BEFORE THE INDIAN CLAIMS COMMISSION

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, ET AL.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 57

Decided: May 16, 1973

Appearances:

James R. Fitzharris, Attorney for the Plaintiff. Rodney J. Edwards was on the briefs.

John D. Sullivan, with whom was Mr. Assistant Attorney General, Kent Frizzell, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

In the title phase of this case, 22 Ind. Cl. Comm. 504 (1970), the Commission determined that plaintiffs had recognized title to the lands ceded to defendant by Article 1 of the Treaty of Saginaw (Treaty of September 24, 1819, 7 Stat. 203). This phase of the case involves a determination of (1) the acreage of the lands ceded, as described in Article 1 of the Treaty of Saginaw, less the reservations as described in the treaty; (2) the fair market value of the ceded lands on the valuation date; and (3) the consideration given for the cession.

In the title phase of this case, we determined that the

date on which the value of the tract should be appraised was March 25, 1820, the date of proclamation of the treaty.

Both the plaintiffs and defendant have separately compiled acreage tabulations and have agreed that the land to be valued consists of 7,417,400 acres. The Commission accepts this figure as the area of the lands described in Article 1 of the Treaty of Saginaw, less the reservations described therein.

This area is located in the southern peninsula of the present state of Michigan, identified as Royce Area 111 on map 1 of Michigan in the eighteenth Annual Report of the Bureau of American Ethnology, 1896-1897 Part II. This peninsula is in the Great Lakes region and lies between Lake Michigan on the west and Lakes Huron and Erie on the east. Saginaw Bay juts far into the area from Lake Huron and is a significant geographical feature.

Michigan's location in the midst of the Great Lakes modifies the climate and stabilizes the temperature. Rainfall is quite evenly distributed throughout the year, with a greater portion falling during the growing season.

The earliest known white settlers in Royce Area 111 were traders and trappers. The first permanent white community within the area was Saginaw, which was settled in 1820. The census of that year showed 9,408 non-Indian inhabitants in all of the Michigan Territory, which included Wisconsin and that portion of Minnesota which is east of the Mississippi River.

Lewis Cass became the territorial governor in 1813. His competent administration and long tenure was a significant factor in the growth of Michigan. By the time of the Treaty of Saginaw, Detroit had become an important center of new growth and Michigan was well on the way toward statehood.

Water transportation was an important factor in the settlement of the Michigan Territory. Small boats, sailing ships and steamships were used in navigation of the Great Lakes and the navigable rivers and streams of Michigan by 1818. The construction of the Erie Canal, which had begun in 1817, promised ready access to eastern markets.

The Indian trails were the only overland transportation routes in the area in 1820. Railroad construction in Michigan began in the 1830's.

All land in what is now Michigan was acquired by the United States through a succession of treaties, commencing with the 1807 Treaty of Detroit and ending with the Treaty of La Pointe in 1842. The first survey in Royce Area 111, covering a small tract near Saginaw Bay, was ordered in June 1820 but was not completed until 1822. The first sale of Government land in the Michigan Territory was made in 1818.

As of the valuation date, trade and commerce in Michigan were centered in Detroit, which was a lively agricultural market. The possibility of expansion of this commerce when the Erie Canal was completed was recognized, and immigration was increasing. Michigan

was destined to become a leading timber producing area, because of its tremendous stands of timber and cheap water transportation. The economy of the area was largely based on fur trading in 1820, and at that time Royce Area 111 was quite isolated from commercial activities.

The parties to this proceeding disagree sharply as to the fair market value of these lands as of the valuation date. Plaintiffs valued them at approximately $2.23 per acre and were of the opinion that about one-half of the land was valuable as timber land and the other one-half was well suited for agriculture. Defendant placed a value of $0.55 per acre on the northern half of the tract because of its speculative value for timber, and valued the southern half at $0.34 per acre because of its potential use for subsistence farming. Defendant proposed an average valuation of $0.445 per acre for the tract as a whole.

We agree with the parties that the highest and best uses of the northern and southern portions of the tract were, respectively, timber operations and agriculture. However, we do not agree with either party as to the value of the tract in 1820.

We believe that plaintiffs' appraisal of the subject tract at an average value of $2.23 per acre is too high. Mr. J. W. Trygg, the plaintiffs' appraisal witness, concluded that the fair market value of the subject tract as of the valuation date was $16,500.00. He does not state with any detail how he arrived at this figure.

Mr. Trygg attempted to determine the amount and value of all the timber on the entire tract. The amount was estimated by gauging the quantity of pine and hardwood growing on small sample plots. Using this information, he computed the number of plots and thus calculated the number of board feet of pine and hardwood timber in each township in the area. In Red Lake Band v. United States, Dockets 18-E and 58, 20 Ind. Cl. Comm. 137 (1969), which involved the value of land adjoining Royce Area 111, the same witness used the same method of appraisal. The Commission commented as follows:

> It appears to us that Mr. Trygg (petitioner's appraiser) used a highly speculative method in arriving at his board feet estimate of merchantable timber on the subject lands in 1836. He did not take into account the inevitable wastage which always accompanies the harvesting of timber, particularly at that early date. Trees which would not have been considered merchantable in 1836 were included in his estimates. He did not distinguish between the amount of white pine and other species of pine which were less valuable. The commercial value of the timber in the subject area was more of a potential than a reality in 1836. [Id. at 138-39.]

