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	February 13, 2014	
	Amy Clark	
Ottawa, ON	1	

SCT-6004-13

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

KEHEWIN CREE NATION

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*.

February 13, 2014

Amy Clark

Registry Officer

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

1. The Claimant, the Kehewin Cree Nation (hereinafter referred to as the “First Nation” or “Kehewin”) 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 *Treaty No. 6* (hereafter “Treaty 6”) and the *Indian Act*, R.S.C. 1985, c. 1-5, as amended. The Kehewin Cree Nation is located in the Province of Alberta.

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. Kehewin originally filed a Treaty Land Entitlement claim entitled *Kehewin I.R. No. 123 Statement of Claim for Unfulfilled Treaty Land Entitlement Under Treaty Six* with the Specific Claims Branch in 1992 alleging that Canada owed an outstanding shortfall of land to Kehewin according to the terms of Treaty 6 (the “TLE Claim”). On April 16, 2009, Kehewin Cree Nation filed a supplemental submission with the Specific Claims Branch.
4. In a letter dated June 26, 2012, the Senior Assistant Deputy Minister of Aboriginal Affairs and Northern Development Canada informed Chief Eric Gadwa of the Minister’s decision not to accept the TLE Claim for negotiation under Canada’s Specific Claims Policy on the basis that there is no outstanding lawful obligation on the part of the Government of Canada.

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

5. The First Nation does not seek compensation in excess of \$150 million.

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

6. The First Nation submits that the specific claim falls within s. 14(1)(a) of the *Specific Claims Tribunal Act* which states that:

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

(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;...

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

(a) Treaty 6 and the Crown’s Promise to Provide Reserve Land

7. On September 9, 1876, Chief Kee-Ye-Win (also known as Kehewin or “The Eagle”) and Headmen Charles Cardinal and Pierre Wahbiskaw signed Treaty 6 at Fort Pitt on behalf

of the Kehewin Band. The First Nation is the successor in interest to the Kehewin Band who became a party to, and is therefore entitled to, the benefits of Treaty 6.

8. Treaty 6 provided for the surrender of aboriginal title to 121,000 square miles of land in exchange for various promises and benefits to be provided by the Crown, including reserve lands to be set aside for each band in the amount of one square mile for each family of five (or 128 acres per person).
9. The reserve land provision in Treaty 6 mandated that government officials send a suitable person to determine and set apart reserves for each band after consulting with each band as to where they preferred to have their reserves. In October 1876, Indian Commissioner W.J. Christie reported that Chiefs Sweetgrass and Kehewin wished to have their reserves “together between the Goose Lake and Moose Lake, north of the North Branch of the Saskatchewan.”
10. Canada did not survey a reserve for Kehewin until eight years later in 1884. Dominion Lands Surveyor A.W. Ponton commenced the first survey of reserve land for the Kehewin Band on October 8, 1884 at the general location selected by Chief Kehewin in 1876. Ponton had been present two days earlier when treaty annuities were distributed to 145 members of the Kehewin Band.
11. According to the survey plan prepared by Ponton (attached as Schedule A), Kehewin Indian Reserve (“IR”) 123 consisted of 28 square miles or 17,920 acres which was sufficient for 140 people based on the formula of 128 acres per person. Ponton knew or ought to have known that 17,920 acres of land was not sufficient to satisfy the Band’s treaty land entitlement based on the payment of annuities to 145 members of Kehewin just two days before Ponton commenced the survey of Kehewin IR 123.

(b) *Surrender and Exchange of Haylands (1903-1915)*

12. In 1904, the Band requested a change in the survey of their Reserve to add hay lands at the east end of the Reserve in exchange for an equal area cut off from the northern part of the Reserve.
13. Assistant Indian Commissioner J.A. McKenna supported the Band’s request for hay lands and on March 23, 1904, he recommended to the Department of the Interior that “an exchange of land” be undertaken in order for the Band “to gain better hay and farming lands” since the Band would have to depend mainly upon cattle raising for a living.
14. On July 31, 1904, Dominion Land Surveyor J.L. Reid reported that he “cutoff a portion of old reserve to the north and added an equivalent amount to the east side as desired by the Indians of that band.” The survey of the modified boundaries of IR 123 could not be completed until the township survey had been completed so Reid prepared a sketch. The Department did not consider the information to be detailed enough for the proposed land exchange and modified boundaries of IR 123 to be confirmed by Order in Council.
15. On November 8, 1906, Indian Agent William Sibbald reported that the Band requested the Department of Indian Affairs readjust the boundaries of Kehewin IR 123 to include a

strip of land about half a mile wide on the northern boundary. Sibbald noted that the strip of land was a particularly good piece of hay land and that it was not intended to be removed from the Reserve when the 1904 sketch of the proposed re-survey was prepared by Reid.

16. Following a three year delay, Indian Agent Sibbald reported to the Secretary of Indian Affairs, J.D. McLean, on December 22, 1909 of the need to resolve the request by the Kehewin Band regarding the haylands cut off in the 1904 re-survey. Sibbald supported correction of the boundaries because the reserve was only 28.15 square miles but the population was 177 leaving a shortfall of reserve land under Treaty 6.
17. On December 22, 1909, Sibbald reported that the population of the Band was 188 members and the area of the reserve was 18,016 acres. On August 22, 1910, Secretary McLean reported that the population of the Kehewin Band entitled it to 37.6 square miles, a shortfall of almost 10 square miles. Notwithstanding Sibbald's and McLean's reports that the Band had a shortfall of land, this was offered as a justification for obtaining the haylands and subsequent correspondence confirms that the alteration of the reserve boundaries was done by a "surrender for exchange" rather than with the intention of providing additional reserve lands to fulfill any outstanding land entitlement under Treaty 6.
18. In or around 1912, the Deputy Superintendent General of Indian Affairs instructed Agent Sibbald that a surrender was required under section 49 of the *Indian Act* "of the two portions given up in exchange for the reserve as now constituted."
19. On February 16, 1912, Canada obtained a surrender from the Kehewin Band of a portion of the Reserve north of the south shore of the Alkaline Lake, a narrow strip of land on the western limits of the Reserve, and a portion "lying south of a line drawn through the northern halves of sections 31, 32, 33 and 34". The surrender document described the transaction as a surrender and exchange. The surrender and exchange was consented to by 13 out of the 17 eligible voting members of the Band. Order in Council P.C. 1359, dated June 5, 1913, approved the surrender and exchange signed by the Band.
20. On February 26, 1915, Order in Council #413 was passed confirming the surrender for exchange and revised boundaries of Kehewin IR 123 as set out in the revised survey plan (attached as Schedule B). The Order in Council states that the size of the adjusted Reserve following the surrender for exchange was 20,531 acres, although the lands described in the Order in Council account for about 32 square miles or 20,480 acres. The reason for the discrepancy is unknown, but the Kehewin Cree Nation submits that the revised area is irrelevant in determining the Reserve's acreage for treaty land entitlement purposes because any additional land obtained by the Kehewin Band was set apart pursuant to a surrender for exchange rather than in fulfillment of an outstanding entitlement to land under Treaty 6.

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

21. The TLE Claim is brought on the grounds that the Crown breached its treaty and fiduciary obligations to the First Nation by failing to satisfy the Band's full entitlement to reserve land under the terms of Treaty 6 since 1884. Canada's lawful obligation remains outstanding to the present.

(a) *The 1998 Historic Treaty Land Entitlement Shortfall Policy*

22. In October 1998, Canada adopted the Adjusted Date of First Survey approach as outlined in the *Historic Treaty Land Entitlement Shortfall Policy* (the "1998 Historic TLE Shortfall Policy"). The 1998 Historic TLE Shortfall Policy sets out the criteria used to determine a First Nation's treaty land entitlement. The Kehewin Cree Nation has an outstanding shortfall of reserve land provided under Treaty 6 based on an application of legal principles and the criteria set out in the 1998 Historic TLE Shortfall Policy.

(b) *Date of First Survey for the Kehewin Band*

23. The first survey of reserve land for the Kehewin Band was commenced on October 8, 1884 by Surveyor Ponton, thus making 1884 the Date of First Survey ("DOFS") for the Kehewin Band.

(c) *Quantum of Reserve Land Set Aside for the Kehewin Band under Treaty 6*

24. The "reserve clause" in Treaty 6 provides that one square mile for every family of five should be set aside for bands under Treaty 6 which amounts to 128 acres per person. When Ponton surveyed the Reserve in 1884, he set aside 28 square miles (17,920 acres) "more or less" as a reserve for the Kehewin Band under Treaty 6. Although Ponton was present when treaty annuities were distributed to 145 members of the Kehewin Band just two days before he started the survey, the survey provided land for only 140 people.

25. It is submitted that Canada must use the size of the Reserve as surveyed prior to the surrender and exchange and subsequent changes in the boundaries of the Reserve in 1904 and 1915. In determining the amount of land set aside for a band in satisfaction of its treaty land entitlement, Clause 3 of the 1998 Historic TLE Shortfall Policy expressly excludes from the calculation "Lands set aside for other purposes generally" and "Lands received in exchange for lands surrendered for sale."

26. In order for Canada to fulfill its treaty land entitlement obligations, it must provide the lands expressly for the purpose of satisfying a band's land entitlement under the terms of Treaty 6. It is submitted that the surrender for exchange and readjustments to the Kehewin Reserve's boundaries in the 1904 survey and the final 1915 Order in Council were undertaken for the primary purpose of providing hay lands to meet the pressing needs of the Band and were not intended to provide additional lands to satisfy any actual or presumed shortfall of land at that time.

27. Furthermore, at all material times, Crown representatives were aware that the Kehewin Band was primarily dependent on raising cattle for its livelihood and that there was a

serious shortage of hay lands on I.R. 123 for the Kehewin Band to engage in this pursuit. By 1906, the Crown was aware that the movement of Onion Lake Band members to the Kehewin Band was placing an additional strain on scarce resources and added to the burden on the land. The Crown was also aware that land outside the Reserve, where the Indians had been cutting hay, would soon be taken up by settlers and the Indians would be confined to the Reserve for hay.

(d) *The Band's Population at DOFS for Treaty Land Entitlement Purposes*

28. The 1998 Historic TLE Shortfall Policy provides that it is necessary to “Determine the population used to assess a band’s TLE, including the DOFS population and “late additions” as defined under the policy.” The 1998 Historic TLE Shortfall Policy sets out the following categories of individuals which may be counted in determining the population of a band for treaty land entitlement purposes:

- the number of Indians appearing on DOFS payroll;
- those individuals who remained with the band for a short time at DOFS (unless there is stronger evidence that they were members of another band);
- arrears: those absent at DOFS but who appear on subsequent paylists and are paid arrears for the DOFS payroll;
- absentees: those individuals absent at DOFS payroll but present in paylists before and after demonstrating that they were band members at DOFS;
- late additions: Indians bound by and eligible to receive the benefits of treaty but who had not yet appeared on any band’s payroll or been included in any TLE and treaty Indians who were originally members of a landless band.

29. The above criteria are substantially in accord with *Lac La Ronge Indian Band v. Canada* [2001] SKCA 109 where the Saskatchewan Court of Appeal identified the “overriding principle” inherent in a treaty that “each living Indian will be counted once for the purpose of the land entitlement.”

30. According to treaty annuity paylists and other documentary sources, the Kehewin Band had an entitlement population of 174 band members at DOFS comprised of 145 members on the DOFS base payroll in 1884, 23 absentees, and 6 new adherents to treaty. As such, the Kehewin Band was entitled to 22,272 acres under the terms of Treaty 6. Since only 17,920 acres were set aside for the Kehewin Band at the Date of First Survey in 1884, this leaves an outstanding treaty land entitlement shortfall of 4,352 acres.

VII. Relief Sought

31. In light of the foregoing, the Claimant seeks the following relief:

- (a) A determination that the Claimant has established a shortfall of 4,352 acres of reserve land owing under Treaty 6 or such other amount as may be proven at a hearing before this Honourable Tribunal;

- (b) Compensation for Canada's breach of its treaty, trust, fiduciary and equitable duties and failure to satisfy the Claimant's full treaty land entitlement in a fair and timely manner;
- (c) Damages for loss of use of lands that should have been set apart for the use and benefit of the Kehewin Cree Nation by Canada from 1884 to the present;
- (d) Equitable interest or restitution on historical losses suffered by the Claimant;
- (e) Such other damages or compensation as this Honourable Tribunal deems just; and
- (f) Costs in relation to the specific claim and this proceeding.

Dated this 13th day of February, 2014 at the City of Calgary in the Province of Alberta.

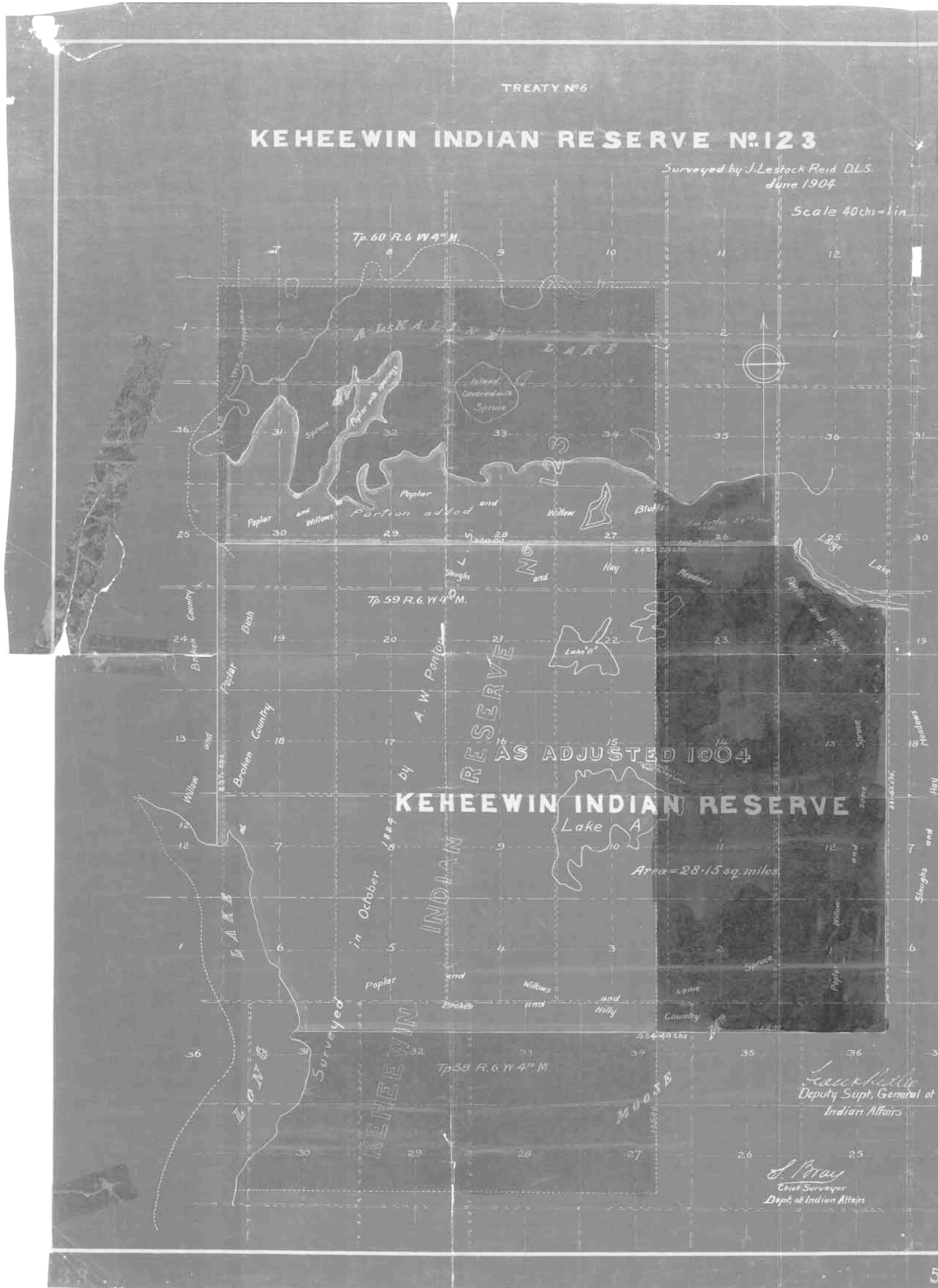
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Schedule B – Survey Plan of Adjusted Kehewin Indian Reserve 123 (1904)



INAC, Indian Land Registry, Instrument #17454