Form 2

SCT File No.: SCT-7003-17

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

ESK'ETEMC 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: ESK'ETEMC FIRST NATION
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Overview

1. The Esk'etemc First Nation alleges, among other things, that the Crown breached fiduciary and other legal duties to them by failing to secure and protect water records, water rights and water works such as a dam and irrigation ditch with respect to one of their reserves. The Crown acknowledges that in 1881 the Indian Reserve Commission allotted approximately 1,000 acres on the left bank of the Fraser River as a reserve for the First Nation. At that time, the Commission recognized that water from a nearby source would be necessary for the First Nation to irrigate and cultivate the reserve. As such, the Commission reserved all the water flowing out of a nearby lake for the use of the First Nation. From 1881 to 1925, there were numerous discussions, investigations and surveys regarding getting water to the reserve, however, getting water onto the reserve did not come to fruition. Further, although in 1891, a Provincial Water Record was granted in favour of the First Nation, the interest granted was not realized and the Record was abandoned in 1925. What is to be determined in these proceedings is whether the discussions, proposals and recommendations regarding water for this reserve amounted to a legal obligation to secure, protect or provide water rights or interests on behalf of the First Nation or an obligation to construct water works to bring water to this reserve.

2. Canada is obligated to respond to this claim according to the Specific Claims Tribunal Rules of Practice and Procedure (SOR/2011-119) and consistent with the duties and functions of the Crown in right of Canada in the conduct of litigation. In accordance with the preamble of the *Specific Claims Tribunal Act* (S.C. 2008, c. 22) Canada agrees that resolving specific claims will promote reconciliation between First Nations and the Crown and the development and self-sufficiency of First Nations. The Government of Canada recognizes that reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships. 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. Canada must work in other contexts beyond pleadings to achieve the fulfilment of those commitments.

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

3. The Esk'etemc First Nation, previously known as the Alkali Lake Indian Band (the "First Nation"), submitted a claim to the Minister of Indian and Northern Affairs Canada (later known as the Minister of Aboriginal Affairs and Northern Development) in February 2003 alleging, among other things, that the Queen in Right of Canada (the "Crown") breached fiduciary and other legal duties to the First Nation by failing to secure and protect water records, water rights and water works such as a dam and irrigation ditch with respect to Indian Reserve Number 6 ("IR 6") at Wycott's Flat (the "Specific Claim"). After the *Specific Claims Tribunal Act* came into force, the Claim was deemed to have been filed with the Minister on October 16, 2008.

4. On September 13, 2011, the First Nation was notified of the Minister's decision not to accept the Specific Claim for negotiation.

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

5. The Crown does not accept the validity of any of the claims set out in the Declaration of Claim, including those in paragraphs 6, 33 and 34, and in particular:

    a. 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; or

    b. 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;

or that the Crown failed to:

c. 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;
d. complete the irrigation works;
e. enforce the assignment of Water Record Number 86 ("WR 86") from William Wycott ("Wycott") to the First Nation by failing to obtain a special order of the Lieutenant-Governor in Council;
f. construct a dam on Harper's Lake to allow the First Nation's right to utilize Water Record Number 142A ("WR 142A") and subsequent failure to retain WR 142A through the Board of Investigation;
g. verify that only 100 inches of water were diverted from Newman's Creek pursuant to Water Record Number 88 ("WR 88");
h. verify that water was not utilized pursuant to Water Record No 87 (as noted in paragraph 34 (e)) or Water Record No 187 ("WR 187") (as indicated in other paragraphs of the Declaration of Claim) in priority to WR 142A;
i. obtain water rights on Dog Creek for irrigation; and
j. secure additional water rights for IR 6.

6. The Crown does not accept the validity of the claim that the First Nation has suffered any loss and the Crown further denies that it owes the First Nation any compensation.

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

7. The Crown admits the facts in the Declaration of Claim, paragraphs 1, 4, 12, 14, and 19.

8. The Crown has no knowledge of the facts set out in paragraphs 5 and 32 of the Declaration of Claim.

9. In reply to paragraph 2 of the Declaration of Claim, the Minister did not accept the First Nation's Claim, accordingly the applicable condition precedent is s.16(1)(a) of the *Specific Claims Tribunal Act*.

10. In reply to paragraph 4 of the Declaration of Claim, the fact that the Senior Assistant Deputy Minister, Treaties and Aboriginal Government, notified the First Nation in writing of his decision not to accept the claim for negotiation is admitted in paragraph 7 above. Beyond the fact of rejection, the contents of the letter of September 13, 2011 are irrelevant to this proceeding. If they are relevant to a matter in issue, then Canada asserts that the contents of the letter are subject to settlement privilege.

11. In reply to paragraph 7 of the Declaration of Claim, the Crown admits that pursuant to a Minute of Decision, Indian Reserve Commissioner Peter O'Reilly ("O'Reilly") allotted IR 6 for the First Nation and that O'Reilly reserved "[a]ll the water flowing out of Harper's Lake…for the use of the Indians". The Crown says that the Minute of Decision is dated July 15, 1881 and notes that IR 6 contains approximately 1,000 acres on the left bank of the Fraser River. The Crown has no knowledge of the amount of precipitation IR 6 historically received up to the year 1881 or during the times material to this Claim.

12. In reply to paragraphs 8 and 9 of the Declaration of Claim, the Crown admits that the quoted statements were made by O'Reilly, which the Crown says were

contained in a letter from O'Reilly to the Superintendent General of Indian Affairs, dated November 28, 1881.

13. In reply to the first sentence of paragraph 10 of the Declaration of Claim, the Crown admits that Wycott recorded water rights on Harper's Lake as set out in WR 86, which was registered on May 27, 1881.

14. In reply to the second sentence of paragraph 10 of the Declaration of Claim, the Crown admits that WR 86 was signed by F. Soues, Assistant Commissioner, Lands and Works ("Soues"), that Soues informed O'Reilly of the previously recorded WR 86 and that he indicated there should be enough water for both Wycott and the First Nation. The Crown further states that Soues informed O'Reilly of WR 86 on July 16, 1881 and that on July 17, 1881, O'Reilly wrote to Soues, challenging the validity of Wycott's WR 86 and referred Soues to Section 48 of the *Land Act, 1875* which provided a landholder's right to record water was based upon his lawful occupation and *bona fide* cultivation of the land.

15. In reply to the third sentence of paragraph 10 of the Declaration of Claim, the Crown says the sentence is argument rather than a fact and therefore should not have been included in the Declaration of Claim.

16. In reply to the fourth sentence of paragraph 10, the Crown admits that on August 11, 1881, O'Reilly wrote to Soues, requesting Soues to inform Wycott that his water record was void. The Crown states that the notation written across WR 86 on the register signed by Soues indicating that it was "Cancelled and this water given to the Alkali Lake Indians by Reserve Commr O'Reilly" is undated and thus the Crown has no knowledge as to when the notation was written or the reason why it was so written.

17. In reply to paragraph 11 of the Declaration of Claim, the Crown admits that in 1883, William L. Meason ("Meason") became the Indian Agent for the Williams Lake Agency, that in November of that year, Dominion Surveyor W.S. Jemmett

("Jemmett") reported to the Superintendent General of Indian Affairs that he had surveyed the "Alkali Lake Indian Reserve at Wycott Flat, and also ran a ditch line from Harper's Lake to the Reserve" and that a Plan of Survey with the heading "No 6 Wycott Flat Alkali Lake Indians" showed a proposed dam at the south end of Harper's Lake. The Crown states that on November 28, 1881, O'Reilly reported to the Superintendent General of Indian Affairs that Meason stated he had considerable experience in the construction of mining ditches and that he would be willing to undertake the superintendence of the work.

