

SPECIFIC CLAIMS TRIBUNAL	
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June 19, 2019	Isabelle Bourassa
Ottawa, ON	1

SCT File No.: SCT - 5005-19

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

KAHKEWISTAHAW BAND #72

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*.

June 19, 2019

 Date

Isabelle Bourassa

Registry Officer

TO: Assistant Deputy Attorney General, Litigation, Justice Canada
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I. Claimant (R. 41(a))

1. The Claimant, the Kahkewistahaw First Nation, is a “First Nation” within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*. The Kahkewistahaw First Nation is located on the banks of the Qu’Appelle River east of Regina in the Province of Saskatchewan.
2. The Claimant is also known as the Kahkewistahaw Band #72 which signed Treaty No. 4 (hereinafter “Treaty 4”) at the Qu’Appelle Lakes on September 15, 1874, under the leadership of Chief Ka-ku-wis-ta-haw. The Claimant may be referred to as “Kahkewistahaw”, the “Band”, or the “First Nation” when referred to in a modern context.

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

3. 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

(a) the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part; ...

4. The subject matter of this proceeding was originally submitted in 1986 by the Qu’Appelle Valley Indian Development Authority (“QVIDA”) for and on behalf of 8 First Nations, including Kahkewistahaw. The claims were not accepted for negotiation by Canada. Following a public inquiry and report by the Indian Claims Commission in 1998, the claims of five First Nations, not including Kahkewistahaw, were accepted for negotiation and settled by the parties.
5. In 2001, the First Nation filed supplementary materials in respect of various alleged breaches by the Respondent (hereinafter “Canada” or the “Crown”). These breaches relate to interference with the Kahkewistahaw Band’s riparian rights, as well as flooding, trespass and damage caused to the First Nation’s reserve land due to the unauthorized and illegal construction by Canada of control structures along the Qu’Appelle River (hereinafter the “Flooding Claim” or the “Claim”).
6. The Flooding Claim was deemed to be filed with the Minister of Indian Affairs and Northern Development on October 16, 2008. By letter dated May 20, 2011, the Senior Assistant Deputy Minister of Indian and Northern Affairs Canada advised the First Nation that the Minister decided not to accept the Claim for negotiation on the basis that there was no outstanding lawful obligation on the part of the Crown.

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

7. The First Nation does not seek compensation in excess of \$150 million for the Flooding Claim.

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

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

14(1) Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:

...

- (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 damaged by the Crown or any of its agencies under legal authority; ...

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

Treaty 4 and Reserve Lands for the Kahkewistahaw Band

- 9. On September 15, 1874, the Chiefs of the Cree and Saulteaux Indians in present day southern Saskatchewan and Canada’s Treaty Commissioners signed Treaty 4 at the Qu’Appelle Lakes. The Crown promised to provide certain Treaty benefits, including reserve lands for each band based on one square mile per family of five.
- 10. Chief Ka-ku-wis-ta-haw signed Treaty 4 at Crooked Lake on behalf of himself and his followers on September 15, 1874.
- 11. In August 1881, Dominion Land Surveyor John C. Nelson surveyed and set apart 73 square miles of land between Crooked Lake and Round Lake as Indian Reserve 72 (“IR 72”) for the use and benefit of the Kahkewistahaw Band. The Qu’Appelle River formed the north boundary of IR 72, which included excellent hay meadows and farming lands.
- 12. In August 1881, Dominion Land Surveyor Nelson surveyed Indian Reserve 72A (“IR 72A”), which comprised 96 acres as a fishing station for the Kahkewistahaw Band on the northeast shore of Crooked Lake.
- 13. Order-in-Council P.C. 1151/1889 on May 17, 1889, confirmed IR 72 and IR 72A as reserves set apart for the Kahkewistahaw Band.
- 14. On November 10, 1960, Order-in-Council P.C. 1528 approved the purchase of 1,128.29 acres on the northeast shore of Round Lake for the Kahkewistahaw Band. These lands were set apart as reserve as an addition to IR 72.

Crooked Lake and Round Lake Control Structures and Flooding of IR 72

- 15. The lands along the Qu’Appelle River were naturally irrigated and well-suited for the production of hay which supported the Band’s horse and livestock industry. The Band sold excess hay off-reserve and use of other resources in the Valley provided an additional source of income for the Band.

16. The economies of the Qu'Appelle Valley Bands before 1940 featured considerable reliance on activities and resources in the Valley bottom, including native hay, timber, beaver, muskrat, deer, berries, maple sugar, and important cultural and medicinal herbs and vegetation, such as sweetgrass and senega root. The water in the river system itself was also fundamental to the Bands' existence, not only for domestic purposes but also for fishing, stock watering, and the natural irrigation that it provided by means of seasonal flooding of low-lying lands. Lower water levels also permitted Band members to cross the river to access hay and other resources on both sides. Several of the reserves had a strong attachment to economic, social and cultural activities centered on the river habitat.
17. The federal *Prairie Farm Rehabilitation Act* was brought into force in April 1935. The Act provided for the rehabilitation of drought and soil drifting areas in the prairie provinces, as well as providing authority for the construction of storage and irrigation projects, including water control structures on the Qu'Appelle River. The Act created the Prairie Farm Rehabilitation Administration (hereinafter the "PFRA") to fulfil this mandate.
18. On July 16, 1941, the PFRA commissioned a report into the effects on the Muscowpetung and Pasqua reserves as a result of the Crooked Lake and Round Lake control structures. The report, dated September 11, 1941, did not include any consideration of flooding or other damages that might be caused to the Kahkewistahaw reserves.
19. On September 16, 1941, the PFRA filed Memorials with the Province of Saskatchewan pursuant to section 18 of the *Water Rights Act* seeking approval to construct water control structures, or dams, on Round Lake and Crooked Lake.
20. By Order-in-Council P.C. 7764 dated October 8, 1941, Canada granted approval for a tender for the construction of the Round Lake and Crooked Lake dams under the authority of the *Prairie Farm Rehabilitation Act*.
21. In December 1941, the PFRA informed the Department of Indian Affairs that it planned to construct control structures at Crooked Lake and Round Lake on reserve lands and that expropriation proceedings would be initiated if required. PFRA proceeded with construction of the Round Lake and Crooked Lake dams on reserve lands without obtaining necessary approvals or consent of the Band as required under the *Indian Act*. Nor did the PFRA seek or obtain easements or consent of the Kahkewistahaw Band under the *Indian Act* to permit flooding of its reserve lands.
22. On February 8, 1942, a PFRA report provided an estimate of damages expected to reserve lands in the Qu'Appelle Valley due to the construction and operation of the Crooked and Round Lake dams. No damage estimate was done for Kahkewistahaw reserve lands. In 1943, the Department of Indian Affairs provided limited compensation to some of the Bands along Crooked Lake and Round Lake but not the Kahkewistahaw Band.
23. The level of each lake was raised by approximately three to four feet which caused an increase in the levels of the Qu'Appelle River adjacent to the Kahkewistahaw Reserve.
24. Flooding of Kahkewistahaw reserve lands occurred almost immediately after construction of the Round Lake and Crooked Lake dams and then again in 1943. The PFRA denied responsibility for the flooding. Major floods occurred again in 1947 and 1948 and intermittently from the date of construction and operation of the Round Lake and Crooked Lake dams.

25. Flooding and other damage continued to occur on IR 72 and IR 72A lands as a result of the construction and operation of the Crooked Lake and Round Lake dams which are located, respectively, upstream and downstream of IR 72.
26. The Crown was aware prior to the construction of the water control structures that flooding would occur on the reserves in the Crooked and Round Lake area of the Qu'Appelle Valley. Despite this knowledge, the Crown took no measures to inform or consult the Qu'Appelle valley bands, to minimize the flooding that would occur, or to provide compensation to the Kahkewistahaw Band for such damages.
27. The locations of the PFRA control structures and Indian Reserves, including the Kahkewistahaw Reserve, are shown in Schedule A.

Flooding of IR 72A and the 1944 Surrender

28. IR 72A was located on the northeast shore of Crooked Lake at the outlet where the lake flowed into the Qu'Appelle River. Of the 96 acres of reserve land, 27.5 acres were transferred to the Hudson's Bay Company by Letters Patent. This reduced the size of the reserve to 68.5 acres. The Crooked Lake Dam was constructed in 1941 on lands in fractional section 8-19A-5 W2M to the south of the boundary of IR 72A. These lands were included in the 1881 survey of IR 72A, prior to patenting to the Hudson's Bay Company.
29. By 1943, a community of cottages known as Sunset Beach was built on fractional section 8, the land previously patented to the Hudson's Bay Company. In 1943, the Municipality of Grayson asked for assistance in constructing a new road into Sunset Beach from the Qu'Appelle Trail, since the existing road was prone to flooding. The Municipality wished to build a new road on the higher ground on IR 72A.
30. A surrender meeting was held with the Kahkewistahaw Band on April 4, 1944. Too few members were present, so the Indian Agent arranged for another meeting. At that meeting, the Indian Agent claimed that the Band wished to surrender the entire reserve. There is no indication why the Band might agree to surrender this quantity of land when only 1.5 acres was required for the access road.
31. The surrender was approved by the Governor in Council on August 7, 1944.
32. After the surrender of IR 72A in 1944, a dispute arose over the location of the road allowance and the sale of the land was delayed for eleven years.
33. In 1955, the entire surrendered reserve was sold to Mr. Criddle for \$2,500 who received Letters Patent for 64.36 acres, although 68.5 acres of reserve lands were surrendered. Due to flooding on the Qu'Appelle River, the land available for sale was reduced.
34. A road allowance was granted to the municipality for 1.5 acres. The road was built near the lakefront and damaged valuable lands which had potential for cottage development.

Round Lake Dam Located on 1960 Addition to Kahkewistahaw Reserve Resulting in Crown Trespass During Construction and Operation of the Round Lake and Crooked Lake Dams

35. The Round Lake Dam was constructed in 1941 partially on fractional northeast quarter section 14, Township 18, Range 3, West of the 2nd Meridian.

36. By Order-in-Council P.C. 1528 dated November 10, 1960, Canada approved the purchase of 1,128.9 acres on the north shore of Round Lake to be added as reserve for Kahkewistahaw. The legal description included lands in the fractional northeast quarter of section 14, Township 18, Range 3, West of the 2nd Meridian. The Round Lake Dam was built on 0.17 acres of this land.
37. Subsequent to the 1960 addition to IR 72, the Crown was required to trespass upon these reserve lands to access the Round Lake dam. The Dam was partially located on the addition to IR 72. This trespass lasted from 1960 until 2002 when the stop logs on the Round Lake Dam were removed by PFRA.
38. During construction of the Crooked Lake Dam in 1941, the Crown trespassed upon IR 72A to reach the dam site.

Detrimental Impacts of Flooding to the Kahkewistahaw Band

39. Kahkewistahaw suffered significant detrimental impacts to its lands and traditions due to the unlawful flooding, including: the destruction of trees, destruction of the haylands along the river, resulting in lack of hay and therefore the ability to support a cattle industry, diminished water quality, increased soil salinity, negative impacts on the fish and wildlife habitat, including, decrease and change in vegetation, reduction of the fishery, and the lack of game. Many previously viable economic opportunities were no longer possible.
40. The severity of the damages caused to the Qu'Appelle Valley river eco-system was exacerbated by the surrender in 1907 of 51 sections of prime agricultural land, constituting 75% of the Kahkewistahaw reserve. The surrendered land included virtually all the arable land on the reserve, with the remaining land being unsuited for cultivation. The lands along the Qu'Appelle River were effectively the Band's only productive lands and its only means of livelihood since most of its farm lands had been wrongfully taken in 1907.
41. Crown water management decisions and strategies have not adequately considered impacts to Kahkewistahaw, its lands, and its traditions. Kahkewistahaw continues to be affected by river levels from water management upstream and is severely impacted by flow regulation on the Qu'Appelle River itself and the lake level regulation on Crooked Lake and Round Lake.
42. This management has had deleterious impacts on the river itself and on lakes along the river system. Channelization to increase river conveyance capacity drastically altered river morphology, which reduced river frontage for the Qu'Appelle Valley First Nations (losing riparian access) and increased river flow velocity. These changes to the river and its flow increased streambank erosion and river sediment, which in turn deteriorated water quality in both the river and the lakes.

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

43. In light of the foregoing, the Flooding Claim is brought on the grounds that the Crown breached its Treaty, statutory, fiduciary and honourable obligations in relation to the illegal construction and operation of control structures built at Crooked Lake and Round Lake in 1941 and associated flooding that caused, and continues to cause, damages to the First Nation's reserve lands.

44. More specifically, the unlawful flooding and damage caused to the Kahkewistahaw reserves was in breach of Treaty 4, the *Indian Act*, and the First Nation's riparian rights. It also constituted trespass on reserve lands and was in breach of the Crown's fiduciary obligation to protect reserve lands and the Honour of the Crown by refusing to mitigate or compensate the First Nation for such damages.
45. The unlawful flooding and damage caused to Kahkewistahaw reserve land was in breach of the obligations it owed to the First Nation under the terms of Treaty 4, including but not limited to:
 - a. The obligation of the Crown to seek consent of the Band prior to alienating their reserve lands;
 - b. The obligation of the Crown to administer and deal with the Indian lands for their benefit and protect them from being interfered by others; and
 - c. The obligation of the Crown to promote agriculture on reserve lands and manage their water resources for the benefit of the Indians as they had an implied right to water under the terms of the Treaty.
46. The Crown breached its statutory obligations to protect Kahkewistahaw's reserve lands from flooding and other damage by allowing the PFRA to build and operate dams at Crooked Lake and Round Lake without legal authorizations as required under the *Indian Act* or any other applicable legislation. In addition, the Crown's trespass on IR 72 and IR 72A was without legal authority and in breach of the statutory provisions of the 1927 *Indian Act*.
47. The Crown's actions also constituted trespass and were in breach of the riparian rights of the First Nation.
48. The Crown breached its fiduciary obligations owed to the Kahkewistahaw First Nation as a result of the construction, operation and consequent effects of the water control structures at Crooked Lake and Round Lake, including, but not limited to:
 - a. Failure to advise and consult with the Kahkewistahaw First Nation regarding the construction, operation and resulting effects of the water control structures at Crooked Land and Round Lake;
 - b. Failure to minimize the impact of the flooding on the First Nation's reserve lands;
 - c. Failure to obtain compensation for the flooding, losses and other damages as a result of the construction and operation of the water control structures; and
 - d. Failure to obtain fair market value for IR 72A when it was sold.

VII. Relief Sought

49. In light of all of the foregoing, the First Nation seeks:
 - a. Compensation for losses and damages - past, present and future - for flooding and the consequent deleterious impacts to Kahkewistahaw reserve lands, including

current market value and loss of use of land, due to the unlawful construction and operation of the Round Lake and Crooked Lake control structures;

- b. Compensation for current market value, loss of use of land and trespass for the 0.17 acres of the 1960 addition to IR 72 upon which the Round Lake Dam is partially built;
- c. Compensation for fair market value foregone when IR 72A reserve lands were surrendered in 1944 and acreage was lost and therefore not available for sale, due to flooding caused by the Crooked Lake Dam;
- d. Equitable interest;
- e. an award of solicitor-client costs pursuant to the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, section 110(2) in relation to the specific claim and this proceeding; and
- f. Such other damages, compensation or interest as this Honourable Tribunal deems just.

Dated this 18th day of June, 2019 at the City of Calgary in the Province of Alberta.

MAURICE LAW



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Schedule A – Qu'Appelle Valley Reserves and PFRA Control Structures

4148-3575-1197, v. 1

