

Robert E. Fraley and Roberta L. Swartzendruber,
with whom was Assistant Attorney General James W.
Moorman, Attorneys for Defendant. Dean K.
Dunsmore was on the brief.

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

In this case, plaintiffs, on behalf of the American Pembina Chippewa group (full and mixed bloods), including the subgroups of the Turtle Mountain Band, the Pembina Band, and the Little Shell Bands, seek additional compensation under Clauses 3, 4, and 5 of Section 2 of the Indian Claims Commission Act, 60 Stat. 1049, 1050, for a large area in North Dakota covered by the McCumber Agreement, 33 Stat. 189, 193. The Commission previously determined that plaintiffs held aboriginal title to the area to be valued herein, and that it was taken when the McCumber Agreement became effective, the day the agreement was ratified by the Turtle Mountain Band, February 15, 1905. 23 Ind. Cl. Comm. 315 (1970).

Subsequent to the interlocutory title decision, the Commission, in two separate interlocutory decisions settling overlapping claims between plaintiffs and neighboring Indians, modified and redefined the boundaries of the area. See 25 Ind. Cl. Comm. 179 (1971), and 26 Ind. Cl. Comm. 336 (1971). All three interlocutory decisions were appealed to the Court of Claims which affirmed the decisions in every regard except the ancestral name given plaintiffs by the Commission. 203 Ct. Cl. 426 (1974).

The case, returned to this Commission for further proceedings, entered its value phase. The trial on value took place August 26 through August 29, 1975, and September 5, 1975. The parties have agreed that the consideration paid under the McCumber Agreement was \$999,887.03.

Before considering the valuation issues, we will dispose of defendant's contention that the valuation date of February 15, 1905, is erroneous. The Commission in its decision of June 20, 1970, held that when the McCumber Agreement, as amended, was ratified by the Turtle Mountain Band on February 15, 1905, it became effective, and that was the date of valuation for the lands involved in this case. 23 Ind. Cl. Comm. 315, 324-325. The plaintiffs in Dockets 113 and 246 and the defendant appealed the Commission's decision. Among the grounds for the defendant's appeal was its assertion that the Commission had erred in fact and law in determining that the Indians' title had been extinguished on February 15, 1905. The Court of Claims considered all of defendant's various contentions on this issue and concluded that the Commission's determination was supported both by the law and by substantial evidence in the record. 203 Ct. Cl. 426, 442-449 (1974). Defendant filed a motion for a rehearing en banc in which the date of extinguishment issue was again raised. That motion was denied on May 31, 1974. On January 27, 1975, defendant filed a "Motion to Determine Issues and Set Procedural Dates for Reception of Evidence: And for Alternative Relief." The motion was, in effect, a motion

for reconsideration for the purpose of obtaining a change in the determination of the date of extinguishment of the Indians' aboriginal title. In the alternative defendant sought to have the extinguishment issues certified to the Court of Claims. On March 19, 1975, the motion was denied, the Commission concluding that:

. . . the issues raised in defendant's motion have been settled and it is the law of the case that the date of extinguishment of the Indians' aboriginal title and, accordingly, the valuation date for the lands involved in this case is February 15, 1905. 36 Ind. Cl. Comm. 69, 70.

For these same reasons defendant's contentions are again rejected, and the lands involved in this case will be valued as of February 15, 1905.

The tract to be valued herein is located in the north central portion of North Dakota. It lies between the Red River Valley on the east and the Missouri plateau on the west and contains 8,104,040 acres. Nearly all of the tract is level to gently rolling. Its eastern edge, running along the Pembina escarpment, is slightly steeper, even hilly at its northeast corner. Steeper also are the Turtle Mountains located about midway along the Canadian border. Elevations vary from 1,300 to 1,650 feet, except for the higher Turtle Mountains. The tract is well drained and contains abundant lakes, ponds, and sloughs, particularly in the eastern half. The total water surface is 121,068 acres.

At the time white men first visited the subject tract it was almost entirely covered with prairie grass, with some timber stands scattered along the streams, around the numerous lakes, and in the Pembina and

Turtle Mountain areas. What timber there was in 1905 was of generally poor quality and used principally by settlers for fuel or in the building of prairie shelters. Much of the timber had been cut over and burned at the time of the taking. We have concluded that the timber had no commercial value at the 1905 taking date.

