

BEFORE THE INDIAN CLAIMS COMMISSION

THE NEZ PERCE TRIBE OF INDIANS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 175
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: March 21, 1967

Appearances:

John W. Cragun of the law firm  
of Wilkinson, Cragun and Barker,  
Attorney for Petitioner

Richard A. Baenen  
Angelo A. Iadarola  
Of Counsel

John D. Sullivan, with whom was  
Mr. Assistant Attorney General  
Edwin L. Weisl, Jr.,  
Attorneys for Defendant

OPINION OF THE COMMISSION

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

The Nez Perce Tribe of Indians is a recognized tribe of American  
Indians and is authorized to bring this claim which was timely filed  
on July 30, 1951. In this and in Docket 180 the Nez Perce Indians  
filed claims which resulted in the trial of several claims (Dockets  
175, 175-A, 175-B, and 180-A).

We have set out in some detail the pertinent details of the  
related claims in a statement preliminary to our Findings of Fact.

In summary, the present status is as follows: Two of the claims  
have been finally determined. These involved a claim (Docket 175-A)

for unconscionable consideration for lands ceded under the Treaty of June 9, 1863 (4 Stat. 647) from the reservation which was retained by the Nez Perce under the Treaty of 1855 which was ratified on March 8, 1859 (12 Stat. 957). Judgment in the amount of \$4,157,605.06 was awarded the Nez Perce (8 Ind. Cl. Comm. 220). Therein we established important facts concerning the inside boundaries of the cession involved herein. In the second claim (Docket 180-A) judgment was awarded in the amount of \$3,000,000 for gold removed from the original reservation and for trespass by white settlers (8 Ind. Cl. Comm. 300). In a third claim (Docket 175-B) the Nez Perce alleged unconscionable consideration in their cession of the reduced reservation as of May 1, 1893 (28 Stat. 326). We dismissed this claim. An appeal was taken to the Court of Claims. That Court reversed our decision and the matter is now pending before the U. S. Supreme Court on the petition filed by the Nez Perce on February 8, 1967 for Certiorari.

The petition herein was severed and amended from the original, but carries the parent docket number, and, as such, was filed on March 1, 1963.

The claim herein is principally for payment of unconscionable consideration of lands ceded by the treaty which was confirmed on March 8, 1859 (12 Stat. 957; 2 Kapp. 702). It is also alleged that the defendant dealt unfairly and dishonorably as to the value of the said lands by withholding information; that the cession was procured by duress; that there was unilateral mistake by petitioner as to the value of said lands; and that there was mutual mistake as to the extent of the lands.

The area involved lies in the present States of Oregon, Washington and Idaho, and generally between the Blue Mountains on the west and the Bitter Root Mountains on the east. The United States acquired undisputed sovereignty over the area in 1846. Thereafter until the establishment of Statehood it lay in part in the Territory of Oregon and in part in the Territory of Washington.

This claim is based upon the cession by the Nez Perce of their lands to the defendant by the aforesaid treaty which was ratified in 1859. The treaty had been negotiated and signed by the parties in 1855.

The evidence in the matter was the subject of research, investigation and testimony by the experts for the parties. These experts are anthropologists.

Dr. Verne F. Ray, who testified for the petitioners, has appeared before the Commission in a number of other cases involving claims of other Indian tribes in the States of Oregon, Washington and Idaho. This is also true of Mr. Stuart Chalfant, who appeared for the defendant. We have fully set out their respective qualifications in our Findings numbered 5 and 11.

Both of the experts studied and gathered related documentary sources which consisted of reports of explorers, government officials, historians, etc., maps, official government correspondence, and other papers. The great preponderance of these sources were gathered by Dr. Ray.

Dr. Ray had made his studies a number of years prior to the passage of our organic act in 1946. Mr. Chalfant did his work after he was engaged as an expert by the defendant.

Both of these experts relied on information which is familiarly characterized in these cases as "family tradition". This is information which they gained from aged Nez Perce Indians.

We have set out the details of their methods, sources, and their testimony in our Findings numbered 6-10 and 12-14.

