BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: July 21, 1971

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

Bernard M. Sisson, with whom was Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant

OPINION OF THE COMMISSION

Commissioner Vance delivered the opinion of the Commission.

In this case the Chippewa Indians claim that the consideration given for the 1837 cession of certain lands in Wisconsin and 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 242 and Area 220 (the portion in Wisconsin enclosed on three sides by Area 242) by Charles C. Royce on his Minnesota Map I and Wisconsin Map I in the 18th Annual Report of the Bureau of American Ethnology (Part II) Indian Land Cessions, and they will hereinafter be referred to as Royce Area 242.

On October 10, 1968, the Commission entered findings of fact, an opinion, and an order holding that as of the time of the Treaty of July 29, 1837 (7 Stat. 536), proclaimed June 15, 1838, the Chippewa Indians were the owners of Royce Area 242 by recognized title. 19 Ind. Cl. Comm. 514. The Commission also held that the subject lands were ceded to the United States by the 1837 treaty. It was directed that the case proceed to a determination of acreage, fair market value as of the June 15, 1838, proclamation date, and also to a determination of the value of the consideration given by defendant for the cession.

The 13,664,871 land and water acres under consideration were situated in the northwestern part of the present state of Wisconsin and in the eastern part of central Minnesota. The subject tract lay west of Lake Michigan and south of Lake Superior, its southern boundary lying 30 miles north of St. Paul and Minneapolis. The Mississippi River formed the western boundary of the subject tract.

The subject land had a temperate, continental climate favorable for habitation, timber operation and agriculture. The average temperature ranged from 39°F in the northern to 43°F in the southern portion of the subject area. The area was a gently rolling plain. Most of the land was situated between 1,000 and 1,500 feet above sea level. The entire area was drained by the Mississippi River, and there were five major river systems within the area providing waterways to every part of the subject tract. From east to west were the Wisconsin, Black, Chippewa, St. Croix, and Rum (part of the Mississippi River system) Rivers.

The pinelands represented the primary value of the subject lands. Of the 13,302,190 land acres in this suit, 6,846,162 acres were properly identified as pineland by Mr. John William Trygg, a professional forester who testified for the plaintiffs. A minimum of 80% or 5,476,930 of these acres were classified as white pineland.

Initially timber was cut for lumber by arrangement with the Indians to meet the needs of the military forts in the area, Fort Snelling (St. Paul), Fort Winnebago (Portage, Wis.) and Fort Crawford (Prairie du Chien, Wis.). During the 1840's lumbering became the most important industry in Wisconsin and Minnesota. By 1853 it was estimated that the pineries of Wisconsin furnished most of the lumber for the markets of the valleys of the Mississippi and its western affluents.

The valuable white pine supply in the subject tract drew entrepreneurs. In 1839, the first commercial sawmill on the Minnesota side of the St. Croix, within the subject area, began operation at Marine, 20 miles below St. Croix Falls. The subject tract furnished most of the logs feeding the mills on the St. Croix Boom. There were 5 million board feet of logs scaled there in 1840, 20 million in 1845, and 90 million in 1850. Other mills followed. In 1844, the first sawmill at Stillwater, Minnesota, on the St. Croix, went into operation taking its stock from the 1837 treaty area. In 1846 and 1847, mills began operation at Osceola within the subject land, and at Arcola, just south of the subject land.

The Chippewa River Valley rapidly became the most important area of the Wisconsin lumber industry. Prior to the 1837 treaty, several sawmills

were operating in the valley within the subject area. An estimate of the pine timber of the Chippewa Valley as it stood in 1840 placed it in the neighborhood of 20 million board feet. In 1847, there were 13 mills running 16 saws on the Black River and its tributaries and turning out 6.3 million board feet of lumber and 1.5 million shingles annually. Commercial lumbering was also developing rapidly on the Wisconsin River in 1837. In 1840, 1841, and 1842, there were 24 mills producing 6.2 million, 7.8 million and 8.5 million board feet of lumber, respectively, plus millions of shingles and lathes. Finally, in 1848, a sawmill was constructed at St. Anthony and commenced operations cutting Rum River white pine, producing from 500,000 to 700,000 board feet of lumber the first year. In 1850, over 6 million board feet of timber were cut on the Rum River and sawed into lumber at St. Anthony.

Most of the lands in the cession area were not surveyed until the 1850's and were not offered for public sale until then. Moreover, lumber entrepreneurs often did not purchase the lands which they cut, preferring instead to cut timber illicitly from lands belonging to the Federal Government, the Indians, the schools or the states. When timber lands were purchased, it was usually at the government price of $1.25 an acre.

The Act of April 24, 1820 (3 Stat. 366), which remained in effect until 1889, permitted the sale of surveyed public lands at public auction to the highest bidder. Those lands not sold at the auction could be purchased at the minimum price in what were termed private

sales. When pineland was surveyed and offered at public auction pursuant to the 1820 Act, the timberman purchasers often conspired to keep the price down to the minimum.

The 1841 Pre-emption act, (5 Stat. 455), was also frequently violated. Although the law was intended to aid the individual farmer to settle on lands, the preemptions were often used to cover frauds. Widespread entries on the pinelands were made under preemption laws without visible occupation of the lands claimed. By employing a farmer as its dummy, a lumber company could obtain the staked claim before competitors could get it.

Agricultural settlers generally preferred land in the river valleys adjacent to streams near wooded lands, and sought out the hardwood forest areas interspersed with openings on the edge of larger prairies. Substantial portions of the subject lands were valuable for agricultural development. As of the valuation period, the presence of hardwood trees was regarded as evidence of good agricultural soil. The hardwood trees also provided timber for fuel and construction. In the main, agricultural products were grown for local consumption and for markets along the Mississippi. The rapid expansion of the lumber industry in the subject area provided a substantial market for agricultural products.

In 1830, the territories of Wisconsin and Minnesota had a population of about 5,000. By 1840 about 31,000 people were in Wisconsin Territory.

And between 1840 and 1850, Wisconsin population increased tenfold, from 30,945 to 305,391. In 1838 there were no roads, railroads, or canals serving the area to be valued. In the southern part of Wisconsin, there were a few small trails and military roads. Thus, the people of interior Wisconsin and Minnesota depended mainly on the rivers for transportation.

In general, prices rose only moderately during the 1830's and were stable during the 1840's. The effects of the depression of 1837 were short lived. During the period when business in general was depressed throughout the country, the lumber industry in the upper Wisconsin region in the subject area enjoyed a boom.

The plaintiffs' valuation witness, Mr. Robert Nathan, an economist, valued the subject land for its two highest and most valuable uses, timber and agriculture. The witness used two approaches to value, one based on the future income from the timber and the other on the prices of pine stumpage and pineland. The details of the two approaches are summarized in our Finding of Fact No. 22. The major reliance was on the future income approach. By this method the value of pine stumpage was computed from the difference between the price of pine lumber less all costs of production and a reasonable profit. The price for lumber was estimated at $20 per mbf delivered to the market. Projected sales from 1839 to 1888 were over 30 billion board feet of lumber. Costs from the tree to the boards of lumber delivered were estimated at $10 mbf. The net cash flow was discounted at 10% to reflect the time

lag between the investment and the return. This approach indicated a maximum value of 23 million dollars for the subject pinelands.

The second approach depended on sales of pineland and pine stumpage. Such data were meager. Prices for the subject pinelands and for other land were gathered for the period 1828-1875. These prices, discounted the 1838 price levels, were used by Mr. Nathan to compute a median price of $4.24 per acre of pineland. Pine stumpage prices similarly deflated indicated a value of $2.07 per acre. In his calculations, Mr. Nathan relied on Mr. Trygg's white pine acreage and volume figures.

We have examined the data used by Mr. Nathan and have noted that his first approach, using a future income method of valuation, contained important assumptions. He assumed a lumber operation and its production figures. These assumptions in addition to estimates of the price of white pine lumber delivered to the market and of all costs from the standing tree to the delivered boards failed to relate to the fair market value price paid for pinelands. We have consistently held that determination of fair market value cannot be reached by a process of multiplying stumpage by a given price per unit. See e.g., Nooksack Tribe of Indians v. United States, 6 Ind. Cl. Comm. 578, 600-601 (1958), aff'd., 162 Ct. Cl. 712 (1963), cert. denied, 375 U.S. 993 (1964). Mr. Nathan's approach was in essence an elaboration of the process of multiplying units by price per unit.

Mr. Nathan's second approach to pineland valuation has been described by plaintiffs as one dependent upon 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 discounted to 1838 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 1838 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.

We are unable to accept Mr. Nathan's price range of $2.50 to $3.50 per pineland acre arrived at from his two valuation approaches. 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 by Mr. Nathan.

In determining the value of agricultural land in the subject area, Mr. Nathan noted that the farm land was favorably located, 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 per acre during 1835-1840. The witness believed that the subject agricultural land would bring no less. Mr. Nathan gave in evidence his opinion that as of June 15, 1838, the fair market value of the subject area was $28 million or about $2.00 per acre.

The defendant's expert appraisal witness was Mr. Walter R. Kuehnle, a professional real estate appraiser. In estimating the acreage in the subject pinelands in Wisconsin and Minnesota the witness referred to vegetation maps of Robert W. Finley, at the time a doctoral student, and F. J. Marshner, an agricultural economist.

Mr. Kuehnle's second method of measuring the extent of pinelands involved a study of the original township plats and the general descriptions thereon. Mr. Kuehnle's third approach to the estimation of pinelands was to study land sales data in the subject area. By 1875 most of the desirable pineland had been sold. Through these three methods the defendant estimated there were 2,500,000 acres of white pineland in the subject area.

In valuing the subject lands, Mr. Kuehnle assumed that since so much comparable land was, and would remain, on the market at the public lands price, the most a subsequent retail purchaser would have been willing to pay per acre of pineland was $1.25. He computed purchase costs at

approximately $.15 per acre so that the best price per acre that an 1838 purchaser could have paid in order to break even was around $1.10. Mr. Kuehnle further assumed a 10% to 15% return on the investment. He applied the rates of sale, determined by land sales experience in Michigan, first to the 2,500,000 acres of white pineland, then to the 2,500,000 acres of adjacent dryland (at 8 percent per annum), and finally to the remaining 6,734,000 acres of dryland at 3 percent per annum. He found that 1,568,000 acres of the subject land were swampland. By discounting the total receipts, year by year, back to July 1, 1838, the indicated value of the area was $3,717,000 (rounded off to $4,000,000) or 28 cents per acre.

In determining the extent of white pinelands in the subject area, the defendant's witness relied upon vegetation maps which were not as accurate as the methods employed by Mr. Trygg for the plaintiffs. Mr. Trygg's township by township use of public survey field notes yielded a more accurate view of the acreage of white pinelands than did the vegetation maps which were produced to indicate general vegetative cover of the subject area. The public surveys which were used by defendant's witness and his map sources, relied on general descriptions which did not contain the depth of study which Mr. Trygg's more thorough approach did. In his third method of ascertaining the amount of white pinelands in the subject area, the defendant's witness used a sales history of the lands which contained many assumptions and included land entries as well as actual sales in the subject area.

The defendant's valuation of the subject lands employed percentages reflecting the rates of land sales in Ohio, Michigan, Illinois, and Wisconsin. These percentages would not have necessarily been appropriate in terms of Wisconsin pineland sales development. The witness also failed to value the land in question for its highest and best use as white pineland and agriculture. He instead regarded the lands solely as purchased and held for resale by the buyer without considering the cutting of timber or the farming the owner might have done on his lands.

In considering the agricultural possibilities of the subject tract, the witness noted that up to 1838 agricultural development in Wisconsin was primitive. Agricultural products were only for local consumption.

In summary, the Commission finds that the subject tract contained valuable white pineland and farmland. The pinelands were located near waterways and operating mills which indicated a promising future for timber land development in the subject area.

On the other hand, Wisconsin and Minnesota were sparsely populated in 1838. Rivers were the main form of transportation for the settlers there. The subject tract was large in size, and it would have had a gradual sales development. Finally, the lumber business in Wisconsin and Minnesota did not reach its peak until some years after 1838.

We conclude that the subject tract as a unit had a fair market value of $9,875,000.00 as of June 15, 1838.

The consideration set forth in the Treaty of July 29, 1837 (7 Stat. 536), was $870,000 or just over 6 cents per acre. The total

consideration of $870,000 for lands having a fair market value of $9,875,000.00 was so grossly inadequate as to render that consideration unconscionable within the meaning of Clause 3, Section 2 of the Indian Claims Commission Act.

When the Commission rendered its initial decision concerning the title issues in this case, the question of the precise definition of the entity or entities to be entitled to participate in any prospective award was reserved. We have now reviewed the evidence on this issue and the contentions of the parties, and we have concluded that the Chippewa Indians of the Mississippi and Lake Superior were the only parties in interest with respect to the 1837 treaty and the lands ceded thereunder. In 1837 Congress appropriated funds "[f]or holding treaties with the various tribes of Indians east of the Mississippi River, for the cession of lands held by them." Act of March 3, 1837 (5 Stat. 158, 161). Treaty commissioners were appointed to hold a treaty with the Chippewa Indians of the Mississippi. The treaty commissioners, however, did not limit themselves to the Chippewas of the Mississippi but brought together as many Chippewa bands as could be collected. Apparently, the commissioners were not certain that title was in the Mississippi Chippewas alone, and they may have been aware, as in fact developed at the treaty proceedings, that several bands of Lake Superior Chippewas, as well as bands of Mississippi Chippewas, were in possession of the area the United States sought to purchase. This uncertainty is reflected in the preamble to the 1837 treaty, referring to the treaty with the "Chippewa nation of Indians." Treaty of July 29, 1837 (7 Stat. 536).

The 1837 treaty was not signed in the name of the "Chippewa nation", but was signed by chiefs and warriors from four bands of the Chippewas of the Mississippi, five bands of the Chippewas of Lake Superior, and two Pillager Bands, or eleven bands in all. The 1837 treaty proceedings and treaties with the Chippewas subsequent to the 1837 treaty, established that the Pillagers had no interest in the area ceded by the 1837 treaty. At the negotiations, the Pillagers made this plain. The United States entered into five subsequent treaties with the Chippewas that bear on the point. Three with the Chippewa Indians of the Mississippi and Lake Superior, one with the Pillager Band, and one with the "Mississippi bands of Chippewa Indians and the Pillager and Lake Winnibigoshish bands of Chippewa Indians".

Next, after the 1837 treaty, the United States entered into the Treaty of October 4, 1842 (7 Stat. 591), with the Chippewa Indians of the Mississippi and Lake Superior. By that time it was recognized that the country ceded by the 1837 treaty belonged in common to the Chippewa Indians of the Mississippi and Lake Superior. The Pillagers were omitted. Article V of the 1842 treaty explicitly expressed this view. By the same article the Chippewas and the United States agreed that annuities under both the 1837 and the 1842 treaties were to be divided equally among the Chippewas of the two divisions and it was agreed the unceded lands of the two divisions were thereafter to be held in common.

After the 1842 treaty, the United States took a cession of Royce Area 268 under the Treaty of August 2, 1847 (9 Stat. 904), with the Chippewa Indians of the Mississippi and Lake Superior. The treaty was

signed by bands from the Mississippi and Lake Superior Chippewas only. Three weeks later the United States took a cession of Royce Area 269, by the Treaty of August 21, 1847 (9 Stat. 908), at Leech Lake with the "Pillager Band of Chippewas". Next followed the Treaty of September 30, 1854 (10 Stat. 1109), between the United States and the Chippewa Indians of Lake Superior and the Mississippi. Article 1 of the 1854 treaty provided for a division of country and a boundary marking the division of territory between the Chippewas of Lake Superior and the Chippewas of the Mississippi. Ownership in common of the whole country was converted to ownership in severalty by each division. The Lake Superior Chippewas then ceded Royce Area 332, and the Mississippi Chippewas agreed that all of the consideration should be paid to the Lake Superior Chippewas (Article 1). In Article 8 of the 1854 treaty it was agreed, between the Chippewas of Lake Superior and the Chippewas of the Mississippi, that the former shall be entitled to two-thirds, and the latter to one-third, of all benefits to be derived from former treaties existing prior to the year 1847. The plaintiffs have suggested that this division be followed and the Commission agrees that this method of dividing the funds between the two bands is proper.

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

John T. Vance, Commissioner

We Concur:

Jerome K. Kuykendall, Chairman

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner