

BEFORE THE INDIAN CLAIMS COMMISSION

THE YAKIMA TRIBE,)	
)	
Petitioner,)	
)	
v.)	Docket No. 47
)	
THE UNITED STATES,)	
)	
Defendant.)	

Decided: February 25, 1966

Appearances:

Paul M. Niebell,
Attorney for Petitioner

Keith Browne, with whom was
Mr. Assistant Attorney General,
Edwin L. Weisl, Jr.,
Attorneys for Defendant

OPINION OF THE COMMISSION

Holt, Associate Commissioner, delivered the opinion of the Commission.

In the subject case the Yakima Tribe of Indians petitioned for recovery for the value of four tracts of land which allegedly were wrongfully excluded by the defendant in fixing the boundary of its reservation established by the Treaty of June 9, 1855 (12 Stat. 951). The Commission's initial decision was appealed to the United States Court of Claims. On October 3, 1962, that Court reversed the Commission's determination on the issues involving Tracts B and D. The Commission's determinations on all other issues were affirmed. On June 18, 1965, the claim known as the "Tract C" claim was separately docketed as Docket No. 47-A, and, on June 25, 1965, a final award was entered therein.

The case is now before us solely on the issues respecting Tracts B and D. We have held further proceedings with respect to the issues involving Tracts B and D, and additional evidence has been received. In view of the fragmentation of this case we have elected to enter complete findings of fact on all matters involving the Tracts B and D claims, even though such findings are in many instances repetitious of those previously entered. It is to be understood, therefore, that the findings numbered 55 through 68 herein are the Commission's findings with respect to the Tracts B and D claims only. And to the extent that any of the findings entered herein may appear to modify or even contradict our earlier findings it must be understood that the previous findings pertain to those other matters already determined and affirmed by the Court of Claims.

Having set forth in our findings the pertinent facts surrounding the creation and subsequent surveying, resurveying, and adjustments in the boundaries of the Yakima Reservation, we do not consider it necessary to detail all those matters in this opinion. The two areas in question adjoin the present Yakima Reservation on the western and southwestern borders. In our previous decision we held that the issues concerning the reservation boundaries in the areas involved had been ruled upon by the United States Supreme Court in Northern Pacific Ry. Co. v. United States, 227 U.S. 355 (1913), and, relying upon that decision, we denied petitioner's claim for Tracts B and D.

In deciding the case on appeal the Court of Claims found that the Commission's unquestioning submission to the Supreme Court's opinion as controlling in this case was unwarranted. The principles of res judicata and collateral estoppel did not apply, and, since the question involved was primarily a "factual" rather than a "legal" one, the Commission was not bound by the doctrine of precedent to follow the statements of the Supreme Court. The Court of Claims pointed out that material has been presented in this case which was not before the Supreme Court when the Northern Pacific case was decided in 1913. In remanding the case for further proceedings relating to Tracts B and D the Court of Claims has stated that this Commission is to "canvass . . . the specialized materials, old and new, which the parties offer, and to decide, with due regard for the opinions in Northern Pacific, whether any or all of Tracts B and D rightfully formed part of the Yakima Reservation under the 1855 Treaty" (158 C. Cls. 672, 682).

The Commission has so "canvassed" the materials, and we have entered our findings thereon. Of course the most pertinent "new material" presented in this case is the so-called treaty map which was prepared by Governor Stevens and transmitted by him with the Treaty to the Commissioner of Indian Affairs. However, the map became misplaced in the records of the United States, and it was not available when the surveys of the reservation were made. And it was not before the courts in the Northern Pacific litigation. The map was discovered in 1930, and it is presently located in the Archives of the United States. We have considered

this important document along with all the other evidence of record in reaching our determination on the Tracts B and D claims.

Petitioner contends that the Tracts B and D have wrongfully been excluded from the reservation, which was created and defined by Article 2 of the 1855 treaty. The question is, as stated by the Court of Claims, primarily a "factual" one. In a general sense the construction of Indian treaties raises legal questions. But as to the individualized boundary calls we are faced with factual questions which are to be resolved upon consideration of all the available materials which can reflect the intention of the treaty makers. It is as expressed by the Supreme Court in the Northern Pacific case, "our effort must be to ascertain and execute the intention of the treaty makers." And further the Court stated that as an element in that effort "concession must be made to the understanding of the Indians in redress of the differences in the power and intelligence of the contracting parties." (227 U.S. 359, 362)

We now turn to a consideration on the treaty makers intent respecting Tracts B and D.

Tract B

The Tract B claim involves a pear-shaped area in the northwest. The reservation boundary in this area is defined as running "thence southerly along the main ridge of said Cascade mountains." The present boundary of the reservation in this area follows the Pecore survey (Finding of Fact No. 64) which was made following the Supreme Court's Northern Pacific decision. The Pecore line follows the main ridge of the Cascade Mountains. In so following the main ridge the reservation

boundary tends in a southeasterly direction and thence almost due west to form a semicircular line around Walupt Lake. This boundary excludes from the reservation an area said to contain about 7,705 acres in which is located a part of Walupt Lake and a large berry patch, both of which were traditional sources of food for the Yakima Indians.

