INDIAN CLAIMS COMMISSION

REPORT ON THE MEDIATION

OF THE

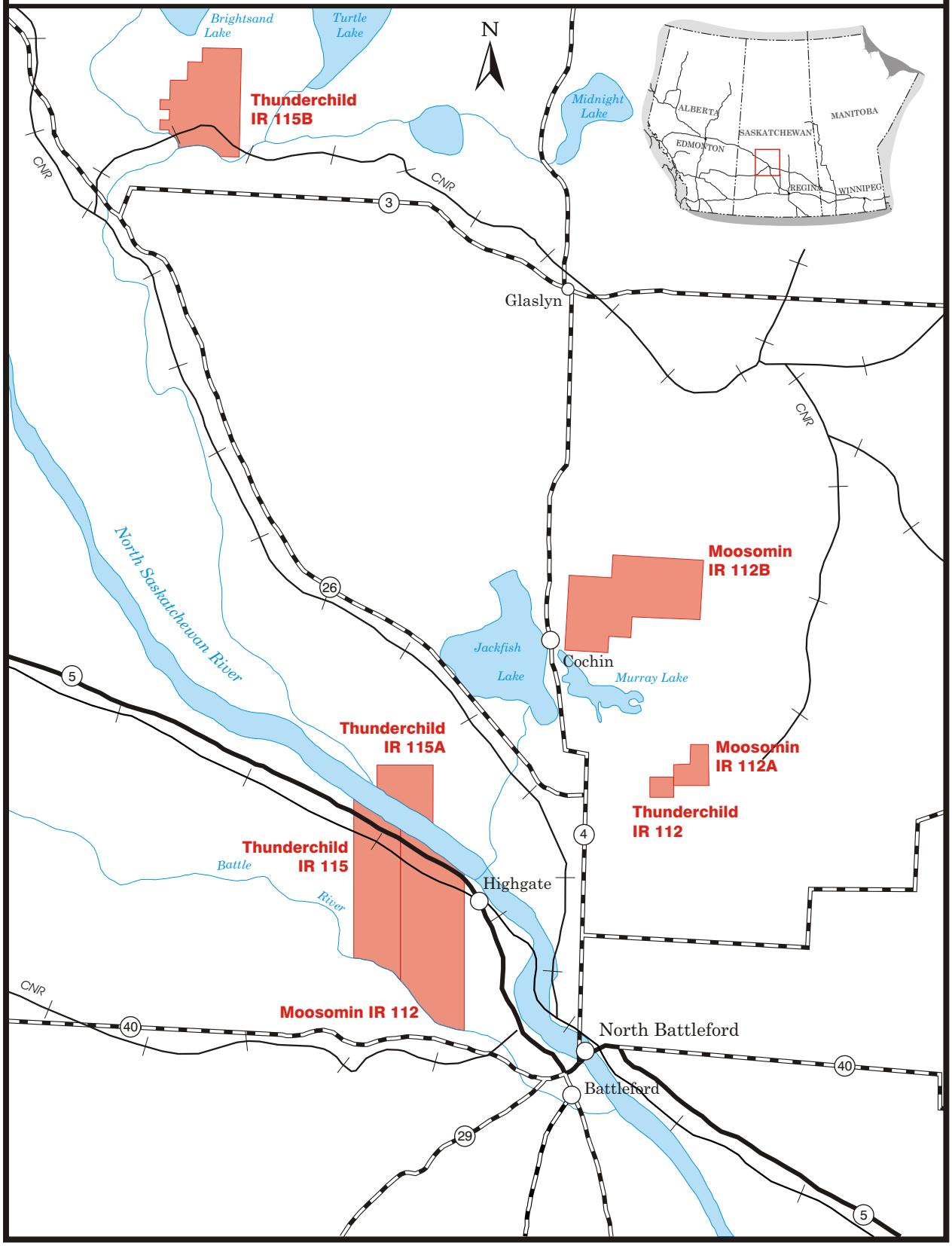
MOOSOMIN FIRST NATION

1909 RESERVE LAND SURRENDER

March 2004

CONTENTS

Claim Area Map



PART I
INTRODUCTION

This is a report on how a claim – which had been outstanding for over 90 years, pursued actively under the Government of Canada's specific claims process for nine years, accepted by Canada for negotiation on terms with which the First Nation could not agree, and then rejected on the issue of most importance to the claimant – was, with the assistance of the Indian Claims Commission (ICC), successfully resolved.

