

BEFORE THE INDIAN CLAIMS COMMISSION

THE NOOKSACK TRIBE OF INDIANS)
 ON RELATION OF JOSEPH LOUIS,)
 CHAIRMAN OF THE GENERAL COUNCIL,)
)
 Claimant,)
 v.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 46

Decided: July 17, 1958

Appearances:

Frederick W. Post, with whom
 was Kenneth J. Selander,
 Attorneys for Claimant.

Ralph A. Barney and Donald R.
 Marshall, with whom was Mr.
 Assistant Attorney General
 Perry W. Morton, Attorneys for
 Defendant.

OPINION OF THE COMMISSION

Holt, Associate Commissioner, delivered the opinion of the Commission.

This case is now before the Commission for determination of the acreage and the value thereof in 1859 of the tract of land described in Finding of Fact No. 14. In our original decision filed May 9, 1955, (3 Ind. Cl. Comm. 479) we held that the claimant Nooksack Tribe held original Indian title through exclusive occupancy and use in 1859, and long prior thereto, to the tract of land described in Finding 14; that said land was taken by defendant on March 8, 1859, without payment of compensation; and, that claimant was entitled to recover compensation

measured by the value of its interest in the land at the time of taking. The Commission ordered that the case proceed for the purpose of determining the acreage of said tract of land and the value thereof on March 8, 1859, less such part thereof as may have been acquired by Nooksack Indians subsequent to 1859, if any.

Further hearings were held before the Commission on these issues on May 9, 1956, and September 23, 1957. However, no further evidence was offered with respect to any land within the described tract having been acquired by Nooksack Indians, so the entire acreage of the tract is now to be valued as of 1859 for the purpose of determining the amount of compensation claimant tribe is entitled to recover. Determinations with respect to offsets will be made following further proceedings on that issue.

The parties are now in agreement that the Nooksack tract contained 80,500 acres of land.

Claimant contends that since there was "no practical market" for the lands in 1859, the amount it is entitled to recover should be based upon the subsistence value of the lands to claimant in 1859, fixed by claimant at \$1,012,500.00. Claimant also contends this amount should be increased 2.7 times to \$2,733,750.00 because of the decrease in the value of the dollar between 1859 and the present.

Defendant contends that Nooksack land had a fair market value in 1859 of \$5,000.00, or approximately six cents per acre.

The evidence, as outlined in our findings of fact, discloses that the Nooksack tract is located in the northwestern corner of the State of

Washington, a few miles south of the Canadian border and approximately 9 miles inland from the waters of Puget Sound. The tract is approximately 45% rough, mountainous land comprising the foothills of the Cascade Mountains and the Sumas Mountains. The tract is watered by the Nooksack River, whose bed and gravel bars account for approximately 8.4% of the area. The remainder of the tract is level to sloping land. The climate is moderate and there is an abundance of rainfall.

In 1859 the tract lay within the County of Whatcom, in the Territory of Washington. There was virtually no white population in the area, the 1860 census showing a population of 352 for the entire County of Whatcom, which at that time included the area now divided into Whatcom, Skagit and San Juan counties. There were no railroads in the area and the few overland roads in the Washington Territory lay to the south of the Nooksack tract. In 1859 virtually all transportation was upon water.

The Nooksack tract was located within a band of heavy timber which covered virtually the entire area west of the Cascade Mountains. The valuable Douglas fir formed about 7/8ths of the forests' growth, while the remaining trees included hemlock and cedar. While the Nooksack tract contained some fertile river bottom land, much of it was subject to flooding and the cost of clearing the heavy timber made the land practically valueless for any agricultural purposes other than to provide subsistence to individual settlers. There were no minerals within the tract.

Since there is no dispute as to the acreage involved, the question now before us is the determination of the value of the Nooksack tract

on March 8, 1859. The test for valuation of land is the fair "market value" of the land. As the Supreme Court stated in New York v. Sage, 239 U. S. 57, 60 L. Ed. 143, ". . . what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it. . . ."

