

BEFORE THE INDIAN CLAIMS COMMISSION

THE CONFEDERATED TRIBES OF THE)	
COLVILLE RESERVATION as the)	
representative of the JOSEPH BAND)	
OF THE NEZ PERCE TRIBE,)	
)	
CHARLES E. WILLIAMS, JOSEPH REDTHUNDER)	
AND HARRY OWHI, as the representatives)	
of the JOSEPH BAND OF THE NEZ PERCE)	
TRIBE,)	Docket No. 186
)	
THE CONFEDERATED TRIBES OF THE)	
COLVILLE RESERVATION, as successor to)	
the claims of the JOSEPH BAND OF THE)	
NEZ PERCE TRIBE,)	
)	
)	
Plaintiffs,)	
)	
v.)	
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: March 26, 1971

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. Standing to Bring Claim. The plaintiff, the Confederated Tribes of the Colville Reservation, is a tribal organization existing at the Colville Reservation in the State of Washington, and it is an organization recognized by the Secretary of the Interior as having authority to represent the Indians enrolled on the Colville Reservation. The plaintiff is an identifiable group of American Indians comprising descendants of various aboriginal tribes and bands, including descendants of members of the Joseph Band of the Nez Perce Tribe.

2. Standing to Bring Claim. The plaintiffs, Charles E. Williams, Joseph Redthunder, and Harry Owhi, are descendants of members of the aboriginal Joseph Band of the Nez Perce Tribe.

3. Early History of the Nez Perce Tribe and Joseph's Band. The Nez Perce Tribe of Indians originally occupied an area in what is now northwestern Idaho, northeastern Oregon, and southeastern Washington, on the lower Snake River and its tributaries. The tribe was divided into a number of bands. One of these bands came to be known as "Joseph's Band," after the elder Chief Joseph, who was its chief in 1855, and who was succeeded after his death in 1871 by his son who was known as young Chief Joseph. Joseph's Band had, from before the time of the first white contact with the band, occupied what became known as the Wallowa-Imnaha area of northeastern Oregon and extreme southeastern Washington. They were a hunting, herding and gathering people who ranged into the uplands of the Wallowa Basin in summer, moving to the lower valleys of the Wallowa, Imnaha and Joseph rivers and the west bank of the Snake River in winter. Sometime prior to 1855, the chief of one of the other bands, known as Lawyer, was appointed head chief of the entire Nez Perce Tribe by the Indian agent.

4. The Treaty of 1855. By the Treaty of June 11, 1855, 12 Stat. 957, the Nez Perce Tribe, including Joseph's Band, ceded to the United States all of the lands occupied by the tribe, except a reservation described in Article II of the treaty. The reservation established by the 1855 treaty included more than half of the lands claimed by the

entire Nez Perce Tribe. This treaty was signed by Lawyer as "Head-chief of the Nez Perces" and by many others, including the elder Chief Joseph. All lands occupied by Joseph's Band, including the lower Grand Ronde River valley and the entire Wallowa and Imnaha valleys, were included in the 1855 treaty reservation. The treaty was ratified on March 8, 1859, and proclaimed on April 29, 1859.

5. White Intrusions. In 1860, gold was discovered on a part of the Nez Perce Reservation; whites were permitted to intrude, the town of Lewiston was established, and the Washington Territorial Legislature organized three counties within the boundaries of the Nez Perce Reservation.

6. The Treaty of 1863. In 1863, a Government commission was appointed to hold a new treaty council with the Nez Perce Tribe. The commissioners demanded relinquishment of approximately nine-tenths of the Nez Perce lands reserved by the 1855 treaty, including all of the area used and occupied by Joseph's Band. The northern or upper Nez Perce bands, led by Head-chief Lawyer, agreed to the treaty. The Treaty of 1863, 14 Stat. 647, was signed on June 9, 1863, and ratified April 17, 1867. The treaty was signed by Lawyer, as "Head Chief Nez Perces Nation" and by other chiefs of bands, but the elder Chief Joseph refused to sign the treaty as did some other prominent and less prominent chiefs. The reservation created by the Treaty of 1863 was a relatively small area of land in what is now the State of Idaho. The entire Wallowa-Imnaha area which was occupied by Joseph's Band,

including the Wallowa Basin, the lower Grande Ronde River valley and the entire Wallowa, Imnaha and Joseph river valleys, was not included in the reservation as described by the Treaty of 1863, but was part of the lands ceded to the defendant by that treaty.

7. The Nez Perce Divided. After Chief Joseph and the chiefs of certain other bands, as well as other minor chiefs, refused to sign the Treaty of 1863, the Nez Perce Tribe divided into two factions, the treaty and the non-treaty parties. The latter party was led by Chiefs Joseph, Looking Glass, Big Thunder, White Bird, and Eagle From the Light, who with their bands refused to recognize the treaty or to remove to the diminished reservation. They became known as the roaming or roving Nez Percés.

8. Joseph's Band After 1863. After Joseph's refusal to sign the Treaty of 1863, Joseph's Band maintained that the treaty did not operate to deprive them of their traditional lands. They continued to live as before in the Wallowa-Imnaha area, accepting no benefits under the Treaty of 1863.

9. The Odeneal-Monteith Report (1873). White immigration into the Wallowa-Imnaha area increased in the early 1870's. Growing tensions caused appointment of an investigating committee comprised of Oregon Indian Superintendent T. B. Odeneal and Agent Monteith of the Nez Perce Reservation at Lapwai, Idaho. This committee met with the white settlers and with Joseph's Band in March 1873 and on April 4, 1873, submitted the following report to the Commissioner of Indian Affairs:

Office Supt. Indian Affairs
Salem, Oregon
April 4th, 1873.

Sir,

Referring to instructions contained in your letter of the 7th of February last, we have the honor to report that in pursuance of an arrangement previously made with Joseph, Chief of the Band of Nez-Perces which claims Wallowa Valley, we met him and about One Hundred of his men at Lapwai Agency in Idaho on the 27th ultimo and after a general council with them, and an investigation of the facts connected with the matter we find,

First, That prior to the treaty of 1855, the Nez Perces had no head chief of the nation, but were divided up into bands, each claiming and occupying the lands within certain boundaries.

Second, That the old Chief Joseph was at the head of the Band which is the subject of this report, and claimed, and held, Wallowa Valley.

Third, That Joseph assented to, and signed, the treaty of 1855, by the terms of which, as you will observe by reference thereto, said valley was included within the bounds of the Nez Perce Reservation.

Fourth, That, at the making of this treaty, I. I. Stevens, then Governor and Ex Officio Superintendent of Indian Affairs, of Washington Territory, appointed Lawyer Head Chief of the Nation, but as he had been an obscure Indian and had no "royal" blood in his veins, not one half of the tribe ever recognized him as such.

Fifth, That in 1863 a supplemental treaty, so-called, was made with "Lawyer," and some of the head men, by which a large scope of country, including the Wallowa Valley, was ceded to the United States. Joseph refused to sign or have anything to do with this treaty, protesting against the sale of his land, and insisting that no one but himself had any right to dispose of it. Up to the time of his death, which occurred about eighteen months since, he and his people refused to accept anything from the government.

Sixth, Joseph claimed that this valley was his, by right of occupation for a lifetime, and on his death-bed he bequeathed it to his people, with his son Joseph, to succeed him in the Chieftanship.

Seventh, While young Joseph, and most of his people seem friendly, and well-disposed, they manifest a very strong determination to hold the valley, to which they are very much attached, it being the summer home of their childhood, the sporting ground of their youth and manhood, and in their view rightfully theirs by inheritance from their fathers.

Eighth, The valley is very high, and the winters there are very severe, so cold, indeed, that the Indians do not occupy it during this season.

Ninth, There is an abundance of fish in the river, and game in the adjacent mountains, and the grass is excellent; hence it is a very desirable place of resort during the summer and Autumn, when they go there to pasture their horses, and to hunt, and fish.

They declined to come and remain permanently upon what is now called the "Established Reservation," of the tribe in Idaho.

They do not wish to locate upon any other established reservation.

They do not desire a separate Reservation, in the valley aforesaid.

They say the whole of the valley is theirs, and they want it all, and are opposed to any whites settling there.

Owing to the coldness of the climate, we consider the valley unsuitable for a reservation upon which to locate, and keep Indians.

If any respect is to be paid to the laws and customs of the Indians, then the treaty of 1863 is not binding upon this Band. If so, then Wallowa Valley is still a part of the Nez-Perce Reservation. If this is the case then the government is in equity, bound to pay White Settlers for their improvements, and for the trouble, inconvenience, and expense of removing from there.

The Band is composed mainly of young men, who are well armed, and mounted, and whose bravery is unquestionable. It would

require a strong force to remove them to, and keep them, within the limits of the reservation, as defined by the treaty of 1863.

