

BEFORE THE INDIAN CLAIMS COMMISSION

THE SKOKOMISH TRIBE OF INDIANS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 296
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: June 30, 1961

Appearances:

Abe W. Weissbrodt, Lyle Keith,  
Patrick H. Winston, David Cobb,  
I. S. Weissbrodt, and Rella R.  
Shwartz, Attorneys for Petitioner.

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

OPINION OF THE COMMISSION

SCOTT, Commissioner, delivered the opinion of the Commission.

By prior determination (6 Ind. Cl. Comm. 152) this Commission has found that petitioner, The Skokomish 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 26, 1855, 12 Stat. 933; II Kapp. 674, which was ratified on March 8, 1859, whereby the lands were ceded to the United States, except such portion thereof as may be found in subsequent proceedings to have been exclusively reserved to said tribe for purposes of a reservation. A hearing has been held to determine the value of said lands as of March 8, 1859.

The parties have presented their evidence which they contend is relevant, competent and material to the issue of what was the fair market value of the Skokomish tract in the form of documents, maps, and testimony of their respective appraisers. The documentary evidence consists of many government publications and reports, including Forest Surveys, Reports of the Interior Department, and Congressional Reports. Contemporary writings and subsequent historical theses and other writings are included. In some instances the parties submitted the same documents; but, as to these, the parties differ in their interpretation and evaluation. A number of maps were prepared from government base maps by the appraisers and received in evidence. Each of the appraisers made intensive studies and investigations and, in the case of the petitioner's appraiser, cruises of the land, from which they submitted reports which were received in the record.

The relevant elements and facets of the record as to the methods, studies, qualifications and reports of the appraisers come into focus as we give our reasons herein for our findings. Both of these appraisers contributed valuable and useful facts and information which have been of great assistance to the Commission in its decision in this matter.

The qualifications of each of the appraisers and the relevance, competency, and materiality of their testimony and reports have been challenged by respective counsel. Defendant contends petitioner's appraiser is not a qualified real estate appraiser; that he used improper methods; that he failed to take into consideration all the necessary factors in making a proper appraisal, and that he lacked the necessary background knowledge of the applicable land laws and the history

of the land disposal prior to 1859 and thereafter. Petitioner, on the other hand, contends that the defendant's appraiser lacks the necessary qualifications because he is not a trained or professional forester or logging engineer; because he failed to cruise any of the subject tract; because it is contended the defendant's appraiser's experience has been confined to that of real estate operations; and because he used what petitioner contends appears to be erroneous standards and methods of appraisal. We have carefully weighed these contentions and, as we have stated, both of the appraisers have contributed valuable information.

Although both appraisers have expressed the desirability of using the method of appraisal which includes the consideration of various elements which a prospective purchaser would have in mind as to not only the present but the "prospective" use of the subject tract, they divert from that point to their different viewpoints.

We have carefully examined the record and have found that for the most part the individuals and firms who came into the section prior to and after the date of the cession (1859) were experienced lumbermen and that they did take into consideration not only the present but the prospective use of the subject tract. There is abundant evidence in the record from a number of different competent and reliable sources that at the time of the cession and prior thereto, going back to at least 1853, these experienced timbermen, who foresaw the future demand for lumber incident to the growth of San Francisco after the gold rush of 1849, and the new foreign markets growing up, had explored other possible sites for the construction of their mill sites before they chose their locations in the area almost immediately adjacent to the subject tract

near the mouth of the Hood Canal. One of the sources for this information is a publication entitled "Time, Tide and Timber, A Century of Pope & Talbot." This publication was prepared by Edwin T. Coman, Jr., Assistant Professor of Business History, Stanford University, and Helen M. Gibbs, Research Associate, Stanford University. Both the petitioner and the defendant have relied upon this publication and quoted from it or referred to it in their briefs.

Pope and Talbot were experienced lumbermen from Maine who went by boat to California in 1849. They established a lumber and shipping business in San Francisco which is still in operation. For a period from 1925 to 1938 the ownership of the business changed hands to the Chas. R. McCormick Lumber Company. In February, 1938, Pope and Talbot reacquired the business which they still operate. (Defendant's Exhibit 291-A) Gold was discovered in 1849 in California and it became a State on September 9, 1850. The following passage from "Time, Tide and Timber" (Defendant's Exhibit 291-A, pp. 29-32) is significant to illustrate the importance of the California market at this time and the choice of mill sites in and around the subject tract:

The people who had migrated to California from the Eastern states realized that slavery had no place in the new environment, and that the exploitation of men who were not free could be disastrous in a society that knew few restraints. Small wonder that new Englanders such as Pope and Talbot had been unwilling to cut their ties with their homes. The matter was settled, however, on September 9, 1850, when President Fillmore signed the bill admitting California to the Union. On October 29, 1850, the steamer Oregon rounded Clark's Point, bedecked with flags, all her guns sounding. She brought the good news. California was the thirty-first state in the Union--and free.

