BEFORE THE INDIAN CLAIMS COMMISSION

BOIS FORTE BAND, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Docket No. 18-D
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: June 13, 1974

Appearances:

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

Bernard M. Newburg, with whom was Assistant Attorney General Kent Frizzell, Attorneys for Defendant.

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

In this case the Bois Forte Band of Chippewa Indians claims 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 have been designated as Area 482 by Charles C. Royce on his Minnesota Map No. 1 in the 18th Annual Report of the Bureau of American Ethnology, Part II, Indian Land Cessions, and they will be referred to hereafter as Royce Area 482. In previous findings made on June 27, 1969 (21 Ind. Cl. Comm. 254), the Commission determined that the United States, the defendant herein, had recognized the title of the Bois Forte Band of Chippewa Indians to Royce Area 482, which area was ceded to the United States by the Treaty of April 7,

1866. The date of the ratification of that treaty, April 26, 1866, was held to be the effective date of the cession.

This case is now before the Commission for determination of the acreage and fair market value of Royce Area 482, as of April 26, 1866. We must also decide whether or not the consideration for the cession was unconscionable.

Royce Area 482 is a nearly rectangular tract located in northern Minnesota. The northern boundary is the Rainy River and Rainy Lake, which form the United States-Canadian boundary.

Plaintiffs and defendant were each assisted by expert witnesses in developing their respective cases. Plaintiffs' expert, Mr. John William Trygg, calculated that the subject area consisted of a total of 2,030,510.28 acres, of which 1,888,122.16 acres were land and 142,388.12 acres were water. Defendant's expert witness, Mr. Bernard C. Meltzer, calculated that the subject area consisted of 2,044,000 acres, of which 124,000 acres were water, and 1,919,500 land. However, defendant has chosen to accept plaintiffs' figure as correct, and we have so found.

The land is fairly level, draining from south to north and east to west, ultimately into the Rainy River. There are numerous rivers, streams and lakes in the subject area, ranging from large rivers, such as the Big Fork and Rainy Rivers, to nameless streams. The land is nearly flat in the northwestern portion of the area and the rivers tend to broaden into marshes and swamps in that region. With this exception the larger rivers are suitable for floating logs. The rivers, flowing westward and northward, ultimately reach the Lake of the Woods, Lake

Manitoba, and finally Hudson Bay. There is no drainage from the subject area into either the Mississippi River system or Lake Superior.

Transportation in the subject area was by foot or canoe in 1866. There were no railroads planned for the area at that time. The only road in the area was from Duluth to the Vermilion Lake gold country. Across the northern boundary of the subject area was an east-west waterway-portage used by trappers, fur traders and explorers traveling between Lake Superior and the west.

Although there were no railroads in the subject area, 324 miles of railroads were in operation in Minnesota at the date of cession, and many more were planned or under construction. In 1857, Congress granted Minnesota 4,500,000 acres of land to aid in the construction of railroads; and in 1858, the Minnesota legislature granted a five million dollar loan to aid railroad construction. Aside from the swampy areas, the topography of the subject area lent itself to the construction of railroads and highways. A knowledgeable prospective buyer would have considered this factor in valuing the subject area.

Because of its northern location, Royce Area 482 has a short growing season. Most vegetative life is dormant for approximately six months of each year. Therefore, only cold weather, short season crops could be grown in the area. The precipitation pattern in the area is favorable to agriculture since most of it occurs in the growing season.

The population of Minnesota was growing rapidly at the time of valuation. From six thousand persons in 1850, the state (admitted to

the Union in 1858) had grown in population to 250,000 in 1865. Since much of this growth was in a time of war, a well-informed buyer would have anticipated a continued rapid growth rate, and probably a post-Civil War boom. The United States population had grown at a much lower rate. In 1850, the population of the United States was 23,191,876, and in 1860 it was 38,900,898. The available population figures indicate that Royce Area 482 was sparsely populated in 1866.

Canada, too, was showing signs of a population boom. The Red River region was developing in Canada, as it was in Minnesota and Dakota Territory. Manitoba Province had an 1870 population of 21,800, and Ontario Province had an 1869 population of 1,962,000.

Northeastern Minnesota had been considered a mineralized area since Europeans first traversed the region. At the date of valuation Royce Area 482 was in the midst of a minor "gold rush." In September of 1865 the word leaked from the office of the Governor of Minnesota that gold had been discovered at Vermilion Lake, half of which is located in the subject area. In January of 1866 a road was begun from Duluth to Vermilion Lake. By May of the same year there were about three hundred white people at the lake, and a sawmill and about fourteen houses had been erected.

The reports of gold deposits in the area proved to be false and the rush soon died. However, it was not until after the valuation date that the reported discovery was revealed to have been unfounded. In fact one of the reasons for negotiating the 1866 treaty with the plaintiff Bois

Forte Band was to avoid the possibility of interference with miners at Lake Vermilion.

In April of 1866, a prospective purchaser of Royce Area 482 would have anticipated the prospect of profiting from gold deposits which might exist in the land. He further would have anticipated a population growth for the area as miners and prospectors became active in the region. While there is no basis for computing a separate mineral value for Royce Area 482, we conclude that the value of the land was enhanced by the reported discovery of gold at Vermilion Lake. The fact that the report was false is hindsight. It is the knowledge and opinion of the 1866 well informed buyer and seller which must be considered in determining the April 26, 1866, fair market value of the subject area. We are not concerned with the fact that the prospects of mineral deposits were contradicted by later knowledge. See Hualapai Tribe v. United States, Docket 90, 17 Ind. Cl. Comm. 456, 524 (1966); Northern Paiute Nation v. United States, Docket 87, 16 Ind. Cl. Comm. 215, 295, 308 (1965), aff'd, 183 Ct. Cl. 321, 393 F.2d 786 (1968).

Plaintiffs have introduced into evidence soil classifications of the subject area which indicate that approximately 36 percent of the subject area's soils are of agricultural quality. Since we have found that the highest and best use for the subject area was for its timber, we deem it unnecessary to classify the soils, except to note that there was sufficient soil of adequate quality to provide for the subsistence of persons living in the area.

More important, we feel, is the land classification. Defendant and plaintiffs classified the lands as follows:

	Plaintiff	Defendant
River bottom	4,155	11,000
Prairie	1,415	7,000
Forests	1,333,700.85	1,281,500 1/
Swamp	548,851.31	670,000

Although these totals are somewhat divergent, the most important figures for the purposes of this opinion, the forested acreage are substantially the same. Although the parties differ by only 52,000 acres on the forested acreage in the area, they are far apart on how much pineland there was in the area. Plaintiffs state that there were 912,204.90 acres of white and Norway pinelands, while defendant contends that there were only 355,000 acres of pinelands. The extent of the white and Norway pine is important because those two species had the only commercial value in 1866. Hardwood would not float, and the aspen, birch, and jack pine became of commercial importance only as the wood-pulp industry developed at a much later date. The parties have relied on experts in support of their pineland estimates.

1/ Defendant does not have an aggregate forest designation but lists red and white pine, 355,000 acres; aspen-birch (conifer), 710,000 acres; aspen-birch (hardwoods), 66,500 acres; and jack pine, 150,000 acres. Defendant's requested findings 16 apparently omitted the jack pine classification inadvertently since the total land acres given on p. 44 of defendant's requested findings is not the sum of the figures listed. If we include the 150,000 acres of jack pine the total given in requested finding 16 would be correct. Defendant's Exhibit V-78, p. 172, lists the same total acres and includes the jack pine classification.

Plaintiffs' expert, John William Trygg, lived his entire life in northern Minnesota. He was employed by the United States Forest Service from 1926 to 1954, of which the last 12 years were in the Superior National Forest, which abuts the subject area. After leaving the Forest Service, he was a consulting forester and in the real estate business in Ely, Minnesota. He has also done independent research into the early timber and logging operations in the subject area. In doing that research he interviewed sawmill, logging and lumber company officials, as well as early settlers and local historians. He recorded their statements as to where and when lumber operations were conducted; costs and methods of operation; the quantity and kind of timber removed; where the timber was sold; the prices paid for stumpage, logs and lumber; and related matters.

For this case he, with his staff, assembled the field notes of the public land surveys, some twenty thousand pages, and abstracted from them the quantity of pine lands in the area as of the dates of the survey--1881-1907. From these field notes he also determined the quantity of white and Norway pine timber acres in the subject area and the density in board feet of the pine timber on the pinelands. We have previously held that "these surveyor's notes are among the best evidence of the quality and adaptability of the specific areas to be valued." Sac and Fox Tribe of Missouri v. United States, Docket No. 195, 13 Ind. Cl. Comm. 295, 315 (1964).

Defendant's expert, Bernard C. Meltzer, is an experienced professional real estate appraiser. He was assisted in his appraisal by Mr. Roland J. Sharr, an experienced real estate appraiser from Minnesota.

In determining the amount of pinelands in the subject area, Mr. Meltzer relied on a map prepared by Mr. E. J. Marschner in 1930. The map was originally compiled from the land office field notes. Mr. Meltzer used the timber designations on the Marschner map to compute the quantity of white and Norway pinelands in the subject area.

The Commission is familiar with the Marschner map. Mr. Marschner testified here during the trial of Docket Nos. 18-B and 18-N, Minnesota Chippewa Tribe v. United States, and the transcript of his testimony has been made a part of the record of this case. Mr. Marschner testified that the purpose of his map was to show the original forest cover of Minnesota. In doing so the surveyors' township plats were reduced in scale so that a township (thirty-six square miles) was reduced to the size of a postage stamp, and some generalization had to be made in order to produce a legible map.

We have considered the two expert's estimates as to the amount of pinelands in the area in 1866. Both are based on the same original data, the field notes of the surveyors. Since defendant's expert used the field notes only as they were summarized on the Marschner map, his figures are less precise than plaintiffs', which were based directly upon the field

notes. In compiling his map Mr. Marschner was concerned with the dominant species of timber. A ten acre tract of pure white pine was too small to record on his map if it occurred in the midst of another of his classifications, such as river-bottom forest. Similarly, a township containing two-thirds aspen-birch and one-third white pine was recorded as aspen-birch (conifer). Each of these areas had timber of commercial value, yet in computing the acreage of pinelands from the Marschner map Mr. Meltzer omitted these acreages, since Marschner had omitted them originally. This is evidenced by the fact that the Virginia and Rainy Lake Lumber Company cut pine from 1910 to 1929 on lands listed by Mr. Marschner as aspen-birch.

Defendant, citing the surveyor's "General Description" in two townships, has questioned Mr. Trygg's computations. However, Mr. Trygg's pineland estimates were based on the field notes of the surveyors and not on the general descriptions. Field notes typically cover 100 or more pages for each township and involved, of course, much greater detail. Thus some general descriptions, which describe in just one sentence the forest cover for an entire township, might seem to contradict estimates based on the detailed field notes. Since Mr. Trygg's estimates were based on the basic data, we have accepted his figures as the most reliable estimate of the pineland acreage of Royce Area 482.

Defendant's expert, Mr. Meltzer, found no comparable sales upon which to base a valuation of the lands in this case. He therefore examined the subsequent public sales of land in Royce Area 482, and determined that

cash sales at $1.25 an acre were made between 1883 and 1891, with 1886 as the median year for such sales. In 1892 the minimum cash price was raised to $2.50 an acre. He found that 1894 was the peak year of sales activity at the $2.50 per acre price. Discounting these two sales prices at a 10 percent rate to the 1866 valuation date, he arrived at his indicated fair market value figures of 18.57 and 17.33 cents per acre.

Defendant contends that a prospective purchaser of the subject tract in 1866 would have anticipated that it would have taken a minimum of 20 years to dispose of the land at $1.25 per acre. Considering that there would have been annual carrying costs of 10 percent, the indicated 1866 fair market value would have been 18 cents. This, of course, is the same computation which Mr. Meltzer used. Defendant has merely ascribed to an 1866 prospective purchaser the same figures which Mr. Meltzer developed from his hindsight method of examining sales some 17 to 28 years after the valuation date.

We do not agree with the assumptions upon which defendant based this valuation computation. We believe that a prospective purchaser of Royce Area 482 would have viewed the future more optimistically in 1866. As we have previously noted, the announced discovery of gold at Vermilion Lake would have hightened prospects for increased activity in the area. We believe that a prospective purchaser in 1866 would have anticipated a demand for land in the area which would have permitted a more rapid disposal than the 20-year period which actually was required (for the $1.25 per acre price)--and upon which defendant calculated the 1866 fair market value.

Mr. Meltzer used a 10 percent discount rate because he found it to have been the most common mortgage rate in 1866. However, he found that long term mortgage rates were in the range of 8 to 12 percent. Thus defendant would have been justified in using other factors in its valuation computation. For example, if an 8 percent discount rate had been applied for a 15-year period, the resulting indicated value would have been 39.4 cents an acre more than double the 18.57 cent figure which defendant computed using 10 percent and 20 years. And if the factor for 8 percent and 10 years had been used, the resulting indicated value would have been 57.9 cents per acre.

Mr. Meltzer used a second valuation procedure to "cross check" his discounted public sales method. He assigned a value to each of his eight land classifications to arrive at a total figure of $357,000, which is virtually the same total he derived from his discount method. The assigned values ranged from five cents per acre, for the swamp and water acreage classifications, to fifty cents per acre for the prairie grass and the red and white pine acreages. The assigned values represented Mr. Meltzer's "judgment factors" based on all the data which he assembled in his report. The resulting overall valuation could have been drastically altered by the subjective selection of a few differing values. In fact almost any valuation could be computed by a careful selection of per acre values to be multiplied by each of the eight land classifications. Thus the procedure could have been used to "cross check" a higher valuation, and we do not find it a valid means for supporting the "correctness" of defendant's $368,000 valuation.