In this case too, Mr. Trygg did not distinguish between the different types of pine, nor did he make any allowance for wastage. He said nothing about prices per board foot for lumber.

We find this appraisal to be unsatisfactory. Their witness has placed a value only on the timber lands, and used an unacceptable method in so doing. No discussion or appraisal of the agricultural lands was given. He has not shown what calculations or reasoning he used in reaching a conclusion as to the value of the whole tract.

Mr. Gordon E. Elmquist was defendant's appraiser and expert witness. He used two methods by which he arrived at alternative

valuations of the area. The first method involved comparable sales of five large tracts in various locations throughout the United States, from which he concluded that a value of $0.55 per acre would represent the fair market value of the tract.

Four of the five sales he relied on occurred approximately 25 years prior to the valuation date herein. In Miami Tribe v. United States, Dockets 253, et al., 22 Ind. Cl. Comm. 92, 122 (1969), the Commission, in rejecting an approach that relied on sales which occurred a long time prior to the valuation date, said:

> The dates of purchase or acquisition of lands relied on by the appraiser, are in the main, so much earlier (1787-1798) than the valuation dates for these tracts (1806-1810) that the comparisons have limited if any meaning.

The fifth sale occurred fourteen years after the valuation date in Canada, and likewise is of virtually no probative value. In fact, the witness conceded that he lacked truly pertinent comparable sales data, and that he therefore used his judgment in making adjustments in the five sales prices in order to arrive at his final valuation.

The Commission finds that the evidence of comparable sales submitted by defendant offers little guidance to a determination of the value of Royce Area 111 in 1820.

Mr. Elmquist used an alternative method to appraise the value of Royce Area 111. This consisted of a developmental approach based on the

price of $1.25 per acre set by the Government in 1820 for sales of small tracts to settlers. The government price of $1.25 was a minimum figure. Since this land was to be disposed of by auction, and competitive bidding could raise the price, Mr. Elmquist added 3 cents per acre to the price to compensate for this factor. Thus he arrived at a figure of $1.28 per acre.

Mr. Elmquist determined that a hypothetical purchaser would have deducted one section of land per township, or 2.8% of the total land acreage, on the assumption that it would be set aside for school purposes. He also deducted 30% of the remaining acreage, which he estimated was the proportion of the land having third and fourth class agricultural soil, which he deemed to have no commercial value. These eliminations of acreage left 5,046,800 acres upon which Mr. Elmquist placed a value.

He next considered certain expenses which he believed would have been incurred and therefore should be recognized. He deducted 16 cents per acre for selling and miscellaneous costs. Another nine cents per acre was deducted for expected profit, which was based on an anticipated 15% rate of return on investment. This resulted in an ultimate land value of $0.93 per acre, or $4,693,524 for 5,046,800 acres. This amount was discounted over

a 20-year liquidation period at 6% per annum to obtain a net value of $2,540,000 as of March 25, 1820. This amounts to $0.34 per acre for the 7,417,400 acres in the tract.

To support his conclusion that a prudent investor would have anticipated a twenty year period to sell the subject lands, Mr. Elmquist merely said that little interest was being shown in the tract in 1820. Official letters, newspapers, and travel accounts of the time which suggested that expectations were for a more rapid rate of settlement and development were ignored.

The parties are in agreement that the highest and best uses for the northern and southern halves of the tract were, respectively, for timber operations, and for agriculture. While it is reasonable to postulate that the southern portion of the subject area would sell in 80-acre tracts, we cannot agree with Mr. Elmquist's assumption that the northern half would also sell in this manner. Since timber operations represented the highest and best use of the northern part, it is most likely that this portion of the area would be disposed of in large tracts. Accordingly, selling costs would tend to be lower and the resale period might tend to be shorter than Mr. Elmquist's estimate.

The southern portion of Royce Area 111 contains mostly first and second class soils, some small areas of third class soil and no

land classified as fourth class soil. Although the northern half of the area contains a substantial amount of third and fourth class agricultural soils, which would be marginal or submarginal as agricultural lands, the parties have agreed to value this northern portion according to its highest and best use, which is for timber operations. Consequently, we conclude that defendant erred in reducing the acreage to be valued by this 30%.

Furthermore, defendant's expert assumed a constant sales price of $1.28 per acre for a period of twenty years, without allowing for rising land values, which certainly would have been contemplated by a purchaser of the subject tract. Finally, defendant contended that a 15% rate of return on investment would have been expected, although a figure of 5 to 6% was being received on major investments in wilderness lands.

For these reasons we do not agree with this method of appraisal.

In arriving at our determination of value, we start with the government established minimum price of $1.25 per acre, plus three cents for auction bidding. A prospective purchaser of the subject lands in 1820 would have had to consider and allow for the costs of disposing of such a large size tract over a relatively long period of time and for interest and profit. An investor would have

considered the subject area's location on the Great Lakes as an asset and no doubt would have been confident that land prices generally would rise over the years. He would have made reasonable allowance for a 10 to 20 year period in which to resell the northern one-half of the subject area in large tracts and the southern one-half in small tracts. A prospective purchaser would have noted the great potential of the subject tract because of its good soil, timber and climate.

The expectation that Royce Area 111 would attract immigrants would have been strengthened by the knowledge of the development of Michigan Territory under the Cass administration, the beginning of work on the Erie Canal, and the commencement of steam navigation on the Great Lakes. Information that the average price obtained in 1818 at the first government land sale in Michigan, for land located within the Detroit vicinity, was approximately $2.50 per acre was available to a prospective purchaser. He would have recognized that the completion in the near future of the Erie Canal, coupled with cheap water transportation from the interior of the area to the shores of Lake Huron, promised easy access to Ohio and New York and the prairie states to the west.

A prospective seller, on the other hand, would have observed the westward migration and the governmental policies favoring it, and

would have realized that he had an excellent investment, that if he did not sell immediately, he very probably could sell at a better price later.

The Commission has given careful consideration to the many exhibits received in evidence, as well as the testimony of the witnesses, and the briefs and arguments of all counsel. Based on the findings of fact herein and the record as a whole, we conclude that the subject tract, as a unit, had a fair market value of $8,160,000 as of March 25, 1820.

We now turn to the matter of the amount of consideration received by plaintiffs under the treaty. The General Accounting Office report shows this amount to be $97,409.14. Plaintiffs argue that, by the plain language of the treaty, payment for the land ceded was made only under Article 4 and was in the amount of $36,000. Plaintiffs contend that the remaining payments, set forth in Articles 6 and 8 of the treaty, were an inducement to make the treaty or were for other concessions made by the Indians under Articles 5, 6 and 7 of the treaty.

Article 1 of the Treaty of Saginaw states, in part, that "the Chippewa nation of Indians in consideration of the stipulations herein made on the part of the United States do hereby, forever cede to the United States. . . ." (Emphasis added). This provision implies that

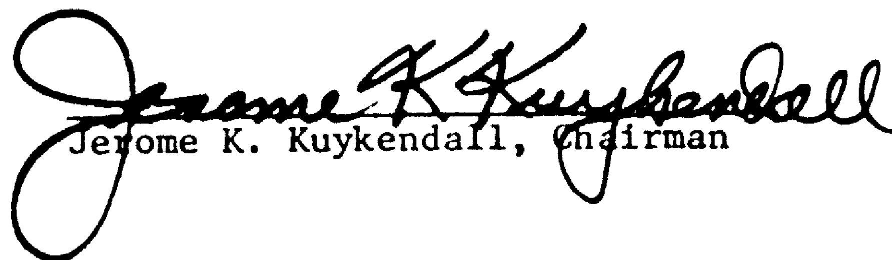
all of the payments made by the United States should be attributed to the promise to cede the land.

Aritcle 4, however, separately states that "in consideration of the cession aforesaid, the United States agrees to pay to the Chippewa nation of Indians, annually, forever, the sum of one thousand dollars." Furthermore, it is clear that the Indians made other concessions to the United States in Articles 5, 6 and 7 of the treaty. Under these provisions the Indians recognized restrictions on their heretofore unlimited hunting rights, agreed to accept payment for improvements which they would be obliged to abandon, and acknowledged the right of the United States to construct roads through any part of the land reserved by the treaty.

To resolve this ambiguity in the treaty, the Commission follows the well recognized rule that specific language should prevail over general statements or recitals, and that when there is doubt, treaties and agreements with Indian tribes should be liberally interpreted in favor of the Indians. Choctaw Nation v. United States, 128 Ct. Cl. 195, 201, 121 F. Supp. 206, 210 (1954) (aff'g, Docket 55, 1 Ind. Cl. Comm. 553 (1951)). Therefore the Commission finds that the consideration for the land cession was only the disbursement under article 4. However, the Commission determined in Saginaw Chippewa Indian Tribe v. United States, Docket No. 13-I, 2 Ind. Cl. Comm. 416 (1953), that the value of the annuity under article 4 was $16,667.

The total consideration of $16,667 for lands having a fair market value of $8,160,000 was so grossly inadequate as to render that consideration unconscionable within the meaning of Clause 3, Section 2 of the Indian Claims Commission Act.

Plaintiffs are entitled to recover from the defendant the net sum of $8,143,333 for and on behalf of the Saginaw Chippewa Indian Tribe of Michigan and the Saginaw, Swan Creek and Black River groups or bands of Chippewa Indians, less the offsets, if any, defendant is entitled to under the provisions of the Act. An order will be entered accordingly.

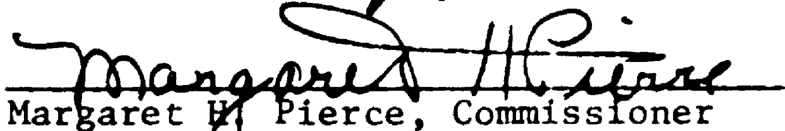


Jerome K. Kuykendall, Chairman

Concurring:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner



Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner