

DETERMINATION OF THE SOUTHERN BOUNDARY OF THE MEDICINE CREEK TREATY CEDED AREA

by Thomas R. Bjorgen and Dr. Morris Uebelacker

I. INTRODUCTION

On December 26, 1854, territorial Governor Isaac I. Stevens, on behalf of the United States of America, signed the Treaty of Medicine Creek with the bands and tribes of Indians inhabiting the southern end of Puget Sound and adjoining territory. The bands and tribes signing the treaty were the Nisqually, Puyallup, Steilacoom, Squaxin, S'Homamish, Ste-chass, T'Peek-sin, Squi-aitl and Sah-heh-mamish.¹

The Treaty of Medicine Creek is set out in State's Exhibit 15 and Tribes' Exhibit 2.² The heart of the Treaty is the agreement by the Tribes to relinquish their rights in their lands, with certain rights reserved, in exchange for the establishment of reservations and other consideration. The lands ceded to the United States by the Tribes are described in Article I of the Treaty, which states in full:

"The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Dwamish, or White Rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point

¹The record contains marked variation in the spelling of Indian names. Unless needed to dispel confusion, this Report will not recite the variants of the names used.

²The State's Exhibits refer to Exhibits 1-55 submitted by the State at the outset of this process and any subsequent attachments or exhibits submitted by it. The Tribes' Exhibits refer to Exhibits 1-10 submitted by the Tribes at the outset of this process and any subsequent attachments or exhibits submitted by them. References to "Ex." and "Exhibit" are to the State's exhibits.

Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon's Island, easterly and southeasterly, to the place of beginning."

The tribes³ or bands signing the Medicine Creek Treaty were not formal or organized political entities. See Marian Smith, *The Puyallup-Nisqually*, p. 4 (1940) (Ex. 36). Rather, Governor Stevens united various bands and villages into larger tribal entities for purposes of reaching agreement to the Treaty. See *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 664 n. 5, 61 L.Ed.2d 823, 99 S.Ct. 3055 (1979); *op. mod.* 444 U.S. 816. The Treaty was written in English, a language unknown to most of the tribal representatives. *U.S. v. Washington*, 384 F. Supp. 312, 330 (W.D. Wash. 1974). It was translated by a United States interpreter into the Chinook Jargon, and thence into the various Indian dialects. *U.S. v. Washington*, 384 F. Supp. at 330 and 356. As discussed in more detail below, the Chinook Jargon was a trade language of limited vocabulary and scope. However, as also shown below, the Jargon did contain words or phrases for some of the key directional terms in the Treaty. A record of the proceedings of the Medicine Creek Treaty Council is at Ex. 15.

Over the years, disagreements have arisen between the Tribes, the State, and various counties as to where the southern boundary of the area ceded by the Tribes in the Treaty in fact lies. In an effort to resolve these disputes short of litigation, the State of Washington, certain counties, and the Nisqually, Puyallup, Squaxin Island and Muckleshoot Indian Tribes (the parties) entered into an interlocal agreement. In this agreement the parties consented to submit the following question to two independent consultants or facilitators for resolution: "Where is the southern cession line described in the Treaty of Medicine Creek?"

By agreement of all the parties, Dr. Morris Uebelacker and Thomas R. Bjorgen were retained as the two consultants to determine the location of the southern cession line of the Treaty of Medicine Creek. This report contains their determination and supporting analysis. A detailed description of the cession line as determined in this report is contained in the accompanying map and text entitled "The Southern Boundary of the Medicine Creek Treaty", dated June 2001.

In making this determination, Dr. Uebelacker and Mr. Bjorgen considered the following documents, not including case law and other legal authority:

- (a) State's Position Paper, dated February, 2, 2001;
- (b) Tribes' Position Paper, dated February, 2, 2001;
- (c) State's Reply to Tribes' Position Paper, dated March 5, 2001;

³ In this report, the terms "Tribe" or "Tribes" include groups or bands of Indians, as well as the formal entities typically referred to as tribes today.

- (d) Tribes' Reply to State's Position Paper, dated March 5, 2001;
- (e) State's Reply to Questions posed by Facilitators, dated May 16, 2001, with attachments;
- (f) Tribes' Responses to Facilitators' Questions, with addenda, dated May 16, 2001;
- (g) State's Reply to Tribes' Responses to Questions posed by Facilitators, dated May 23, 2001;
- (h) Tribes' Reply to State's Answers to Facilitators' Questions, dated May 23, 2001;
- (i) Exhibits 1-55, submitted by the State and listed in the Revised Exhibit List attached to State's Reply to Tribes' Position Paper, dated March 5, 2001;
- (j) Exhibits 1-10, submitted by the Tribes and attached to Tribes' Position Paper, dated February, 2, 2001;
- (k) Exhibits A-E, submitted by the State and attached to State's Reply to Questions posed by Facilitator, dated May 16, 2001;

In addition to the exhibits submitted by the parties listed above, the following documents were also considered in making this report. Where an exhibit submitted by the parties is also listed below, more of the document was considered than the excerpt submitted as an exhibit.

- (l) Sketch showing Yakama, Walla Walla, Cayuse and Nez Perce ceded areas, dated June 12, 1855 by Isaac I. Stevens;
- (m) Treaty between the United States and the Yakama Nation of Indians, dated June 9, 1855;
- (n) George C. Shaw, The Chinook Jargon and How To Use It (1909);
- (o) 7 Handbook of North American Indians, (Suttles ed. 1990);
- (p) Haeberlin & Gunther, The Indians of Puget Sound (1930)
- (q) Allan Smith, Ethnographic Guide to the Archaeology of Mt. Rainier National Park (1964);
- (r) Vern Ray, Handbook of Cowlitz Indians (1966);
- (s) Inventory of Native American Religious Use, Practices, Localities and Resources, Mt. Baker-Snoqualmie National Forest (1981).

- (t) Cecelia Svinth Carpenter, *Where the Waters Begin: The Traditional Nisqually Indian History of Mt. Rainier* (1994);
- (u) Cecelia Svinth Carpenter, *They Walked Before* (1974);
- (v) Indian Health Service Nisqually Indian Tribe Home Page, dated 5-10-01.
- (w) Judith W. Irwin, *The Dispossessed: The Cowlitz Indians in Cowlitz Corridor*, (Cowlitz County Historical Society 1994);
- (x) Report of George Gibbs to Capt. McClellan (3-4-1854), Exec. Doc. No. 78, 33rd Cong. 2d Sess;
- (y) Letter from A.C. Tonner, Acting Commissioner of Indian Affairs to Hon. Francis Cushman (10-24-1904), 64th Cong., 1st Sess., Rep. No. 829;
- (z) *The Washington Archaeologist* Vol. VIII, No. 1, (1964).

One or both of the undersigned made site visits between March and June 2001 to Capitol Peak, the Skookumchuck Valley up to the dam, the area between the Skookumchuck Valley and the Nisqually River near Yelm, the vicinity of the Medicine Creek Treaty grounds, and the south slope of Mt. Rainier to an elevation of 7200 feet. No oral testimony was taken or considered.

On the basis of this factual material⁴ and subject to the governing legal standards set out below, the undersigned make the following determination of the location of the southern cession line described in the Treaty of Medicine Creek.

II. LEGAL PRINCIPLES

A. The interpretation of Indian treaties.

The task presented is to place on the ground the southern cession line described in the Treaty of Medicine Creek. This is a task of treaty interpretation.

The fundamental goal of treaty interpretation is "to determine what the parties meant by the treaty terms." U.S. v. Washington, 157 F.3d 630 (9th Cir. 1998). "It is the intention of the parties . . . that must control any attempt to interpret the treaties." Fishing Vessel, 443 U.S. at 675.

To properly divine the intent of the parties, Indian treaties

⁴ The factual determinations on which this report relies are incorporated into the analyses below.

"cannot be interpreted in isolation, but must be read in light of the common notions of the day and the assumptions of those who drafted them."

Oliphant v. Suquamish Tribe, 435 U.S. 191, 206, 55 L.Ed.2d 209, 98 S.Ct. 1011 (1978). In interpreting treaties, the courts will look "to the larger context that frames the treaty, the negotiations, and the practical construction adopted by the parties", along with "the historical record". Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196, 143 L.Ed.2d 270, 119 S.Ct. 1187 (1999). The courts examine Indian treaties in light of the circumstances surrounding their passage. See Mille Lacs Band, 526 U.S. at 196 et seq. Accord, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 351-52, 139 L.Ed.2d 773, 118 S.Ct. 789 (1998).

Just as importantly, the United States Supreme Court has characterized Indian treaties as contracts subject to special rules of contract interpretation. Fishing Vessel, 443 U.S. at 675. These special rules require that

"treaties be liberally construed to favor Indians, that ambiguous expressions in treaties must be resolved in favor of the Indians, and that treaties should be construed as the Indians would have understood them."

Cohen, Handbook of Federal Indian Law, p. 222 (1982). An Indian treaty must be construed

"not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

Fishing Vessel, 443 U.S. at 676. Stated another way, a treaty "with the Indians is not to be construed to their prejudice." Antoine v. Washington, 420 U.S. 194, 199, 43 L.Ed.2d 129, 95 S.Ct. 944 (1975).

One important restriction on these rules, however, is that

"even though legal ambiguities are resolved to the benefit of the Indians, courts cannot ignore plain language [contained in a treaty] . . . Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice."

Menominee Indian Tribe v. Thompson, 161 F.3d 449, 457 (7th Cir. 1998). Even though ambiguities are resolved in favor of Indian interests,

"courts cannot create favorable rules based on the policy considerations which prompted the rules of liberal construction in favor of Indians."

Fry v. U.S., 557 F.2d 646, 649, (9th Cir. 1977).

The application of these canons to the Treaty of Medicine Creek raises a potential paradox. As shown below, we have little way of determining the precise intent of the Tribal representatives who signed the Treaty. It is quite possible that some had in mind that they were ceding or giving up only the immediate areas around their winter villages, as well as customary hunting and berrying grounds in or near the drainage in which they lived. If so, the evidence discussed below would show that the government representatives likely intended a larger ceded area than did the representatives of the Tribes. This would raise the paradox of one rule of construction, interpreting treaties as the tribes understood them, requiring the violation of another, not interpreting treaties to their prejudice. Another difficulty is that the interpretation which may have benefitted the Tribes in 1854 is one which harms their interests today. In 1854, a smaller ceded area may have preserved claims of unextinguished Indian title to areas of shared use outside of the area ceded. In 2001, a smaller ceded area only reduces claims of reserved rights under the Treaty.

Fortunately, a recourse to the purpose of these rules of interpretation dissolves these problems. One rationale for these rules is found in the formulation that

"[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."

Oliphant, 435 U.S. at 208, n. 17. Stated another way, these rules of interpretation "are rooted in the unique trust relationship between the United States and the Indians." Oneida County v. Oneida Indian Nation, 470 U.S. 226, 247, 84 L.Ed.2d 169, 105 S.Ct. 1245 (1985). Another source of these rules is found in the unequal bargaining position of the parties. In Cree v. Flores, 157 F.3d 762, 769 (9th Cir. 1998); citing Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31, 25 L.Ed.2d 615, 90 S.Ct. 1328 (1970), the Court recognized that

"[t]he Indian Nations did not seek out the United States and agree upon an exchange of lands in an arms-length transaction. Rather, the treaties were imposed upon them and they had no choice but to consent."

In this situation, these rules of interpretation are further supported by the fact that the United States had virtually exclusive possession of the language in which the treaties were explained, negotiated and drafted. As already noted, the Medicine Creek Treaty was translated from English into Chinook Jargon and thence into the various Indian dialects. See U.S. v. Washington, 384 F. Supp. at 356. Chinook Jargon

"not only was imperfectly understood by many of the Indians, but also was composed of a simple 300-word vocabulary that did not include words corresponding to many of the treaty terms."

Fishing Vessel, 443 U.S. at 667, n. 10.