The report will not provide a full history of the Moosomin First Nation claim. The issues involved in the 1909 surrender claim and the inquiry process have been discussed by the Commission in its March 1997 publication *Moosomin First Nation 1909 Reserve Land Surrender Inquiry Report*.[1] This report will summarize the events leading up to settlement of the claim and illustrate the role of the Commission in the resolution process. Although other Commission personnel were involved at various points along the way, it was Ralph Brant, as Director of Mediation, who led the negotiating process.

The Moosomin First Nation formally submitted its claim, pursuant to Canada's Specific Claims Policy, to the Minister of Indian Affairs on July 15, 1986. The claim asserted that the 1909 surrender of Indian Reserve (IR) 112 and IR 112A was invalid on the basis that the First Nation did not agree to the surrender and that the sale of the lands was never in its best interest. In 1993, Canada agreed to accept the claim for negotiation on the basis that Canada had breached its post-surrender fiduciary obligations in the non-fulfillment of an agreement and the mismanagement of band funds. The First Nation did not agree with Canada's position that the surrender was valid and continued to pursue its original goal – to have the surrender declared invalid. On March 29, 1995, Chief Ernest Kahpeaysewat was informed by the Specific Claims Branch of Indian Affairs that, in Canada's view, "the evidence and submissions are insufficient to establish that the surrender of Indian Reserve

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[1] Indian Claims Commission, *Moosomin First Nation 1909 Reserve Land Surrender Inquiry Report* (Ottawa, March 1997), reported (1998) 8 ICCP 101.

No. 112 was invalid or that a fiduciary obligation was breached by Canada in obtaining the surrender."[2]

On July 17, 1995, the Moosomin First Nation asked the Indian Claims Commission to conduct an inquiry into the claim. In response, and pursuant to its mandate under the *Inquiries Act*, the Commission proceeded to an inquiry, and the parties were brought together to discuss the claim and to clarify the many related issues, evidence, and opposing legal positions. The Commission's process also allowed for the exchange of documents and provided a forum for full and open discussion.

The inquiry came to an end in November 1996 and the Commissioners issued their report on the claim. Their findings, following deliberations based on all the available evidence, were that:

1 "Canada breached its fiduciary obligations in securing the surrender of Indian Reserves 112 and 112A because the Crown failed to respect the Band's decision-making autonomy and, instead, engaged in 'tainted dealings' by taking advantage of its position of authority and by unduly influencing the Band to surrender its land";

2 "the Band's decision-making autonomy was ceded for it by the overwhelming power and influence exercised by Crown officials seeking to obtain the desired surrenders"; and

3 "the Governor in Council gave its consent under section 49(4) of the *Indian Act* to a surrender that was foolish, improvident, and exploitative, both in the process and in the end result."

The Commissioners' recommendation follows.

RECOMMENDATION

> Accordingly, we find, for the reasons stated above, that this claim discloses an outstanding lawful obligation owed by Canada to the Moosomin First Nation. We therefore recommend to the parties:

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[2] Allan Tallman, Specific Claims West, to Chief Ernest Kahpeaysewat, March 29, 1995, Department of Indian Affairs and Northern Development (DIAND), file BW8260-SK374-C1 (ICC Documents, pp. 1434-39), as reported in ICC, *Moosomin First Nation 1909 Reserve Land Surrender Inquiry Report* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 109.

> That the claim of the Moosomin First Nation be accepted for negotiation under the Specific Claims Policy.[3]

Later that year, Canada accepted Moosomin's claim for negotiation by letter from the Honourable Jane Stewart, then Minister of Indian Affairs and Northern Development, dated December 18, 1997. In her letter, Minister Stewart agreed with the Commission's recommendation that Canada negotiate the Moosomin First Nation's surrender claim "on the basis that the surrender was not properly taken."[4]

With this letter, the process of negotiating a settlement began. For nearly two years the parties negotiated without the assistance of a neutral facilitator. Land appraisals and loss-of-use studies were undertaken and were at the preliminary report stage. By early 2000, however, negotiations had reached an impasse on several issues, the major ones being: the applicability of Criteria 10,[5] Canada's Additions to Reserve Policy,[6] and how to measure the rate of development of the surrendered land.[7]

Ralph Brant, Director of Mediation at the Commission, was contacted by legal counsel for the First Nation, with the agreement of the federal negotiator, to request the Commission's assistance.

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[3] ICC, *Moosomin First Nation 1909 Reserve Land Surrender Inquiry Report* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 205–6.

[4] Jane Stewart, Minister of Indian Affairs and Northern Development, to Chief Thomas Mooswa, December 18, 1997.

[5] Based on the Commission's inquiry findings, and Minister Stewart's admission that the surrender was not properly taken, it was the position of the First Nation that Criteria 10 should be excluded as a factor in this case.

[6] The usual practice of Canada offering a band the opportunity to increase its reserve acreage by the difference in acres between the surrendered reserve and any reserve obtained in lieu thereof under the surrender, if adhered to in this case, would have denied the First Nation any right to increase the size of its reserve, since the surrendered reserve (IR 112) was smaller in acreage than the replacement reserves obtained through the surrender. The First Nation argued that this approach failed to account for a very real loss of productivity, demonstrated in the loss-of-use studies that had been done to date. The First Nation was of the view that it should be granted an opportunity to add land to its reserve base in order to make up for the lost productive potential of IR 112.

[7] The First Nation was of the view that the surrendered lands would have been developed at a similar rate to that of surrounding regional municipality lands. Canada proposed that a comparative analysis of rate of development on other local reserves be conducted.

THE COMMISSION'S MANDATE AND MEDIATION PROCESS

The Indian Claims Commission was created as a joint initiative after years of discussion between First Nations and the Government of Canada on how the process for dealing with Indian land claims in Canada might be improved. Following the Commission's establishment by Order in Council on July 15, 1991, Harry S. LaForme, a former commissioner of the Indian Commission of Ontario, was appointed as Chief Commissioner. With the appointment of six Commissioners in July 1992, the ICC became fully operative.

The Commission's mandate is twofold: it has the authority (1) to conduct inquiries under the *Inquiries Act* into specific claims that have been rejected by Canada, and (2) to provide mediation services for claims in negotiation.

Canada distinguishes most claims into one of two categories: comprehensive and specific. Comprehensive claims are generally based on unextinguished aboriginal title and normally arise in areas of the country where no treaty exists between First Nations and the Crown. Specific claims generally involve a breach of treaty obligations or where the Crown's lawful obligations have been otherwise unfulfilled, such as a breach of an agreement or a dispute over obligations deriving from the *Indian Act*.

These latter claims are the focus of the Commission's work. Although the Commission has no power to accept or force acceptance of a claim rejected by Canada, it does have the power to thoroughly review the claim and the reasons for its rejection with the claimant and the government. The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, gather information, and subpoena evidence, if necessary. If, at the end of an inquiry, the Commission concludes that the facts and law support a finding that Canada owes an outstanding lawful obligation to the claimant, it may recommend to the Minister of Indian and Northern Affairs that a claim be accepted.

In addition to conducting inquiries, the Commission is authorized to provide mediation services at the request of parties in negotiation. From its inception, the Commission has interpreted its mandate broadly and has vigorously sought to advance mediation as an alternative to the courts. In the interests of helping First Nations and Canada negotiate agreements that reconcile their competing interests in a fair, expeditious, and efficient manner, the Commission offers the parties a broad range of mediation services tailored to meet their particular goals.

PART II

A BRIEF HISTORY OF THE CLAIM

The present report relates only to the Commission's fulfillment of its mediation mandate. It should be noted, however, that, as a result of the previous inquiry, the Commission had the benefit of historical records and detailed legal submissions from the parties setting out the basis of the claim. This knowledge was relied upon only to the extent that background information may have been required by the Director of Mediation or Commission staff. The Commission makes no findings of fact in this report.

The historical context of this claim has been described at length in the March 1997 *Moosomin First Nation 1909 Reserve Land Surrender Inquiry Report* of the Commission.[8] Only a brief summary will be found here.

In August 1876, Canada and the Plains, Wood Cree, and other tribes of central Saskatchewan and Alberta entered into Treaty 6. In exchange for the surrender of their rights, privileges, and titles to 121,000 square miles of land, Canada promised to set aside reserves for the Indians and to assist them in making a transition from a subsistence livelihood to an agriculture-based economy.

In the spring of 1881, and pursuant to Treaty 6, Moosomin First Nation selected 23 square miles, or 14,720 acres, of land for its reserve (IR 112). These lands, situated on the south side of the North Saskatchewan River a short distance from Battleford, Saskatchewan, had excellent agricultural potential. In his 1905 Annual Report, Indian Agent J.P.G. Day described the Band's land as follows: "This land lies between the Battle and Saskatchewan rivers; the country is rolling and partially wooded with bluffs of poplar; the soil is a sandy loam and is well adapted for both agricultural purposes and stock-raising. Water is plentifully distributed all over the reserve."[9] By all accounts, IR 112 consisted of some of the most fertile agricultural land in the region and was ideal for mixed farming.