\* \* \*

\* \* \* During 1849 and 1850, the business had been almost entirely dependent upon two streams: the immigrants on their way to the gold fields who besieged merchants for food, mining equipment, lodging, and entertainment; and the never-ending influx of miners returning from the Sierras with their little bags of gold dust. After the minor "panic" late in 1850, prosperity had returned. Docks and wharves groaned under the weight of cargoes being discharged, and warehouses bulged. Gold was still important, but it was not paramount. In the eyes of Pope and Talbot, commerce offered a far more secure foundation for the city's economy than the shifting sands from which miners were panning gold. Fundamental to this commerce were two things that were in their very blood--ships and lumber.

If Pope, Talbot, and Keller had been men of lesser ambition or vision, they might have thought that a bird in hand is worth two in a bush, and been satisfied with the business they then had. But lightering had always been their second love, and by 1851, ordinary lumber shipped from the East could not be sold for enough to pay a "decent profit." In 1850, Pope had written his Eastern relatives that merchandise could not be sold profitably in San Francisco when the "freight is 4 times the cost."

Cheap lumber was a necessity if San Francisco was to grow. The Sierra foothills would have had to be solid gold instead of only veined with the ore to have built the city of Eastern lumber at prices prevailing during the height of the Gold Rush \$100 to \$500 per thousand. At such prices, the lumber in an average five-room house would have cost \$2,000 upward. What the city needed was common lumber at around \$25.

Good timber was available, close at hand, from the California redwood region and from Oregon Territory. In late 1850, Pope wrote his Eastern relatives that one redwood tree would make 200,000 to 300,000 feet of lumber (their tiny vessels seldom carried more than 100,000 to 150,000 feet), and that Oregon could "supply this state with all but pine Bds." Lumber, all that was needed to build San Francisco and more, could be produced on the Pacific Coast. It is not surprising that Pope and Talbot were interested in helping to manufacture that lumber. The buzz of a sawmill was a sound good to their ears, and lumber offered, in their eyes, a good solid foundation upon which a man could stake his future and fortune.

A. J. Pope and W. C. Talbot were interested not only in manufacturing lumber, but also in shipping it. Consequently, they wanted their proposed sawmill to be located at tidewater at a point where sailing vessels would have a good anchorage and a safe harbor. Humboldt Bay, the only harbor to which the California redwood region was accessible, offered a fine anchorage once a vessel was in the harbor, but a bar at its entrance offered a serious hazard. Hence, although the redwoods were closer to San Francisco, Pope and Talbot decided to build their mill on Puget Sound in Oregon Territory. Concerning the Pacific Northwest and its Douglas fir, then called Oregon pine, they were singularly well informed.

To a limited extent the parties are in agreement. This agreement is in reference to the location of the subject tract, organization of Washington Territory, dependence on water transportation, Cash Sales Proclamations, and the analysis of cash sales. Based on our study of the record and taking into consideration the agreement of the parties on these subjects, we have made our Findings of Fact thereon numbered 11, 12, 17, 18(e), and 21.

The parties are in limited agreement on the following subjects: acreage, highest use of the land, climate, drainage, timber operations in 1853, water transportation facilities of the Puget Sound area, the recital of operations of early sawmills in Washington Territory, as to actual cash sales made, as to the Timber and Stone Act, and agriculture. These are the subjects of our findings numbered 13, 14, 15, 18(e), 18(f), 21, 23, 25 and 26.

The parties disagree as to the facts relating to the following subjects: timber resources and species; topography; whether the lumber industry shifted in importance from points in Oregon to the Puget Sound area during the critical period presented in this matter; relative importance and advantages of Puget Sound timber operations in comparison

with that in other Pacific coastal locations at the time of the cession; accessibility of commercial timber; population; reserved or granted lands; significance of land disposal statutes and public and private disposal of lands; trade and commerce and shipbuilding; conclusions; and reservation land and treaty considerations. We have dealt with these subjects in our findings numbered 16, 18(a), 18(e), 18(g), 19, 20 and 23-29.

Petitioner has requested a finding of acreage based upon planimeter determination by the Bureau of Land Management of the Department of the Interior (Petitioner's Exhibit 242 and Defendant's Exhibit 307-A) of a total of 355,800 acres, consisting of 353,800 acres of land and 2000 acres of inland water, including the acreage of the present Skokomish Indian Reservation. Defendant contends the award should be valued on the land alone less the acreage of the reservation to make a net of 349,960 acres. In our findings numbered 13 and 28 we have determined upon the acreage to be 355,800 acres, because we have included the area of inland water and the reservation. See Finding 23, Duwamish case, 7 Ind. Cl. Comm. 725, 727, as to our inclusion of inland waters. As to the reservation land, the acreage was provided by treaty (12 Stat. 933), setting out 3840 acres for the use of petitioners and other Indian tribes. Since it will or may become necessary to take into consideration the interest the petitioner tribe retained in the reservation land, we have reserved that determination for a future proceeding herein.

