BEFORE THE INDIAN CLAIMS COMMISSION

THE CONFEDERATED TRIBES OF THE
WARM SPRINGS RESERVATION OF OREGON,
Plaintiff,
v.
THE UNITED STATES OF AMERICA,
Defendant.

Docket No. 198

Decided: December 18, 1972

Appeances:
Frank E. Nash, Attorney of Record for the
Plaintiff, with Mark C. McClanahan, of
counsel; and Angelo A. Iadarola of Wilkinson,
Cragun & Barker, of counsel.
John D. Sullivan, with whom was Mr. Assistant
Attorney General Shiro Kashiwa, Attorneys
for the Defendant.

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

The issues now before the Commission are, first, the fair market value
of that tract of land title to which was found in the plaintiff tribe under
the Commission's decision of April 4, 1967 (18 Ind. Cl. Comm. 354), and,
second, whether the defendant is liable to the plaintiff for additional
compensation for the award area which it claims was ceded to the United
States for an unconscionable consideration under the provisions of the
Treaty of June 25, 1855, 12 Stat. 963. The date of valuation for the
subject tract is March 8, 1859, the effective date of the 1855 Treaty.
The subject tract contains 1,605,000 acres and is situated in north central Oregon, its northern boundary abutting the south shore of the Columbia River for a distance of a hundred miles or more. From west to east the subject tract includes parts of present Hood River, Wasco, Sherman, and Gilliam counties. The western portion of the tract in Hood River County, differs markedly both geographically and topographically from the balance of the area to the east. The Cascade Mountain Range, dominated by snow-covered Mt. Hood, separates eastern and western Oregon, and forms the transitional zone between the wet-humid and heavily forested lower valley of the Columbia River and the semiarid, treeless southwestern extension of that larger area known historically as the "Great Plain of the Columbia". The land surface in this western portion is broken by canyons and ravines. Water from the melting snow eventually drains from the mountains into the Hood River and its tributaries. The Hood River empties into the Columbia River about 14 miles west of and below the site of The Dalles. The agricultural area in the western part is minimal and confined to the Hood River upper and lower valleys. As noted above, the central and eastern portions of the subject tract, being that area in Wasco County east of the Cascades, and in Sherman and Gilliam counties, forms a small part of the Columbia Plain. This vast plains region was described by the early settlers as a single, undulating semiarid expanse of prairie land, covered with a heavy growth of bunchgrass and herbiage, and not adaptable to the customary farming and agricultural
practices of the day.

The Oregon Territory was officially established by the Congress in 1848. Two years earlier, the United States and Great Britain had settled by treaty Oregon's disputed northern boundary line. As constituted in 1848, the Oregon Territory included all that territory west of the Rocky Mountains extending northward from Spanish California at the 42nd parallel to British Columbia at the 49th parallel. In 1853, the Territory of Washington was established and the Oregon Territory was reduced to an area south of the middle channel of the Columbia River. In 1854, the Oregon Territorial legislature created Wasco County, probably the largest county ever, since it included all of Oregon east of the Cascades. The embryonic town of The Dalles was designated the Wasco county seat.

The city of The Dalles, or Dalles City as it is sometimes referred to, owes its beginning to a series of early events, but primarily to the fact that it was a strategically located site. From aboriginal times this particular location along the south bank of the Columbia River had been a favorite Indian gathering place for fishing the river and for assembling on ceremonial and other special occasions. In an effort to reach these Indians, the Methodists established a mission station at this site. In the 1840's many immigrants, traveling westward along the Oregon Trail to reach the Willamette Valley on the other side of the Cascades, used this location to switch from land to
river transportation. At about this same time the Army was having its problems with the Cayuse Indians. In 1850 a military post was established at The Dalles. In the next few years there was a semblance of permanent settlement at the townsite as new arrivals found work at the military post. When the military reservation was reduced in 1854, the energetic citizenry of The Dalles began to push for official recognition under the 1844 Townsite Law (Act of May 23, 1844) ch. 69, 5 Stat. 667) as then extended to the territories of Oregon and Washington. In 1855, the Board of Commissioners, which had been set up to locate the county seat for newly formed Wasco County, ordered a survey of a tract of land of 160 acres for the new townsite. Despite the fact that the proposed townsite was on unsurveyed public land, and the Mission Society of the Methodist Episcopal Church had filed a claim that included the proposed townsite, a board of trustees was elected and rules and procedures were adopted for the division of property in the new townsite. As finally surveyed, the townsite contained 112 acres. On January 26, 1857, the city of The Dalles was incorporated, and by April 18, 1860, it was officially entered as a townsite at the land office in Oregon City.

A capsule view of the early settlement east of the Cascades in the 1850's indicates a direct relationship to the pattern of commerce and trade that developed on the Columbia River and the Great Plain. The first areas to be settled were the transportation and commercial centers. The Dalles and the Walla Walla area east of the subject
tract were prime examples. These particular centers derived their importance as key points for the supply and transhipment of livestock, goods and material to the interior. Initially it was the new immigrants that spurred activity at the commercial centers. Then the military added its contributions during the Indian wars of the 1850's. From 1858 through 1864, there developed a rapidly expanding peripheral mining frontier north and south of the Columbia River. The demands of the miners for goods, livestock, and services at times became almost insatiable during this period.

As the commercial centers developed, they invited the settlement of farmers along the immediate creek and river bottoms and in the well watered valleys. The first settlers east of the Cascades chose to locate near The Dalles on the Columbia River west of the Deschutes River. Although their reasons for staying were initially commercial, many became farmers.

By 1858, cattle raising had become an important industry in Oregon. The demands of the miners caused the cattlemen in the Williamette Valley west of the subject tract to drive their herds in increasing numbers across the Cascades and on to the rich grasslands of the great Columbia Plain. While thousands of head of cattle were shipped up the Columbia River by steamboat in the 1860's, perhaps even greater numbers were driven overland through the passes of the Cascades. Prominent grazing districts during this period could be found at Walla Walla, and in the Klickitat and Yakima valleys north of the Columbia
River. The free range policy of the Federal Government encouraged unrestricted use of the lush grasslands with little, if any, expense to the owners. Under such conditions, the cattle industry was considered transitional insofar as it did not promote permanent settlement and development in these particular areas. This was also true in the subject tract. Operating as he did with a comparatively free hand, the Oregon cattieman of the 1850's and 1860's was not obliged to purchase and control large areas of grazing land. If he was compelled to buy land at all, it was usually just enough to insure access to a water supply.

While all the ingredients seemed to be there, including good beef prices of $0.08 to $0.10 per pound on the hoof, cattle raising during this period never reached its potential. Although the reasons therefore are not clear, history shows that the Oregon settlers of the 1850's and 1860's did not engage in large-scale cattle production even when the demand far outstripped local supply. It has been suggested that the farmers in the vicinity of The Dalles were more interested in obtaining profits from the trade and commerce which took place because of proximity to an important transportation center. Another reason of perhaps greater import, since it would affect expansionist activity in any industry, was the fact that the Oregon economy of the 1850's was firmly tied to the available supply of gold. Long range borrowing
was an expensive proposition. In Oregon during this period, long term loans, although rare, probably commanded interest rates as high or higher than those for a short term. In 1859, short term commercial interest rates were quoted at between 3% and 5% per month.

