

BEFORE THE INDIAN CLAIMS COMMISSION

THE CHINOOK TRIBE AND BANDS OF)	
INDIANS,)	
)	
Plaintiffs,)	
)	
v.)	Docket No. 234
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: November 4, 1970

ADDITIONAL FINDINGS OF FACT

The Commission makes the following findings of fact which are supplemental to the findings numbered 1 through 31.

32. The Commission has found that the Clatsop Indians and the Lower Band of Chinook Indians (the latter also being referred to as the Chinook Tribe "proper") had aboriginal or Indian title to certain lands lying in parts of the present states of Washington and Oregon. This area of land will hereafter be referred to as the "subject tract", and the valuation of the tract is made as of the dates of taking, i.e., August 5, 1851, for the Oregon portion and August 9, 1851, for the Washington portion.

The Clatsop or Oregon portion (described in Finding of Fact No. 29) is a strip about 16 miles long and 4 to 6 miles wide, bordered on the north by the Columbia River and on the west by the Pacific Ocean. It is located in Clatsop County and contained the town of

Lexington in 1851. The port Astoria is located in the same county, but adjacent to the subject tract. The Washington portion (described in Finding of Fact No. 30) is a strip 9 miles long and 12 miles deep, bordered on the south by the Columbia River and on the west by the Pacific Ocean. This portion is located in Pacific County and in 1851 contained the principal towns of Pacific City and Chinook.

33. Acreage

The area to be valued contains 76,630 acres of dry land. Adjacent thereto are several thousand acres of tidelands.

34. Climate

The climate of this area is characterized by cool summers, mild winters and heavy annual precipitation. For Astoria the average temperature is 51°, with an average January minimum of 36° and an average August maximum of 69°. The average annual precipitation in this area is 77.46 inches, the months of July and August, however, being relatively dry. During the winter months severe storms do occur with wind velocities occasionally reaching 90 miles per hour. The moderate temperatures and the dampness throughout most of the year provide a very long growing season for timber and grass. The growing season at Astoria is 273 days per year.

35. Topography

The Oregon portion of the subject tract is characterized by coastal beaches, alluvial plains and low but rugged and heavily timbered

mountains. The plains area, known as the Clatsop Plains, contains about 15,000 acres and is noted for its good grazing and farming lands.

Within the Oregon portion flow numerous creeks, the major ones being Alder Creek and Skippenon Creek which drain northerly into the Columbia River. The Lewis and Clark River, which designates the eastern boundary of the Clatsop Tribal area, likewise flows northerly and empties into the Columbia River at Young's Bay. The Lewis and Clark River Valley contains good grazing and farming land.

36. The Washington portion of the subject tract is characterized by beaches, water and tide flats, and rolling plains in the western part and by low and heavily timbered mountains in the eastern part. The timbered area is also very rugged due to the many ravines cut by numerous small streams. The Wallacut River and the Chinook River are the major waterways which flow southerly and empty into Baker's Bay on the Columbia River. The third major river of this portion is the Bear River which flows northerly and drains into Shoalwater Bay.

37. The Columbia River, which bisects the subject tract, and the six rivers specifically mentioned above have tidal waters. During high ocean tide these rivers are "backed up", providing greater depth. These tidal waters are important for the navigability of the rivers and for the flotation of logs downstream.

38. Transportation facilities

The Columbia River is a navigable waterway. At its mouth in 1851 were two main entrance channels for ocean going vessels.

Passage through these channels and the lower reaches of the Columbia, however, was somewhat hazardous due to the presence of shifting sand bars. In 1841 Lieutenant Wilkes mapped the sand bars and other navigational hazards thereby reducing the dangers to sailing ships navigating the Columbia River. To further minimize the danger of running aground on sand bars pilot boats were used commencing in 1847 to guide the ships up the river. In addition to the Columbia River, six rivers on the subject tract are navigable by smaller craft to the head of their tidewaters (usually a distance of 2 to 4 miles upstream).

In 1850 the steamship, Columbia, built in Astoria, began regular runs up and down the Columbia River between Astoria and Portland. This was the first steamship used on the river and it reduced the travel time between Astoria and Portland from 13 days to one day. The Columbia carried passengers, cargo, and mail.

39. As of 1851 there was a road known as the Skippenon Road which extended southwest from Lexington across the Clatsop Plains to Seaside, Oregon. This was the main route which gave the Plains settlers access to the county seat of Lexington and to the Columbia River.