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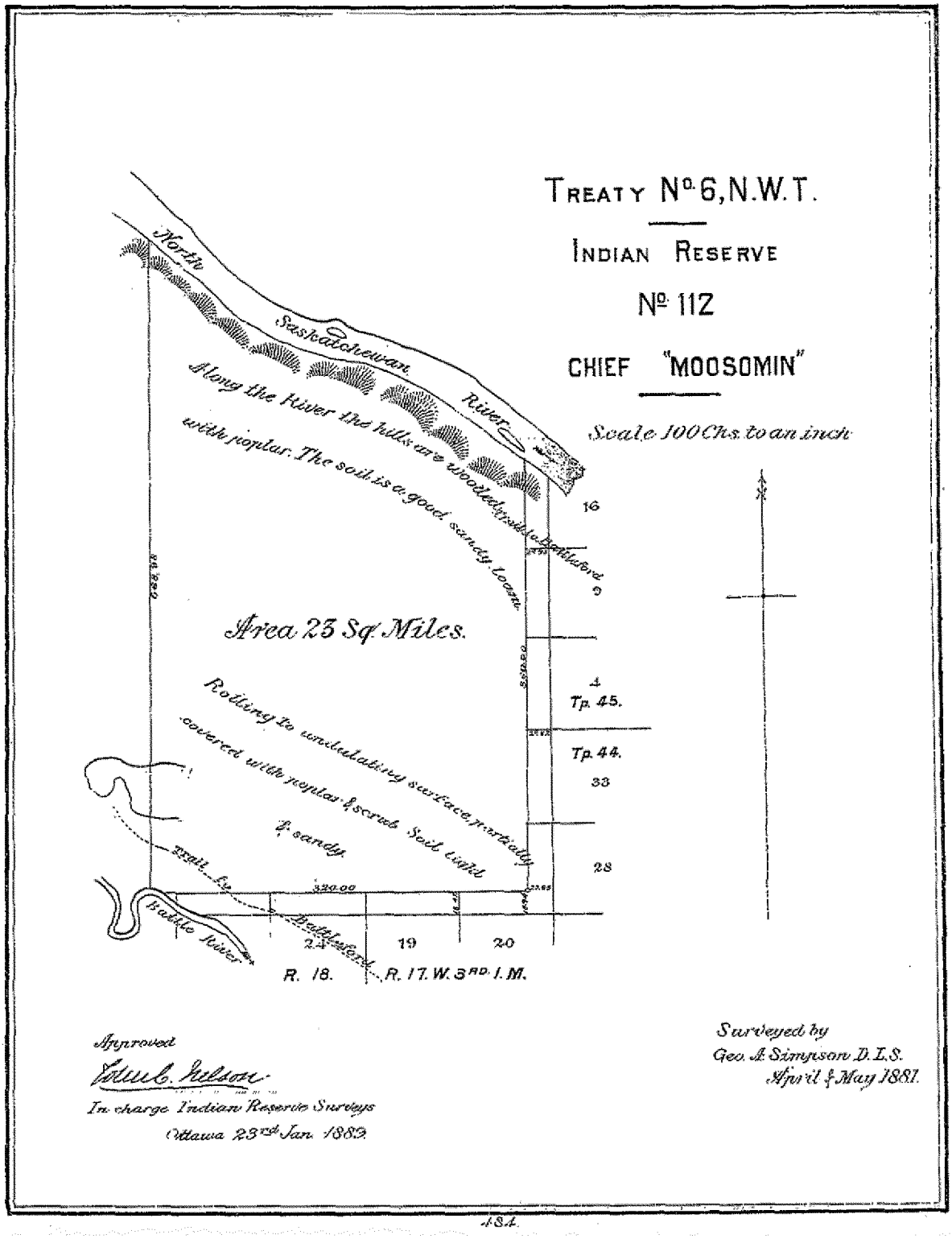
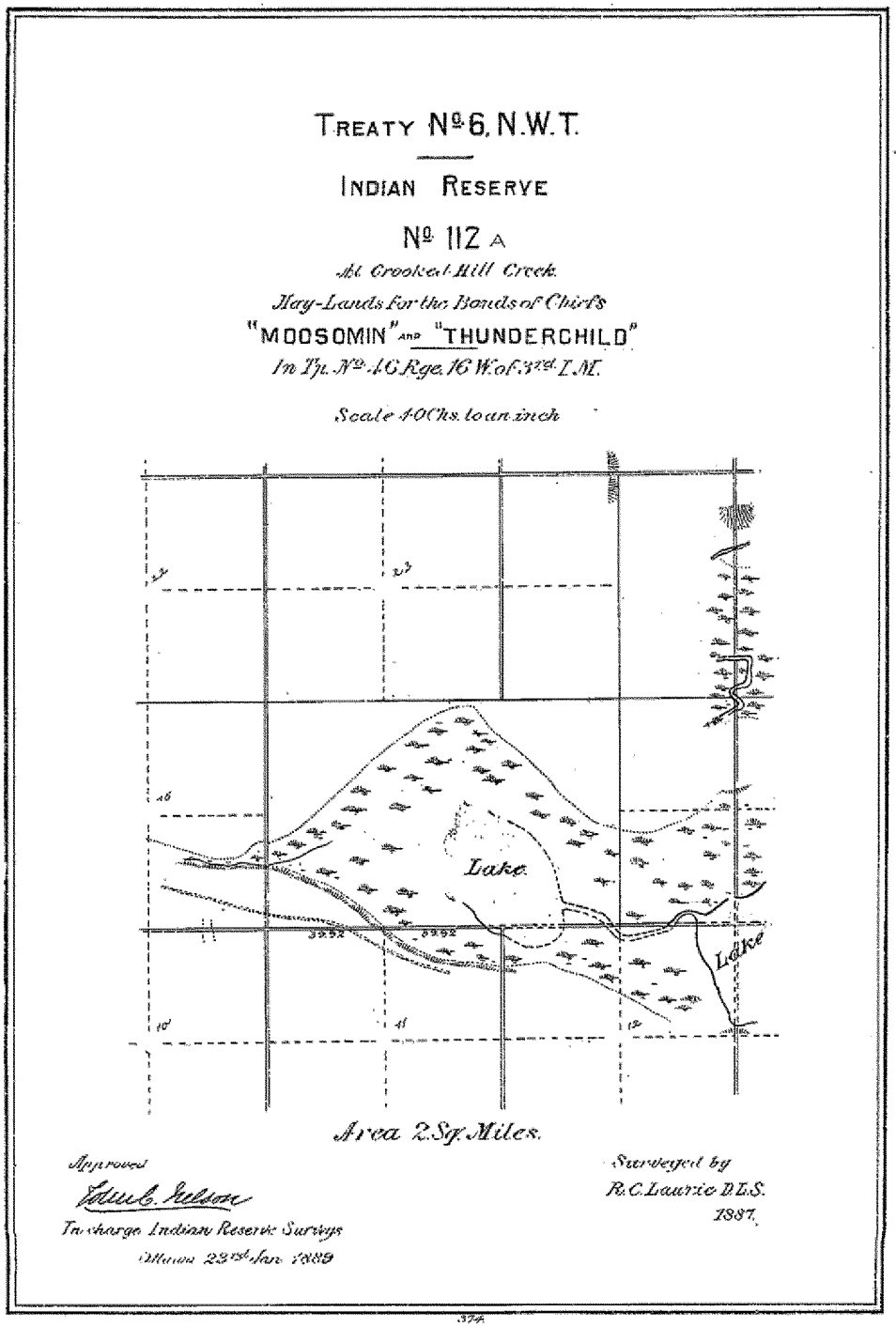
[8] Full documentation of the details summarized here is found in ICC, *Moosomin First Nation 1909 Reserve Land Surrender Inquiry Report* (Ottawa, March 1997), reported (1998) 8 ICCP 101.

[9] Canada, Parliament, *Sessional Papers*, 1906, No. 27, 105 (ICC Documents, p. 1632), as cited in ICC, *Moosomin First Nation 1909 Reserve Land Surrender Inquiry Report* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 118.


TREATY Nº 6, N.W.T.
INDIAN RESERVE
Nº 112
CHIEF "MOOSOMIN"
Scale 100 Chs. to an inch
North Saskatchewan River
Along the River the hills are wooded with poplar. The soil is a good sandy loam.
Area 23 Sq. Miles.
Rolling to undulating surface mostly covered with poplar & scrub. Soil light & sandy.
Trail to
Battle River
320.00
16
9
4
Tp. 45.
Tp. 44.
33
28
24
19
20
R. 18.
R. 17. W. 3RD. I. M.
Approved
In charge Indian Reserve Surveys
Ottawa 23rd Jan. 1882
Surveyed by
Geo. A. Simpson D.L.S.
April & May 1881.
484


TREATY Nº 6. N.W.T.
INDIAN RESERVE
Nº 112 A
At Crooked Hill Creek.
Hay-Lands for the Bands of Chiefs
"MOOSOMIN" AND "THUNDERCHILD"
In Tp. Nº 16 Rge. 16 W of 3rd I.M.
Scale 40 Chs. to an inch
Lake
Lake
Area 2 Sq. Miles.
Approved
Edw. Nelson
In charge Indian Reserve Surveys
Ottawa 23rd Jan 1889
Surveyed by
R.C. Laurie D.L.S.
1887.

In 1887, R.C. Laurie, Dominion Lands Surveyor, surveyed an additional two square miles, or 1,280 acres, of excellent hay lands as IR 112A for the joint use and benefit of the Moosomin and Thunderchild Bands. Reserves 112 and 112A were both confirmed by Order in Council on May 17, 1889.[10] The hay lands added another 640 acres of reserve land for Moosomin First Nation.

In 1903, the value of IR 112 and IR 112A was further enhanced by the construction of the main line of the Canadian Northern Railway directly through the reserves and the building of a railway station on Moosomin IR 112 at Highgate. The railroad proved to be a great help to the Moosomin First Nation as it provided work and a near market for all its produce.

