

BEFORE THE INDIAN CLAIMS COMMISSION

THE SKAGIT TRIBE OF INDIANS, also known)	
as THE LOWER SKAGIT TRIBE OF INDIANS,)	
also known as WHIDBEY ISLAND SKAGITS,)	
)	
Plaintiff,)	
)	
vs.)	Docket No. 294
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: November 13, 1969

ADDITIONAL FINDINGS OF FACT (ON VALUE)

Pursuant to Interlocutory Order entered herein March 20, 1959, the Commission has received testimony and evidence and has considered the arguments and briefs of counsel for the parties relating to proof of the acreage of lands to which Plaintiff held aboriginal title and of the fair market value thereof as of March 8, 1859, the date of ratification of the Treaty of Point Elliott (12 Stat. 1927). Based thereupon, the Commission makes the following additional Findings of Fact, to-wit:

15. Description of lands. The lands are described in Finding No. 12 in Skagit Tribe v. United States, 7 Ind. Cl. Comm. 292, 311 (1959), as two tracts, the total acreage of which is agreed to by the parties as 56,300 acres. One tract consists of 50,300 acres of the central part of Whidbey Island, Island County, Washington. The second tract is a triangular-shaped area of 6,000 acres on the mainland in Skagit County, the shoreline of which extends northwestward

along Skagit Bay from the mouth of Brown's Slough to the north of the mouth of the north fork of the Skagit River. The mainland tract is separated from northern Whidbey Island by less than 4 miles of water.

16. Population on Date of Valuation. The population of the Skagit Tribe on March 8, 1859, the effective date of the Point Elliott Treaty, was found by the Commission to be 300. The population in 1858 of settlers in Island County, which then consisted of Whidbey Island, Camano Island, and most of the present county of Snohomish, was 180 according to the assessment roll, and most of these were estimated to be on Whidbey Island. The population in 1860 was 294, and grew slowly until the establishment in the 1940's of the Ault Air Base and Whidbey Island Naval Station.

The present county of Skagit, which includes the Skagit mainland tract, had no settlers at the effective date of the Point Elliott Treaty, and there was in 1866 one reported settler on the extreme northern edge of the Skagit mainland tract.

17. Climate. As to climate, the Whidbey Island tract and the mainland tract differ principally as to precipitation, precipitation being somewhat higher on the mainland tract. The climatic data for northern and central Whidbey Island is to be considered as fairly representative for both tracts. Island County, which includes Whidbey Island, "has one of the most uniform marine climates of any area in the United States." The growing season averages 202 days. Dry and wet seasons are fairly distinct; most of the precipitation, which averages 18.64 inches, comes in the winter. Precipitation on the

mainland tract is estimated at between 30 and 35 inches per year. Average temperatures, based on a 41-year record, show a mean low of 38.6° and a mean high of 61.1°.

18. Topography. The topography of the tract on Whidbey Island is described generally as gradually rolling with elevations ranging from 100 to 300 feet. A line of precipitous bluffs, ranging up to 250 feet in height, surrounds the island except in the bays and harbors where the bluffs give way to level or gently sloping shorelines. A relatively small area of fresh water marsh or swamp was also on the island.

The mainland tract was a low, level salt water swamp area with the exception of a ridge on the north side of the north fork of the Skagit River. A large number of sloughs cut up the marsh or swamp area. The salt water marsh was estimated to cover about 4,070 acres, largely submerged at high tide.

19. Soils -- Land Classification. A great variety of types of soil is found on Whidbey Island, resulting from deposits of glaciers which moved over the area. Soils of the glacial uplands were of limited value for agricultural use, but there were nearly 7,000 acres of open prairie land well adapted to agricultural uses, the largest such open area in the Puget Sound area. It was the first area sought for crop purposes.

The soil of the mainland tract, with the exception of about 400 acres, was suited for agriculture, but much of it could not be successfully utilized until drainage problems were solved. Readily

available for agricultural use in the mainland tract were about 500 acres, with 930 additional acres susceptible to agricultural use. Salt water marsh lands totaled 4,070 acres and 500 acres contained timber.

Defendant's expert appraisal witness, C. Marc Miller, classified lands of the tract as follows:

Whidbey Island

Open, agricultural land	7,938 acres
Accessible Commercial timberland	41,494 acres
Fresh water marsh land	868 acres

Mainland

Open, agricultural land	1,430 acres
Salt water marsh land	4,070 acres
"Non commercial" timberland	<u>500 acres</u>
	56,300 acres

Island County assessment rolls for 1859 show 389 acres in wheat, 524 acres in oats, 2 acres in rye, 19 acres in barley, 58 acres in peas, 64 acres in potatoes. Prior to 1859 the Skagit Indians cultivated potatoes in the prairie areas of Whidbey Island. Fresh produce from there was marketed on Puget Sound and fairly regularly in Victoria, British Columbia.

20. Timber and Other Cover. The tract on Whidbey Island, with the exception of the open or prairie land estimated at 6,000 to 7,900 acres, was at one time covered with dense forest. There is no specific record as to its density, as much of it was logged off before surveys by Gannett and others. The forest consisted of at least one-half Douglas fir, and the rest, western hemlock and western red cedar. As

of 1859, and for years thereafter, lumbermen confined the production of lumber almost exclusively to Douglas fir. The undergrowth in the forest area included fir, alder, hemlock, willow, salal, fern, hardhack, salmonberry and briers. Surveyors' field notes made in connection with the surveys of 1855, 1856, 1858, and 1859, refer to dead or burned timber or fir with such terms as "burned," "mostly dead", "killed by fire" and "all" or "nearly all" killed by fire. The evidence presented did not establish that fire damage was extensive, but such factors must be considered in any evaluation. The loss of timber from fires was not restricted to Whidbey Island, as such damage was common to the entire Puget Sound area.

In contrast, the mainland tract was open land having occasional clumps of trees with the exception of approximately 500 acres north of the north fork of the Skagit River on which there were spruce, cedar, yew, alder, and balsam fir, but little or no red fir. The undergrowth on the higher land north of the north fork of the Skagit River included vine maple, willow, crabapple, salmonberry, hardhack, alder briers and nettles.

Sedges, cattails, skunk cabbage, hardhack, Labrador tea and sphagnum moss were found in the open fresh water marshes on Whidbey Island, and grasses, tules, hardhack and briers were found in the salt swamp area of the mainland tract.

The open or "prairie" areas on the Whidbey Island tract were covered with various types of grass and scattered garry oaks, Douglas fir, mountain red cedar, red alden, willow, vine maple, Oregon maple,

and elderberry and other bushes.

21 No Minerals. No mineral deposits were known and no mines were within the Skagit tracts at the date of valuation. Indeed, no coal or other mineral deposits of commercial importance have been found there since that date.

22. Settlement of the Lands. The open, so-called "prairie" area of the Skagit tract on Whidbey Island was first settled. The forested areas of the tract were not generally sought or taken for settlement in or about 1859, no extensive demand then existing for exportation of lumber from the Puget Sound region. However, sales of land on Whidbey Island were among the very earliest sales in the entire Puget Sound area. The tabulation on page 55 of Defendant's Exhibit 300-A (compiled from records of the Bureau of Land Management) shows that 21,948.35 acres of lands of the Skagit tracts (Whidbey Island and the mainland) were disposed of from 1859 to 1870, made up as follows: 3,965.55 acres under the Homestead Act of 1862, 4,455.21 acres under the Cash Sales Act of 1820, 1,790.78 acres under Military Bounty Land Warrants and 11,736.81 acres under the Donation Land Act. In 1870, 456.5 acres were acquired under the Homestead Act of 1862, 640 acres with Military Bounty Land Warrants, 800 acres with Agricultural College Scrip, and 471.96 acres under the Donation Land Act--a total of 20,447.70 acres. Although all of the stands of timber on the island may not have been quite as dense nor composed of trees of the size found in some other Puget Sound areas, and a possibly substantial amount may have been destroyed or badly damaged by fire,

between 35,000 and 40,000 acres of the timberlands had become privately owned by 1880, including those taken under the Donation Land Act and the Homestead Act. Almost 85 percent of all land of the Skagit tracts had passed to private ownership by 1880.

History of the Puget Sound area discloses that these Skagit lands attracted more interest, and at an earlier date, than the other lands in the area because of their location and convenient accessibility by water, the readily cultivatable open prairie lands on Whidbey Island, the existence of natural harbors at Coupeville on Penn Cove and at Oak Harbor, and the location of timberland on the waterways, making timber harvest quite accessible. More prospective settlers and buyers saw Whidbey Island before March 8, 1859 than any other location in the area.

With the first settlements concentrated in the Penn Cove area, permanent towns came into existence at Coupeville and Oak Harbor.

23. Accessibility - transportation. For the Indians of the Puget Sound area, most travel was on waterways, which were the avenues of commerce, particularly since fishing continued to be a principal occupation and food source. White settlers who arrived prior to and during 1859 depended upon the same means of transportation. The only routes from this area to markets in Oregon, California, and even the eastern United States were by water. Hence, the location of the Skagit lands as to general accessibility was unexcelled anywhere in the Territory of Washington. In fact, their location made the Skagit lands among the first to be invaded and utilized by white settlers,

including trappers, fishermen, farmers, lumbermen and merchants.

Roadways played a very minor part in the development of the area until the advent of railroads twenty to thirty years after our valuation date. By 1854, settlers on Budd Inlet and at Olympia had opened a road to Cowlitz Landing on which passengers and freight were carried by stagecoach. But Whidbey Island could be reached from Cowlitz Landing only by canoe and horseback over an 80 mile route. However, the Whidbey Island ports of Coupeville and Oak Harbor had become regular stops for ocean-going vessels engaged in trade from San Francisco and beyond.

24. Economy of Puget Sound Area. Commencing in about 1859, and for three or four decades thereafter, the economy of the white men in this frontier area was based almost exclusively on lumbering. The principal market for the lumber was San Francisco, but since the supply exceeded the demand there, additional markets were developed in Hawaii, Tahiti, China, Australia and Chile. The first shipment of piles went to San Francisco in 1850, and about the same time sales were made at Fort Nisqually, the Hudson's Bay Post, and at Fort Steilacoom. In 1853 sawmills were opened at Seattle and at Alki, and construction began on mills at Fort Ludlow and Utsalady and on the Pope and Talbot Puget mill at Port Gamble. In 1854 a mill was built at Apple Tree Grove and moved in the same year to Fort Madison. In 1853 the Roeder-Peabody-Page mill was built on Bellingham Bay. During the years 1856 through 1858 the area had broken out with a rash of new sawmills and the older ones had increased production. Due to over-

production, under-capitalization, and a nation-wide economic depression following the Indian Wars, early in 1859 mills started to curtail production.

The lumber operations involved timber most easily accessible from the waterways. Small settlements grew up at the mill sites. Timberlands in the Skagit area were ideally located on the coast lands and proved to be early targets of the lumber industry.

Money in the Puget Sound area was in short supply and interest rates were extremely high, in at least one instance running as much as 4% per month on chattels, and to 1 1/2% per month on real property.

Although lumbering must be credited with supporting settlers of the Puget Sound area for many years after 1859, agricultural pursuits were carried on to the extent necessary to supply the local population. Most of the settlers had been farmers and they planned in terms of farm production as their ultimate use of these lands. To such people, the broad, open prairies of Whidbey Island were most attractive, and experienced the earliest cultivation.

While fishing had not obtained the status of an industry, the white settlers, like their Indian neighbors, depended upon this as a major source of food supply. Its potential as a future major factor in the region's economy was quite apparent - awaiting only the development of a larger market.

25. Land sales. As we found in the cases of claims of other Indian tribes in the Puget Sound area previously adjudicated, there is a scarcity of comparable sales or acquisitions at times relevant

to our valuation date here. This is especially true as to timberlands. A study of such sales in the ensuing thirty years indicated that all sales of land involving any considerable acreage were sales by the Federal government under the Cash Sales Act at \$1.25 per acre, or by the Board of University of Washington Commissioners at a fixed price of \$1.50 per acre. Purchases could be made with depreciated government scrip, military warrants, or greenback currency. Other federal statutes under which timberlands were acquired were the Preemption Acts, the Homestead Act of 1862, the Timber Culture Act of 1873, and the Timber and Stone Act of 1878.

Witnesses reported isolated instances of sales during this period, acknowledging that they could not be viewed as comparable for our evaluation purposes, but to indicate the sparcity of land transactions at that time. Pope and Talbot, largest lumber company in the area, made its first land purchase in the Puget Sound area in 1861 at \$1.50 per acre. It continued purchasing some lands from 1863 to 1866 with military scrip, making the cost less than the listed \$1.25 per acre. From 1875 through the 1880's Pope and Talbot purchased numerous 160 acre tracts in the Puget Sound area at about \$3.12 per acre. Purchases by other mill operators reflect similar purchase prices. The ordinary buyer, such as the individuals who were moving into the area, would not have available to him the same devices for special advantage.

All such purchases involved timberlands located within a mile and a half of waterways. The bulk of early purchases involved Douglas

fir trees, but some cedar. Use of other species suitable for paper pulp, such as hemlock and white fir, did not commence until after the turn of the century.

To March 8, 1859, only 13 sales of agricultural or potentially agricultural lands had been made in Island County, 5 in King County, and a few in Thurston and Pierce Counties. Most of the Skagit lands lie in Island County, and the sales were of open prairie lands on Whidbey Island. Those were the first regions settled. Acquisition was made under the Donation Land Act, the Preemption Act, or after 1862, the Homestead Act. No evidence of amounts originally paid for the negligible number of such sales appears in the record, but transfers by persons holding title acquired from government sources are reflected in the report of Defendant's appraisal witness Miller as follows:

<u>Sales Before March 8, 1859</u>				
<u>Date</u>	<u>Number of Sales</u>	<u>Total Acreage</u>	<u>Total Consideration</u>	<u>Average Price Per Acre</u>
1854	2	320	\$ 700.00	\$2.19
1855	1	160	300.00	1.875
1856	2	480	3,000.00	6.25
1857	none	---	---	---
1858	6	1,120	8,500.00	7.59
1859	2	293	1,300.00	4.44
<u>After March 8, 1859</u>				
1859	4	340	1,450.00	4.26
1860	3	200	1,583.00	7.92
1861	3	740	5,700.00	7.70
1862	4	941	3,241.59	3.44

26. Fair Market Value. Up to March 8, 1859 sales and transactions

with white settlers in the Puget Sound area failed to establish any pattern of land values. The record fails to produce evidence upon which a value established by the customary methods of appraisal, based upon comparable sales, can be established. Actually, some of these lands were still used and occupied by the Indians.

James A. Crutchfield, Jr., a professor of economics, appeared as an expert witness for the Plaintiff. He utilized two methods of valuing the tract and arrived at an opinion of value under each method. His first method is referred to as the "market valuation", based upon the commercial value derived from the marketing of products. He computed the value of timber discounted to 1859 at 8%, and added a per acre value for agricultural potential. Under this method he placed a valuation on the Whidbey Island lands of \$4.94 per acre, and the mainland tract of \$1.25 per acre.

In his second method of valuation, referred to as the "subsistence valuation", he arrived at a valuation of the entire Skagit tract of \$1,000,000.00 less \$200,000.00 for retained rights, or a net subsistence value of \$800,000.00. This conclusion was derived by using \$150.00 per year as the value of subsistence (potential earning capacity) of each Indian, multiplied by the number of Skagit Indians at the time (400). The Crutchfield methods of evaluation have been rejected by the Commission in prior decisions.

C. Marc Miller, a qualified and experienced appraiser, testified as an expert witness upon behalf of the Defendant. Recognizing the absence of comparable sales, he utilized a market value approach,

taking into consideration all possible factors that would be apparent to a prospective purchaser, i.e. white settler, lumberman, in 1859. He considered such elements as the natural resources of the land, including its climate, vegetation (timber included), game and wild-life (fishing included), mineral resources, its then or potential use, its existing agricultural production, transportation, accessibility, potential markets, soil surveys, general economic conditions, topography, population and settlement patterns. He gave careful consideration to sales and other factors relating to separate values of agricultural or potentially agricultural lands and of timberlands on Puget Sound.

Miller proceeded to classify lands as to types as hereinabove described, and then to place values accordingly. He set the fair market value of the Skagit tracts as of March 8, 1859 at \$31,250.00 or approximately 55 1/2 cents per acre, derived as follows:

Whidbey Island

	<u>Acres</u>	<u>Per Acre</u>	<u>Value</u>
Open, potentially agricultural land	7,938	\$2.00	\$15,876.00
Accessible commercial timberland	41,494	.30	12,448.00
Fresh water marshland, unclaimed	868	.30	260.00

Mainland

Open, potentially agricultural land	1,430	1.25	1,787.50
Salt water marshland	4,070	.20	814.00
Noncommercial timberland	<u>500</u>	<u>.10</u>	<u>50.00</u>
Total Acreage	56,300	Total Value	\$31,235.50

Miller contended that the prevailing sale price of government lands of \$1.25 per acre constituted a maximum ceiling price above which a hypothetical willing buyer would not have gone. The Commission however, has previously rejected this Miller contention in Snohomish Tribe of Indians v. United States, 7 Ind. Cl. Comm. 768 (1959). In 1859 the highest value of Skagit lands to incoming settlers was for agriculture. The Skagit lands contained the most attractive open prairie lands suitable for agriculture of any accessible lands in the Puget Sound area. Evidence was presented that economic factors then at work made it obvious that in the near future these lands would have even greater value because of their timber. Subsequent history confirms this prognostication. Located on the Skagit lands were thousands of acres of good timber located near the waterways, so as to be immediately accessible for movement of lumber to the developing markets.

The Commission has noted that part of the Skagit lands are embraced within the tract designated as the Tulalip (or Snohomish) Indian reservation. The adjacent Snohomish tract within that reservation was decreed to have a value on March 8, 1859 of \$1.10 per acre in the aforesaid Snohomish case. We used that valuation in determining the land value credited to the United States for lands given to the Plaintiff tribe in Upper Skagit Tribe et al v. United States, 13 Ind. Cl. Comm. 583 (1964).

In addition to the factors referred to by Miller, the record herein establishes accessibility and quality of both agricultural

and timber lands on the Skagit tract as having a more favorable influence on values than Miller saw. Reports of Swan and Kellogg on the history of Whidbey Island, as well as observations by Gannett and by Indian agents, disclose that these lands were of the type most eagerly sought at that time. For them the demand was greater and there were more prospective buyers and settlers.

Accordingly, based upon all of the pertinent factors reflected in the consolidated dockets of the Skagit and its related cases, we have determined the fair market value of the Skagit lands on March 8, 1859 to be as follows:

Whidbey Island

	<u>No. Acres</u>	<u>Per Acre</u>	<u>Value</u>
Open agricultural lands	7,938	\$4.00	\$31,752.00
Accessible commercial timberland	41,494	1.50	62,241.00
Fresh water marshland	868	.50	434.00

Mainland

Open agricultural lands	1,430	3.00	4,290.00
Salt water marshland	4,070	.30	1,221.00
Less accessible timberland	<u>500</u>	<u>.50</u>	<u>250.00</u>

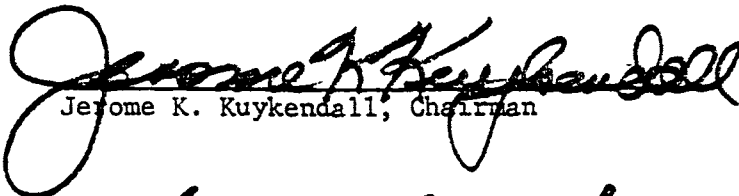
TOTALS	56,300		100,188.00
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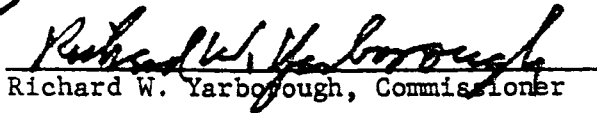
The Commission has previously determined in the Upper Skagit case, supra, that the share of the tribe which is Plaintiff in the instant case in the monetary consideration paid by the United States pursuant to the Treaty of Point Elliott executed January 22, 1855 (12 Stat.927) and ratified on March 8, 1859, was \$25,331.50, leaving a difference of \$74,856.50. We find that payment by the United States under the treaty of the sum of \$25,331.50 for acquisition of 56,300 acres of land then


having a fair market value of \$100,188.00 (constituting a payment of only twenty-five (25%) percent of the value) was such a grossly inadequate amount as to make the consideration unconscionable.


John T. Vance, Commissioner

Concurring:


Jerome K. Kuykendall, Chairman


Richard W. Yarborough, Commissioner


Margaret A. Pierce, Commissioner


Brantly Blue, Commissioner