Both parties in this proceeding agree that there was no "actual market" for the Nooksack area in 1859. The evidence indicates that there were no sales of large tracts of land in the general area involved at a date on or prior to the valuation date herein involved. In the absence of evidence of actual market value, in the sense of willing buyers and willing sellers, resort must be had to other data which would have been considered by a hypothetical buyer and seller in dealing with the land in question in 1859. The principles and factors which are to be taken into consideration in such cases were summarized by the Court of Claims in Otoe and Missouri Tribe of Indians v. The United States of America, 131 C. Cls. 593. The Court stated at page 633 that the factors to be considered in the absence of evidence of "market value" included "the natural resources of the land ceded, including its climate, vegetation, including timber, game and wildlife, mineral resources and whether they are of economic value at the time of cession or merely of potential value, water power, its then or potential use, markets and transportation -- considering the ready markets at that time and the potential market."

With this brief statement of the methods of evaluating land, let us examine the appraisals of the expert witnesses of the parties. The claimant's expert, Mr. James A. Crutchfield, valued the tract by two methods,

arriving at two figures.

His first method involved a computation of the value of the timber on the Nooksack land based on an assumed 1859 average stand of 14,000 ft. BM per acre valued at an assumed valuation figure of \$1.00 per 1,000 BM in 1900 discounted to 1859 at 8%. To this figure was added an additional 25 cents per acre representing his opinion that 10% of the land would have been usable for agriculture and have been valued at \$2.50 per acre net of the value of the timber.

The Commission cannot give much weight to this appraisal. The record does not contain sufficient evidence upon which to base any specific estimate of the average stand of timber in the Nooksack tract on March 8, 1859. Accordingly, Mr. Crutchfield's estimate of 14,000 ft. per acre is pure conjecture. Further, his figure of \$1.00 per thousand feet BM for an average stumpage value of timber in Washington in 1900 is disputed by many of the authorities and cannot, in any event, have any mathematically computable relationship to a stumpage value for the Nooksack tract timber in 1859. The Commission does not believe the evidence supports Mr. Crutchfield's opinion that 10% of the Nooksack land would have had a value of \$2.50 per acre in addition to the value of the timber.

The opinion of Mr. Crutchfield cannot be given much weight by the Commission for the further reason that his method of evaluation is not in accordance with legally approved standards but rather involves methods based on conjecture and speculation, which methods have been specifically rejected by the courts and this Commission. Mr. Crutchfield's method was rejected in U. S. v. 13.40 Acres of Land, etc., 56 F. Supp. 535, in

which the Court stated that, "The separate valuation of timber or rock attached to land, or valuations arrived at by a process of multiplying the number of cubic feet or yards by a given price per unit, are not approved bases for evaluation." Mr. Crutchfield's valuation also involved the adding of computed timber values to a computed agricultural value. This method of proving separately the values of various uses to which the land is adapted and then adding these separate items of value to find the value of the land was rejected in Morton Butler Timber Co., et al., v. U. S., 91 F. 2d, 884.

The second method of evaluation used by Mr. Crutchfield, which is the method urged by counsel for claimant, involves a computation of the income which the Nooksack Indians could have earned had they been employed by the white settlers rather than obtaining their own subsistence from the land which they occupied. Mr. Crutchfield has assumed that the Nooksack Indians could have each earned an average of \$150 a year or a total tribal income of \$67,500. Capitalizing this figure at 6% he has computed a value of \$1,125,000, which he says, must have represented the value of the tract to the Nooksack Indians since they preferred to make their own subsistence from the land rather than work for the white man. From this figure he has deducted 10%, representing the value of the fishing rights retained by the Indians. Under this method of computation Mr. Crutchfield found that the value of the tract in 1859 was \$1,012,500, or about \$12.58 per acre.

While this method appears to be based upon assumptions which the Commission believes are completely unjustified, it is not necessary to burden this opinion with them since the method is entirely theoretical

and is not based upon any judicially accepted method of evaluating land. The Commission cannot give weight to an opinion on valuation which is based on such a method.

Mr. Crutchfield has also multiplied both of his appraisal figures by a 2.7 factor, which, he claims, represents the amount by which the dollar has depreciated since 1859 on the basis of the index of wholesale prices of the Bureau of Labor Statistics. The law is well settled that, in the absence of provisions for the payment of interest in the jurisdictional act, unless the taking of land was under Congressional authority in the exercise of the United States sovereign power of eminent domain, the payment of just compensation does not require an increment measured by interest or any other standard to be added to the value at the time of taking. The Assiniboine Indian Tribe v. The United States, 1 I.C.C. 530 and cases therein cited. The Indian Claims Commission Act (60 Stat. 1049) contains no provision for the payment of interest. The taking in this case was not in the exercise of the power of eminent domain. The claimant is entitled to recover the fair market value of the lands as of March 8, 1859, but is not entitled to any increment to be added to the fair market value, whether such increment be computed as interest, or by multiplying the fair market value by a dollar depreciation factor, or by any other means.

The defendant's appraiser, Mr. Vern A. Englehorn, has submitted a detailed appraisal report containing much material which has been helpful to the Commission in arriving at an evaluation of the Nooksack area. Mr. Englehorn has attempted to appraise the land on the basis of its fair market value in 1859 assuming a hypothetical seller and hypothetical buyer and taking into consideration the area's size, topography, accessibility,

surrounding sales, population, and factors which would be involved in its utilization for resale as timber land. However, the Commission cannot agree with Mr. Englehorn's conclusion that the Nooksack land had only a nominal value not exceeding \$5,000, or a little over 6 cents an acre, as of March 8, 1859.

Both parties are in agreement that the highest and best use for the Nooksack tract would have been as timber land. A prospective purchaser of the tract would have considered many factors affecting the price which he would be willing to pay for the timber land. Among the factors to have been considered would have been the quality of the timber, its density, its accessibility to both saw mills and markets for lumber, and the topography of the area.

The record clearly indicates that the Nooksack tract lay within the heavily forested section between the Cascade Mountains and Puget Sound. It appears that approximately 90% of the trees in the area were the valuable Douglas fir and that the remaining 10% included hemlock and cedar trees which were also valuable for lumbering operations. In 1859 the Douglas fir was being exported all over the world for use as spars on sailing ships. Much lumber was also exported to supply the expanding area around San Francisco.

There is no evidence upon which to base any accurate estimate of the average density of the forests within the Nooksack tract in terms of thousands of board feet per acre. A survey conducted by Mr. Henry Gannett in 1899 revealed an average stand of 3,000 ft. BM per acre average for the entire County of Whatcom. However, Mr. Gannett reported that Whatcom County was originally very heavily timbered and that its

forests were probably as dense as those of any other county in the state, but that fire had destroyed large areas. While there is evidence that fires had destroyed some forest land in the Puget Sound area prior to 1859, it appears that the most damaging fires occurred subsequent to the evaluation date. The Commission believes that on the evaluation date the forests within the Nooksack tract were comparable in their stand to the average of the surrounding Puget Sound area.

The Nooksack tract was not immediately accessible to the many saw mills which had been constructed in the Puget Sound area prior to March 8, 1859. Most of the mills were located in the southern portion of the Sound in the counties of Kitsap, Jefferson, Pierce and Thurston. The closest mill to the Nooksack tract was at Bellingham Bay, 15 miles from the Nooksack area, but that mill had a very limited output, it being reported that the water power failed during the summer and its market was limited to supplying the small settlement at Whatcom, Bellingham Bay. In 1859, timber on the Nooksack tract would have been considered inaccessible for extensive lumbering operations with the crude means then being employed by timbermen. The evidence discloses that the only timber which was cut commercially was that which stood within a mile to two miles inland from salt water or a driveable stream. The Nooksack tract was located 9 miles, at the closest point, from salt water, and the Nooksack River, which flowed through the tract, was not driveable at that time due to extensive log jams.

