

BEFORE THE INDIAN CLAIMS COMMISSION

MINNESOTA CHIPPEWA TRIBE, ET AL.,)
 ON BEHALF OF THE CHIPPEWA INDIANS)
 OF THE MISSISSIPPI AND LAKE)
 SUPERIOR,)
)
 Plaintiffs,)
)
 v.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 18-T

Decided: March 30, 1971

Appearances:

Rodney J. Edwards, Attorney for Plaintiffs, Marvin J. Sonosky was on the brief.

Craig A. Decker, with whom was Mr. Acting Assistant Attorney General Walter Kiechel, Jr., Attorneys for the Defendant.

OPINION OF THE COMMISSION

Commissioner Vance delivered the opinion of the Commission.

In this case the Minnesota Chippewa Tribe and others, acting on behalf of the Chippewa Indians of the Mississippi River and Lake Superior, claim that the consideration given for the cession of certain lands in Minnesota was unconscionable within the meaning of Clause 3, Section 2 of the Indian Claims Commission Act (60 Stat. 1049, 1050). The lands involved were designated as Area 268 by Charles C. Royce on his Minnesota Map No. 1 in the 18th Annual Report of the Bureau of American Ethnology (Part II), and they will hereinafter be referred to as Royce Area 268.

On August 20, 1968, the Commission entered findings of fact, ¹⁴⁷ an opinion, and an interlocutory order holding that as of the time of the Treaty of August 2, 1847 (9 Stat. 904), ratified April 3, 1848, the Chippewa Indians of the Mississippi River and Lake Superior were the owners of Royce Area 268 by recognized title. The Commission also held that the subject lands were ceded to the United States by the 1847 Treaty. It was directed that the case proceed to a determination of acreage, fair market value as of the April 3, 1848, ratification date, and the value of the consideration. Minnesota Chippewa Tribe v. United States of America, 19 Ind. Cl. Comm. 341 (1968). These are the issues now before the Commission.

The subject tract consisted of 1,104,000 acres of land and water located in central Minnesota. The Mississippi River formed the area's eastern boundary with the Crow Wing and Long Prairie Rivers forming its northern and western boundaries. The land acres in Royce Area 268 can be classified as follows: white pine timberland 169,870.33 acres, Norway pine timberland 13,888.67 acres, prairie land 107,171.76 acres, hardwood forest 653,233.01 acres, bottom land 10,784.96 acres, marsh 40,534.18 acres, and swamps 54,517.09 acres, or a total of 1,050,000 land acres in Royce Area 268. The total water acres for this area amounted to 54,400 making the total land and water area in the subject tract 1,104,400 acres. These figures are basically those arrived at by Mr. John William Trygg, a professional forester who testified for the plaintiffs.

Of the 1,050,000 acres of land located in the subject tract, 169,870.33 acres of white pine and 13,888.67 acres of Norway pine had

highest and best uses as timber lands. The pinelands in Royce Area 268 were concentrated in the northern portion of the subject land in a horseshoe-shaped area. The pineland area was traversed by several important streams and by numerous small ones rising from the many lakes in the pineland area. The rivers and their tributaries made pine logs accessible to the mills. The rivers also provided a means for transporting the finished lumber to markets at towns along the Mississippi River and inland.

Commercial lumbering in Minnesota commenced as early as 1839 at Marine on the St. Croix River, but at the time of the 1847 cession, Stillwater was the most important lumber center in Minnesota. Stillwater was within 80 miles of the subject area. Stillwater acquired its log stock from the St. Croix Valley ceded by the Chippewas in 1837.

Following the 1847 cession, St. Anthony, located at the falls of that name, became a lumber center. As early as 1837, in anticipation of the extinguishment of Indian title to the upper Mississippi River pinelands, the site of the Falls of St. Anthony was preempted under the public land laws as a highly desirable location for sawmills. The St. Anthony mills and Minneapolis were about 70 miles southeast of the subject area.

Initially log stock for the St. Anthony mills came from the Rum River country ceded by the Treaty of July 29, 1837 (7 Stat. 536). Log stock was not legally available from the subject land before or immediately after the Chippewa cession in 1847. After the cession, the lands involved were continued as Indian country as a home for the Winnebago Indians.

It did not become part of the public domain until the Winnebago cession by the Treaty of February 27, 1855 (10 Stat. 1172). Therefore, although Royce Area 268 had been ceded by the Chippewas in 1847, the tract was not then available for white acquisition and settlement, and its rich timberlands could not be utilized. Such development was delayed until the 1855 Winnebago cession. For this reason we have found it necessary to give some consideration to events occurring in the late 1850's and early 1860's when Royce Area 268 was opened for use by the white population.

Of the 1,050,000 land acres located in the subject tract, 811,723.91 acres had a highest and best use for agricultural purposes. This figure included 653,233.01 acres of hardwood forest, 10,784.96 acres of bottom land, 40,534.18 acres of marshland, and 107,171.76 acres of prairie land. The subject land lay primarily within a hardwood forest, and substantial portions were valuable for agricultural pursuits. As of the valuation period, the presence of hardwood trees was regarded as evidence of good agricultural soil. The hardwood trees provided timber for fuel and construction, and the settlers could work their farms during the growing season and work in the woods in the winter.

The first public sales of the St. Croix Delta pinelands of Minnesota occurred in July of 1848. This land was within the Stillwater (later called Cambridge) Land District which extended to within 25 miles of the subject tract. It took some 10 years to sell about 1.3 million acres of pineland in the St. Croix Delta area, of which 415,146.63 acres brought \$1.25 per acre cash and 692,542 acres were bought for substantially less than \$1.25 by the warrant system. The western lands in the

Cambridge Land District were turned over to the St. Cloud Land District established in 1853. From 1853 to 1857, a total of 339,754 acres was sold of which 101,154 acres were sold for cash at \$1.25 and the rest of the land was sold by warrants for that amount or considerably less. Since the subject land continued as Indian country until 1855 when the United States reacquired the land from the Winnebago Indians, it was not until 1858 that the first public survey of the land was approved, and it was 1860 before the land in Royce Area 268 was offered for sale.

Ezra Cornell was involved in substantial purchases of pineland in Wisconsin and Minnesota. By 1867 Cornell had acquired 7,968 acres in Minnesota at an average cost of 50 to 60 cents per acre. However, the purchases were made with scrip, which sold at a discount and failed to reflect an accurate fair market value.

The subject land had a four season continental climate, suitable for habitation, for timber operations and for agriculture. In 1849 Minnesota had a population of 4,680, which by 1850 had increased to a total of only 6,077. This was much lower than the other nearby states to the east and south. In 1850 Michigan had a population of 397,564; Iowa had 192,214; Missouri had 682,044, and Illinois had 851,470.

There were no railroads in Minnesota in 1848. But in 1848 it was known that railroads ultimately would come to Minnesota. As early as 1847, plans had been outlined for two railroads, one from Lake Superior and one from St. Paul to meet at the Red River near Fergus Falls in western Minnesota. Two years later in 1849, recommendations were made to

Congress for the construction of railroads from the head of navigation of the Red River by way of the mouth of the Crow Wing River in the subject tract, to the head of Lake Superior (i.e., from Breckenridge, Minnesota, by way of Brainerd to Duluth).

At the direction of Congress surveys for a transcontinental northern line were made in 1853 and a route was recommended running from St. Paul across the State of Minnesota and traversing the subject land to Breckenridge at the head of navigation on the Red River of the North, and thence westward. This route ultimately became the Great Northern Railroad, chartered by Minnesota in 1856, and by Congress in 1863. Between 1853 and 1857, the Minnesota legislatures chartered 27 railroad companies.

Plaintiffs and defendant offered expert witnesses on the fair market value of the subject land. Mr. Robert Nathan, an economist testifying for the plaintiffs, valued the subject pineland for its highest and most valuable use as timberland. Employing two approaches to fair market value, Mr. Nathan based one method on future income derived from the timber and the other on sales of pinelands and pine stumpage. The details of the two approaches are summarized in our Finding of Fact No. 24. In determining the fair market value of the white pine acreage by the future income method, the plaintiffs' expert used an average cost of \$8 per thousand board feet (mbf) which he multiplied by the projected sales from 1848 to 1887 (1,284,401 mbf), to arrive at a total lumbering cost for those years. He then subtracted this cost from the gross

revenue calculated for those years at an assumed price of \$19.50/mbf. The net cash flow was discounted at 10% and at 8% to reflect the time lag between the investment and the return. At the 10% rate the investment would have been returned in 15 years and at the 8% rate in 18 years. By this approach Mr. Nathan computed a value of \$1,736,304 or \$2,470,795 for the pine stumpage depending on whether the 8% or 10% discount rate was used. This process resulted in a value for the pinelands of \$9.44 or \$13.44 per acre.

There is no evidence indicating that pineland had a market value which could even approach such a figure. Mr. Nathan has recognized that such a figure cannot be justified because he finally concluded that \$2,000,000.00 was the fair market value of the entire 1,050,000 acres in Royce Area 268 (of which total the pinelands were only 183,759 acres or about 18%).

Mr. Nathan's first approach was an economic analysis of an assumed lumber operation involving potential lumber markets, an estimated price of pine lumber delivered to the market, and estimates of all costs from the standing tree to the delivered boards. These costs and prices were multiplied by assumed production figures. The analysis involved net cash flow, the period of exploitation and discounted value to the investor. It required a number of assumptions, much speculation, and a series of mathematical computations. However, it had no relationship to the prices paid for pineland, and the Commission is unable to relate such conclusions to the fair market value of the land involved. Further, we have consistently held that determinations of fair market value cannot be reached by a process of multiplying stumpage figures by a given price

per unit. See, e.g., Noosack Tribe of Indians v. United States, 6 Ind. Cl. Comm. 578, 600-601 (1958), aff., 162 Ct. Cl. 712 (1963), cert. den., 375 U.S. 993 (1964). Mr. Nathan's approach was in essence an elaboration on the process of multiplying units by price per unit.

The second approach has been described by plaintiffs as one dependent on sales of pineland and pine stumpage. Mr. Nathan stated that he had gathered data on private, state, and school sales of pine timberland and stumpage for the period from 1828 to 1875. The prices were deflated to 1848 values by means of the Warren and Pearson All Commodities Wholesale Price Index. Upon examination of the supporting data, we have found that a number of the transactions were not in fact sales. Mr. Nathan has included advertised prices and other offers to sell land without any indication of how much, if any, pineland was ever sold at the listed prices. Most of the transactions relied on by Mr. Nathan took place in Maine, Michigan and Wisconsin. Virtually all of the "sales" occurred long after the valuation date. While Mr. Nathan adjusted the prices to 1848 values by means of the wholesale price index, it does not appear from the record that pinelands appreciated at the same rate as the general wholesale price index. All of these "prices" were discounted to 1848 values and used by Mr. Nathan in computing his \$3.15 median price per acre.

We are unable to accord much weight to Mr. Nathan's \$3.15 median price for pinelands. While land sales can provide valuable evidence of fair market value, the sales must be bona fide, arms-length transactions. And,

to be truly meaningful, the sales must have a certain similarity to the lands to be valued and the transactions must be reasonably contemporaneous. The necessary criteria are lacking in the "sales" utilized Mr. Nathan.

In valuing the other types of subject land acreage, Mr. Nathan found that 765,579 acres of Royce Area 268 were suitable for agriculture. It was favorably located land accessible to markets and plentifully supplied with hardwoods. Comparable land in Wisconsin, south of the subject area, sold for the public land price of \$1.25 during the 1840's.

The witness for the defendant on acreage and valuation, Bernard C. Meltzer, used three methods for valuing the subject lands. His first method relied on land sales in Minnesota by the federal and state governments and by railroads. For federal sales he found a midpoint year of concentration for the \$1.25 and \$2.50 per acre transactions and discounted the sales back to 1848 levels. His average sale figure per acre was \$.3070. He also discounted the sale figure of \$5.50, the average per acre sale amount for the midpoint year of state land sales, and determined a figure of \$.3152 per acre value for the subject tract in 1848. Finally, the witness found a per acre value of \$.3050 for railroad owned land sales by determining a midpoint year for land sales of this nature and discounting by 10% back to 1848.

These sales may have some relevance as guidelines but the Commission has held that "[s]ales of public lands are controlled sales and thus may not be used alone to establish fair market value." Absentee Shawnee v. United States, 6 Ind. Cl. Comm. 377, 406 (1958).

The witness' second method for computing fair market value was based upon the cover of the land. The classifications consisted of pinelands, northern hardwoods, prairie, oak openings, and water. The dates of sales and level of sales were noted for these acres and discounted back to 1848. This method also considered other characteristics such as climate, soils, and transportation facilities. The average per acre sale was \$.344. The third method refined the second method in seeking to distinguish land value in regard to closeness to waterways or trails. Although the breaking down of the subject tract into categories of highest and best use as was done in method two, may be helpful, the figures utilized by Mr. Meltzer in his computations were based on subjective selections which were often quite arbitrary. Obviously other figures could have been utilized to produce a quite different ultimate result. The third method involved an even greater use of arbitrary figures to differentiate land within the general highest and best use categories. In his three methods of valuation, Mr. Meltzer found the subject tract to be worth approximately \$0.32 per acre.

In summary, the Commission finds that the subject tract contained valuable white pinelands, and it had farm lands of quality on the prairie and also in the hardwood areas. Much of the land was located near waterways and growing lumber centers like St. Anthony Falls and Stillwater. A prospective buyer in 1848 knew about the plans for developing a railroad through Minnesota and the subject tract was small enough to attract buyers.

On the other hand, the subject tract and the rest of Minnesota were sparsely populated in 1848. The hardwoods had to be cut in order to farm forest lands. The lumbering business in Minnesota did not reach its peak until later in the 1800's.

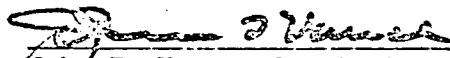
We conclude that the subject tract as a unit had a fair market value of \$600,000.00, as of April 3, 1848.

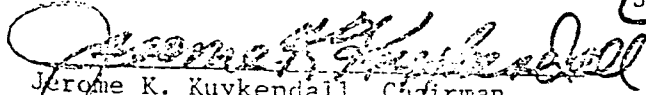
The consideration set forth in the Treaty of August 2, 1847 (9 Stat. 904), was \$17,000 to the Chiefs of the Chippewas of Lake Superior and \$17,000 to the Chiefs of the Chippewas of the Mississippi, and \$1,000 annually for 46 years to the Chiefs of the Mississippi Indians or a total of \$80,000.

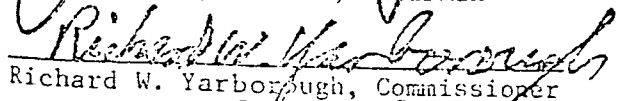
The total consideration of \$80,000.00 for lands having a fair market value of \$600,000.00 was so grossly inadequate as to render that consideration unconscionable within the meaning of Clause 3, Section 2 of the Indian Claims Commission Act.

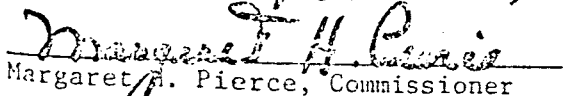
This case will now proceed to a determination of the offsets to be allowed.

We Concur:


John T. Vance, Commissioner


Jerome K. Kuykendall, Chairman


Richard W. Yarborough, Commissioner


Margaret A. Pierce, Commissioner


Brantley Blue, Commissioner