

SPECIFIC CLAIMS TRIBUNAL		
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June 18, 2020		
Isabelle Bourassa		
Ottawa, ON	1	

SCT File No.: SCT-5001-20

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

WHITECAP DAKOTA FIRST NATION

Claimant

v.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Crown-Indigenous Relations

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*.

June 18, 2020

Isabelle Bourassa

(Registry Officer)

TO: Her Majesty the Queen in Right of Canada
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I. Claimant (R. 41(a))

1. The Claimant, Whitecap Dakota First Nation 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. 1-5, as amended, in the Province of Saskatchewan. It is located some 30 km south of the City of Saskatoon.

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

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
(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; ...

3. In April of 2005 Whitecap Dakota First Nation (“**WDFN**”) submitted a claim asserting that the Crown breached its lawful obligations by failing to preserve access to grazing lands within the Dundurn Forest Reserve under a lease arrangement in the 1930’s, leading to the loss of WDFN’s cattle industry and of the improvements WDFN had made to the pasture (the “**Claim**”).
4. Receipt of this Claim was acknowledged by the Department in August 2005. In March 2007 the Department provided confirmation research, inviting comments from WDFN, to which WDFN responded in June 2007.
5. On November 24, 2008 the Department notified WDFN that the Claim had been filed with the Minister on October 16, 2008.
6. On August 24, 2009 Senior Assistant Deputy Minister Michel Roy notified WDFN that the Claim had been rejected for negotiations under *The Specific Claims Policy and Process Guide* on the basis that there was no outstanding lawful obligation.

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

7. For the purposes of the Claim, the Claimant WDFN does not seek compensation in excess of \$150 million.

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

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

(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))

Overview

9. WDFN is a Dakota First Nation, whose ancestors used and occupied lands within what is now Canada, as well as lands south of the 49th parallel, since time immemorial. Notwithstanding this longstanding use and occupation, and notwithstanding a centuries-long history of alliance with and military support to the British and Canadian Crowns, WDFN was and continues to be denied adhesion to any of the numbered Treaties. This has resulted in WDFN having a reserve land base that, from the outset and to this day, is a fraction of that set aside for its neighbouring Treaty First Nations, as well as a denial of treaty benefits to the Nation and its members.
10. Given the small size of the reserve, and its unsuitability for agriculture, Canada undertook to expand the reserve as necessary, and to provide, preserve and expand grazing lands in order to help sustain WDFN's once-thriving livestock industry – which came to be a critical component of the WDFN economy.
11. Indeed, from the time its reserve was established, WDFN continually made requests to the Crown for additional lands that would be more suitable for grazing and pasture. Government files show correspondence spanning three decades concerning the Whitecap Reserve and the need to provide the Band with more

suitable land. The Crown made some efforts in this regard, securing incremental additions to the reserve and leasing grazing lands, which helped to alleviate the effects of WDFN's extremely limited initial land base.

12. However, inordinate delay regularly ensued before requests were addressed by government officials. Between 1889 and the mid 1930s, there was almost continual discussion within the government about WDFN's need for additional grazing lands. There were numerous instances of delay and inefficiency on the part of Crown officials in addressing WDFN's requests for more land. It was not uncommon for several years to pass before requested and identified land was added to reserve, or for requests for grazing permits to be approved, often due to inter-departmental confusion about which department actually had jurisdiction over the land in question.
13. By 1930, Canada had for many decades secured the leasing of lands within the Dundurn Forest Reserve lands for the benefit of WDFN, for cattle grazing purposes. The specific location of those grazing lands was critically important because of the lack of other available grazing lands in the area, due to encroaching white settlement. WDFN relied and depended upon the Department to lease these important grazing lands on its behalf, which it undertook to do.
14. Despite this history and the enormous importance of the said grazing lands to the WDFN economy, Canada unilaterally transferred the Dundurn Forest Reserve lands to the Province of Saskatchewan at the time of the *Natural Resources Transfer Agreement*, and failed to secure the continued access to those lands by WDFN and/or any suitable alternate lands. Prior to the transfer, the Department of Indian Affairs was presented with the opportunity to advise both the Department of Interior and the Province of Whitecap's leasing and cattle grazing interests within the Dundurn Forest Reserve, and to preserve said interests, but failed to do so. The Department failed to even inform the Province that the First Nation had cattle grazing on these lands. The Province would later enter into a long-term grazing lease with the University, thereby permanently terminating WDFN's use of the lands.

