INDIAN CLAIMS COMMISSION

REPORT ON THE MEDIATION

OF THE

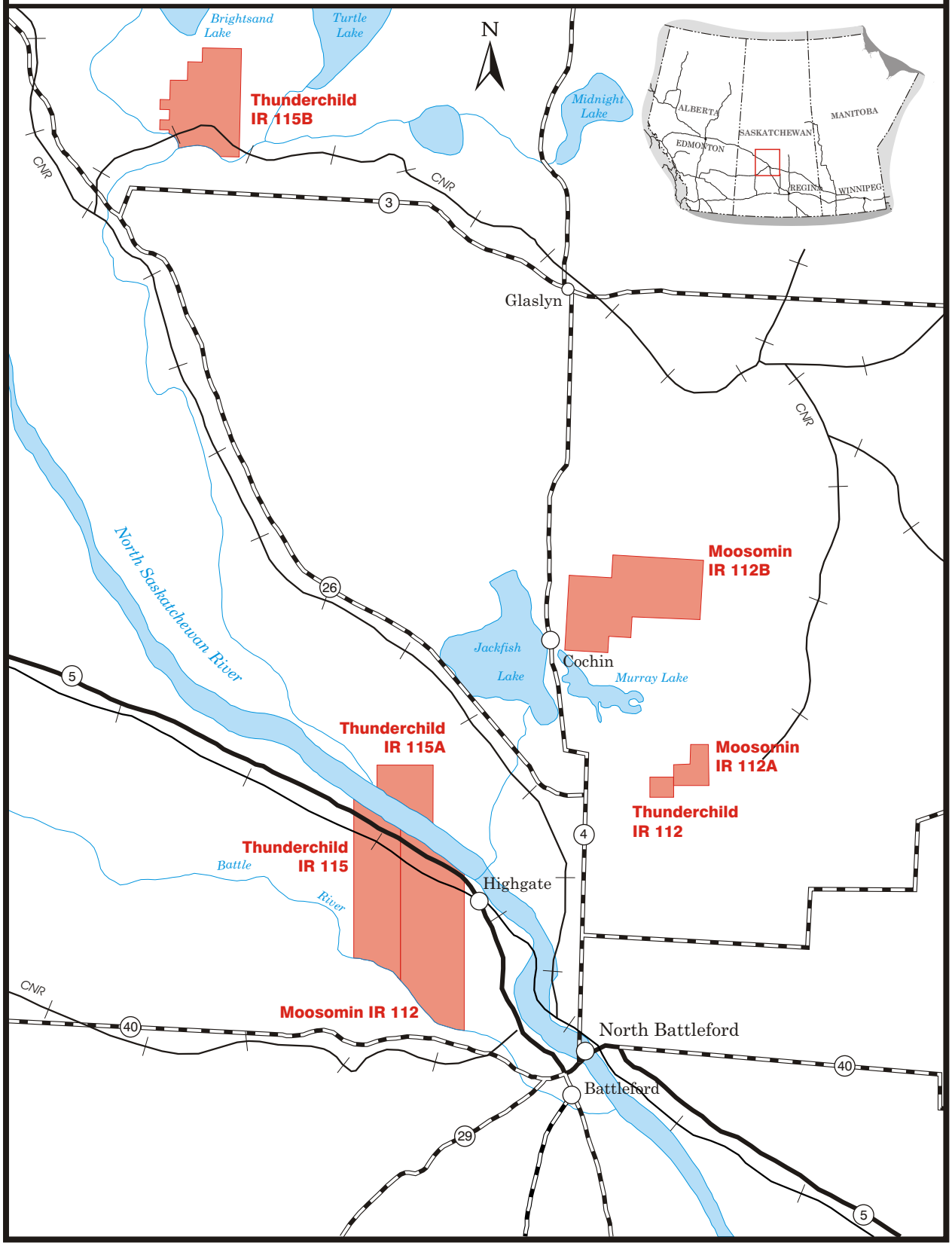
THUNDERCHILD FIRST NATION

1908 SURRENDER CLAIM

March 2004

CONTENTS

Claim Area Map



PART I
INTRODUCTION

This is a report on how a claim – which had been outstanding for 95 years and pursued under the Government of Canada's specific claims process for almost eight years – was, with the assistance of the Indian Claims Commission (ICC), successfully resolved.

This report will not provide a full history of the Thunderchild First Nation claim. It is primarily intended to summarize the events leading up to settlement of the claim and to illustrate the role of the Commission in the resolution process. Ralph Brant, Director of Mediation at the Commission, led the negotiation process.

The Thunderchild First Nation formally submitted its claim to the Minister of Indian Affairs in February 1986. It argued that the claim should be accepted under the federal government's Specific Claims Policy based on allegations that the Thunderchild surrender of August 1908 was, among other things, null and void. On July 9, 1993, the claim regarding the 1908 surrenders of the Band's interest in Indian Reserves (IR) 112A, 115, and 115A was accepted for negotiation under Canada's Specific Claims Policy. Confirmation of the acceptance came from Ian Potter, then Assistant Deputy Minister of the Department of Indian Affairs and Northern Development (DIAND), in a letter, which stated: "For the purposes of negotiations, Canada accepts that the band has sufficiently established that Canada has a lawful obligation within the meaning of the Specific Claims Policy with the regard to the 1908 surrender."[1]

With this letter, the process of negotiating a settlement began. At the request of the First Nation and with the concurrence of Canada, the Commission agreed to act as a facilitator.

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. It was established by Order in Council on July 15, 1991, followed by

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[1] Ian Potter, Assistant Deputy Minister, Claims, to Chief Winston Weekusk, July 9, 1993 (ICC file 2107-32-1M).

the appointment of Harry S. LaForme as Chief Commissioner. The ICC became fully operative with the appointment of six Commissioners in July 1992.

The Commission's mandate is twofold: it has the authority (1) to conduct inquiries under the *Inquiries Act* into specific land 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 the inquiry concludes that the facts and the law support a finding that Canada owes an outstanding lawful obligation to the claimant, it may recommend to the Minister of Indian Affairs and Northern Development 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 interest 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