Band members thrived on these lands for the next three decades, from 1881 to 1909. During that period, they were well on their way in making a successful transition from the traditional economic pursuits of their ancestors to an economy primarily focused on agriculture. The Band's farming success was impressive given that during these years the Canadian government was actively pursuing policies that effectively undermined the Band's efforts in making the transition.[11] In part because of the Band's success in farming, local settlers and politicians began to lobby Indian Affairs officials in 1902 to move the Moosomin and Thunderchild Bands so that their reserve lands could be made available for the settlers flooding into the west.

The Moosomin First Nation was, from the start, firmly opposed to leaving its lands. However, lobbying for a surrender continued unabated for the next seven years until the Band gave in, under extreme pressure, on May 7, 1909. It would appear that the Band was simply overwhelmed by the constant pressure, coercion, bribery, and duress exerted by settlers, politicians, clergymen, and officials from every level of Indian Affairs to surrender its lands.

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[10] Order in Council PC 1151, May 17, 1889, National Archives of Canada (NA), RG 2, series 1, vol. 419 (ICC Documents, p. 95), as reported in ICC, *Moosomin First Nation 1909 Reserve Land Surrender Inquiry Report* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 116.

[11] Examples of these policies included the increased control exerted by Indian agents over virtually every aspect of Indian life on, and off, the reserve (the Agency system). Other examples include the introduction of the permit system in 1881; the introduction of the peasant farming and severalty policies in 1889; and a new focus on immigration, expansion, and the attraction of new (white) settlers to help develop western Canada economically. In addition, amendments to the *Indian Act* throughout these years made it easier for reserve land to be surrendered or otherwise taken without a Band's consent.

The Order in Council accepting the surrender was approved on July 6, 1909.[12] The First Nation was subsequently relocated north to a new reserve (IR 112B) where the land was hilly, stony, in a frost belt, and practically useless for farming. IR 112 was subdivided into 115 parcels and sold by public auction, primarily to land speculators, commencing in 1909. One half of the two-square-mile hay reserve known as IR 112A was later restored to the Band for its use and benefit.

[12] Order in Council PC 1539, July 6, 1909, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 422), as reported in ICC, *Moosomin First Nation 1909 Reserve Land Surrender Inquiry Report* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 166.

PART III

NEGOTIATION AND MEDIATION OF THE CLAIM

The Commission's role in the process of settling the claim would normally have ended as soon as its inquiry was completed and the claim of the First Nation accepted for negotiation by Canada. In this case, negotiations between Canada and the Moosomin First Nation began shortly after the acceptance and continued relatively successfully for approximately two years before encountering difficulty. In early 2000, the Commission was asked, and agreed, to act as a facilitator for the negotiations.

For the most part, facilitation focused on matters relating to process. With the agreement of the negotiating parties, the Commission chaired the negotiation sessions, provided an accurate record of the discussions, followed up on undertakings, and consulted with the parties to establish mutually acceptable agendas, venues, and times for the meetings. The Commission was also available to mediate disputes when requested to do so by the parties, to assist them in arranging for further mediation, and to coordinate the various land appraisals and loss-of-use and research studies undertaken by the parties to support negotiations.

Although the Commission is not at liberty to disclose the discussions during the negotiations, it can be stated that the Moosomin First Nation and representatives of the Department of Indian Affairs and Northern Development worked to establish negotiating principles and a guiding protocol agreement, which helped them to arrive at a mutually acceptable resolution of the First Nation's claim.

Elements of the negotiation included agreement by the parties on the nature of the Commission's role in the negotiations; quantification of the land lost by surrender; identification of damages and compensation criteria; valuation of economic losses; research projects; agriculture and forestry loss-of-use studies; land appraisals and updates; determination of rates of development and leasing rates; consideration of the costs of additions to reserve; treatment of the costs of the negotiations; and, finally, settlement issues and agreements, surveys, ratification, and communications.

