

Chief Joseph's band of Nez Perce deserve to have all their homeland returned

By Michael J. Moiso, 2024

In June of 2024, the Nez Perce took another small step towards reclaiming their homeland with the acquisition of 17 acres overlooking the Wallowa lake. With the acquisition in 2020 of “the place of the boulders” at the base of the Wallowa mountains that includes a Nez Perce village site and a bluff where Chief Joseph is said to have held council, the path to reclaiming the Wallowa valley suddenly seems more attainable. They are both small pieces of land figuratively speaking, but a huge leap forward in the movement to reclaim their homeland.

In 1995, the descendants of Chief Joseph's band had organized a new presence in Joseph, Oregon with an interpretive center and pow-wow grounds, which resulted in the establishment of the Wallowa Band Nez Perce Trail Interpretive Center. By 2000, the Center had purchased a total of 320 acres and had become known as the Nez Perce Wallowa Homeland. The annual events at the Center bring together the descendants of the band, other Nez Perce members and the local community to honor and celebrate their culture and history. In 1996, the nonprofit Trust for Public Land (TPL) a national land-trust conservancy in partnership with the Nez Perce, purchased 10,300-acre property, known as Chief Joseph Ranch, as a wildlife preserve that is managed by the Nez Perce, not the federal government. Subsequent purchases have increased the preserve, now called the Precious Lands Wildlife Area, to 16,286 acres.

The effort for all these acquisitions involved a wide coalition of people and entities and continued the quest for a presence in the Wallowa Valley. The Interpretive Center and Wildlife Area were both important in re-establishing a foothold in the Wallowa Valley, and the purchase of ‘the place of boulders’ brings the dream of a permanent living presence one step closer.

It is important to keep the perspective that the U.S. government took close to one million acres from Chief Joseph's band with respect to the Wallowa Valley. The government took close to seven million acres from the Nez Perce nation overall. That is why these acquisitions are only a step towards what Chief Joseph's band deserves which is property that encompasses a much larger swath of the Wallowa Valley, lake and mountains. Any and all descendants of Chief Joseph's band deserve to have a place to live and carry on their traditions and culture.

Getting the Wallowa Valley returned to his people was a central part of Chief Joseph's story. He believed the Wallowa Valley was essential to the preservation of his band's language, culture, and way of life. It started when Chief Joseph and his band refused to move to a reservation created by an 1863 Treaty that took away 90% of the land granted the Nez Perce in an earlier 1855 Treaty that included the Wallowa Valley. It led to a tragic story that still resonates today.

There have been a plethora of books and articles written about the plight of Chief Joseph and his band of Nez Perce including two New York Times best sellers in 2005 and 2017. Both provide impressive accounts of the failed negotiations of the 1863 Treaty and Chief Joseph's attempt to flee to Canada with his band.¹ There was a Hollywood movie made in 1975, "*I Will Fight No More, Forever*" highlighting the war-weary flight to Canada that would make young Chief Joseph famous for his evasion of the Army. In 2012, Chief Joseph's war blanket sold for \$877,000 proving his notoriety as a military strategist is still intact. The irony of this story is that Chief Joseph never wanted notoriety for his military accomplishments, all he wanted was for his people to be allowed to return to the Wallowa Valley. He spent the remainder of his life lobbying Washington to get his homeland returned to no avail. Young Chief Joseph was the first to assert the legal argument that the 1863 Treaty was an unconstitutional taking.

The descendants of Chief Joseph's band carried on the fight when they brought a case before the U.S. Court of Claims in 1929 & 1930 claiming the 1863 Treaty was an invalid agreement, but the court sided with the government and held the treaty was valid. In 1960, members of the collective Nez Perce tribe signed a Compensation Settlement that provided for a recalculation of the value of the land taken, but it did not have majority support from the descendants of Chief Joseph's band. In 1994, the Nez Perce including representatives of Chief Joseph's band appealed a case to the 9th Circuit Court of Appeals seeking fishing rights. Part of the argument from Chief Joseph's band involved succession rights as an independent band within the tribe, but the 9th Circuit knocked this down holding the band had not proven they had maintained an independent identity. Proof of this independence would come a year later with the creation of the Interpretative Center in 1995 showing the 9th Circuit was wrong. There have been several other court cases over the years, but those highlighted relate most to the possibility of getting a large portion of the Wallowa Valley back in the hands of Chief Joseph's band.

It is humbling to think about the tremendous effort put in by all those involved in the court cases and appeals, the creation of the Interpretative Center and Reclamation Project, the establishment of the Wildlife preserve and the purchase of the 148 acres. Together, it represents hope and conviction in getting more of the Wallowa Valley returned. Anyone and everyone involved with these efforts deserves to be acknowledged for giving their time and talent to help keep the dream alive. The plight of Chief Joseph's band has touched a lot of people over the last 160 years and it still does. Perhaps it was Helen Hunt Jackson, who in her book *A Century of Dishonor*, published in 1881 provided the first full written account of the double-dealing approach the government took with the 1863 Treaty and forcing Chief Joseph and his Band out of the Wallowa valley.

The purpose of this article is to suggest three potential ways for getting the government to cede more of the Wallowa Valley back to Chief Joseph's band. The first suggestion is the

¹ Kent Nerburn, *Chief Joseph & the Flight of the Nez Perce* (2005); Daniel J. Sharfstein, *Thunder in the Mountains* (2012)

possibility of an Executive Order authorizing the Secretary of the Interior to establish a new independent Reservation in the Wallowa valley. This option requires a favorable White House, but is based on a precedent set by the Executive Order signed by President Ulysses S. Grant in 1873 returning the land back.

The second suggestion is by a legislative Act setting aside federal land for the band's sole use. There is no direct precedent for this, but Congress is very active with laws that effect Native American tribal land and with a sympathetic Congress it could happen. It also requires a favorable Congress.

The third and desired suggestion is an appeal of the U.S. Court of Claims case of 1930 (opinion published in 1941). It requires a legislative act establishing a De Novo review of the U.S. Court of Claims case of 1930, but there is a precedent for Congress passing an act establishing a De Novo review with the Sioux Nation in 1980.² If De Novo review is allowed, the appeal would rely on the legal argument of a Bad Faith Agreement with the 1855 Treaty that would render the 1863 Treaty invalid with respect to the Wallowa Valley. This appeal would seek to introduce new testimony from Official Records not considered by the U.S. Court of Claims.

The United States Government still owns considerable acreage in the Wallowa Valley as federal land and has the power to return it to its rightful owner. With the right presentation to the President and Congress showing the travesty that took place with the 1863 Treaty, a path could be forged to return the land so that Chief Joseph's band could finally go home.

History of the 1855 & 1863 Treaties

The first treaty with the Nez Perce took place in 1855. It was negotiated by both upper and lower bands of the Nez Perce including old Chief Joseph's band that occupied the Wallowa Valley. The 1855 Treaty granted the Nez Perce almost seven million acres of land in Oregon, Washington and Idaho including the Wallowa Valley that belonged to old Chief Joseph's band. There were fifty-eight different bands within the Nez Perce tribe at the time of the 1855 Treaty negotiations.

The Nez Perce operated in an autonomous structure with each band occupying its own territory, but the final version of the 1855 Treaty failed to specify this in writing. The government had negotiated directly with old Chief Joseph to get his assent and assured him orally of his rights to the Wallowa Valley, but it didn't say this in the 1855 Treaty. Instead, the 1855 Treaty referred to the Nez Perce as one entity stripping away the independent autonomous ownership of each band despite promises that the treaty did reflect these rights.

Old Chief Joseph didn't know to object because he was told his rights to the Wallowa Valley were intact. His band enjoyed relative peace after signing the 1855 Treaty and had no

² United States v. Sioux Nation of Indians, 448 U.S. 371 (1980)

reason to doubt the sincerity of the government representatives who told him the valley was theirs. But settlers and miners slowly began to pour into the Wallowa Valley and the other territories after gold was discovered in the late 1850's. As a result, the U.S. government in 1863 introduced a new treaty taking back ninety-percent of the overall land granted in the 1855 Treaty, including the Wallowa Valley, reducing the legal description from seven million acres to around seven-hundred thousand acres in exchange for money and more government support. It was during the negotiations for the 1863 Treaty that old Chief Joseph learned that the 1855 Treaty did not include language protecting his right to the Wallowa Valley and that he had been duped.

Old Chief Joseph refused to sign or agree to the 1863 Treaty as did many Chiefs of the other bands. Old Chief Joseph walked out of the negotiations, but the government accepted the signatures of a small majority of Chiefs and non-Chiefs even though there were no signatures from anyone from Chief Joseph's band. Old Chief Joseph had to grapple with the fact that he had been misled with the 1855 Treaty with respect to protecting his rights giving him zero leverage to protect his interests with the 1863 Treaty that was attempting to take back the Wallowa Valley without his assent. This would later become the central issue with the 1930 U.S. Court of Claims of whether Chief Joseph had a recognized independent title to the Wallowa Valley with the 1855 Treaty or was that right extinguished because the final written document only granted an undivided interest in the Nez Perce as a whole with no independent rights. As mentioned, the problem with the Court's decision denying his rights is it ignored the oral promises made by the government and that they misled Chief Joseph about this issue. It is the very definition of a bad faith agreement that is discussed further later in this article.

Old Chief Joseph kept up the protest after walking out of the 1863 negotiations and continued his claim of ownership of the Wallowa Valley. The treaty was ratified by Congress in 1869 but the government continued to allow Chief Joseph and his band to occupy the Wallowa Valley exclusively and continued to pursue his mutual assent to the 1863 Treaty, after it had been ratified.