Plaintiffs' expert, Mr. Trygg, valued the subject area at $5,000,000. He stated that he based his conclusion upon a consideration "of all the elements and physical and economic factors" which he believed affected the value of the lands and which he detailed in his appraisal report. It appears that his $5,000,000 figure was actually arrived at by a mathematical process of multiplying a stumpage value by his calculation of the board feet of pine timber within Royce Area 482. He considered that there were slightly over five billion board feet of pine in the entire tract. While he could find no evidence of any 1866 stumpage prices for timber in the vicinity, he relied on stumpage prices at later dates and in other areas. Applying projections and ratio relationships to available source data he concluded that the pine timber stumpage on the subject lands would have had an 1866 value of not less than $1.00 per thousand board feet. Thus he calculated that the pine timber had a value of $5,000,000, and he reasoned, this sum indicates the amount that the land in Royce Area 482 was enhanced by its timber resources.

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., Nooksack Tribe v. United States, Docket 46, 6 Ind. Cl. Comm. 578, 600-601 (1958), aff'd, 162 Ct. Cl. 712 (1963), cert. den. 375 U.S. 993 (1964). Further, Mr. Trygg's stumpage price is not based on data relating to the northern Minnesota region in 1866. In fact, as he noted in his report, stumpage prices were practically nonexistent on the valuation date. The stumpage price represents

Mr. Trygg's subjective selection of a $1.00 figure based on data collected from other regions or at much later dates. By his method the 912,204.90 acres of pineland, which he considered had an average stumpage of 5000 board feet per acre, would have had an 1866 value of $5.00 per acre. There is no evidence to indicate that any acreage within Royce Area 482 had an 1866 fair market value of $5.00 an acre. In fact it was many years after the valuation date that prices for land in the subject area even approached such a figure.

In summary, the Commission finds that the subject area contained valuable white and Norway pine. Much of this pine was located on or near rivers and streams which were suitable for floating cut logs to sawmills located in Canada. A well-informed buyer would have realized that this Canadian market was growing and would provide a steady market for white and Norway pine logs. There was sufficient good soil for the raising of subsistence crops for inhabitants of the area, including lumbermen. The climate of the area, although harsh, was conducive to lumbering operations. The ground was frozen much of the year, which facilitated the over-land movement of logs to the many streams and rivers of the area. The reported discovery of gold hightened prospects for immediate interest in the area and the attendant development of its resources.

We have considered the evidence presented by both parties in this case, and we have weighed the conclusions and opinions of the two experts. Both experts have provided basic data and assembled reports which have provided the Commission with the pertinent facts which a prospective buyer

and seller of Royce Area 482 would have considered in arriving at a fair price for the lands on April 26, 1866. We have not, however, followed all of the conclusions of the experts or adopted their valuations. As we have previously stated, we have accepted Mr. Trygg's estimate of the pineland acreage within the tract. But we cannot use his stumpage calculations as any basis upon which to determine fair market value in this case. Our ultimate determination is more along the lines used by Mr. Meltzer, although we have arrived at a significantly higher value. We believe that Mr. Meltzer's value per acre for the prairie grass and the red and white pine acreages were approximately correct, although at the lower range of what would have been considered a fair market value for such land. Because we have viewed the 1866 prospects for the subject lands more optimistically, we believe that the pinelands and the agricultural lands would have been worth substantially more than the 50 cents per acre assigned by Mr. Meltzer. In our view the value of these categories was closer to 75 cents per acre. And since we have found that there was much more acreage in the pineland classification (912,204.90 acres), we would attribute a much higher total value to the pinelands in the tract. We also consider that the remaining acreage was more valuable than the values assigned by Mr. Meltzer.

We conclude the subject tract as a unit had a fair market value of $1,100,000 as of April 26, 1866.

The consideration set forth in the Treaty of April 7, 1866 (14 Stat. 765), in addition to the land reserved to the band, was as follows:

Article III (2d)

1 blacksmith shop (not to exceed)	$ 500
1 schoolhouse (not to exceed)	500
8 houses	3,200
Agency building and storehouse	2,000
	$6,200

Article III (3d)

Annual payments for 20 years totalling $14,100 per year--a total of $282,000.

Article IV

$50,000 to chiefs, headmen and warriors then present.

Thus the total consideration promised in the treaty was $338,200. This consideration for lands having a fair market value of $1,100,000 was so grossly inadequate as to render that consideration unconscionable within the meaning of Clause 3, Section 2 of the Indian Claims Commission Act.

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

Brantley Blue
Brantley Blue, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner