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SPECIFIC CLAIMS TRIBUNAL		
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SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

AKISQ'NUK FIRST NATION

CLAIMANT

v.

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

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: AKISQ'NUK FIRST NATION
As represented by Darwin Hanna, of
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I. Status of Claim (R. 42(a))

1. The Akisq'nuk First Nation (the "First Nation") submitted a claim to the Minister in February 1994 alleging, among other things, that the federal Crown breached fiduciary obligations owed to the First Nation in connection with an area of land known as District Lot 108 ("Lot 108") which lies adjacent to the First Nation's Indian Reserve No. 3 ("I.R. 3").

2. The Minister notified the First Nation in writing on March 15, 2011 of his decision not to accept the claim for negotiation.

II. (a) Validity (R. 42(b) and (c))

3. The Crown does not accept the validity of any of the claims set out in the Declaration of Claim, and in particular denies:

(a) the alleged 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;

(b) the alleged 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.

III. Allegations of Fact – Declaration of Claim (R. 41 (e)): Acceptance, denial or no knowledge (R. 42(d))

4. In reply to paragraph 7 of the Declaration of Claim, the Crown admits that Lot 108 is comprised of 320 acres located north of I.R. 3 and east of Windermere, and that it has a legal description of District Lot 108. The Crown does not know to what extent, if any, the lands which comprise Lot 108 are also known as the "Elkhorn Ranch". The Crown does not know to what extent, if any, the lands which comprise Lot 108 are included within the traditional territory of any First Nation.

5. In reply to paragraph 8 of the Declaration of Claim, the Crown admits that by January 1876 the Governor General of Canada and the Lieutenant Governor of British Columbia had agreed to establish a Joint Indian Reserve Commission to allot Indian reserves in British Columbia.

6. In reply to paragraph 9 of the Declaration of Claim, the Crown admits that Peter O'Reilly was appointed Reserve Commissioner on August 9, 1880 and that Commissioner O'Reilly took a leave of absence during 1883.

7. In reply to paragraph 10 of the Declaration of Claim, the Crown admits that I.W. Powell wrote the Superintendent General of Indian Affairs on April 17, 1883 with respect to the establishment of reserves in the Kootenay district, and other regions of British Columbia, during Commissioner O'Reilly's leave of absence. In reply to paragraph 10, the Crown further says that at the time of this letter I.W. Powell was Indian Superintendent, not Dominion Inspector of Indian Agents. In response to the final statement in paragraph 10, the Crown has no knowledge of the relationship, if any, between the First Nation and the Ktunaxa people, and says that this final statement reflects an opinion, not a fact, and should not be included in the Declaration of Claim.

8. In reply to paragraph 11 of the Declaration of Claim, the Crown admits that on October 27, 1883, G.H. Johnston registered a pre-emption of 320 acres in the Kootenay district.

9. In reply to paragraph 12 of the Declaration of Claim, the Crown says that Commissioner O'Reilly, not I.W. Powell, wrote to William Smithe, the Chief Commissioner of Lands and Works, on April 10 or 11, 1884 to suggest that no applications for pre-emptions or purchases in the area be granted in light of Commissioner O'Reilly's upcoming visit to the Kootenay district.

10. In reply to paragraph 13 of the Declaration of Claim, the Crown admits that, on or about August 5 and 6, 1884, Commissioner O'Reilly noted the circumstances of the First Nation, as well as their preferences regarding land allotment.

11. In reply to paragraph 14 of the Declaration of Claim, the Crown admits that F.W. Aylmer surveyed Lot 108 and that the survey field notes indicate the presence of an "Indian cabin" on Lot 108 at the time of the survey, but the Crown does not know the exact date of Alymer's survey. In reply to the remaining statements in paragraph 14, the Crown says that the existence of an "Indian cabin" on land not included within Lot 108 is irrelevant, and has no knowledge of the relationship, if any, between the First Nation and the occupant of the "Indian cabin". Finally, the Crown says that the final statement in paragraph 14 is an opinion, not a fact, and should not be included in the Declaration of Claim.

12. In reply to paragraph 15 of the Declaration of Claim, the Crown admits that on August 9, 1884, Commissioner O'Reilly completed a Minute of Decision for the allotment of the lands which subsequently became I.R. 3.