Both parties in this case have relied primarily on the reports and testimony of their expert witnesses in establishing estimates of the fair market value of the subject tract in 1859. The Commission has carefully examined the reports and accompanying data submitted by these expert witnesses and has found them to be informative and useful. As frequently happens in cases of this type, their ultimate conclusions as to value are widely divergent, plaintiff fixing the minimum value at $1.79 per acre in 1859, the defendant claiming the subject lands were worth slightly more than $0.25 per acre at that time. Both appraisers used essentially the same method of classifying the types of land in the area. They divided the tract into five categories based on highest and best use, and assigned each segment a value based on its contribution to the 1859 value of the subject tract as a whole. These basic divisions consisted of one townsite (The Dalles), cropland, forest land, marginal or waste land, and, the largest segment, grazing land. In his final analysis of the 1859 value of the subject tract, plaintiff's appraiser assigned a single value to the combined grazing-forest-marginal land, which combination represents about 90% of the total acreage within the Warm Springs tract.
The plaintiff's appraisal team was headed by Mr. M. Jeffrey Holbrook, a qualified appraiser. Mr. Holbrook was primarily responsible for the preparation of the three volume report that was submitted by the plaintiff. In the absence of any comparable sales Mr. Holbrook relied upon variations of an income approach to determine market value. In arriving at his total estimate of value Mr. Holbrook failed to take properly into account the then existing Federal land policies and their effect on the 1859 market value of the subject tract, particularly, the availability of the millions of acres of competitive public lands, and the open range policy of the United States with respect to grazing lands. Plaintiff's posture concerning fair market value is indicated in the following statement:

The fair market value of the subject lands was the price which would have been arrived at by the hypothetical seller and purchaser had the United States not had a policy, in force on the valuation date and continuing for the then foreseeable future of selling substantial quantities of competitive lands at the government price of $1.25 per acre, a below fair market value, or of allowing free grazing lands that could have been sold. 1/

The Commission finds this statement to be incorrect.

Acceptance of it would require us to use a later valuation date, when all formerly competitive public lands were in private hands and

1/ Petitioner's Proposed Findings of Fact and Conclusions of Law -- Value and Brief. Page 121.
there was no longer any open grazing land. We must, however, value the Warm Springs land as of the date of acquisition by the United States, which is March 8, 1859, the effective date of the 1855 Treaty. In making our determination, the Commission must consider all the factors, good or bad, that would have influenced or controlled the fair market value of the subject tract in 1859. We are therefore not at liberty to ignore the fact that during this period there was available to the Oregon settler (by purchase at $1.25 per acre, or otherwise) under several land disposal acts millions of acres of competitive public lands. Although government policy precluded public acquisition of grazing land in units of economic size, we cannot ignore the fact that in 1859 cattlemen on both sides of the Columbia River enjoyed free access to millions of acres of rich grassland on the great Columbia Plain.

To avoid the consequences of the government's open range policy, the plaintiff's appraiser suggests that a prospective owner of the subject tract in 1859 could have controlled access to the subject area and thereafter charged a grazing fee to cattlemen wishing to pasture stock on his land. While admitting the lack of economic fencing material, the plaintiff asserts that the terrain and internal vegetative growth would provide the equivalent of fencing both internally and on the perimeter. Plaintiff's appraiser cites the Columbia River as an effective natural barrier on the north, the Cascade Range and the forest area as a natural barrier on the west, and finally, the size and water courses of the Hood, Des Chutes, and John Day Rivers, as well as the primary and secondary drainage emanating therefrom, as effective natural barriers on the southern boundary. With
such control, plaintiff's appraiser then concludes that migrant herds could enter the subject tract only at designated points, that control of roads and trails at entry would be relatively simple, and that internal control could be maintained with a minimum of effort due to the nature and locations of possible drive routes. We think that the assumptions and conclusions of plaintiff's appraiser are more argumentative than factual in content. Perhaps some element of control due to natural boundaries could be maintained on the extreme western end of the subject tract where the perimeter line follows natural boundaries. However, the southern boundary of the award area extends east and west over forty miles in each direction from the town of Maupin, and consists of two straight lines that do not conform with natural boundaries. Physiographic maps of the general area show that for some distance on each side of the southern boundary there is similar terrain, primarily grass-shrub rangeland and upland suitable for grazing. In addition, the famous Barlow road through the Cascade Range is situated outside of the subject tract and well beyond the control of any prospective owner thereof. Great numbers of cattle had been driven over the Barlow road and into the general area immediately south of the subject tract.

Even if we were to assume that a prospective owner of the subject tract could have effectively controlled and policed perimeter access to an area of over one million acres, the record herein does not demonstrate the economic feasibility of such a venture. In our judgment had any enterprising

cattleman been denied access to the subject tract, he would have found a way to avoid the area and reach the adjoining millions of acres of free rangeland.

As indicated earlier, a prospective owner of the subject tract in 1859, or a cattleman desiring to buy any acreage therein, would only have been concerned with controlling access to water, especially if water was in short supply. However, the evidence indicates that for grazing purposes the subject tract as well as the millions of acres of grazing land outside of the subject tract were blessed with an adequate supply of water.

The Commission also questions the efficacy of Mr. Holbrook's refined income approach in evaluating the grazing lands in the subject area. This sophisticated refinement, which plaintiff identifies as a translation of "forage" to "income", admittedly was not a concept or practice in vogue as of the valuation date. Presuming that ideal conditions in 1859 would warrant a well versed entrepreneur to engage in full scale cattle production by utilizing every acre of the grazing lands to their fullest potential, the appraiser then calculated the measurement of productivity and return that can be attributed to the land. Through a series of presumptions, assumptions, and mathematical calculations that are based upon data for the most part extracted from recent studies and observation of modern day agricultural practices in Oregon, plaintiff's appraiser concluded that, in 1859, the grazing lands in the subject tract would have accommodated 88,000 head of cattle, that there would have been an annual weight gain per head of 400 pounds, that the total market value of this annual weight gain would be $352,000, and after capitalizing the annual income at 18%, the total investment would have been worth $1,750,000. It is this investment
figure that Mr. Holbrook assigns as the value of the 1.4 million acres of "Grazing, Forest, and Marginal land". The Commission must reject plaintiff's grazing land calculations because they are too conjectural and speculative, and utterly unconfirmed by subsequent events. We also find Mr. Holbrook's methods not in tune with a more pragmatic approach which the Commission believes a prospective 1859 purchaser of the subject tract would have adopted in calculating the value of the grazing lands. He again ignores the fact that there was a great abundance of free grazing land in the region and assumes, without any justification, that there would be a market each and every year for 88,000 head of cattle.

Mr. Holbrook's "economic sites" evaluation is a unique concept wherein the appraiser has attempted to assign a specific monetary value to three sites on the Columbia River based on their contribution to a monopolistic control of all river traffic. The three sites are the Cascades portage at the northwest corner of the subject tract, the dock and moorage sites at Dalles City, and the Celilo portage which is located about forty miles upstream from Dalles City. As history shows, the Oregon Steamship Navigation Company, or the O.S.N., managed to acquire the three sites in question, and, by squeezing out all competition, the company was able to gain monopolistic control of traffic on the Columbia River between 1860 and 1880.

Mr. Holbrook valued the 1859 contribution of the "economic sites" at $585,000, a figure that is based on certain post treaty acquisitions which the O.S.N. made to further its operations. In 1862, the O.S.N. acquired for $155,000 the Cascades portage facilities on the Oregon side. The price included the portage land, a railroad, four cars, and a wharf boat. The O.S.N. also acquired the more improved portage facilities
on the Washington side of the river for $28,000 plus a percentage of the profits. Apparently, Mr. Holbrook concluded that the sum of these figures, $183,000, represented the market value of one-half control of the Cascades portage. Full control of the Cascades portage was worth $366,000. At approximately the same time (1862), the O.S.N. also acquired the Celilo portage for an undisclosed price. Mr. Holbrook assumed that the total Celilo portage was worth at least as much as the figure at which he had arrived for the Cascades portage, namely $366,000. With all these figures Mr. Holbrook made the following computation; take one-half of the Cascades portage site, $183,000, which is that part on the Oregon side of the river, add the entire Celilo portage site, since it was all on the Oregon side, $366,000, and then add $36,000, which was the assessed value in 1868-69 of the wharfs and docks at Dalles City. Thus he arrived at a grand figure of $585,000.

The Commission fails to see how this sum of money could accrue to a hypothetical purchaser of the subject tract. The plaintiff's alleged value of these "economic sites" has no relationship to the basic or intrinsic value of the tract as a whole. Undoubtedly, these strategic sites had some unique value, as witness the operations of the Oregon Steamship Navigation Company.

3/ The defendant objects on legal grounds to the allowance of any additional compensation to the plaintiff tribe based upon the special value of the economic sites on the Columbia River, citing United States v. Twin City Power Company, 350 U.S. 222 (1955). See also United States v. Rands, 389 U.S. 121 (1967). The applicability of the rule in Twin City in the instant case is questionable, since among other things, the present suit is not concerned with federal eminent domain proceedings aimed at condemning particular sites on the Columbia River to which the riparian landowner is asserting Fifth Amendment rights.
What this business might or might not be willing to share with a prospective 1859 owner of the entire subject tract seems, in the Commission's judgment, to be the crux of the matter. On the record before us any figure we might choose would be based only on conjecture and speculation.

In evaluating tracts of land, the Commission has, however, always taken into account the natural attributes and advantages which they possessed. The Columbia River stretched along the northern boundary of the Warm Springs tract. On the basis of accessibility alone, lands immediately adjacent to the river undoubtedly had greater attraction than lands otherwise situated. With the exception of The Dalles townsite, the overall value of which reflects its choice location, the record herein does not support any specific value for strategic sites along the Columbia River. However, these sites are a distinct plus, and without them the Commission's 1859 evaluation of the Warm Springs tract would have been somewhat less.

We think Mr. Holbrook's evaluation of croplands is not greatly excessive, although on balance the Commission has arrived at a somewhat lower figure. Mr. Holbrook's evaluation of the townsite is close to that of the Commission. However, we do not accept his adding together the separate values of the land and improvements. Apart from the fact that

4/ The Oregon Steamship Navigation Company was by no means a local business whose activities were confined to a brief stretch of the Columbia River. By combining water and land routes its far flung operations were extended, over a twenty-year period, throughout the Washington territory and into Montana and Idaho. By 1880, the O.S.N. owned twenty-six vessels and had invested more than $3,000,000 in its facilities. Pl. Ex. 710: D. Johansen, Empire of the Columbia 279 (2d ed. 1967).
it is virtually impossible to calculate separately the value of the improvements in The Dalles as of 1859, the Commission believes that the correct rule is to arrive at a total value of the townsite as affected by improvements without adding thereto the specific value of such improvements. Chinook Tribe of Indians v. United States, Docket 234, 24 Ind. Cl. Comm. 56 (1970).

The defendant's appraiser, Mr. Chase W. Raney, took a conservative approach in estimating the fair market value of the subject tract in 1859. Even though competitive public lands would have exerted a downward push on private land sale prices, Mr. Raney's $0.25 per acre evaluation of the subject lands strikes the Commission as being too low. When we examine Mr. Raney's appraisal in detail, we find that he actually appraises almost two thirds of the subject tract at less than $0.11 per acre. This would include 60% of the grazing lands and all the timber land. Mr. Raney's figures suggest an extreme discount of the potential use of the subject lands. The grazing lands on the subject tract were better than average and it had already been demonstrated, although on a limited basis, that these lands possessed a potential for growing wheat.

While the bulk of the timberland was indeed inaccessible for extensive commercial lumber operations, there was a limited but active local demand for the timber that was accessible to the Columbia River and its tributary streams. About two thirds of the forested area was in the principal Douglas fir zone of what is now Hood River County. The remaining one third, or roughly 100,000 acres of pine and fir, was situated in what is now northwestern Wasco County. Roads and trails penetrating into this latter area made it somewhat accessible from the east.
We have set forth in the findings herein the fact that during the period in question there were six operating sawmills located in and adjacent to the accessible timber. One of these mills provided lumber for steamboat construction. Another sawmill that was located on Mill Creek near The Dalles had been repaired by the Army and supplied the building needs of Fort Dalles. There was another sawmill on Eagle Creek near the Cascades which provided sawed lumber for the Oregon Portage Railroad. It has been estimated that over $50,000 worth of firewood cut from the nearby forests was consumed annually by the Oregon Steamship Navigation Company for its steamboat operation on the Columbia River.

The Commission is of the opinion that Mr. Raney's extremely low timber appraisal ignores this active local demand for timber and heavily discounts future use. We agree with the plaintiff that the vast but excellent timber stands in Oregon and Washington did have substantial value. Indeed, had the bulk of the excellent timber on the Warm Springs tract been more accessible, it would have undoubtedly commanded a higher value comparable to those values established during the same period for timber lands of equal quality in either Oregon or Washington.

The Commission also disagrees with Mr. Raney's townsite evaluation, finding it to be too conservative and not supported by the relevant sales data in the record. While Mr. Raney's figure of $2.50 per acre for the most select agricultural lands is supported by the record, he has underestimated the total acreage of cropland within the subject area.

The subject area is a 1.6 million acre tract consisting chiefly of grazing land with a timbered area in its western portion. The grazing lands are rich in bunchgrass, but their potential and future worth was for growing wheat. Much of the grazing land undoubtedly remained uncultivated until some later date. The focal point of all economic and other activity in the tract was The Dalles, a busy little frontier town located on the Columbia River just west of the Deschutes River. It was an important commercial and transportation center, a place where livestock, goods, and materials were transhipped to other destinations. While the town supported local businesses, most of this patronage undoubtedly came from transients. Most of the permanent settlers outside the town had located themselves on the rich bottom land of the nearby streams.

Although the land sales data as of 1859 which is in evidence is limited, it does shed some light on land values in and around the town of The Dalles. The value of adjoining unimproved farm land generally exceeded the minimum government price for public land. The Columbia River made the adjoining northern boundary lands readily available to prospective settlers, but the bulk of the interior lands away from the tributary streams of the Columbia were relatively inaccessible, being well outside the normal pattern of settlement, commerce, and economic influence. This condition prevailed until the advent of the railroad in the 1880's.

In the Commission's judgment a prospective 1859 purchaser of the subject lands would not have paid the $1.25 minimum government price
to acquire as a unit the entire 1.6 million acre tract. While he might have envisioned the potential multiple use of grazing land as wheatland, and the future value of the timberland, he would have recognized that the present demand for lands within a 1.6 million acre tract was indeed limited. Thus, he would be forced at some cost to hold the subject tract or a goodly portion thereof for future use.

6/ Because the Commission has rejected the fair market value estimates of the expert witnesses, it might be suggested that we should have adopted the prevailing statutory minimum price for public lands as the 1859 fair market value of the Warm Springs tract. However, it is unnecessary to face such an alternative in this case, since, as our findings of fact show, there is more than ample evidence in the record apart from the conclusions of the expert witnesses, upon which to determine the 1859 fair market value of the subject lands. Miami Tribe of Oklahoma v. United States, 146 Ct. Cl. 421, 175 F. Supp. 926 (1959).

7/ Contrary to the view expressed by plaintiff's counsel (pp. 124-125 -- Petitioner's Proposed Findings of Fact and Conclusions of Law -- Value and Brief), Mr. Holbrook, the plaintiff's appraiser, did not make any specific discount for the size of the tract in his value computations. Mr. Holbrook did attempt to show that the rangeland would produce more than sufficient income to offset any costs incurred during the holding period needed to dispose of the lands within the subject tract. However, the production of such offsetting income was derived primarily from Mr. Holbrook's refined "income" to "forage" method of evaluating the rangeland, which concept the Commission has specifically rejected.
a further discount in order to compensate for this factor. Based upon
our findings of fact and all the evidence of record, the Commission has
concluded that, as of March 8, 1859, the effective date of the 1855
Treaty, the subject lands had a fair market value of $1,650,000, or
approximately $1.03 per acre.

Under the provisions of the 1855 Treaty the United States agreed to
pay and did pay $313,682.70 to the plaintiff tribe for the ceded area.
The 1855 Treaty also established a permanent reservation for the Warm
Springs Indians. This reservation of more than 500,000 acres was
located southwest of the subject tract. Since it formed part of the
consideration for the lands ceded to the United States under the 1855
Treaty, the defendant shall be entitled to a proper credit for this
reservation against any award herein to the plaintiff tribe.

The defendant has valued the Warm Springs reservation at $85,470
as of March 8, 1859, the effective date of the 1855 Treaty. For the
purpose of testing the conscionability of the 1855 Treaty consider-
ation, the Commission has added defendant's fair market figure to the
$313,682.70 actually paid to the plaintiff tribe, and we have
concluded that for lands having a value of $1,650,000 the United States
paid the plaintiff tribe an unconscionable consideration. within

8/ In Nez Perce Tribe of Indians v. United States, 176 Ct. Cl. 815 (1966)
reversing and remanding Docket 175-B, 13 Ind. Cl. Comm. 184 (1964), the
Court of Claims suggested, as reasonable, discounts in the range of 20-25
per cent for the elements of size and accessibility. If such discounts
are applied to plaintiff's estimated $1.79 per acre fair market value figure
for the subject tract, the result comports favorably with the Commission's
market value conclusion.
the meaning of Section 2, Clause 3, of the Indian Claims Commission Act, 60 Stat. 1049, 1050.

Accordingly, the plaintiff is entitled to recover from the defendant the sum of $1,336,317.30 less allowable offsets. The case shall now proceed to a determination of the proper credit to be allowed the defendant for the Warm Springs reservation as of the effective date of the 1855 Treaty, and for a determination of all other offsets and matters bearing upon the extent of defendant's liability to the plaintiff.

Concurring:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Brantley Blue, Commissioner

Jerome K. Kuykendall, Chairman
Commissioner Pierce dissenting:

It is with regret that I write this dissent since in doing so I must not only disagree with the conclusions of the majority as to the value of the subject land, which value I think is found to be substantially below that required by the whole record, but because I must point out how the findings of fact made by the majority are, in my opinion, seriously inadequate in the light of the record assembled by the parties in this case. In addition, I disagree with some aspects of the majority's theory on valuation as applied to this particular case.

At the outset, because I believe that proper findings of fact are basic to a decision such as the one rendered in this case, I will state my position on the function of findings of fact and the obligation of the Commission to make them under the terms of the Indian Claims Commission Act as interpreted on many occasions by the United States Court of Claims. My conviction is that both parties are entitled to findings which reflect every fact established by the complete record whether or not some fact may be deemed immaterial by the trier of the facts in the light of his particular legal concept of the proper resolution of the issues in the case. As we all know, in a case where the facts are not substantially in dispute, the parties still have completely opposing legal or economic theories relative to the disposition of the lawsuit, and this is true in a valuation proceeding where one might suppose, mistakenly, that the issues are purely factual. Under one theory certain undisputed proven facts may
be immaterial, while under another they may be essential and dispositive. Accordingly, I do not believe that the Commission is free to refrain from making findings which are justified by the record just because those findings are not necessary to support the particular conclusion reached by the Commission, or because, though not in dispute and amply supported by the record, the Commission rejects the theory of valuation they support. If, on appeal, the appellate court rules that the Commission erred in rejecting one or more of the value theories not made the subject of findings of fact, the court would be justified in refusing to review the record to determine whether or not it contained sufficient evidence to warrant additional findings in support of the improperly rejected value theory and, instead, might remand the case for the making of further findings. The Commission's incidental allusions to record facts supporting the rejected theories will not, I think, serve to supply the deficiency in the findings. Atchison, T. & S. F. Ry. Co. v. United States, 295 U. S. 193, 201, 202 (1935).

This whole problem is dealt with at some length in an early opinion of the Court of Claims in Snake or Piute Indians of the Former Malheur Reservation v. United States, Docket 17, 125 Ct. Cl. 241 (1953), beginning particularly with the discussion which starts on page 247. In that case, as in this, the Commission followed the literal injunction of Section 19 of the Indian Claims Commission Act and made "findings of the facts upon which its conclusions are based" but failed to make findings of fact established by the whole record so as to enable the Court to make the sort of review called for in Section 20(b) of the Act. Osage Nation of Indians v. United States, Docket 9, 119 Ct. Cl. 592, 97 F. Supp. 381 (1951).
cert. denied, 342 U. S. 896 (1951). One of the cases cited in the Snake decision is particularly apposite to the situation here. In United States v. Morow, 182 F. 2d 986 (1950), a suit brought against the United States under the Federal Tort Claims Act for personal injuries and damages to her car in a collision with a United States Marine Corps truck, the District Court had rendered a judgment in favor of plaintiff. On appeal, the Circuit Court of Appeals held that the District Court had misinterpreted the last-clear-chance doctrine as applied in the State of Virginia and that under a proper interpretation of that doctrine, the findings of the District Court were not sufficiently comprehensive. The Court of Appeals stated that there was evidence in the record not made the subject of findings which might well have supported the District Court's conclusion that the plaintiff was entitled to recover, but that the appellate court would not so hold and remanded the case to the District Court to make additional findings, stating at page 989,

The findings of the District Court are not sufficiently comprehensive to warrant us in directing the entry of judgment for the defendant United States or in affirming the judgment for the plaintiff on the basis of evidence not made the subject of findings of the District Court. (Emphasis supplied)

I am aware of those cases which hold that detailed findings of every subsidiary evidentiary fact are not required, but this is so only where there appears to be no omission which is in any way prejudicial to one of the parties. See Capital Transit Co. v. United States, 97 F. Supp. 614, 621 (1951). In the instant case I believe the omissions to be prejudicial to the plaintiff.
In this case the majority has adopted theories of value which in some instances correspond to those urged by plaintiff and in others do not. Where the Commission agrees with plaintiff's basic value theory, it sometimes fails to make all the findings which I believe are justified by the record and then makes an ultimate finding of value which, in my opinion, is short of the mark. In other instances where the Commission rejects plaintiff's theory on the relevance of a particular item of value, it makes no findings at all, although in the course of rejecting the theory in its opinion, the majority discusses unrefuted evidence not made the subject of any findings. It was this latter practice of the Commission, particularly in connection with its rejection of plaintiff's so-called economic site theory of value, which led me to examine in detail the evidentiary record in this case and impelled me to my conclusion that the findings of fact were in material respects inadequate.

In arriving at its conclusions as to the value of the Warm Springs lands the majority has, in general, followed the formula suggested in the opinion of the Court of Claims in Alcea Band of Tillamooks, et al. v. United States, 115 Ct. Cl. 463, 87 F. Supp. 938, (1950), rev'd. as to interest only, 314 U. S. 48 (1951), and in many subsequent opinions of the Court and the Commission, considering the location of the lands, their physical characteristics, the history of the Oregon Territory (the Alcea case also dealt with Oregon lands in the 1850's), federal laws relating to the disposal of lands in Oregon, private sales of land in and around the tribal area, natural resources in the subject area and
their development in the relevant period, the population in the area, the demand for the land, commerce in the area, and the actual and potential value of the area's natural resources such as timber, grazing lands, agricultural lands, etc.

It was plaintiff's thesis throughout the trial of this case that the subject area had certain unique characteristics which distinguished it from other Indian lands in the northwest and made it more desirable. Plaintiff went to some pains, through the assistance of excellent reports of its expert witnesses, to document this thesis. On the basis of these reports and the supporting documents, plaintiff urged that because of the tract's location just east of the Cascade Mountains, bordered on the north by the Columbia River, and having good and necessary portages located within the tract, the lands in the hands of a single owner, private or corporate, could have amounted to a monopoly in connection with transportation and east-west travel on the Columbia River for immigrants, for military and commercial traffic, for cattle drives inland to mining communities east and northeast of the tract, and likewise in connection with similar land transportation and travel using the Barlow Road south of and just outside the tract. Plaintiff also urged that in addition to the value accruing to the tract by virtue of this monopolistic potential and the presence in the tract of such "economic sites" as the city of The Dalles and the two important portages established long before the valuation date at the Cascades in the northwestern corner of the tract
and at The Dalles and Celilo in the eastern part of the tract, the grazing potential of the land was greatly enhanced by the fact that because of the natural barriers provided on the west by the Cascade Mountains, on the north by the Columbia River, on the east by gorges and wastelands, and including in the interior a useful segmentation into large separate grazing areas by reason of the location of otherwise uneconomic stands of forest lands, a single owner could, with minimum manpower and expense, control for his own use the grazing lands in the tract while making whatever use he wished of the free public range lands to the south and east. The facts upon which plaintiff relies in support of this valuation theory are firmly established by the record. In addition, the record establishes that until ratification of the Warm Springs treaty on March 8, 1859, official government policy prohibited settlement of these lands. However, settlers in fact came to live in the tract, planted orchards which took from 5 to 10 years to mature, cleared much of the good agricultural land and cultivated it, made permanent improvements wherever they settled, procured franchises to build bridges over watercourses in the tract, and operated ferries and portages. They even persuaded the Oregon Territorial legislature to organize as a separate unit of civil administration Wasco County which included in it all of this Indian land, and incorporated as the county seat the city of The Dalles in 1857, although the city could not officially be entered as a townsite at the land office in Oregon City until April 17, 1860, after extinguishment of Indian title to the land on which the city was confidently thriving. Although settlers in the Willamette Valley had likewise staked their
claims on land to which Indian title had not been extinguished, the Indians west of the Cascades were friendly, and there was little problem negotiating and ratifying treaties of cession in 1854 which served to clear title to the Willamette Valley lands. This was not true east of the Cascades where the Indians did not want to part with their land, and when they did so in 1855, they were shortly at war with the white miners who crossed Yakima lands to get to a gold strike reported in the vicinity of Colville. The Yakima Indians considered this an invasion of their territory on which, under their recent treaty of cession, they had understood they might remain unmolested by whites until a year following ratification. (Treaty of June 9, 1855, 12 Stat. 951, ratified March 8, 1859) In 1855, the other tribes in the area who had also signed treaties of cession, including the Warm Springs Indians, joined forces with the Yakimas, and until early 1858 these Indians kept the federal military forces and the territorial militia at bay and the area in constant turmoil. Yet, despite this, settlers came from the quiet Willamette Valley and from the east where free land was already cleared of Indian title, to make their homes and transact business on land to which Indian title had not been extinguished and on which they had been expressly forbidden to settle.

For the most part, the above facts, excellently documented and undisputed, have not been made the subject of findings. Their existence is referred to only superficially, if at all, by the majority in its opinion rejecting plaintiff's contentions that the subject land was in
real demand, that transportation through the tract by water and land was good in the light of all the circumstances, that the three economic sites, i.e., the Cascades portage, The Dalles city, and the Dalles-Celilo portage, greatly enhanced the desirability and value of the tract in 1859. The majority characterizes plaintiff's economic sites evaluation as a "unique concept" in which there is little merit, although the opinion finally states that along with the other physical characteristics of the tract, these economic sites were "a distinct plus, and without them the Commission's 1859 evaluation of the Warm Springs tract would have been somewhat less." I see nothing unique in plaintiff's economic sites evaluation argument, but I do think the tract enjoyed a unique advantage because of the presence in it of these sites, the value of which is attested by the fact that they were being profitably operated on Indian land during an Indian war and at a time when officially, at least, the federal government had banned all white activity in the tract except that of the military. Plaintiff attempted to arrive at a monetary value representing the amount by which it felt these three economic sites enhanced the value of the whole tract. The figure suggested, $585,000.00, was rejected by the majority as being conjectural and speculative. Yet in the absence of primary findings on the abundance of evidence relied on by plaintiff in reaching this figure, it is not possible to judge just how conjectural or speculative the figure actually is. My own study of the evidence persuades me that plaintiff's estimate of the amount by which these economic sites enhanced the value of the tract is, if anything, too modest.
With respect to certain of the majority's findings of fact, I find some to be incomplete in the light of the record, and others somewhat misleading. Findings 59, 60, 61 and 65 deal with the subject of transportation to, within, and out of the subject tract. The general tone is that transportation was poor where it existed and sparse in general. The fact that the Oregon Trail traversed more than 40 miles of the northern portion of the subject area is not mentioned, but the fact that it was a difficult route for wheeled vehicles and not "fixed", changing somewhat from year to year, is noted. Plaintiff did not suggest that the Oregon Trail was a superhighway, but proved that it was a heavily traveled route ending at The Dalles and that its importance could hardly be overestimated from the standpoint of the immigrants bound for the Willamette Valley and the Puget Sound region, army troops and supplies being transported to and from Fort Dalles, and miners traveling from the west to the mines east and northeast of the tract. Finding 60 states that in 1859 and for many years thereafter the Columbia River and the Oregon Trail were the principal means of access to the subject tract and that "the almost complete lack of access roads to the Columbia River and transport facilities to the interior, particularly in the eastern portion of the subject tract, delayed any appreciable settlement until well into the 1870's and 1880's." This statement is, I believe, contrary to the record insofar as it speaks of lack of access roads to the Columbia River. The evidence is undisputed that there were
several well traveled, if primitive, routes crisscrossing the tract and connecting the Barlow Road (discussed in Finding 61) with the Columbia River and the Oregon Trail. One such route was the Dalles to Tygh Valley and Warm Springs Road linking The Dalles with the Barlow Road and also the Warm Springs Reservation with The Dalles. Immigrant trains destined for the Willamette Valley used this road annually, and miners from the Willamette Valley and California followed the road in 1858 and later. Supplies, troops, and administrative personnel traveled the route to the Warm Springs Reservation, and the Indians continued to use it to make their annual migration to the fishing grounds at Celilo Falls on the Columbia River. The John Day to Tygh Valley Road was constructed in 1847 shortly after the completion of the Barlow Road and was a shortcut from the John Day River to settlements in the Willamette Valley. This was another immigrant route and a route for cattle drives which followed the road across the upper Deschutes River near Sherar's Bridge. No findings are made on this evidence. In Finding 61 the Barlow Road is conceded to be an alternate route to the Columbia River water route for immigrant wagons traveling through The Dalles to the Willamette Valley between 1846 and 1847, but it is described as a "miserable road at best, impassable eight months of the year and not improved by heavy travel." In the opinion, the Barlow Road is described as a "famous" road, located outside the tract in suit, "well beyond the control of any prospective owner of the tract, and a road
over which great numbers of cattle were driven into the area south of the tract." This statement is, I think, contrary to the inference which is impelled by Finding of Fact 61 and certainly by the evidence of record. The finding points out that, although the road was outside the subject tract, it was the land gate through which commerce, crossing the Cascade Mountains at that point, entered or left the subject tract, and connected with a trail which led southwest from The Dalles through the subject tract. Although undisputed in the record, the finding does not mention that the road began about 10 miles west of Tygh Valley, a valley located in the subject tract which was used for grazing cattle, and extended west, not east, south of Mount Hood along a route similar to the present Mount Hood Loop highway west of the Cascade Mountains. The fact that the road was outside the subject tract did not mean that it was beyond the control of any prospective purchaser of the tract, since its very reason for being was to provide an alternate route out of the tract from The Dalles to the Willamette Valley from 1846 to 1864. In Volume II of the report of plaintiff's expert witness there is evidence that at least the wagon traffic on the Barlow Road was a one-way matter from east to west on the Barlow Road because the road's 60 percent grade in places required westbound wagons to be lowered by ropes and chains passed around trees. It would have been nearly impossible for horse or oxen to pull wagons up such hills on an eastward journey. There was, however, significant eastward movement of cattle along the Barlow Road into the subject area during times relevant to this litigation. It would seem
reasonable to conclude on the basis of the record evidence that a single owner of the Warm Springs tract in 1859 could have effectively controlled any significant use of the Barlow Road and that if such owner wanted to prevent traffic, persons or cattle, from entering his land, this toll road would have become useless. On the other hand it would be equally reasonable to infer that the presence of the road would be a distinct asset to the owner of the subject tract. Finally, the record contains unrefuted evidence of bridges, ferries, pack trails, cattle trails, and innumerable Indian trails that could and may well have been used. It also contained local roads connecting settlements with The Dalles. The Commission's findings on shipping and transportation on the Columbia River are relatively complete although they do not mention that it was the policy of those holding the monopoly on river transportation, including the Oregon Steam Navigation Company, to charge all that the traffic could bear for passenger and freight transportation and that apparently the traffic could bear a great deal. Other evidence shows there were large amounts of freight transported between 1861 and 1864 and over 90,000 passengers, with profits that would have allowed a 20 percent dividend. On the basis of all the evidence a reasonable inference would seem to be that purchasing power within the subject tract and the area served by the tract was high.

Finally, on the matter of shipping and transportation which could have been controlled by the owner of this tract in 1859 and thereafter, more specific and complete findings would, I think, justify certain
affirmative conclusions regarding the tract which would have a direct bearing on its importance in the surrounding area, the demand for the tract, and the great contribution the transportation and shipping facilities, land and water, made to the value of this tract. Despite the fact that the tract was sparsely settled prior to 1859, as were most Indian lands, the settlements in the tract were thriving and were performing essential functions for enterprises in the tract and in the areas to the east and west thereof, i.e., the cattle and agricultural Willamette Valley enterprises, cattle industry in western Oregon and California, the mines in Colville and Idaho, and the military in the area and in eastern Washington, Oregon, and Idaho. Such service was possible because of these primitive but greatly used transportation routes through the area from east to west and from north to south. It is fair to conclude that at the times in question it was essential to keep the tract open as a means of egress and ingress and to keep it functioning to meet the demands of the huge traffic passing through it in both directions prior to, at, and after the valuation date.

