

BEFORE THE INDIAN CLAIMS COMMISSION

MINNESOTA CHIPPEWA TRIBE, WHITE)
 EARTH BAND, LEECH LAKE BAND,)
 MILLE LAC BAND, ED WILSON,)
 JAMES DAVIS, JOHN CORBOW,)
 WILLIAM MORELL, HAROLD EMERSON,)
 JOSEPH MORRISON, OLE SAM,)
 MONROE SKINAWAY, EUGENE REYNOLDS,)
 FRANK LA ROSE, JOSEPH MONROE,)
 ARCHIE LIBBY AND JOHN SQUIRREL,)
)
 Plaintiffs,)
)
 v.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket Nos. 18-B and 18-N

Decided: November 20, 1964

Appearances:

Jay H. Hoag, with whom was
 Marvin J. Sonosky,
 Attorneys for Plaintiffs

Sim T. Carman, with whom was
 Mr. Assistant Attorney General,
 Ramsey Clark,
 Attorneys for Defendant

OPINION OF THE COMMISSION

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

As we have set forth in an introductory statement to the findings of fact, the original complaint in Docket No. 18-B contained three causes of action against the United States. The second and third causes were subsequently severed and became Causes I and II of Docket No. 18-N.

With respect to Docket No. 18-N this Commission, on August 24, 1955, entered some eight findings of fact. However, in retrospect it was apparent that those findings, or at least portions of them, should not have been made, and, by order of the Commission dated February 27, 1964, they were ordered stricken. In one particular those findings apparently had led petitioners to an abandonment of the first cause of action under Docket No. 18-N and a subsequent attempt to substitute a different claim.

Cause I, Docket No. 18-N, arose out of the Treaty of May 7, 1864, which had cancelled and superseded a previous Treaty of March 11, 1863. Involved was the cession to the United States of the reservations known as Gull Lake, Mille Lacs, Sandy Lake and Rice Lake, Rabbit Lake, and Pokegama Lake. In return the Mississippi Bands of Chippewa Indians received one larger reservation plus other consideration.

In our previously entered findings of fact we found, as urged by the parties, that:

"Finding 2

Under Article 1 of the Treaty of May 7, 1864, 13 Stat. 693, of the eight reservations described in Finding 1, four were ceded to the United States. The four ceded reserves are as follows:

Gull Lake (Royce 453);
Sandy Lake and Rice Lake (Royce 455);
Rabbit Lake (Royce 456); and
Pokagomon Lake (Royce 457).

The Mille Lac Reservation (Royce 454) was not ceded by the Treaty of 1864.

Finding 2A

Following the Treaty of February 22, 1855, 10 Stat. 1165, the Mille Lac Band of Indians remained in possession of their reservation (Royce 454) and "continually and openly occupied said reservation from that date until subsequent to the passage of the act of January 14, 1889." 1/

The difficulty with respect to the Mille Lac Reservation arose from the language in Article 12 of the 1864 Treaty which included a proviso that the Mille Lac Indians should not be compelled to remove from their old reservation to the new one so long as they did not in any way molest the persons or property of the whites.

In 1889 Congress passed an act providing for the sale of all Chippewa lands in Minnesota except the White Earth and Red Lake Reservations, the proceeds to become a permanent fund. The act provided, however, that no subsisting, valid, pre-emption or homestead entry should be sold or disposed of. The act further provided for the appointment of commissioners to negotiate with the Chippewa Indians in Minnesota for the cessions of their reservations. Councils were held with the Mille Lac Indians and on October 5, 1889, a relinquishment was executed ceding all their right, title and interest to certain reservations and relinquishing their "right of occupancy on the Mille Lac Reservation." However, the Mille Lac Reservation lands were not disposed of under the 1889 Act but rather under the general land laws.

1/ This was the finding of the Court of Claims in Mille Lac Chippewas v. United States, 47 C. Cls. 415, 423, Finding vi.

Thereafter, acting under a 1909 special jurisdictional act, the Court of Claims determined that the proviso in Article 12 operated to grant to the Indians more than a mere license or favor or occupancy at sufferance. It was, the Court held, a reservation of the Mille Lac lands--"the right to occupy the same under the express conditions of the reservation" (Mille Lac Chippewas v. The United States, 47 C. Cls. 415, 438). The Court entered judgment for the Mille Lac Chippewas for the value of the entire Mille Lac Reservation.

However, the Supreme Court reversed the decision. The Court held that the lands in the Mille Lac Reservation were expressly ceded to the United States by the 1864 Treaty. But, a controversy thereafter arose over the meaning and effect of the proviso in Article 12 and that controversy continued and was still subsisting when the 1889 act was passed. The Court stated that by the act of 1889 the "controversy was intended to be and was adjusted and composed by concessions on both sides, whereby the lands in the Mille Lac Reservation were put in the same category, and were to be disposed of for the benefit of the Indians in the same manner, as the lands in the other reservations relinquished under the act, but subject to the condition and qualification that all subsisting bona fide pre-emption and homestead entries should be carried to completion and patent under the regulations and decisions in force at the time of their allowance.

"True, it is said on behalf of the Indians that they did not so understand that existing entries could be thus carried to patent. But

of this it is enough to observe that the language of the proviso to §6 is plain and unambiguous; that the agreement recites that the Mille Lacs 'do hereby accept and consent to and ratify the said act and each and all of the provisions thereof;' and that the Indians, no less than the United States, are bound by the plain import of the language of the act and the agreement. Not only so, but the act conferred upon the Mille Lacs many very substantial advantages which doubtless constituted the inducement to the adjustment and composition to which they assented. Among other advantages, it enabled them to share in the proceeds of the disposal of a vast acreage of lands in which they otherwise would have had no interest." (229 U. S. 498, 507-508). The Court held that the Indians were not entitled to recover as to lands covered by the Section 6 proviso of the 1889 Act but were entitled to recover for the remaining lands which had been disposed of under the public land laws but should have been disposed of under the 1889 Act for the benefit of the Indians. Upon remand recovery was had for 31,692.64 acres out of the 61,028.14 total. The remaining 29,335.50 acres had been validly entered prior to the Act.

Following then our ill advised entry of findings in Docket No. 18-N, petitioners stated that they were withdrawing the claim based on the 1864 Treaty. As to this cause of action petitioners contended:

Docket No. 18-N, Claim 1. This docket covers two claims. The first covers five of the reserves established by the 1855 treaty (Royce 453 through 457). The Commission has found that four of these reserves (Royce 453, 455, 456, and 457) were ceded to the United States by the Treaty of March 11, 1863, 12 Stat. 1249, specifically superseded by the Treaty of

May 7, 1864, 13 Stat. 693 (Commission's Finding 2, Docket 18-N). No separate compensation is sought for those four reserves in Docket 18-N and the case stands dismissed as to them (Sonosky, Tr. 1335, 1343).

As to the fifth reserve (Mille Lac, Royce 454) the Commission found that it was not ceded in 1864, but remained in the possession of the Mille Lac Band from 1855 until after the passage of the Act of January 14, 1889 (Commission's Finding 2A, Docket No. 18-N); that the Mille Lac reserve (Royce 454) was disposed of under the public lands laws in violation of the Act of January 14, 1889, 25 Stat. 642, calling for the classification and sale of the land and timber (Commission's Findings 2B, 2C, Docket No. 18-N); that under a special jurisdictional act the Mille Lac Chippewas recovered for 31,692.64 acres but not for the balance of 29,335.50 acres (Commission's Finding 2D in Docket No. 18-N). In Docket No. 18-N, plaintiffs seek to recover compensation for the 29,335.50 acres for which no compensation has been paid. (Pet. Brief, filed September 2, 1958, pp. 2, 3).

While in discussing this claim on June 16, 1960, petitioners' counsel agreed that certain of our previous findings were contrary to the Supreme Court's decision, counsel stated that the claim was predicated on the Commission's findings. Mr. Sonosky stated, "But the Commission has made a finding in the case. We are asking whatever relief may flow from those findings . . . If you adopt the Commission's findings there was no cession under the 1864 treaty and then the claim becomes one of improper disposal of the land." (June 16, 1960, Tr. 6)

In ordering that the findings cited by petitioners be stricken we recognized that those findings had induced the petitioners to abandon their Cause I claim and to seek recovery on a new cause of action. In our opinion entered with that order of February 27, 1964, we stated:

It appears that petitioners have been led to their present position because of the findings previously entered by this Commission. We do not know if petitioners would have withdrawn Cause I if the findings had not been entered. Nor do we know if the present argument of petitioners would be pressed in the absence of the previously entered findings. We agree with Mr. Sonosky that the findings (in part at least) were ill-advised and they will, accordingly, be stricken.

In order that the parties will not in any manner be prejudiced in the presentation of this case, the Commission will now entertain a motion by petitioners to reinstate Cause I, if they so desire. And we will permit the filing of such additional materials or amendments to the proposed findings and briefs as the parties may deem warranted by the striking of our previously entered findings.
(Commission Opinion, Dkt. No. 18-N, February 27, 1964, pp. 4, 5)

On March 18, 1964, petitioners filed a motion to reinstate Cause I of Docket No. 18-N and it was granted by order dated March 30, 1964. On May 21, 1964, petitioners filed proposed findings of fact. However, those findings do not relate to the alleged cause of action entitled Cause I, which concerned the cession of Royce Areas 353 through 357 under the 1864 Treaty. Instead petitioners have proposed findings which are taken in large from the Court of Claims decision in the Mille Lac case and which propose only that petitioners be compensated for 29,335.50 acres of Royce Area 454 (Mille Lac Reservation) based on a valuation as of 1889.

We have in our Findings of Fact Nos. 51 through 57 entered herein made our findings concerning Cause I, Docket 18-N as set forth in the petition. By the 1864 Treaty the Mississippi Bands ceded five reservations containing a net acreage of 246,888.14 acres for one large reservation of some 1,621,678 acres -- over 6 times as large. In addition they received other consideration for the cession. We have found that petitioners have failed to establish any right to recover under Cause I of Docket No. 18-N.

Petitioners have sought to pursue under Cause I of Docket No. 18-N a cause of action based on a violation of the 1889 Nelson Act. Defendant has objected to any consideration of such a claim on the ground that it is not contained in the allegations of petitioners' complaint and that therefore this Commission has no jurisdiction to entertain it. An examination of the complaint clearly reveals that the "claim" urged by petitioners in its Proposed Findings of Fact and Brief is not set forth in its complaint. We agree with defendant that the Indian Claims Commission lacks any jurisdiction to consider this "claim." It is well settled that our jurisdiction is limited to claims sued upon before the expiration date for filing claims. Section 12 of the Indian Claims Commission Act, 60 Stat. 1049, 1052 provided that this Commission should receive claims for a period of five years after approval of the Act, i.e., until August 13, 1951. No claim which was existing before that date but not presented within such period may thereafter be submitted. Petitioners' "claim" based on the 1889 Nelson Act was not timely filed, and we have no jurisdiction to consider it.

Concerning Cause II of Docket No. 18-N there is no controversy as to the title question. Both parties agree and we have found that the Mississippi Bands were the owners by recognized title of Royce Area 507 which was, by the 1867 Treaty, ceded to the United States in exchange for the White Earth Reservation (Royce Area 509) and other consideration.

Accordingly, we turn to the question of the fair market value of the tracts involved, namely:

Docket No. 18-B

Royce Area 357 -- February 22, 1855

Royce Area 454 -- February 22, 1855

Docket No. 18-N

Royce Area 507 -- March 19, 1867

Royce Area 509 -- March 19, 1867

Royce Area 357 actually involves two separate tracts as described in our Findings of Fact Nos. 48, 49 and 50, as amended. The parties have by stipulation agreed that the respective net acreages of the two Royce Area 357 tracts were:

Mississippi Bands	4,452,100 acres
Pillager and Lake Winnibigoshish Bands	5,781,600 acres

The total net acreage of Royce Area 357 was 10,233,700 acres, and the parties have also agreed that the Commission shall value Royce Area 357 as a whole and apply the resulting average per acre value to each of the separately owned tracts.