In 1871, old Chief Joseph succumbed to illness and passed away. His eldest son also named Joseph took over the mantle as the band's Chief. Young Chief Joseph continued the claim that his band had exclusive title to the Wallowa Valley and that the 1863 Treaty was not a valid agreement.

Young Chief Joseph was immediately successful with his lobbying efforts when a commission was created in 1873 that led to an executive order issued by President Ulysses S. Grant re-establishing title to the Wallowa Valley to Chief Joseph's band in a new independent reservation. This was a pivotal moment because the President of the United States was agreeing that Chief Joseph's band had a right to the Wallowa Valley. By 1875, however, pressure from Oregon's governor and congressmen who opposed the executive order convinced Grant to issue a new executive order rescinding the 1873 order.

Throughout this time period from the 1863 Treaty up to the second 1875 executive order, the band continued to live in the Wallowa Valley without interference from the U.S. government. In 1876, a new commission was created and sent to try and reach a settlement with young Chief

Joseph, but these negotiations failed to produce a compromise. In 1877, the government gave young Chief Joseph a 30-day notice to vacate the valley and relocate to the Lapwai reservation in Idaho. He chose instead to flee to Canada as a chance to continue their way of life by joining Sitting Bull's tribe who had already fled there.

They engaged in multiple battles along the way against the U.S. Army who was trying diligently to capture them before they reached Canada. They started in Oregon and ended 1500 miles later at the Bears Paw Mountain in Montana, where they were captured 40 miles short of the Canadian border. This is when young Chief Joseph uttered his famous line, "I will fight no more, forever", which is the title of the 1975 movie.

Chief Joseph was confined on a reservation in Leavenworth, Kansas with most of his band. He was eventually relocated to the Colville Reservation in Washington while the rest of his band was relocated to the Lapwai Reservation in Idaho with the exception of some who remained in Kansas. Chief Joseph was not allowed to move back to the Wallowa Valley but he did visit the area on many occasions trying to get the local community to support the return of his homeland. He continued his mission and travelled the country pleading his case to political leaders and dignitaries for the remainder of his life. Despite a promise on his father's deathbed that he would get the valley returned to their people, young Chief Joseph died in 1904 having failed to do so. It is said he died of a broken heart.

Twenty-five years later, however, the descendants of Chief Joseph's band resurrected the cause to get the Wallowa Valley returned with the appeal to the U.S. Court of Claims.

The 1929 & 1930 U.S. Court of Claims cases

In 1929, Congress passed an Act authorizing the Nez Perce to file treaty claims with the U.S. Court of Claims.³ In March of that year, the descendants of Chief Joseph's band filed their first claim based on the allegation that the government had breached its obligations under the 1855 Treaty to protect the tribe from settlers and prospectors who were trespassing. The court held that the government did not have an obligation under the 1855 Treaty to provide protection against encroachments by settlers and miners.⁴

In 1930, the band filed a second claim based on an argument that the 1863 Treaty was not valid with respect to the Wallowa Valley because Chief Joseph had title and did not provide his mutual assent to the agreement. The issue in this 2nd claim was whether Chief Joseph's band had a recognized title in the Wallowa Valley which would mean his signature was required for the 1863 Treaty to be valid with respect to the valley. The U.S. Court of Claims held that Chief Joseph did not have a recognized title and that he gave up any independent rights when he signed the 1855 Treaty, that the signatures on the 1863 Treaty by a simple majority of the Nez Perce bands was satisfactory and that his mutual assent was not required.⁵

³ Act for the Relief of the Nez Perce Tribe of Indians, Ch 275, 45 Stat. 1249 (1929)

⁴ Joseph's Band of the Nez Perce Tribe of Indians v. United States, 95 Ct. Cl. 1, 8-10 (opinion published in 1941)

⁵ Joseph's Band, *supra* at 11

The court accepted the government's argument that the written 1855 Treaty established ownership of the lands described within the treaty with the Nez Perce as one-entity and that Chief Joseph had waived any independent title claim in the Wallowa Valley when he signed the 1855 Treaty. What the government didn't present, however, was the evidence showing the truth that old Chief Joseph had been misled about what was promised and what ended up in the written treaty.

The official records of the negotiations of the 1855 Treaty is key evidence regarding the history of the negotiations and the juxtaposition between the promises made and the written agreement. It appears that this evidence was not presented in the 1930 U.S. Court of Claims case. Testimony from the official records is discussed later in the appeal section of this article, but if the Court did not see these records then that is the opening for an appeal.

