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# THE INVALIDITY OF THE NEZ PERCE TREATY OF 1863 AND THE TAKING OF THE WALLOWA VALLEY

John K. Flanagan\*

## I. Introduction

For many American Indians, the formation of a structured tribal organization did not take place until after their first contact with European-American settlers. In western America, where many Indians had a migratory pattern of existence, tribes held together loosely, if at all. Of the migratory Indians, those who spoke the same language and followed the same routes of migration tended to form the only significant cohesive units.<sup>1</sup> The Nez Perce, who lived in the Pacific Northwest, were among those Indians not highly structured at the tribal level, this largely due to their migratory land-use pattern, which isolated bands from one another.<sup>2</sup>

By looking at the Nez Perce as a case study, we can better understand how contact with whites forced significant changes in tribal organization upon the many American Indians who previously had little cohesion at the tribal level. From the standpoint of the United States government, American Indian tribal organization at the highest possible level became an essential ingredient in the process of peaceful acquisition of lands previously occupied by Native Americans. Effective treaty-making required tribes to have leaders who could speak and sign for their people.<sup>3</sup> Since the Nez Perce had many autonomous bands,<sup>4</sup> government officials forced or at least encouraged the Nez Perce to appoint leaders who could make decisions for the tribe as a whole.

In 1863, a treaty<sup>5</sup> between the United States and the Nez Perce reduced the size of the tribe's reservation in Idaho by nearly ninety percent, from 6,932,270 acres to 748,996 acres.<sup>6</sup> Most of the "lower" or "nontreaty" Nez Perce lost most or all of their homeland to the government. The nontreaty

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1. VINE DELORIA, JR. & AND CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 82 (1983).

2. DEWARD E. WALKER, JR., *CONFLICT & SCHISM IN NEZ PERCE ACCULTURATION* 9-18 (1985).

3. Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 *STAN. L. REV.* 979, 987-88 (1981).

4. FRANCIS HAINES, *THE NEZ PERCES* 14-15 (1955) [hereinafter HAINES, *NEZ PERCES*].

5. Treaty with the Nez Perce, June 9, 1863, U.S.-Nez Perce, 14 Stat. 647 (ratified Apr. 17, 1867).

6. ALVIN M. JOSEPHY, JR., *THE NEZ PERCE INDIANS AND THE OPENING OF THE NORTHWEST* 429 (1965).

Nez Perce, those who refused to sign the agreement, claimed it was a fraudulent act or a "thief" treaty made by Chief Lawyer and the Indian commissioners.<sup>7</sup>

Lawyer had been made the "principal chief" of the Nez Perce tribe in 1855. It is unclear whether the Nez Perce had actually elected Lawyer or whether he was chosen and then appointed by U.S. government officials. Nevertheless, Washington Territory Governor Issac I. Stevens and other Americans had "recognized" him as the principal representative of the tribe for the 1855 Walla Walla Council,<sup>8</sup> which had created the very first Nez Perce reservation.<sup>9</sup> Lawyer was again looked upon by the Americans as the principal chief at the 1863 Lapwai Council.

Lower Nez Perce essentially claimed that Lawyer and other upper Nez Perce leaders had no right to sign away their lands. The government believed Lawyer and the others who signed the 1863 treaty represented a majority of the Nez Perce tribe, thus making the agreement binding on the dissenting minority, which included Joseph's band.<sup>10</sup> Most of the lower Nez Perce were then forced to leave their homeland. For Joseph's band, this meant leaving the Wallowa Valley of northeastern Oregon.

In 1941, Joseph's band of the Nez Perce brought suit against the United States in the U.S. Court of Claims, seeking rights to their homeland.<sup>11</sup> The Court accepted the view of the government that the dissenting minority was bound by the action of the majority of the tribe, thus denying Joseph's band any rights in the Wallowa region or any further compensation.<sup>12</sup> However, for cultural, political and legal reasons, this article suggests that the Court of Claims should have found the 1863 Nez Perce Treaty invalid in so far as it pertained to Joseph's band, and therefore should have recognized that the band had rights in the Wallowa or at least should have awarded the band appropriate compensation.

## II. Background

Before contact with the first European-Americans and until they were forced to move onto reservations, many American Indians migrated over large tracts of land in search of food or to trade with other Indians. The Nez Perce were among those Indians who did not live in one place throughout the entire

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7. LUCULLUS VIRGIL MCWHORTER, *YELLOW WOLF: HIS OWN STORY* 35 (1940).

8. The 1855 Walla Walla Council was where the first treaty was made between the United States and the Nez Perce Tribe. See *Treaty with the Nez Perce*, June 11, 1855, U.S.-Nez Perce, 12 Stat. 957 (ratified on Mar. 8, 1859).

9. CLIFFORD M. DRURY, *CHIEF LAWYER OF THE NEZ PERCE INDIANS* 81 (1979).

10. U.S. DEPT OF INTERIOR, *ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, DEPARTMENT OF INTERIOR*, at 213 (1877) [hereinafter 1877 COMMISSIONER'S REPORT].

11. *Joseph's Band of the Nez Perce Tribe of Indians v. United States*, 95 Ct. Cl. 11 (1941).

12. *Id.* at 21.

year, but rather moved seasonally in routine fashion to regular hunting, fishing, root-gathering and trading spots.<sup>13</sup> Joseph's band moved to deep canyons away from the Wallowa area for warmth in the winter to prairies for root-gathering in the spring and early summer to the Wallowa Valley for hunting and fishing in the late summer and fall.<sup>14</sup>

This kind of migratory land-use pattern, followed by the Nez Perce and other tribes, was not simply what Americans called "wandering" or "roaming" about the region.<sup>15</sup> Though government officials and white settlers often belittled such migratory ways of life, this "roaming" was an integral part of the Nez Perce economy. Since the Nez Perce did not farm or harvest anything but wild plants, they were forced to migrate out of necessity to where they could find food. Historian Robert M. Utley has written that "a ceaseless quest for food ordered the life of the Nez Perces" as they did not plant crops but rather "moved about to where food could be had."<sup>16</sup> The Nez Perce also traded with other tribes at popular trading centers, which often involved travel away from their homeland as well.<sup>17</sup>

The arrival of European-American and British settlers into the Pacific Northwest did not in the beginning adversely affect the Nez Perce economy. Rather, trade with white settlers enhanced the wealth of the Nez Perce, this largely due to competition between British and American traders.<sup>18</sup> By the 1830s, the Nez Perce reached the high point of their wealth and power in dealing with the Americans, and they were as free and independent as they had always been.<sup>19</sup> A reciprocal relationship benefiting both whites and the Nez Perce existed for a time.

This reciprocity did not last for long, as was the case for most Indians who found themselves dealing with the European-American settlers.<sup>20</sup> Sociologist Stephen Cornell has noted that any reciprocity which may have existed "weighted eventually against the Indians."<sup>21</sup> Indeed, government officials would in time influence Nez Perce tribal organization in order to put an end to what they viewed as "roaming" and to make room for white settlement.

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13. JOSEPHY, *supra* note 6, at 16-24.

14. DAVID LAVENDER, LET ME BE FREE 194-95 (1992).

15. *See, e.g.*, President Grant's Executive Order of June 9, 1873 (on file with the *American Indian Law Review*) (setting aside land for the "roaming Nez Perce" in the state of Oregon). Joseph's band was often referred to by U.S. government officials and others as among the "wandering" or "roaming" Nez Perce.

16. ROBERT M. UTLEY, THE INDIAN FRONTIER OF THE AMERICAN WEST 1846-1890, at 6 (1984).

17. *Id.*

18. JOSEPHY, *supra* note 6, at 71.

19. *Id.* at 78.

20. STEPHEN CORNELL, THE RETURN OF THE NATIVE 23 (1988).

21. *Id.*

Toward this end, in the early 1840s, Indian Agent Elijah White formulated laws and directed the Nez Perce for the first time to choose a single leader of the entire tribe.<sup>22</sup> Other chiefs at the band level would be subordinate to this tribal leader, who would enforce the new laws upon all Nez Perce.<sup>23</sup> According to historian Alvin M. Josephy, Jr., the scheme was "undemocratic and tyrannical," and "too great a break with cultural traditions for the leaders of the autonomous Nez Perce bands and villages to understand."<sup>24</sup> Furthermore, historian L.V. McWhorter has suggested that this scheme amounted to the "beginning of disintegration" of the tribe.<sup>25</sup>

The Nez Perce believed in autonomy at every level, from the individual to the village to the band. Before any contact with whites, as mentioned before, a marginally cohesive tribal unit existed among the Nez Perce. According to a study of Nez Perce religion and politics by historian Deward E. Walker, Jr., at the tribal level "there was little in the way of permanent political or social groupings."<sup>26</sup> Villages were the smallest groupings of Nez Perce, with the minimum grouping being an extended family.<sup>27</sup> Each village generally followed its own leader, the headman.<sup>28</sup> The band was the political unit above the village and was usually composed of several villages.<sup>29</sup> The headmen from each village formed the band council.<sup>30</sup>

Permanent leaders did not normally exist at the band or tribal level.<sup>31</sup> Headmen could also choose not to comply with decisions of the band council.<sup>32</sup> On the rare occasion when a tribal council did occur, different bands, villages or even individuals could comply or not with majority decisions of the whole tribe.<sup>33</sup> Therefore, majority rule was not an established principle in Nez Perce tribal organization. Rarely would a headman even speak for any Nez Perce other than those from his own village.<sup>34</sup> The proposal by Agent White was bound to one day cause trouble for both the Americans and the tribe.<sup>35</sup> As Alvin Josephy has also written, the Nez Perce "could not comprehend the new position" created by Agent

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22. JOSEPHY, *supra* note 6, at 230.

23. *Id.*

24. *Id.* at 231.

25. LUCULLUS VIRGIL MCWHORTER, HEAR ME, MY CHIEFS! 106 (1952) [hereinafter MCWHORTER, HEAR ME].

26. WALKER, *supra* note 2, at 14-15.

27. *Id.* at 10.

28. JOSEPHY, *supra* note 6, at 32.

29. WALKER, *supra* note 2, at 13.

30. *Id.*

31. *Id.* at 16.

32. HAINES, NEZ PERCES, *supra* note 4, at 16.

33. JOSEPHY, *supra* note 6, at 32.

34. *Id.* at 230.

35. *Id.* at 231.

White, and "they had no idea of abandoning the traditional autonomy and independence of their individual villages."<sup>36</sup>

In 1855, the Nez Perce and other tribes met with government officials for the first time to discuss a treaty to surrender land to the United States. Joseph's father was among the Nez Perce leaders who signed the treaty at the Walla Walla Council, which created the first reservation for the Nez Perce tribe.<sup>37</sup> While other tribes lost significant portions of their lands, the Nez Perce retained most of their country, including the Wallowa Valley.<sup>38</sup>

Less than a decade later, government officials decided to negotiate a new treaty. Gold discoveries on reservation lands, resulting in an increasing number of treaty violations by miners, led the government to negotiate a new treaty to size down the Nez Perce reservation to about a tenth of its original size. The proposal would take away most of the homeland of the lower Nez Perce.

Lawyer served as the principal representative of the tribe, as he had done for the 1855 treaty. Many of the lower Nez Perce, however, believed Lawyer could not speak for them, and they would later regret placing trust in him.<sup>39</sup> Looking Glass, one of Joseph's chief war leaders, once noted that he and other Nez Perce leaders had "wanted to hang Lawyer for signing treaties with Governor Stevens."<sup>40</sup>

The lower Nez Perce always believed that Governor Stevens had been behind the selection of Lawyer as the principal chief for the Walla Walla Council. Stevens had chosen him, according to many critics, because Lawyer was a "pliable tool in the white man's hands."<sup>41</sup> But in fairness to Lawyer, he did not rush to sign the 1863 agreement.

Lawyer did not initially support a new treaty. He and the tribe as a whole were promised certain compensation for signing the 1855 treaty, but the government had been remiss in fulfilling its obligations. This, according to Lawyer biographer, Clifford M. Drury, "brought difficulties to Lawyer as Head Chief who wanted to believe in the integrity of the Government."<sup>42</sup> At the Lapwai Council, Lawyer had argued for a larger reservation.<sup>43</sup> He also never claimed that he and his followers were signing for the nontreaty bands.<sup>44</sup> In fact, according to historian Francis Haines, "each chief who signed believed that he was signing only for his own village lands and that his

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36. *Id.*

37. *Id.* at 332.

38. *Id.* at 333-35.

39. *Id.* at 426.

40. DRURY, *supra* note 9, at 214.

41. *Id.* at 213.

42. *Id.* at 173.

43. *Id.* at 215.

44. *Id.*

action would not affect the lands of the other chiefs."<sup>45</sup> But none of this mattered to the commissioners, who claimed that they had enough signatories to the treaty to represent a majority of the tribe.

Controversy arose from the fact that only one or maybe two of the headmen who signed the 1863 treaty were lower Nez Perce.<sup>46</sup> Trickery on the part of the commissioners was apparently necessary to get a majority.<sup>47</sup> This trickery became apparent from an analysis of the numbers of the signatories. Of the fifty-eight Nez Perce leaders who had signed the 1855 treaty, fifty-three of them were present at the 1863 council.<sup>48</sup> But after more than half of the fifty-three headmen withdrew, the American commissioners still found fifty-one Nez Perce to sign, indicating the probable inducement of twenty-five or more unqualified Nez Perce to sign in place of those who had dissented.<sup>49</sup>

The Treaty of 1863, however, did not have immediate impact on the lower Nez Perce, who refused to recognize its terms. This led to the Executive Order of 1873, which was signed by President Grant upon the recommendations of two government agents. John B. Monteith, the U.S. Indian Agent at Lapwai, and T. B. Odeneal, the Superintendent of Indian Affairs for Oregon, had met with Joseph and his younger brother, Ollokot, to discuss the legal aspects of the Treaty of 1863 and to convince Joseph and his band to move onto an already established reservation.<sup>50</sup> They compromised by dividing the Wallowa country into halves. The eastern portion would be for Joseph's band and the western portion for white settlement.<sup>51</sup> This effectively meant the creation of another Nez Perce reservation. The executive order itself claimed to create a "reservation for the roaming Nez Perce Indians" in the Wallowa Valley, in the state of Oregon.<sup>52</sup>

Joseph and Ollokot were amenable to this division of their homeland in light of the alternatives of war or moving onto the Lapwai reservation in Idaho. But the President's order divided the Wallowa into northern and southern halves, rather than east and west.<sup>53</sup> This was significant from the standpoint of the Nez Perce migratory land-use pattern. According to historian David Lavender, Joseph's band was actually given "the area's choicest agricultural land, which was exactly what they did not want."<sup>54</sup> The lower

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45. HAINES, NEZ PERCES, *supra* note 4, at 149.

