BEFORE THE INDIAN CLAIMS COMMISSION

THE MINNESOTA CHIPPEWA TRIBE, ET AL., ON BEHALF OF THE CHIPPEWAS OF LAKE SUPERIOR,	)	
Plaintiffs,	)	Docket No. 18-U
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: March 24, 1971

Appearances:

Jay H. Hoag and Rodney J. Edwards,
Attorneys for Plaintiffs,
Marvin J. Sonosky was on the brief.

David M. Marshall, with whom was
Mr. Assistant Attorney General
Shiro Kashiwa, Attorneys for the
Defendant.

OPINION OF THE COMMISSION

Commissioner Vance delivered the opinion of the Commission.

In previous findings made on December 8, 1964, 14 Ind. Cl. Comm. 360 (1964), the Commission determined that the Chippewas of Lake Superior were the sole owners of territory in northeast Minnesota ceded by the Treaty of September 30, 1854 (10 Stat. 1109). The area is designated as Area 332 by Charles C. Royce on his Minnesota Map No. 1 in the 18th Annual Report of the Bureau of American Ethnology (Part II).1/

The case is now before the Commission for determination of the fair market value of Royce Area 332 as of January 10, 1855, the amount

1/ In the opinion and in the findings of fact we shall generally refer to the subject lands as Area 332.

of consideration provided for the lands, and whether the consideration was unconscionable within the meaning of Clause 3, Section 2 of the Indian Claims Commission Act (60 Stat. 1049, 1050). The hearings on the question of the fair market value of the area were held in April and May of 1966.

Our findings filed now deal only with that issue. We do not touch upon the question of consideration since the record contains insufficient evidence to justify comment at this time. The matter will be left for a further hearing where all aspects can be fully developed.

The parties were at extremes on almost every aspect of the case, from the state of the weather in Area 332 to the question of the fair market value of the subject tract. There is a wide disparity concerning the integral items which form the basis for the determination of what a hypothetical willing and knowledgeable buyer would have paid in 1855, to an equally situated seller of a vast tract of land for which there was really no market.

On the point of the extent of the total acreage in the area, the parties seemed to be closest in agreement in that they differed only as about 48,076 acres out of almost 6 million acres. The Commission felt that the plaintiffs' position on this aspect had merit and therefore we accepted the higher acreage figure for the area of 5,867,435.81 acres.

Both parties initially touched on the issue of the mining potentia that existed in Area 332 in 1855. Although plaintiffs didn't assign a value to the mining potential there seemed to be no question that they

believed a buyer would have considered it when negotiating to purchase the territory. The defendant felt that a buyer would have been aware of the potential but this would not have influenced his thinking.

The Commission has again gone back in time and tried to avoid the use of hindsight since history reveals that the area did provide substantial mineral wealth. What was discovered years after the cession were huge deposits of iron ore. There had been hints of its existence as early as the 1700's, but the extent of it was not realized until long after the valuation date. Other minerals, such as gold and copper, were also sought both prior to and after the valuation date. There is evidence that a knowing buyer would have legitimately had interest, expectation and some excitement at the thought of the possibilities for future mineral discovery in Area 332. This did lead to some enhancement of the value of the area.

However, the main and obvious asset of Area 332 in 1855 was timber. It was generally agreed that it was timber country and that white and Norway pine were the prevalent species. But whether the trees were accessible, whether there was a market for them, whether the timber was of good quality and how much of it there was were hotly contested. Both parties had done extensive investigations and bolstered their cases by presenting experts possessing credentials in history, experience and personal knowledge of conditions.

The Commission agrees that the highest and best use of the area was for timber but there is ample evidence to confirm the view that

the full potential could not have been realized in 1855, nor for some years thereafter. With an almost complete lack of sales the Commission has no tangible comparison to make in determining the market value of Area 332. In the absence of a market at the time and therefore in the absence of evidence of market value in the conventional sense, the Commision has done what was suggested in the case of Otoe and Missouria Tribe v. United States, 131 Ct. Cl. 593, 131 F. Supp. 265, cert. denied, 350 U.S. 848 (1955). We have taken into consideration such factors as the natural resources of the land, transportation, the available markets, economic conditions, and the highest and best use to which the land could be placed. The Commission has considered the fact that before it is profitable to begin a timber operation an adequate reserve of timber must be available, so any purchaser would want complete control of timber reserves. Thus it is possible to visualize a potential purchaser acquiring a large territory which might be somewhat primitive but which would allow for expansion as the country and technology developed.

Anyone buying in 1855 would have been satisfied to know that Area 332 contained valuable pine. The parties have generally agreed that about half the total area was pineland. Plaintiffs' estimate was 3,174,056 acres, while defendant contended that 2,495,000 acres were pineland. There were numerous other species of trees in the territory but as of the valuation date a market for them had not been developed. Norway pine and white pine were sometimes combined in estimates and were often logged and marketed

together, although white pine was then more desirable and valuable. Both parties generally agree that over 80% of the pine trees estimated to have been in the area in 1855 were of the more valuable white pine species.

The exact board footage of pine in Area 332 in 1855 cannot be determined. The parties are in substantial disagreement and there is no contemporary data available. The 1896 report of the Chief Fire Warden of Minnesota does give an estimate of the amount of pine cut in Carlton County prior to 1896 and other sources give an estimate of lumber produced prior to 1896 in the Duluth district. But these are not sufficient for purposes of making an accurate determination. We agree with the defendant's position when it comes to computing the amount of pine using the Scribner Log Rule rather than the International Table since the Scribner (or St. Croix) Rule was used in Minnesota in 1855.

The Commission had serious difficulty with Mr. Trygg's[2/] complicated and intricate method for determing an estimated volume of pine in Area 332. We were unable to accept completely the figures from his sample plats because of the variable sizes of the plats. We further found it difficult to rely on the pine figures from his selected townships since they were not fully representative of the sizes of trees in the area. It is our opinion, however, that defendant's experts erred when they

2/ Mr. John William Trygg, a professional forester and appraiser, was plaintiffs' expert witness.

made no allowance for Norway pine below 12 inches in diameter although the Scribner Rule could be utilized to measure timber 8 inches breast high and such logging was done in years following the valuation date. We also think that if plaintiffs' expert was overly optimistic in classifying as pineland any land which bore 200 board feet or more of white and Norway pine to the acre, defendant's expert was unduly restrictive in excluding from his estimate pinelands containing less than an average of 4000 board feet per acre.

On the issue of value, defendant's experts disagreed between themselves. One estimated that in 1855 Area 332 was worth $875,000 and the other valued it at $1,800,000, almost a million dollar difference. Plaintiffs' expert valued the tract at $8,500,000. The Commission weighed the evidence carefully and tried to give deference to all the views presented. We considered the plaintiffs' estimate too high given the overall conditions of Area 332 in 1855. The pineland was not of the highest quality. There were many other species of trees interspersed with the pine which, in 1855, had no commercial value. On the valuation date Royce Area 332 was still viewed as somewhat primitive and lumbering technology had not yet been refined.

However, even defendant's higher figure was too conservative in light of the potential. Area 332 did contain large quantities of valuable white pine, there were drivable streams within respectable distances of the stands of pine, transportation was improving and the plans for further advancement were evident.

In Nooksack Tribe of Indians v. United States, 6 Ind. Cl. Comm. 578, 601 (1958), aff'd, 162 Ct. Cl. 712 (1963), cert. denied, 375 U.S. 993 (1964), the Commission determined that the separate valuation of timber or valuations arrived at by multiplying the number of cubic feet by a given price per unit is not an approved basis for evaluation. As recently as the case of S'Klallam Tribe of Indians v. United States, 23 Ind. Cl. Comm. 510, 514 (1970), the Commission valued as a whole land areas having a single or highest best use. Therefore the Commission did not choose between the various calculations proposed by the rival experts concerning the exact board footage of pine timber located in Area 332 as of 1855 in order to arrive at a fair market value for the subject tract. We have determined that the fair market value of Area 332 as of 1855 was $3,250,000.

This case will now proceed to a determination concerning the consideration for the cession and whether or not the consideration was unconscionable. Also to be determined is whether there were gratuitous offsets paid to the plaintiffs chargeable against any award made to the plaintiffs.

John T. Vance, Commissioner

We Concur:

Jerome K. Kuykendall, Chairman

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner