

BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: April 4, 1967

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  
 Edwin L. Weisl, Jr., Attorneys  
 for the Defendant.

OPINION OF THE COMMISSION

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

On October 14, 1966, the Court of Claims, after reaching certain conclusions, reversed and remanded this case back to the Commission. The remand order from the Court concerns itself primarily with the two points which this Commission has now reconsidered and acted upon in compliance with the Court's directive. They are:

. . . . .

... 2) there is not substantial evidence to support the Commission's eastern boundary determination, and we remand determination to the Commission for a redrawing of the boundary not inconsistent with this opinion, 3) there is

substantial evidence to support the Commission's southern boundary finding with regard to Snake usage and length of Wayampam occupation, but there is not substantial evidence for their finding with regard to common usage; therefore, we remand this question to the Commission for any adjustment necessary to make the southern boundary determination consistent with our holding ..." \*

#### The Eastern Boundary

The Court concluded from all the evidence that this Commission's delineation of the eastern boundary of Wayampam "aboriginal title" as of the effective date of the 1855 treaty "... is not supported by substantial evidence." In so doing the Court has clearly indicated to the Commission that the line as drawn by the Commission should be moved further east. The evidence cited by the Court in support of its conclusions is the same evidence that was considered by the Commission. We shall not quarrel with the Court's view, for we know that we are dealing in matters of judgment and not of mathematical exactness. If higher authority has now seen the picture differently, we bow to higher authority. We note in this regard, however, that the Court has relied principally upon the conclusions of Dr. Ray, petitioner's expert. As the Court has clearly observed, Dr. Ray, in his determination of what constitutes the eastern boundary of Wayampam aboriginal claims, has simply split the difference of the extensive common use area that he found existed between the eastern limits of exclusive Wayampam territorial claims and the western limits of the

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\* The Confederated Tribes of the Warm Spring Reservation in Oregon v. United States, Appeal No. 2-64, Slip Opinion of October 14, 1966, pp. 22, 23. The Court also vacated the Commission's "Finding 4" in its remand order. Finding 4 concerns itself with the cession of fishing rights in 1865 and is not relevant to claims asserted herein. The Commission had advised the parties pending the appeal, that this finding should be stricken. In considering a related matter, the material in Finding 4 was inadvertently included in this docket.

land of its Umatilla neighbors further east. The Court says:

"... He divided the common-use land from the John Day River east to Willow Creek between the two tribes and placed the territorial boundary at the watershed divide of these two streams." \*

Now, if petitioner's expert is satisfied that there exists a common use area of considerable magnitude between the Wayampam claimants on the west and the Umatilla claimants \*\* on the east, then his Wayampam eastern boundary line is certainly arbitrary, since it is placed further east than the actual limits of exclusive Wayampam territory as considered by Dr. Ray. Dr. Ray's methodology in this case, wherein he has plotted the boundaries of petitioner's aboriginal claims is perfectly consistent with the position that has generally been followed by other claimants, to these many years--namely, that Indian claimants, in fixing inter-tribal boundaries, like nature, abhor a vacuum. The Commission's determination of the eastern limits of Wayampam aboriginal ownership exceeds that of petitioner's expert, Dr. Ray; for the Commission's line lies east of the John Day River. It should also be pointed out that, in its original thinking on this matter, the Commission never considered its eastern line as drawn to be the absolute limit of the Wayampam aboriginal territory, so that even one step further eastward could not be supported by substantial evidence. Such precision in fixing aboriginal boundaries is, of course, extremely difficult. The line as fixed by the Commission at that time was considered by it to be a reasonable compromise based upon

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\* P. 9, Slip Opinion, October 14, 1966

\*\* See Docket No. 264. The Confederated Tribes of the Umatilla Indian Reservation v. United States, (1964) 14 Ind. Cl. Comm. 14

all the evidence. In light of the Court's ruling, we have now re-evaluated the evidence and agree that a further extension eastward of the eastern boundary line is just as reasonable and is supported by substantial evidence.

Therefore, the eastern boundary line will now commence at that point where an extension of the southern boundary line from the town of Maupin intersects Rock Creek, thence in a northwesterly direction following the meanders of Rock Creek to its intersection with the Willamette Base Line, thence north on a line to the Columbia River passing through the town of Arlington in Gilliam County.

#### The Southern Boundary

The problem in the Court's mind surrounding the southern boundary of the Wayampam aboriginal claim as determined by the Commission is set forth in the following language of the Court's opinion:

"The opinion of the Commission suggests that its boundary determinations were influenced by a consideration in addition to those of inconsistent use by the Snakes, and too short a period of Wayampam occupation. Namely, the Commission hints at a denial of land because of its usage as a common subsistence area by more than one band of Indians. See 12 Ind. Cl. Comm. 664, 710-711, 720-723, 727." \*

Further on in its opinion the Court punctuates its concern over the southern boundary in the following manner:

"... With regard to the southern boundary, the Commission's decision is unclear upon which findings its determination is based. Even though there is substantial evidence to support its decision on the southern boundary, this determination cannot be upheld since there exists grounds upon which its action cannot be sustained. Security and Exchange Commission v. Chenery Corp., 318 U.S. 80, 94-95 (1943). Therefore, we remand the issue to the Commission for a determination

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\* P. 18, Slip Opinion, October 14, 1966

of the southern boundary not inconsistent with this opinion's holding on the cultural unity of the Wayampam." \*

Finally in its concluding paragraph, the Court summed up as follows:

. . . . .

