

SPECIFIC CLAIMS TRIBUNAL		
F I L E D	TRIBUNAL DES REVENDIGATIONS PARTICULIÈRES <div style="border: 1px solid black; display: inline-block; padding: 2px;">April 3, 2023</div> Susie Thorsley	D É P O S É
Ottawa, ON	<div style="border: 1px solid black; display: inline-block; padding: 2px;">22</div>	

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

**ONION LAKE CREE NATION, COLD LAKE FIRST NATIONS,
FROG LAKE FIRST NATION, and KEHEWIN CREE NATION
(collectively the “ONION LAKE AGENCY FIRST NATIONS”)**

Claimants

v.

HER HIS MAJESTY THE QUEEN KING IN THE RIGHT OF CANADA
as represented by the Minister of Crown-Indigenous Relations and Northern Affairs Canada

Respondent

AMENDED 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*.

Original Filed: September 23, 2020

Amended: March 31, 2023

Date

Registry Officer

TO: **HER HIS MAJESTY THE QUEEN KING IN RIGHT OF CANADA**
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I. CLAIMANTS (R. 41(A))

1. The Claimants are Onion Lake Cree Nation, Cold Lake First Nations, Frog Lake First Nation, and Kehewin Cree Nation. Each of the Claimants is a “First Nation” within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, S.C. 2008, c. 22, and a “band” within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, as amended.
2. Indian Reserve 123A (“IR 123A”), which is the subject of this specific claim, is located in the Province of Alberta and was set apart for the joint use and benefit of the Claimant First Nations which were at all material times within the Onion Lake Indian Agency.

II. CONDITIONS PRECEDENT (R. 41(C))

3. 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;

(b) three years have elapsed after the day on which the claim was filed with the Minister and the Minister has not notified the First Nation in writing of his or her decision on whether to negotiate the claim...

4. The Claimants submitted a specific claim on May 16, 2016, which was deemed to be filed with the Minister of Indian Affairs and Northern Development (the “Crown” or “Canada”) on October 19, 2016. The Claim asserts that IR 123A was surveyed as a “reserve” for the joint use and benefit of the Claimants in October 1897 but was later alienated by the Crown without lawful authority, the consent of the bands, or payment of any compensation whatsoever to the Claimants for whom the reserve was surveyed by the Crown (the “Claim”).
5. In a letter dated November 15, 2019, Canada offered to negotiate a narrow aspect of the Claim. This offer was contingent on the Claimants releasing Canada from any and all liability in respect of the remaining portions of the Claim.

III. CLAIM LIMIT (ACT, S. 20(1)(B))

6. Each Claimant does not seek compensation in excess of \$150 million for each Claim herein, specifically:

(a) the Claim that Canada breached its statutory, fiduciary, and honourable obligations to the Claimants when it unlawfully alienated the surface interest in the IR 123A lands (17,851 acres) in favour of others to the exclusion and prejudice of the Claimants, who held beneficial interests in IR 123A; and

(b) the Claim that Canada breached its statutory, fiduciary, and honourable obligations to the Claimants when it issued letters patent to the lands comprising IR 123A, which failed to reserve the sub-surface rights and constituted an unlawful taking of an interest in land held by Canada for the exclusive use and benefit of the Claimants.

IV. GROUNDS (ACT, S. 14(1))

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

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

(a) a failure to fulfil 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) an illegal lease or disposition by the Crown of reserve lands; and

(e) 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))

(a) *Treaty 6 and the Establishment of Reserves*

8. Each of the Claimants are signatories to Treaty No. 6 entered into with the Crown in 1876.

9. During the negotiation of Treaty 6, Treaty Commissioner Lieutenant-Governor Alexander Morris recognized that the “Indians were anxious to make a living by the soil” so he offered more liberal terms with respect to farming and agricultural implements than the previous numbered treaties. This was consistent with the government’s policy to provide the Indians with an alternative economic livelihood to traditional pursuits and to situate bands in areas where they might sell their agricultural produce to nearby non-Indian communities.

10. Between 1879 and 1888 Indian Reserves No. 119, 120, 121, 122 and 123 were surveyed and set apart for five Cree Chiefs which are today comprised of the Onion Lake, Frog Lake, and Kehewin Bands.

11. In 1904, Indian Reserve No. 149 was surveyed and set apart for Chipewyan Chief Kin-oo-say-oo and the Cold Lake Band.

(b) *Development of Agriculture and Cattle Herds*

12. Following the Riel Rebellion of 1885, the Crown introduced a number of coercive measures and punishments of bands, including the Claimants, that were deemed to be “disloyal” to the Crown for their alleged participation in the events of the Rebellion. One such measure was to break up and amalgamate some bands and abolish the tribal system by “doing away with Chiefs & Councillors”.

13. In or about 1885, the Crown implemented a plan that would result in transformation of the Fort Pitt Agency into the Onion Lake Agency, the amalgamation of a number of Cree

Bands and the consolidation and relocation of “industrious” Cree people in the Agency interested in farming onto two reserves at Onion Lake. Those Indians who chose to live by their traditional vocations remained at their reserves with very little support or relief from the federal government. The Chipewyan at Cold Lake were not moved to the Onion Lake reserves and remained on their reserve to pursue agriculture, hunting, fishing and cattle raising.

14. The Indians consolidated at Onion Lake proved particularly adept at raising stock. By November 1889, a group of Indians at Onion Lake utilized a government loan system to acquire cattle and increase their herd to 160 head of cattle. The Chipewyan at Cold Lake were similarly adept at cattle raising and also utilized the loan system to increase their herd to 128 head of cattle. These herds were collectively known as the “Indian Herd.”
15. A separate herd of cattle was established for the benefit of all of the Indians in the Onion Lake Agency, known as the “Agency Herd.” The primary purpose of the Agency Herd was to provide sustenance and employment to Indians in the Agency. The Indians were hired to maintain the herds and were responsible for gathering hay for both the Agency and Indian Herds.
16. The growth of the cattle herds required access to hay for feed. In 1891, it was reported that the Indians assisted an Agency employee to cut and stack 800 tonnes of hay for the Agency Herd which comprised 405 head of cattle, while the Onion Lake Band gathered 600 tonnes of hay for their 324 head of cattle and the Cold Lake Band gathered 400 tonnes of hay for their 210 head of cattle.
17. According to the Annual Report for the Department of Indian Affairs, the following year yielded better results: the Indians produced 968 tonnes of hay for the Agency Herd, Onion Lake harvested 900 tonnes of hay for their herd, and Cold Lake harvested 600 tonnes of hay for their herd.
18. The trend continued in 1893 where it was reported that the Indians produced 1,500 tonnes of hay for the Agency Herd, 1,200 tonnes of hay for the Onion Lake Indian Herd and 600 tonnes of hay for the Cold Lake Indian Herd for a cumulative total of 3,300 tonnes of hay.
19. The success continued. In 1895 it was reported that 1,500 tonnes of hay were produced for 664 head of cattle of the Agency Herd, 1,200 tonnes of hay cut and stacked for the 390 head of cattle in the Onion Lake Indian Herd, and 700 tonnes of hay cut and stacked for the 281 head of cattle in the Cold Lake Indian Herd.
20. Successful cattle raising reaped rewards for the Onion Lake Agency Bands who were largely self-sufficient. By 1895, the Agency Herd was providing all of the beef supply for the Agency in addition to the sale of some cattle. The Onion Lake Indians also sold cattle to purchase agricultural implements and necessities. Cold Lake earned \$6,000 and purchased their own food and clothing, requiring no support from the Indian Agent.
21. Documentary evidence and oral history of Elders from the Claimants corroborate that the lands at “Big Swamp” that would become IR 123A were used by all the Indians in the Onion Lake Agency to graze and winter both the Agency Herd and the Indian Herds, along

with other uses. A shortage of hay in the vicinity of Onion Lake created the necessity for the haylands at Big Swamp to procure hay for the cattle in the Agency, while the Indians at Cold Lake and Kehewin were in closer proximity to the haylands.

(c) *Establishment of “Big Swamp” as Haylands IR 123A*

22. The sheer number of cattle in the Onion Lake Agency necessitated numerous ranches and sufficient hay production to maintain the herds. In 1893, Indian Agent Mann had stables built at Big Swamp, known as “Ranch #3,” located 15 miles north of Kehewin. This location was a bountiful source of water and hay.
23. The process to set aside the Big Swamp as a reserve for “the Indians for hay purposes” began with a request by Indian Agent Mann to the Indian Commissioner in July 1895 to protect the area from encroachment by settlers. In addition to Ranch #3 being situated at Big Swamp, Agent Mann reported that the area could provide hay for over 400 head of cattle.
24. Agent Mann requested that the Big Swamp area be set aside as an Indian reserve. Acting Deputy Superintendent General of Indian Affairs, D.C. Scott, requested a survey to be completed and, in the meantime, he also requested that the Department of the Interior not alienate these lands pending completion of a survey.
25. The Department of the Interior agreed to the request of the Acting Deputy Superintendent of Indian Affairs, and on August 27, 1895 sent instructions to the Dominion Lands Agent to refrain from granting permits to cut hay in the township.
26. In August of 1897, Indian Commissioner Forget instructed Dominion Land Surveyor Ponton to survey the haylands reserve at Big Swamp. Ponton conducted the survey from October 6 to 15, 1897. The plan of survey was submitted to the Department of Indian Affairs Secretary on April 12, 1898. Secretary of Indian Affairs J.D. McLean approved the survey of IR 123A, evidenced by the notation “Approved” on the plan of survey.
27. Dominion Land Surveyor Ponton returned to Big Swamp to connect the “Hay Reserve” to the Dominion Land Survey. This was done to “enable the Department of the Interior to locate it on the map of the North West Territories, before applying for an Order-in-Council.” This final survey of the hay reserve, entitled “Treaty No. 6 N.W.T. Plan of Hay Lands near Moose Lake in the Onion Lake Agency set apart for the Department of Indian Affairs Area 26.5 Sq. Miles” was completed in September 1898. Based upon the table of distances provided on the plan, the area of the reserve was approximately 27.9 square miles, or 17,851 acres.
28. Oral history from the Kehewin First Nation confirms the presence of survey markers with the inscription “IR 123A” having been placed on the boundaries of the reserve. Elder evidence from all the Claimants shows their reliance on IR 123A to support and maintain their thriving cattle industry.
29. In response to a request by the Superintendent General of Indian Affairs in February 1900 for a statement of reserves in Manitoba and the North West Territories, Surveyor Ponton

included the hay reserve in the official “Schedule of Indian Reserves in the Dominion,” ascribing it Reserve 123A.

30. A map of the reserve was produced by Canada describing Reserve 123A on the 1900 Schedule of Indian Reserves, as “Hay Lands for 120 [Makaoo, Onion Lake], 121 [Onee pow o hay, Frog Lake], 122 [Pus ke ah ke he win] and 123 [Ke he win].”

(d) *Indian Affairs Relinquishment of IR 123A*

31. During the period between 1896 and 1911, several surrenders of reserve land were procured from Indian bands on the prairies at the instigation of the Department of Indian Affairs. During this period, the Crown introduced a number of policies and legislative amendments to the *Indian Act* that were designed to encourage and induce Indian Bands on the prairies to surrender some or all of their reserve lands for sale to non-Indian settlers.
32. From 1900 to 1903, IR 123A experienced significant flooding. In 1902, the Department of Indian Affairs, acting on Indian Commissioner Laird’s advice, decided not to drain the reserve despite urgings to do so from the Indian Agent and Secretary J.D. McLean. Indian Commissioner Laird was opposed to the expenditures required to drain the reserve and ultimately wanted to discontinue the cattle herds to accommodate settlement on vacant Crown lands that might otherwise be used for ranching the cattle.
33. The decision to not drain IR 123A had a detrimental impact on the Agency, cattle herds, and on the Indians whose livelihood depended upon them. The Indians could not cut hay on the reserve, and the other option – cutting hay on Crown land around Onion Lake – was increasingly limited by the lack of hay resources and settlers that were taking up lands in the area. This was a problem that had been anticipated by both Department of Indian Affairs Secretary McLean and Indian Agent Sibbald. Their concerns were not acted upon and thereafter the Claimants’ beneficial use of the surface lands were abrogated.
34. The five large winter stables at IR 123A had to be abandoned and the Agency Herd was moved in 1901 to the south side of the river where hay was available. However, this land was not reserved for the Indians, so it was susceptible to settlement. In April 1903, Agent Sibbald wrote Commissioner Laird requesting that the new location of the cattle ranches be reserved for the use of the Agency.
35. The shortage of good haylands had a devastating impact on the Indian Herds. In 1902, Agent Sibbald reported that meat supply for rations had to be purchased and the size of the Agency Herd had been decreased by 20%. In 1903 Agent Sibbald reported that hay production was severely taxed and the Indian Herd at Onion Lake ran a loss of 8%.
36. In 1903, the Department of Indian Affairs began encouraging the Cree Indians it had amalgamated at Onion Lake to return to their reserves at Kehewin and Frog Lake. The Agency Herd was apportioned amongst the Indians. The demand for hay continued, without a designated location to harvest. Increased settlement confined the Indians to relying on their own reserves for hay production which, with the exception of the Kehewin reserve, were deficient in hay resources. Without access to IR 123A, efforts to secure

adequate hay for the herds was a continuing challenge.

37. By 1906, many Band members had returned to their original reserves. The Department of Indian Affairs Annual Report for 1906 reported separately on the Onion Lake Band, the Frog Lake Band, the Kehewin Band and the Cold Lake Band.
38. Soon after the flooding, settlers started to trespass on portions of IR 123A. The first recorded encroachment occurred in 1907 when an adjacent township partially occupied by IR 123A was sub-divided. Indian Secretary J. D. McLean acquiesced to this decision.
39. In response to a settler request for a quarter section of IR 123A in 1908, Department of Indian Affairs Assistant Secretary Stewart advised on October 20, 1908 that the land was not on the market because “this land has not been surrendered by the Indians.”
40. In January 1909, however, the Department of Indian Affairs arbitrarily decided that IR 123A was no longer a reserve. Indian Agent Sibbald reported that the Bands in the Onion Lake Agency would still need haylands to feed their cattle herds. In June 1909, acting Assistant Deputy Superintendent General of Indian Affairs, J.D. McLean, reported the haylands were required by the Indians and squatters should move elsewhere.
41. In June 1910, two homestead entries had been granted on IR 123A. In September 1910, the Department of Indian Affairs stated that it had relinquished the reserve. By September 8, 1911, IR 123A had been reduced from its original 17,851 acres to just 800 acres.
42. On March 24, 1920, Department of Indian Affairs Secretary McLean wrote to Indian Agent Sibbald informing him of the reduction in size of IR 123A, and asking if the remaining lands would be sufficient for the Onion Lake Bands. By 1929, there was only one quarter section of IR 123A that had not been granted to settlers, and the Indian Agent stated that he saw no reason to keep the quarter section as an Indian reserve.
43. On January 9, 1930, the Commissioner of Dominion Lands informed the Department of Indian Affairs that the remaining quarter section of IR 123A was no longer required.

VI. THE BASIS IN LAW ON WHICH THE CROWN IS SAID TO HAVE FAILED TO MEET OR OTHERWISE BREACHED A LAWFUL OBLIGATION

44. Indian Reserve 123A was created as a “reserve” under the 1886 *Indian Act* upon approval of the plan of survey on April 12, 1898. The Crown expressed its intention to set aside the lands for the Claimants, the lands had been surveyed and set apart by the Crown as an Indian reserve, and the lands were used by the Claimants and were essential to support its agricultural livelihood and growing cattle herds.
45. The following summarizes the evidence illustrating the creation of IR 123A as a reserve within the meaning of the *Indian Act*:
 - (a) the initiating request to reserve the subject lands for the use and benefit of the Indians of the Onion Lake Agency by Deputy Superintendent of Indian Affairs, D.C. Scott to the Department of Interior on July 29, 1895;

- (b) the request by D.C. Scott to Deputy Minister of the Interior, John Hall on August 23, 1895 to protect the proposed reserve land from third party interests pending the survey;
 - (c) the request by Secretary J.D. McLean to the Secretary, Department of Interior on October 24, 1899 to protect the surveyed reserve land from third party interests;
 - (d) Deputy Superintendent General, D.C. Scott and Secretary of Indian Affairs, J.D. MacLean had sufficient authority to bind the Crown by virtue of holding senior positions within the Department of Indian Affairs with delegated authority to make decisions on behalf of their Department;
 - (e) The Crown took positive steps to set apart the land as IR 123A for the use and benefit of the Bands of the Onion Lake Agency;
 - (f) instructions to survey the proposed reserve issued by Indian Commissioner A.E. Forget to A.W. Ponton on August 4, 1897;
 - (g) survey field work conducted between October 6, 1897 and October 15, 1897;
 - (h) plan of survey submitted by A.W. Ponton to Indian Secretary J.D. McLean on April 12, 1898;
 - (i) approval of the plan of survey and affirmation of reserve creation by J.D. McLean, effective April 12, 1898;
 - (j) transmission of plan of survey of Haylands IR 123A to the Department of Interior, along with instructions to secure surveyed reserve land from third party interests by J.D. McLean to Department of Interior on October 24, 1899;
 - (k) compliance by the Department of Interior to secure the hay reserve through the issuance of instructions to the local land agent on November 20, 1899 giving the Department of Indian Affairs effective control of the reserve lands
 - (l) The Bands of the Onion Lake Agency and the Crown accepted IR 123A as a reserve for the use and benefit of the Indians of the Onion Lake Agency;
 - (m) the hay reserve was used for cattle grazing and hay production both before and after the survey of IR 123A, providing over 2000 tonnes of hay annually, feeding over 1794 cattle in the agency in and around 1900;
 - (n) designation of the hay reserve as IR 123A in 1900;
 - (o) Dominion maps produced that depicted Haylands IR 123A in 1904, 1907 and 1908;
 - (p) Department of Indian Affairs control over IR 123A at all material times after the reserve creation on April 12, 1898;
 - (q) Oral history from all Claimant First Nations regarding their extensive use and reliance upon IR 123A for the maintenance of their cattle.
46. An Order in Council is not a requirement to create a reserve. Once the criteria described above are met — Crown intention, survey of the lands, and band use — a reserve interest in the lands is created. The conduct of the Crown's agents represents affirmative acceptance of Haylands IR 123A as an Indian reserve for hay purposes.

47. IR 123A was never validly surrendered by the Claimants or taken under other valid legal authority. In the absence of a lawful alienation by way of a surrender, the taking of IR 123A was invalid and contrary to express provisions of the *Indian Act*.
48. The Crown breached its statutory, fiduciary and honourable obligations when it alienated the entire reserve between 1904 and 1930. The Crown did not seek a surrender pursuant to the *Indian Act*, and the Crown breached its fiduciary obligation to protect and preserve the reserve lands from exploitation. In particular, the Crown itself was the exploiting party. The illegal alienation of the reserve lands was also in breach of the Crown's honourable obligations.
49. In and around the township subdivision of the IR 123A lands in 1908, the persistent requests of other interests to acquire the reserve lands resulted in the Crown issuance of letters patent over the entirety of IR 123A over the subsequent decades.
50. The Crown breached its statutory, fiduciary, and honourable obligations to the Claimants when it issued letters patent to the lands comprising IR 123A but not preserving the Claimants beneficial interest in their sub-surface rights, including mines and minerals.
4951. In the alternative, if the Crown establishes that IR 123A was not a reserve in 1898, the Crown breached its fiduciary and honourable duties when it failed to protect the Claimants' "cognizable interest" in the IR 123A lands.
5052. The Crown also failed to inform and consult the Claimants that IR 123A would not be set aside, and unilaterally disposed of the entire lands to third parties without the consent of the Bands or payment of compensation for the unlawful alienation of the IR 123A. The result was the collapse of the Claimants' expanding cattle raising industry.
5153. The Crown failed to act in accordance with the honour of the Crown in surveying and setting apart IR 123A for the exclusive use and benefit of the Claimant Bands, starting from 1898 onward, when it allowed and authorized the alienation of the reserve lands.

VII. RELIEF SOUGHT

5254. Each Claimant seeks the following relief:
- (a) A determination that Canada breached its statutory, fiduciary, and honourable obligations to the Claimants when it unlawfully alienated and disposed of the surface interest in the IR 123A lands (17,851 acres) in breach of its statutory, fiduciary, and honourable obligation in favour of others to the exclusion and prejudice of the Claimants, who held beneficial interests to IR 123A;
- (b) A determination that Canada breached its statutory, fiduciary, and honourable obligations to the Claimants when it issued letters patent to the lands comprising IR 123A, which failed to reserve the sub-surface rights and constituted an unlawful taking of an interest in land held by Canada for the exclusive use and benefit of the Claimants.

- (c) Damages and equitable compensation based on the current unimproved market value of the 17,851 acres comprising the former IR 123A plus loss of use from the date of 1903~~1~~ to the date of judgment;
- (d) Damages and equitable compensation based on the current unimproved market value of the subsurface rights underlying the 17,851 acres formerly comprising the IR 123A lands plus loss of use from 1908 to the date of judgment;
- (e) Costs to be awarded on a solicitor-client or substantial indemnity basis pursuant to the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, section 110(2) in relation to the specific claim and this proceeding; and
- (d) Such other relief as this Honourable Tribunal deems just.

Original Declaration of Claim filed on the ~~Dated this~~ 23rd day of September, 2020, at the City of Calgary in the Province of Alberta.

Amended Declaration of Claim filed March 31, 2021, at the City of Calgary in the Province of Alberta.

MAURICE LAW



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