

BEFORE THE INDIAN CLAIMS COMMISSION

THE DUWAMISH TRIBE OF INDIANS,)

Petitioner,)

v.)

THE UNITED STATES OF AMERICA,)

Defendant.)

Docket No. 109

Decided: July 6, 1959

Appearances:

Frederick W. Post and
Malcolm S. McLeod
Attorneys for Petitioner.

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

OPINION OF THE COMMISSION

Holt, Commissioner, delivered the opinion of the Commission.

By a prior determination this Commission found that petitioner, The Duwamish Tribe, had held Indian title to a certain area of land in what is now the State of Washington and that said title in the Indians had been extinguished by the Treaty of January 22, 1855, 12 Stat. 927, II Kapp. 669, wherein the lands were ceded to the United States (5 Ind. Cl. Comm. 117, 131).

The Commission further held therein that the effective date of said 1855 treaty was March 8, 1859. This trial has been held to determine the value of said lands as of March 8, 1859.

The boundaries of the lands found to have been exclusively used and occupied by the Duwamish Indians are fully set forth in Finding 20 of our prior findings of fact (5 Ind. Cl. Comm. 117, 131). Generally speaking the lands, which will hereinafter be referred to as the Duwamish tract, or the subject tract, are located in what is now King County in the State of Washington. The subject tract is bounded on the west by Puget Sound and on the east by Lake Washington. Elliott Bay adjoins the tract and the City of Seattle now takes in a large amount of the lands of the tract. The Duwamish River flows north through the tract and its mouth is at Elliott Bay.

The Duwamish Tract consists of 54,790 acres of land. Of this total acreage the tract has been classified as containing 7,555 acres of bottom or potential agricultural land; 31,350 acres of accessible timberland; 14,525 acres of inaccessible timberland; and 1,360 acres of inland water. The parties agree that as of March 8, 1859, the highest and best use of the subject tract was for timber production and that as of that date there were no minerals of any importance known to be present on the tract.

The Puget Sound region was sparsely settled as of 1859. The first American settlers in this region arrived in 1845, and in 1851 they established the first Puget Sound town, Tumwater, about 50 miles southwest of the Duwamish tract. In 1851 the first settlers arrived in the subject tract. The plat of the town of Seattle was filed in 1853 and King County by 1860 had a population of 302. The slowness of settlement in the Puget

Sound area prior to the 1880's has been attributed to the inaccessibility of the region and the lack of transportation facilities. As of 1859 all the settlements of western Washington were virtually dependent upon water transportation there being few roads and no railroads. The Northern Pacific Railroad was not completed until 1883 and did not reach the Puget Sound area until 1887.

Timber production was the main industry in the subject tract from practically the first settlement therein. Henry L. Yesler built a steam-powered sawmill on the north shore of Elliott Bay in 1852. This mill had a capacity of 10,000 to 15,000 board feet per day and for years furnished employment to the local inhabitants. It was the only mill in King County in 1860. Early timber operations were crude and for a long period the timber first cut was that along the waters of the Sound and those streams which could be used to drive logs. Timber operators usually selected only the best stands of trees for a distance of only one to two miles inland. Until the coming of the railroad making transportation to the eastern part of the country feasible and profitable and until lumbering operations in the Great Lakes area and in the south diminished, the market for Washington timber was limited to local demand and to far away markets such as California, South America, Hawaii and the Orient. The only means of transporting the lumber at that time was by ship.

The witnesses for the parties agree that as of the valuation date there was no market for the subject tract. Mr. James A. Crutchfield, a professor of economics, appeared as a witness for petitioner. Mr.

Crutchfield utilized two methods of valuing the tract and arrived at an opinion of value under each method. In his first approach this witness said the term "market valuation" referred to the values which could be imputed to the lands under commercial utilization of their marketable products. In applying this method the witness states he followed the procedure outlined in the earlier cases (The Nooksack Tribe v. United States, 6 Ind. Cl. Comm. 578; and Muckleshoot Tribe v. United States, 6 Ind. Cl. Comm. 608). By the first approach he computed what he considered to be the value of the timber on the subject tract based on an average stand of 14,300 board ft. BM per acre valued at an assumed valuation figure of \$1.00 per 1000 BM in 1902 discounted to 1859 at 8%. To this figure was added an additional 60 cents per acre representing his opinion of a residual value of the Duwamish tract for agriculture. Combining the timber value and the agricultural value, Mr. Crutchfield was of the opinion that the lands in the subject tract were worth \$5.46 per acre. This Commission in the Nooksack and Muckleshoot cases, supra, stated that Mr. Crutchfield's opinion could not be given much weight under this approach because "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." For the same reasons the Commission can give little weight to the witness' opinion of value in this case.

Petitioner's witness in his second method of evaluating the land arrived at an opinion based on a "subsistence valuation". By this

approach he was of the opinion that the net subsistence value of the Duwamish Tract was \$604,000.00. The Commission refused to give any weight to an opinion of value based on such a method in the Nooksack and Muckleshoot cases, supra, and will not do so in this case since the approach is entirely theoretical and is not based upon any judicially accepted method of evaluating land. Mr. Crutchfield also would increase the valuations by multiplying his appraisal figures by a 2.7 factor, which, he claims, should be allowed to provide equal purchasing power in terms of current dollars. Such a method of increasing the valuation amount was denied in the Nooksack and Muckleshoot cases, supra, and is also herein denied.

Mr. C. Marc Miller, a qualified appraiser, testified as an expert witness on value for defendant. Mr. Miller also prepared a comprehensive appraisal report (Def. Ex. 205-A). Defendant's witness used the market value approach to determine what in his opinion was the fair market value of the subject tract in 1859. Lacking comparable sales this witness testified the fair market value is arrived at by taking into consideration all matters that a hypothetical purchaser and seller would have in mind such as condition of the area, demand, population, and settlement. Mr. Miller classified most of the subject tract as timberland, accessible or inaccessible, a small portion as potential agricultural land and a small part as inland water. This witness took into consideration the various elements to be studied in evaluating land such as soil,

topography, transportation, climate, markets, demand, settlements and highest and best use of the subject tract for which it was then adaptable or likely to be needed in the reasonably near future. Mr. Miller was of the opinion that the hypothetical prospective purchaser of this tract would realize that only through the resale or use of these lands could he expect to recover his original investment, taxes, fire protection, administrative costs and costs of resale and he would expect to realize interest upon his investment for the period that the investment remained unliquidated.

Defendant's appraiser felt that a hypothetical prospective purchaser would have noted that approximately 75% of the subject tract, that is the accessible timberland and the potential agricultural land, belonged in the most desirable category. The purchaser, according to Mr. Miller, would have expected to dispose of the most desirable land within 10 years, or in an average of 5 years, and dispose of the remaining 25% (the inaccessible and least desirable) in 10 to 30 years, or an average of 20 years. Mr. Miller was of the opinion that the fair market value of the Duwamish tract as of March 8, 1859, was \$21,000.00 or approximately 40 cents per acre.

Defendant's expert witness in arriving at his evaluation figure concluded that the hypothetical willing seller and willing buyer would have recognized "that the price at which comparable government lands could be secured would effectively establish a ceiling on the price the buyer could hope to secure from the resale" of the Duwamish lands, that

is, \$1.25 per acre. Using this \$1.25 per acre figure as a ceiling Mr. Miller calculated what in his opinion an investor would have paid for the subject tract. While the availability of Government lands and the quantity subject to disposal in the area would be taken into consideration by a prospective purchaser it does not follow that the price set for such Government lands would result in a ceiling which one might expect to apply to all lands in the area. There is evidence in this case of some sales of select timberlands in excess of \$1.25 per acre at or reasonably near the time of valuation.

A prospective purchaser in 1859 would have recognized the fact that the subject tract was favorably situated on and around Elliott Bay, said to be the best, and best protected, deep water harbor on Puget Sound; that the Duwamish River flowed through the tract which with its tributaries, periodically gave access to a large interior region; that along the Sound there was a great amount of other competitive accessible timberland to supply the markets that then existed for the region; and that there was no immediate value for the inaccessible timber. The same prospective purchaser would also consider the fact that lumbering operations had been in progress successfully on the tract since 1853 supplying the limited local demand and the ready markets that then existed; that the town of Seattle which had been platted in 1853 was desirably located on Elliott Bay and could be expected to develop; and that prospects for the subject tract, with 75% of it considered to be accessible, were much better than for many other areas in the Puget Sound region.

The Commission based upon the findings of fact herein made and the record as a whole and giving due consideration to the size of the tract, its location and accessibility, concludes that the fair market value of the Duwamish tract on March 8, 1859, was \$74,000.00, or at the average rate of approximately \$1.35 per acre.

The case will now proceed to a determination of the consideration paid to the Duwamish Indians, if any, under the provisions of the Treaty of January 22, 1855, supra; whether the consideration so paid, if any, was unconscionable, and, if so, what offsets are chargeable against said Indians under the provisions of the Indian Claims Commission Act.

/s/ WM. M. HOLT
Associate Commissioner

I concur:

/s/ EDGAR E. WITT
Chief Commissioner