The Mille Lac Reservation was the only reservation set aside by the 1855 Treaty which was not within the ceded Royce Area 357. The reservations which were set apart for the Indians constituted part of the inducement for the cession of Royce Area 357. Those reservations are set forth in our Findings of Fact No. 42(e)--five for the Mississippi Bands and three for the Pillager and Lake Winnibigoshish Bands. The acreages of the seven reservations located within the boundaries of Royce Area 357 have been deducted from the gross acreage of Royce Area 357. The value of the eighth reservation, the Mille Lac, will be included as part of the consideration received by the Mississippi Bands

for the cession of that part of Royce Area 357 owned by them. The Mille Lac Reservation contained 60,365.39 acres.

The acreages of the two areas involved in Docket No. 18-N were:

Royce Area 507 -- 1,621,678

Royce Area 509 814,960

While there has been no difficulty with respect to the overall acreages of the tracts involved, there has been disagreement among the parties in apportioning the various land categories -- and in particular the swamp land areas. We have in our Finding of Fact No. 66 set forth the methods employed by defendant's expert, Mr. Dewey Newcombe, in arriving at his swamp land acreages. We find that the documentary material relied upon by Mr. Newcombe (much of which was supplied by petitioners after the hearings had been concluded) does not, in a number of instances, support his conclusions. We have concluded that the computations made by Mr. Trygg represent the best available evidence, and we have, therefore, utilized those figures in arriving at our findings on the land classification acreages.

The lands to be valued are located in the north-central portions of Minnesota. All of the lands involved are encompassed within the exterior bounds of Royce Area 357 except for a small "trumpet-shaped" segment of Royce Area 507 extending to the north-west and the Mille Lac Reservation (Royce Area 454) which nearly adjoins Royce Area 357 on the south. Accordingly, most of our findings and this opinion have been drafted with the greater emphasis on Royce Area 357 with findings entered when necessary to reflect diverse factors affecting market value of the other tracts

involved. While our findings must necessarily deal also with factors pertaining to both the 1855 and 1867 valuation dates, we have considered with respect to each of the tracts involved only those factors which would have affected the fair market value on the respective dates involved.

The subject areas are located in a portion of the country where the climate was rather severe. The topography was generally level to gently sloping. The area contained a large network of streams and rivers with many lakes. There was much poorly drained land. As we have found Royce Area 357 was classified as 6.7% water and 22% swamp land. Over half of the areas were forested and this contributed the most valuable asset which the subject lands possessed on the 1855 and 1867 valuation dates. Smaller percentages of the areas were classified as agricultural land. About 16% of Royce Area 357 was located in the Red River valley. Royce Area 509 also included lands in the west which were part of the fertile Red River valley (about 35% of Royce Area 509 was classified as agricultural land). And Royce Area 507 had some 325,000 acres (about 20%) of agricultural lands located in the "trumpet-shaped" segment which extended outside Royce Area 357.

The subject areas were sparsely populated at the time of valuation. Most of the white population in Minnesota was located in the southern portion, chiefly around the present cities of Minneapolis and St. Paul. The Territory of Minnesota had been created in 1849 and in 1858 Minnesota was admitted to the Union.

Early transportation consisted of the overland trails which had been made by the Indians and on the navigable rivers within the subject areas. The Mississippi River had its source in Royce Area 357 and its numerous tributaries comprised an extensive river transportation system. In 1854 the railroad had reached the east bank of the Mississippi at Rock Island, Illinois, close to 400 miles from Royce Area 357. There was steamship traffic down the Mississippi connecting St. Paul (about 90 miles south of Royce Area 357) and Rock Island. In 1855 there were no railroads in Minnesota. The first rail lines were laid in 1862. By the end of 1867 there were 429 miles of track in Minnesota. The first railroad to enter Royce Area 357 was completed in 1871 (the line from Duluth to Moorehead).

At the time of the 1855 and 1867 cessions, the law provided for the acquisition of public lands in Minnesota by purchase or settlement. The provisions of the pre-emption laws were extended to the Territory of Minnesota in 1854. In 1862 the Homestead Act permitted settlers to acquire 160 acres by residence, improvement and cultivation for five years.

The first local land office for the sale of public land in Minnesota was established at St. Croix Falls, Wisconsin, in 1847, and the next year it was moved to Stillwater in Minnesota Territory. During the decade ending in 1858, all the various land offices in Minnesota sold about 5,859,000 acres of land, of which about 4,113,000 were entered with bounty lands warrants and the remainder sold for cash.

In 1855 there was virtually no demand for agricultural land in the area of the Red River Valley included within Royce Area 357. The leading wheat counties in Minnesota during the 1850 to 1870 period were in the south. It was not until the railroads reached the area that there was any real interest in the agricultural lands of the area. This lack of demand for agricultural lands is clearly demonstrated by the land sale figures introduced by petitioners. Mr. Davis' land sale study covered the period from 1853 through 1875. Of the 5636 sales studied, only 393 were agricultural sales. There were no agricultural sales from 1853 through 1860. And through 1865 there were only two agricultural sales. In fact through 1870, a date fifteen years after the 1855 valuation date and three years after the 1867 valuation date, there were only 12 sales of agricultural land. Those 12 sales all occurred in three townships of Clay County watered by the Red River.

As of the respective valuation dates over one-half of the tracts in question were timbered. The evidence clearly indicates that the forested areas were a complicated patchwork of a great variety of species. There were few solid blocks of any one species. As of 1855 the white pine constituted Royce Area 357's most valuable asset. While petitioners have vigorously contended that both the white and Norway pine were of equal commercial importance and value as of both the 1855 and 1867 valuation dates, we do not find that the evidence supports such a contention. As of 1855 the lumbering industry, which was just beginning in Minnesota, was concerned only with the white pine. In 1867 the white pine certainly dominated the industry although the Norway pine was just

beginning to be recognized commercially. As Agnes Larson wrote in the History of the White Pine Industry in Minnesota, "Before 1855-90 the term lumbering as used in Michigan, Wisconsin, and Minnesota applied almost exclusively to work in white pine. Even the red pine, incorrectly called the Norway, was little esteemed until the white pine was growing scarce." (Pet. Ex. 201, p. 5). And even when the Norway pine achieved a commercial importance, its value was less than the white pine. Both parties have agreed that the other numerous species found within the subject areas had no merchantable value as of the valuation dates involved in this case.

Parts of Royce Area 357 (particularly the eastern and south central portions) possessed some of the best stands of white pine in the State of Minnesota. However, there were other highly desirable areas of white pine which were closer to transportation facilities and lumber markets. The early sawmills were constructed to the south of Royce Area 357 and in the early days the St. Croix region northeast of Minneapolis-St. Paul was a lumbering center. In Wisconsin the Chippewa River, which also emptied into the Mississippi, was an important lumbering area.

As of 1855 lumbering in Minnesota was in its infancy. By 1867 it had, of course, increased in importance but it was not until the 1870's and the coming of rail transportation that Minnesota's lumber industry commenced its dynamic growth. And it was not until 1890 that it really reached its height. During the period from 1850 to 1870 there was a continually expanding local market as the population of southeastern Minnesota increased. However, the lack of rail transportation limited

the markets which could be supplied economically with lumber from the area. While a prospective purchaser in 1855 would have considered that adequate rail transportation would eventually reach and extend into Royce Area 357, he would have realized that it would be a number of years after 1855. And until the railroads did reach the area the lumbering operations would remain limited. As Agnes M. Larson wrote, "Lumbermen early foresaw how railroads would affect their industry. 'What an enormous extent of country will buy lumber of us as soon as there are railroads to carry it!' was the cry of newspapers at the lumber centers. Not one fiftieth as much lumber was manufactured in Minnesota as would be if railroads were established, said a paper from the Falls in 1858" (The White Pine Industry in Minnesota, Pet. Ex. 201, p. 24). As we will discuss later in connection with the sales data, the eventual arrival of the railroad had a great impact on the demand and prices for land in the area.

We are in this case faced with some widely divergent estimates of the market value of the tracts involved. For example petitioners' experts would value Royce Area 357 as follows:

Mr. Trygg -- \$15,925,375.00

Mr. Davis -- \$15,200,000.00

Defendant's expert valuation was:

Mr. Newcombe -- \$1,267,503.00

While we have found that much of the material which has been presented by these experts has been valuable in assisting the Commission in arriving at a decision in this case, we are unable to accept any of the experts' opinions respecting fair market value.

In our Finding of Fact No. 80 we have set forth our findings concerning the expert testimony of John William Trygg, a professional forester and appraiser of timber lands, who was presented by petitioners. We have entered our findings respecting many of the deficiencies which we have noted in his analysis of the value of the timber located on the tracts involved. Mr. Trygg's estimates were based on a mathematical computation which used as a base the "actual cut" of timber on some eleven sample areas. As we have outlined in Finding of Fact No. 80(a) Mr. Trygg's "actual cut" figures led to a computation that the forested areas contained an average of 4803 board feet of timber per acre. This figure multiplied by the total timberland acreage in each tract and then multiplied by a stumpage value (adjusted to reflect relative accessibility or marketability) produced the final valuation estimates.

We have found that the computations have been based on much speculation and assumption. Mr. Trygg has first assumed that both white and Norway pine were of equal value on the 1855 and 1867 valuations dates. We find that the evidence does not support this opinion. As we have previously stated, only white pine was sought in 1855. And in 1867 its value exceeded that of the Norway pine.

In Mr. Trygg's sample tract number 11 we find the evidence indicates that 64% of the timber was Norway pine. And of the 7 areas involved in sample tract number 11, the three located within Royce Area 357 had 69% Norway pine stumpage. In fact the actual per acre white pine stumpage (without any "overrun adjustment") for sample tract 11 was only about 726 board feet. Similarly, in sample area 10 we have found that Norway

pine comprised 90% of all the pine timber with an average per acre white pine stumpage of only about 320 board feet.

We doubt the validity of Mr. Trygg's application of the "overrun" factor. This involved increasing the volume of the timber on a number of the sample tracts based on an assumed increase in the volume of timber actually cut over that estimated from cruises of standing timber. Mr. Trygg found that the log scale records from one township in sample area 1 were 51.93% higher than the cruise estimates. Assuming that this same percentage of error would have applied to all cruise estimates, Mr. Trygg increased the stumpage estimates for sample areas 1, 2, 10 and 11 by 51.93%.

In a number of other sample areas he used "sawmill cut" figures. The figures used admittedly extended far beyond the valuation dates involved in this case. In sample area 3 the "figures" covered a period from 1898 to 1925 or 1926 -- some 43 to 70 years after the 1855 valuation date. While we doubt the validity of the figures used in sample area 3, we note that the "estimate" given by Mr. Perske included many species -- "they sawed everything, popple, and tamarack and birch" -- and that he could only guess how much of the cut would have been white and Norway pine.

We have in our findings set forth some of the difficulties we have noted in Mr. Trygg's efforts to compute an overall stumpage figure for the tracts to be valued. We have done so mainly because petitioners have placed such an emphasis on this 4803 board feet figure, even urging rejection of defendant's expert valuation because of his failure to offer evidence of the timber quantity. Also petitioners' other expert witness, Mr. Davis, accepted Mr. Trygg's computation as a basis for part

of his own opinion of value. Of course we believe that timber quantity, especially white pine, was an important factor to be weighed in valuing the tracts in 1855 and 1867. But even if Mr. Trygg's "stumpage" figures were entirely sound and acceptable, we do not mean to indicate that we would accept his method of multiplying a stumpage figure by a unit price to arrive at an overall market value determination. We have had occasion many times to discuss such methods and we have, following numerous court decisions, rejected such a method of evaluation as not being in accordance with legally approved standards. Nooksack Tribe v. United States, 6 Ind. Cl. Comm. 578, aff'd _____ C. Cls. ____ (July 12, 1963), cert. denied, January 20, 1964.

We have examined carefully the evidence concerning the stumpage of white pine and Norway pine in the subject tracts. Petitioners have contended for the 4,803 board feet per acre average to which we have just referred. Defendant, while maintaining that on the valuation dates timbered areas were sold by the acre not by stumpage, has contended that the pineries on the involved lands covered not to exceed 18% of their total acreages. We cannot accept either figure. But, quite frankly, we are unable to substitute a precise figure which we believe would reflect the true situation on the respective valuation dates. The white and Norway pine occurred in widely dispersed areas throughout the forested portions of the subject tracts. The stumpage of the two species in the various areas was subject to extreme variations. Clearly there were within the subject tracts a number of "pineries" where the stumpage would have averaged and even greatly exceeded the 4803 board feet figure.

Many areas would even have possessed that average footage of white pine alone. As we have mentioned there was, in Cass County, a single white pine which yielded 6300 board feet of lumber. There were acreages which reportedly yielded 94,000 board feet per acre. But there were also many forested areas which included little or no pine. However, we do believe that the evidence indicates that the subject tracts included some of the best stands of white and Norway pine in the entire State of Minnesota. With respect to stumpage we believe the subject tract would have at least equalled the stumpage averages of any other large forested areas in the state. But the evidence is simply not available to permit any definitive determination of an average per acre stumpage which could be mathematically applied to the 5½ million forested acres in Royce Area 357.

Petitioners have urged that a determination of timber quantity (white and Norway pine timber) is required. And they have argued that timberlands were sold on a stumpage rather than an acreage basis. We do not agree that a determination of an average per acre stumpage figure must be made in this case before the fair market value can be arrived at. In considering the market value of large tracts, as herein involved, with widely dispersed and broken forest patterns of many interspersed species and with the conditions existing on the valuation dates with respect to accessibility, transportation and markets, we do not believe that an average per acre stumpage figure would be determinative of the fair market value of the forested areas. There is also the further problem of differentiating between the white and Norway pine stumpages. And we also note that petitioners' expert appraiser, Mr. Davis, did not

in the final analysis rely on stumpage figures in arriving at his ultimate estimate of fair market value. His final conclusion was based on his market data study.

We turn now to petitioners' "principal" expert witness, Mr. W. D. Davis. In our Finding of Fact No. 81 we have set forth in detail his approaches to the issue involved and our findings with respect to the various factors upon which he has relied. Mr. Davis considered two main approaches to the question--the cost approach and the market data approach.

We shall not dwell on Mr. Davis' cost approach, which he himself stated has recognized limitations and can only serve as "the highest limit of market value." In following this approach Mr. Davis has used Mr. Trygg's total stumpage figures. We have already discussed the difficulties we have found with those figures. We do note that Mr. Davis has reduced the product, however, by multiplying total stumpage by a straight 50 cents per thousand board feet to arrive at a timbered area figure for Royce Area 357 of \$14,124,000.00, considerably less than Mr. Trygg's computation. In totaling his "values of the parts" we note that Mr. Davis has even assigned a 50 cents per acre valuation to the swamp lands in Royce Area 357.

Mr. Davis' ultimate opinion of the fair market value of the tracts involved was based on market data. We have in our findings set forth much of the data which Mr. Davis assembled from his study. We have found Mr. Davis' compilation of sales data to have been very exhaustive, and he has gone to great lengths to organize and analyze the results of his study. While we could not include all of the various tables

and groupings in our findings, we have given careful consideration to all of them. And while we cannot accept Mr. Davis' ultimate conclusion of value, we have found his work to be of great assistance in reaching our decision in this case.

We find from a careful review of the data that land sales were very slow in the period immediately following the cession of Royce Area 357. In fact there were only 10 sales within Royce Area 357 in the eleven year period following the 1855 valuation date. The number of transactions increased thereafter, but it was not until the 1870's that there was significant activity in the private sale of lands in Royce Area 357. From 1856 through 1870 (a period extending to fifteen years after the valuation date) there were only 429 "in" sales within Royce Area 357 tabulated by Mr. Davis. This represented only 15% of the 2,895 private "in" sales used in his analysis. In the five year period 1871 through 1875 (sixteen to twenty years after the 1855 valuation date) there were 2,466 "in" sales or 85% of those used in the analysis of inside sales. The great increase in real estate activity after 1870 was, we believe, occasioned in large measure by the development of rail transportation in the area.

We have noted also instances where a large number of sales used in the analysis are grouped in certain areas. For example there are a large number of "out" sales in St. Louis county. There were 846 such transactions--or 30% of all the "outside" sales included in the Royce Area 357 study. This was twice the number of sales in the next highest county (Morrison with 422 sales). The average consideration for the St. Louis "out" sales was the highest--\$6.25 per acre. We have examined

those St. Louis County sales, and we find that most of them occurred in the Duluth area on Lake Superior to the east of Royce Area 357. And a number of the sales involved lots in Duluth. Certainly transactions involving only an acre or two for a price of several hundred dollars an acre cannot be advanced as any evidence of the fair market value of a 10 million acre tract. It is rather amazing to find sales such as transaction number 7242 involving one acre of land in Duluth sold by Cox to Cox for \$1500.00 included in an analysis of sales to be used in the subject case.

We have in our findings set forth a comparison of the St. Louis County "in" sales and those "outside" Royce Area 357. There were 846 "out" sales -- only 344 "in" sales. The "out" sales averaged \$6.25 -- the "in" sales averaged \$1.29. There were no "in" sales prior to 1872. There was only one "in" sale in 1872, none in 1873, 108 in 1874 and 235 in 1875.

The reason for the sharp disparity in both prices and apparent demand for land within this one county can be explained by the history of the development of the Duluth area. As set forth by Agnes M. Larson in her book on the white pine in Minnesota, the Duluth area received the benefits of an extensive promotion by Jay Cooke and his associates. The Cooke interest in Duluth began in 1868; he built a \$50,000 elevator there in 1869; the railway reached Duluth in 1870; there was a panic in 1873. This simple chronology of events is strikingly reflected in the yearly number of sales and the consideration per acre figures for the St. Louis "out" sales. As Agnes M. Larson wrote, "From 1866 until the panic came

in 1873 Jay Cooke was an important figure in the growth of Duluth and in the sale of the surrounding pinelands." (Pet. Ex. 201, p. 268)

Mr. Davis has recognized that his sales analysis included improved real estate. We agree that any use of sales data must take into consideration such improvements. However, we do not believe that the value of improvements is subject to a simple mathematical computation from Census data. The figures used by Mr. Davis from the 1900 Census involve a comparison of "values" for "land and improvements except buildings" and "buildings." Therefore improvements such as plowed fields or fencing would appear in the first value category while buildings would appear under that value category. Of course it is well recognized that the census valuations are merely the results of answers received from farm operators, many of whom have no clear basis for estimating value. As we stated in our recent decision in a Nez Perce case, the Census Bureau recognized the limitations of these figures and commented that while it was known that variations existed it was difficult to establish checking procedures that would disclose inaccurate estimates. (Nez Perce Tribe of Indians v. The United States, 13 Ind. Cl. Comm. 184, 244).

In discussing his computation that, according to the Census report, "buildings actually contributed only 16.735% of the total farm value," Mr. Davis made specific comment on one county. He wrote "It is interesting to note that in Clay County buildings contributed only 12.25% of the total value." (Pet. Ex. 234, p. 172). The Commission has noted that in St. Louis, Cass and Itasca Counties, where the greatest number of sales were taken (2824 sales out of the 5636 total), the percentages were 28.35, 20.03 and 29.11, respectively.

We have also noted the means by which Mr. Davis was mathematically able to precisely compute his 23.6% "discount for size." Mr. Davis found that in 1853 a ship canal company in Michigan had accepted a state grant of 750,000 acres (the acreage to be selectively chosen) in return for the construction of a canal. The ultimate cost of the construction was \$999,802.46 which had a relationship to the 750,000 acre grant of \$1.33 per acre, which figure Mr. Davis used as the purchase price for this "large transaction." Comparing the \$1.33 figure with the \$1.74 average consideration reflected in his sales data through 1855 (adjusted for improvements), he arrived at the 23.6% figure. At the time the grant was accepted the estimated cost of the canal would have amounted to 74.3 cents per acre. And if Mr. Davis had chosen to use that figure in his computation the resulting discount for size would have been 57.3%.

But the fact remains that the ship canal arrangement was not a sale. It occurred in Michigan. It involved dissimilar lands (mineral lands were included). The lands were selected not in one unit but were widely scattered. And it does not provide any basis for mathematically computing a "discount for size."

In our Finding of Fact No. 81(e) we have set forth the "large land sales" which Mr. Davis gave "careful consideration." He described the St. Mary's Canal lands in the Michigan Peninsula as "probably the most comparable area to the subject property." The evidence does not support such a conclusion. The other large transactions include more doubtful transactions by the St. Mary's Canal Company (i.e., sales to Harvey and

Fairbanks); sales in such remote locations as Kansas, Pennsylvania, Illinois, Colorado, and New Mexico; sales of prairie lands and operating farms; and a "sale" which was in fact a mortgage. While Mr. Davis concluded that the large sales indicated a value of \$1.50 per acre for Royce Area 357; \$2.00 per acre for Royce Area 507; and \$2.10 for Royce Area 509, we cannot agree. We find no basis whatever for correlating the large sales to the fair market value of the subject tracts. In fact it would seem that Mr. Davis himself recognized the difficulties for he remarked that "the Cherokee Neutral Land was entirely different from the land in Cession 507" and that the Broadlands "was similar to Cession 507 only in that a substantial sum of money was involved and the date was near to the date of Cession 507" and that the Ohio Company sale and the Erie County, Pennsylvania, purchase was "not very similar to the subject property except in size."

We believe that the 5636 sales introduced by petitioners indicate that as of both 1855 and 1867 there was a limited demand for timbered lands in the subject tracts. The lands which were bought during the valuation periods involved in this case were carefully chosen. Even Mr. Davis' 47 "large" sales did not involve one large tract but rather were assemblages of small selected tracts. Agnes M. Larson described a purchase of 1900 acres in Itasca County in 1882 as follows:

Those 1900 acres were located in nine different sections of the township, an indication that they were carefully chosen. Lumbermen rarely located all their purchases in one place; any spot with poor timber was omitted. (Pet. Ex. 201, p. 276)

The average per acre prices, therefore, reflect in general the fair market prices for the selected areas which were most favorably located with

respect to the quantity and quality of pine timber and its accessibility. Certainly the remote timbered areas, most of the agricultural land, the swamp lands, and those areas not possessing good stumpage of white pine were not actively sought. And the values for such relatively undesirable areas are not fairly represented in the arithmetical average computation of the per acre consideration paid for the 5636 sales.

While there was much good land in the tracts involved, there were also less desirable areas. In 1855 and 1867 not all of the timbered lands were economically accessible. On the valuation dates the limited demand for commercial lumber also affected the extent of any area which could be logged. The "relative marketability" factor is demonstrated by Mr. Trygg in his valuation computation. Of his estimated 26,793,482 M.b.f. in Royce Area 357 he applied the following percentage reductions:

<u>Relative Marketability</u>	<u>Stumpage in Area</u>
100%	5,626,631 M.b.f.
75%	13,664,676 M.b.f.
50%	6,430,436 M.b.f.
25%	1,071,739 M.b.f.

Mr. Trygg also recognized that it would require a considerable period of time to market lumber cut on Royce Area 357. His estimate of the projected probable sale of that lumber was:

1855-60	2%
1861-65	5%
1866-75	15%
1876-85	30%
1886-95	30%
1896-1900	<u>18%</u>
	100%

This covers a period extending to 45 years after the valuation date.

In the first 10 years Mr. Trygg projects only a 7% sale of the lumber and the first 20 years only a 22% sale.

We have in our Finding of Fact No. 82 set forth briefly the critical considerations and conditions which defendant's expert, Mr. Dewey Newcombe, weighed in reaching his conclusion of value. While we would agree that those factors would have affected the fair market value of the tracts in question, we cannot accept what we view as an overly pessimistic opinion expressed by Mr. Newcombe. He has with respect to Royce Area 357, after excluding almost 3 million acres of swamp land as valueless, placed an average per acre value of only 20 cents per acre on the "dry lands." This resulted in a valuation of \$1,267,503.00 or an overall average per acre valuation of only about 12 cents per acre. After reviewing all of the evidence of record including all of the factors mentioned by Mr. Newcombe, and including the private sales data and other evidence introduced by petitioners, we conclude that the fair market value of the subject tracts was substantially higher than the opinions of value expressed by Mr. Newcombe.

The Commission has considered that the "fair market value" of each of the respective tracts as a whole is the proper method of reaching our decision in this case. Market value has been variously described and defined. Both Mr. Davis and Mr. Newcombe have used the same definition:

Market value is the highest price estimated in terms of money which the land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all the uses to which it is adapted and for which it is capable of being used. Sacramento, etc. R. R. Co. v. Heilbron, 156 Cal. 408; 104 Pacific 979.

We have weighed all of those factors and conditions which we believe both the prospective well informed seller and the well informed buyer would have considered in dealing with each of the respective tracts as of the valuation dates involved.

As of 1855 any well informed buyer or seller would have taken into consideration, with respect to Royce Area 357, the immense size of the tract and the length of time and expenses involved in handling and disposing of such a large area; its relatively remote location in 1855; the scarcity of white population; the absence of railroad transportation; the limitations of available markets for lumber products from the area; the vast forests surrounding the area which were capable of also supplying lumber products for many of the same markets; and the lack of any strong demand for such lands. However, the well informed buyer and seller would also have considered the quantity and quality of the fine stands of white pine which were generally located in areas throughout the forested sections of the area; the evidence of steadily increasing white population; the expanding markets for lumber products; the knowledge that railroads would eventually serve the area and result in greatly expanding the markets which could be served from the area; the presence of a water transportation system which provided accessibility for much of the timber; and the evidence of the prices which were being paid for choice lands which were favorably located.

With respect to the Mille Lac Reservation, Royce Area 454, we have in general considered the same factors as we have mentioned for Royce Area 357 (the valuation dates are the same). Of course the size factor

was not as significant with the Mille Lac area which was only 60,365.39 acres. Further, as determined by the Court of Claims there was a slightly greater percentage of pine timbered acreage--36,028.14 acres pine timber out of a total of 61,028.14 acres or 59%. The Court of Claims found that 25,000 acres was agricultural lands (Finding XII, 47 C. Cls. 415, 430) but in the opinion the Court stated that the 25,000 acres of said land was "swamp or agricultural land upon which no pine timber grew" (47 C. Cls. 415, 461). Defendant's expert has classified only 662.75 acres as swamp land following the Court of Claims decision on remand from the Supreme Court (51 C. Cls. 400). This is an insignificant amount of swamp land and we have found that the reservation was 59% timbered and the remaining 41% was agricultural land. Located at the southern border of Royce Area 357, the Mille Lac Reservation was closer to the lumber markets to the south.

Likewise the well informed prospective buyer and seller in 1867 would have viewed the Royce Area 507 tract in much the same light as we have briefly outlined with respect to Royce Area 357. Of course many of the favorable aspects were more favorable in 1867 and the deterrents were not as great in 1867. The lumber industry had progressed in the period from 1855 to 1867. Norway pine was being recognized as a valuable commercial species, and it would have constituted an element of value although not nearly as great as the white pine. Population had increased, railroads were being built closer to the area, large timber operators were becoming active in Minnesota, and agricultural lands were just coming into demand in the area. The percentage of timbered lands in

Royce Area 507 was about the same as for Royce Area 357. Royce Area 507 did have slightly more agricultural land and less swamp land and water.

Royce Area 509, also to be valued as of March 19, 1867, was similar to Royce Area 507 and substantially identical factors applied to both. Royce Area 509 did, however, have a greater percentage of agricultural lands (about 35.9% as compared with 20.1% for area 507). The swamp lands and water areas were less in Royce Area 509. The timbered areas were about the same. Accordingly, Royce Area 509 with less water area and swamp lands had a slightly higher fair market value than did Royce Area 507.

After considering the above and all the evidence of record, it is the conclusion of this Commission that the fair market value of each of the respective tracts as a whole was, on the pertinent dates, as follows:

	<u>Area</u>	<u>Date</u>	<u>Acreage</u>	<u>Value</u>	<u>Average Per Acre</u>
Dkt. No. 18-B	357	Feb. 22, 1855	10,233,700	\$5,628,535.00	\$0.55
	454	Feb. 22, 1855	60,365.39	39,237.00	0.65
Dkt. No. 18-N	507	March 19, 1867	1,621,678	1,297,340.00	0.80
	509	March 19, 1867	814,960	692,715.00	0.85

We have in our Finding of Fact No. 84 made our determinations with respect to the consideration paid by defendant to each of the two entities: the Mississippi Bands; and the Pillager and Lake Winnibigoshish Bands, for the cession of Royce Area 357. The parties have not devoted much attention to the matter of the consideration paid for the cession^s involved in these two dockets. Defendant has contended that the full amount set forth in a General Accounting Office report (\$1,457,497.64 total) should be used as the disbursement figure. Petitioners have contended that the agreed consideration could not have exceeded \$1,364,225.00, but they have not

made objection to any specific item in the General Accounting Office schedule.