Loss-of-use studies and land appraisals undertaken by the negotiating table prior to the Commission's involvement were finalized to provide the information required for a claim valuation

and subsequent negotiations. Specifically, independent consultants assessed the losses of use from agriculture and forestry to estimate the net economic losses to the First Nation as a result of the 1909 surrender. Rates of development, Additions to Reserve Policy, applicable compensation criteria, present value approach, and sale proceeds were all identified by the parties to the Commission as issues requiring resolution.

Following complicated and intense negotiations, delays and a suspension of negotiations resulting from illness and other work commitments of the federal negotiator and ultimately a change in federal negotiator in 2001, and several months of offers and counteroffers between the negotiating parties, a tentative agreement was reached in May 2002.

While Canada went through its approval process, involving a submission to Treasury Board, legal counsel for the parties set to work on the documents supporting the agreement. On July 2, 2003, the Settlement Agreement was initialled by Chief Mike Kahpeaysewat and the chief federal negotiator, Silas Halyk. Members of Moosomin First Nation voted to ratify their settlement on September 6, 2003.

The Settlement Agreement was implemented in the fall of 2003, providing $41 million in compensation to the Band. This amount was paid into a trust account set up for this purpose by Moosomin First Nation.

PART IV
CONCLUSION

In a pattern similar to the majority of specific land claims outstanding in Canada, the Moosomin First Nation claim took many years to resolve – 16 in this case. The Commission, involved as mediator since 2000, had no authority to force a settlement nor to impose one. The parties alone get the credit for settling this claim. However, the outcome of the negotiations indicates the Commission's ability to advance the settlement of claims. For approximately nine years, efforts by the First Nation to have its claim validated were unsuccessful. The Commission's inquiry process was able to produce movement towards validation. After two years in negotiation, efforts by the First Nation and Canada to achieve a settlement also proved unsuccessful, and it was the Commission's mediation process that helped bring the negotiations to a successful conclusion.

The Commission has two recommendations to tables beginning negotiations of this kind. The first recommendation has to do with the timing of the Commission's involvement. Time and again we are asked to come into situations where negotiations, underway for some time, have floundered and are on the verge of collapse. Regardless of the originating problem, hard feelings have almost always built up between the parties and have poisoned both the present and the future negotiating environment. Certainly the Commission is pleased to assist at any point in the negotiations; however, we recommend that the Commission's mediation services be used from the beginning of a negotiation with the hope that these types of difficult situations can be avoided altogether.

The Commission's other recommendation has to do with research and loss-of-use studies and the need for the negotiating parties to review very carefully the requirement to undertake them. Often parties to a new negotiation are not able to choose the appropriate study areas or to define the scope of the work to be undertaken within each study area. When studies are undertaken at too early a stage in the negotiation process, the end result can be unnecessary, overlapping, and expensive work. By taking their time at the start, negotiators have the opportunity to review the vast amount of work already done on claims that have been settled, claims that may involve similar amounts of land or similar geographical situations. This abundant information should be considered by the table in determining what further study needs to be done. The end result would almost certainly be a shorter

overall negotiation process and an earlier settlement, at considerably less cost to the First Nation, Canada, and Canadian taxpayers.

Similarly, where the negotiating parties decide that research and loss-of-use studies are to be undertaken, they would be well advised to take advantage of the Commission's knowledge and experience in coordinating studies. In this role, the Commission assumes responsibility for overseeing the research/loss-of-use study process beginning with the development of the request for proposal packages (including the provision of generic models of, and assistance in developing, the terms of reference for each study); overseeing the proposal call and contract award process; providing ongoing study coordination throughout the study process; setting the required reporting requirements and deliverables and ensuring that they are fulfilled. The Commission is able to provide this type of service in a most cost-effective way and can thus provide added value to the overall negotiating process.

FOR THE INDIAN CLAIMS COMMISSION

Renée Dupuis
Chief Commissioner

Dated this 26th day of March, 2004.