BEFORE THE INDIAN CLAIMS COMMISSION

THE NEZ PERCE TRIBE OF INDIANS,
OR CHARLES E. WILLIAMS AND
JOSEPH REDHUGGER, as repre-
sentatives of the NEZ PERCE
TRIBE OF INDIANS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 175-A

Decided: December 31, 1959

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. Petitioner timely filed this claim pursuant to the Indian Claims Commission Act of August 13, 1946. The claim is for additional compensation for reservation lands ceded by petitioner to defendant by the Treaty of June 9, 1863, 14 Stat. 647, for an alleged unconscionable consideration. The ceded lands were earlier established as a reservation for petitioner by the Treaty of June 11, 1855, 12 Stat. 957. It is claimed alternatively that petitioner has a right of recovery for unfair and dishonorable dealings resulting from defendant’s acts in acquiring the cession of the lands.

2. Petitioner, the Nez Perce Tribe, is an Indian tribe having a tribal organization recognized by the Secretary of the Interior as having authority to represent such tribe, and this claim is presented by such tribal organization for and on behalf of such tribe. Members
of the tribe reside, principally upon the Nez Perce Indian Reservation in the State of Idaho. Some reside on the Colville Indian Reservation in the State of Washington.

3. The Nez Perce Tribe claimed an area of land located in what is now the States of Oregon, Washington, and Idaho, and by Article 1 of the Treaty of June 11, 1855, 12 Stat. 957, II Iapp. 702, it ceded all such lands except a reservation described in Article II as follows:

Commencing where the Moh-ka-na-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.

4. Following ratification of the Treaty of June 11, 1855, Indian 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.

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. During the winter, whites continued to intrude on the reservation. By March 1861 some 1800 claims had been prospected although not more than five or six of these were being operated.

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 and the chiefs and head men of the Nez Perce Tribe by which the tribe would agree to permit 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. [Footnotes 5, 6, and 7, 3 Ind. Cl. Comm. 571, 573-575]

5. (a) 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 [see Fdg. 7, 3 Ind. Cl. Comm. 571, 574 for provisions of said Agreement]. The presence of this company helped to preserve peace and quiet on the reservation by preventing intrusion on the root 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 the Clearwater. Some five to seven thousand whites were reportedly on the reservation [Fdg. 8, 3 Ind. Cl. Comm. 571, 575, 576].
(b) 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.

6. In November 1861, Superintendent of Indian Affairs Kendall 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 fifty others of cloth erected on the lots. By June, Lewiston reportedly had a population of 1200. 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 political machinery for 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. By the summer of 1862, there was an estimated white population of 15,000 on the reservation in the towns and mining districts.

7. The situation on the Nez Perce Reservation remained a powder keg through the fall and winter of 1862. The Commissioners authorized by Congress did not treat with the Indians in that year for a cession. Superintendent Hale in September attributed this delay to several reasons such as not having received notice of funds being placed to his credit for such a purpose; that the fact that on the reservation whites were settling on Indian grazing and agricultural lands would make it difficult to treat; 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 with the tribe. On the reservation in the early fall of 1862 matters were in a turmoil. Agent Anderson was ordered to have traders obtain licenses in order to control the liquor traffic—the funds to be held for the benefit of the Indians subject to the discretion and approval of the Indian Department. In August, the Agent complained that many whites had squatted on the agricultural and grazing lands of the Indians contrary to his express prohibition. Agent Anderson said they took up these claims under the supposition that a new treaty would be made and the Indians removed. He said the military had informed him that under its orders it could not interfere or remove
the trespassers or halt the bringing of whiskey upon the reserve. A few days later he reported the military had broken up one or two grog shops. In October Anderson issued notice to all persons trespassing on lands outside of Lewiston to remove and that the military refused to act unless such notice was first posted. A few whites and Indians were murdered during this period but open hostilities did not break out. On October 15, 1862, General Alvord reported to Headquarters, Department of the Pacific, that the Commanding Officer at the Nez Perce reservation had under his instructions recently removed a good many intruders from the Indians' farming and grazing lands and broken up various grog shops, to the satisfaction of the Indians. He also reported rebel sympathizers on the reserve were trying to incite the Indians. The military decided to leave a garrison on the reservation during the winter. On October 24, 1862, General Alvord met with the Nez Perce chiefs on the reservation and assured them that the Government would protect them and that the troops would remain to prevent the whites from settling on their grazing and farming lands and to punish whiskey sellers. Alvord said, "In this unfortunate and unlooked for state of affairs the best the Government can do for you is to provide, as it has, for the making of a new treaty, so as to compensate you so far as possible for the unauthorized occupation of the gold mines by our people." In January 1863, Agent Anderson reported the Indians had agreed on May 10th for holding the treaty council. Anderson reported the arrest of several persons selling whiskey to the Indians, that the military didn't seem disposed to render much aid in suppression of the liquor traffic and that the Indians complained that
8. Superintendent Hale and Agents Hutchins and Howe as Commissioners on behalf of the United States began treating with the Nez Perce chiefs on May 25, 1863, for the cession of a portion of the reservation. Superintendent Hale in explaining why the Government was seeking this cession said:

About a year ago, the Government was informed of the discovery of numerous gold mines in and around your reservation. Knowing that white men would rush in to work these mines, before it would be possible to send a force of soldiers, sufficiently strong to prevent them, and that there would be men who would violate the laws framed for your protection, the Government at once began to enquire, as to the best way to preserve peace, and protect you from suffering wrong. Knowing you were friendly to the Government, and perceiving, by the Maps, that the Nez Perces had a much larger Reservation, than they could use, so large too, that it would be impossible for the U.S. to protect you, without an army of soldiers, a larger number than could now be spared, the President thought you would be willing to make your Reservation smaller, and by being paid for it, relinquish such portions as contained the Gold mines, and as were necessary to enable to work them. It was known that you would not work the mines, and that you did not want them.

Lawyer, the head chief of the tribe, in replying to the above speech said that the government had previously marked out their boundaries (1855 treaty) but that it had broken that treaty and that many articles in the treaty had not been fulfilled. Lawyer wanted to know what the Government offered before considering the proposition. Superintendent Hale agreed many of the stipulations of the 1855 treaty had not been
not but pointed out that he had caused many provisions to be carried out recently and promised any deficiencies would be made good. Lawyer related the history of the contact the Nez Perce had had with Government officials and pointed out the many acts of friendship, loyalty and service to the Government committed by the tribe over the years. He then asked:

I now show to you the other side. There is a Ferry kept by white men near the Alpowa. I am about to ask what shall I receive for the privilege? There is another at the mouth of the Clearwater; - another across the Snake River. Another question I put to you, - what are we to receive for the town of Lewiston? What for the ferry at the North Fork of Clearwater. There is a mining town at Oro Fino, - what are we to receive for it? What for Elk City? There is a Ferry also on this side, at another of the Forks of Clearwater, and another above the Forks, near Quil-quil-se-ne-na's camp. What shall we receive for these? What for the country thus taken?

I have named these grievances, these violations of the treaty, of the law by the side of our services to the whites. I wait now to know what we shall receive for all these. We wish you not to be offended, and we want to keep nothing back, - let us know. * * *

I have friends in Lewiston, but I have said nothing to them about this. I have not prevented miners and others from going through my country. We have all been willing for this, and said, My friends dig the gold. I am willing for any to look back on my doing, and see if there is my fault with my past conduct. * * *

I will now give you the great answer, dig the gold, and look at the country, but we cannot give you the country you ask for.

Other chiefs supported Lawyer and insisted on keeping the reservation as laid out in the 1855 treaty. Superintendent Hale pointed out that it was because of the gold discoveries and the lawless faction that go where gold is found that the Government sent Commissioners to advise
the Indians for their own preservation and to keep peace, prevent war and bloodshed. Hale said by making the reservation smaller the Indians could be better protected since it would be impossible to protect them on a large reservation even with an army. As to what they were to receive for the ferries and mining towns Hale informed them that "these are some of the questions we came here to settle." Later on Hale told the Indians they had been sent to consult with them in reference to any wrongs which the Indians may have suffered and to prevent them from suffering any further wrongs. Finally Lawyer and the other friendly chiefs agreed to making the new treaty.