13. In reply to paragraph 16 of the Declaration of Claim, the Crown admits that lands which subsequently became I.R. 3 were surveyed by E.M. Skinner in September 1886. The Crown further says that the concluding statement in this paragraph is an opinion, not a fact, and should not be included in the Declaration of Claim.

14. In reply to paragraph 17 of the Declaration of Claim, the Crown does not know the history of the water licences issued for Windermere Creek, including the licence holders or purposes of the licences. The Crown further says that the issuance of water licences is irrelevant and falls within provincial jurisdiction.

15. In reply to paragraph 18 of the Declaration of Claim, the Crown says that the Crown grant for Lot 108 was issued to G.H. Johnston on December 18, 1889, not October 19, 1889.

16. In reply to paragraph 19 of the Declaration of Claim, the Crown admits that Canada held legal title to Lot 108 from 1924 – 1936 and that Lot 108 was used for agricultural purposes during this time.

17. In reply to paragraphs 20 and 21 of the Declaration of Claim, the Crown admits that Chiefs Abell and Michell of the First Nation wrote to federal Crown officials in 1939 and 1942, respectively, concerning the extent of the First Nation's reserve interests.

18. In reply to paragraph 22 of the Declaration of Claim, the Crown admits that a September 24, 1991 plan signed by D.B. Taylor plots Aylmer's field notes, Skinner's field notes, and O'Reilly's Minute of Decision on a sketch of the northern portion of I.R. 3 and Lot 108. The Crown further says that the concluding statement in this paragraph is an opinion, not a fact, and therefore should not be included in the Declaration of Claim.

IV. Statements of Fact (R. 42 (a))

19. In addition to the foregoing, the Crown pleads the following facts.

The allotment of reserves generally in British Columbia

20. Following British Columbia's entry into Canada in 1871, and pursuant to Article 13 of the *Terms of Union*, Indian reserve commissions were established to allot Indian reserves in British Columbia. By 1876 the Governor General of Canada and the Lieutenant Governor of British Columbia had reached an agreement that settlement of the Indian Land question in British Columbia was to be referred to a Joint Indian Reserve Commission comprised of three Commissioners; one appointed by Canada, one by British Columbia, and the third jointly named by both governments. This agreement is documented in a report entitled "Report of a Committee of the Honourable the Executive Council, approved by His Excellency the Lieutenant-Governor", dated January 6, 1876. The Joint Indian Reserve Commission was followed in 1878 by Commissioner Sproat, acting as sole commissioner, until his resignation in 1880.

21. Following Commissioner Sproat's resignation, in 1880 the Governor in Council approved the appointment of Peter O'Reilly, a County Court Judge and Stipendiary Magistrate, as Indian Reserve Commissioner, having been recommended by senior federal and provincial Crown officials.

22. The order in council appointing Commissioner O'Reilly, P.C. 1334, stated that the duties of the commissioner "consist mainly in ascertaining accurately the requirements of the Indian Bands in that Province, to whom lands have not been assigned by the late Commission, and allotting suitable lands to them for tillage and grazing purposes". Commissioner O'Reilly's terms of appointment included that he was to act in his own discretion "in furtherance of the joint suggestions" of the provincial Chief Commissioner of Lands and Works and the federal Indian Superintendent for British Columbia "as to the particular places to be visited and the reserves to be established". Commissioner O'Reilly's reserve allotments would be subject to confirmation by these same officials on behalf of their respective governments and, failing agreement, should be referred to the Lieutenant Governor.

23. In August 1880, the Deputy Superintendent General of Indian Affairs provided instructions to Commissioner O'Reilly with respect to the discharge of his mandate. Those instructions provided that, in allotting reserve lands, he should have "special regard" not just to the interests of the bands, but to the claims of "white settlers" as well. The instructions further provided, among other things, that Commissioner O'Reilly was to be careful not to disturb the Indians in the possession of any "villages, fur trading posts, settlements, clearings, burial places and fishing stations occupied by them and to which they may be specially attached".

24. In 1881, the Governor in Council extended Commissioner O'Reilly's position indefinitely (he was originally appointed for only twelve months). Commissioner O'Reilly was away on medical leave for at least six months between May 1 and October 31, 1883. Following his return from medical leave, Commissioner O'Reilly remained reserve commissioner until his retirement in 1898.

25. The federal Crown lacked the sole authority to allot, set aside, or create reserves for the First Nation. The allotment and creation of reserves required the cooperation of the provincial Crown because the lands upon which reserves for the First Nation were to be established were provincial Crown lands.

The allotment of I.R. 3

26. Commissioner O'Reilly visited the Kootenay district for the purpose of allotting lands for Indian reserves there during the summer of 1884.

27. On or about August 5, 1884 Commissioner O'Reilly met with settlers in the Kootenay district and notes were recorded of their discussions concerning the Kootenay and Shuswap peoples living in the Kootenay district. The notes document information Commissioner O'Reilly learned about the First Nation's population, livestock and land expectations.

28. On or about August 6, 1884, Commissioner O'Reilly met with Chief Moyes of the Columbia Lakes area and others for the purpose of identifying an appropriate reserve allotment for the First Nation. They discussed summer and winter grazing requirements, population, and numbers of livestock. Commissioner O'Reilly asked the Chief and others to show him the best places in the area because he was unfamiliar with the territory. Commissioner O'Reilly warned Chief Moyes that he may not be able to allot all the lands it desired, since there were "other peoples interests to be considered".

29. On August 9, 1884, Commissioner O'Reilly completed his Minute of Decision for the allotment of the lands which subsequently became I.R. 3, which included a metes and bounds description of the allotted reserve lands as well as his sketch of its boundaries. Commissioner O'Reilly estimated the size of the reserve at approximately 8,320 acres. His allotment included lands that had been previously pre-empted by settlers but were considered abandoned at the time of Commissioner O'Reilly's visit to the area.

30. The lands which subsequently became I.R. 3 were surveyed by E.M. Skinner in September 1886. Surveyor Skinner submitted his report and survey sketch on May 12, 1887 to Commissioner O'Reilly noting changes he had made to the original boundaries described in Commissioner O'Reilly's Minute of Decision. Surveyor Skinner estimated the size of the reserve he surveyed, with adjusted boundaries, at 8,456 acres. Commissioner O'Reilly signed Surveyor Skinner's survey sketch.

31. On June 10, 1887 both Commissioner O'Reilly and the Chief Commissioner of Lands and Works signed the official *Plan of Kootenay Indian Reserve No. 3, Lower Columbia Lake, Kootenay District, British Columbia* which incorporated Surveyor Skinner's boundary changes. Another copy of this plan was signed by the Superintendent General of Indian Affairs.

Lot 108

32. Pre-emption was a method of acquiring provincial Crown land by claiming it for settlement and agricultural purposes. The *Land Act, 1875*, S.B.C. 1875 set out the steps and documentation that were required to pre-empt provincial Crown land. The provincial *Land Act* withdrew "Indian settlements" from Crown lands that were otherwise available for sale or pre-emption, but the legislation did not define the term "Indian settlement".

33. The Kootenay district of British Columbia had not attracted much settlement prior to about 1882, after which time, the number of settlers claiming land by pre-emption significantly increased.

34. On October 27, 1883, G.H. Johnson registered his pre-emption of Lot 108. He submitted a declaration that Lot 108 was available for pre-emption on this date. The Certificate of Record notes the land as "Lot 108.9.1 Kootenay District" and describes it as follows: "Upon a Creek called Sheep Creek commencing at a post marked G.H.J. – N.E. thence running South 40 chains to a tree marked G.H.J. – S.E. thence West 50 chains to a tree marked G.H.J. – S.W. thence North 40 chains to a post marked G.H.J. – N.W. thence East 50 chains to initial point."

35. G.H. Johnson paid $320 for Lot 108, the last of his three payments being made on July 5, 1889. G.H. Johnson was issued four Certificates of Improvements to Lot 108 and received the Crown Grant No. 449/43 for Lot 108 on December 18, 1889.

36. From 1924 – 1936 Canada held title to Lot 108 and other adjacent lots. During this time, Lot 108 was used for experimental agricultural purposes.

The McKenna-McBride Commission and the First Nation

37. On September 24, 1912, the federal and provincial Crown signed an agreement referred to as the McKenna-McBride Agreement. The agreement established a Royal Commission on Indian Affairs for British Columbia, "to settle all differences between the Governments of the Dominion and the Province respecting Indian Lands and Indian Affairs generally [...]". The Commission's powers included the ability to recommend reserve allotments. This agreement was approved by reciprocal federal and provincial orders in council which included the following provision:

> [...] notwithstanding anything in the said [McKenna-McBride] Agreement contained, the acts and proceeding of the Commission *shall be subject to the approval of the two Governments* [emphasis added].

38. On September 21, 1914, the First Nation met with the McKenna-McBride Commission. Chief Arbel described his concerns about land pre-emptions in the area and the First Nation's grazing land requirements. He requested more land for the First Nation. The McKenna-McBride Commission also heard from Ignatius Eaglehead about the First Nation's land use and requirements.

39. The issue of adding Lot 108 to I.R. 3 was never raised by First Nation members in their testimony before the McKenna-McBride Commission.

40. On October 28, 1914, the McKenna-McBride Commission examined Indian Agent Galbraith who testified about the survey of I.R. 3 and his opinion that its boundaries should have been extended into the mountains so that those lands could be used as a forest reserve. Indian Agent Galbraith advised the McKenna-McBride Commission that the First Nation had asked for more land at the time of Commissioner O'Reilly's allotment:

> They asked that a little piece of more land be given to them for their cattle. They were under the impression that Mr. O'Reilly's line; that is the west line would continue straight north down to the second jog in the reserve survey as they knew perfectly well that G.H. Johnston's land was taken up.

41. On December 9, 1914 Indian Agent Galbraith submitted a map to the McKenna-McBride Commission on which he had marked out an area he thought could possibly be provided to the First Nation as additional reserve land for their cattle and horses.

42. On February 12, 1915, Indian Agent Galbraith further reported to the McKenna-McBride Commission:

> [...] The only available land I find near [I.R. 3] is north of Lots 122, 115 & 124 and is partially covered with small timber and is not fit for cultivation. If 3000 acres can be found near there, I would recommend it be added to the reserve.

43. The McKenna-McBride Commission confirmed I.R. 3 as "now fixed and determined" on March 24, 1915. On March 25, 1915, it recommended the addition of 3,040 acres to I.R. 3. On March 29, 1915, it rescinded its first recommendation and instead recommended that a 2,960 acre parcel be added to I.R. 3.

44. On June 30, 1916, the McKenna-McBride Commission released its final report, including the recommendation that a 2,960 acre parcel should be added to I.R. 3.

45. At the time of the McKenna-McBride Commission and the release of its final report, the 2,960 acre parcel referred to in the Commission's recommendation was provincial Crown land and Lot 108 was privately owned.

46. By the terms of its establishment, the recommendations of the McKenna-McBride Commission were not binding on either the provincial or federal Crown. The cooperation of both the federal and provincial Crown was also required in order to implement the Commission's recommendations.

47. In 1920 British Columbia proposed that a joint federal-provincial review of the recommendations of the McKenna-McBride Commission be carried out (the "Ditchburn-Clark review'). W.E. Ditchburn, Chief Inspector of Indian Agencies in British Columbia, was appointed as the federal representative and Major J.W. Clark was appointed as the provincial representative to this review.

48. The provincial representative, Major Clark, concluded that the 2,960 acre addition to I.R. 3 was not required. Chief Inspector Ditchburn, for the federal Crown, disagreed, conveying to the federal Deputy Superintendent General of Indian Affairs his view that the additional lands were required for the First Nation. On March 27, 1923, Chief Inspector Ditchburn submitted his final report to the Deputy Superintendent General of Indian Affairs on the results of his negotiations with Major Clark, noting the provincial Crown's final disallowance of additional reserve lands in the Kootenay Agency, including I.R. 3.

49. On July 19, 1924, the Prime Minister approved the amended McKenna-McBride Commission report. The additional acreage of 2,960 in the McKenna-McBride Commission's report was crossed out and described as "Disallowed." On July 25, 1923, the Government of British Columbia approved the same.

V. Relief (R. 42(f))

50. The Crown denies the entitlement of the relief sought and seeks to have the claim dismissed in its entirety.

51. The Crown seeks its costs in the proceedings.

52. The Crown pleads and relies on section 20 of the *Specific Claims Tribunal Act*.

53. Such further relief as this Honourable Tribunal deems just.

VI. Communication (R. 42(g))

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Dated: November 20, 2013

Signature of
☐ Respondent ☒ lawyer for Respondent
William F. Pentney,
Deputy Attorney General
Per: Brett Nash
Department of Justice
British Columbia Regional Office