To supplement the evidence gathered by the parties the Commission has entered Commission's Exhibit No. 2, which is a map of Governor Stevens' routes through this general area. The petitioner, at the request of the Commission, submitted six Transverse Mercator Projection Maps which have been marked Commission's Exhibit No. 1. These have marked on them the outline of petitioner's claim. They depict the topography of the area in miniature duplication of contour topography. Thus, the Commission has had for consideration a more than usual realistic reproduction of the relative height of mountains, depth of valleys, location of streams, lakes, valleys and open country, all so important in relationship to the determination of the probable location of villages, hunting trails, fishing and gathering areas, etc., of these Indians.

A review of the testimony of the two experts (see Findings 10 for Ray and 14 for Chalfant) discloses their agreement as to many of the details of use and occupancy.

We have chosen to include evidentiary findings which are numbered 2 through 60 rather than to include in this opinion the details of background for the necessary basic findings which we have made as our numbers 61 through 94.

The statements and findings from many of the sources in the record relied upon by these experts have been condensed and are the subject of our evidentiary findings numbered 15 through 60. These include those of Lewis and Clark, Alexander Ross, Captain Bonneville, Rev. Samuel Parker, Gallatin, Wilkes, Father deSmet, Gibbs, William Haller, Warren, Stevens, Mooney, Ogden, Curtis, Spinden, Splawn, Swanton, Howard, Meek, Stuart, Fremont, government officials, the treaty council journal, census reports, etc.

Although many wrote of these Indians, very few actually traveled through their country prior to the critical date herein. Lewis and Clark were the first known whites to meet the Nez Perces. Their journals and maps are of great assistance in this matter. Captain Bonneville was the only known white explorer to traverse the western area.

Many of the sources, however, are contemporary or within a relatively short time after the date of the treaty and based on information given by the Indians. Hence many of these documents are worthy of weight in our consideration of this case.

In The Sac and Fox Tribe of Indians of Oklahoma v. The United States, 161 C. Cls. 189 at page 201, the Court of Claims stated:

\*\*\*Post-treaty materials can often shed light on the state of affairs prior to the treaty. Their weight may depend upon their closeness in time to the critical date or upon the nearness of the events they describe, but there is and can be no general rule warranting the fact-finder in disregarding en masse all such evidence. They must be considered and cannot be discarded out of hand. We know that in other cases the Commission has correctly taken post-treaty evidence into account in

deciding a treaty or a pre-treaty issue. See, e.g., The Sac and Fox Tribe v. United States, 159 Ct. Cl. 247, 252-53 (1962) involving another Sac and Fox claim.)\*\*\*

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The Nez Perce Indians were the most prominent, powerful and influential of any of the Indians in the area between the Cascades and the Bitter Root Mountains.

Originally these Indians were principally confined to the valleys and the stream areas with use of mountains adjacent to their permanent villages. Even so they covered a wide range. With their acquisition of the horse in 1730 they expanded their area substantially and traveled into the lands of other Indian nations.

The Nez Perce Indian Nation was made up of a number of bands known by and named in part for their geographical location. However, in the later years prior to the treaty council of 1855 they had achieved a relatively close-knit cohesion among the bands on general matters of government. As compared to modern forms of government as we know and practice, we would today term the Nez Perce as a loosely-knit confederation of bands of the same people (culture, identity, etc.). As they dealt with the government of this country and in their warfare with other Indians they presented a united front.

They had a well-established annual cycle of subsistence activity (Finding No. 73). In this they had developed an expert knowledge of the best times of the year to catch salmon, to hunt the deer, to gather the berries, to dig the roots, etc.

As a supplement to this well-established annual cycle, the Nez Perce traveled every year to the east of the Bitter Root Mountains into the Flathead and Blackfoot country to hunt the buffalo.

Their area for the hunt, for fishing, gathering and digging are well established in the record and set out in our Findings numbered 74-79.

The Nez Perce had many horses. The 1860 census estimates the number to have been 10,000. This enabled them to travel great distances from their permanent villages in quest for subsistence and to defend their country.

Their permanent villages were principally found along the rivers and in the valleys. The hunting sites and the less substantial shelters were well established. To these they returned at certain times of each year according to the annual cycle (Findings 83-85).

The Nez Perce trails honeycombed the area. There were a number of well-known and named trails, such as the famous Lolo Trail which Lewis and Clark used in entering their country. From these, supplemental trails fanned out throughout this area (Finding No. 82).

The clothing of these Indians was made up of the skins of the various animals of the hunt -- the deer, mountain sheep, etc. The bows and arrows, etc., were also made in part from the same general sources. The horses of these Indians had to be fed through grazing in the open prairies, upland plateaus, and mountain meadows.

The game was relatively scarce in the area between the Snake River and the Bitter Root Mountains. Thus it is seen, with 5000

Nez Perce with 10,000 horses, it was necessary that they travel great distances in carrying out these subsistence activities.

This tribe of Indians was friendly with its neighbors to the west and the north. They were friendly with the Flatheads to the east. They were traditional enemies of the Blackfoot to the east and of the Snake, Paiute, Shoshone and Bannock Indians to the south.

One of the principal differences in the testimony of the experts and the contentions of the parties herein relates to the southern portion of the claim. Both agree that up until the time range 1825-1830 there was bitter warfare between the Nez Perce and the aforesaid southern tribes, and that after this there were relatively peaceful relations insofar as the area under study here is concerned.

Ray and Chalfant differ, however, as to the situation which prevailed in the period between this time lag and the treaty date. Ray, for the petitioner, contends the southern tribes did not re-enter and the Nez Perce continued to use and occupy the area, but that in this period the use and occupancy was exclusively with the Nez Perce. Chalfant contends the evidence is that these southern tribes continued to use the area in peace with the Nez Perce.

We have found that the Nez Perce knew the area of their country and that, at the request of Governor Stevens at the 1855 treaty council, they drew a map upon which the treaty calls in the treaty of cession were based (Findings 51(a)-(e), 93).

Based on this map Stevens prepared another map for a proposed reservation within the bounds of the treaty calls. Looking Glass,



one of the Nez Perce chiefs, came into the council late. He, at first, protested the proposed boundary and drew his conception of the boundary for a reservation. The government then replied that if the Nez Perce gave the area depicted by Looking Glass it would receive none of the Nez Perce country outside of the reservation. Looking Glass then agreed.

A comparison of the boundary of the reservation set up in the treaty here under consideration and of the cession calls therein reveals a substantial area south of the reservation area.

Therefore, if we agree with petitioner's proposed Finding Number 54 that the Nez Perce had a definite sense of territorial ownership of the lands used and occupied by them, by reference to the care taken by Stevens at the said treaty council in securing maps from the Nez Perce, we can reasonably assume that the treaty call to the south is a reasonable interpretation of their boundary. Concept of ownership, however, alone is not sufficient. We have used this evidence only in confirmation of record proof of exclusive use and occupancy for subsistence purposes. It is, of course, impossible because of the passage of so many years to define these boundary limits with complete accuracy. The sovereignty of this country over the area was established in 1846. After sovereignty, white emigration into the great Pacific northwest ensued. One of the great concerns of the government officials in this period prior to the treaty was the safety of the emigrating whites whose main passageway was through this southern area and to the southwest and the west of the area. In this connection the maintenance of peaceful relations between the Nez Perce and these tribes to the south was of great concern (Finding

No. 46). The traditional differences and the natural enmity was referred to (Pet. Ex. 45).

A portion of the disputed area in the south was the subject of our decision in Northern Paiute v. United States, 7 Ind. Cl. Comm. 322, 367 (1959). We excluded a portion of the area here involved on the ground of joint use.

Other areas of the claim in the east, northeast, northwestern, and western portions of the claim have been challenged by the defendant as areas of joint use. Therefore, defendant has contended the lands were not exclusively used and occupied by the Nez Perce.

Since this is a claim based on aboriginal title, several elements must be present. 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 cession, transfer, or loss of the property. (See The Snake or Piute Indians v. United States, 125 C. Cls. 241, 254; 112 F. Supp. 543 (1953); The Quapaw Tribe of Indians v. United States, 128 C. Cls. 45, 49; 120 F. Supp. 283, 285 (1954); Alcea Band of Tillamooks v. United States, 103 C. Cls. 494, 557; 59 F. Supp. 934, 965 (1945), affirmed 329 U. S. 40 (1946); The Sac and Fox Tribe of Indians of Oklahoma, et al v. The United States, 161 C. Cls. 189, 201, 202).

The areas under contention include the "Chamberlain Meadows" in the northeast; the camas prairie south of present-day Moscow, Idaho, and areas in the western portion of the claim. We have carefully examined the evidence respecting the Indians' land use in these areas.

We have found that the evidence clearly establishes the Nez Perce use and occupation of these areas. We have found that petitioner has documented its use of these areas and established that the areas were within the ancestral homelands of the Nez Perce Tribe. Accordingly, we find these areas to have been exclusively used and occupied for a long time prior to the Treaty of March 8, 1859, and the areas are included in the lands to which we have concluded the Nez Perce held aboriginal Indian title.

We are, of course, aware that there is evidence relating to the presence of other Indians within the areas under consideration from time to time. Such presence was infrequent, temporary, and for such limited purposes as trading, ceremonial games, dances, and other social gatherings. The Commission does not believe that the presence of visiting Indians for the purpose of attending such ceremonies acted to in any way lessen the validity of the Nez Perce claim of Indian title to the areas. The visits under such circumstances would not diminish the exclusive use and occupation which the Nez Perce maintained over these areas.

The defendant contends the area in and around the Lolo Trail was jointly used by the Nez Perce and the Flathead Indians. We cannot agree.

Defendant's contention is based upon statements made by members of the Lewis and Clark party. The evidence is that as this party entered the Nez Perce country through the Lolo Pass from the Flathead country and proceeded along the Lolo Trail they came upon fishing and hunting

sites which they referred to as Flathead sites. No Indians were seen by the party at these sites. As we have found the reference by the party to these sites as being Flathead was in error (see Finding No. 92). The evidence also is that there was confusion by others as between the Flatheads and the Nez Perce. (Ibid)

In at least two locations Chalfant's proposed boundary lines are more generous than those representing the petitioner's claims (compare Pet. Maps Ex. 2-G and Def. Map Ex. 24-A). It is, of course, impossible to draw these lines with complete accuracy. We have found in these areas of difference, one south of the Lower Snake and the second in the northern area, to be areas of joint usage (see Findings 88 and 90).

The defendant's proposed boundary on Defendant's Ex. 24-A approximates the area of the original Nez Perce Reservation. Thus, in addition to the exclusion of the southern area described in the treaty calls, Chalfant excludes the eastern area to and along the crest of the Bitter Root Mountains. We have found that the Nez Perce used this area for subsistence; and we have included it within the bounds of their aboriginal country (see Findings 73-80, 92, 94). The Bitter Root Mountains were natural barriers along the east of their country. This finding is also strengthened by the facts we have heretofore set out from the exchange between Looking Glass and the government officials at the 1855 treaty council (see Findings 51(e) and 92).

In our determination of the southern and eastern areas described in the Nez Perce aboriginal country (Finding No. 94) outside the

Chalfant line, we have indicated the importance of the 1855 treaty considerations and the methods used in arriving at the treaty calls. We have not, however, used these facts as more than confirmation of other materials in the record from which it is clear that the Nez Perce actually used these areas in quest of their subsistence. The concept by the Indians of ownership alone is insufficient to establish Indian title. (Shoshone Tribe, et al v. United States, 11 Ind. Cl. Comm. 387, 442)

In view of all of the evidence of record we have found that the Nez Perce Tribe of Indians aboriginally owned the area of land described in our Finding No. 94.

This matter will now proceed to a determination of the acreage of land found to have been exclusively used and occupied by the Nez Perce Tribe of Indians as of March 8, 1859 (Finding No. 94); the market value thereof as of March 8, 1859, the effective date of the treaty; the amount of consideration paid where applicable; the amount of offsets, if any, which may be allowable under the provisions of the Indian Claims Commission Act; and other relevant issues raised by the pleadings.

T. Harold Scott  
Associate Commissioner

We concur:

Arthur V. Watkins  
Chief Commissioner

Wm. M. Holt  
Associate Commissioner