

BEFORE THE INDIAN CLAIMS COMMISSION

THE NOOKSACK TRIBE OF INDIANS
ON RELATION OF JOSEFE LOUIS,
CHAIRMAN OF THE GENERAL COUNCIL,

Claimant,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 46

Decided: July 17, 1958

ADDITIONAL FINDINGS OF FACT

The Commission makes the following findings of fact which are supplemental to the findings numbered 1 to 17, inclusive, heretofore made herein:

18. The boundaries of the lands which the Commission found the Nooksack Tribe held under original Indian title in 1859, are set out in Finding 14. The described area contains 80,590 acres of land, including the Nooksack River bed. For convenience these lands will sometimes be referred to as the Nooksack tract.

The Commission, in finding that the Nooksack lands were taken by the defendant as of March 8, 1859, further found (Finding 17) there was evidence that some Nooksack Indians may have acquired certain rights subsequent to 1859 in a part of said lands, but the character and extent of such rights and how they were acquired were not shown by the record. No further evidence having been offered on this question at the hearings completed on September 24, 1957, on the issue of value

of the Nooksack tract, the entire acreage in the tract, 80,590 acres, is to be valued as of the date of taking.

19. The Nooksack tract is located 9 to 22 miles northeast of Bellingham Bay, on Puget Sound, in Whatcom County in the present State of Washington. The northwest corner of this triangular tract of land is $3\frac{1}{2}$ miles south of the Canadian border. The northern boundary of the tract extends between the towns of Lynden on the west and Maple Falls on the east for a distance of 17 miles on a line approximately parallel to the Canadian border. This northern line crosses the Sumas Mountains and ranges from an elevation of 95 feet above sea level at the western end to elevations of about 2500 feet across the Sumas Mountain crests. The east line extends from Maple Falls southwest to the town of Acme, a distance of about 15 miles, crossing the foothills of the Cascade Mountains and rising to an elevation of 2200 feet. The west line from Acme northwest to Lynden is approximately 19 miles, crossing a range of mountains at an elevation of 3000 feet during the first 8 miles and the remaining 11 miles pass over relatively flat terrain.

The Nooksack River and its forks run through the Nooksack tract. The northwestern portion of the tract has a relatively smooth topography while the central section is mountainous with sharp rises to an altitude of 3000 feet above sea level. The eastern section of the tract contains a fertile valley along the Nooksack River and the south fork of the River which valley rises gradually to elevations of 1500 to 2000 feet in the foothills of the Cascade Mountains. Approximately

45% of the Nooksack tract is rough and mountainous. The Nooksack River bed and gravel bars along the river account for 8% of the tract. The remainder of the tract ranges from level to gently sloping and occasional steep areas.

The climate of the area is controlled by the moderating influences of the Pacific Ocean. The winters are mild and the summers cool. There is an abundance of rain providing for a damp climate during the entire year with the exception of a relatively dry period during July and August.

20. The slowness of settlement of the Puget Sound area prior to the 1880's can be attributed to its physical inaccessibility and the lack of transportation facilities. As of 1859 all the communities of western Washington were virtually dependent upon water transportation. At that time there were no roads nor railroads in the area. The construction of railroads west of the Mississippi was delayed until sufficient funds were available, which funds generally were derived from the sale of lands granted the railroad. The first transcontinental rail service was to California in 1869. The Northern Pacific railroad to the West Coast was completed in 1883 and did not reach the Puget Sound area until 1887.

21. By Act of Congress the Territory of Oregon was established on August 14, 1848 (9 Stat. 323). This territory included the present states of Oregon, Washington and Idaho. The Territory of Washington was created by the Act of Congress of March 2, 1853 (10 Stat. 172) and included the present states of Washington and Idaho. The Act of

March 3, 1863 (12 Stat. 808) created the Territory of Idaho and established the eastern boundary of the present State of Washington. On November 11, 1889, Washington was admitted to the Union as a state.

22. In 1852 the first settlers reached Bellingham Bay located about 9 miles from the Nooksack tract. The first claim in the Bellingham Bay area under the Donation Act of 1850 was filed in 1853. That claim, of 129.48 acres, was 12 miles west of the Nooksack tract. Some fifteen other settlers filed claims during 1853-1854.

Whatcom County was established in 1854 and included the area now divided in Whatcom, Skagit and San Juan counties. In 1860, the population of the Washington Territory was 11,934 and of Whatcom County, 352. The 1870 census gave the population of Whatcom County as 534.

The first settlers arrived in the Nooksack area in 1861 and settled in Lynden. The town of Lynden was established in 1870; Acme in 1887, and Van Zandt in 1892.

Timber

23. The Puget Sound area lies in a band of heavy timber which covers virtually the entire area west of the Cascade Mountains. In fact reports indicate that nearly 9/10ths of Washington's timber is in that area. The Douglas fir forms about 7/8ths of the forests' growth. There is also valuable timber such as red cedar and hemlock. In 1899, Henry Gannett, Chief of the Division of Geography and Forestry for the Department of the Interior, reported that "with the exception of the redwoods of California, the forests of Washington are the densest, heaviest, and most continuous in the United States. Except for a few

prairie openings, and except where removed by fire or the ax, they cover the country as a thick mantle from high up on the Cascade Range westward to the shore of the Pacific." He reported that he found the forests of the western section of Whatcom County, which would include the Nooksack tract, to be from 75 to 100% of red fir, with 10 to 25% hemlock and 10 to 25% cedar. As to Whatcom County, he stated:

This eastern mountainous half of the country has a light stand of timber. The western half was originally heavily timbered. Its forests were probably as dense as those of any other county in the State, but they have been almost entirely destroyed by fire. Certain areas along the coast, on Nooksack River and on Bellingham Bay and British Columbia Railroad, have been logged, but the amount is small as compared with that destroyed by fire.

24. Virtually all reports concerning the early life in the settlement of the Puget Sound area refer to forest fires in the area. While it is not possible, from the available evidence, to ascertain the dates of any such fires in the Nooksack tract, it appears that fires did much damage to the forests of the area, even prior to the arrival of white settlers. There are reports of the Indians setting great broadcast fires to keep down undergrowth so they could see the game, and to improve the growth of berry patches. There were reports of great forest fires throughout the Cascades in 1849, of a large fire in the territory in 1855 and again in 1857. The Nooksack area General Land office surveys, which were made in the 1870's, 1880's, and 1890's, contain frequent references to burned out areas. The Township 40, Range 4 East, surveyed in 1874, which includes a portion of the north area of the Nooksack tract, was described by the surveyor:

* * * Timber is about all killed by fires, there not being more than a section of the township unburned. The township East of this lies in the mountains, and the timber being all destroyed by fire, is entirely worthless.

The surveyor described Township 40, North, Range 5 East, surveyed in 1891 (the south two tiers of sections being in the Nooksack tract) as follows:

This township has all been burnt over in the last 20 or 30 years except sections 36 and 35 and parts of sections 25, 34, 1, 2, and 3. * * *

Of Township 39 North, Range 5 East, surveyed in 1890, the northeast section of the Nooksack area, the surveyor reported:

This township is very rough and broken. The only land suitable for farming is situated in the narrow valleys along the north and middle forks of the Nooksack River. The balance is rough and mountainous and covered with a dense growth of timber and brush. Most of the timber is small and thick, there having been a fire through most of this country years ago, and the present growth having come on since, it being from twenty to thirty feet high.

The surveyor's notes for the areas surrounding the Nooksack tract also make reference to past fires having burned out large areas of timber.

25. The Nooksack River is the main drainageway of Whatcom County. There are three forks of the river and they pass through the Cascade Mountain foothills in the eastern part of the Nooksack tract where they join the river then flow through the entire tract from the southeastern portion to the northwest corner. The Nooksack was a navigable river but portages were required around massive log jams in both upper and lower rivers. In 1884, the surveyor's report on Township 39, North, Range 4 East (the central and eastern portion of the Nooksack tract)

refers to "driftwood jams which now obstruct navigation" in the Nooksack River.

26. In the early days of our colonial history, the forests were generally regarded as inexhaustible and were in many instances considered a liability rather than an asset, since many of the early settlers were interested in the use of the land for agriculture and grazing purposes and the clearing of lands for those purposes was a burdensome and expensive process. That was the attitude of some of the early Oregon-Washington settlers where fires were started by them in the forests as an aid in clearing the land. However, there also existed a recognition of the need for timber for homes and local industries as well as for shipbuilding and export. From a commercial standpoint the lumber industry in this country had its beginning in Maine, and gradually extended along the Atlantic seaboard and then into the Great Lakes region in 1850. Lumbering operations of any importance did not reach the Oregon-Washington area until about 1890 to 1900 although shipments of timber began on Puget Sound around 1850. The earliest commercial uses made of the vast timber resources were for spars and pilings. The huge trees were cut by the settlers and dragged to the waters' edge to be sold and loaded on ships for transportation to the world markets.

27. The first sawmill on Puget Sound was a small waterpower mill at a site named New Market, now Tumwater, near the present city of Olympia, Washington. In September 1852, there were three sawmills in operation in what became Washington Territory. Two years later there

were thirty-three sawmills in operation in Washington Territory. In 1855 there were twenty-four sawmills in the Puget Sound area. All the sawmills were constructed along the waters of the Sound or on the banks of rivers whose waters could be utilized in transporting the logs as well as providing power for the saws. The first steam plant sawmill was Yesler's mill built in present Seattle in the winter of 1852-3. It had a capacity of 10,000 to 15,000 board feet per day and became the main industry in Seattle and for years furnished employment for the local inhabitants.

In the winter of 1852-3 a mill was built at Whatcom, Bellingham Bay (15 miles from the Nooksack tract), but since water power failed in the summer its capacity was 5,000 board feet per day during high water. This was the only sawmill in Whatcom County in 1860. The first sawmill north of Whatcom was built in 1882 on Ten Mile Creek, five miles south of Lynden, within a few miles of the Nooksack tract. In 1884 a sawmill was built at Lynden in the northwest corner of the Nooksack tract. That mill put out 1500 board feet of lumber per day and utilized timber from the Nooksack land. In 1889 a sawmill was built a few miles west of the Nooksack tract which furnished much of the lumber used to build the city of Bellingham during the 1890's. The logging was done by oxen and teams hauling the lumber over a planked road to Bellingham.

28. The early lumbering operations were very crude. The logging was done by manpower. Trees were felled by ax, which was used until the early 1880's when the cross-cut saw came into use. The trees were

cut into logs of a length which men could handle and were rolled or dragged to the nearest water to be floated to a sawmill. Because of the laborious operation, the timber was cut slowly. The timber first cut was that along the waters of the Sound and those streams which could be used to drive logs. Even as late as 1880 it was reported that the forests along the shores of Puget Sound, the Strait of Juan de Fuca, and the lower Columbia River had been culled only of the best trees for a distance of only one to two miles inland. In the Department of Interior's Census Office Report on the Forests of North America, by Charles S. Sargent (1884) it is reported,

The methods adopted by the lumbermen of western Washington territory are wasteful in the extreme. Loggers cut only timber growing within a mile or a mile and a half of shores accessible to good booming or shipping points or which will yield not less than 30,000 feet of lumber to the acre. Only trees are cut which will produce at least three logs 24 feet long, with a minimum diameter of 30 inches. Trees are cut not less than 12 and often 20 feet from the ground, in order that the labor of cutting through the thick bark and enlarged base may be avoided, while 40 or 50 feet of the top of the tree are entirely wasted.

29. In keeping with the early settlers' attitude toward the liability of seemingly inexhaustible forests and his desire to clear land, was the feeling of the lumberman who cared little whether the timber he took legally belonged to him or not. Timber was cut indiscriminately from a neighbor's land, railroad land, or the public domain. It has been reported that Puget Sound was the center of wholesale timber stealing. In 1861 measures were taken to suppress this illegal activity and the areas leading lumbermen from Port Gamble, Port Madison, and Seabeck (all lumbering centers on the shores of the

southern part of Puget Sound) were indicted. The usual penalty upon a finding of guilty was payment for the land upon which the timber was cut plus a jail sentence of "an hour of jolly communion" with the court, the prosecution and the defense.

In an effort to prevent spoliation of public timber a charge of \$2.50 a thousand was made for timber cut on government land. This "stumpage fee" was opposed by mill men of Puget Sound, who felt the price was exorbitant since the land, if surveyed, could be offered for sale at \$1.25 per acre. An agent sent west during the Grant administration found that since 1855 on Puget Sound alone timber to the value of not less than \$40,000,000 had been stolen from the government. During this period a common term in the Pacific Northwest was "round forty." A settler would acquire 40 to 160 acres of land; then he would cut not only the timber on his own land but on the surrounding land on all four sides. Before he was through cutting, he would have cut from 160 to 640 acres of timber from this government land in addition to his own 40 to 160 acres.

Agriculture

30. The Nooksack tract contained some fertile river bottom land which could have been used to produce crops. However, much of this land was subject to flooding and could only be utilized where a system of drainage ditches had been dug. Other areas of this tract which contained good agricultural soil were heavily timbered and the cost of clearing such land, estimated at from \$50.00 to \$300.00 per acre, was prohibitive. However, most of the soil in the tract was unproductive

for any agricultural use. Approximately 45% of the total acreage would be classified as rough and mountainous.

The 1860 census report listed 366,156 acres in the Washington Territory as farmland. This compared with 2,060,539 acres of farmland in the Oregon Territory. In 1860 there were only 12 farms containing 2,025 acres in all of Whatcom County, exclusive of the San Juan Islands (Whatcom County at that time also included the present Skagit County). Less than 0.2% of the total area of Whatcom County was listed as farmland in the 1860 census. Of this amount, only 95 acres were listed as improved. The early history of the entire Washington Territory and in particular the Puget Sound area indicates that the use of land for agricultural purposes was almost exclusively for the subsistence of the settlers.

31. Under the Oregon Donation Act of September 27, 1850 (9 Stat. 496) settlers were able to acquire a right to land in the Oregon Territory, which included the present State of Washington. The Act originally provided for grants of 320 acres to single, and 640 acres to married, white settlers who had settled on the land claimed prior to December 1, 1850. The Act required that the settlers live on the land for four years, cultivate and improve it for their own use and not as agent for anyone else; that no town lots, mineral lands or lands reserved for public purposes could be selected. The act limited the donations to one per person. Actual proof of a settler's compliance with all the terms of the act was required before a patent could issue, and no patent could issue until the land was surveyed by the government surveyor.

In 1851, 58 entries were made in the Washington Territory under the Donation Act, and in 1852 there were 117 entries. The Preemption Act of September 4, 1841, was made applicable to Washington in 1854. Under the Preemption Act, any person who did not own land in the Territory or who was not the proprietor of 320 acres of land in any other State or Territory, might secure 160 acres of public land at \$1.25 per acre provided the land was surveyed, the Indian title extinguished, actual settlement made with a dwelling erected, and the settler living on the land. In 1859 the total acreage taken in the Washington Territory under the Donation and Preemption Acts totaled 11,277 and this increased in 1860 to 17,974 acres. The total number of donation certificates and acres of land granted in Washington and Oregon was:

Oregon --	7,317 certificates;	2,563,757.02 acres
Washington --	985 certificates;	290,215.35 acres

The Homestead Act was enacted May 20, 1862 (12 Stat. 392) permitting settlers to acquire farms of 160 acres (or 80 acres on land selling for \$2.50 per acre) free except for a nominal filing fee. The Act required cultivation, improvements and five years' actual occupancy. However, any person claiming under the Act could secure title before the expiration of the five years by the payment of the minimum price of the land selected (\$1.25 or \$2.50 per acre).

Public land could also be acquired by the location of military land bounty warrants, under the Act of February 11, 1847 (9 Stat. 125), and of agricultural college scrips, under the Act of July 2, 1862 (12 Stat. 503).

