

BEFORE THE INDIAN CLAIMS COMMISSION

CHARLES E. WILLIAMS, JOSEPH REDTHUNDER )  
 and HARRY OWHI, as Representatives of )  
 THE NEZ PERCE TRIBE, )  
 )  
 Petitioners, )  
 )  
 v. )  
 )  
 THE UNITED STATES OF AMERICA, )  
 )  
 Defendant. )

Docket No. 180-A

Decided: December 31, 1959

Appearances:

David Cobb, with whom were  
 I. S. Weissbrodt, Abe Weissbrodt  
 and Donald C. Gormley,  
 Attorneys for Petitioners.

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 petitioners herein are individual members of the Nez Perce Tribe who bring this action in behalf of the tribe. The claims presented by petitioners stem from the intrusion of white trespassers upon the Nez Perce Reservation during the period 1860-1867 following the discovery of gold upon said reservation and while the Nez Perce Tribe had the right to the exclusive possession of the lands from which the gold was taken by said trespassers.

In a previous determination in this case (3 Ind. Cl. Com. 571) the Commission made findings of fact and rendered an opinion in which the Commission, with Chief Commissioner Witt concurring in part and disagreeing in part, held that the United States would be liable in damages for whatever land occupancy uses of the reservation by white intruders might be proved by petitioners since defendant's failure to prevent such trespasses as required by Article 2 of the Treaty of June 11, 1855, 12 Stat. 957, and the unratified Agreement of April 10, 1861, and the failure to protect the rights and property of the Nez Perce by securing compensation for the tribe for the uses made of the reservation, did not conform with the standard of fair and honorable dealings. The Commission further held that the United States would be liable for the value of whatever gold petitioners might prove was acquired by defendant at its mint or any of its branches which petitioners could show originated in the Nez Perce Reservation. The Commission at that time held that the proof then before the Commission was insufficient to sustain any claim for gold taken from the Nez Perce Reservation and acquired by defendant. Because the Commission believed there was a strong indication that some gold acquired at the mint came from the reservation, this Commission was reluctant to dismiss the "conversion" claim because of failure of proof. The Commission found that although the evidence showed that many areas of the reservation were occupied by white intruders for various purposes, the record did not, however, show the parts of the reservation so occupied and used except in the vaguest way. With respect to such land occupancy the Commission indicated definite proof

as to the occupied areas and proof of value of the use of the occupied areas would have to be supplied by petitioners.

After the rendition of said findings of fact and opinion by the Commission, petitioners moved for leave to amend their complaint to conform to the evidence by including a new paragraph, 22A, in order to clarify their position that the original allegations were intended to include gold mining uses of the reservation. The Commission, over defendant's objections, issued an order on March 6, 1956, permitting petitioners to so amend their petition.

A further hearing has now been held for the purpose of giving petitioners an opportunity to attempt to prove damages resulting from the uses made of the Nez Perce Reservation by white intruders and also to try to prove the amount of Nez Perce gold acquired by the United States in its mint or branches. Petitioners contend that in order for the tribe to have been compensated for the mining and other related uses of the reservation during the period 1860-1867 a reasonable royalty agreement based on the amount of gold taken from the reservation could have and should have been negotiated by defendant with the miners for the benefit of the tribe. In support of this contention petitioners have introduced documentary evidence and presented expert witnesses to prove what petitioners believe was a reasonable approximation of the amount of gold produced on the reservation, the cost of producing said gold, the net profit realized by the miners and what they considered would be a fair and reasonable royalty based on a percentage of the gold removed by the miners. Petitioners contend that the dollar value of the gold removed