Finding 66, dealing with agriculture in the subject tract, notes that according to the 1860 census there were 34,438 acres of farmland in Wasco County, of which 6,057 acres were improved. It does not state that 85 percent of the population of Wasco County was in the subject tract and that the only significant settlement outside the tract was in the vicinity of Umatilla. The finding states that the 1860 census shows an estimated cash value of all Wasco County farmlands, including
improvements, to be roughly $8.24 per acre. It then states that by far the greatest farming efforts were concentrated in the Walla Walla Valley, well east of the subject tract where the largest body of attractive lowland soils lay. I can find no support for this statement in the record as of 1859. The 1860 census reports farmland in Walla Walla County in Washington Territory to be worth on the average $4.98 per acre. Likewise, the finding's statement that the most desirable land in the subject tract consisted of 20,000 acres of bottom land along creeks and streams where farmers were engaged in subsistence farming is not, in my opinion, supported by the record unless one relies on defendant's expert's testimony that he arrived at the 20,000-acre figure by the use of a planimeter on a contour map, a method he admitted was not one to insure any impressive degree of accuracy. As for the superiority of the Walla Walla farmlands, the only authority I can find is defendant's expert who, in testifying at the trial that he preferred Walla Walla land over the subject tract, appeared to be speaking of the land as of today and not as of 1859 when, of course, he could scarcely have been in a position to entertain such a preference. Mr. Ramey, defendant's expert witness, also testified that farming in the tract in 1859 was principally subsistence farming, although he then stated that farmers in the tract cultivated a number of large orchards and sold their surplus locally, chiefly at The Dalles. Cultivating orchards which take from 5 to 10 years to be productive, and raising enough produce to have a profitable surplus for sale, does
not sound like pure subsistence farming to me. The record contains evidence that these farmers obtained quite high prices for the fruit, surplus vegetables, and grain they sold to transients, townspeople, and the military. The finding concludes that while the technical feasibility of growing grain on the hills and benchlands and in the valleys was established in the 1860's, the economic feasibility of this was not established that early and that the first wheat raised for grain was harvested in 1879. I fail to see how this fact detracts from the agricultural value of the tract in 1859 when farming, fruit-growing, and grazing (to be discussed later) were going on profitably and substantially over the subsistence level. The fact that this land developed a different value potential later or that land in Walla Walla, Washington, in the mid-1860's was considered fine farming land, has nothing, in my opinion, to do with the value of the subject tract in 1859. In view of the imperfect titles to land in the area in suit, the Indian wars, the official opposition to settlement, and with all the free, and according to the majority, vastly superior land available elsewhere, there must have been something that made this particular tract very desirable to those hardy souls who cultivated farms and raised fruit in the 1850's.

On the question of livestock, Finding 67 is well supported by the record. However, the implication that cattlemen had no interest in owning any of this land for grazing purposes because of the free range and free water policy of the Government, ignores the fact that under
applicable land policies in the 1850's, 1860's and 1870's, a cattle-
man could not own enough land to make a livestock operation profitable.
In valuing this tract, it seems to me we should assume that a cattleman
or a group of cattlemen could buy this large tract. The fact that there
was free range land and free water elsewhere would not necessarily deter
them from purchasing 1,600,000 acres containing over a million acres of
good grazing land with sufficient water and natural boundaries which,
without fencing and with a minimum of manpower policing, could be kept
free of intruders. The free range, subject to overgrazing, would only
enhance the value of such a large singly owned tract since that free
range would be available to the owner of the large tract but not to
others. That settlers in the subject tract did not apply themselves
vigorously to raising horses or cattle on a large scale was probably
due to the fact that they could not acquire enough land to devote to
grazing and were satisfied with their lucrative farming and fruit growing
activities, not to mention the title problems which must have given
them some pause.

Finding 72 discusses the general economic conditions in the area.
I am unable to understand the basis for the conclusion that the economic
situation in Oregon during the 1850's and 1860's was not one that would
have promoted or encouraged investment of outside capital. Plaintiff's
expert testified without refutation that Oregon citizens did not seek
outside capital, not that such capital was unavailable; that Oregon's

1/ At the trial, Dr. Dorothy Johansen, one of plaintiff's expert witnesses,
recalled and testified that in 1854 there was a severe recession in the busin
world; that in 1857 and early 1858 "You couldn't buy money for any price" (Tr.
p. 402); that by late 1858 and in 1859 the money market was very easy and
interest on long-term loans was from 6 to 7%.
gold production was sufficient to meet its needs; and that Oregon made no effort to compete economically with San Francisco and Puget Sound.

Finding 73 deals with plaintiff's three-volume appraisal report and Finding 74 with defendant's one-volume report. The treatment of both is so summary that the discussion in the opinion of facts not in these findings is difficult to understand.

Finding 75 deals with "Sales Data." The majority rejects any value which it suspects may represent improvements, discards as not worthy of consideration any "resales", and deems several so-called unique transactions unrepresentative and abnormally inflated. The finding also disapproves of the extraordinary high-priced sales of undivided 1/2 and fractional interests in lots contained in plaintiff's exhibit showing sales in this and surrounding areas. The finding does not list the sales it accepted as reliable or those it rejected as unreliable. I have examined Plaintiff's Exhibit 701 EEE which is the basis for this finding and am unable to determine the foundation for the calculations reached in the finding. Some of the undivided 1/2 interests sold for quite low amounts, and there is some indication that they may have been included in the majority's calculations. In any event, the finding simply does not furnish sufficient basic data to warrant any reliable conclusion. I think it was arbitrary to reject evidence of sales on the assumption that the particular properties sold must have had a unique value to the purchasers whenever high prices were paid. I can find nothing in the record to support such an assumption. As for the presence of improvements and the fact
that some of the sales data reflected "resales", I revert to the fact that the land being sold was not the property of the sellers, but was Indian land. If the Indians are not entitled to be paid for the improvements or to have the land valued at the "resale" prices, the fact that trespassers were willing to place valuable improvements on this land and that others were willing to pay high prices for land to which they were getting very doubtful title, if any, is surely evidence of the desirability of and demand for this land we are asked to value. See Osage Nation v. United States, supra.

Finding 76 places a value on the tract, dividing the land into four classifications each of which contributed to the overall fair market value of the tract. In placing a value on the townsites in the tract, the finding confines itself to The Dalles, although the record establishes that there were six other potential townsites in existence on the valuation date which must have enhanced the value of the tract (Cascades, Mosier, Hood River, Celilo, Dufur, and Tygh Valley). The Dalles is characterized as "busy if not prosperous." The record appears to support a finding that the town was both busy and prosperous. The finding concludes that The Dalles contributed $100,000 to the tract. Plaintiff urged a value contribution of $150,000, which in the light of the record, including the 1860 census and the tax assessment records in evidence, plus the market sales data in Plaintiff's Exhibit 701 EEE, seems a modest valuation. Both the census data and the tax assessment data are admitted to undervalue the land in The Dalles. Certainly the
two clouds on title to land in this township, unextinguished Indian title and the claim of the Methodist Episcopal Church not settled for many years after 1859, must have affected the prices which the individual owners could get on sale of the lands, a problem a single owner buying good title in 1859 would not have had to contend with. The record contains contemporary expressions of persons living in The Dalles concerning the value of the townsite urged by plaintiff, and this evidence is not refuted.

The majority's valuation of the cropland in the subject tract is $2.02 per acre as contrasted with the approximately $2.50 claimed by plaintiff. The finding is so summary that it is impossible for me to determine how this figure was reached, whereas the record contains a great amount of detail which would support a reliable figure somewhat in excess of that found by the majority. As it stands, I do not think the finding even supports the $2.02 found by the majority.

The finding contains a very brief statement concerning the grazing land, in excess of a million acres, noting that this large grazing area was not used to its full potential, that the land nearest The Dalles became a holding area for cattle shipped from the west, and that the government's free range policy and the superior grazing land east of the subject tract, had a depressing effect on the value of the land as grazing land. The finding concludes that the grazing land contributed about $0.84 per acre to the value of the tract in 1859. Before discussing this finding, I will mention the Commission's valuation of the timberland.
in the tract. The finding states that there were 433,350 acres of
timberland and six operating saw mills located near the most accessible
timber; that there was ample lumber for local building needs for farmers,
The Dalles, and the military; that there were no commercial sales of
timberland on the tract in 1859, and accessible timber was free for
the taking; that in the absence of railroad facilities or other means
of transportation to reach the interior timber stands, there was no
commercial or export market for the timber on the tract in the 1850's
and 1860's. The majority then concludes that the timberlands contributed
$0.87 per acre in 1859 to the subject tract, more than the value assigned
to the grazing land.

The plaintiff did not value the timberlands separately because it
was undisputed that in 1859 such lands were not commercially valuable
as timberland for the reasons set forth in the above discussed finding
of the Commission. Plaintiff did, however, consider that the record
established that the presence and location of the forests in this tract
greatly enhanced the value of the grazing lands as did the marginal or,
as defendant terms them, the waste lands. Accordingly plaintiff valued
as a single unit the grazing, timber, and marginal lands on the theory,
well supported by the record, that a prospective purchaser would have
considered the grazing lands well worth having not only because of the
bunchgrass and other fodder present on them, but because they were, in
effect, "fenced" by the forests and marginal lands, and guaranteed
continued moisture and protection for the cattle because of the forests. As stated earlier herein, the location of the marginal lands and the forests rendered the grazing lands controllable cheaply without fencing if the land had been under single ownership. As for the effect of free government range land on the value of the grazing lands, there is absolutely no evidence that the adjacent free range lands were comparable in quality to the range lands in this tract and certainly no tract nearby had the unique characteristics possessed by the Warm Springs grazing lands. Foremost among those characteristics was the strategic location of the tract. The great marketing advantages which would accrue to an owner of these lands because of their location at a place where the owner would control a monopoly on transportation and shipment into and out of the area, created a benefit well above that of the free range lands located outside the subject tract. Because of terrain conditions, the lands bordering on the north side of the Columbia River did not provide access to the river except for one stretch of bad river near the Cascades where there was a portage on the north shore. A potential purchaser of grazing lands in 1859 would be mindful that the Warm Springs grazing lands included virtually all routes to other markets in the inland Pacific Northwest. The quick growth of mining communities north and east of the tract spurred the demand for livestock operations in this area. From 1850 on, the needs of the military posts at The Dalles, Fort Walla Walla and Fort Simcoe, and the improvement
and increases in transportation services available, plus the growth of population in the area at and after the valuation date, stimulated the demand for livestock. In the light of all of the above facts and others not made the subject of findings, I think that plaintiff's value of $1.21 per acre for the grazing lands as a contribution to the value of the tract, was unusually accurate. It is certainly supported by the record and also the record supports its method of valuing the grazing lands, timber lands, and marginal lands, as a unit. I admit that reaching a value in such a case is very subjective, but I think the majority's method of valuing the timber and grazing land separately is completely unjustified by the record, and the value resulting from that method is less than even the bare minimum supported by the record.

In the opinion the majority gives its reasons for the low value it places on the grazing land. Without the benefit of findings on the evidence of how the grazing land might have been economically controlled without fencing and with little manpower, the opinion states that the record does not demonstrate the economic feasibility of such a grazing venture; that if any enterprising cattleman had been denied access to the subject tract by our hypothetical single owner, he would quickly have found a way to avoid the area and reach the adjoining millions of acres of free range land. There are no findings, and no evidence to support findings, that the millions of acres of free range land adjoining this tract were at all comparable to or as desirable as the grazing lands in this tract, or that such enterprising cattleman would not have been
happy to pay a modest fee to graze his cattle on the Warm Springs tract on the drive north to the Columbia River and the routes to the places north and east of the tract where the demand for the cattle was greatest.

In commenting upon plaintiff's expert's (Mr. Holbrook) method of evaluating the grazing lands, the opinion characterizes his "forage" to "income" approach as a sophisticated refinement which was not a concept or practice in vogue as of the valuation date. Since the majority has made no findings relative to the data used or the material in the study on which Mr. Holbrook based his sophisticated approach to valuation, it is impossible to tell whether or not the approach was a valid one. The opinion then reverts to its favorite theme of the depressing effect on the value of the grazing land created by the abundance of free grazing land.

The opinion concludes that a prospective purchaser would not have paid even the government price of $1.25 per acre for this land since he would have recognized that the demand for the lands was limited indeed, and he would have been forced to hold the tract for a considerable time at some cost awaiting opportunity for future sales. There are no findings to support this conclusion but the record contains much evidence that tends to establish that a single owner could have promptly realized substantial income from this tract to offset any costs of the holding period. Some of the means established by the record are income from grazing cattle,
fees charged to cattlemen for the privilege of grazing and crossing
the tract, tolls for using the portages and bridges necessary for
crossing the tract on the northern boundary, resales at modest prices
of land which had been settled and improved for agricultural, commercial
and townsite purposes so that the "owners" would finally have clear title
to the land, and sales of larger tracts than private persons could pur-
chase from the government under applicable federal land disposal
laws.

In addition to applying a discount because of the assumed long holding
time and the high development costs, neither of which I believe the
record justifies, the majority has also discounted the value of the land
because of its problems of accessibility, particularly in the eastern
portions of the tract. As I have already pointed out, the record
establishes that this tract presented no problems of accessibility
into the interior. Considering the time of the cession and the princi-
tiveness of transportation west of the Mississippi River, generally,
transportation to and from this tract was probably superior to many
others and there was certainly a lot of it going on.

In conclusion, I think that the $1.03 per acre found by the majority
to be the fair market value of this land in 1859 is not supported by the
evidence in the whole record, and that the findings inadequately represent
that record.
As to what value I would place on this land as of 1859, I think the evidence in this case comes closer to establishing the value requested by plaintiff than in any case I have examined in a very long time. In any event, the value required by the record is much closer to the $1.79 per acre requested by plaintiff than the $1.03 per acre determined by the majority.

Margaret H. Pierce, Commissioner