15. By the mid-1930s, access to adequate grazing land had been completely lost to WDFN, and their once thriving cattle enterprise came to an end. The result was significant hardship and economic loss for WDFN, which had depended in large degree on the cattle enterprise, which made up a large proportion of its economy.

Brief history of WDFN

16. WDFN is part of the larger Dakota-Nakota-Lakota Nation, whose traditional governance structure is called the Seven Council Fires, or *Oceti Sakowin*.

17. WDFN's Dakota ancestors used and occupied significant parts of Northwest Ontario, southern Manitoba and Saskatchewan and Southeast Alberta, as well as areas south of the 49th parallel, since time immemorial. With the arrival of Europeans, the Dakota entered into treaties, alliances and trading relationships with the French and then the British Crown. Honouring their alliance, the Dakota fought alongside the British during the Seven Years War, the Pontiac War, the American Revolutionary War and the War of 1812. These last two wars, in turn, first effectively gave birth to the country that would become Canada (American Revolutionary War), and then ensured its survival in the face of subsequent American attack (War of 1812).

18. Dakota Chief Wabasha was commissioned a General by the British during the American Revolutionary War, and Wabasha II was made a captain during the War of 1812. Later, Chief Whitecap would become, along with John Lake, one of the founding fathers of the City of Saskatoon – a fact recognized and memorialized in bronze along the banks of the Saskatchewan River.

19. In the course of the War of 1812, British officers were tasked with securing the allegiance of the Dakota to their cause and to fight the American invasion, on the express promise that the British would secure their lands and rights and would not forsake those rights or lands in any peace negotiated with the Americans at the war's end. The Dakota agreed, and were crucial allies in successfully repelling the American invasion. The Dakota fought in and helped secure crucial victories

- over the Americans at several key battles – for which they were recognized at the time and more recently on the occasion of the War of 1812 bicentennial.
20. Sadly, the British did not honour their solemn commitments; in the Treaty of Ghent in 1814, the British abandoned their Dakota allies and agreed to place much of their lands under U.S. control. This was confirmed, without consultation with or consent from the Dakota, in the establishment of the border at the 49th parallel and its subsequent survey. In order to appease the Americans, the British agreed to limit Dakota access to their lands north of the 49th parallel, gradually cutting the Dakota off from their territories within what is now Canada.
 21. Unsurprisingly, relations between the Dakota and the Americans, whom the Dakota had freshly fought and helped defeat, were strained from the outset. Those tensions rose in the ensuing decades as a result of U.S. policies and actions against Indigenous peoples, including the *Indian Removal Act* of 1830, and the growing influx of Euro-American settlers into Dakota territories.
 22. Subsequently, in 1862, following a significant uprising in Minnesota, many Dakota, led by Chief Whitecap, Chief Standing Buffalo, and Chief Littlecrow, followed their old trade routes along the Souris River and re-entered their traditional seasonal territories across the 49th parallel into present-day Manitoba and Saskatchewan. The Chiefs brought with them the medals and flags given to them by the British and reminded the officials of the promises which were made to them – namely that they would always be welcome within their lands under British protection, and need only show their medals and flags.
 23. Following Confederation in 1867 and the *Rupert's Land Act* in 1870 by which Canada “acquired” vast territories from the Hudson’s Bay Company, Canada proceeded to negotiate treaties with the Indigenous Nations within the boundaries of those lands, in accordance with its legal and honourable obligations.
 24. However, the Canadian government took the unfounded and indeed absurd position that the Dakota were not “British Indians,” but instead were “American Indians” with no claims to land on the north side of the international border. As a

