

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

KAHKEWISTAHAW BAND #72

SPECIFIC CLAIMS TRIBUNAL		
F I L E D	TRIBUNAL DES REVENdicATIONS PARTICULIÈRES	D É P O S É
	September 13, 2019	
	Isabelle Bourassa	
Ottawa, ON		6

Claimant

v.

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

Respondent

RESPONSE

Pursuant to Rule 42 of the
Specific Claims Tribunal Rules of Practice and Procedure

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

TO: Kahkewistahaw Band #72
As represented by Ron S. Maurice, Ryan M. Lake and Sheryl A. Manychief,
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Overview

1. Canada is committed to reconciliation and a renewed nation-to-nation relationship with Indigenous peoples based on recognition of rights, respect, cooperation and partnership. Canada endeavours to embody these principles as it assists the Tribunal in its task of adjudicating matters brought before it.
2. Canada favours resolving claims made by Indigenous peoples through negotiation and settlement. Canada will continue to pursue all appropriate forms of resolution as this Tribunal claim proceeds through the Tribunal process.
3. Canada acknowledges that Kahkewistahaw First Nation is an adherent to Treaty No. 4, is a band within the meaning of the *Indian Act*, and is a First Nation within the meaning of the *Specific Claims Tribunal Act* (SCTA). Canada has complied with the promises and terms of Treaty No. 4 and has conducted itself in accordance with the honour of the Crown and with a view to Kahkewistahaw First Nation's best interests.
4. Canada constructed dams on Crooked Lake and Round Lake on Saskatchewan provincial Crown land in 1941. The dams do not cause the level of the water in the lakes (and the Qu'Appelle River which connects them) to exceed the ordinary high water mark, and any flooding that occurred subsequent to the dams' construction is consistent with seasonal or wet cycle flooding patterns. As a consequence, Canada says the dams did not cause flooding, alienation, or loss of acreage to IR72 or IR72A.
5. Kahkewistahaw First Nation's claim respecting trespass does not constitute a compensable ground under the SCTA. To the extent the alleged trespass on IR72A relates to 27.5 acres patented to the Hudson's Bay Company in 1885, the claim has been resolved by way of a settlement. Kahkewistahaw First Nation's claim respecting the sale of IR72A land in 1955 is the subject of another claim before the Specific Claims Tribunal.

I. Status of Claim

6. The requirements in section 16 of the SCTA are satisfied in that:
 - The claim was originally received by the Minister of Indian Affairs and Northern Development on July 30, 2001 and filed with the Minister of Indigenous and Northern Affairs Canada (the Minister) on October 16, 2008.
 - On May 20, 2011, the Minister notified Kahkewistahaw First Nation in writing of the decision not to accept the claim for negotiation.

II. Canada's position with respect to Validity of the Claim

7. Canada is committed to a determination of whether it complied with its statutory and fiduciary obligations to Kahkewistahaw First Nation regarding the construction, maintenance and operations of the Crooked Lake and Round Lake dams. Currently, Canada cannot agree that the facts establish a valid claim under the SCTA. Canada will continue to evaluate the facts and law related to the matters at issue to determine whether it can agree with the validity of some or all of the claim.
8. To the extent the allegations in this claim relating to IR72A arise out of the same or substantially the same facts on which the Kahkewistahaw First Nation v. HMTQ SCT-5002-16 claim is based, Canada pleads and relies upon ss. 20(4)(a) and 35 of the SCTA and the doctrine of *res judicata*.
9. To the extent the claim arises out of allegations of trespass, specifically paragraphs 44, 46 and 47, these are not compensable grounds described in s. 14(1) of the SCTA.

10. In the absence of evidence, Canada is not able to admit that Kahkewistahaw First Nation has suffered damages to the extent claimed, regarding the alleged losses due to flooding of IR72 and IR72A. However, if damages are proven, any award of compensation could only be made pursuant to s. 20(1) (f) and subject to s.20(3) of the SCTA, as the other subparagraphs of s. 20 are inapplicable.

III. Canada's Position with respect to Allegations of Fact

11. Many material facts related to this claim are not in dispute. Allegations of fact from the Declaration of Claim are admitted, or qualified, in this Response as set out below. Canada is hopeful that the parties can reach an agreed statement of facts early in the process.

12. Canada admits that Kahkewistahaw First Nation is a "First Nation" within the meaning of the SCTA, and that Kahkewistahaw First Nation is located in the Qu'Appelle River Valley, as stated in paragraph 1.

13. In response to paragraphs 2, 9, and 10, Canada acknowledges that on September 15, 1874, at the Qu'Appelle Lakes, Chief Ka-ku-wis-ta-haw signed Treaty No. 4 on behalf of Kahkewistahaw First Nation. Canada admits that under Treaty No.4 Canada allotted one square mile of reserve land per family of five in present day Southern Saskatchewan.

14. In response to paragraphs 11, 12, and 13, Canada admits that in 1881, the Dominion Land Surveyor, Nelson, surveyed 73 square miles on the Qu'Appelle River between Crooked Lake and Round Lake for IR72. Canada says that in 1884, Nelson surveyed IR72A, described as fishing grounds, which included 96 acres near Crooked Lake's outlet. Order-in-Council P.C. 1151 dated May 17, 1889 confirmed IR72 and IR72A were set apart for Kahkewistahaw First Nation.

15. In response to paragraphs 11, 15 and 16, Canada currently has insufficient knowledge to admit or deny Kahkewistahaw First Nation's use of the land, or the quality of hay meadow and farming land, and other resources on IR72 and IR72A.
16. In response to paragraph 14, Canada acknowledges that on November 10, 1960, Order-in-Council P.C. 1528 approved the purchase and addition of 1,128.29 acres on the northeast shore of Round Lake to IR72.
17. In response to paragraph 17, Canada says that a severe drought during the 1930s stressed southern Saskatchewan's water supply. In response to petitions and provincial requests for assistance, Parliament passed the *Prairie Farm Rehabilitation Act* which established the Prairie Farm Rehabilitation Administration (PFRA) to advise the Minister of Agriculture on water management and soil conservation. The *Prairie Farm Rehabilitation Act* was given Royal Assent on April 17, 1935.
18. In response to paragraph 18, Canada says a report was prepared on July 25, 1941 in anticipation of the construction of a dam on Echo Lake (Report). The Report considered the potential effects the Echo Lake dam would have on the Muscowpetung and Pasqua reserves. The Report examined only the impact of the Echo Lake dam and did not examine the impact of the Crooked Lake and Round Lake dams. As IR72 and IR72A are not located near or around Echo Lake, the Report did not examine the impact of the Echo Lake dam on IR72 and IR72A. A first addendum to the Report was subsequently prepared to consider the potential impact to reserve lands surrounding Crooked Lake and Round Lake if dams on those lakes were constructed. The addendum to the Report was dated September 11, 1941 (First Addendum).
19. In further response to paragraphs 18 and 41, the First Addendum predicted flooding of various reserve lands surrounding Crooked Lake and Round Lake. However, the

First Addendum did not predict IR72 or IR72A would be adversely impacted by the construction of the dams.

20. In response to paragraph 19, Canada acknowledges that on September 17 and 18, 1941 the PRFA filed Memorials with the Province of Saskatchewan, pursuant to s. 18 of the *Water Rights Act*, requesting approval to construct dams on Crooked Lake and Round Lake.
21. In response to paragraph 20, Canada acknowledges that Order-in-Council P.C. 7764 dated October 8, 1941 approved a tender for construction of dams on Round Lake and Crooked Lake under *Prairie Farm Rehabilitation Act* authority.
22. In response to paragraph 21, Canada says that the Round Lake and Crooked lake dams were located on provincial land. Further, any flooding of IR72 and IR72A was not caused by the dams but by natural seasonal wet weather cycles.
23. In response to paragraphs 22, 26, and 48, the First Addendum identified reserves located along the Qu'Appelle river at risk of flooding if dams were constructed on Crooked Lake and Round Lake. The First Addendum did not identify IR72 and IR72A as being at risk for flooding. On February 3, 1942, a second addendum to the Report estimated losses that would be incurred by the affected First Nations. Order-in-Council P.C. 10476 dated 19 November 1942, authorized payment of the estimated losses to Indian Affairs Branch as compensation.
24. In response to paragraph 23, the operation of the dams do not cause the level of the water in the lakes and the river to exceed the ordinary high water mark. The dams do not present restrictions to water flow during seasonal flood periods.
25. In response to paragraphs 24 and 25, Canada says that water can spill over the banks of the Qu'Appelle river onto adjacent land during spring run-off and wet years. Such flooding is consistent with seasonal or wet cycle flooding patterns.

There is currently no evidence demonstrating that the flooding of IR72 and IR72A was not caused by natural seasonal or wet cycles.

26. In response to paragraphs 12 and 28, IR72A was surveyed as a fishing station in 1884 and confirmed as a reserve by Order-in-Council P.C. 1151 dated May 17, 1889, consisting of 96 acres on the northeast shore of Crooked Lake. In 1885, the Department of the Interior issued a patent to the Hudson's Bay Company (HBC) for 27.5 acres of the 96 acres surveyed as IR72A. In 1914 Canada concluded that the HBC held legal title to the 27.5 acres. By this time the HBC had already sold most of the land to private interests. Although the Crooked Lake dam is located on provincial lands, Canada accessed the dam for purposes of construction, maintenance and operation via the 27.5 acres patented to the HBC.
27. In further response to paragraphs 12 and 28, in February 1992 Canada and the Kahkewistahaw First Nation entered into the *Kahkewistahaw Band and Canada Settlement Agreement* resolving a claim presented by the Kahkewistahaw First Nation to the Government of Canada in 1984 that it never received 27.5 acres of land forming part of the 96 acres surveyed as IR72A, the same 27.5 acres patented to the HBC in 1885, and as confirmed by Order-in-Council P.C. 1151 dated May 17, 1889.
28. In response to paragraphs 29, 30, and 31, in 1943, the Rural Municipality of Grayson (Municipality) requested permission from Indian Affairs Branch to build a road through IR72A to access the Sunset Beach resort development (Sunset Beach) on Crooked Lake. The Indian Affairs Branch advised the request would be approved provided Kahkewistahaw First Nation was willing to surrender the land. On July 4, 1944, Kahkewistahaw First Nation surrendered all of IR72A comprising 68.16 acres, which was approved by an Order-in-Council dated August 7, 1944.
29. In response to paragraphs 32 and 34, after the surrender, the Indian Affairs Branch and the Municipality disagreed over the location of an access road requested by the

Municipality to Sunset Beach. The Municipality had built the access road through IR 72A along the shoreline of the lake. Indian Affairs Branch objected to this location and insisted the road be re-located away from the shoreline. The dispute was resolved in 1947, when the Municipality relocated the road to the existing road allowance which formed the southern boundary of IR72A.

30. In response to paragraphs 33 and 48, Canada acknowledges that the 1944 surrender of IR72A refers to 68.16 acres of land. However, due to construction of municipal roads and transfers of land to the Province of Saskatchewan, by the time the land was sold in 1955 approximately 65 acres of land were available for sale. In June 1955 the 65 acres of available IR72A land was valued at \$1920.00. In November of 1955 these lands were sold by public tender for \$2,500 with Letters Patent issuing in the name of the purchaser for 64.36 acres.
31. In response to paragraph 35, Canada acknowledges the Round Lake dam was constructed in 1941 on the northeast quarter, section 14, Township 18, Range 3 West of the 2nd Meridian.
32. In response to paragraphs 36, 37, and 38, Canada acknowledges that in 1960 Kahkewistahaw First Nation purchased land northeast of Round Lake and added it to IR72. Canada admits that from 1960 until 2002, it accessed the Round Lake dam via IR72 through inadvertence for the purpose of its operation and maintenance.
33. In response to paragraph 39, Canada says that certain cultivated hay and pasture lands located along the Qu'Appelle River between Round Lake and Crooked Lake, where IR 72 is located, have historically been and continue to be at risk of flooding. While there is some evidence of flooding on IR72 and IR72A land after the construction of the Round Lake and Crooked Lake dams, any flooding and consequential damage to the reserves was due to natural causes, such as periods of higher than normal rain fall. To the extent that the claim alleges flooding was not caused naturally by seasonal or wet cycles, there is currently no evidence in support

of that allegation. Canada is currently unaware of the extent or the impact of flooding on IR72 and IR72A.

34. In response to paragraph 40, Canada acknowledges that in 1907, the Kahkewistahaw First Nation surrendered 33,281 acres of IR 72 for sale. The next year it was reported that most Kahkewistahaw First Nation farmers had to establish new farms, as their holdings had been in the surrendered portion. While the land remaining in IR72 after the 1907 surrender contained some arable land, Canada acknowledges that the remaining lands were inferior to the surrendered lands in terms of both the percentage and quality of arable land.
35. In response to paragraphs 41 and 42, Canada acknowledges that because IR72 runs along the Qu'Appelle River, Kahkewistahaw First Nation land is affected by water flow and levels. Canada says that in making water management decisions and strategies, Canada has met all of its statutory, fiduciary and consultation obligations. Canada currently has no information regarding negative impacts of these decisions on Kahkewistahaw First Nation lands.
36. In response to paragraphs 43, 44, 46, 47 and 48, the Crooked Lake and Round Lake dams were not constructed on Kahkewistahaw First Nation land. Throughout the construction and operation of the dams, Canada met its statutory, Treaty, and fiduciary obligations and acted in compliance with the Kahkewistahaw First Nation's riparian rights.
37. In response to allegations of trespass in paragraphs 44, 46 and 47, Canada says it never trespassed on IR72A lands. Canada says that after the construction of the Round Lake dam it routinely crossed 0.17 acres of land between a road allowance and the Qu'Appelle River to operate and maintain the dam. Prior to 1960 the 0.17 acres were not part of IR72. After the 1960 addition to the reserve PFRA staff inadvertently continued to access the 0.17 acres of land, which now formed part of IR72. Since 2002, Canada has not accessed the Round Lake dam without permission from Kahkewistahaw First Nation.

38. In response to paragraphs 44, 45, and 47, Canada says that evidence regarding the cause of any flooding that may have occurred on IR72 and IR72A is consistent with natural causes, being seasonal or wet cycle flooding patterns. Canada does not agree the flooding was caused by the dams. To the extent the claim alleges flooding was not naturally caused by seasonal or wet weather cycles, there is currently no evidence in support of that allegation.

39. In response to paragraph 27, Canada takes no issue with the map attached to the Declaration of Claim as Schedule A for the purpose of showing the general location of the Crooked Lake and Round Lake dams and IR72 and IR72A.

IV. Canada's Statement of Facts

40. The Qu'Appelle Valley's climate has alternated between cycles of flooding and drought since at least the 1850s. As a result of prolonged years of severe drought, Canada enacted the *Prairie Farm Rehabilitation Act* in 1935, creating the PFRA to advise the Minister of Agriculture on water management and soil conservation.

41. In 1940 the PFRA proposed building dams on Crooked Lake and Round Lake, but was concerned that construction of the dams would result in flooding of Qu'Appelle Valley Indian reserve lands. The First Addendum, referred to above, was prepared to determine the flooding risk posed to reserve lands around Crooked Lake and Round Lake. The First Addendum did not identify IR72 or IR72A as likely to suffer flooding damage.

42. In 1941, the Round Lake dam was constructed on provincial land. The lands acquired by Kahkewistahaw First Nation and added to IR72 in 1960 did not include the land on which the Round Lake dam was located.

43. The PFRA staff inadvertently accessed a 0.17 acre parcel of IR72 from 1960 to 2002 to operate and maintain the Round Lake dam. Since 2002 Canada has not

accessed the Round Lake dam for any reason without Kahkewistahaw First Nation's consent.

44. The Crooked Lake dam was constructed on provincial land. As access to the dam for purposes of construction, operation and maintenance was on the 27.5 acres patented to HBC in 1885, Canada did not trespass on IR72A lands.

45. Canada entered into a settlement agreement with Kahkewistahaw First Nation in February 1992 resolving a claim that the First Nation never received 27.5 acres of land forming part of the 96 acres confirmed for IR72A by an 1889 Order-in-council.

46. Certain allegations in this claim relating to IR72A arise out of the same or substantially the same facts on which the earlier claim, *Kahkewistahaw First Nation v. HMTQ SCT-5002-16*, is based, including allegations in paragraphs 33, 34, 48(d) and 49(c) that:

- land available for sale due to flooding was reduced;
- land granted to the municipality to build a 1.5 acre road damaged valuable lands;
- Canada breached fiduciary obligations owed for failure to obtain fair market value for IR 72A when sold; and
- compensation for fair market value was foregone when reserve lands were surrendered in 1944 and acreage was lost due to flooding caused by the Crooked Lake dam.

47. The dams do not present restrictions to water flow during flood periods. The dams are generally left open in the spring to allow free flow of spring run-off. After the peak run-off, the Qu'Appelle River system is regulated to maintain desirable lake and river levels and adequate water supplies for the summer season. The operation of the dams never cause the level of the water in the lakes or the river to exceed the ordinary high-water mark.

48. Along the Qu'Appelle River, IR72 has experienced seasonal or wet year flooding. None of the land is permanently or semi-permanently flooded. Any flooding damage can be attributed to natural environmental causes.
49. In 1943, Indian Affairs Branch advised the Municipality it would approve the request for permission to build a road through IR72A to Sunset Beach on Crooked Lake provided Kahkewistahaw First Nation was willing to surrender the required 1.5 acres of land. In 1944, Kahkewistahaw First Nation surrendered all 68.16 acres of IR72A.
50. A dispute between the Indian Affairs Branch and the Municipality over the location of an access road to Sunset Beach delayed the sale of IR72A surrendered lands. The matter was resolved in 1947, when the Municipality agreed to locate the road on the existing road allowance along the southern boundary of IR72A.
51. In February 1955, IR 72A, comprising 65 acres of land, was valued at \$1920.00. In November 1955, the surrendered lands were sold for \$2,500. Letters Patent issued to the purchaser for 64.36 acres.

V. Relief

52. Canada seeks the following relief:
 - a. Dismissal of the claim;
 - b. Costs; and
 - c. Such further relief as this Honourable Tribunal deems just.

VI. Communication

53. The Respondent's address for the service of documents is:

Department of Justice (Canada)
Prairie Regional Office (Saskatoon)
Saskatoon Square
410 – 22nd Street East, 4th floor, Suite 410
Saskatoon, SK S7K 5T6

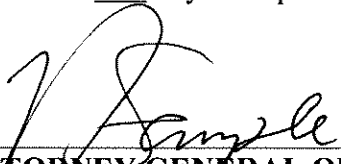
Attention: Scott Bell

54. Facsimile number for service is **(306) 975-4030**.

55. Email address for service is:

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Dated this 13 day of September, 2019.



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