

However, it was the understanding of the parties and this Commission that additional evidence would be received as to the acreage in the northern part of the reservation (Tract C) for which petitioners were permitted to recover if that acreage was not agreed upon between the parties; and the parties having been unable to agree upon the location of the source of the South Fork of Ahtamum Creek, which point is decisive of the acreage of Tract C, additional evidence was received upon that point. Additional evidence was also received as to the title to the 346.44 acres of land for which recovery was authorized in our Finding of Fact No. 28.

Accordingly the questions to be now determined are: (1) the right or lack of right of the petitioners to recover for the 346.44 acre tract; (2) the acreage contained in Tract C; (3) the value of each tract at the date of taking; and (4) whether the taking is of such nature that petitioners are entitled to just compensation.

THE ACREAGE INVOLVED

I. The 346.44 Acre Tract

The defendant has not pressed its claim that the patented lands known as the Cedar Valley tracts, located in the southwest corner of the reservation, do not actually contain 27,647.71 acres. It does deny that it is liable to petitioners for the value of 346.44 acres of land situated in Section 9, Township 11 North, Range 12 East, which, based upon the evidence then before us, was found by this Commission to have been patented to the Northern Pacific Railway Company. The evidence now of record discloses that the mineral

indemnity selections which were made by the Northern Pacific Railway Company during 1918 and 1921, covering this land, were never approved by the General Land Office and were finally released by the Railway Company. Thereafter they were duly cancelled of record by the General Land Office and formal notice of this action was given to the Railway Company on May 21, 1942.

It is the petitioners' contention that there has been a virtual taking of this land by reason of these selections and subsequent withholding of possession. However, we can see little distinction between this acreage and the lands lying west of the Campbell-Germond-Long survey line which the Supreme Court on February 24, 1913 in its decision in Northern Pacific Railway Company vs. United States, 227 U.S. 355 recognized as constituting a part of the area reserved by the Yakima Indians in their treaty of 1855.

The petitioners have never questioned their continuing right of occupancy and possession to those lands. While recognition of the 346.44 acre tract as a part of the Yakima Indian reservation has been delayed, still the Indian title has never been extinguished, and physical possession appears to be subject only to the petitioners' desire to exercise their right of it. Under the circumstances we do not believe petitioners have lost the title to this land, and they are not entitled to recover therefor.

The area for which petitioners may recover will be limited to the 27,647.71 acres known as the Cedar Valley tracts and to Tract C, as hereinafter described.

II. Tract C Acreage

As recited in our Finding No. 19, the true northern boundary line of the Yakima Indian reservation follows westwardly from the source of the South Fork of Ahtanum Creek along the divide around the headwaters of the Klickitat river to Spencer's Point. The boundary line as formerly recognized therefore omitted from the reservation that area south of this line and north of a straight line drawn between the source of Reservation Creek and Spencer's Point, which E. C. Barnard of the Geological Survey in 1900 reported contained 16,448 acres. This area plus the acreage lying between the South Fork of Ahtanum Creek and Reservation Creek, from their confluence to their sources, comprises Tract C.

Petitioners say the South Fork of Ahtanum Creek has its source in a spring near Vessie Corral in Section 5, Township 11 North, Range 14 East, and that the area which lies between this stream and Reservation Creek, east of Barnard's line, contains 3,986 acres. This acreage, plus Barnard's estimate of 16,448 acres makes the total of 20,434 acres which petitioners say is the acreage of Tract C. It is defendant's contention that the South Fork of Ahtanum Creek rises in the northern part of Section 18, Township 11 North, Range 14 East, and that the area between that stream and Reservation Creek contains 2,930.77 acres; that the area reported by Barnard to contain 16,448 acres actually measures but 15,163.65 acres and that the total acreage within Tract C is therefore but 18,094.42 acres. (Def. Ex. No. 53)

Petitioners rely upon the statements of Mr. Joseph C. Thoma, a Cadastral Engineer of 54 years experience, who used a compensating polar planimeter on a Mount Adams Quadrangle map prepared by the Geological Survey Division, Department of Interior, to determine the acreage between the two streams and adopted Barnard's estimate of 16,448 acres for the area within the balance of Tract C. (Pet. Exs. 78,95). This map was prepared prior to an actual survey of the region (Def. Ex. 57) and shows the Vessie Corral branch as a permanent stream approximately $1\frac{1}{2}$ miles in length before its convergence in Section 4 with the branch rising in Section 18 which defendant claims is the main South Fork of Ahtanum Creek.

Defendant has submitted the testimony of Orville L. Shadduck, who for the past 17 years has served as Civil Engineer in the United States Corps of Army Engineers. In ascertaining the acreage in Tract C he used the acreages denoted on General Land Office drawings, and when reservation lines cut through section lines he took planimeter readings on photostatic copies of plats prepared by the Surveyor General, certified by that officer to be in accordance with original survey notes on file in the office of the United States Surveyor General in Olympia, Washington, and Metzger county maps or plats which are prepared from the same source data. A planimeter reading of the entire area was used as a check on the sectional readings. Mr. Shadduck testified these Metzger maps are in general use among county assessors and surveyors; that planimeter readings of photostatic copies of original maps are accepted in the surveying practice

and when due allowance is made for shrinkage such readings within one-tenth of one percent accurate. (Trans. pp. 125-147)

A photostatic copy of that plat of Township 11 North, Range 14 East bearing the Surveyor General's acceptance date of February 12, 1921, appears in evidence as Defendant's Exhibit No. 51. This map shows a stream rising in the northernmost part of Section 18, flowing north into section 7 and northeasterly through Section 8 to its convergence in Section 4 with a stream rising in Section 5. These united streams flow east through Sections 5, 4 and 3 to a junction, in Section 2, with Reservation Creek. The descriptive data gives its width as 1 link (7.92 inches) wide at the boundary line between Sections 18 and 7; 15 links wide at the boundary line between Sections 7 and 8, and also Sections 8 and 5. It is 18 links wide at the boundary between Sections 5 and 4. A short distance east of this latter boundary line it receives the flow of a stream less than one mile in length, one link wide at the section line (Tr. pp. 115-119), which is the Vessie Corral stream petitioners say is the main South Fork of Antanum Creek.

No discharge measurements have been made on the disputed streams and Mr. Thoma points out that the original field notes on which the township plat is based do not mention the actual presence of water in the stream beds. We think, however, that the more accurate information is that based upon the survey notes, and that the true head of the South Fork of Antanum Creek is in Section 18. We believe there is less possibility of error in actual acreage when available survey

data is used than exists in planimeter readings of Geological maps prepared before actual survey, and that the area between the South Fork of Ahtanum Creek and Reservation Creek, east of the Barnard line of 1900, contains 2,930.77 acres.

The same process of reasoning causes us to accept the survey and planimeter readings of the area north of the straight line between Reservation Creek and Spencer's Point and south of the crest of the divide extending by way of Darling Mountain from Reservation Creek around the headwaters of Klickitat river to Spencer's Point, which show an area of 15,163.65 acres, (Def. Exs. 51 through 56) in preference to Barnard's estimate in 1900 made without benefit of survey. Accordingly, we find the total acreage within Tract C to be 18,094.42 acres. Of this acreage, however, only 17,669.10 acres have been patented, and Indian title has not been extinguished to the remaining 425.32 acres.

VALUATION

The Supreme Court permitted the use of average dates of patent to avoid burdensome computations involving values of patented lands in Creek Nation v. United States of America, 302 U.S. 620. ^{1/} We believe this

^{1/} "The Act of 1891 did not dispose of the lands. Its erroneous application and the consequent disposals of the lands to adverse holders constituted the taking by the United States. The petitioner is entitled to the present full equivalent of the value of the lands, without improvements, as of the dates of the patents of the various parcels, if, as we assume, the patent in each instance issued promptly after the delivery of the final certificate; but if a substantial interval elapsed between the date of the certificate and patent, then, as of the date of the certificate. A fair approximation or average of values may be adopted to avoid burdensome detailed computation of value as of the date of disposal of each separate tract."

method would give us a proper date for evaluation of the Cedar Valley tracts. Both parties seem to have agreed in their briefs that these tracts should be valued as of December 21, 1904, the date of the passage of the Congressional Act preserving to all bona fide settlers or purchasers under Public Land Law, any interest acquired in these lands, and that date is acceptable to this Commission. All evaluation evidence becomes applicable thereto in view of Mr. Henze's statement that he was unable to ascertain any appreciable difference between 1906 values, to which he testified, and those of 1904. (Trans. pp. 26, 46-8). The parties have also agreed upon evaluating the Tract C lands as of 1923, the average date when patents were issued, and this date of evaluation is acceptable to this Commission.

The petitioners rely upon testimony of Karl D. Henze to establish the respective values of the Cedar Valley and Tract C lands. Defendant relies upon the oral testimony of C. Marc Miller and a detailed evaluation report prepared by him which appears in evidence as Defendant's Exhibit No. 49, and has been carefully analyzed.

Mr. Henze testified that since 1946 he has been a member of the firm of Mason, Bruce and Girard of Portland, Oregon, Consulting Foresters, functioning as a consulting engineer with emphasis on economics in forestry. Between 1931 and 1946 he had been in the employ of the United States Forest Service with the exception of a three-year period of Army service. He had access to the accumulated data of that partnership dating back to 1921, and the benefit of consultation with the senior member, Mr. Mason, who had formerly served both as District Forester of the Forest Service, Department

of the Interior, and as Chief of the Timber Section in the Bureau of Internal Revenue.

Mr. Miller is a real estate broker in Seattle, Washington, with 25 years experience in appraisal work, specializing exclusively in rural and suburban properties, and trained in the science of Forestry. He has owned and sold timberland, has appraised several extremely large tracts which included timberlands, for individual clients, the State of Washington and the Government, including among them the Yakima Artillery Range for the Army and the Hanford area for the Atomic Energy Commission. Both men are well qualified appraisers, experienced in timberland appraisal work.

T. Cedar Valley Tracts (27,647.71)

The 27,647.71 acres of land within Cedar Valley to which patents were validated by the Act of December 21, 1904, lie within a 20-mile square area in the southwest corner of the present Yakima Indian reservation. Some 15,300 acres form a fairly solid within Klickitat county and the remainder are not so compactly blocked in Yakima county. They are timberlands, and on December 21, 1904, supported an average stand of 13,000 board feet of Ponderosa pine and 3,000 board feet of other mixed species timber per acre.

The evidence of record which has been detailed in our Findings of Fact establishes that in 1904 these tracts were separated from all other areas of civilization by virgin timberland. The main Cascade Mountain range bounded them on the west. The Klickitat river ran between this region and the Glenwood plateau to the southwest; the Simcoe Ridge lay

between it and Goldendale, some 13 miles to the south. White Swan, some 24 miles to the east, was the nearest town in that direction. Miles of unbroken timberland stretched away to the north.

The land possesses no known minerals, and there is no evidence of scenic views, fish, wild life or recreational usage which would affect the fair market value of the tracts as of December 21, 1904. The soil is poor, snow lies on the ground the greater part of the year, frosts are frequent as late as mid-June, and the growing season is short. Cattle and sheep are grazed between June 1st and September 31st, but the forage is pinegrass, which has little nutritious value, bunch grass, scattered patches of peavine, sunflowers and weeds.

The evidence discloses that about 100 people resided in Cedar Valley in 1902; that its population was densest in 1904 but dwindled thereafter. By 1904 these pioneers had built a few roads and trails within the valley but only one road connected the area with the outside world. This was the dirt military road built in 1855-56 and unimproved until 1909. It extended through the valley from The Dalles on the Columbia river to Fort Simcoe and Yakima. The nearest railroad terminated at Goldendale, some 13 miles away. Another railroad ran along the eastern end of the Yakima reservation, some 30 miles distant. Telephone and telegraph lines had not reached this primitive country.

It appears the settlers were attracted by the wood and water in this area, and they built several mills in and about the Cedar Valley tracts. These mills operated only short periods at a time and no more than two were ever in operation at any one time. Some lumber was hauled

outside Cedar Valley, but the trips required several days, none of the streams could be utilized in moving logs, and this was not a general practice. We think the mill operations in Cedar Valley in 1904 must be considered local in character, producing lumber for local consumption.

There is much evidence regarding the lumbering activities carried on by the Yakima Indians upon their reservation. Petitioners call attention to incidents where lumber was bought and sold by the Indians or their Agency to neighboring settlers; of complaints that the settlers were trespassing upon the reservation with their herds, and of frequent requests that the reservation boundaries be surveyed and marked as the country was rapidly being settled. There are also reports of pasture rentals collected by the Agency or the Yakima Indians.

The Yakima Agency is some eighty miles long east and west, extending from the Cascade Mountains on the west to the Yakima river on the east. The western portion and the country about the western portion of that reservation is rough, mountainous and wooded. The eastern part of the reservation is agricultural land and it is bordered in that section by rich agricultural land which was attractive to the early pioneers. Settlement in the Yakima river drainage was intensified by the early introduction of irrigation there, and there is some evidence in the record of the leasing of lands in the eastern part of the reservation to settlers within that general region. The probability that the incidents referred to have reference to the eastern part of the Yakima reservation rather than the Cedar Valley region or its inhabitants is supported by statements of some of the early settlers within Cedar Valley who were personally

contacted by defendant's witness, Mr. C. Marc Miller, and reported to him that only a few head of stock were ever raised in Cedar Valley. We find nothing in the record connecting these incidents to Cedar Valley.

In evaluating the Cedar Valley tracts as of 1904 and also Tract C as of 1923, petitioners rely primarily upon the testimony of their witness Karl Henze. Defendant has presented and relies primarily upon the testimony of C. Marc Miller and a detailed evaluation report prepared by him. Both these expert witnesses are competent appraisers.

Defendant's appraiser reached his estimate of the 1904 value of these tracts after examining the land and after acquainting himself with economic conditions prevailing in and about this area at the time by contacting then residents of the area, examining cruise records of the tracts and adjacent areas to ascertain the stand and condition of the timber, and checking records in Yakima and Klickitat counties to ascertain the consideration paid in timberland sales occurring within periods relatively near the appraisal date, by contacting commercial lumbering companies to ascertain the prices paid for timberland purchased for immediate logging about that date and after taking into consideration climate, soil, location, mineral values and other elements that attach to and are entitled to consideration as component parts of the land when determining its fair market value. It was Mr. Miller's opinion that no market existed for these lands in 1904; that the timber was inaccessible for want of roads and transportation facilities; that there were miles of more accessible and heavier stands between it and the nearest

commercial mills or markets, and it had no value to contribute to the land itself, which he valued at a nominal 50¢ per acre.

Petitioner's appraiser made use of the comparative sales approach but made no such check into the local economic conditions. He placed great reliance on both "Timber Ownership and Lumber Production in the Inland Empire" by David Townsend Mason and "Stumpage Prices of Privately Owned Timber in the United States" by Henry B. Steer. The information set out in these pamphlets is based upon statistics gathered in one instance from the entire Inland Empire country, an area encompassing eastern Washington and Oregon, parts of Idaho and Montana and, in the other instance, throughout the entire State of Washington. These give the overall trends and general market prices within the named areas and through yet larger areas, but that information needs to be carefully applied when comparatively small tracts in areas not supporting commercial lumber operations are under consideration. The value of the latter document is materially discounted by the fact that no stumpage sales occurred in Yakima county before 1913 and the first such sale in Klickitat county was not until 5 years later. These publications do show an increasing interest as of December 21, 1904, in the timber and timberlands of the Northwest forests, a potential value increase which a prospective purchaser would take into consideration, but would scarcely reflect the price a willing purchaser would pay for land containing a stand admittedly less heavy than surrounding timber, much of it nearer commercial mills and more accessible in location.

Mr. Henze placed an overall value of \$30.00 per acre upon the Cedar Valley tracts as of December 21, 1904, based, he testified, upon other transactions wherein similar values were accorded the land and timber on it. We have searched the record in vain for sufficient data concerning the transactions Mr. Henze considered had comparable aspects and were indicative of a 1904 fair market value of the Cedar Valley tracts, to enable us to consider their comparative features or even, with any degree of satisfaction, to permit identification of all the transactions considered by him. His evident unfamiliarity with recorded sales in Yakima and Klickitat counties and the status of commercial lumber operations within the counties on or about the appraisal date could have been easily overcome by reference to the county records. While such sales within a period not too remotely prior or subsequent to the appraisal date may be insufficient in number to reflect the market value of the tracts here involved, they unquestionably would affect the price a prospective purchaser would consider paying for this land, and they merit examination and consideration. Eight of the tracts under consideration sold between 1902 and 1914 for prices ranging from \$3.125 to \$12.50 per acre. Some 9,449 acres immediately south of Cedar Valley and within the same township as some of these tracts sold between 1892 and 1904 for an average \$4.08 per acre. After the railroad reached Goldendale in that area, the average price per acre increased to \$6.37 for land sold between 1904 and 1909, inclusive.

These sales should be carefully weighed, however, since it must be assumed that the consideration paid was enhanced by the presence of the usual homestead improvements and allowance must be made for the closer

location to railroad facilities, commercial lumber mills and settlements supplying a greater market potential, as well as the comparable size of the tracts and the quantity of the timber stand. These sales evidence a value for timberlands in this area in excess of the nominal 50¢ per acre fixed by Mr. Miller but we think it falls far short of the \$30.00 per acre valuation by Mr. Henze. A prospective purchaser would have been aware of these facts, and that no interest was being evidenced in the Cedar Valley land by commercial operators; he would have known that timberland was obtainable under the Public Land Laws in areas not to exceed 160 acres in size for ~~\$1.25~~^{\$2.50} per acre.

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That land within this area did not have a great value at this time is evidenced by the sale in 1906 of 2,546 acres about a millsite at the mouth of Nasty Creek on Ahtanum Creek for \$1.00 per acre, and by the fact that a resident of the valley refused to purchase 320 acres of the best timberland in 1902 for \$1.00 per acre.

We are mindful that in the recent case of Yakima Tribe v. United States, Docket No. 162, the present petitioners recovered \$3.00 per acre for the Wentashapam Fishery tract of 23,000 acres as its fair market value on January 8, 1894. As our Findings of Fact in that docket will disclose, that tract was a solid unit on the Wentashapam river, 50 miles above the mouth of the Columbia river, in Chelan county, Washington. A transcontinental railroad passed within two miles of it affording transportation to the west coast and the eastern markets, and to the Columbia river water facilities. A railroad division town was 18 miles south, white settlements were adjacent; a county road ran through it; there were some good agricultural

lands along the river within the tract, and valuable salmon fishing rights were one component element of value.

While a prospective purchaser would have realized the subject lands had a limited grazing value and were proving agriculturally unsatisfactory, he would have also realized that a potential future market existed for the timber but that its fruition awaited the harvesting of more accessible and heavier timber stands between the areas then being cut and Cedar Valley; that while the tracts were compactly enough situated to be logged as a unit they were not in fact a solid block and the cost of logging the timber would be increased due to the necessity of constructing more than the usual miles of access and feeder roads and possible bridges. Taking into consideration all the elements of value and the evidence of record in this case, we think that on December 21, 1904, the Cedar Valley tracts had a fair market value of not more than \$2.50 per acre.