- result, the Dakota were not offered Treaty as were other First Nations in the region, despite Chief Whitecap's presence at the negotiation and signing of both Treaty 4 of 1874 and Treaty 6 of 1876.
25. Instead, the Dakota were allotted significantly smaller reserves in Canada (80 acres per family of five versus 640 acres provided to treaty Nations), subject to increase "if warranted."
 26. WDFN originally settled in the Beaver Creek area on the South Saskatchewan River in 1878, requesting permission to settle at that location. As the government delayed in granting the reserve, they moved further south and settled in their current location in 1879, south of present-day Saskatoon.
 27. Whitecap Reserve No. 94 (sometimes historically referred to as the "Moose Woods" reserve) was finally surveyed in mid-June 1881, but wasn't formally confirmed until May 17, 1889, when Order-in-Council 1151 was passed. In his report on the survey of the reserve, Surveyor Simpson stated "*the number of souls in the band is between seventy and eighty and my instructions were to allow eighty acres to every five souls. I therefore gave them 1,280 acres, equal to two sections of land.*" However, the Order-in-Council mentioned 1,472 acres or sufficient land for 92 band members.
 28. As noted, owing to the Dakota's exclusion from Treaty, the land surveyed for Whitecap's initial reserve, at 80 acres per family of five, was far less than that surveyed for Treaty First Nations. By contrast, Treaty First Nations in Saskatchewan (signatories to Treaties 4 and 6) received 640 acres per family of five (8 times as much land as the Dakota). Thus, WDFN from the start had to contend with a significantly limited land base, though it would later be somewhat enlarged by subsequent minor allocations. The discrepancy between WDFN's reserve-base and that of treaty Nations remains vast. Nor did WDFN members receive annuities or other treaty benefits; rather, some implements and equipment were provided on an *ad hoc* basis from time to time. As meagre as treaty benefits

were and remain for Treaty First Nations, WDFN has received significantly less, by several orders of magnitude.

Requests for and additions of grazing lands

29. By January of 1886, WDFN found itself in dire straits due to failed crops and the 1885 Northwest Rebellion. Through Dakota interpreter E.A. LeQuesne, WDFN sent a letter to the Indian Commissioner Edgar Dewdney, as dictated by Wapahaska, outlining their predicament and beseeching assistance from the Government.

30. In August of 1887, Dewdney suggested to the Department that a piece of additional land be added to WDFN since, he urged, “*this land furnishes the hay which is not to be found on the Reserve as it now stands, and is absolutely essential to the welfare of the Indians.*”

31. In June of 1888 Surveyor Nelson altered the boundaries by adding 424 acres to the north end and cutting off about 240 acres which was described by some members as “*sandy, hilly land of muskeg which they wished to have cut off the north east corner.*” These additional acres were incorporated into the 1889 Order-in-Council.

32. In July 1889 Inspector Wadsworth reported the use by WDFN of adjacent lands as grazing lands and recommended these be retained. The Commissioner of Indian Affairs, Hayter Reed, although he disagreed with the land described, did after considerable delay agree in July of 1891 that additional grazing lands were needed and sent Surveyor Ponton to assist Agent Tucker in selecting suitable land.

33. Surveyor Ponton reported on the land selection and noted:

it appears that, although roots are doing well on the Reserve, the grain crop is again a failure, in consequence of spring frost... These Indians will therefore have to depend principally on stock raising, and are said to expect an increase of 29 next year, but this of course will necessitate securing hay lands.

34. The land selected by Tucker was problematic since it was part of the Temperance Colonization Company's grant. Reed thought this could be settled by the Colonization Co. exchanging the land for other land. However, by late April 1892 Reed still had not received a response; he therefore wrote again to the Deputy Superintendent of Indian Affairs, inquiring if the Department of the Interior had "*secured to us the hay lands required for the use of the Sioux Indians of the Moose Woods Reserve.*" In August 1892, more than a year after the inquiry was made, the request was denied by the Department of the Interior on the basis of protests from the Temperance Colony and a belief that there was adequate hay on the Reserve.
35. Despite this, Inspector McGibbon made a request for more hay land in late November of 1892. Agent Tucker wrote a passionate letter in support of the request:

It is a known fact that this reserve is utterly worthless except for pasture. The Indians have cropped it I understand for the last 14 years and got only one good crop in that time. The fact was explained to you and you promised to enlarge the reserve by giving them some hayland south of here so as to enable them to make a living by raising cattle, but last fall I got a letter from you saying you decided not to enlarge the reserve. What do you mean? Do you intend to drive the Indians away from here? What is to become of them? Are they to be driven back to the towns, where they will be debauched, their daughters prostituted, their children die from starvation, for they cannot live here if they have no protection from pestering whitemen.

I left a good home to come to this country to help the Indian and I do not think that I spent five of the best years of my life in vain. Therefore I say that the Indians will get that hayland, and if you won't give it to them, I will write to the Minister of the Interior about it and if he refers me to you as I expect he will, I shall then carry it to headquarters, to ratepayers of Canada. "Agitation," John Bright says, "is but the marshalling of the nation's conscience to right her laws," and I shall agitate this question together with some others. [Emphasis added]

36. The response to Agent Tucker in March 1893 was to advise him not to act in such an intemperate manner, and to advise him that the Department was still seeking to have the Department of the Interior reverse its position. Further, a permit was in

the process of being sought from Interior to obtain 175 tons of hay and assigning an Officer from the Department to determine what the needs of the band were.