On account of the great depth of snow, and for the further reason that there were no Indians there, we did not visit Wallowa Valley.

We did not feel authorized to say to the Indians that they must do anything in particular, so that we confined our efforts to ascertaining their views, and wishes, and the facts upon which their claims are based.

The Government has had several Townships of the land surveyed, and stock raisers seem desirous of locating there.

We have given public notice to the whites not to go into the Valley until the matter is adjusted, but those who are there, will probably remain, and others may go there. The two races cannot, for any great length of time, live together in this valley, on peaceable terms. The whites must be induced to leave, or the Indians must be removed. Each considers the other a trespasser, and the rash act of some imprudent white man, or reckless Indian, is liable to produce trouble at any time. We consider prompt action important.

Very Respectfully

Your Obt. Servts.
(Sgd) T. B. Odeneal

Supt. Indian Affairs in Oregon

(Sgd) Jno. B. Montieth
U. S. Ind. Agent
Nez Perces Agency

Hon. Commissioner
Indian Affairs
Washington, D. C.

(Plaintiffs' Exhibit 1, pp. 9-11,
National Archives, Bureau of Indian
Affairs, Idaho Superintendency.
Letters Received 1873. 0-83.)

10. Reservation for Joseph's Band Recommended. On the basis of the report of the investigating committee, the then Acting Commissioner of Indian Affairs, on April 25, 1873, recommended to the Secretary of the Interior that:

***the band of Indians referred to [i.e. Joseph's Band] be permitted to remain in said valley [i.e. the Wallowa Valley] and occupy it during the summer and autumn or for such time as the weather is suitable, as has heretofore been their custom, and that assurance be given them that it is not the intention of the Department to disturb them so long as they remain quiet and peaceable and commit no depredations upon white settlers; that an Executive Order be requested as soon as a proper description of the proposed reservation can be obtained setting apart the said valley for their exclusive use; that white settlers be prohibited from entering or settling therein; that an appraisement be made of the value of improvements of settlers already in said valley and that an appropriation be asked for at the next session of Congress to pay for the same and to extinguish their claims. (Plaintiff's Exhibit 1, p. 13, National Archives, Bureau of Indian Affairs, Report Book No. 22, pp. 455-458)

11. Secretary of Interior Concur. On April 28, 1873, C. Delano, Secretary of the Interior, addressed the Acting Commissioner of Indian Affairs, in part as follows:

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I have considered your letter of the 28th instant, transmitting the report of Superintendent T. B. Odeneal in reference to the condition of the Nez Perce Indians in Wallowa Valley, Oregon.

In view of the facts brought to light by this report of the Superintendent, who was accompanied by Agent Montieth, I am inclined to adopt, without modification, your suggestions and recommendations, viz.: That the band of Indians referred to be permitted to remain in said valley and occupy it during the

summer and autumn, or for such time as the weather is suitable, according to their previous custom, and that assurances be given them that it is not the intention of the Department to disturb them so long as they remain quiet and peaceable and commit no depredations upon white settlers.

You will, therefore, prepare an Executive Order for the approval of the President, as soon as the proper description of the proposed reservation can be obtained, setting apart this valley for the exclusive use of the said Indians. In the meantime you should cause the white settlers to be advised, through the proper Superintendent and Agent, that they are prohibited from entering or settling in said valley. An appraisement is hereby authorized to be made of the value of the improvements of said settlers already in the Wallowa Valley; and, under a recommendation from your Office, Congress will be asked, at its next session, for an appropriation sufficient to pay for said improvements at their appraised value, in order that the claim of the settlers may be extinguished.

* * * * *

(Plaintiffs' Exhibit 1, p. 14,
National Archives, Bureau of Indian
Affairs, Idaho Superintendency,
Letters Received 1873. 1-131, O-9)

12. The Executive Order of 1873. Subsequently, the following departmental recommendation was submitted to the President and an executive order was issued in the following terms:

DEPARTMENT OF THE INTERIOR
Office of Indian Affairs, June 9, 1873.

The above diagram is intended to show a proposed reservation for the roaming Nez Percé Indians in the Wallowa Valley, in the State of Oregon. Said proposed reservation is indicated on the diagram by red lines, and is described as follows, viz:

Commencing at the right bank of the mouth of Grande Ronde River; thence up Snake River to a point due east of the southeast corner of township No. 1, south of the base line of the surveys in Oregon, in range No. 46 east of the Willamette meridian; thence from said point due west to the West Fork of the Wallowa River; thence down said West Fork

to its junction with the Wallowa River; thence down said river to its confluence with the Grande Ronde River; thence down the last-named river to the place of beginning.