Coal was generally known to exist in the western portions of North Dakota, including portions of the subject tract. The evidence, however, fails to show any commercial value for coal at the time of taking. There was no development of other minerals in the tract at that time.

White settlers began moving into the area long before the date of taking. The defendant started surveying the lands in 1882, and in that year land towards the eastern end was opened to settlers under the land laws. By 1905 over 90 percent of the tract had been expropriated for settlement, and on the valuation date about 95,000 people, exclusive of Indians, lived in the subject area. It was thoroughly covered by a network of railroads. All but a small portion of the award area was within eight to ten miles of a railroad, and no farm was more than 18 miles from a railroad.

In 1905 there were about 14,000 to 15,000 operating farms in the tract. The size of an average farm in North Dakota was about 350 acres. Wheat was the principal crop produced in the area. Other important crops were oats, barley, flaxseed, and hay. The soil was generally good to excellent. About 80 percent of the agricultural land had first or second rate soil. There was about 17 percent with third rate soil and only 1 percent had soil rated in the fourth, or poor, category.

On February 15, 1905, there were 34 towns containing a population of 23,994 persons. Those towns covered a total of 4,877 acres.

The highest and best use for the subject tract was commercial agriculture. There was a small area of 4,877 acres which was suitable for townsite development. Taking into consideration the 121,068 acres which were covered by water the resulting acreages were:

Commercial agriculture	7,978,095
Water	121,068
Townsites	<u>4,877</u>
Total	8,104,040

We have not considered any separate category for the small amount of timberland. It was not of a commercial quality and most of that which had not been burned or cut over was interspersed among cultivated farmland. We have therefore considered the timbered areas as part of the overall agricultural land. It must also be recognized that a part of the area had soils which would have dictated a more profitable use as pastureland or very marginal cropland.

There were a number of private sales within the subject tract about the valuation date, and those sales were examined and analyzed by both of the plaintiffs' experts.

The expert witness for plaintiffs in Dockets 113 and 246 was Mr. William H. Muske, a qualified appraiser. He examined the sales records from some 1,238 private sales of rural tracts in the area. Of these there

were 1,102 transactions which he considered as valid indications of market value. A total of 1,033 of the transactions represented sales of land with soil ratings of 1, 2, or 3. Those sales occurred during a period from 1903 through 1907, with most of the transactions occurring after the February 15, 1905, valuation date. The average per acre selling prices for all the sales was \$17.06, and the average for those sales prior to 1905 was \$15.34. Mr. Muske categorized the sales by soil types and then by county groupings into three value zones. Since he did not have a valid indicated market value for land with a soil rating of 4, Mr. Muske assigned an average value of \$5.00 per acre for those lands. Applying the indicated per acre prices to the respective acreages of the subject tract which were in the three county groups and the four soil ratings, Mr. Muske arrived at an overall indicated value of \$16.36 an acre for farm size, improved tracts of agricultural land.

Included in his sales analysis were 64 sales of wooded lands. Categorizing those sales by location and forest type he found average values of \$14.00 per acre for the better areas of timberland and \$7.50 an acre for those less desirable areas.

The expert for plaintiffs in Dockets 191 and 221 was Dr. Raleigh Barlowe, an economic historian. He presented two analyses of recorded land sales in the subject area. The first analysis involved sales data for 1,411 transactions covering a period from 1899 through 1905. Those

sales involved 238,813 acres, and the average selling price was \$12.83 an acre. By year the average prices per acre were:

1900	\$ 7.74
1901	9.25
1902	12.26
1903	13.47
1904	15.15
1905	15.81

The average for 1,166 tracts sold in the 4-year period from 1902 through 1905 was \$14.07 an acre, and the average for 889 sales in the 3-year period 1903 through 1905 was \$14.64.

The second analysis of 889 sales in a selection of 25 representative townships indicated an overall average value of \$13.09 for transactions from 1900 to February 1905. The average price for the 1903-1905 period was \$15.13.