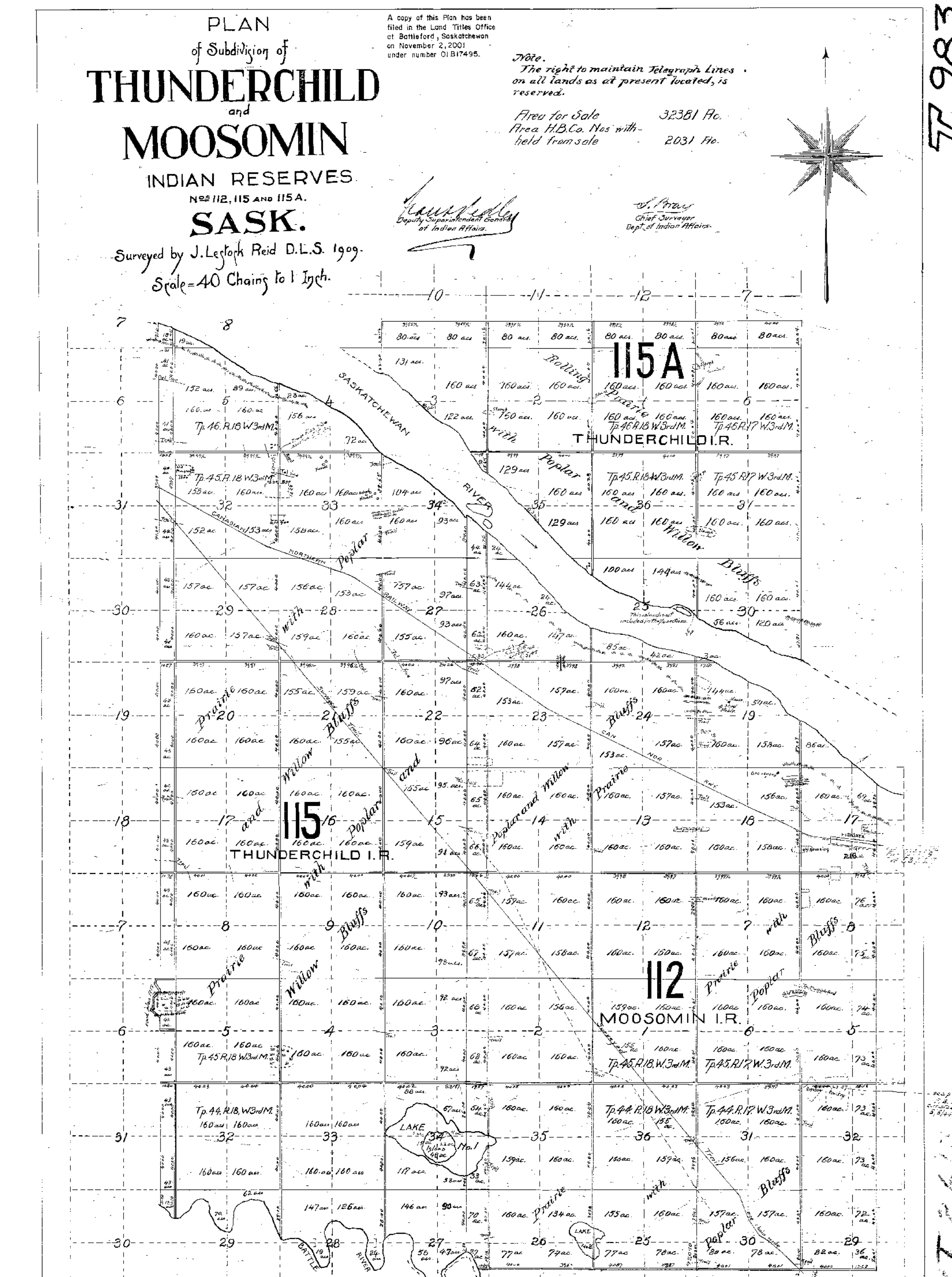
A BRIEF HISTORY OF THE CLAIM

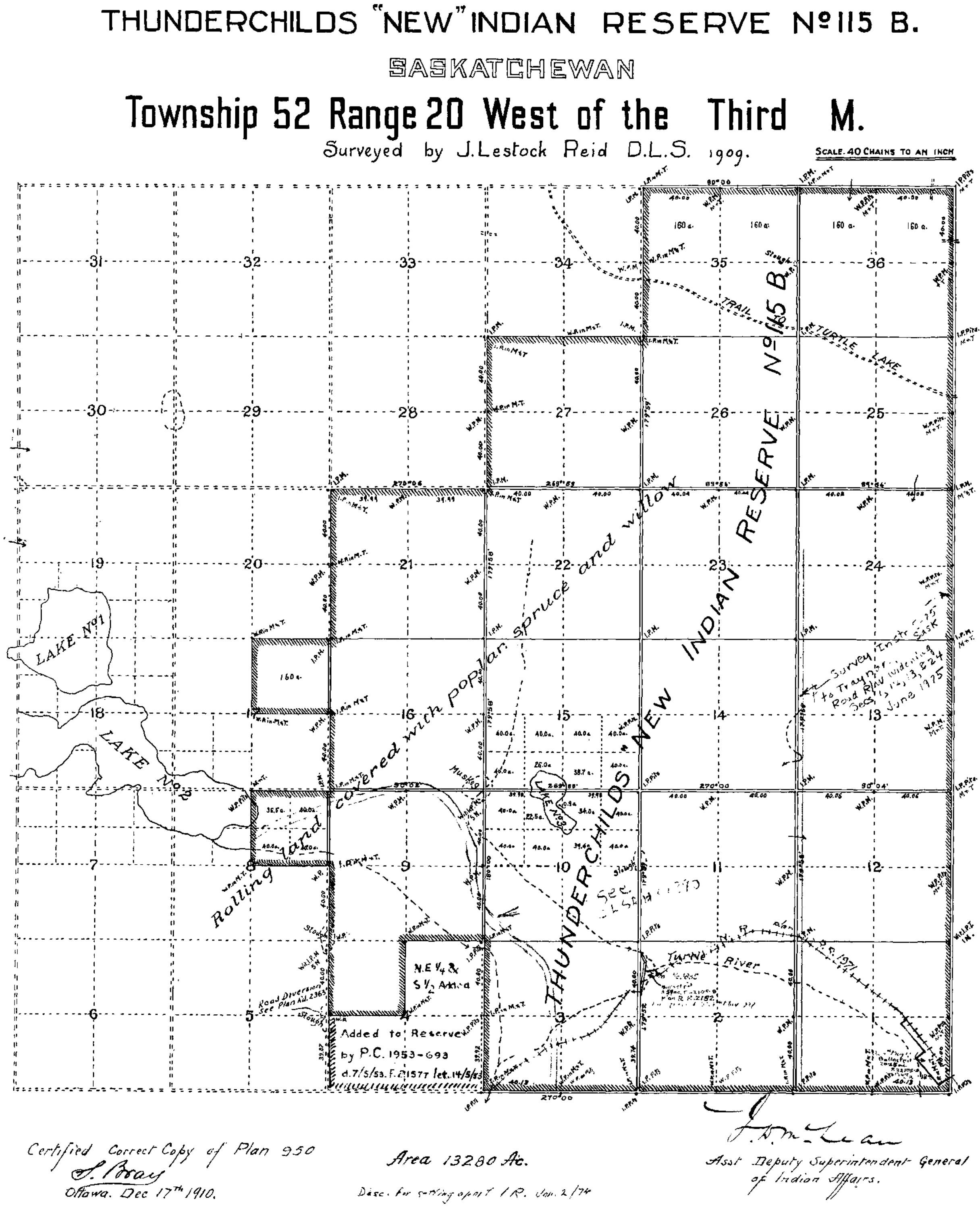
In 1876, Canada and the First Nations of the Plains, Wood Cree, and other tribes of central Saskatchewan and Alberta, including the Thunderchild First Nation, entered into Treaty 6. In exchange for ceding certain rights, titles, and privileges to 121,000 square miles of land, Canada promised to set aside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