I respectfully recommend that the President be requested to order that the lands comprised within the above-described limits be withheld from entry and settlement as public lands, and that the same be set apart as an Indian reservation, as indicated in my report to the Department of this date.

EDWARD P. SMITH, Commissioner.

DEPARTMENT OF THE INTERIOR, June 11, 1873.

Respectfully presented to the President, with the recommendation that he make the order above proposed by the Commissioner of Indian Affairs.

C. DELANO, Secretary.

EXECUTIVE MANSION, June 16, 1873.

It is hereby ordered that the tract of country above described be withheld from entry and settlement as public lands, and that the same be set apart as a reservation for the roaming Nez Perce Indians, as recommended by the Secretary of the Interior and the Commissioner of Indian Affairs.

U. S. GRANT. (I Kapp. 894)

13. The Executive Order Reservation. The Executive Order of June 16, 1873, established a reservation for "the roaming Nez Perce Indians." The reservation consisted of lands in the northern portion of the Wallowa-Imnaha area and constituted slightly more than one-half of the lands claimed by Joseph's Band. The area reserved was not the same area recommended as a reservation by the Acting Commissioner of Indian Affairs (see Finding of Fact No. 10, supra), the latter recommendation having related to the southern portion of the Wallowa-Imnaha area.

14. Joseph's Reaction to the Reservation. Joseph's Band was not satisfied with the boundaries of the Executive order reservation which had the effect of validating the right of the white settlers to enter and occupy the southern portion of the Wallowa-Imnaha lands.

15. Topography and Climate of the Reservation. The northern part which was reserved is forested with pine and is characterized by deep, narrow valleys. This region is much warmer in winter than the high, open and windswept country to the south. Consequently, it had always served as the wintering grounds for Joseph's Band where all of the winter villages were situated. However, this region was not sufficiently productive to provide for the economic needs of the Joseph Band Indians.

16. The Claimed Area to the South. Joseph's Band spent their summers almost exclusively in the Wallowa Basin in the southern part, where the band not only provided for its day-by-day subsistence but accumulated the reserves which were necessary to see the band through the rigorous winters. The Wallowa Basin country was especially important for a people who kept and used such a large number of horses as were owned by Joseph's Band. It was an ideal summer range for their thousands of horses.

17. The Band's Occupation of the Reservation. During the two winters of the reservation's existence (1873-1875), Joseph's Band occupied lands within the reservation boundaries. During the two and one-half summers of the reservation's existence, the band

occupied and used the southern portion of the reservation and the area further to the south which it claimed and had always occupied in summer.

18. Political Pressure. Before and during the period the reservation was in existence severe political pressures were exerted to bring about revocation of the Executive order. On May 28, 1873, Senator James K. Kelley and Representative James G. Wilson of Oregon urged the Commissioner of Indian Affairs not to establish a reservation for Joseph's Band in the southern portion of the Wallowa-Imnaha area (Plaintiffs' Exhibit 1 at 18). On July 21, 1873, the Governor of Oregon wrote the Secretary of Interior requesting "*** the preliminary steps taken for the vacation [by settlers] of [the Wallowa] Valley for the purpose of creating a Reservation [for Joseph's Band] *** be rescinded." (Id. at 24) Again on July 8, 1874, Senator Kelley wrote to the Commissioner of Indian Affairs requesting that the Commissioner "*** advise the President that the [Wallowa Valley] is not necessary or suitable for an Indian reservation, and that it be relinquished as such ***." (Id. at 45) Finally on May 17, 1875, Senator Kelley again addressed the Commissioner in the same vein. (Id. at 49)

19. Official Reports Regarding the Reservation. The Annual Reports of the Commissioner of Indian Affairs to the Secretary of the Interior for the years 1875, 1876 and 1877, reveal that the Wallowa Reservation was intended as a reservation for Joseph's Band. See Plaintiffs' Exhibit 15 at 12; Plaintiffs' Exhibit 16 at xvi; and Plaintiffs' Exhibit 17 at 11 and 212-213.

20. White Settlers Not Removed. Although improvements on reservation lands made by white settlers were appraised and the appraisals reported to Washington, no efforts were made to move the settlers off the reservation and compensate them for their improvements.

