

BEFORE THE INDIAN CLAIMS COMMISSION

TILLAMOOK BAND OF TILLAMOOKS, NAALEM )  
 (Ne-ha-lum) BAND OF TILLAMOOKS, )  
 CLATSOP TRIBE, KATHLAMET BAND OF )  
 CHINOOKS, NUC-QUEE-CLAH-WE-MUCK )  
 TRIBE, the CONFEDERATED TRIBES OF )  
 SILETZ INDIANS, CONFEDERATED TRIBES )  
 OF THE GRAND RONDE COMMUNITY, OREGON, )  
 and portions and descendants of all such )  
 tribes and bands, )

Plaintiffs, )

v. )

Docket No. 240 )

THE UNITED STATES, )

Defendant. )

Decided: August 27, 1962

Appearances:

Joseph W. Creagh and  
 E. L. Crawford,  
 Attorneys for Plaintiffs

Walter A. Rochow, with whom  
 was Mr. Assistant Attorney  
 General, Ramsay Clark,  
 Attorneys for Defendant

OPINION OF THE COMMISSION

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

By prior determination (3 Ind. Cl. Comm. 526) this Commission has found that the Confederated Tribes of Siletz Indians and the Confederated Tribe of the Grand Ronde Community, Oregon, include descendants of the Nehalem Band and Tillamook Band of Tillamook Indians, and they are entitled to maintain this action; that the Nehalem and Tillamook bands of

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Tillamook Indians have held Indian title to a certain tract of land in what is now the State of Oregon, and that said title was extinguished by the treaties of August 6 and 7, 1851, and the Acts of June 7, 1897 (30 Stat. 78) and August 24, 1912 (37 Stat. 535); that ever since the treaties were negotiated and executed, notwithstanding the fact they were never ratified by Congress, the lands thereby ceded have been treated by officials of the U. S. government as public lands and open to settlement under the laws of the United States. A hearing has been held to determine the value of said lands as of August 6 and 7, 1851. Accordingly, the only questions to be determined by this Commission at this time are the fair market value of the lands in August, 1851, and whether the consideration paid was unconscionable.

The plaintiffs and the defendant have presented their evidence which they contend to be relevant, competent and material to the establishment of the fair market value of the subject tract as of August, 1851, in the form of official and unofficial documents, maps, testimony of their appraisers and expert witnesses and the testimony of witnesses who had personal knowledge of the area and its development. The documentary evidence consists of many government publications and reports, including Forest Service Reports, U. S. Department of Agriculture Reports, extracts from field notes of official surveys, Historical Sketch of Tillamook County made in 1940 under the WPA, Abstracts of Taxes for 1954-55 through 1957-58, Congressional reports, and several theses concerning the area. A number of maps were prepared by appraisers and experts from basic government maps and were received in evidence.

The appraisers for both the plaintiffs and defendant made extensive studies and investigations from which they prepared reports which were submitted to this Commission and received in evidence. All of these appraisers contributed valuable information and statistics which have been enlightening and helpful to the Commission in its attempt to reach a decision in this matter.

The qualifications of appraisers for the plaintiffs have been challenged by the counsel for the defense, together with the relevancy, competency and materiality of their testimony and reports. Counsel for the defendant has contended both persons making the appraisal of the timber are not qualified to testify on values as of 1851, the computation was based on hindsight, since there were no comparable sales, that the valuation of a portion of the tract, i.e., timberland, is not acceptable and finally, that a joint appraisal is not acceptable.

Counsel for the plaintiffs made no objection to the introduction of the report of defendant's expert appraiser.

The record establishes that for the most part the persons who settled in the area immediately after the date of cession were farmers, and that they were searching for free land on which they could establish a home for their families. Further, they were persons with limited capital. Under the provisions of the Donation Land Act of September 27, 1850, settlers who had asserted their claims prior to September 1, 1850, were entitled to claim 640 acres, if married, and 320 acres, if single. Settlers asserting claims between December 1, 1851, and December 1, 1853, were entitled to only half that amount. Originally the law required

actual settlement and cultivation of the land by the settler, so it would follow that the early settlers took the land as farmers and not as lumbermen. The policy of the government at that time was to forbid sales of large tracts of lands and to do everything possible to induce settlement, cultivation and establishment of homes on public lands. Timberlands, as such, could not be purchased from the government under then existing laws and sawmill operators could secure lumber only by trespassing on government land or by purchase from private owners..

The California Gold Rush from 1849 through 1850 created a market for lumber and portions of Oregon benefited therefrom. However, the chronological history of the subject tract makes clear that such could not have applied to it since the first settlement, if it can be so called, came in 1851.

The parties are in agreement, at least to a limited extent, with respect to the location, acreage and valuation date of the subject tract, the climate, the topography, sales, dependence upon water transportation, organization of the Oregon Territory, the location of the Douglas Fir Region, minerals found within subject tract, and offsets. These are covered in our Findings of Fact numbered 1, 2, 3, 15, 16, 19, 17(b), 20, 27, 32 and 34.

The parties disagree at least in part as to exploration and early settlement of Oregon, the rate of settlement in subject tract, the accessibility of subject tract, the basic economy, acquisition of public lands and the laws under which such acquisition was possible, importance of lumbering and early sawmills in the Douglas Fir Region, the merchantable

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timber in the Douglas Fir area, particularly in subject tract, in 1851, late development of the lumber industry in subject tract, water transportation in bays and rivers, agriculture, timber resources, population, commerce and trade, fisheries, dairy industry, availability of competitive lands and highest and best use of lands in subject tract.

These are covered in our Findings numbered 14, 17, 18, 19, 20, 22, 23, 24, 25, 26, 28, 29, 30, 31 and 32.

The plaintiffs and defendant, under a stipulation filed with this Commission on April 30, 1956, have agreed that the Nehalem tract consists of 97,250 acres and the Tillamook tract 126,500 acres, or a total of 223,750 acres, and that the date of valuation should be August, 1851. Since, according to the Treaties of August 6 and 7, 1851, it did not reserve unto the tribes any portion of the lands which they originally claimed, it is not necessary to go further into the extent of the area conveyed. Further, this Commission in Finding 8(b) of Findings of Fact dated June 10, 1955, has dealt conclusively with this element of the claim.

Both the plaintiffs and defendant agree that the climate is mild, with exceedingly heavy rainfall which is conducive to heavy growth of both grass and timber. We have so found in our Finding No. 15.

The defendant has requested that we find that the topography of the subject tract is characterized as rugged mountains and a few alluvial plains; that although the mountains are relatively low, the terrain is rugged, broken by steep ravines and dense forest growth through which

it was difficult to build even a wagon road; and that the land rises sharply from the ocean beaches to the hills of the Coast Range. Evidence submitted by both plaintiffs and defendant establishes this to be true. We have relied greatly upon the contour map of the subject tract prepared by the U. S. Geological Survey and upon official reports for Clatsop and Tillamook counties prepared by the United States Department of Agriculture Forest Service in the preparation of our findings as to the topography of the tract and, while these publications are not contemporaneous with the date of the cession, 1851, our conclusion is that except for the clearing of trees in the so-called prairies and the use of the alluvial plains, the physical topography of the land has not been physically changed since that date.

The defendant has asked that we find that there was a heavy undergrowth throughout the Coast Range and throughout the subject tract; that "to clear the land was an expensive process, costing probably \$300 per acre in the heavily timbered parts, which included by far the most of the tribal lands here involved." Plaintiffs object to that portion of the finding concerning cost. The record does not disclose any evidence which would establish the cost of clearing the land, and it would appear to be speculation on anyone's part. The record does disclose that the original settlers chose prairie lands which were partly clear because of their nature, that they cleared more land as the necessity arose, that they used the timber to construct houses, farm buildings and fences, and when those needs were satisfied, they sold such timber as they could, and in some cases, burned the surplus. In addition, labor was cheap

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and because of the mild climate, land could be cleared throught the year. Accordingly, we cannot set an arbitrary figure as to the cost of clearing the lands.

The testimony of Marguerite Stasek Tittle contained in Depositions (page 77) indicates the use of such practices.

Q. Now, what methods did these early settlers use to clear their land where they had timber?

A. They felled the trees and took what they had to have for lumber, floated it down the rivers to the house in Hobsonville, got enough lumber sawed to build their buildings, and put the rest in luge stacks and burned it.

Plaintiffs have requested that this Commission find that after the arrival of the first settler in the Tillamook area in April, 1851, the "settlement followed rapidly." Defendant objects and asks that a contrary finding be made. Evidence submitted by both plaintiffs and defendant would not indicate a rapid and heavy settlement in the lands in subject tract. In The Early History of Tillamook (Pl. Ex. 21) a total of 88 inhabitants is reported in the first census (1854) with 33 of them legal voters. In the Historical Sketch of Tillamook County, prepared in September, 1940, under the Work Projects Administration (Pl. Ex. 24, p. 3) the following comments were made as to the growth and development of that portion of the area:

Tillamook County, the 12th county in Oregon to be organized, was established on December 13, 1853, when the territorial legislature approved an act to create the new county out of an area previously included in Clatsop, Yamhill and Polk counties. Permanent settlement in the Tillamook country had by then but barely begun. In fact, Joseph Champion, when he set about in 1851 to establish trade relations with the Indians at Tillamook Bay, had found no better dwelling place in which to spend his first two months than a certain hollow spruce tree.

The example of Joseph Champion is in its way prophetic, suggesting what has been a major characteristic of the county's subsequent development. For since Champion's time the economy of the county has remained above all a "natural" one, with settlement continuing to be largely rural. It has been an economy resting directly upon basic resources and derived from the contiguity of ocean, forest, farm land and pasture; the fisheries of the bays and inlets, the farm produce and dairy herds of the valley lowlands and the great stands of spruce and fir on the slopes of the Coast Range. Consequently it is not surprising that, while in 1930 the total inhabitants of Tillamook County numbered but 11,824, approximately four-fifths of this population were classed as rural farm and rural non-farm.

Several adverse factors, however, have served in Tillamook County to check the best utilization of its distinct natural advantages. The first of these impediments was the difficulty, extending well into the present century, of transporting supplies and products to and from outside market centers, because of the lack of an adequate road system. Another circumstance has been the decrease in certain industrial activities, such as the salmon canning industry, which is now largely centered along Alaskan waters. A third and without doubt most serious hindrance has been the loss of much valuable timber through forest fire, coupled with the fact that a considerable part of land already logged off has fallen back into the hands of the county for delinquent taxes.

Such conditions as these provide, of course, but a part of the picture. Moreover, they will have bearing henceforth on the future of Tillamook County, rather than on its pioneer past. Accordingly, a chief object of this sketch has been to show how the county's pioneer stage (as it may be called) in various ways lingered on into the present century and very nearly into the present stage of transition. \* \* \*

Settlement Subsequent to County Organization As has been mentioned earlier, growth in population was slow in Tillamook County, and the gradual increase in the number of voting precincts during the first decades of the county's existence is not so much an indication of the increasing population as a sign that farming and lumbering activities were scattered. A major problem facing the county today is the fact that settlement remains dispersed, and that public expenditures are accordingly high for roads, schools, and other services.

The first census, ordered by the county court and taken on October 11, 1854, enumerated 80 people, of whom only 32 were legal voters. \* \* \*

It would appear, therefore, that the settlement of the area was impeded by the lack of roads, the difficulty of navigation of the harbors and rivers of the area, and most of all by the lack of capital.

The California Gold Rush undoubtedly had some effect upon the economy of the State of Oregon. However, by the time the first settler had come to the subject tract, the boom was no longer. The return of the men to Oregon together with the requirement contained in the Donation Land Act of September 27, 1850, requiring occupation by claimants of their respective claims combined to stabilize the population.

The specie of timber included in the tract and the resources of the tract are the subject of our Findings Nos. 22 and 23. The plaintiffs rely upon the report of William B. Osborne and Bruce E. Hoffman entitled Report on Forest Land and Timber Conditions and Values as of 1851 for the Lands Involved in the Case of Tillamook vs. U.S.A. This purports to be a projection back from the first general compilation of estimated volumes and species for the area and the base from which they worked was the 1932 U.S. Forest Service Resources survey, together with their own knowledge of the tract. They did not, however, make an actual cruise of the entire area. This report states:

In order to estimate the timber volumes by species on these lands in 1851, a projection backwards from the first general compilation of estimated volumes and species for the area was necessary. The U. S. Forest Service compiled an inventory in the early 1930's of volumes and land classifications for Tillamook and Clatsop Counties. At the time, the standards of utilization had not yet made any great advances that followed

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a relatively few years later. Spring boards and high stumps above the butt swell were still the general practice and there was a very limited demand for pulp material. Thus, the estimates that they used as to volume, especially since many of them were based on earlier cruises, probably were not too far from what they might have been in 1851 as to saw timber volumes. This does not mean of course, that the volume on any one particular area remained constant. It is our feeling tho, that the volumes as shown in the cruise are reasonably close to the volumes that an 1851 cruiser would have shown as the sawtimber volumes, had he done the 1932 cruise. \* \* \*

The final results of their work are separated in board feet whereas at the time of cession, forest lands were valued and sold by the acre.

As to values of timber the Osborne-Hoffman report contains the following:

As to values, it is the writers feeling, that for immediate cutting the timber in 1851 had if any thing a negative value. There was so much of it and most of the land desired for settlement or farming had to be cleared. As these tracts were cut the resulting logs were sold or converted to building materials if possible. In some cases however, burning was used to clear the lands. All of which indicates to the writers a negative stumpage value for immediate cutting. Where some of the cost of clearing the land could be recovered from the sale of logs or lumber it was done. On the other hand, there still was a very real value for the timber at that time, it was the speculative value for future cutting. \* \* \*

Defendant relies largely on several writings by Stewart H. Holbrook, several U. S. Forest Service publications, several theses covering the history of the Lumber Industry in the Pacific Northwest and the U. S. Department of Commerce and Labor publication The Lumber Industry, published in 1911.

The Appraisal of Leroy D. Draper of the subject tract with respect to the timber resources of the region was based upon the 1933 survey

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which divides the State of Oregon into various portions, the north Oregon coast being one. This table shows the prevalence of Douglas Fir except in the area in which subject tract is located.

The defendant contends that the timber of subject tract had a negative value in the days of early settlement, and this should be given careful consideration in computing the value.

The Draper report contains the following division and classification of forest lands:

	<u>Nehalem Lands</u>	<u>Tillamook Lands</u>
Douglas Fir	20,591 Acres	19,397 Acres
Other Types	<u>66,332 Acres</u>	<u>67,587 Acres</u>
	86,923 Acres	86,984 Acres

Total timber lands -- 173,907 Acres

The Draper report contains the following recapitulation of values of the lands contained within subject tracts:

RECAPITULATION

Nehalem Lands:

Timberland:

Douglas Fir	20,591 Ac. @ 35¢	\$7,207.00	
Other types	66,332 Ac. @ 15¢	9,950.00	
Farm or Town Type	6,685 Ac. @ 40¢	2,674.00	
Waste Lands	3,642 Ac. @ 5¢	<u>182.00</u>	\$20,013.00

Tillamook Lands:

Timberland:

Douglas Fir	19,397 Ac. @ 35¢	6,879.00	
Other types	67,587 Ac. @ 15¢	10,138.00	
Farm or Town Type	34,245 Ac. @ 40¢	13,698.00	
Waste Lands	5,271 Ac. @ 5¢	<u>264.00</u>	<u>30,889.00</u>

\$50,902.00

The plaintiffs' appraisers submitted an estimate of 55,000 board feet per acre of Douglas Fir, 40,000 board feet per acre of Hemlock and 40,000 board feet per acre of Spruce on both the Tillamook lands and Nehalem lands as of 1951.

The defendant's contention is that in 1851, the land was sold by the acre, and since lumbering did not emerge as a real economic factor until after 1880, the proper method of evaluation is by acre and not by board feet. However, the defendant's expert, Mr. Draper, does, on page 317 of his report, state "Timber in the Tribal Area averages 50,000 feet to the acre."

It would appear, therefore, that plaintiffs and defendant agree as to the board feet per acre but disagree as to the specie of timber, the accessibility and utilization.

We have considered not only the utilization which was made of the available timber at the time of cession, but also the fact that the only official information from which an appraiser could make an estimate of the board feet considered usable at that time would require that he consider the events which occurred between the date of cession and the dates of such official figures. In the case of the subject tract, the factors to be considered would be the early clearing of the timber in the so-called prairies and near the streams to make room for agricultural growth, the numerous burns, especially the well-known Tillamook Burns, storms, losses of trees by blight and disease, etc. In this case, there is a complete lack of land surveys and data from timber cruises, which makes the task of evaluation more difficult.

In the Alcea Band of Tillamooks, et al., v. U. S., 115 C. Cls. 463,

the Court, at page 509 of its opinion, stated:

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 (finding 26) 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; that the agricultural lands (shown to be 6% of the total area) were somewhat less in 1855, and that in general the acreage classifications by types were not substantially different at the two periods.

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.

From the evidence submitted by both plaintiffs and defendant, it is evident that there existed in 1851 large virgin stands of timber. The plaintiffs contend that approximately 33 1/3% of the timber was Douglas Fir, while the defendant contends that the species represented no more than 23%, and the remaining consisted of Cedar, Western Hemlock fir spruce and hardwoods. We have taken into account all of the evidence of record including the statistics provided under the Forest Survey made under the McSweeney-McNary Forest Research Act of 1928, and we find that this area, while located within the Douglas Fir region, does not have a preponderance of that specie, but rather it represents about 25% of the entire timber stand, and that it represented about the same percentage of the timber standing as of 1851. Since Douglas Fir was the only timber on the subject tract which was considered worth cutting as of 1851, it constituted the main portion of the timber value.

Further, the value of the timber depended greatly upon its location, and it is established by the evidence presented by both plaintiffs and defendant that back from the river any appreciable distance, the timberland had little value until after 1900. The evidence is replete with examples of heavily timbered 160 acre tracts which sold for \$500 or less even as late as the late 1890's.

As to the value of timber not easily accessible to water, the record contains evidence submitted by both plaintiffs and defendant that

in 1851 it had little or no value and therefore we cannot attach to it for the purpose of this claim a character which it did not have.

However, any person inspecting the land in 1851 would realize that the area had a great potential value as a source of timber, although as has already been stated, there was no recognized use at that time for many of the species of timber found therein.

The plaintiffs maintain that the highest and best use of the lands in subject tract was agriculture, and timber operations with consideration also to be given to the fishery potential. On the other hand the defendant alleges that the highest and best use was for timber operations and to some extent for agriculture.

All the evidence submitted by both plaintiffs and defendant indicates that since the first settler, the economy of the country has been largely rural, and that it has been based upon resources from the land, farm, pasture and forest, the fisheries, farm produce and dairy herds, and the stands of timber on the coastal range.

In order to prevent the speculation which had occurred in other areas, and make subsistence tracts of land available for those who desired to acquire land for actual settlement, public surveys were made slowly and to keep pace with the rate of settlement. Thus large tracts of land and speculation with such tracts was made almost impossible by law.

According to the Report of the Commissioner of the General Land Office in Sen. Ex. Doc., 35 Cong. 1 Sess. (1857-58) serial 919, pp. 234-35, the following covered the progress of land occupation as of that date:

The greatest part of the most valuable lands in Oregon has been taken by actual settlers under the donation laws; and many settlers having located their claims on the 16th and

36th sections, the superintendents of schools selected other lands in lieu of what was taken, and two townships or lands equivalent thereto, were taken for university purposes. After these grants came the preemptionists, who have been selecting the best of what remained. Now there is but little vacant good land west of the Cascade mountains.

According to the 12th Census Report 1900, in 1850 there were 1,164 farms in Oregon; in 1860, there were 5,806 with 2,337 consisting of over 100 acres but under 500 acres, and 1,236 consisting of over 20 acres but under 50. In 1870 the total number had increased to 7,587.

The record makes it clear that from the first settlement in 1851, the greatest economic factor in the growth of this area has been farming, and the other industries grew as natural adjuncts thereto. The people farmed, cut timber and fished in order to eke out a livelihood. What they produced was originally for their own use, the surplus, when such there was, enabled them to enter into trade with the outside world, and out of this grew whatever commercial enterprises as ultimately may have become important to the economic growth and stability of the area.

The plaintiffs maintain that the area was always accessible from the sea and that although wagon roads across the mountain ranges were not constructed until the 1870's, the area still was attractive to settlers. The evidence submitted by both plaintiffs and defendant establishes beyond a reasonable doubt that access to the area by land from the east was dangerous and difficult, that even after so-called roads were constructed, there were several months in the year when they were virtually impassable. As to access by the sea, the evidence submitted by both parties establishes the difficulties encountered by ships of sufficient size to carry cargo to navigate successfully along

the coast, and even greater difficulties in going in and out of Nehalem and Tillamook Bays. Even at the present time, this particular area is known for its heavy seas and perilous passage.

A difference of opinion exists as to the practical use of the rivers of the area as modes of transportation for humans, cargoes and drivability for timber to mills. The evidence submitted by both parties establishes that the streams within subject tract rise in the coast range and flow into the several bays; that their flow is heavy in the spring but shallow during the greater part of the year. The largest river, the Nehalem, is a tidal river and it has been established that it was navigable for small boats for a few miles affording a means of transportation for the products of the area and that it was driveable for logs throughout the subject area, i.e., not to exceed 10 miles.

The other rivers were smaller and were adaptable for a short distance during the spring of the year. None of the streams were established to have been navigable streams of a size to accommodate heavy shipping or driving. Their effect upon the economic growth of the area was not such as would create a great commercial center.

The plaintiffs assert that the bays of the area, especially Tillamook Bay, afforded "an entrance from the sea which could be practically used in favorable weather by vessels of sufficient size to haul supplies, farm products, fish and lumber and that the same has from time to time been so used." Plaintiffs further assert that the facilities of Tillamook Bay were favorable to the processing and shipment of lumber.

On the other hand, the defendant asks that the Commission find that Tillamook Bay and Nehalem Bay both had shifting bars and channels with low water depth except at high tide; that they were both considered treacherous and avoided by sea captains in the 1850's and even later until the Corps of Army Engineers made extensive improvements. The Commission finds that the evidence fails to establish that the harbors were important in attracting seagoing vessels or commerce requiring vessels of such size.

The plaintiffs request that the Commission use as a basis for determining the acreage in the several classifications, i.e., (1) Tidelands, sand, brush lakes and towns; (2) agricultural, and (3) timberlands in the Tillamook area. The 1932 Forest Resources Survey, shows the following:

Tidelands, sand, brush, lakes and towns	3,693 acres
Agricultural	31,627 acres
Timber lands	91,023 acres

That the 1932 Forest Resources Survey made by the United States shows as of that date the Nehalem tribal area was divided into the following land classifications:

Tidelands, sand, brush, lakes and towns	2,439 acres
Agriculture	6,472 acres
Timber lands	87,461 acres

The defendant, on the other hand, requests that a more detailed breakdown be used and that the Commission find the acreage to be divided as follows:

Nehalem Lands:

## Timberland:

Douglas Fir	20,591 Ac. @ 35¢	\$7,207.00	
Other types	66,332 Ac. @ 15¢	9,950.00	
Farm or Town Type	6,685 Ac. @ 40¢	2,674.00	
Waste Lands	3,642 Ac. @ 5¢	<u>182.00</u>	\$20,013.00

Tillamook Lands:

## Timberland:

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Other types	67,587 Ac. @ 15¢	10,138.00	
Farm or Town Type	34,245 Ac. @ 40¢	13,698.00	
Waste Lands	5,271 Ac. @ 5¢	<u>264.00</u>	<u>\$30,889.00</u>
			<u><u>\$50,902.00</u></u>

The Commission has taken into consideration both analyses.

With respect to agriculture and agricultural lands as of 1851, the plaintiffs would have the Commission find that the climate was ideal for the growth of trees and agricultural products, including grass; that the vegetables, fruits and grains now being raised in the subject tract could have been successfully grown in 1851 on these lands, and that because of its especial nature, the area developed into a dairy center.

Defendant, on the other hand, requests that we find that because of the rugged hills, narrow valleys and relatively few alluvial plains, the farms were small and concentrated in the valleys and close to the rivers and bays; that in 1939 relatively little of the total land was tillable and even less was tillable in 1851.

The evidence of both plaintiffs and defendant indicates that the lands suitable for farming in both the Tillamook and Nehalem areas were limited in size, that the land contained large trees which had to be removed before the land could be tilled, that the rainfall is and was extremely heavy, that a heavy almost constant wind from the ocean made impractical, if not impossible, the growth of many crops, that the growing season does not permit full maturing of grains so it is and was raised only for feed purposes, that during the early settlement of the area subsistence crops were raised with the surplus of dairy products being used for cheese and butter. At the present time only 20,261 acres out of 720,000 acres in Tillamook County are tillable, and only 170 acres of tribal land in Nehalem County are classified as agricultural.

Since as of 1851, there was no agriculture in the area, only by later crop statistics could the agricultural potential of the area be determined. All evidence establishes that the lands first potential was for grass and grazing, and secondly for subsistence crops, and that few crops could be produced on a commercial basis.