37. As no further steps were taken over the next two months, Agent Tucker wrote again to the Department inquiring about the hay permits. In May the Department responded by saying no promise had been made to secure the permits. Another two months passed before further action was taken. By letter dated July 8, 1893 Inspector Cook reported his views on the need for more hay lands:

The Indians have now given up on trying to raise grain and are going into stock and have about 120 head of cattle and 50 ponies for which they will require this year about 300 tons of hay, and as very little of it can be obtained on the Reserve they are applying to get the Reserve enlarged so as to take in sufficient hay and grazing lands to meet the requirements for the present, and have asked for Sections 19, 30 and 31 Tp 33, Range 5, W. 3rd, and I see no reason why their request should not be granted.

The whole difficulty with the existing state of affairs appears to be this: the Indians have to depend almost entirely on hay obtained outside the Reserve limits for their Winter fodder, and any white settlers could at any time get a permit to cover the only hay lands in the vicinity... and the Indians would either have to buy the hay at exorbitant rates or move off to other quarters, again the white settler could turn his cattle into the hay swamps and destroy the hay. [Emphasis added]

38. Surveyor Ponton, who accompanied Inspector Cook, also saw the necessity of hay and grazing land access for Wood Mountain:

I would draw your attention to the immediate necessity of securing hay lands for this Band, either the sections recommended by Mr. Cook or elsewhere; otherwise they must dispose of their fine herd of cattle and wander to the town to seek work. Their reserve of some 1500 acres is composed of land worthless for agriculture, and far too limited in extent in any case to support ten families and pasture 120 head of cattle and 50 ponies. Since owing to the nature of the lands by which the Reserve is surrounded, no settlement is likely to approach its immediate neighbourhood, there will be no danger of interfering with the interests of future settlement, through granting the application for hay lands. [Emphasis added]

39. Finally, on October 21, 1893 an Order-in-Council was passed setting aside sections 19, 30 and 31, Tp. 33, Range 5, W. 3rd as part of the Moose Woods Sioux

Indian Reserve. However, due to an oversight and further delays in communicating the Order-in-Council within the Department, word of it did not reach the reserve until February 12, 1894. In the interim, on January 27, 1894 Assistant Commissioner Forget inquired about the hay lands and reported:

Mr. W.R. Tucker reports that hay belonging to the Indians, stacked on the land which it is desired to have reserved is being destroyed by cattle belonging to settlers and that until the land has been set apart as a portion of the Reserve he is unable to compel their removal.

40. By 1894, the cattle herd on the WDFN reserve had doubled in two years (from 86 to 155 head). In 1896, the Inspector reported another significant increase in the Band's cattle herd, and the number of privately-owned cattle on the reserve had grown as well. By 1902, WDFN's cattle herd was considered their chief source of wealth and provided a significant source of food.
41. On October 15, 1898 Agent Tucker again requested additional hay and grazing land, arguing that if more land was not provided the band would have to decrease its herd. He identified Sec. 25, Tp. 33, R. 6 as the desired pasture land. On November 24, 1898 an Order-in-Council was passed adding this section to the Reserve. No additional grazing lands would be added to Whitecap's reserve for the next 13 years

Further requests for grazing lands and permits on Dundurn Forest Reserve

42. On December 20, 1911, Inspector Chisholm wrote to Secretary McLean requesting three unoccupied parcels of land adjacent to the reserve (Sections 5 and 6 in Tp. 34, R. 5, and Section 32 in Tp. 33, R.5). McLean, in turn, addressed the request to the Department of the Interior, which did not reply until 16 months later in May 1913, stating that some of the land was not available but would note the application for the undisposed lands.
43. In 1913, there were 255 livestock on Whitecap's reserve, requiring 1,256 tons of hay over the winter. The number represented a reduction of 42 from the previous year's total, a fact Inspector Chisholm blamed on a shortage of feed. In his 1913 report, Chisholm noted that the reserve was "*in the greatest need of an additional*

area for grazing purposes” and that “grazing lands that the herd had freely used in previous years had been taken up by settlers and their crops.”

