

BEFORE THE INDIAN CLAIMS COMMISSION

THE NEZ PERCE TRIBE OF INDIANS,)	
OR CHARLES E. WILLIAMS AND)	
JOSEPH REDTHUNDER, as repre-)	
sentatives of the NEZ PERCE)	
TRIBE OF INDIANS,)	
)	
Petitioner,)	
)	
v.)	Docket No. 175-A
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: December 31, 1959

Appearances:

Donald C. Gormley, with whom were Charles A. Hobbs, and George E. Lyman, Attorneys for Petitioner.

John D. Sullivan, with whom was Mr. Assistant Attorney General, Perry W. Morton, Attorneys for Defendant.

OPINION OF THE COMMISSION

HOLT, Commissioner, delivered the opinion of the Commission.

The Nez Perce Tribe, and certain individuals named in the petition, filed a petition before this Commission (Docket No. 175) on July 26, 1951, alleging three claims all for additional compensation for land ceded under treaties and an agreement: i.e., (1) for land ceded under the Treaty of June 11, 1855, 12 Stat. 957; (2) for land ceded under the Treaty of June 9, 1863, ratified April 17, 1867, 14 Stat. 647, and (3) for land ceded by Agreement of May 1, 1893, 28 Stat. 326. On July 30, 1951,

certain individual Nez Perce Indians as representatives of the Nez Perce Tribe filed claims under Docket No. 180 which were identical with the claims previously filed by the Tribe with respect to (1) and (2) above, together with a claim for damages for gold removed from, and trespass on, the Nez Perce Reservation during the period 1860-1867.

On motion filed by the petitioner in Docket No. 175 the Commission dismissed the petition in Docket No. 180, for reasons stated in 2 Ind. Cl. Comm. 245. Later, by order of February 27, 1953, the petition in Docket No. 180 was reinstated, and consolidated for trial with Docket No. 175. Subsequently the gold and trespass claim in Docket No. 180 was severed from the petition and given a new docket number, No. 180-A. Hearings were held on the claim in No. 180-A, and findings of fact made and opinion rendered in which this Commission found that the United States would be liable in damages for whatever uses of the reservation by white intruders might be proved by the tribe (3 Ind. Cl. Comm. 571, 578) and for the value of such gold taken from the reservation which the tribe might in further proceedings prove was acquired by defendant in its mint. 3 Ind. Cl. Comm. 571, 581, (1955).

During 1955 and 1956 petitioners and their attorneys in Docket Numbers 175 and 180 (which included 180-A) negotiated an agreement whereby, with the approval of the Commission, the claims remaining in No. 180 (after 180-A had been severed) and those in No. 175 would be merged into a single suit containing the several alleged causes of action under the 1855 and 1863 Treaties and the 1893 Agreement and the claim in No. 180-A would continue to be prosecuted separately. This

agreement was approved by the Commissioner of Indian Affairs on September 6, 1956, and by this Commission by order of December 4, 1957.

By the Treaty of June 11, 1855, 12 Stat. 957, II Kapp. 702, the Nez Perce Tribe ceded, relinquished and conveyed to the United States all their right, title and interest in or to the country occupied or claimed by them in the then territories of Oregon and Washington, which lands are described in Article 1 of said treaty. From such cession was reserved an area of land for the exclusive use and occupation of the Nez Perce Tribe. The reservation lands are described in Article 2 of the 1855 treaty and are set forth in full in Finding 3 herein. The 1855 treaty was not ratified until March 8, 1859.

The events which led to the disruption of the peaceful use and occupation of the 1855 reservation lands by the petitioner have been related previously by this Commission in the "gold claim," Docket No. 180-A, 3 Ind. Cl. Comm. 571, and again in the findings of fact herein, (Findings 4 through 9). Briefly, in the fall of 1860 whites intruded on the reservation and discovered gold. By the spring of 1861 some 1800 claims had been prospected by white trespassers. Because of the gold rush an Agreement was entered into in 1861 by the Superintendent of Indian Affairs and the tribe whereby the tribe agreed to permit white men to enter upon roughly the northern half of the reservation for mining purposes but shortly rich placers were discovered south of the line and the miners entered that area in large numbers. By the fall of 1861 some 5,000 to 7,000 miners were on the reservation. Commencing in 1861 officials of the United States urged that a new treaty be

made with the tribe for a cession of the gold lands but it was not until the summer of 1862 that Congress appropriated the money for the purpose of negotiating a treaty with the Nez Perce Indians.

The Commissioners appointed to negotiate for the cession of the gold lands began their meetings with the chiefs and head men of the Nez Perce Tribe on May 25, 1863. After much discussion the Treaty of June 9, 1863, 14 Stat. 647, II Kapp. 843, was made and concluded by which the Nez Perce Indians ceded a portion of their reservation to the United States.

The instant claim, which was timely filed by petitioner herein, is for additional compensation for the reservation lands ceded to the United States by the Nez Perce Tribe by the 1863 treaty for an alleged unconscionable consideration. Petitioner claims alternatively that it has a right to recover for unfair and dishonorable dealings resulting from defendant's acts in acquiring the cessions of the lands. Defendant does not question the identifiability of petitioner nor the capacity of petitioner to maintain this action. The Treaty of June 9, 1863, was not ratified and did not become operative until April 17, 1867, which latter date is therefore the evaluation date.

Besides the question as to the value of the ceded reservation lands, which will hereinafter be referred to as the subject tract or the Nez Perce tract, on April 17, 1867, the parties have raised a number of subsidiary issues which required thorough study. These additional issues are (1) the Northern Boundary of the ceded tract; (2) the Western Boundary of the subject tract; and (3) the consideration paid by defendant to the Nez Perce Tribe for the 1863 cession.

NORTHERN BOUNDARY

The treaty calls with respect to boundaries of the Nez Perce reservation as set forth in the 1855 treaty have resulted in much dispute between the parties to this action as they did also in consideration of the prior Nez Perce litigation with respect to the "gold claim" in 3 Ind. Cl. Comm. 571. In that proceeding the Commission set the southern and eastern boundaries of the reservation (Fdg. 13, 3 Ind. Cl. Comm. 571, 578). The northern and western boundaries were not questioned during the proceedings then held with regard to the gold and trespass claim. The question of boundaries arises for several reasons. First, because the reservation was never surveyed and secondly because of the use of terms or names as treaty calls which are not recognizable on modern maps and because some of the treaty calls are general in nature. The northern and northwestern boundaries in Article 2 of the treaty are described as:

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 ten miles below the mouth of the Al-po-wa-wi River; * * *

In placing these boundary lines on a present day map, petitioner includes a large area of land in what is now known as the Palouse wheat region while defendant insists that this addition of some 670,000 acres should not be embraced within the subject tract. Defendant contends that the treaty calls are vague and that the petitioner in Docket No. 180-A at the hearings in that case, where the southern and eastern boundaries were determined, accepted as did defendant, the northern

boundary as mapped by Charles Royce, 18th Annual Report of the Bureau of American Ethnology, Part 2. If, of course, as petitioner now contends through different counsel, the treaty calls may be identified so as to show Royce's interpretation of them was erroneous, then the Commission is obligated to set the boundaries in conformance with the treaty calls and petitioner is not estopped to have the boundaries properly identified. It should be noted that in the hearings regarding the gold and trespass claim it was not necessary to determine the northern boundary.

Petitioner herein has introduced a number of contemporary maps which contain thereon the Indian names for streams which do not appear on modern day maps. A careful study of these maps shows that the Mo-ha-na-she, identified in the treaty as the southern tributary of the Palouse River, is really the main branch of the Palouse as it is known today. The Ti-nat-pan-up mentioned in the treaty is what is known now as the south fork of the Palouse River. Certain land marks are also shown on the contemporary maps, and their modern names identified by other evidence, which make it possible to designate the boundary line. The maps show the Ti-nat-pan-up stream flowing into the Mo-ha-na-she, or Palouse, at a point almost due south of a landmark named Pyramid Peak which is now identified as Steptoe Butte. This landmark is located almost due north of the present town of Colfax, Washington, which is at the confluence of the Palouse River and the south fork of the Palouse River. In view of the evidence as submitted by petitioner the Commission concludes that the northern boundary is that line contended for by petitioner.

WESTERN BOUNDARY

Counsel for petitioner in Docket No. 264, The Confederated Tribes of the Umatilla Indian Reservation v. The United States, called the attention of the Commission to an overlap of about 150,000 acres between petitioner therein and the Nez Perce Tribe with respect to the western boundary as claimed by the Nez Perce Indians. Docket No. 264 involves a claim of Indian title and the case has been tried and briefed. Counsel for the Umatilla points out that the area as mapped by the Nez Perce experts for the western boundary of the 1855 reservation creates an overlap with the eastern boundary as mapped to show the claim in the Umatilla case both by the petitioner and defendant therein. The Umatilla treaty described the eastern boundary as following the southern boundaries of the Nez Perce purchase of 1855. The treaties were made almost simultaneously in 1855 and the descriptions in the treaties which are pertinent are set forth in our Finding 25. The overlap includes two areas, the larger in the vicinity of Elgin, Oregon, and a smaller area along the watershed between the Wallowa and Powder Rivers. Counsel for the Nez Perce Tribe urges the boundary is correct as depicted by its expert on its map (Pet. Ex. 247). Mr. Brown, petitioner's expert, testified that there was an Indian crossing at Elgin, Oregon, and that the words "Grand Ronde" as used in the treaty description referred to the "grand turn" of the Grand Ronde River. Maps referred to by Nez Perce counsel show a trail crossing at a point near which Elgin, Oregon, is now located. In view of the above testimony and evidence, and in the absence of any other evidence to locate the crossing referred to in the 1855 treaty the Commission

concludes that the boundary line as drawn by petitioner herein is consistent with the treaty calls "thence to the crossing of the Grand Ronde River, midway between the Grand Ronde and the mouth of the Woll-low-how River; * * *." The Commission further agrees with the petitioner herein on the line following the watershed between the Powder and Wallowa Rivers which small overlap was caused by the difficulty of following such a crest.

CONSIDERATION

The General Accounting Office of the United States prepared a report (Pet. Ex. 246) in order to attempt to show what disbursements were made by defendant under the provisions of the Treaty of June 9, 1863, supra, as consideration for the cession of the reservation land by said treaty. The G.A.O. report identifies definitely certain items which that office states were disbursed pursuant to 1863 treaty provisions. With respect to others, totaling \$294,050.61, the General Accounting Office found it impracticable to render an accounting under the 1863 treaty separately from the Treaty of June 11, 1855, 12 Stat. 957, since said treaties provided for similar objects, and in many instances the moneys appropriated to fulfill one treaty were advanced to disbursing officers together with moneys appropriated to fulfill the other treaty.

Petitioner contends that only disbursements proved to have been spent under Article 4 of the 1863 treaty may properly be allowed as consideration for the 1867 cession; or alternatively, that only the disbursements known to have been spent under Article 4 of the 1863 treaty, plus a reasonable allocation of joint disbursements under Articles 4 of the

two treaties were properly consideration. With respect to joint, or mixed, disbursements under the two treaties petitioner suggested three different methods of allocating a percentage of the mixed disbursements to the treaties. All are admittedly arbitrary. One method would assume the moneys were spent half and half; another is based on the ratio of appropriations between the two treaties commencing at the time of the first mixed disbursement which would result in 52% being allocated to the 1855 treaty and 48% to the 1863 treaty; and the last method is based on comparing the expenditures known to have been made under Article 4 of the 1855 treaty to those known to have been made under Article 4 of the 1863 treaty, or a ratio of 53% of the mixed disbursements being allocated to the 1855 treaty and 47% to the 1863 treaty. Of the suggested methods of allocation petitioner urges this last one as best and by applying it to the mixed disbursements petitioner contends only a total of \$41,950.51 should be allocated to the 1863 treaty as consideration. Together with this amount petitioner concedes that \$117,547.68 of the disbursements made pursuant to Article 4 of the 1863 treaty is properly consideration, or a total consideration of \$159,498.19. Defendant, on the other hand, contends that the simpler method would be to take one-half of the amount paid jointly between the two treaties, that is the sum of \$147,025.30, and allow this amount as part of the consideration. This sum plus the disbursements which the G.A.O. Report shows as being expended under Articles 4 and 5 of the 1863 treaty, defendant urges, should be found to be the consideration paid for the 1863 treaty, for a total of \$429,272.16. Defendant concedes that the \$600.00 expended under Article 6

and \$4,665.00 disbursed pursuant to Article 7 of the 1863 treaty were not part of the consideration.

The Commission has made a thorough study of the G.A.O. report and concludes that neither the methods suggested by petitioner nor that set forth by defendant would be the proper course to follow in determining the consideration paid for the 1863 treaty. The Commission has found (Fdg. 38(a)) that the items shown by the G.A.O. Report to have been expended under Article 4 of the 1863 treaty are properly part of the consideration. These items total \$174,565.27. As to the amount of \$107,861.59 shown by the G.A.O. Report (p. 17) to have been disbursed pursuant to Article 5 of the 1863 treaty only a portion of the items making up this total sum have been found to be part of the 1863 consideration (Fdg. 38(b)). Certain of these items, i.e., Salary of Sub-Chief, Pay of Matrons and Buildings for Chiefs were specifically provided for in Article 5 of the 1863 treaty for the first time and expenditures for these items are part of the consideration. The items for Agency buildings and repairs, Hardware, and Erection and equipment of hospital were not found to be part of the consideration since they were for objects provided for in Article 5 of the 1855 treaty. The amounts expended for the items Pay of Mechanics, Pay of Farmers and Pay of Miscellaneous Employees were concluded to be part of the 1863 consideration for two reasons; first because the 1863 treaty provided for additional employees and services and secondly because these sums were expended during a period when the 20 year obligation to furnish the services of employees had expired under the 1855 treaty. The item under

Article 5, disbursements of \$26,178.40 for Education, the Commission believes should properly be shown under Article 4 disbursements for the 1863 treaty. Article 4 (Fourth) of the 1863 treaty provided for the expenditure of \$50,000.00 for the boarding and clothing of the children attending the Indian schools and for equipment, furniture, etc., for the schools. Permitting this \$26,178.40 plus enough of the mixed Article IV and V disbursements for Education to fill out the \$50,000.00 obligation under Article 4 (Fourth) of the 1863 treaty is believed to be the fair and equitable method of allocating these expenditures.

Of the mixed disbursements the Commission has determined (Fdg. 39(a)) that one half of the Article 4 expenditures, or \$6,516.18, is the most equitable allocation of the joint expenditures to the 1863 treaty. As to Article 5 mixed disbursements the Commission finds that those items for Erection and equipment of hospital, Agency buildings and repairs, and Erection and equipment of shops were properly obligations assumed by the 1855 treaty and are not part of the consideration for the 1863 treaty. The remaining mixed Article 5 expenditures were for Pay of Miscellaneous employees, Pay of Mechanics and Pay of Farmers. The Commission allocated \$32,149.20 of the total of these three items to the 1863 treaty based on the ratio of the number of employees provided for in the two treaties which under the circumstances appears to be an equitable method to apply.

The G.A.O. Report shows Article 4 and 5 mixed disbursements of \$137,577.98 (p. 18) where the General Accounting Office could not determine the proper Article under which to list these items. Of these

expenditures one item is \$30,114.59 for saw and grist mills. Since Article 4 (Third) of the 1863 treaty provided for the expenditure of \$10,000.00 for the erection of a saw and flouring mill, only this sum is properly part of the consideration. Another item is \$102,597.29 for Education. As previously stated a portion of this expenditure, or \$23,821.60 (Fdg. 39(c)) has been found to be part of the consideration in order to fill out the obligation to expend \$50,000.00 under Article 4 (Fourth) of the 1863 treaty. The item \$4,433.10 for Hardware was an obligation assumed by the 1855 treaty. The \$433.00 expended for Fuel seems properly an Article 4 item and one-half, or \$216.50, is allocated to the 1863 treaty. The Commission concludes therefore that the total consideration paid by the United States to the Nez Perce Indians for the 1863 cession was \$352,394.94.

THE NEZ PERCE TRACT

The findings of fact herein made set forth in detail much pertinent information with respect to the Nez Perce tract concerning soil types, climate, topography, settlement, transportation, etc., and will not be fully reiterated in discussing the valuation issue of the case. Briefly, however, the subject tract being an extensive area of 6,932,270 acres contains a variety of lands, topographically speaking, including rugged mountains, deep canyons, fertile prairies and small valleys. The climate throughout the tract, generally speaking, is mild as compared to similar latitudes east of the Bitterroot Mountains. The tract is located in northeastern Oregon, southeastern Washington and north central Idaho between the Salmon and Palouse Rivers.

As of 1867 the center of population for the region of the northwest within which the tract is located was Walla Walla Valley just to the west of the tract. This valley and the town of Walla Walla became the trading center of the interior region for the Nez Perce and other mines of the region following the discovery of gold in the 1860's. The Oregon Trail, which skirted the ceded tract, passed through Walla Walla Valley and the Mullan Road ran northward from this point. There was a primitive road from Walla Walla to the town of Lewiston within the subject tract. The major transportation route into the tract, however, was by way of the Snake River to Lewiston which was the supply depot within the tract. Steamboat service to Lewiston had commenced in 1861 and during high water season three boats a week were operated. Six primitive overland roads, or trails, had been established through the tract by 1862.

During the height of the gold mining operations there were thousands of miners and others upon the ceded area. The majority of these, being miners, were a transient population and by 1867 many of them had left the tract for other mining areas. No exact figures for the population of the tract are available for 1867 but the 1870 census for Idaho shows for Shoshone County a population of 722 including 568 Chinese, for Nez Perce County a population of 1607 including 747 Chinese and 849 for Idaho County including 425 Chinese. Stevens County (of which Whitman County was then a part), Washington, in 1870 had a population of 734. Columbia, Garfield, and Asotin Counties were a part of the large Walla Walla County in 1870 and had a population of 5,300,

which included the well settled Walla Walla Valley. The decade 1870-1880 saw the first appreciable population increase of permanent settlers to the ceded area particularly on the agricultural lands in the northwestern part of the tract. Whitman County was organized from a part of Stevens in 1871 and by 1880 had a population of 7,014. Columbia County which was carved out of Walla Walla in 1875 had a population in 1880 of 7,103 but only a portion of this county was in the tract. Asotin County (all within the tract) and Garfield County (a part within the tract) were still part of Walla Walla in 1880 which had a population of 8,716. By 1880 the population for Idaho County was 2,031; Nez Perce County 3,965 and Shoshone County 469.

From the time of the earliest settlement of the northwest region it was known that many of the valleys situated therein were adaptable to agricultural pursuits. Settlement of this region east of the Cascade Mountains really commenced with the opening in 1858 of the Walla Walla Valley and Umatilla Valley. The early settlements were made in the valleys and along the water courses 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. In 1864 it was discovered that the hill soil in the vicinity of Walla Walla was suitable for the raising of grain and this resulted in an increase in settlement in that area. Within the Nez Perce tract settlement progressed slowly but steadily in the years following the valuation date. The famous Palouse wheat region situated in Whitman County received its first appreciable settlement in

1869 when several families located on Union Fork. By 1871 there were some 200 people located on Union Fork and around the Palouse Forks. In this section it was erroneously believed until 1876 that cereal grains could not be raised on the hills because it was thought the altitude in the area would render it subject to frost. The early settlers in this county busied themselves with the care of their flocks and herds giving little attention to agriculture, except for raising a little wheat for themselves and wheat hay for their horses and other stock kept for use on their farms. Livestock was the chief enterprise of this county until the coming of the railroad in 1883. As of 1867 the settlers of the northwest region east of the Cascades were hindered in getting their produce to markets because of the lack of adequate transportation facilities. There was transportation by steamboat via the Columbia to the west coast but two portages were necessary at the Dalles and at the Cascades of the Columbia. The cost of transportation even by boat was exceedingly high and as a result there was practically no outside market for the produce of the region. The increased settlement and wheat production of areas such as the Walla Walla Valley and its vicinity soon resulted in large surpluses that could not be profitably marketed. The region of the northwest east of the Cascades had to await the coming of the railroad in 1883 before it was to have adequate means of transporting its products to market. Until such transportation became available, markets for the northwest region were local and limited in nature.

VALUATION

The Commission is faced with the task of determining the value of an extensive tract of 6,932,270 acres of land adaptable to a number of

uses at the remote date of April 17, 1867. The expert appraisers for the parties, Mr. William C. Brown for petitioner and C. Marc Miller for defendant, agree that the proper standard to be followed in determining the value of the tract as of 1867 is the fair market value approach. That is about the only point on which the experts agree in this case. Petitioner's appraiser concluded that in his opinion the fair market value of the tract in 1867 was \$18,250,000, for an average of approximately \$2.63 per acre. Defendant's appraiser, on the other hand, stated in his opinion the Nez Perce tract would have been worth \$400,000.00 in 1867, or an average of approximately six cents per acre. Petitioner's appraiser classified 1,164,084 acres of the tract as agricultural land at \$5.17 per acre while defendant's appraiser was of the opinion that probably not more than two per cent of the tract could have been classified as agricultural land in 1867. Mr. Miller did not consider the disputed Palouse area in the north as part of the tract in his valuation study. Mr. Brown classified 3,152,653 acres of the tract as timber land to which he assigned a value of \$4.11 per acre to the lands he designated "first accessible" timber lands, the sum of approximately \$2.05 to "next accessible timber" and approximately \$1.03 per acre for the "last accessible timber land." The total figure representing the fair market value of timber lands according to Mr. Brown's opinion amounts to \$6,059,169.00. Defendant's expert classified 4,010,126 acres of the tract as timber lands for which he reported there was absolutely no demand in 1867. Petitioner's appraiser classified 2,379,953 acres as grazing lands which he appraised at an average of approximately \$1.27

per acre. Mr. Miller classified 1,281,487 acres as grazing land for which he concluded there would have been no demand in 1867 because of the vast amount of grazing land in the region subject to use under the free range policy. Mr. Brown agreed with petitioner's other experts who prepared the valuation on mineral lands that the mining areas of the tract in 1867 totaled 21,168 acres and had a fair market value of \$3,000,000.00. Mr. Miller, for defendant, was of the opinion that mining activity in the tract had declined to a point by 1867 that there was very little value in the mining prospects of the ceded area.

Given these diametrically opposed views of the appraisers for the parties it became necessary for the Commission to intensely study the record to ascertain the actual conditions with respect to the nature of the land; its then highest and best uses or those uses for which it was potentially adaptable in the reasonable future; the demand for the lands; markets; accessibility and salability as shown by comparable land sales. Some of these elements have been discussed previously while others necessarily must be discussed in considering the methods of valuation used by the appraisers.

A study of the record caused the Commission to conclude, and it so ultimately found, that the land classifications and the highest and best uses for which the lands of the tract were adaptable as of April 17, 1867, were more in line with the conclusions reached in these respects by Mr. Brown, petitioner's expert. In considering the highest and best uses of the tract the Commission, however, believes that as of 1867 certain of the lands, although known to be arable, should be

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considered only as potential agricultural lands and that there was no immediate value for a large amount of the timber that would have been considered economically inaccessible in 1867.

The Commission has set forth in detail in its findings of fact the pertinent parts of the appraisal methods used by the experts in this case. Mr. Brown, petitioner's appraiser, presented a complicated and detailed valuation report consisting of three volumes which was supplemented by a four volume valuation study of the mineral lands by petitioner's mining experts, Mr. Philip J. Shenon and Mr. Roy P. Full. In essence, Mr. Brown's appraisal method involved considering certain value indications obtained from diversified sources which were subject to adjustments, then averaged and the final average value indication used as the basis of setting a value for subject lands before discounting for size. In considering these lands, Mr. Brown used principally five value indications which were (1) index sales, that is sales within the tract of small acreages; (2) comparable sales, or sales of small tracts in adjoining counties; (3) railroad sales; (4) an adjudicated award given to the Puget Sound Agricultural Company and (5) the adjudicated award given to the Hudson's Bay Company by the Joint British-American Commission for settlement of claims of those companies.

Most of the 2,453 sales considered by petitioner's expert are small sales which occurred during his "valuation period" 1859 to 1902 with an average valuation date of 1882. The use of such an extended period appears to result in applying to the tract an evaluation date much later than 1867. In Mr. Brown's report in Nez Perce Tribe v. U.S.,

Docket 175-B (Pet. Ex. 89, p. 143) the appraiser states the average price for land in 1880 in this area was \$2.63 per acre which is his final value conclusion in this case. It results in taking into consideration sales during periods of time when conditions are known to have changed due to better transportation facilities, increased settlement and development, and the occurrence of events unforeseen at the valuation date. With respect to the small sales Mr. Brown allowed only a ten percent discount for improvements on the sales price for sales prior to 1867 and twenty per cent for post treaty sales. A study of the location of the small "comparable sales" indicates that many of these small tracts were choice locations along major routes of travel or favorably situated in or near then existing communities such as Walla Walla in the Walla Walla Valley. As of 1867, Walla Walla Valley was highly developed and the town was the trading center and center of population of the northwest region. Mr. Miller, defendant's appraiser, urged that the small sales in many cases were made for the cost of improvements only. In view of the record the allowance of a mere 10% or 20% discount for improvements does not seem reasonable.

Mr. Brown further complicated the appraisal by classifying the small sales as unmixed agricultural land or mixed sales through inspection of the lands in the various sales. Sales which included at least 90% agricultural land were classified as unmixed while those conveying less than 90% were termed mixed land sales. This method, of course, resulted in the necessity of allocating the purchase price to the various classifications of land within a mixed sale. For timber

land within a sale he allowed the same as for agricultural land while for grazing land a four to one value ratio between agricultural and grazing land was allowed. This method of dividing the consideration shown in a small sale transaction is objectionable for several reasons. First, the procedure of assigning certain portions of the sales price to various types of land assumes that the buyer of the small tract purchased on that basis. It may well be the purchase price was largely governed by the select location of the tract, its proximity to a nearby market or water, or some other special advantageous aspect of the tract. Secondly, as of 1867 we are dealing with a frontier economy in this area and the immediate need of a buyer would be to operate a subsistence homestead. Such a purchaser would look for a small tract that would provide him with sufficient agricultural, grazing and timber land to meet his needs. To say such a purchaser would have paid on the basis of so much for each type of land overlooks the need in the frontier economy for a well balanced homestead to meet the requirements of subsistence farming. Finally the method of allocating the price and acreage in mixed sales has the tendency to distort the sales prices of different types of land and the acreages thereof that were sold during a period. This is apparent when timber land in a small sale is allocated the same proportion as agricultural lands during a time when there was a demand for agricultural land and little for timber land as such.

Two valuation indications used by Mr. Brown involved the adjudicated awards made to the Hudson's Bay and Puget Sound Agricultural Companies by the Joint British-American Commission. The lands for the greater

part involved in these awards were located west of the Cascade Mountains. The Puget Sound's Agricultural claims involved about 170,000 acres in Pierce and Lewis Counties, Washington. The Hudson's Bay Company claim involved 179,280 acres much of it in the vicinity of Vancouver, Washington. The Commissioners considering those claims rendered their opinions with respect to the awards in 1869. According to the opinion of one of the Commissioners considering these claims the Hudson's Bay claim consisted of three items (1) the value of the company's post and lands, (2) the value of the trade and (3) the loss and damage from acts (of trespass) which had been committed. The Joint British-American Commission in their opinions making the awards do not set forth the method by which they valued the rights and claims of the Companies. They did not set a value separately for agricultural, timber and grazing lands nor did they indicate what part of the awards was for improvements or whether some was to be payment for rights of trade or in damages for trespass.

Petitioner's expert, however, used these awards as value indications. To do this he allocated the awards in proportion to the composite testimony shown by the evidence with respect to value as set forth in the hearings on the claims of the Companies by the witnesses for the United States who testified as to value of the different types of land within the claims. Such a method of allocating the awards to various types of land within the claims is purely theoretical and mere conjecture. It should be noted also that these lands were for the most part west of the Cascades, closer to markets, in more highly developed country, and with better transportation facilities. The lands involved in the

Companies' claims were remote as far as comparison with the subject tract is concerned.

It is not necessary to consider further the value indications used by petitioner's appraiser with regard to the different types of land within the tract since any final average of these value indications would be questionable for the reasons set forth in analyzing them. The study of index and comparable sales do indicate, however, that there was a market for small tracts in and adjoining the Nez Perce ceded area at or about the date of valuation, especially for the agricultural lands of the region. With respect to the grazing lands of the region there were, according to Mr. Brown, very few sales of straight grazing land within the tract or in the surrounding area. This was undoubtedly due to the free range policy in which ranchers made free use of the vast public domain on which to run their cattle. With a slow but steady settlement of the region being experienced in 1867 there may well have been some demand for large acreages of grazing land by ranchers interested in protecting themselves against homesteaders.

It has been previously pointed out that the lack of transportation facilities and high freight rates had virtually cut off the northwest region within which the tract was located from markets. This is especially true of the timber lands of the ceded tract. Even if it were true that much of the timber on the tract was of a commercial nature it would not have been considered economically accessible in 1867 except the comparatively small amount that would be needed to meet the local demand. There were no sales of large tracts of timber lands

within the ceded area until 1900 when the Northern Pacific Railroad was extended into the timbered area of the tract. As of 1867 the Great Lakes region of the country was the center of the lumber industry while the excellent forests of the Puget Sound area west of the Cascades were available to supply the west coast markets. On the Nez Perce tract, however, timber operations had been carried on even prior to the valuation date. These operations were small in nature and served to satisfy the local demand for lumber to be used in mining operations and for building purposes. As of 1867, timber operators on the ceded area would have been interested only in select tracts easily accessible to water.

The appraiser for petitioner was of the opinion that 610 acres of the ceded tract had a highest and best use in 1867 as town sites. With the decline in mining activity and the departure of many miners only three communities remained on the subject tract in 1867 and these were Lewiston, Pierce City and Florence. The facts pertaining to the acreages of these town sites and the method used by Mr. Brown to evaluate them are set forth in Finding 33. The outcome of this valuation approach was to place a value of \$89,370.00 on the Lewiston town site consisting of 550 acres and a value of \$122,710.00 for Florence containing 40 acres. This results in the larger, more promising and favorably located town site being valued at a lower sum, than the smaller, remote and less promising mining community of Florence. As of 1867 the mining camp of Florence would, no doubt, be more comparable to the Pierce City town site of 20 acres which Mr. Brown valued at \$13,625.00. At the time of valuation the future importance of Florence and Pierce City as town sites

would have been suspect because of the decrease in the mining population and decline in mining activity in the tract. While these factors would also have influenced the value of the Lewiston town site, which was originally surveyed as containing approximately 40 acres until it was resurveyed prior to August 1874 when it consisted of about 556 acres, its favorable location at the confluence of the Snake and Clearwater rivers and proximity to settlements in the agricultural lands to the west of the tract would have then indicated that there was opportunity for the continued development of this town site. Taking into consideration the findings of fact herein made and the record as a whole the Commission is of the opinion that a prospective purchaser would have believed he could pay the sum of \$5,000.00 for the Florence townsite, \$5,000.00 for the Pierce City townsite and \$40,000.00 for the townsite of Lewiston.

Petitioner in order to show the fair market value of the mineral lands of the subject tract relied on the testimony and report of its witnesses, Mr. Philip J. Shenon and Mr. Roy P. Full, mining geologists. These witnesses were of the opinion that the mineral lands of the Nez Perce tract had a fair market value of \$3,000,000.00 as of April 17, 1867. The appraisal approach used by these witnesses involved the use of sales of placer mining claims in the Pierce City - Oro Fino mining district only for the year preceding the evaluation date. First, however, these experts measured the mining districts to determine the number of placer claims for each district. This was done by mapping and measuring the streams and gulches within a mining district. The

streams and gulches included those not only for which they had documentation to indicate mining activity but also included streams and gulches for which there was no such documentation in order to secure what they believed would be a fair representation of mining activity in 1867. The length of the measured areas was then computed into mining claims according to the length of claims as prescribed by the mining district in which the gulch or stream was located. By this method the witnesses concluded there were a total of 16,462 claims consisting of \$13,363 acres in their "measured area." By using the average sales price determined by a study of the claim transactions for the Pierce City - Oro Fino district for the year prior to April 17, 1867, which was \$116.08 for 182 sales and by multiplying the 16,462 claims by this average sales figure they concluded the "measured area" had a value of \$1,910,908.06. These witnesses also found a value for lode deposits but only in the Florence mining area. This was computed by estimating the length of the lodes known to be in existence in 1867 by the number of claims on said lodes. From the consideration shown in the sales transaction involving lode claims the witnesses computed the average foot value of the lodes. Applying this figure to the length of the lodes the petitioner's mineral appraisers concluded the lode deposits of 305 acres in the Florence area were worth \$117,608.00 in 1867. The balance of the total final mineral value figure of \$3,000,000.00, or \$971,483.04, was included to give a value to what the mineral experts termed the "unmeasured area" consisting of 7500 acres, where there was historical evidence of mining activity but for which there was not believed to be adequate information for assigning value.

The Shenon and Full study supports petitioner's contention that there was mining activity on the subject tract as of the valuation date and that the known presence of gold upon the land would have added substantially to the fair market value of the ceded area. The appraisal approach fails to take into consideration several important factors, however. The mineral experts made no allowance for improvements in considering the sales of placer mining claims. The record indicates that as of 1867 mining activity was on the decline in the subject tract and the inclusion of all streams and gulches in a mining district assumes most of these in the "measured areas" were paying properties and salable. The \$971,843.04 assigned as a value to the "unmeasured area" is an arbitrary figure. The value assigned to lodes fails to take into consideration that development work may have been undertaken on the lode claims and was paid for in the transactions.

Mr. C. Marc Miller, a qualified appraiser, testified as an expert witness for defendant and prepared a valuation report. As previously stated this witness was of the opinion that the fair market value of the tract was only the nominal sum of \$400,000.00, or an approximate average of about six cents per acre. Although Mr. Miller studied sales of small tracts in and adjoining the ceded area, he did not use these as a measure of value since he was of the opinion that the consideration stated in many of these transactions would have been but payment for the improvements on the lands. Defendant's witness went far afield to find sales which he used as the main basis of his valuation indications. These transactions relied on by Mr. Miller were the sales of Spanish

and Mexican Land Grants in southern Colorado and northern New Mexico close to a thousand miles from the subject tract. These sales are far too remote to be given any weight in determining the value of the Nez Perce tract.

As of 1867, a prospective purchaser of the subject tract would, or should have known, that the ceded area was then adaptable to the highest and best uses of agricultural, grazing, lumbering and mining pursuits. Such a buyer would have been aware of the importance of the then existing townsites not only as markets for the residents of the tract but as an attraction in bringing other settlers to the tract. The prospective purchaser would have known that while mining activity was on the decline there were still many mining operations continuing in the mining districts with claims being bought and sold. As of the evaluation date it was known that the valleys and prairies of the tract contained fine agricultural land but because of the altitude it was believed the hill lands such as in the Palouse area and the valley lands such as in Wallowa Valley were not suitable for agricultural pursuits although arable lands. These lands therefore may only be considered as potential agricultural lands as of the valuation date. The prospective purchaser would have been well informed as to the transportation problems facing the settlers in the northwest region and the resulting inability to profitably reach outside markets. This buyer would have also been aware of the free range policy with respect to grazing lands in the region and the vast amount of public domain available for grazing and other uses. A study of the settlement and development of areas to the

west of the tract would have informed the buyer that the region was due for steady growth especially with respect to agricultural lands. The Commission is of the opinion that a prospective purchaser would have considered that the 1,164,084 acres of agricultural lands of the tract had a value of \$1,000,000.00; the timber-lands, consisting of 3,152,653 acres, a value of \$1,600,000.00; the 2,377,953 acres of grazing land a value of \$1,000,000.00; that the known presence of mineral deposits on the 21,168 acres of mineral lands would have added \$1,000,000.00 to the value of the tract; and that the 610 acres of townsites would have added \$50,000.00 to the value of the tract. The Commission is further of the opinion that such a prospective purchaser would have purchased this extensive tract with a view to resale and that he would have been aware of the long period necessary to dispose of said lands; the expenses to be incurred such as taxes, fire protection, surveys and sales expense; and that he would allow for risk, return on his investment and profit.

The Commission, taking into consideration the findings of fact herein made and the record as a whole, and giving due weight to the size of the tract and the multiple highest and best uses for which it was adaptable, concludes that the fair market value of the Nez Perce tract consisting of 6,932,270 acres as of April 17, 1867, was \$4,650,000.00. The Commission further concludes that the consideration of \$352,394.94 paid to the Nez Perce Indians by the United States for the cession of a part of their reservation having a fair market value of \$4,650,000.00 was grossly inadequate and unconscionable. Defendant is entitled to credit \$352,394.94 expended under the Treaty of June 9, 1863,

against the \$4,650,000.00 fair market value of the tract, leaving a balance due to petitioner tribe of \$4,297,605.06, from which will be deducted the offsets, if any, to which defendant may be entitled under the provisions of the Indian Claims Commission Act.

Wm. M. Holt

Associate Commissioner

I concur:

Edgar E. Witt

Chief Commissioner

Commissioner Watkins took no part in the consideration or decision of this case.