

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDICTIONS PARTICULIÈRES		
F I L E D	December 5, 2016	D E P O S E
David Burnside		
Ottawa, ON	4	

KAHKEWISTAHAW FIRST NATION

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 First Nation
as represented by Stephen M. Pillipow,
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1. This is the Attorney General of Canada's response, on behalf of the Crown in right of Canada, to the Declaration of Claim (the "claim") filed by Kahewistahaw First Nation (the "claimant") with the Specific Claims Tribunal (the "Tribunal") on October 5, 2016 pursuant to the *Specific Claims Tribunal Act* (the "Act").
2. The claim relates to alleged breaches of the Crown's legal obligations to the claimant arising from the alienation of IR72A.

I. Status of Claim (R. 42(a))

3. The requirements in s. 16 of the Act to file a specific claim are satisfied in that:
 - the claimant submitted a specific claim to Canada for assessment under the *Specific Claims Policy* on December 9, 2010;
 - the claim was filed with the Minister of Indian and Northern Affairs (the "Minister") on February 2, 2011;
 - on September 13, 2013, the Minister notified the claimant in writing of his decision to negotiate the specific claim in part; and,
 - more than three years elapsed from the day on which the Minister notified the claimant of his decision, and the specific claim has not been resolved by a final settlement agreement.

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

4. The Attorney General must respond to this claim according to the rules of practice applicable to pleadings in a matter of this nature and consistent with her duties and functions in the conduct of litigation for or against the Crown in right of Canada. Canada will pursue reconciliation and is committed to a renewed nation-to-nation relationship with Indigenous Peoples based on recognition of rights, respect, co-operation and partnership. The Attorney General and the Government of Canada seek to work in other contexts beyond pleadings to achieve the fulfilment of those commitments.

5. The Crown accepts the validity of paragraph 50 of the claim only so far as the Crown did not compensate the claimant for a road built along the road allowance in IR72A. The road allowance contained 1.5 acres of land.
6. The Crown accepts the validity of paragraph 51 of the claim only so far as the Crown transferred 2.64 acres of IR72A to the Province of Saskatchewan for a road without compensation to the claimant.
7. The Crown accepts the validity of paragraph 53(b) only so far as the Crown did not sell the surrendered land without delay. The Crown denies this resulted in any financial loss owed to the claimant.
8. The Crown does not accept and specifically denies the validity of all remaining allegations in the claim. Without limiting the generality of the foregoing, the Crown denies:
 - a. it owed a duty to consult with the claimant regarding the Craven Dam construction and breached that duty;
 - b. it breached the terms of Treaty No. 4 regarding the surrender of IR72A;
 - c. the surrender was contrary to the provisions of the 1886 *Indian Act*, RSC 1886, c 43;
 - d. the Crown breached its fiduciary or trust-like obligations to the claimant in relation to the use of IR72A by the rural municipality (RM), the surrender of IR72A, the post-surrender road diversion or the mineral rights.
9. The Crown's position is the Tribunal does not have jurisdiction to hear the allegation in paragraph 47. The *Act*, s. 15(1)(f) specifically excludes claims based on aboriginal rights or title.

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

10. The Crown, unless hereinafter expressly admitted, denies each and every fact alleged in the claim and puts the claimant to strict proof thereof. Further, and without limiting the generality of the foregoing, the Crown specifically denies the facts in the following paragraphs of the claim: 25-27, 34, 37 in part, 46-49, 50 in part, 51 in part, 52, 53(a), 53(b) in part, 53(c), 53(d) and 54.
11. The Crown admits the facts set out in the following paragraphs of the claim: 1, 2, 3 in part, 4, 5, 7-16, 18-24, 28-33, 35, 36, 37 in part, 38-45, 50 in part, 51 in part, and 53(b) in part.
12. The Crown has no knowledge of the facts in paragraphs 6 and 17 of the claim.
13. In response to paragraph 3 of the claim the Crown says the Minister received the claim under the Specific Claims Policy on December 8, 2010.
14. In response to paragraphs 4 and 5 of the claim, the Crown says all communications between Crown and claimant were without prejudice and are subject to settlement privilege.
15. In response to paragraph 17 of the claim, the Crown says the evidence does not reveal exactly when the road was built and whether the RM or another entity constructed it. The statement that the RM trespassed on IR72A is a question of law at issue in this claim and not a statement of fact as alleged.
16. In response to paragraph 25 of the claim, the Crown says Indian Agent Kerley (Kerley) and six band members signed the surrender document. Of the 43 eligible voters, 25 were present and 23 of those voted in favour of the surrender. The six members who signed the surrender were on the voters list and shown as present at the meeting and voting in favour.
17. In response to paragraph 27 of the claim, the Crown says the surrender affidavit was sworn on July 8, 1944 by Kerley and three individuals who signed the surrender. The

affidavit attested that a majority of male members of the band 21 years of age or older consented to the surrender. Lawrence Kay's unsworn affidavit states he was 20 years and 10 months old at the time and present at the surrender meeting.

18. In response to paragraph 34 of the claim, the Crown says on June 14, 1947 the Director of the Indian Affairs Branch suggested a refund to the RM of the \$30 paid for the road and prevention of continued use of the road. In September 1953 Kerley stated there was no record of a refund.
19. In response to paragraph 37 of the claim, the Crown admits only the sale of the remainder of IR72A was raised again when K.W. Criddle expressed interest in July 1953. The rest of the paragraph is denied.
20. In response to paragraph 46 of the claim, the Crown says the federal Crown holds the mines and minerals underlying the surrendered IR72A, and the Crown denies it transferred the mines and minerals to the Province.

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

Indian Reserve 72A – Fishing Station

21. The claimant adhered to Treaty No. 4 on September 15, 1874. An 1881 survey plan of a proposed fishing station for the Claimant along Crooked Lake shows an unidentified trail passing through the land.
22. On May 17, 1889, Order in Council (OIC) PC 1151 confirmed IR72A. The OIC indicated IR72A contained 96 acres. In 1944 this was reduced to 68.5 acres to account for Hudson's Bay Company land that was never part of IR72A.
23. IR72A was part of the North-West Territories until the Province of Saskatchewan was created in 1905.

1924 Road Transfer to Province of Saskatchewan

24. Prior to the IR72A confirmation, Order in Council P.C. 1026 dated May 10, 1888 ordered transfer of certain surveyed trails to the Lieutenant Governor in Council “for the public uses of the Territories”, including the “old trails crossing and in, the Qu’Appelle Valley”.
25. In 1900, a survey of the “Old Trail in the Qu’Appelle Valley” along the northern shore of Crooked Lake included a 2.3 acre section through the fractional SE1/4 5-19-5 W2M. Although the survey plan did not identify this as IR72A, it was the location of the reserve.
26. Section 21 of the 1905 *Saskatchewan Act*, 4-5 Edw. VII, c. 42 automatically vested in the Province all of the roads and trails which previously had been transferred to the Territories.
27. In 1924 the Province of Saskatchewan “relinquished all claim” to the 2.3 acre section of the Old Trail through IR72. In exchange, a new road allowance of 2.64 acres was taken.
28. Canada consented to the transfer of 2.64 acres from IR72A “without compensation” as the Province had agreed to relinquish its claim to the 2.3 acre Old Trail.
29. Canada took the 2.64 acres for a new road under s. 46 of the *Indian Act*, R.S.C. 1906 c. 81, s. 46.

Road Between Townships 19 and 19A

30. It is unknown what entity built a road between Townships 19 and 19A in IR72A.
31. There is no record that the Crown allowed or authorized the road to be built or that the claimant objected to construction or use of the road.
32. The road allowance was surrendered with the rest of IR72A in 1944.

Surrender of IR72A

33. The possibility of a surrender arose in 1943 when the RM wanted to build a road on 1.5 acres through IR72A. Flooding had affected the existing road on the road allowance between Townships 19 and 19A along the southern border of IR72A.
34. Kerley and the claimant met twice in early 1944 to ascertain whether the claimant wanted to surrender 1.5 acres to the RM for a new road. On April 27, 1944 Kerley told the Indian Affairs Branch the claimant had decided unanimously to surrender all of IR72A. He explained the claimant had indicated it did not use the land in question and fished mostly at Round Lake. Kerley reported the claimant contemplated a surrender of IR72A and lease or purchase of a fishing station and camp site near Round Lake School.
35. On July 4, 1944, Kerley and six claimant members signed a surrender document for the Crown to “sell [all IR72A] to such person(s), and upon such terms as the Government of the Dominion of Canada may deem most conducive to our Welfare and that of our people”.
36. The six claimant members were on the voters list, were at the meeting and voted in favour of the surrender.
37. A majority of the claimant’s male members, 21 years or older, consented to the surrender. Kerley and three of the individuals who signed the surrender swore the affidavit on July 8, 1944.
38. Kerley listed 43 eligible voters, 25 of whom were present at the surrender, and 23 of those present voted in favour of the surrender.
39. Kerley sent the surrender documents to the Indian Affairs Branch on July 8, 1944. He noted 12 of 18 absentees were working off reserve or in the armed forces.
40. Governor General in Council accepted the surrender by OIC PC 6171 dated August 7, 1944.

41. There was an approximate 10-year delay to 1955 before the Crown attempted to sell the surrendered land.
42. The November 2, 1955 advertisement for sale indicated a total acreage of 53 acres.
43. The Crown sold the land for \$2,500, more than the appraised value of \$1,860.
44. The patent issued to the purchaser was for 64.36 acres.

Mineral Rights

45. The advertisement for sale of IR72A in 1955 expressly excluded mines and minerals.
46. Federal Letters Patent issued on June 18, 1956 to Mr. Criddle reserved all mines and minerals.

V. Relief (R. 42(f))

47. The Crown seeks the following relief:
 - a. Dismissal of all claims set out in the Declaration of Claim except for those set out in:
 - i. paragraph 50, only so far as the Crown did not compensate the claimant for a municipal road built along the road allowance in IR72A;
 - ii. paragraph 51 of the claim only so far as the Crown transferred 2.64 acres of IR72A to the Province of Saskatchewan without providing compensation to the claimant;
 - iii. paragraph 53(b) only so far as the Crown did not sell the surrendered land without delay;
 - b. costs; and
 - c. such further relief as this Honourable Tribunal deems just.

VI. Communication (R. 42(g))

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

Department of Justice (Canada)
Prairie Regional Office (Saskatoon)
10th Floor, 123-2nd Avenue S
Saskatoon, SK S7K 7E6
Attention: Lauri M. Miller

49. Facsimile number for service is (306) 975-5013.

50. Email address for service is saskSCT-5002-16-kahk@justice.gc.ca

Dated this 5th day of December, 2016.



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