44. For the next several years, correspondence was exchanged back and forth between various officials within the Department and within the Department of the Interior as to which lands were available for addition to the reserve. By this time some of the land requested had been added to the Dundurn Forest Reserve, which led to discussion about securing access to this land. In this correspondence, McLean described WDFN as *“a very progressive band of Indians, and their present lands are quite insufficient to supply feed for their stock.”*
45. After much back and forth, Inspector Chisholm agreed in October of 1914 that the west ½ and north east ¼ of Section 6, Tp. 34 be added to the Reserve, and McLean made the request to the Department of the Interior. However, it would take a further **7 years** to confirm the additions to reserve, due to delays by the Interior in securing authorization, allowing homesteads to be entered, resulting in yet further delays.
46. It was not until July 14, 1921 that an Order-in-Council was passed adding the south east ¼ of Section 6, Tp. 34, R. 5, W. 2d. The other half section was already homesteaded. However, on May 14, 1926 an Order-in-Council was passed adding the south west ¼ to the Reserve as the homestead had been abandoned. Several years later, on March 7, 1933, the north east ¼ of Section 6, Tp. 34 was added by Order-in-Council, though WDFN did not actually get access until April 1934, due to confusion over whether the land might have been held by the Department of National Defence (ultimately, it was confirmed the land was not required by DND and was relinquished).
47. During this time attention was also focused on securing appropriate lease arrangements in the Dundurn Forest Reserve for additional pasture land. In a letter from Inspector Chisholm to Secretary McLean dated October 24, 1914, he informed McLean that the Supervisor of Forest Reserves said he was prepared to

issue a grazing permit to Section 5, Tp. 34, R.5 and all of Sections 29 and 32, Tp. 33, R. 5 all within the Dundurn Forest Reserve. Inspector Chisholm noted:

The Chief objection to a grazing permit on a forest reserve is that it is granted for only a year or part of a year, and there is never an absolute certainty of securing its renewal. In the present instance, however, I think there is very little likelihood for many years to come of circumstances arising that would prevent its being renewed for the benefit of the Indians.

48. This leasing arrangement was approved by Secretary McLean on February 11, 1915. However, the band members were to pay the leasing fees.
49. In July 1915, Inspector Chisholm reported that he had been successful in obtaining a grazing lease on the Dundurn Forest Reserve and that at that time, WDFN members were occupied in building a fence around portions of this land.
50. In April of 1917, the Department sought additional land, but was facing difficulty in acquiring the lands requested or alternative lands. Newly-appointed Inspector Crombie reported that WDFN was renting 4 and ¼ sections of land within the Dundurn Forest Reserve and paid “\$30.50 per annum, which is figured on the basis of one hundred head of stock at five cents per month for six months plus fifty cents for permit fees.” As a result, Inspector Crombie suggested that if suitable lands could not be found then the Forest Department should not be charging the Indians for the grazing permits:

The land referred to on the Forest Reserve used by the Indians for grazing purposes has been all fenced in by them and they have gone to considerable expense in this respect and it seems to me as only fair to this band, that in the event of the Department being unable to secure additional land to be included in their reserve that they get this concession from the Forestry Department.

51. In a letter to Agent Schmidt dated January 28, 1918, Secretary McLean noted that “there is no record here of the grazing permit which the White Cap Sioux Indians now have of the four and a quarter sections to which you refer. This matter appears to have been dealt with directly by your Agency without further reference to the Department.” McLean agreed with Schmidt’s suggestion that the lands under the grazing permit should be fenced by WDFN and directed that “you

should therefore immediately apply to the local officer for a permit over the additional sections mentioned in your letter.” McLean reiterated that the Band would pay the grazing fees and that the Agent would apply for the annual permit.

52. By 1918, WDFN’s livestock (including poultry) was worth \$28,251, comprising over 26% of the band’s property (a very large proportion compared to other bands in the area). By 1921, the sale of beef accounted for over 38% of WDFN’s total income. The Department’s 1919 Annual Report shows that WDFN had 8,000 acres of land fenced, while their reserve consisted of only 4,160 acres (3,840 acres of non-reserve land fenced).
53. In February of 1921, the Department of National Defence requested a portion of the Dundurn Forest Reserve for its use as a training area. The Director of Forestry (Interior) approved the proposal on certain conditions, including not “*interfering too much with the grazing rights granted*” within the forest reserve.
54. On April 15, 1921 Agent Schmidt informed Secretary McLean that the cost of the annual grazing lease had increased from \$45.50 per year to \$91 per year, which he thought excessive:

I beg to say that I consider the amount now charged too high, more so when it is considered that it is for the use of Indians who have not sufficient grazing for their cattle on the reserve set out for them by the Government.

I recommend and ask the Department to take the matter up, and secure for this band a free grazing permit on this land now being leased by them, and which they have fenced in on the Dundurn Forest Reserve.

55. The Director of Forestry replied on May 2, 1921 that there had been an increase per head for all who grazed their cattle on forestry lands and the idea of a free grazing lease was unheard of, whether Indian or non-Indian, and suggested that if the Band could not afford the increase then the Department might arrange to pay for the permits. Mclean wrote back to Agent Schmidt that WDFN would have to pay the grazing dues seeing as they had no funds (*i.e.*, no account) held by the Department.

56. On May 26, 1921, Agent Schmidt requested that the Department have some of the grazing lands leased by WDFN transferred to reserve status, *“for the purpose of enlarging the White Cap Sioux reserve, which is by far too small as it is at present to meet the requirements of the Band for grazing purposes.”*
57. In 1923, the value of WDFN’s livestock (and poultry) was reported to be \$18,500, or about 17.5% of the total value of the band’s property. Agent Schmidt reported that there had been a surplus of cattle on the reserve which he had sold. For the following year, 1924, the value of WDFN’s livestock had further dropped by \$2,000.
58. An Order-in-Council was passed on June 14, 1924, giving the Minister of the Interior authority to include grazing leases within the boundaries of forest reserves within this provision (previously, renewals within forest reserves had been refused).
59. In November 28, 1924, in considering the potential lease of part of the Dundurn Forest Reserve to the Department of National Defence, the Acting Director of Forestry noted that *“looking over the map and land records of the reserve it seems that it has to a very great extent, if not entirely, been subject to fencing permits for grazing purposes.”*
60. In February 7, 1925, another Order-in-Council was passed authorizing the Minister of the Interior to issue 21-year grazing leases on vacant Dominion lands unfit for agricultural purposes in Saskatchewan. In that year, the value of WDFN’s livestock and poultry increased to over \$21,000 -- almost \$5,000 over that of the previous year -- and had increased by over \$3,000 in 1926.
61. In 1926, an Order-in-Council was adopted giving the use of part of the Dundurn Forest Reserve to the Department of National Defence. In 1928, the Department of Indian Affairs inquired about purchasing some additional land for WDFN to add to their reserve as grazing lands, however, the Department of the Interior indicated that the *Forest Reserves Act* would have to be amended in order to release the land.

Transfer of Dundurn Forest Reserve

62. In August of 1930, the Department was advised that the entire Dundurn Forest Reserve was being transferred to the Province of Saskatchewan pursuant to the *Natural Resources Transfer Agreement (NRTA)*, which effected the transfer of public lands and natural resources from the federal Crown to that of the Province, which had entered Confederation in 1905.
63. While the Province came to hold the Forest Reserve, portions of it were leased to the WDFN Reserve. However, in February of 1931, Agent Schmidt raised concerns with the Province about the price they intended to charge for grazing stock in the Forest Reserve. Schmidt expressed the view that the prices were beyond the resources of the Band. However, Assistant Deputy McKenzie agreed to pay the new lease rates.
64. In 1933 it came to the Department's attention that portions of the Dundurn Forest Reserve were transferred to the Department of National Defence. In March of 1935, Agent Schmidt wrote to the District Engineer of Military District #12, seeking access to portions of the Dundurn Forest Reserve for grazing purposes, all of which had been used by the Band in the past. He requested the following lands:

N ½ Section 5, All 7 & 8, NW ¼ -9, All 17 & 18, s Y -19, All 20, in Township 34 Range 5, West of the 3'd Meridian.

These lands are fenced, the fence having been erected by the Indians at their own expense. Our grazing land on the Indian Reserve is very limited and not sufficient for our needs.

I beg to ask that, as in the past, permission be granted to graze their stock on the above-mentioned lands, free of charge.

65. On April 27, 1935, Captain N.I. Fraser replied that only a small portion of the land which had been requested (namely, N ½ Section 5, Section 8 and NW ½ Section 9) was available, and permission was granted to graze over these lands. As to the rest of the land requested he stated "*the remainder, I believe, now comes under the Department of the Interior.*"

66. On August 21, 1935 Acting Secretary MacInnes wrote R.A. Gibson of the Department of the Interior regarding the lands in the Dundurn Forest Reserve that were not within the jurisdiction of the Department of Defence. Gibson replied later in August that the balance of the lands requested had been transferred to the Province of Saskatchewan and further added:

This Department was not aware of your interest in any of these parcels – as a matter of fact at the time the Natural Resources were being transferred we enquired as to what lands were required by your Department and in your reply, which was dated the 21st October, 1931, no reference whatsoever was made to the parcels covered by the present application. [emphasis added]

67. Accordingly, the Department wrote to the Department of Natural Resources for the Province of Saskatchewan regarding the grazing which had now been transferred to the Province. The letter mentioned that the Indians of WDFN had yearly been grazing their livestock on this land since 1918 and that they had, at their own expense, fenced the said lands, and enquired if an arrangement could be made to allow for continued grazing on the lands.

