

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

ESK'ETEMC FIRST NATION

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| SPECIFIC CLAIMS TRIBUNAL | | |
| TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES | | |
| F I L E D | August 23, 2017 | D E P O S E |
| David Burnside | | |
| Ottawa, ON | 1 | |

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*.

August 23, 2017

David Burnside

(Registry Officer)

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I. Claimant (R. 41(a))

1. The Claimant, ESK'ETEMC FIRST NATION ("Esk'etemc"), previously known as the Alkali Lake Indian Band, 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 the *Indian Act*, R.S.C. 1985, c. I-5, as amended, in the Province of British Columbia.

II. Conditions Precedent (R. 41(e))

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

(d) three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister's decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.

3. Esk'etemc initially filed this claim with the Minister in or about October, 2008 in respect of breaches by Canada relating to the failure to secure and protect water records, water rights and water works such as a dam and irrigation ditch with respect to Wycott's Flat Indian Reserve #6 ("IR 6") ("Claim").
4. On September 13, 2011, Patrick Borbey, Senior Assistant Deputy Minister, Treaties and Aboriginal Government, wrote to Esk'etemc stating that "it is Canada's position that this claim does not disclose an outstanding lawful obligation".

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

5. Esk'etemc does not seek compensation in excess of \$150 million for the purposes of the Claim.

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

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

(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; and

(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.

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

7. Indian Reserve Commissioner Peter O’Reilly allotted IR 6 pursuant to a Minute of Decision dated July 16, 1881. IR 6 consists of 1100 acres on the Fraser River Plateau region that receives less than 30 cm. of precipitation a year. In addition to the land O’Reilly allotted “[a]ll the water flowing out of Harper’s Lake ...for the use of the Indians”.

8. O’Reilly stated that “some 250 acres is good level land, and capable of being converted into a valuable farm, should it be found possible to bring in a supply of water, a work which the Indians are most anxious to undertake; with this object in view I have reserved the entire body of water known as ‘Harper’s Lake’ about 4 ½ miles east of the reserve, and at an altitude of at least 1000 feet above the flat”.

9. The importance of increasing the amount of cultivatable land for the Esk’etemc was recognized by O’Reilly, he stated:

When it is remembered that these Indians possess, as previously stated, less than 100 acres of cultivatable land, it will be seen how important it is to assist them in this undertaking; and I am of opinion that a survey should be made by a competent Engineer, and if found feasible, that the Government should further assist by furnishing the tools, a superintendent of the work, and possibly a sawyer, the Indians

finding the labor. I have estimated that the whole work, including a small dam at outlet of the lake, should be completed within two months at a cost to the Government of say \$750 to \$1000.

These Indian appear to be industrious and have shewn a desire to cultivate every possible acre of land. They have assured me that they will supply all the labor necessary to carry out the above undertaking, and **I think it would be more desirable to assist them in this way, than by purchasing a farm for them.**
[Emphasis added]

10. On May 27, 1881, William W. Wycott registers a Water Record #86 on Harper's Lake which is for 300 inches for irrigation of the "Fraser River banks" which later became known as the Wycott Flats. The record is signed by F. Soues, Assistant Commissioner, Lands and Works ("CLW Soues") and he advises O'Reilly of this and states that there should be enough water for both Wycott and IR 6. William Wycott never did pre-empt Wycott Flats and was therefore not entitled to retain Water Record #86. An undated notation written in red across the original record on the register signed by CLW Soues states "Cancelled and this water given to the Alkali Lake Indians by Indian Reserve Commr O'Reilly" after being advised by O'Reilly to do so on August 11, 1881.
11. Soon after the allotment of IR 6 in 1881, O'Reilly recommends Mr. William Laing Meason ("Meason") to superintend the building of the dam due to his expertise in this area. In 1883 Meason becomes the Indian Agent for the Williams Lake Agency and in November of that year Dominion Land Surveyor W.S. Jemmett ("Jemmett") reported on the proposed irrigation works and stated that he had surveyed the "ditch line from Harper's Lake to the Reserve". Jemmett's Plan of Survey also showed a proposed dam at the south end of Harpers Lake.
12. On August 25, 1884 Meason reports to the Superintendent General of Indian Affairs:

This water has to be taken from the spring overflow of a lake, and this must be retained by a dam about fifty-one yards long and four feet high. Dam building is a trade which few understand, and this the Indians are aware of; and they are unwilling to dig such a long ditch, about four miles, until a dam is built by some competent person, and has proved to be solid by resisting one spring freshet. They are most willing to supply the labor. ... A sum of \$500 would, I think, be sufficient to pay the wages of a competent man to undertake this, and to buy all the tools necessary....

13. The *Land Act, 1884* prevented First Nations from the right to record land and water by excluding Indians from the defined classes of persons to which the Act applied unless by special order of Lieutenant-Governor in Council. A special order was not sought by Canada on behalf of the Esk'eteme.
14. The *Land Act, 1888* was amended in 1888 allowing water rights to Indians. On February 23, 1891, in accordance with legislation and the authority of the Chief Commissioner of Lands and Works, Meason records Water Record #142A for the use and benefit of the Esk'eteme for irrigation purposes for a term of ninety years. The record reads:
 2. ALKALI LAKE RESERVE. The right to construct a dam at the outlet of Harper's Lake on Dog Creek Mountain, and the right to the water retained by said dam, to be conveyed by means of a ditch already surveyed, to the Reserve known as Wycott Flat.
15. No action was taken by either Meason or the Department of Indian Affairs ("DIA") from the time O'Reilly allotted IR 6 and 1893 when Indian Agent Gomer Johns succeeded Meason as Indian Agent for this area. On October 26, 1893 Chief August appealed to Indian Superintendent Vowel to resolve the water problem and described the conflict with white ranchers including former Indian Agent Meason.
16. Meason and his family owned a lot of land in the area of IR 6 which meant that he was also competing for water interests in this area to irrigate his own ranch lands. In fact, one month prior to the allotment of IR 6 Meason recorded a Water Record #88 for his ranch at Little Dog Creek. This water record was for 100 inches from Newman's Creek to be diverted into Little Dog Creek. Newman's Creek feeds into Harper's Lake at the opposite end to where the dam and irrigation ditch were proposed to be built.
17. Meason and his family purchased further lands between Harper's Lake and IR 6 in the years 1893 to 1910. Specifically, on May 6, 1895, a Certificate of Pre-emption is issued to William Meason, Jr. ("Meason Jr.") and the lot is surveyed as Lot 262, which is located just outside where the proposed dam on Harper's Lake is to be built.

18. On November 3, 1896 Meason Jr. records 100 inches of water from Harper's Lake for use on Lot 262 (Water Record # 187). The water "is to be diverted from the water which runs through his Pre-emption in the early summer from melting snow, and used for the purposes of irrigation on the above named Pre-emption for a term of 99 years".

19. On August 18, 1897 Indian Agent Bell ("Bell") informs Indian Superintendent Vowell of the water records that were recorded by Meason in 1891 for IR 6 as follows:

Alkalai Lake Reserve

It is impossible to state the amount of water recorded presumably the whole of the water retained by the dam mentioned but my information is that the lake is tapped at the other end or from where the proposed dam was to be and that no water has ever reached Wycott Flat.

Alkalai Lake Reserve

The right to the water retained by a dam on Harper's Lake for the Wycott's Flat. This is of no value whatever as the lake is tapped at the other end and the water diverted to Capt. Measons [sic] at Little Dog Creek.

20. Between 1897 and 1909 Chief Samson and his men spend two years building an irrigation ditch. Harper's Lake runs dry and Indian Agent Bell advises them to stop.

21. In 1914 Chief Samson of the Esk'etemic testifies before the Royal Commission that:

We have tried to get water down for that flat. I worked on it for two years; me and my men. Where we were getting the water it was a small lake but it went dry and Mr. Bell told us to let it alone. The lake ran dry when we were building the ditch.

22. Chief Samson also informs the Royal Commission that in winter the Esk'etemic ranges up to 100 horses on IR 6 but "by spring there is not one speck of grass left". He states that because of the failure to bring water from Harper's Lake, the only possible way to get water on to IR 6 is by taking it from the Fraser River. As a result of Chief Samson's testimony, the Royal Commission recommends the cut off of IR 6 on February 28, 1916.

23. A Board of Investigation is established pursuant to the Provincial *Water Act* of 1909 to examine all water records, fix priority dates and cancel old records. At their hearing the Measons make the following statement to the Board:

This property [Lot 262] now belongs to us and we use said water. This water is stored about ½ mile below Indian Reserve and taken from Harper Lake (same lake as the Indians take 100 inches from).

24. In 1918 the Board of Investigation reviews the water rights appurtenant to the Indian Reserves. Water Power Branch Engineer A.M. Phillips (“Phillips”) is responsible for the Williams Lake Agency. In a letter dated June 13, 1920 Indian Agent Daunt (“Daunt”) advises the Secretary of Indian Affairs in Ottawa that the Chief at Alkali Lake “had directed my attention to the possibility of getting water upon the land in question, and expressed the hope that something might be done sooner or later to have this effected”. Daunt continues:

From a cursory examination of the land in question it would appear to be quite possible to irrigate between 200 and 300 acres, by means of a ditch from Dog Creek, and if this was done it would be by far the most valuable portion of the lands of this tribe. The Flat is situated upon a Fraser River Bench at a far lower altitude than any of the other Reserves and would be capable of raising many products which cannot be grown upon the higher parts of the Reserve.

It is of course impossible to report fully as to costs, etc., without a regular survey of the proposition, but the whole water question of this Agency is receiving attention during this summer by Mr. Phillips of the Hydrometric Survey, and the object of this letter is to request that if it is at all possible any contemplated relinquishment of the lands in question may be held over, pending his survey and report.

25. Ditchburn requests Phillips to prepare a report on IR 6 and on November 20, 1920 Phillips advises that he is unable to thoroughly look into it until next season and asks that the if it all possible “to stay the cut-off proceedings with regard to this piece of land”. On October 8, 1921, Phillips completes a plan of a proposed survey ditch from Dog Creek to IR 6.
26. Mr. Balls, who is the Senior Assistant Engineer (“Engineer Balls”), prepares a report entitled “Water Records Appurtenant to British Columbia Indian Reserves, Report No. 5 Williams Lake Agency dated April 11, 1922 (the “Report”). The Report assesses the current water supply as follows:

Indians state that Harper’s Lake was at one time more than double its present area, but that the only creek flowing into the lake was diverted some twenty years ago by Mr. Meason, who owned then the Holden Ranch, into Little Dog Creek to supply a portion of his Ranch. The alleged point of diversion was inspected and indications

of this having been done are quite evident, and inquiry from other local residents confirm the Indians' statement. In addition to this diversion an offtake ditch from Harper's Lake has been dug more recently to irrigate another portion of the Holden Ranch. This ditch was also inspected and found to be below the normal level of the lake, at the foot of which a log-earth fill dam has been built. Apparently the Indian Record has never been recognized by the successive owners of the Holden Ranch, although the Indians endeavoured to make use of the record by digging a ditch.

While **the Indians' right to storage in this lake should be maintained** inspection of the water shed proved that it would not in any event afford sufficient water for the total irrigable area on Wycott's Flat and the supply would require to be augmented by a ditch from Dog Creek with additional storage provided at its source in Big Lake, where a small dam already exists. [Emphasis added.]

The Report also states that IR 6 "contains very valuable land, suitable for growing vegetables and fruit as well as ordinary crops" and that 637 acres are irrigable. There is also reference to a special report prepared by Phillips dated October 25, 1921 that outlines the proposed works for constructing a ditch from Dog Creek to IR 6.

27. Of import is the reference in the Report to Dog Creek IR #2 which states that:

The area of irrigable land on this reserve would by itself, hardly warrant the expense of a ditch from Dog Creek, for which a rough reconnaissance was made, but in conjunction with adjoining lots westward, a ditch could be built economically for all parties concerned. This project would also have a bearing on proposed storage in Dog Creek for Dog Creek Indian Reserve No. 4 and Alkali Lake I.R. No. 6.

Water records are filed for IR #2 but not for IR 6.

28. The Board of Investigation confirms Water Record #142A but it is officially abandoned on November 23, 1925 by Ditchburn. In later years there are numerous opportunities to obtain water rights in the area to irrigate IR 6.
29. In 1931, Lot 262 reverts to the Crown which had a Conditional Licence for 100 inches for irrigation attached to it. Later in 1935 the new owner of Lot 262 acquired water rights for 100 acre feet of diversion for irrigation and 100 acre feet of storage for irrigation. Between 1931 and 1933 the entire Meason Ranch reverted to Provincial Crown land. Despite this, the Crown did nothing to acquire the water rights attached to Meason Ranch where were abandoned due to the reversion which could have been utilized to benefit IR 6.

30. The watershed for Harper's Lake was variable from year to year. The name of Harper's Lake changed to Green Lake and in later years to Vert Lake. The Engineers Report for the Final Licences were issued 1939 to the new owner of Lot 262 state that "Green Lake watershed is limited" and that "the lake is holding only 2.5 feet of storage" but by 1943 the storage on Harpers/Green Lake increased to 276 acre feet.
31. In 1943 the Dog Creek Airport located only a mile away from IR 6 required water. In 1944 while digging a well an underground creek is located that is supplied by Vert Creek, a tributary of Vert Lake. The Department of Transport applies for and receives a Conditional Licence # 15940 for 15,000 gallons of water per day, which evidently was in excess of their requirements. They held this record until 1961.
32. An Engineers Report of the Water Management Branch dated 1972 states that the construction of a dam on Vert Lake has increased the storage to 1068 acre feet. Conditional Licences are issued for 1000 acre feet on Harpers Creek and Vert Lake for irrigation of ranch land that is now held by the James Cattle Company. By 1973 the James Cattle Company holds all the water licences on the Vert Lake watershed.

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

33. This claim is based on the Crown's breach of the *Indian Act* and of the Crown's fiduciary obligations at common law relating to the failure to secure adequate water for irrigation of IR 6 thereby denying the opportunity to cultivate much of Wycott's Flat when this was allotted in lieu of other farm land.
34. Without limiting the foregoing, Canada failed to:
 - a. complete the irrigation works;
 - b. to enforce the assignment of Water Record 86 from W. Wycott to Esk'etenc by failing to obtain a special order of the Lieutenant-Governor in Council;

- c. construct a dam on Harper's Lake to allow Esk'etemc's right to utilize Water Record 142A and subsequent failure to retain Water Record 142A through the Board of Investigation;
- d. to verify that only 100 inches of water were diverted from Newman's Creek pursuant to Water Record 88;
- e. to verify that water was not utilized pursuant to Water Record #87 in priority to Esk'etemc's Water Record #142A;
- f. to obtain water rights on Dog Creek for irrigation; and
- g. to secure additional water rights for IR 6.

Dated this 23rd day of August, 2017


Stan H. Ashcroft

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