

BEFORE THE INDIAN CLAIMS COMMISSION

THE CONFEDERATED SALISH AND )  
 KOOTENAI TRIBES OF THE FLATHEAD )  
 RESERVATION, MONTANA, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 THE UNITED STATES, )  
 )  
 Defendant. )

Docket No. 61

Decided: September 29, 1965

ADDITIONAL  
FINDINGS OF FACT

Explanatory Statement

The Commission has heretofore determined in 8 Ind. Cl. Comm. 40 that petitioner, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, is the successor-in-interest to the Flathead, Kootenai (Libby-Jennings Band) and Upper Pend d'Oreille Tribes of Indians who held original Indian title to three tracts of land in western Montana which they ceded to the United States by the Treaty of July 16, 1855, 12 Stat. 975. By the interlocutory order of August 3, 1959, this Commission ordered the case to proceed to a determination of the acreage of the ceded lands, their value as of March 8, 1859, the effective date of the treaty, and whether the consideration paid was unconscionable.

Hearings having been held on the aforesaid issues so defined by the order of August 3, 1959, the Commission makes the following findings of fact which are supplemental to the findings numbered 1 to 21, inclusive, heretofore made herein:

22. The Commission's Finding No. 19 sets forth the geographical boundaries of the three tracts of land formerly held by the Flathead, Kootenai and Upper Pend d'Oreille Tribes which it is agreed are to be valued as one tract, since petitioner is the successor-in-interest to each of the aforesaid aboriginal tribal groups. The boundaries set forth in Finding 19 are delineated on the map designated as Joint Exhibit 1 in this proceeding. Generally speaking, the ceded lands constitute all but a small part of the State of Montana lying west of the Continental Divide. The Bitterroot Mountain range is the southwestern boundary; and, for the most part, the northwestern boundary follows the divide between the tributaries of the Clark Fork and the Kootenai Rivers. All the area lies within the drainage basins of these two rivers which drain into the Columbia River. In terms of present-day geography, the ceded tract contains all or part of the following counties: Lincoln, Flathead, Lake, Lewis and Clark, Ravalli, Missoula, Powell, Granite, Deer Lodge, and Silver Bow.

23. Petitioner and defendant stipulated at the hearing that the total area to be valued, excluding the present Flathead Indian Reservation, is 12,005,000 acres. This figure includes the area of Flathead Lake outside the Flathead Reservation, which is 55,000 acres.

The total acreage to be valued does not include a tract of 12,292 acres of land outlined in red on Joint Exhibit 1 which is the subject of a claim of an erroneous boundary survey in another case pending before the Commission.

24. A small part of the ceded lands, lying in the northeast corner of the area to be valued, lies within the Glacier National Park. Approximately eight and one-half million acres of the ceded lands lie within the boundaries of seven national forests: Bitterroot, Blackfoot, Cabinet, Flathead, Kootenai, Lolo, and Missoula. The Bitterroot and the Flathead National Forests were established in 1897 and the remaining national forests were established in 1906-08.

The elevation of the subject lands ranges from a low of somewhat under 2,000 feet in the lower valleys in the northwest to a high in some mountain peaks of around 10,000 feet. The valley lands lie principally at elevations between 2,000 and 4,500 feet.

25. Most of the subject land is mountainous virgin timberland. In 1859 it was barren of all modern means of access and communication.

The topography of the subject area is principally mountainous and has been described as very rough and broken. There are, however, a number of rather extensive valleys, the principal ones being the Bitterroot Valley south of Missoula, Montana; the Deer Lodge Valley lying west and south of Missoula; the Clark Fork Valley lying west of Missoula; the Big Blackfoot Valley northeast of Missoula; and the Flathead Valley north of Flathead Lake. The mountainous lands are principally forested. There is a zone of grassland foothill country between the mountainous lands and the valleys in the lower elevations. The valleys are five to ten miles wide. The Upper Blackfoot and Deer Lodge are the best stock raising valleys.

26. The climate west of the Continental Divide is modified somewhat by the flow of air off the Pacific Ocean. As a result, western Montana has a more moderate and equitable climate, and is less given to sudden changes than is the eastern part of Montana. The year round average temperature for the subject area is  $43.1^{\circ}$ . The seasonal averages are for spring  $42.7^{\circ}$ , summer  $62^{\circ}$ , fall  $43.6^{\circ}$  and winter  $24.2^{\circ}$ . The average length of the growing season ranges from 119 days to 149 days.

27. The major rivers within the subject area are the Clark Fork, Bitterroot, Blackfoot, Flathead, Kootenai, and the Saint Regis. Due to the forest cover, the flow of water to the lower levels or valleys is relatively stable. Besides Flathead Lake, which is partly within the subject tract, there are numerous other smaller lakes so the subject area has an ample water supply.

28. The soils in the subject lands have not been surveyed or mapped except in the valleys. The soils of the mountains and foothill lands are generally shallow and stony but do have adequate mineral and organic fertility for some forest and grass growth, except for the higher elevations where soil development usually is limited or non-existent. The soils in the long narrow valleys are alluvial, largely the product of river silt. These valleys are generally suitable for agricultural use, as was demonstrated by the early missionaries who harvested from them a variety of vegetables and cereals.

Transportation

29. On the valuation date, March 8, 1859, there was no railroad, nor were there adequate wagon roads to facilitate transportation to the ceded lands from east or west. The first railroad through the subject tract was the Northern Pacific, completed in 1883. In 1859, the eastern boundary of the tract could be reached by wagon trails through mountain passes. Eastern access was principally from the Missouri River, starting at Fort Benton and through Rogers' (Clark's) Pass, Mullan's Pass, McDonald's Pass, or Marias Pass. Along the southern boundary there was access from Salt Lake City and the Oregon Trail through Deer Lodge Pass, Gibbon's Pass, and Nez Perce Pass, into the Bitterroot Valley. From the west, the ceded tract was reached across Idaho through the Lolo Pass, to the northern end of the Bitterroot Valley. Another route from the west was through Lookout or Sohan Pass, at the head of the St. Regis River, which is today a major access route to and from the ceded tract. Another route from the west was along the Clark Fork River. There was little if any access to the ceded tract from the north, except by a few fur trappers, because the northern boundary was rough, rugged country, and because the Canadian boundary was a political one.

But the subject lands were not wholly isolated and inaccessible in 1859. There were the routes and natural roads and passes enumerated above; and the transportation picture was changing for the better. In 1855 Congress had made an appropriation for a military road across the ceded lands, connecting Fort Benton to the east and Walla Walla to the

west. A second appropriation was made for the military road in 1859. Construction on the road, known as the Mullan Road, was started in 1858, and it was completed in 1860.

There were plans also for railroad transportation to the area. Governor Isaac I. Stevens of the Washington Territory, which contained the subject tract, conducted an exploration, by direction of the Secretary of War, of lands which included the subject tract, to survey a transcontinental railroad route. This was in 1853. The plans ultimately developed into the Northern Pacific Railroad, which was chartered in 1864, and the actual construction of which began in 1870, to be completed in 1883. A well-informed buyer in 1859 would certainly have known of the Mullan Road, and of the less advanced plans for the Northern Pacific Railroad.

#### Early History - Settlers

30. As the nineteenth century opened, the important economic activity in the subject lands, and in the northwestern United States in general, was the fur trade. In 1805, soon after the Louisiana Purchase, the Lewis and Clark expedition traversed the subject lands. The Lewis and Clark expedition diaries provide the first recorded information concerning the area. The Hudson's Bay Company established their port and trading post at Howe House, at the northern end of Flathead Lake in 1810.

During the period of active fur trading, early missionaries began to establish missions in the area. St. Mary's Mission was established in the Bitterroot Valley near the location of the present town of

Stevensville in 1841. The St. Ignatius Mission, south of Flathead Lake, was founded in 1853.

Major John Owen, who had come west as a sutler with a military expedition in 1849, purchased St. Mary's Mission in 1850, and began to operate the Fort Owen trading post at that location. He made the post an elaborate, well-fortified, and even a luxurious one, by frontier standards, greatly enlarging the farm, the sawmill, and the grist mill. Major Owen made continual improvements, and by 1860 the buildings, of adobe bricks, lined with lath and plaster, were enclosed by a high adobe wall. A well in the central yard provided the water supply, and there was a large storehouse for vegetables raised on the farm.

Between 1853 and 1858, Major Owen developed a brisk business with traders who came to Fort Owen along the Emigrant Road. Many of them were low on supplies, and their livestock were footsore and weary, by the time they reached the fort. The Bitterroot Valley was a favorite wintering grounds for these travelers because they could exchange their worn out cattle for the fine horses of the Flatheads. In 1857 it was estimated that the Flatheads had some 4,000 head of horses and 1,000 head of cattle in Bitterroot Valley.

The investigations by engineers and scientists, beginning in 1853 and 1854 in connection with the exploration of a transcontinental railroad route brought brisk business to Fort Owen, and also to Fort Connah south of Flathead Lake, established in 1846. Salish House, just outside the subject tract in Thompson Falls, established in 1809, made a considerable contribution to the economic life of the area.

Fort Owen enjoyed prosperous times for a mid-nineteenth century frontier business in 1855 (\$2100) and 1856 (\$1855). The railroad survey parties had then left, but the stockmen and traders from the Emigrant Road were coming to Bitterroot in increasing numbers. Also, Fort Owen increased trade during the course of the 1855 treaty councils conducted by Governor Stevens at Council Grove, near the confluence of the Bitterroot and Clark Fork Rivers. Governor Stevens appointed Major Owens special agent to the Flathead Tribe, which gave the Fort added income and virtual control over local Indian trade.

Between 1856 and 1858 there was trouble between the white settlers and the Indians west of the mountains in the Washington and Idaho country. The Indians there were dissatisfied with recent treaties and white encroachment, and their hostility compelled some of the white settlers to leave Washington and Idaho areas and seek refuge at Fort Owen. The serious commercial and banking panic which swept the United States in 1857 did not reduce trade at Fort Owen, the business bellwether of the subject tract. That year and 1858 were progressive and lucrative in the Bitterroot. The financial depression prompted many persons in the east to move westward in search of a new life. By 1858, the Fort had become the most important trading center within a radius of several hundred miles. The volume of business in 1857 was \$4936 and that in 1858 was \$3181. The Indian agency was assuming a more important role these years bringing more trade to the Fort and requiring more supplies to be given out to the Indians as annuities. Major Owen went every year



to Fort Benton, and also westward to the Dalles and Walla Walla for supplies. The years 1859 and 1860 were very bright ones at Fort Owen. The business volume in 1859 was \$7,571 and in 1860 at mid-year it was \$6566.

The principal reason for the 1859-1860 upsurge of economic activity in the subject lands was the construction of the military road between Walla Walla and Fort Benton, under the direction of Lieutenant Mullan, for whom the road was named. The construction workers had to go into winter quarters (1859-1860) at Cantonment Jordan on the St. Regis River, about a hundred miles north of Fort Owen. They drove their cattle and horses south to the milder and better wintering area in the Bitterroot Valley. Fort Owen was the closest source of supplies, so it did a large business with the construction people that winter and in the spring of 1860, when the construction was proceeding through Hell Gate Canyon.

As 1859 drew to an end, many changes were evident in the subject tract. Some of the Mullan construction hands quit their jobs to settle in the Bitterroot Valley; newcomers drifted in to look for farm sites; and some people began to enter the area in search of gold. These developments were all pregnant with progress for the subject lands; but, ironically enough, mid-1860 was the beginning of the end for Fort Owen and of personal tragedy for Major Owen.

Owen, whose generosity, advice and aid, first to the railroad planners and later to Lieutenant Mullan in the construction of the Mullan Road, knew in mid-1860 that the fort and trading post, the center of his

business and personal life, was to become a failure, a relic of the past. The final route of the Mullan Road by-passed Fort Owen 35 miles to the north.

31. The petitioner employed as an expert appraiser Mr. Mont H. Saunderson, real estate appraiser and ranch economist, of Bozeman, Montana. Mr. Saunderson was assisted by Mr. John R. Host, forestry expert, of Missoula, Montana. Also assisting Mr. Saunderson was Dr. Merrill G. Burlingame, History Professor at Montana State University, of Bozeman, Montana. Mr. William H. Richards, a cadastral engineer, formerly with the Bureau of Land Management, Department of the Interior, testified as to acreage; and Mr. Melvin S. Morris, Forestry Professor at Montana State University, assisted Mr. Saunderson, as did Mr. Charles C. O'Boyle, consulting geological engineer, of Denver, Colorado.

Mr. Saunderson, Dr. Burlingame, Mr. O'Boyle, and Mr. Host also submitted written reports containing much information pertaining to the elements or factors normally considered in fixing a valuation, such as history, topography, climate, soils, settlement, accessibility, and adaptability of the subject lands, as well as real estate sales both within the area and in other places.