68. The Province replied on September 6, 1935 that the lands requested had been disposed of under a long-term grazing lease with the University of Saskatchewan and went on to state:

We were not aware prior to receipt of your letter of August 27th that these lands had been used by the Indians for the grazing of their stock.

Impact of loss of grazing lands

69. By the mid-1930s access to suitable grazing land had been completely lost to WDFN, and the cattle enterprise came to a standstill. Unable to compete in an expanding cattle industry, the herd was reduced and eventually eliminated. The result was significant hardship and economic loss for WDFN, which had depended in large degree on the cattle enterprise, which made up a large proportion of its economy.

70. The present day elders of WDFN recall the land that was part of the Dundurn Forest being used by the band for cattle and horses. The elders also remember cutting hay and harvesting crops in the area, and that the band members had on their own and at their own expense built fences to keep the cattle in.

71. In addition to the use of the land for the general livelihood of WDFN, the Elders advise that it was used as a burial ground and is believed to be sacred.

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

72. WDFN submits that the claim should be validated as a breach by the Crown of its fiduciary obligations on the following grounds:

- a. WDFN was in an exceptional position of vulnerability, owing, *inter alia*, to their drastically smaller reserve land base as compared to neighbouring Treaty First Nations, and which lands were unsuitable for agriculture;
- b. WDFN accordingly came to be dependent on a thriving livestock industry, which industry could only be sustained through access to adequate grazing lands. Owing to the excessively small reserve size and its unsuitability for agriculture, this necessitated the securing of grazing leases;
- c. The Crown failed to act in the best interests of WDFN by failing to maintain and secure the grazing lands necessary for the continued maintenance and growth of WDFN's cattle herd; in particular, it failed to preserve access to grazing lands within the Dundurn Forest Reserve, resulting in the loss of WDFN's cattle enterprise; and
- d. The Crown further failed to seek compensation for the loss of WDFN's cattle enterprise, the value of the permits/grazing rights, and the improvements made to the grazing lands lost when the lease expired.

73. The Crown had a fiduciary relationship with WDFN. From the moment the Whitecap reserve was created in 1889, the Crown's fiduciary obligations to the Band were engaged. In all subsequent dealings between the Crown and WDFN, the Crown became the Band's fiduciary and the honour of the Crown was at stake.

74. This fiduciary relationship in this context was all the more significant, and the standard of conduct that much higher, given the Crown's decision to deny WDFN adhesion to treaty, resulting in an absence of annuities and other treaty benefits and, most acutely, a drastically-reduced reserve land base.
75. The Crown had a fiduciary obligation to secure and maintain reasonable lands necessary to sustain WDFN economically. WDFN depended on the Crown's representations that it would expand their land base as warranted, and that it would secure adequate grazing lands to allow for the maintenance and growth of its successful livestock industry.
76. From the time its Reserve was established, WDFN continually made requests to the Crown for additional lands that would be more suitable for grazing and pasture. Government files show correspondence spanning three decades concerning the Whitecap Reserve and the need to provide the Band with more suitable land.
77. The Crown plainly made some efforts in this regard, securing incremental additions to the reserve and leasing grazing lands, which to some degree helped to alleviate the shortage of useful lands caused by the Crown's refusal to provide the Dakota with an adequate initial land base under Treaty. As such, the Crown engaged itself and its fiduciary obligation toward WDFN in encouraging and supporting the establishment, maintenance and sustainability of a cattle industry for the use and benefit of WDFN.
78. However, an inordinate amount of delay ensued before these enquiries were addressed by government officials. From the report of Inspector Wadsworth in July 1889 to the correspondence between Government departments in the mid 1930s, there was almost continual discussion about the need for additional grazing lands for WDFN. There were numerous instances of delay and inefficiency on the part of Crown officials in addressing WDFN's requests for more land. It was not uncommon for several years to pass before requested and identified land was added to reserve, or for requests for grazing permits to be approved, often due to

inter-departmental confusion about which department actually had jurisdiction over the land in question. As a result of the delays, WDFN's cattle enterprise failed to fully and properly thrive, and ultimately was, through Crown action or inaction, forced to shutter.

79. Ultimately, after decades of mismanagement of the affairs of WDFN in regard to its livestock operations, the Crown caused the demise and ultimate collapse of those operations by failing to safeguard the grazing interests of WDFN within the Dundurn Forest Reserve. By 1930, WDFN had a long-standing history of leasing lands within the Dundurn Forest Reserve lands for cattle grazing purposes, which was done of necessity to maintain its cattle enterprise in spite of its limited land base. The specific location was also critically important because of the lack of other available grazing lands in the area, due to encroaching white settlement. WDFN relied and depended on the Department to lease these important grazing lands on its behalf, and the Crown undertook to do so. In this respect, WDFN was entirely under the power or discretion of the Crown in respect to the terms and management of the lease and, more broadly, in relation to the health and viability of its livestock industry. Thus, the Crown had a fiduciary obligation to WDFN in respect of the Dundurn Forest Reserve, and in particular to take reasonable steps to maintain access to these critical grazing lands, and to prevent or mitigate their loss.
80. The Department of Indian Affairs was presented with the opportunity to advise both the Department of Interior and the Province of Whitecap's leasing and cattle grazing interests within the Dundurn Forest Reserve, and to preserve said interests, at a point prior to its disposition to the Province pursuant to the Saskatchewan *Natural Resources Transfer Agreement*, and failed to do so. The Department failed to even inform the Province that the First Nation had cattle grazing on these lands.
81. Indeed, the NRTA contains explicit provisions to preserve and protect pre-existing interests in lands, mines and minerals otherwise being transferred. Section 1 of the NRTA provides that the transfer of federal public lands and

- natural resources is “subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same.”
82. The Province would later enter into a long-term grazing lease with the University, thereby permanently terminating WDFN’s use of the lands.
83. Thus, the Crown failed to protect WDFN’s lease arrangements for parts of the Dundurn Forest Reserve used for grazing/pasture, or indeed to seek alternative arrangements. No preservation or accommodation of WDFN interests was sought or secured. In their failure to preserve or even advise the Province of the interests of WDFN, the Crown failed to secure WDFN’s access to necessary grazing lands for their livestock, which resulted in the gradual erosion and eventual collapse of WDFN’s livestock enterprise. Nor did the Crown secure any form of compensation for this loss, or the loss of value of the improvements to the land made by WDFN at their own expense and through their own labours.
84. By the mid-1930s, access to adequate grazing land had been completely lost to WDFN, and their cattle enterprise came to an end. The result was significant hardship and economic loss for WDFN, which had depended in large degree on the cattle enterprise, which made up a large proportion of its economy.
85. The Crown had a fiduciary obligation to WDFN in respect of the Dundurn Forest Reserve, to take reasonable steps to maintain access to the grazing lands, and to prevent or mitigate their loss. This the Crown failed to do, resulting in a breach of its fiduciary obligation to WDFN. In the words of the Supreme Court of Canada, “[a] reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential.” Through apparent negligence, the Crown forsook WDFN’s interest in the leased lands, which were known to have significant value to WDFN. In this regard, the Crown’s conduct fell well short of the standard expected of “a man of ordinary prudence in managing his own affairs.”
86. The direct and foreseeable result of the Crown’s breach of its fiduciary obligation was the loss of WDFN’s cattle enterprise, which deprived WDFN of the

significant economic benefits flowing therefrom. This had lasting and significant impacts to WDFN.

87. The Crown further breached its fiduciary obligations by failing to protect or pursue WDFN's interests arising from the lease of grazing lands on the Dundurn Forest Reserve. Firstly, if the Crown had been acting with ordinary diligence it would have taken steps to protect its investments in improvements made to those lands. Further, after the loss of the Dundurn Forest Reserve grazing lands, the Crown failed to seek compensation for WDFN for the loss of its cattle enterprise, the value of the grazing permits/rights, and the improvements made to the grazing lands – including fencing costs.

VII. Relief Sought

88. In light of the foregoing, WDFN seeks the following relief:

- a. Equitable compensation for loss of WDFN's cattle enterprise, the value of grazing permits/rights lost, and improvements made to the subject lands;
- b. Interest; and
- c. Costs.

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