

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

KAHKEWISTAHAW FIRST NATION

F I L E D	SPECIFIC CLAIMS TRIBUNAL TRIBUNAL DES REVENDICTIONS PARTICULIÈRES	D E P O S E
	October 5, 2016	
	David Burnside	
Ottawa, ON		1

Claimant

v.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Indian Affairs and Northern Development

Respondent

DECLARATION OF CLAIM
Pursuant to Rule 41 of the
Specific Claims Tribunal Rules of Practice and Procedure

This Declaration of Claim is filed under the provisions of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure*.

Date: October 5, 2016

David Burnside

(Registry Officer)

TO: HER MAJESTY THE QUEEN IN RIGHT OF CANADA

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I. Claimant (R. 41(a))

1. The Claimant, Kahkewistahaw First Nation, confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*. The Claimant is located in the Province of Saskatchewan.

II. Conditions Precedent (R. 41(c))

2. The following conditions precedent as set out in s. 16(1) of the *Specific Claims Tribunal Act*, have been fulfilled:

16. (1) A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and

...

(d) three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister's decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.

3. This claim relates to the alienation of approximately 68.5 acres of land set apart as part of Indian Reserve 72A for the use and benefit of the Claimant. The Claimant filed its claim with the Minister for processing under the Specific Claims Policy, which claim was received by the Minister on December 9, 2004.

4. In a letter dated September 13, 2013, the Claimant was advised by the Respondent that it was the decision of the Minister to accept part of the claim for negotiations.

5. As of September 14, 2016, the claim has not been resolved by a final settlement agreement

III. Claim Limit (Act, s. 20(1)(b))

6. For the purposes of this claim, the Claimant does not seek compensation in excess of \$150 million.

IV. Grounds (Act, s. 14(1))

7. The following are the grounds for the specific claim, as provided for in s. 14 of the *Specific Claims Tribunal Act*:

(b) a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation – pertaining to Indians or lands reserved for Indians – of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;

(c) a breach of a legal obligation arising from the Crown’s provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;

(d) an illegal lease or disposition by the Crown of reserve lands;

(e) a failure to provide adequate compensation for reserve lands taken or damage by the Crown or any of its agencies under legal authority;

V. Allegations of Fact (R. 41(e))

8. The Claimant adhered to Treaty No. 4 on September 15, 1874.

9. In 1881, Surveyor John C. Nelson surveyed land along Crooked Lake and recommended that this land be set aside as a fishing station for the Claimant.

10. The Department of the Interior reserved the lands and the fishing station was confirmed as I.R. 72A by Order in Council P.C. 1151 dated May 17, 1889, as containing 96 acres.

11. It was later discovered that 27.5 acres of I.R. 72A had been patented to the Hudson’s Bay Company in 1885. As a result, I.R. 72A was reduced by 27.5 acres from 96 acres to 68.5 acres.

Road Transfer

12. In 1900, W.T. Thompson surveyed the Old Qu'Appelle Trail along the northern shore of Crooked Lake and the Qu'Appelle River. The road took up 2.30 acres of land in I.R. 72A.

13. In 1922, the Department of Highways proposed a change in the location of the old trail. The new road allowance, for the most part, followed the roadway surveyed by Thompson in 1900. This new road allowance used 2.64 acres of I.R. 72A, and in 1924 was transferred to the Province of Saskatchewan pursuant to Section 46 of the *Indian Act* by Order in Council P.C. 1574 on September 16, 1924.

14. No compensation was paid to the Claimant for the 2.64 acres of land taken.

Construction of Craven Dam

15. In around 1909, the Department of Marines & Fisheries of the Federal Government constructed a dam on the Qu'Appelle River at Craven, Saskatchewan just below the Long Lake Creek. The purpose and effect of this dam was to turn the water from the Qu'Appelle River into Long or Last Mountain Lake. While this benefited Long or Last Mountain Lake the rest of the lakes in the Qu'Appelle Valley, including the Crooked Lake, suffered from a reduction in the water flowing into them and the negative consequences that resulted to the fishing in these lakes.

16. There is nothing in the record which indicated that the Crown consulted with the Claimant about the construction of the dam at Craven or its consequences to the Claimant's Treaty rights, or took any steps at the time to accommodate the Claimant's rights.

Trespass

17. It appears that the Rural Municipality of Grayson No. 184 constructed a road along the land situated between Townships 19 and 19A which was part of I.R. 72A. There is no record of this land having been provided to the RM or to the Province of

Saskatchewan for the purposes of this road. As such the RM was trespassing on I.R. 72A.

Surrender of I.R. 72A

18. As a result of a dam built in 1942 by the Prairie Farm Rehabilitation Administration (hereinafter the "PFRA") on the Qu'Appelle River at the outlet of Crooked Lake, the water level of Crooked Lake was varied and in 1943 the Road Allowance between Townships 19 and 19A was reported to have been flooded.

19. On December 8, 1943, Don R. Hrynewich, the Secretary-Treasurer of the RM, wrote to the PFRA to see if they were interested in assisting them in constructing a road to Sunset Beach and to the PFRA's dam at Crooked Lake. Hrynewich proposed building a road on higher ground, through I.R. 72A, to avoid problems with flooding. It was stated that this road required approximately 1.5 acres of I.R. 72A.

20. On December 18, 1943 the PFRA made the request for the 1.5 acres, on behalf of the RM, and forwarded a sketch showing the approximate location of the roadway.

21. It appears that the Crooked Lake Indian Agent, W.J.D. Kerley, was asked to discuss the matter of the request by the RM for the road diversion with the Claimant. Agent Kerley advised that the Chief "is in favour of granting this 1.5 acres and wishes to take the matter up with the band."

22. Agent Kerley reported on April 27, 1944 regarding two meetings he had with the Claimant, one on April 4, 1944 and the other sometime later. He reported that the Claimant decided (although he did not say how this decision was made) to surrender the entire I.R. 72A, indicating that "[t]hey have in mind selling this and if possible leasing or purchasing a fishing station and camp site near Round Lake School as the majority of their children attend there."

23. Agent Kerley was sent surrender forms on May 3, 1944, but was not given any instructions on the taking of the surrender.

24. On July 8, 1944, Agent Kerley reported that he obtained a surrender of all of I.R. 72A. The surrender covered the whole of I.R. 72A, described on the surrender document as containing 68.16 acres.

25. Agent Kerley provided no details of the surrender meeting, no details of what was said or discussed at the surrender meeting, no minutes of the meeting were provided, and no details of what if any notice was provided of the meeting.

26. During the course of the meeting, members of the Claimant were advised by Agent Kerley to vote to sell the land on I.R. 72A and were advised that they would receive a more convenient location as a fishing station. The members were not told the purpose of the sale nor the price that the sale would receive.

27. There was at least one member of the Claimant who was under the age of 21 years who voted on the surrender. There were also members of the Claimant who did not vote but whose purported signatures appear on the documents relating to the surrender.

28. The surrender was accepted by Order in Council P.C. 6171 on August 7, 1944.

Alienation of I.R. 72A – Road Diversion

29. Following the surrender of I.R. 72A, D.J. Alan, Superintendent, Reserves and Trusts informed Superintendent of Indian Agencies, M. Christianson of the surrender for sale which “will enable us to transfer to the Rural Municipality of Grayson No. 184 the parcel of 1.5 acres which they require for a roadway to serve Sunset Beach”. The price for the land was understood to be \$20.00 per acre but no specifics were provided for how the \$20.00 per acre price was determined. Superintendent Alan directed Superintendent Christianson to arrange with the RM to have a cheque for \$30.00 forwarded.

30. On November 20, 1944, the RM paid the \$30.00 which was placed in Land Suspense Account 821 and proceeded with the construction of the road diversion. The plans for the road had been prepared by the PFRA and C.H. Biddell, a

Saskatchewan Land Surveyor, determined the location of the road. The land area actually used for the road diversion was 1.83 acres, somewhat more than the 1.5 acres requested.

31. It was later discovered that the road diversion was constructed in the wrong location. Rather than being set back from Crooked Lake, the road was constructed along the shore of Crooked Lake, in an area that damaged valuable shoreline property.

32. The dispute over the location of the road diversion went on for a number of years. The Department of Indian Affairs refused to transfer the title to the land used for the road diversion, and the RM refused to do anything, claiming they had followed a survey plan provided by the PFRA and would take no responsibility for the location of the road diversion.

33. It took a number of years, but eventually the dispute was resolved and a new road was constructed on the road allowance between Townships 19 and 19A. The road remained on I.R. 72A.

34. At some point in time, the \$30 paid by the RM was returned to the RM. As such, no compensation was paid to the Claimant for the land.

Alienation of I.R. 72A – Sale of Remainder of I.R. 72A

35. Shortly after the surrender, discussions on how best to deal with the disposition of the remainder of I.R. 72A began. D.J. Allan, Superintendent, Reserves and Trusts, noted that I.R. 72A “has about 3,000 feet of Lake frontage that might conceivably have a value for summer homes.” Allan asked Superintendent Christianson to offer an opinion on whether it would be “expedient to offer the land for sale by public tender, whether a portion of the lake shore might profitably be subdivided, or whether the matter of its ultimate disposal should be left in abeyance.”

36. Superintendent Christianson inspected I.R. 72A and reported to Superintendent Allan that if the “3,000 ft. of lake frontage was put up for sale at the present time I do

not think it would bring over \$500.00 or \$600.00 but if it were kept for a year or two and subdivided after the war is over I think the Indians would realize at least \$3,000.00 out of the Sub-division.” Based on these investigations, plans were developed for such a subdivision by the Department.

37. From 1947 to 1953 the matter of the sale of the remainder of I.R. 72A was forgotten by the Indian Affairs Branch, and was not raised again until July 1953 when an individual (on behalf of the neighbouring resort owner, K.W. Criddle) expressed interest in purchasing the fishing station.

38. When the issue of sale of the reserve resurfaced in 1953, discussions resumed regarding the most advantageous method of sale. However, it appears that the investigations by Allan and Christianson and their plans for subdivision were lost, forgotten about or simply ignored as it “would not be worth all the additional trouble and expense.”

39. On August 6, 1953 Superintendent Brown wrote Supervisor Ostrander noting that the Department was “in a position to proceed with the proposed sale without further reference to the band.”

40. On October 20, 1953 Superintendent Brown wrote Agent Kerley advising that the area of I.R. 72A was definitely established at 64.36 acres excluding the Road Allowance between Townships 19 and 19A. Brown advised Kerley that the Road Allowance between Townships 19 and 19A was still under the control of the Department and that title would be transferred to the Province after the reserve was sold. No further action was taken on the sale of the lands until 1955.

41. In 1955, K.W. Criddle remained interested in purchasing the entire reserve at a price of \$30 per acre for a total of \$1,950. Appraisal of the land was delayed by flooding, and was completed on June 11, 1955, which indicated the size of I.R. 72A was 65 acres.

42. Options were discussed as to the timing of the sale, as well as whether to sell I.R. 72A in one block or in smaller parcels, however, the matter of the subdivision of

the lots along the shore of Crooked Lake does not appear to have been discussed. The decision was made by J.W. Pickersgill, Minister, Department of Citizenship and Immigration, to sell the property in either three separate lots – one of 13 acres, one of 8 acres, and one of 44 acres – or all three together, totalling 65 acres.

43. On September 30, 1955, a call for tenders was signed advertising that 64.36 acres were available for sale.

44. On November 2, 1955, a revised call for tenders was signed. This notice reduced the acreage of the reserve for sale to 53 acres. No explanation was provided by the Department for the reduction in acres.

45. All three parcels offered for sale by tender were purchased by Mr. Criddle, for \$2,500. A patent was issued to Mr. Criddle in June of 1956, with the Sale Record indicating the sale of 64.36 acres, not 53 acres as noted in the Tender document.

Alienation of I.R. 72A – Mineral Rights

46. The mineral rights for these approximately 65 acres remains registered in the name of Her Majesty the Queen in Right of Saskatchewan. There is no record of these mineral rights having been sold or of the Claimant receiving compensation for these rights.

VI. The Basis in Law on Which the Crown is said to have failed to meet or otherwise breached a lawful obligation:

47. The Claimant claims that the Respondent had a duty to consult with the Claimant regarding the construction of the Craven Dam. The Claimant claims that the Respondent breached its duty to consult obligation with the Claimant when it constructed the Craven Dam and failed to accommodate the Claimant for the loss of its fishing rights.

48. Treaty No. 4 specifically required the consent of all of the Indians interested in a reserve to be given before any land could be taken from a reserve. The Claimant claims that the Respondent breached the terms of Treaty No. 4 by failing to obtain the

consent of all of the members of the Claimant prior to the land being taken from I.R. 72A.

49. The 1927 *Indian Act* required the surrender meeting to be called in accordance with the rules of the Band. The Claimant claims that the Respondent breached the terms of the 1927 *Indian Act* by failing to ensure that the surrender meeting was called or conducted in accordance with the rules of the Claimant.

50. The Respondent owed fiduciary or trust-like obligations to the Claimant in relation to the use of I.R. 72A by the RM. The Claimant claims that the Respondent breached its fiduciary or trust-like obligations to the Claimant by failing to protect the interests of the Claimant in I.R. 72A from trespasses by the RM, or by failing to compensate the Claimant for the use of the land by the RM

51. The Respondent owed fiduciary or trust-like obligations to the Claimant to deal with the 1924 road transfer in the best interests of the Claimant. The Claimant claims that the Respondent breached its fiduciary or trust-like obligations to the Claimant when they transferred 2.64 acres of I.R. 72A to the Province of Saskatchewan for road purposes in 1924 without providing compensation to the Claimant.

52. The Respondent owed fiduciary or trust-like obligations to the Claimant in relation to the surrender of I.R. 72A. The Claimant claims that the Respondent breached its fiduciary or trust-like obligations to the Claimant, particulars of which include:

- (a) Failing to consult with all members of the Claimant regarding the taking, the terms of, and the consequences of, the surrender to the members prior to the land being taken from I.R. 72A;
- (b) Failing to ensure that the Claimant adequately understood the surrender and the consequences of the surrender to the Claimant;
- (c) Failing to act in the best interests of the Claimant in relation to the surrender of I.R. 72A; and

- (d) Failing to withhold its consent to the surrender which was so foolish a decision that it amounted to exploitation.

53. The Respondent owed fiduciary or trust-like obligations to the Claimant to deal with the surrendered land in the best interests of the Claimant. The Claimant claims that the Respondent breached its fiduciary or trust-like obligations to the Claimant, particulars of which include:

- (a) Failing to ensure that the RM constructed its road diversion through I.R. 72A in 1944 in a location that did not harm the reserve;
- (b) Failing to ensure that the RM road diversion and the sale of the remaining portions of I.R. 72A proceeded without delay and in a manner that was in the best interests of the Claimant;
- (c) Failing to ensure that the Claimant received compensation for the full amount of the lands sold; and
- (d) Failing to ensure that the Claimant received compensation for the mineral rights to I.R. 72A transferred to the Province.

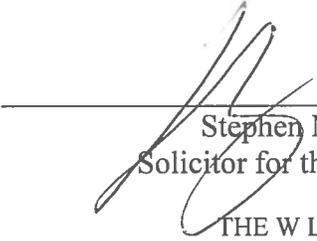
VII. Relief Sought

54. The Claimant seeks the following:

- (a) Compensation for either the value of the lands taken from I.R. 72A for the road allowance in 1924, brought forward to the present date, or the current, unimproved market value of the lands taken from I.R. 72A for the road allowance in 1924;
- (b) Compensation equal to the current, unimproved market value of the lands taken from I.R. 72A in 1944;
- (c) Compensation equal to the value of the loss of use of the lands taken from I.R. 72A in 1944;

- (d) Compensation for losses suffered as a result of the Respondent's breach of its fiduciary or trust-like obligations, breach of the terms of Treaty No. 4, and breach of the terms of the 1927 *Indian Act*;
- (e) Equitable compensation and/or interest;
- (f) Costs in relation to these proceedings; and
- (g) Such other damages, compensation or costs as this Honourable Tribunal may award.

Dated this 5th day of October, 2016.



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