

BEFORE THE INDIAN CLAIMS COMMISSION

THE DUWAMISH TRIBE OF INDIANS,
 Petitioner,
 v.
 THE UNITED STATES OF AMERICA,
 Defendant.

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Docket No. 109

Decided: July 6, 1959

ADDITIONAL FINDINGS OF FACT

The Commission makes the following findings of fact which are supplemental to the findings numbered 1 to 20, inclusive, heretofore made herein:

21. The Commission has earlier in this case decided that petitioner herein, The Duwamish Tribe, held aboriginal Indian title to certain lands in what is now the State of Washington which were ceded to the United States by the Treaty of January 22, 1855, 12 Stat. 927, and that the United States extinguished petitioner's Indian title to said lands on March 8, 1859, the effective date of the treaty (5 Ind. Cl. Comm. 117). The lands found to have been exclusively used and occupied by the Duwamish Indians are set out in said prior decision in Finding 20. Said lands will hereinafter be referred to as the subject tract or the Duwamish tract. This trial has been held to determine the value of said lands as of March 8, 1859.

22. (a) The subject tract is an area of land lying between Puget Sound and Lake Washington mostly south of Elliott Bay and north of a line drawn east from Point Pully to just south of McDonald Lake. The Duwamish tract

is located in the northwestern portion of King County, Washington, and consists of 54,790 acres. The subject tract is approximately 13 miles in its greatest length north and south and ranges in width east and west two and a half to fourteen miles. The southern portion of the Duwamish tract is drained by the Duwamish River and its tributary, Cedar River. The valley of the Cedar River in its course through the tract is narrow and rather deeply entrenched; the valley of the Duwamish is low and flat-bottomed with inadequate drainage, resulting in many marsh and swampy areas. About 14 $\frac{1}{3}$ of the lands of the subject tract are located in these river valleys and the remainder of the tract is made up of a succession of rather steep, rounded hills and ridges, with elevations rising from sea level to 400 feet. Much of the coastline of the tract ranges from very abrupt to sheer cliffs. From Point Pully north for a distance of three or four miles the terrain lifts to a height of 250 feet within an eighth of a mile of the shoreline, and from Four Mile Rock southward to Smith's Cove for a distance of more than a mile the shoreline presents a sheer cliff towering approximately 200 feet above the waters of Puget Sound. Cedar River was not navigable. While the Duwamish River was navigable it was at the time of valuation "much obstructed by numerous snags."

(b) 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.

23. The land in the subject tract is classified as follows:

Bottom or Potential Agricultural Land	7,555	acres
Accessible Timberland	31,350	acres
Inaccessible Timberland	14,525	acres
Inland Water	1,360	acres

24. 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. There were few roads and no 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.

25. 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.

26. The first American settlers arrived in the Puget Sound area in 1845, and in 1851 they established the first Puget Sound town, Tumwater, about 50 miles southwest of the Duwamish tract. The first white settlers in the subject tract arrived in 1851. In 1853 northern Thurston County became King County and the plat of the town of Seattle was filed. In 1853

a special census listed 170 inhabitants in King County and the census of 1860 showed only 302 people in King County. In 1853 Henry L. Yesler built a steam-powered sawmill on the north shore of Elliott Bay. The population of the town of Seattle in 1855 was said to be 50 people and following four years of Indian trouble in the area it was reported there were twenty families in the town.

Timber

27. 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 forest growth. There is also valuable timber such as red cedar and hemlock. In 1899, Henry Cannett, Chief of the Division of Geography and Forestry for the Department of 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 on King County:

This county is in the middle of the State north and south, and extends from the crest of the Cascade Range westward to the shores of Puget Sound. Much of the eastern part of the county lies high up in the Cascade Range, and contains little timber of present merchantable value. Aside from this and a few trifling areas of prairie, the county was originally heavily forested, but the forests have been largely removed by fire or the ax. The latter has taken the timber from Vashon and Maury islands, from the shores of Puget Sound, and of lakes Washington and Sammamish, and from a broad belt along the line of the Northern Pacific Railroad, together with other smaller areas in the interior of the county. Fires have done a vast amount of damage in various parts of the county, mainly in its central

portion, although the mountainous regions have not been neglected by it. Indeed, fully one-half of the area formerly covered with merchantable timber has been devastated by fire.

28. In the subject tract there were approximately 14,000 board feet of timber per acre, made up of the following species and amounts thereof:

Red Fir (Douglas)	50%
Hemlock	20%
Cedar	15%
Lesser Species	15%

29. 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.

30. 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. The mill in Seattle was the only one in King County in 1860.

31. 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 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.

32. 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

33. (a) The Duwamish tract contained some fertile land, mostly along the river valleys which would need clearing. The productive soil accounted for about 14% of the land. Most of the tract was so heavily timbered as to prohibit clearing since the cost was estimated from \$50.00 to \$300.00 per acre.

(b) The 1860 census listed 366,156 acres in the Washington Territory as farmland. This compared with 2,060,539 acres of farmland in Oregon Territory. In 1860 there were only 73 farms containing 12,894 acres in King County. Less than 1% of the total area of King County was listed as farmland in the 1860 census. 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.

34. (a) 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 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.

(b) 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

(c) 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).

(d) 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).

(e) 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.

(f) The rate at which land in the Duwamish tract passed from federal to private ownership was as follows:

<u>10-Year Period</u>	<u>Acreage</u>	<u>Percent of Total</u>
1850-1859	359.20	.5
1860-1869	23,520.48	44.2
1870-1879	<u>14,739.36</u>	<u>27.3</u>
Total	38,619.04	72.0

Of this total acreage of 38,619.04 disposed of in the 28 year period 1,556.86 acres were State University grant selections, 469.77 were State common school land selections and 3,074.77 acres were Agricultural College and Valentine Scrip selections.

35. (a) There is no evidence of any sales of land comparable in size, character or location to the Duwamish 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 tract 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. From 1875 through the 1880's, Pope and Talbot purchased numerous 160-acre tracts on a selective basis within a mile and a half of salt water at about \$3.12 per acre, with an occasional purchase slightly above or below this figure.

(b) 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.

(c) 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. Of the 900,000 acres so purchased 116,602.02

were located in King County.

36. The highest and best use for which the Duwamish lands were adaptable as of March 8, 1859, was timber production.

37. There were no mineral deposits of any importance known to be present on the Duwamish tract as of March 8, 1859.

38. (a) Mr. James A. Crutchfield, a Professor of Economics at the University of Washington, appeared as a witness for petitioner. This witness testified that he used two methods of evaluating the subject tract. The first method he used to determine value was on the basis of the actual commercial use which land might have and secondly he used a method to arrive at a "subsistence valuation."

(b) Mr. Crutchfield in his report states (Pet. Ex. 1a) that he arrived at his estimate of value based on the actual commercial use which the land might have by following the procedure outlined in earlier cases. The cases referred to by petitioner's witness are The Nooksack Tribe v. United States, 6 Ind. Cl. Comm. 578, and Muckleshoot Tribe v. United States, 6 Ind. Cl. Comm. 608. In these prior determinations this Commission set forth fully in its findings of fact the methods used by the witness and in its opinions stated Mr. Crutchfield's opinion of value could not be given much weight since his method of valuation was 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 opinion based on his "subsistence value" method was rejected in these prior cases as being entirely theoretical and

as one not based upon any judicially accepted method of evaluating land.

39. Mr. C. Marc Miller, a qualified appraiser of Seattle, Washington, testified as an expert witness for defendant and prepared a written valuation report (Def. Ex. 205-A) which contains a wealth of material pertaining to the subject tract. Mr. Miller used as his yardstick in reaching his opinion as to value the fair market value approach. Defendant's appraiser took into consideration the many factors considered in evaluating lands such as the sizes of the tracts, accessibility, surrounding sales, taxes, transportation, population, demand for land, markets, financial investment, risks and need for a return on investment and profit. With respect to the subject tract, Mr. Miller wrote:

The Duwamish tract had certain recognized advantages not common to other areas in the Puget Sound region. The tract is situated on and around Elliott Bay, the best, and best protected, deep water harbor on Puget Sound. Through the tract flows the navigable Duwamish River which, with its tributaries, periodically give access to a large interior region. These advantages might well give rise to the expectation that an earlier and more active demand for the lands of the Duwamish Tract would develop than could be anticipated for other Sound regions. This demand, however, did not exist on March 8, 1859, and could only be anticipated.

Defendant's witness was of the opinion that the full fair market value of the subject tract as of March 8, 1859, was the sum of \$21,000.00, or at the rate of approximately \$0.40 per acre.

40. Upon the basis of the findings of fact herein made, and the record as a whole, the Commission finds that the Duwamish tract,

consisting of 54,790 acres, had a fair market value as of March 8, 1859, of \$74,000.00, or at the average rate of approximately \$1.35 per acre.

/s/ EDGAR E. WITT
Chief Commissioner

/s/ WM. M. HOLT
Associate Commissioner