The parties agree that the highest and best use of the subject tract at the time of cession was for timber purposes. Petitioner has requested that we find that it should be valued primarily on its value for this use and the realization of this value by sale in large tracts to lumbermen, citing

our Finding No. 34 in the Tillamook case, 4 Ind. Cl. Comm. 31, at page 55, and the testimony of the appraisers. Defendant objects to the inclusion of any finding that the value should be based on realization from the sale of large tracts to lumbermen since it is contended the evidence discloses only small demand and that for small choice and selected lots. In our Finding No. 14 we have not included the disputed language. The Tillamook case involved a much later date than that under consideration here. Also up to the date of cession no land could be purchased on the subject tract and surveys necessary for purchases of sales under the Cash Sales Act had not been made. We are not unmindful of the fact that during the period prior to the cession and thereafter it was unnecessary for those engaged in lumbering mill operations to purchase land because of depredation and spoilation of the timberland which became a substantial and important source of their supply. Therefore, although we are unable to find substantial records which would establish the basis for finding that such sales at the time of the cession would have been in large blocks to lumbermen, we are of the opinion that had it not been for the available supply through depredation and spoilation made possible through lack of government supervision and the absence of surveys to make purchase of large blocks possible, that such large sales might have been possible. (See Alcea Band of Tillamooks, et al v. U. S., 115 C. Cls. 463, at pp. 509, 510) This appears to be borne out by what happened at a later date when it was possible for lumber companies to buy land in the subject tract and in the general area in large tracts. For example, the following: In 1863 Pope and Talbot purchased 17,450 acres from the University of

Washington for \$1.50 and 17,398 acres from the federal government at \$1.25 with military scrip; from 1875 to 1880 Pope and Talbot purchased numerous 160 acre tracts from private individuals at \$3.125 per acre; the Puget Mill Company of Pope and Talbot at Port Gamble acquired 50,718.66 acres from the Olympia Land Office and 8,734.61 acres from the Vancouver office under the Cash Sales Act; the Washington Mill Company at Seabeck, Washington, on the subject tract bought 13,903.94 acres under the Cash Sales Act; up to 1881, 190,469.30 acres were acquired in the Puget Sound area in cash sales of 1000 or more acres to single purchasers; and in 1900 the Weyerhaeuser Timber Company purchased 900,000 acres of Western Washington timberlands for \$6.00 per acre. (See Defendant's Exhibit 300-A, pp. 147, 148, 149, 151).

Petitioner has requested that we find that the climate favors luxuriant growth of timber and other vegetation and permits lumbering operations for virtually the entire year. A finding as to climate similar to that which we have found in this same area in the Duwamish case, 7 Ind. Cl. Comm. 725 (Finding 22-B) finds agreement with both of the parties. The defendant, however, objects to the proposal of petitioner that the climate permits logging operations for virtually the entire year. This opposition is based upon statements made by defendant's appraiser and in his report (Defendant's Exhibit 300-A, pp. 33, 34) to the effect that in the upper reaches of the Olympic Mountains on the edge of the northwestern portion of the subject tract lying within the Olympic Range there are heavy snowfalls in winter which would prevent such operations. In our opinion, for brief periods during the winter some small portions of that part of the subject tract would not be available for logging. We have found that the climate, which is that of the "rain forest" is conducive of rapid growth and heavy stands of timber.

We have relied heavily upon the contour map of the subject tract prepared by the Corps of Engineers, United States Army (Petitioner's Exhibit 135) and upon the official reports for Jefferson, Kitsap and Mason Counties prepared by the Forest Service of the United States Department of Agriculture in the preparation of our findings as to the topography of the subject tract. While it is true that these publications are not contemporaneous with the date of the cession, our examination of the considerable amount of literature, historical and otherwise, which is in the record, leads us to believe that the physical topography of the land has not noticeably changed since that date. Although practically all the timber has been logged off and is now in second growth, the contour of hills and the position and character of rivers, mountains, and fresh water inland lakes, etc., are in our opinion, the same today as in 1859. Defendant objects to any finding that the topography of the land is generally gentle and undulating and contends that a large part of it is rough and broken terrain inaccessible and unsuitable to logging operations as of the date of the cession. Our examination of the contour map, survey reports, aerial photographs, and other relevant portions of the record gives us, we believe, sound basis for the findings which we have made. While it is true that in the Blue Hills section in the southern portion of the subject tract lying in Kitsap County the mountains reach a height of about 1700 feet elevation, the contours appear to be gradual and we do not believe that the Commission would be warranted in finding that this portion of the tract was potentially unsuitable for logging operations. We have classified this portion and the western portion of Jefferson County, which is also

mountainous, as being potentially accessible since these do not come within the mile and a half portion of the acreage which the record establishes as being immediately accessible. The contour map and the official reports clearly indicate that the entire area represents a drainage to the Hood Canal and support the findings that we have made in our Paragraph 16 that the topography generally is favorable to lumbering operations. Defendant is in limited agreement with petitioner in respect to the proposal that the Hood Canal serves as a drainage to the surrounding land of the subject tract.

As to the various Land Disposal Acts which were in effect at the time of the cession and which were passed and were in operation for the period thereafter, we have drawn heavily upon the report of the defendant's appraiser. (Defendant's Exhibit 300-A, pp. 163-166). Petitioner seems also to have relied upon the same statistics which are drawn from information furnished by the General Land Office of the Department of Interior. Counsel for the defendant acknowledges the statistics furnished by his appraiser but draws a different conclusion than that of the petitioner as to the significance of same. We have adopted the official information as to the operations and disposals under these various laws because we believe they are relevant and helpful in arriving at the determination of the value of the subject tract. It is true that these statutes could not be operative on the precise date of the cession because that was the date title of the Indians was extinguished and no sales could have been made. However, they do furnish some perspective which we believe may be considered in our determination of this value. As we have found, most of the

disposal acts were primarily designed to promote agricultural settlement. Nevertheless, as shown by the official statistics, there were certain amounts of the public domain disposed of under each of the acts on the subject tract during certain periods of time. Defendant has contended that the relatively small percentage sold through the disposal acts in the period of time immediately after the cession is one of the most important reasons why the Commission should find that the valuation of the tract should be no more than seven cents per acre as of 1859. We recognize that this was a new and sparsely settled section of the country at that time and that, therefore, if we were to value the tract on the basis of local demand and use for timber in 1859 we would find little support for substantial operation. However, the facts in the record reveal that substantial lumber milling operations were established in and immediately adjacent to the subject tract during a six year period prior to the date of the cession; that these were the most important in size in the entire area for a great number of years; that they were important in size as of the date of the cession, supported as they were at that time by depredation; and that when the land was available for sale it was purchased by such lumbering companies as Pope and Talbot. We have made our findings as to the large purchases under the Cash Sales Act in the general area and it is our opinion that there was, considering all the circumstances, including the cycles of depression and prosperity shown in the record, a sufficient demand for timber at the time of the cession coming from the discovery of gold in California and the opening up of foreign markets to warrant the milling operations which had been located at Port Ludlow, Port Gamble, Seabeck, and others. It is further



day, bringing the Puget Mill potential up to 235,000 feet a day, or in the neighborhood of 70 million feet annually.

The partners in the Puget Mill Company realized that the continued operation of any lumber manufacturing enterprise is only assured through a permanent supply of timber. During the 1870's, the chief source of supply for the sawmills at Port Gamble, and for all others on Puget Sound, was the timber that grew down to the water's edge. Hand loggers, who had acquired possession of this timber by some way or another, however vague or untenable from a modern point of view, contracted to deliver logs at the mills.

Pope and Talbot, and their associates in the Puget Mill Company, knew that this source of supply would not last indefinitely and they proposed to purchase timberlands as soon as possible. The first opportunity came in 1861, when the Commission of Lands for the University of Washington set out to sell lands granted that Commission by the federal government under the "University Grant." Purchasers were permitted to select lands from the public domain, and these were withdrawn from public entry. The purchase price of this land was \$1.50 per acre, and Captain Keller and Cyrus Walker bought 15,260 acres. The money paid by Puget Mill, \$22,130, was the largest fund available for the construction and operation of the University of Washington at that time.

After this purchase, Walker immediately began to buy timberlands with military script, which had been issued to veterans of all wars including the Mexican War. The government accepted this script in payment for 160 acres, anywhere in the public domain, at \$1.25 per acre. The first purchases were made in 1861, and the warrants expired in June 1863. During that time, Walker was a busy man, for he acquired 17,398 acres. With the university land purchased earlier, Puget Mill holdings were 32,658 acres by September 1, 1864.

Even a casual analysis of the operations of the company reveals the farsighted policies of Pope and Talbot. During the 1860's, the combined cuts of the mills at Port Gamble were approximately 18,000,000 feet annually. A conservative estimate of the timber owned by the Puget Mill Company in the Sound area would place the cruise at 40,000 to 50,000 feet per acre, or a total of over a billion and a half feet of logs -- sufficient to maintain the output for at least seventy-five years at the rate the mills were then cutting. This estimate does not take into consideration logs bought on the open market, which were for years the principal source of supply for Puget Mill.

During the next ten years, Fred Drew, who was log agent and chief cruiser, made enormous purchases of timberlands through various methods, and by 1875, the Puget Mill Company was the largest holder of timberlands in the Territory of Washington. After 1878, some purchases were made under the Timber and Stone Act, which enabled "any citizen or person who has made a declaration of his intention of becoming a citizen" to purchase a timber claim of 160 acres at \$2.50 per acre. He was required to submit an affidavit swearing that the land was not suitable for agricultural purposes and declaring that he was "not purchasing for speculative purposes."

It became an established policy for lumber companies to purchase these Timber and Stone claims from the owners -- a practice that was sound economically and of benefit both to the federal government and to the man entering on the claim, despite the interpretation of the law, which evidently intended him to operate on the land, although it did not require legal residence. All of the claimants profited, more or less, in selling to lumber companies, depending upon the value of the timber. Familiar stories of those early days tell of entire crews off sailing vessels making application for land under the terms of the Act and then selling it at a profit.

Some men say that one reason why so much Pope & Talbot timber was located near tidewater was that Cyrus Walker was afraid the sailors might get lost in the woods if they were taken too far inland. Walker, however, had been buying timberland so situated for almost twenty years. He was buying to suit the logging practices of the times.

First, swampers went into the woods and cut the brush. They were followed by fallers, who stood on high springboards to fell the trees, and by buckers, who sawed them into proper lengths. Teams of oxen, sometimes of ten or twelve yoke, dragged the logs down skidroads, made slippery with grease, to the salt water. As logging operations penetrated deeper and deeper into the woods, efficiency declined, for the oxen never got out of low gear. Some men began to look about for a way to put their logs on wheels, and tramways with wooden rails were built from the yard to the water. Horses or mules pulled the cars on their primitive tracks.

Aware of these methods, Walker had instructed his cruisers, who were always on the watch for available lands, not to consider timberland that could not be logged profitably with ox teams, and this meant that timber must not be much over a mile from salt water. Most of the timber purchased

was in large blocks, though some of the holdings were small. The land holdings of the Puget Mill Company extended from Cameno and Whidbey Islands and the vicinity of the Stilaguamish River to the lower end of Puget Sound and Hood Canal in Kitsap, Mason, and Pierce Counties. The only lands removed from the Sound were those near Chehelis and those on the Cowlitz River.

Even though, by 1875, the holdings of the Puget Mill Company and Pope and Talbot were large enough to have supplied the mills for half a century, the owners did not waste their resources. They proved good custodians of their timber. Company cruisers kept a weather eye on company lands, patrolling them regularly for fire at a time when protection of the forests was a matter of the future. This practice, and the policy of purchasing the logs to be sawed by the mills rather than of cutting Puget Mill timber, saved millions of feet of logs for a later decade.

Walker bitterly decried the logging practices of the times-- practices that did not change much until the middle of the 'eighties. Only the best trees were cut, and only the best of each tree harvested. Ten feet or so of the butt wood was left as stump, and all of the tree from the first branches upward was left on the ground to be burned along with the slashing and some of the remaining trees. If the fire got out of control, no one worried too much; the supply of timber seemed inexhaustible to all but a few farsighted men.

The owners of the Puget Mill Company had anticipated the value of timber in the years to come. If they had failed to do so, Pope & Talbot and the Puget Mill Company would long since have been forced out of operation by a dwindling supply of raw material.

Because the sales of land on the subject tract and in this general area and the prices paid for same were of necessity at dates later than the cession, the prospective purchaser for the entire tract at that time could not have had knowledge of them; and, therefore, they have not been used by the Commission in its findings as facts within the ascertainable knowledge of such a purchaser at that time upon which to base his judgment of current fair market value. We have included these, however, since it is our opinion the prospective purchaser would have in mind not only the immediate, but also the prospective use of the land for future timber

operations. We, therefore, believe these sales and prices tend to confirm any demand at cession date based on prospective use of these lands.

As to the transportation facilities, the defendant contends that the absence of railway facilities even to this date has been a deterrent to timber operations on the subject tract and should therefore be an important consideration to lower the valuation as of 1859. Petitioner contends that the natural navigable waterway along the entire length of the Hood Canal obviates the necessity of railway or other transportation facilities for timbering purposes. An examination of the maps and a study of the documents, official and private, reveals the accessibility of the tract generally from the entire length of the Hood Canal by vessel into the Admiralty Inlet of the Puget Sound and through the Straits of Juan de Fuca to the Pacific. As we have stated, as of today practically the entire subject tract has been logged through the use of this waterway and we therefore are of the opinion that the absence of railroad facilities was not a substantial deterrent to utilization of timber on the subject tract as of 1859. We have treated the question of transportation facilities in our Finding No. 21.

We believe the early history of the Pacific Northwest and the Puget Sound area is important in furnishing facts which should be considered in our valuation of the tract. Generally the parties are in agreement as to this history but differ as to the significance and interpretation of the many facets thereof to the question of valuation. Defendant takes the view that since this was a young, wild, thinly populated and little explored region, the value of the land was almost nimal -- seven cents an acre in 1859. The petitioner contends the historical facts indicate

the springwells and development of demand and markets for timber, and points to the wisdom of the choice at an early date after the discovery of gold and the early emergence of foreign markets, of locations for sawmills on and near the subject tract, and, therefore, that these justify the higher valuation requested. Both viewpoints and the contentions urged deserve consideration. This was a young and undeveloped section of the country. There was a seemingly inexhaustible supply of standing timber. The historical facts we have found, however, in overall perspective, warrant more than such nominal value as proposed by defendant. We have noted the population movements, the emergence of demand, the transportation facilities, and the actual operations supported by demand prior to the cession. We have treated this historical background in our Finding No. 17. We have also found the essential facts as to the development and operation of the Douglas fir industry (Finding No. 23). These findings are akin to our historical findings because the economic history of the region is virtually the history of its lumber industry. The number, location, operation, size and importance of the sawmills, the lumbering districts, the depredation and spoilation of the public domain, and the early methods of logging are all well documented by official and private reports and writings in the record.

As to the classification of the timberland on the tract, both parties agree that at first this was logged only from one to one and one-half miles from the shore of the Hood Canal. Petitioner proposes, however, that we find that practically all was accessible because after logging the first mile and one-half, the logger would take the next mile and one-half, and so on. The defendant proposes we find the area closest to the sawmills to

be the only accessible commercial timberlands as of 1859 and proposes this was 57,141 acres. Defendant's contention is that this constitutes the acreage which as of the appraisal date would have included all of the lands of the tract which would have been considered accessible for logging purposes at the time. Defendant also proposes that we find that 48,020 acres be deemed to be inaccessible in 1859 but which might reasonably be expected to be accessible within the reasonable foreseeable future. The land which defendant proposes to be so classified is within one and one-half miles of the shores of the Hood Canal but extends only a short distance south from the sawmills than that which defendant proposes as the accessible area. In addition, the defendant proposes that we find that 244,799 acres of the subject tract consists of timberlands which at the time of the cession were inaccessible and non-commercial. In other words, the defendant has requested that we classify the acreage within one and one-half miles from the shores of the Hood Canal as being accessible on the basis of how far it may lay from the then existing sawmills, two of which were situated just outside the northeastern portion of the tract at the mouth of the Hood Canal, and a third along the east-central shore of the Hood Canal. The request has not been based upon ability of those companies to go anywhere within one and one-half miles from shore along any part of the Hood Canal for logging purposes at that time, but rather on the proximity of the lands to the sawmills. Accessibility, in our opinion, does not depend upon the distance of the lands in question from the location of the sawmills but rather upon the ability under the then known methods of logging of the operators of those sawmills or their suppliers to penetrate the timberland from shore for logging

purposes since the entire length of the Hood Canal was navigable and with many bays and inlets usable for the purpose of rafting and taking logs to these mills. We therefore have found, on the basis of planimeter measurements made by the Bureau of Land Development of the Department of Interior, the acreage within one and one-half miles of the Hood Canal and its tributaries on the subject tract, which totals 137,500 acres, of which 113,200 acres were immediately accessible and commercial timberland as of the date of the cession. In arriving at this figure we have deducted 24,300 acres which are represented as 300 acres of marshland and 24,000 acres destroyed by fire as of 1859. The balance of the land, less marsh, inland water, and barren land, comprises 194,170 acres, and has been classified in our findings as commercial timberland which was at that time potentially accessible. As we have stated above, since the date of cession practically all of this timberland has been cut over and is now in second growth in Douglas fir.

In our Finding No. 26 dealing with population and lumber statistics, we have relied upon government statistics. It is rather significant that at that time the population in and around the subject tract exceeded the area upon which the city of Seattle is now located.

Petitioner requests that we find that after the discovery of gold in California and the emergence of foreign markets to Pacific coastal and northwestern lumber centers that the relative size and importance of the lumbering industry shifted from Oregon to the Puget Sound area. The defendant objects to such finding because it is contended that the finding should be specific as to the subject tract instead of the Puget Sound area and that such a shift, if true, does not relate to the date

of cession. In our Finding 23(c) we have noted the various major lumbering districts in the Douglas fir forest region and the fact that prior to discovery of gold in California the lumber centers of the Pacific Northwest had largely centered in Oregon below the Columbia River, but mainly for local use; and that after the date of the discovery of gold and the emergence of foreign markets, experienced lumbermen who were originally from Maine and had settled in California inspected and explored the various existing and potential lumber regions in the Washington-Oregon Territory and chose to locate their mills in close proximity to the subject tract and used the subject tract as a source of lumber for those mills.

There had been at the critical date and continued to be a larger number of sawmills in the other districts of the Douglas fir region to the south along the Pacific Coast and in Oregon, but the statistics show that in 1859 the mills in Kitsap and Jefferson Counties, which included Port Ludlow and Port Gamble, produced about 80 percent of the total production of Puget Sound and exceeded the production of all of the mills in western Oregon. These are official figures of the Bureau of the Census and we therefore believe we were warranted in making the finding of a shift of importance to the Puget Sound region in our Finding 23(c). The further fact that three other of the largest producing mills in the Puget Sound area were in or at the edge of the subject tract, we believe, establishes the importance of this timber area. The choice of Pope and Talbot during the period prior to and after this cession date also indicates important considerations which we took into account in our valuation of the tract.

The parties are in agreement that agriculture had little importance on the subject tract in 1859. Petitioner has requested a finding that the

subject tract was an area in which there was shipbuilding during a period prior to and immediately after the cession. Defendant objects because it is contended that in general such a finding is not based upon substantial evidence. During the period prior to the cession the first steamship was built at Port Gamble.

The specie and resources of timber on the subject tract are the subjects of our Findings Nos. 24 and 25. In the proposals of the petitioner some reliance is made upon official surveys of the Forestry Division of the Department of Agriculture pursuant to the McSweeney-McNary Forest Research Act of 1928 (See Petitioner's Exhibits Nos. 212, 221 and 222); the official report of the U. S. Geological Survey in 1902 entitled "The Forests of Washington" (Defendant's Exhibit 218-A, House Document 213, 57th Congress); cruises of land in the subject tract, and the expert analysis, report and testimony of its appraiser, William A. Eastman, Jr. Defendant relies to a considerable degree upon the nineteenth annual report of the U. S. Geological Survey of 1899 (Defendant's Exhibit 86-A), but seems to ignore the fact that its appraiser took that report into account and drew attention of the Commission to the fact that it had been revised in 1902 by Henry Gannett in the House Document on which the petitioner relies in part. Thus the defendant's counsel chose to ignore the conclusions of his appraiser based upon Gannett's report of 1902. Defendant's counsel has submitted the proposal that we find as of the date of cession under the methods of utilization available at the time that there were 10,000 board feet per acre. Mr. Miller, the appraiser called by defendant, estimates the average stand of timber on subject tract from 15,000 to 18,000 board feet per acre. Mr. Eastman, the appraiser called

by petitioner, who is both a trained forester and an expert in the appraisal of timberlands, submitted the following table in his report which is based upon the various surveys and cruises made at different times and recommended the most conservative of the figures by reason of the elementary and crude methods of utilization at the time of cession. The table is as follows:

(Petitioner's Exhibit 241, Table 14)

TABLE 14  
COMPARISON OF VOLUME ESTIMATES  
FOR 347,810 ACRES CONIFER TIMBER ON SKOKOMISH

DATE OF VOLUME ESTIMATE	ESTIMATE BY:	AVER.		ESTIMATED VOL. MBM. 1859		TOTAL EST. VOL. MBM	FACTOR %
		VOL.. 1 AC.	% DF	DOUGLAS FIR	OTHER SPECIES		
1890-1900	State of Wash.	11	97	3,711,134	114,776	3,825,910	100%
1902	Gannett	16	93	5,175,412	389,547	5,564,960	145%
1916-1924	James D. Lacey	35	88	10,712,548	1,460,802	12,173,350	318%
1933-1940	Forest Survey.	30	97	10,121,271	313,029	10,434,300	273%
1960 <sup>1</sup>	W. A. Eastman	40	97	13,495,028	417,372	13,912,400	363%

<sup>1</sup>  
Estimate based on present day standards of utilization. Stumps cut 1½' above ground, 6" minimum top, pulpwood utilization, salvage of partially decayed or damaged trees, green, standing, dead or down.

Thus the defendant's appraiser submitted an estimate of from 15,000 to 18,000 board feet per acre on the tract in 1859 based on his perspective of Gannett's revised estimate of 1902; the proposal of defendant's counsel that we find there were 10,000 board feet per acre as of that date was based on the perspective of the government report of 1899 which was revised by Gannett in 1902; and the proposal by petitioner of 11,000 board feet based on the consideration, study, analysis and report of the appraiser, Mr. Eastman, whose perspective took into account the difference in methods of

utilization in 1859 and later dates shown in the above table. Mr. Eastman's perspective was conservative because he recognized the wastage on account of the crude methods of logging in those days in which the base of the tree up to about ten feet was not cut and in which the top of the tree was not utilized. Thus we have a conservative proposal by petitioner which is based on the estimates of a trained and experienced expert in the field whose profession is that of forester and who took into account the fact that it would not be realistic to propose that there was full utilization at that time. There is no question but that the standing timber as of 1859 far exceeded the estimate proposed by the petitioner, but we believe it to be a fair method of appraisal in reaching the fair market value of these lands as of 1859 to take into account the method of utilization in those days.