The 1960 Compensation Agreement

In 1960, the Nez Perce tribe entered into an agreement with the government for additional compensation from the takings under the 1863 Treaty.⁶ The tribe was represented by individuals from the collective bands within the Nez Perce. The only tie to Chief Joseph's band was an individual whose parents were members of Chief Joseph's band.⁷ It is dubious whether the band was legally represented in the settlement. The final judgment signed in 1960 emphasizes this point when it stipulated, "an agreement was made through selective members of the tribe, acting for the tribe."⁸ There was 200 of the members of the Nez Perce dating back to 1886 present for the 1960 compromise settlement with 141 voting in favor of the compromise and 58 choosing to abstain from voting at all.⁹ It is not clear how many descendants of Chief Joseph's band were involved or consulted about the compromise. It can still be argued that the government pressed forward with a compromise of convenience denying Chief Joseph's band the legal right to return of their land.

In the 1960 Settlement, for example, "the Indian Claims Commission awarded the Nez Perce about \$4,650,000 for the more than six million acres taken by the 1863 Treaty. This figure was approximately sixty-seven cents an acre. Of this amount, the descendants of Joseph's band were given about fourteen percent for the Wallowa country, for which the band had never accepted."¹⁰ This amount only netted a total of approximately \$3,000,000 when all was said and done which amounts to a share of about \$440,000 for the one million acres taken from Chief Joseph's band based on the fourteen percent figure cited. The amount is utterly unconscionable when you think about it being almost one million acres that rivals the most beautiful landscapes in the country with its snow-capped mountains and a majestic valley.

⁶ Nez Perce Tribe v United States, 18 Ind. Cl. Ct. 175-A (1959)

⁷ Nez Perce Tribe v United States, 8 Ind. Cl. Ct. 770 (1960)

⁸ Nez Perce Tribe, Supra at 774

⁹ Nez Perce Tribe, Supra at 767

¹⁰ John Flanagan, *The Invalidity of the Nez Perce Treaty of 1863 and the Taking of the Wallowa Valley*, American Indian Law Review Volume 24 Number 1 (1999)

If the 1960 Compromise was intended to be a final judgment regarding any claims regarding the 1855 and 1863 Treaty with respect to the Wallowa Valley and Chief Joseph's band, then it falls just as short as the two treaties. Chief Joseph's band deserves to return to their homeland. The compromise is just another settlement of convenience for everyone but Chief Joseph's band and it is not necessarily an inhibitor for any of the three ideas recommended herein to get the valley returned.

The 1994 9th Circuit Court of Appeals case

In 1994, Chief Joseph's descendants continued the crusade by appealing a 1993 District Court case filed by the Nez Perce tribe to establish fishing rights on land covered within the 1863 Treaty. Part of the appeal involved an independent claim by Chief Joseph's band to the fishing rights.

The 9th Circuit Court tackled the issue of succession rights with respect to Chief Joseph's band. Even though this involved fishing rights, it obviously had bigger implications. The Court held that Chief Joseph's band had not proven they were entitled to succession rights because they had not maintained a strong independent identity within the Nez Perce tribe. Moreover, the Court held that Chief Joseph's band had abandoned its independent rights when it signed the 1855 Treaty denying them individual fishing rights at the core of the 1993 District Court case.

Once again, the band had been denied any autonomous rights to the Wallowa Valley stemming from the 1855 Treaty that was based on a lack of good faith by the government. This 9th Circuit Court decision was a dagger in the heart of getting the Wallowa Valley returned, but the appeal showed the continued quest by the descendants of Chief Joseph's band to fight for their individual autonomy within the Nez Perce as a whole. The fight in that case was only over fishing rights, but it establishes a record of the band attempting to preserve its rights as an autonomous group. It is beyond frustrating to see the courts reject the truth in this matter and perpetuate a false narrative. There have been other court cases involving Chief Joseph's band, but this 9th Circuit Court case had a direct line to the very legal issue still dangling out there involving the 1855 Treaty. It is another important piece in the overall tapestry of Chief Joseph's right to the Wallowa Valley.

It wasn't long after this decision that the Reclamation Project started for the purchase of land to establish the Interpretative Center and pow-wow grounds. This project has been going strong since its conception in 1995. The 320 acres the Reclamation Project has purchased together with the 16,000 acres in the Wildlife Area and the 17-acre place and the 148 acres acquired is proof of Chief Joseph's band's quest to have a permanent presence in the land of their ancestors and an independent identity within the Nez Perce. The fact remains that they deserve to have a lot more of their homeland returned.

