No. 21-906

In the Supreme Court of the United States

KLICKITAT COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF WASHINGTON; KLICKITAT COUNTY SHERIFFS OFFICE, AN AGENCY OF KLICKITAT COUNTY; BOB SONGER, IN HIS OFFICIAL CAPACITY; KLICKITAT COUNTY DEPARTMENT OF THE PROSECUTING ATTORNEY, AN AGENCY OF KLICKITAT COUNTY; DAVID QUESNEL, IN HIS OFFICIAL CAPACITY,

Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, A SOVEREIGN FEDERALLY RECOGNIZED NATIVE NATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SAMIR DEGER-SEN
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020
(212) 906-1200

GREGORY G. GARRE
Counsel of Record
JOSHUA J. CRADDOCK
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioners

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The Ninth Circuit's decision annexes a 190-square-mile tract of Klickitat County, Washington, and transforms it into part of the Yakama Indian Reservation. To evade review, the Tribe devotes its response to manufacturing complexity and a litany of fabricated objections that have no bearing on the straightforward legal questions that are presented and compel this Court's review.

First, the Ninth Circuit nullified the 1904 Act, in which Congress settled the boundary dispute by adopting Barnard's findings as to the southwestern boundary. Instead of defending the decision below on its own terms, the Tribe now argues—contrary to the Ninth Circuit's own premise—that the 1904 Act did not set any boundary. The text and history of the Act prove otherwise, as the United States repeatedly recognized following enactment. The Ninth Circuit itself acknowledged that the 1904 Act adopted the Barnard survey and that Barnard's Line excludes Tract D, but it invoked the Indian canon to disregard that boundary and nullify the statute. Pet.App.19a-21a. The court's refusal to give effect to the boundary adopted by the 1904 Act warrants review.

Second, the Ninth Circuit disregarded this Court's decision in *Northern Pacific Railway Co. v. United States,* 227 U.S. 355 (1913). The Tribe claims (at 15) that *Northern Pacific* has "no bearing" on this case. But *Northern Pacific*'s holding *depended* on the Court's conclusion that the Barnard survey set the boundary for the Reservation, and it affirmed a district court decision that declined to nullify patents in Tract D because they lay outside the Reservation. After this Court's decision, moreover, the United States itself recognized that *Northern Pacific*

conclusively excluded Tract D from the Reservation. The conflict with *Northern Pacific* is real.

Third, the Treaty itself plainly excludes Tract D. The Treaty unambiguously requires the southwestern boundary to connect with the "divide" between the waters of "the Klickatat and Pisco Rivers." Pet.6. All agree this divide exists and is located fifteen miles *north* of Tract D—making the Ninth Circuit's treaty interpretation *impossible*. Pet.5. But the Ninth Circuit reasoned that a purported ambiguity in a *separate* call (the supposed absence of the "spur") justified invoking the Indian canon and disregarding the Treaty's unambiguous statement that the boundary must follow the Pisco-Klickitat divide. Pet.App.11a. In other words, the Ninth Circuit invoked the Indian canon to *eliminate* the Treaty's explicit Pisco-Klickitat divide call—a gross abuse of the Indian canon.

Instead of grappling with these clear legal errors, the Tribe tries to evade them. For example:

- The Tribe argues that Petitioners "did not raise [the] argument in the Ninth Circuit" that "*Northern Pacific* excludes Tract D." Opp.5. But Petitioners *repeatedly* argued that *Northern Pacific* adopted the Barnard Line, excluding Tract D, Dkt.27 at 17-19, 62; Dkt.56 at 11, and argued the conflict with *Northern Pacific* in their rehearing petition. Dkt.75 at 2, 14.

- The Tribe claims this case is a "quixotic effort" to overturn a "longstanding" position. Opp.1. But for nearly 100 years, both the Yakama Nation and United States agreed that Tract D was outside the Reservation. Pet.11-12. And for the past 167 years, Tract D has been governed as non-Indian land by both

Petitioners and the State. Pet.12-13. It is the Ninth Circuit's decision that upends settled expectations.

- The Tribe claims that Elmer Calvin surveyed the area and "dr[e]w a boundary that came as close as possible to the Treaty text, viewed in light of the recovered map." Opp.2. False, again. Calvin was commissioned *only* to survey Tract D, not to locate the boundary based on the Treaty calls. *See* 9-ER-2027; 11-ER-2357. Calvin testified that he was "not familiar" with the Pisco-Klickitat divide area; he did not attempt to locate that divide; and he was only "assign[ed] to see if [he] could locate topography" that would "justif[y]" the Yakama claim. 11-ER-2411-14.

This Court should not be misled. The Ninth Circuit's decision implicates profound questions about when an Act of Congress settling a boundary dispute must be given effect and whether the Indian canon may be invoked to rewrite statutory and treaty text. The petition should be granted.

I. The First Question Warrants Review

The Tribe defends the decision below on the ground that the 1904 Act "does not purport to set any reservation boundaries." Opp.16. But that is not what the Ninth Circuit held. Rather, the court acknowledged that "between the surveys Congress" considered, Congress "chose" the Barnard survey (which, the court recognized, excludes Tract D). Pet.App.20a-21a. Yet, "[a]pplying the Indian canon of construction," the court nonetheless found there was not sufficiently "'clear evidence'" that Congress "'*considered* the conflict between its intended action …' and the Yakamas' right to Tract D" and "'resolve[d] that conflict by abrogating the treaty.'" Pet.App.21a (citation omitted). As Petitioners have explained,

that inquiry was misguided because Congress was not "abrogat[ing] the treaty" to diminish the Reservation, but was settling a boundary dispute by giving the Tribe *more* land than what the Treaty called for. Pet.27. It was only under the Ninth Circuit's *later* (and misguided) Treaty interpretation that the 1904 Act would have constituted any "abrogation."

The Tribe's new, alternative argument cannot be reconciled with the text and history of the 1904 Act. 4-ER-804-05. Section 1 authorized the Secretary to pursue allotment *within* the Reservation, but that authorization was expressly predicated on resolving the boundary dispute, as the Ninth Circuit recognized. Pet.App.19a (The Yakamas "refused to acquiesce in any sales of surplus Reservation lands" until the boundary dispute was resolved.). Thus, the 1904 Act repudiated the "erroneous boundary survey" conducted by Schwartz and "recognized" Barnard's "findings" as "part of the Yakama Indian Reservation." Act of Dec. 21, 1904, ch. 22, §1, 33 Stat. 595, 596. In doing so, Congress settled Yakama claims to the disputed tract. *Id.* ("any claim of said Indians to these lands" is "fully compensated for").[1] Section 8 further allocated money to "define and mark *the boundaries of the western portion of said* [*Yakama*] *reservation*, including the adjoining tract of [293,837] acres" identified by Barnard and "recognized, as above set out." *Id.* §8, 33 Stat. at 598. The boundary survey under this appropriation was done in 1906, and undisputedly excluded Tract D. 12-ER-2782.

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[1] This dispels the Tribe's claim (at 16) that the Act had just one purpose—allotment. As §1 makes express, the Act also settled a land dispute—enabling the allotments.

The statutory history confirms this reading. Barnard went to the area in 1898 to "settl[e] the contentions of the Indians" concerning the boundary. 1-SER-215. The Secretary's letter transmitting Barnard's report to Congress urged legislation that would "cover all claims of said Indians." 12-ER-2625. Both Congressional reports for the 1904 Act began with a discussion of the boundary dispute and Barnard's findings, before concluding that the Act would "settle[]" the "dispute between the Government and the Indians." 8-ER-1835-39; 12-ER-2629-32. This settlement—explicitly premised on adopting Barnard's "findings"—was the Act's linchpin.

The Tribe expresses incredulity with this interpretation. But following the 1904 Act, the United States repeatedly and unequivocally affirmed that the "Barnard report prompted Congress to pass the [1904 Act], adopting said survey as correctly fixing the Southern and Western Boundaries of the Yakima Indian Reservation." Add.4a; *see also* Add.5a-6a ("[T]he boundary from Grayback Peak to Goat Butte was approved as the boundary line … by the [1904 Act].").[2]

The Tribe claims that Congress's "almost identically worded statute" respecting the Colville Reservation in Washington is "indistinguishable." Opp.16-17 (citing Act of Mar. 22, 1906, ch. 1126, 34 Stat. 80). That is simply false. Unlike the 1904 Act, the 1906 Colville Act does not address any disputed boundary claim. And *Seymour v. Superintendent*

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[2] Excerpts from prior briefs filed by the United States recognizing that the Barnard Line and this Court's decision in *Northern Pacific* exclude Tract D are appended hereto. *Cf.* Pet.24 n.9

addressed the entirely separate question of whether allotment under Colville Act "destroy[ed] the existence" of the Reservation; it said nothing about boundaries at all. 368 U.S. 351, 356 (1962).

Like the Ninth Circuit, the Tribe stresses that the 1904 Act says "nothing about Tract D" specifically. Opp.4; Pet.App.21a. That is a red herring. The Act expressly adopted Barnard's findings, which—all agree—exclude Tract D from the Reservation. Pet.App.20a. Nothing more is required. The Act did not expressly exclude Mexico, either. But like Tract D, Mexico is plainly outside the Barnard Line.[3]

II. The Second Question Warrants Review

A. The decision below directly conflicts with *Northern Pacific*

The Tribe asserts that "*Northern Pacific* did not address Tract D" and only endorsed "the correctness of the Barnard survey relative to the Schwartz survey" without ultimately deciding the boundary question. Opp.25-26 (emphasis omitted). This is false, too. *Northern Pacific* framed the question presented as: "what are the boundaries of the reservation?" 227 U.S. at 356. That question "turn[ed] upon which of the surveys, Schwartz's or Barnard's, correctly marks the boundaries of the reservation." *Id.* at 358. And this Court affirmed "the correctness of the Barnard survey." *Id.* at 366.

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[3] The Tribe points (at 19) to the 1939 appropriation of funds for an additional survey. But Congress never enacted a new boundary based on that survey; the survey was necessary to resolve disputes over *other* tracts not covered by the 1904 Act (*e.g.*, on the Reservation's eastern border); and nothing in the 1939 appropriation changes the text of the 1904 Act.

If that were not enough, the district court, whose opinion this Court affirmed, *expressly* addressed Tract D when it excluded patents lying "outside of (southwest of) the Barnard line" from its cancelation decree against the Railway, and thus "necessarily adopted as a controlling boundary the line straight from the Hump to Grayback." Add.13a. In subsequent litigation over Tract D, the United States itself explicitly declared that "[t]he southwestern boundary is controlled by the decision in the *Northern Pacific* case." Add.9a. Even the Tribe "admit[ted]" that the boundary had been judicially determined according to the Barnard Line. Add.6a.

The Tribe argues (at 21-23) that enforcing the 1904 Act would require "overruling" *Northern Pacific*. That has it backwards. *Northern Pacific* does not address the boundary set by the 1904 Act because the disputed patents were issued before 1904, and the Court had to determine whether they were improper at the time they issued. Moreover, *Northern Pacific*'s Treaty interpretation aligns entirely with the 1904 Act's boundary determination as to Tract D. By contrast, the Ninth Circuit's decision flouts Congress's judgment *and* this Court's precedent by establishing a southwestern boundary that departs from both the 1904 Act and *Northern Pacific*.

B. The decision below rewrites the Treaty

Even if the 1904 Act and *Northern Pacific* did not control, the Treaty's plain terms would require a less-inclusive boundary that still excludes Tract D. The Tribe claims that this argument is "internally inconsistent" with Petitioners' argument that the 1904 Act controls. Opp.1, 5, 31-32, 37. But they are simply alternative rationales to reverse the decision

below. Petitioners' primary position, here and in the courts below, is that the 1904 Act must be given effect. But, *even if* the Treaty text controls, the Ninth Circuit's decision cannot stand.

Regardless of where or whether the "spur" exists, it is undisputed that the Treaty calls for a boundary that tracks the Pisco-Klickitat divide—located fifteen miles *north* of Tract D. Pet.App.87a. That call alone compels the conclusion that Tract D is *outside* the Reservation. Pet.5. But the Ninth Circuit invoked the Indian canon to excise the express call for the Pisco-Klickitat divide and to draw a boundary along an entirely *different* divide between *different* rivers (the White Salmon-Klickitat divide) based on an alleged understanding of the treaty that "the Tribe did not press ... [until] *decades after the Treaty's signing*." Pet.App.13a-14a (emphasis added).

But courts cannot invoke substantive canons "when a law merely contains some ambiguity or is difficult to decipher." *Wooden v. United States*, 142 S. Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring). The Indian canon only applies when all other interpretative tools fail, and can never be used to "ignore plain language." *South Carolina v. Catawba Indian Tribe,* 478 U.S. 498, 506 n.16 (1986); *see also* Tr. 59:23-60:10, *Yselta Del Sur Pueblo v. Texas*, No. 20-493 (Feb. 22, 2022) (Justice Kagan: "Maybe we should just toss [substantive canons] all out .... I think kind of we should, honestly.").

This dispatches the Tribe's construction. Alleged ambiguity in one call (the spur) does not permit a court to ignore *other* unambiguous calls to reach a result that *cannot be correct* when the Treaty is viewed as a whole. That is an Indian canon gone amok. Indeed, it is long-established that "consistent

and certain" calls for "definite objects" must control over uncertain, "vague, or repugnant" calls in land grants. *Shipp v. Miller's Heirs*, 15 U.S. (2 Wheat.) 316, 321 (1817) (Story, J.); *see* Pet.28-29. That venerable principle would make little sense if any "vague" call permitted a court to simply *ignore* a "definite" one—and instead resolve the case solely through a substantive canon. Here, even assuming the spur "does not actually exist as described," Pet.App.15a-16a, the Pisco-Klickitat divide *does*—and everyone knows where it is. Neither the Indian canon nor anything else justified ignoring that call.

Doubling down on the Indian canon, the Tribe emphasizes (at 10, 14) the district court's purported "finding that the Yakamas would have understood the Treaty to include Tract D." But that "finding" cited no documentary historical evidence of original understanding. Pet.App.35a. Rather, it was the product of the district court's "appl[ication of] the [Indian] canons" to *assume* the Tribe's original understanding, *id.*—a clear legal error. And in fact, the Tribe consistently advocated for the Barnard Line for 75 years between 1855-1930. Pet.7-8, 31; *see also* Add.11a (quoting the *Northern Pacific* finding that Chief Spencer's testimony endorsing the Barnard Line was "'corroborated by indisputable evidence'").

Yet both courts below invoked the Indian canon and declared that Tract D was included based on an alleged Indian understanding that was "not press[ed]" until *75 years* after the Treaty. Pet.App.13a-14a. Once again inventing alternative rationales for the decision below, the Tribe argues that its boundary is "an almost perfect match" for a spur from which it says "the waters of the Klickitat and *White Salmon*" flow. Opp.12-13 (emphasis

added). But the Tribe did not make that argument below. For good reason: Those rivers do not flow *from* that spur, but in fact run *alongside* it. Moreover, this theory substitutes the "Pisco river" with the "White Salmon river"—a completely different river some fifteen miles south of the Pisco River (Pet.5) that was not mentioned in the Treaty text or during the Treaty Council, 3-ER-403-04—contradicting both the Treaty and Treaty Map, and rendering the next call ("down said spur…") superfluous.

The Ninth Circuit's invocation of the Indian canon to erase the Treaty's express reference to the Pisco-Klickitat divide and to relocate the boundary along an entirely different divide demands review.[4]

III. This Case is Extraordinarily Important

The Tribe urges (at 34) that this case is "idiosyncratic" and "fact-bound." That could be said about any Indian boundary case. But this one involves the nullification of an Act of Congress, a clear conflict with this Court's precedent, a clear attempt to erase treaty text, and gross abuse of the Indian canon. These issues are inherently worthy of review.

The Tribe disputes (at 35-36) the practical significance of this case. But as the briefing in the *Penobscot* cases underscores (Nos. 21-838 & 840) Indian boundary issues are immensely important to both sides. Here, the County will lose jurisdiction

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[4] The Tribe attacks Petitioners' reference to a map it says was "excluded" below. Opp.29. This is another distraction. The 1904 Act and Treaty alone control this case; the map simply illustrates how Petitioners' interpretation fits the topography, too. Anyway, the district court *denied* the Tribe's motion to exclude the map as moot because "the evidence [was] in." 2-ER-307-08.

over *all* serious Indian-perpetrated crimes involving domestic violence or juveniles in Glenwood Valley, including the child rape precipitating this case (Pet.13)—hardly a mere "juvenile delinquency" (Opp.35). *See Confederated Tribes & Bands of the Yakama Nation v. Yakima County*, 963 F.3d 982, 985 (9th Cir. 2020). As amicus explains, the decision will create a "complex jurisdictional quagmire" that risks exacerbating a "spike in violent crime," and fostering other regulatory disputes. WFB-Br.10-11.

The Tribe then flips the script by claiming (at 36) that "all stakeholders thought the reservation status of Tract D was settled, until Petitioners sought to relitigate this closed issue." But it was the Tribe that initiated this litigation by claiming Tract D for itself. Both Petitioners and Washington have consistently treated Tract D as non-Reservation land since before statehood. 2-ER-253-54; 1-SER-2-5. And notwithstanding the United States' reversal in 1968 of its longstanding position that Tract D was *excluded* from the Reservation, the United States has not enforced on Tract D EPA and agricultural regulations applicable in Indian country. WFB-Br.8-9.

Finally, the *Penobscot* cases underscore the need for guidance on the Indian canon. The Tribe asserts (at 38-39) that "the two cases involve different canons" because *Penobscot* involves "interpretation of a *statute*." But the Ninth Circuit also expressly "[a]ppl[ied] the Indian canon" to the 1904 Act. Pet.App.21a. *Cf.* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 Boston Univ. L. Rev. 109, 152 (2010) (questioning the application of that canon to statutes). In *Penobscot,* the First Circuit refused to invoke the Indian canon to override geographic calls; here, the Ninth Circuit invoked the

canon to *erase* a treaty call. Supp.Br.3-4. Granting both cases would allow the court to address the proper use of the Indian canon in the full range of circumstances in which it arises.

Indeed, the government argues that certiorari is warranted in *Penobscot* to address "the broader implications of the [First Circuit]'s approach to ambiguity and the Indian canons." No. 21-840 U.S. Reply-Br.11. The best way to provide needed guidance on the Indian canon is to grant review in this case as well as *Penobscot*. But, in any event, certiorari is plainly warranted here.

CONCLUSION

The petition should be granted.

Respectfully submitted,

GREGORY G. GARRE
Counsel of Record
JOSHUA J. CRADDOCK
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

SAMIR DEGER-SEN
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020
(212) 906-1200

Counsel for Petitioners

March 29, 2022

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Office Supreme Court, U.S.
FILED.
JAN 7 1913
James H. McKenney,
Clerk.

No. 500

In the Supreme Court of the United States
OCTOBER TERM, 1912

THE NORTHERN PACIFIC RAILWAY COMPANY ET AL.,
Appellants,

v.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES

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* * *

[24]

The present and accepted survey was begun by Mr. Barnard, then a topographer and now a geographer, of the United States Geological Survey, in the fall of 1898, and was completed by him in the fall of 1899, and was completed by him in the fall of 1899 (R., 121). It was approved and submitted to the Secretary of the Interior by the Geographer and the Director of the Geological Survey January 16, 1900 (R., 120, 121). The Secretary approved it April 7, 1900 (R., 133), and submitted it to Congress on April 20 of that year (R., 109). And by the act of December 21,

1904 (33 Stat., 595), Congress branded the Schwartz survey as erroneous and accepted and confirmed the survey as made by Barnard.

* * *

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 1916

THE NORTHERN PACIFIC RAILWAY COMPANY, THE MERCANTILE TRUST COMPANY, HENRY YEACKEL and FLORA YEACKEL, His Wife, WILBUR S. BADLEY and FLORENCE BADLEY, His Wife, C. D. WISE, and—WISE, His Wife and R. D. McCULLY,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

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* * *

FILED
FEB 18 1911
F. D. MONCKTON,
Clerk.

* * *

[4]

In the year 1890 one Schwartz made what purported to be a survey of the Southern and Western boundaries of the Reservation, which is shown in defendants' Exhibit "C," and fixed the Western boundary on the summit of the range of hills above

referred to, which extend from the source of the South Fork of the Ahtanam to Mile Post 51.

The officers of the Land Department of the Government apparently assuming that the Schwartz Survey indicated the true western boundary of the Reservation, issued to the defendant railroad and railway companies, under said Act of 1864 (13 Stats. L. 365), patents covering lands West of the Schwartz line and East of the Cascade Mountains.

Protest upon the part of the Indians resulted in the Government dispatching E. C. Barnard, Topographer of the Geological Survey, to definitely and correctly ascertain the position of the Western and Southwestern boundary line of the Reservation. Mr. Barnard, after two examinations, fixed the Western boundary at the summit of the Cascade Mountains. (Complainant's Exhibit 3.)

[5] The Barnard report prompted Congress to pass the Act of December 21, 1904 (33 Stats. L. 595), adopting said survey as correctly fixing the Southern and Western boundaries of the Yakima Indian Reservation.

* * *

Appeal No. 4-61

In the United States Court of Claims

THE YAKIMA TRIBE OF INDIANS, APPELLANT,

v.

THE UNITED STATES, APPELLEE.

BRIEF OF THE UNITED STATES, APPELLEE

FILED JAN 19 1962

* * *

[37]

In 1904 Congress passed an act, 33 Stat. 595, recognizing the right of the Yakam Tribe to the lands shown to be within the Reservation by the Barnard survey and restoring said lands to the Reservation.

The lands previously patented to the Northern Pacific Railway Company were within the lands restored to the Yakama Tribe and the United States brought an action, *Northern Pacific Railway Company* v. *United States*, 191 Fed. 947 (C.A. 9), aff'd, 227 U.S. 355, to annul the patents. The United States Supreme Court annulling the patents determined the reservation boundaries to be along the main ridge of the Cascades from Goat Rocks to Goat Butte, a point south and east of Mt. Adams and then, in a straight line, to Grayback peak.

[38] The portion of the boundary from Grayback Peak to Goat Butte was approved as the boundary line on April 7, 1900 (Cl. Ex. 35, p. 4), and by the act

of December 21, 1904, 33 Stat. 595. This line was located on the ground by an official survey made in 1907 by Campbell, Germond, and Long (Cl. Ex. 35, p. 4).

* * *

[41]

The Commission also found that the boundary line affecting Tract D had been judicially settled in the *Northern Pacific* case, *supra*, by the Supreme Court's determination that the western boundary was along the main ridge of the Cascades from Goat Rocks to Mount Adams and then to Grayback in accordance with Indian testimony and the report of Barnard (2 Ind. Cl. Comm. 433, 444, 447). Appellant admits this (Appellant Br. 105) and then proceeds, in many pages, with its contentions respecting the proper interpretation of the treaty and other matters to show the allegedly correct boundary. It thus ignores the issue whether the Commission, as a matter of law, correctly held that the boundary had been judicially settled. Appellant considers the Commission's findings to be independent findings rather than recitals from the *Northern Pacific* case which the Commission felt were binding upon it. Therefore appellant attacks the contents of the recitals from the prior adjudication and ignores the issue whether the Commission correctly decided it was bound by the determination based on the recitals.

* * *

[44]

The determination of the Supreme Court locating the boundary from Goat Rocks along the main divide of the Cascades to Goat Butte near Mt.

Adams and then to Grayback Peak was necessary because it had before it the status of certain lands which had been patented to the Northern Pacific Railway. If these lands were within the reservation they were lands of the Indians and the patents were void. If they were not within the reservation they were public lands of the United States which had passed to private ownership. Therefore, said the Supreme Court, 227 U.S. 355, 356, "The question then is, What were the boundaries of the reservation, or— to use the present tense as the more convenient— what are the boundaries of the reservation?"

* * *

[48]

Therefore, since the boundaries of both claims have been judicially settled, the question for review before this Court does not involve evidence adduced by appellant in support of its claims but the only question is whether the Commission correctly held that it was bound by the Supreme Court determination in *Northern Pacific* v. *United States*, 227 U.S. 355.

The determination of the Commission was correct because it is the duty of any subordinate federal tribunal to follow Supreme Court decisions in a prior case involving the same material fact.

* * *

The construction of a treaty by the Supreme Court is binding upon state courts and lower federal courts **[49]** so that the construction placed upon the Yakima Treaty of 1855 by the Supreme Court in the *Northern Pacific* case is the law of that instrument.

* * *

FILED
APR 18 1952
s/ *James Langston* Clerk
INDIAN CLAIMS COMMISSION

BEFORE THE
INDIAN CLAIMS COMMISSION

No. 47

THE YAKIMA TRIBE OF INDIANS, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

DEFENDANT'S OBJECTIONS TO FINDINGS OF FACT REQUESTED BY PLAINTIFF; DEFENDANT'S REQUEST FOR FINDINGS OF FACT; AND BRIEF

---

* * *

[61]

Tract D—Southwestern Boundary (Glenwood Area)

A. The existing southwestern boundary running in a straight line from the Hump on the slope of Mt. Adams (Goat Butte) to Grayback Mountain should not be disturbed.

> 1. The southwestern boundary is controlled by the decision in the *Northern Pacific* case.

[62] In 1907, the United States, on behalf of the Yakima Tribe of Indians, filed a bill in equity to annul certain patents issued in 1895 and 1896 to the Northern Pacific. The foundation of the bill was that the lands covered by the patents were actually part of the Yakima Reservation under the treaty of 1855.

No question was raised of the defendant's title, other than whether the lands fell within the reservation. "If they were within the boundaries of the reservation they were lands of the Indians; otherwise, public lands of the United States and passed to the companies, respectively, under the act of Congress and the patents issued in pursuance thereof."[38]

* * *

[63]

Quoting from the trial court's opinion (p. 519 et seq.):

* * *

[65]

> Barnard made his first recognizance in the fall of 1898 and completed it in 1899, but his report did not reach the Department until early in 1900. Most of the old Indians who would have known about the lines were then dead, but he mentions information obtained from Stick Joe to the effect that

[38] 227 U.S. 355, 356.

about 1860 this Yakima Indian accompanied a party of officers along a portion of the southern boundary. They left the military road at mile-post twenty-nine and followed a well-defined ridge to Grayback Peak, finding a marked wooden post set in the ground. At this point the surveyor or officer took out a telescope, or some surveying instrument, and sighting towards Mount Adams pointed out a conical hump on its southeast Slope saying to the party that the line went *straight to that point*. It is to be borne in mind that the twenty-nine mile-post was a designation of the military road and not of the boundary. The fact that it marked both was a coincidence only. The wooden post at the foot of Grayback, however, was not found by Barnard.

[66] Chief Spencer related how the year after the treaty three men came and took him to the outlet of the Camas Prairie and there a tree was blazed and they found a pile of stones which he was informed constituted a monument in the boundary line. This was at the junction of the Indian Trail and the Goldendale road. This location was in pursuance of what Governor Stevens had told him the year before would be done. Townsend, the Indian Agent, was one of the men. He said these men pointed two ways from that corner, one to the foot of Mount Adams and the other to Grayback peak. Other boundary lines pointed out to him at the time he speaks of with some minuteness

of detail. The Chief kept this rock pile renewed and built up for many years. But assuming, as it has been contended, that the statements of the Indian Agent ought to be received with caution in that they come from parties directly in interest, an examination shows that they are corroborated by indisputable evidence. Chief Spencer gave the names of persons who were officers contemporary with the time of which he speaks. This, of course, it might be possible for an Indian to do, but it is not probable that he would know the names of those officers unless he had come in contact with them as related by him. * * * From Grayback peak the conical hump on the southeast slope of Mount Adams was plainly visible, which is slightly corroborative of what Stick Joe said concerning the **[67]** conversation with the officers, already related. *Thus delimited the reserve includes the hunting ground and berry patches upon which at the time of the treaty they naturally laid great store and which they have utilized ever since.* The fact that the treaty carried with it the privilege of hunting, gathering roots and berries and pasturing horses and cattle upon open and unclaimed lands, does not outweigh the deduction, which may legitimately be drawn from the claim that these extensive hunting grounds and berry patches were purposely embraced within the reserve. No act or admission of the Yakima Nation of Indians, of any of the tribes belonging to it, or of any individual

> member is shown, from which the conclusion can be reached that the Indians ever conceded the Schwartz line, or admitted anything short of a line running to the main ridge of the mountains.

The court concluded (p. 532):

> It is true that the Barnard survey as to the northern boundary is subject to the objection that certain lines were arbitrarily fixed. But in so far as I have been able to discover by reference to the exhibits, those boundaries which the treaty clearly justifies embrace all of the lands in controversy except the following, *which the witness Barnard was not able to say were within such boundaries*:
>
> Northeast Quarter of Southeast Quarter, South Half of Southeast Quarter, Section 11, Township 7, North of Range 12, East.
>
> **[68]** Lots 1, 2, 3, 4, Section 19, Township 7, North of Range 13 East.
>
> All lots described in Sections 1 and 11, Township 6, North of Range 13 East.
>
> All of Section 13, Township 6, North of Range 13, East.
>
> * * * * *
>
> It follows that the complainant must prevail except as to the lands above described, and a decree will go accordingly.

The above-described lands were therefore excluded from the decree of cancellation (Def. Ex. 33, pp. 533-544.)

The location of these lands is such that it is clear they were excluded because they lay outside of (southwest of) the Barnard line running straight from the Hump to Grayback Peak, or—more accurately—that Barnard's testimony failed to establish that they lay inside that line.[41] No other line could have been determinative—the lands in question lay far from any other line of the Barnard survey.

Thus, it is clear that the court, in order to enter its decree, necessarily adopted as a controlling boundary the line straight from the Hump to Grayback.

[69] The decree was affirmed by the Court of Appeals for the Ninth Circuit (191 Fed. 947) and by the Supreme Court (227 U. S. 355).

* * *

[77]

Upon the basis of the foregoing, it is clear that the judgment in the *Northern Pacific* case, affirmed by the decision of the Supreme Court, established the southwestern boundary along a straight line—the Barnard line—from the Hump to Grayback Peak. That decision was reached upon consideration of facts substantially similar to those in the instant case.

Moreover, the decision in the *Northern Pacific* case determined a question affecting the title to the lands in Tract D, i. e., it determined that those lands lay outside the Yakima Indian Reservation. Obviously these lands have been dealt with in reliance on that

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[41] Barnard's deposition was taken in Denver and he did not have in his possession the pertinent township plats. It would have been necessary for him to examine them or to make a field examination, to determine whether the lands excluded from the decree lay within or without his southwest boundary. Def. Ex. 33, p. 99.

decision for forty years. Under these circumstances, the doctrine of *stare decisis*[42] is peculiarly applicable,[43] and the question of the true southwestern boundary is "no longer doubtful or subject to change."[44]

A fortiori, it is the duty of any subordinate federal tribunal to follow the Supreme Court's decision in the prior case.[45]

> * * * Whether correct or incorrect, the holding of the Supreme Court, so far as we

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[42] That doctrine "is grounded on public policy and, as such, is entitled to great weight and must be adhered to, unless the reasons therefor have ceased to exist, are clearly erroneous or unless more harm than good will result from doing so." 14 Am. Jnr. 284.

[43] As the Circuit Court of Appeals for the Tenth Circuit said in *Dunn* v. *Micco*, 106 F. 2d 356, 350 (C. C. A. 10): "The rule stare decisis applies with peculiar force and strictness to decisions which have established a rule of property. Such rules should be certain and stable and when once established should not be disturbed, even though a different conclusion might be reached if the question were an open one. The reasons are obvious. Property is acquired and sold in reliance on such rules." And see 14 Am. Jur. 286.

[44] *United States* v. *Title Insurance Co.*, 265 U. S·. 472, 486, 487.

There the Supreme Court said, quoting from *Minnesota Co.* v. *National Company*, 70 U. S. 332, 334: "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be open to question. Such decisions become rules of property, and many titles may be injuriously affected by their change. * * * Doubtful questions on subjects of this nature when once decided should be considered no longer doubtful or subject to change.

[45] *Old Dominion Copper Mining and Smelting Co.* v. *Lewisohn*, 202 Fed. 178, 179 (C. C. A. 2).

> are concerned, is binding and must be accepted **[79]** at face value.[46]
>
> We are bound by the decision of the Supreme Court even though we do not agree with the decision or the reasons which support it.[47]

A lower federal court must follow a prior Supreme Court decision, even where the decision (unlike the *Northern Pacific* case) does not affect title to real property, unless—as is not the case here—the factual situation is *clearly* different.[48]

The decision of the Supreme Court in the *Northern Pacific* case is controlling here, not only because it affected title to real property, but also because it determined the southwestern boundary by a construction of the treaty creating that boundary.[49]

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[46] *Gudmundson* v. *Cardillo*, 126 F. 2d 521, 524 (App. D. C.).

[47] *Colegrove* v. *Green*, 64 F . Supp. 632, 634 (N. D. Ill.). See also *United States* v. *Sloan*, 31 F. Supp. 327 CW. D. S. C.); *Bank Line, Ltd.* v. *United States*, 96 F. 2d 52, 54 (C. C. A. 2); *Travelers Mutual Casualty Co.* v. *Skeer*, 24 F. Supp. 805, 806 (W. D. Mo.); *Sunshine Anthracite Coal Co.* v. *Adkins*, 31 F. Supp. 125, 130 (E. D. Ark.), aff'd, 310 U.S. 381.

[48] "Manifestly, it is our duty to follow the law of the Supreme Court unless the present record contains facts which *clearly differentiate* the present case * * *." *Old Dominion Copper Mining & Smelting Co.* v. *Lewisohn*, 202 Fed. 178, 179 (C. C. A. 2). See also *Angle* v. *Chicago P. & S. Ry. Co.*, 95 Fed. 214, 216 (W. D. Wis.).

[49] The construction of a treaty by the Supreme Court is binding upon State courts (*Universal Adjustment Corp.* v. *Midland Bank*, 184 N. E. 152, 281 Mass. 303; *People* v. *Chosa*, 233 N. W. 205, 252 Mich. 154; *Johnstown Land Co.* v. *Brainerd Brewing Co.*, 172 N. W. 211, 142 Minn. 291) and, *a fortiori*, upon lower federal tribunals. The construction placed upon the Treaty of 1855 by the Supreme Court in the *Northern Pacific* case is the law of that instrument. *Combs* v. *O'Neal*, 8 D. C. 405,

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407. Where the Supreme Court determines a boundary by construing prior treaties and Federal statutes, that determination is binding upon state courts and lower federal courts. See *Kissell* v. *Stevens*, 261 S. W. 299, 300, 164 Ark. 195.

In the *Kissell* case the court said:

"On the question as to the boundary line between the states of Arkansas and Tennessee, we are concluded by the decisions of the Supreme Court of the United States on that subject. * * * In the suit instituted by the state of Arkansas against the state of Tennessee (246 U. S. 158, 38 Sup. Ct. 301, 62 L. Ed. 638, L. R. A. 1918D, 258) the Supreme Court of the United States adjudicated the boundary line in the aforementioned treaties and statutes, fixing it as follows * * *."

A boundary, once established by the highest court, will not be disturbed by a lower court. *Douglas Oil Co.* v. *State* (Tex. Civ. App.) 70 S. W. 2d 452, 458. There the court held that "Appellants would be bound by the boundary adjudication of the Supreme Court in the [prior] *Smith-Turner* and *Whiteside* cases, under the application of the doctrine of *stare decisis*, regardless of whether the boundary issue had been litigated in a case in which appellants were parties." The court stated that "* * * the holdings in the [prior] cases could be set up as conclusive of the boundary issue in any subsequent litigation."