Confederated Tribes and Bands of Yakama Nation v. Klickitat County, 1 F.4th 673 (9th Cir. 2021)

- **Holding:** County lacked criminal jurisdiction over a track of land contained as part of the reservation established for the Yakama Nation under an 1855 treaty with the United States.
- **Summary:** The Treaty with the Yakamas dated June 9, 1855, 12 Stat. 951 (1859), set aside a reservation for Nation's exclusive use and benefit. The treaty described the reservation's boundaries through references to various mountains and rivers. A map capturing the reservation was drawn but then misfiled, only to be discovered in 1930. The Department of the Interior accepted in 1939 a survey conducted two years after the discovery that included, inter alia, a 121-thousand acre parcel of land known as "Tract D." Although other federal entities disagreed initially with the Department's position, the Indian Claims Commission concluded in 1966 that "the Treaty parties had originally intended to include Tract D within the Reservation." That ruling resolved the issue definitively within the federal government.

  Subsequently, however, a dispute arose between the Nation and Klickitat County over the scope of state criminal jurisdiction for an offense allegedly committed by a tribal member on Tract D. That dispute resulted in the Nation filing this suit against the County over whether Tract D is encompassed within the 1855 reservation. The district court held that it is after a three-day bench trial.

  The court of appeals affirmed the resulting judgment. The panel decision was controlled by the treaty's language, and particularly its delineation of one boundary of the reservation ("southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the *spur* whence flows the waters of the Klickatat and Pisco rivers; thence down said *spur* to the divide between the waters of said rivers" (emphasis added)), as viewed through the lens of the Indian canons. As the panel's decision would indicate, this description was replete with ambiguity.

  The district court found that no "spur" actually existed and that, therefore, any claim that a spur delineated a reservation boundary excluding Tract D was meritless. Applying the clear error standard, the panel agreed "given the lack of expert testimony supporting the location of any such spur" between the Klickitat and Pisco Rivers. The panel also found support for the trial court's finding because "[t]he County's proffered spur conflicts with the findings of the United States' surveyors, whose expertise we owe deference" and because "[t]he County's theory also conflicts with the ICC's conclusion that '[t]here is in fact no spur.'" Capping factual support for the disputed parcel's on-reservation location was the lower court's determination that "the Yakamas would have naturally understood the Treaty to include Tract D within the Reservation" based upon "the materials from the Treaty negotiations." As the panel reasoned:

  > It made sense for the district court to emphasize the minutes because the Yakamas depended almost entirely on oral communication to understand the Treaty's contents. According to the minutes, the Yakamas were told that the Reservation's boundary would run "down the main chain of the Cascade mountains south of Mount Adams." This suggests that the Yakamas were made to understand the boundary as running south of Mount Adams, thereby including territory directly south of the mountain within the Reservation's boundaries. Tract D meets that description.

The panel then applied a de novo standard of review as to "the Treaty's meaning" with regard to whether it included Tract D. The county contended that "even if the first call is ambiguous because a spur between the Pisco and Klickatat Rivers may not exist south of Mount Adams, the second call is unambiguous because there is a 'divide' between those rivers that lies well north of Tract D." The panel was unpersuaded:

> The County's argument merely replaces one ambiguity with another. Notably, the Pisco-Klickatat divide lies north of Mount Adams. The County concedes this point, but it nonetheless argues that the Treaty's call for the boundary to traverse that divide must be honored anyway. We disagree. Critically, the Treaty text states that the boundary should run "south and east of Mount Adams, to the spur ... thence down said spur to the divide." ... The Treaty thus indicates that the southwestern boundary runs south of Mount Adams. Although accepting the County's interpretation might resolve the Treaty's ambiguity as to the relevant divide, it would create a different ambiguity by conflicting with the Treaty's description of where the boundary lies relative to Mount Adams. Because the Treaty is ambiguous either way, under the Indian canon of construction, we must resolve the ambiguity in favor of the Yakamas.

It added that "[f]undamentally, the County's argument is that there can only be one way to understand this Treaty, and that the one correct understanding of the Treaty is different from the ICC's determination and from the conclusions of all federal surveys since the rediscovery of the map. Any such argument is at the very least an uphill climb."

Finally, the panel considered, and found wanting, "the County's argument that even if the Treaty originally included Tract D within the Yakama Reservation, Congress altered the Reservation's southwestern boundary by statute in 1904 and excluded Tract D." The 1904 statute "authorized selling Yakama Reservation lands without the need to obtain the Yakamas' consent." The legislation further added 300,000 acres of land to the reservation "[t]o mollify the Yakamas" in accordance with a 1900 report that had determined such land should have been recognized as within the 1855 reservation set-aside. Once again, the panel was unpersuaded:

> Applying the Indian canon of construction, we decline to infer from the 1904 Act a congressional intent to exclude Tract D from the Yakama Reservation. Nothing in the Act itself or the legislative history suggests that Congress even contemplated Tract D. And, between the surveys Congress did consider, it chose the one that gave the Yakamas more land, not less. The Act therefore lacks "clear evidence that Congress *actually considered* the conflict between its intended action on the one hand" and the Yakamas' right to Tract D on the other, and that it "chose to resolve that conflict by abrogating the treaty" to take Tract D away from the Yakamas.

It then took comfort from *Northern Pacific Railway Co. v. United States*, 227 U.S. 355 (1913), where "the Court recognized the existence of the 1904 Act, but it did not hold that the Act conclusively settled the Reservation's boundaries." The Supreme Court, instead, merely determined whether an 1890 survey or the 1900 report "better adhered to the Treaty negotiators' intentions." The panel drew from *Northern Pacific* the inference "that the 1904 Act did not supersede the Treaty's establishment of the southwestern boundary."

- **Relevant (2020) Deskbook Sections:** 1:9 n.8; 3:4 n.12

- **Comment:** The “uphill climb” was indeed steep for the county in view of the ICC ruling, the Interior construction for over 80 years (as aided by the treaty-time map rediscovered in 1930), and the canons. It appears to have been ill-fated litigation from the outset.