

BEFORE THE INDIAN CLAIMS COMMISSION

THE SNOHOMISH TRIBE OF INDIANS,)	
)	
Petitioner,)	
)	
v.)	Docket No. 125
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: July 23, 1959

ADDITIONAL FINDINGS OF FACT

The Commission makes the following findings of fact which are supplemental to the findings numbered 1 to 18, inclusive, heretofore made herein (4 Ind. Cl. Comm. 549):

19. The Commission has earlier in this case decided that petitioner herein, The Snohomish 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 (4 Ind. Cl. Comm. 549). The lands found to have been exclusively used and occupied by the Snohomish Indians are set out in said prior decision in Finding 17. Said lands will hereinafter be referred to as the subject tract or the Snohomish tract. This trial has been held to determine the value of said lands as of March 8, 1859.

20. (a) The Snohomish tract as described in our prior findings, generally speaking, is an area of land that includes the south ends of Whidby Island and Camano Island and all of Gedney, or Hat, Island.

The tract also includes a portion of the mainland fronting on the Sound stretching from Mukilteo in a northerly direction to Warm Beach and easterly in the south, generally speaking, to the old intersection of the Snohomish, Snoqualmie and Skykomish Rivers and to Granite City in the north. The tract is fully described in Finding 17, as amended, in our previous determination. The lands on the islands are located in Island County in what is now the State of Washington while the lands on the mainland are in Snohomish County. The tract as set forth in Finding 17 contains 164,265 acres of land which includes 24,320 acres of land in the Tulalip Indian Reservation, sometimes referred to as the Snohomish Reservation, which was set apart by Article 3 of the 1855 treaty "for the purpose of establishing thereon an agricultural and industrial school, * * *, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory."

(b) The subject tract on the mainland is irregular in shape and is deeply indented in its western or coastal border by the waters of Port Gardner. The portion of the tract on the mainland is drained by the Snohomish River and its tributary, the Pulchuck or Pilchuck. At least 20 percent of this mainland portion of the tract lies in the low, broad valley of the Snohomish River and the narrow, entrenched valley of the Pilchuck River. There were good soils but fairly extensive swamp and marshy lands along the Snohomish River which later were diked and drained before cultivable. Some agricultural land is found in the Pilchuck Valley also. The Snohomish River was navigable while the Pilchuck was navigable only for canoes. Aside from the broad, low delta

and the valleys of the Snohomish and Pilchuck Rivers the mainland portion is made up of somewhat hilly and broken land. Gedney Island rises rather abruptly from the waters of the Sound but the interior is comparatively level with good soil. The lands in the tract which are located on the southern end of Whidby Island were for the most part high, rolling, and hilly with the shore line banks abrupt. The same condition existed as to the lands on the southern part of Camano Island within the subject tract.

(c) 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.

21. The land in the subject tract consisting of 164,265 acres is classified as follows:

Bottom or Potential Agricultural Land	12,153 acres
Accessible Timberland	56,467 acres
Inaccessible Timberland	65,790 acres
Marsh, Overflow or Swampland	24,830 acres
Inland Waters	5,025 acres

An undisclosed, but considerable amount, of the marsh and overflow lands would be considered potential agricultural land that would need diking and drainage.

22. 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.

23. 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.

24. The first American settlers arrived in the Puget Sound area in 1845, and in 1851 they established the first Puget Sound town, Tumwater, near the present site of Olympia. Whidby Island was the next area to attract settlers and during the years 1850 to 1855 many of the settlers reaching the Puget Sound region found their way to Whidby Island. The early settlers on this island concentrated in the prairie area around Penn Cove to the north of the part of the subject tract on the island. A sawmill, known as the Tidewater Mill, was located at Penn Cove. South of the mainland portion of the tract the site of the present city of Seattle was platted in 1853. Island County in 1858

reportedly had a population of 180 with most of the settlers on Whidby Island. Some 40 whites are said to have been on the mainland portion of the tract by 1861 principally around Tulalip Bay.

Timber

25. 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 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 on Snohomish County:

This county extends from the crest of the Cascade Range to Puget Sound. The eastern part is composed of high and rugged mountains, and contains little, if any, merchantable timber. The western half was originally forested, with the exception of a few tracts of prairie. Logging has, however, been carried on extensively in this county, two-fifths of the area formerly timbered having been stripped by the ax. Burns have not been extensive or destructive.

Of Island County, Gannet wrote:

This comprises a group of islands in the northern part of Puget Sound, including Whidby and Camano Islands. These islands originally were entirely covered with fir forests, but have been almost completely denuded by the ax.

26. In the subject tract there were on the average approximately 12,000 board feet of timber per acre on the accessible timberlands and 11,000 board feet per acre on the inaccessible timberlands, made up of the following species and amounts thereof:

Red Fir (Douglas)	50%
Cedar	25%
Hemlock	15%
Lesser Species	10%

An undetermined but small amount of the timber on the subject tract had been burned or damaged prior to the valuation date.

27. 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.

28. 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. Island County had one sawmill in 1860.

29. 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.

30. 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 Grand 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

31. (a) The subject tract contained some fertile land mostly along the valleys of the Snohomish and Pilchuck Rivers. The earliest farming was undertaken above the tidelands and at the mouth of the Snohomish River. The productive soil accounted for about 20% of the land but a great deal of the potential agricultural land would require clearing at a high cost per acre or as in the case of the marshy or overflow lands needed to be diked or drained before cultivation.

(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 1870 there were 94 farms in Island County consisting of 7,275 acres of improved land and 15,280 acres unimproved. Total acreage of Island County was 131,840 acres. In Snohomish County there were 122 farms consisting of 1,473 acres improved and 17,785 unimproved lands. Snohomish County contained 1,344,000 acres. 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.

32. (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 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.

(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 the land in the Snohomish tract which was available for acquisition passed from federal to private ownership was as follows:

<u>10-Year Period</u>	<u>Acreage</u>	<u>Percent of Total</u>
1860-1869	4,205.88	3.0
1869-1870	<u>44,664.02</u>	<u>33.2</u>
Total	48,869.90	36.2

33. (a) There is no evidence of any sales of land comparable in size, character or location to the Snohomish 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. 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 18,788.26 were located in Snohomish County.

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

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

36. (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.

37. 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. 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 \$16,200.00, or at the rate of approximately \$0.12 per acre.

38. Upon the basis of the findings of fact herein made, and the record as a whole, the Commission finds that the Snohomish tract, consisting of 164,265 acres of land, had a fair market value as of March 8, 1859, of \$180,700.00, or at the average rate of approximately \$1.10 per acre.

39. The case will now proceed to a determination of the consideration paid to the Snohomish Indians, if any, under the provisions of the Treaty of January 22, 1855, supra; and whether the consideration so paid, if any, was unconscionable. At the further hearing the case will also proceed to a determination of the interest retained by the Snohomish Indians in the Tulalip Reservation, set aside by Article 3 of the 1855 treaty for petitioner and other Indians which interest will be based on the ratio of the average population of petitioner tribe on said reservation to the average of the total population upon said reservation, and appropriate deduction for such retained interest will be made from the gross value of the subject tract at the average rate of \$1.10 per acre; and to a consideration, if necessary, of what offsets are chargeable against said Snohomish Indians under the provisions of the Indian Claims Commission Act.

Edgar E. Witt
Chief Commissioner

Wm. M. Holt
Associate Commissioner