9. The treaty was executed by the Commissioners and the chiefs and head men of the Nez Perce Tribe on June 9, 1863. By this treaty (14 Stat. 647, II Kapp. 843) the tribe relinquished to the United States all the land theretofore reserved to said tribe except the tract of land within the following boundaries:

Commencing at the northeast corner of Lake Wa-ha, and running thence, northerly, to a point on the north bank of the Clearwater River, three miles below the mouth of the Lapwai, thence down the north bank of the Clearwater to the mouth of the Hatwa Creek; thence, due north, to a point seven miles distant; thence, eastwardly, to a point on the north fork of the Clearwater, seven miles distant from its mouth; thence to a point on Oro Fino Creek, five miles above its mouth; thence to a point on the north fork of the south fork of the Clearwater, five miles above its mouth; thence to a point on the south fork of the Clearwater, one mile above the bridge, on the road to Elk City, (so as to include all the Indian farms now within the forks;) thence in a straight line, westwardly, to the place of beginning.

This treaty was not ratified until April 17, 1867, and was proclaimed and became operative on April 20, 1867. By Article IV of the treaty the
United States agreed to pay to the tribe in consideration of the relinquishment of said lands the sum of $262,500 to be applied as provided in said article. In Article V the Government also agreed to expend $2500 in erecting and furnishing houses and ploughing and fencing lands for two subordinate chiefs and to pay said chiefs salaries of $500 a year for 20 years. The Government also agreed to employ two matrons for the boarding schools, two assistant teachers, one farmer, one carpenter and two millers in addition to the employees specified in Article V of the 1855 treaty.

**NORTHERN BOUNDARY**

10. The parties do not agree on the northern boundary of the area ceded by the 1863 treaty. The disputed area involves some 670,000 acres of land in the Palouse region. According to mapping of the area reserved to the Nez Perce Tribe by the 1855 treaty by Charles Royce (Royce Area 141, BAE, 18th Report), upon which defendant relies, the 670,000 acres would not be included in the ceded area. The description of the controversial northern boundary in the 1855 treaty reads as follows:

Commencing where the Moh-ha-na-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 **.*

The Moh-ha-na-she has been identified as the present day Palouse River (Pet. Ex. 18). The Ti-nat-pan-up Creek is now known as the South Fork of the Palouse River according to petitioner's expert, Mr. Brown. The early maps of record (Pet. Exhibits 138-141, 144) show Ti-nat-pan-up Creek flowing into the Mo-ha-na-she, or sometimes named the Palouse on
said maps, at a point almost due south of a landmark designated Pyramid Peak, now known as Steptoe Butte. This landmark is located almost due north of the present town of Colfax, Washington, which is on the confluence of the Palouse River and the south fork of the Palouse River.

Based on the evidence submitted with respect to the present day names of the streams designated on the old maps the inclusion of the lands in the north in the Palouse area is consistent with the treaty calls.

WESTERN BOUNDARY

11. (a) The reservation set aside by the Treaty of June 11, 1855, is fully described in Finding 3 herein. The Confederated Tribes of the Umatilla Indian Reservation v. United States, petitioner in Docket No. 264, before this Commission takes issue with the mapping of the western boundary line of the Nez Perce 1855 reservation by the experts for the Nez Perce Tribe. As to the disputed portion of the western boundary the Nez Perce 1855 treaty provided (Article 2, 12 Stat. 957):

* * * 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; * * *

The land cession involved in Docket No. 264, The Confederated Tribes of the Umatilla Indian Reservation, was negotiated by the Treaty of June 9, 1855, with the Walla Walla, Cayuse and Umatilla Indians, 12 Stat. 945, II Kapp. 694, wherein the eastern boundary of said cession was described in Article 1 as:
* * * Commencing at the mouth of the Tocannon River, in Washington Territory, running thence up said river to its source; thence easterly along the summit of the Blue Mountains, and on the southern boundaries of the purchase made of the Nez Perce's Indians, and easterly along that boundary to the western limits of the country claimed by the Shoshonees or Snake Indians; * * *

(b) The Confederated Tribes in Docket No. 264 claim that their area, as mapped by their experts, overlaps the Nez Perce boundary principally in the vicinity of Elgin, Oregon. In the Nez Perce case the western boundary line is drawn across the Grand Ronde River near the present city of Elgin, Oregon. In the Umatilla action the petitioner's eastern line is drawn across the Grand Ronde river at a point about eight miles below (i.e., northeast of) the city of Elgin. The issue rests on the location of the "crossing of the Grand Ronde" referred to in Article 2 of the Nez Perce 1855 treaty. According to petitioner's expert, Mr. Brown, there was an old Indian crossing at Elgin, Oregon. Mr. Brown also interpreted the words "Grand Ronde" as used in the treaty description to refer to the "grand turn" of the Grand Ronde River and that midway between this turn and the mouth of the Wallowa River would also be right at Elgin. The western boundary is found to be as depicted on the Nez Perce map, Petitioner's Exhibit 247, near Elgin and also as shown in the small overlap area in southeastern Union county where the overlap occurs due to the difficulty of following the crest between watersheds.

12. The tract relinquished by the Nez Perce by the Treaty of June 9, 1863, is situated in northeastern Oregon, southeastern Washington and north central Idaho between the Salmon and Palouse Rivers. Commencing
on the north it is bounded by a line which follows the Palouse River from the Bitterroot Mountains to the point of its confluence with the present-day south fork of the Palouse River at Colfax, Washington. On the west it is bounded by a southeast line from the mouth of the south fork of the Palouse River, formerly known as Ti-nat-pan-up Creek, to Bishop Bar on the Snake River; thence southwestward to the source of Alpowa River, and thence along the crest of the Blue Mountains. The line then runs from the Blue Mountains to the crossing of the Grand Ronde River midway between the Grand Ronde and the mouth of the Woll-low-how. The line then goes southeastward along the divide of the Wallowa Mountains to a point on the Snake River fifteen miles below the Powder River, thence northeastward along a diagonal line to McKay Bar on the Salmon River. The boundary on the east runs on a generally north and south line between McKay Bar and Pierce City and on the northeast by a northwestward curving line between Pierce City and the source of the Mo-ha-na-she Creek (Palouse River).

The ceded tract contained 6,932,270 acres. The diminished reserve, described in Finding 9, consisted of an estimated 704,996 acres.

13. (a) Much information pertaining to the climate, topography, fertility of the soil and natural resources of the Nez Perce ceded area and the region of the country in which it was located was contained in a general way in the early reports of explorers, such as Lewis and Clark in 1805 and 1806, and Indian agents. It was long believed that parts of this region contained fertile soil suitable for farming and settlement and that large areas contained excellent bunch grass and water
making the country adapted to stock raising. While these early reports were general in nature, officials of the Government in later years referred specifically to the Nez Perce tract. Governor Isaac I. Stevens as early as 1855 observed:

* * * The Nez Perces country is exceedingly well adapted to grazing, and is for the most part a remarkably fine, arable country. * * *

In traversing lands between the Snake and Palouse Rivers, Stevens noted the luxuriance of the grass and the richness of the soil which he likened to the soil of the prairies of Illinois. Stevens further reported that "under the spurs of the Bitter Root mountains the whole country is arable, the soil as rich as the best prairies of Minnesota, and every convenience for the house and farm at hand - water, wood for fires, and timber for building."

(b) The annual report of the Commissioner of Indian Affairs for the year 1860 contained the following concerning the Nez Perce area:

The Nez Perces are located upon a reservation of immense area and great natural resources, embracing extensive pastures and agricultural tracts, abundance of game and fish, while forests of pine, cedar, and larch, found along the course of the "Clear Water" river, with the timber of the mountains, would yield a permanent income to the tribe, the stream being adapted to rafting, and navigable for batteaux.

(c) Edward Giddings, in a report which in 1862 became part of an official presidential message to Congress made the following statements concerning the subject area:

Here is situate the city of Lewiston ... A large portion of the lands for miles east, west, and south of this place has been located upon and claimed by American citizens, and the Indians were powerless, except to complain, and behold
with astonishment the great tide of immigration rushing on and taking possession of their territory reserved to them by treaty.

* * *

* * * Camas prairie contains an area of about 200,000 acres of first quality land, and is pronounced by those who have settled upon it to be equal in fertility to the famed Missouri bottom lands ... There is a skirt of most excellent timber, white and yellow pine and fir, for a mile or more back from its edge, extending entirely around said prairie.

* * *

* * * The [Falouse] country lying between the Clearwater and Coeur d'Alene rivers is an excellent body of land, well watered, an abundance of timber on the streams, and a large portion of land arable. At the present time there is but little doubt that the Nez Perce, Salmon river and Colville mines will prove a source of incalculable wealth to Washington Territory. Men of sagacity, energy, and capital have seen this ...

(d) Agriculture in Nez Perce country was successfully pursued starting in 1836 when the Reverend Henry Harmon Spalding arrived at Lapwai (in the area reserved by the Indians in the 1863 treaty). There he built a mission and developed a farm and later built a flour and saw mill. This missionary also instituted irrigation methods in the area although he reported irrigation unnecessary in a number of years. Mr. Spalding, whose farm was in the valley, raised large crops of wheat, corn, potatoes, peas and stated "Every kind of grain or vegetable which I have tried in this upper country grows well." Under his guidance the Nez Perce Indians also commenced farming with favorable results. While the agricultural adaptability of the valley lands, in the region of the country in which the Nez Perce tract was located, early had been shown, it was not established until 1861 that some of the hill
lands in the region were adaptable to the raising of cereal grain. This notable event occurred on the highlands adjoining Walla Walla Valley to the west of the ceded tract.

14. The area of the tract located between the Palouse River on the north and the Clearwater and Snake Rivers on the south, and bordered on the east by Potlatch Creek, is known as the Palouse section. It has a gradual westward gradient with varying elevations between 1,800 and 3,000 feet. It is comprised of gently rolling prairie and contains many small streams and springs.

The southwest area of the tract, bordered on the north and east by the Snake River, on the south by the Wallowa Mountains, and on the west by the Blue Mountains, is basically a plateau, except for the slopes of the Blue Mountains and the Wallowa Mountains. The surface of this area is broken by the Snake River, Grand Ronde, Joseph, Immaha and many lesser canyons. The Blue Mountains on the west rise from 3,000 to 5,000 feet; the Wallowa Mountains to the south are more rugged and rise from 3,500 to 10,000 feet. The plateau land on Anatone Flat, in the northern part of this area and Wallowa Valley, in the south central part of this area, is predominantly level and gently rolling in character.

The extreme south section of the area, east of the Snake River, is predominantly mountainous with lesser areas of moderately level mountain meadows. The surface of this section is broken by the Salmon River, Snake River and lesser canyons.

The central section north of the Salmon River, east of the Snake River and south of the Middle Fork of the Clearwater River, has the
following topographical features: That portion lying between the Clearwater River on the west and the east boundary consists of several low, folded, forested hills and ridges; the middle portion contains the Camas and Nez Perce Prairies which have elevations of approximately 3,000 feet and consist of table land with a slight gradient toward the water courses; the western portion east of Tammany Flat is comprised of a series of steeply declining hills. Tammany Flat, south of Lewiston, consists of 50,000 acres of land which is rolling and terraced, but not exceedingly rough.

The area north of the middle fork of the Clearwater River and east of Potlatch Creek is predominantly an elevated, forested plain of medium gradient with no appreciable area of rough, mountainous land.

15. The majority of the land in the tract is well drained. There is no drainage problem as most of the surface water is immediately absorbed by the soil in the cultivated areas and the drainage in the forest and grazing areas is adequate as the surface water subsides from the soil. Excess water, if any, is drained off through channels which lead to the smaller tributaries of the main rivers thus forming a general channel system which drains into the Snake River.

16. Most of the agricultural land of the tract consisted of Palouse and Nez Perce loam. The Palouse soil is dark brown to black in color, and predominantly of silt loam texture. These soils are high in organic content and are very fertile. The Nez Perce type soil is also dark greyish brown to black in color, and consists of predominantly silt loams and silty clay loams. This soil is found in the upland plateau wheat section.
In the forested upland ranges at high elevations are found the
Halmear and associated types of soil. These are light colored soils and
are of lower fertility when compared to the Palouse and Nez Perce types.

Other important soil types which occupy limited and restricted
areas of the northern and northeastern prairie portions of the tract
are Waha silt loam, Tolo silt loam, Moscow loam, Southwick silty clay
loam, Sagemoor silt loam, Beverly fine sandy loam and Caldwell silt
loam.

In the Wallowa and Grand Ronde Valleys in addition to several of
the above-mentioned types of soil, the Alicel, Hyrum, LaGrande, Spring-
dale, Gooch, Klamath, Conley and the more recent alluvial Catherine
soils are found.

17. Generally, the climate throughout the tract is mild as com-
pared to similar latitudes east of the Bitterroot Mountains. This is
because it is sheltered by the Rockies and outlying ranges on the east
and north so that the cold waves which sweep down over the central plains
from Canada are less severe. The moist air moving inland from the
Pacific Ocean loses much of its moisture when forced over the Cascade
Mountains. As it moves inland it is dynamically warmed so that as it moves
inland over Eastern Washington and into Western Idaho it becomes a warm,
dry wind that is able to take up moisture rather than bringing about
precipitation. This action contributes to the dry, hot summers found
here. The process is reversed as the air mass reaches the Bitter Root
Mountains, so that the easterly part of the subject area is somewhat more
favored as regards precipitation. The climate within the tract is varied,
however, due to differences in topography.
The northwest section of the tract, consisting of Asotin, Columbia, Garfield and Whitman Counties, Washington, and Latah County and the western half of Clearwater County in Idaho has an average growing season of 155 days. The summers are dry with most precipitation coming during the winter, commencing with the last two weeks of September. The rainfall is sufficient for all common crops, and it is reported that a crop failure from drought has not occurred since the first settlement.

The growing season on the ridges in eastern Latah County is longer than that for the county as a whole, and permits the growing of such crops as corn and field beans. The northeast section, consisting of the eastern part of Clearwater, Idaho, Nez Perce, and Lewis Counties, all in Idaho, has an average growing season varying from 203 days in the Lower Lewiston country, decreasing gradually with elevation to 113 days at Nez Perce, Idaho County. The summers in this region are dry, with most of the precipitation falling during the period from September 15 to May 15. The rainfall is sufficient for most all common crops.

The southwest section comprising Wallowa, Union, Umatilla and Baker Counties, Oregon, has an average growing season of 150 days at Grand Ronde, and 135 days in the Wallowa Valley. With the exception of July and August, which are nearly always dry, the rainfall is evenly distributed throughout the year. This distribution of precipitation is favorable to the growing of winter grain. The relative humidity is low, and evaporation is rapid. Thus, although high temperatures are common in summer, the heat is not oppressive.
Adams County and a portion of Idaho County south of the Middle Fork of the Clearwater and east of the Salmon River have comparatively short and cool summers. Oceanic westerly winds cause an increase of precipitation in this area. July and August are the driest months, and the heaviest precipitation occurs from November to April, much of it in the form of snow. Although there are extremes of cold temperature in the winter, they are of short duration.

The climate of Idaho and Adams Counties within the ranges of the Salmon River and Seven Devils' Mountains and the Fayette Lakes area are marked by climatic variations within short distances, owing to great local difference in elevation. Thus, temperature and precipitation records from any one location are not representative of this area.

18. The dominant grass cover of the prairie plateau is blue bunch wheat grass and fescues. At the upper margin of the plateaus, yellow pine is found with a pine grass understory. Also found on the prairies are wild current and rose shrubs. In the drier areas of the lower canyon gorges, needle grass and Indian rice grass are found. Some sagebrush is found on the lower lying prairies, but it is exceedingly rare.

The mountainous section of the tract has a wide variety of vegetation. The coniferous trees present are red fir, white fir, western yellow pine, red cedar, hemlock, spruce and lodgepole pine. In the seeps and wet areas along the stream channels are found aspen, cottonwood, alder, birch and willow. At elevations above 6,000 feet is found alpine fir, noble fir, and grand fir. In the lower altitudes are found yellow and white pine, and higher, hemlock, Douglas fir, spruce and
western larch. The areas above 7,500 feet are devoid of heavy vegetation. There the soils are thin, there is much bare rock surface, and a few alpine dwarf trees, shrubs and forbs are present.

19. The most direct and economic trade route to the settlements along the Columbia River was by way of the Snake River. There was steamboat traffic on the Snake River from 1861. During high water season, three boats a week were operated. When the wheat shipments started, there was an average of a boat a day. The Snake River could be navigated beyond Lewiston to a point called Pittsburgh Landing, which was near the mouth of Salmon River.

By 1862, six primitive overland roadways had been established through the tract. One went along the Clearwater River to the mining towns of Pierce City and Oro Fino. The second ran from Lewiston through Craigs and Springs and connected with the Clearwater route. Another route went between Springs and Elk City. Another route went between Springs and Florence by way of Camas Prairie. A direct route had been established through the present site of Grangeville to Pierce City and Oro Fino. Several trails connected these routes with the Salmon River.

Captain Mullan's wagon road from Fort Walla Walla to Fort Benton was located eighty miles west of Lewiston. The Nez Perce Indians had established a trail over Lolo Pass to the Bitter Root Valley in Montana.

Access to the Oregon portion of the tract was from the northern immigrant route of the Oregon Trail which passed through the Grand Ronde Valley.

Access from Boise Basin to the tract was by means of pack trails via Payette River and other routes to New Meadows and the McCall area.
20. Congress did not establish formal territorial government in the Pacific Northwest until the creation of Oregon Territory in 1848, although informal provisional government by the residents of the Willamette Valley had been enjoyed since July 5, 1843, when the settlers of the Oregon Territory passed the "Law for the Provisional Government of Oregon." The creation of Oregon Territory by Congress in 1848 fixed exterior boundaries of that territory very nearly identical with the boundaries of the present State of Oregon, and left the remainder of the original Oregon Territory as unorganized territory until 1853. On March 22, 1853, the Territory of Washington was created. The new Territory of Washington was bounded on the south by the Columbia River and the 46th parallel, on the east by the crest of the Rockies, and on the north by the Canadian line and on the west by the Pacific Ocean. It was enlarged in 1859 by having added to it that small area in the northwest corner of the original Oregon Territory not included in the State of Oregon when Oregon was admitted to the Union in 1859. In 1863 Idaho Territory was created and included all of the Old Oregon Territory, except the State of Oregon and what is now the State of Washington, plus the additional territory now included in the present States of Montana and Wyoming east of the summit of the Rocky Mountains. In 1864 Idaho Territory was reduced by the creation of Montana Territory, with the same boundaries as the present State of Montana. The last step in the reduction of Idaho was the creation of Wyoming Territory in 1868.

21. In dealing with the history of the lands included in the Nez Perce ceded area, it must be borne in mind that while those lands as of
the present date are shown as including a portion of six counties in the present State of Idaho, four counties in the present State of Washington, and three counties in the present State of Oregon, as of April 17, 1867, the lands were wholly located within the then boundaries of the three counties of Shoshone, Nez Perce and Idaho in the Territory of Idaho, the counties of Walla Walla and Stevens in the Territory of Washington, and in the counties of Union and Baker in the State of Oregon.

The counties of Latah, Lewis, Clearwater and Adams in the State of Idaho were not organized until after April 20, 1867, and the counties of Asotin, Garfield, Whitman and Columbia in the State of Washington were not organized until after that date. These last named counties were all organized out of territory formerly included in the State of Oregon in 1862 and the County of Union in 1864. The county of Wallowa was organized out of a portion of the territory formerly included in Union County in 1887.

22. (a) The earliest settlement in the region was in 1836, when Henry Harmon Spalding established a mission farm in Lapwai Valley. In 1840, William Craig settled upon an Oregon Donation claim approximately four miles above the Spalding mission. The region east of the Cascade Mountains was ordered closed to white settlement in 1855. In 1858, the Walla Walla Valley was opened to white occupation. About 2,000 settlers are said to have taken claims in the Walla Walla and Umatilla Valleys during that summer. These valleys are immediately west of the subject tract. The early settlements were made in the valleys and along the water courses. This was because of convenience and road access and
because the requirements of frontier economy favored claims which furnished the best wood, water and grass, combined with as much agricultural land as possible. The discovery in 1864 that grain could be raised in the hill soil of the Walla Walla area gave impetus to the settlement of the region.

(b) The majority in the early occupation of the subject tract was a transient population. By 1867 many of the miners had left the tract for newly discovered mining areas in the Coeur d'Alene country. Chinese began to rework all but the richer placer areas within the subject tract. According to the 1870 census report the total population of Shoshone County was 722 including 568 Chinese; in Nez Perce County the population was 1607 including 747 Chinese and in Idaho County the population of 849 consisted of 425 Chinese. By 1880 the population of Idaho County was 2,031; for Nez Perce County 3,965; and for Shoshone 469. In the 1870 census it is shown that Idaho County had 14 farms with a total of 825 acres of improved and 2,464 acres of unimproved land; that Nez Perce County had 32 farms consisting of a total of 2,725 acres of improved lands and 3,395 acres of unimproved lands. The 1880 census showed 258 farms in Nez Perce County, consisting of 36,377 acres of which 18,992 were improved lands; that Idaho County had 155 farms totaling 30,914 acres with 22,830 acres improved; and Shoshone County with 5 farms totaling 859 acres of which 699 acres were improved. Most of the farm land in Idaho County is concentrated in the fertile Camas Prairie northwest of Grangeville.
The first appreciable settlement in present day Whitman County occurred in 1859, when several families located on Union Flat. At first it was erroneously believed that the altitude in this area would render it subject to frosts that would injure its value as a grain producer, although known to be excellent arable land. For the next two years immigration came slowly but steadily and in 1871 there were 83 permanent settlers with families, or a population of about 200, on Union Flat and around the Palouse forks. The early settlers of the county reportedly busied themselves with the care of their flocks and herds, giving little attention to agriculture, except for raising a little wheat for themselves and some wheat hay for their horses and other stock kept for use on their farms. This wheat was produced on the "flat lands" or narrow valleys, since it was erroneously believed until 1876 that cereal grains could not be raised on the hills. Livestock was the chief enterprise of this county until the coming of the railroad in 1883. From then on the production of wheat increased rapidly. Whitman County was part of the then large Stevens County until 1871. Stevens County had a population of 734 in 1870. Whitman County population figure for 1880 shows a total of 7,014. According to the 1870 census there were 1,930 acres of improved lands and 2,833 acres of unimproved lands on farms in Stevens County. After Whitman County was organized from a part of Stevens in 1871 the 1880 census shows 711 farms in Whitman County consisting of 1,207 acres of which 110,261 acres are shown as improved lands.
24. During 1871, the first agricultural settlement was made near Moscow in the vicinity of Paradise Valley, Idaho, in what is now Latah County. This county was organized from part of Nez Perce county in 1888. Wallowa County was a part of the large Union County, Oregon, until 1887. In the Wallowa portion of the tract the first settlers appeared in 1871 for the purpose of engaging in stock raising. The Joseph Band of Nez Perce objected to the presence of the settlers on lands they claimed were not ceded. Indian Agent Monteith in recommending Wallowa Valley be kept for Indian use, in 1872 stated the Wallowa country was adapted to stock raising and observed:

* * * It is a great pity that the valley was ever opened for settlement. It is so high and cold that they can raise nothing but the hardiest kind of vegetables. One man told me that the wheat was frozen after it was in the milk. It is a fine grass country and raising stock is all that can be done to any advantage. * * *

In June, 1873, the Wallowa Valley country was closed to white occupation until June, 1875, by Presidential proclamation. The first population figures for this county appear in the 1890 census which shows 3,661 persons. Agricultural development in this county was gradual until about 1900. Between 1900 and 1920 much more rapid expansion took place due chiefly to additional irrigating facilities. The percentage of the county in farms rose from about 10 percent in 1900 to approximately 25 percent in 1920; the number of irrigated farms increased 140 percent in the same period. According to the 1930 census the population of the county was 7,814 which was concentrated in the Wallowa Valley, other sections of the county being very sparsely settled at that time.
25. At the time the lands in present Columbia, Garfield and Asotin Counties, Washington, were part of Walla Walla County. Columbia County was carved out of Walla Walla in 1875 and Garfield County was organized from Columbia County in 1881 while Asotin County was then carved out of part of Garfield in 1883. Asotin is entirely within the tract. A small part of Columbia, consisting of approximately 62,500 acres, is within the subject tract. Of the 356,960 acres in Garfield County some 124,000 are within the tract. In 1870 the population of Walla Walla County which then included the above mentioned lands and extended to lands in and around Walla Walla Valley, which valley was well settled, totaled 5,300. In 1880, Walla Walla had 8,716 people and Columbia 7,103. In 1890 Garfield had a population of 3,097 while Asotin numbered 1,580.

**VALUATION METHODS**

26. William C. Brown, a professional real estate appraiser, testified as a witness for petitioner as to his opinion of the market value of the subject lands as of April 17, 1867. That opinion was based on an extensive study made by Mr. Brown and other technical and professional assistants under his direction. This witness prepared an appraisal report (Pet. Ex. 238 in 3 volumes). The period covered in the land valuation of Mr. Brown's appraisal commenced in 1859 and ended in 1902. Petitioner's appraiser classified the 6,932,270 acres in the subject tract as to land use as follows:

<table>
<thead>
<tr>
<th>Land Use</th>
<th>Acres</th>
</tr>
</thead>
<tbody>
<tr>
<td>Townsite</td>
<td>610 acres</td>
</tr>
<tr>
<td>Mineral</td>
<td>21,168 acres</td>
</tr>
<tr>
<td>Agriculture</td>
<td>1,164,084 acres</td>
</tr>
<tr>
<td>Timber</td>
<td>3,152,653 acres</td>
</tr>
<tr>
<td>Grazing</td>
<td>2,377,953 acres</td>
</tr>
<tr>
<td>Waste</td>
<td>215,802 acres</td>
</tr>
</tbody>
</table>
Mr. Brown concluded that the contemporary uses of the subject tract as of April 17, 1867, were small grain production, diversified agriculture, irrigation, lumbering, mining, grazing, townsite location, steam navigation, water development and water shed protection and that these known uses were those for which the tract was best adapted as of that date. Mr. Brown assigned no value to the 215,802 acres of waste land.

**AGRICULTURAL LANDS**

27. Mr. Brown in his appraisal report (Pet. Ex. 238, p. 107) states that a careful consideration of 2,453 recorded sales and inspection of 928,993 acres of land conveyed by said sales, "form the basis for the estimates made" in his appraisal. Of these transactions 969 are "index" sales, that is sales within the tract, and 1,299 are "comparable" sales located in counties adjoining the subject tract which were used as indications of value. These sales of small tracts of land took place during Mr. Brown's "valuation period" 1859 to 1902 with an average valuation date of 1882. Petitioner's appraiser based on a study by classification and physical inspection of these sales determined the amount of agricultural, timber or grazing land in each sale. All sales were classified as either mixed or unmixed sales. Sales which were at least 90% agricultural land were classified as unmixed agricultural land sales while those which conveyed less than 90% agricultural land were termed mixed land sales. According to Witness Brown's study there were index sales covering 92,493 acres of agricultural land during the entire valuation period for a total adjusted value of $633,495.00, after discount for improvements, or an average price of $6.44 per acre. Of
the comparable sales (less 123,231 acres) were conveyed according to the
witness' report for a total net value of $952,901.00 after adjustments
and a 20% discount for improvements, or an average price of $7.61 per
acre. An adjustment was made in those transactions where the consideration
was shown to have been paid in gold coin in order to adjust to currency
values. Another adjustment was made in those sales in order to relate
the value of sales made at times other than the valuation date through
the use of an economic time value adjustment. Sales were classified
as pre-treaty and post-treaty. Pre-treaty sales were discounted 10%
for improvements. Post treaty sales were discounted 20% for improvements.

28. In addition to index and comparable sales, three other value
indications were used by petitioner's appraiser in arriving at a final
value indication for the agricultural lands of the subject tract. Rail-
road sales totaling 133,938 acres for a total adjusted consideration of
$458,373 or an average acre value of $3.49 constituted another value
indication. A fourth indication considered by the witness was
based on an award given to the Puget Sound Agricultural Company and the
fifth was based on an award made to the Hudson's Bay Company by the
Joint British-American Commission for settlement of the claims of those
companies. Taking into consideration the average of these "five value
indications" and then applying a 20% discount for size Mr. Brown was of
the opinion that the agricultural land within the subject tract was
worth an average of $5.17 per acre.

29. (a) The index and comparable sales cover a very extended
period of time. Conditions over this prolonged period did not remain
the same. Transportation facilities improved during the latter part of the "valuation period" in the region covered by these sales. Increased settlement in the region over the "valuation period" with the resulting amenities of life brought condition changes that would effect the market value of lands in the area covered by the sales. Events, such as the adaptability of the hill lands in the Palouse region to grain growing, were not known for a number of years after the valuation date. Railroads did not serve any part of the region until the 1880's except for a small line between Walla Walla and Wallula completed in 1875. Markets for the products of the region for many years after 1867, except those local in character, were either non-existent or virtually cut off by lack of transportation or high freight rates.

(b) A study of the comparable sales discloses that the lands involved were mostly small select tracts favorably located along or near the then major routes of travel such as the Emigrant Road. Many of the comparable sales were in the vicinity of communities such as Walla Walla and in the Walla Walla Valley. As of the valuation date Walla Walla was, comparatively speaking, well developed and the supply center for the region. Walla Walla Valley was favorably located on the Oregon Trail and the Mullan Road ran northward from Walla Walla. Petitioner's expert, Mr. Brown, testified he had excluded all sales in the immediate vicinity of a town or community (Tr. 121).

(c) The comparable and index sales used as indications of value were undoubtedly for the most part sales of small tracts with improvements. The extent of improvements is not shown by the record and
possible of determination at this late date. Petitioner's witness, Mr. Brown, applied discounts of 10% for pre-treaty sales for improvements and 20% for post treaty sales. These estimates were based mainly on indications obtained from census reports. Census figures are not conclusive. The only separation of reality values made by the Census was that made between buildings on the one hand and land with fixed improvements on the other. Census never attempted to separate the value of fixed improvements such as wells, orchards, plowing and clearing and so on from the land.

(d) A study of the index and comparable sales made at or reasonably close to the valuation date reveals that as of 1867 there was some demand in the region of said sales for small tracts of land adaptable to agricultural and livestock pursuits.

ABER-LANDS

30. (a) The tract contained 2,152,653 acres of timber-land according to petitioner's expert witness, Mr. Brown. The dominant species were Western White Pine, Ponderosa Pine, Douglas Fir, White Fir, Western Red Cedar and Western Larch. Timber operations were an industry in the subject tract even prior to the valuation date. They were small in size and the market was local in nature. A study of the index sales of timber-land discloses that the early transactions were of small acreages and were apparently selective. The record contains evidence of sales conveying 128,869 acres of timber-land during the period 1861 through 1902. Some of the timber-lands included in this total are from mixed sales and their inclusion as timber sales are questionable.
The sales include 58,829 acres conveyed by private sales for a total adjusted consideration of $490,432.00, or an average price per acre of $8.33. State of Idaho sales of timber-land in the amount of 25,000 acres for a total adjusted consideration of $169,451 (the State sales in 1901 and 1902 were timber deeds only and petitioner's appraiser arbitrarily added $1.25 per acre for the value of the land) sold for an average per acre value of $6.78. Also included in the index sales is a sale by the Northern Pacific Railroad of 45,040 acres in 1901 for an adjusted consideration of $254,025 for an average per acre value of $5.64.

(b) As of the valuation date 1867 much of the 3,152,653 acres classified as timber-land would not have been considered economically accessible although the timber may have been commercial in nature. No great amount of the timber on the tract would have been required to meet the local demand and there was no other market then existing for timber from the tract and no means of suitably transporting the product. While river transportation was available freight rates were high. As of 1867 the lumber industry was centered in the Great Lakes States. Railroad facilities were needed to give impetus to the lumber industry in the area and the Northern Pacific did not build through the timbered area of the tract until about 1900.

GRAZING LANDS

31. (a) Petitioner's expert, Mr. Brown, used "five value indications" in arriving at a value of $1.27 per acre for grazing land within the tract. These were index sales, comparable sales, the awards to the
Puget Sound Agricultural Company and the Hudson's Bay Company and a sale by a railroad. The appraiser's total grazing land figures for index and comparable sales consists mostly of what he determined were grazing lands in his mixed sales. There were very few sales of straight grazing land within the tract or surrounding area. To ascertain the amount of the total sales price in each transaction which Mr. Brown believed should be allocated as the sum paid for the grazing land in a mixed sale he applied a four to one value ratio between agricultural and grazing land. According to Mr. Brown's method there were total index sales of grazing land during his valuation period of 17,453 acres with a total adjusted consideration of $81,733 or an average price per acre of $2.38 and a total of comparable grazing land in adjoining counties amounting to 17,739 acres for a total adjusted value of 841,463 or $2.38 per acre.

(b) It was known as of the valuation date that the Nez Perce tract contained a large amount of grazing land. It was also a fact that some of these lands on the subject tract were considered excellent for grazing purposes. The Nez Perce Indians had for years ranged large herds of horses and some cattle on their lands and ranchers brought cattle to the tract following the gold discoveries to supply the mining camps. Parts of the tract, however, were at high elevation and the grazing lands therein were utilized for summer grazing only. As of 1867 the "free range" concept prevailed among cattle operators and the open and free use of public lands continued for many years thereafter.
ADJUDICATED AWARDS

32. The awards made by the Joint British-American Commission in settlements of the claims of the Hudson's Bay and Puget Sound Agricultural Companies did not set a value separately for agricultural, timber and grazing lands. The opinion of the Commission which adjudicated the claims gave no indication of how it arrived at the value of the rights and claims of the companies. Petitioner's expert allocated the award in proportion to the composite estimate shown by evidence of the United States witnesses concerning the value on the various types of land involved in the claims before the Joint British-American Commission. Since the Commission adjudicating the claims did not separately state the value of the classes of land involved nor indicate the method of reaching a value any attempt to allocate said awards on the basis of testimony of witnesses would be mere conjecture and theoretical.

(b) The lands involved in the adjudicated awards to the Puget's Sound Agricultural Company and the Hudson's Bay Company were for the most part located a remote distance from the subject tract in the Pacific Northwest west of the Cascades. The Puget Sound's lands were at Nisqually and Cowlitz plains and the Hudson's Bay lands were for the most part in the vicinity of Vancouver, Washington, closer to markets and population centers and with better transportation facilities.

TOWN SITES

33. At the date of valuation, Lewiston, Pierce City and Florence were the only occupied white communities within the subject tract. The Lewiston townsite consisted of some 550 acres according to petitioner's
expert. When originally surveyed in 1861 it contained about 40 acres and sometime prior to 1876 it was resurveyed and platted. Mr. Brown valued this area at $89,370.00. The Florence townsite was estimated by Mr. Brown to contain 40 acres and was valued by Mr. Brown at $122,710.00. Petitioner's witness fixed a value of $13,625.00 on the Pierce City townsite consisting of some 20 acres. The process used in evaluating the townsites was based on an analysis of sales of lots within the communities. For Lewiston the sales covered the period 1861 through 1869. The sales used in studying the Florence townsite were, except for two transactions, recorded in 1862, at which time mining activity was at its height. Most of the sales considered with respect to the Pierce City townsite were transactions after the valuation date and occurred between 1866 and 1876.

Many of the sales of lots or fractions of lots within the communities were sales of improved property for which discounts for improvements were allowed by petitioner's witness. Many sales did not indicate whether or not improvements were involved in the transactions. The discounts allowed for improvements were necessarily arbitrary and the consideration of many sales as unimproved lots an assumption. As of 1867, mining activities in the subject tract were on the wane. Florence and Pierce City were mining camps primarily at that date. Lewiston on the other hand was ideally situated at the head of steamboat navigation at the confluence of the Snake and Clearwater Rivers and was the inland depot for the Nez Perce mining regions. Its importance to the subject tract as a community was recognized even before the date of valuation. Under the method of evaluating these townsites used by petitioner's expert, however,
the most valuable townsite, Lewiston, containing 550 acres would be worth but $89,370.00 while the more remote and less promising townsite of Florence consisting of 40 acres would be given a value of $122,710.00. The existence of these townsites, however, as of the valuation date would have enhanced the value of the tract.

MINERAL LANDS

34. (a) Mr. Philip J. Shenon and Mr. Roy P. Full, mining geologists, were qualified as expert witnesses by petitioner. These witnesses were employed by the Nez Perce Tribe to estimate the fair market value of the mineral lands within the subject tract as of April 17, 1867. To determine the acreage of the mineral lands Shenon and Full made a study of the literature and records, such as sales and location notices, which were available to attempt to ascertain the areas where mining activity was indicated as of 1867. Much of the sales and location data relative to mining in the area is very scarce at this late date. The records have been lost or destroyed. These witnesses found that while they could identify some streams and gulches where mining activity took place prior to 1867, others could not be identified now. To compensate for the unidentified areas of mining activity the witnesses included streams or gulches for which no documentation was available in their mapping of the area in order to secure what they believed would be a fair representation of mining activity as of 1867. These streams or gulches were marked in red on maps prepared by the witnesses. The red lines were then traced with a map measurer to determine their length in feet. Once this measurement was ascertained, it was divided into mining claims,
according to the length of claims as prescribed by the mining code of the particular district in which the gulch or stream was located. Depending upon the width of the stream or gulch, one or more claims were assigned to each linear distance as set out in the mining laws. By this method these witnesses concluded that the mining districts within the tract contained in the measured areas a total of 16,162 claims, consisting of 13,363 acres.

(b) To arrive at a valuation of the placer mining acreage Shenon and Full relied on recorded sales of claims in the Pierce City - Oro Fino area only for the year immediately preceding the valuation date. Sales records in the other districts were lost, destroyed or meager. The Pierce City claims transactions for one year prior to the valuation involved 182 sales for an average sales price of $116.08 per claim. The measured placer ground within the subject tract was estimated by Shenon and Full to have a total value of $1,910,908.06 by this valuation procedure.

(c) Only in the Florence District did Shenon and Full assign a specific value to 305 acres of lode deposits. The length of the lodes was estimated by the number of claims reported on them. From the consideration shown in a claim transaction the witnesses computed the average per foot value of the lode. Using this method the witnesses estimated the total measured value of the lode deposits to be $117,608 in the Florence District.

(d) Shenon and Full assigned a value of $971,453.04 to what they termed the unmeasured areas consisting of 7530 acres of land. These consisted of areas where there was historical evidence of mining activity
but for which there was not believed to be adequate information for
assigning a measured value. These experts were of the opinion that "the
overall value of the mineral deposits within the ceded lands, as of
April 17, 1867, including measured and unmeasured deposits, is not less
than $3,000,000.00."

(e) The mineral land appraisers for petitioner made no allowance
in considering the sales of mining claims for improvements on said
claims. The record indicates that some expense was incurred and labor
performed in opening placer mining claims. Improvements such as cabins,
ditches, flumes and sluices were usually found on these claims. No
adjustment was made for improvements in considering the lode claims.
The consideration in those transactions may have covered but the de-
development work thereon. There is no substantial evidence that the lode
claims were paying properties in 1867. The $971,483.04 value assigned
to the unmeasured areas is purely arbitrary. The method of determining
value based on allocating claims for the total length of streams or
gulches in the measured areas assumes that most of such areas contained
pay dirt and were salable in 1867 at a time when mining activity in the
tract was on the decline and much of the mining then engaged in was the
reworking of claims by the Chinese.

(f) A study of the detailed and informative report submitted by
Shenon and Full indicates that the mining districts of the subject tract
were still being actively worked, some more than others, as of the
valuation date. For example, these witnesses estimate that the pro-
duction in the Pierce City - Oro Fino district (about 75 percent of the
mining area in this district was in the tract) for the years 1867-1871 amounted to $1,750,000.90; that the Elk City district (20% within the tract) produced $855,000 for the years 1867-1871; that the Florence district produced $800,000.01 during the same period; that the Warren district mines (about two-thirds of which were located outside the tract) produced $3,870,000 for the years 1867-1871; and that other mining areas in the tract produced varying amounts of gold. These estimates are based on incomplete records for the most part but do indicate continued mining activity. As of 1867 the known presence of gold producing land upon the tract would have substantially enhanced the value of the Nez Perce ceded area.

LAND DISPOSAL

35. According to figures supplied by petitioner's appraiser, Mr. Brown, land disposals of the subject tract had taken place up to 1900 as follows:

<table>
<thead>
<tr>
<th>Settlement Totals for Tract</th>
<th>1,579,200 acres</th>
</tr>
</thead>
<tbody>
<tr>
<td>Retained in National Forest</td>
<td>3,127,846</td>
</tr>
<tr>
<td>School Land in 362 Townships</td>
<td>386,560</td>
</tr>
<tr>
<td>State Selections Clearwater Co. to 1902</td>
<td>87,894</td>
</tr>
<tr>
<td>N. P. Ry. Selections Clearwater Co. to 1896</td>
<td>5,699</td>
</tr>
<tr>
<td>Wasteland</td>
<td>215,802</td>
</tr>
<tr>
<td>Unaccounted to 1900</td>
<td>1,529,269</td>
</tr>
</tbody>
</table>

36. (a) Mr. C. Marc Miller, a qualified appraiser, testified as an expert witness for defendant and submitted an evaluation report of the subject tract (Def. Ex. 29). This witness classified 6,240,000 acres (the disputed Palouse area of 672,000 acres was not included in Miller's study) as follows:
(b) Mr. Miller, although he looked into the private sales of small acreages within the tract and adjoining counties, testified he did not use such sales as a measurement of value since he believed the consideration in many of these sales would be paid, in his opinion, to cover but the improvements on the land. Defendant's expert testified on cross-examination that the main basis of his evaluation was the value indications obtained from a study of sales of Spanish and Mexican Land Grants in southern Colorado and northern New Mexico.

(c) Defendant's appraiser concluded, among other things, from his study of the many factors affecting value that the northwest interior region of the United States, within which the subject tract was located, was peculiarly isolated as of the valuation date; that there were no markets for the products of the tract except those limited and local in nature; that transportation from the interior region of the northwest was by steamboat to the coast and the high cost of transporting products by this means was excessive; that as of 1867 only a small portion of the subject tract would have been classified as agricultural land; that there was no demand for the timber land on the tract which he found to be inferior to timber lands particularly in western Oregon and western Washington both as to accessibility and per acre yield, and that the grazing lands in his opinion were inferior to the free, open range land of other parts of the interior region. Mr. Miller did not assign any
separate value for the mineral lands within the tract since he believed that under the mining methods used at the time of the valuation the mining activity had declined to a point where there was very little value in the mining prospects of the tract.

(d) Mr. Miller's opinion of value was based mainly on value indications obtained from a study of Spanish and Mexican land grants in southern Colorado and northern New Mexico. These land grant transactions are located far from the subject tract and too remote to be a proper value indication for comparison purposes with the Nez Perce lands.

37. The Commission finds, based on the findings of fact made herein and the record as a whole, that the fair market value of the 6,932,270 acres of land located within the Nez Perce tract ceded by the Treaty of June 9, 1863, as of the evaluation date of April 17, 1867, was $4,650,000.00. The value of the tract as a whole is based on finding the 1,264,031 acres of agricultural land had a value of $1,000,000; the 3,152,653 acres of timber-lands a value of $1,600,000.00; the 2,377,953 acres of grazing land a value of $1,000,000.00; the 21,168 acres of mineral lands a value of $1,000,000.00; and the townsites a value of $50,000.00, with Lewiston being valued at $40,000.00 and Pierce City and Florence at $5,000.00 each. No value is found for the 215,802 acres of wastelands.

**CONSIDERATION**

38. (a) The General Accounting Office of the United States prepared an accounting report (Pet. Ex. 246) at the request of the parties to permit a determination to be made of the consideration paid to the Nez
Treaty

The Pece Tribe by the United States for the cession of the subject tract.

The G. A. O. found it impracticable to render an accounting under the Treaty of June 9, 1863, separately from the Treaty of June 11, 1855, due to the fact that said treaties provided for similar objects, and certain disbursements could not be shown to be made under one treaty rather than the other.

(b) Pertinent articles regarding the consideration under the 1855 treaty are as follows:

Art. 1. In consideration of the above cession, the United States agree to pay to the said tribe in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the following manner, that is to say, sixty thousand dollars, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty, in providing for their removal to the reserve, breaking up and fencing farms, building houses, supplying them with provisions and a suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities, as follows: for the first five years after the ratification of this treaty, ten thousand dollars each year, commencing September 1, 1856; for the next five years, eight thousand dollars each year; for the next five years, six thousand each year, and for the next five years, four thousand dollars each year.

All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

Art. 5. The United States further agree to establish, at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping the same in repair, and providing them with furniture, books, and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of said tribe, and to employ one superintendent of teaching and two teachers; to build two blacksmiths' shops, to one of which shall be attached a tin-shop and
to the other a gunsmith's shop, one carpenter's shop, one wagon and plough maker's shop, and to keep the same in repair, and furnished with the necessary tools; to employ one superintend-ent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades, and to assist them in the same; to erect one saw-mill and one flouring-mill, keeping the same in repair, and furnished with the necessary tools and fixtures, and to employ two millers; to erect a hospital, keeping the same in repair, and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provide with the necessary furniture the buildings required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chief of the tribe is expected, and will be called upon, to perform many services of a public character, occupying much of his time, the United States further agrees to pay to the New Iroquois tribe five hundred dollars per year for the term of twenty years, after the ratification hereof, as a salary for such person as the tribe may select to be its head chief. To build for him, at a suitable point on the reservation, a comfortable house, and properly furnish the same, and to plough and fence for his use ten acres of land. The said salary to be paid to, and the said house to be occupied by such head chief so long as he may be elected to that position by his tribe, and no longer.

And all the expenditures and expenses contemplated in this fifth article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said tribe, nor shall the cost of transporting the goods for the annuity-payments be a charge upon the annuities, but shall be defrayed by the United States.

(c) Pertinent articles of the 1863 treaty read as follows:

Art. 4. In consideration of the relinquishment herein made the United States agree to pay to the said tribe, in addition to the annuities provided by the treaty of June 11, 1855, and the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred and sixty-two thousand and five hundred dollars, in manner following: to wit:

First. One hundred and fifty thousand dollars, to enable the Indians to remove and locate upon the reservation, to be expended in the ploughing of land, and the fencing of
the several lots, which may be assigned to those individual members of the tribe who will accept the same in accordance with the provisions of the preceding article, which said sum shall be divided into four annual instalments, as follows: For the first year after the ratification of this treaty, seventy thousand dollars; for the second year, forty thousand dollars; for the third year, twenty-five thousand dollars; for the fourth year, fifteen thousand dollars.

Second. Fifty thousand dollars to be paid the first year after the ratification of this treaty in agricultural implements, to include wagons or carts, harness, and cattle, sheep, or other stock, as may be deemed most beneficial by the superintendent of Indian affairs, or agent, after ascertaining the wishes of the Indians in relation thereto.

Third. Ten thousand dollars for the erection of a saw and flouring mill, to be located at Kamia, the same to be erected within one year after the ratification hereof.

Fourth. Fifty thousand dollars for the boarding and clothing of the children who shall attend the schools, in accordance with such rules or regulations as the Commissioner of Indian Affairs may prescribe, providing the schools and boarding-houses with necessary furniture, the purchase of necessary wagons, teams, agricultural implements, tools, etc., for their use, and for the fencing of such lands as may be needed for gardening and farming purposes, for the use and benefit of the schools, to be expended as follows: The first year after the ratification of this treaty, six thousand dollars; for the next fourteen years, three thousand dollars each year; and for the succeeding year, being the sixteenth and last instalment, two thousand dollars.

Fifth. A further sum of two thousand five hundred dollars shall be paid within one year after the ratification hereof, to enable the Indians to build two churches, one of which is to be located at some suitable point on the Kamia, and the other on the Lapwai.

Art. 5. The United States further agree, that in addition to a head chief the tribe shall elect two subordinate chiefs, who shall assist him in the performance of his public services, and each subordinate chief shall have the same amount of land ploughed and fenced, with comfortable house and necessary furniture, and to whom the same salary shall be paid as is already provided for the head chief in article 5 of the treaty of June 11, 1855, the salary to be paid and the houses and land to be occupied during the same period and under like restrictions as therein mentioned.
And for the purpose of enabling the said to erect said buildings, and to plough and fence the land, as well as to procure the necessary furniture, and to complete and furnish the house, etc., of the head chief, as hereinafter provided, there shall be appropriated, to be expended within the first year after the ratification hereof, the sum of two thousand five hundred dollars.

And inasmuch as several of the provisions of said art. 5th of the treaty of June 7th, 1855, pertaining to the erection of school-houses, hospital, shops, necessary buildings for employees and for the agency, as well as providing the same with necessary furniture, tools, etc., have not yet been complied with, it is hereby stipulated that there shall be appropriated, to be expended for the purposes herein specified during the first year after the ratification hereof, the following sums, to wit:

First. Ten thousand dollars for the erection of the two schools, including boarding-houses and the necessary out-buildings, said schools to be conducted on the manual-labor system as far as practicable.

Second. Twelve hundred dollars for the erection of the hospital, and providing the necessary furniture for the same.

Third. Two thousand dollars for the erection of a blacksmith's shop, to be located at Kamia, to aid in the completion of the smith's shop at the agency, and to purchase the necessary tools, iron, steel, etc.; and to keep the same in repair and properly stocked with necessary tools and materials, there shall be appropriated thereafter, for the fifteen years next succeeding, the sum of five hundred dollars each year.

Fourth. Three thousand dollars for erection of houses for employ(ees), repair of mills, shops, etc., and providing necessary furniture, tools, and materials. For the same purpose, and to procure from year to year the necessary articles—that is to say, saws, logs, nails, glass, hardware, etc.—there shall be appropriated thereafter, for the twelve years next succeeding, the sum of two thousand dollars each year; and for the next three years, one thousand dollars each year.

And it is further agreed that the United States shall employ, in addition to those already mentioned in art. 5th of the treaty of June 7th, 1855, one minister to take charge of the Indian-schools, two assistant teachers, one farmer, one carpenter, and ten millers.
All the expenditures and expenses contemplated in this treaty, and not otherwise provided for, shall be defrayed by the United States.

39. (a) The General Accounting Office Report (Statement No. 1, p. 17) discloses that a total sum of $174,365.27 can be identified as having been disbursed under the provisions of Article 4 of the Treaty of June 9, 1863, on behalf of the Nez Perce Tribe. Included within this total sum of $174,365.27 are two items (a) $55,556.05 for disbursements made in the removal of Indians and (b) $417,8.4 for transportation, etc. of supplies to the inclusion of which petitioner objects in determining the consideration. The cost of removal was part of the consideration to be given under Article 4 (see Finding 37(c)) and disbursements made therefor are payments on the claim. The disbursements made for transportation of supplies, etc., provided for by said Article 4 are payments on the claim. The sum of $174,365.27 is properly part of the consideration.

(b) The G. A. O. Report (Statement No. 1, p. 17) lists a number of items totaling $107,881.59 as having been expended for the benefit of the Nez Perce Indians under the provisions of Article 5 of the 1863 treaty. Of the items there listed the following are payments on the claim under Article 5:

<table>
<thead>
<tr>
<th>Item</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Salary of Sub-Chief</td>
<td>$11,116.66</td>
</tr>
<tr>
<td>Pay of Matrons</td>
<td>12,367.65</td>
</tr>
<tr>
<td>Buildings for Chiefs</td>
<td>2,470.00</td>
</tr>
<tr>
<td>Pay of Mechanics</td>
<td>25,736.07</td>
</tr>
<tr>
<td>Pay of Farmers</td>
<td>8,861.92</td>
</tr>
<tr>
<td>Pay of Misc. Employees</td>
<td>18,595.49</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$79,147.79</strong></td>
</tr>
</tbody>
</table>
The disbursements for Pay of Mechanics, Farmers and Miscellaneous Employees occurred in the fiscal years 1881 to 1900 inclusive (G.A.O. Disbursement Schedule No. 2, pp. 49-55) which covers a period when the obligation under the 1855 treaty to keep in service for 20 years the employees provided for therein had expired.

The item of $26,178.40 disbursed for "Education" and charged to Article 5 of the 1863 treaty by G. A. O. is properly a payment on the claim under Article h of the 1863 treaty. By Article h (Fourth) of said 1863 treaty the United States obligated itself to expend $50,000.00 over a 16 year period for the boarding and clothing of children who attended the schools erected on the reservation. No expenditures for this purpose are shown by the G. A. O. list of Article IV disbursements under the 1863 treaty. The broad designation "Education" would cover the provisions of Article h (Fourth) of the 1863 treaty. Article 5 of the 1863 treaty includes no provisions for Education that would be obligations assumed by the 1863 treaty. The $26,178.40 is payment on the claim under Article h of the 1863 treaty.

The following items charged as disbursements under Article 5 of the 1863 treaty do not come within the obligations assumed by said Article 5 but are actually disbursements made according to the provisions of Article 5 of the 1855 treaty and are not payments on the claim for the 1863 treaty:

- Agency Buildings and Repairs $384.50
- Hardware 1,756.39
- Erection and Equipment of Hospital 374.51
(c) **Recapitulation** - Article 4 and Article 5, Payments on the Claim for the 1863 treaty:

<table>
<thead>
<tr>
<th>Article</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 4</td>
<td>$174,365.27</td>
</tr>
<tr>
<td>Article 4</td>
<td>$26,178.40</td>
</tr>
<tr>
<td>Article 5</td>
<td>$79,177.79</td>
</tr>
</tbody>
</table>

$279,691.46

40. According to the General Accounting Office there were certain disbursements made under the treaties of 1855 and 1863 for which it was found impracticable to render an accounting under one treaty separately from the other. These mixed disbursements are shown in Statement No. 1 of the G. A. O. Report at page 18, as $13,032.37 disbursed under Article 4, $143,440.26 under Article 5, and $137,577.98 under Articles 4 and 5.

(a) Article 4 - $13,032.37. This sum is divided on a 50-50 ratio between the two treaties and the amount of $6,516.18 is consideration under the 1863 treaty.

(b) Article 5 - $143,440.26. The items making up this total sum includes among others:

- Erection and equipment of hospital .......... $ 3,139.10
- Agency buildings and repairs ................. 10,074.44
- Erection and equipment of shops .............. 11,704.50

These items are not provided for by Article 5 of the 1863 treaty but are expenditures which would meet obligations set up by the 1855 treaty. These items therefore are not part of the consideration for the 1863 treaty. Only part of the total sum expended for the remaining Article 5 items, i.e., pay of mechanics, miscellaneous employees and farmers which total $112,522.22 is to be included as consideration. The Commission
finds that 15 employees were provided for by the 1855 treaty and six by the 1863. Based on allocation of the $112,522.22 according to the number of employees provided for within the two treaties respectively the Commission finds $32,114.20 of the total sum expended for pay of mechanics, farmers and miscellaneous employees to have been consideration for the 1863 treaty.

(c) Article 4 and 5 - These mixed expenditures totaling $137,557.98 were disbursed as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Saw and grist mills</td>
<td>30,114.59</td>
</tr>
<tr>
<td>Education</td>
<td>102,597.29</td>
</tr>
<tr>
<td>Hardware</td>
<td>4,433.10</td>
</tr>
<tr>
<td>Fuel</td>
<td>433.00</td>
</tr>
</tbody>
</table>

The 1855 treaty (Article 5) provided for the erection of one saw-mill and one flouring mill, keeping the same in repair, and furnished with the necessary tools and fixtures. The "Third" part of Article 4 of the 1863 treaty provided for the expenditure of $10,000.00 for erecting a saw and flouring mill at Kamia. The sum of $10,000 only is consideration under the 1863 treaty and the remaining $20,114.59 was expended under the 1855 treaty.

Of the $102,597.29 of the mixed disbursements for Education only $23,821.60 may be taken as consideration under the 1863 treaty. The only provision in the 1863 treaty pertaining to education and calling for expenditures under the provisions of that treaty are to be found in Article 4 (Fourth) providing $50,000.00 over a 16 year period. In Finding 39(b) this Commission allowed $26,173.40 expended for "Education" as part of the 1863 consideration. Therefore $23,821.60 of the $102,597.29
mixed Article IV and V total sum is to be considered part of the 1863 consideration in order to comply with the $50,000.00 provided for in Article 4 (Fourth) of the 1863 treaty.

The sum of $4,333.00 mixed disbursement for fuel should properly be an Article 4 expenditure and one half of this sum, or $216.50 is found to be part of the 1863 treaty consideration. The mixed expenditures for Hardware appear to have been more of an Article 5 obligation under the 1855 treaty and the sum of $4,433.10 is not included as 1863 consideration.

(d) Recapitulation - The amounts found to be consideration where mixed disbursements occurred are as follows:

<table>
<thead>
<tr>
<th>Article 4</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provisions, etc.</td>
<td>$6,516.18</td>
</tr>
<tr>
<td>Saw and Grist Mill</td>
<td>$10,000.00</td>
</tr>
<tr>
<td>Education</td>
<td>$23,821.60</td>
</tr>
<tr>
<td>Fuel</td>
<td>$216.50</td>
</tr>
<tr>
<td><strong>Total Article 4</strong></td>
<td><strong>$40,554.28</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 5</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pay of Mechanics, Farmers and Misc. Employees</td>
<td>$32,149.20</td>
</tr>
<tr>
<td><strong>Total Article 4 and 5</strong></td>
<td><strong>$72,703.48</strong></td>
</tr>
</tbody>
</table>

41. The Commission finds that the consideration paid by the United States to the Nez Perce Indians under the provisions of the Treaty of June 9, 1863, amounted to a total sum of $352,394.94.

42. The Commission finds that the consideration paid by the United States in the amount of $352,394.94 for the cession by the Nez Perce Tribe of 6,932,270 acres, which is found to have had a fair market
value of $4,650,000.00 as of April 17, 1867, was grossly inadequate and unconscionable. The petitioner is therefore entitled to recover of the United States the difference between the consideration paid and the value found for said lands, or $4,977,635.06, from which will be deducted the offsets, if any, hereinafter to be determined in accordance with the Rules of this Commission.

Edgar E. Witt  
Chief Commissioner

Wm. K. Holt  
Associate Commissioner