We have considered the claimed disbursements, item by item. There is no purpose to be served by detailing each item in this opinion. We have disallowed those expenditures which were made for purposes not provided for in the 1855 Treaty or which exceeded the amount specified in the treaty. We did under item 10, Finding of Fact 84(a), allow the disbursement of \$13,810.79 in excess of the "utility" payments where it appeared that there was a \$15,000.00 balance available under another treaty provision permitting such a balance to be expended "in the same manner as their annuity money." In view of the fact that a portion of the "annuity money" could be spent for purpose of utility and further considering the discretionary power of the President, set forth in Article 5, to withhold any moneys and expended them for the benefit of the Indian families, we believe that this item was properly included as part of the consideration paid under the treaty. We similarly allowed disbursement of "annuity goods" for "annuity money" in item 5, Finding of Fact No. 84(b). We disallowed an item which included expenditures for insurance. Such a payment is not a part of the consideration.

In view of the fact that the 1855 Treaty involved two separate, distinct entities whose treaty payments were specifically segregated and for whose benefit separate money judgments are to be entered, we cannot include as consideration the \$71,419.58 item for insurance, transportation, and distribution of annuities to the Mississippi Bands and the Pillager and Lake Winnibigoshish Bands.

The disbursements which we have found to have been made as part of the consideration totaled:

Mississippi Bands	\$ 469,332.00
Pillager and Lake	
Winnibigoshish Bands	<u>865,354.85</u>
Total	\$1,334,686.85

This total is actually slightly less than the total amount of disbursements which petitioners contended could not be exceeded. However, as we have previously discussed, the Mille Lac Reservation (Royce Area 454) was set aside for the Mississippi Bands, and its fair market value (\$39,237.00) is to be added to the consideration figure for the Mississippi Bands.

Our determination concerning the consideration disbursements made under the Treaty of March 19, 1867, are set forth in Finding of Fact No. 85. Defendant listed payments totaling \$431,368.78. Petitioners contended that the agreed consideration could not have exceeded \$150,000.00. However, petitioners have made no objections to any specific items. We have set forth our findings concerning the 1867 Treaty disbursements item by item.

The two largest categories are agriculture and education. The treaty provided for an expenditure of \$5,000.00 for the purchase of cattle, horses, and farming utensils and for improvements to open farms. There was a further provision to expend \$6,000.00 a year for 10 years and so long thereafter as the President might deem proper, to promote agriculture. Under these provisions we have found the disbursements for various agricultural purpose to have been proper items of consideration disbursed pursuant to treaty provisions.

With respect to education the treaty provided for \$5,000.00 for the erection of school buildings and \$4,000.00 each year for 10 years and as long as the President might deem necessary for the support of schools. We have found that the \$246,743.03 disbursements under item 7 for "education" were made pursuant to treaty provisions.

Both the agricultural and educational disbursements exceeded the "minimum" payments stipulated by the treaty. The educational payments were continued through 1932. The disbursements were made pursuant to the proviso which gave the President discretionary power to extend the annuity payments beyond the mandatory 10 year period if a necessity existed for such payments. These discretionary payments are similar to those involved in the case of Pawnee Indian Tribe of Oklahoma et al v. The United States, 8 Ind. Cl. Comm. 648; affirmed in part, overruled in part, 157 C. Cls. 134; cert. denied, 370 U. S. 918. In that case we held that payments provided for in a treaty of cession, which payments are left to the discretion of the President, should, when made, be included in determining what consideration was paid for the ceded land. The Court of Claims agreed that defendant is entitled to credit for such amounts.

We have disallowed those items which we have found were not specifically enumerated in the treaty or those expenditures which exceeded stipulated amounts. We have also disallowed an item which included expenditures for insurance.

With respect to Docket No. 18-B we have applied the average per acre valuation of Royce Area 357 to each of the two tracts involved, as follows:

Mississippi Bands

4,452,100 acres x \$0.55 = \$2,448,655.00

Pillager and Lake Winnibigoshish Bands

5,781,600 acres x \$0.55 = \$3,179,880.00

The consideration received by each of these entities for the cession of their lands was:

Mississippi Bands

Disbursements	\$469,332.00
Value of Mille Lac Reservation (Royce Area 454)	<u>39,237.00</u>
Total	\$508,569.00

Pillager and Lake Winnibigoshish

\$865,354.85

Weighing the fair market value of each of the two tracts against the consideration received for their cession, we have concluded that the disparity was so great as to make the consideration unconscionable, and petitioners are entitled to recover under Clause 3, Section II of the Indian Claims Commission Act. Accordingly, we have determined that the Minnesota Chippewa Tribe is entitled to recover on behalf of:

- (1) the Mississippi Bands the sum of \$2,448,655 less payments on the claim in the amount of \$508,569.00 leaving a net sum of \$1,940,086.00, and
- (2) the Pillager and Lake Winnibigoshish Bands the sum of \$3,179,880.00 less payments on the claim in the amount of \$865,354.85 leaving a net sum of \$2,314,525.15

These awards will, however, be chargeable with any allowable gratuitous offsets which were paid to the respective entities.

In the matter of Docket No. 18-N, Cause II, we have found that the Mississippi Bands received consideration totaling \$1,083,387.86 for the

cession of land having a fair market value of \$1,297,340.00. Thus we have found that the Mississippi Bands received consideration which was about 83% of the fair market value of the lands which they ceded. To recover on the grounds of unconscionable consideration it must be shown that the disparity of the price paid and the then fair market value of the land was "very gross." Payment of 83% of the value is not a "very gross" disparity. The slight difference in amount which we have found does not shock our conscience. Petitioners are not entitled to recover under Cause II of Docket No. 18-N.

Both causes of action under Docket No. 18-N having been disallowed, this case will now proceed to a determination of the gratuitous offsets, if any, allowable against the award to be entered in the matter of Docket No. 18-B.

Wm. M. Holt
Associate Commissioner

We concur:

Arthur V. Watkins
Chief Commissioner

T. Harold Scott
Associate Commissioner