

BEFORE THE INDIAN CLAIMS COMMISSION

THE LOWER SIOUX INDIAN COMMUNITY)	
IN MINNESOTA, ET AL.,)	
)	
Plaintiffs,)	
)	
v.)	Docket No. 363
)	(Second Claim)
THE UNITED STATES OF AMERICA,)	(Act of 1904)
)	
Defendant.)	

Decided: June 30, 1973

FINDINGS OF FACT

This is an action for just compensation under the Fifth Amendment of the Constitution for the takings of reservation lands of the Lower Sioux Indian Community in Minnesota, et al., known herein as the Sisseton and Wahpeton Sioux Bands, sole plaintiffs herein. The takings occurred as a result of disposals of the Devils Lake Reservation in North Dakota by the United States without the consent of the bands, including loss of approximately 65,000 acres of reservation land excluded from the reservation by an erroneous survey in 1875.

The Indian Claims Commission makes the following Findings of Fact:

1. Capacity to Sue. At all times pertinent to the claim asserted herein the Lower Sioux Indian Community in Minnesota, or the Sisseton and Wahpeton Sioux Bands, were identifiable groups of American Indians, with whom the United States concluded certain treaties, either severally or jointly. Although the Sisseton and Wahpeton Bands and the Medawakan

and Wahpakoota Bands were known collectively during treaty times as the Mississippi or Minnesota Sioux, they were separate land owning entities. Sisseton and Wahpeton Bands v. United States, Dockets 142, et al., 10 Ind. Cl. Comm. 137 (1962).

2. Background of Claim. The plaintiffs filed a petition in 1951, making two claims. The first claim concerned certain lands lying on both sides of the Minnesota River in Minnesota and South Dakota. This claim was settled by the plaintiffs and the defendant. 18 Ind. Cl. Comm. 427 (1967).

The second claim of the petition was for an accounting by the defendant of all property of plaintiffs, real or personal. An accounting report was filed in June 1961, to which exceptions were filed in September 1968. Thereafter, on October 6, 1969, the plaintiffs filed two amended petitions which included, inter alia, a claim for just compensation for the Fifth Amendment taking of plaintiffs' lands in North Dakota known as the Devils Lake Reservation. The Indian Claims Commission concluded on December 10, 1969, 22 Ind. Cl. Comm. 226, that the claims presented in the amended petitions had been asserted within the broad language of the original amended petition setting out the accounting claim.

Pursuant to a pretrial order dated March 25, 1970, trial was held on May 14, 1971, concerning liability, the measure of damages, and valuation of the Devils Lake Reservation lands of the Sisseton and Wahpeton Bands. Witnesses for the plaintiffs and defendant testified and submitted supporting evidence as to the use and

value of the lands. The lands were described in the pretrial order as follows:

Item 1. Claim for use (1867-90) of 11,420 acres for a military reserve.

Item 2. Claim for 64,000 acres excluded from the reservation by erroneous survey in 1875.

Item 3. Claim for Sections 16 and 36 in each township of the reservation, or lands in lieu thereof, granted to the State of North Dakota by Section 5 of the Act of April 27, 1904, c. 1620, 33 Stat. 319.

Item 4. Claim for not to exceed 900 acres reserved for church, mission, and agency purposes and 1,600 acres reserved for the Fort Totten Indian school, under Section 4 of the Act of April 27, 1904, supra.

Item 5. Claim for 960 acres the President reserved for a public park by proclamation dated June 21, 1908, pursuant to Section 4 of the Act of April 27, 1904, supra.

Item 6. Claim for all of the unallotted lands of the Devils Lake Indian Reservation, including the Fort Totten Military Reserve, disposed of under the general provisions of the homestead and townsite laws of the defendant, at prices fixed by the 1904 Act, pursuant to Section 4 of the Act of April 27, 1904, supra, excepting from such disposal 6,160 acres required for future allotments and excepting lands identified in Items 2 through 5, above.

The exact acreages and value dates are discussed hereafter in Finding No. 9.

3. Treaty of 1867. The Devils Lake Indian Reservation in North Dakota, identified as Royce Area 497, was established for the Sisseton and Wahpeton Bands of Sioux Indians and others by Article 4 of the Treaty of February 19, 1867, 15 Stat. 505.

The reservation is located in east-central North Dakota. The main

portion of the reservation, lying south and west of Devils Lake, is located in five present-day counties of the state, specifically Benson County, where the main portion is situated, and Eddy, Wells, Nelson and Ramsey counties.

4. Erroneous Survey. In 1875 the western line of the reservation was erroneously surveyed resulting in the exclusion of approximately 64,000 acres of land from the reservation. The error on the part of the defendant's agents was brought to the attention of the Department of Interior when various settlers were found in the excluded area by the Indian Agent, and when a railroad was preparing to cross the land.

After examination of the matter, the Secretary of Interior reported, in a letter dated August 9, 1887, to the Commissioner of Indian Affairs that:

The boundary lines of the reservation have already been surveyed and established, and since that was done a large number of settlers have in good faith gone upon the lands lying west of the reservation line as established in 1875, believing them to be a part of the public domain and have acquired rights thereon. In view of these facts, no change will be made in the western reservation line already established . . .

Approximately sixteen years after the erroneous survey, Congress appropriated \$80,000.00 to pay for the excluded acreage, at \$1.25 per acre. Act of March 3, 1891, 26 Stat. 989, 1010.

5. Disposal of Excluded Land. The land excluded by reason of the erroneous survey, approximately 64,000 acres, was disposed of by the United States on various dates: (a) by grant of school sections 16 and 36 or equivalent lands to the State of North Dakota; (b) by grant of land for

state institutions; and (c) by patents under the homestead and townsite laws. The acreages and median dates of taking of this land, as agreed to by the parties herein, will be discussed hereinafter.

6. Agreement of 1901. The Indian Appropriation Act of March 3, 1901, c. 832, 31 Stat. 1058, 1077, authorized the Secretary of the Interior within his discretion, to negotiate through any Indian inspector agreements with "any Indians for the cession to the United States of portions of their respective reservations or surplus unallotted lands," such agreements being subject to ratification by Congress.

In November 1901 an Indian inspector negotiated an agreement for the cession of tribal lands with male Indians of the Devils Lake Reservation, age 18 or over, subject to the ratification of Congress. Under Article I and II of the agreement, after reserving certain areas for future allotments, provision was made for the outright cession and sale of all unallotted lands, for a consideration of \$345,000.00. Such consideration also included settlement of any tribal claim growing out of the aforesaid erroneous survey of the western boundary, and any claim for loss of timber taken for the use of the military at Fort Totten from 1867 to 1890. This agreement was referred to Congress for ratification, by the Secretary of the Interior on December 12, 1901.

7. Act of April 27, 1904. The Act of April 27, 1904, provided, and other things, for the cession to the United States of all unallotted land in the Devils Lake Indian Reservation, including the tract of land "at present known as the Fort Totten Military Reserve"; for the grant to the State of North Dakota, for school purposes, of sections 16 and 36, or at

equivalent two sections, in each township within the reservation; for the reservation of certain areas for churches and missions, and for agency, Indian school and public park purposes. The Act directed that all remaining reservation land not needed for allotment be disposed of under the homestead and townsite laws at \$4.50 per acre, payable one-third at the time of entry, and the balance in installments. Additionally, the act vested the President with the power to dispose of such unallotted land at less than \$4.50 per acre if in his judgment no more land could be sold at \$4.50 per acre. The proceeds were to be credited to the plaintiff bands. The statute directed the United States to pay \$3.25 per acre for the school lands given to North Dakota and for land reserved by the United States for school, agency, church and mission purposes. The act was silent on compensation for the acreage reserved for a public park, known as Sully's Hill.

8. Disposal of Reservation Land. The lands in the Devils Lake Reservation, with the exception of that land allotted to the Indians, were distributed pursuant to the Act of 1904. The State of North Dakota was vested with title to tribal lands in connection with the school land grant; and, by proclamation of June 2, 1904, the President defined the tribal lands reserved for public and charitable purposes designated by the statute. The remaining lands were opened for disposition under the homestead and townsite laws. The lands were not classified or appraised, and the provisions of the 1904 Act did not require such action.

9. Acreages and Value Dates. J. William Trygg, a qualified appraiser and expert witness for plaintiffs conducted an investigation and submitted a report with respect to the public land records of the Devils Lake Reservation, including information showing acreages in the categories of land specified in the pretrial order of March 25, 1970, and the controlling dates on which the United States disposed of the lands, tract by tract, either by sale, by donation, or by reservation for a public purpose.

The appraiser for plaintiff, William H. Muske, advised that upon an independent investigation of the land office records, the aforesaid tabulations of Mr. Trygg were found to be accurate. Instead of appraising each tract of land disposed of under the public land laws as of the date of each patent, Mr. Muske computed median dates of valuation in consultation with the appraiser for the United States, including a date for fixing the rental value of the area utilized as a military reserve. As a consequence plaintiff and defendant are in general agreement as to acreages and valuation dates.

The following recapitulation includes the items involved in this action, the acreages of such items, and the median or other value dates, as determined by the Commission.

<u>ITEM</u>	<u>DISPOSAL</u>	<u>ACRES</u>	<u>VALUATION DATE</u>
1	Rental military reserve	11,313.08	January 1, 1880
2a	Homestead, etc.	59,143.68	January 1, 1897
2b	State institutions	269.99	January 7, 1897
2c	State institutions	1,903.70	October 10, 1895
2d	School sections	1,280.00	February 5, 1885
2e	School sections	2,310.85	February 23, 1884
3a	School sections	5,774.01	July 15, 1904
3b	School sections	6,713.94	July 8, 1904
4	Agency, church, mission, Indian school reserves	2,433.75	June 2, 1904
5	Sully's Hill	779.45	June 2, 1904
6	Homestead, etc.	90,138.15	January 1, 1910

In connection with Item 1, loss of use of reservation land, totalling 11,313.08 acres, and Item 2(a), homestead lands of 59,143.68 acres in the excluded area, the parties agreed on the median dates of value.

They agreed, concerning Item 1, on a median rental date, and indicated, concerning Item 2(a), that the appropriation of the land and change of ownership was consummated by the issuance of patents. The Commission has determined that the change of ownership was consummated by such issuance of patents. We therefore conclude that the aforesaid median dates are supported by the evidence.

With respect to Items 2(b) through (e), inclusive, totalling 5,764.54 acres of the excluded lands, such land was disposed of to the State of North Dakota by grants for schools and state institutions. These transfer

dates were agreed on by the parties herein, are supported by the evidence, and are adopted by the Commission.

The area of the erroneously excluded lands has heretofore been assumed to be 64,000 acres. The Act of March 3, 1891, supra, specified that the excluded area included 64,000 acres, and the Court of Claims, in a 1923 decision concerning the area, made the same assumption. Sisseton and Wahpeton Indians v. United States, 58 Ct. Cl. 302, 320, cert denied, 275 U.S. 528 (1927), aff'd on appeal, 277 U.S. 424 (1928). However, the parties have mutually agreed that the excluded area actually contained 64,908.22 acres. Defendant in its tabulation designated the erroneously excluded lands disposed of for homestead (59,143.68 acres) as Item 2, and the remaining lands disposed of for state institutions of schools (5,764.54 acres) as Item 3(b). Plaintiffs in their tabulation designated the erroneously excluded homestead lands as Item 2(a), and the state institutions and school lands as Items 2(b) through (e). We have adopted plaintiffs' designation system as reflecting more accurately the pretrial order.

Concerning Items 3(a) and (b), including 12,487.95 acres of reservation lands, donated by defendant to North Dakota, there is no dispute that the value dates are those when the surveys of school sections were approved.

The Item 4 lands, including 2,433.75 acres, were reserved by the United States for various public and charitable purposes, including church and mission. The parties agree, and we concur, that the value

date is June 2, 1904, the date of the Presidential proclamation defining such reserved lands.

With respect to Item 5 lands pertaining to Sully's Hill, a public park, a proclamation by the President of the United States, 33 L.D. 1, defined the park, as provided in section 4 of the Act of April 27, 1904, supra. The Commission has adopted June 2, 1904, as the correct date for valuation purposes.

The median date of entry for the various parcels of the 90,138.15 acres of Item 6 lands was January 1, 1906. Defendant's appraiser contends that the median date of entry is the valuation date. The median date of issue of the patents to the land was January 1, 1910. Plaintiffs' appraiser contends that the median date of issue of patents is the correct valuation date. The Commission, for reasons explained in the opinion, has concluded that the median date of issuance of patents, January 1, 1910, is the correct valuation date.

10. Early History of Dakota Territory. For many centuries prior to the arrival of the white man, the Dakota Territory was occupied by nomadic Indian tribes. The Red River of the North and its tributaries in eastern Dakota, from Lake Traverse to Pembina, and the Missouri and its tributaries in the west, extending into Montana Territory, were the sites of many early Indian settlements. In between these waterways lay the great open rolling prairies where the herds of buffalo provided a plentiful supply of meat, fat and hides for Indian survival.

During the period from the Lewis and Clark Expedition of 1804 to the building of railroads in the latter part of the 19th century, activity in the Dakota Territory changed from tribal hunting, fur trading and other aspects of an Indian civilization, into the beginning of white settlements. Indian unrest brought military forts and expeditions whereby displacement of the tribes to reservations took place in the 1860's. Thus, great land areas were released for white settlements through Indian cessions of land to the United States. Indian dependency upon the white man, even for the necessities of life, became apparent in the last half of the 19th century. The great land settlement boom in the Dakotas began in 1871 or thereabouts, crested in the years 1878 through 1886, declined and then resumed in the late 1890's, finally ending with the beginning of World War I

11. Background of the Subject Area. The Dakota Territory was organized in 1861 and North Dakota became a state in 1889. When the gold rush erupted in Montana in 1862, the army built several forts along the trails used by the gold seekers. In 1867 a few log cabins and a stockade were built at Fort Totten, located on the south shore of Devils Lake on reservation ground. In 1868 construction of more permanent buildings and a new fort were authorized by the War Department, and a new fort was built about 800 yards south of the original fort.

When Devils Lake Reservation was established in February 1867 the Sisseton and Wahpeton Sioux Indian Bands began settlement around the south shore of the lake. By 1871 the Indians had planted over 100 acres of ~~land~~

The town of Devils Lake, located on the north shore of the lake, ~~was~~

the county seat of Ramsey County. The first Great Northern Railroad passenger train reached Devils Lake on July 4, 1884, and on the same day steamboat service was inaugurated on the lake. There was also a stage coach line serving towns along the north lake shore and the Turtle Mountain area.

The settlement of the north shore began when the Chippewa lands were opened for settlement in 1882. Before 1883 the only areas in the Fort Totten - Devils Lake region that had been surveyed were the military and Indian reservations. As of 1889 all of the townships of Ramsey County had been sub-divided. As of 1884 the eastern part of Benson County had been surveyed and by 1889 eighteen townships in Benson County had been sub-divided.

The first lands to be claimed were the wooded areas around Devils Lake, but subsequent settlers took land progressively further from the lake. The settlers tended to settle near the railroad. The price of land varied according to its distance from the railroad and the wooded shores of Devils Lake.

The settlement of the Devils Lake area coincided with the great boom of 1879 through 1886. During this period prices for basic commodities were high. Land speculators were everywhere buying land for eventual profit. However, the boom ended with the depression of 1886. Bad weather, the end of the railroad expansion, and the fact that most of the choice free land east of the Missouri River had been claimed, were some of the major causes of the depression, which was felt in the Devils Lake area.

In the Federal Census of 1870, when North Dakota was a part of the Dakota Territory, the area comprising North Dakota had a population of 2,405. In 1880

the population had grown to 36,909, and to 190,983 by 1890, to 319,146 by the year 1900 and to 577,056 in 1910.

The five counties in North Dakota included in the subject area were created between 1873 and 1885, and experienced a population growth from 13,760 in 1890 to 36,474 in 1900, and finally to 54,634 in 1910.

12. Topography and Soils. The central belt of the state, with about one-third of the land area, is of primary interest since the Devils Lake area is located within this formation, which extends from Canada on the north to South Dakota on the south. The flat to gently rolling areas of this section have a rich clay subsoil of substantial depth which is covered by about six inches of chocolate brown to black soil formed by decayed grass. These soils are quite fertile and often produce "bumper" crops of grain if the moisture supply is good. From 1875 to 1910, when the rainfall was sufficient, these virgin grass lands produced very high grain yields of quality wheat.

13. Classification of Soils. Mr. William H. Muske, plaintiffs' appraisal expert, submitted an appraisal report which included a detailed analysis of soil types. A classification of the lands was made from modern soil classifications and data secured from the land records prepared by public land surveyors at the time such lands were surveyed. Land was rated agriculturally as first, second and third rate, with combinations and fourth rate. The soil ratings were entered on a map, as reflected by the public land surveyors, and the acreages and proportions of land

in each area were found to be as follows:

Excluded Area

<u>Rating</u>	<u>Acres</u>	<u>Percent of Whole</u>
1st Rate	33,203.95	51%
1st & 2nd Rate	12,206.88	19%
2nd Rate	10,395.24	16%
2nd & 3rd Rate	560.00	1%
3rd Rate	7,044.04	11%
4th Rate	<u>1,498.11</u>	<u>2%</u>
Totals	64,908.22	100%

1904 Act Reservation Land

<u>Rating</u>	<u>Acres</u>	<u>Percent of Whole</u>
1st Rate	73,904.01	69%
2nd Rate	30,538.71	29%
3rd Rate	<u>1,825.10</u>	<u>2%</u>
Totals	106,267.82 ^{1/}	100%

Mr. Gordon E. Elmquist, defendant's appraisal expert, submitted an appraisal report, including an analysis of soil types or classifications. Based on comparable sales data and surveys made by the United States General Land Office and Geological Surveys, along with soil maps, the following classification was made of the subject lands:

^{1/} Correct total acreage, as agreed to by parties herein, is 105,839.30 acres.

Pre-trial Order Item	Cropland		Pasture Class 3	Total	No. Acres	
	Class 1	Class 2			Timber	Marsh
1	1,283.82	4,023.93	6,005.33	11,313.08	1,311.59	620.00
2	40,661.65	13,999.15	4,482.88	59,143.68 ^{2/}	21.00	1,426.00
3a	3,509.60	5,156.23	3,980.72	12,646.55 ^{3/}	328.75	599.52
3b	3,190.85	1,435.18	1,138.51	5,764.54 ^{4/}	-	213.00
4	815.27	1,373.48	245.00	2,433.75	429.70	181.00
5			779.45	770.45	779.45	
6	14,683.85	48,501.54	25,763.00	88,948.39 ^{5/}	2,129.58	4,120.00

The totals given above by the defendant's appraiser are for Classes 1, 2 and 3 of the subject lands. The timber and marsh acreages are included also within these total sums, as being within Classes 1, 2 and 3.

Based on the evidence of record it appears that each appraiser considered and allocated all land chosen in the comparable sales, including pasture and timber, and reached their conclusions as to value in accordance with their respective appraisal methods.

Examination of the comparable sales discloses that the plaintiffs selected a more representative cross-section of soil types, inasmuch as

^{2/} Previously reported as 64,908.22 acres, which is the combination of Items 2 and 3b in this tabulation.

^{3/} Previously shown as 12,646.55 acres. This was corrected to 12,487.95 acres by the parties at the trial.

^{4/} See ^{2/}, supra, combination of Items 2 and 3b.

^{5/} This item was also adjusted by the parties to 90,138.15 acres.

the comparable sales selected included both improved and unimproved land, as discussed more fully hereinafter. Thus, the Commission finds on the basis of the evidence of record that plaintiffs' land classifications more reasonably reflect the quality of the subject lands as of the respective valuation dates.

14. Climate. North Dakota has a continental four-season climate which has a great bearing on productivity of the soil in the state. In brief, in North Dakota, precipitation is considered the most important climatic factor. It is of prime importance that the rains come, principally during the crop season.

The average number of clear days is 160, partly cloudy 100 and cloudy 105. On a clear day, from May to the end of July, the sun shines for more than 15 hours. Such hours of sunshine make possible many good crops in what is a comparatively short growing season.

The area in question here usually enjoyed a frost-free average growing period of about 120 days. In short, rainfall and climate in the subject area are generally favorable for the raising of grasses, grains or cereals, including choice wheat, as discussed hereinafter.

15. Wheat Production in Subject Area. In the 1870's Minneapolis became the largest milling center in the United States. New flour milling techniques were developed and the quality of hard red spring wheats from North Dakota increased the demand for Dakota wheats. The farmers of the Devils Lake area had high yields of superior quality wheat. Demand for land and the grain products of the state was constant, and the growth

in cultivated acreage in the subject area and North Dakota was massive between 1890 and 1909.

16. Development and Spread of Transportation. Two historic water routes, the Red and Missouri Rivers, served the needs of the explorers, Indians and fur traders. Later, water travel continued along the primary rivers by boat, barge or steamer, and by 1860 steamers made seasonal trips along the Missouri between Fort Benton, Montana, and St. Louis, Missouri. Steamer travel provided transportation for both passengers and the shipping of grain or other produce to markets.

Two principal railroads served the subject area. The Northern Pacific Railroad was the first to enter North Dakota, at Fargo near the eastern boundary, in 1872. The tracks were completed to Bismarck, on the Missouri River, in 1873. The Great Northern Railroad main line was built from 1879 to 1886 in this area, proceeding from Minnesota, via Crookston, and on to the Devils Lake Reservation area.

17. Land Settlement. As the railroads expanded their main lines and branch line feeders, the settlement of land in the area was accelerated. The railroads had acquired great areas of the public domain near their lines that would be unproductive to them without land settlement and wheat to transport to market. Railroad, territorial and private groups fostered land settlement promotions during this period, and, with the development of public interest in "free lands" or low

cost acreage, the "Dakota Boom" of 1879 through 1886 developed. The valley lands were mostly under the plow by 1890, and settlement had also spread westward across the drift area of North Dakota, covering all of the area in question in the early part of the 20th century.

Since the United States Government had subsidized construction of railroads with large grants of land in North Dakota, 10,679,490 acres, or 23.7 percent of the state's total acreage, were held by the Northern Pacific Railroad. In the 1870's nearly 10,000,000 acres of this land was available for sale, and the railroad devised a plan to develop large scale farms, known as bonanza farms, from their land grants. Several bonanza farms developed under ideal conditions, and there were 323 farms each possessing more than 1,000 acres reported in the 1890 census. However, drought was general in the years 1887 through 1889, and the price of wheat declined from 79 cents a bushel from 1876 through 1880, to 66 cents a bushel from 1880 to 1889. The large farms declined in general use thereafter. However, the publicity given to the farms stimulated settlement of the area and brought many immigrants from Europe.

Statistics from the 1910 census for all farms in North Dakota in 1900 and 1910 are as follows:

<u>Number, area and Value of Farms</u>	<u>June 1900</u>	<u>April 1910</u>	<u>Percent Increase</u>
Population, North Dakota	319,146	577,056	80.8
Number of all farms	45,332	74,360	64.0
Land area of state in acres	44,917,120	44,917,120	----
Land in farms - acres	15,542,640	28,426,650	82.9
Improved land farms - acres	9,644,520	20,455,092	112.1
Average acres per farm	342.9	382.3	11.5
Value of farm property			
Total	\$255,266,751	\$974,814,205	281.9
Land	\$173,352,270	\$730,380,131	321.3
Buildings	25,428,430	92,276,613	262.9
Implements-Machinery	14,055,560	43,907,595	212.4
Animals - poultry	42,430,491	108,249,866	155.1
Average value of all property per farm	\$5,631	\$13,109	132.8
Average value of land only per acre	\$11.15	\$25.69	130.4

Note: Ranges or ranches using the public domain for grazing purposes or leasing land were counted as farms in 1910 and 1900. They were included as owned or managed, free from mortgages, and under 3 acres in size. The counting of these ranges as farms affects all totals, averages, and percentages in which the number of farms is a factor. In 1910 there were 36 such ranges included as farms.

18. Timber and Minerals. North Dakota had a limited amount of timber. During settlement of the state timber was valuable, providing materials not only for fuel and fencing, but for log buildings and furniture. The Devils Lake Reservation had several groves of timber, particularly at or near Fort Totten. A letter dated February 21, 1879, from the Indian agent at Devils Lake Agency to the Bureau of Indian

Affairs stated that "the Military Reservation selected the site . . . and established their lines so as to include all of its desirable timberland . . ."

The Tenth Census forest section described the Devil's Lake timber as follows:

Probably seven-eighths of the Devil's Lake timber is burr oak; the remainder is sycamore, green ash, etc. The timber in many places grows large. Sometimes 30 to 40 feet to the first limb and is valuable for fuel, for the construction of log houses . . .

While lime, sand and gravel were available for building purposes, there were no significant mineral deposits known at the valuation dates, and minerals are not a factor in valuing the subject lands.

19. Importance of Wheat. The demand for wheat in North Dakota and in the nation became important factors in the economy during the early 20th century. Even with falling prices, dry years and other disasters, development of the farming areas in North Dakota continued through the late 1880's and early 1890's, and a mild boom started in the 1890's, which carried through to World War I.

The general boom covering the period from 1898 to World War I was largely a reflection of national trends. After the 1890 depression the United States entered a period of extraordinary economic growth. Railroads expanded their trackage and equipment at a fast rate, the

value added to raw materials by manufacturing doubled, and millions of European immigrants poured into the nation. The second boom in North Dakota was an aspect of this unusual national growth, marking the disappearance of the frontier.

As the arable unoccupied lands began to be settled, the demand for food products, such as those produced from wheat, rose faster than its production. The prices of farm produce and farm land went up, with higher wheat prices a part of this trend. A flood of settlers poured into North Dakota, with 250,000 entering the state between 1898 and 1915.

20. Highest and Best Use of the Land. The climate, topography, soil and native vegetation, together encouraged an agriculture broadly devoted to wheat and other grains in this cool, temperate, northern Plains area. We therefore conclude that the highest and best use of the subject lands at the valuation dates was for agriculture.

21. Comparable Sales. Mr. William H. Muske, a qualified appraisal expert, testified for the plaintiffs and submitted his comparative sales study in evaluation of the subject lands.

Most of the land to be valued is in Benson and Eddy Counties. The report includes data concerning 1,056 recorded comparable sales transactions for the years 1895 to 1915 in Benson and Eddy counties. Practically all of the sales were transfers of the lands in suit. Five hundred thirty-six sales pertained to the 1904 Act area in Benson County and 288 sales concerned the 1904 Act area in Eddy County. The

remaining 232 sales occurred at or near the excluded area, nearly all in Benson County, during the period 1895 through 1905. There were 462 sales transactions excluded from consideration by Mr. Muske for the reasons that they involved Indian or trust land transfers, transfers between members of the same family, small acreages, deeds for fractional interests, rights of way, poor description of land, or deeds subject to unpaid taxes. After excluding these 462 sales, there remained 416 transactions in the ceded area and 178 in the excluded area.