The beaches were commonly used as a highway by the coastal inhabitants of the subject tract. In the more rugged areas only Indian trails provided a means of access between settlements.

40. In the Washington portion there were 3 portage routes which connected Shoalwater Bay with Baker's Bay. Taking advantage of tidal waters on the rivers the 4 to 5 mile distance between the two bays

could be covered almost entirely by boat. These portage routes were of primary importance in transporting oysters and fish from Shoalwater Bay to the shipping ports on the Columbia River.

41. History of the Area

During the first decade of the 19th century exploration of the Pacific Northwest was carried out by Lewis and Clark. Contemporaneously trading posts were established. It is estimated that Chinookville, located in the Washington portion of the subject tract, had its beginning about 1800. In 1811 John Jacob Astor founded Astoria on the south bank of the Columbia River adjacent to the subject tract.

At this time sovereignty over the Pacific Northwest had not yet been determined. Conflicting claims to the region arose in the 1700's between Great Britain and Spain and soon to follow were the claims of the United States and Russia. Through a series of treaties and agreements the claims of Spain and Russia were eliminated; however, Great Britain and the United States maintained their claims to the area on grounds of discovery, exploration, settlement, and contiguity with their recognized possessions. In 1818 the United States and Britain entered into a formal agreement permitting the two countries to jointly occupy and settle the claimed territory. In 1846 the United States announced its intention to terminate the joint-occupancy agreement and the Oregon Territory boundary was negotiated at that time.

Before the termination of this agreement the Oregon Provisional Government had been established by the regional settlers. The

Provisional Government functioned from 1843 until August 14, 1848, when the Oregon Territory came into official existence by Act of Congress.

The first significant settlement of the Pacific Northwest began in the Willamette Valley region during the 1830's. This area was located approximately 80 miles east of the subject tract. The route by which the migrants from the East usually arrived was the Oregon Trail, beginning at Jefferson, Missouri, and ending near Fort Vancouver, on the Columbia River. It is estimated that there were 150 Americans in the Oregon region by 1840. Settlement of the Oregon Territory greatly increased during the 1840's and by 1850 the territorial population was more than 13,000.

42. The first settler farmer on the subject tract was reportedly one Solomon Smith who, in 1840, began his farm on the Clatsop Plains. The settlement of Clatsop County progressed rapidly after that, virtually all of the suitable non-forested (Clatsop Plains) settlement lands having been claimed by 1851. Local government for Clatsop County was first evident in 1845 when 124 people voted to elect officers for the Provisional Government. The same year the Clatsop County Court was established with powers to order a census and levy road and property taxes, among other things. During the late 1840's schools and churches had been built on the Clatsop Plains, a post office was established at Astoria (1847), the town of Lexington was platted (1848) and designated the county seat, and saw mills were built. By 1850 the population

of Clatsop County had reached 462 (excluding Indians). Of these, 249 lived in Astoria with most of the remaining 213 individuals living on lands within the subject tract.

43. Settlement in the Washington portion proceeded at a slower rate. The first census of Pacific County was in 1853 when a total population of 152 was recorded. Pacific City had been founded and developed in 1850-1851. However, its existence was short-lived. In 1852 the Government reclaimed the land on which Pacific City was located for military purposes. There was never a plat of Pacific City found, although lot sales are described in the record. The only other significant town located in the Washington portion of the subject tract in 1851 was Chinookville. This town, platted before 1851, had a population fluctuation coincidental with the fishing season. Both Chinookville and Pacific City were located on the Columbia River.

44. Pertinent Public Land Laws

The Oregon Provisional Government passed legislation which provided for the staking and recording of settlement land claims. Under this law an individual was allowed to claim up to 640 acres of land, provided he occupied and made improvements on said land. When the United States formally acquired the Oregon Territory, the land laws of the Provisional Government were annulled. However, the settlers' claims to their land were indirectly confirmed with the enactment of the Oregon Donation Land Act on September 27, 1850, (9 Stat. 496).

45. (a) Donation Land Act

Under the provisions of this act a white, married individual who had settled on the lands prior to September 1, 1850, could lay claim

to 640 acres of public land. A single man was entitled to 320 acres. The Act also provided that those who settled between December 1, 1851, and December 1, 1853, were entitled only to half as much as the earlier settlers. On February 14, 1853, the Act was amended (10 Stat. 158) to reduce the four year occupancy requirement to 2 years upon the payment, however, of \$1.25 per acre for the land settled. In 1854 the occupancy requirement was reduced to one year if \$1.25 per acre were also paid (10 Stat. 305).

(b) Preemption Act

On September 4, 1841, the United States Congress enacted the Preemption Act (5 Stat. 453) which originally provided that an individual who was not the owner of land in the territory or the owner of 320 acres of land in another state or territory, could purchase 160 acres of public land at \$1.25 per acre. It was required that the individual actually settle and make certain improvements on the land in order to take advantage of this preemptive right to purchase.

(c) Military Bounty Land Warrants

By the Act of February 11, 1847 (9 Stat. 125), an honorably discharged non-commissioned officer or private, who had served at least one year, could be issued a land warrant to be used for acquiring a 160 acre tract of public land. The land warrants were not assignable until an 1852 amendment to the Act (10 Stat. 3, ch. XIX) permitted free transfer rights. As a result, land warrants were discounted below their face value of \$1.25 per acre and widely used for speculative land purchasing. The warrants were also used to make the payments for land purchased under the Preemption

Act, thus in fact enabling one to purchase the land for less than \$1.25 per acre.

46. Timber

The western slope of the Cascade Mountains in western Oregon and Washington is known as the Douglas fir region. Although the Douglas fir predominated in this region, it is quite uncommon along the coastal areas where spruce and hemlock were predominant. On the subject tract in 1851 only two or three percent of the timber was Douglas fir.

47. During most of the 19th century, the commercial logging industry was concentrated in the northeast and middle west of the United States. It was not until the 1890's, with the building of railroads and the development of improved logging methods that lumbering in the Pacific Northwest became a great commercial enterprise. The record shows, however, that there was limited commercial logging in certain areas of the Northwest in the 1840's. The great stands of timber in Oregon were early recognized as having potential value, but logging of the area was retarded primarily because of the difficulty in transporting the timber to the mills and the limited market available.

The earliest method of logging in the Oregon area was by hand. Trees were felled with axes, trimmed, and then transported to the mills by water. The trees immediately adjacent to drivable waterways were taken first because they could easily be rolled into the stream and floated to the mill. After this convenient timber was exhausted, trees from 1 to 1-1/2 miles from the water had to be taken. To transport

the more distant logs to the streams, teams of oxen were used to drag the logs over a "skidrow". The skidrow was made by placing small logs parallel and greasing them to reduce friction. The timber standing further than about 1 mile from a drivable stream had little value at the time because of the difficulty in transporting it to the waterways.

Logging operations were also very wasteful during this period. Trees were cut from 12 to 20 feet from the ground in order to avoid cutting through the thick bark at the base of the tree. Further waste occurred because trees were topped at 40 to 50 feet.

48. The first detailed surveys of the timber on the subject tract were made in 1908, 1909 and 1913 by the United States Forest Service. Thereafter the McSweeney-McNary Reforestation Act of 1928 ^{1/} authorized a survey of timber in parts of Washington and Oregon, including the subject tract. The 1932 survey under this Act showed the approximate distribution of land and timber types. Between 1851 and the dates of the forest surveys various changes in the timber on the subject tract had taken place due to disease and logging operations. However, the quantities and classifications of timber present on the subject tract on the date of valuation can be reconstructed with a fair degree of accuracy by a trained forester. Both plaintiffs and defendant agree that the timber on the subject tract as of 1851 was predominantly Sitka spruce, western hemlock and red cedar, with Douglas fir comprising two or three percent of the total.

49. It was the contention of the defendant that the timber on the subject tract was used almost exclusively for local consumption

^{1/} 45 Stat. 699 (chap. 678)

and that there were virtually no commercial logging operations on tribal lands prior to 1851. The basis of this contention was that of all the species found on the subject tract only Douglas fir was considered merchantable, noting that Douglas fir represented only a minor portion of the timber. Plaintiffs, on the other hand, contended that neither the buyer nor seller of commercial timber in this area distinguished the various types of timber and all species were logged and sold on an equal basis, and that, indeed, extensive commercial logging of tribal land timber was taking place on and before 1851. Plaintiffs' forestry expert characterized all timber as either merchantable or potentially merchantable as of 1851, the former being valued at \$0.40 per thousand board feet (MBM) and the latter valued at \$0.05 per MBM. Having estimated the volume of timber on the subject tract at the date of taking at 757,030 MBM and multiplying it by the proposed value per MBM, plaintiffs valued the timber standing at \$120,026.60; whereafter plaintiffs also ascribed a value of \$0.05 per acre to the land on which the timber stood (\$2,289.35). The total value of the timberlands according to the plaintiffs was \$122,315.95 or about \$2.67 per acre.

