

SPECIFIC CLAIMS TRIBUNAL

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	July 29, 2011	
	Guillaume Phaneuf	
Ottawa, ON		1

BETWEEN:

OSOYOOS INDIAN BAND

Claimant

v.

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

As represented by the Minister of Aboriginal Affairs and Northern Development Canada

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*.

July 29, 2011

Guillaume Phaneuf
(Registry Officer)

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

1. The Claimant, OSOYOOS INDIAN BAND (the “Band”), confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, by virtue of being a “band” within the meaning of the *Indian Act*, R.S.C. 1985, c. 1-5, as amended, in the Province of British Columbia.

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

(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; ...

3. After almost two decades of negotiating for the return of the Kettle Valley Railway Right of the Way to the Band, the Band’s solicitor submitted a specific claim with Specific Claims West, Indian and Northern Affairs Canada on August 17, 2005 (the “Claim”), which was acknowledged by Jacques Siegrist, Senior Claims Analyst (“Siegrist”) on September 1, 2005.
4. By February 14, 2006, the Band had reviewed the Specific Claims Branch’s analysis of the Claim and had informed Siegrist that the Claim was ready to be referred to the Department of Justice.
5. Siegrist wrote to the Band on February 16, 2006, advising that the Claim was being referred to the Department of Justice for review.
6. On December 8, 2006, Siegrist informed the Band that the Claim was conveyed to the Department of Justice for legal review on February 27, 2006, and that the processing of the Claim would likely take several years.

7. The Director General for Canada's Specific Claims Branch advised the Band on November 24, 2008, that the Claim met the minimum standards established by the Minister pursuant to the *Specific Claims Tribunal Act* and was filed with the Minister on October 16, 2008.
8. Siegrist wrote to the Band on February 10, 2009, advising that the Band would receive a response as to whether the Claim would be accepted for negotiation on or before October 16, 2011.
9. On February 16, 2011, Patrick Borbey, Senior Assistant Deputy Minister, Treaties and Aboriginal Government, ("Borbey") wrote to the Band declaring that the Claim had not been accepted for negotiation by the Minister of Indian Affairs and Northern Development on the basis that "there was no outstanding lawful obligation on the part of the Government of Canada" since at the time the right of way in question was taken, Osoyoos Indian Reserve Number One (the "Reserve") was only a "provisional reserve" and was not an "Indian Reserve" to which the *Indian Act* applied until Order in Council 1036 was passed in 1938.

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

10. The Band does not seek compensation in excess of \$150 million for the purposes of the Kettle Valley Railway Specific Claim.

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

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

...

- (a) a failure to fulfill a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;

(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) 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))

12. **May 23, 1901:** The Kettle River Valley Railway Company (changed to Kettle Valley Railway Company in 1911) was federally incorporated by S.C. 1901, c.68. In section 2 of that statute, the "undertaking of the Company" is declared to be a work for the general advantage of Canada.

13. **November 21, 1913:** By Minute of Decision, the Royal Commission Report on Indian Affairs for the Province of British Columbia confirmed that 32,097 acres of land were to be set aside for the Osoyoos Indian Band.

14. **November 7, 1922:** The Federal Crown, by Privy Council Order in Council No. P.C. 2317, granted the subject land, comprised of 3.97 acres of the Reserve, to the Kettle Valley Railway Company for a right of way (the "Land"). Order in Council 2317 states:

The Kettle Valley Railway Company has applied to the Department of Indian Affairs for right of way, to comprise all that parcel of land situated in the Osoyoos Indian Reserve No. 1 in the Smilkaneen Division of Yale District, in the Province of British Columbia and Dominion of Canada, containing by admeasurement 3.97 acres more or less...

The Railway Company has paid in full for the right of way above described at the valuation of the Department of Indian Affairs of \$200 per acre for the 3.07 acres in Reserve No. 1 plus \$100 for severance...

The Minister therefore recommends that under the provisions of Section 46 of the *Indian Act* as amended by section I of Chapter 14, 1-2 George V, authority be given for the sale to the Kettle Valley Railway Company of the Indians' interest in the above described 12.968 acres of the Osoyoos Indian Reserves Nos. 1 and 2, for right of way purposes.

15. **November 30, 1922:** Letters patent were issued to the Company for the Land weeks later which referred to the "Osoyoos Indian Reserve Number One" and described the Land as "part and parcel of those set apart for the use of the Osoyoos Band of Indians".
16. **July 29, 1938:** the Crown in Right of British Columbia formally conveyed to the Crown in Right of Canada the Reserve in trust for the use and benefit of the Band.
17. **March 2, 1956:** Pursuant to the *Canadian Pacific Subsidiaries Act*, S.B.C. 1956 c.54, the assets of the Kettle Valley Railway Company were vested in the Canadian Pacific Railway Company ("CPR").
18. **June 7, 1956:** Pursuant to the *Canadian Pacific Railway Company (Subsidiaries) Act*, 1956, S.C. 1956, c. 55 the railway and undertaking of the Kettle Valley Railway Company were vested absolutely in CPR.
19. **June 21, 1978:** CPR abandoned the Kettle Valley Railway line pursuant to Order No. R-27066 of the Railway Transport Committee.
20. **June 26, 1981:** In a letter from the Chief of the Band to the Department of Indian Affairs it was stated:

We requested the Dept. of Indian Affairs to check recovery of Right of Way of Kettle Valley Railway as per sketch attached.

Your help and cooperation concerning the above is greatly appreciated.

21. **May 28, 1987:** In a letter from Angela Cantryn, Head, Land Management and Leasing, Department of Indian Affairs to the Chief of the Band, the Department stated:

Re: Railway Right of Way

Osoyoos Indian Reserve No. 1

Your request that the Department proceed with the steps to have the above-noted lands returned to reserve status has been reviewed by the Department of Justice (Legal Service) and the file has been transferred to our regional office.

I understand that instructions are presently being issued to the Department of Justice (Civil Litigation) to commence an action to have these lands returned to the reserve.

22. **September 30, 1987:** In a letter from A.J. Broughton of the Department of Indian Affairs to the Chief and Council of the Band it was stated:

I have recently been advised that the Department of Justice, after a thorough review by senior counsel, is now of the view that the Federal Government does not have a basis on which to commence a court action for recovery of the railway right of way lands running through your Reserve. This opinion is based on the fact that, at the time of the Order in Council in 1929 by which the land was taken for railway purposes, it was Provincial Crown land.

23. **January 27, 1988:** The Band's solicitor was informed by CPR that the Land was made the subject of an agreement in 1987 in which CPR was to convey the Land back to the Province of British Columbia.

24. **February 1, 1990:** The Land was transferred from CPR to the Province of British Columbia.

25. **February 9, 2005:** In a letter from Land and Water British Columbia Inc. to the Band it was stated:

In your letter you request the Right of Way be returned to Osoyoos Indian Band. LWBC may be prepared to consider an application for the sale of this land to the Osoyoos Indian Band at fair market value once we have reviewed the status of the property.

26. **August 17, 2005:** The Band's solicitor submitted a specific claim with Specific Claims West, Indian and Northern Affairs Canada claiming:

1. The Federal Crown (as represented by the Department of Indian Affairs) was in breach of its fiduciary obligation by failing to ensure that the Land, transferred to the Kettle Valley Railway Company and later to CPR, reverted to the Federal Crown for the benefit of the Band upon the railway's abandoning the line.
2. The Federal Crown was in breach of its fiduciary obligation by failing to pursue legal action on behalf of the Osoyoos Indian Band to have the Land returned.

IV. COMPENSATION SOUGHT

The location of the Land makes it integral to Reserve development, and we accordingly are of the view that the Department should seek to purchase the Land from the Province (Land and Water British Columbia Inc.).

In the alternative, the Band seeks monetary compensation for the loss of the Land;

27. **February 16, 2011:** In a letter from Borbey to the Band it was stated:

It is the Government of Canada's position that there is no outstanding lawful obligation on the part of the Government of Canada for the reasons stated below.

In response to allegations 1 and 2, Osoyoos IR 1 became an Indian Reserve within the meaning of the *Indian Act* on July 29, 1938, under the British Columbia Order in Council 1036. At the time of the Kettle Valley Railway Company right of way taking, Osoyoos IR 1 was a provisional reserve and the provisions of the *Indian Act* did not apply. Therefore, Canada owed no lawful obligation to minimally impair or ensure a reversionary interest concerning the right of way taking from IR 1.

Further, the taking from IR 1 was pursuant to the 1919 federal *Railway Act*, and, as a result of the taking, the Kettle Valley Railway Company acquired a limited interest in the right of way by way of an easement, with such land reverting to Canada. Because the right of way lands never had reserve status, there was no fiduciary obligation on the federal Crown to grant them reserve status or to initiate litigation to return the right of way to IR 1.

28. It is the Band's submission that, when the Land was no longer required for railway purposes in 1981, it should have reverted back to the Band.

29. The Band further submits that the Province of British Columbia transferred any interest it had in the Land, including a possible reversionary interest, to the Federal Crown on behalf of the Band in 1938. Therefore, the fact that it was Provincial Crown land in 1922 does not affect the Band's entitlement to the Land. As a result, the Band has been denied its rightful opportunity to recover the Land.


VI. The basis in law on which the Crown is said to have failed to meet or otherwise breached a lawful obligation:

30. This claim is based in the Crown's breach of its common law fiduciary duty when it failed to ensure that the Land reverted back to the Federal Crown for the benefit of the Band when CPR abandoned its railway line and failed to pursue legal action on behalf of the Band to have the Land returned to the Reserve.

31. In light of the foregoing, the Band seeks compensation from Canada for:

- (a) Damages for the value of the Land and such other damage or compensation as this Honourable Tribunal thinks just.

Dated this 28th day of July, 2011


Counsel for the Claimant

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