"... 3) there is substantial evidence to support the Commission's southern boundary finding with regard to Snake usage and length of Wayampam occupation, but there is not substantial evidence for their finding with regard to common usage; therefore, we remand this question to the Commission for any adjustment necessary to make the southern boundary determination consistent with our holding, ..." \*\*

First of all the Commission more than agrees with the Court's conclusion that,

"... the Commission seems to admit this cultural unity of the Wayampam." \*\*\*

The fact is, we do admit it, and as a practical matter, the Commission treated the Wayampam as a single land owning entity. This is quite evident because the Commission circumscribed the lands owned by the four bands of Wayampam within a single boundary line. The Commission's subsequent attempt to delineate separately the land used by these bands was really academic insofar as determining overall Wayampam exclusive land ownership. The Commission was well aware of the cultural unity of the four bands, and their reliance upon concerted action in practically all their endeavors. Consequently, we did not find any "common usage" areas between the individual territorial haunts of the four Wayampam bands. The fact is clearly demonstrated on the map included at the end of the Court's opinion.

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\* P. 21 Slip Opinion, October 14, 1966

\*\* P. 23, supra,

\*\*\* P. 119, supra.

The Commission found that each of the four Wayampam bands had a strong sense of individual land ownership with respect to their immediate village sites and fishing grounds. However, with respect to those areas outside the immediate village sites, the Commission found as follows:

"... The land outside of these sites and their immediate vicinity was considered open country, subject to use by any member of any one of the four bands, the Wascos and other friendly Indians. Neither of the four bands made any claim of right during the period in question, to exclusively utilize any of this area beyond the vicinity of their own fishing grounds and village sites. Other Indians entering this area, with the exception of the Snake Indians to the south and south-east, used such outlying lands as they wished and without objection." \*

The southern boundary as fixed by the Commission was determined strictly on the basis that 1) there was substantial evidence of Snake usage south of this line during critical periods involved, and 2) the Wayampam exclusive use and occupancy of much of the area south of the southern boundary was of such recent origin before the 1855 Treaty of cession as to constitute too short a period of time in which aboriginal title could have ripened. No area outside of this southern boundary was denied to the Wayampam because of any common usage among these four bands. The fact that the Commission found no political unity existing between these bands and that they had maintained their separate identity throughout the treaty negotiations, did not in this instance control the Commission's determination of the overall area to be awarded to these

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\* Finding of Fact 36, 12 Ind. Cl. Comm., 664, 686-687.

Indians. The unity of purpose exercised by the Wayampam bands in dealing with the hostile Snake activity that constantly thwarted Wayampam territorial expansion was noted in several of the Commission's Findings of Fact, for example:

. . . . .

"... There were occasional meetings among the several separate bands, usually for the purpose of discussing the constant problem of defense against the Snake Indians." \*

And, with reference to the John Day River Indians,

. . . . .

"...In conjunction with the other Wayampam they took necessary offensive and defensive action in dealing with the hostile Snakes." \*\*

Viewed in light of our explanation as set forth above, the Commission feels that those pages of the Commission's Findings of Fact and Opinion cited by the Court, and particularly the language appearing in the second paragraph of the Commission's Finding 52, \*\*\* does not demonstrate any apparent denial of Wayampam territorial land claims below the southern boundary as fixed by the Commission, on account of "common usage" by the four Wayampam bands. The Commission has therefore concluded that the

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\* Finding of Fact 35, 12 Ind. Cl. Comm., 664, 686

\*\* Finding of Fact 49, supra, p. 708

\*\*\* 12 Ind. Cl. Comm. 664, 710

. . . . .

"... However, we also find that, with respect to the remainder of the claimed area outside of the lands awarded herein, there is insufficient evidence to prove actual exclusive use and occupancy in any of the seven bands. On the contrary, the three Wasco bands, the four Wayampam bands, as well as the Snake Indians, Molala, and others wandered, traveled, hunted, fished, gathered, and fought over the remainder of the claimed area throughout the critical period, but none of them did so in any exclusive manner, or for a long enough time to perfect Indian title thereto."

evidence of record does not warrant any change or adjustment in the Wayampam southern boundary line as previously drawn (except for its extension in conjunction with the Commission's relocation of the eastern boundary). The Commission will enter an order making the appropriate changes in the Commission's Findings of Fact in conformity with this opinion.

Arthur V. Watkins  
Chief Commissioner

I concur:

Wm. M. Holt  
Associate Commissioner

Associate Commissioner T. Harold Scott did not participate in the case.