



represent such tribe and that the claims set forth in the petition are not presented by such organized tribe; that the claims alleged are included in a separate action, Docket No. 175, which was pending at the time of the filing of said Docket No. 180, and that the claim for the conversion of gold from the lands of the Indians, as set out in paragraphs numbered 31 to 37, inclusive, was fully litigated in the United States Court of Claims (95 C. Cls. 1), and is therefore barred by the doctrine of res judicata.

The first three grounds of the motion will first be discussed together. According to the allegations of the petition, the claim is presented by three named individuals as representatives of the Nez Perce Tribe, and it was alleged therein that the Nez Perce is a tribe, band or identifiable group of Indians whose members have now been disbursed and dwell upon several separate Indian reservations, and that no tribal organization exists recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group.

The government has offered no evidence to sustain its allegation that the Nez Perce has a tribal organization recognized by the Secretary of the Interior. However, in the brief submitted by the petitioners, they set forth a copy of a constitution and by-laws of a tribal organization called "The Nez Perce Tribe," which was approved by the Assistant Commissioner of Indian Affairs on April 2, 1948, and ratified by the Nez Perce Tribe in General Assembly on April 30, 1948. The government does not question the authenticity of the document, and the petitioners claim that such tribal organization does not represent the original Nez Perce Tribe but only a part thereof residing in the State of Idaho.

It appears, however, from the allegations of the petition — and we are bound thereby for the purposes of this motion — that the claim is properly presented by representatives of the original tribe and that the claim here asserted is on behalf and for the benefit of such tribe. It is true, of course, that there is no allegation in the petition expressly stating that the individuals, Charles E. Williams, Joseph Redthunder, and Harry Owhi, are members or descendants of members of such tribe. However, proof was offered at the hearing by petitioners that said individuals were of Nez Perce ancestry, so the petition could, and probably should be amended to allege the tribal status of such individuals.

The question whether the claim has been properly presented, that is, by persons having the capacity to present it, is a question of fact which can only be determined when proof thereof is offered. We are not called upon at this time to determine whether the organized group which filed its petition in Docket No. 175, or the petitioners in the petition herein, Docket No. 180, is properly before the Commission. In other words, it is our opinion the question as to capacity to assert the claim is not now before the Commission and can only be determined when presented by proper pleadings and proof.

The remaining ground to be disposed of concerns the question as to whether the petitioners herein are estopped by the judgment of the Court of Claims in the case of Nez Perce Tribe of Indians v. The United States, 95 C. Cls. 1, decided October 6, 1941. In this connection, we may say that no proof of the findings of fact and judgment or opinion of said court has been offered by either party, but both have relied upon the case as reported in 95 C. Cls. 1.

Res Judicata

In paragraphs 31 to 37, inclusive, the petitioners set forth in their petition a claim for gold removed by non-Indian miners from the lands reserved by the treaty of June 11, 1855, 12 Stat. 957, and a claim for the use of their lands occupied by mining communities. The alleged grounds for recovery as set forth in said paragraphs are summarized on page 17 of the petition as follows:

Respondent, in violation of law and in breach of its fiduciary obligations as guardian and trustee in possession:

- (a) failed to protect the Nez Perce Tribe from trespasses on its lands and from the taking of its properties from said lands.
- (b) failed to safeguard the rights of the Nez Perce Tribe to damages for the unlawful trespasses on its lands.
- (c) failed to safeguard the rights of Nez Perce Tribe to royalties or other compensation for the unlawful mining of the gold on its lands.
- (d) Converted the gold unlawfully mined and removed from the lands of the Nez Perce Tribe to its own use.
- (e) Encouraged the said unlawful trespasses upon and the mining and removal of the gold from the lands of the Nez Perce Tribe by purchasing the said gold from the trespassers.

It is these allegations that petitioners depend on as distinguishing the present case from the former case, 95 C. Cls. 1, relied upon by the Government as res judicata.

Counsel for petitioners make the point that under the jurisdictional act (Feb. 20, 1929, 45 Stat. 1249) in the former case the Court of Claims had no jurisdiction to determine equitable claims of the Indians, such as they claim this to be. Section 1 of that act gave the Court of Claims jurisdiction to

\*\*\* hear, determine, adjudicate, and render final judgment on all legal and equitable claims of whatsoever nature of the Nez Perce Tribe of Indians in Idaho, or of any band thereof, against the United States, arising under or growing out of the original Indian title, claim, or rights of the said Indian tribe or any band thereof, including all title, claim, or rights growing out of treaties of June 11, 1855 (Twelfth Statutes, page 957), and June 9, 1863 (One hundred and forty-eighth Statutes, page 673), and an agreement of May 1, 1893, approved by Act of Congress of August 15, 1894 (Twenty-eighth Statutes, page 286), with the said Nez Perce Tribe or bands of Indians, in connection with the Nez Perce Indian Reservation in the States of Idaho and Oregon, and more particularly as to the following claims:

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3. Claim for gold mined and removed by white men, without authority and in trespass, from the Nez Perce Indian Reservation lands in Idaho prior to the treaty of June 9, 1863, and its approval or ratification by the Senate on April 17, 1867 (Fourteenth Statutes, page 647), ceding such lands to the United States, such claim, in any event, not to exceed one-eighth of the amount of gold so mined and removed: Provided, That this Act shall not be construed as creating any rights which may be made the basis of a legal or equitable cause of action but shall only authorize the said Nez Perce Tribe of Indians to present to the United States Court of Claims for adjudication such legal rights and claims, if any, which may exist under the treaties and agreements mentioned in this Act."

Thus we see that the Court of Claims was empowered to adjudicate "all legal and equitable claims of whatsoever nature" the Indians had against the United States, arising or growing out of the original Indian title, claims or rights of said Indian tribe or any band thereof, including all title, claims or rights growing out of the treaties of 1855, 1863 and the agreement of 1893. And by Section 1(3), supra, the gold loss was expressly provided for as the "claim for gold mined and removed by white men, without authority and in trespass, from the Nez Perce Indian Reservation," that is, from the same lands involved here. The Supreme Court has held in the case, United States v. Cherokee Indians, 148 U. S. 427,