The ships from the San Francisco area and other ports around the world called at the ports in the southern portion of the Sound where there was a concentration of saw mills producing the products for

export. There was no evidence that any products from the mill at Bellingham Bay were exported. Accordingly, it appears that the Nooksack area was quite remote from the ready market for its timber.

The topography of the area would have added considerably to the expense of cutting the timber since approximately 45% of the terrain is classified as rough and mountainous. However, a prospective purchaser would have been aware of the possibility of clearing the log jams in the Nooksack River and being able to utilize it for transportation to a saw mill located within or near the area.

After considering all the above factors, a prospective purchaser would have been aware that there was, in 1859, no immediate value for the timber. A prospective buyer would, however, have recognized its potential value, which would have to await the arrival of the railroad and the clearing of the log jams in the Nooksack River to furnish adequate means of transportation as well as the exhaustion of the millions of acres of more accessible and readily marketable timber which lay to the south along the shores of Puget Sound. A prospective purchaser would also have considered the existing danger of damage to the timber from fires which were causing thousands of dollars in damage to the Washington forests every year. However, the Commission believes that a timberman would, after weighing all of the factors referred to above, have been willing to buy and a seller willing to sell the Nooksack tract on March 8, 1859, for a consideration amounting to 65 cents an acre.

While there is no evidence of sales of comparable timber tracts at or prior to the evaluation date in this case, there were sales in 1861, 1862, and 1863 of tracts of timber land to Pope and Talbot at a

price of \$1.50 per acre. However, these sales involved the choicest timber land not more than a mile to a mile and a half from the shores of Puget Sound and were located within the immediate vicinity of the mill at Port Gamble. The later sales of timber land at prices ranging from \$3.15 to \$6.00 an acre occurred 15 to 40 years subsequent to the evaluation date in this case and are, therefore, too remote in time to be given much weight in consideration of the fair market value of the Nooksack tract in 1859. Likewise, evidence of sales of small tracts of improved realty in the area has little relationship to an evaluation of some 80,000 acres of raw land involved in this case.

In Alcea Band of Tillamooks, et al., v. The United States, 115 C. Cls. 463, the Court of Claims found that four tracts of land, ranging in size from 433,150 acres to 1,152,410 acres, located in northwestern Oregon had a value, as of November 9, 1855, of \$1.20 per acre. The land in the Tillamook case was also located in the rich Douglas fir region of the Pacific Northwest. However, as the expert appraiser for the claimant recognized, this land was located in a more highly developed area. Mr. Crutchfield testified on direct examination as follows:

Q. And right at that point you might distinguish the problem in the Nooksack area from that which you know to exist in the Tillamook area?

A. Yes. I read the Court's report of that case, and in the Tillamook area of course the irrigation area had been very extensively settled before the Puget Sound area had, and the record indicated there that there was quite a considerable white settlement, that lumber was actually being exported from those lands, transportation facilities had been well developed and the lands were, at least in part, incorporated within a regular market community. In some of the lands in western Washington I think that same thing might be argued, but in the case in point it probably could not.

Q. You mean in the Nooksack case?

A. In the Nooksack case, yes. White settlement there was extremely limited at the time, there were a couple of squatters and no more. (Trans. pp. 11, 12, Hearing at Billings, Montana, May 9, 10, 1956).

The record fails to support a finding that in 1859 the Nooksack land would have been valuable for any agricultural purposes other than the utilization of some of the river bottom land by settlers for subsistence purposes. Thus any value of the land for agriculture would have been nominal. The land did not possess any known minerals.

After considering all the evidence in the record, it is the conclusion of the Commission that the 80,590 acres of Nooksack land had an average fair market value of sixty-five cents per acre on March 8, 1859, or \$52,383.50.

As the lands were taken by defendant without the payment to the Nooksack Tribe of any compensation therefor, the claimant is entitled under Clause 4 of Section 2 of the Indian Claims Commission Act to an award in the sum of \$52,383.50, less such offsets as may be allowable under the Indian Claims Commission Act.

Wm. M. Holt
Associate Commissioner

We concur:

Edgar E. Witt
Chief Commissioner

Louis J. O'Marr
Associate Commissioner