We are asked to interpret the Medicine Creek Treaty today, in 2001. Therefore, whether a possible interpretation favors the Tribal interests must be judged under today's circumstances, not those of 1854. Thus, a larger ceded area must be deemed to favor tribal interests, due to the presence of certain reserved rights within that area.

Most to the point, though, it would be wholly inconsistent with the trust relationship underlying these rules of interpretation to reject the ceded area which Governor Stevens may have had in mind, simply because the Tribal representatives may have had a smaller area in mind. Such an interpretation would also be inconsistent with the purpose of the rules to account for the unequal bargaining position of the parties. After discussing these rules and the language difference, the court in *U.S. v. Michigan*, 471 F. Supp. 192, 252, (W.D. Mich. 1979); rem. 623 F.2d 425 and 653 F.2d 277; cert. den. 454 U.S. 1124, stated that

"to interpret particular words in the treaty so as to defeat or diminish a reserved right would be flatly contrary to these canons of construction."

It would be even more contrary to do so on the basis of speculation as to what land area the Indians may have been thinking they were ceding. If Governor Stevens intended a larger ceded area than that intended by Tribal representatives, Stevens' intent must prevail.

B. The rules of survey interpretation.

The description of the cession line in the Medicine Creek Treaty is neither a survey nor a legal description in a deed of real property. Its purpose, however, is similar to each of these: it describes the area within which the Tribes relinquished the bulk of their rights in real property. Thus, the principles governing the interpretation of surveys and deed descriptions may at least provide guidance in fixing the southern cession line.

As with Indian treaties, the fundamental purpose or goal of the interpretation of surveys and deed descriptions is to follow the intent of the parties. See Clark on Surveying and Boundaries, 16.05, 16.09, and 18.01. In retracing a prior survey, the goal is to "follow the footsteps" of the original surveyor. Clark, supra at 14.01.

"The primary duty of the retracing surveyor is to locate the lines of the original survey as they were first located by the original surveyor, and not where they should have been, in the event the records of such surveys differ from the on-the-ground location."

Id. at 14.01. The question "as to the true and correct boundary line is not where a new and accurate survey would locate it, but where the retracing surveyor actually found it." Id. If retracing a survey shows that newly positioned lines are not what was intended, the intent of the original surveyor controls. Id. at 14.16. To judge the intent of the parties, one should use the meaning of the terms in a boundary description which were current when the description was prepared. Id. at 16.01.

"Words recited in a description must be given a reasonable construction in light of the meanings of such words at the time of the writing or execution of the conveyance."

Id. at 18.09.

Boundary descriptions may contain latent, as well as patent ambiguities. See id. at 14.21 and 18.18. Latent ambiguities are those which become apparent as the words are "placed on the ground." Id. at 14.21. The difficulties in fixing the southern cession line are primarily of this type.

When a boundary description is ambiguous or conflicting, courts will allow extrinsic evidence to clarify the problem, Id. at 15.11, but not to change a description. Faced with ambiguities, courts will construe the description in the light of the circumstances under which the deed was executed. Id. at 16.08. If boundaries in a deed are inconsistent, the boundaries "that more nearly meet the initial intention of the conveyance should be retained." Id. at 16.09. Resolving ambiguities is "primarily a problem of determining the original intention of the grantor at the time the creating document was signed." Id. at 18.01. Where, as here, the Tribes are the grantors of rights in land, this rule coincides with those of Indian treaty interpretation described above. Id. at 16.07.

Conflicts in the calls of a description or survey are resolved by considering them in the following order of importance:

1. lines actually run in the field;
2. natural monuments;
3. artificial monuments;
4. adjoiners;
5. courses;
6. distances; and
7. area or quantity.

Id. at 14.21 and 15.08. This ranking is in a descending order of control; if one does not untie the knot, the next down may be consulted. Id. at 14.21. However, the ranking is not absolute. Its results must yield to evidence of clear intent of the parties or a preponderance of evidence to the contrary. Id.

Finally, more specific or certain descriptions will generally prevail over the less so. Id. at 16.08. Particular descriptions control general descriptions. Id. at 16.31. With deeds, the general rule

is that

"[i]n cases of inconsistency or repugnancy, a particular description of the property conveyed usually controls a general description, unless a different intention is shown by the deed when construed or considered as a whole."

26 C.J.S., Deeds, Sec. 100 j (1956).

In the Medicine Creek Treaty, the Tribes ceded their "interest in and to the lands and country occupied by them, bounded and described as follows . . ." The discussion below shows that both identifying the area "occupied" by the Tribes and following the subsequent geographic description are vexed with uncertainties. However, as between the two the geographic description is more definite and particular than is the reference to the area occupied by the Tribes. Further, the latter is a reference to area or quantity, a circumstance of lower priority than the courses and distances contained in the geographic description in the Treaty. In addition, the law governing deeds gives effect to a recital as to "locality" when it

"is not ambiguous when applied to facts on the ground and is sufficiently accurate to show what place was intended, and a construction may be adopted which will make good sense of the entry . . ."

26 C.J.S., *id.* at Sec. 100 k. The reference to the area "occupied" by the Tribes is a reference to locality. The evidence below of shared and shifting areas of use and occupation shows that this reference falls well short of the standard that it be "sufficiently accurate to show what place was intended". Under all of these standards, the area occupied by the Tribes is relevant to the determination of the parties' intent. However, it is subordinate to the geographic description with its more precise calls.

The application of some of the rules of survey and boundary interpretation described above is found in Northern Pacific RR v. United States, 227 U.S. 355, 57 L.Ed. 544, 33 S.Ct. 368 (1913), a case dealing with a boundary description in the Treaty with the Yakamas, a treaty also negotiated by Governor Stevens. Its central issue was similar to an issue presented here. In the Yakama Treaty, the northern boundary of the reservation was described as a line proceeding westerly along the south fork of the Ahtanum River "to the Cascade Mountains; thence southerly along the main ridge of said mountains . . ." The headwaters of the Ahtanum are well east of the Cascade Crest. The Railroad argued, consequently, that the boundary turns south at the headwaters and follows the ridge which is present there, producing a western boundary of the reservation east of the Cascade Crest. Northern Pacific, 227 U.S. at 359. The Railroad also argued that the boundary could not reach the Cascade Crest, because doing so would require crossing the Klickitat River, which was not called for in the Treaty description. *Id.* at 362. The United States argued that the boundary must continue westerly from the headwaters of the Ahtanum until its reached the Crest, and then turn south.

The Supreme Court held for the United States. Stating that all calls in a description must be considered, it held that the line following the Ahtanum "must reach the main ridge to run southerly along it." *Id.* at 359. The Court also held that there is only one "main ridge" of the mountains and the parties knew what it was. *Id.* at 360-61. Therefore, even though the treaty stated that the northern boundary runs along Ahtanum Creek to the point where it turns south, the Court continued that boundary westward past the headwaters of the Ahtanum to the true crest of the mountains before it turned south. Further, the Court was willing to do this, even though it required a major river crossing not called out in the description. The Court, in other words, arguably twice modified a call in the description in order to be consistent with other calls and the intent of the parties.

This case has two lessons for the present dispute. First, it establishes that calls in a boundary description such as this may be modified in order to gain greater consistency with other calls in the same description and with the intent of the parties. Second, it makes clear that the call "main ridge" of the Cascades in the reservation description in the Yakama Treaty refers to the Cascade Crest. That treaty also refers to the "main ridge" of the Cascades as the western boundary of the area ceded by the Yakamas. Therefore, the Supreme Court's analysis also shows that the western boundary of the Yakama ceded area lies along the Cascade Crest.

C. Conclusion.

The rules described above for the interpretation of Indian treaties govern our determination. The rules set out above for the interpretation of surveys and deeds guide that determination. However, before these rules may be applied to the text of the Treaty, logic demands a closer examination of Indian use and occupation patterns and the legal consequences of those patterns to this determination.

III. THE INTEREST CEDED BY THE MEDICINE CREEK TRIBES AND THE AREA WHICH THEY OCCUPIED OR USED

A. The role of considerations of use and occupancy in this analysis.

Our task is to interpret the Treaty to determine the southern boundary of the ceded area. The principles discussed above show that our lodestars are the text of the document and the intention of the parties. The analysis of the parties' intention begins with the language of the Treaty and the context in which the written words are used. U.S. v. Washington, 157 F.3d at 642.

The principles discussed above also make clear that where, as here, the text is ambiguous, we may look to other relevant circumstances to determine intent. Although not determinative, one of those circumstances is the extent of the area in which the Medicine Creek tribes had rights to cede. If, for example, one interpretation of an ambiguous boundary description would result in a party ceding land in which it had no rights to cede, that interpretation would seem unreasonable. This

inquiry is also compelled by the nature of Indian treaties. A treaty is not "a grant of rights to the Indians, but a grant of rights from them - a reservation of those not granted." U.S. v. Winans, 198 U.S. 371, 49 L.Ed. 1089, 25 S.Ct.662 (1905). A tribe could neither grant nor reserve rights if never had. For these reasons, the intention of the parties as to the area which the Medicine Creek tribes ceded is signaled to some degree by the extent of the area in which they had rights to cede. In the context of Indian treaties, the inquiry into the geographic extent of rights is inextricably bound up with the extent of use or occupancy.

Inquiring into the extent of use and occupancy is also demanded by the words of the Treaty. As noted above, the Tribes ceded "all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows . . ." As shown above, the calls and distances of the geographic description will control the less certain area description of the lands occupied by the tribes. Nonetheless, the latter description at least discloses that the parties intended that the tribes cede the land "occupied by them". Thus, the extent of the land which could be said to have been occupied by the tribes is relevant to interpreting the vague language of the geographic description. We recognize, as stated in Spier, Tribal Distribution in Washington, p. 6 (1936), that "it is doubtful if a single one of the Washington tribes thought in terms of boundaries." Even so, the land occupied or used by the Medicine Creek tribes does provide guidance in the fixing of a poorly described boundary. Their area of use and occupation cannot be ignored.

B. Indian title and other rights in land.

The "discovery" of the North American continent conferred title on the government by whose citizens the discovery was made against all other European governments. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823). This title by discovery was transferred to the United States from Great Britain by the treaty which concluded the Revolutionary War. Id. The Indians, however, retained the right to use and occupy the soil. Id. and Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832). This right came to be known as Indian or aboriginal title.

Indian title is "the right of the original inhabitants of the United States to use and occupy their aboriginal territory." Confederated Tribes of Chehalis v. Washington, 96 F.3d 334, 341, (9th Cir. 1996). Indian title "exists at the pleasure of the United States and may be extinguished by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise . . . [cits. om.]" Confederated Tribes of Chehalis, 96 F.3d at 341. The United States, in other words, could obtain Indian title by war or by purchase. Wilkinson, Indian Tribal Rights and the National Forests, 34 Idaho Law Rev. 435, 439 (1998). Governor Stevens was attempting the latter. Id. at 439.

The extinguishment of Indian title "terminates corresponding use and occupancy rights, including fishing rights, except where . . . reserved . . ." Id. Indians were able to claim compensation for the loss of Indian title in proceedings before the now closed Indian Claims Commission. See Otoe and Missouri Tribe v. U.S., 131 F.Supp. 265 (Ct. Claims 1955), cert. den. 350 U.S. 848.

Otherwise, there is no legal obligation to compensate for the taking of Indian title. Northwestern Bands of Shoshone v. U.S., 324 U.S. 335, 339, 89 L.Ed. 985, 65 S.Ct. 690 (1945); and Tee-Hit-Ton Indians v. U.S., 348 U.S. 272, 99 L.Ed. 314, 75 S.Ct. 313 (1955).

To establish Indian title, "[t]here must be a showing of actual, exclusive and continuous use and occupancy 'for a long time' prior to the loss of the land." Confederated Tribes of Warm Springs Reservation v. U.S., 177 Ct. Cl. 184, 194 (1966). Indian title has been described as "the right, because of immemorial occupancy, to roam certain territory to the exclusion of any other Indians . . ." Northwestern Bands of Shoshone, 324 U.S. at 338.

In applying these standards,

"Indian possession or occupation was considered with reference to their habits and modes of life: their hunting grounds were as much in their actual possession as the cleared fields of the whites . . ."

Mitchell v. U.S., 34 U.S. (9 Pet.) 711 (1835). Areas of "continuous use" are not limited to the areas where the tribe had permanent villages, but also include "seasonal or hunting areas over which the Indians had control even though those areas were used only intermittently." Warm Springs, 177 Ct. Cl. at 194.

The requirement of "exclusive use and occupancy" has been subject to conflicting interpretations. The citation above from Northwestern Bands of Shoshone, 324 U.S. at 338, suggests that a tribe could have Indian title only over land from which it had excluded other tribes.

On the other hand, U.S. v. Santa Fe Railroad, 314 U.S. 339, 345, 86 L.Ed. 260, 62 S.Ct. 248 (1941), suggests that the exclusivity required for Indian title would be lost only for "lands wandered over by many tribes." The latter approach is consistent with the view of Felix Cohen, who states that the requirement of exclusivity is satisfied when "two or more tribes jointly or amicably hunted in the same area to the exclusion of others . . ." Cohen, supra at 442-43. Even more strongly, the Court of Claims has held that the joint and amicable possession of the property by two or more tribes or groups will not defeat Indian title. Warm Springs, 177 Ct. Cl. at 194, fn. 6. Further, when two or more tribes jointly used a usual and accustomed fishing ground, they each enjoyed and retained those rights under a Stevens treaty. See U.S. v. Lower Elwha Tribe, 642 F.2d. 1141, 1143-44 (9th Cir. 1981). The retained rights to usual and accustomed fishing grounds and Indian title are not necessarily synonymous, since usual and accustomed grounds may lie outside of the areas in which Indian title was ceded. See Seufert Bros. v. U.S., 249 U.S. 194, 197-98 (1919). However, each requires regular and long-standing use which may or may not be joint. Therefore, the analysis of Lower Elwha should also apply to Indian title generally. Under it, Santa Fe Railroad, Cohen, and Warm Springs, all supra, two or more tribes may hold overlapping areas in which each has Indian title.

Tribes also may have had limited rights in land to which they did not have Indian title. In

Seufert Bros, 249 U.S. at 198, the Supreme Court recognized that the Yakama Tribe may have retained fishing rights south of the Columbia River, even though their lands "were all to the north of the river . . ." In Warm Springs, supra at 194, the Court of Claims held that the presence of land within the area ceded in a treaty is not by itself sufficient proof of Indian title. In other words, the Court recognized that tribes may have ceded rights in land beyond that in which a they had Indian title. Finally, the Supreme Court of Washington recognized that tribes may have retained hunting rights outside of the ceded area in a Stevens treaty. State v. Buchanan, 138 Wn.2d 186, 207, 978 P.2d. 1070 (1999).

These legal principles demand the resolution of a factual issue: in what area could the parties to the Medicine Creek treaty have reasonably believed the Tribes had rights to cede? This question, under the principles above, requires an examination of the area occupied by the Medicine Creek tribes or used by them for the winning of resources. It also requires an examination of the parties' intent, perhaps most specifically what Governor Stevens knew or thought about the patterns of native use in the Cowlitz valley.

C. The area occupied or used by the Medicine Creek Tribes.

1. Nisqually use of the area extending to the Cascade Crest.

The Nisqually Indians likely occupied a large territory extending from the head of the Sound to the east of Mt. Rainier. See Spier, Tribal Distribution in Wash. 1936, p. 33. Jacobs, p. 98 (1931) would exclude the Taidnapam and Yakama from the Mt. Rainier area and assign its southern slopes to the Meshal. Allan Smith, Ethnographic Guide to the Archaeology of Mt. Rainier National Park, p. 98 (1964). The Meshal (alternatively Mashel or Mica'l) are a largely Sahaptin speaking group considered to be Nisqually. A. Smith, id. at p. 109 (1964); and Spier, id. at p. 26.

Allan Smith's Ethnographic Guide is the most detailed treatment we found of Indian presence in Mt. Rainier National Park. The tribes used the areas around the mountain for hunting, berrying and the gathering of "technological plants" such as beargrass and medicinal herbs. A. Smith, id. at pp. 71 and 221-24. Although he assigns the eastern part of the Park to the former territory of tribes not part of the treaty of Medicine Creek, Fig. 7, he also makes clear that the hunting and berrying areas around the mountain were open to use by all. Id. at p. 71. Different tribes would harvest and dry berries at the same site and enjoyed the meetings because of intermarriages. Id. at p. 71. Intertribal visiting across these use boundaries "was seemingly very common". Id. at p. 256.

Allan Smith believes that the "general intertribal marriage pattern along the western Cascades slopes" helps explain why tribes allowed others such free use of their territory around Mt. Rainier. Id. at pp. 85-86. Smith also states that members of the Nisqually Tribe are reported to have "often travelled east of the mountains", using Naches and Cowlitz Passes. Id. at p. 231. A Nisqually informant stated that his father knows an important pass through the Cascades unknown to the Whites. Id. at p. 230. Allan Smith also states that his informants reported "substantial numbers of

Yakima intermarriages in the Puyallup and Nisqually upriver villages." *Id.* at 249. As explained below, intermarriage spurred travel and contact. Most trans-Cascade trade, however, involved Sahaptins from east of the mountains travelling to the west side. *Id.* at p. 247.

Although there is evidence to the contrary, see A. Smith, *id.* at pp. 62 and 71-74, the force of Smith's study, supported by Spier and Jacobs as noted above, shows that the Nisqually likely used the area of Mt. Rainier, including the Ohanapecosh and Muddy Fork of the Cowlitz drainages, for hunting, berrying and trans-Cascade travel. Any inclusion of those areas in the Medicine Creek ceded area would be consistent with these use patterns. The Nisqually had rights to cede in the area between Mt. Rainier and the Cascade Crest, extending southerly down the drainage of the Ohanapecosh and Muddy Fork of the Cowlitz.

2. Nisqually and other Medicine Creek use of the drainage of the Cowlitz River.

There is no question but that the permanent or winter villages of the Nisqually people were on the Nisqually River or its tributaries. See Marian Smith, *The Puyallup-Nisqually*, *id.* at pp. 12-14 and Fig.1 (1940); and Carpenter, *Where the Waters Begin*, p. 61 (1994). Similarly, the "Text of the Records of the Proceeding of the Commission to Hold Treaties with the Indian Tribes of Washington Territory", p. 8 (Ex. 15), describes the tribes signing the Medicine Creek Treaty as "occupying the lands lying around the head of Puget's Sound and the adjacent Inlets . . ."

Marian Smith's work, at Ex. 36, is the most comprehensive treatment we found of the life of the Medicine Creek tribes. Those tribes and bands, she states, lived in small groups, the members of which came together during the more sedentary winter months at villages. M. Smith, *id.* at p. 4. Villages were located either at the juncture of two streams or where a stream or river entered the Sound. *Id.* at 4. Although they lacked a unifying political or social structure, each village tended to control the tributary or river segment above it. *Id.* at 4-6. Certain villages wielded influence over a wide area due to the power and character of their leading men. *Id.* at 6. In addition, groups and individuals recognized a number of overlapping and sometimes contradictory allegiances. These ranged from family groups and house groups to villages and drainage systems. *Id.* at 6-7.

Marian Smith identifies 34 villages of the Medicine Creek peoples. See *id.* at 9-14 and Fig. 1. She identifies the most upriver Nisqually village as the Sahaptin-influenced Meshal or Mica'l village near Eatonville. M. Smith, *id.* at p. 13. Carpenter states that villages were also located further upriver near Elbe and on Skate Creek. Carpenter, *id.* at p. 61. She states that these villages were occupied up to the time of the Medicine Creek treaty. *Id.*

During the appropriate times of the year, family groups would travel from the village to hunt, fish, pick berries, and gather roots and other resources. M. Smith, *id.* at p. 4. The length and nature of the trip varied according to its purpose. Men and boys might undertake distant hunting expeditions alone, while larger groups might combine several activities. *Id.* at pp. 4-5. For the bulk of the Medicine Creek tribes, the hunting territory of one group was usually open to use by others.

Id. at pp. 24-25. The up-river villages, on the other hand, had a more definite idea of hunting territories, borrowed from the Sahaptins to the east. Id. at pp. 24-25. They likely had to obtain permission before using the hunting territory of another tribe. Id. at pp. 24-25.

Smith states that "as a matter of convenience expeditions kept fairly close to the village site" and tended to follow waterways. Id. at p. 5. She also recognizes, though, that linguistic and familial ties were the cause of trips and connections outside of home territories. The Sahaptin-influenced upper Nisqually villages were in direct contact with Sahaptins to the east of the Cascade Crest and were also connected with the Tanai-no, a Sahaptin or bilingual group situated between the Bald Hills and the present town of Tenino. Id. at pp. 19-22. Smith also notes that most of her informants were familiar with the Chehalis Indians to the south. Id. at p. 19. These affiliations, she states, were of two types: (1) cross-country contacts spurred by intermarriage between the upper, river villages, and (2) a "close tie" over Black Lake between the village at Mud Bay and the Chehalis to the south. Id.

Other literature indicates more strongly that the Nisqually and other Medicine Creek tribes likely used areas outside of the Nisqually drainage and other home territory for hunting, berrying and travel. The discussion above shows that the Nisqually likely used the Ohanapecosh and Muddy Fork areas of Mt. Rainier for hunting, berrying and trans-Cascade travel. The literature discussed below shows it likely that the Nisqually also regularly ventured into the main drainage of the Cowlitz River.

Travel and trade across the Cascade Mountains by native Americans was common. See Gibbs, Tolmie and Mengarini, Tribes of Western Wash and NW Oregon, pp.169-70. (Ex. 27). In fact,

"before the diminution of the tribes and the diversion of trade to the posts, there were numerous trails across the Cascades by which the Indians of the interior obtained access to the western district."

Gibbs, Id. at p. 169. The Washington Archaeologist Vol. VIII, No. 1, (1964) shows the major passes and trails across the Cascades used by Indians around 1850. The closest trails to our area of inquiry are across Carlton, Cowlitz and Cispus Passes and down the Cowlitz River. Alexander Ross of the Hudsons Bay Company referred to horse travel from the Chehalis River and over Cowlitz or Naches Passes in the period 1813 to 1821. Vern Ray, Handbook of Cowlitz Indians, p. B-28 (1966) (Ex. 29). Most of this trade and travel involved Indians from east of the mountains venturing to the west side. Gibbs, Tolmie and Mengarini, Id. at p. 169. Allan Smith, id. at p. 231. Yakamas, for instance, would travel to the Nisqually area in summer to sell horses and buy dried clams and other products. Report of Railroad Explorations from Geo. Gibbs to Capt. McClellan 3-4-1854, p.14 (Ex. 9).

However, members of the Nisqually Tribe are reported to have "often travelled east of the mountains", using Naches and Cowlitz Passes. Allan Smith, id. at p. 231. Willie Frank Sr., a late Nisqually elder, suggested that a trail was used by the Nisqually which went over Skate Creek from just below Longmire to the Cowlitz River, up it to the Ohanapecosh River, up it to Summit Creek

and over Cowlitz pass. Allan Smith, *id.* at p. 235. The Nisqually berried at Bear Prairie, along the Skate Creek corridor between the Nisqually and the Cowlitz drainages. See Allan Smith, *id.* at p. 240.

Language affinities also spurred trade and intercourse between Indian peoples. The Medicine Creek Tribes each spoke Southern Lushootseed, one of the Southern Coast Salish languages. Handbook of North American Indians, *id.* at pp. 485-87. To the south, the Cowlitz spoke a Southwestern Coast Salish language. *Id.* at p. 505. East of the mountains, the Yakama, Kittitas, Wanapam and Klickitat spoke a different language family known as Sahaptin. See M. Smith, *id.* at p. 19. Over time, Sahaptin speakers had slowly migrated into the upper Cowlitz and Nisqually valleys. See Ray, *id.* at p. A-5 and M. Smith, *id.* at p. 13.

As a result, the Upper Cowlitz spoke a Sahaptin dialect known as Taidnapam.⁵ Ray, *id.* at A-7. In the Nisqually village which Marian Smith locates near Eatonville, Sahaptin was either as common or more common than Salish. See M. Smith, *id.* at p. 13, and A. Smith, *id.* at pp. 78-80. Because Sahaptin drifted in from the east, M. Smith, *id.* at p. 13, and A. Smith, *id.* at pp. 78-80, it is likely that the two higher Nisqually villages identified by Carpenter at Elbe and Skate Creek were also heavily Sahaptin.

The Mashel or Mica'l, the largely Sahaptin-speaking branch of the Nisqually at the Eatonville village, maintained close ties with the Indian villages across the mountains to the east. Inventory of Native American Religious Use, Practices, Localities and Resources, Mt. Baker-Snoqualmie National Forest, p. 497 (1981). The upriver Nisqually had "considerable contact with the Sahaptin-speaking Kittitas and Yakima." Handbook of N. American Indians, Vol. 7, p. 488 (1990) (Ex. 34). The Mashel "ranged all through the mountains, but wintered . . . in the Skate Creek area." *Id.* at 497. Because Skate Creek supplies an easy route between the upper Nisqually and Cowlitz valleys, it is inevitable that the Sahaptin Upper Cowlitz Taidnapam and the Sahaptin Mashel Nisqually had contact over that route. In fact, Sluiskin, who guided Hazard Stevens and Van Trump to Mount Rainier in 1870 was either a Yakama or Taidnapam and was found by them near Packwood. Allan Smith, *id.* at pp. 104-06 and 141-42. On the return of Stevens and Van Trump from the mountain, they noticed that Sluiskin was quite familiar with the trail down the Nisqually River. *Id.* at pp. 104 et seq.

As significant as language to travel patterns was the widespread intermarriage between different tribes. Intermarriage required a minimum set of "exchange visits and at least some transfer of goods". Allan Smith, *id.* at p. 249. In addition, tribes enjoyed mixing with other tribes at summer berrying grounds in order to visit relatives. *Id.* at p. 71. Allan Smith, *id.* at 77, cites Marian Smith that "every effort was expended to increase . . . marriage with distant villages." This was desired

³In this Report "Taidnapam" and "Upper Cowlitz" are used interchangeably. They do not include the Taidnapam bands which inhabited the Upper Lewis River.

because it allowed a person to move more widely and with safety. *Id.* at 77. Haeberlin & Gunther, *The Indians of Puget Sound*, p. 7 (1930) state that "every Puget Sound Salish community was to a considerable extent heterogeneous owing to the practice of tribal exogamy and patrilocal residence."

Marital relations spread over the entire Puget Sound drainage down to the Chehalis and Upper Cowlitz and possibly Lower Cowlitz. Allan Smith, *id.* at 87, citing Marian Smith. Although neighboring groups and villages were especially linked along drainage, "there were no breaks in the social network, which extended throughout the Southern Coast Salish network and beyond." *Handbook of N. American Indians*, Vol. 7, p. 485 (1990) (Ex. 34). In keeping with this pattern, The Nisqually intermarried with the Cowlitz. Carpenter, *Where the Waters Begin*, *id.* at p. 14 (1994), and Haeberlin & Gunther, *id.* at p. 7.

The Nisqually and Puyallup would travel among tribes with which they had intermarried, and this included passing through Cowlitz country. *Tribes Responses to Questions (Addendum)*, p. 16, citing Myron Eells. There is also some evidence that Upper Sound Indians hunted around Mt. St. Helens at treaty time and in the late 1800's. *Tribes Responses to Questions (Addendum)*, p. 15-16. The Hudson's Bay Company also travelled with Indians between Puget Sound and Cowlitz country. *Id.* at 13.

In summary, the literature we examined strongly suggests that links of language, intermarriage and trade regularly drew the Nisqually into the main drainage of the Cowlitz. The literature also shows a similar link between the Squi-aitl of Eld Inlet and the Chehalis to the south.

3. The decisions of the Indian Claims Commission.

The Indian Claims Commission was a federal tribunal with jurisdiction that included claims for compensation for the taking of Indian title and claims that treaties should be revised on the grounds of fraud, duress, unconscionable consideration. Former 25 U.S.C. 70a. As noted above, only through the Indian Claims Commission was compensation available for the taking of Indian title. Otoe, Northwestern Bands of Shoshone, and Tee-Hit-Ton Indians v. U.S., all supra.

Unlike the analysis of Indian title generally, the Indian Claims Commission only awarded compensation for areas which a tribe exclusively used and occupied. For this reason, the decisions of the Commission in claims by the Nisqually, the Puyallup, and the Squaxin, see Ex. 40, 41, 43 and 44, are of little relevance to the fixing of the cession line of the Medicine Creek Treaty. Governor Stevens' intent, as discussed in detail below, was to extinguish all land claims by the western Washington tribes. As already noted, Indian title and other rights may extend well beyond areas of exclusive use. Therefore, so did the lands which Stevens desired ceded.

The claim by the Cowlitz, however, is another matter. In Plamondon v. U.S., No. 218, p. 145 (8-5-53) (Ex. 37), the Indian Claims Commission held that "the Cowlitz Tribe exclusively used and occupied . . . the entire drainage of the Cowlitz River and extending to the south to include the Toutle River drainage." This is inconsistent with the evidence summarized above which shows that

Medicine Creek tribes likely travelled into the Cowlitz drainage to hunt, pick berries, trade and visit. The decision in Plamondon also calls into question the Tribes' claim that the ceded area extends into Cowlitz territory. If the Medicine Creek tribes had no use rights in that area, they had nothing to cede in that area.

The undersigned are not a court. Our determination is not bound by principles of stare decisis, res judicata or collateral estoppel. Thus, the factual finding of exclusive use in Plamondon is not binding; rather, it is an important element of the bulk of information or evidence which we must weigh and consider.

Findings of Fact 4-13 in Plamondon show the consideration of numerous reports, studies and maps which leave no doubt but that the Cowlitz occupied the drainage of the Cowlitz River. This is consistent with the information set out in Part III. D., below. The Findings in Plamondon, however, disclose no consideration of whether the Nisqually or other Medicine Creek tribes used the drainage of the Cowlitz in any way. With no apparent consideration of use by the Medicine Creek tribes, it is difficult to read the Commission's finding of exclusive Cowlitz use to imply that no Medicine Creek tribes used the Cowlitz drainage.

The Commission relied further on a statement in Governor Stevens' Reports of Explorations and Surveys, 3-4-54, (Ex. 9), prepared by George Gibbs, that

"[t]he Cowlitz, likewise a once numerous and powerful tribe, are now insignificant and fast disappearing. The few bands remaining are intermingled with those of the Upper Chihalis. According to the best estimates obtained, the two united are not over one-hundred sixty five in number and are scattered in seven parties between the mouth of the Cowlitz and the Satsop . . . The Taitinapam, a band of Klickitats already mentioned, living near the head of the Cowlitz, are probably about seventy-five in number."

Ex. 9, p. 34 and Ex. 37, p. 157. In addition, the Commission relied on a map prepared by Gibbs in 1853-54 and a virtually identical map by Stevens showing tribal areas.

As shown below, Stevens and Gibbs also prepared and adopted the "rough tracing" map showing the southern Medicine Creek cession line extending well into Cowlitz and Taidnapam territory. This map clearly shows an intent by Stevens and Gibbs that the Medicine Creek tribes cede rights in land designated as Cowlitz territory. Given that, it would be anomalous to read Plamondon, which relied in part on Stevens' and Gibbs' statement and maps, as meaning that the Medicine Creek tribes had no rights to cede in land designated as Cowlitz on Stevens' "rough tracing".

Plamondon certainly shows that the Cowlitz drainage was Cowlitz territory. It does not show, however, that the Medicine Creek tribes never used the Cowlitz drainage or had no rights to cede in that area. That determination must rest on other evidence.

D. The area occupied by the Cowlitz and Upper Cowlitz.

Where the Medicine Creek tribes travelled seasonally or occasionally into the Cowlitz drainage, the Cowlitz lived there permanently. The literature makes clear that there were two basic groupings of Indians living along the Cowlitz River. First, the Cowlitz, sometimes referred to as Lower Cowlitz, lived along the Cowlitz River from its confluence with the Columbia to the vicinity of the present Riffe Lake. See Spier, *id.* at 26; and *The North American Indian*, p. 5 (Ex. 28). As noted, the Cowlitz spoke a Southwestern Coast Salish language. *Handbook of North American Indians*, *id.* at p. 505.

The Upper Cowlitz lived in the Cowlitz drainage upriver from the present Riffe Lake, see Spier, *id.* at p. 26, although one informant placed an Upper Cowlitz village as far down as the mouth of the Tilton River. Lewy Costima in Jacobs, *Northwest Sahaptin Texts*, pp. 245-46 (1934) (Ex. 31). As also noted, the Upper Cowlitz spoke a Sahaptin dialect known as Taidnapam. Ray, *id.* at A-7. These Taidnapam villages were numerous and relatively small. *Id.* Ray describes them as extending far up the Cowlitz River, nearly to Mt. Rainier and the Cascade Crest. *Id.* at A-5 and A-7. Allan Smith places the highest Taidnapam village at the junction of the Clear and Muddy Forks of the Cowlitz, with the next two lower villages at Packwood and the point where Johnson Creek meets the Cowlitz River. Allan Smith, *id.* at p. 141-42. The Taidnapam would range at least from the mouth of the Ohanapecosh River down to the mouth of the Toutle and the Toledo area. See Jim Yoke in Jacobs, *Northwest Sahaptin Texts*, pp. 228 et seq. They would also travel onto the surrounding ridges and mountains for hunting, berrying and fishing. Testimony of Mary Kiona, before the Indian Claims Commission in Plamondon v. US, No. 218 (8-5-53) (Ex. 33).

The evidence shows that the boundary between the Cowlitz and Taidnapam territory and the Nisqually territory to the north ran along the divide between the Cowlitz and the Nisqually drainages. See Ray, *id.* at p. A-4 and his map at Ex. 38; the map in Plamondon v. US, *is.* at Ex. 39; Testimony of Mary Kiona, *id.* at p. 12; and *Inventory of Native American Religious Use, Practices, Localities and Resources*, Mt. Baker-Snoqualmie National Forest, *id.* at p. 508. This line is almost identical to the southern cession line proposed by the State. Both Ray and the decision of the Indian Claims Commission in Plamondon would extend this northern boundary of Cowlitz territory from just south of Mt. Rainier to the vicinity of Naches Peak next to Chinook Pass. See Ex. 38 and 39. Spier, on the other hand, assigns the Upper Ohanapecosh extending up to Chinook Pass to the Mica'l or Mashel. Spier, *id.* at 42-43. The Mica'l, as already noted, are a branch of the Nisqually.

Ray characterizes the boundary between the Cowlitz and Nisqually drainages as high, rugged and notably stable. Ray, *id.* at p. A-4. Mary Kiona testified in Plamondon v. U.S. that her people, the Upper Cowlitz Taidnapam, had arguments with the Nisqually over hunting and berrying grounds and that there was "trouble" on their common boundary. Testimony of Mary Kiona, *id.* at p. 10 and 53. The Taidnapam, according to Ms. Kiona, could not cross the boundary into Nisqually territory to get game. *Id.* at 10- 11. Other authority, however, suggests amicable relations and intermarriage between the Medicine Creek tribes and the Cowlitz and Taidnapam. See Lane, cited in *Tribes'*

Response to Questions (Addendum) pp. 13-14; and discussion of intermarriage patterns above.

E. Conclusion.

The evidence is clear that the Cowlitz and Upper Cowlitz Taidnapam occupied the drainage of the Cowlitz River and that the Nisqually occupied the drainage of the Nisqually River. The boundary between these areas of occupation is along the divide between the two river drainages. The southern cession line proposed by the State from the source of the Skookumchuck to Mt. Rainier is virtually identical to this boundary between areas of occupation.

The evidence is also clear that the Nisqually and other Medicine Creek Indians travelled into the Cowlitz drainage for hunting, berrying, visiting and trade. Thus, under the legal principles discussed above, some Medicine Creek tribes likely had Indian title to those areas in the Cowlitz drainage which they shared with other tribes for hunting and berrying. Cases such as Seufert Bros and State v. Buchanan, discussed above, also make clear that tribes may have rights to use land in which they do not have Indian title. The evidence shows that even if the Medicine Creek tribes lacked Indian title to any land in the Cowlitz drainage, their use of that drainage may well have created use rights in land short of full Indian title.

Governor Stevens was under an express charge to make treaties with the Indian tribes to "extinguish their claim of title to all the lands within the Territory", except for reservations. Letter of 8-30-1854 from Charles Mix, Acting Commissioner of Indian Affairs to Isaac Stevens. (Ex. 10.) The purpose of the Stevens treaties was "freeing a great territory from Indian claims, preparatory to opening it to settlers . . ." Seufert Bros, supra at 197. Accord, Fishing Vessel, 443 U.S. at 661. Thus, Governor Stevens had an incentive to make the ceded areas large. Leaving land untouched by cession, aside from reservations, would have violated his orders. Overlapping or unduly large ceded areas would not.

After signing the Medicine Creek Treaty, Governor Stevens sent it to George Manypenny, the Commissioner of Indian Affairs, with a letter dated December 30, 1854. (Ex. 16.) This letter was accompanied by "a rough tracing showing in red the land ceded . . ." Id. This "rough tracing", which is found at Ex. 17, plainly shows the line between Cowlitz and Medicine Creek territory very close to the location the State would place the cession line. Significantly, the "rough tracing" shows the southern boundary of the ceded area extending almost to Mt. St. Helens, well into territory which is plainly marked "Cowlitz" and "Taitinapam", a variant of Taidnapam. However, the map also mistakenly places the Cowlitz River to the west of Mt. St. Helens and shows the southern boundary of the ceded area lying well to the north of the Cowlitz River. This raises an internal conflict, since the boundary would have to cross to the south of the Cowlitz River in order to approach Mt. St. Helens.

These inconsistencies, though, are not relevant to the analysis of occupation and use. What is relevant is the fact that the "rough tracing" unambiguously shows Stevens' intent to extend the

cession line into Cowlitz and Taidnapam territory. Whether he thought the Taidnapam and Cowlitz were so few in number as not to be inhabiting this area, see Ex. 9, p. 34 and Ex. 13, or whether he was aware of the fact that the Medicine Creek tribes actually used this area, his intent is clear. He intended the Medicine Creek cession line to extend significantly into what he believed was Cowlitz and Taidnapam territory.

This is consistent with Stevens' actions in negotiating other treaties. The decision in Plamondon, supra at 149, notes that the Treaty of Point Elliott ceded rights in Nooksack lands, even though that tribe was not a party to the treaty. This shows how another Stevens treaty can include as ceded lands the territory occupied by another tribe. This also occurred in the Treaty with the Yakamas, in that the ceded lands included territory of some bands who were not a party to that treaty. Both the Treaty of Point Elliott and the Treaty with the Yakamas included the same language as the Treaty of Medicine Creek: the tribes ceded their rights in the land "occupied" by them.

Governor Stevens intended the southern cession line of the Medicine Creek Treaty to intrude significantly into what he believed was Cowlitz and Taidnapam territory. The principles of Indian title and other use rights discussed above are the rules for deciding whether the Medicine Creek tribes had any rights to cede in Cowlitz territory. The preponderance of the factual material discussed above shows that under those rules, the Nisqually at least likely had rights to cede in the Cowlitz valley. Thus, the patterns of Indian use and occupation do not prevent the southern cession line of the Medicine Creek Treaty from reaching into the Cowlitz drainage. With that, the geographic description in the treaty must now be consulted to determine just how far into Cowlitz territory the cession line is intended to go.

IV. DETERMINATION OF SOUTHERN CESSION LINE

Our charge is to determine the southern cession line described in the Treaty of Medicine Creek. To properly do that, we must determine how far to the east the southern line extends. That, in turn, requires determining the proper alignment of the eastern cession line. Thus, our analysis must begin with the call in the treaty description which reaches the furthest east. Only by beginning there can we determine where and how far to the east the southern boundary should reach.

A. "thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Dwamish, or White Rivers, to the summit of the Cascade Mountains"

1. The description is ambiguous.

The first step in reading this call of the description is to determine whether it is ambiguous. See U.S. v. Washington, 969 F.2d 752, 755 (9th Cir. 1992), cert. den. 507 U.S. 1051. The Puyallup River begins at the snout of the Puyallup Glacier, which descends the western flank of Mt. Rainier.

It is also fed by the Carbon River, which flows from the Carbon Glacier on the north side of the Mountain. The White River rises from the Winthrop and Emmons glaciers, which lie on the northern and northeastern sides of Mt. Rainier. Consequently, a line following the divide between these two rivers inevitably reaches the summit of Mt. Rainier, ultimately following the ruins of Curtis Ridge between the Winthrop and Carbon glaciers. If the summit of Mt. Rainier is what the parties intended as the summit of the Cascade Mountains, then that is the point at which the eastern cession line begins and proceeds southerly. This interpretation is urged by both the State and the Tribes.

This call, however, is ambiguous when it is placed on the ground. Mt. Rainier is the highest point of the Cascade Mountains, but is not on the crest of the Cascades. The crest, in fact, is some distance to the east of the Mountain, running from south to north through Cowlitz and Chinook passes and along the ridge just to the east of Upper Crystal Lake. Under the principles described above, extrinsic evidence must be considered to resolve this ambiguity. In considering extrinsic evidence, our lodestar is the intent of the parties, subject to the applicable legal standards discussed above, including the special rules governing the interpretation of Indian treaties. See Part II. A., above, and Cohen, id. at 222.

2. The intent of the Tribes.

As stated by Marian Smith,

"[t]he Indians of this region were supremely conscious of the nature of the country in which they lived. They were completely aware of its character as a great watershed. From the geographical concept of the drainage system they derived their major concept of social unity."

M. Smith, *id.* at p. 2. This, coupled with the frequent travel across the Cascade passes described in Part III, above, suggests that the Indians likely would have viewed the crest as the "summit" of the Cascades.

On the other hand, Mt. Rainier is such an imposing figure in both native myth and geography that it may well have been thought of as the "summit" in this description. Both Mary Kiona and a Nisqually informant cited by Allan Smith place the boundary between Yakama country and that of the tribes to the west along Mt. Rainier. See Testimony of Mary Kiona, id. at pp. 17 and 44; and A. Smith, id. at pp. 62 and 71. The Supreme Court in Northern Pacific RR, 227 U.S. at 363, emphasized "the importance of giving effect to the more commanding features of the landscape" in interpreting the Treaty with the Yakamas, also negotiated by Governor Stevens. Further, the Chinook Jargon contains no word designated for "summit", but does contain the term "sag-ha-lie", which means "top", "high", "above" or "up". George C. Shaw, *The Chinook Jargon and How To Use It* (1909). The Jargon also contains the phrase "sag-ha-lie illahie", meaning mountain; and "la-monti", meaning "a mountain". Id. If these phrases were used in the translations at the Medicine

Creek Council, it seems likely that they would have been taken as referring to Mt. Rainier, due to its commanding height and stature as viewed from south Puget Sound.

Thus, the evidence which might bear on the Indian understanding of the phrase "summit of the Cascade Mountains" is itself ambivalent. Persuasive evidence indicates that the Indians could have thought it either to be Mt. Rainier or the actual Cascade Crest to the east. On the basis of all the information considered, we are unable to determine how the Indians likely would have understood that phrase.

3. The intent of the representatives of the United States.

Two facts make the divining of Governor Stevens' intent much easier. First, he plainly thought that Mt. Rainier was on the Cascade Crest. See Ex. 11 and the map accompanying the Treaty with the Yakamas. Even though this is not in fact the case, the principles set out above demand that it be assumed in attempting to determine his intent. Second, it has already been pointed out that his orders were to "extinguish" Indian claims of title to "all the lands within the Territory", except for reservations. Letter of 8-30-1854 from Charles Mix, *id.* at Ex. 10. Accord, Fishing Vessel, and Seufert Bros, both supra. The Medicine Creek treaty must be construed consistently with that intent.

On June 9, 1855, less than six months after signing the Treaty of Medicine Creek, Governor Stevens concluded a treaty between the United States and a number of eastern Washington tribes which he effectively consolidated as the Yakama Nation. Article 1 of this treaty began with words virtually identical to that of the Medicine Creek Treaty:

"The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit . . ."

The description of the ceded area then began by stating:

"[c]ommencing at Mt. Rainier, thence northerly along the main ridge of the Cascade Mountains to the point where the northern tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise . . ."

The description of the ceded area is closed by bringing the boundary up from the Columbia River and "to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning." Treaty with the Yakamas, Art. 1.

The term "main ridge of the Cascade Mountains" means the Cascade Crest. See Northern Pacific RR, 227 U.S. at 359-63. Stevens thought Mt. Rainier was on the crest. It is not. The Yakama treaty thus cannot begin at both Mt. Rainier and the crest. If the Yakama cession line is

deemed to begin at Mt. Rainier, it would be impossible to proceed "thence northerly along the main ridge of the Cascade Mountains to the" Methow area. Similarly, it would be impossible to close the description of the Yakama ceded area by proceeding from the south "along said ridge to the place of beginning." On the other hand, if the line begins on the crest, it is impossible for it to commence at Mt. Rainier, which is expressly called out as the place of beginning.

This inconsistency is effectively resolved by the decision in Northern Pacific RR. The Treaty is clear that the Yakama cession line follows the "main ridge of the Cascade Mountains" for its entire western length. Northern Pacific RR is clear that the main ridge is the Cascade Crest. Thus, extending the Yakama cession line west of the crest at Mt. Rainier or any other point would be inconsistent with the Treaty as interpreted by the Supreme Court. If Stevens knew that Mt. Rainier was to the west of the crest, the call to begin at the Mountain would be nearly conclusive. However, he thought it was on the crest. Given that, the text of the treaty and the decision in Northern Pacific RR can best be reconciled and followed by placing the western cession line of the Yakama Treaty on the Cascade Crest.

This is also the only conclusion consistent with the text of the Treaty of Point Elliott, a treaty with the Dwamish, Suquamish and other tribes concluded by Governor Stevens on January 22, 1855. This treaty begins with the same words of cession found in the Medicine Creek and Yakama treaties, followed by a geographic description. The description places the eastern boundary of the ceded area along "the summit of the Cascade Range". In the absence of any dominating higher peaks to the west of the crest in the area of the Point Elliott Treaty and under the approach of Northern Pacific RR, this can only mean the Cascade Crest. Governor Stevens' practice was to avoid overlapping cession lines. See Ex. 20. Thus, the call of the eastern cession line under the Point Elliott Treaty indicates that the western cession line of the Yakama treaty lies on the Cascade Crest.

For each of these reasons, the western cession line of the Yakama Treaty should be deemed to lie along the Cascade Crest. If the eastern Medicine Creek cession line proceeded southward from Mt. Rainier, a swath of land west of the crest from Mt. Rainier southward would not be ceded to the United States. This would have violated Stevens' express charge from his superiors and would have been inconsistent with his practice of avoiding gaps in areas ceded by treaty. Cf. Northern boundary of Medicine Creek ceded area with southern boundary of area ceded by Point Elliott Treaty, and western boundary of Medicine Creek ceded area with proposed eastern boundary in the failed Chehalis River Council Treaty. Ex. 15 and 45. See also Ex. 20. Leaving an unceded area so close to the crest would also be inconsistent with Stevens' role as the head of the Northern Pacific Railroad Survey. (Ex. 9, p. 1.) If anything, Stevens would have made sure that land close to possible mountain passes would have been cleared of Indian claims. For these reasons, a recourse to the intent of the parties shows that the Medicine Creek cession line should extend to the Cascade Crest.

4. Other extrinsic evidence.

Other available evidence confirms this reading of Stevens' intent. First, the southern cession

line of the Point Elliott Treaty is described as

"thence Eastwardly running along the North line of lands heretofore ceded to the United States by the Nisqually, Puyallup and other Indians, to the summit of the Cascade Range of Mountains . . ."

Treaty of Point Elliott, Art. 1. As shown above, the phrase "to the summit of the Cascade Range of Mountains" in the Point Elliott Treaty means the Cascade Crest. The Point Elliott line can only run along the Medicine Creek line to the crest if the Medicine Creek reaches the crest. Cf. Northern Pacific RR, 227 U.S. at 359. Thus, the Point Elliott Treaty indicates that the Medicine Creek northern cession line extends to the Cascade Crest.

Second, there is little, if any, semantic difference between the phrase "summit of the Cascade Range of Mountains" used in the Point Elliott Treaty and the phrase "summit of the Cascade Mountains" used in the Medicine Creek treaty. If the Point Elliott phrasing means the Cascade Crest, so should the Medicine Creek.

Third, the decision in Northern Pacific RR, 227 U.S. at 359, teaches that consistency with subsequent calls is important in resolving ambiguities. Under the Medicine Creek Treaty, once the "summit of the Cascade Mountains" is reached, the cession line proceeds "southerly, along the summit of said range . . ." If Mt. Rainier were the northeastern corner of the ceded area, there would be no "summit of said range" on which the line could proceed southward.

The State suggests that the line would run down Mazama Ridge, onto the Tatoosh Range and then follow the divide between the Nisqually and Cowlitz drainages in a southwesterly direction to Sawtooth Mountain and thence more westerly. Viewed from the 7000 to 8000 foot level of Mt. Rainier, however, there is a definite valley barring any "summit" line to the Tatoosh Range. Mazama Ridge does not connect with the Tatoosh, but rather ends before it reaches the Reflection Lakes/Lake Louise area. The Reflection Lakes, though, are on the divide between the Nisqually drainage to the west and the Cowlitz to the east. Thus, the State's proposal is consistent with the drainage divide concept which informed much native sense of geography.

In no manner, however, can it be said that the State's line south from Mt. Rainier is "along the summit" of the Cascade Range. A similar argument was made to the U.S. Supreme Court in Northern Pacific RR. The northern line of the Yakama Reservation was described as running westerly along the Ahtanum River "to the Cascade Mountains; thence southerly along the main ridge of said mountains . . ." Id. at 357. The headwaters of the Ahtanum are well east of the Cascade Crest. The Railroad argued that the line turned south along whatever ridge was present at the headwaters. The Supreme Court rejected this, holding that the main ridge means the crest, not just any ridge, and that the line had to be extended to it. Id. at 359-63. Similarly, the ridge line identified by the State as running south from Mt. Rainier is not the summit or main ridge of the Range. Turning south at Mt. Rainier and proceeding along the State's line would repeat the approach rejected

in Northern Pacific RR.

The Tribes' proposal shares these problems to an even greater extent. The Tribes would run the cession line southward down Stevens Ridge from the Stevens Glacier area on Mt. Rainier. This ridge, however, abruptly ends at the deep valleys of Stevens Canyon and the Muddy Fork of the Cowlitz. Thus, their line is not along an obvious "summit" or ridge and, in any event, also cannot be said to be along the summit of the Cascade Range.

In contrast, extending the Medicine Creek cession line to the Cascade Crest avoids these problems. From any point on the crest, there is an obvious divide running south, which also is the main ridge or divide of the Cascade Range. Consistency with subsequent calls shows that the eastern cession boundary of the Medicine Creek Treaty lies on the Cascade Crest.

5. Conclusion.

The available extrinsic evidence, as well as the intent of the parties, shows that the eastern Medicine Creek cession boundary lies on the Cascade Crest.⁶ We realize that following this will violate the Treaty call to follow the divide between the Puyallup and White Rivers to the summit of the Cascade Mountains. Instead, the segment from the Mountain to the vicinity of Chinook Pass would follow the divide between the Cowlitz and the White Rivers. The Supreme Court recognized, though, in interpreting another Stevens treaty, that not all calls may be reconcilable and that following the intent of the parties and the canons of treaty interpretation may require some calls to be discounted or ignored. See Northern Pacific RR, 227 U.S. at 359 and 362. This is another such situation.

To determine how far to the south the cession line runs on the Cascade Crest, the next call must be analyzed.

B. "thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek"

1. The positions of the parties.

a. The State's position.

This is the call on which the parties most differ. The State argues that this describes a line extending south from Mt. Rainier, over the Tatoosh Range to Sawtooth Mountain, and then westerly to the headwaters of Skookumchuck Creek. The State's principal rationales for this line are

⁶ We understand that we were not charged with determining the eastern cession line of the Medicine Creek Treaty. However, as explained above, we could not determine how far to the east the southern cession line should run without first fixing the eastern boundary.

contained in the report of professional surveyor Dave Steele, found at Ex. 4. Mr. Steele states that there is no specific definition for the term "a point opposite", but that in his professional opinion it is the point which is the shortest distance across from what is being referenced. Ex. 4, p. 4. Under this rationale, the point on the ridge system extending south from Mt. Rainier which is opposite the source of Skookumchuck Creek would be in the vicinity of Sawtooth Mountain.

Mr. Steele supports this conclusion in a number of ways. First, he notes that the "rough tracing" map which Stevens sent to Washington, D.C. with the signed Treaty, Ex. 17, shows a pronounced mountain range running directly from Mt. Rainier to Mt. St. Helens. He points out that this range does not exist, and argues that the system of ridges and peaks which the State's line follows is its best approximation. Ex. 4, p. 4. Secondly, he points out that on the "rough tracing", Ex. 17, the southern Medicine Creek cession line is wholly to the north of the Cowlitz River drainage. Id. The State's line is the most southerly alignment which would remain north of that drainage.

The State also points out that its southern cession line is virtually identical to the boundary between Cowlitz and Nisqually territory. As the legal analysis above shows, this consideration is not conclusive. The Medicine Creek tribes used the Cowlitz drainage and quite possibly had use rights in that drainage which could be ceded. On the other hand, the Medicine Creek treaty was with the Nisqually, not the Cowlitz. Thus, the territorial boundary between those peoples provides principled support to the State's line.

The State also submitted two computer generated exhibits, 54 and 55, the stated purpose of which is "to help demonstrate visual exposure by performing viewshed analysis from a given observation point." Ex. 54 and 55. These exhibits, in other words, represent the topographical features which an individual would see from a certain point. Ex. 54 represents the view from a bluff in the Arcadia area of Mason County, while Ex. 55 represents the view from a bluff on the southern tip of Vashon Island. The analysis from Arcadia, and to a lesser extent the analysis from Vashon Island, show that the southernmost ridge or elevations which would be seen while looking to the southeast is very close to the southern cession line proposed by Mr. Steele for the State. The State argues that this view represents the most likely impression or information Governor Stevens would have had of the area, thus indicating his likely intent to refer to the Steele line as the southern boundary.

b. The Tribes' position.

The Tribes argue that this call describes a line extending southeasterly and southerly from Mt. Rainier to a point just west of Old Snowy Mountain in the Goat Rocks; then angling southwesterly over Hamilton Buttes, Sunrise Peak and Badger Peak to a point almost due east of Mt. St. Helens; then proceeding northwesterly in a straight line over Mt. Margaret and the Cowlitz valley to the headwaters of Skookumchuck Creek.

In support of this line, the Tribes rely chiefly on the "rough tracing" which accompanied the Treaty of Medicine Creek to Washington, D.C.⁷, and on the reports of professional surveyor Jerry R. Broadus, found as Attachments (or Exhibits) 8 and 10 to the Tribes' Position Paper. Mr. Broadus points out that Governor Stevens' knowledge of the Cascade Mountains of Washington came from his participation in the surveying party for the northern transcontinental railroad and from existing maps. Tribes' Att. 8, p. 3. Because the railroad survey did not cross the area between the peaks of Rainier, St. Helens and Adams and because the maps available in 1854 showed a range running from Rainier to St. Helens, it was reasonable, Mr. Broadus concludes, that Stevens believed a definite range extended from Rainier to St Helens. This is the range shown on the "rough tracing". Mr. Broadus points out that we must assume the knowledge which Stevens had when he concluded the treaties. From that, he concludes that the "point opposite" must lie somewhere on the assumed line between Mt. Rainier and Mt. St. Helens.

On pp. 6-7 of Att. 8, Mr. Broadus sets forth two interpretations of a "point opposite". First, he states that surveyors commonly use this term in the following sense: the point "A" on a line is opposite some other point "B" if the line which "A" is on forms a right angle with a line drawn from "A" to "B". This is illustrated by the first Figure on p. 10 of Att. 8. This method, Mr. Broadus states, would be especially familiar to Stevens from his training in geodetic surveying. Att. 8, p. 6. If a range from Rainier to St. Helens is assumed, this interpretation would result in a point opposite the source of the Skookumchuck being located just northeast of Mt. St. Helens.

Mr. Broadus' second interpretation of a "point opposite" relies on the fact that the "main source" of the Skookumchuck is itself a point at the end of a line, the course of Skookumchuck Creek. Att. 8, p. 7. Because the Skookumchuck flows generally northwest from its source, a point opposite that source, under this interpretation, would be reached by travelling in the opposite direction from the flow; that is, to the southeast. *Id.* This would result in virtually the same "point opposite" as that generated by the first method. *Id.* As Mr. Broadus points out on Att. 8, p. 7, this interpretation is consistent with the punctuation custom followed by Stevens. However, it does not take into account the entire course of the Skookumchuck, which describes an arc lying on an east-west axis. If its entire course were considered, this method would generate a line much closer to the State's.

The Tribes' most direct argument, though, is a simpler one. They point out that the "rough tracing" plainly shows the southern cession line reaching to the slopes of Mt. St. Helens. See Ex. 17. They also point out that it also plainly shows that line intruding well into Cowlitz and somewhat into Taidnapam territory. This reading, of course, conflicts with the State's point that the "rough tracing" shows that the southern Medicine Creek cession line lies wholly to the north of the Cowlitz

⁴The State argues that this "rough tracing" is the map at Ex. 17, while the Tribes argue it is the map at Attachment 4 to their Position Paper. Whatever small differences may lie in these documents, they do not affect either the arguments made by the parties or the analysis of this report. Thus, references to the "rough tracing" in this report are to both documents.

River drainage. No line can extend from the source of the Skookumchuck to near St. Helens and remain north of the Cowlitz drainage.

2. The call is ambiguous.

The interpretations of this call presented by the State and the Tribes are each well argued and documented, and each rest on a rational basis. That, in itself, is sufficient indication that the phrase "to a point opposite the main source of the Skookum Chuck Creek" is ambiguous when placed on the ground. The ambiguity is heightened by the internal inconsistency of the "rough tracing". Thus, under the principles of treaty and survey interpretation discussed above, we must consider the intent of the parties and any extrinsic evidence in resolving this ambiguity. These principles also require that we take the knowledge of the parties, correct or incorrect, into account when determining their intent.

3. The knowledge of the parties.

a. Tribal knowledge.

We have no direct evidence as to the knowledge which the native signers of the Medicine Creek Treaty had of the territory east and south of Skookumchuck Creek. However, because the Indian peoples had inhabited this land for millennia and because of the likely travel and contacts described above, we must assume that the Tribal representatives had a generally accurate idea of the geography relevant to the resolution of this call. Specifically, we may safely assume that they knew the location of Skookumchuck Creek.

We know also that the Chinook Jargon contained the term "en-a-ti", which means "opposite to", "across" or "beyond"; the term "ko-pa", which means "to" as well as other prepositions; the terms "de-late" and "si-pah", each of which mean "straight"; the term "sag-ha-lie", which means "top", "high", "up" or "above"; and the terms "la-monti" and "sag-ha-lie illahie", each of which mean "mountain". See Shaw, *The Chinook Jargon*, id. Thus, despite its limited vocabulary and specialized use, the Chinook Jargon was at least capable of conveying the sense of a top or mountain opposite to Skookumchuck Creek. We have, however, no way of knowing what Chinook Jargon terms were actually used in the translations at Medicine Creek.

Finally, we have a description of Nisqually-Puyallup travel customs from Marian Smith which sheds some light on the Indian notion of "point opposite". On p. 5 of her study, *The Puyallup-Nisqually*, id. at Ex. 36, Ms. Smith states that

"[a]s a matter of convenience expeditions kept fairly close to the village site. Since travel was along the waterways, they had a choice of two directions, up-stream along the smaller water course, and down-stream or along the shore of the Sound. Even locations not bordering upon a beach were reached by following the water to a point opposite them and

then cutting inland to save as much cross-country travel as possible."

(Emph. added.)

This passage suggests that an inland point would be deemed opposite to that point on a beach which was closest to it. Mountain ranges and beaches may each be viewed as a line. Thus, this passage suggests the Indian understanding that the point on a mountain range opposite to the source of Skookumchuck Creek would be the point which is the shortest distance from that source. This is consistent with both Mr. Steele's interpretation and Mr. Broadus' first option. It is not necessarily consistent with Mr. Broadus' second optional interpretation. Under the view expressed by Marian Smith, if the "point opposite" is on the assumed range between Mt. Rainier and Mt. St. Helens, the line proposed by Mr. Broadus would be most consistent with Indian understanding. If, on the other hand, the "point opposite" is on the series of peaks extending from Mt. Rainier to Sawtooth Mountain, Mr. Steele's line would be most consistent.

b. Governor Stevens' knowledge.

Governor Stevens' knowledge, whether accurate or not, is easier to determine. We know that he was in charge of the Northern Pacific Railroad Survey. (Ex. 9, p. 1.) We know that he had training as a geodetic surveyor. (Tribes' Position Paper, Att. 8, p. 3.) We know that he prepared or sponsored a number of the contemporary maps of the area. Therefore, we may assume that those maps informed much of Stevens' conception of the geography of the area.

Of the maps which we examined, the earliest was the Surveyor General's "Diagram of a Portion of Oregon Territory", October 21, 1852, found at Ex. 5. This map appears to show the main crest of the Cascades running from Mt. Rainier to Mt. St. Helens, with a spur running east from Mt. St. Helens to Mt. Adams. The map from the railroad surveys of the mid-1850's, found at Ex. 7, appears to show one prominent ridge from Rainier to St. Helens and one from Rainier to Mt. Adams. The map of 1853-54 by Governor Stevens, Ex. 8, also shows a prominent ridge from Rainier to St. Helens, as well as two others radiating to the south and southeast from Rainier. Ex. 11 is the map of September 16, 1854, which the Governor sent to Commissioner of Indian Affairs Manypenny in Washington, D.C. It appears to be the base map for the subsequent "rough tracing" and clearly shows one prominent ridge from Mt. Rainier to Mt. St. Helens and one from Rainier to Mt. Adams.

We examined three maps prepared after the Treaty of Medicine Creek. Ex. 19, drawn by George Gibbs in 1855 shows no ranges extending south from Mt. Rainier. It does contain the phrase "Cascade Mountains" running south between Mt. St. Helens and Mt. Adams. Ex. 14 is a map dated 1854, but with post-treaty notations and reservation locations. It, again, plainly shows one prominent ridge from Rainier to St. Helens and one from Rainier to Mt. Adams. These maps, both pre-treaty and post-treaty, show that Governor Stevens thought that a mountain range extended from Mt. Rainier to Mt. Adams. The determination of his intent must take that into account.

One other post-treaty map is of definite significance in the determination of Stevens' intent. This is the 1857 map prepared by Stevens found at Ex. 20. This map expressly shows the southern cession line of the Treaty of Medicine Creek proceeding almost due west from Mt. Rainier to the Skookumchuck along the divide between the Nisqually and the Cowlitz drainages. This map leaves no doubt that in March 1857, a little over two years after he signed the Treaty, Isaac Stevens considered the southern cession line to be almost exactly where the State now argues it lies. As a nearly contemporaneous opinion of the principal drafter and mover of the Treaty, this map is powerful evidence of the government's intent. Our task, though, is to determine the intent of the parties at the time they signed the Treaty. That intent is shown most directly by the "rough tracing", the map that Stevens sent back to Washington D.C. with the Treaty itself.

4. The "rough tracing".

After signing the Treaty of Medicine Creek on December 26, 1854, Governor Stevens sent it to Commissioner Manypenny with a letter dated December 30, 1854. The final paragraph of that letter, found at Ex. 16, begins by stating: "[e]nclosed is a rough tracing showing in red the lands ceded and the reserves of the present treaty . . ." As noted, the State claims that the "rough tracing" is the map at Ex. 17, while the Tribes claim it is at Att. 4 to their Position Paper. As also noted, the small differences between these maps are not relevant to our analysis. Each version of the tracing shows a dark line extending to a point on the north slope of Mt. St. Helens. It seems ineluctable that this is the red tracing referred to by Stevens as the cession line.

As the State points out, there is no evidence that the "rough tracing" was ever shown to any tribal representative. Nor is there any direct evidence that it played any role at the treaty council at Medicine Creek. However, the Tribes cite Stevens' statement that

"[i]t was my invariable custom, whenever I assembled a tribe in counsel [sic], to procure from them their own rude sketches of the country, and a map was invariably prepared on a large scale and shown to them, exhibiting not only the region occupied by them, but the reservations which were proposed to be secured to them."

Reports of Explorations and Surveys to Ascertain the most Practicable and Economical Route for a Railroad from the Mississippi River to the Pacific Ocean, Vol. XII, Book I, Introduction, p. 18 (1855); cited at Tribes' Position Paper, p. 12.

The "rough tracing" purports to show the regions occupied by the Tribes and the area they ceded. It was prepared, at the latest, four days after the Treaty was signed and was sent to Washington D.C. with the Treaty by Stevens. This leaves little doubt that "rough tracing" discloses Stevens' intent at the time the Treaty was signed. In addition, Stevens' description of his "invariable custom", as well as the timing of the map's preparation, strongly suggest that the "rough tracing" was shown to the Tribes at Medicine Creek. The only circumstance indicating the contrary is that the

tracing does not show reservations, which were part of Stevens' expressed "invariable custom". However, the preponderance of this evidence, taken together, indicates that the Tribal representatives were probably shown the "rough tracing" at Medicine Creek. The "rough tracing" is evidence of the area which the parties, especially Governor Stevens, intended would be ceded.

The "rough tracing" speaks to the Treaty in four ways. First, as already discussed it discloses clear intent that the cession boundary extend significantly into Cowlitz and less so into Taidnapam territory. With the inaccuracies of the map, the amount of Cowlitz territory shown north of the cession line cannot be scaled or otherwise used to help determine the location of the line. What the tracing does show, however, is that the cession line was intended to intrude well into the land of the Cowlitz.

Second, the "rough tracing" shows the southwestern segment of the cession line running directly up the flow of the Skookumchuck and extending past its source to the ridge shown between Mt. Rainier and Mt. St. Helens, making a right angle with that ridge line. This directly supports each of the senses of "point opposite" proposed by Mr. Broadus. It is also consistent with Mr. Steele's "shortest distance" interpretation of a "point opposite", but is not consistent with his application of that interpretation. The "rough tracing" strongly suggests that Mr. Broadus' interpretation of a "point opposite" and his application of it is most consistent with the intent of the parties.

The third and fourth elements of the "rough tracing" conflict with each other. One shows the cession line extending to the slopes of Mt. St. Helens, while the other shows it well to the north of the entire Cowlitz River. These cannot both be the case. A straight line extending from the Skookumchuck to St. Helens must cross the Cowlitz. Just as we must interpret the Treaty in light of Stevens' belief that a range extended from Rainier to Adams, so we must also read it in light of his apparent belief in 1854 that the Cowlitz River ran westward from a point west of Mt. St. Helens. The resolution of this conflict will also affect the second point discussed immediately above. If the "rough tracing" means that the line must stay north of the Cowlitz, then neither of Mr. Broadus' interpretations of "point opposite" can be accepted. One of these conflicting elements must be given precedence over the other, or each rejected due to their conflict.

The rules of survey interpretation described above supply little help. Both Mt. St. Helens and the Cowlitz River are natural features, but Clark on Surveying and Boundaries, *id.* at 16.12, suggests that neither can be deemed natural monuments for purposes of the hierarchy of calls noted above. Even if they could be considered as monuments in resolving the conflict in the "rough tracing", it is impossible to conclude that one should be given precedence over the other, especially when viewed, as we must, from the perspective of the Tribes. Mt. St. Helens, especially before the cataclysm of 1980, was a prominent landmark doubtlessly familiar to the peoples of the southern Sound. The Cowlitz River was not visible from the territory of the Medicine Creek Tribes, but, as a major river drainage, occupied the high status which the literature suggests major drainages had in native consciousness of the land.

For these reasons, the rules of interpretation governing both surveys and Indian treaties do not resolve the conflict in the "rough tracing". Fortunately, other extrinsic evidence does.

5. The treaty proposed at the failed Chehalis River Council.

As noted above, Governor Stevens was under orders to make treaties with the Indian tribes to "extinguish their claim of title to all the lands within the Territory", except for reservations. Letter of 8-30-1854 from Charles Mix, id. (Ex. 10.) The Governor took his charge seriously. After completing the Treaty of Medicine Creek on December 26, 1854, he concluded two others with the more northerly tribes in short order: the Treaty of Point Elliott with the Suquamish and others on January 22, 1855, and the Treaty of Point No Point with the S'Klallam and others on January 26, 1855.

See Ex. 15 pp. 39 and 59.

The following month, the Governor turned his attention to the south. On February 27, 1855, he convened the Chehalis River Treaty Council, intending to conclude a treaty with the Upper Chehalis, the Lower Chehalis, the Quinault, the Queets, the Lower Chinook and the Cowlitz. Ex. 45, pp 1-2. A Report from the Bureau of Indian Affairs, found as Ex. C to the State's Reply to Questions Posed by Facilitators, dated May 16, 2001, states that one of the Cowlitz leaders was an Upper Cowlitz. The State concludes from this that Stevens' intended this treaty to include also the Upper Cowlitz or Taidnapam, discussed in detail above. State's Reply to Questions Posed by Facilitators, p. 11. We believe the State is correct in this conclusion, especially given Stevens' charge to extinguish Indian claims to all of Washington Territory, apart from reservations.

The Chehalis River Council did not result in a treaty, because several of the tribes were unwilling to be removed to a single reservation at an undetermined location between Gray's Harbor and Cape Flattery. See Ex. 45. Stevens had prepared a complete treaty, though, ready for signature. Ex. 45, pp. 31-37. The description of the cession line in this proposed treaty affords additional evidence of at least Stevens' intent with the nearby Medicine Creek Treaty.

Article 1 of the proposed Chehalis River Council Treaty describes its cession line in part as running

"southeasterly and along lands lately ceded by the Nisqually and other Tribes of Indians to the summit of the Black Hills and across the same to the Coal Bank on the Skookum Chuck Creek; thence up said Creek to the summit of the Cascade range; thence southwardly along said range to the Divide between the waters of the Cowlitz and the Cathlapootl Rivers . . ."

As shown by the discussion above of his contemporary knowledge, Stevens likely meant the phrase "summit of the Cascade range" to mean the range which he thought extended from Mt. Rainier to Mt. St. Helens. However, none of the contemporary maps which we examined show the Skookumchuck reaching any point close to this assumed range. See Ex. 5, 7, 8, 11, 14, 17, 19 and

20.

This text, though, does make clear that the proposed cession line ultimately reaches this "summit" or range and proceeds southwardly along it to the divide between the Cowlitz and Cathlapootl Rivers. The Cathlapootl is known today as the Lewis River. The divide between it and the Cowlitz which is closest to this "summit" or range is at a point on the divide between Mt. Margaret and Badger Peak. Thus, even though the Skookumchuck does not reach any point that could be called the summit of the range, the text of the failed treaty is clear that its proposed cession line extends from the source of the Skookumchuck to the divide between Mt. Margaret and Badger Peak. From there it bends back to the southwest and into irrelevance for our purposes.

Stevens' charge, again, was to relieve all land outside of reservations of Indian claims. Because both Cowlitz and Upper Cowlitz Taidnapam were represented at the Chehalis River Council, it seems clear that the proposed treaty was intended to resolve the claims of both Tribes. In other words, Stevens did not have in mind any additional treaty to deal with possible Taidnapam claims to the upper Cowlitz drainage.

Stevens obviously intended to carry out his charge. The only alignment of the southwestern segment of the Medicine Creek cession line which is consistent with that intention would be a line tracking the adjoining cession line of the proposed Chehalis River Council Treaty. As just shown, that is a line extending from the source of the Skookumchuck to the divide between Mt. Margaret and Badger Peak, the divide between the Cowlitz and the Lewis (or Cathlapootl) Rivers.

Any alignment of the Medicine Creek cession line which did not meet the Chehalis River Council line would leave territory likely known to Stevens unceded. This would be bluntly inconsistent with his charge and his intention to accomplish that charge. It would also be inconsistent with Stevens' customary practice of not leaving gaps between the ceded areas of adjacent treaties. See Ex. 20.⁸ The State's proposed line illustrates these points well. It would require attributing to Governor Stevens an intent to leave a large territory untouched by cession, an area in which White and Indian claims would continue to clash. On the other hand, the Tribes' proposed line would extend from the Skookumchuck over Mt. Margaret to a point east of Mt. St. Helens. In doing so, it would intrude well into the drainage of the Lewis or Cathlapootl River, territory to the south of the southern boundary of the proposed Chehalis River Council Treaty. No extrinsic evidence suggests an intent that the Medicine Creek ceded area extend that far to the south.

The "rough tracing", read in light of the cession line of the proposed Chehalis River Council

⁵ We realize that Ex. 20 also shows a much more northerly alignment of the cession line and discloses large unceded areas. However, the preponderance of the evidence of Stevens' intent in 1854 and 1855, especially the "rough tracing" and his orders from Commissioner Manypenny, make it highly unlikely that he intended to leave such a large area unceded and subject to conflicting claims.

Treaty, shines a bright light on Stevens' likely intent. The Medicine Creek cession line most in keeping with what is known of that intent would track the cession line of the proposed Chehalis River Council Treaty without extending into the drainage of the Lewis. This is the line we show extending from the source of the Skookumchuck to the divide running between Mt. Margaret and Badger Peak.

6. Other extrinsic evidence.

This interpretation of a "point opposite" is supported also by relevant topography. The upper portion of the Skookumchuck, flowing to the northwest, and the North Fork of the Tilton, flowing to the southeast, describe two aligned and opposite drainage basin segments. These two basins are opposite each other, with elevation point 3568 on the divide separating them marking the central point of opposition. The natural geometry of these two drainage basins also indicates the basic direction of "point opposite" in the Medicine Creek Treaty. From elevation point 3568, the alignment of the North Fork of the Tilton, as well as the Skookumchuck, plainly establishes that direction to the southeast, on a line remarkably similar to that of the adjacent proposed Chehalis River Council Treaty.

The appearance of the country must also be considered in evaluating the intent of the parties. As noted, the State has submitted Ex. 54 and Ex. 55, which show that the southernmost elevations which would be seen while looking to the southeast from Arcadia and Vashon Island are very close to the cession line proposed by the State. These exhibits have not been rebutted. They support the line proposed by the State.

Also significant, however, is the view from Capitol Peak in the Black Hills just to the southwest of Olympia. Capitol Peak is 2658 feet in elevation and lies just west of the Black River-Black Lake corridor connecting south Puget Sound with the Chehalis Valley. As such, the view from its slopes was likely familiar to the Medicine Creek bands living on the southern inlets of Puget Sound. The only major change in the topography to the southeast as viewed from Capitol Peak in the last 150 years is the truncation of Mt. St. Helens. Otherwise, the view today of the topography is much as it was at the time of the Treaty.

From Capitol Peak, Mt. Rainier and Mt. St. Helens are plainly visible to the east and southeast. From this distance, the skyline of the Cascade Mountains appears to connect the two peaks, behind which Mt. Adams rises some degrees to the north of St. Helens. From this view, it is understandable that Stevens, and perhaps the Tribal representatives, thought that a ridge or range connected Mt. Rainier and Mt. St. Helens.

More to the point, the Skookumchuck valley can be seen extending up toward the skyline between Rainier and St. Helens. If the line of that valley were extended, it would reach that skyline at a point much closer to St. Helens than to Rainier. Viewed from Capitol Peak, this is the natural "point opposite". A line running to the Tatoosh Range south of Mt. Rainier, from this perspective,

would seem to bend distinctly to the left or north, away from the natural extension of the Skookumchuck to the skyline between the two peaks. Thus, the prospect from Capitol Peak strongly supports the notion that the "point opposite" is not far to the north of St. Helens. It does not support the State's view of that point as lying in the vicinity of Sawtooth Mountain.

Whatever the conclusion, though, subjective impressions from views of the landscape must be treated cautiously. These impression can shed light on the sense or picture which each side had of the country. However, we do not know whether any of the signers of the Medicine Creek Treaty ever went up onto Capitol Peak, or the bluffs at Arcadia and Vashon Island suggested by the State. Nor do we know if the impressions which we might have today from those vantage points are similar to those of 150 years ago had any of the signatories had the same view. If the gulf of time between them and us is large; the gulf of culture is profound.

Thus, the view of the countryside will be considered, but will be given secondary rank to the more persuasive extrinsic evidence, such as the "rough tracing", the ceded area in the failed Chehalis River Treaty, and Stevens' charge from Commissioner Manypenny. Whatever role the testimony of the views has, though, supports placing the "point opposite" much closer to St. Helens than to Rainier.

7. Conclusion.

The text of the Medicine Creek Treaty, what we know of the intent of the parties, and the preponderance of the extrinsic evidence, including the "rough tracing", the reports of the professional surveyors, the proposed Chehalis River Council Treaty, and the other evidence noted, point to the same conclusion: the line from Skookumchuck Creek to a point opposite its main source runs from its source to the divide between Mt. Margaret and Badger Peak. To remain true to the rule that tribal limits tended to follow mountain crests, A. Smith, Id. at 21, 61 and 64, we have located this line along ridge crests, as much as was possible.

The remainder of the analysis must connect the point between Mt. Margaret and Badger Peak with the eastern cession line which we have already determined runs south along the Cascade Crest from Chinook Pass.

C. Completing the southern cession line.

As in Northern Pacific RR, this is a situation in which not every call, much less every piece of evidence, can be reconciled. We must attempt to do here what the Supreme Court did in Northern Pacific RR, give conflicting calls and evidence the interpretation which is most in keeping with the intent of the parties, subject to the specific rules for the interpretation of Indian treaties.

That approach, as shown above, has led us to conclude that the call running the northeastern

cession line of the Medicine Creek Treaty "to the summit of the Cascade Mountains" requires reaching the Cascade Crest. The call to proceed "thence southerly, along the summit of said range" requires travelling south along the crest. The Treaty description directs us to continue southerly "to a point opposite the main source of the Skookum Chuck Creek". All the evidence summarized above, however, indicates that this "point opposite" is on the divide between Mt. Margaret and Badger Peak, well to the west of the Cascade Crest. In other words, running southerly on the Cascade Crest will not reach this "point opposite" near Badger Peak. The reading of the calls of the treaty in the manner most consistent with the intent of the parties and the extrinsic evidence results in a gap. The question, then, is how to bridge this gap in the way most consistent with the text of the treaty and the parties' intent.

One possibility would be to continue running the southern cession line from the Skookumchuck until it reached the Cascade Crest. This, however, would result in the cession line meeting the crest somewhere to the south of Mt. Adams. This is starkly inconsistent with the "rough tracing" and would result in the Medicine Creek Tribes ceding large tracts of land which we have no indication they ever used or even visited. For these reasons, this option must be rejected.

A recourse to the "rough tracing" suggests a solution which holds much better to our knowledge of the intent of the parties. As already shown, the contemporary maps, including the tracing, demonstrate that Governor Stevens believed a prominent ridge or range extended from Mt. Rainier to Mt. St. Helens. The "rough tracing", along with the other extrinsic evidence discussed above, discloses Stevens' intent that the cession line run along that range from the "point opposite" just north of Mt. St. Helens to Mt. Rainier. As noted, Stevens also thought that Mt. Rainier lay on the true crest of the Cascades.

The parties have each properly attempted to mirror this intent by proposing lines which run largely along ridge crests. The State's line runs along the ridge line from Sawtooth Mountain to the Skookumchuck. For the reasons discussed above, however, we cannot accept the State's line as running to the correct "point opposite". The Tribes' propose a line running from just west of the Cascade Crest in the Goat Rocks along a series of peaks to a corner just east of Mt. St. Helens. This line remains on a ridge line, except for its crossing of the upper Cispus River. As also shown above, we cannot accept this line, because it places the "point opposite" well into the Lewis River drainage.

It is possible, though, to identify a line from the Cascade Crest to the "point opposite" near Badger Peak which, with one exception, runs along drainage divides. This is the line described in detail on the accompanying map, which extends from Old Snowy Mountain on the Cascade Crest in the Goat Rocks to Elk Peak and Hamilton Buttes, across the Cispus River, and then to Sunrise Peak, Badger Peak and to what we believe is the correct "point opposite" on the divide between the Cowlitz and the Lewis Rivers. This line would enable us to proceed southerly along the Cascade Crest to the Goat Rocks and then to follow drainage divides, with the exception of the Cispus crossing, from there to the "point opposite" the main source of the Skookumchuck.

This line does not reconcile all the calls and all the evidence. It does reconcile, though, the two critical conclusions which we found compelled by the Treaty text, the extrinsic evidence and the intent of the parties: first, that the cession line must proceed past Mt. Rainier to the Cascade Crest, and second, that the "point opposite" the main source of the Skookumchuck lies just west of Badger Peak. This line then connects the points compelled by these conclusions by following a ridge line which approximates, better than any other ridge line, Stevens' assumed range between Mt. Rainier and Mt. St. Helens. In this manner we have determined the southern cession line of the Medicine Creek Treaty.

V. CONCLUSION

The mixture of incomplete geographical knowledge, mistaken geographical assumptions, and imprecise terminology produced an ambiguous description of the southern cession line in the Treaty of Medicine Creek. The State and the Tribes have proposed lines resolving these ambiguities based on markedly divergent readings of this Treaty. Each proposed line, however, is based on a fair and comprehensive assessment of the facts and a rational application of governing legal standards.

We are unable to reconcile all the Treaty text and all the extrinsic evidence into a solution free of conflict or inconsistency. We believe, however, that the line shown and described on the accompanying map is the interpretation of the Treaty text which is most consistent with the intention of the parties and the extrinsic evidence. That intention and that evidence speaks clearly enough that we do not need to turn to the rule of Indian treaty interpretation that ambiguities must be resolved in favor of the tribes. That rule, though, would only lend further support to the determination in this report.

For the reasons set out in this report, the southern cession line described in the Treaty of Medicine Creek should be placed in the location shown on the accompanying map.