The defendant employed as an expert appraiser Mr. Harry R. Fenton, of Bellevue, Washington. He was assisted by Mr. Charles R. Stark, formerly with the City Engineer's Office, Seattle, Washington. Mr. Stark lives at Kent, Washington.

Timber land - Acreage

32. About two-thirds of the ceded tract became part of the national forest reserves after legislation in 1891 providing for such reserves from the public domain by executive order. Flathead National Forest, containing 2,090,000 acres, and Bitterroot National Forest, containing 1,155,000 acres, were established by proclamation on February 22, 1897. Missoula National Forest containing 1,325,000 acres was so established on March 6, 1906. On August 13 of the same year, the 1,660,000 acre Kootenai National Forest was proclaimed as established; and about a month later, September 20, 1906, Lolo National Forest, with 1,206,000 acres was added to the forest reserve by proclamation of that date. Cabinet National Forest, 1,030,000 acres, was established by proclamation on March 2, 1907; and the proclamation of the establishment of the 1,052,800 acre Blackfoot National Forest was issued June 25, 1908.

The total expanse of national forest reserves which lies within, or partially within, the subject tract, amounted to a little over nine and one-half million acres, of which about eight and one-half million acres was within the tract. The difference is accounted for by the fact that the Cabinet National Forest, of 1,030,000 acres is almost wholly outside the subject lands.

One of the earliest estimates of the timber resources of these seven Montana National Forests was made by the U. S. Forestry Service in 1912. Without unnecessary detail, the total board feet of timber was estimated as 35,451,000,000. Subtracting the timber stand attributed to the

Cabinet National Forest of 3,425,000,000 board feet, similarly to the calculation of acreage above, the 1912 estimate of the timber resources of the subject tract in 1912 was 32,026,000,000 board feet.

Parts of the Kootenai and Blackfoot National Forests, some million and a quarter acres, are estimated to be outside the subject tract. To counterbalance this timber deficit, a similar estimate is that an approximately equal acreage with approximately equal timber density lies in that part of Glacier National Park, which is within the subject tract.

Most of the approximately seven and one-half million acres of forest cover was inaccessible in 1859 and hence of no immediate value as commercial timber. Probably 32 billion board feet of standing timber would not be far from a correct estimate in 1859. There had been a sawmill at Fort Owen for 15 years, but any loss of timber by the harvesting during that period was very likely counterbalanced by the fire protection practiced after the establishment of the forest reserves. Prior to the conservation of the forest areas, the general attitude of settlers in the subject tract had been to consider timber more as a liability than an asset. The common practice, before government protection of the reserves, was to burn out the timber to clear the land for what the settler considered a more practical use, either to grow crops on the more fertile tracts, or to use the tracts as grazing, or range land, when suitable to that purpose. It is emphasized that the factors of fire damage and conservation are here discussed merely for completeness; and that, though rough counterbalances, they amounted to a small part of the vast 7,500,000 acre forest

cover, mostly inaccessible, which was not to become a major economic asset until about 1870.

Besides the eventually usable timber, the subject tract contained in its mountains about a million acres of barren land, sometimes called alpine land, completely unusable mountain peaks and the like, with a slight scraggly growth of useless small trees and bushes. The area content of a million acres of waste land was in the testimony of Mr. Saunderson, petitioner's appraiser, after the stipulation of acreage as 12,005,000, lessening Mr. Saunderson's reported total acreage of the subject tract (12,300,000) by 295,000. That is to say, the petitioner's appraisal expert, with expert advice on forestry from the petitioner's expert on forestry, John R. Host, reiterated the million-acre wasteland figure after the stipulation of total acreage by the parties. To be precise, Mr. Saunderson's million acre estimate was 50,000 acres less than that in his formal report. The Commission accepts one million acres of waste or alpine land as substantially correct.

#### Crop Lands - Acreage

33. The petitioner has classified 350,000 acres of the subject lands as crop lands, and the defendant has concurred. The figure was arrived at from the study of recent agricultural statistics of those counties of Montana with valley lands within the subject area. Presumably the defendant's agreement with the rounded figure of 350,000 acres was influenced in some degree because it is consistent with the defendant's larger and more embracing classification: arable and grass land -

1,532,743 acres. At any rate, since both parties of interest agree on 350,000 acres, and since the figure has a solid statistical basis, we adopt the classification of 350,000 acres of crop land as correct.

Range or Grazing lands - Acreage

34. For the reasons above discussed<sup>1/</sup> we have accepted the petitioner's classification of the nomenclature applicable to the subject lands: timber land, waste land, range land, and crop land. In three of the four types in the classification, as also discussed above, we have made findings as to acreage, as follows:

Total stipulated acreage		12,005,000
Timber land	7,500,000	
Waste land	1,000,000	
Crop land	<u>350,000</u>	<u>8,850,000</u>
Remainder		3,155,000

The petitioner argues in his brief but not in testimony that the entire 295,000 acres (the difference between the petitioner's original estimate and the stipulated 12,005,000 acres) should be charged against the worthless waste land. We think this is a forceful advocate's view. We are of the opinion, however, that it is impossible to endorse it in view of Mr. Saunderson's testimony after the stipulation had been made that 1,000,000 acres was waste land and without value. Hence, we find the acreage of range, or grazing land to be the entire remainder, set forth in the above table, 3,155,000 acres.

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1/ Findings Nos. 32 and 33

Large Sales

35. There were no really large sales of timber land in or near the subject tract until many years after 1859. In part, this was due to the fact that Indian title to the lands had not been extinguished before 1859 and hence no sales were possible. Another restriction was a result of the Homestead Act of 1862, making the subject lands part of the public domain and restricting sales for the most part to a 160-acre maximum (with certain exceptions, such as railroad grant land, which will be discussed below). A further restriction on substantial sales in the area stemmed directly from natural causes: the frontier, undeveloped character of western Montana in the mid-nineteenth century, with the inevitable byproduct of quasi isolation and rudimentary transportation facilities.<sup>2/</sup> After 1897, any large Montana sale of timber or ranch land except railroad land became a legal impossibility due to legislation that year providing for the establishment of National Forest.<sup>3/</sup> Eight and one-half million acres were taken from the subject tract by National Forests in the period 1906-1908. None of this forest reserve land could thereafter be sold, and indeed the only commercial use it could be put to was a limited amount of government-sponsored harvesting.

For the reasons above, in great part, there was no evidence of really large land sales in the subject lands, except one sale of railroad land, at any time; and evidence of sales outside the subject area was mainly confined to lands some distance away in both time and space.