before April 17, 1867, the date the Treaty of June 9, 1863, 14 Stat. 647, II Kapp. 843, became operative and the United States acquired the gold lands, was \$26,000,000.00. The net profit realized from the gold after production costs, according to petitioners, was \$16,800,000.00. Petitioners urge that a royalty of 50 per cent of the net profit, that is \$8,400,000.00, could have been negotiated for the tribe and would have afforded a fair and equitable arrangement to compensate the Nez Perce Indians for the removal of the gold from its reservation. Petitioners further urge that the proof shows \$2,178,534.91 of Nez Perce gold was acquired by the United States by deposits in its San Francisco Branch Mint. Petitioners contend that the tribe should be allowed to recover \$2,178,534, being the value of the gold allegedly converted by the defendant. This sum of \$2,178,534 according to petitioners should then be deducted from the \$26,000,000 (the alleged total value of the gold removed from the reservation) and on the balance, that is \$23,821,466.00, the tribe should be allowed a royalty of 50% on the net profit therefrom. The royalty asked by petitioners is \$7,741,976.45 which added to the \$2,178,534 for conversion makes a total recovery sought by petitioners of \$9,920,510.45.

Defendant, while not waiving any of its legal defenses which will be discussed hereinafter, introduced evidence and expert testimony which counsel for the Government stated would show at least to a fair degree of accuracy how much gold was mined within the reservation as bounded by the Commission, the cost of producing the gold and what royalty would have been expected on the net profit. Defendant made but two requested

findings of fact with respect to these matters and these requested findings are ultimate in nature and to the effect that on the evidence available no reasonable approximation can be made at this date of the gold removed and that by reason of the absence of a definable eastern boundary it is impossible to arrive at such an approximation.

Defendant strongly urges that the claim of trespass presented by petitioner is barred on the basis of res judicata, citing 95 C. Cls. 1. It is defendant's position also that the amount of gold taken from the reservation, if any, cannot be determined. In support of this view defendant urges that the eastern boundary of the reservation which was never surveyed can not be reasonably established and therefore the amount of gold taken from the reservation, if any, could not be reasonably approximated. With respect to the eastern boundary, defendant states that the placing of the east line a few miles to the west would have excluded most of the area from which gold was removed. Defendant also contends that even if the east line could be fixed with certainty the amount of loss to the Nez Perce Indians is so vague and uncertain that no reasonable determination of its amount can be made and defendant states this is evident when one takes into consideration the ultimate conclusions of the experts in this case. Defendant's position with respect to the conversion claim need not be discussed for reasons stated hereinafter.

The defendant has persistently argued from the commencement of this long and complicated action that the doctrine of res adjudicata applies to the trespass claim herein presented by petitioners. This Commission has already held that the former judgment in 95 C. Cls. 1

is not a bar to the prosecution of this claim. 2 Ind. Cl. Comm. 193, 199, 200 and 3 Ind. Cl. Comm. 586-588. With respect to defendant's contentions concerning the eastern boundary of the reservation this Commission found (Finding 13, 3 Ind. Cl. Comm. 571, 578, 579) that a determination of the eastern boundary could be made and so fixed said boundary line. Whether or not a reasonable determination of the amount of loss suffered by the Nez Perce Indians may be made depends upon a consideration of the methods used by the experts for the parties to fix such damages and the evidence relied upon by these experts in reaching their conclusions. Granting that the eastern line of the reservation is drawn as determined by the Commission there is agreement among the witnesses that at least to a fair degree of accuracy there is evidence to show how much gold was taken from the reservation. The determination of the amount so extracted necessarily involves the interpretation placed upon the evidence relied upon by the expert witnesses for the parties since they used substantially the same evidence, that is contemporary newspaper accounts of gold mining (which are the principal source of information used), official reports and other sources.

#### GOLD PRODUCTION

The expert witnesses appearing for petitioners were Mr. Philip J. Shenon and Mr. Roy P. Full, mining geologists, of the firm of Shenon and Full, Salt Lake City, Utah. Mr. Sherwin M. Barton of the firm of Barton, Stoddard and Milhollin, consulting engineers, Boise, Idaho; Mr. Ernest Oberbillig, formerly an Associate Professor of Mining at the

University of Idaho; and Dr. Merle William Wells, Associate Professor of History at Alliance College, Pennsylvania, testified as expert witnesses for defendant. The mining experts for both parties, apparently independently, arrived at the same method for evaluating the amount of gold produced during the trespass period. They took into consideration, where the data was available, for each of the mining districts and each of the mining seasons in the period under consideration (1) the average daily yield per miner, (2) the average number of miners working per day, and (3) the number of days worked in the season, and by multiplying these three estimated factors, obtained an estimated total gold production for the district and season. The mining experts also submitted written reports.

The results of their studies for each of the mining districts for each of the mining seasons in the period 1861-1867 are set forth in detail in the findings of fact made and will not be reiterated herein. Shenon and Full, for petitioners, estimated the dollar value of the gold removed from the reservation prior to April 17, 1867, was \$25,913,611.00. Defendant's mining experts estimated the gold production to have amounted to \$15,133,778.00. The data, as previously stated, upon which these experts for both parties relied in forming their estimates consists principally of contemporaty newspaper accounts of the average number of men in the different mining districts, their average daily yield and the length of the mining seasons. The large discrepancy between the experts' estimates of the amount of gold produced results from their

different interpretations of the source material available for study with respect to the factors considered and to a difference of opinion regarding the amount of gold produced that should be credited to the reservation where mining districts were located but partially within the reservation. For example, in the "Nez Perce Mines," a mining district including the Pierce City - Oro Fino - Bald Mountain areas, petitioners' experts estimated that in 1861 there was an average of 1250 miners, a working season of 170 days and an average daily yield of \$12 per miner. Defendant's experts for the same year estimated an average of 1000 miners, a 125 day working season and an average daily yield of \$8 per miner. For the year 1861, Shenon and Full for petitioners computed an estimated \$2,550,000.00 worth of gold produced while the Barton, Stoddard and Milhollin firm estimated gold production for that mining district in 1861 at \$1,000,000.00. As to mining districts located only partly within the reservation the experts differ greatly as to the amount of gold production that should be considered Nez Perce gold such as in the "South Fork Mines," a mining district including Elk City, Orogrande, Newsome and Clearwater Station areas. In that mining district petitioners' experts found the gold production to be \$5,510,000.00 and estimated the production within the reservation at \$2,005,000.00 while defendant's mining experts estimated production at \$4,070,000.00 and attributed \$1,180,000.00 to the reservation. In the "Warren-Sacesh" mining district Shenon and Full estimated production at \$5,915,000.00 and credited \$848,000.00 to the reservation while defendant's experts estimated production to be \$7,176,000.00 and allocated \$350,000.00 to the reservation



area. In the "Nez Perce Mines" area Shenon and Full estimated 61.6 per cent of the total production came from within the reservation and the mining experts for defendant considered that 80 per cent of the area worked lay within the reservation.

For certain areas such as the "Dixie District" located mostly outside the reservation and "Other Districts in Reservation" estimates were made by Shenon and Full although contemporary data concerning these mining areas was extremely limited. Shenon and Full estimated \$100,000.00 as the total production for the "Dixie District" within the reservation and defendant's experts allocated but \$20,000.00 to the reservation. For the "Other Districts in Reservation" such as the mining done on the bars of the Snake River, Shenon and Full estimated \$500,000.00 as the gold production. The consideration of these districts, in view of the limited evidence relied upon in making a final estimate of gold produced on the reservation, is believed to be of doubtful value.

The reports and testimony of the mining experts for both parties conclusively show that a large amount of gold was produced in the period 1861-1867 within the boundaries of the Nez Perce Reservation as determined by the Commission. It is true that the estimates made by the experts are based mostly on estimates with respect to the average number of miners, the average daily yield and length of working seasons as set forth in contemporary newspaper accounts. Such a method of estimating production with due allowance being made for the tendency of miners and other interested parties at the time to over-exaggerate is better evidence than the published estimates made years later by mining engineers

or geologists which were heavily relied on in the previous hearing before this Commission.

The experts for the parties believed that the data upon which they relied for estimating gold production was the best evidence available and they concluded that from it a reasonable evaluation of gold production could be made at this time. While the difference between their estimates is great this is due to the interpretation placed on the contemporary accounts by these experts and their conclusions as to what extent certain of the mining districts were located within the reservation. Any substantial change in any one of the factors considered in making the estimates would bring a resulting increase or decrease in the final estimate for the mining districts.

The Commission in finding the total dollar value of the gold produced from the Nez Perce Reservation has taken into consideration and made due allowance for the tendency of over-exaggeration in the source material upon which the experts relied in the estimates which were made. The fact that only parts of some of the mining districts were within the reservation was considered by the Commission and allowance made based on the belief that a smaller percentage of the gold produced in these districts should be allocated to the reservation. Due consideration was also given to the fact that there was some pre and post season production which does not appear to have been considered by defendant's experts and to the fact that petitioners' experts estimated large gold production for certain districts for which there was limited evidence. Taking into consideration the findings of fact herein made, the record

as a whole, and in view of the above observations the Commission concludes that a fair and reasonable estimate of the dollar value of the gold produced from the Nez Perce Reservation would be \$20,000,000.00.

#### PRODUCTION COSTS

The mining experts appearing for the parties differ substantially as to what items should be considered in estimating the cost of production of the gold removed in order that a net profit from the gold operations might be estimated also. Shenon and Full for petitioners were of the opinion that the wages paid the miners, measured either by actual wages paid or a cost measured by a standard maximum wage of \$5 per day, would reasonably reflect the total production cost. In allowing only the wages to be the measurement of production costs Shenon and Full assumed that the wages paid to miners in these placer camps during the boom periods were higher than the labor cost which could appropriately be considered as an equivalent for the mining services and that this amounted to an element of profit sharing. The main reason for such an assumption appears to be based on a comparison with wages paid in the coal mines of the eastern states during the same time. For this reason these experts believed that in establishing cost by using only the average wage of the mining districts there was represented sufficient expenditures to take care of any labor charge plus any minor charge for equipment. On the basis of the Shenon and Full study petitioners urge that the estimated net profit on the production of gold from the reservation would be reasonably represented by the sum of \$16,800,000.00.

The firm of Barton, Stoddard & Milhollin in its production cost study for defendant considered many other cost items in addition to wages such as food and lodging, travel cost, tools, opening the claim, quick-silver and marketing. These mining experts concluded that the estimated total cost of production for their estimated \$15,133,780.00 worth of gold removed from the reservation would amount to \$13,308,520.00, leaving an estimated net profit of \$1,825,260.00.

In considering what type of a reasonable royalty agreement could and should have been negotiated to compensate the Nez Perce Indians for the mining and related uses of their reservation in the 1861-1867 period, it is believed that such an agreement would have permitted the mining operator, or operators, to use the timber and water resources on the lands and to build ferries and establish town sites. While the cost of developing, opening and operating the mines would therefore be somewhat reduced there would still be other cost items involved in building the water ditches, dams, sluices and flumes necessary for the operation of the mines. Carpenters and laborers other than miners would have to be paid. Tools necessary to construct these things and to mine the gold would have to be provided. The high wages paid in these mines would be sufficient to take care of travel and food for the miners and these do not appear to be proper cost items. The high wages prevailing in the area, however, seem to have resulted more from the remoteness and rigorous life of the mining camps, the high cost of living, the Civil War, the shortness of the mining season, and the constant drifting of miners to new mining fields than to any element of profit sharing. There

would be the expense of constructing at least some temporary shelters on or near the claims for the miners especially at the beginning of operations. There was considerable expense in opening and developing the claims in these mining districts according to contemporary reports. There would also be the cost of marketing the gold, that is transporting it safely to where it could be assayed and refined and some cost of transporting equipment and supplies to the mines.

