

IDAHO STATE HISTORICAL SOCIETY REFERENCE SERIES

LAWYER AND THE 1863 NEZ PERCE TREATY

Number 462

June 1968

Prior to 1842, the Nez Perce Indians were organized into small camps of summer hunting and food gathering groups, and more permanent winter villages. The larger villages usually contained several interrelated families. Each of the villages (of which there were a hundred and thirty or so) had one or more head men who generally were the older, more competent leaders. Several adjacent villages, most often located on streams which made up a local drainage area, were grouped into bands, which might travel together after acquisition of horses had made such movement possible early in the eighteenth century. By 1800, Nez Perce "Bands were clearly distinguished from one another and had well-known dialectical, ecological, and economic differences." (Deward E. Walker, Jr., Conflict and Schism in Nez Perce Acculturation: A study of Religion and Politics [1968], 14.) When whites began to enter the Nez Perce country at the beginning of the nineteenth century, four regional groups of Nez Perce bands also were emerging, sometimes for military purposes, or for major buffalo hunting expeditions to the Great Plains where large groups were necessary for defense. Bands located around Kamiah, Lapwai, the lower Snake, and Salmon-Wallowa area made up the four major groupings. These groups of bands had no permanent organization nor leadership, and individual bands were led by councils of head men from the various villages which made up the bands. Band leaders gradually began to emerge from the band councils, and white man dealing with the Indians usually tended to identify the bands by leaders whom they recognized, whether the Indians did or not. (The Indians named their bands and villages for places, not people.) Thus the whites referred to White Bird's band, Joseph's band, Looking Glass' band, or Timothy's band, for example. No one paid too much attention to what the Indians thought of such identification, which was entirely foreign to their way of doing things.

Preferring to deal with a single Indian chief for all the Nez Perce--a system the whites supposed the Indians ought to have wanted to follow--the whites persuaded at least some of the Nez Perce to agree to such an arrangement in 1842. While at Lapwai, December 3-20, Elijah White (acting as United States Indian agent for Oregon, which at that time did not form part of the United States) appointed Ellis as head chief. For the next two decades, Nez Perce got along as best they could with accommodation to the whites in some kind of recognition of all four groups of bands, although none of the four groups as much as had a chief of its own: even the band leaders could be described accurately as prominent Indians in the band councils, but not as autocratic, hereditary chiefs of a kind with which the whites thought the Indians ought to be equipped.

When the United States got the Nez Perce to agree to a reservation treaty in 1855, the Indians relinquished very little of their land, and even less of their village sites. A substantial number of Nez Perce leaders (fifty-eight to be precise), including their head chief recognized by

the whites, assented to the treaty, which was ratified and put in effect by the United States in 1859. In the Indian view, the signatures of fifty-eight Nez Perce leaders scarcely bound anyone but the fifty-eight leaders to respect the terms of the treaty. Agents for the United States, however, thought that the head chief, at least supported by other Nez Perce leaders, could reach diplomatic and legal agreements which committed all the Nez Perce to land sales. Neither the Indians nor the whites had much of an idea what the other side meant by negotiating treaties or selling lands; for the Indians, international treaties and the European national state system which produced them were pretty much unheard of, and the concept of land sale largely was nonsense that scarcely could be explained. The Indians understood the treaty to mean that whites would be kept from settling down on their land, except for the portions not included in their reservation. Gold discoveries in 1860, however, made the terms of the treaty obsolete (as far as the whites were concerned, but by no means for the Indians) the year after it became effective, and prior to Indian receipt of any treaty benefits or payments.

An emergency agreement of April 10, 1861 secured some sort of Indian permission for whites access to the Nez Perce mines, and for placering north of the Clearwater and the Lolo Trail. White miners, however, disregarded even this agreement and prospected forbidden parts of the reservation, greatly increasing the mining country. Worse yet, in the estimation of the Indians, they settled places like Lewiston where the Nez Perce seriously objected to white intrusion. Most of the mining country seemed useless to the Indians, and aside from the hazards of having white men around at all, most (but not quite all) of the Indians leaders were willing to tolerate mining. White trade associated with gold production, in fact, was quite acceptable to many of the Indians.

Trouble came, however, when the United States concluded that the Nez Perce treaty of 1859 would have to be revised in order to decrease the size of the original reservation. Without consulting the Indians, United States decided that something like ninety percent of remaining Nez Perce reservation lands would have to be taken away. Agents were sent out to explain this disagreeable situation to the Indians, and to get a new treaty. Enough lands of two of the four band groups were to be retained on the new reservation to make the new treaty proposal a possible, if undesirable, one for the Kamiah and Lapwai signers of the original treaty. Now the whites insisted that the Kamiah and Lapwai groups make room for the lower Snake and Salmon-Wallowa bands to move in with them on a smaller reservation. Lawyer, as head chief, was expected to work out the details and gain assent of the other Indian leaders. This he could not do, even if he had wanted to. He was prepared to relinquish the actual mining areas, and even the Lewiston town site, since nothing could be done about those intrusions into the reservation. Many of the other Indian leaders were willing to make that much of a concession. Lawyer had no interest in bringing a lot of rival bands to his village areas, nor could he have gotten them to agree to come even if he had tried to convince them that they should. The United States, though, refused to consider anything less than minor boundary adjustments for the proposed small reservation, and the only Indians who really were in, or located conveniently enough, to the small reservation that they would not have to do much moving. Under these awkward circumstances, no one could negotiate any longer for the entire set of four band groups. The United States reservation demands made their interests and possible course for future action

irreconcilable. Under the circumstances, they did the only thing they could. In a long council, June 4, 1863, the Indians dissolved whatever loose federation of the four groups that the whites had induced them to set up (complete with the Nez Perce head chief) in 1842. Then the United States agent dealt with the various band leaders whose lands remained in the small reservation proposed to supplant the original one. Band leaders of the Salmon-Wallowa and of the lower Snake groups left in disgust: from then on, they were non-treaty Indians, separated from the Kamiah and Lapwai groups which could afford to accept a new treaty under pressure. Since the United States would agree to nothing else, none of the Nez Perce band leaders had any alternative. Lawyer continued to be recognized as the head chief by the whites, but he was head chief only of the reservation Indians. Although he has been criticized as having sold out lands of the non-treaty bands to the whites, he knew that he could not do this, and pointed out in later years that he had done no such thing. Fortunately he and the other treaty band leaders who agreed to a small reservation, June 9, 1863, made no successful effort to convince the United States negotiators that the new treaty had no application to the non-treaty Salmon-Wallowa and lower Snake Bands. Had they succeeded in making such a point, the United States agents simply would have had to try to think up some new disguise to get the old treaty changed, and they had already run out of ideas. After all, the new treaty was something needed by the United States--not by the Indians--in order to meet some United States legal requirements that the Indians neither understood nor cared about. (These legal requirements dealt with jurisdiction over public lands, and their opening to settlement by law as well as in fact.) No matter what the Indians did or felt, the United States was going to get the treaty modified and the Nez Perce lands open for legal, as well as for actual, settlement: any Nez Perce action to impede these formalities (by pointing out the very different way they handled the same problem) only would have made the situation awkward without changing anything important for the Indians under the circumstances. All the Nez Perce could do was to divide into treaty and non-treaty (reservation and non-reservation) bands; Lawyer could not sell non-treaty lands, and neither could any other Indian. When he, and some of his followers of the treaty bands, found out that the United States would be satisfied with the new treaty signed only by some of the treaty band leaders, a very difficult legal situation (which was of interest only to the United States negotiators and other white officers and attorneys) was cleared up. Nothing that Lawyer nor the other Indians could have done could have changed the situation in any significant way, other than create some additional United States legal problems that held no interest for the Indians. So there is no point in blaming Lawyer or other treaty leaders for signing the new treaty. The new treaty, as the United States found out, did not obligate any of the non-treaty bands to move onto the reservation, and when military pressure sufficient to accomplish such a move was applied fourteen years later, the Nez Perce War resulted. Perhaps Lawyer and the treaty faction could have brought on a war sooner by refusing to sign a new treaty. By refusing to sign, they also might have avoided the Indian split into treaty and non-treaty factions, since then all of the Indians would have been non-treaty. But they had no possibility of effective action to preserve the old reservation lands, and they hardly should be censured for not accomplishing the impossible, even though they had wished to and tried to accomplish the impossible.

Publications--450 N. 4th Street, Boise, ID 83702--208-334-3428