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2/ Finding No. 29

3/ Finding No. 24

The petitioner presented evidence of five large sales, one of which was within the subject tract, and all of which took place more than 20 years after 1859. They were consummated in the twenty-year period from 1881 to 1901.

Railroad grant lands were subject to no limitation on the acreage sold. They were customarily sold on five to ten year contracts, usually at five percent. The Northern Pacific Railway Company entered into a sales agreement (subsequently dated July 15, 1901) on February 8, 1899, with Marcus Daly, a well-known entrepreneur in later 19th century real estate in the subject area, for a tract of then undetermined acreage. Daly assigned his interest in the contract to Big Blackfoot Milling Company on February 9, 1899; and the finally determined acreage was approximately 148,770, at \$2.12 per acre. The tract consisted of choice timber and range land, situated in the Clark Fork drainage area and, of great economic importance, it was contiguous to the route of the Northern Pacific Railway.

The Northern Pacific had made a second large sale of railroad grant land in 1881, which the petitioner considered comparable to parts of the subject lands. This was a tract of 149,010 acres of mixed land (range land and crop land) in the Palouse area of eastern Washington, in Whitman County, for \$387,427.09, or \$2.60 an acre. This of course was also railroad grant land. There was a peculiarity in the transaction in that the sale was from the Northern Pacific to the Oregon Improvement Company; and President Villard of the Northern Pacific also headed the



Oregon Improvement Company. It might be called a conflict of interest today. At any rate, it would seem that the close relationship between the seller and the buyer, considered with the fact that the Northern Pacific, as a matter of policy in the 1880's, priced all land sales at \$2.60 an acre, combine to make what would be called today an administered price, that is to say, the \$2.60 price was governed, at least in part, by factors other than the give and take of the free market place.

The petitioner's appraiser, Mont H. Saunderson, has calculated that putting \$2.50 an acre on a certain number of acres in the subject lands, calling it crop land, and putting \$1.40 an acre on the rest and calling it range land, will give a fair relationship between the value of the subject lands and the price of the Palouse tract. The Palouse land is considered one of the richest wheat areas in the United States. We note in passing that the price itself, as well as the method employed to check it, are founded on an abstract and arbitrary division of the subject tract. And, not wishing to belabor the point, we also note that the Palouse land, unlike any of the land in the subject area in 1859, was immediately contiguous to very good transportation, in which powerful elements in both the selling group and the buying group had positions of power.

The petitioner also gave evidence of three sales of Canadian land, all in the province of Alberta, generally speaking just north of the northern boundary of the subject area. Two of the three tracts, while not of the magnitude of the two American sales discussed above, may be classified as large in comparison with the 160-acre limitation generally applied to the public domain in the subject tract.

The first of the three Canadian sales concerned 16,000 acres of Canadian government lands, 12 miles north of the Montana-Alberta boundary, located between the Waterton and Belly Rivers. The tract was mostly foothill grassland with considerable timber on the higher slopes, and the sale was in May, 1895, 36 years after the critical date, at \$1.25 an acre. Mr. Saunderson expressed the opinion that this would be a reasonable basis for a comparable valuation of the lower mountain lands of the subject area in 1859.

Mr. Saunderson's second Alberta sale consisted of about 28,662 acres sold in April, 1896 by the Alberta Railway and Coal Company to a Mr. James A. Cunningham. The land was range land, and Mr. Saunderson thought it was comparable to the grass and range lands of the subject tract. The price was \$1.00 per acre. This sale, we note again, was almost 40 years after 1859.

The third Alberta sale considered by Mr. Saunderson was really a large one, 200,000 or 260,000 acres. A sales agreement by the Alberta Railway and Irrigation Company to one Jesse Knight was executed in July, 1901. This tract, like the one discussed immediately above, was classified as grass and range land. The evidence on price (not mentioned in the deed) is inconclusive, although \$2.00 per acre is mentioned in books on the Knight and Galt families, as is the character of the agreement itself. In effect, it was a buy and sell agreement conditional upon the buyer's ability to exercise an option to buy a contiguous tract of 60,000 acres by 1903. Mr. Saunderson was of the opinion that this transaction was

evidence of range land value in the subject tract of about \$1.50 an acre. The basis for his opinion is not a firm one and the events recited take place many years later than 1859.

In 1859, Montana was an isolated and remote portion of Washington Territory; and it had no governmental organization of its own until 1864, when Montana Territory was established. There was no really effective political structure before 1889, when Montana became the forty-first state. The Big Blackfoot Milling Company sale of a large tract in the subject lands was completed in 1901. There were very good reasons for the unusually favorable price of \$2.12 per acre; it was the choice timberland of the subject tract; it was 42 years after 1859; Montana had an organized government; and the tract of over 150,000 acres was on an operating railroad. None of those favorable factors was present in 1859 in any part of the subject lands. The second large sale discussed above of almost as large a tract in 1881 in the Palouse area of eastern Washington, about 120 miles due west of the subject lands, was in the heart of what was to become very rich wheatland. The favorable price of \$2.60 an acre was no doubt in part due to the high quality of the range and cropland sold. The tract was also contiguous to a contemplated railroad. The subject lands did not enjoy anything like the rich soil of the Palouse area, nor was there any certainty in 1859 that any part of the subject lands would be on or near any good transportation. In addition, the price of the Palouse tract may have been considerably inflated due to the identities of the seller and buyer. For all the

reasons set forth above, although we have considered the sales of these two large tracts in the valuation of the subject lands, they reflect prices much too high to have any real bearing on the value of the subject lands.

The other three sales spotlighted by the petitioner as set forth above, were in Alberta. Only one of the sales (200,000 acres in 1901) was really large; the others (16,000 acres in 1895; 28,661 acres in 1896) were not comparable in size to the petitioner's two American sales.

An important point, we believe, is that the three Canadian sales were about 40 years after 1859, and they were in a politically organized country, a district of the Northwest Territories, to become in a few years (1905) a Province of the Dominion of Canada. The petitioner's appraiser, Mr. Saunderson, testified that all three sales were on or near a railroad. As in the case of the two large American sales, it would appear that these Canadian sales of choice land with good transportation facilities would reflect prices too high to be comparable to the value of rough land in western Montana in 1859.

The defendant, like the petitioner (except for the Big Blackfoot sale) was unable to find any large sales in the subject tract; but the defendant, unlike the petitioner, went generally south and west for comparable sales, whereas the petitioner had gone generally north and west.