II. Tract C, 17,669.10 acres

Since the Indian title to 425.32 acres within Tract C has never been extinguished, the defendant is not liable to petitioners for a taking of more than 17,669.10 acres within this tract. (See Def. Exs. 51 through 56 for exact location).

The remainder of Tract C is virgin timberland, lying high up in the Cascade Mountains, untouched in 1923 by railroads, county roads or highways, telephone and telegraph lines or other elements common to civilization. There is no evidence that minerals, wild life, scenic views or even watershed use form component parts of its value. It has a light ragged stand of timber which is mostly non-commercial in character. In

1923 part of it was renting at from $2\frac{1}{4}\%$ to 5% per acre for use as summer grazing land in conjunction with adjoining acreages, and as a portion of a much larger tract a part of this land was finally disposed of by the patentee for \$2.00 per acre in 1942. By the unsatisfactory method of computing the value of the total board feet of timber upon it and other land, assigning a 50% per acre value to the entire acreage, and dividing the net results, Mr. Henze valued this at \$6.00 per acre as timberland. Mr. Miller assessed its value at \$1.00 per acre as grazing land.

We are satisfied that the best use to which this land may be put is short-term grazing land. We think that a prospective purchaser in 1923 would have considered that the thin, short, rough and unevenly distributed timber stand upon it, far removed from railroads, navigable streams or roadways, contributed but little to the value of the land. We are mindful of the sale in 1928 and shortly thereafter of some of this land for from 50% to \$2.50 per acre but the sales were not consummated, and their ultimate disposition in 1942 for \$2.00 per acre is subject to discount by reason of the lands being included with a much larger tract supporting a considerable timber stand.

A capitalization of the highest rentals produced would indicate a value of slightly less than \$1.00 per acre; 132 F 2d 699 the valuation for taxation purposes was \$1.00 per acre; nearby lands, closer to settled areas, sold in 1917 for \$1.00 per acre. Lands to the north at a lower altitude sold for more but the comparative timber stand upon it is not before us. From a consideration of other sales and all of the evidence of record touching upon the value of this tract, we conclude that in 1923

the 17,669.10 acres within Tract C had a fair market value of not to exceed \$1.25 per acre.

JUST COMPENSATION

There remains the question of whether petitioners may recover an increment as a part of just compensation. It is established that all of the land here involved was originally included within the boundaries of the reservation area which was retained by petitioners in their treaty of cession on June 9, 1855, 12 Stat. 951. Subsequently these lands were omitted from the reservation area by erroneous surveys conducted by the defendant. Interests adverse to petitioners' title were recognized under the Public Land Laws and petitioners' divestiture of title was made effective by the issuance of patents. The Congress, by Act of December 21, 1904, 33 Stat. 595, validated this wrongful taking, for which petitioners have never been compensated. Such a taking clearly entitles the petitioners to just compensation. Creek Nation vs. United States, 302 U. S. 290, 82 L. Ed. 482 (295 U. S. 105).

The equivalent of just compensation may be determined by taking the value at the date of taking plus an increment arrived at by the allowance of a reasonable rate of interest computed upon that value from such date. Such reasonable rates of interest are also established by precedent, Alcea Band of Tillamooks, et al., v. United States, 103 C. Cls. 494. Petitioners may recover ^{# 47,119.28} ~~\$27,617.71~~ as the fair market value of the Cedar Valley tracts on December 21, 1904, together with interest computed at 5% per annum from December 21, 1904 to December 21, 1934, and 4% per annum thereafter until entry of a final award herein, and the further sum of \$22,086.38, as

the fair market value of the Tract C land on January 24, 1923, together with interest thereon at the rate of 5% per annum from January 24, 1923 to January 24, 1934, and 4% per annum thereafter until entry of a final award herein; said interest representing a measured increment necessary to the granting of just compensation herein.

Edgar E. Witt
Chief Commissioner

We concur:

Louis J. O'Marr
Associate Commissioner

Wm. M. Holt
Associate Commissioner