With respect to fishing and fisheries which plaintiffs contend constituted a major item in the economic life of the tribal area, plaintiffs would have us find that the bays in the area and the rivers contained large quantities of shell fish, the streams had sizeable runs of salmon and other edible fish; that this constituted commercial fishing possibilities which should be considered in arriving at a value for the land in 1851. The defendant contends that the record does not justify inclusion

in the market value any portion of that value attributable to commercial fishing. We have found that commercial fishing and the potential therefor should not be considered as included in the market value of the subject tract since, although it is true that the native Indians and first settlers made fish a major item of their diet, it was not until 1888 that it was developed on a commercial scale in the Tillamook area and 1893 in the Nehalem area. The presence of fish in itself did not add materially to the value of the tract except for consumption by the settlers since there was no nearby market and no satisfactory mode of transportation to any market. The fact that a few barrels of salt fish were transported and sold in 1852 by the captain of a small coastwise vessel does not establish the existence of commercial fisheries, or the possibility of such.

The plaintiffs assert that cattle had been moved through the tribal area as early as 1841, and that early settlers soon found this country suited to the dairy industry; that the first dairy cattle were brought into the area in 1851 and that by 1860 cheese was manufactured and sold, and butter was regularly packed in wooden kegs and exported; that the cheese industry is one of the most important in the area and had an early and important effect on its economy. Defendant readily admits that dairying and cheese manufacture are primary industries in the area as of today, but contends that such industry did not become an important economic factor until after 1891. Accordingly, defendant objects to consideration of such industry in valuation of the tract, and inclusion

of any findings which would even imply such importance. We have found that the potential importance of dairying and cheesemaking could not reasonably have been foreseen in 1851, and that no commercial dairy industry existed in 1851. Butter making and cheesemaking are a normal development in a rural community where production of milk and butter fat exceed the immediate needs of the population, the extent of which could have been anticipated in 1851. The fact that dairy cattle were brought into the communities by the settlers, that they had more milk and butter than they could consume, that they sold or traded their excess to travelers in need of food or ships' captains in need of fresh food and trade items does not establish that a dairy industry per se existed. Further, moving cattle through an area, or even bringing cattle into an area, does not of itself warrant a finding such as that requested by the plaintiffs. The evidence establishes that not until after 1891 when a cooperative creamery and cheese factory were established was cheese manufactured on a commercial scale, and not until 1894 did it become a major industry in the country; that during the intervening years persons particularly skilled in cheesemaking came to the area, that they recognized a potential use for the milk produced by the farmers, that they developed several excellent types of cheese, that the fame and reputation of those cheeses spread and that the demand for them became nation-wide. However, in 1851, none of these elements were present, nor could they have been anticipated.

Neither plaintiffs nor defendant claim that the lands contain any mineral of any value, nor do they claim that use of the land, streams

and bays for recreational purposes should be considered in determining the value of the subject tract. Both apparently concede that such hunting and fishing as may have been done was to obtain food, furs and the by-products necessary for a livelihood.

The plaintiffs request that the Commission find that "settlement followed rapidly" after the arrival of the first settler in 1851 and that Tillamook became the 12th county in the Oregon Territory in 1853; that there were 80 white residents by 1855, and that by the date an assessment roll had been made and taxes collected, a sailing vessel had been constructed by the settlers, and water transportation established.

Defendant, on the other hand, proposes that we find that virtually no settlement was made in that portion of the tribal area within Clatsop County before 1870, and then only 28 people were reported near Nehalem Bay; that in the Tillamook area the population in 1853 consisted of three families and two bachelors; that by 1854 the population had increased to eighty and by 1860 to ninety-five; that settlement in subject tract was slow, and even today the population is small with the largest city, Tillamook, claiming a population of no more than 3600 people.

The evidence establishes that the first settler in the Tillamook area, Joe Champion, arrived in 1851; that in 1852 Elbridge Trask came from the Clatsop Plains and in 1853 James Quick and O. S. Quick settled there; that the petition for Tillamook County organization contained 29 names. It appears that the creation of a new county was not inspired by the rapid settlement of the country but rather because the area was

so isolated from the Yamhill County seat that it was difficult to carry on necessary business.

The History of Governmental Organizations and Records Systems of Tillamook County, Oregon, prepared and published by the Federal Works Agency, Works Projects Administration, Sept., 1940. Plaintiffs' Ex. 24, p. 14 contains the following:

Settlement Subsequent to County Organization As has been mentioned earlier, growth in population was slow in Tillamook County, and the gradual increase in the number of voting precincts during the first decades of the county's existence is not so much an indication of the increasing population as a sign that farming and lumbering activities were scattered. A major problem facing the county today is the fact that settlement remains dispersed, and that public expenditures are accordingly high for roads, schools, and other services.

The first census, ordered by the county court and taken on October 11, 1854, enumerated 80 people, of whom only 32 were legal voters. \* \* \*

and p. 16:

The Nehalem Valley received its earliest settlers, John Crawford and Jack Keaton, in the 1860's. But the first real settlement in what is now the town of Nehalem was made by Sam Corwin and Sam Richardson. The home of the former on the north slope was later occupied by Henry Ober, from whom the name Ober's Landing came. It was not until 1883 that immigration to the Nehalem Valley increased, eventually making that region relatively one of the more populous districts of Tillamook County. In 1883 three young Germans, Herman Schoolmeyer, Henry Tohl and Herman Tubbesing, entered the lower Nehalem Valley, each choosing a homestead. \* \* \*

The importance of land sales within the area are a subject of dispute between the parties. Land sales records in Tillamook County begin with 1860, with settlement on the land four to five years prior. If the number of deeds recorded is an indication of the rapidity of

settlement, it certainly should be noted that in Tillamook County from September 11, 1860, through 1869, there were 45 deeds recorded conveying 6,379.63 acres and in Clatsop County from November 7, 1857, through 1878, there were 20 transfers conveying 37,974.87 acres. Nothing in the evidence indicates how many of these conveyances may have been for the same tract of land. This does not warrant a finding on the part of the Commission that this land was in great demand, or that it was settled rapidly. It also must be borne in mind that in 1851 the Donation Act of 1850 enabled individual settlers in Oregon Territory to acquire land at no cost except the filing fee. Even so, there is no evidence of a land rush in the subject area.

Again the recorded sales are confined to areas close to the bays which were settled first, and it is reasonable to believe that a good portion of the consideration paid may have been for the improvements already made on a portion of the tracts by original settlers. Accordingly, the record contains nothing which would justify a finding indicating other than gradual settlement of the area and sales of lands.

Plaintiffs request that in determining the value of the lands and the amount of the award, that awards for similar lands in the same vicinity be kept in mind. Within the State of Oregon, the Tillamook Tribe of Indians, et al v. U. S. A., 4 Indian Claims Commission 56, brought an award of \$3.00 per acre with valuation determined as of 1892, or 41 years after the date by which we are bound in this case. That tract is from a geographical standpoint an integral part of the tract involved in the case of Alcea Indians vs. U.S., supra, on which there

was 60% Douglas Fir. Since, therefore, it lay within the area of 60% Douglas Fir, and the cession was some 40 years after date of cession of subject tract, we have taken both elements into consideration.

The claim of the Alcea Indians v. United States, 115 C. Cls. 463, with a valuation date of 1855 brought an award of \$1.20 per acre. This land lies to the south of subject tract and according to experts contained some 60% Douglas Fir, while the subject tract contained about 25%. In its opinion the Court stated:

From the record as a whole, we conclude that the lands taken had an average value of at least \$1.20 per acre on November 9, 1855, taking into consideration the proven demand for the lands, the prices at which it was disposed of by the Government and by the settlers themselves, the mineral, agricultural and timber values above referred to, and not ignoring the fact that some of the land was undoubtedly of small value then and today, and also taking into consideration the reasonable costs of making all necessary surveys and supervising the disposition of such lands. \* \* \*

From a careful consideration of the record, this Commission, applying the criteria set forth in the decision in Alcea and other similar claims, has concluded that the lands in question had an average value of eighty-five cents (\$0.85) per acre; that the consideration paid to the Nehalem Band and Tillamook Band of Tillamook Indians for lands to which they held original Indian title was so grossly inadequate as to make it unconscionable; that the plaintiffs are entitled to recover for and on behalf of and for the benefit of the descendants of members of the Nehalem Band of Tillamook Indians as such Tribe was constituted and recognized by the United States as of August 6, 1851, the sum of \$82,662.50, less an offset of \$10,500, or a net sum of

\$72,162.50; and that the plaintiffs are entitled to recover for and on behalf of and for the benefit of the descendants of members of the Tillamook Band of Tillamook Indians as such Tribe was constituted and recognized by the United States as of August 7, 1851, the sum of \$107,525, less an offset of \$10,500, or a net sum of \$97,025.

T. Harold Scott  
Associate Commissioner

We concur:

Arthur V. Watkins  
Chief Commissioner

Wm. M. Holt  
Associate Commissioner