During the late 1880s, 10,572 acres, consisting of IR 115, IR 115A, and half of IR 112A (land shared with the adjacent Moosomin First Nation), were surveyed and set aside in 1889 as reserve lands for the Thunderchild First Nation under Treaty 6. The main body of the reserve was located a short distance north and west of the Battlefords. The Thunderchild lands were ideally situated and suited for mixed farming, containing some of the best farm land in the region. Over the course of the 1880s, 1890s and early 1900s, the First Nation and its members were making a successful and prosperous transition to an agricultural way of life.

By 1903, the value of these reserves was enhanced by the construction of the main line of the Canadian Northern Railway, which passed through IR 115 and connected it to major settlements in the region. Following the construction of the railway, there was a growing interest in and demand for the First Nation's reserve lands, and the Band faced pressure to surrender its land and relocate further north. Local politicians, business leaders, settlers, and clergy lobbied the Department of Indian Affairs to obtain the First Nation's consent to the surrender of its lands. Senior levels of the department in Ottawa instructed the local Indian Agent to obtain a surrender from the Band in 1907. These initial efforts were unsuccessful.

However, pressures on Thunderchild band members for a surrender remained strong, particularly from local clergy, and, in early 1908, instructions were issued by senior personnel in Ottawa to revive efforts at the local department level to obtain a surrender from the Band. On August 26, 1908, Commissioner David Laird along with Indian Agent J.P.G. Day attended a meeting at the Thunderchild reserve to discuss the surrender, and they offered the First Nation rations for a full year rather than just six months, as well as a cash payment to obtain the majority support required by law.


PLAN
of Subdivision of
THUNDERCHILD
and
MOOSOMIN
INDIAN RESERVES
Nos 112, 115 and 115A.
SASK.
Surveyed by J. Lestock Reid D.L.S. 1909.
Scale = 40 Chains to 1 Inch.
A copy of this Plan has been filed in the Land Titles Office at Battleford, Saskatchewan on November 2, 2001 under number 01B17495.
Note.
The right to maintain Telegraph Lines on all lands as at present located, is reserved.
Area for Sale 32381 Ac.
Area H.B.Co. Nos with-held from sale 2031 Ac.
Deputy Superintendent General of Indian Affairs.
Chief Surveyor Dept. of Indian Affairs.
115A
THUNDERCHILD I.R.
115
THUNDERCHILD I.R.
112
MOOSOMIN I.R.
SASKATCHEWAN RIVER
BATTLE RIVER
LAKE
Tp.46.R.18.W3rdM.
Tp.45.R.18.W3rdM.
Tp.45.R.17.W3rdM.
Tp.44.R.18.W3rdM.
Tp.44.R.17.W3rdM.
T. 983
983
T. 983 See T. 2613


THUNDERCHILDS "NEW" INDIAN RESERVE No 115 B.
SASKATCHEWAN
Township 52 Range 20 West of the Third M.
Surveyed by J. Lestock Reid D.L.S. 1909.
SCALE. 40 CHAINS TO AN INCH
THUNDERCHILDS NEW INDIAN RESERVE No 115 B
Rolling land covered with poplar spruce and willow
LAKE No 1
LAKE No 2
LAKE No 3
TRAIL
TURTLE LAKE
Turtle River
Added to Reserve by P.C. 1953-693
N.E 1/4 & S 1/2 Added
Certified Correct Copy of Plan 950
Ottawa. Dec 17th 1910.
Area 13280 Ac.
Asst Deputy Superintendent General of Indian Affairs.

Laird and Day had with them, for this purpose, $15,000 in cash.[2] In Commissioner Laird's report to Ottawa,[3] he describes meeting with the Band over two days, during which he initially got three or four negative votes before finally obtaining a vote that approved the surrender by a narrow majority of one vote. Worthy of note is the fact that, at the time of the surrender, the location of a replacement reserve was still undetermined and the selection of replacement lands was made after the surrender was obtained.

The Band was ultimately forced to relocate to the site of the new reserve known as IR 115B, situated about 113 kilometres north and west of the Battlefords. In contrast to the reserves that were lost in the surrender, IR 115B consisted of rugged terrain with largely non-arable, extremely rocky soils. Geographically, the new reserve was located quite a bit north of the surrendered lands, in an area having a shorter growing season. In comparison to the surrendered reserve lands, the new reserve was unsuitable for agricultural development, leaving the Band with extremely limited economic opportunities.

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[2] The deal eventually struck included two years' rations and a cash payment totalling $12,840 (107 Indians were paid on the reserve $120 each).

[3] David Laird, Indian Commissioner, to J.D. McLean, Secretary, Department of Indian Affairs, September 3, 1908, National Archives of Canada (NA), RG 10, vol. 7795, file 29105-9.

PART III

NEGOTIATION AND MEDIATION OF THE CLAIM

Following Canada's acceptance of the Thunderchild claim in 1993, negotiations began between the parties and continued fairly successfully for approximately two years. During this time, a number of supporting studies were initiated. In July 1996, however, negotiations came to an impasse. On July 30, 1996, legal counsel for the First Nation wrote to the Commission requesting an inquiry into the issue of the proper theoretical and methodological approach to quantifying the loss of use under compensation criteria 3(ii) of Canada's Specific Claims Policy.[4]

In scheduling the first planning conference, counsel for the Indian Claims Commission suggested, and the negotiating parties agreed, that Justice Robert Reid, then Director of Mediation at the Commission, act as Chair. The intent was that, by taking a mediation approach right from the start, it might be possible for the parties to work towards a mutually acceptable resolution to the claim outside the formal inquiry process. Of course, had the issues in dispute not already been agreed upon by the parties prior to the initial planning conference, then the mediation approach would not have been appropriate and the First Nation's concerns would have moved through the Commission's normal inquiry process.

The mediation approach proved successful and negotiations resumed in December 1996. For the next three years, discussions continued with a focus on the negotiation process and loss-of-use studies.

Mediation/facilitation services provided by the Commission focused almost entirely on matters relating to process, the Commission's role being to chair the negotiation sessions, provide an accurate record of the discussions, follow up on undertakings, and consult with the parties to establish mutually acceptable agendas, venues, and times for the meetings. At the request of the parties, the Commission was also responsible for mediating disputes and assisting the parties in arranging for further mediation. Although the Commission is not at liberty to disclose the discussions during the negotiations, it can be stated that Thunderchild First Nation and representatives of

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[4] James A. Griffin, Counsel for Thunderchild First Nation, to Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, July 30, 1996 (ICC file 2107-32-1).

DIAND worked to establish negotiating principles and a guiding protocol agreement, which helped them to arrive at a fair settlement of the First Nation's claim.

Studies supporting the negotiations, including a forestry loss-of-use study and mineral valuation study were conducted to provide the information required for a claim valuation and subsequent negotiations. Specifically, independent consultants assessed the losses of use from forestry, oil, and gas to estimate the net economic losses to the First Nation as a result of the 1908 surrender. The amount of compensation for the losses and the final payment schedule were issues that needed to be resolved between the parties.

Unfortunately, negotiations did not proceed entirely smoothly during these years. Significant delays to the negotiations were caused by many postponements and cancellations of meetings. Relative to other negotiation tables with which the Commission's mediation unit has been involved, the number of interruptions to the Thunderchild negotiations was unusually high, mostly at the instance or request of the federal negotiator. On the positive side, however, a number of preliminary settlement offers and counteroffers were made during this time, although none were successful.

In October 2001, a new federal negotiator was appointed and, in an unusual approach, invited Thunderchild First Nation to put together the first settlement offer. The First Nation came back in January 2002 with a proposal for settlement.[5] For the next few months, settlement negotiations consisted almost exclusively of offers and counteroffers going back and forth between Canada and the First Nation, and by the end of May, an informal agreement was reached on the amount of compensation and terms of settlement. A formal written offer was given by Canada to the Thunderchild First Nation by letter dated October 18, 2002.[6]

While Canada was going through its internal approval process, which involved making a submission to Treasury Board, legal counsel for the parties were working drafting settlement documents in support of the agreement. Over the course of the following eight months, the Commission helped maintain momentum in this work by convening regular meetings and conference

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[5] Dan Maddigan, Solicitor on behalf of the Thunderchild First Nation, to Lynda Rychel, Senior Counsel, Department of Indian Affairs and Northern Development Legal Services, January 25, 2002 (ICC file 2107-32-1M).

[6] Silas E. Halyk, QC, Chief Federal Negotiator, to Thunderchild First Nation, October 18, 2002 (ICC file 2107-32-1M).

calls between the parties. On July 2, 2003, the final Settlement Agreement was initialled by Chief Delbert Wapass and the chief federal negotiator, Silas Halyk. Members of Thunderchild First Nation voted to ratify the settlement on September 4, 2003. The deal was concluded on October 2, 2003 when then Minister of Indian Affairs Robert Nault visited the community and took part in the official signing ceremony.

The Settlement Agreement was implemented in the fall of 2003, providing $53 million in compensation to the Band. Settlement capital, paid into a trust account set up for this purpose by the First Nation, was marked as a long-term asset to be invested for the benefit of First Nation members. In addition, Thunderchild First Nation was given the ability to acquire up to 5,000 acres of land to be set apart as reserve, within 15 years of the settlement, subject to DIAND's Additions to Reserve Policy.

PART IV
CONCLUSION

The Thunderchild First Nation 1908 surrender claim took, from the date of acceptance of the claim for negotiation to the date of completion, over 10 years to resolve. The Commission, involved as mediator since 1996, had no authority to force a settlement nor to impose one. The credit for settling this claim belongs to the parties alone. The outcome of the negotiations, however, indicates the Commission's ability to advance the settlement of claims. For approximately three years, efforts by the First Nation to have its claim settled were unsuccessful. An impasse in the negotiations had been reached. The Commission was able to come in and help the parties past their stalemate on the issue of the proper theoretical and methodological approach to quantifying the loss of use under Canada's compensation criteria. The Commission's efforts in getting the parties past this impasse produced enough movement for the claim to be brought to an acceptable settlement.

In making recommendations arising out of its experience with the Thunderchild First Nation's 1908 surrender claim, the Commission would first suggest that the parties involve the Commission in the negotiations at a much earlier stage. Perhaps the impasse would not have come about or the time involved in working around the challenges involved would have been significantly reduced if the Commission had been involved earlier. In any event, having the benefit of the Commission's support, knowledge, and experience from the beginning of the negotiation process would have enhanced the parties' ability to negotiate.

The Commission would also like to emphasize an ongoing problem that continues to plague the process – the inability of the parties at the table to maintain consistency in negotiations, an inability caused in part by high turnover rates in negotiators and legal counsel. In this particular case, Thunderchild First Nation members dealt with four federal negotiators and four Department of Justice legal counsel over the course of the negotiation of their claim.

In addition, the Commission reiterates a recommendation made in previous reports that the negotiating parties review very carefully the requirement to undertake research and loss-of-use studies. 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.