The Three Potential Solutions for return of the Wallowa Valley

1. Executive Order by the President to establish a new Treaty and Reservation

A new Executive Order establishing a return of the land to the Nez Perce is a plausible solution, of course dependent on a favorable occupant of the White House at the time of the

request. There has been a plethora of executive orders over tribal land. Former President Bill Clinton's 1996 Executive Order instructed every federal agency to evaluate their policies regarding Native American sacred sites. Land managers were ordered to: "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites" and to "maintain the confidentiality of sacred sites."¹¹

The most important precedent is the 1873 Executive Order issued by President Ulysses S. Grant conveying the Wallowa Valley back to Chief Joseph's band. The executive order returned the Wallowa valley based on negotiations between government representatives and young Chief Joseph and his brother, Ollokot:

"John B. Montieth, the Indian Agent at Lapwai, and T.B. Odeneal, Superintendent of Indian Affairs for Oregon, had met with Chief Joseph and his younger brother, Ollokot, to discuss the legal aspects of the 1863 Treaty and to convince Joseph and his band to move onto an already established reservation. They compromised by dividing the Wallowa country in halves. The eastern portion would be for Joseph's band and the western portion for white settlers. This effectively meant the creation of a new Nez Perce reservation"¹²

The Secretary of the Interior later presented these recommendations to President Grant that resulted in him signing the 1873 executive order. The executive order was specifically intended as a compromise with Chief Joseph regarding the Wallowa Valley acknowledging that his title was fraudulently taken under the 1855 Treaty and therefore, the 1863 Treaty was not valid with respect to his homeland. This recognition of the fraud perpetrated with the 1855 and 1863 treaties is also extremely important to the Bad Faith Agreement argument made later for an appeal. It goes to the heart of the argument that the government clearly recognized Chief Joseph's right to the valley. Unfortunately, the Executive Order was overturned two years later in 1875 due to political pressure from Oregon's Governor and Senator. However, it did establish an important precedent for an executive order establishing a new reservation.

A new commission appointed by the President could follow the same outline as done with the 1873 commission and designate an acceptable portion of the original boundary map for the Wallowa Valley at the time of the 1855 Treaty that is realistic to acquire and satisfactory for the cultural and tradition needs of the band. The 1873 executive order cut that original tract in half and that is probably the reasonable amount of land to pursue in this case. The land would not need to be contiguous to be part of the new reservation. The important element to layout is a properly surveyed set of tracts that collectively would represent the new reservation.

Under the guidance of the Secretary of the Interior, the report of the commission would then be presented to the President with the suggestions. With a favorable White House, this idea could

¹¹ Executive Order 13007

¹² Flanagan, *supra* at 80

be a realistic path to returning even more of the homeland to the Nez Perce. Rising public support for return of tribal land to Native Americans makes this an interesting option.

2. Legislative Act by the U. S. Congress to create a larger Preserve

Congress could pass a law authorizing the creation of larger preserve like that of the Wildlife Area preserve already managed by the Nez Perce. Like the Executive Order, it would depend on a cooperative and willing Congress. A committee could be created to pursue the drafting of a bill similar to what was done in 2002 with the sacred land protection legislation, also introduced at the State level in California.¹³ The Sacred Lands Protection Act before Congress never actually moved out of committee, but the California Act passed, but unfortunately was vetoed by Gov. Gray Davis. In June 2003, a revised Native American Sacred Lands Act was introduced, but this bill also didn't pass. The essence of those laws is the same where the Wallowa Valley would be declared as sacred land and a trust would be created to protect the lands. It could be an identical agreement to the Wildlife Area granting Chief Joseph's band the exclusive right to manage it and the agreement could be expanded to include a living presence by the band members.

It could be called the Chief Joseph Sacred Lands Protection Act. It is not a stretch to imagine all of the Oregon legislators getting on board with this law. It could be pursued at the federal and state level. It is a bold idea that has a chance of garnering quick public support that could sweep the legislation into success and with a sympathetic President, could be signed into law. This idea does not have the same unfettered ownership that the other two ideas offer, but every option should be considered.

3. Appeal of the 1930 U.S. Court of Claims Case

The best and yet most difficult solution to pursue is appeal of the Court of Claims case. We have a precedent with the Sioux Nation case that shows the path to a potential appeal. Congress, in 1978, passed a law allowing for de novo review of cases litigated in the Court of Claims.¹⁴ The Sioux Nation relied on this law to bypass any timely appeal restrictions to get their claim reviewed by the Federal Court of Claims. Congress could pass a new Act allowing for a de novo review of Chief Joseph's band's U.S. Court of Claims case based on new evidence not presented to the Court of Claims proving it was a bad faith agreement.

The 1960 Compensation Settlement does provide an additional hurdle to overcome because of its deliberate language establishing it as the final settlement of claims for the Nez Perce, however, relief could be found based on the dubious representation of Chief Joseph's band and the unconscionable amount of the settlement. The fact that the final calculation ended with a net of only \$3,000,000 for the Nez Perce of which Chief Joseph's band was entitled to about 14%, means it was clearly unconscionable.¹⁵ It can also be argued that there were unequal bargaining

¹³ H.R. 5155

¹⁴ Act of Mar. 13, 1978, Pub. L. No. 95-243, 92 Stat. 153

¹⁵ Final Judgment, *Williams v United States*, No. 180-A (Ind. Cl. Ct. 1960)

positions that resulted in an unconscionable settlement with inadequate representation of Chief Joseph's band.

The 1994 9th Circuit Court of Appeals case might also provide a small hurdle in proceeding with an appeal. The Court denied the band succession rights, but the land acquisitions since the 1994 case provide new evidence of a concerted effort by the descendants of the band to preserve their independent identity and culture, separate from the interests of the Nez Perce tribe as a whole.

If the challenges from the 1960 Settlement and the 1994 Decision are overcome, there is a case to be made that the 1855 Treaty was a bad faith agreement thereby making the 1863 invalid with respect to the Wallowa Valley. The following is the argument for this appeal.

a) The 1855 Treaty resulted in a Bad Faith Agreement

The U.S. Court of Claims states in its decision:

“There was nothing in the treaty of 1855 which either recognized any title to the Wallowa area in Joseph's Band or gave to that band or any other band title to specific parts of the lands reserved to the Nez Perce Tribe by that treaty.”¹⁶

The premise of the Court of Claim's decision was that Chief Joseph had no recognized title in the Wallowa Valley and that any interest he might have had was extinguished when he signed the 1855 Treaty because it established one new title in the Nez Perce as a whole with no independent rights. While it is technically true that the 1855 Treaty fails to distinguish an independent title in Chief Joseph, it can be shown that a title was recognized by the government representatives involved directly with Chief Joseph and that oral promises were made through the interpreters that his independent rights to the valley were protected and noted in the treaty. This is an essential issue to this case because what was written in the 1855 Treaty was not what was represented orally and Chief Joseph, nor anyone else in his band, could read or write English so he relied on the promises made. This can be shown through new evidence not presented in the Court of Claims case.

The representatives for the U.S. government knew about the autonomous structure followed by the Nez Perce and provided assurances with the 1855 Treaty negotiations that the structure of individual territorial ownership would be honored within the treaty. But this is not what happened so it opens the question of the government intentionally misleading and being dishonest about the obligations covered in the Treaty.

We have evidence from the record of official proceedings for the 1855 Treaty negotiations in explaining the promises made during the negotiations as explained by Julia Sullivan in an Idaho Law Review article:

¹⁶ Joseph's Band, Supra at 11

“All of the oral promises made during the negotiations were translated, word for word, into the Nez Perce language. These promises were understood and relied upon by the Indians in deciding whether to sign the treaty. The written treaty, on the other hand, was never translated into Nez Perce. To the best of this writer’s knowledge, no Nez Perce translation of the treaty exists to this date. Although some of the Indians who participated in the 1855 Treaty council were able to read and write in their own language, no more than one, and probably none, of the signatories could read and write fluently in English. Thus, when the Chiefs signed the treaty, it was based on the oral promises made to them in council, not those incorporated into the written language of the text of the legal document. The Chiefs were told that the written treaty embodied all of the promises made to them during the oral negotiations. The Americans assured the Indians that “in the paper everything was set down which was promised.”¹⁷ The Indians accepted this representation.”¹⁸

This evidence needs to be considered in this case to show the true intent of the parties. We also have key evidence in a statement from the U.S. Department of Interior Annual Report of the Commissioner of Indian Affairs that Chief Joseph’s title in the Wallowa Valley was specifically recognized:

“Montieth, agent of the Nez-Perce, held a council at the Lapwai Agency on the twenty-seventh of March ’73 with Young Joseph and his band, and subsequently submitted to the Department the subjoined report embracing the conclusions of fact at which it arrived: First, that prior to the treaty of 1855, the Nez-Perce had no head-chief of the Nation, but were divided up into bands; that each band had a chief or lead-man, and each claimed, occupied and held the lands within certain natural boundaries. Second that old chief Joseph was at the head of the band which is the subject of this report, and in accordance with the custom aforesaid owned the Wallowa Valley. Third, that old chief Joseph assented to and signed the treaty of 1855, upon the condition that his country, the Wallowa Valley, should be included within the boundaries of the Nez-Perce Reservation, and it was accordingly so included.”¹⁹

This testimony offers further proof that the government made oral promises with the 1855 Treaty based on a recognized autonomous title in Chief Joseph with respect to the Wallowa Valley that was not reflected in the written treaty. It was known that the Nez Perce did not speak or write English, and that they relied on the promises interpreted to them. The Court of Claims should have considered these special circumstances in determining the true rights established in the 1855 Treaty.

¹⁷ Record of Official Proceedings of 1855 Treaty Negotiation at 77 (on file with the National Archives)

¹⁸ Julia E. Sullivan, *Legal analysis of the Treaty violations that led to the Nez Perce War of 1877*, Idaho Law Review Vol. 40 p 684-685 (2004)

¹⁹ US Dept. of Interior, *Annual Report of the Commissioner of Indian Affairs*, note 10 at 212 (1877)

The point is that Chief Joseph's band did have a recognized title to the Wallowa Valley before the 1855 Treaty and the government deliberately omitted the oral promises made to old Chief Joseph recognizing this title intentionally misleading him about was in the final treaty. The government was misleading and misrepresented what was in the written treaty. This is the essence of a bad faith agreement.

In a recent Harvard Law Review article, David E. Pozen posits the definition of a bad faith agreement: "Subjective bad faith may involve the use of deception to conceal or obscure a material fact, a malicious purpose, or an improper motive or belief, including the belief that one's own conduct is unlawful."²⁰

Adherence to good faith principles continues to be a fundamental element in treaty interpretation.²¹ The U.S. Supreme Court has shown it remains committed to this adherence:

"Because a treaty ratified by the United States is not only the law of this land . . . but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history...."²²

If the appeals court allows the new testimony from the official records of the 1855 Treaty showing the oral promises made that conflict with the written document, the court will have no choice but to find that the 1855 Treaty was a bad faith agreement. If so, then the 1863 Treaty was not binding on Chief Joseph with respect to the Wallowa Valley. If that is the case, then the Wallowa Valley would still be part of the existing reservation. We have testimony from an 1876 commission that supports this conclusion. The commissioners were General Oliver Howard together with Major Henry Clay Wood, who was an assistant adjutant general to the Department of the Columbia. Major Wood said this in his report:

"The question for the Government to determine is as to whether the title of these Indians was extinguished by the so-called supplemental treaty of 1863, in which they took no part. If so extinguished, then this band should be removed to and kept upon the reservation of the tribe in Idaho; if not, then the valley they claim is still part of said reservation, and they should be

²⁰ Harvard law review, Volume 129 Feb. 2016 No. 4 Constitutional Bad Faith, David E. Pozen, p. 892

²¹ See David J. Bederman, Revivalist Canons and Treaty Interpretation, 41 UCLA L.Rev. 953, 966 (1994) (observing that "Canon Two" of treaty interpretation is that "treaties should be construed liberally and in good faith,"); see also James C. Wolf, Comment, The Jurisprudence of Treaty Interpretation, 21 U.C. Davis L. Rev. 1023, 1040 (1988) (declaring that the Supreme Court "has firmly established that treaties should be interpreted liberally and in good faith")

²² *El Al Isr. Airlines v. Tseng*, 525 U.S. 155, 167 (1999) (quoting *Zicherman v. Korean Airlines*, 516 U.S. 217, 226 (1996)); see also *E. Airlines*, 499 U.S. at 535 ("[W]e may look beyond the written words to the history of the treaty [and] the negotiations.") (quoting *Air Fr. v. Saks*, 470 U.S. 392, 396(1985) (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431–32 (1943)))

permitted to occupy it whenever it suits their pleasure to do so. 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 a part of the Nez-Perce reservation; this being the case, then the Government is equitably bound to pay the white settlers for their improvements, and for the trouble, inconvenience and expense of removing from there.”²³

His conclusions offer strong testimony that the government representatives, each step of the way, believed that Chief Joseph’s band had a recognized title that was not properly reflected in the 1855 written treaty thereby making the 1863 Treaty invalid. As Major Wood suggests, “the Government is equitably bound” to return the Wallowa Valley back to its rightful owners.

Charles Erskine Scott Wood, or C.E.S. Wood, who served under General Howard when Chief Joseph fled and was captured, and later became a famous writer and lawyer in Oregon, also articulated how the government found a way around the promises made in the 1855 Treaty through the minority supported 1863 Treaty:

“The faith pledged to Joseph in 1855, when the country was a wilderness, could not now be kept in its spirit, and through that loop-hole the commissioners sought escape.”²⁴

Wood was referring to the oral promises made to Chief Joseph with the 1855 Treaty regarding his ownership of the Wallowa Valley that the government ignored with the 1863 Treaty, as a matter of convenience, by accepting the signatures of the other Nez Perce members who had no interest in the Wallowa Valley.

Point is that if the 1863 Treaty is held to be invalid with respect to the Wallowa Valley because it is established that Chief Joseph had a vested interest from the 1855 Treaty, then the court would have two choices: 1) hold that the land still belongs to Chief Joseph’s band and order its return to the reservation, or 2) hold the legal argument is moot because the government had the right to take the Wallowa Valley anyway under the Fifth Amendment Takings Clause. However, the Fifth Amendment Takings approach also fails thanks to the following outcome for the Sioux Nation.

The Fifth Amendment takings clause should not be applied in this case

In the *United States v. Sioux Nation of Indians*, the Sioux Nation appealed a decision by the U.S. Court of Claims that had rejected their argument to have the Black Hills returned.²⁵ The Black Hills had been taken in a subsequent treaty and the Sioux Nation argued it was a bad faith agreement as the basis of their appeal. The U.S. Court of Claims held that the bad faith argument

²³ 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*, note 118 at 41 (1876)

²⁴ Charles Erskine Scott Wood, *Chief Joseph, the Nez Perce*, *The Century* vol. 28, issue 1 (May 1884)

²⁵ *Sioux Nation*, *Supra* at 371

was moot because the government had the right to take the Black Hills under the Fifth Amendment takings clause. The merits of their bad faith agreement argument were not presented or heard. The U.S. Supreme Court affirmed the Court of Claim's decision and the Sioux Nation was granted more compensation, but not the return of the Black Hills.²⁶ This is all based on whether the original takings at that time were valid.

With Chief Joseph and Wallowa valley, the government took recognizable steps to separate Chief Joseph's claim to the valley from the overall takings from the other Nez Perce tribes with the 1855 and 1863 treaties. As explained earlier, when old Chief Joseph rejected the 1863 Treaty and refused to sign, the government did not force his band out of the Wallowa Valley and continued to negotiate a settlement. Negotiations continued after the Treaty was ratified and led to a Compromise that resulted in the 1873 Executive Order granting the majority of the valley back to Chief Joseph's band. President Grant was granting the land back to Chief Joseph while approving the 5th Amendment takings campaign against the other Nez Perce tribes and the Sioux Nation regarding the Black Hills.

President Grant specifically authorized the takings of the Black Hills by force while simultaneously signing an Executive Order granting the Wallowa Valley back to Chief Joseph. These opposing campaigns by President Grant offer prima facie evidence that the government had no intent of pursuing a Fifth Amendment takings of the Wallowa Valley from Chief Joseph's band, and clearly recognized a legal right to the valley by Chief Joseph and his Band. This is an important distinction from the Sioux Nation case.

There is also substantial proof in the previously shown testimony of the government representatives that the general census was that Chief Joseph's band should be allowed to retain ownership of the Wallowa Valley. This shows the government was not interested in pursuing a 5th Amendment takings of the Wallowa Valley.

While the government took the Black Hills back immediately after their treaty was signed and never wavered after that decision, the government allowed Chief Joseph's band to remain in the Wallowa Valley exclusively for 14 more years after the 1863 Treaty was signed. Instead of removing them by force, the government pursued a 14-year campaign to find a compromise with Chief Joseph regarding the Wallowa Valley. The government could have shifted to a 5th Amendment takings campaign at any time, but they didn't because they weren't interested in a 5th amendment takings.

Because the federal government still owns and protects land in the Wallowa Valley, and because the descendants now have a new stake hold there, an appellate court might entertain the argument that the government never intended to take the Wallowa Valley by way of the 5th amendment and that a sufficient legal interest exists. This would pave the way for the bad faith agreement argument to be presented and heard with a strong chance for a favorable outcome.

²⁶ Sioux Nation, Supra

Conclusion

This case is deserving of special consideration. Of the many bad faith takings by the U.S. government of tribal land, the plight of Chief Joseph's band and the Wallowa Valley ranks up there as one of the most unconscionable acts. A delegation of influential people needs to be created to work on the three solutions suggested so that the promise made by young Chief Joseph that the land will be returned to his people is honored.

The story of Chief Joseph and the Wallowa Valley continues to resonate with Americans 160 years later. That there were two NY Times best sellers already published in the 21st Century proves this story is not going away. The fight needs to carry on knowing that compensation in any form was never going to be acceptable because it is the land that is needed to carry on the cultural way of life unique to all of the Nez Perce. Their language and culture are symbiotic with the Wallowa valley and that is why their survival depends on getting all of their homeland returned.

There is no greater proof of the continued goal to return to the Wallowa Valley then the acquisition of "the place of boulders". The purchase was a rallying moment that encourages the continued pursuit of getting more of the Wallowa Valley returned. An executive order and a legislative act are both plausible paths, but it is the appeal of the court of claims case that offers the most hope and the longest lasting solution. There is no greater way to show appreciation for all those who have worked on the previous court cases and land acquisitions then to keep the fight alive. I am reminded of a quote from a speech young Chief Joseph made in 1879:

"Good words do not last long unless they amount to something. Words do not pay for my dead people. They do not pay for my country now overrun by white men. They do not protect my father's grave. They do not pay for my horses and cattle. Good words do not give me back my children. Good words will not make good the promise of your war chief, General Miles. Good words will not give my people a home where they can live in peace and take care of themselves. I am tired of talk that comes to nothing. It makes my heart sick when I remember all the good words and all the broken promises."²⁷

²⁷ Lincoln Hall Speech, Washington D.C. January 14, 1879