While wages would reflect a large part of the production cost the items discussed above would add materially to the total cost. The Commission concludes that 70 percent of the dollar value of the gold removed from the reservation would represent production cost. The net profit which could have been realized on the \$20,000,000.00 worth of gold found to have been removed from the reservation may reasonably be approximated at \$6,000,000.00.

#### ROYALTY

Petitioners contend that a royalty agreement could and should have been negotiated which would have afforded a fair and equitable arrangement to the Nez Perce Tribe for the removal of the gold from its reservation. Royalty agreements have been used in the development of mineral lands in this country from early in its history. The record contains no evidence of a royalty agreement which would be comparable to the leasing of a large mining area as is involved in this case for mining and other related uses. The royalty agreements placed in evidence involve only small claims. One covers three small mining claims in the Florence district of the reservation and is dated in 1869. This provided

the owners of the claims would receive one-half of the net proceeds weekly. The other two agreements cover small placer claims in 1857 and 1860 in California, one providing the owner would receive one-half of the net proceeds and the other arranged for the owner to receive one-fourth of the gross. Defendant contends that there is no evidence of a royalty arrangement which would be comparable to the situation involved in this case and that it was not customary during the period involved for miners to pay a royalty.

The mining experts for petitioners were of the opinion that a royalty of 25 per cent of the gross product, or 50 per cent of the net profit, would have been fair and equitable and stated that in view of conditions on the reservation a royalty agreement of 25 per cent of the gross would be the most desirable agreement since such would give the lessee full right to occupation of the reservation as necessary for exploitation of the mineral resources. Defendant's mining experts concluded that the range of possible royalty would be between 6 and 8 per cent of the gold produced on the reservation.

The method of determining what the Nez Perce Tribe should have received for the mining and related uses of the reservation during the 1860-1867 period by estimating what a reasonable royalty on the gold removed from the reservation in that period would be, is believed to be one which would afford a fair and equitable measure of damages. In determining the per cent of the royalty consideration has been given to the type of mining involved, to the fact that an agreement could and should have been made which would permit the lessee occupation rights which

would provide timber, water, supply depots, ferry rights, etc., and to the fact that such a large operation would also be beneficial to the Indians in providing markets for their produce and cattle. Giving due consideration to these factors and to the record as a whole the Commission concludes that a royalty agreement providing for the Nez Perce Tribe to receive 50 per cent of the net profit realized from the gold removed from the reservation during the trespass period could and should have been negotiated for the benefit of the tribe by the defendant. The Nez Perce Tribe is entitled therefore to recover from defendant 50 per cent of the net profit (which has been reasonably approximated to have amounted to \$6,000,000.00), or \$3,000,000.00, less such offsets, if any, to be later determined by this Commission.

As previously pointed out petitioners contend that in addition to recovering for the mining and other related uses on the basis of a royalty agreement the tribe should be allowed to recover \$2,178,534.00 being the amount of Nez Perce gold allegedly acquired by the United States through the Mint. To avoid double recovery by the tribe for the same gold for which compensation is sought for conversion petitioners state the \$2,178,534.00 should be deducted from the total amount of gold found to have been removed from the reservation and a royalty allowed only on the balance. This procedure requested by petitioners of seeking recovery from defendant on the basis of alleged conversion is inconsistent with the demand by petitioners that the defendant be found liable on the grounds that a fair and reasonable royalty agreement could and should have been negotiated for the tribe. If such an agreement had been made

When certainly petitioners could not have advanced such a claim for alleged conversion nor have recovered on such a claim subsequently. To allow petitioners to recover for the alleged conversion would be finding the United States liable not only for what it did not do but also for something it allegedly did do in receiving gold in its mint and thus would permit double liability and double recovery for the same alleged wrong, that is failure to protect the property of the Nez Perce Tribe.

Wm. M. Holt  
Associate Commissioner

Concurring:

Edgar E. Witt  
Chief Commissioner

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