

12 Ind. Cl. Comm. 664

BEFORE THE INDIAN CLAIMS COMMISSION

THE CONFEDERATED TRIBES OF THE)	
WARM SPRINGS RESERVATION OF OREGON,)	
)	
Petitioner,)	
)	
v.)	Docket No. 198
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: October 10, 1963

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
Ramsey Clark, Attorneys for
Defendant.

OPINION OF THE COMMISSION

Watkins, Chief Commissioner, delivered the opinion of the Commission.

The Commission's Findings of Fact and Opinion were previously entered in this docket on June 10, 1960. Thereafter hearing was had upon the Petitioner's motion for rehearing, and upon consideration thereof the Commission found that the additional evidence offered at the hearing was such that even if received it could not have in any way affected the final determination in this matter. Therefore the motion for rehearing was denied but the Commission did find that its previous Findings of Fact, Opinion and Order of June 10, 1960, should be vacated. An order to such effect having been entered, there is now for determination

(1) petitioner's capacity to sue; (2) whether the defendant had recognized title to the land involved herein and, if not, then (3) to what land, if any, has original title been established? ^{1/}

Petitioner claims recognized title to all of the land ceded under the Treaty of June 25, 1855, but only part of that area is claimed under original title. Defendant denies any recognized title, disputes the amount of land to which original title is claimed, and, conceding that petitioner may prosecute this action in a representative capacity, it challenges petitioner's claim that it is a successor in interest.

In our Findings of Fact this day entered we have found that the several Indian entities executing the 1855 treaty were confederated by it into one post treaty entity, and that the present petitioner may prosecute this action in a representative capacity on behalf of that entity or the entities signatory to that treaty, but that it is not the successor in interest. Our reasons follow:

The treaty commissioner negotiating the 1855 treaty did so under instructions to unite as far as possible the tribes and bands of Indians found in the Oregon Territory east of the Cascade Mountains for the purpose of ceding all right, title, and interest to lands claimed by them. The treaty provides for the setting apart of certain of the ceded land as a reservation for the Indian parties to it, for the election of

^{1/} Before proceeding to give our reasons for adoption of the Findings of Fact herein it should be noted that Dockets No. 198 and 264 were consolidated for purposes of hearing only, and that it was stipulated that all evidence oral or written received in either of said Docket numbers may be considered in each of them in arriving at a determination of said Docket numbers.

a head chief by the confederated bands, for the plowing and fencing of land for such official, for construction of a house to be occupied by him, and, for a limited period of time, for payment of a salary to him during his term of office. The consideration runs to the new confederation to be paid in money, goods, and services, regardless of the population of the various bands at the time of their confederation or the proportionate interest any one of them could claim to the land ceded to the United States. On November 15, 1865, the hunting, fishing, gathering and pasture rights reserved by the 1855 treaty were ceded to the United States under a supplemental agreement by the one entity, the "confederated tribes and bands of Middle Oregon." (14 Stat. 751) The confederation was intended to be permanent and the Indian parties thereto organized under a head chief as a single entity for the purpose of carrying out the treaty, and acted within the framework of a confederation until organization of the petitioner. (Yakima Tribe v. United States, 7 Ind. Cls. Comm. 294) (Pet. Ex. 269)

Petitioner, however, is not the successor in interest to that confederation. Petitioner was incorporated under the Wheeler-Howard Act of 1934 by all of the Indians residing upon the Warm Springs Reservation at that time whose names appeared upon a certain allotment roll. Its membership was extended to every child of at least $\frac{1}{2}$ Indian blood born to a member residing on that reservation and to any child of $\frac{1}{8}$ or more Indian blood who is a descendant of a member or former member of the organization and adopted into it, and who has resided on the reservation for at least 3 years. There is no requirement that a member

trace his ancestry to the treaty entities of 1855 or the entity created by the 1855 treaty. (Pet. Ex. 380)

About 1878 a number of Paiute Indians settled on the Warm Springs Reservation. They are now "largely intermarried" with other residents, but at the time of trial on the present issues the rolls of petitioner organization included 207 whole-blood or mixed-blood Paiute Indians. (Trans. p. 418) So, while petitioner includes members of the former confederation, its membership is extended to individuals named on an allotment roll, a much wider class of people, and any award which might be made to petitioner as a successor in interest would inure to the benefit of the entire membership. Thus, in event of such an award in this case, whole-blood Paiutes whose antecedents had no relation to the pretreaty entities of the confederation formed in 1855 would participate in the benefits of a cause of action which accrued, it at all, to the pretreaty entities or the confederation created by them in 1855. We cannot conceive that Congress intended any such result when it gave to this Commission authority to adjudicate matters involving original title.

RECOGNIZED TITLE

We have denied petitioner's claim of recognized title in our Findings of Fact No. 22 for a number of reasons:

It is well settled that a mere treaty of cession, without more, does not establish recognized title. It must be accompanied by Congressional action showing a specific intent to accord legal rights, and not

mere premissive occupation. (Tec-Hit-Ton Indians v. United States, 348 U.S. 272, 99 L. ed 314, 320) But petitioner says the provisions in the Laws for the Provisional Government of Oregon (Pet. Ex. 371, p. 15) adopted July 26, 1845, and the Oregon Organic Act of August 14, 1848, 9 Stat. 323, which preserved the Indians' rights of person and property, the Act of June 5, 1850, 9 Stat. 437, and that of September 27, 1850, 9 Stat. 496, amended February 14, 1853, recognizing claims of settlers to land west of the Cascade Range and directing the survey and sale of land there, were all administratively interpreted (Attorney General's Opinions, August 2, 1854, June 22, 1856; Pet. Exs. 141, 165, 265) as not applicable to land "in the actual occupation of Indian tribes." Petitioner says that Congress must be presumed to have known of this interpretation and that defendant's administrative officers considered that land in Oregon east of the Cascade Range was "Indian country," when it authorized the negotiation of treaties to extinguish original title in this region on July 31, 1854, 10 Stat. 330, and extended the public land policies to that region on May 29, 1858, 11 Stat. L. 293, and by its enactment of that legislation it recognized the existence of original title there; that its action was so interpreted by the General Land Office; that Congress affirmed and completed this recognition of title by identifying the land when it approved the 1855 treaty.

We do not agree with this thesis. It was early determined, and has been consistently held, that the American Indians had a use right in such lands as they are able to establish they used and occupied exclusively

from time immemorial. This right is what was preserved to the Indians by the Provisional Government Act, Organic Act and the Indian Intercourse Act as extended to Oregon during 1850; nor has petitioner presented evidence that Congress had any other intent in mind when it adopted them, Tee-Hit-Ton Indians v. United States, supra. An administrative interpretation cannot retroactively create an intent not earlier existing. We held in Quapaw Tribe v. United States, 1 Ind. Cl. Comm. 469, that the Northwest Ordinance which contains similar language respecting the protection of Indian rights in person and property was not an admission of original title. Neither can the acts relied upon by petitioner be said to be an admission of such title.

Congress did not, as petitioner asserts, differentiate between the land east and that west of the Cascade Range intending to "protect only one thing -- the Indian title" to the eastern lands, but it simply followed the customary pattern of extinguishing Indian title where a demand for available public land existed or could be anticipated shortly. The defendant did this by taking cessions from the Indians to all lands claimed by them irrespective of whether the Indians making the cessions actually held original title to all of the lands which they ceded.

We have found no evidence of an intent to recognized title in the legislation relating to the negotiation or ratification of the June 25, 1855, treaty. What Congress intended to accomplish when it ratified the 1855 treaty is clearly expressed by the treaty itself. We do not think there can be imputed to Congress any intent other than that clearly indicated by its earlier action in appropriating funds for extinguishment

of Indian title, and that to be drawn from the wording of the treaty wherein the ceded area is said to be "the country claimed by them * * *."

The complete indifference to territorial limits or claims is manifested both in the treaty council minutes and the treaty commissioner's transmittal letter, wherein it is stated that this cession might conflict with one obtained earlier from the Cayuse tribe, but that this could not be deemed objectionable since the Government was acquiring all the interests of the Indians in this area (Pet. Ex. 168, p. 25).

The 1855 treaty provision for the establishment of an Indian reservation within the ceded area is not government recognition that the Indians had permanent rights to ceded area, and are now retaining a part thereof, but is simply an act on the part of the defendant that henceforth the described portion of the ceded land will be set apart as a permanent residence for said Indians until such time as the President might otherwise direct. Such a reservation in the treaty gives the Indians something more than what they previously enjoyed. Now they have permanent rights of occupation which have been granted or given to them, and as stated in the treaty, if a more satisfactory tract was later found, these Indians had the right to request it for their future home in lieu of the described area. The record indicates the reservation was originally selected because Agent Thompson's interpreter thought the site was suitable for the purpose and because it removed the Indians from the vicinity of a wagon road. (Pet. Ex. 155; Def. Exs. 3, p. 12; 5, p. 32; 91; Pet. Ex. 400)

Petitioner advances as further proof of recognized title an 1854 map prepared by one Major G. O. Haller. First of all we do not believe that this map by itself accomplishes what the petitioner claims it does. When it was submitted by Agent Thompson with his annual report of 1854, he wrote Superintendent Joel Palmer that he had not yet visited all of the Indians in this agency, but that he enclosed this map that Palmer might have an idea of their general locality; that it had been prepared by Major Haller who had taken pains to ascertain the topography of the country and that it "might be relied upon as being in the main correct." It is evident that Thompson was discussing principally the topography depicted on the map and not specifically the location of the Indians when he made this statement (Pet. Ex. 148, p. 492).

After carefully examining the Haller map we believe that the author was dealing in generalities in fixing tribal locations. Showing the general locations of a tribe, band, or group of Indians is a far cry from designating specific boundaries for the area that would be accorded some form of recognition. There are certain areas on the map left vacant which suggest either unoccupied areas or areas whose occupants cannot be identified. There is also a designated area indicating common occupancy. The obvious inaccuracies of certain river locations attests to the author's unfamiliarity with terrain as well as a lack of reliable information.

Nor do we think that Superintendent Palmer thought this map showed the territorial limits of the Indian entities. He had been appointed treaty commissioner on August 15, 1854, to negotiate cessions from these

Indians, and had been instructed to submit a map showing the location of the Indian tribes and bands and the extent of country claimed by each of them. Had he considered the Haller map did this, it would not have been necessary for him about two weeks after receiving it to direct Agent Thompson to visit as many of the Indians within the Umatilla District as was possible, and ascertain their location, numbers, condition and means of subsistence. (Pet. Exs. 142, 144)

Secondly, and what is more important, there is nothing in the record before us to indicate that the Haller map^{*} was prepared in furtherance of a Congressional intent or design to accord to the Indians concerned those title rights contended for by the petitioners herein. In the absence of Congressional approbation, the mere act of some government official along these same lines would be an empty gesture without legal effect. Accordingly, we have found against the petitioner on the issue of recognized title.

There remains for consideration the nature of the land-using entities and what, if any, land was held by each under original Indian title. In discussing these matters we shall for purposes of convenience

* In our former opinion we commented upon certain information which is not reflected upon each of the copies of that map now in evidence. It now appears that the process used in color reproduction does not reproduce certain inks, whereas black and white photostats will pick up this missing data. We are now satisfied that the copies before us are all of the same map.

refer to the three Wasco bands collectively as the Wasco Indians. Petitioner's expert witness, Dr. Ray, applied the name "Wayampam" to the Tygh, Wyam, Tenino and John Day River bands of Indians, having found it less confusing than the name "Tenino" which has been applied to them collectively by various writers, some of whom are scientists (Tr. p. 76). We shall as a matter of convenience also refer to these Indians collectively as Wayampam. Since the numerical numbers of the several entities may have some relation to the area each of the land-holding entities held under original title on the dates pertinent to the issues before us, we have next considered the evidence bearing upon their population.

There is much variance in the evidence concerning the number of Indians in these several bands. We believe the most nearly accurate enumeration would be that made by agents in charge of the Uvilla District Agency within which they were located, and we have based our determination upon such reports. Earlier reports indicate there were great numbers of Indians along the Columbia River within the claimed area, but it appears the greater number of them were Indians visiting in this area for trading, gambling and social purposes. Serious epidemics also reduced the local population during 1820-1832, until the Cascade Wasco were said to number only about 30 Indians living in 3 lodges. (Pet. Ex. 60) According to the reports of the Indian Agents, the November 1855 census of the Wasco bands was 403 souls. The census of the Cascade and Hood River Wasco was 150, of which it appears about 70 were Cascade Indians and 80 Hood River Wasco. The Dalles Wasco numbered 253. Contemporary reports

around the treaty time disclose that there were 150 John Day River Indians, 500 Tygh Indians and 300 Wyam and Tenino Indians. Our findings of fact respecting the 1855 census of these bands is based upon such reports. (Pet. Ex. 180; 148; 248; Def. Ex. 87)

In determining important questions of aboriginal title to the claimed area ceded under the 1855 treaty, it is, of course, incumbent upon the Commission to identify the particular land-owning entity or entities involved. According to the petitioner, the three bands or tribes comprising the Wasco group are separate land-owning entities, while the four neighboring bands or tribes making up the Wayampam group are in fact "sub tribes" of a higher overall political land-owning entity known as the Wayampam tribe.

Defendant's position is that the four separate, independent, and autonomous dual-villages were the only land-holding entities among the Wayampam Indians in pre-treaty times, and that they were without political unity of any kind.

Petitioner's contentions are the views expressed by its expert witness, Dr. Verne Ray. However, the Commission is aware that Dr. Ray's testimony in this regard is a recent and radical departure from his earlier position, wherein he was a strong supporter of the rigid and completely autonomous village composition among the Wayampam bands. In his testimony Dr. Ray admitted that he considers the concept of an over-all Wayampam tribal entity as "high probability but not a certainty."

The Commission rejects as conjectural and not supported by the weight of the evidence the theory of an over-all Wayampam tribal entity.

We think the evidence strongly shows a pattern of independent subsistence and tribal activity among the seven bands or tribes of the Wasco and Wayampam Indians. Any fine shade of political distinction between the Wascos and the Wayampams is really a distinction without such a difference that would warrant a finding that at treaty time the seven bands were not in fact separate land owning entities.

The 1855 treaty language and the events surrounding the treaty negotiations indicate to this Commission that the treaty officials were cognizant of the fact that they had to deal successfully with separate tribes having separate interests before the treaty purposes of cession and unification could be accomplished.

The minutes of the 1855 treaty council are most revealing. The assembled bands of Indians were well aware of the earlier land cessions by those Indians living west of the Cascades which resulted in their eventual relocation. This question of relocation was of great concern to the 1855 treaty participants. Each of the four Wayampam bands was represented at the 1855 treaty council by its own chief, and each band acted in an independent fashion.

Thus, when the treaty commissioner informed the Wasco Indians that the Tenino band had sold only Tenino land, not one of the assembled Indians questioned the Tenino band's right to sell its own land, nor did any other band or any individual on behalf of the other bands claim an interest in the land sold by the Tenino. Of significance is the fact that nowhere during the treaty negotiations is there any indication of

a principal chief or spokesman for all the Wayampam bands, or of the existence of an over-all tribal council. If there had been such an important official it is dubious that his presence would go unmarked, or that he would not have been heard at such an important event.

For example, there is a provision in the treaty with respect to a portion of the consideration to be paid the Indians for the cession. It reads as follows:

The United States also engage to erect four dwelling-houses, one for the head chief of the confederated bands, and one each for the Upper and Lower De Chutes bands of Walla-Wallas, and for the Wascopum band of Wascoes, and to fence and plough for each of the said chiefs ten acres of land; also to pay the head chief of the confederated bands a salary of five hundred dollars per annum for twenty years, commencing six months after the three principal bands named in this treaty shall have removed to the reservation, or as soon thereafter as a head chief should be elected: And provided, also, That at any time when by the death, resignation, or removal of the chief selected, there shall be a vacancy and a successor appointed or selected, the salary, the dwelling and improvements shall be possessed by said successor, so long as he shall occupy the position as head chief; so also with reference to the dwellings and improvements provided for by this treaty for the head chiefs of the three principal bands named.

Again, a chief of the claimed over-all tribe of Wayampam was not mentioned, but the chiefs for the Upper and Lower DeSchutes bands of Walla Wallas (Wayampams) and the Wascopum band of Wascoes, were each to have a dwelling house erected by the United States, and also were each to have ten acres of land fenced and ploughed. Human nature being what it is, it is unbelievable that a head chief for the Wayampam tribe, if one existed, would have remained silent when benefits were handed out by the Government and he was being by-passed. It is also unlikely that

the United States representatives would have overlooked him, for if they had done so, he would have indignantly reminded them of the oversight, and unless it were corrected, there probably would not have been a treaty.

The treaty commissioner, who was Superintendent of Indian Affairs in Oregon, and the local Indian agent in charge of these Indians were both present during the council. These are the men who would have been most familiar with the tribal relationship existing among these Indians. As representatives of the Government they would have been interested in seeing that the treaty of cession was negotiated with and approved and executed by the proper chief, representative, body or bodies having authority to act on behalf of these Indians. In fact, it was their duty and responsibility to do so. In his follow up report of July 9, 1855, Treaty Commissioner Joel Palmer stated that he had treated with the John Day River Indians and "all the Bands on the DesChutes River."

There are other early references in the record indicating that the Wayampam bands are independent entities, such as the aforementioned 1854 map of Major G. O. Haller depicting the general locality of the DesChutes River bands, the Tygh, and the John Day River Indians; Agent R. R. Thompson's annual report of 1854 listing DesChutes River bands, the Tygh and John Day River Indians; Agent A. P. Dennison's August 1, 1857, report that DesChutes Indians had "formerly occupied that section of country between The Dalles and the Ty-ich River," that the Ty-ich (Tygh) had "formerly occupied the Tygh valley and the country in its vicinity,

which lies 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"; J. W. P. Huntington's 1863 report that the bands then on the Warm Springs Reservation were the Taich (Tygh) or Upper DesChutes, the Wyam or Lower DesChutes, Tenino and Dockspus (John Day River) bands; and testimony given before the House Committee on Public Lands on February 18, 1891, by witnesses who had attended the 1855 treaty council and who named the Tygh or Upper DesChutes, the Celilo or Lower DesChutes, and the Tenino as separate parties to the treaty, and the John Day River Band as a separate tribe. (Pet. Exs. 147, 148, 81, 167, 155, 248, 306, 379-b, 389; Def. Ex. 15)

Besides the testimony of petitioner's expert witness, Dr. Ray, there are in evidence selected excerpts from earlier reports of other qualified experts who have studied and done field work among the Columbia River Indians and the neighboring tribes.

In an article published during 1893 following his field work among the Wayampam Indians, Mr. James Mooney said that there were four independent tribes of Indians. The fact that Mooney had the benefit of both pre-treaty and treaty contemporary informants adds considerable weight to his report. Ruth Murray Underhill in "Red Man's America" said that Plateau Indians were usually autonomous village Indians (Def. Exs. 69 and 43). Mr. Suphan, defendant's expert witness, who did field work among the Wayampam Indian bands on the Warm Springs Reservation during 1953, found complete concurrence among them that in

pre-reservation times the Wayampam were independent bands, lacking tribal unity (Def. Ex. 17, p. 17). Dr. George Peter Murdock, whose field work among the Wayampam was done during 1934-1935, described them as four "sub tribes or pairs of villages" and said they were originally independent of each other.

In view of this evidence, which does not support Dr. Ray's present position, as well as his statement that he considers his conclusion of tribal unity among the Wayampam "a high probability but not a certainty," the Commission has found that the Wayampam Indians prior to 1855 were four separate land using entities capable of self determination with respect to all matters negotiated under the 1855 treaty of cession.

ABORIGINAL TITLE

Petitioner claims aboriginal title or Indian title to a greater part of the area ceded under the Treaty of June 25, 1855. We are, of course, dealing now with a question of fact, and it is incumbent upon the petitioner to show by substantial evidence that each of the seven bands held aboriginal title to specific tracts within the ceded area. In the recent case of The Sac and Fox Tribe of Indians of Oklahoma, et al., v. United States (Appeal No. 1-61), decided April 5, 1963, the Court of Claims briefly stated the basic elements of aboriginal title under our act when it said:

To be accepted under the Indian Claims Commission Act, aboriginal title must rest on actual, exclusive, and continuous use and occupancy "for a long time" prior to the loss of the property. (cases cited) . . . Each of these components must be shown by adequate proof.

A little further on in its opinion the Court enlarged upon the subject in the following manner:

The status of aboriginal ownership is not accorded to tribes at the very instant they first dominate a particular territory but only after exclusive use and occupancy "for a long time." This is as it should be -- especially under the Indian Claims Commission Act which is the charger for doing justice between the Indians and the United States. Justice would not be vindicated if a tribe were able to claim a monetary award, on the ground that it was unfairly deprived by the Government of its original ownership of property, where the lands were but recently seized by conquest from another tribe. The rights of aboriginal title must have time to take root, transforming a conquered province into domestic territory. The Claims Commission Act, which seeks to repair damage caused by United States conquest of Indian lands, should not be turned into an engine for creating aboriginal title in a tribe which itself played the role of conqueror but a few years ago.

We, of course, note the court's repeated emphasis on the phrase "for a long time" as definitive of the time period in which a tribe must perfect aboriginal title. No attempt was made by the court in the Sac and Fox case to define in years what constituted the period "for a long time." Obviously then, the term must vary according to the facts in each particular case, and no precise number of years can be fixed as controlling. Conceivably, where two or more antagonistic tribes or bands are continually contesting for the exclusive possession of a common subsistence area, it might take perhaps fifty or even a hundred years or more for the dominant tribal group to change a conquered province into a domestic state. In such a case "for a long time" could well mean for a very long time. On the other hand, the time period may be so short within which the superior tribe has gained exclusive use and

occupancy of an area at the expense of the prior user, that an aboriginal claim under our Act by the former is clearly unjust and inequitable. With this in mind we shall now look at the facts of aboriginal ownership in the case before us.

The principal documentary evidence in this case concerning the Columbia River Indians and, perhaps the earliest, consists of the journals of the famous Lewis and Clark expedition of 1804-1806. Captain Meriwether Lewis and Captain William Clark were appointed to head an official expedition to the Pacific Coast to secure certain information about this western country, including the numbers, identity, and location of Indians in it. They received special training for this work, and their official observations were recorded in journals kept by them. Some other members of their party kept private journals of their observations. This accumulated data discloses that in 1805 the Indians now known to be the Wayampam bands, as well as some of the Wasco bands were residing along the north side of the Columbia River. They were then fishing along the south bank and doing some hunting in the territory immediately south of the Columbia River and up the DesChutes River as far as Sherar's Bridge, and the northern part of the Tygh Valley. Lewis and Clark did not find any Wayampam villages on the southside of the Columbia in October 1805. And in April 1806, they found only one village. The reason they gave the explorers for not living more extensively on the southside of the river was their fear of attack by the Snake Indians. And who were the

Snake Indians?

The Snake Indians occupied and used in aboriginal times most of the subject tract up to the Columbia River. They also occupied and used during this period an additional area in south central and southeastern Oregon, which was an inhospitable country, offering little in the way of food supplies. For the most part they subsisted on roots, berries, insects, fish, deer, elk, and other animals as they might obtain by traps, snares, or the bow and arrow. The Snakes were the least culturally advanced of any of their neighbors. They moved about in small roving bands characterized by an almost entire absence of responsible social organization. The Snakes had but a few horses in the early 1800's, and like most tribes in the area, they had few guns, if any, until a later period. However, as fighters, they were of the Guerrilla type and feared by other tribes. Because of the economics of their situation and their method of living, the Snakes covered large areas of Oregon in search of food, and they could be found in mountain areas looking for nuts and berries, digging roots in the valleys and taking fish on the Columbia River. When the Wayampam Indians began their expansion south across the Columbia River and its tributaries, the Snakes bent every effort to prevent these Indians from penetrating the country south of the river. The Lewis and Clark journal and the Robert Stuart journal records Snake war parties as far north as the Columbia River.

Between 1805 and into the late 1860's there are numerous references in the record of Snake activity in the claimed area particularly in the central and southcentral parts, and around the area upon which

the present Warm Springs Reservation is located. These references are taken from official Government documents and correspondence as well as from the writings and studies of noted anthropologists, ethnologists and others particularly versed in the life and history of these north-west Indians.

During 1834-1835, Nathaniel Wyeth, a fur trapper, reported meeting both Snake and Walla Walla hunters within a few miles of each other near the confluence of the DesChutes and the Crooked Rivers on the southern boundary of the present Warm Springs Reservation. George Suckley, a local resident, who furnished data to Horatio Hale, the ethnologist with Governor Isaac I. Stevens' exploring party of 1855, advised him that:

Formerly the Snakes extended north down the John Day and Des Chutes River to the Dalles (on the Columbia River). A few are now found near the Warm Springs on the sources of the Des Chutes River. The Upper Chinook then lived on the shore opposite the Dalles but below the DesChutes falls. The latter with the Walla Walla speaking and Cayuse Indians drove the Snakes back to their present limits, and the Chinook then crossed the Dalles and settled at Wasco-pam (Pet. Ex. 156, additional matter supplied).

During 1855 Major Haller said Snake country extended north to the Grand Ronde in eastern Oregon, a point about equi-distant north with the northern boundary of the Warm Springs Reservation, and Special Indian Agent Nathan Oleny ran their boundary from that valley west to the warm springs on the DesChutes River. (Pet. Ex. 172; Def. 91) Agent A. P. Dennison reported Snakes were living on the east side of DesChutes opposite the Warm Springs Agency during 1858-1859. (Pet. Ex. 282, #195)

Captain Wallen in 1859 said Snakes camped on Crooked River but most of their lodges were south of the reservation (Pet. Ex. 280), and there are numerous references to the determined resistance of the Snake Indians to the establishment of the Warm Springs Reservation. They attacked construction workers and later both the agency personnel and Indian occupants. At one time they captured the agency and occupied both Government and Indian buildings. Troops were required to protect the construction workers and to preserve life and property on the reservation. During 1860 Superintendent of Indian Affairs in Oregon, Edward R. Geary, who had made an investigation on the reservation of the cause of Snake hostility explained to Brigadier General Harney in an official report why the Snakes were so antagonistic toward the Warm Springs Reservation because:

* * * by some strange oversight this Reservation * * * lies within the limits of the Territory not only claimed by the Snakes themselves, but admitted by the Indians, parties to the treaty (of 1855) to belong to them. The Snakes claim that the Whites had no right to give their ancient enemies their favorite hunting grounds, without consulting and compensating them, the true and original owners therefor.

In order to reconcile this difficulty it is my intention as early as practicable in the spring to endeavor to meet the Snake Indians in Council and affect some arrangement which will satisfy and quiet them. (Def. Ex. 101, p. 67)

Superintendent J. W. P. Huntington, 21 years after the reservation was established, referred to Trout Creek, 40 miles north of Crooked River and 20 miles northeast of the reservation, as the northern limits of

Snake country (Def. Ex. 106 #8), and about 1867 one Colonel Thompson learned that a party of Snake Indians had burned the building on Burnt Ranch at the confluence of Cherry Creek and John Day River. His party pursued the Snakes west to Trout Creek where they met a party of Indians from the Warm Springs Reservation hunting in this "neutral country" who accompanied his party, following the Snakes to McKay Creek "near Snake country." (Pet. Ex. 390)

Ralph Shane, who wrote an article on early explorations conducted within the Warm Springs Reservation area, concurred with Dr. James Mooney that the reservation was not exclusively occupied by Wayampam Indians prior to 1855 (Def. Exs. 43; 63), and there are several exhibits indicating these bands did not claim the country as far south as the reservation. In testimony given before the Court of Claims on August 12, 1931, in a suit instituted by the Warm Springs Tribe of Indians of Oregon, a Tenino (Wayampam) Indian, whose father had executed the 1855 Treaty as a Tygh chief, said the Tenino in 1855 ceded the land from the Waupinita Ridge which lies north of the Warm Springs Reservation and south of Tygh Creek, northward to the Columbia River. Additional evidence includes a statement by an Indian informant to Edward S. Curtis in 1909 while Curtis was doing field work in this vicinity, that the Snake Indians laid in wait to kill the Columbia River Indians digging roots in the hills south of that river; that about 1815, a war party of Wasco, Wayampam and others went up the DesChutes River, destroyed a large Snake camp on a tributary of that river, and while enroute home came

upon another Snake camp on Warm Springs River which they attacked, killed many, and took some 40 Snake women and children prisoners. (Def. Exs. 24, p. 179; 17, p. 48; Pet. Ex. 7) While Dr. Murdock was working among the Wayampam Indians during 1934-1935, his informant, who was a Tenino Indian and who said that his grandfather had told of participating in the action, told Dr. Murdock about 1810-1820 the Tenino expelled the Molala Indians from Tygh Valley. At the time of this incident and for a long time prior thereto, according to Murdock's informants, the Snakes held the Warm Springs reservation area to the south of Tygh Valley, used the berry grounds around Mt. Jefferson and Ollalie Butte, and wintered at Hot Springs, Warm Springs and on Seekseekwa Creek at Siksi'kwi. They exploited the root grounds to the east about Shaniko, Oregon, and while the John Day River band used the valley of that river east of Tygh Creek, "they admit that the country properly belonged to the Paiute (Snake)." (Def. Ex. 52, p. 398)

This evidence as well as all the other references in the record has convinced the Commission that the Snake Indians were the prior users of a great deal of claimed area, reaching almost to the Columbia River, and that, from the time of Lewis and Clark up to the 1855 treaty of cession and the creation of the Warm Springs Reservation, this Snake tribal activity seriously impaired if not stopped altogether the acquisition of new territory south of the Columbia River by the several Wasco and Wayampam bands. In our considered judgment, the valid territorial claims of the Wasco and Wayampam bands must be restricted to the northern

part of the claimed area. The extent southward of their land holdings below the village and fishing sites on the Columbia and DesChutes Rivers, hardly exceeds thirty or thirty-five miles from any point on the Columbia River.