21. The Revocation Order of 1875. The Bureau of Indian Affairs having recommended revocation of the Executive Order of June 16, 1873, creating the Wallowa Reservation, the President, on June 10, 1875, issued the following Executive order:

EXECUTIVE MANSION, June 10, 1875.

It is hereby ordered that the order dated June 16, 1873, withdrawing from sale and settlement and setting apart the Wallowa Valley, in Oregon, described as follows: [description omitted] as an Indian reservation, is hereby revoked and annulled; and the said described tract of country is hereby restored to the public domain.

U.S. GRANT. (I Kappler 895)

Joseph's Band was not compensated for the value of the reservation when the lands were returned to the public domain.

22. Hostilities. Following the Executive Order of 1875, the Wallowa Reservation having been restored to the public domain, white settlers moved in and serious conflicts between them and the Indians followed, with fatalities on both sides. General Howard, commanding a division of the United States Army, was directed to remove the roving Nez Perces, by force if necessary, to the tribal reservation at Lapwai, Idaho, as defined by the Treaty of 1863. In May 1877, councils were held with Chiefs Joseph, Looking Glass and White Bird, who agreed that their bands would remove to the reservation peaceably. However,

before this was done, further fatal conflicts occurred, the soldiers attacked the Indians, pursued them and finally captured them. On October 5, 1877, in the Bear Paw Mountains in Montana, Joseph surrendered to General Nelson Miles, Joseph having been promised that those who surrendered would be sent to the Nez Perce (Lapwai) Reservation in Idaho.

23. Exile in Indian Territory. Despite this promise of General Miles, Joseph's Band and those others who had surrendered were thereafter moved, at the direction of Generals Philip H. Sheridan and W. T. Sherman, to the Indian Territory where they remained until 1885.

24. Return to the Northwest. In 1885, Joseph's Band was permitted to return to the Northwest. One hundred and fifty members of the band were sent to the Colville Reservation in Washington while 118 others were permitted to go to the Nez Perce Reservation in Idaho. This selection was based in part on the willingness of members of the band to accept Christianity. Those who were willing were allowed to go to Idaho, while those holding to the native religion were sent to Colville. Chief Joseph was given no choice and was sent to Colville.

25. No Return to Wallowa-Imnaha. During the period the band spent in Indian Territory and later when located at Colville, Joseph several times sought permission for his band to return to the Wallowa-Imnaha country of Oregon. The band was never permitted to return, although in 1891 they were offered the opportunity to go to the Nez Perce Reservation at Lapwai, Idaho.

26. Prior Litigation. In 1941, the Court of Claims, decided the case of Joseph's Band of the Nez Perce Tribe of Indians v. United States, 95 Ct. Cl. 11. This suit was brought under a special jurisdictional act, 45 Stat. 1249 (1929), and involved a claim by Joseph's Band of aboriginal title to the Wallowa-Imnaha area based upon immemorial possession by the band. In that suit the Court of Claims held that Joseph's Band did not have such exclusive use of the Wallowa-Imnaha area as to allow a finding of aboriginal title, that the Nez Perce Tribe, as an entity, had the power to make the Treaty of 1863, and the dissenting minority, including Joseph's Band, was bound by that treaty, and that the Executive Order of 1873 did not constitute evidence of a title then existing in Joseph's Band to the Wallowa-Imnaha area because said Executive order created the Wallowa Reservation for all the non-treaty or roaming Nez Percés and not for Joseph's Band alone.

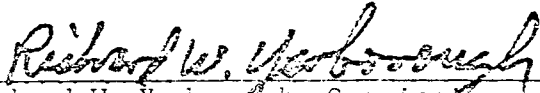
CONCLUSIONS OF LAW

On the basis of the evidence of record and the foregoing findings of fact, this Commission concludes as a matter of law that:

1. The plaintiffs herein, the Confederated Tribes of the Colville Reservation and Charles E. Williams, Joseph Redthunder and Harry Owhi, have the legal capacity to bring this suit under section 2 of the Indian Claims Commission Act of 1946 (60 Stat. 1049).

2. The plaintiffs' claim for the destruction of the Joseph Band as a viable economic, social and political entity does not state a cause of action cognizable under the Indian Claims Commission Act.

3. Plaintiffs have proven a compensable claim, under section 2, clauses (1) and (5) of the Indian Claims Commission Act, for the withdrawal, by the Executive Order of June 10, 1875, of the Wallowa Reservation which had been created by the Executive Order of June 16, 1873.


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner