

**SPECIFIC CLAIMS TRIBUNAL**

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TRIBUNAL DES REVENDIGATIONS PARTICULIÈRES		
F I L E D	December 23, 2020	D E P O S É
Alexandre Bois		
Ottawa, ON	19	

B E T W E E N:

**WATERHEN LAKE FIRST NATION**

Claimant

v.

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA**

as represented by the Minister of Indian Affairs and Northern Development

Respondent

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

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

Original Filed: November 25, 2019

Amended: December 23, 2020

TO: Waterhen Lake First Nation  
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## I. Overview

1. Her Majesty the Queen in Right of Canada (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 the Waterhen Lake First Nation is an adherent to Treaty 6, a Band within the meaning of the *Indian Act*, and a First Nation within the meaning of the *Specific Claims Tribunal Act (SCTA)*. Canada acknowledges the Waterhen Lake First Nation's rights under Treaty 6, including its rights to Waterhen Lake Reserve No. 130 (Reserve).
4. Fifty-one members of the Waterhen Lake First Nation adhered to Treaty 6 on November 8, 1921. During and after adhesion talks, Canada selected lands (1921 lands) from which the Waterhen Lake First Nation's Reserve would later be chosen. At the time, the actual number of Band members was unknown. As such, in considering lands appropriate for inclusion in the Reserve, Canada took into account the known Band members, as required by Treaty 6, and the likelihood of a growing number of members adhering to treaty in subsequent years.
5. On May 2, 1930, Order in Council P.C. 917 set apart 19,778.8 acres for the Reserve. The size of the Reserve was determined based on the size of the Waterhen Lake First Nation at the time. Other lands previously provisionally selected never formed part of the Reserve.

6. Canada has complied with its treaty obligations and, for the most part, its fiduciary obligations in setting apart the Reserve for the Waterhen Lake First Nation, in a fair and timely manner in ~~compliance~~ accordance with the terms of Treaty 6.
7. However, Canada admits that in not fully informing the First Nation that not all of the 1921 lands would be created as a reserve, and in not making clear the extent and location of later reductions, Canada failed to provide full disclosure to the First Nation, in breach of Canada's fiduciary duties. In addition, in significantly reducing lands that had been included or requested in the 1921 lands for timber and hay, Canada breached a fiduciary duty in the reserve creation process.

## **II. Status of claim (R. 42(a))**

8. Canada admits the requirements in section 16 of the SCTA are satisfied, as pled in paragraphs 2 through 4 of the Declaration of Claim.
9. The Waterhen Lake First Nation submitted a claim to the Minister of Indigenous and Northern Affairs (Minister) on October 30, 1996, and supplemental submissions on June 3, 2002, before the SCTA came into force. Canada admits that subsection 42(1) of the SCTA deems that the Waterhen Lake First Nation filed the claim with the Minister in accordance with section 16 of the SCTA.
10. On January 21, 2010, the Minister notified the Waterhen Lake First Nation in writing of the decision not to negotiate the claim. On August 26, 2019, the Minister invited the First Nation to make further submissions to facilitate a possible reassessment of the claim. On October 3, 2019, the Waterhen Lake First Nation resubmitted the claim to the Minister. ~~The claim will now be reassessed.~~

11. On August 7, 2020, the Minister wrote to the Waterhen Lake First Nation, offering to seek a negotiated settlement of the claim. On October 28, 2020, the Waterhen Lake First Nation advised that it wished to pursue this claim through the Tribunal but remains open to negotiation and mediation as the claim proceeds.

### **III. Canada's position with respect to the validity of the claim**

12. The Reserve lands set aside for the benefit of the Waterhen Lake First Nation were determined in accordance with the terms of Treaty 6. Other lands provisionally identified for the possibility that additional reserve lands would be required never formed part of the Reserve and, as such, were never alienated.
13. Canada has complied with its treaty obligations and, for the most part, its fiduciary obligations in setting apart the Reserve for the Waterhen Lake First Nation in a fair and timely manner. ~~The facts do not establish a valid claim under the SGTA.~~
14. However, Canada admits that it breached its fiduciary duty in the reserve creation process by not fully informing the Waterhen Lake First Nation that not all of the 1921 lands would necessarily be created as a reserve. Canada failed to provide full disclosure to the Waterhen Lake First Nation by not making clear the extent and location of later reductions to the 1921 lands.
15. Canada further admits that it breached its fiduciary duty in the reserve creation process by significantly reducing lands requested by the Waterhen Lake First Nation in 1921 for timber and hay.

#### **IV. Canada's position with respect to the allegations of fact**

16. The material facts related to this claim are not in dispute. Where Canada does not wholly admit allegations of fact from the Declaration of Claim, it does so merely on a characterization of the facts alleged. Canada proposes that the parties develop an agreed statement of facts early in the process.

##### ***Treaty 6 adhesion negotiations***

17. In response to paragraph 7 of the Declaration of Claim, Canada admits that, in 1876, it entered into Treaty 6 with certain Plains and Woods Cree bands in what is now central Saskatchewan. Among other things, Treaty 6 provided for the surrender of Aboriginal title to 121,000 square miles of land in exchange for various promises and benefits, including entitlement to reserve lands.

18. In response to paragraph 8, Canada admits that the Waterhen Lake First Nation has lived in the area surrounding Waterhen Lake for many generations.

19. In response to paragraph 9, Canada admits that representatives from the Department of Indian Affairs (DIA) first met with the Waterhen Lake First Nation in 1910 to discuss an adhesion to Treaty 6. At that time, members of the First Nation declined to take treaty. DIA officials again met with the Waterhen Lake First Nation in 1913 to discuss taking treaty, but again the members of the First Nation declined.

20. In response to paragraph 10, Canada:

- a. admits that the Waterhen Lake First Nation objected to the survey of townships in the Waterhen Lake area;

- b. admits that, on April 17, 1913, DIA Secretary McLean asked Inspector Chisholm to arrange for the Waterhen Lake First Nation to sign treaty; and
- c. states that Mclean did not say in his April 17, 1913 letter to Chisholm, nor did he have the authority to say, that the Reserve would be selected according to the First Nation's request and that its boundaries would be defined by the township plans.

21. In response to paragraph 11, Canada:

- a. states that in August 1913, Chisholm reported that the Waterhen Lake First Nation claimed the entire district for "many miles around";
- b. states that Chisolm was unable to procure an accurate map and therefore was unable to indicate a more precise location of the land the First Nation wished for a reserve; and
- c. states that the Waterhen Lake First Nation's preference was that if they could not have the entire district, they would like the lands on the south and south-eastern side of Waterhen Lake, including the lands west of the mouth of Island River to the Waterhen River outlet.

22. In response to paragraph 12, Canada says that it erroneously left the Waterhen Lake First Nation on the treaty adhesion document signed by the Big Island First Nation in 1913 and that Order in Council P.C. 4512 corrected this mistake when the Waterhen Lake First Nation did adhere to Treaty 6 in 1921.

23. In response to paragraph 13 Canada admits that on June 26, 1914, Chisholm identified lands which he recommended be reserved for the Waterhen Lake First Nation and that the DIA Secretary informed the

Surveyor General of these lands. However, portions of these lands were unavailable, and different lands needed to be identified.

24. In response to paragraph 14, Canada:

- a. states that efforts to have the Waterhen Lake First Nation adhere to Treaty 6 were renewed in 1915. McLean wrote to Chisholm on April 12, 1915 and instructed him to urge the Waterhen Lake First Nation to take treaty so that lands could be reserved for them. McLean authorized Chisholm to identify an approximate locality and extent of a reserve, in order to prevent settlement or alienation of the land which may be required for the Waterhen Lake First Nation and
- b. states that by May of 1916, Chisholm had been replaced by Inspector of Indian Agencies Crombie.

25. In response to paragraph 15, Canada:

- a. states that Crombie, not Chisholm, met with the Waterhen Lake First Nation in April 1917. Running Around requested reserve lands fronting on Waterhen Lake, "no less than eight miles in length, running north and south, and six miles wide, east and west" near the Hudson's Bay post and the lands east of the Narrows. Running Around also asked for lands for timber and hay;
- b. states that Crombie advised the DIA to send a surveyor as soon as possible to locate the Reserve, and that he believed the First Nation would then adhere to treaty; and
- c. admits that no surveyor was sent as per Crombie's request.

26. In response to paragraph 16, Canada admits that on April 25, 1917, Chief Surveyor Bray wrote Deputy Superintendent General of Indian Affairs Duncan C. Scott. Bray recommended that all of Townships 63 and 64, Range 16, the south half of Township 63, Range 17 and the north half of Township 62, Range 17 be withheld from disposition until the Reserve could be surveyed.
  
27. In response to paragraph 17, Canada admits that on June 21, 1917, the DIA informed Crombie of a temporary reservation for the Waterhen Lake First Nation but clarified that the temporary reservation was land from which to survey the Waterhen Lake Reserve, possibly the following year. The lands were those identified on April 25, 1917, with the exception of sections 25 to 36 of Township 64, Range 16, as these exempted lands were heavily timbered and therefore not to be reserved for the First Nation.

***The 1921 treaty adhesion***

28. In response to paragraph 18, Canada:
  - a. states that on September 3, 1921, not September 6, 1921, that DIA Assistant Deputy and Secretary MacKenzie wrote to Indian Commissioner Graham instructing him to send Indian Agent Taylor to secure the adhesion of the Waterhen Lake First Nation to Treaty 6; and
  
  - b. states that on September 6, 1921, MacKenzie gave further instructions to have Taylor select the lands that should be retained as a reserve so that the balance of the temporary reservation could be released back to the Department of the Interior.

29. In response to paragraph 19, Canada admits that the Waterhen Lake First Nation adhered to Treaty 6 on November 8, 1921. Order in Council P.C. 4512 confirmed the adhesion on December 1, 1921.
30. In response to paragraph 20, Canada:
- a. states that Taylor's November 15, 1921 report of the treaty adhesion did not identify the lands chosen for Reserve;
  - b. states that the lands identified by Taylor were those from which the Reserve lands were to be chosen in the future, including an additional 12 sections of land in Township 62, Range 16; and
  - c. states that Taylor's message was that such a timber reserve could possibly be arranged by the surveyor who surveys the Reserve; and
  - d. states that Taylor suggested that the survey of the Reserve should take into account that there would be a substantial increase in the size of the Band as more members joined treaty.
31. In response to paragraph 21, Canada admits that the sections McLean identified on April 13, 1921, as "especially required" for the Waterhen Lake Reserve as hay lands were not included in Taylor's November 15, 1921 report. Officials considered this issue at the time. The lands in question were some distance from the main Reserve lands and it would have been expensive to haul hay from there to the main Reserve. It was believed at the time that other ~~Other~~ lands contained ample hay for the use of the Waterhen Lake First Nation.

32. In response to paragraph 22, Canada:

- a. admits that the letter from Taylor dated March 7, 1922, explains Taylor's rationale for the Reserve. He chose the lands in Township 62 Range 16 because the Band members "urgently asked for this, that they might have some timber on their Reserve," and that the timber was in Taylor's view, not valuable;
- b. admits that Taylor did recommend the addition of other lands to the Reserve; and
- c. states that Taylor explained that the lands marked were more than the First Nation was entitled to at the time due to the possibility of additional band members adhering to treaty in the future.

33. In response to paragraph 23, Canada:

- a. admits that from 1921 to 1926, officials occasionally referred to the lands marked as Waterhen Lake Indian Reserve Number 130;
- b. admits that there was correspondence from 1921 to 1926 relating to the lands outlined to be chosen for Reserve, replacement lands for school lands within the Reserve, usage of Reserve lands and removal of squatters on Reserve land; and
- c. states that in that same timeframe, officials also routinely spoke to a large *temporary* reservation of lands being made, from which the Waterhen Lake Reserve may possibly be surveyed.

***Post adhesion events leading to Reserve creation***

34. In response to paragraph 24, Canada admits that on October 24, 1923, the Department of the Interior recommended that, once the school lands exchange was complete, the lands selected by the DIA, comprising 29,187.40 acres, as well as 2 additional sections of land, be set apart by Order in Council as a Reserve. The selected lands were identified on a sketch attached to the correspondence.
35. In response to paragraph 25, Canada admits that, by Order in Council on November 17, 1924, the DIA acquired the sections reserved for school lands.
36. In response to paragraph 26, Canada:
  - a. admits that a draft Order in Council was prepared in 1925 to confirm Waterhen Lake Indian Reserve Number 130 and withdraw 29,187.40 acres of land from the operation of the *Dominion Lands Act*; and
  - b. states that the Department of the Interior, not the DIA , prepared the draft Order in Council.
37. In response to paragraph 27, Canada admits that on November 28, 1925, McLean stated that it was doubtful enough Band members would join Treaty 6 to justify a reserve of this size for the Waterhen Lake First Nation and that McLean recommended delaying confirmation of the Waterhen Lake Reserve.
38. In response to paragraph 28, Canada:
  - a. admits that in 1926, the Department of the Interior wrote to McLean and proposed to remove the reserve designation from the lands at Waterhen

Lake. McLean replied that a reserve of approximately 11,000 acres was needed for the Waterhen Lake First Nation; and

- b. states that McLean also asked that 10,000 acres be temporarily withheld for any members of the Band expected to take treaty at a later date.

39. In response to paragraph 29, Canada:

- a. admits that on July 24, 1926, McLean instructed Land Surveyor Fairchild to select lands for the Waterhen Lake First Nation;
- b. admits that on November 30, 1926, Fairchild reported that he advised those in attendance that it would be “advantageous to them if they would agree to have the lands selected by me constitute their reserve”; and
- c. admits that Fairchild selected the lands by their legal descriptions on the township plans. It does not appear that a survey was conducted.

40. In response to paragraph 30, Canada:

- a. admits that on May 2, 1930, Order in Council P.C. 917 confirmed 19,772.80 acres of land as Waterhen Lake Indian Reserve Number 130;
- b. admits that Order in Council P.C. 917 included sections 31 and 32 of Township 61, Range 16, which McLean had identified as essential hay lands; and
- c. states that within the aforementioned sections, the waters of Beaver River and a strip of land one chain in width from the south limit of the Reserve to the north limit of the Reserve were excluded.

41. In response to paragraph 31, Canada states that Order in Council P.C. 917 set aside a Reserve sufficient for the 154 Band members known at the time, in compliance with the terms of Treaty 6.
42. In response to paragraph 32, Canada does not admit the accuracy of the map attached as a Schedule to the Declaration of Claim.
43. Canada states that paragraphs 33 and 34 are conclusions and assertions of legal opinion. They are not statements of fact. Canada states that the facts of this claim do not support the conclusions and legal opinions asserted.
44. In response to paragraph 35, Canada:
  - a. admits that, once a reserve is created, it can only be alienated or disposed of in accordance with the provisions of the *Indian Act*; and
  - b. states that the 29,187.40 acres in question was not reserve land. Therefore, an expropriation or surrender was not necessary.
45. Canada states that paragraphs 36 to 40 are conclusions and assertions of legal opinion. They are not statements of fact. Canada states that the facts of this claim do not support the conclusions and legal opinions asserted.

**V. Canada's statements of fact**

46. Treaty 6 includes a promise to set aside a reserve for each band in the amount of one square mile for each family of five (approximately equal to 128 acres per person).

47. In 1910, the DIA attempted for the first time to admit the Waterhen Lake First Nation into Treaty 6.
48. On May 3, 1910, the Inspector of Indian Agencies, W.J. Chisholm, advised the Secretary of the DIA, J.D. McLean to send an officer to the Waterhen Lake and Big Island Lake area to offer the Band members admission to treaty.
49. On May 12, 1910, McLean authorized Chisholm to visit the Waterhen Lake First Nation, explain to them the terms of Treaty 6, and determine whether they wished to take treaty.
50. On November 15, 1910, Chisholm reported to McLean that the Band members made it clear that they did not wish to take treaty.
51. The DIA again attempted to admit the Waterhen Lake First Nation into treaty and, during the summer of 1913, treaty adhesion negotiations took place.
52. The Waterhen Lake First Nation declined treaty in 1913, but the treaty adhesion document submitted to Council for approval erroneously included it along with the Big Island Lake Band. Order in Council P.C. 4512 rectified this mistake and rescinded the portion of the 1913 Order referring to the Waterhen Lake First Nation.
53. In 1915, the DIA instructed Chisholm to try to persuade the Waterhen Lake First Nation to allow the allocation and survey of a reserve for them. McLean authorized Chisholm to designate an approximate locality and extent of a reserve, in order to prevent settlement or alienation of the lands that may be required for the Waterhen Lake First Nation.

54. Poor weather delayed Chisholm from performing this task. The DIA replaced Chisholm with W.B. Crombie as inspector of Indian Agencies in 1917.
55. In his April 14, 1917 report, Crombie explained that he met with the Waterhen Lake First Nation and discussed adhesion to treaty on March 22 and 23, 1917. He then took a census of the Band members. Only 12 of the 18 men in the First Nation at the time were in favour of accepting treaty, thus the DIA did not accept any of the Band members into treaty.
56. In his April 1917 report, Crombie recommended the selection of a reserve as soon as possible based on a future population of 100 people, and that the First Nation be made aware that the DIA was willing to accept them into treaty as soon as a majority of them wished to adhere to treaty.
57. On April 25, 1917, in light of Crombie's April 1917 report, Chief Surveyor of the DIA, S. Bray, recommended setting aside lands on a temporary basis until the DIA could make a final reserve selection for the Waterhen Lake First Nation.
58. On May 4, 1917, the DIA sent the Deputy Minister of the Interior a letter requesting a temporary reservation, noting that Treaty 6 entitled each family of five to 640 acres. Although the DIA could not make a definite selection, the letter attached a map outlining the entire area from which to later define the exact limits of the Reserve.
59. On May 11, 1917, an internal memo to the Deputy Minister of the DIA outlined that a future allotment for 100 individuals under Treaty 6 would require an area of 12,800 acres.

60. On June 21, 1917, the Department of the Interior temporarily held land for the DIA from which to eventually select and survey the land for the Waterhen Lake Reserve.
61. On June 10, 1921, Chief Running Around wrote the DIA asking when it was going to create a reserve. The DIA referred the matter to Indian Commissioner Graham for consideration.
62. On September 3, 1921, McLean approved of sending Indian Agent Taylor to take the adhesion of the Waterhen Lake First Nation. On November 8, 1921, the Waterhen Lake First Nation adhered to Treaty 6. During the course of negotiations, Chief Running Around stated that he wanted the Reserve to be set aside immediately. Taylor advised that he was not a surveyor and could not set aside the Reserve but that the Reserve could be set aside where Chief Running Around wanted it.
63. On November 15, 1921, Taylor reported that the First Nation numbered only 49, but would likely increase to 119 at the next annuity payment. He recommended basing the survey of the Reserve on 119 adherents, rather than 49.
64. On November 17, 1921, Graham forwarded Taylor's report to Deputy Superintendent Scott. Graham reiterated that the land marked was not the entire area to be set aside, but was land from which to choose the final Reserve, in proportion to the number of Band members that adhered to treaty. Graham informed Scott that Taylor was of the opinion that the removal of at least 18 sections from the plan would bring it to the size required by Treaty 6.
65. On December 1, 1921, Order in Council P.C. 4512 confirmed the adhesion. One of the terms of the adhesion was that the Crown would set aside a reserve of the same proportions as those mentioned in the

original Treaty 6, which is “one square mile for each family of five or in that proportion for larger or smaller families (128 acres per Band member).”

66. In 1923, the Department of the Interior recommended the transfer of 29,187.40 acres to the DIA. On November 5, 1925, McLean received a draft Order in Council asking him for comments and suggestions regarding the proposed land transfer.
67. McLean responded with a request to delay the confirmation of a reserve for several years as the DIA did not know how many Band members would accept treaty, and that the final number would not likely justify the transfer of all 29,187.40 acres within the temporary reservation.
68. On June 6, 1926, Chief Surveyor Robertson recommended sending Surveyor Fairchild to Waterhen Lake to make a selection of reserve lands from those temporarily reserved. He recommended a permanent selection for the 82 Band members who had joined treaty and an additional selection of 8,000 to 10,000 acres for those who may join in the future. The DIA would relinquish the remaining lands to the Department of the Interior.
69. On July 24, 1926, McLean instructed Fairchild to select 128 acres for each of the 82 Band members as required by Treaty 6 and to select further acreage not exceeding 10,000 acres, to be held for two to three years for those who may yet enter treaty. Any land not needed by the time of treaty payment in either 1928 or 1929 would be released from temporary reservation and returned to the Department of the Interior.
70. Fairchild proceeded to Waterhen Lake and carried out his instructions. On September 25, 1926, he met with 20 members of the Waterhen Lake First Nation and set aside Reserve lands for the now 93 treaty adherents and

6537 acres for 51 anticipated adherents. Chief Running Around and Councillor Round Sky spoke at length and expressed satisfaction with his selection. None of the Band members present raised any objections.

71. On March 8, 1927, Departmental Controller Cote recommended to the Deputy Minister of the Interior that 12,022.6 acres be set apart as reserve land by Order in Council and that 7746.2 acres be held in temporary reservation.
72. On December 7, 1929, Acting Assistant Deputy and Secretary MacKenzie requested the confirmation of all the land, including the 7,746.2 acres of temporary reserve, as reserve land.
73. Order in Council P.C. 917 dated May 2, 1930, set apart 19,772.8 acres as Waterhen Lake Indian Reserve No. 130, an amount sufficient under Treaty 6 for 154 Band members.

## **VI. Relief**

74. Canada seeks the following relief:
  - a. Dismissal of the claim set out in the Declaration of Claim, except as admitted in paragraphs 7, 14, and 15;
  - b. Costs; and
  - c. Such further relief as this Honourable Tribunal deems just.

## VII. Communication

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

Department of Justice (Canada)  
Prairie Regional Office (Saskatoon)  
410 – 22<sup>nd</sup> Street East, Suite 410,  
Saskatoon, SK S7K 5T6  
Attention: David Culleton

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

77. Email address for service is: [sasSCT-5008-19-waterhen@justice.gc.ca](mailto:sasSCT-5008-19-waterhen@justice.gc.ca)

Original Response Dated ~~this~~ 25<sup>th</sup> day of November 2019.

Amended Response filed: December 23, 2020



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