The defendant's appraiser, asserting that none of the timber had commercial value as of 1851, estimated the worth of the timberland on the subject tract at \$8,185.50 or \$0.15 per acre.

50. The extent to which the timber enhanced the value of the subject tract at the date of cession, 1851, was dependent on the use of that timber at the time and the possible future use as seen by a prospective purchaser on said date.

The earliest settlers in the area used the timber primarily for making improvements on their land. Logs were cut and utilized to build their houses and out-buildings. Cedar logs were commonly used for fence posts or split to make shingles. The settler would transport some logs to the sawmill to be cut into lumber for his own consumption, the mill owner often taking a percentage of the lumber as his cutting fee. The immediate availability of timber was an asset to the settler of the area and he would have considered this a significant factor in judging the value of the land.

51. In 1851 there was no commercial demand for western hemlock. Because eastern hemlock had been found to be generally unsatisfactory as lumber material, the prejudice was carried to western hemlock until about 1900 when the latter was found to be very useful as pulp wood. The cutting of western hemlock on a commercial scale did not begin until almost 50 years after the date of valuation.

52. Similarly, Sitka spruce was not recognized as being commercially useful until the latter half of the 19th century. The earliest statistics showing the amount of spruce logged are for the year 1869. From the Washington-Oregon region 5,000,000 board feet of spruce was milled in that year, representing the logging of about 150 acres of spruce timberland. In contrast, 161,000,000 board feet of Douglas fir lumber was produced in the same region in 1869. One of the early uses of spruce lumber was for the manufacture of boxes. But it was not until the

late 1860's that spruce became commercially valuable when it was found useful for the manufacture of paper products.

53. The fine quality and value of Douglas fir for structural purposes had been recognized throughout the world well before 1851. The desirability of this choice lumber created extensive ready markets to which Douglas fir was exported from the Pacific Northwest. The records of the Customs Collector at the Port of Astoria indicated the type and quantity of the products exported by ship from the Columbia River area and showed that from May 28, 1849, to September 6, 1850, over 5.3 million board feet of lumber were cleared through customs. However, it was not specified in what area the lumber had been cut nor of which specie it was. As was stated above, the great stands of Douglas fir commenced just east of the subject tract. It is also to the east of the subject tract that the greatest amount of logging and milling activity was going on at the date of valuation.

In 1850, the areas where the production [of lumber] was greatest were those nearest the junction of the great shipping estuaries, the Willamette and the Columbia. Clackamas and Washington counties on the southside of the Columbia and Clark on the north embraced nearly half of the mills, well over half the annual product, and about 73 percent of the value of the annual production of lumber in Oregon Territory. (Plaintiffs' Appraisal Report, Ex. V-9, p. P-2)

The three above named counties are well upstream from the tribal lands and contain the principal cities of Portland, Oregon City, and Vancouver.

54. Mills

The distribution and size of saw mills is a potential indicator of the amount of logging in a particular area. The greatest lumber

production was to the east of the subject tract, particularly in the Willamette Valley region. The Oregon Territorial Census of 1850 indicated 37 saw mills in the territory at that time. Many of the mills in the Willamette area were power mills having a production capacity of 12,000 board feet per day and even one of 25,000 board feet per day.

55. Historical sources indicated that between 1846 and 1851 six mills had been built on the subject tract and three more were located just adjacent on the Lewis and Clark River and on Young's Bay. Five of the mills on the tribal lands were relatively small having a daily production capacity of 1,000 to 5,000 board feet. The sixth mill, located in Pacific City, was a stream powered mill which would have had a much greater capacity than the other mills on the subject tract. (There were no records to indicate what its capacity actually was.) It must be noted that not all six mills continuously operated during the 1846-1851 period. The date the mills were constructed and their approximate size was recorded, but there was no evidence as to how much lumber they actually produced nor for what period of time they were in actual operation. For example, the 1850 Clatsop County census listed only two mills in the county.

56. Sales of Timberlands

The Timber and Stone Act of 1878 ^{2/} provided that one could purchase up to 160 acres of unoccupied, unimproved, surveyed timberland at a minimum of \$2.50 per acre. This was the first authorization to

^{2/} 20 Stat. 89, (chap. 151)

purchase timberlands simply for the timber thereon, the earlier sales statutes being aimed at promoting settlement and making improvements on the land.

Although prior to 1878 there were restrictions against spoliation and the cutting of timber from Government lands, these restrictions were not effectively enforced and it became a widespread practice to cut public timber without purchasing the land. A settler would acquire 40 to 160 acres of land, then proceed to cut the timber from all adjacent four sides, as well as on his own land. This practice came to be known as clearing "a round forty."

There are no records of private conveyances of timbered land on the subject tract near the date of valuation. The probable reason for this is that there were great quantities of timbered land still available in 1851 which one could claim under the existing settlement laws. For the subject area, the first recorded sale of land specifically described as timbered land was in 1858 when 320 acres were sold for \$0.47 per acre. In 1859 a 50-acre tract of timbered land was sold for \$0.60 per acre. From 1860 to 1871 there were four more sales of land described as timberland representing a conveyance of 1136.70 acres for an average of \$4.00 per acre. Regarding these last four sales, however, it must be noted that at least one parcel had a saw mill on it and another included cleared agricultural land and other improvements.

57. Sale of Agricultural Lands and Townsite Lots

Lands on the subject tract were usually claimed by the earliest settlers under provisions enacted by the Provisional Government of the

Oregon Territory and then under the Donation Land Act of 1850, supra. For this reason there are few recorded sales of agricultural land between individuals prior to August 1851.

(a) The 1850 United States Census shows that by that year 16,488 acres of land in the Clatsop portion of the subject tract had been claimed by 40 heads-of-household. This acreage represented virtually all of the Clatsop Plains and other rich farm land lying in the Oregon portion of the tribal lands. The earliest recorded sale of Clatsop tribal lands was the sale of 640 acres for \$4.77 per acre in 1850 (the sale price included "all buildings, bridges, fences, etc."). The next recorded sale, also in 1850, conveyed 321 acres for \$10.90 per acre. However, this same parcel was reconveyed two years later for \$3.12 per acre, indicating the original sale price probably included personal property. (It was common practice to include personal property in the sale of a land parcel without ascribing separate values to the personal property and to the land.) Between 1852 and 1865 there were over 70 sales of land parcels within the Clatsop portion of the subject tract. The parcels conveyed ranged from 640 acres down to 4.3 acres, with a consideration ranging from \$23.26 to \$0.47 per acre. Most of the sales fell into the \$1.25 to \$3.75 per acre range. The parcels were, for the most part, improved and the sale price included the value of the improvements.

(b) In the Washington portion of the tribal lands there were 20 recorded sales between 1854 and 1860. The tracts ranged from 643.20

acres to 0.74 acres and the consideration paid from \$135.14 to \$1.25 per acre. Most of these were waterfront parcels, the price paid also including the value of the improvements on the land, livestock, or personal property of various types. For example, the parcel which sold for \$135.75 per acre was a homesite consisting of 9.74 acres. Most parcels sold for \$1.50 to \$4.25 per acre.

(c) Townsites

Lots in the platted towns of Lexington, Chinookville, and Pacific City were sold prior to the valuation date. In Lexington 8 lots were sold between 1848 and 1851. The first lot was sold for \$25.00 (\$217.00 per acre); six more lots were sold for \$70.00 to \$80.00 each (about \$500 to \$700 per acre) and one lot was sold for \$150.00 (\$1,300.00 per acre). The next sale of Lexington land was in 1857 when the remaining platted lots were sold along with other land for \$5.05 per acre. From 1848 to 1869 twenty-six more lots were conveyed, the unimproved or slightly improved lots selling from \$10 to \$25 each (\$100 to \$217.00 per acre). Although approximately 23 acres had been platted for the townsite, the individual lot sales between 1848 and 1869 totaled less than 5 acres.

Between 1851 and 1860 there were 88 lots (15.12 acres) sold in Chinookville. The selling price was principally from \$11.11 to \$25.00 per lot (\$100 to \$217.00 per acre). Some lots did sell for as much as \$500.00, \$800.00, and \$1,000. However, this can be attributed to the inclusion of extraordinary improvements on the particular lots in the sales.

In 1850 and 1851 there were 9 recorded sales in Pacific City, involving 73 lots (8.395 acres) for a total consideration of \$8,800. The price ranged from \$37.00 to \$1,000.00 per lot. No plat of Pacific City has been found, although historical references indicate the developers of Pacific City had sub-divided 173 acres into lots for the townsite. The existence of Pacific City was short lived because in 1852 the Government began procedures to reclaim the townsite in order to establish a military reservation.

58. Mining and Minerals

Other than sand, gravel, clay, and rock, no minerals have been found in commercial quantities up to the present time in the subject area.

59. Farm Produce

The Clatsop Plains provided excellent grazing land for livestock. The 1850 U. S. Census showed there were 700 head of cattle (239 milk cows), 49 sheep, and 88 swine in Clatsop County that year. The same census indicated the following produce for the year 1850:

	<u>Clatsop County</u>	<u>Oregon Territory</u>
Irish Potatoes	9,280 bushels	91,326 bushels
Indian Corn	2,340 "	--
Wheat	590 "	211,943 "
Butter	6,350 lbs.	211,464 lbs.
Cheese	1,900 lbs.	--

Wheat was not a satisfactory crop for the Clatsop area because of the excessively moist climate. However, potatoes thrived in such climate. Many cranberries were harvested on the subject tract.

60. Trade and Commerce

The record shows that commercial exportation of products from the Columbia River area was being carried out before August 1851. For a period of 18 months, ending September 2, 1850, 110 ships cleared customs at Astoria carrying 27,179 tons of cargo valued at approximately \$150,000. Many of these ships were under foreign flags, carrying cargoes to the Orient, Australia, South America, and to other parts of the United States.

While the type and value of the exported product was recorded, the location of the origin of the products was not. However, production statistics for the subject area and for all of Oregon Territory indicated most of the products came from the Willamette Valley region, east of the subject tract. Historical sources reported some individual instances of export of butter and potatoes from the subject land. The 17 barrels of cranberries exported from January 1 to March 1, 1850, came from the tribal lands. And because the waters of the Columbia River which flow through the subject tract were particularly abundant with salmon, this fish being easily caught in this area by utilization of the tide lands and sand bars, a large amount of the salmon exported came from within the tribal lands. (From January 1 to March 31, 1850, there were 818 barrels of salmon cleared through customs at Astoria.)

61. Fishing

The early settlers in the subject area relied on the salmon as a plentiful food source, but also recognized it as a potentially profitable commercial enterprise. Although the first fish cannery on the Columbia

was not established until 1866, limited packing and export of salmon began as early as 1830 when 53 barrels of salted salmon were shipped to Boston and sold for \$14.00 per barrel. As stated in Finding No. 60 above, 818 barrels of salmon cleared customs at the port of Astoria between January 1 and March 31, 1850. Although limited amounts of salted salmon were being exported (some even to the Sandwich Islands) during the period 1850-1865, the markets for the salmon were still primarily local, and it was not until the first canneries were established that the salmon fishing became a great commercial enterprise on the Columbia.

62. Oysters, clams, and other shellfish were gathered from parts of Shoalwater Bay. The southern end of this bay extends approximately one mile into the northern portion of the subject tract. The water in the southern portion of the bay, however, was not satisfactory to support oysters and few, if any, oysters were actually found in the waters and tidelands of that part of Shoalwater Bay which lies within the subject tract. The very productive oyster beds commenced about one mile north of the subject area where layers of oysters were reportedly up to one foot in thickness.

The first reported commercial exportation of oysters from Shoalwater Bay was in 1851 when a part of 2,000 bushels harvested was shipped to San Francisco. Their harvesting and exportation rapidly increased thereafter, 18,625 bushels in 1852, and 35,678 bushels in 1860. Most of these oysters were shipped out of the Columbia and sold in California markets.

In order to utilize the port facilities on the Columbia River, the oysters and other fisheries were transported over the portage routes described in Finding No. 40.

63. Highest and Best Use

The experts of the plaintiffs and of the defendant are in some disagreement as to the appropriate classification of the lands within the subject tract, as well as to the acreage ascribed to each classification.

Plaintiffs' expert classified the lands as follows:

<u>Highest and Best Use</u>	<u>Washington Portion</u>	<u>Acreage</u>
<u>Settlement Lands</u>		
Bakers Bay		3,520
Shoalwater Bay and ocean frontage		1,440
Non waterfront area		8,474
<u>Townsites</u>		
Chinookville		40.48
Pacific City		172.90
<u>Tidelands</u>		
Bakers Bay		4,825
Shoalwater Bay		2,340
<u>Timberlands</u>		
		<u>32,312</u>
Total:		53,124.38

Oregon Portion

<u>Settlement Lands</u>	
Clatsop Plains	14,838
Lewis and Clark Valley	1,800
<u>Townsite Lands</u>	
Lexington	40
Millsites (6)	480
<u>Timberlands</u>	
	<u>13,475</u>
Total:	30,633

Defendant's expert classified the lands as follows:

<u>Highest and Best Use</u>	<u>Washington Acres</u>	<u>Oregon Acres</u>	<u>Totals</u>
Timber	36,635	17,935	54,570
Farm and) Settlement)	7,855	7,115	14,970
Waste	<u>1,660</u>	<u>5,430</u>	<u>7,090</u>
TOTALS	46,150	30,480	76,630

The Commission finds that about 65% of the subject tract as of August 5 and 9, 1851, had a highest and best use as timberland, while the remaining area had a highest and best use for farming purposes, townsite locations, and for conducting fishery operations. The fair market value of the subject tract on the date of taking must be determined in light of these uses.

64. The prospective purchaser of the subject tract in August 1851, would view the timber thereon as an immediate asset to a settler for his local consumption. The vast quantities of timber, while not being merchantable in 1851, would have been recognized as a potential source of profit in the future. The fertile Clatsop Plains and Lewis and Clark River Valley would have been seen as good agricultural and grazing areas. The prospective purchaser and seller would have considered the good townsite locations along the Columbia and other rivers in making his evaluation of the subject tract. He would also have recognized a potentially profitable industry in salmon fishing, packing and, in this regard, would have specially considered the value of ownership of the

uplands which gave access to the lower Columbia River fisheries. These real and potential uses of the tribal lands, and others discussed in these findings, would have all been considered by the prospective buyer and seller in arriving at a fair market value for the tract.

65. Consideration

In Finding No. 17 of The Chinook Tribe and Bands of Indians v. United States, 6 Ind. Cl. Comm. 177, 197 (1958) the Commission found that the Act of Congress of August 24, 1912 (37 Stat. 518, 535), authorized payment to the Clatsop Tribe the amount of \$15,000.00 and to the Lower Band of the Chinook Indians \$20,000.00 as full consideration for their tribal lands. We stated that in Duwamish et al. Tribe of Indians v. United States, 79 Cl. Cl. 530 (1934), cert. denied 295 U.S. 755 (1935) the United States Court of Claims found that of the amount appropriated, the Clatsop Tribe actually received \$11,470.59 and the Lower Chinook \$14,837.36. We now find that the total consideration actually paid by the defendant for the tribal lands was \$26,307.95.

66. Gratuitous Offsets

The defendant does not claim that any gratuitous offsets were made to the Clatsop or the Chinook "proper" Tribes which would mitigate the amount of this final judgment.

CONCLUSIONS OF LAW


Based on the Findings of Fact herein and on the record as a whole, this Commission concludes as a matter of law that:

1. The fair market value of the subject tract as of August 5 and 9, 1851, was \$75,000.00.
2. The consideration of \$26,307.95 for lands having a fair market value of \$75,000.00 was unconscionable within the contemplation of

clause 3 of section 2 of the Indian Claims Commission Act of 1946.

3. No gratuitous offsets have been asserted by defendant against the Chinook "proper" or Clatsop Indians.


4. The plaintiffs, for and on behalf of the Lower Band of Chinook and Clatsop Indians, are entitled to recover the difference between the fair market value of the tribal lands in August, 1851, and the consideration actually paid to them by the defendant, i.e., \$48,692.05.



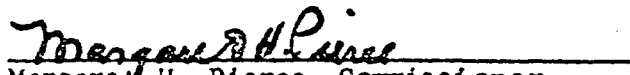
Jerome K. Kuykendall, Chairman



John F. Vance, Commissioner



Richard W. Yarborough, Commissioner



Margaret H. Pierce, Commissioner



Brantley Blue, Commissioner