Due to the destruction of the assessor's records, it was not possible to determine whether land was improved or unimproved in Benson County. The appraiser concluded however that a likely possibility existed that most encumbered land was improved. Data was prepared on the value per acre of both encumbered and unencumbered land, along with the soil types, as discussed previously herein, for the excluded and reservation lands on the various valuation dates.

Mr. Muske concluded that consideration of the unencumbered lands sales alone did not produce a dependable indication of the market value of the lands in question. Thus, all types of sales were utilized for the land in question, encumbered or unencumbered, to arrive at a wider cross-section of comparative sales. Further, Mr. Muske indicated that some of the encumbered sales may not have included buildings, and that significant features having an influence on the selling price of land were considered, such as close proximity to streams, railroads or townsites.

Mr. Gordon E. Elmquist, a qualified appraisal expert, testified for the defendant and submitted his detailed report concerning the value of the subject lands. Mr. Elmquist based his conclusions on the same comparable sales data for Benson and Eddy counties for the period 1895 to 1915 used by Mr. Muske. Mr. Elmquist counted 1057 sales in contrast to Mr. Muske's 1056. After excluding Indian sales, family transactions, quitclaim deeds, or any questionable sale, the number of comparable sales was reduced to 653. At that juncture, the sales including buildings or improvements were excluded insofar as possible, based on available information in the dea

The Benson and Eddy county records were searched to determine if the real estate, when assessed, was broken down between land and buildings or improvements. Those in Eddy County were broken down in this manner but those in Benson were not. The Eddy County assessments included only a token evaluation of the improvements, but those transactions showing such improvements were also eliminated from consideration.

Defendant's appraiser also secured a 1910 platbook of Benson County, prepared by a land company then doing business in the area, which indicated buildings on the various tracts under consideration. Additionally, the General Land Office plats, many completed in 1903, indicated buildings. Thus, by referring sales descriptions to the platbook and survey plats, any transaction indicating buildings was eliminated.

As a consequence, Mr. Elmquist based his appraisal on a total of 461 remaining sales transactions, of which 323 included only crop and pastu

lands, while 138 sales had marsh and timberland interspersed. Other significant features having an influence on selling price, such as closeness to roads, townsites, railroads and streams, were also considered.

Data with respect to the 461 sales were compiled for the years 1895 to 1915 on the basis of total sales price, number of acres, classification of the land, significant features, and price per acre of each sale. Few, if any, distinctions could be found by Mr. Elmquist with respect to sales involving soils classified as No. 1 or No. 2. These soil types sold interchangeably. However, he determined that sales in the third category (pasture) had a generally lower price range, and that no other correlation regarding price and significant features could be found in most of the sales.

In general, both appraisers agreed that utilization of comparable sales was the proper approach to ascertain fair market value of the subject lands. The appraisers differed in their selection of representative comparable sales primarily in that land with improvements was excluded by defendant's appraiser, but included by the plaintiffs' appraiser, in arriving at their respective valuations.

The Commission finds that the sales transactions selected by the plaintiffs' appraiser, including both improved and unimproved land, represent a wider cross-section of representative sales. In general, the best land was the first land taken up by the settlers under the homestead laws, and such land, taken in the first instance, was that which was first improved by the settlers. The exclusion of all comparable sales

of land with improvements by the defendant's appraiser eliminates a high proportion of sales of the best land and thus limits such market data to land with a lower value. Of course where comparable sales of improved lands are considered, appropriate deductions must be calculated for the value of improvements.

22. Plaintiffs' Valuation. Mr. Muske used comparable sales as described above for his determinations of fair market value of the various items on their respective valuation dates.

Mr. Muske tabulated the fair market value of the excluded and reservation areas on the basis of comparable sales. Mr. Muske used census data to determine the percentage value of building improvements as to Items 2(a) and 6 lands, and computed other improvements to the land at \$1.25 an acre. For reasons set forth in the opinion, we conclude that Mr. Muske's valuation method is acceptable as to these items.

Mr. Muske concluded, on the basis of his calculations, that the total improved value of the Item 2(a) land was \$547,440, with 13%, or \$71,168, representing the value of buildings, while other improvements to the land, at \$1.25 an acre, totalled \$73,929. Thus \$146,097 was deducted for all improvements, which is about 26.6% of the total. With respect to Item 6, the total improved value of the land was found to be \$2,084,787, with 13%, or \$271,022, representing the value of buildings, and \$112,673 representing other improvements to the land. Thus \$383,695 was deducted for improvements, or approximately 18.4% of the total.

We conclude that plaintiffs' appraiser properly made no deductions for improvements to the land in his computations for the remaining,

smaller tracts, Items 2(b) through 5. Where school section lands were sold or otherwise disposed of to others, such lands were not the subject of or included in grants to the State of North Dakota. Further, the law protected preemptors and homesteaders from displacement from their lands by school grants. Two-thirds of the school grant lands were selected within one month of the pertinent presidential proclamation of land selection, and there is no evidence of addition of improvements in the interim.

The plaintiffs' appraiser submitted, in conclusion, a summation of the value of the lands (excluding Item 1) included in this action, showing his valuation of the unimproved lands as follows:

<u>Item</u>	<u>Disposal</u>	<u>Acres</u>	<u>Value</u> <u>Date</u>	<u>Value</u>
2a	Homestead, etc.	59,143.68	1/1/97	\$ 402,347
2b	State institutions	269.99	1/7/97	2,200
2c	" "	1,903.70	10/10/95	12,100
2d	School sections	1,280.00	2/5/85	3,500
2e	" "	2,310.85	2/23/84	6,700
3a	" "	5,774.01	7/15/04	81,600)
3b	" "	6,713.94	7/8/04	87,225)
4	Agency, church, mission, Indian school reserves	2,433.75	6/2/04	35,950
5	Sully's Hill	779.45	6/2/04	7,000
6	Homestead, etc.	90,138.15	1/1/10	<u>1,701,092</u>
	TOTAL.			\$2,342,714

23. Defendant's Valuation. Mr. Elmquist used comparable sales as described above (Finding 21) for his determination of fair market value of the subject lands on their respective valuation dates. Mr. Elmquist excluded from comparable sales consideration those transactions involving land with buildings. Mr. Elmquist also made deductions with respect to improvements to the land, such as land clearance, sod breaking, wells, fencing and other improvements, estimated to be present in 50 percent of the comparative sales under consideration. A deduction of \$2.50 per acre was made for improvements to the cropland, and 50 cents an acre to pasture land. No deductions were made for improvements to timber or marshland.

Application of these deductions was made not only to Items 2(a) and 6, the larger tracts, but to other items herein. Deductions were thus made for other parts of Item 2 (total deductions of \$2,218.00), Item 3 (deduction of \$11,273.00) and Item 4 (deduction of \$2,036.00).

A recapitulation of unimproved land values, based on 461 sales, was submitted as follows:

<u>Item No.</u>	<u>Acres</u>	<u>Value Per Acre</u>	<u>Total Value</u>
2(a)	59,143.68	\$ 6.34	\$ 375,000
2(b)	349.99	5.14	1,800
2(c)	1,823.70	3.89	7,100
2(d)	1,280.00	3.52	4,500
2(e)	2,310.85	3.46	8,000
3(a) & (b)	12,487.95	10.32	129,000
4	2,433.75	9.53	23,200
5	779.45	6.03	4,700
6	88,948.69	17.99	<u>1,600,000</u>
			\$2,153,300

The Commission concurs with defendant's appraiser that improvements were likely not added to marsh or timberlands, and that few improvements were added to pasture lands due to the nature and purpose of such lands. The Commission does question, however, defendant's utilization of deductions for improvements to "unimproved" cropland, in the absence of specific evidence that such improvements were indeed made to the land.

In addition to omitting sales transactions involving land with buildings from comparable sales consideration, the defendant's appraiser utilized only those comparable sales which ostensibly involved unimproved land. However, thereafter deductions were made for improvements to the land. While improvements to the land may be made regardless of the construction of buildings on the land, it seems more likely that construction of buildings on the land, it seems more likely that construction of both types of improvements usually coincide in a farming operation, and

that making deductions for improvements to land selected as "unimproved" is questionable.

As discussed previously herein, the Commission concludes that adjustments for improvements to the land, other than those in the larger tracts (Items 2(a) and 6), should not be made for the remaining items, which should be appraised in an unimproved or raw state.

Mr. Elmquist considered, in addition, costs of disposing of large tracts of land, i.e., Items 2(a) and 6. He stated that large tracts of land must be sub-divided and sold over a long period of time, involving surveying and development costs, taxes, insurance, commissions, interest loss and miscellaneous charges. Mr. Elmquist concluded that Items 2(a) and 6 did qualify as large tracts, and that therefore the valuations of these items should be reduced by 50%, or, \$187,500 and \$800,000, respectively. The discount for size was not applied to the remaining items, since they were smaller properties much like those being exchanged in the market. Thus defendant's net total valuation for Items 2(a) and 6, after deductions for size, is \$1,165,800.00.

The evidence establishes that Items 2(a) and 6, approximately 60,000 and 90,000 acres, respectively, were in an area experiencing continuing demand for land in a comparatively well developed and accessible location, popular as one of the best wheat growing regions of the United States. Additionally, the land in the two tracts was disposed of in 160 acre parcels by patents over several years. The two valuation dates are the respective median dates of such patents. We have determined, in view of these facts, that no deduction for size is appropriate for these tracts, for reasons set forth in the opinion.

For all of the above reasons we reject defendant's conclusions as to value.

24. Value Determination. We base our determination on the foregoing findings and the record as a whole. We conclude that the comparable sales are the best indication of value that a hypothetical buyer on the valuation dates would have had.

The Commission has determined that the subject lands must be valued in their unimproved state. Therefore, in determining value using comparable sales, including sales of improved lands, appropriate deductions must be made for buildings or other improvements to the land. We note that the parties concur in this approach, and that their respective experts do not differ significantly in their conclusions as to the value of the unimproved lands.

Deductions for improvements are applicable only to the large tracts, Items 2(a) and 6. The remaining items must be valued on the basis of comparable sales of raw or unimproved land, since the likelihood of improvements on or to these tracts is considered remote, for reasons stated above (Finding 22).

As we have indicated in Finding 22 above, we are in agreement with the method used by plaintiffs' appraiser to compute deductions for buildings and other improvements to the land as to the larger tracts, Items 2(a) and 6. We are also in agreement with plaintiffs' appraiser as to which transactions should be considered to compute the fair market value on the valuation dates of the unimproved lands, Items 2(b) through (e), 3(a) and (b), and 4 and 5, and on his consequent computations.

We have concluded, as indicated in Finding 23, supra, that a deduction for size, as requested by defendant, is inappropriate in the fact situation before us.

Accordingly, the Commission determines that the fair market values for the lands of Items 2(a) through 6 are as indicated in the table of plaintiffs' appraiser's conclusions, in Finding 22, supra.

25. Rental Value - Fort Totten Land. This leaves for determination the rental value of 11,313.08 acres of reservation land, Item 1, which was utilized by the United States Army as a military reservation from on or about July 17, 1867, until abandonment of the fort on October 1, 1890, a period of approximately 23.25 years. The parties have agreed on the median date of rental loss as January 1, 1880.

The plaintiffs' appraiser advised that he could find no evidence concerning land rentals on a cash basis for this period, involving Benson County or the immediate area. He suggested, as an alternative valuation method, one based upon the valuation of the land and application thereto of a prevailing rate of interest approximating rental income. He contended that available evidence indicated an assessed value per acre, for land only, for 1885, varied from \$2.65 per acre in Eddy County to \$4.53 an acre in Ramsey County, with \$3.87 an acre for land in Benson County. The appraiser concluded that on January 1, 1880, the median date of loss, the value of land utilized by the military was \$3.00 per acre.

Plaintiffs introduced evidence that in 1890 mortgage rates secured by owner-occupied farms in the counties where the subject lands were

located averaged 10%, and that during the period 1867-90, the statutory maximum rate of interest permitted by law was 12%. On the basis of this evidence, plaintiffs adopted 10% as the applicable prevailing rate of interest.

Plaintiffs' appraiser concluded that 10% interest applied to land valued at \$3 per acre would result in an annual rental rate of 30 cents per acre, or a total for the tract of \$3,400 per year for 24 years, yielding a sum of \$81,600 due plaintiffs.

The defendant's appraiser adopted the same method, but arrived at different conclusions as to the value of the land and the prevailing interest rates. He argued that the average North Dakota assessed value of land during this period was approximately \$2.40 an acre.

The appraiser indicated that in 1884 the average value of all land in the Dakota Territory was at \$3.31 per acre, and that a Devils Lake newspaper of January 20, 1905, noting land values and interest rates for the previous 23 years, indicated land valued in that area as being between \$2.00 and \$3.00 an acre in the 1882 to 1885 period. Based on these prices, Mr. Elmquist concluded that an average value per acre in 1880 would be \$2.50 an acre.

Defendant submitted evidence showing that interest on time sales of Northern Pacific lands in the subject area in 1877, 1883 and 1889

was 7%. Additional evidence showed interest rates in the area at between 6 and 8 percent at various times during the period 1894-1908. Defendant's appraiser concluded that a fair rental value for 23 years, based on \$2.50 an acre and a 7 percent interest rate, would amount to approximately \$46,000, representing the fair rental value of the reservation.

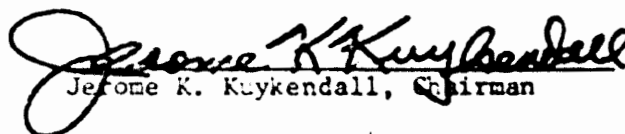
The Commission finds that due to the favored location of the military reservation on the lake, with shelter and extensive timber reserves, the value of the land on the valuation date, as determined by the plaintiffs' appraiser at \$3.00 an acre, is fair and reasonable, and that during the years in question the prevailing rate of interest was 7 percent. Thus, at \$3.00 an acre, the total value of the land is determined to be \$33,939.24 in 1880. Interest at 7 percent yields \$2,375.75 per annum. We therefore compute the fair rental value of the reservation land for 23.25 years at \$55,236.19.

26. Summation - Value. Based on the entire record, the Commission finds the acreages, dates of loss or value, and the value of the various subject lands on those value dates, as follows:

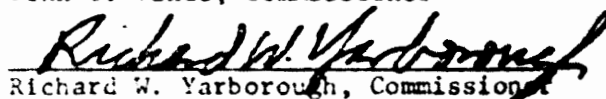
<u>Item</u>	<u>Disposal</u>	<u>Acres</u>	<u>Value Date</u>	<u>Value without buildings or other improvements</u>
1	Rental military reserve	11,313.08	1/1/80	\$ 55,236.19
2a	Homestead, etc.	59,143.68	1/1/97	402,347.00
2b	State institutions	269.99	1/7/97	2,200.00
2c	" "	1,903.70	10/10/95	12,100.00
2d	School sections	1,280.00	2/5/85	3,500.00
2e	" "	2,310.85	2/23/84	6,700.00
3a	" "	5,774.01	7/15/04	81,600.00
3b	" "	6,713.94	7/8/04	87,225.00
4	Agency, church, mission, Indian school reserves	2,433.75	6/2/04	38,950.00
5	Sully's Hill	779.45	6/2/04	7,000.00
6	Homestead, etc.	90,138.15	1/1/10	<u>1,701,092.00</u>
Total				\$2,397,950.19

27. Interest. As discussed previously herein, the lands herein were taken in contravention of the Fifth Amendment of the Constitution of the United States. Under the Fifth Amendment, plaintiffs are entitled to receive just compensation for their lands, measured by the full market value of the land, to which is added an increment, usually measured by interest from the date of taking to the date of payment. The Commission

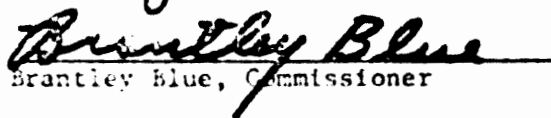
has determined that simple interest of five percent, from value date or dates to the date of payment, is the proper rate of interest herein for reasons set forth in the opinion.


Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret J. Pierce, Commissioner


Brantley Blue, Commissioner