18. In reply to paragraph 13 of the Declaration of Claim, the Crown admits that the *Land Act, 1884* only permitted persons who were farmers (landholders who were occupying and *bona fide* cultivating land) and miners to record a water right unless they were lawfully entitled to hold land under any former Act, Ordinance, or Proclamation. The Crown further admits that a special order from the Lieutenant-Governor in Council could be obtained providing a First Nation with permission to pre-empt land and that no such order was applied for or obtained by the federal government on behalf of the First Nation or by the First Nation itself with respect to IR 6.

19. In reply to paragraph 15 of the Declaration of Claim, the Crown admits that on October 26, 1893, Chief August wrote to Indian Superintendent Vowell regarding the lack of water on "the biggest and best piece of land" the Government gave to the First Nation and conflicts with a William Wright and Meason. The Crown says that the first sentence of paragraph 15 lacks sufficient particulars about the alleged inaction of Meason or the Department of Indian Affairs (the "DIA") from the time O'Reilly allotted IR 6 and 1893, such that the Crown can neither admit nor deny the allegations.

20. In reply to paragraph 16 of the Declaration of Claim, the Crown admits that Meason and his family owned land in the area of IR 6; that on June 14, 1881, Meason recorded WR 88 for his farm at Little Dog Creek; that the water record

was for 100 inches from Newman's Creek to be diverted into Little Dog Creek; and that Newman's Creek flowed into Harper's Lake. The Crown states that the allegation that Meason was competing for water interests in the area to irrigate his own ranch lands is an argument, rather than a fact, and therefore should not have been included in the Declaration of Claim.

21. In reply to paragraph 17 of the Declaration of Claim, the Crown admits that Meason and his family purchased further lands between Harper's Lake and IR 6 in the years 1893 to 1910 and that on May 6, 1895, a Certificate of Pre-emption was issued to William Meason Jr. and the lot was surveyed as Lot 262. The Crown states that the other facts in paragraph 17 are lacking sufficient specificity for the Crown to form a response.

22. In reply to paragraph 18, the Crown admits that on November 3, 1896, William Meason Jr. was granted water rights through WR 187, for 100 inches of water for use on Lot 262 and that 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 ninety nine years."

23. In reply to paragraphs 20, 21 and 22 of the Declaration of Claim, the Crown states that on September 24, 1912, an agreement (referred to as the McKenna-McBride Agreement) was signed by officials representing the Dominion of Canada and the Province of British Columbia. 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..." in British Columbia and included the power to recommend reserve allotments and cut-offs (the "Royal Commission").

24. In further reply to paragraphs 20, 21 and 22 of the Declaration of Claim, the Crown admits that on July 10, 1914, Chief Samson of the First Nation testified before the Royal Commission that: in winter the First Nation ranges 100 horses on

IR 6 and "there has not been one speck of grass left there in the spring"; "the only possible way" to get water on to IR 6 is by taking it from the Fraser River; and he and his men spent two years building an irrigation ditch. The Crown has no knowledge of the alleged building taking place or the years when it was allegedly undertaken or of any Indian Agent allegedly directing that such digging be stopped. The Crown admits that the Royal Commission recommended the cut off of IR 6 on February 28, 1916.

25. In reply to paragraph 23 of the Declaration of Claim, the Crown admits that a Provincial Board of Investigation ("PBI") was established pursuant to the *Water Act* of 1909 to review existing water rights and order the issue of water licences. The Crown admits the Board of Investigation Minutes contain the statement of Malcom Meason as outlined in paragraph 23. The Crown states that this statement was made on September 22, 1910, when the PBI met with landowners in the Alkali Lake area. The Crown further states that the Board of Investigation Minutes note that the PBI ordered licences to be issued to the Measons.

26. In reply to paragraph 24 of the Declaration of Claim, the Crown admits that in 1918 the PBI began the task of reviewing existing water records for Indian Reserves and that Assistant Engineer A.M. Phillips ("Phillips") was responsible for the investigation of water rights for the Williams Lake Agency. The Crown further admits that Indian Agent Daunt's letter of June 13, 1920, to Department of Indian Affairs Assistant Deputy and Secretary contained the quotes as outlined in paragraph 24 of the Declaration of Claim.

27. In reply to paragraph 25 of the Declaration of Claim, the Crown admits that on November 17, 1920, Chief Inspector W.E. Ditchburn ("Ditchburn") wrote a letter to Phillips regarding the Royal Commission's recommendations with respect to IR 6. The Crown states Ditchburn advised that the Royal Commission recommended IR 6 be cut off in view of the fact that "the chief of the Alkali Lake Band said it

was impossible to get any water on to the reserve except by pumping it up from the Fraser River."

28. In further reply to paragraph 25 of the Declaration of Claim, the Crown states that Ditchburn also advised that Indian Agent Ogden ("Ogden") in his evidence before the Royal Commission made the same statement and testified that the pumping "would be out of the question." In addition, the Crown states that Ditchburn wrote in the letter that he would like to hear from Phillips "at your earliest convenience as to whether you looked into the possibility of obtaining sufficient water for the reserve under question and whether you have as yet made a report on the matter, and if so, I would like to have an outline of same, for if it can be shown that water can be put on this reserve at a reasonable cost it is my intention to endeavor to have the cut off disallowed."

29. In further reply to paragraph 25 of the Declaration of Claim, the Crown admits that on November 20, 1920, Phillips wrote to Ditchburn that he was unable to thoroughly look at the matter until the next season owing "to the appropriation not being sufficient to cover both the Water Rights Investigations and the large number of irrigation problems awaiting solution, I had instructions from Mr. Swan to confine the season's work to the Water Rights investigations…". The Crown states that Phillips advised that the Chief of the First Nation claimed that it was possible to obtain water on IR 6 by a ditch from Dog Creek and that there should be an effort to retain the land until "a survey can be made to ascertain whether it is possible or not to obtain water from Dog Creek for this reserve" and that "…(i)n this case while the cost of a ditch would undoubtedly be high, the productivity would have to be considered as well, comparing with established returns from similar land at Pavilion, Fountain, Lillooet, etc.". The Crown admits that a plan for a proposed ditch from Dog Creek to IR 6 was dated October 8, 1921.

30. In further reply to paragraph 25 of the Declaration of Claim, the Crown states that on November 17, 1920, Ditchburn also wrote to Daunt, advising Daunt that he was

"now engaged in the work of dealing with the Report of the Royal Commission of Indian Affairs and negotiations are taking place between Major Clarke, representing the Provincial Government, and myself in an endeavor to have the Indian Reserve question in British Columbia settled once and for all as provided for in the McKenna-McBride Agreement of 1912..." and that with reference to IR 6, he would like Daunt to give him "the latest information you have on this matter as to whether there is any possibility of water being obtained for irrigation of a certain portion of this land in order that I may be in a position to place before the Provincial representative an intelligent objection if the reserve is desired to be retained."

31. In reply to paragraph 26 of the Declaration of Claim, the Crown admits that on April 11, 1922, the Dominion Water Power Branch finalized its *Water Rights and Field Report, Williams Lake Agency* and that the quoted statements made in paragraph 26 of the Declaration of Claim are contained in the report (the "1922 Water Report"). The Crown further admits that there is reference in the report to "proposed works dealt with in special report, dated October 25, 1921" by Phillips. However, the Crown states that the 1922 Water Report does not make a recommendation regarding application for water rights on Dog Creek on behalf of the First Nation, but rather states that the "proposed works" are dealt with in Phillips' special report dated October 25, 1921. The Crown has no knowledge of the contents of the special report, in particular what recommendations, if any, Phillips made respecting water rights on Dog Creek.

32. In reply to paragraph 27 of the Declaration of Claim, the Crown admits that the 1922 Water Report contained the quote as indicated regarding Dog Creek IR #2 and that a Final Licence was obtained for Dog Creek IR #2 in the year 1934. The Crown also admits that water rights on Dog Creek were not sought by the DIA for Dog Creek Indian Reserve No. 4 or IR 6.

33. In reply to paragraph 28 of the Declaration of Claim, the Crown admits that WR 142A was abandoned in 1925. The Crown further states the recommendations by Crown authorities to abandon WR 142A occurred according to procedures in place at that time and following investigations and assessments of the viability of providing water to IR6. The Crown has no knowledge of the alleged numerous opportunities in later years to obtain water rights in the area to irrigate IR6.

34. In reply to paragraph 29 of the Declaration of Claim, the Crown admits that on April 17, 1935, G. Nelles Stacey acquired water rights for diversion of 100 acre feet and 100 acre feet of storage of water for irrigation from Green Lake for Lot 262. The Crown has no knowledge of the other facts in paragraph 29.

35. In reply to paragraph 30 of the Declaration of Claim, the Crown admits that the name of Harper's Lake changed to Green Lake and in later years to Vert Lake. The Crown has no knowledge of the other facts in paragraph 30.

36. In reply to paragraph 31, the Crown admits that in 1944, the Department of Transport received Final Licence #0151799 for 15,000 gallons of water per day from Newman Creek for Lot 429. The Crown has no knowledge of the other facts in paragraph 31.

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

History of Water Rights in British Columbia

37. In addition to the foregoing, the Crown sets out the following facts that are related to the Specific Claim.

38. Prior to 1871, the Colonial Government of British Columbia did not have any articulated policy with respect to water rights appurtenant to Reserves. The *Gold Fields' Act*, 1859 was the first legislation which dealt with the right to use water,

which set out the rules and regulations for reserving water by miners, but did not record the same in conjunction with "Indians" or Reserves.

39. In 1865, water privileges were extended by *An Ordinance for regulating the acquisition of land in British Columbia* (B.C.) to those persons "lawfully occupying and 'bona fide' cultivating lands". On March 31, 1866, *An Ordinance further to define the law regulating the acquisition of Land in British Columbia* was given Royal Assent. The provisions of the Ordinance were such that the only mechanism available at the time for recording water rights was via land acquisition or mining development or with the special permission of the Governor.

40. On June 1, 1870, British Columbia Ordinance, *An Ordinance to amend and consolidate the Laws affecting Crown Lands in British Columbia* was enacted. With the passing of the *Land Act, 1870,* pre-emption rights were linked to the right to obtain water. This served to restrict Indian access to records by requiring the permission of the Governor in Council to hold a pre-emption. Colonial law established the principle that the "priority of right" to water was according to priority of record, so that the first in time was first in right.

41. After the entry of British Columbia into Confederation in 1871, the Province continued to retain exclusive jurisdiction over lands and water. In May 1871, the British government passed an Order-in-Council setting the Terms of Union. Article 13 of this document concerned First Nation policy and referred to the future conveyance of land to Canada "in trust for the use and benefit of the Indians". Article 13 did not mention water and British Columbia maintained that water rights were separate from ownership of land.

42. In 1892, British Columbia enacted the *Water Privileges Act.* Through this legislation the Province declared that all rights to use water not being a navigable river or otherwise under the exclusive jurisdiction of the Parliament of Canada were vested in the Crown in right of the Province. This legislation provided that the Provincial Crown was the exclusive purveyor of water rights in the Province,

and thereby established that all future rights to use water must be acquired from the provincial government, and not the common law.

43. In 1897, British Columbia enacted the *Water Clauses Consolidation Act*. The *Act* required applicants of water records to specify the land on which the water was to be used, something previous water legislation had not required of persons applying for water records. Section 35 set out substantially the same framework for acquisition of water for Indian Reserves as had been described in the *1888 Act to Amend the Land Act*. In both acts, the Province held that they maintained administrative rights over the water of British Columbia, as declared in s.4 of the 1897 *Act*.

44. The 1909 *Water Act* was enacted with a view to settle all claims to water in British Columbia. The *Act* confirmed that all unrecorded water in the Province, not under the jurisdiction on the Dominion, was vested in right of the Province. The *Act* also created the PBI which had a mandate to review all existing water records, adjudicate disputes and issue licenses once all competing claims were settled. The *Water Act* did not contain any provisions for recognizing water rights on Indian Reserves. It was the PBI which finally tried to settle outstanding issues of quantity and priority of water rights.

45. In December 1921, British Columbia enacted *An Act respecting Certain Claims to Water for Use on Indian Reserves* to deal with water claims on reserve lands located outside of the Railway Belt. The *Act* granted the PBI the power to hear and determine claims and issue licences based on applications filed by Indian Agents in the Dominion Land Office. The date of priority was deemed to be the date of filing, rather than the date the waters were first allotted by the Reserve Commissioners. The *Act* specifically did not recognize any First Nation claim by virtue of length of use or aboriginal title, or by virtue of any allotment or recommendation of any Reserve Commissioner or Commissioner.

46. The Crown in right of Canada lacked the sole authority to allot or create water records or rights for the First Nation. The allotment and recording of water rights required the cooperation of the Crown in right of British Columbia because the Province had exclusive jurisdiction over the administration and granting of water rights in British Columbia.

IR 6 and WR 86, WR 88, WR 142A and WR 187

47. From the time of O'Reilly's allotment on July 15, 1881 until July 29, 1938 (the date when British Columbia transferred to Canada its administration and control of Crown lands that had been provisionally allotted as reserves via Order-in-Council 1036), IR 6 was a provisional reserve.

48. The Dominion Order-in Council P.C. 1334, dated July 19, 1880, appointed O'Reilly as the new sole Indian Reserve Commissioner and stipulated that his actions were to be "subject to confirmation" by both the Provincial Chief Commissioner of Lands and Works ("CCLW") and the Federal BC Indian Superintendent. The Order-in-Council did not refer to water rights.

49. O'Reilly's Field Minute dated July 1881 recorded a statement from the First Nation's Chief that the Band would be glad to have Wycott's Flat for IR 6 and that they could bring water on it from Harper's Lake.

50. O'Reilly's allotment of IR6 was approved by the CCLW on June 4, 1884.

51. The Provincial Government's "return" of "all lands set apart for Indians", dated February 20, 1885, listed as a Reserve: "Wycott's Flat, Fraser River..." but did not mention any water rights.

52. The interest granted within WR 142A was on Provincial Crown land.

53. On June 15, 1916, the Royal Commission recorded its Minute and Resolution for "Water Rights of Indians in BC" – "Williams Lake Agency", whereby it confirmed O'Reilly's Minute of Decision of July 15, 1881 to reserve "all the water flowing out of Harper's Lake... for the use of the Indians". The Royal Commission's confirmation was made conditional with the following language: "...to the extent to which the allotting Commissioners had authority to allot such Water Rights..."

54. The Royal Commission completed its work and issued a report on June 30, 1916 (the "Royal Commission Report"). The Royal Commission Report contained several schedules or tables setting out the results of its work in the Williams Lake Agency. A table entitled "Reductions and Cut-offs of Reserves" shows the cut-off of IR 6 on February 28, 1916.

55. The Royal Commission Report also noted, "one Reserve [Wycott's Flat] being cut off as altogether unused and one reduced in area.... At the same time the Commission has endeavoured to provide other lands more suitable for agricultural utilization and range purposes, in order that the Williams Lake Agency Indians may become in larger measure self-sustaining, with the result that 29 new Reserves have been created..." A table included in the Royal Commission Report shows nine additional land applications were approved to create six new reserves for the First Nation, four of which were further approved in 1923.

56. On March 29, 1919, the Province of British Columbia passed the *Indian Affairs Settlement Act*. The legislation empowered the Province to give effect to the Royal Commission Report, either in whole or in part. It also allowed the Province to negotiate further with Canada, and to enter into further agreements. Canada introduced similar legislation on July 1, 1920, known as *The British Columbia Indian Lands Settlement Act.*

57. On June 23, 1921, Ditchburn wrote to the Dominion Water Power Branch ("DWPB") in British Columbia and requested District Chief Engineer Swan

("Swan") investigate into the possibility of irrigation on Wycott's Flat "at a reasonable cost".

58. The PBI, who had the jurisdiction and authority to order and cancel water records, cancelled WR 86 on March 31, 1922, for Wycott's failure to exercise the grant.

59. On March 27, 1923, Ditchburn, in a report to DIA Deputy Superintendent General Scott ("Scott"), advised Scott that the Royal Commission's recommendation to cut off "Wycott's Flat Reserve No 6" was disallowed and IR 6 was confirmed because irrigation was "quite feasible" by ditch and flume from Dog Creek.

60. Provincial Order-in-Council No 911 dated July 26, 1923 confirmed the Royal Commission Report as amended by Ditchburn and Clarke. The schedule "CONFIRMATIONS OF RESERVES" recorded IR 6 "...to be confirmed."

61. On September 17, 1923, the PBI met at Williams Lake to hear the claims of the DIA to records of water for Indian Reserves in the Williams Lake Agency. The DIA was represented by Engineer Balls ("Balls") and Indian Agent MacLeod ("MacLeod"). With respect to the water allotments made by the Indian Reserve Commission, the PBI ruled, "that all such allotments were null and void and conferred no rights to water."

62. Five weeks later, Balls reported to Swan on the hearing, advising that the Plans and Reports were formally filed and claims presented, including IR 6 as follows: "Prov. Record dated Feb 23, 1891 – W.R. No 142A – 'The right to construct a dam at the outlet of Harper's Lake...right to water retained by said dam...to be conveyed by means of a ditch already surveyed to ...Wycott's Flat'." Balls advised that the hearing of this record was adjourned "to allow the Department to put in further evidence as to the quantity of water available and as to its value as an irrigation supply, in view of the long ditch required."

63. On December 21, 1923, Ditchburn advised the Deputy Superintendent General on the matter of Indian water records confirmed by the PBI. He stated, "(e)vidence in support of claims was based principally on the water requirements of the irrigable area on reserves, without particular regard to the feasibility of obtaining water from unused sources.... Having established the right to water, under records, from unused sources, the Department is now required to show how the water is to be utilized. Upon investigation it has been found that, out of the many rights confirmed, a few are of little or no value and should therefore be officially abandoned."

64. On December 5, 1924, MacLeod wrote to the DIA Assistant Deputy and Secretary, forwarding an offer from a Mr. Ames to lease IR 6 and Dog Creek Indian Reserve Number 4. MacLeod recommended the offer be accepted, advising that: "[t]hese reserves are on the lower branches of the Fraser River and we cannot irrigate them without incurring large expense which the present conditions do not warrant." Ditchburn supported MacLeod's position regarding the lease of the Indian Reserves. Ames did not lease the land.

65. On March 31, 1926, the DWPB issued its "Supplement to Report Number 5, Williams Lake Agency: Water Records Appurtenant to British Columbia Indian Reserves." Under "Alkali Lake No. 6 – Wycott's Flat", in "Remarks" the report stated: "An investigation of Harper's Lake as a source of irrigation water supply proved it to be valueless. The water level in the lake has been going steadily down for years and it is not economically feasible to divert water into it from any other source."

V. Relief (R. 42(f))

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

67. If the Crown is liable, which is not admitted, then the Crown seeks to have the First Nation's claim for compensation dismissed on the basis that the First Nation has suffered no loss.

68. If the Crown is liable, which is not admitted, then the Crown asserts that the Province of British Columbia caused or contributed to the alleged acts or omissions and any losses arising therefrom as set out in subparagraph 20(1)(i) of the *Specific Claims Tribunal Act*.

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

70. The Crown seeks its costs in the proceedings.

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

VI. Communication (R. 42(g))

Dated: October 23, 2017

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