

to settle peaceably for the Indians could be assured that they would be justly paid for their lands. (Pet. Ex. 40).

3. By the Act of July 31, 1854 (10 Stat. 315, 329-330), \$45,000 was appropriated for the expenses of negotiating treaties with the Indian tribes in the Territory of Washington. (Pet. Ex. 44). Stevens was appointed as Commissioner to negotiate with the tribes to purchase their lands and was instructed to concentrate the Indians on a limited number of reservations. On May 28, 1855, at Walla Walla, Washington Territory, Stevens and Superintendent Palmer of Oregon Territory commenced a council with the Nez Perce and other tribes of those territories including the Yakima, Walla Walla, Umatilla and Cayuse Indians. The Council lasted many days. The Nez Perce were willing to sell their lands but wanted to be assured that whites would be kept off their reservation. The Commissioners explained that by going on the reservation the government could do more to protect the Indians and to preserve peace. The Commissioners assured the Nez Perce that no whites would be permitted to go on the reservation but the agent and the persons employed by the agency. (Pet. Ex. 53, pp. 10, 18, 19, 26, 36, 44, 45, 46, 47).

4. This tribe claimed a large area of land located in parts of what are now the States of Oregon, Washington and Idaho, and by the Treaty of June 11, 1855, 12 Stat. 957, they ceded to the United States all such lands, which are described in Article 1 of said treaty, and by Article 2 thereof reserved from such ceded lands, for the use and occupation of said tribe and other friendly tribes and bands of Indians in Washington Territory a tract of land described as follows:

Commencing where the Moh ha-ne-she or southern tributary of the Palouse River flows from the spurs of the Bitter Root Mountains; thence down said tributary to the mouth of the Ti-nat-pan-up Creek; thence southerly to the crossing of the Snake River ten miles below the mouth of the Al-po-wa-wi River; thence to the source of the Al-po-wa-wi River in the Blue Mountains; thence along the crest of the Blue Mountains; thence to the crossing of the Grand Ronde River, midway between the Grand Ronde and the mouth of the Woll-low-how River; thence along the divide between the waters of the Woll-low-how and Powder Rivers; thence to the crossing of the Snake River fifteen miles below the mouth of the Powder River; thence to the Salmon River above the crossing; thence by the spurs of the Bitter Root Mountains to the place of beginning.

(b) Said Article 2 also contains this provision:

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said tribe as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent; and the said tribe agrees to remove to and settle upon the same within one year after the ratification of this treaty.

(c) Article 11 of said treaty contains this provision:

This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

(The treaty was ratified on March 8, 1859, and proclaimed on April 29, 1859).

(d) Article 3 provided that roads might be run through the reservation if necessary for the public convenience and the use of the Clear-water River and other streams flowing through the reservation was secured to citizens of the United States for rafting purposes and as public highways.

(e) No other Indians but Nez Perce occupied said reservation.

5. Following ratification of the Treaty of June 11, 1855, Agent Cain caused a notice to be posted warning all persons not to attempt to trade

with the Nez Perce without a license and he informed the Indians in July, 1859 that whites were not allowed to live on the reservation and that some whites had been removed therefrom. (Pet. Ex. 121, 123).

6. In the fall of 1860, a small party of whites intruded upon the reservation in search of gold. The Nez Perce Agent attempted to have them removed by the military who refused to act unless the intruders stopped to work on the reservation. By the time the military undertook to act, snow blocked the attempt to reach the miners. The agent to quiet the Indians assured the Indians that the military would be sent in the spring to remove the miners. (Pet. Ex. 189). During the winter, whites continued to intrude on the reservation. (Pet. Ex. 178). By March 1861, some 1800 claims had been prospected although not more than 5 or 6 of these were being operated. (Pet. Ex. 184).

7. As a result of the chaotic conditions existing on the reservation resulting from the gold rush and to avoid a threatened uprising, an agreement was entered into on April 10, 1861, between the Superintendent of Indian Affairs for Oregon and Washington on behalf of the United States and the chiefs and head men of the Nez Perce tribe, as follows:

1. That portion of the Nez Perce reservation lying north of the Snake and Clearwater rivers, the south fork of Clearwater and the trail from said south fork by the "Weipe root-ground, across the Bitter Root mountains, is hereby opened to the whites in common with the Indians for mining purposes, provided, however, that the root-grounds and agricultural tracts in said district shall, in no case, be taken or occupied by the whites, but shall remain for the exclusive use and benefit of the Indians.

2. No white person, other than those in the service of the United States, shall be permitted to reside upon or occupy any portion of the Nez Perce reservation south of the line above described, without the consent of the superintendent, agent,

and tribe, except that the right of way to the mining district north of said described line may cross Snake river at any eligible point below the mouth of Clearwater.

3. The entire portion of the Nez Perce reservation hereby opened to the whites for mining purposes, shall in all respects be subject to the laws of the United States regulating trade and intercourse in the Indian country; and no person shall be permitted to trade therein without obtaining license and giving bonds as provided by law.

4. It is further agreed on the part of the United States that a sufficient military force shall be placed on the reservation to preserve the quiet of the country and protect the Indians in the rights secured to them by treaty and these articles of agreement. (Pet. Ex. 182).

In reporting this agreement to his superior, the Commissioner of Indian Affairs (Ex. 189), Superintendent Geary, one of the signers, stated:

"* * the enclosed Articles of Agreement were entered into unanimously by all the chiefs and headmen present. No considerable number was absent and these stipulations may be regarded as having received the approval of the entire tribe."

The above agreement was made pursuant to the provisions of Article 2 (Finding 2(b)) by which the tribe permitted white men to enter upon roughly the northern half of the reservation for mining purposes. However, rich placer mines were later discovered and operated south of the Clearwater River's line.

8. Following the Agreement of April 10, 1861, a company of soldiers was sent to the reservation to undertake the duties required by Article 4 of the Agreement. The presence of this company helped to preserve peace and quiet on the reservation by preventing intrusion on the rook grounds of the Indians and in suppressing the whiskey traffic. The presence of the military, however, utterly failed to confine the miners

to north of the Clearwater River as required by the agreement, for in August 1861 it was reported that prospecting had been going on and rich mines discovered south of Clearwater. (Pet. Exhibits 192, 198, and 200). Some five to seven thousand whites were reportedly on the reservation in September, 1861.

9. In November 1861, Superintendent Kendall, who replaced Geary, reported to the Commissioner of Indian Affairs that at the junction of the Snake and Clearwater rivers a town had been laid out and a record for lots established under the tacit approval of the former Superintendent and the Agent for the Nez Perce. In January 1862, the agent reported that in spite of his warnings against it and request for military aid the town had been staked out and a dozen wooden houses and 50 others of cloth erected on the lots. (Pet. Exs. 212, 226). By June Lewiston reportedly had a 1200 population. In March 1862, the agent reported that the legislature of Washington Territory had divided the reservation into three counties, granted charter privileges such as turnpikes and ferries, and had set into action the political machinery of the counties. Mining towns sprang up at other locations such as Oro Fino, Pierce City and Florence. With the withdrawal of troops due to the Civil War whites intruded upon the agricultural and grazing land of the Indians. (Pet. Exs. 319, 321, 329, 325, 327). By the summer of 1862, there was an estimated white population of 15,000 in the towns and mining districts. (Pet. Ex. 297).

10. Even prior to the negotiation and execution of the Agreement of April 10, 1861, the officials of the United States, including the agent for the Nez Perce, Superintendent of Indian Affairs for Oregon

Territory and the Acting Governor of Washington Territory, had urged their superiors in Washington, D. C., to take immediate steps to obtain a cession of the gold lands from the Nez Perce, not only to prevent war but to protect the Nez Perce from the effects of a gold rush into their territory. In February 1861, a resolution of the United States Senate instructed the Committee on Indian Affairs to inquire into the expediency of negotiating for a cession of the northern portion of the reservation. The Commissioner of Indian Affairs recommended to this Committee that a treaty be made for the purchase of said lands. It was the summer of 1862, however, before Congress appropriated money for the purpose of negotiating a treaty with the tribe.

11. The Commissioners appointed in July 1862 to negotiate with the Nez Perce did not treat with the Indians in that year. One of the Commissioners attributed this delay to several reasons such as not having received notice of funds being placed to their credit for such a negotiation; to the fact that whites on the reservation were settling on Indian grazing and agricultural land which would make it difficult to negotiate with the tribe; and the need of restoring the confidence of the Indians in the Government, and the necessity of fulfilling prior treaty obligations before attempting a new treaty. On June 9, 1863, the Nez Perce Tribe entered into a new treaty with the United States (14 Stat. 647, II Kapp. 843) by which they ceded all the gold lands to the Government (Royce No. 441, Map of Idaho) retaining a diminished reserve of some 790,000 acres (Royce No. 442, Map of Idaho). This treaty was not ratified until April 17, 1867, and was proclaimed on April 20, 1867.

12. The United States (1) in failing to prevent the intrusion of whites upon the reservation of the Nez Perce established by the treaty of 1855 as required by Article 2 of said treaty, (2) in failing to prevent the intrusion of whites upon the lands of the Indians south of the Clear-water as required by the Agreement of April 10, 1861, (3) in failing to protect the rights and property of the Nez Perce by securing compensation for the tribe for the uses made of the reservation by said whites did not conform with the standard of fair and honorable dealings. The United States is therefore liable in damages for whatever uses of the reservation by said whites may be proved by said tribe.

13. The boundary of the Nez Perce Reservation established by the Treaty of June 11, 1855, was never surveyed. By using the calls of the treaty, the greater part of the boundary of the reservation has been placed upon modern maps with no difficulty and is shown identically on maps offered in evidence by both parties. The north and west boundary of the reservation are not in dispute and are marked on Petitioners' Exhibit No. 729 and Defendant's Exhibit A-1. The southern boundary is found to be the line as drawn on Defendant's Exhibit A-1. (Compare with Surveyor General's Map, Pet. Ex. No. 695). The eastern boundary line which is based upon an impossible call in the 1855 treaty - "by the spurs of the Bitter Root Mountains" - is more difficult of ascertainment. However, based upon the evidence and especially the Surveyor General's Map, this line is found to be in close proximity to the eastern line shown on defendant's Exhibit A-1 except for the following adjustment.

- The line should be moved slightly to the east on the northward part of

the line to fall just east of Pierce City and the old location of the Oro Fino as shown on Petitioners' Exhibit 729. The line will remain as shown on A-1 with reference to Elk City leaving that city to the east of the eastern boundary line.

14. In the era 1860-1867 gold mined in Idaho was either shipped out of the Territory through express companies such as the Wells, Fargo Company or carried out by the miners themselves, and a large amount remained in circulation within the territory. There are no definitive production records for either Idaho Territory as a whole or for the mining claims upon the reservation. Various estimates have been made for both areas but they are general in nature and vary tremendously in the amounts estimated to have been taken out of the territory and districts.

15. During the period 1860-1867, the only authentic reports of gold production for the State of Oregon and the Territories of Washington and Idaho which was deposited in the United States Mint, its San Francisco branch and the New York Assay Office are contained in the Director of the Mint reports for those years. These reports show the gold received by the Mint and its branches for each fiscal year and the accumulations for the preceding years, but they do not show the output of mines in the Nez Perce reservation. Such reports are not in evidence but the documents in which they appear are shown in subsequent findings and the essential parts thereof are set forth in such findings.

16. The Director of the Mint made reports for each of the fiscal years 1863 through 1867, in which he reported deposits in the Mint, its San Francisco branch and its New York Assay Office of domestic gold received from western states and territories, as follows:

For Fiscal Year Ending
June 30, 1863 (House Ex. Doc. No. 3,
38th Cong., 1st Sess. Serial No.
1186).

Idaho (became territory
March 3, 1863)\$ 1,816.97

Washington (total for this
and all prior years).... \$31,451.58

Oregon (total for this and
all prior years)..... \$3,980,285.94

For Fiscal Year Ending
June 30, 1864 (House Ex. Doc. No. 3, 38th Cong.
2nd Sess., Serial No. 1222)

Idaho 2,306,568.10

For Fiscal Year Ending
June 30, 1865 (House Ex. Doc. No. 3, 39th Cong.
1st. Sess., Serial No. 1254)

Idaho 4,971,454.75

For Fiscal Year Ending
June 30, 1866 (House Ex. Doc. 39th Cong. 2d
Sess., Serial No. 1287)

Idaho 3,391,997.48

For Fiscal Year Ending
June 30, 1867 (House Ex. Doc. No. 2, 40th
Cong. 2d Sess. Serial No. 1328)

Idaho 2,392,595.77

Total Idaho deposits of gold received by Mint and its
branches between March 3, 1863 and June 30, 1867\$13,064,433.07

17. The Director of the Mint report for the fiscal year, 1867 (House
Ex. Doc. No. 2, 40th Cong., 2nd Sess., Serial No. 1328) shows deposits of

"Refined Gold" in the San Francisco branch, but not identified as to source, for the following fiscal years:

1865	\$ 2,598,601.49
1866	2,665,033.00
1867	<u>5,715,260.40</u>
Total	\$10,978,894.89

And in his report for 1868 (House Ex. Doc. No. 2, 40th Cong., 3rd Sess., Vol. 5, p. 441, Serial No. 1370) the Director of the Mint reports deposits of \$8,693,399.01 of "Refined Gold" received at the San Francisco Branch during the fiscal year ending June 30, 1868, but, as in the report for the preceding three years set forth next above, the source, that is, the "state or country from whence it is derived, if it can be ascertained" (required by General Instructions, Def. Exs. 24, 25 and 26) is not shown.

18. The evidence shows that large amounts of gold were produced in the Nez Perce reservation within the boundaries determined by Finding 13. It is not shown, however, that any part of it was acquired by respondent through the mint or any of its branches. If, however, by further evidence it can be shown that part of the gold produced in Idaho territory and acquired by the mint originated in the Nez Perce reservation, we find the respondent liable for the value thereof.

I concur in part, and disagree in part. See Opinion attached.

Louis J. O'Marr
Associate Commissioner

Edgar E. Witt
Chief Commissioner

Wm. M. Holt
Associate Commissioner