We believe that we have fairly taken into account not only the methods of utilization during those days but the fact that the only available and official information from which an experienced and qualified forester could make an estimate of the usable board feet per acre in those days would be one in which he would take into account the fact that between the date of the cession and the dates in which he had these official figures for consideration there would have transpired many events to have diminished the original stand of timber and the balancing factor of reforestation. Some of the events which the record shows have transpired since the date of cession to the dates of the government surveys in 1899 and 1902 are logging operations, forest fires, storms, loss of trees through disease, etc. The absence of any extensive land surveys or timber cruising data during the critical period increases the problem. The estimate of

petitioner here as to the number of usable commercial board feet of timber as of 1859, which is 11,000 board feet per acre, appears to be best justified in the light of the whole record. The following language of the Court of Claims in Alcea Band of Tillamooks, et al v. United States, 115 C. Cls. 463, at pp. 509, 510, is appropriate, we believe, to the situation here, except that on the subject tract it appears there was no appreciable amount of land usable for agriculture as in that case. In that case, as we understand it, there were large tracts of land (as in this case) which were classified to have the highest and best use for timber, and in addition there were areas usable for agriculture. The relevant passage reads as follows:

Between 1855 and the dates of the forest surveys mentioned above, the stand and character of the timber on these lands were necessarily somewhat affected by such events as forest fires, logging operations, growth of trees, loss of trees through disease, storms, and the clearing of land for agriculture. We have found \*\*\* that based on the information contained in the surveys in evidence, and with full information of the timber history of these areas from 1855 to those dates, it would be possible for a man trained and experienced in forestry to reconstruct with a fair degree of accuracy the quantity and classifications of timber on these lands in 1855. The evidence both documentary and oral submitted is sufficient to support the conclusions that somewhat more saw timber was on these lands in 1855 than when the forest surveys were made; \* \* \*

After a consideration of the above, we are unable to agree with defendant's contention that the growing timber on plaintiffs' lands had a negative value in 1855. The lumber industry in the United States in 1855 was an important industry and its future possibilities were generally appreciated by businessmen. The Government itself at that time must have been fearful that our forest reserves were being dissipated because from time to time it took various measures to guard against waste. It did not permit the sale of Oregon timberlands to any but settlers and then in small quantities; after the location of huge timber tracts in Michigan, Minnesota, and Wisconsin

referred to above, it amended the Agricultural College Act to limit the size of the tracts that might be selected in the future, and it was not until 1878 that the Stone and Timber Act was passed permitting the purchase of timberlands as such, and then only in quantities of 160 acres; from time to time the Government withdrew from the public lands available for disposition, large tracts of timberland for national forests. We are of the opinion that if the timberlands in the tribal area had been available and offered for sale at or around 1855 in tracts of sufficient size to attract the interest of lumber companies, much of this timberland would have been sold for at least as much as the agricultural land brought, and possibly more. Even under the restrictions imposed, a few sawmills existed, lumber was manufactured and sold for substantial prices, and settlers found timber on their lands valuable for building and fencing purposes. Under the facts and circumstances established by the record in this case, we believe we are justified in considering the potential value of this timber, particularly since we are convinced the people generally knew that the lumber industry was a promising one and that the timber in Oregon was valuable. The timber on the several tracts of these tribes was commercially accessible.

There is no question but that on the subject tract there existed, as of the date of cession, virgin stands of timber, and today the second growth consists almost entirely of Douglas fir. The petitioner has proposed that we find that as of 1859 97% of this timber was Douglas fir and 3% of other species, such as hemlock, cedar, lovely fir, spruce, larch, yellow pine, white fir, etc. Defendant proposes we find the species were divided as follows: 75 to 80% of Douglas fir, 20 to 25% of hemlock, cedar, spruce, pine and lovely fir. The petitioner's proposal is drawn from Mr. Eastman's estimate. Defendant relies upon his appraiser's study of the matter which took into account the government surveys of 1897 and the revision thereof in 1902. We have taken into account all of the evidence of record on the point and have found that as of 1859 the species of the timber were approximately 90% Douglas fir and 10% divided between hemlock, cedar, lovely fir, and spruce. In

arriving at this figure, again we have relied upon Mr. Gannett and then have taken into consideration the fact that in the intervening years between the date of cession and these surveys there would have been some change by reason of the fact that there were intervening forest fires, logging operations, and other factors we have noted above. These were taken into account by the petitioner's appraiser but we believe that the figures from the government surveys, in the light of these other considerations, would warrant a somewhat smaller percentage of Douglas fir as of the cession date than that proposed by the petitioner.

The case will now proceed to a determination of the consideration paid to the Skokomish Tribe of Indians, if any, under the provisions of the Treaty of January 26, 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 Skokomish Tribe in the Skokomish Reservation set aside by Article 3 of the 1855 treaty for petitioner and other Indians, and appropriate deduction for such retained interest will be made from the gross value of the subject tract at the average rate of \$1.20 per acre; and to a consideration, if necessary, of what offsets are chargeable against said Skokomish Tribe of Indians under the provisions of the Indian Claims Commission Act.

T. Harold Scott  
Associate Commissioner

We concur in the result:

Arthur V. Watkins  
Chief Commissioner

Wm. M. Holt  
Associate Commissioner