46. MCWHORTER, HEAR ME, *supra* note 25, at 109.

47. HAINES, NEZ PERCES, *supra* note 4, at 149.

48. *Id.*

49. *Id.*

50. LAVENDER, *supra* note 14, at 203.

51. *Id.* at 204.

52. President Grant's Executive Order of June 9, 1873, *supra* note 15.

53. LAVENDER, *supra* note 14, at 205.

54. *Id.*

Nez Perce had not adopted farming to any great extent, but rather had continued traditional means of fishing, hunting and gathering roots.

In any event, Joseph's band did not stop their "roaming" and did not cultivate the land. This led government officials to re-evaluate the situation. In 1875, President Grant rescinded his order and restored the land to the public domain. Any possible fraud in making the Treaty of 1863 did not much matter in the end. The nontreaty Nez Perce would inevitably lose. A decision would eventually be made to give Joseph's band an ultimatum to leave the Wallowa country of Oregon for the reservation in Idaho. By 1877, Joseph's band and other nontreaty Nez Perce would be forced to choose between war and the reservation. In the process of choosing the reservation, a war would begin and Joseph's band would lose the Wallowa country forever.

In the suit brought by Joseph's band in 1941, the U.S. Court of Claims found that the Treaty of 1863 was valid and held the dissenting minority of Nez Perce bound by the action of the majority of the tribe.<sup>55</sup> The dissenting minority included Joseph's band. The Court basically concluded that Principal Chief Lawyer and others represented the Nez Perce tribe "as an entity," thus making the 1863 treaty binding on the entire tribe.<sup>56</sup> The Court failed to recognize Joseph's band as having rights in the Wallowa country separate from the tribe as a whole. The decision effectively denied Joseph's band any compensation for their land that was taken by the U.S. government and placed in the public domain.

In holding Joseph's band bound to the Treaty of 1863, the U.S. Court of Claims accepted the views of the government, which focused principally on notions of majority rule. Potential fraud aside, the government believed that a majority of the Nez Perce tribe agreed to the Treaty of 1863. Regarding the Wallowa area, the Nez Perce Commission formed by the U.S. Interior Department in 1876 reported that "the President claimed that he extinguished the Indian title to it by the treaty of 1863, which bore the signatures of a majority of then chiefs and headmen."<sup>57</sup>

Support for this argument went back to the 1855 agreement entered into at the Walla Walla Council. The Commission found that Joseph's father had signed the Treaty of 1855, thus implying "a surrender of any *specific* rights to any particular portion of the *whole* reserve, which includes the Wallowa Valley, only retaining an undivided interest."<sup>58</sup> The basic idea here, as suggested by the Court of Claims, is that participation in the Treaty of 1855 demonstrated "power in the tribe to act as a whole with reference to all lands

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55. *Joseph's Band of the Nez Perce Tribe of Indians v. United States*, 95 Ct. Cl. 11, 21 (1941).

56. *Id.*

57. 1877 COMMISSIONER'S REPORT, *supra* note 10, at 212.

58. *Id.* at 213.



of the tribe or any of its bands."<sup>59</sup> If this were not the case, according to the Court, then Joseph's father "in that treaty would have been relinquishing lands which he and his band did not own."<sup>60</sup> The Court concluded that "the Nez Perce tribe, as an entity, had the power to make the treaty of 1863 and that the dissenting minority, including the members of plaintiff band and the other nontreaty Nez Percés, was bound by that treaty."<sup>61</sup>

Bound by the claimed majority, Joseph's band was therefore required to live within the limits of the Idaho reservation.<sup>62</sup> Yet the band continued a migratory existence following the Treaty of 1863 and never stayed within the limits of the Idaho reservation. This migratory land-use pattern followed by Joseph's band led government officials to claim that the band never had exclusive rights or title in the Wallowa region. In 1873, Oregon Governor Lafayette F. Grover claimed Joseph's band had never accepted the Wallowa area as a permanent home and that the band simply wanted possession of the land "to gratify a wild, roaming disposition."<sup>63</sup> The Court of Claims likewise believed that Joseph's band had a "peculiar home" that involved seasonal locations, with the Wallowa Valley as only their summer home.<sup>64</sup> This migratory way of life led the Court to conclude that Joseph's band never had "exclusive possession" of the Wallowa region, thus making a claim of title too difficult for the Court to accept.<sup>65</sup>

### III. An Invalid Treaty

#### A. Cultural Considerations

Despite the decision of the U.S. Court of Claims, a case can be made that the 1863 Nez Perce Treaty was an invalid agreement as it pertained to the lower Nez Perce, including Joseph's band, whose leaders did not sign at the Lapwai Council. Support for this goes back to the earliest contact between the Nez Perce and European-American settlers. Intruding whites were often determined to force Indians to adopt aspects of their European cultures. The history of Indian-white relations demonstrates a general lack of willingness on the part of the Americans to understand and accept native cultures.

From the standpoint of the Americans, according to Stephen Cornell, an "Indian problem" had existed for centuries.<sup>66</sup> One factor had been how best to culturally transform Indians into non-Indians.<sup>67</sup> Missionaries were among

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59. *Joseph's Band*, 95 Ct. Cl. at 21.

60. *Id.*

61. *Id.*

62. 1877 COMMISSIONER'S REPORT, *supra* note 10, at 213.

63. OLIVER O. HOWARD, NEZ PERCE JOSEPH 27 (1881).

64. *Joseph's Band*, 95 Ct. Cl. at 21.

65. *Id.* at 20-21.

66. CORNELL, *supra* note 20, at 6.

67. *Id.*

the first to attempt to transform Indian culture. One of the first such missionaries in the Pacific Northwest, Henry H. Spalding, clearly had cultural transformation as a goal. As Alvin Josephy has written, "His aim was eventually to make the Nez Perces a nation of farmers, no longer anxious to leave their homes to chase buffalo on the plains, but settled happily around him and accessible to his religious instruction the full year."<sup>68</sup>

Spalding's goal of transformation demonstrated his ignorance of the tribe's culture. Alvin Josephy has suggested that Spalding had a "lack of understanding of the Indians' cultural background and habits of thinking."<sup>69</sup> Though cultural gaps existed between the Nez Perce and missionary families, according to Josephy, Spalding was not willing "to bridge the gulf on the Indians' terms, and was intolerant of native beliefs and practices that he did not understand or of which he failed to approve."<sup>70</sup> As one example of Spalding's ignorance, he punished by lashings those Nez Perce whom he considered unruly.<sup>71</sup> Such forms of punishment were not practiced by the Nez Perce, who usually showed their disapproval by shaming or ostracizing rather than by physical contact.<sup>72</sup>

Another missionary, Elijah White, who became an Indian agent for the Oregon Territory, also made efforts toward establishing discipline and order among the Nez Perce. White was considered the agent most responsible for instituting the position of "head chief" among the Nez Perce.<sup>73</sup> White also set forth laws which he expected the Indians to follow and enforce upon themselves.<sup>74</sup> Although the tenth and eleventh articles of White's regulations seemed fair in that Indians punished Indians and whites punished whites,<sup>75</sup> in time the laws would not be imposed fairly between Indian and white offenders due to political pressures.<sup>76</sup>

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68. JOSEPHY, *supra* note 6, at 160.

69. *Id.* at 161.

70. *Id.*

71. *Id.*

72. *Id.*

73. MARK H. BROWN, *THE FLIGHT OF THE NEZ PERCE* 23 (1967).

74. JOSEPHY, *supra* note 6, at 229.

75. *Id.* The tenth and eleventh articles of White's laws read as follows:

10) If an Indian raise a gun or other weapon against a white man, it shall be reported to the chiefs, and they shall punish him. If a white person do the same to an Indian, it shall be reported to Dr. White, and he shall redress it. 11) If an Indian break these laws, he shall be punished by his chiefs; if a white man break them, he shall be reported to the agent, and be punished at his instance.

*Id.*

76. *Id.* Josephy claimed that "the Indians would discover that the laws could not be made to apply to white men." *Id.* at 230. This was the case because white offenders were exempted from Indian jurisdiction, giving

whites liberty to exploit, rob, persecute, and murder Indians, for no Indian agent would ever have the power or ability to bring a white man to justice in the face of the public opinion and political opposition of the white settlers, who recognized

As with Spalding's efforts at law and order, White's laws had the effect of substituting more humane Nez Perce forms of disapproval with European-American forms of punishment, such as lashings and imprisonment.<sup>77</sup> This would give rise to the start of the breakdown in Indian-white relations. While an "Indian problem" existed for Americans, according to Stephen Cornell, a "European-American problem" existed for the Indians that challenged tribal survival.<sup>78</sup> Although many Nez Perce actually converted to Christianity and accepted the religious teachings of missionaries like Spalding and White, the creation of European laws and their corresponding punishments went beyond religious pretense.<sup>79</sup> The regulations became more than attempts by missionaries to convert Nez Perce. They became attempts at transforming Nez Perce culture, an aspect of Indian-white relations that led to conflict.

Beyond the imposition of European-American notions of law and order in society was the most crucial factor in the process of cultural transformation. Attempts by missionaries and government officials to introduce farming into Nez Perce culture was clearly part of the American goal of acquiring native lands, which had become the focus of Indian-white relations throughout the country.<sup>80</sup> Americans and Indians generally had different views about land. Both viewed land as providing subsistence, wealth, power and freedom.<sup>81</sup> To Indians, however, land was not something an individual controlled, but rather that with which an individual shared a relationship as part of the community.<sup>82</sup> To Chief Joseph, the earth and the individual were of "one mind" and "the measure of the land and the measure of our bodies" were the same.<sup>83</sup>

Missionaries and government agents often failed to see any value in native views of land. For instance, as the Nez Perce War approached, many whites became preoccupied with those Indians who considered themselves "dreamers," whose beliefs were consistent with a traditional Nez Perce tenet which said the earth was not to be disturbed by man.<sup>84</sup> Such a religion was obviously not compatible with white settlement in Nez Perce territory. Americans saw "dreamers" as fanatics because of their belief that Indians would rise from the dead and drive out whites and re-enter the land of their

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no rights of the Indians and protected each other against the native peoples.

*Id.*

77. *Id.*

78. CORNELL, *supra* note 20, at 7.

79. JOSEPHY, *supra* note 6, at 229.

80. CORNELL, *supra* note 20, at 33.

81. *Id.*

82. *Id.* at 39.

83. *Id.*

84. 1877 COMMISSIONER'S REPORT, *supra* note 10, at 213.

ancestors.<sup>85</sup> But the Americans failed to see that this was but a desperate religion and was not a call to arms.<sup>86</sup>

Government officials mistakenly associated Joseph's band with the dreamer faith. Indian agents viewed the religion as having influenced decisions made by Joseph and other nontreaty Nez Perce band leaders as attempts were being made to place all Nez Perce on the Lapwai reservation in Idaho. As the Nez Perce Commission reported, "Influenced by such belief, Joseph and his band firmly declined to enter into any negotiations or make any arrangement" to reach a final settlement on placement.<sup>87</sup> Though many lower Nez Perce found inspiration in the faith's teachings, most were not ardent followers.<sup>88</sup> Misunderstanding of both Nez Perce religion and the differences that existed among the bands would become a factor leading to war.

Many Americans believed the goal of the dreamer faith was to unite Indians against whites. According to Alvin Josephy, most of the Indian agents at the Lapwai reservation believed Joseph was "a pernicious disciple of a native cult that was threatening the peace and security of the Northwest."<sup>89</sup> The principal military leader who negotiated with and pursued Joseph's band before and during the Nez Perce War, General Oliver O. Howard, saw Joseph as the leader who controlled the behavior of all the nontreaty Nez Perce.<sup>90</sup> Such misconceptions of Joseph's beliefs and power had dire consequences for his band. As part of an effort to put an end to the spread of the religion, Howard would give Joseph's band an unrealistic ultimatum to move within thirty days from their homeland to the reservation.<sup>91</sup> Though not directly bearing on the validity of the Treaty of 1863, this American misunderstanding of the dreamer religion and interference with its practice demonstrated perhaps the worst kind of meddling by government officials in Nez Perce culture which would lead to conflict resulting in war.

Native spiritual views and migratory land-use patterns of tribes like the Nez Perce formed perhaps the greatest hurdle to white settlement. Although Stephen Cornell has suggested that Indian "economy" was difficult to define,<sup>92</sup> as mentioned before, land was certainly an essential resource to those tribes with a migratory pattern of existence. Such land use would not easily mesh with the American farming and grazing culture on the horizon. Missionaries and Indian agents would choose not to balance differences between European-American and native cultures, but rather would aim to transform cultures like that of the Nez Perce as it became necessary for the

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85. *Id.*

86. JOSEPHY, *supra* note 6, at 435-36.

87. 1877 COMMISSIONER'S REPORT, *supra* note 10, at 213.

88. JOSEPHY, *supra* note 6, at 436.

89. *Id.* at 486.

90. *Id.* at 518.

91. *Id.* at 507.

92. CORNELL, *supra* note 20, at 38.

westward expansion of the country. Whether or not affecting the validity of any particular treaty, the transformation of native cultures generally had a significant role in the process of manipulation of tribal organizations necessary for the peaceful cession of native lands to the federal government.

### *B. Political Considerations*

By creating the position of "head chief," Agent White had begun the process of changing the political structure of the Nez Perce tribe. As suggested by historian Mark H. Brown, White had created "an office which did not exist in reality."<sup>93</sup> As mentioned before, autonomy existed among the different Nez Perce villages with little leadership at the tribal and band levels.<sup>94</sup> Village headmen were the usual sources of guidance for the people of their respective villages.<sup>95</sup> Each individual was considered autonomous.<sup>96</sup> Principles of autonomy followed by the migratory tribes became the focus of missionaries and government officials who aimed to influence and change tribal organizations, including that of the Nez Perce.

Though in reality appointed by Indian agents, and without the support of the people of the tribe, these head chiefs did not have much of an impact upon the Nez Perce until the 1855 appointment of Lawyer. As Agent White had done in filling the position, Governor Stevens "steered and secured" the selection of Lawyer as the principal chief largely to ensure strong Christian leadership that would more likely agree to terms proposed by the Americans.<sup>97</sup> With questionable independence, Lawyer was perhaps more easily persuaded to American points of view. But the 1855 agreement itself, however, did not greatly affect the tribe as a whole in terms of loss of territory.

Many of the non-Christian or "heathen" Nez Perce signed the 1855 agreement merely because they were not forced to give up much of their own land. Not until the 1863 Lapwai Council would Nez Perce headmen be asked to give up significant portions of their homelands. This would cause great strife within the tribe due to Nez Perce traditional views of autonomy. According to Francis Haines, "Each village was considered the owner of all the land near the village."<sup>98</sup> If one village did not wish to give up its land to the United States, other villages could not force it to do so. The creation of a head chief by the Americans was therefore meant to resolve this problem.

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93. BROWN, *supra* note 73, at 23.

94. WALKER, *supra* note 2, at 14.

95. JOSEPHY, *supra* note 6, at 32.

96. *Id.*

97. MCWHORTER, HEAR ME, *supra* note 25, at 107.

98. HAINES, NEZ PERCES, *supra* note 4, at 16.

According to Mark Brown, it was "convenient, perhaps necessary from a practical standpoint, to treat the Nez Perce as a single body."<sup>99</sup>

The institution of a single leader of the tribe became problematic in more than one way. Not only did the position go against notions of autonomy and independence, it also ignored the practical realities of the physical environment of the Nez Perce homeland. The isolation and autonomy of the various bands was in part rooted in the surroundings. A single tribal chief, as Mark Brown has also suggested, "ignored the reality created by the deeply incised, narrow valleys in which these people lived — namely that the tribe was composed of bands which were isolated and practically independent of each other."<sup>100</sup>

The seven million or more acres considered the Nez Perce homeland had been sparsely settled by the natives themselves before the intrusion of whites. By 1840, the total Nez Perce population was estimated at four to five thousand and was spread over more than one hundred villages.<sup>101</sup> From these numbers, it is possible to see how the various groupings could become and remain estranged from one another, and therefore not have a significant central tribal government. By the time of the 1863 treaty, the demographics had not changed to any great extent because the 1855 agreement had left much of the Nez Perce homeland in tact.

It was then the 1863 treaty, in particular, that challenged Nez Perce tribal organization. Not until this council would the Nez Perce reservation be substantially reduced in size and would the many headmen be asked to give up their homelands. To make matters even more difficult, it would be the lower "heathen" Nez Perce bands that would be asked to give up the most country. The headmen of these bands were the most attached to traditional Nez Perce tribal organization, and yet their people would have to give the most and take the least. They would also be asked to live near the upper, Christian Nez Perce bands. Such demands made successful negotiations virtually impossible.

In the first place, it had been difficult for the non-Christian bands to accept Lawyer, a Christian, as "principal chief" of the tribe. It then seemed especially unfair to be asked to live among or near these Christians. As historian David Lavender has suggested, "Perhaps the whites had made the amalgamation impossible by being insensitive to the Indians' deep attachment to their homelands."<sup>102</sup> The Treaty of 1863 would eventually split the tribe into Christian and non-Christian groups. Most of the Christians would sign and most of the non-Christians like Joseph's father would not sign. The lower

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99. BROWN, *supra* note 73, at 26.

100. *Id.*

101. WALKER, *supra* note 2, at 13 (referring to an 1840 census conducted by missionary Asa Bowen Smith).

102. LAVENDER, *supra* note 14, at 190.

Nez Perce would also no longer recognize Lawyer as the principal chief.<sup>103</sup> The lower Nez Perce returned to their homeland during the Lapwai Council believing they had fulfilled their tribal obligations.<sup>104</sup> It did not occur to Joseph's father and the others that their lands would be sold in their absence.<sup>105</sup> Only one headman who did not sign the treaty held land within the new reservation boundary, and only one who signed held land outside the boundary.<sup>106</sup>

Despite these circumstances, government officials claimed that a majority signed the treaty. But as suggested earlier, based on the number of headmen who had signed the 1855 treaty and then refused to sign in 1863 at the Lapwai Council, a majority likely never existed. A bare majority at best could have signed onto the second treaty. As Agent John B. Monteith stated in his 1872 annual report to Washington, "The tribe is about equally divided between Treaty and those who term themselves Non-Treaty Indians."<sup>107</sup> David Lavender went so far as to write that "less than half the tribe" recognized Lawyer as their head chief at a time when a majority supposedly signed the 1863 treaty.<sup>108</sup> While government officials claimed that the validity of the 1863 treaty was based upon the principle of majority rule, such was marginally followed at the Lapwai Council. According to Mark Brown, "In the absence of accurate census figures, it is not possible to arrive at a definite and positive answer. The indications are that the majority on which the legality of the treaty stood was a very thin one."<sup>109</sup>

From a political standpoint, the existence of a majority should be irrelevant as to the validity of the treaty. This is so because, as mentioned before, majority rule was never a part of the political traditions of the Nez Perce as a tribe. An individual could comply or not with majority decisions that came down from band or tribal councils,<sup>110</sup> and in theory this should apply to treaties as well. This tradition of individual autonomy represents an automatic roadblock in the process of treaty-making. For this reason, as unrealistic as it may seem, one can argue that no treaty made between the United States and the Nez Perce tribe should be valid in so far as it pertains to any particular individual of the tribe who has dissented.

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103. *Id.*

104. *Id.*

105. *Id.*

106. HAINES, NEZ PERCES, *supra* note 4, at 147.

107. BROWN, *supra* note 73, at 36.

108. LAVENDER, *supra* note 14, at 203.

109. BROWN, *supra* note 73, at 36.

110. JOSEPHY, *supra* note 6, at 32.

### C. Legal Considerations

#### 1. Original Title

In being the first to occupy many tracts of land, American Indians were considered by U.S. law to have original title, which was a right of use or occupancy that was subject to the authority of the federal government.<sup>111</sup> This right of occupancy could be taken away at any time without compensation by those who discover the land.<sup>112</sup> Discovery gave exclusive title to whoever made it.<sup>113</sup> Although it did not end the native right of occupancy, discovery gave the discoverer the exclusive right to take away the aboriginal title to the land either by force or purchase.<sup>114</sup> This rule is consistent with the view that the Fifth Amendment takings clause<sup>115</sup> does not require the federal government to provide just compensation for the taking of land held by those Indians with mere original title.<sup>116</sup>

In the case here, the many villages and bands of the Nez Perce tribe were the original occupants of the land considered their homeland.<sup>117</sup> As government officials have acknowledged, this occupation gave the Nez Perce tribe original title to the land,<sup>118</sup> meaning a right to use or occupy the land so long as the U.S. government, as discoverer, had not extinguished this title by force or purchase.<sup>119</sup> By the time of the 1855 treaty at the Walla Walla Council, this original title had not been extinguished, and the Nez Perce continued to enjoy this right of occupancy in their homeland until the 1863 council at Lapwai.

Though government officials and the descendants of Joseph's band have insisted that the band should have absolute title,<sup>120</sup> Chief Joseph himself had

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111. Clinton, *supra* note 3, at 1039.

112. *Id.*

113. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

114. *Id.* at 587.

115. The Fifth Amendment to the United States Constitution states that "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

116. Clinton, *supra* note 3, at 1039. This rule was set forth by the Supreme Court in the case of *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

117. *See, e.g.*, Joseph's Band of the Nez Perce Tribe of Indians v. United States, 95 Ct. Cl. 11, 14-15 (1941) ("The Nez Perce Tribe of Indians originally occupied an area in what is now northwestern Idaho, northeastern Oregon, and southeastern Washington . . .").

118. *See, e.g.*, HENRY CLAY WOOD, THE STATUS OF YOUNG JOSEPH AND HIS BAND OF NEZ-PERCE INDIANS UNDER THE TREATIES BETWEEN THE UNITED STATES AND THE NEZ-PERCE TRIBE OF INDIANS, AND THE INDIAN TITLE TO LAND 42-45 (Portland, Or., Assistant Adjutant General's Office, Department of the Columbia 1876) (concluding that Joseph's band had original title or a right of occupancy, but never had exclusive title to the Wallowa Valley). The author was Assistant Adjutant General for the Department of the Columbia.

119. Clinton, *supra* note 3, at 1039.

120. *See, e.g.*, HOWARD, *supra* note 63, at 33 (claiming that Joseph's band did not want "an undefined right of occupancy," but rather "an *absolute title to the lands*, an *absolute* and



only wanted the right to occupy the Wallowa Valley. Two years after the Nez Perce War, Joseph reiterated the view of his father that "no man owned any part of the earth, and a man could not sell what he did not own."<sup>121</sup> While no other Indians had ever claimed a right to the Wallowa Valley,<sup>122</sup> this did not mean that Joseph believed his band had an exclusive right to be there.

On the contrary, Joseph's band had been willing to tolerate white settlement in the region so long as they could remain there as well. The band would have remained on peaceful terms with the whites who had moved into the Wallowa Valley had it not been for the threats and taunts, edging them ever closer toward war.<sup>123</sup> Though the band had been bothered by white settlers in the area, Joseph believed "some of these were good men," and the band was able to live "on peaceful terms with them, but they were not all good."<sup>124</sup> It was those who were "not all good" that inevitably led the Nez Perce and the government to conflict. An inability on the part of white settlers to accept the occupancy of Joseph's band in the Wallowa Valley became the true problem.

Known widely as the peaceful tribe of Indians, the Nez Perce had often been able to live in peace with white intruders. As evidence of Nez Perce distaste for the killing of any man, after the War of 1877, Joseph had stated, "I would have given my own life if I could have undone the killing of white men by my people."<sup>125</sup> Not until war had true conflict ever arisen between the Nez Perce and the whites. Perhaps the best evidence of the willingness of Nez Perce to live in peace with Americans was the compromise reached in 1873, which divided the Wallowa Valley in half between white settlers and Joseph's band.

In any event, it is evident from the history of relations between the Nez Perce and Americans that Joseph's band may have been content to jointly occupy their homeland with whites, and this with only a right to occupy based on their original title. Since this title had never been extinguished either by force or purchase before the 1855 treaty, Joseph's band should still have their original title to the Wallowa Valley. But if this lack of extinguishment is not enough, then the Treaty of 1855 at the Walla Walla Council should have set in stone the band's right to occupy their homeland.

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*independent sovereignty*, and refuse even to be limited in their claim and control, necessity, humanity"); see also *Joseph's Band*, 95 Ct. Cl. at 18 (where the plaintiff band claimed exclusive ownership of the Wallowa Valley).

121. Young Joseph, *An Indian's Views of Indian Affairs*, 128 N. AM. REV. 417 (1879).

122. *Id.* at 418.

123. *Id.* at 420.

124. *Id.*

125. *Id.* at 425.

## 2. *Recognized Title*

To establish rights in land stronger than aboriginal title, under American law the U.S. Congress must "recognize" the title, which was usually done by statute or treaty with Indian nations. This recognized title was then given the full protection of the takings clause of the Fifth Amendment.<sup>126</sup> This meant that "just compensation" must be provided by Congress for the taking of any recognized property rights.<sup>127</sup> The history of treaty-making and negotiations between the Nez Perce and the Americans demonstrates a recognition of rights in the Wallowa country for Joseph's band.

By the Treaty of 1855 and its later ratification by the U.S. Congress, the Nez Perce received recognized title to that portion of their homeland included in the first reservation. It was at this time that Joseph's band acquired recognized title to the Wallowa Valley. This first official recognition of rights in the homeland of Joseph's band would not be the last. In the time period following the Walla Walla Council, another treaty would be worked out between the Nez Perce led by Chief Lawyer and the U.S. government officials.

Recognition of a need for this second treaty came about by 1861 when Edward R. Geary, the Superintendent of Indian Affairs for the State of Oregon and the Washington Territory, became concerned that problems would arise between the increasing number of gold miners and the Nez Perce.<sup>128</sup> The 1855 Walla Walla Treaty had specified that the reservation was for "the exclusive use and benefit" of the Nez Perce tribe.<sup>129</sup> From the American point of view, some adjustment had to be made in this provision of the treaty.<sup>130</sup>

A council was then held at Lapwai. Joseph's father and other lower Nez Perce were not asked by the government to join this meeting.<sup>131</sup> Only Lawyer and his subchiefs, representing the upper Nez Perce, were called upon to meet with Geary.<sup>132</sup> This was done because the gold rush was happening on land occupied by only the upper Nez Perce.<sup>133</sup> By not even attempting to include Joseph's father and others in this council because their homelands were not affected by the miners, the government was effectively recognizing that different Nez Perce bands had control over different lands, which would

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126. Clinton, *supra* note 3, at 1037.

127. *Id.* at 1036.

128. DRURY, *supra* note 9, at 168.

129. See Treaty with the Nez Perce, June 11, 1855, U.S.-Nez Perce, art. 2, 12 Stat. 957, 957 (ratified Mar. 8, 1859).

130. DRURY, *supra* note 9, at 169.

131. *Id.*

132. *Id.*

133. *Id.*

later undermine the view that Lawyer and other upper Nez Perce could sign away the lands of the lower Nez Perce in the 1863 treaty.

The second article of this 1861 adjustment to the 1855 Walla Walla Treaty prohibited any whites from living elsewhere on the reservation unless permission had been granted by the proper parties.<sup>134</sup> The government apparently did not feel it was necessary to contact those Nez Perce leaders whose village or band lands were not being subjected to intrusion by the gold miners. A contradiction in policy can be found here. When decisions had to be made regarding lands occupied by only the upper Nez Perce, U.S. government officials obviously felt no obligation to include the lower Nez Perce. But then in 1863, when only the lower Nez Perce would be asked to give up most of their homelands, the upper Nez Perce would be largely relied upon to form a majority in signing the treaty.

Gold discoveries had led to an increasing number of treaty violations by miners. This became an early indication to the government officials that a new treaty had to be worked out that would greatly reduce the size of the Nez Perce reservation.<sup>135</sup> Although miners were not yet invading the Wallowa Valley, the commissioners believed that the valley was too large for the number of Nez Perce living there and too far from the Indian agency located at the proposed Lapwai reservation.<sup>136</sup> No matter what the government's reasons for a new reservation, however, Joseph's father and most other lower Nez Perce would not sign onto the treaty at the 1863 Lapwai Council.

Government enforcement of the Treaty of 1863 would take time. Congress would not ratify the treaty for nearly four years and Lawyer would often complain about the government's failure to fulfill its obligations under the treaty.<sup>137</sup> Joseph's people were not immediately affected by the treaty, as they were allowed to continue in their migratory land-use pattern for a number of years. The treaty would nevertheless loom over the lower Nez Perce and the Indian agents concerned as more and more white settlers began to appear in the Wallowa Valley.<sup>138</sup>

In 1873, Joseph finally met with the Indian agents on the Lapwai reservation.<sup>139</sup> John B. Monteith and T. B. Odeneal first tried to convince Joseph to move his band from the Wallowa Valley onto the reservation. But according to Alvin Josephy, this did not work and "Joseph's intense sincerity and force of logic soon convinced the government men that something had definitely gone awry in 1863."<sup>140</sup> Joseph's father had signed the 1855 treaty

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134. *Id.*

135. *Id.* at 175.

136. *Id.* at 181.

137. JOSEPHY, *supra* note 6, at 441-42.

138. *Id.* at 455.

139. *Id.*

140. *Id.*

only because it had recognized the Wallowa area as the homeland of his people and because no other Nez Perce band had ever claimed the region belonged to any but Joseph's band.<sup>141</sup> He had not signed the treaty with the belief that he was giving up rights in the land to the whole tribe. He had signed simply to keep his band's homeland. In their report to Washington that year, Monteith and Odeneal questioned whether Joseph's band should be held to the Treaty of 1863, "If any respect is to be paid to the laws and customs of the Indians then the treaty of 1863 is not binding upon Joseph and his band. If so, then Wallowa Valley is still part of the Nez Perce reservation."<sup>142</sup>

A compromise was then reached between Joseph's band and the Indian agents. They agreed to divide the Wallowa Valley between Joseph's band and the white settlers. Joseph and his people were willing to share and live with the whites so long as they could continue their way of life. A division of the region on an east-west basis would have permitted the band to fish, hunt and gather roots in traditional fashion. Perhaps for that reason, the Executive Order of 1873 issued by the government instead divided the land north and south, leaving the Nez Perce with the best agricultural land.<sup>143</sup> The U.S. government wanted the Nez Perce to end their "roaming" and to settle and become farmers, and that was likely the reason why the executive order divided the land in such a fashion.<sup>144</sup>

This simply was not satisfactory to Joseph's band, which then ignored the order and continued to migrate as before. In 1875, the President rescinded his order and the entire Wallowa region was reopened to white settlement. While tensions between lower Nez Perce and Americans heightened in years that followed, some of the government officials nevertheless recognized injustices laid upon Joseph's band and other lower Nez Perce.

In his writings following the Nez Perce War of 1877, General Oliver O. Howard contemplated how the government would recognize Indian title to land in one treaty and then later take it back. With regard to such inconsistent action, Howard once wrote that "wiser heads than Joseph's have been puzzled by this manner of balancing the scales."<sup>145</sup> Howard believed that Joseph and his band always had rights in the Wallowa Valley. In 1875, shortly after receiving his orders to handle the Nez Perce matter, Howard reported to Washington that it was "a great mistake to take from Joseph and his band of Nez Perces Indians that valley; . . . and possibly congress can be induced to let these really peaceable Indians have this poor valley for their own."<sup>146</sup>

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141. *Id.* at 459.

142. *Id.* at 456.

143. LAVENDER, *supra* note 14, at 205.

144. *Id.*

145. HOWARD, *supra* note 63, at 27.

146. *Id.* at 31.

According to Alvin Josephy, Howard "sympathized with the pitiable situation of Joseph's people, and secretly sided with them."<sup>147</sup> Josephy found support for this theory in Howard's "tortured attempts to explain the causes of the war against Joseph in his books" that he wrote following the 1877 war.<sup>148</sup>

In 1876, the U.S. Interior Department formed a commission to look into the matter of the Nez Perce. General Howard and Major Henry Clay Wood were among the five appointed. Wood's signature would not appear on the final report. Wood, as the Assistant Adjutant General to the Department of the Columbia, would write his own official report dissenting on the commission's finding that Joseph's band should be held to the Treaty of 1863. Wood wrote:

The non-treaty Nez-Perces cannot in law be regarded as bound by the treaty of 1863; and in so far as it attempts to deprive them of a right to occupancy of any land its provisions are null and void. The extinguishment of their title of occupancy contemplated by this treaty is imperfect and incomplete.<sup>149</sup>

Wood had distinguished between an exclusive right to the land and a right of occupancy. Wood never claimed that Joseph's band had exclusive title to the Wallowa Valley, but rather had a tenancy in common with other Nez Perce.<sup>150</sup> Wood believed this right of occupancy, however, could not be taken away without the consent of the band.<sup>151</sup> Wood also believed that if failure to fulfill treaty obligations nullified a treaty, then "the Nez Perces, undoubtedly, were at liberty to renounce the treaty of 1855 (and probably the treaty of 1863), the Government having violated the treaty obligations."<sup>152</sup> Regarding the President's revocation of the Executive Order of 1873, Wood claimed, "If *not* a crime, it *was* a blunder."<sup>153</sup> But the commission and the government would not accept Wood's views on the matter.

The government would follow the line of arguments put forth by Oregon Governor Grover, who claimed that Joseph's band did not want the Wallowa Valley for a reservation or home, but rather sought "to gratify a wild, roaming disposition."<sup>154</sup> The lower Nez Perce would be held to an invalid treaty and Joseph's band would get caught up in a war as a result. Ignoring Wood's claim that it was not exclusive title but rather a right of occupancy that Joseph's band sought in the Wallowa Valley, the government and later the U.S. Court of Claims would follow the view that the band's migratory land-

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147. JOSEPHY, *supra* note 6, at 475.

148. *Id.*

149. WOOD, *supra* note 118, at 41.

150. *Id.* at 35.

151. *Id.* at 44.

152. *Id.*

153. *Id.* at 34.

154. HOWARD, *supra* note 63, at 27.

use pattern failed to give them any rights in the valley. The lower Nez Perce would not only lose the War of 1877, but would also lose rights in their homeland that had been recognized.

Not only had the rights of Joseph's band in the Wallowa area been recognized by the 1855 treaty, but also by President Grant's Executive Order of 1873. While it is not certain as to whether executive orders may give title protected by the takings clause of the Fifth Amendment,<sup>155</sup> the order here regarding Joseph's band should bear to some degree on the recognition of their right to occupy their homeland. This is so because the order was issued ten years after the Treaty of 1863, when Joseph's band had supposedly given up rights to the Wallowa area. The executive order can be viewed as evidence that if the 1863 treaty took land from Joseph's band, then it must have been an unjust taking, as the order returned half of the Wallowa region to the band.

A parallel can be drawn here with the situation involving the Sioux nation where that tribe had first been given recognized title to the Black Hills by the Fort Laramie Treaty of 1868.<sup>156</sup> But in 1876, an agreement that took away Sioux rights to the Black Hills was reached between the government and only about one-tenth of the adult male Sioux population.<sup>157</sup> The agreement was codified by Congress the following year despite the fact that the 1868 treaty had specified that any further cession of lands from within the Great Sioux Reservation would require the approval of at least three-fourths of Sioux adult males.<sup>158</sup> Because this requirement had not been followed, the 1876 agreement was deemed a taking by the U.S. Court of Claims.<sup>159</sup> The situation of the Sioux was not unlike that of the Nez Perce.

A majority of the Nez Perce headmen representing both lower and upper bands had signed the 1855 treaty. However, this was not the case with the 1863 agreement, where only one or two lower Nez Perce had signed. Although the Treaty of 1855 had not stipulated that the consent of a majority of lower Nez Perce was necessary for any further cessions, such a requirement could be implied by the fact that the validity of the first treaty had stood to a large extent on having such a majority. As the U.S. Supreme Court upheld the finding of the Court of Claims that a taking had occurred by the 1876 agreement with the Sioux,<sup>160</sup> the Court of Claims should have likewise found that the Nez Perce Treaty of 1863 was a taking of recognized property rights from those bands whose headmen did not sign the agreement.

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155. Clinton, *supra* note 3, at 1037.

156. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 (1980).

157. *Id.* at 381-82.

158. *Id.*

159. *Sioux Nation of Indians v. United States*, 601 F.2d 1157 (Ct. Cl. 1979), *aff'd*, 448 U.S. 371 (1980).

160. *United States v. Sioux Nation of Indians*, 448 U.S. at 424.

### 3. Just Compensation

Once a taking has occurred under the Fifth Amendment, it then becomes necessary to determine the "just" compensation due the party whose property has been taken. The issue regarding "just" compensation is whether Congress has made a good faith effort to provide full value for the land taken by its power of eminent domain.<sup>161</sup> The inquiry is an objective test that the government cannot avoid by asserting that it has acted in good faith.<sup>162</sup> In the case of the Sioux nation, the only consideration given to the tribe for the taking under the 1876 agreement had been about \$43 million worth of food provided to the tribe over the course of three-quarters of a century.<sup>163</sup> Such rations were deemed inadequate consideration by the Court of Claims, thus implying an obligation on the part of the government to provide "just" compensation.<sup>164</sup>

The Sioux were then awarded \$17.5 million plus five percent interest dating from 1877, which came to about \$105 million total for the more than seven million acres of the Black Hills.<sup>165</sup> This award determination was based on the fair market value of the land at the time of the taking plus interest that could have been earned over the years by holding the land. As was done for the Black Hills, courts generally look at the fair market value in arriving at a monetary amount for just compensation.<sup>166</sup> An allowance for interest is also given for unconstitutional takings.<sup>167</sup>

In 1959, the Indian Claims Commission awarded the Nez Perce about \$4,650,000 for the more than six million acres taken by the 1863 treaty.<sup>168</sup> This figure was approximately sixty-seven cents an acre.<sup>169</sup> Of this amount, the descendants of Joseph's band were given about fourteen percent for the Wallowa country, for which the band had never before accepted

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161. See *Three Affiliated Tribes of Fort Berthold Reservation v. United States*, 390 F.2d 686, 691 (Ct. Cl. 1968).

162. *Sioux Nation of Indians v. United States*, 601 F.2d at 1162.

163. *United States v. Sioux Nation of Indians*, 448 U.S. at 420.

164. *Id.* at 424.

165. EDWARD LAZARUS, *BLACK HILLS WHITE JUSTICE* 375 (1991).

166. Clinton, *supra* note 3, at 1040.

167. See *United States v. Sioux Nation of Indians*, 448 U.S. at 387 (citing *United States v. Tillamooks*, 341 U.S. 48, 49 (1951)).

168. Francis Haines, *The Nez Perce Tribe Versus the United States*, *IDAHO YESTERDAYS*, Spring, 1964, at 25.

169. *Id.* This calculation is based on a taking of 6,932,270 acres. A more accurate calculation would be approximately 75 cents an acre based on a taking of 6,183,274 acres, which is 6,932,270 acres less the 748,996 acres given to the Nez Perce under the 1863 treaty.

compensation.<sup>170</sup> This award was made to compensate for inadequate payments for the lands sold to the government by the 1863 treaty.<sup>171</sup>

Despite this attempt by the government to make up for the inadequacies of previous payments for the land taken by the 1863 treaty, the question remains whether "just" compensation has been given for what should have been deemed a taking under the Fifth Amendment. If a taking occurred, which is likely the case, then the amounts so far paid to the Nez Perce, including Joseph's band, are simply not sufficient. As in the case of the Sioux, interest dating back to the time of the taking should also be provided in addition to the land's fair market value at the time of the taking.

#### IV. Conclusion

The Treaty of 1863 between the Nez Perce and the United States should never have been made or should have subsequently been deemed invalid. The government's reliance on the theory of majority rule failed in more than one respect. First, it was never established with certainty that a majority of Nez Perce leaders signed the treaty. Second, if a majority did sign the treaty, it did not represent the lower Nez Perce. Third, the government should have worked out a compromise with each Nez Perce band rather than appoint a principal chief of the entire tribe.

The U.S. Court of Claims should not have taken the easy way out by accepting the government's position regarding the treaty. Based on the above discussion of the invalidity of the Treaty of 1863, Joseph's band should have received rights in the Wallowa Valley or at least appropriate compensation. Yet the Court's decision added little to the damage, which had been done decades before by the government. It was the Nez Perce Commission that truly buried Joseph and his people.<sup>172</sup>

The findings of the 1876 commission had suggested that force was needed to put the lower Nez Perce onto the reservation in Idaho.<sup>173</sup> But two of the commissioners, General Howard and Major Wood, had previously stated that Joseph's band had a legal claim to the Wallowa Valley.<sup>174</sup> Francis Haines has suggested that these facts "indicate a desire on the part of the commissioners to punish Joseph and his little band" since "when they reached their final decision they decided every point against the chief and his people, whose only crime had been that they wanted to keep their homes and had dared say so in council."<sup>175</sup>

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170. NATIONAL PARK SERV., U.S. DEP'T OF INTERIOR, NEZ PERCE COUNTRY: A HANDBOOK FOR NEZ PERCE NATIONAL HISTORIC PARK, IDAHO 173 (1983).

171. *Id.*

172. HAINES, NEZ PERCES, *supra* note 4, at 201.

173. 1877 COMMISSIONER'S REPORT, *supra* note 10, at 214.

174. HAINES, NEZ PERCES, *supra* note 4, at 201.

175. *Id.*



Any such invidious motives on the part of the commissioners, however, should not be the sole reason why Joseph's band should have been recognized by the Court of Claims as having rights in the Wallowa Valley. Joseph's band and other lower Nez Perce should not have been held to the 1863 treaty and should have received rights in their homeland because they had not signed the agreement and had not authorized anyone else to sign for them. In the end, the government was wrong to force Joseph's band out of their homeland in 1877. Also, the Court of Claims was wrong not to recognize some form of title, such as a right to use or occupy the Wallowa Valley, which had never been legally extinguished.

For the above reasons, it was appropriate for the Nez Perce, and especially for the descendants of Joseph's band, to accept in 1959 the compensation provided to make up for the past inadequate payments for the surrender of their homeland under the 1863 treaty. The question remains, however, whether the \$4,650,000 award and the past inadequate payments are "just" compensation for what the Court of Claims should have deemed an unconstitutional taking of a right of occupancy of those Nez Perce bands that did not sign the 1863 agreement. Joseph's band and its descendants, who had not accepted any compensation before 1959, may yet be deserving of special consideration, perhaps in the form of interest dating back to 1863, for the taking of their right to occupy the Wallowa Valley of northeastern Oregon.