The only evidence relating to sales of townsite land was presented by Mr. Muske on behalf of plaintiffs in Dockets 113 and 246. Of the 34 populated towns in the area, Mr. Muske selected 11 from which to examine sales data. With the exception of one transaction, all the sales occurred during the period from 1903 through 1907. Most of the 83 sales were made after the February 15, 1905, valuation date. Mr. Muske classified the sales as either "residential" or "commercial," depending on their location with respect to the main street of the town. After eliminating most of those in an extremely high range, he calculated overall average prices of \$0.030 per square foot for residential lots and \$.098 per square foot for commercial lots. These averages would correspond to figures of \$1,306.80 an acre for residential and \$4,268.88 an acre for commercial land.

A large sample of sales was obtained from Towner in McHenry County. It had a medium sized population and was centrally located in the tract. The analysis involved 37 sales of residential lots and 26 sales of commercial lots. Only nine of the sales were prior to the valuation date with most of the transactions occurring in the 1906-1907 period. The overall average prices per square foot were \$.030 for residential and \$.162 for commercial lots. For the 4,877 acres in townsites, Mr. Muske determined that there were 205 acres in commercial lots and 2,721 acres in residential lots. The balance was in streets, roads and railroads.

Both experts for the plaintiffs relied heavily on their comparable sales analyses in arriving at their valuations of the subject area. In finding 39 Mr. Muske's valuation approach has been detailed. In summary Mr. Muske applied his indicated values for the groups of comparable sales to the respective acreages of the subject tract which were in the corresponding county and soil rating categories. For the agricultural lands he adjusted the resulting value by 12 percent to account for the value of fencing and for the initial breaking of the prairie land. These adjustments when taken together constituted a 20 percent reduction. For the timberland he applied only a 3 percent reduction from the indicated timberland value. This represented one-fourth of the 12 percent building improvement adjustment--with no allowance being made for either fencing or breaking sod. Mr. Muske applied his average square foot values of three cents a square foot for residential and ten cents a square foot for commercial to the acreages for each of these categories within the 34 populated towns in the area. There were no adjustments made for any improvements on town lots.

Mr. Muske then considered the adjustments which were necessary because of the size of the tract. He estimated that all of the lands could have been disposed of over a 9 year period. He therefore applied adjustments for the costs of preparing the land for sale, selling the land, administration, taxes, and the cost of holding the land during the projected disposal period. He also allowed for a 20 percent profit on the undertaking. The 9 year disposal rate for the timberland was at a uniform rate for each year. However, for the agricultural land he used a rate of 35 percent for the first year, 25 percent for the second and 15 percent for the third and fourth years. This represents a disposal rate of 90 percent of all the agricultural lands in just 4 years. Mr. Muske allowed for the disposal of the remaining 10 percent over the next 5 years--a rate of 2 percent a year. Mr. Muske used an 8 percent rate as a discount factor for the 9 year disposal period. For the agricultural and timberland all of these cost adjustments resulted in a reduction of 39 percent from his indicated retail value. The corresponding reduction for the townsite lands was 49 percent.

Applying these adjustments Mr. Muske arrived at the following values:

Agricultural and timberland	\$63,350,000
Townsites	<u>2,260,000</u>
Total	\$65,610,000
Adjustment to exclude Turtle Mountain Reservation	<u>347,000</u>
Total fair market value of subject lands without improvements	\$65,263,000

As an alternative Mr. Muske also appraised the lands with their improvements to arrive at a total adjusted appraisal of \$84,445,000.

In finding 40 we have outlined the valuation procedures used by Dr. Barlowe for plaintiffs in Dockets 191 and 221. He relied on four indications of market value.

1. An interpolation of U.S. Census of Agriculture figures to arrive at a 1905 value of \$14.90 an acre.
2. School land sales in 1904 and 1905 averaging \$14.57 an acre.
3. Sales analysis for 1903 through 1905 indicating an average price of \$14.64 an acre.
4. Survey of sales in 25 representative townships for a period of 1903 to early 1905 indicating an average price of \$15.13 an acre.

He applied an adjustment of \$1.00 an acre to the census farmland value to account for plowing as an element of improvement. He reduced his sales analysis figures (items 3 and 4) by 12 percent as an adjustment for building improvements. After those adjustments, his average per acre figures were:

Interpolated census value	\$13.90
School land sales	14.57
Adjusted county sample	12.88
Adjusted 25-township sample	13.31

From these computations Dr. Barlowe concluded that the fair market value ranged from \$13.00 to \$13.50 an acre--or an average of \$13.25 an acre. He did not apply any discounts or adjustments because of the size of the tract, time required to sell the lands, or for taxes, expenses, or a profit. Therefore the entire 8,104,040 acres in the tract were appraised at a figure of \$107,378,530.00.

In our valuation we have relied heavily on the evidence and opinions of the plaintiffs' two experts. We do not, however, accept their contentions with respect to the inclusion of improvements in the valuation or the failure to adjust the per acre value for such elements as size, expenses of sale, taxes, and profit.

Mr. Muske, as an alternative, appraised the tract with improvements. He found the indicated value of the improvements on the agricultural land and timberland as of February 15, 1905, to have been \$26,143,000. And he found the indicated value of improvements on the townsite lands to have been \$6,362,070. Adding these figures to his unimproved land values produced an overall value, after adjustments, of \$84,445,000. This figure included improvements such as houses, fencing, and plowing. Plaintiffs contend that since these improvements had been attached to the land, they had become part of the fair market value of the land. Relying on cases that hold that a landowner becomes the owner of improvements annexed to the realty by another, in the absence of an agreement to the contrary, plaintiffs in Dockets 113 and 246 seek an appraisal of \$84,445,000 for the tract.

We do not agree with plaintiffs' arguments on this issue. Plaintiffs are not entitled to recover the value of improvements placed by settlers on the subject lands. This same contention was advanced and rejected by the Commission in Lower Sioux Indian Community v. United States, Docket 363, Second Claim, 30 Ind. Cl. Comm. 463, 487-88 (1973), aff'd, 207 Ct. Cl. 492, 519 F. 2d 1378 (1975). In the case of United States v. Northern Paiute Nation, 183 Ct. Cl. 321 (1968), the Court of Claims concluded that the Indian plaintiffs were not entitled to the value of improvements made on their land in good faith by others asserting an interest in the land. Id. at 340-42.

Plaintiffs in Dockets 191 and 221 contend that there should be no discount for size and time to sell lands. They argue that sales could have been made to settlers already on the land and that discounts for expenses are theoretical. Further, the Indians did not have to pay taxes, and, since the actual buyer of the tract was the United States, it would be unconscionable to consider a profit factor.

However, these arguments fail to recognize that the matter now before the Commission is a determination of the February 15, 1905, fair market value of the tract as a whole, consisting of some 8,104,040 acres.

The established definition of fair market value is that price at which a hypothetical willing seller would sell and a hypothetical willing buyer would buy, both parties being fully informed and neither being under abnormal pressure. In relating sales of small, improved parcels to the fair market value of a vast area, which in this case exceeds 8 million acres, discounts and adjustments are necessary. And such adjustments, as were applied by Mr. Muske, are proper and have been utilized in similar cases before this Commission and the Court of Claims. Nez Perce Tribe v. United States, 176 Ct. Cl. 815, 821-25 (1966); cert. denied, 386 U.S. 984; Sioux Nation v. United States, Docket 74-B, 33 Ind. Cl. Comm. 151, 172 (1974), rev'd on other grounds, 207 Ct. Cl. 234, 518 F.2d 1298 (1975), cert. denied 423 U.S. 1016; Ponca Tribe v. United States, Docket 323, 28 Ind. Cl. Comm. 335, 339 (1972); Seneca Nation v. United States, Dockets 342-A et al., 28 Ind. Cl. Comm. 12, 21 (1972).

In reaching our determination of the fair market value of the subject tract we have been primarily guided by the comparable sales data presented by plaintiffs' experts, Mr. Muske and Dr. Barlowe. The numerous sales of the land itself--and especially those sales immediately prior to the valuation date--are the best evidence of fair market value.

Mr. Muske's sales analysis included many after the valuation date. His compilation included transactions from 1903 through 1907, with a majority of them occurring after February 15, 1905. Of the 1,033 transactions only 337 were prior to 1905 (in 1903 and 1904). Those sales

in 1903 and 1904 averaged \$15.32 an acre, but most of them occurred in the more valuable eastern counties. Those 1903-1904 transactions, arranged by Mr. Muske's three county groupings were:

	<u>Transactions</u>	<u>Price</u>	<u>Acreage</u>	<u>Price/Acre</u>
Group I (Eastern)	153	\$503,189	27,756	\$18.12
Group II (Middle)	91	228,690	16,163	14.14
Group III (Western)	93	173,311	15,084	11.18

Thus it appears that the more valuable eastern county group, which was more heavily populated and had a greater percentage of the more desirable soil rated 1 and 2, had a preponderance of sales during the 1903-1904 period. In fact, although the Group I counties had only 33 percent of the land in the subject tract, the sales in that group represented 45 percent of all the sales for those 2 years. Since Mr. Muske did not include timberland in this part of his sales analysis, the compilations do not include the less valuable wooded areas, and the lands with soil rating number 4 also are not included.

Dr. Barlowe's sales analyses did not involve many transactions after the valuation date. His compilation of sales from 1900 through 1905 produced an average per acre value of \$12.83 an acre. But this average was reduced by lower priced sales several years before the valuation date. The average for sales during a 4-year 1902 through 1905 period was \$14.07.

And when the time was shortened to a 3-year span from 1903 through 1905 the average rose to \$14.64 an acre. However, a majority of Dr. Barlowe's sales also involved land in the more eastern counties of the subject tract. As he noted in his report, his 25 township study revealed that several of the late-settled western townships had few, if any, bona fide sales before 1903. The average per acre selling prices for the eastern county lands was significantly higher than for the western counties. Using Mr. Muske three county groupings, Dr. Barlowe's sales analysis of the 1,411 transactions would be:

	<u>Acres</u>	<u>Consideration</u>	<u>Price/Acre</u>
Group I (Eastern)	83,281	\$1,261,920	\$15.15
Group II (Middle)	81,595	988,450	12.11
Group III (Western)	<u>73,937</u>	<u>812,577</u>	<u>10.99</u>
Total	238,813	\$3,062,947	\$12.83

The Commission has concluded that the sales of land comparable to the 7,978,095 acres of land with a highest and best use for commercial agriculture indicate an average value of \$14.00 acre. This represents the February 15, 1905, value of farm-sized, improved tracts.

Since the indicated value includes improvements, adjustments must be considered to arrive at an unimproved land valuation. We believe that Mr. Muske's 20 percent discount for improvements, including building improvements, fencing, and breaking sod is reasonable, and it is supported

by the evidence. Applying that discount we have computed an average per acre value for farm-sized tracts of \$11.20.

Mr. Muske has correctly considered the various adjustments which are necessary because of the size of the tract. We agree with Mr. Muske's conclusions with one minor exception. While we believe that a 9 year disposal rate is reasonable, we do not consider that the rate would have been at as accelerated a pace as Mr. Muske has assumed. He has used a rate which would have disposed of 90 percent of all the agricultural lands in just 4 years. The lands in the eastern portion of the tract would have been in the greatest demand and, accordingly, would have sold quickly. However, demand would have been considerably less for the agricultural lands in the western part of the subject area.

The census figures for 1900 and 1910 indicate the amount of agricultural land which was in farms. For the entire area there were 3,232,353 acres in farms in 1900 and in 1910 the acreage had doubled to 6,488,884 acres. Thus by 1910, out of a total of 7,855,000 acres of agricultural land about 82 percent was in farms. Mr. Muske has computed the acreages by county for both the 1900 and 1910 census. He also has furnished figures for 1905 but they were taken from a state report by the Commissioner of Agriculture and Labor. Mr. Muske noted several instances where apparent discrepancies cannot be reconciled. Since the federal census data was on specific instructions while the basis for the state figures is not known, we have not relied on the state figures. Mr. Muske has estimated that at the valuation date about 4,860,000 acres, or 61 percent of the total agricultural acreage, was in farms.

Using Mr. Muske's three county grouping the acreage figures for 1900 and 1910 were:

Group I (Eastern)			
	<u>Acreage in Farms</u>	<u>Total Agricultural Acreage</u>	<u>Percent of Total</u>
1900	1,721,679	2,681,800	64%
1910	2,296,056	2,681,800	86%
Group II (Central)			
1900	1,140,629	2,607,200	44%
1910	2,265,008	2,607,200	87%
Group III (Western)			
1900	370,045	2,566,000	14%
1910	1,679,477	2,566,000	65%

Dr. Barlowe in his sales analysis also noted that there were noticeably fewer transactions prior to 1905 in the western counties. In fact he found few, if any, bona fide sales before 1903 in many of the western counties.

In view of the foregoing and considering the magnitude of an undertaking which required the sale in 9 years of some 8 million acres of commercial agricultural land at a gross amount of about 90 million dollars, we believe that a prospective purchaser of the entire tract would more realistically have projected sales of about 75 percent of the agricultural land during the first 4 years. Projecting a disposal rate of 30 percent for the first year, 20 percent for the second, and 12.5 percent for each of the third and fourth years would have accomplished this more reasonable rate. The remaining 25 percent would likely have been sold at an even rate of 5 percent for each of the last 5 years. We have recalculated Mr. Muske's figures at these rates and find it would reduce his indicated market value to \$60,333,533. This figure represents an overall reduction of 42 percent to account for the costs of surveying, advertising and sales, administrative, taxes, entrepreneur's profit, and discounting at 8 percent to a February 15, 1905, value.

Applying this 42 percent discount to our per acre small tract valuation would result in the following calculations.

$$\$11.20/\text{acre} \times 7,978,095 \text{ acres} \times 58\% = \$51,825,705$$

Thus we have concluded that the February 15, 1905, fair market value of the commercial agricultural land was \$51,825,705.

Our determination of the fair market value of the 4,877 acres of townsite land is also based on sales data. The only evidence of sales of townsite land was presented by Mr. Muske. A majority of the townsite land sales occurred after the valuation date. Of the 63 sales of lots in the town of Towner, only nine were made prior to the valuation date.

Mr. Muske computed an average per square foot value of three cents for the residential lots and ten cents for the commercial lots. This is the equivalent of \$1,306.80 per acre for residential and \$4,350.00 an acre for commercial land. Mr. Muske stated that since he had excluded those transactions which he found to have been in the extremely high range, he did not apply any discount for size. This high range area was generally described by Mr. Muske as above 11 cents a square foot for residential lots and above about 30 cents a square foot for commercial lots. However, an examination of the sales data reveals that Mr. Muske included in his analysis several sales at prices above those figures. His Towner analysis included two commercial land transactions at prices averaging .428 cents per square foot and .370 cents per square foot.

The elimination of those two sales would have reduced his overall average for commercial lots by about 7 percent. The residential lot analysis in Towner included two sales at prices of .143 cents a square foot and one sale at .114 cents a square foot. Elimination of those three sales would have reduced the overall average for residential lots by 13 percent. We believe that a number of the other sales in both the residential and commercial lot analysis included some improvements. There had been extensive and substantial improvements to the populated townsite land by 1905. In his appraisal of the townsite land as improved, Mr. Muske added some \$6,362,700 to his indicated unimproved lot value. This was based on tax assessments which listed improvements at values which averaged 143 percent more than the assessed values of the unimproved land.

In view of these factors we have concluded that a reduction of 25 percent should be applied to Mr. Muske's town lot figures. This would result in per acre figures of \$980.00 for residential lots and \$3,267.00 for commercial lots. Applying those values to Mr. Muske's acreage figures for the townsite land would result in the following:

Residential - 2,721 acres x \$980.00 =	\$2,666,580.00
Commercial - 205 acres x \$3,267.00 =	<u>669,735.00</u>
Total	\$3,336,315.00

This represents the value of lot size, unimproved townsite land. Applying Mr. Muske's discount of 49 percent for selling expenses, profit, and discounting at 8 percent for the 9 year disposal period, we have computed a February 15, 1905, value for townsite land in the amount of \$1,701,520.00.

Thus we have concluded that the fair market value of the entire 8,104,040 acres, on February 15, 1905, was:

Agricultural land	\$ 51,825,705
Townsite land	<u>1,701,520</u>
Total	\$ 53,527,225

In reaching our conclusions we have not relied on defendant's valuation. Defendant has contended that the United States is not required to compensate plaintiffs for the enhancements in value which were caused by the United States or may be imputed to the United States. In this regard defendant has noted that the extensive railroad construction caused a substantial increase in land values prior to the 1905 valuation date. In fact, were it not for that railroad development, defendant contends, the entire tract would have remained largely unused, the highest and best use for the lands would have been for limited subsistence farming and grazing, and the land values would have been substantially lower. Since the actions of the railroad builders, as well as the development of the lands by the settlers, were performed in conformance with the laws of the United States, defendant argues that such acts are imputed to the United States, and, accordingly, the valuation in this case should reflect a value for the lands as if there were no railroads or other amenities of civilization.

To reach such a valuation defendant has relied on sales of land located to the west of the subject tract. Defendant's expert appraiser,

Dr, William G. Murray, analyzed some 217 sales of land in northwestern North Dakota and Montana. From those transactions he selected 12 as the basis for his valuation. The lands were similar to the subject tract, but they were remote from any form of public transportation. The average per acre price for the 12 sales was \$9.40. Dr. Murray applied a \$3.00 per acre reduction to allow for improvements and the same adjustments used by Mr. Muske to account for the expenses of surveying, advertising and sales, administration, and taxes. Dr. Murray also used a 20 percent reduction for profit on the undertaking and discounted the adjusted selling price over a 12 year period at an 8 percent rate. The resulting valuation was \$22,225,385.00 or an average of \$2.74 an acre.

Defendant also computed an indicated market value based on the sales data of plaintiffs' experts, Dr. Barlowe and Mr. Muske. Since it was defendant's contention that 40 to 50 percent of the land value of the subject tract resulted from the extensive railroad network, an additional 40 percent reduction was applied to the sales data. Using Mr. Muske's method of further adjusting the sales data, but substituting a 12 year disposal projection, defendant computed an indicated market value of \$23,870,430.00 or an average of \$2.95 an acre.

We do not agree with defendant's approach to the valuation of the subject lands. While it is true that the Indians are not entitled to the value of the improvements which were placed on the lands prior to the 1905 valuation date, the value enhancement resulting from those improvements is properly included in the fair market value of the tract.

This has been the rule in all cases involving the valuation of Indian lands--both before this Commission and the Court of Claims.^{*/} Thus, while the value of the railroads' tracks and other properties are not included in the fair market value of the lands, the plaintiffs are entitled to a recovery which includes the enhanced value to the commercial agricultural land, which to a great extent was occasioned by the extensive rail transportation facilities. Similarly, although not including the value of the improvements within the towns, the enhanced townsite land values are properly included in the fair market value of the entire tract.

The attempt by defendant to eliminate the enhancement in value which resulted from the extensive railroad network and the other amenities of civilization and development is not proper. Defendant, in effect, is attempting to value the lands as they were at a time prior to the February 15, 1905, valuation date for this case. For these reasons we have rejected the valuation computations of the defendant. However, we have noted the sales data presented by Dr. Murray which indicates a value of about \$9.40 an acre for less developed land remote from any transportation facilities. This corroborates our valuation of the subject lands.

The parties have agreed that the consideration paid under the McCumber Agreement was \$999,887.03. The payment of such consideration for the cession of lands having a fair market value of \$53,527,225.00

*/ E.g., Tlingit and Haida v. United States, 182 Ct. Cl. 130 (1968); Jicarilla Apache Tribe v. United States, 24 Ind. Cl. Comm. 123 (1970); Fort Sill Apache Tribe v. United States, 25 Ind. Cl. Comm. 352 (1971).

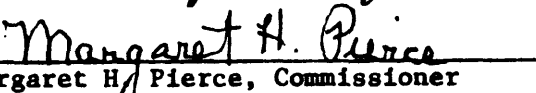
was so grossly inadequate as to render that consideration unconscionable within the meaning of Clause 3, Section 2 of the Indian Claims Commission Act, 60 Stat. 1049, 1050. The plaintiffs, on behalf of the American Pembina Chippewa group (full and mixed bloods), including the subgroups of the Turtle Mountain Band, the Pembina Band, and the Little Shell Bands, and the Little Shell Bands, are entitled to recover the sum of \$52,527,337.97, less such gratuitous offsets as defendant may be entitled under the provisions of the Indian Claims Commission Act.


John T. Vance, Commissioner

We concur:


Jerome K. Kuykendall, Chairman


Richard W. Yarbrough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner