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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF WASHINGTON

10 THE CONFEDERATED TRIBES AND
11 BANDS OF THE YAKAMA NATION,

12 Plaintiff,

13 v.

14 KLICKITAT COUNTY, a political
15 subdivision of the State of Washington;
16 KLICKITAT COUNTY SHERIFF'S
17 OFFICE, an agency of Klickitat County;
18 BOB SONGER, in his official capacity;
19 KLICKITAT COUNTY
20 DEPARTMENT OF THE
21 PROSECUTING ATTORNEY, an
22 agency of Klickitat County; DAVID
23 QUESNEL, in his official capacity,

24 Defendants.
25
26

No. 1:17-cv-03192-TOR

DEFENDANTS' TRIAL BRIEF

Trial: July 29, 2019 at 9:00 a.m.

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I. INTRODUCTION

The Yakama Nation sued Klickitat County over the County's prosecution of a Yakama member who pled guilty to two counts of rape of a child in the second degree. This jurisdictional dispute turns on whether the Glenwood Valley, where the crime occurred, is within the exterior boundaries of the Yakama reservation.

After considering the evidence, the Court should reject Plaintiff's claim that this area (referred to as "Tract D") is within the reservation. *First*, the Yakama Nation cannot carry its burden of proving that the parties to the Treaty of 1855 intended Tract D to be included in the reservation. *Second*, Congress expressly settled the disputed western boundary in 1904, adopting a boundary that does not include Tract D in the reservation. That boundary is still in effect.

As to the first point, the evidence will show that the United States and the Yakama Nation understood at treaty times that Tract D was outside the reservation. This understanding is shown by the treaty language itself, the map prepared with the treaty, and by the parties' subsequent actions and statements.

Treaty Language. The treaty language defining the southwest boundary of the reservation states that the boundary follows a "spur" that divides the drainage of tributaries of the Klickitat River (flowing south) and the Pisco River (flowing north). That spur sits well north of Tract D.

1 Treaty Map. During the treaty negotiations, Gov. Isaac Stevens, who
2 represented the United States in the negotiations, used a map to illustrate the
3 reservation area. The Treaty Map—a product of input from each party to the
4 treaty—plainly depicts a southwest boundary that excludes Tract D.

5
6 Statements of Understanding. Repeated consistent statements made after the
7 treaty by U.S. government agents, tribal leaders who attended the treaty
8 negotiations, and other tribal officials with knowledge of the boundaries also
9 demonstrate that the parties did not intend Tract D to be included in the
10 reservation. These statements describe a southwest boundary from Grayback
11 Mountain at the southwest corner of the reservation to a “conical hump” (Goat
12 Butte) at the base of Mt. Adams. Both the United States and Yakama took
13 litigation positions consistent with these boundaries in the early 1900s.

14
15 Beyond this, in 1904 Congress exercised its plenary authority to resolve
16 continuing disputes about the reservation boundaries by setting clear and final
17 boundary lines for this portion of the reservation. Relying on the investigation of
18 E.C. Barnard, Congress set the boundary along the line from Grayback Mountain
19 to Goat Butte. Congress directed that boundary to be surveyed and marked out.
20 Yakama petitions following the 1904 Act demonstrate that Yakama was “sure and
21 certain” that the proper boundary excluded Tract D.
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1 Decades later, rediscovery of the Treaty Map – and a distorted and erroneous
2 interpretation of the reservation boundaries drawn on it – led the Indian Claims
3 Commission to award compensation to Yakama based on an incorrect finding that
4 Tract D was intended to be included in the reservation. It made that finding on
5 false assumptions and without important evidence. Subsequent positions taken by
6 solicitors at the Department of Interior incorrectly relied on that ruling as having
7 “corrected” the boundary. But Congress has the sole authority to alter reservation
8 boundaries, and it has not done so since 1904.
9

10
11 In addition, a ruling that Tract D is outside the reservation is consistent with
12 the long-settled expectations of area residents. The Glenwood Valley was opened
13 to non-Indian settlers immediately after the treaty was signed. The land is
14 overwhelmingly owned by non-Indians, largely farmers and ranchers, many with
15 family roots dating back a century or more. The evidence will show that Klickitat
16 County has exercised full jurisdiction over Tract D since it was formed in 1859.
17
18

19 Based on the evidence, the Court should find that (1) the treaty parties did
20 not intend to include the Klickitat County portion of Tract D within the Yakama
21 reservation and (2) the present reservation boundary was established by Congress
22 pursuant to the 1904 Act. In doing so, the Court will accomplish what Congress
23 sought to do more than 100 years ago: finally settle this dispute.
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II. STATEMENT OF FACTS

Historically known as Camas Prairie or Tahk Plain, the Glenwood Valley is located in northwest Klickitat County. Originally the territory of the Klickitat tribe, the valley was ceded by the Yakama Nation to the United States in an 1855 treaty.

A. The Treaty Language, Map, And Negotiations Show Tract D Is Outside The Reservation.

On June 9, 1855, representatives of the 14 tribes and bands comprising the Yakama Nation signed a treaty at the Walla Walla Council ceding their aboriginal territory to the United States and reserving a tract of land for their “exclusive use and benefit.” Ex. 6. Article II of the treaty describes the reservation as follows:

Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said 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; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

Id. at Art. II (underlining added). Article III provides Yakama with off-reservation subsistence rights of “taking fish at all usual and accustomed places, in common with the citizens of the Territory, . . . hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.” *Id.* at Art. III.

1 Treaty negotiations took place between May 21 and June 11, 1855. On June
2 4, 1855, Gov. Stevens described a Yakama reservation “to extend from the
3 Attannan River, to include the valley of the Pisco River and from the Yakama
4 River to the Cascade Mountains.” Ex. 589 at 64 (underline added). On June 5, he
5 described a slightly different reservation, “commencing with the mouth of the
6 Attanum River, along the Attanum River to the Cascade Mountains, thence down
7 the main chain of the Cascade Mountains south of Mount Adams, thence along the
8 highlands separating the Pisco and Saltoss River from the rivers flowing into the
9 Columbia, thence to the crossing of the Yakama below the main fisheries, then up
10 the main Yakama to the Attanum where we began.” *Id.* at 69 (underline added).

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12
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14 The final agreed boundaries are reflected in Article II of the treaty and the
15 Treaty Map. Both the tribal negotiators and Stevens were familiar with the salient
16 geographic markers in Article II, as well as those shown on the Treaty Map.

17
18 **1. Stevens’ familiarity with salient geographic features confirms his**
19 **intention to exclude Tract D from the reservation.**

20 Gov. Stevens, who graduated top of his class from West Point, “had
21 considerable experience as a ‘practical geographer,’ having served in the
22 Topographic Engineer Corps during the Mexican War and worked on the US Coast
23 Survey.” Ex. 561 at 87. Between 1853 and 1855—just prior to the Walla Walla
24 Council—Stevens led U.S. efforts to ascertain the best route for a railroad from the
25
26

1 As shown on the map excerpt above and to the right
2 (Ex. 500), McClellan made camp at the south end of Tahk
3 Plain on August 12, 1853. On August 13, he and his team
4 made camp just north of Conboy Lake. *Id.* At both camps,
5
6 McClellan's team took latitudinal measurements. Ex. 505 at 456. The August 12
7 camp was located at 45° 55' 31" North Latitude. *Id.* The August 13 camp was
8 located at 45° 59' 32" North Latitude. *Id.*



10 In his Railroad Survey report, Stevens recounted that McClellan then
11 journeyed north out of Camas Prairie, going up and over a “spur” dividing the
12 tributaries of the Klickitat and Pisco rivers. “[T]he elevation of the divide,” or spur,
13 between the “Klickitat valley” and the “Pisko” on McClellan’s trail was “3,633 feet
14 above the sea.” Ex. 506 at 256. Stevens further detailed the “rivers west of the
15 Columbia,” noting that “[b]etween these rivers are spurs thrown out from the main
16 chain of the Cascades, and extending towards and in some cases reaching the
17 banks of the Columbia.” *Id.* (underline added). “Those [spurs] between the Klickitat
18 and Pisko tributary of the Yakima, and between the main Yakima and the
19 Wenatshpam, or Piquouse river, are considerable mountains.” *Id.*

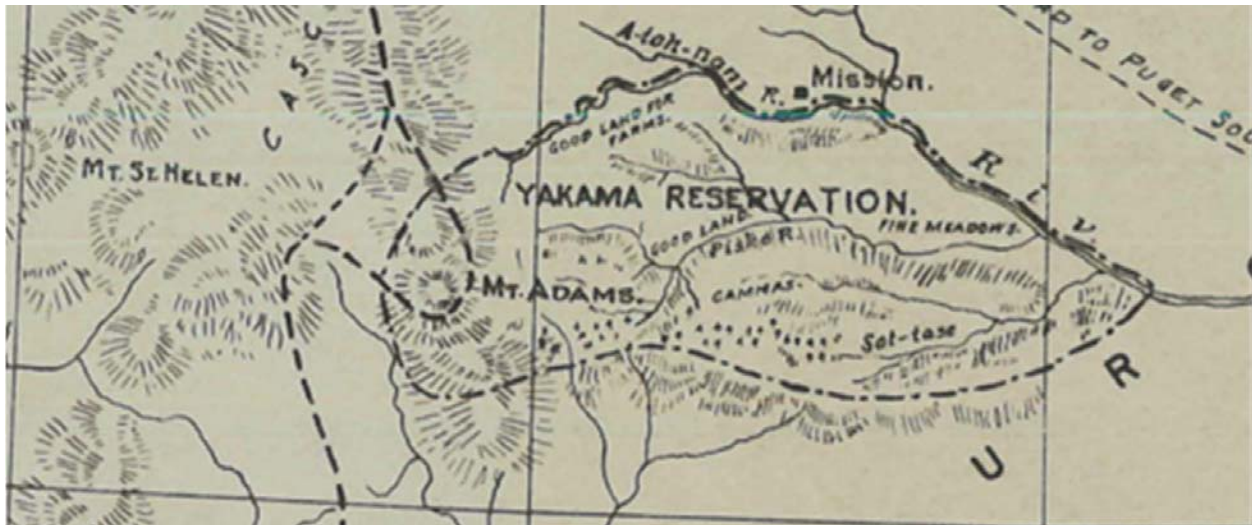
22 Thus, before negotiating the 1855 treaty, Stevens knew that this east-west
23 “spur” formed the “divide” between the waters of the Klickitat and Pisco. *Id.* And
24
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the point at which McClellan crossed this “divide” is clearly shown on the Railroad Survey maps. Ex. 500 and 501 (crossing the “divide” between Aug. 14 and 15).

2. The Treaty Map shows Tract D is outside the reservation.

As was his “invariable custom,” Stevens created a “sketch map” during the Walla Walla Council to aid the Indians in understanding their reservation. Ex. 522 at 455; Ex. 589 at 65-6, 89, 102. Stevens’ son, Hazard, who attended the council, reported, “[t]he Indians took great interest in this map, asking many questions about the mountains and streams they saw represented upon it, and in some instances adding streams which were not laid down.” Ex. 39 at 25.

The Treaty Map depicts the reservation as follows:



(Ex. 502: Treaty Map excerpt depicting reservation boundary)

It is undisputed that Stevens’ knowledge of the Tract D area was derived from the Railroad Surveys and that his creation of the Treaty Map was “based on the cartographic work he had overseen as head of the railroad survey.” Ex. 73 at

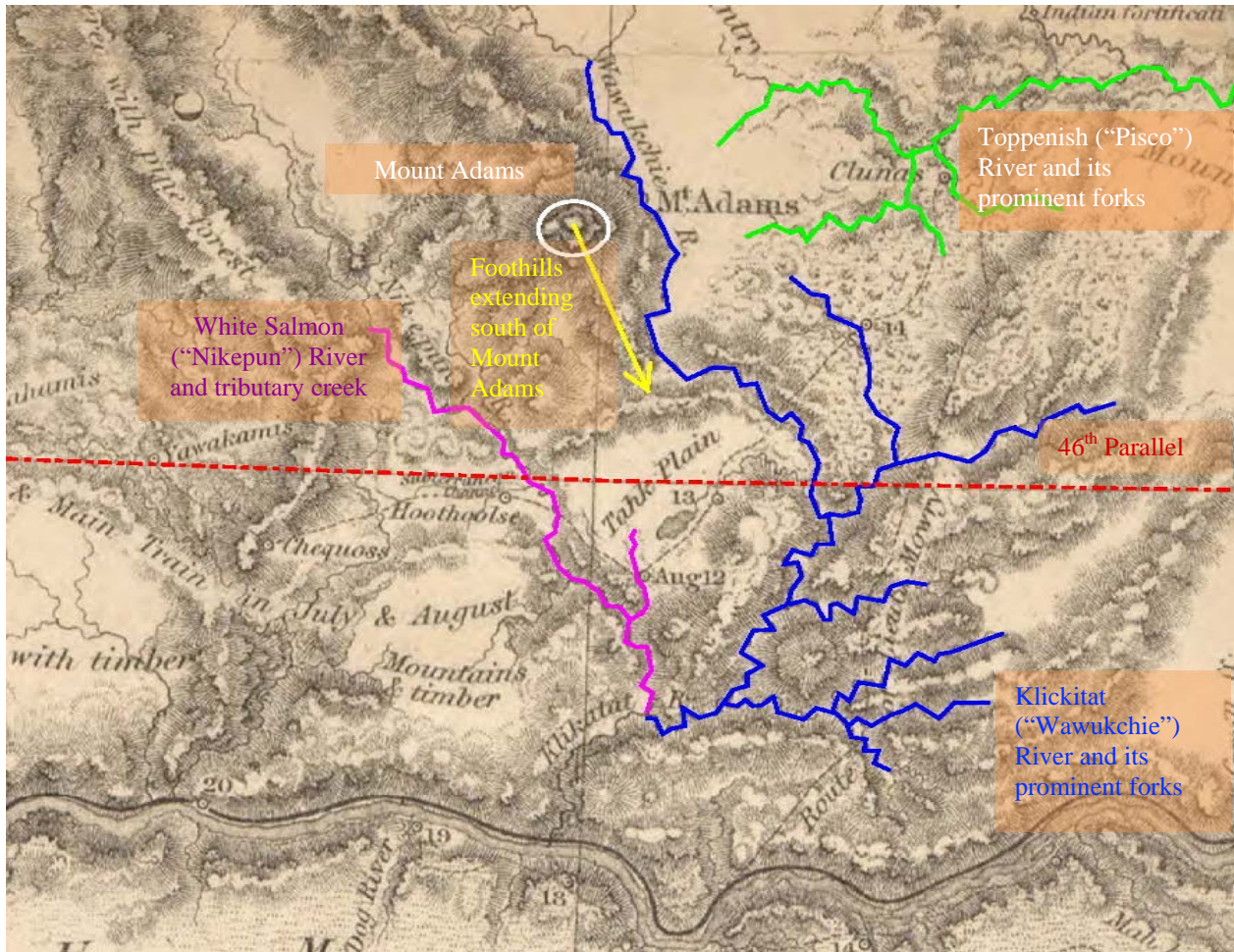
1 194-195; Ex. 561 at 88. Stevens knew the 46th Parallel passed through the upper
2 half of Tahk Plain and that both of McClellan's camps in Tahk Plain were located
3 south of that latitudinal line. Knowing this, Stevens drew the southern boundary of
4 the reservation on the Treaty Map *far north* of the 46th Parallel.
5

6 **3. Comparing features on the Treaty Map and the Railroad Survey**
7 **maps confirms Tract D was not included.**

8 A comparison of the Treaty Map with Stevens' virtually contemporaneous
9 maps from the Railroad Surveys provides important context regarding the relevant
10 geographic features with which both parties to the treaty were familiar and further
11 confirms that Tract D was not intended to be included in the reservation. The
12 following features, highlighted in color on the below excerpts, appear on the 1853-
13 54 Railroad Survey map (Ex. 500); the 1855 Railroad Survey map (Ex. 501); and
14 the 1855 Treaty Map (Ex. 502):
15
16

- 17 (1) the White Salmon ("Nikepun") River and tributary creek (pink);
18
19 (2) the Klickitat ("Wawukchie") River and prominent tributaries (blue);
20
21 (3) the Toppenish ("Pisco") River and prominent tributaries (green);
22
23 (4) the 46th Parallel (red);
24
25 (5) Mount Adams (white circle); and
26
(6) foothills extending south of Mount Adams (yellow arrow).

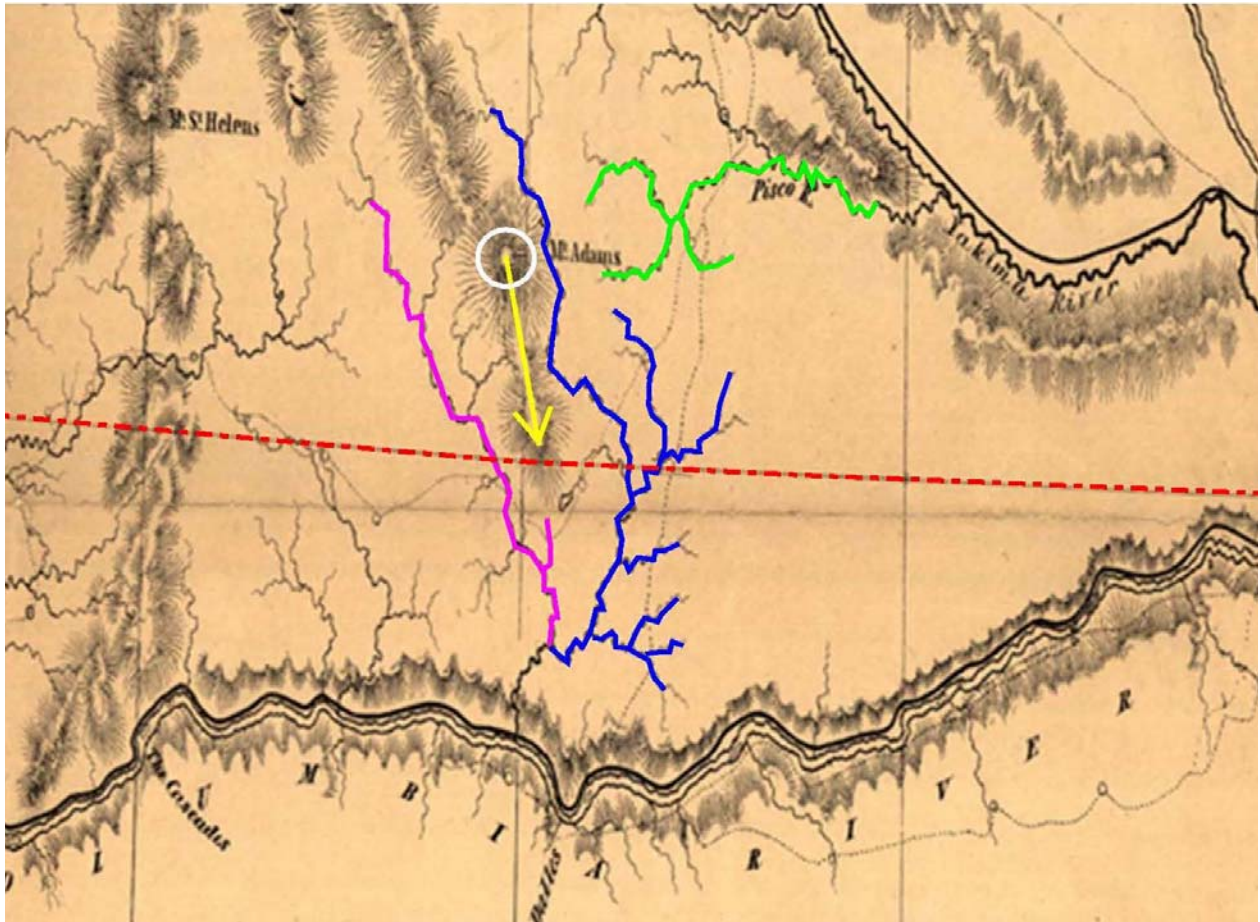
a. 1853-54 Railroad Survey Map (Ex. 500)



On the above map, Tahk Plain is accurately shown as south of the foothills of Mount Adams and *far south* of the divide between the Pisco River (green) and Klickitat River (blue). At the south end of Tahk Plain, a creek drains into the White Salmon River (pink). Also, Conboy Lake is shown as situated south of the 46th Parallel, between the head of that creek and the main fork of the Klickitat. McClellan's trail and his August 12, 13, and 14, 1853 camps are clearly depicted on the map, including both Tahk Plain camps.

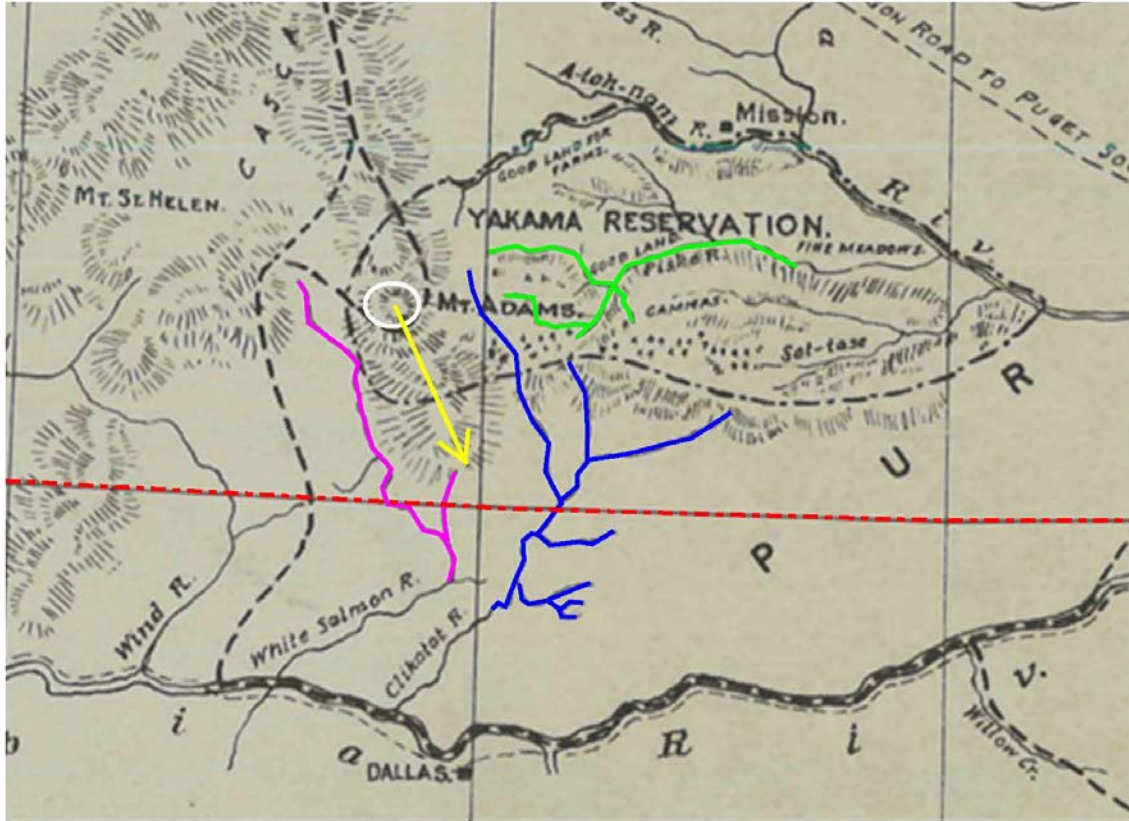
b. 1855 Railroad Survey Map (Ex. 501)

A later Railroad Survey map (from 1855) further demonstrates the consistent location of these common features:



On the 1855 Railroad Survey map, Tahk Plain is identified by the location of Conboy Lake and McClellan's camps *below* the 46th Parallel and south of the Mount Adams foothills, *far south* of the divide between the Pisco and Klickitat tributaries, and approximately parallel with the main fork of the Klickitat. This map, which was completed just months before the Yakama treaty, also shows the small creek running from Tahk Plain into the White Salmon River.

c. The 1855 Treaty Map (Ex. 502)



When comparing the Railroad Survey maps with the Treaty Map, two things become obvious: (1) the Treaty Map was based on the two prior maps; and (2) the Treaty Map places Tahk Plain well south of the reservation boundary. Like the prior maps, the Treaty Map depicts the foothills running south from Mount Adams; the divide between the Klickitat and Pisco tributaries; the creek running from Tahk Plain into the White Salmon; and the main fork of the Klickitat near the 46th Parallel. It shows the reservation boundary moving sharply east halfway down the foothills, crossing the main Klickitat, and continuing along the divide between the Pisco and Klickitat tributaries. The boundary is *many miles north* of the 46th

1 Parallel and the main fork of the Klickitat. This placement of the boundary
2 confirms that Tract D was not intended to be included within the reservation.

3
4 **B. The Parties' Subsequent Actions And Statements Confirm They Did
Not Intend To Include Tract D.**

5
6 **1. Early Yakama tribal leaders assisted in marking out a boundary
that excludes Tract D.**

7 Article II of the treaty provides that its boundaries were to be surveyed "as
8 necessary." Ex. 6 at Art. II. About two years after the treaty, U.S. agents met with
9 Chief Spencer, the first Head Chief of the Yakama Nation (Ex. 586), for the
10 purpose of marking out the boundary of the reservation. Ex. 65 at 146-51. They
11 traveled east of Camas Prairie to the junction of the Indian Trail and the
12 Goldendale Road and discussed how that intersection marked the reservation's
13 southwest corner. *Id.* From that point, the boundary went in two separate
14 directions: northwest to "the foot of Mt. Adams" on "the east side of Mt. Adams";
15 and southeast to Grayback Mountain. *Id.* at 149; Ex. 76 at 6-9; Ex. 66 at 81-83.
16 This boundary excluded Tract D. Chief Spencer, who was born in 1836 (Ex. 593 at
17 6 (1899 Census)), never expressed a contrary understanding of the boundary.

18
19 Around 1861, the United States sent surveyors T.F. Berry and P. Lodge to
20 survey the reservation's southern boundary. The surveyors were accompanied by
21 Stick Joe, a Klickitat chief and future tribal judge who was born in 1827. Ex. 76 at
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1 6-9; Ex. 54 at 10; Ex. 593 at 13 (1887 Census). The survey party discussed how the
2 boundary extended from Grayback Peak to the “conical hump” at the eastern base
3 of Mount Adams. Ex. 76 at 6-9; Ex. 66 at 81. Like Chief Spencer, Stick Joe never
4 expressed a contrary understanding.
5

6 **2. Both Yakama and homesteaders treated Camas Prairie as outside**
7 **the reservation.**

8 In the 1870s, non-Indians began settling areas within Tract D under the
9 general land laws, receiving land patents from the United States, and establishing
10 communities such as Laurel, Fulda, and Glenwood. Ex. 561 at 94. While Yakama
11 regularly raised boundary concerns during these early years, it never claimed Tract
12 D to be within the reservation during that time. Ex. 5 at 13-14. On the contrary,
13 initial conflicts with tribal subsistence practices in Camas Prairie eventually led to
14 “intercultural cooperation” between non-Indian settlers and tribal members who
15 continued to use the valley for seasonal root digging. Ex. 561 at 95; Ex. 5 at 12.
16
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18

19 **3. The 1890 Schwartz Survey and subsequent actions and statements**
20 **by the United States and Yakama, including the 1904**
21 **Congressional Act, further confirm Tract D is excluded.**

22 In 1890, the United States sent George Schwartz to survey the southern and
23 western boundaries to address Yakama’s claims of improper grazing on reservation
24 lands. Ex. 76 at 11-12. Schwartz reported that the Indians again claimed a line
25 from Grayback “northwesterly...to the base of Mt. Adams.” *Id.*; Ex. 587 at 233.
26

1 Schwartz, however, believed that the treaty calls prohibited the reservation
 2 from crossing the Klickitat River, so he disregarded the Indians' claims and,
 3 instead, drew a western boundary some 20 miles short (east) of the Cascade
 4 Mountains Ex. 76 at 12. When the General Land Office approved the Schwartz
 5 Survey, Examiner J.E. Noel confirmed that it conflicted with what the Indians
 6 claimed as the boundary. In his August 15, 1891 report, Noel notes,
 7

8
 9 From what I can learn there is no question about the line up to about
 10 the 51st mile where a low ridge makes off in a S. W'ly direction
 11 terminating at the Big Klickitat River near a peak known as Grayback.
 12 The Indians claim that the line should follow this ridge to Gray Back,
thence in a N. W'ly direction to the foot of Mount Adams.

13 Ex. 592 at 492 (underline added).

14 **4. At Yakama's request, the United States sends E.C. Barnard to**
 15 **investigate the Schwartz boundary dispute.**

16 Yakama objected to the Schwartz Survey almost immediately. Ex. 510. In
 17 1892, tribal leaders—including Head Chief Joseph Stwire (“White Swan”) and
 18 Chief Captain Eneas¹—petitioned the Commissioner of Indian Affairs to send “a
 19

20 ¹ White Swan was the first elected Head Chief of the Yakama Nation, succeeding
 21 Chief Spencer in 1868. Ex. 508 at 1. He was born in 1829 and attended the Walla
 22 Walla Council. Ex. 593 at 1 (1896 Census). He stated he “remember[ed] every
 23 word that was said at that treaty.” Ex. 17 at 16. As a chief of the Yakama band,
 24 Capt. Eneas was a prominent leader within the Yakama Nation. Ex. 515 at 7. Born
 25
 26

1 good eastern man...to examine our line.” *Id.* at 4. The petition states, “we are not
2 mistaken about the old boundary line” and specifically identifies Stick Joe and
3 Chief Spencer as witnesses “to prove that old line.” *Id.* at 3-4.
4

5 Rather than resurvey the boundaries, as Yakama had requested, the United
6 States sent the Crow-Flathead Commission to try and purchase those lands
7 excluded by the Schwartz Survey. Ex. 17; Ex. 515; Ex. 561 at 98-100. But Yakama
8 steadfastly refused to sell, insisting that the parties first resolve the disputed
9 boundary. Ex. 515 at 6-7. So, in 1898, the commissioners told Yakama leaders,
10 “that is what we are here for. To have them select men to meet us to settle this
11 boundary line question.” *Id.* at 7. Yakama “chose Chief Spencer and Stick Joe,
12 both venerable Klickitats.” Ex. 561 at 100.
13
14
15

16 Six years after Yakama had first requested a resurvey of its western line, the
17 United States sent E.C. Barnard to investigate the dispute. Ex. 76. After multiple
18 interviews with Chief Spencer and Stick Joe, and after conducting an extensive on-
19 the-ground reconnaissance with tribal guide Abe Lincoln, Barnard determined that
20 Schwartz had erroneously excluded 293,837 acres from the reservation as
21 *understood* by the Indians. *Id.* at 4, 7-9, 16. Based on his interpretation of the
22
23
24 in 1835, Eneas also attended the Walla Walla Council. Ex. 563 at 15; Ex. 593 at 3
25 (1906 Census). Like White Swan, he “knew what he heard.” Ex. 563 at 16.
26

1 *treaty*, however, Barnard concluded that Yakama was actually entitled to 357,878
2 acres. *Id.* at 7-9. Importantly, neither interpretation included Tract D. *Id.* at 16.

3
4 **5. Congress reviews Barnard's report and sets the western boundary
to settle the dispute with Yakama.**

5 Barnard submitted his report on January 12, 1900. Ex. 76 at 6. But Congress
6 did not act on the boundary issue until April of 1904. Ex. 20. In connection with its
7 efforts to open the Yakama reservation for non-Indian allotment, on Dec. 21, 1904,
8 Congress passed H.R. 14468 ("1904 Act"). Ex. 18.

9
10
11 In relevant part, Section 1 of the 1904 Act states:

12 That the claim of said Indians to the tract of land adjoining their
13 present reservation on the west, excluded by erroneous boundary
14 survey and containing approximately two hundred and ninety-three
15 thousand eight hundred and thirty-seven acres, according to the
16 findings, after examination, of Mr. E. C. Barnard, topographer of the
17 Geological Survey, approved by the Secretary of the Interior April
18 seventh, nineteen hundred, is hereby recognized, and the said tract
shall be regarded as part of the Yakima Indian Reservation for the
purposes of this Act.

19 Ex. 18 at § 1.

20 To clearly establish a precise western boundary in accord with that
21 Congressional finding, Section 8 of the 1904 Act provides:

22
23 That to enable the Secretary of the Interior to classify and appraise the
24 aforesaid lands as in this Act provided, and to conduct the sales
25 thereof, and to define and mark the boundaries of the western portion
26 of said reservation, including the adjoining tract of two hundred and
ninety-three thousand eight hundred and thirty-seven acres, to which

1 the claim of the Indians is, by this Act, recognized, as above set out,
2 and to complete the surveys thereof, the sum of fifty three thousand
3 dollars, or so much thereof as may be necessary, is hereby
appropriated.

4 *Id.* at § 8 (emphasis added). Official surveys of the Barnard Line were completed
5 by Campbell, Germond, and Long in 1907. Ex. 46 at No. 63.
6

7 While Congress was aware of Barnard's interpretation of the treaty
8 encompassing 357,878 acres, it nevertheless chose to ratify the lesser boundary
9 encompassing 293,837 acres. Ex. 20 at 2; Ex. 77 at 1. In other words, *knowing* that
10 Barnard's interpretation of the treaty language would entitle Yakama to an
11 additional 64,000 acres, Congress ratified a boundary that excluded those acres.
12

13
14 **6. While Yakama protested the sale of unallotted land authorized by
the 1904 Act, it expressly affirmed a boundary excluding Tract D.**

15 After Congress ratified the Barnard Line in December of 1904, Yakama
16 submitted an official petition expressing "thanks and appreciation" for restoring
17 the "disputed tract" to the reservation, stating "nor is there any greater acreage of
18 land than should properly belong to them." Ex. 530 at 2-3; Ex. 527 at 2. Yakama
19 did protest other aspects of the Act: namely, its opening of reservation lands to
20 non-Indian settlement without tribal consent or what it believed was fair
21 compensation. *Id.*
22
23
24

25 In a subsequent petition to the President of the United States, Yakama
26

1 echoed its earlier complaints about consent and compensation, but now adopted
2 Barnard's more generous interpretation of the reservation boundaries, claiming the
3 Schwartz Survey "as run, deprived [it] of 357878 acres of lands." Ex. 535 at 1
4 (underline added); Ex. 534. The petition was signed by more than 150 Yakama
5 members "in council assembled"—including White Swan and Eneas. Ex. 535 at 5.
6

7
8 Three months later, in July of 1906, Yakama leaders—again including
9 White Swan and Eneas²—submitted another petition, this time to Indian Affairs,
10 expressly defining the reservation boundary as understood by the Indians:
11

12 from Grayback west following the old marked trees to junction of
13 Indian trail as indicated on Barnard map; thence in a direct line to
14 hump at foot of Mount Adams; thence to follow the main divide of the
Cascade Mountains to Goat Rocks.

15 Ex. 536 at 7. This petition claims the line adopted by Chief Spencer almost 50
16 years earlier. Confirming that this was the boundary line understood by the
17 Indians, tribal leaders stated, "We are sure and certain that this was the line
18 intended by the treaty and will feel satisfied if this line is adopted." *Id.* at 5
19 (underline added). This same line would eventually be surveyed by Pecore in 1924.
20
21 It unequivocally excludes Tract D.
22

23
24 ² Other signatories included Abe Lincoln and Charley Olney. Ex. 536 at 7. Both
25 spoke fluent English and served as tribal interpreters. Ex. 64 at 182; Ex. 65 at 143.
26

1 **7. Litigation over land patents confirms the treaty parties’**
2 **understanding that the boundary did not include Tract D.**

3 Following Congressional ratification of the Barnard Line, the United States
4 filed suit against the Northern Pacific Railway Company to annul non-Indian
5 patents to land located between the Schwartz Line and the new Barnard Line. Ex.
6 543 at 502. The United States, “as trustee and guardian for” Yakama, took the
7 position that the Barnard Line was the correct boundary. *Id.* The trial court adopted
8 the Barnard Line and ordered the patents annulled, and both the Ninth Circuit and
9 U.S. Supreme Court affirmed. *See N. Pac. R.R. Co. v. United States*, 227 U.S. 355,
10 358, 367 (1913). Between 1920 and 1924, Chester Pecore resurveyed the western
11 boundary in accordance with the Supreme Court’s decision. Ex. 46 at No. 64.

12 To establish Yakama’s understanding of the western boundary at trial, the
13 United States called tribal member Abe Lincoln to testify. Ex. 64. Lincoln was a
14 “line rider” whose job it was to patrol the reservation boundaries in order to
15 prevent non-Indian stock from encroaching on reservation land. *Id.* at 175. On
16 numerous occasions, he had been selected by the Indians as interpreter for formal
17 councils with U.S. agents, including those concerning the disputed boundary. *Id.* at
18 175, 182. He personally guided Barnard during Barnard’s 1899 investigation. *Id.* at
19 175, 179. As to the southwest boundary, Lincoln testified as follows:

20 Q: Did you interpret in any of those interviews to the white inspector,
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1 or any Government officials down there, where the Indians claimed
2 that their reservation line was?

3 A: Yes, I explained that, and the Indians told the inspector. I
4 explained it to the inspector where the boundaries was.

5 Q: Where did you explain where it was?

6 A: Just where I told you.

7 Q: Well, take this Exhibit No. 1 [Barnard's Map] and explain your
8 statement either on there or independent of there, and tell where the
9 Indians claimed.

10 A: They claimed from the south fork head of the Atanum, a straight
11 line to Goat Rocks, then from Goat Rocks following the divide to Mt.
12 Adams, and from Mt. Adams a straight line to the junction of the
13 Indian trail and Goldendale road.

14 Q: The junction of the Indian trail and the Goldendale road?

15 A: And the Goldendale road, and then from the junction of the Indian
16 trail with the Goldendale road right straight east to Grayback. (*Id.* at
17 184).

18 -----

19 Q: You are familiar are you with what the Indians claim during all
20 these years?

21 A: Yes, sir.

22 Q: And that is what they claimed, was it?

23 A: That is what they claim.

24 Q: Have they ever consented, so far as you know, to any other
25 reservation?

26 A: Well, they all consented and we all consented to where I took
Barnard around.

Q: Yes, and no other?

A: And no other. (*Id.* at 185).

The trial court found, "it is clearly established that they [Yakama] have contended
for boundaries substantially as defined by the Barnard survey." Ex. 543 at 531.

1 **8. The United States investigates, but finds no evidence supporting, a**
2 **boundary that would include Tract D.**

3 Around 1930, the Treaty Map was rediscovered among unrelated papers in
4 the Department of Interior. Ex. 4 at 19. The Treaty Map—which showed Mount
5 Adams within the reservation—prompted renewed discussion within the U.S.
6 Government regarding what exactly was intended under the 1855 Treaty. The
7 United States contemplated bringing a lawsuit on behalf of Yakama, but it first
8 needed to investigate the merits of this new claim. Ex. 550 at 1; Ex. 54 at 4.
9
10

11 In July of 1930, Superintendent E.W. Estep interviewed a number of
12 Yakama members to determine the tribe’s historical understanding of its boundary.
13 Ex. 550. One such member was Tribal Judge Charles Olney. Before becoming
14 Judge, Charles Olney “was captain of the Indian Police...and was employed as line
15 rider.” *Id.* at 2. As such, he was “familiar with the entire country.” *Id.* Olney
16 claimed “that the boundary line recently established [Pecore] is the correct one and
17 [he] does not believe the Indians ever claimed the Camas Prairie as being theirs
18 after the making of the Treaty.” *Id.*
19
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21

22 Estep also interviewed Lancaster Spencer, son of Chief Spencer, who was
23 “about seventy-three years of age” at the time. *Id.* As reported by Estep, “Lancaster
24 says that his father never claimed the Camas Prairie Country, and he is not aware
25 of the fact that any of the Indians made such a claim.” *Id.* Estep concluded, “I
26

1 doubt very much whether it is possible at this late date to collect reliable evidence
2 that would justify a claim to the Camas Prairie Country.” *Id.* at 4.

3
4 For unknown reasons, Interior sent Superintendent C.R. Whitlock to conduct
5 a second inquiry. Ex. 54 at 4. At the outset of the meeting, Whitlock made it clear
6 that the “Indian Office intends to take this matter to the Supreme Court of the
7 United States in order to quiet title to this piece of land” and that the purpose of the
8 meeting was to collect “all the information we can get on the side of the Indians to
9 help fight this case.” *Id.* During the council, many Yakama members spoke:
10

11
12 • Thomas Sam claimed “the line ran to the center of Mount Adams, to
13 the place called Pasch” which he described as “almost directly west of Grayback
14 Butte.” *Id.* at 5-6 (underline added). “There is a stake at that place, at Pasch. There
15 is a stake at that point, and that is a corner of the reservation. Then from that point
16 the line runs to Grayback Mountain.” *Id.* at 5.

17
18 • Samuel Jackson stated “I think that line running through Glenwood is
19 the line that is correct.” *Id.* at 6 (underline added). He confirmed his understanding
20 that the “stake” marking the corner of the reservation was “East of the town of
21 Glenwood” by “three or four miles.” *Id.* (underline added).
22

23
24 • Louis Brown stated his belief that “[t]he line should go right to the
25 place they call Pasch” and from there “right across over to Mount Adams.” *Id.* at 7.
26

1 • Timothy Joyce stated: “where that line is, I know that country quite
2 well. There are no white people there. They know that land belongs to the Indians.”
3 *Id.* at 8. This would exclude Camas Prairie, which was long settled by non-Indians.

4 • Jobe Charley first stated, “I would like to have Lancaster Spencer
5 make a statement about this line. He is an old man and knows all this country.” *Id.*
6 at 8. He later stated that near “Pasch...[t]here is a kind of hill or mountain and that
7 is the corner of the Yakima Indian Reservation.” *Id.* at 10. He confirmed his belief
8 that “[a] small part of that Glenwood country was left off the reservation.” *Id.*
9 (underline added). And, after Louis Watlamatt spoke, Charley clarified that “Pasch
10 is where that rock corner is. Louis Watlamatt followed that line.” *Id.* at 14.

11 • Lancaster Spencer confirmed what he had earlier told Superintendent
12 Estep—namely, that his father had been shown a line from the “hump” east of
13 Mount Adams, to the “marked trees” at a “point east of Camas Prairie at the
14 junction of two trails,” and then “to a place on the mountain called Grayback
15 Mountain.” *Id.* at 9, 16. Spencer, who spoke English, provided Whitlock with a
16 sworn statement to this effect. *Id.* at 16.

17 • U.S. Forester Drissen then read notes of a conversation he had with
18 Abe Lincoln. *Id.* at 10. Lincoln had explained that when the Klickitats “moved up
19 to the reservation in 1858 the band stopped at the trail near the Outlet Creek, or
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1 Pasch Creek, near where a tree was blazed to make the boundary line. The chief
2 said that was the corner of their reservation; to the south of there was the white
3 man's land and to the north was the reservation for the Indians. They deplored the
4 fact that they had lost the Camas Prairie." *Id.* (underline added).
5

6 • James Meninick stated, "I can say, from what my people have been
7 telling me, that right beyond Glenwood, from that point the line runs right towards
8 Mount Adams." *Id.* at 11. Meninick believed Pasch was West of Glenwood. *Id.*
9 Wheeler Miller agreed with Meninick. *Id.* at 14.
10

11 • Louis Watlamatt stated, "Abe Lincoln and I went around together
12 looking over the reservation. ... We came on the end of the Grayback Hill then we
13 followed it right across. There are two trails coming together and there is a creek
14 running and that line went on the south side of this creek. We came to a place
15 where there was a tree marked. This mark was almost grown over, the bark was
16 growing over it. And I was told that here is the original corner of the Yakima
17 Indian Reservation as it had first been established." *Id.* at 12.
18
19
20

21 • Jim Wallahee stated, "[t]he man they used to call Owhi, and his son,
22 they know all about the old boundary line of the Yakima Reservation." *Id.* at 13.
23 Owhi signed the 1855 treaty. Ex. 6 at 5. His son, Leshi Owhi, signed the July 1906
24 Petition to Indian Affairs affirming the Pecore Line. Ex. 536 at 7.
25
26

1 • Frank Seelatsee stated, “[y]ou have heard different statements about
2 this line running into Grayback. From Grayback into the hills across the Klickitat
3 River on the west. From that hill it points into Pasch, then west of Glenwood there
4 is a hill, and this hill on the west side of Glenwood, and it points from Pasch into
5 that.” *Id.* at 14. When asked to describe Pasch, he states, “[i]t is a meadow.” *Id.* at
6 15. He claimed “that Glenwood town is inside our reservation.” *Id.*

7
8
9 Despite the flatly contrary statements at the council, Whitlock concluded
10 that “the testimony I have been able to gather...tends to lean toward the general
11 understanding that the boundary line did run South of Camas Prairie...and that
12 Camas Prairie was within their reservation.” *Id.* at 1. Curiously, his letter includes
13 a purported statement by Jobe Charley that contradicts Charley’s own statements
14 made during the council. *Compare id.* at 16 with *id.* at 10, 14. Whitlock also had
15 difficulty with the term “Pasch,” claiming, “it seems to have a rather indefinite
16 meaning.” But several members described its location at the intersection of the
17 Indian Trail and Goldendale road—consistent with the boundaries described by
18 Chief Spencer and Stick Joe. *Compare id.* at 2 with *id.* at 5, 10, 14.

19
20
21
22 Though his conclusions were suspect, Whitlock’s report prompted Interior to
23 revisit the southwest boundary. As the U.S. Attorney General noted in April 1933,

24
25 The advocacy of the so-called treaty line as the southwest boundary of
26 the Yakima reservation is a somewhat recent development in your

1 Department. This line was not advocated either by the Interior
2 Department or the Department of Justice in the litigation which
3 culminated in the decision of the Supreme Court of the United States
in the case of Northern Pacific Railway Company v. United States.

4 Ex. 594 at 1.

5 In an earlier letter, the Department of Justice had suggested that if Interior
6 intended to continue advocating a new southwestern boundary, it needed to “fully
7 develop” the “matters upon which you expect to rely to establish the so-called
8 Treaty Line as the southwestern boundary line of the reservation.” *Id.* at 2. Aware
9 of no “valid reasons why the so-called treaty line should be adopted as against
10 either the Pecore or Barnard lines,” the Attorney General pointed out that an
11 examination of the Treaty Map:
12
13
14

15 shows the line as running through the territory which is located
16 between the headwaters of the Klickitat and Pisco Rivers. Manifestly,
17 a line so located would not embrace lands southwest of the Pecore line
18 as part of the reservation but would definitely exclude them. Indeed, if
19 this map of June 12, 1855 were regarded as controlling, there would
be eliminated from the reservation many thousands of acres of land
which are not included therein by the Barnard line.

20 *Id.* at 2-3 (underline added). He concluded, “[i]t is the judgment of this Department
21 that the map of June 12, 1855 does not support the so-called treaty line which your
22 Department now advocates, but definitely disproves it.” *Id.* at 3.

24 After three years of searching, Interior’s investigation had come up empty.
25 As reported by First Assistant Secretary T.A. Walters in September 1933,
26

1 It is observed in the pending Northern Pacific land grant litigation it is
 2 the intention of the Department of Justice to contend for the Pecore
 3 line between Grayback Peak and Conical Hump as the southwest
 4 boundary line rather than the alleged "Treaty" line on the ground that
 5 no evidence has been furnished which would warrant your
 6 Department contending for the alleged "Treaty" line.

7 In connection therewith it may be said that during the past several
 8 years a thorough search of all available sources of information has
 9 been made by this Department with the view of obtaining such
 10 documentary evidence as would tend to support the claim of the
 11 Indians to the alleged 'Treaty' line. However, other than the Governor
 12 Stevens' sketch of June 12, 1855 [the Treaty Map], as referred to in
 13 your letter, nothing has been found which could be considered as
 14 having any value as evidence. ...

15 This Department has not been able to locate any additional
 16 documentary evidence relative to the Treaty line.

17 Ex. 552 at 1-2 (underline added).

18 **C. When Yakama Revises Its Claim Regarding The Reservation**
 19 **Boundary, Congress Leaves The 1904 Act's Boundary In Place.**

20 Interior never filed suit to establish Yakama's new claim to Camas Prairie,
 21 so Yakama turned its efforts to Congress. Exs. 22 and 44. In 1939, Yakama sought
 22 Congressional approval to take its boundary claim before the U.S. Court of Claims.
 23 Ex. 22 at 4. Congress refused to act. Ex. 4 at 23-24.

24 **D. ICC Erroneously Agrees With Yakama, But Cannot Change Boundary.**

25 In 1946, Congress created the Indian Claims Commission to address all
 26 existing tribal claims against the United States. *See* 60 Stat. 1049, Act of Aug. 13,
 1946 ("ICC Act"). Like the Court of Claims, the ICC's authority was limited to

1 compensation; it had no authority to change boundaries. *Id.* at § 22; Ex. 4 at 25.

2 Yakama brought claims for compensation regarding four tracts of land that it
3 alleged had been excluded from its reservation by erroneous surveys: Tracts A, B,
4 C, and D. Ex. 555 at 41. The ICC denied Yakama's claims to Tracts A and B and
5 partially awarded damages for Tract C. Ex. 559 at 4. As to Tract D, it ultimately
6 found it "was intended to be included within the Yakima Reservation." Ex. 46 at
7
8 No. 68. In reaching this conclusion, the ICC made several critical errors:

9
10 *First*, the ICC incorrectly assumed the treaty contained an "impossible call."
11
12 *Id.* Regarding "the spur whence flows the waters of the Klickitat and Pisco
13 Rivers," the ICC determined "there is no spur of that description" and disregarded
14 the requirement altogether. *Id.* In doing so, it also disregarded the next treaty call,
15 which requires the boundary to extend "to the divide between the waters of said
16 rivers." Ex. 6 at Art. II. But the Treaty Map shows that the "spur" identified in the
17 calls is actually split by the main stem of the Klickitat River, and the "divide
18 between...said rivers" is actually a divide between their tributaries. As discussed in
19
20 Section V.A.1, below, this spur is Peavine Ridge, located far north of Tract D.

21
22 *Second*, the ICC relied heavily on the Treaty Map's depiction of the
23 boundary extending south of Mount Adams, but it failed to perform any critical
24 analysis of how far south the boundary should go. Inexplicably, the ICC found
25
26

1 that, “[i]n the area in question the only identified geographic landmark is Mt.
2 Adams.” Ex. 46 at No. 65. Yet comparing the near-identical geographic features on
3 the Railroad Survey maps with the Treaty Map—of which there are many—
4 unequivocally places Tract D substantially south of the reservation’s boundary.
5

6 *Third*, Stevens knew Tract D was located substantially south of the 46th
7 Parallel. To place Tract D within the boundary on the Treaty Map presumes he
8 made a colossal error depicting the reservation far north of that well-known
9 latitudinal line. It also represents an extreme distortion relative to the other
10 geographic features the treaty drafters placed on the map with considerable
11 accuracy. In order for the boundary to include Tract D, one would have to assume
12 that Stevens correctly located every relevant geographical feature with the sole
13 exception of Tract D, which one would have to assume he got astoundingly wrong.
14
15

16 *Finally*, the ICC was not presented with critical evidence of Yakama’s own
17 post-treaty understanding of the boundary. For example, Yakama’s petitions were
18 not part of the ICC record; nor was Abe Lincoln’s sworn testimony. The ICC’s
19 finding on Tract D was based on an incomplete and poorly developed record and
20 should be afforded zero weight in this Court’s consideration of the issue.
21
22
23

24 **E. Based On The Erroneous ICC Finding, The United States Attempts To**
25 **“Return” Mount Adams To Yakama.**

26 Following the ICC’s mistaken decision in 1966, Interior—who had been

1 advocating the new boundary since 1930—issued a legal memorandum claiming
2 that not only was Tract D part of the original reservation, but that it continued to be
3 part of the reservation. Ex. 27. Assistant Regional Solicitor C. Richard Nealy
4 wrote, “the findings in the present suit [ICC] serve to correct errors heretofore
5 made in the survey and establish the boundaries of the reservation as described in
6 the Treaty of 1855.” Ex. 27 at 9-10. Nealy incorrectly presumed that the ICC
7 decision “restored [Tract D] to the Yakima Reservation.” *Id.* at 1. In 1972,
8 President Nixon issued Executive Order 11670, which purported to “return” to
9 Yakama the eastern and southeastern slopes of Mount Adams. Ex. 25.

13 **F. Klickitat County Has Always Exercised Jurisdiction In Tract D.**

14 Klickitat County was established in 1859. Testimony at trial will establish
15 that since that time, the County has exercised *full jurisdiction* over those portions
16 of Tract D within Klickitat County. Just like the State of Washington, *see* Ex. 599,
17 it has never treated those areas as being within the reservation.

19 **III. KLINKITAT COUNTY WITNESSES**

20 The County intends to call historian Michael C. Reis to discuss his research
21 into the historical record, as well as various County representatives to discuss the
22 effect a jurisdictional upheaval would have on the County and its residents.
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IV. BURDENS OF PROOF

At trial, Yakama Nation has the burden to prove that the parties to the 1855 treaty intended Tract D to be part of the reservation. *See United States v. Lummi Indian Tribe*, 841 F.2d 317, 318 (9th Cir. 1988) (“[t]he burden is on the petitioning tribe” to prove that the disputed area is a treaty area). If the Court finds that Tract D was intended to be part of the reservation, the burden shifts to the County to prove that Congress later established boundaries that exclude Tract D.

V. LAW AND ARGUMENT

A. Tract D Was Never Intended To Be Part Of The Reservation.

While “treaties are construed more liberally than private agreements,” “even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.” *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943). “[C]ourts cannot ignore plain language that, viewed in historical context and given a ‘fair appraisal,’ clearly runs counter to a tribe’s later claims.” *Or. Dep’t of Fish & Wildlife v. Klamath Tribe*, 473 U.S. 753, 774 (1985). In that respect, interpretation of Indian treaties is like interpretation of any treaty: It “begin[s] with the text of the treaty and the context in which the written words are used.” *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1508-09 (2017) (quotation and citation omitted).

The context that federal courts consider in determining the intent of the

1 parties to an Indian treaty includes “the treaty language as a whole, the
2 circumstances surrounding the treaty, and the conduct of the parties since the treaty
3 was signed.” *Cree v. Waterbury*, 78 F.3d 1400, 1403 (9th Cir. 1996). Treaties “are
4 to be construed, so far as possible, in the sense in which the Indians understood
5 them,” *Choctaw*, 318 U.S. at 432, and ambiguous provisions should be resolved
6 in their favor, *Winters v. United States*, 207 U.S. 564, 576-77 (1908).
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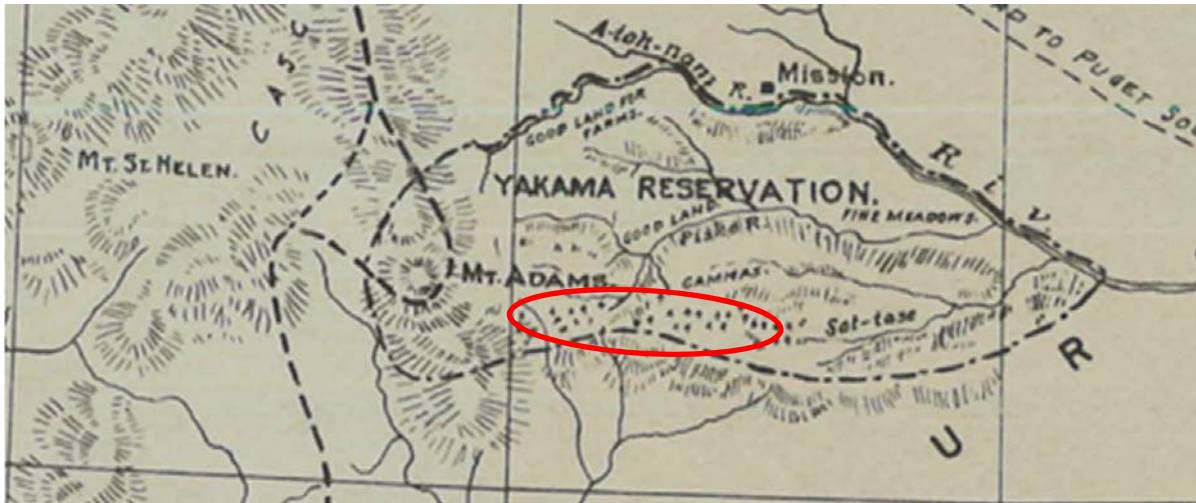
9 However, it is well established that a court “cannot, under any acceptable
10 rule of interpretation, hold that the Indians [had a certain right] merely because
11 they thought so.” *Confederated Bands of Ute Indians v. United States*, 330 U.S.
12 169, 180 (1947); *see also DeCoteau v. Dist. Cty. Ct. For Tenth Judicial Dist.*, 420
13 U.S. 425, 447 (1975) (Indian canon “is not a license to disregard clear expressions
14 of tribal and congressional intent”); *Little Six, Inc. v. United States*, 280 F.3d 1371,
15 1376 (Fed. Cir. 2002); *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 457
16 (7th Cir. 1998). “[T]he extent of our interpretive deference to the perspective of the
17 Native leaders cannot extend past the meeting of the minds between the parties.”
18 *Jones v. United States*, 846 F.3d 1343, 1356 (Fed. Cir. 2017). It is “the intention of
19 the parties, and not solely that of the superior [or inferior] side, that must control
20 any attempt to interpret [a treaty].” *Washington v. Wash. State Commercial*
21 *Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675 (1979). Here, the evidence
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1 shows no party to the 1855 treaty intended to include Tract D in the reservation.

2 **1. The treaty calls exclude Tract D from the reservation.**

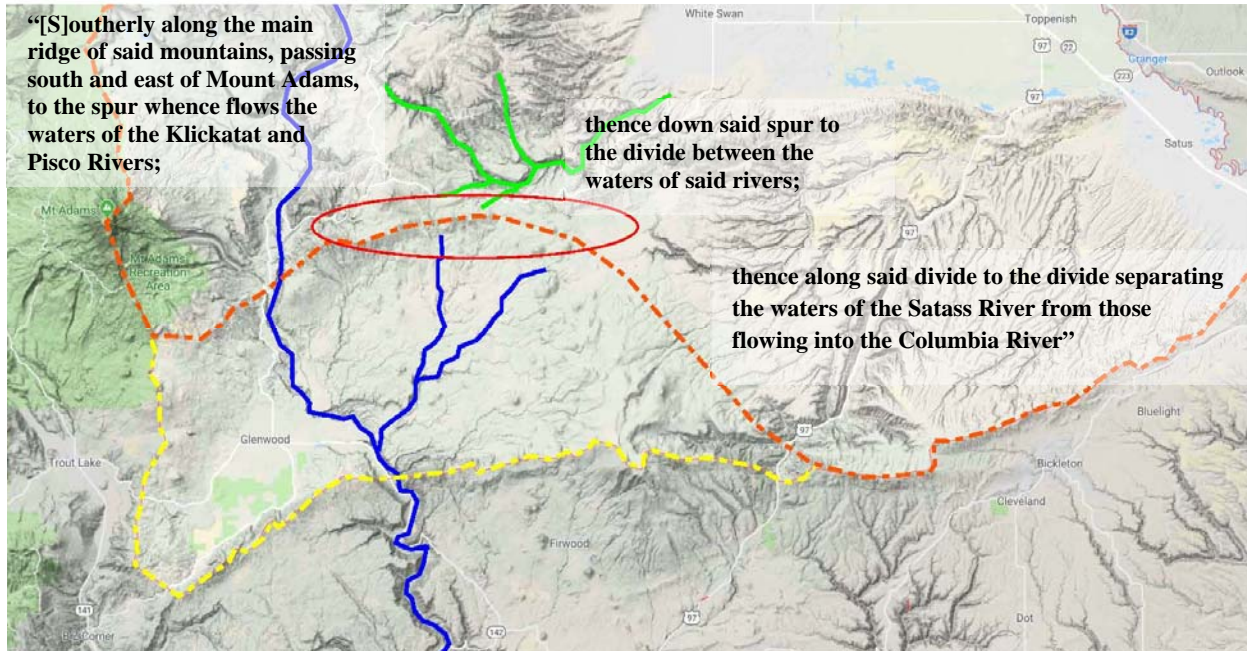
3 Article II of the treaty requires the boundary to go southerly along the main
4 ridge of the Cascade Mountains, “passing south and east of Mount Adams, to the
5 spur whence flows the waters of the Klickitat and Pisco Rivers.” Ex. 6 at Art. II.
6 Some—including the ICC—have labeled this as an “impossible call.” Ex. 46 at No.
7 68. But the call is not impossible.
8

9 The Treaty Map shows the reservation boundary extending south of Mount
10 Adams about halfway down the foothills before turning sharply east and running
11 atop an east-west chain of hills from which the tributaries of the Klickitat and
12 Pisco flow. Critically, this “spur” is first split by the main stem of the Klickitat
13 River. Thus, the fact that the main stem of the Klickitat does not *originate* in a
14 particular spur does not render the call impossible. In fact, any spur meeting the
15 calls in Article II *must* be split by the Klickitat River. Ex. 73 at 154. The Treaty
16 Map makes clear that the intended spur crosses the main stem of the Klickitat
17 River and then continues along the divide (circled in red on the next page) between
18 the Klickitat and Pisco *tributaries*.
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As discussed above on page 7, Stevens knew there were “spurs” running east from the Cascades towards the Columbia and that one of these east-west “spurs” formed the “divide” between the waters of the Klickitat and Pisco. Ex. 506 at 256. He knew this in part because McClellan had crossed this “divide” in August of 1853 *after* he left the Klickitat valley but *before* descending to the Pisco. *Id.* This divide is located east of Mount Adams and well north of the 46th Parallel.

While post-treaty surveys expanded certain parts of the southern boundary, the calls and the Treaty Map make clear that treaty parties intended a boundary that ran along what is now known as Peavine Ridge (circled in red on the modern map below). This boundary unequivocally excludes Tract D. In contrast, the boundary advocated by Yakama in this case and accepted by the ICC in 1966 (yellow line) disregards *every call* involving the Klickitat and Pisco Rivers and is wholly incompatible with the boundary on the Treaty Map.



(Ex. 503: highlighting and treaty calls added)

2. Prior to 1930, neither the United States nor Yakama expressed any understanding that Tract D was within the reservation.

If the Court finds ambiguity in the treaty calls, it should look to Yakama's historical understanding as long as Yakama's understanding does not "rewrite" the treaty. Yakama's understanding is well documented.

Shortly after treaty time, both Chief Spencer and Stick Joe accompanied U.S. agents who discussed a western boundary from Grayback Mountain to Goat Butte. When Schwartz completed his survey in 1890, Yakama leaders specifically identified Chief Spencer and Stick Joe as witnesses who knew the correct line. Ex. 510. When U.S. commissioners instructed Yakama to "select men...to settle this boundary line question" in 1898, Yakama leaders again chose Chief Spencer and

1 Stick Joe. Ex. 515 at 7; Ex. 561 at 100. And “all consented” to the boundary line
2 that Abe Lincoln showed Barnard. Ex. 64 at 185.

3
4 When Congress passed the 1904 Act to settle the longstanding boundary
5 question, Yakama affirmed a boundary excluding Tract D. In 1905, Yakama
6 thanked Congress for recognizing the “disputed tract” but protested the fact that
7 Congress planned to sell off Yakama’s surplus lands. Exs. 530 and 527. In April
8 1906, Yakama claimed the larger of the two lines identified in Barnard’s report
9 (encompassing the 357,878 acres) but never claimed any part of Tract D. Ex. 535.
10 In July of 1906, Yakama leaders specified a boundary from Grayback, to the
11 crossing of the Indian Trail and Goldendale Road, to Goat Butte, which they were
12 “sure and certain...was the line intended by the treaty.” Ex. 536. Shortly thereafter
13 Lincoln testified under oath that the boundary described in the July 1906 Petition
14 was what the Indians *always* claimed. Ex. 64 at 185.
15
16

17
18 Despite the boundary being a principle issue of dispute between the United
19 States and Yakama for decades, and despite the numerous occasions where
20 Yakama expressed its understanding, Yakama never claimed Tract D as part of its
21 reservation. Rather, it consistently claimed a boundary from Grayback, to the
22 junction, to Goat Butte.
23
24

25 Yakama’s expert relies on statements by certain tribal members in the 1930s
26

1 and 1950s about what “the old people” believed. But what those individuals said
2 more than 80 years after the treaty flatly contradicts not only what *other* Yakamas
3 said in the 1930s and 1950s, but also the actual statements of the Indians *alive at*
4 *the time of the treaty* – including the statements of chiefs White Swan and Capt.
5 Eneas, who attended the treaty council.
6

7
8 Yakama may argue that Camas Prairie was included in the reservation
9 because it was a source of camas root, pointing to (1) pre-treaty communications
10 from Indian Agents to Gov. Stevens recommending that a reservation include
11 Camas Prairie; and (2) a June 14, 1855 letter in which Stevens states that the
12 reservation contains “roots.” The argument is unpersuasive for multiple reasons.
13

14 *First*, Gov. Stevens never expressed any intent to include Camas Prairie in
15 the reservation, and the record shows he did not always follow the advice of his
16 subordinates. For example, George Gibbs—one of Stevens’ principle advisors—
17 counseled against confining Plateau peoples like Yakama on reservations *at all*.
18 Ex. 562 at 49. Stevens rejected that advice. *Id.*
19

20
21 *Second*, Article III of the treaty already protected Yakama’s continued use of
22 Camas Prairie for subsistence purposes. As Yakama’s expert Dr. Fisher wrote,
23 “[t]o most Indians, the only promise that mattered was the one ensuring continued
24 access to off-reservation subsistence resources.” *Id.* (underline added). Stevens
25
26

1 knew Article III “would ostensibly soften the shock of land cessions” by ensuring
2 access to food sources, *id.*, and “the Indians saw no conflict between ceding pieces
3 of their territory while continuing to use them,” *id.* at 52 (underline added).
4

5 *Third*, Article III also reflects that not all important places can be included in
6 a reservation. But, when Yakama wanted to reserve significant areas, it did so
7 expressly. *See United States v. Oregon*, No. 68-513-KI, 2008 U.S. Dist. LEXIS
8 62743, at *7 (D. Or. Aug. 13, 2008) (Yakama specifically requested inclusion of
9 the Wenatshapam Fishery). It made no such request regarding Camas Prairie.
10

11
12 With regard to Stevens’ letter and the reference to roots within the
13 reservation, Yakama ignores, among other things, that Stevens actually wrote
14 “Cammass” on the Treaty Map—in an area *far away* from Camas Prairie. Ex. 502.
15

16 **B. In Passing The 1904 Act, Congress Unambiguously Set The**
17 **Reservation’s Western Boundary.**

18 “It is long settled that the provisions of an act of Congress, passed in the
19 exercise of its constitutional authority, if clear and explicit, must be upheld by the
20 courts, even in contravention of express stipulations in an earlier treaty.” *United*
21 *States v. Dion*, 476 U.S. 734, 738 (1986) (internal quotations and citations
22 omitted). Accordingly, Congress may unilaterally set reservation boundaries.
23 *Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2016); *South Dakota v. Bourland*,
24 508 U.S. 679, 687 (1993). Congressional intent to do so is discerned from the text
25
26

1 of the statute, the circumstances surrounding passage of the statute, and subsequent
2 demographic history and governmental treatment of the land. *Solem v. Bartlett*,
3 465 U.S. 463, 470-72 (1984).
4

5 After the Schwartz Survey in 1890, the western boundary of the Yakama
6 reservation became a principle point of contention. To settle the “long-standing
7 dispute,” Congress passed legislation recognizing Yakama’s claim to additional
8 acreage beyond the Schwartz line. It made that acreage part of the reservation and
9 directed Interior to “define and mark the boundaries” established by the Act. The
10 plain language of the act, its legislative history, and the surrounding circumstances
11 all demonstrate Congress’ clear intent to set the boundary once and for all.
12
13

14 **1. The plain language of the 1904 Act definitively establishes the**
15 **western boundary of the Yakama reservation.**

16 The 1904 Act is clear. To settle Yakama’s boundary claim, Congress added
17 293,837 acres beyond the Schwartz line to the reservation and directed Interior to
18 mark, define, and survey the new boundaries before opening up the entire
19 reservation to non-Indian settlement. Ex. 18 at §§ 1, 8; Ex. 20 at 2; Ex. 77 at 2.
20
21

22 “The language of a statute is controlling where the meaning is plain and
23 unambiguous.” *United States v. Maria-Gonzales*, 268 F.3d 664, 668 (9th Cir.
24 2001). “Thus, even though legal ambiguities are resolved to the benefit of the
25 Indians, courts cannot ignore plain language that, viewed in historical context and
26

1 given a fair appraisal, clearly runs counter to a tribe's later claims." *Klamath*, 473
2 U.S. at 774 (internal quotations and citations omitted).

3
4 **2. Legislative history makes clear that Congress intended to settle
5 the boundary line question once and for all.**

6 The history leading up to the 1904 Act underscores Congress' intent to
7 finally define the disputed reservation boundaries. *See Parker*, 136 S. Ct. at 1080-
8 81. Both the House and Senate discussed the longstanding boundary dispute before
9 passing the 1904 Act. Ex. 20 at 2, Ex. 77 at 1-2; Ex. 76. Thus, both houses of
10 Congress understood that by passing the 1904 Act "[a] long-standing dispute
11 between the Government and the Indians [would be] settled and the title of the
12 Indians to the lands claimed by them [would be] recognized." Ex. 20 at 5; Ex. 77 at
13 4.
14

15
16 In setting the western boundary, Congress had three options from which to
17 choose. First, it could have adopted the Schwartz line. Second, it could have used a
18 boundary based on Barnard's interpretation of the treaty calls, which would have
19 added 357,878 acres beyond the Schwartz Survey. Ultimately, Congress adopted
20 the third option: a boundary based on what Barnard reported *Yakama itself* had
21 claimed. That boundary encompassed a total of 293,837 acres beyond the Schwartz
22 boundary. In adopting and ratifying the latter boundary, Congress knew it was
23 giving Yakama less than Yakama was arguably entitled to under the treaty.
24
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1 **3. The circumstances surrounding the 1904 Act show that both**
2 **Yakama and the United States understood the Act to have set the**
3 **western boundary.**

4 One purpose of the 1904 Act was for Congress to do unilaterally what the
5 United States had been unable to do through negotiation. The United States wanted
6 to open up surplus reservation lands for non-Indian settlement. It tried to buy those
7 lands from Yakama in the 1890s through the Crow-Flathead Commission.
8 Yakama, however, refused to sell until the western boundary dispute was settled.

9 To resolve the dispute, Yakama selected Chief Spencer, Stick Joe, and Abe
10 Lincoln to show Barnard the true boundary line. Barnard determined that the treaty
11 entitled Yakama to 357,878 additional acres but that the tribe only claimed
12 293,837. Congress ultimately chose to give Yakama what it claimed rather than
13 what it was arguably entitled to under the treaty.

14 In this case, Yakama has taken the position that the 1904 Act only added
15 acres for purposes of allotment and that the Act did not actually affect the
16 reservation boundaries. Not only is this an untenable position in light of the history
17 surrounding the dispute—*e.g.*, Congress’ express intent to *settle* the longstanding
18 boundary dispute—but it also contradicts Yakama’s own historical position.

19 Following the 1904 Act, Yakama passed a resolution thanking Congress for
20 recognizing its “right and title” to the “disputed tract.” Ex. 530 at 2. It made no
21

1 mention of any perceived limitation on Congress' restoration of the land. Decades
2 later, at the ICC, Yakama repeatedly took the position that the 1904 Act changed
3 the reservation's boundaries, asserting that the "addition of 293,837 acres to the
4 Yakima Indian Reservation was confirmed by Congress in Section 1 of the Act of
5 December 21, 1904" and that "[t]he boundaries thus added . . . were surveyed in
6 1907 by Campbell, Germond and Long." Ex. 555 at 14-15 (underline added).
7
8 Yakama stated unequivocally that "Congress . . . approved the addition of 293,837
9 acres to the land of the Yakima Reservation west of the erroneous Schwartz
10 line"—never once claiming such addition was somehow limited to allotment
11 purposes. *Id.* at 37. Nor is there any support for Yakama's apparent contention that
12 it had one set of reservation boundaries under the Act but different boundaries for
13 other, unidentified purposes. Such an interpretation is nonsensical.

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17 Considering the long history of the disputed western boundary and
18 Congress' express intent to settle that dispute, it is illogical that Congress would
19 spend four years developing legislation based on a two-year investigation only to
20 leave the ultimate boundary issue undecided. There is simply no evidence that
21 Congress intended to limit its recognition of the new boundary.
22

23
24 Finally, Tract D has been overwhelmingly populated by non-Indians for over
25 a century "and the area has long since lost its Indian character," indicating that "*de*
26

1 *facto*, if not *de jure*, diminishment may have occurred.” *Solem*, 465 U.S. at 471.

2 **4. Only Congress can change the boundary now.**

3 It is undisputed that the Indian Claims Commission had no authority to alter
4 reservation boundaries. Thus, to evade the clear effect of the 1904 Act, Yakama
5 may argue that Congress was mistaken in relying on Barnard because his boundary
6 was incorrect. But courts “cannot correct the effects of [a] mistake... under the
7 guise of a ‘liberal construction.’” *United States v. Rushlight*, 291 F.2d 508, 517-18
8 (9th Cir. 1961). Indeed, “[w]hether Congress was acting under a misapprehension
9 of fact or law is irrelevant once legislation has been enacted.” *Mount Graham Red*
10 *Squirrel v. Madigan*, 954 F.2d 1441, 1461 (9th Cir. 1992); *see also United States v.*
11 *Creek Nation*, 295 U.S. 103, 111 (1935); *Confederated Salish & Kootenai Tribes v.*
12 *United States*, 185 Ct. Cl. 421, 426-27 (1968). “If Congress enacted into law
13 something different from what it intended, then it should amend the statute to
14 conform it to its intent. It is beyond our province to rescue Congress from its
15 drafting errors, and to provide for what we might think is the preferred result.”
16 *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (internal citation and quotation marks
17 omitted). “As long as the legislation is valid, it is not the duty of the courts to
18 revise it.” *Stratman v. Leisnoi, Inc.*, 545 F.3d 1161, 1172 (9th Cir. 2008).
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VI. CONCLUSION

The evidence will show that neither the United States nor Yakama intended Tract D to be part of the reservation established by the Treaty of 1855. The treaty language and map created during the treated negotiations clearly show Tract D as outside the reservation.

The parties' subsequent actions and statements confirm this intent. Yakama exercised its access rights under Article III of the treaty to gather roots in Camas Prairie alongside the non-Indian settlers. For nearly 80 years following the treaty, both treaty parties made repeated, consistent, and reliably recorded statements identifying a boundary that excluded Tract D. Yakama's revisionist position, adopted more than three generations *after* the treaty was executed, by individuals who were not alive at treaty times, simply cannot overcome the overwhelming evidence of the understanding of the tribal leaders who actually attended the negotiations. Even if Yakama's revisionist history were accurate (it is not), Congress expressly acted in 1904 to set clear reservation boundaries that exclude Tract D. This Court should reject Plaintiffs' efforts to set aside the clear understanding of the treaty parties and Congress on this issue.

Regarding County jurisdiction within the reservation, this Court should affirm its ruling from the Order Denying Preliminary Injunction (ECF 58).

1 Respectfully submitted this 13th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2019, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which automatically generated a Notice of Electronic Filing (“NEF”) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice. All parties are registered users of the CM/ECF system.

DATED this 13th day of June, 2019.

s/ Michelle Stark
Michelle Stark, Legal Assistant