It is petitioner's contention that the reservation boundary should follow "along the crest of the main divide of the Cascade Mountains from Goat Rocks to Nanny Butte, crossing Walupt Lake, and continuing along the crest of Walupt Butte to join the present boundary at a point approximately one mile west of the Coleman Weed Patch, the traditional berry patch of the Yakima Indians (Petitioner's Proposed Finding No. 15, pp. 22, 23). In so doing the claimed Tract B would be included in the Yakima Reservation. The described line would, petitioner asserts, follow a natural ridge which is almost as high as the ridge followed by the Pecore survey; it would follow a general north-south course and not make an abrupt swing eastward which is "unnatural and unnecessary"; it would conform to the intent of the treaty makers to include traditional tribal hunting grounds and berry patches in the Yakima Reservation; and it would follow the boundary which was yearly patrolled by the Indian Police Force, under the direction of the United States Agent at the Yakima Indian Agency.

We are, however, unable to accept petitioner's conclusion with respect to the Tract B claim. The reservation calls in this area are clear and unambiguous. The boundary is to run southerly along the main ridge of the Cascade Mountains. There has been no difficulty or dispute

as to where the "main ridge" of the Cascade Mountains runs in this area--and petitioner does not contend that the "main ridge" is located anyplace other than along the Pecore survey line.

The boundary which petitioner urges would flatly disregard the pertinent call of the treaty. Petitioner's line would be west of the undisputed main ridge of the Cascade Mountains. In petitioner's view, however, this should be done because, it is asserted, the Yakima Indians would naturally have understood and intended that the boundary should lie along the ridge which followed a general southerly course and would include an area of traditional food supply. This, petitioner states, should be done in preference to following the ridge which was determined by "technical surveying rules known solely to experienced surveying instruments, for the first time 71 years after the execution of the Yakima Treaty" (Petitioner's brief, p. 46). We cannot agree. Petitioner has not cited any evidence contemporaneous with the treaty negotiations which would even intimate such an understanding or intention. There is nothing on the treaty map which would support petitioner's contention. Even petitioner recognizes that the boundary urged by it would be abruptly broken by the Walupt Lake. But this is answered by the assertion that the line contended for "would appear to follow a natural and continuous chain of mountains."

With respect to the argument that the parties intended that the Indians' traditional hunting grounds and berry patches be included in the reservation, we note that in Article III of the Treaty the Indians

were specifically granted the "privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land" (12 Stat. 951). Obviously, it was recognized that all the Indians' traditional hunting grounds and berry patches would not be included in the reservation. Nor would the fact that the Indian police may have subsequently patrolled an area along the boundary contended for establish any intent on the part of the treaty makers to include Tract B in the reservation.

We have carefully considered all of petitioner's contentions. But we frankly do not view any of the evidence as indicating any intent on the part of the treaty makers to run the boundary which petitioner contends should be followed. It is, we believe, quite a tenuous argument which petitioner has presented in support of its Tract B claim. There is practically no evidentiary basis even cited for the conclusions asserted. What petitioner really asks the Commission to do is to reach a result based wholly on assumption and speculation rather than a sound factual conclusion based on evidence.

The treaty language is clear, precise, and unambiguous. As to the Tract B claim, there is no evidence to indicate that the wording of the treaty was other than as the parties intended. As the Court of Claims very recently held in a similar case involving an interpretation of treaty boundaries:

"In fact, although plaintiff refers to 'resolving an ambiguity,' it would appear that plaintiff is really seeking to have us set aside the wording of the treaty and substitute in its place a substantially different description. This

we are unwilling to do. Cf. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945). Our task in the present case is to construe the language of the treaty, not to rewrite it." (The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, v. The United States, _____ C. Cls. _____, Appeal No. 50233, decided November 12, 1965).

The boundary as surveyed by defendant in its Pecore survey follows the treaty calls exactly. Petitioner has failed to establish any right to recover under the Tract B claim, and it must be disallowed.

Tract D

Tract D is a large isosceles triangle based on the present southwest boundary (which is a straight line running southeasterly from the terminal point of the western boundary--a point east of Mt. Adams in the Cascade Range--to the point of the beginning of the southern boundary (Grayback Mountain)). The reservation boundary in this area is defined in the treaty as running southerly along the main ridge of the Cascade Mountains, "passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco Rivers; thence down said spur to the divide between the waters of said rivers; . . ." The area of Tract D is said to be about 121,465.69 acres.

Unlike the situation which we faced in the Tract B claim, we find that the treaty calls in this area are not clear and precise. And this is so because the calls do not fit the actual topography of the area. There is in fact no spur leading off the main ridge of the Cascades "whence flows the waters of the Klickitat and Pisco [now the Toppenish] Rivers." This therefore appears as an impossible call.

The present boundary of the reservation in this area was established by the 1907 survey of Campbell, Germond, and Long in accordance with a boundary in the area recommended by E. C. Barnard in 1900. However, we have concluded that the boundary thus established was in error. We believe that there were two significant facts which conspired to cause this error. First was the fact that the 1855 Treaty map had been misplaced in the records and was not available to the United States officials who laid out the reservation boundary. And secondly was the fact that reliance was placed on the "White Swan" map which was made in March 1857.^{1/}

The White Swan map undoubtedly was the cause of much difficulty in resolving this matter, and we must confess that it is disturbing to us in our consideration of this case. The so-called White Swan map was made under the direction of Governor Stevens for the express purpose of designating the natural features of the country as far as explored and known and the reservations established by treaty or convention with Indian tribes. In his letter of April 30, 1857, transmitting the map Governor Stevens stated that he could "vouch for the general accuracy of the map and of the Indian statistics given in it." However, the map has a number of inaccuracies in depicting the topography in the general area under consideration. And the map differs materially from the 1855 treaty map in depicting the Yakima Reservation. The two principal difficulties are that the White Swan map shows the Klickitat River located

^{1/} And it must also be observed that the Northern Pacific Railway case was decided by the Supreme Court in 1913 with the White Swan map before it but without benefit of the 1855 Treaty map.

west of Mount Adams, whereas the treaty map shows this river heading east of Mount Adams. And the White Swan map shows the Yakima Reservation boundary as excluding all of Mount Adams whereas the Yakima treaty map shows Mount Adams within the reservation boundaries. Frankly we are unable to reconcile the differences in these two maps of Governor Stevens. We resolve this problem by simply rejecting the White Swan map. It is admittedly more inaccurate than the treaty map. As pointed out by the Court of Claims the White Swan map was "made in March 1857 but not considered very reliable." And the Supreme Court noted that although vouched for by Stevens, the map has many inaccuracies. And of further significance is the fact that the White Swan map was not in any way connected with the 1855 Treaty or its negotiations. The map was prepared two years later. The so-called treaty map, however, was prepared contemporaneously with the treaty and was transmitted with the treaty itself. The treaty map must control in any matters of disagreement between the two designations of the Yakima Reservation boundaries.

The Yakima treaty map indicates to us that the reservation boundary was intended to follow the Cascades passing to the south of Mount Adams before turning to the east. The White Swan map shows the reservation boundary leaving the Cascades north of Mount Adams and running to the southeast. This is generally the course taken by the Barnard Recommendation upon which the Campbell survey was based. We must assume that the White Swan map played a material part in choosing that course. And we doubt that the earlier surveys would have been so made if the treaty map had then been available.

As we have stated, we view the treaty map as depicting a boundary line extending some distance south of Mount Adams. We have also noted that Governor Stevens stated at the treaty council that the Yakima Reservation was to extend down the main chain of the Cascade Mountains south of Mount Adams.

We recognize the fact that the boundary contended for by petitioner extends further south of Mount Adams than does the boundary as shown on the treaty map. The treaty map boundary is some 10 miles south of Mount Adams in the southwest corner whereas the Tract D claim would run the boundary some 23 miles south of Mount Adams. However, in view of the obvious uncertain knowledge of the topography (particularly in this area) such a discrepancy in distances is not at all surprising. The significance, as we view it, is that the treaty map shows a boundary which extends a considerable distance due south of Mount Adams. And if any landmark was well known and prominent in this area, it certainly was Mount Adams with its peak rising to an elevation of 12,307 feet, far above the surrounding Cascades.

Giving due consideration to the treaty map and to Governor Stevens' explanation to the Indians at the treaty council that the reservation extended "down the main chain of the Cascade mountains south of Mount Adams," we interpret the treaty call to require a boundary that extends south of Mount Adams before turning in an eastwardly direction.

There is a distinct spur which runs southerly and easterly from the southern slopes of Mount Adams. True this is not a spur "whence

flows the waters of the Klickitat and Pisco Toppenish Rivers"--but there is no such spur. The treaty calls for a boundary which leaves the main ridge of the Cascade Mountains by means of a "spur" and to follow that "spur" to a divide. We believe that the boundary urged by petitioner satisfies such a call. The boundary which petitioner claims should be followed follows the main ridge of the Cascade Mountains passing over Mount Adams and continues to the south following a distinct spur which runs southerly and easterly from Mount Adams and then turns in an easterly and northeasterly direction to Crayback Mountain. This we conclude was the intention of the treaty makers in describing the Yakima Reservation boundary at its southwest corner.

Defendant has vigorously and ably argued its position that the present southwest boundary of the reservation is as was intended by the treaty makers. We have examined the many exhibits introduced in support of its arguments. But, for the reasons we have outlined, we have concluded that petitioner's claim for the Tract D area must be allowed.

We will leave for further proceedings and determination the questions of acreage, date of taking, and valuation.

/s/ Arthur V. Watkins
Chief Commissioner

/s/ Wm. M. Holt
Associate Commissioner

/s/ T. Harold Scott
Associate Commissioner