The Timber and Stone Act of 1878 (20 Stat. 89) permitted the sale of timber lands in quantities not exceeding 160 acres per person and at a minimum price of \$2.50 per acre.

Title to public land could, of course, only be perfected after the land was surveyed. The public surveys of the Nooksack land were made in the 1870's, 1880's and 1890's, although this did not preclude settlers from securing private surveys. While it appears that private surveyors were available in Olympia at the southern point of Puget Sound as early as 1853, there is no evidence of any private surveys being made in the immediate area of the Nooksack tract prior to the evaluation date.

Taking an area which includes all of the Nooksack tract and approximately 144,000 additional acres around it; the rate at which the land passed from federal ownership was as follows:

<u>10 year period</u>	<u>Acreage</u>	<u>Percent of total</u>
1850-1859	0	0
1860-1869	0	0
1870-1879	12,006	5.3
1880-1889	108,845	48.5
1890-1899	61,307	27.3
1900-	32,517	14.5
School land	<u>9,956</u>	<u>4.4</u>
	224,631	100.0

During this period over 50% of the land was homesteaded and less than 16% was purchased under the Timber and Stone Act.

The rate at which the Nooksack land itself passed into private ownership lagged slightly behind the surrounding area as shown by the following table:

<u>10 year period</u>	<u>Acreage</u>	<u>Percent of total</u>
1850-1859	0	0
1860-1869	0	0
1870-1879	3,474	4.31
1880-1889	28,058	34.81
1890-1900	30,089	37.34
After 1900	14,006	17.38
River	2,733	3.39
School	<u>2,230</u>	<u>2.27</u>
	80,590	100.00

32. There is no evidence of any sales of land comparable in size, character or location to the Nooksack tract prior to 1859. There were, however, several sales which were similar in certain respects to the land involved in this case.

The Pope and Talbot firm, the Puget Mill Company, was one of the early purchasers of tracts of timber land. This company was one of the largest sawmill companies with a mill at Port Gamble on the western side of the Sound. Under the Act creating the Washington Territory, two townships of land were allowed for financing the University. The land could be sold for not less than \$1.50 per acre. Pope and Talbot were permitted to select the best of this University land and the records show purchases of 787.75 acres in 1861; 565.50 acres in 1862; and 17,450 acres in 1863, all at a purchase price of \$1.50 per acre. The land so purchased was choice, accessible timberland, not more than a mile to a mile and a half from the shoreline of the Sound and within the immediate vicinity of the Port Gamble mill. Pope and Talbot also utilized military scrip to acquire 17,398 acres in 1863 but the exact price paid cannot be determined. The Puget Mill Company purchased 2,849.75 acres in Island County for about \$1.05 per acre in 1866.

The first sale by the Northern Pacific Railroad Company was in December, 1872, when it sold 24.69 acres north of Kalama on the Columbia River at a price of \$5.00 per acre. The first sale of more than 200 acres was in May of 1874. That involved a tract of 590.36 acres on the Nisqually Plains which sold for \$3.15 per acre. From July 1, 1883, until June 30, 1884, the railroad sold a total of 147,450.49 acres in Washington for \$4.70 per acre.

The first large purchase of Washington timber land was made on January 31, 1900, when the famous Weyerhaeuser Timber Company purchased 900,000 acres of the finest Washington timber land from the Northern Pacific for a price of \$6.00 per acre. However, none of the timber land was located in the Nooksack tract or Whatcom County.

The only evidence of land sales referred to by the claimant's expert appraiser in his report was a reference to "a number of sales of partially cleared claims in Whatcom County in the fifties at prices averaging about \$3.00 to \$3.25 per acre."

33. The claimant called one witness, James A. Crutchfield, to testify as an expert appraiser. The only exhibit introduced by the claimant in the hearing on valuation was Mr. Crutchfield's 19 page appraisal report.

Mr. Crutchfield is an economist holding Bachelor's, Master's and Doctor's degrees in economics. He is employed as a Professor of Economics at the University of Washington. He testified that he had worked for 18 months on a regular basis and at intervals with Larry Smith & Co., real estate consultants. He was also employed from 1943

