved in that case; that the additional time could not have more completely subjected the land to the dominion of the Ottawa and Potawatomi Indians, and that their possession and right of occupancy was as sacred, as complete and as valuable as though their original arrival in the country was lost behind the veil of antiquity, which would, of course, have given them occupancy since time immemorial. We think a like situation prevailed in the present instance, and that if the Tygh can show exclusive use, occupancy and possession of an area about Tygh Valley and Shreer's Bridge continuing from their expulsion of the Molala until their cession in 1855 it may be said such occupancy constitutes original Indian title and is a basis for a claim involving such title within the scope of the Indian Claims Commission Act.

The Commission is faced with the difficult task of fixing territorial boundaries for the several separate land using entities with but little more than the locations of various villages to guide it in many areas.

Furthermore since sovereignty of the United States indisputably attached to this territory in 1846, the question of original Indian title must be approached in the light of conditions existing in 1846 inasmuch as the land-using entities could not increase their aboriginal territorial limits as against the interest of the United States after sovereignty had once attached to the land. Iowa Tribe et al., vs. United States, 6 Ind. Clms Comm. 464, 502.

The evidence before us as well as that of which we take judicial notice discloses that the Wasco and the three Wayampum entities were ancient enemies of the Snake Indians of southern Oregon, who were identified as part of the Northern Paiute in Dkt. 87, Paiute Indians vs. United States, 7 Ind. Clms. Comm. 322. Dr. Omer C. Stewart's map introduced therein as Cl. Ex. No. 942 shows the early boundary of these Shoshonean speaking people as running north in Oregon to Mt. Wilson in the Cascade Range, thence eastward across the DesChutes River and then north along the eastern side of that river to about the Willamette Base Line; thence east across the John Day River and then south to the 45° of latitude; thence eastward. Dr. Stewart testified in that case that by 1820 the Shoshonean speaking people were pushed south of a line drawn from Mt. Jefferson in the Cascade Range northeasterly above the Warm Springs river to the 45° of latitude. Dr. Julian H. Steward said he had found only a few sources indicating the Paiute were west of the DesChutes River and assigned the Snakes an area east of that river as far north as Crooked River, then east along the John Day and its northern fork. (Def. Ex. 136, p. 177-185, Dkt. 87).

Other evidence discloses the Snakes once extended far north into

the claimed area and that they were gradually driven south by the Wayampum and Wasco, assisted by their relatives, the Skeen and Wishram from north of the Columbia River. It is evident this expulsion was in progress when Lewis and Clark visited the region in 1804-1806, and that it was accomplished through the exertion of a superior force against the resisting Snakes. So the problem becomes one not so much concerning ancient territorial boundaries as determining what part of the claimed area has been shown to have been wrested from the Snakes and subjected to such exclusive occupancy and use by petitioner Indians prior to 1846 as may be sufficient to create an original Indian title.

The Wasco

It is conclusively established that the Wasco used and occupied the land about their several villages and fishing stations along the southern bank of the Columbia River from the Cascades in that river up stream to Big Eddy, Oregon, with but four miles of river bank between their easternmost village and the Tenino's western village, and that they were there within the first decade of the 19th century. There is no suggestion in the record that any other Indians came into this region immediately east of the summit of the Cascades with claims of territorial right. But a common boundary between the Wasco and the Tenino and Tygh adjacent to them on the south and east is indefinite. Documentary evidence is restricted to remarks that the Wasco went inland, to the interior or to the northern slopes of Mt. Hood for hunting and food gathering. The Tygh, Tenino, and Wyam also went berrying on the slopes of Mt. Hood, and during the 1855 treaty council the Wasco

Chief Mark claimed the land south to Tygh Creek (Def. Ex. 5). Dr. Ray has given the Wasco an east and south line commencing on the Columbia near their easternmost village and thence southerly to and along the drainage divide between Mill Creek and Five Mile Creek to the drainage divide of Hood River and along that divide to Mt. Hood. Mr. Suphan adopts substantially the same line except that he states there were areas of joint user south of Mt. Hood, in the region about Dufur, Oregon, and in the courses of Zigzag and Salmon Rivers which are outside the claimed area, to the west of the summit of the Cascades. There is no use indicated of the upper slopes of Mt. Hood, much of which is covered with glaciers. Petitioner's exhibit 405 indicates a line drawn south from a point on the Columbia River two miles east of Big Eddy, Oregon, to the Fifteen Mile Cfeek, down that creek to a point halfway between its mouth and the mouth of Five Mile Creek, thence southwest by the shortest line to the drainage divide between Five Mile Creek and Mill Creek, and thence southwest along said divide to the eastern limits of Hood River drainage will terminate nearly east of Mt. Hood. By extending that line westward to the Range line between Ranged 9 and 10 East, thence north along said Range line to the Township line between Townships 1 and 2 south to the summit of the Cascade Range would, we think, bound the area of exclusive use of the Wasco and enclose the lower slopes of Mt. Hood. We have accordingly fixed this line as the east and South Wasco boundaries. Wasco territorial claims and Wasco usage may have extended farther south and southeast, but under the evidence, which we believe is the best obtainable at this date, we cannot in good conscience fix an original title boundary line farther east or south than this.

The Wayampum

The Tenino, Wyam and John Day River Indians' fisheries and villages were principally concentrated along the Columbia between a point 4 miles east of Big Eddy, Oregon, and the mouth of John Day River, with the John Day having residences near Clarno, Oregon, about treaty time. There were other fishing sites farther up the Columbia, and Dr. Ray testified the Wayampum owned the country eastward to the drainage divide between John Day River and Willow Creek. In his 1938 publication he said the country between these streams was jointly used by Wayampum and Umatilla; that there were jointly occupied villages there, and he divided the area between them. Major Alvord in 1853 said Willow Creek was the northeastern limits of Wayampum territory (Pet. Ex. 383), and Governor Stevens so sketched it in 1855 (Pet. Exs. 87, 88). Haller's map of 1854 shows "Scattering Bands Inds." on Willow Creek (Def. Ex. 80; Pet. Ex. 73), and that same year Superintendent Palmer said the Cayuse were immediately east of a line drawn south from the mouth of Willow Creek to the headwaters of John Day River (Pet. Ex. 135).

Melville Jacobs gave Willow Creek to the Umatilla (Def. Exs. 22; 44, p. 62), but Professor Murdock said the Umatilla - John Day River territorial boundaries met at Arlington, Oregon (Def. Ex. 52, p. 397). Edward S. Curtis placed the Cayuse-John Day division line on the John Day River (Def. Ex. 24) and Charles Wilkes' 1841 map shows Cayuse on that river (Def. Ex. 75). Ethnologist John R. Swanton said the Cayuse country extended west to the DesChutes River (Def. Ex. 66, p. 415); Captain John Fremont found a Cayuse camp on the DesChutes in 1843, and the next day met a few Snakes and some Nez Perce Indians (Def. Ex. 108). Agent A. P. Dennison at the Warm Springs reservation during 1857 said John Day Indians formerly lived in the immediate vicinity of the

John Day River (Def. Ex. 15). Defendant's witness, Robert Suphan, said the John Day Indians used the river valley without indicating whether he meant the immediate valley or the river drainage.

Dr. Ray's map of nearly 80 Wayampum village sites (Pet. Ex. 403) shows Wayampum villages several miles east of the John Day River, one being near Arlington, Oregon. It appears to us that the number of Wayampum Indians between 1830 and 1855, their economic dependence upon fish for food, the abundance of fish all along the Columbia and its major branches, the trade feud between petitioner Indians and the Snake Indians to the east and south, casts considerable doubt upon Ray's village sites; some of which are in what would have been quite exposed locations, particularly since Ray gives no date or length of occupancy for them but testified that if the Wayampum were able to go into a country, set up camp for a few days or a week and then return safely home, they then considered they owned the country, that it belonged to them (Trans. P. 296). While such a brief occupancy denotes a degree of usage, it omits the element of exclusiveness essential to create original title.

We are of the opinion the evidence will not support a finding that the John Day River Indians, who were the most eastern of the Wayampum group, exclusively used and occupied the country east of the immediate vicinity of that river. We have found their eastern limits a short distance east of the John Day, having adopted straight lines in bounding what we believe to be their use area for the sake of ease in description and computation of acreage.

From an exhaustive study of the entire record we conclude petitioner has not shown exclusive use and occupancy of the southern portion of the claimed