It is the consensus of the experts and one of whom testified in this case, that for a number of years preceding United States sovereignty over the Northwest Territory and prior to the 1855 treaty of cession, the Wayampam bands pushed their drive of conquest steadily southward displacing the Snake Indians in the course of this movement. The Commission generally agrees with this thesis, but not with all the claimed results of what this southern expansion may have accomplished relative to perfecting the Indian title to the lands claimed herein, especially insofar as the Wayampam bands are concerned.

Dr. Ray, petitioner's expert, says that the Wayampam drive to push the Snakes out of the subject tract began in 1750, reached its peak in 1790, and that the Wayampams were in firm control of the entire area by 1810. This encompassed a period of 60 years from the beginning of the conquest to its claimed successful completion. Therefore, according to the petitioner's view, Wayampam title to the claimed area was finalized some 35 years before American sovereignty attached in 1846, and some 45 years before the area was ceded in 1855. The repeated presence of Snake Indians throughout the greater part of the claimed area between 1810 and 1855 is explained away on the basis that these are nothing more than marauding bands venturing into a vacuum created by Wasco and Wayampam

bands returning to the area of the Warm Springs Reservation. Dr. Ray is of the opinion that the Snakes entered this area recognizing that the Wayampam Indians owned the country, and that they were venturing into it without right. His theory is interesting, but we find no substantial evidence in the record in support of it or his timetable. Dr. Ray's theory, however, does support or corroborate the simple fact that the Snake Indians were in a greater part of the claimed area before the Wayampams sought to drive them out. Admittedly, Dr. Ray bottoms his theory primarily on information supplied by Wayampam informants. What documentary evidence there is in the record in support thereof is conjectural.

We know, of course, that Wayampam expansion south of the Columbia River is the dominant theme running throughout this case. But when did it actually begin?

Reference has already been made to the reports of Lewis and Clark in 1805 and 1806, wherein it is stated that the Wayampam's had their principal villages on the north side of the Columbia River because of their fear of the Snake Indians who were reported at locations estimated to be from a 4 to a 12 day march below the Columbia River. Apparently the Wayampams had made no serious attempt at this date to expand their territorial holdings south of the Columbia River. Ross Cox in 1811 reported a large Indian camp on the south bank of the Columbia River just above the mouth of the DesChutes River, but he said, "The natives reside solely on the northern side." (Pet. Ex. 5, Vol. 2, p. 126) Robert Stuart, while traveling on the Columbia River during 1812, mentioned passing two

villages on the south bank and a strong tribe on the north side above the "long narrows." (Celilo Falls) (Def. Ex. 17)

Peter Skene Ogden, a noted trapper, met "upwards of 100 Indians" on the DesChutes River a few miles above its mouth during 1825. George Simpson, a Hudson's Bay Company official, after traveling up and down the Columbia River by water during 1824-25, listed as tribes residing on the south bank of that river a "Lowhum" tribe above the "Chutes" at the mouth of the DesChutes River; a Day's River tribe above "Lapum River"; and a "Sapa" tribe on a small river which appears to be a reference to Willow Creek, upstream from the John Day River. Charles Wilkes in 1841 found a village on Lower John Day River; Nathaniel Wyeth in 1834 found a "small village of Inds." one mile up the DesChutes River near where Samuel Parker found one in 1835. (Def. Exs. 17, p. 41; 27; 70; Pet. Ex. 382 and Pet. Ex. 106, Dkt. 264) Based on all the evidence, it is our best judgment that about 1815 the Wayampam bands permanently established some of their villages south of the Columbia River, and some near the south bank of that river, but that they had fished and hunted many years before that time in the areas where their villages were later located.

Early in the nineteenth century the Tenino band of Wayampams began to exert strong pressure against their southern neighbors, the Molala. The Tenino expansion southward culminated in the displacement of the Molala in the Sherar's Bridge-Tygh Valley region. Around 1820 the Teninos, who had settled there, broke off from the parent group, and became known as the Tygh band of Wayampams. Having driven out the Molala, the Tenino continued to probe even further to the south, directing their efforts against the Snakes. These Wayampams were familiar with the source of the Warm Springs River

in 1843, and by 1845 "DesChutes" Indians were pasturing their horses in the valley of the Warm Springs River. Dr. Murdock indicates that by the time the Warm Springs Reservation had been established, the Tenino had expelled the Snakes from the berrying grounds near Mt. Jefferson, from the wintering places at Hot Springs, and from the root gathering grounds around Shaniko, Oregon. They had carved out a territory from the Paiutes which they were well aware belonged to the latter.

Mr. Suphan, defendant's expert witness, was of the opinion that by 1855 the primary subsistence area of the Wayampam bands extended south of the Columbia River to an arc roughly drawn from Mt. Jefferson and extending easterly through Simnasho, Oregon, over Mutton Mountains to North Junction, Oregon, and thence to a point near John Day River slightly east of Clarno. According to Mr. Suphan, these Indians by 1855 were penetrating far south of the claimed area, but laid no claim to the country south of Seekseekwa Creek near the southern boundary of the Warm Springs Reservation.

It is problematical that during this same period the southern expansion of the Wayampams up the John Day River paralleled their efforts on the DesChutes River. The evidence on the point is meager. During 1842 Charles Wilkes, who had prepared a linguistic map of this country, mentioned a "large village" of about 60 Indians along its banks just below the Columbia River. An interpretation of his map reflects both the territorial and linguistic limits of the Wayampams, which would suggest a southern John Day River boundary opposite and east of Sherar's Bridge and Tygh Valley.

Evidence of the eastern limits of Wayampam lands centers around the John Day River band of Wayampams. In 1853 Major Alvord was of the opinion

that the John Day River band owned the country east to Willow Creek. Major Haller located scattered bands of Indians on his 1854 map but could not identify them further. Charles Wilkes' 1841 map depicts the eastern Wayampam boundary as a line extending south along the eastern watershed of DesChutes River (Def. Ex. 75). Agent A. P. Dennison in 1857 reported the John Day River Indians were in the immediate vicinity of that river (Def. Ex. 15). Dr. Murdock recorded they occupied only two village sites, both near the mouth of John Day River, but that their territory adjoined that of the Umatilla Tribe near Arlington, Oregon (Def. Ex. 52). Dr. Ray, petitioner's expert witness, first excluded all land east of John Day River from Wayampam territory because he found the Umatilla had camped west to that river; later he divided the common-use land from John Day River east to Willow Creek between the Umatilla and the John Day River Indians. He testified the watershed divide is the territorial divide, and has placed a John Day River village site on the Columbia River near Arlington, Oregon (Pet. Ex. 403). Mr. Suphan, defendant's expert witness, gave no eastern limits for these Indians although his primary subsistence map suggests a line running south from Arlington.

From this conflicting evidence we have concluded that the eastern boundary of the lands used by the John Day River band of Wayampams follows generally a line east of the John Day River that runs southeast from Blalock on the Columbia River to the Willamette Base line, then south to a point approximately due east of the Sherar's Bridge-Tygh Valley area.

Although we believe that by 1855 the several Wayampam bands were sending hunting parties into the southern limits of the claimed area, the

evidence in the record has not established an exclusive use in these Indians by 1855. Clearly the Snakes by far had not been entirely driven out of the claimed area by 1855 and even where they had been expelled, the Wayampam occupation was of such recent character that it had not yet ripened into Indian title. (Sac and Fox Indians et al., v. United States, supra) We have concluded, therefore, that the southern territorial limits of Wayampam exclusive use and occupancy as of 1855 does not extend any further than the Sherar's Bridge-Tygh Valley area, nor any further west than the sources of the several streams that run from the west through Tygh Valley and empty into the DesChutes River. To the northwest lies the adjacent territory of the three Wasco bands situated on the south side of the Columbia and east of the Cascades.

As described in our Finding 50, this Commission found that the three Wasco bands and four Wayampam bands, as of the effective date of the 1855 treaty, had Indian title to separate but contiguous tracts on the south side and below the Columbia River. For the sake of convenience the Commission circumscribed a line around the entire area.

Then, as shown in our Finding 51, the Commission has attempted to fix reasonable boundaries for the tracts owned exclusively by the three Wasco bands and the four Wayampam bands of Indians within the overall area. Beginning with the three Wasco bands and moving from west to east, we find the Cascade Wasco, then the Hood River and Dalles Wasco. Each of their land holdings fronts upon the south side of the Columbia River, and we have separated them as nearly as possible by drainage areas.

There then follows three of the Wayampam bands, the Tenino, Wyam and the John Day River band, which is the most eastern group. The lands of each of these three Wayampam bands fronts on the south side of the Columbia River and extends southward some 20 to 30 miles. The separation between the Dalles Wasco and the Tenino is a line running southwest from Big Eddy on the Columbia River; between the Tenino and the Wyam it is a line running south from the Columbia approximately midway between Big Eddy and the town of Moody; and between the Wyam and the John Day River Indians, the separation is a line running southeast from approximately midway between the mouths of the DesChutes and John Day Rivers at Rufus, Oregon, to the Willamette Base Line and then south. The eastern boundary of the John Day River Indians is a line running southeast from Blalock to the Willamette Base Line, and then south, reaching a point approximately opposite of and due east of the Sherar's Bridge-Tygh Valley area. The Tygh band of Wayampams are located on a diamond shape tract of land south of the Tenino and Wyam lands and north of the town of Maupin, Oregon.

Indian title to the respective tracts of lands belonging to the seven bands or tribes of the "Confederated Tribes or Bands of Middle Oregon," as described in the Commission's Findings 50 and 51, was extinguished by the United States for a consideration on March 8, 1859, the effective date of the Treaty of June 25, 1855 (12 Stat. 953). This case shall now proceed to a determination of the acreage of the lands ceded above, their value as of March 8, 1859, the amount of the consideration paid by the United States to the confederated bands for their lands, and all other matters

bearing upon the question of the liability of the United States to those Indians represented by the petitioner herein.

Arthur V. Watkins
Chief Commissioner

I concur:

Wm. M. Holt
Associate Commissioner

Commissioner Scott did not participate in this case.