One Siegnerouch (Arropine), signed a deed, and it was recorded December 23, 1856, to a tract of land in Sanpete County in the then

Territory of Utah to Brigham Young, Trustee, for a stated price of \$155,000.00. The defendant contends, and the petitioner has not shown the contrary, that the tract contained about 17,600,000 acres, thus producing a per acre price of \$0.088. On the character of the Utah land, the defendant speculated that the \$155,000.00 price was probably based on certain small areas within the tract where there was water and forage, and that the outlying mountain and desert areas would have been considered worthless. This may have been to buttress the defendant's contention that almost 8,000,000 acres of the subject land was a vast wasteland.

Another large area, but smaller than the Sanpete land, was alleged to have been sold by James Bridger and Louis Vasquez to representatives of the Mormon Church in Green River County, Utah. The deed recites a land area of 400 square miles (256,000 acres) for the stated price of \$8,000. This deed was recorded on October 21, 1856. The sale price included some personal property, which was not specified. The source of the defendant's information on this sale, a pamphlet called "Division of Land in Pioneer Days," indicates weakness in Bridger's title. Despite this doubt on title, the defendant points out that the buyers, the Mormon Church, accepted Bridger's title as valid, and that the selling price of three cents an acre on the average was considered adequate for wild, mountainous country in the 1850's in Utah, as was the per acre price of \$0.088 in the Sanpete sale.

The defendant also offered a copy of a letter from Amasa Lyman to Morman President Richards, reciting the purchase in 1851 for \$77,500 by Lyman of the San Bernardino Ranch in southern California, supposedly embracing 100,000 acres for \$0.775 per acre, or 80,000 acres for \$0.97 per acre. The resale of 25,000 acres of this land in 1858 for \$18,000, to help clear up the mortgage, indicates (a) that the larger acreage figure was the more accurate, and (b) that range and crop lands in a more favorable climate than that of the subject lands were readily available in large tracts at less than \$0.80 per acre.

#### Small Sales

36. Mr. Fenton, the defendant's appraiser, offered no sales of small tracts in the subject area because he found none before or during 1859. There were indeed no sales possible, in the sense of granting a good title, until well after that date, from the public lands. To take Missoula County as an example, the recording of sales began in 1865. The settlers, or squatters, began to file ranch claims with the county for the land they occupied. Title, as distinguished from a mere inchoate right to occupy public lands, could be obtained only from the United States; and the title would be bestowed only after survey plats had been filed in the local United States Land Office. Surveys of Montana lands were authorized in 1867, but were not actually made in some areas until years later because of the magnitude of the task.

Mr. Saunderson, the petitioner's appraiser, offered sales after 1867, as evidence, disclosed by county records, of what some buyers had

been willing to pay for small tracts of choice valley land on or before the date the sales were recorded.

What has been said of Missoula County, and the general price structure which will follow, are typical of counties in the subject lands containing choice valley tracts. Early sales were presented in considerable detail by Mr. Saunderson of farm land in Missoula, Flathead, Deer Lodge, and Ravalli (Bitterroot Valley) Counties.

Missoula County records disclosed 27 sales of unsurveyed land, mostly (where the acreage was stated) in 160-acre tracts, between 1869 and 1876. Studying these sales statistically, we find that prices for the quarter-sections vary from \$75 (\$0.47 per acre) to \$12,000 (\$75 per acre), but that these two extremes are distinctly out of line with the other reported prices; the second lowest price for 160 acres was \$400 (\$2.50 an acre), the second highest price was \$1500 (\$9.37 an acre), and the median price was \$500 (\$3.12 an acre).

Also in evidence are 20 sales of surveyed land in Missoula County in the 1869-1874 period. These were all 160 acres in area, and the prices paid ranged from \$100 (\$0.63 per acre) to \$1500 (\$9.40 per acre) with a median price of \$500 (\$3.12 per acre), and an average price of \$3.75 per acre.

Fifteen sales in Missoula County in the 1855-1859 period by the Northern Pacific Railroad of parcels of selected tracts near the railroad were also introduced by the petitioner. They ranged from 160 acres to about 640 acres in size, and the per-acre price was from \$2.00 to \$6.00,

average \$3.25, median \$2.50. These sales are of small evidentiary value in relation to the subject lands because, besides being small, they are far removed in time from the critical date. All took place 20 to 30 years after the critical date of 1859.

In Flathead County in 1890, in accordance with the Act of March 2, 1889 (25 Stat. 871), a special agent of the Secretary of the Interior appraised for sale 57 allotments of public lands patented to members of the Flathead Tribe. The 57 allotments embraced 81 forty-acre tracts within the Stevensville Township. The 40-acre units were in choice locations with regard to transportation; most of them were immediately contiguous to the railroad or to public roads. The appraisal and sale were part of the larger operation of moving the patentee Indians to the Jocko Reservation.

The appraised tracts had a variety of characteristics; some had rich soils, others were barren; some had good timber, others had none; and some of the tracts were well supplied with water, while others were arid. What almost all of them had in 1890 was excellent transportation facilities; and transportation facilities of any kind were precisely what most of the subject lands did not have in 1859.

The special agent, no doubt having in mind the legislative purpose (to sell the land quickly at a good price, rather than to hold out for the highest price it would bring at the expense of a more leisurely selling pace), stated that he did not appraise the tracts at their highest possible value, but at a price which he believed settlers could afford. He appraised these tracts at five to twenty dollars and acre.



Mr. Saunderson provided details of 49 leases of tracts in Flathead County. These leases of good land, from the aspects of transportation and land quality, totaled slightly over 8,377 acres, and the total of the leases was \$5,580.39, showing an average of \$0.67 an acre. Most of these tracts were 160 acres; and the leases ranged from \$20.00 (\$0.13 per acre) to \$176.00 (\$1.10 per acre). The median figure on the 160-acre tracts was \$120.00, or \$0.69 per acre.

We have considered these leases, as we have considered small sales many years after 1859, because they are within the subject lands. But whatever factors may have influenced the rental that could be charged for good crop land in 1892, the one vital element, the sine qua non of any lease transaction, the lessee (or any lessee) was not on the scene in 1859. The fact cannot be blinked that there were virtually no people at all in the area referred to in Flathead County on the valuation date, and therefore there was no demand for rental land.

In Deer Lodge County, Mr. Saunderson found 17 sales between 1865 and 1873, all but one of which was in the customary 160-acre size and that one was a little over 151 acres. There were a total of 2,651 acres sold for a total price of \$8,115.00, or an average per-acre price of \$3.06. The prices in these sales ranged from a low of \$100 (approximately \$0.69 per acre) to a high of \$1200 (approximately \$8.25 per acre), with a median price of \$500 (approximately \$3.12 per acre).

Mr. Saunderson was also able to find fourteen railroad sales in the Deer Lodge County records between 1883, the year that the Northern Pacific

was completed and in 1889. The tracts ranged from 160 acres to 2,080 acres, at per-acre prices from a low of \$1.00 to a high of \$4.75. The total acreage of this group of sales was \$9,237.73 and the total price \$27,421.32, at an average per-acre price of \$2.97. The median price of this group was \$3.00 per acre.

There was a further group of sales that Mr. Saunderson found in the Ravalli County records (Bitterroot Valley, near Hamilton, Montana). As has been stated above, most of the sales of public land in the subject area were restricted to 160 acres; but Marcus Daly, who figured in the Big Blackfoot Milling Company Sale, found a way to contravene the limitation in the acquisition of choice land, the purchase of several 160-acre tracts, by himself or his employees or friends, and the assembly of such purchases into larger tracts.

Mr. Saunderson offered 17 "Marcus Daly" sales in the 1889-1899 decade. Although eight of these are 160 acreys, and others are less than that, some sales exceed 160 acres. The per-acre price indicates that Marcus Daly, as in the Big Blackfoot Milling Company sale, was knowledgeable as to picking some of the choicest lands in the subject area for his operations. The acreage and sales prices were:

<u>Acres</u>	<u>Price</u>	<u>Price Per Acre</u>
20	\$ 800	\$ 40.00
40	400	10.00
80	560	7.00
80	3,200	40.00
120	500	4.25
120	1,150	9.50
180	400	2.50
160	600	3.75
100	640	4.00
160	900	5.60
160	2,225	14.00
100	3,680	23.00
160	4,000	23.00
160	5,000	31.25
400	10,000	25.00
480	9,000	18.75
635.49	12,000	19.25

The pattern in the "Marcus Daly" sales appears to be: (a) a consistent sense of the choicest land in the subject area, as reflected in the very high per-acre prices of the tracts of less than 160 acres; and (b) a generally rising per-acre price in direct proportion to the scope of assembling larger areas than the 160 acres envisaged by the preemption and homestead laws.

The "Marcus Daly" sales encompassed a total of slightly over 3,255 acres for a total price of \$55,050, or an average per-acre price of \$16.91 an acre. The lowest per-acre price was \$2.50, the highest \$40.00, and the median \$10.00.

As Mr. Saunderson, the petitioner's appraiser, noted in his report (Pl. Ex. 1, page 64): "The search of the Montana County Clerk and Recorders offices yielded mostly small sales that are not indicative of the early values of large acreages of undeveloped lands." And further,

on page 67: ". . . the retail price information such as that obtainable from the early records of the County Clerk and Recorder's offices has only limited application to the subject property." The recorded sales used by Mr. Saunderson as a rule occurred 20 years or more after 1859, and were of the best valley land in the subject tract, from the standpoint of superior soil, or of transportation facility, or both. The same considerations apply to the Interior Department appraisal of the small tracts in connection with removal of the Indian occupants to the Jocko Reservation, especially with regard to transportation facilities.

Although, in 1859, there had been no sales of range or crop lands in the subject area upon which, in the opinion of Mr. Fenton, defendant's appraiser, a comparison of values could be made, he did research and summarize sales of public lands during the first half of 1859 throughout the central and western and other parts of the United States. These sales were made customarily in quarter sections, and the purchasers sometimes contrived, with the help of their friends and relatives, to checkerboard an area, buying the best quarter section, and using the adjoining ones for free grazing.

Mr. Fenton found about 2,000,000 acres sold in this way in 1859 in 18 states, located from Florida to Nebraska, and westward to the Pacific, thus covering many different climates and terrains. He did feel, however, that in combining the statistics of sales contemporary with the critical date, he would reach a statistical average that would indicate the top per-acre price that the subject lands could sell for on March 8, 1859. Mr. Fenton found sales of 2,080,798 acres for \$1,031,896. This worked

out to an average of 49.59 cents per acre, rounded to 50 cents. Mr. Fenton was of the opinion that this was the average upper limit that a purchaser of the subject lands could hope to realize from the resale of the agriculturally useful portion of the subject tract.

#### Mineral Enhancement

37. The first record of the discovery of placer gold in Montana was a terse entry by Major John Owen in his diary on February 15, 1852, "Gold hunting. Found none." Charles S. Warren, in his book The Territory of Montana, discussing the stories of the pioneers, stated that "In the spring of 1852 Samuel M. Caldwell discovered gold in what is at present known as Mill Creek, nearly opposite Fort Owen, west of the Bitter Root River." There is no evidence that Mr. Owen or Mr. Caldwell knew of the activities of the other.

There is another story that one Francois Finlay, also known as Benetsee, discovered placer gold in the subject lands in 1851 or 1852. This is probably true, and is a small thread in the tapestry of the development of the state because a friend of Finlay's, Antoine Plante, was a guide for the Stevens expedition from Fort Benton to the Bitterroot Valley in 1853. Governor Stevens, writing in his report of the expedition in September, 1853, showed that he was very interested in Plante's tale of the discovery of gold near the Hell Gate fork of the Bitterroot River (now Missoula). Governor Stevens gave Lieutenant John Mullan, who was wintering in the Bitterroot Valley in 1853-1854, the job of searching for

further evidence of gold. Stevens was interested mainly in the spur that the discovery of gold might give to the construction of the hoped-for railroad across Montana. Lieutenant Mullan's interest, monopolized by the construction of the Mullan Road, was somewhat more tepid: he reported that he had visited Gold Creek, and that he had been told that placer gold had been found in its waters.

Governor Stevens wrote, when he returned to Montana in 1855 to make treaties with the Indians, that Antoine Plante and a friend had specimens of placer gold which they found at Clark's Fork. In 1856, friends of Francois Finlay did some prospecting in Gold Creek, but didn't find enough gold to hold their interest.

John W. Silverthorne is said to have turned up at Fort Benton in 1856 with a supply of gold dust, for which he asked credit of \$1000. The credit was granted, and the dust, assayed in 1857, was found to be worth \$1525. Silverthorne never revealed the source of his gold. Later research disclosed that he lived in the Bitterroot Valley with his family until his death in 1887, and that he had been in the gold fields in British Columbia. The Silverthorne story is standard in most histories of Montana; but, typically in these early stories, it provides no firm evidence of any substantial discovery of gold in the subject lands in the 1850's.

Granville Stuart claimed that he and his brother were responsible for the first find of substantial placer gold in Montana. His reason was that the stories of earlier discoveries had received virtually no

publicity; and, even if they were true, they did nothing to hasten the day when gold would be extracted in measurable quantities in Montana. Stuart and his brother began their search for placer gold along the Emigrant Road in the fall of 1860. They found prospects that they considered good in the summer of 1861 at Willard's Creek, and publicized them widely. Possibly as a result of Stuart's news, a number of people in search of gold began arriving in the Deer Lodge region in 1862.

There is no record of measurable extraction of gold in Montana before 1862. That year the Montana Bureau of Mines and Geology recorded the extraction of 25,000 troy ounces of gold with a valuation of \$500,000. Measurable extraction of silver began in 1869, copper in 1882, and zinc in 1905.

Mr. Saunderson sums up the history of the first knowledge of gold in the subject land in pages 45 and 46 of his report, as follows: "It was known as early as 1852 that there was placer gold on Clark Fork River, and probably it was known as of the valuation date that there was placer gold on Flint Creek, in the general location of Phillipsburg, Montana, and in the Butte area. Placer gold mining began in both of these areas soon after 1860." This opinion is confirmed in the book Contributions to the Historical Society of Montana, Vol. II, p. 63, as follows: "\* \* \* the first paying mines discovered in Montana were on Willard's Creek in 1862." If there was no paying gold mine in Montana until 1862, Mr. Fenton supplied some evidence that there was some preparation for placer gold mines in 1861. In any case, there appears

to be no evidence that there was any anticipation of mining activity, and certainly no evidence of any measurable gold extraction, in the subject lands until well after March 3, 1859.

Mr. Charles C. O'Boyle, a consulting geological engineer, testified for the petitioner as to the gold extracted in Deer Lodge County by 1869. He began with an assumption that gold extracted in that county by 1869 was \$23,270,000. He reached that figure by research on available data from a large number of claims, the owners and managers of which, thinking largely in frontier terms, did not keep careful figures, or kept none. The \$23,270,000 figure, which had to be the basis of his calculations, discussed below, was to a considerable extent built on mathematical abstractions. The mathematical process was of course guided by Mr. O'Boyle's professional skill and discipline, and more directly by a flat statement in the book Statistics of Mines and Mining in the States and Territories West of the Rocky Mountains by R. W. Raymond, U. S. Commissioner of Mining Statistics. Mr. Raymond estimated gold production in Montana through 1869 at \$24,270,000; but Mr. O'Boyle excluded \$1,000,000 as mined outside the subject lands, in French Gulch, thus arriving at his \$23,270,000 statistical base for the calculations reviewed below.

Mr. O'Boyle reported that the statistical studies of gold mining in Montana in the seven years prior to 1869 reveal that the average gold per man-day was \$12.09, and the average cost per man-day \$5.40, or approximately 44.7 percent. He applied the 44.7 percent to the assumed total yield of \$23,270,000, and thus derived a cost figure of



\$10,401,690; and, subtracting that cost figure from the assumed total yield, reported a net profit from gold mining activities in the subject lands by 1869 of \$12,868,310.

Proceeding on the same assumption of \$23,270,000 production of gold in the subject area in the 1862-1868 time period, Mr. O'Boyle applied a "relief from royalty" process to the \$23,270,000. Historically, he explained, land owners, including the government, had demanded from prospectors on their land a percentage of the value of minerals extracted from that land. He stated that a royalty of 50% of the net, \$6,434,155, or 25% of the gross, \$5,817,500, would be an equitable way to determine the royalty due the owner from the prospector after extraction of the gold beneath the subject lands, presumably in 1869. He feels that the two figures (50% of the net, and 25% of the gross) prove, by their rough equivalence, that his method is sound. This appears mathematically not only to be sound, but redundant, because it is the inevitable result of his theory that the net will be 55.3%, and this is, of course, roughly equivalent to 50%; so 50% of the net (27.65%) and 25% of the gross (25%) will be roughly equivalent.

If the year 1869 is selected, if the estimated total production figure of \$23,270,000 prior to that date is accepted, and if Mr. O'Boyle's two reciprocal theories (of a/ cost percentage, and b/ gross and net

royalties) are applied to the estimated \$23,270,000, it becomes mathematically possible to assess "freedom from royalty," or "mineral enhancement" in the subject lands in 1869 at \$5,817,500 (25% of the gross) or \$6,434,155 (50% of the net). The petitioner has chosen to claim the latter, larger figure. All these calculations have little to do with the value of the subject lands on March 8, 1859, because there is no evidence of any measurable production prior to March 8, 1859; or in Mr. Saunderson's words: "Placer gold mining began in both these areas (Phillipsburg and Butte) soon after 1860." It is further evident, nevertheless, that by March 8, 1859, it was known by a substantial proportion of the small population of the subject lands, and even by a few people without the area, that traces of placer gold had been discovered within the subject lands, and that a buyer of the subject tract on March 8, 1859, would expect to pay more for the subject lands than would have been the case if there had been no discovery at all, but that the increase for mineral enhancement would be but a fraction of the petitioner's "release from royalty" figure.

#### Supplementary Approach to Value

38. As one supplementary approach to valuation of the subject lands, Mr. Saunderson capitalized the 50 Flathead County leases at 8%. This resulted in a valuation of \$5.50 per acre, which Mr. Saunderson cut in half because of the character of the leased land; it was in small acreage, with good transportation readily at hand. He was of the opinion that the resulting \$2.75 per acre was a useful check on the \$2.50 an acre which he had allotted to the crop areas of the subject lands.

As to this capitalization of 1892 Flathead County leases, we are impressed by Mr. Fenton's factual answer; there was no land rental market whatever in the subject lands in 1859.

Mr. Saunderson used another supplemental approach: the calculation of the number of cattle the range areas of the subject lands could have supported, reduced by the proportion of the year that the Montana climate would have made grazing impossible. Looked at in this abstract and theoretical way, Mr. Saunderson came to the conclusion that the range areas would support 151,078 head of cattle, capitalized by the so-called Cow Year Long method of \$30 a head, yielding a total of \$4,532,340, which Mr. Saunderson considered a useful check on his assessment of \$4,760,000. for the range areas. Again, the Commission is impressed by Mr. Fenton's factual view: that there was, due to the free grazing system, virtually no demand for range areas in the subject lands in 1859, no demand for cattle in the quantity of over 150,000 head, and absolutely no way to transport any such quantity if there had been any demand in 1859.

On the forest areas of the subject lands, Mr. Saunderson applied stumpage figures, based upon the 1900 average of \$1.18 a thousand board feet in western Montana. Mr. Saunderson allowed for the 40-year time difference (1859 to 1900) by allowing \$0.40 per thousand board feet on an estimated 27 billion feet of standing timber (about 5 billion less than Mr. Host estimated), to yield a price for the forest areas of the subject lands of \$10,800,000. This was somewhat more than Mr. Saunderson's

estimate of the value of the timber areas in 1859 at a dollar an acre, for a total of \$7,500,000. To all of this Mr. Fenton turned the factual view that there was no evidence whatever of any stumpage price prior to 1900, that there was no demand and no hope of any for timber in the subject land (other than very small amounts for local use), and that there were no facilities in 1859 to transport timber from the subject lands. He cited a former decision of this Commission: Crow Tribe v. U.S., 6 Ind. Cl. Comm. 98, in which the Commission noted that there was no market for timber on the valuation date.

39. The subject lands embrace 7,500,000 acres of timber land; 1,000,000 acres of waste land; 3,155,000 acres of range land; and 350,000 acres of crop land. The total, 12,005,000 acres, including mineral enhancement, had a fair market value of \$5,300,000 on March 8, 1859.

#### Consideration for Cession

40. The claimed area lands were ceded by the predecessors-in-interest of the petitioner by the Treaty of July 16, 1855 (12 Stat. 975; II Kapp. 722). Articles 4 and 5 of which (pertaining to consideration), read as follows:

Art. 4. In consideration of the above cession, the United States agree to pay to the said confederated tribes of Indians in addition to the goods and provisions distributed to them at the time of signing this treaty the sum of one hundred and twenty thousand dollars, in the following manner--that is to say: For the first year after the ratification hereof, thirty-six thousand dollars, to be expended under the direction of the President, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them,

and for such other objects as he may deem necessary. For the next four years, six thousand dollars each year; for the next five years, five thousand dollars each year; for the next five years, four thousand dollars each year; and for the next five years, three thousand dollars each year.

All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them, and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

Art. 5. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, an agricultural and industrial school, erecting the necessary buildings, keeping the same in repair, and providing it with furniture, books, and stationery, to be located at the agency, and to be free to the children of the said tribes, and to employ a suitable instructor or instructors. To furnish one blacksmith shop, to which shall be attached a tin and gun chop; one carpent's shop; one wagon and ploughmaker's shop; and to keep the same in repair, and furnished with the necessary tools. To employ two farmers, one blacksmith, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades, and to assist them in the same. To erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures, and to employ two millers. To erect a hospital, keeping the same in repair, and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provide with the necessary furniture the buildings required for the accommodation of said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chiefs of the said confederated tribes of Indians are expected and will be called upon to perform many services of a public character, occupying much of their time, the United States further agree to pay to each of the Flathead, Kootenay, and Upper Pend d' Oreilles tribes five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such

persons as the said confederated tribes may select to be their head chiefs, and to build for them at suitable points on the reservation a comfortable house, and properly furnish the same, and to plough and fence for each of them ten acres of land. The salary to be paid to, and the said houses to be occupied by, such head chiefs so long as they may be elected to that position by their tribes, and no longer.

And all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said tribes. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

Art. 6 The President may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

41. The General Accounting Office lists expenditures pursuant to Article 4 of the Treaty of July 16, 1855 of \$184,191.71. Although most of the listed items may be related to the broad language of Article 4, the consideration paid is limited to \$120,000.00 under the terms of Article 4. The General Accounting Office lists a total of \$287,140.26 expended under Article 5. The defendant does not claim the item of \$2,324.00 for transportation of Indian supplies. The \$2,324.00 was spent jointly on petitioner and other tribes, and the General Accounting Office was unable to separate the amount spent on petitioner. We find that this item was not consideration, nor was \$1,838.41 spent for agency buildings and expenses. Consideration paid under Article 5 was,

therefore, \$282,977.85. The defendant, under Article 6 of the Treaty, undertook to survey part of the lands reserved to the petitioner into lots. The defendant not having done this, the Congress, by the Act of April 23, 1904, directed that the petitioner's reservation be surveyed at the expense of the petitioner. The Court of Claims, in deciding an accounting suit concerning this surveying expense, stated in The Confederated Salish and Kootenai Tribes of The Flathead Reservation, Montana v. The United States, No. 50233, July 17, 1964, slip opinion, page 2:

\* \* \*

Upon consideration of the oral argument of counsel and the briefs of the parties it appears that plaintiffs conveyed their lands to defendant pursuant to the Treaty of Hell Gate of July 16, 1855 (12 Stat. 975, 2 Kapp. 722), under a provision that the tract be surveyed and marked out for the exclusive use and benefit of said confederated tribes and granting the President discretion from time to time to cause the whole or a portion of the reservation to be surveyed into lots. By Act of April 23, 1904 (33 Stat. 302), it was directed that plaintiffs' reservation be surveyed at plaintiffs' expense. The survey was conducted and the expenditures and disbursements thereof, amounting to \$190,399.97, were charged against the receipts from the sales of reservation lands held to be surplus. Defendant asserts that all appropriations and expenditures were made under the Act of April 23, 1904, and are lawful and proper.

The Court concludes that the surveying of plaintiffs' lands under the treaty of 1855 was to have been done at Government expense but that such surveying was never done. The Act of 1904, in requiring that the tribes bear the expense of surveying, violated the provisions of the treaty of 1855, thus taking rights away from plaintiffs. \* \* \*

In accordance with the foregoing, we find that the consideration agreed to and payable by the defendant under Article 6 was \$190,399.97;

and the Commission finds that the total consideration agreed to and paid or payable under the Treaty of July 16, 1855, amounts to \$593,377.82.

42. The Commission finds that the consideration of \$593,377.82 for the cession of 12,005,000 acres with a fair market value of \$5,300,000.00 as of March 8, 1859 was unconscionable. The petitioner is therefore entitled to recover from the United States the difference between the fair market value of \$5,300,000.00 and the consideration of \$593,377.82, or \$4,706,622.18, from which will be deducted the offsets, if any, hereinafter to be determined in accordance with the rules of the Commission.

Arthur V. Watkins  
Chief Commissioner

Wm. M. Holt  
Associate Commissioner

T. Harold Scott  
Associate Commissioner