

**SPECIFIC CLAIMS TRIBUNAL**

BETWEEN:

**GAMBLER FIRST NATION**  
also known as **GAMBLERS FIRST NATION**

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES		
F I L E D	October 1, 2015	D É P O S É
Nicholas Young		
Ottawa, ON		4

**Claimant**

v.

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA**  
As represented by the Minister of Indian Affairs and Northern Development

**Respondent**

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

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

TO: Gambler First Nation  
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## Overview

1. The Gambler First Nation, also known as the Gamblers First Nation (the “Claimant”) alleges that a surrender of a portion of Indian Reserve Number 63 (“IR 63”) in 1892 was improperly done and that there was an illegal lease or disposition of those reserve lands. The contested surrender in this claim is one of three occurring between 1881 and 1898. They arise in a context of the movement of interrelated or overlapping groups of Treaty 4 signatories between several reserve locations in this period. In respect of the 1892 surrender directly in issue in the present claim, the Claimant says that the Crown incurred a discreet legal obligation and must now compensate the Claimant for the lands taken. The Crown denies any outstanding lawful obligation is owed to the Claimant. The Crown says that in assessing the claim, the Tribunal will have to consider whether at the material time, the Claimant should be considered to be part of Waywayseecappo First Nation (“Waywayseecappo”), or regarded as a separate band. Similarly, an issue is whether at the material time, the Tootinaowaziibeeng Treaty Reserve (Valley River) can be considered separate from the Claimant, or from Waywayseecappo. Arguably, all were part of a larger historical group known to Indian Affairs as the Fort Ellice Band.

2. This is the Response of Her Majesty the Queen in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development Canada (the “Crown”) to the Declaration of Claim filed by the Claimant with the Specific Claims Tribunal (the “Tribunal”) on July 21, 2015 (the “Claim”) pursuant to the *Specific Claims Tribunal Act* (the “Act”).

3. The Claim relates to the lawfulness of a surrender of a 15 square mile portion of IR 63 in southwestern Manitoba in exchange for a reserve located at Valley River, Indian Reserve Number 63A (“IR 63A”). It is alleged, on various grounds, that the Crown failed to properly obtain the surrender. It is alleged further that the Crown illegally disposed of IR 63A.

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

4. A Specific Claim from the Claimant, was submitted to the Minister of Indian Affairs and Northern Development (the “Minister”) on February 1, 2012 (the “2012 Claim”). The 2012 Claim was received by the Minister on February 10, 2012.

5. By letter dated November 25, 2014, Joe Wild, Senior Assistant Deputy Minister, Aboriginal Affairs and Northern Development Canada, notified the Claimant that its 2012 Claim had not been accepted for negotiation.

## **II. Validity (R. 42(b))**

6. The Crown denies the validity of the Claimant’s Claim, as set out in the Declaration of Claim, and denies that the Claimant has suffered any losses or damages resulting from any failure or breach of obligation by the Crown as alleged or at all. Specifically, the Crown denies:

- a. that the surrender of IR 63 was unlawful;
- b. any breach of treaty, the *Indian Act* or obligations arising from the Crown’s fiduciary duties;
- c. the Crown illegally disposed of IR 63A; and
- d. that there are any consequential losses or damages.

7. Alternatively, the Crown says if the Tribunal finds the 1892 surrender was unlawful, pursuant to Section 20(3) of the *Act*, the Crown is entitled to an off set for the value of lands received by the Claimant or its predecessors in exchange for the lands surrendered.

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

8. Unless expressly admitted, the Crown denies each and every allegation of fact or law in the Claim and puts the Claimant to the strict proof thereof.

9. The Crown admits the facts set out in paragraphs 2, 3, 4, 7, 8, 18, 24, and 25 of the Claim.

10. The Crown denies the allegations in paragraphs of 11, 21, 22, 23, 27, 28, 29, 30, and 31 of the Claim.

11. In response to the style of cause and paragraph 1, the Crown denies that “Gambler First Nation” is the name of a Band within the meaning of the *Indian Act* as recorded with the Department of Indian Affairs and Northern Development Canada. The Crown says that “Gamblers” is the recorded name of a Band within the meaning of the *Indian Act* and if this is a claim of “Gamblers” it should be plead using that name and in accordance with Rule 41(a) of the *Specific Claims Tribunal Rules of Practice and Procedure* and paragraph (a) of the definition of “First Nation” in the *Act*.

12. In response to paragraph 5, the Crown acknowledges that the Claimant is not seeking compensation in excess of \$150 million and further says that sub-sections 20(4)(b) and 20(5) of the *Act* apply to the Claim limit.

13. In response to paragraph 6, the Crown denies that any of the grounds set out in s. 14 of the *Act* apply.

14. In response to paragraph 9, the Crown admits that in 1880 some members of the Waywayseecappo Band who were followers of the Gambler had requested a reserve of approximately six by five square miles, separate and apart from Waywayseecappo Reserve IR 62 (“IR 62”). The Crown denies that it entered into any agreement with the Claimant in relation to the request for a new reserve.

15. In response to paragraph 10, the Crown admits that in 1881 a surrender of land was obtained from IR 62, land was, in effect, taken from IR 62 and new land was surveyed and set aside at IR 63 in 1883. The Crown denies that it was a term of the 1881 surrender that the new IR 63 was to be set apart for the Claimant, saying rather that it was set aside for the benefit of Waywayseecappo. In other words, the followers of the Gambler were not regarded as forming a band separate from Waywayseecappo.

16. In response to paragraph 12, the Crown says that in a letter dated July, 1887 it was reported that the Gambler and a number of others returned to IR 62 and that in a letter dated December, 1889 it was reported that a number of those who were at Silver Creek joined those settled at Valley River.

17. In response to paragraph 13, the Crown admits that in May, 1889 Order in Council P.C. 1151 confirmed IR 63. The Crown denies that it was confirmed as a reserve for the Claimant, as opposed to Waywayseecappo.

18. In response to paragraph 14, the Crown admits the first sentence. The Crown says a February, 1890 letter from A.E. Forget, Assistant Indian Commissioner recommended 14.5 square miles of IR 63 be retained for those who wished to stay on IR 63.

19. In response to paragraph 15, the Crown says there were inquiries regarding settlement of the IR 63 after the Department of Indian Affairs had already begun to consider a surrender for exchange, but prior to the time of the surrender in 1892. The Crown denies that there was any, or any undue or improper pressure from “Federal, Provincial and local politicians” to open up the land for settlement. However, the Crown concedes that in 1891 a petition to open up the IR 63 reserve for settlement was signed by a number of residents of the municipality of Russell, including the town of Binscarth. The Crown says that the petition made several allegations, including that because IR 63 was “practically unoccupied and unused, the progress of the village [of Binscarth] and the surrounding district” was hindered.

20. In response to paragraph 16, the Crown says that the letter dated August 4, 1892, to Indian Agent Markle, states “you are hereby authorized, under instructions to be given you by the Indian Commissioner, to attend the meeting of the Band and negotiate the surrender...”

21. In response to paragraph 17, the Crown has no knowledge of whether the exchange between Agent Markle and John Tanner referenced in Agent Markle’s letter of August 23, 1892 was the first time the matter of the surrender and the land to be taken from IR 63 was addressed with John Tanner by the Crown. The Crown says that in 1889 those at Valley River were willing to resign their interest in IR 63. The Crown admits the rest of the paragraph.

22. In response to paragraphs 19 and 20, the Crown admits that on September 15, 1892 the Crown obtained a surrender for exchange from IR 63, signed by six men and that on October 5, 1892 the surrender was re-acknowledged by the six men, as well as signed by four additional men. The Crown says that the surrender document begins by stating “that we, the undersigned...of The Silver Creek Band of Indians resident on our Reserve at Silver Creek”.

23. In response to paragraph 26, the Crown says IR 63A is labelled in the Canada Lands Survey System as “Valley River Reserve” and in the Aboriginal Affairs and Northern Development Canada’s Indian Lands Registry System (“ILRS”), “Valley River 63A” is listed under band “292 - Tootinaowaziibeeng Treaty Reserve”.

24. In response to paragraph 32, the Crown specifically denies that the Claimant is entitled to damages, compensation, equitable interest, or costs.

#### **IV. Statements of Fact (R. 42(e))**

##### Background

25. On September 15, 1874, the Crown entered into Treaty 4 with the Cree and Saulteaux Tribes of Indians at Qu'Appelle Lakes. On September 21, 1874 at Fort Ellice, Manitoba, a group of Saulteaux Indians known as the Fort Ellice Group adhered to Treaty 4 by the signature of Way-wa-se-ca-pow and Ota-ma-koo-ewin.

26. In July, 1877, Lizard Point (IR 62) was surveyed and set aside for the Fort Ellice Groups, also known as Waywayseecappo's Band.

27. By mid-1880, a portion of the members of the Waywayseecappo Band (followers of the Gambler) asked to have a reserve of their own away from the current reserve, and the Waywayseecappo Band agreed to cede from the reserve a corresponding area.

28. In March, 1881, a surrender was signed, surrendering 30 square miles of IR 62 in exchange for "other lands of equal extent assigned to the said Band."

29. In June, 1883, DLS, A.W. Ponton surveyed IR 63. The reserve contained 30 square miles located on the east side of the Assiniboine River at Silver Creek, nine miles north of Fort Ellice.

30. During the mid-1880s, the Gambler and others resided upon the IR 63. In July 1887 Agent Markle reported that the Gambler and some others had returned to IR 62.

31. Order in Council P.C. 1151, dated May 17, 1889 confirmed the new IR 63, identifying the Chief as "The Gambler" and confirmed the re-surveyed IR 62, identifying the Chief as "Way-way-see-cappo".

### Impetus for the 1892 surrender

32. In December, 1889, Hayter Reed, Indian Commissioner reported that approximately 50 members of the Gamblers Band were left on IR 63 as many had left. Some of those who abandoned IR 63 joined those already settled at Valley River. Reed also reported that out of those who were left interested in IR 63 “there is a considerable proportion who although allowed for when that reserve was surveyed, were at the time, residing at Valley River,....and had been settled there continuously for some thirty years previously.” Since he did not think either those living at IR 63 or at Valley River would care to move, Reed suggested that a reserve be created for those residing at Valley River on the terms of an exchange for a surrender of a portion of IR 63.

33. In February, 1890, internal Department of Indian Affairs communications discussed the proposed exchange and the allotment of land for each reserve, with it being noted that the land allotted for each reserve would be more than the same number of individuals would have been entitled to under treaty.

34. By May, 1890, communication from the Department of Interior indicated an intention to create an Indian Reserve at Valley River.

35. In August, 1890, Agent Markle paid those residing at Valley River their annuities at that location.

36. On August 16, 1891, Agent Markle reported that IR 63 had “only four farming heads of families” as several had gone to Way-way-see-cappo’s several years ago and one had gone to Crooked Lake Agency last spring. He wrote that others resided at Valley River.

37. On August 23, 1892, Agent Markle reported to the DSGIA that he had requested that a portion of the Band residing at Valley River inform him of a time when they could meet on IR 63 for the purpose of taking a surrender. Agent Markle noted that the distance between Valley River and IR 63 was approximately a two-day drive and that he had deemed it best to consult those at Valley River regarding the date of the proposed meeting “so that a full attendance may be ensured”.

38. On August 23, 1892, Agent Markle also reported that he had shown a rough diagram of the portions of the Reserve proposed for surrender to John Tanner, a resident of the Reserve, and that Tanner had recommended different sections be surrendered. Agent Markle suggested that a release be prepared to reflect Tanner's proposal in order that the "Indians be allowed to make a choice as to which of the two [options] they prefer".

39. On September 3, 1892, Agent Markle was advised to present the surrender to the Band as originally drafted and "allow the Indians a free expression of their opinion on the subject". The letter noted that "it may happen that the opinion expressed by John Tanner is not shared generally by the Band and that the surrender as now drafted may pass".

The surrender was taken

40. Under section 39 of the *1886 Indian Act*, a valid release or surrender of a reserve or portion of a reserve must be:

- a. Assented to by a majority of male members of the band, of the full age of 21 years, at a meeting or council of the band summoned for that purpose, according to their rules and held in the presence of the Superintendent-General or an officer duly authorized to attend such council, by the Governor in Council, or by the Superintendent General;
- b. Those entitled to vote or be present at such council must have resided habitually on or near the reserve and be interested in the reserve; and
- c. The fact that the surrender had been assented to by the band had to be certified on oath before an appropriate judicial official (as specified by the legislation) by the Superintendent-General or by an officer authorized to attend the meeting and one of the chiefs or principal men who were present at the meeting and entitled to vote.

41. On September 15, 1892, a surrender document was signed by six men. On October 5, 1892, the original marks were re-acknowledged and four additional marks were added to the surrender document, for a total of 10 men. The surrender also contained the signatures of J.A. Markle, Indian Agent, T.P. Wadsworth, William Nabis, Birtle Interpreter, P.D. Bushe, Constable, N.W.M.P. (Northwest Mounted Police) and Donald McIvor.

42. The surrender document stated that the “Principal men of the Silver Creek Band of Indians” resident on the Silver Creek Reserve surrendered fifteen square miles of IR 63, as described, upon the condition that “other lands of at least equal extent and value shall be secured as a reserve” for them.

43. On October 5, 1892, the same day that additional men signed the surrender, seventeen men of the Claimant were paid annuities.

44. The affidavit requirements of section 39 of the *1886 Indian Act* were met on September 6, 1893. County Court Judge Thomas Dickey Cumberland swore an affidavit attesting to the fact that that John Rattlesnake and Agent Markle appeared before him and swore that the surrender had been assented to by the Band as set out in the said surrender. In the affidavit, Agent Markle attested that the surrender “was assented to by a majority of the male members of the said Band of Indians of the Silver Creek Reserve No. 63 of the full age of twenty one years then present.” Further, he attested:

that such assent was given at a meeting or council of the said Band summoned for that purpose and according to the provisions of the *Indian Act*. That he was present at such meeting or council and heard such assent given. That he was duly authorized to attend such council or meeting by the Superintendent General of Indian Affairs. That no Indian was present or voted at said council or meeting who was not a member of the said Band or interested in the land mentioned in the said release or surrender.

45. The affidavit further stated that John Rattlesnake attested that the surrender:

was assented to by him and a majority of the male members of the said Band of Indians of the full age of twenty one years then present. That such assent was given at a meeting or council of the said Band of Indians summoned for that purpose according to the provisions of the *Indian Act* ...That no Indian was present or voted at such council or meeting who was not a habitual resident on or near the reserve of the said Band of Indians or interested in the

land mentioned in the said release or surrender. That he is one of the principle men of the said Band of Indians and entitled to vote at the said council or meeting and that there are no chiefs of said Band of Indians.

The affidavit was signed by T.D. Cumberland, County Court Judge, who testified that William Nabis was sworn in to act as interpreter for John Rattlesnake

#### The surrender was accepted

46. On October 26, 1893, Assistant Indian Commissioner A.E. Forget, transmitted the surrender to the Deputy of the Superintendent General of Indian Affairs.

47. The Governor in Council accepted the surrender by Order-in-Council P.C. 2929, dated November 10, 1893.

#### Valley River post-surrender

48. In the October 1893 treaty annuity payroll for the "Gambler's Band 63", several band numbers are listed as having a new band number with "Band 62 ½". There is a separate October, 1893 treaty annuity payroll for "Valley River Band 62 ½".

49. In October, 1893, T.P. Wadsworth, Inspector of Indian Agencies and Reserves, wrote to the Indian Commissioner, Regina, that the Silver Creek Band had been divided. He noted "an exchange of some thirteen sections of land, has been accomplished with the Government so that that portion will be distinct and separate hereafter." Concerning Wadsworth's report that there had been no division in the bookkeeping for the "seceders", marginalia signed by the Assistant Commissioner stated "The Agent will be advised to keep the accounts of the two divisions of this Band separate".

50. Valley River Reserve was surveyed in September, 1894 by A.W. Ponton. The survey plan of the Valley River Reserve, is titled "Survey of Indian Reserve No. 63A at Valley River, Province of Manitoba for Indians of Gambler's Band in lieu of surrendered portion of Indian Reserve No. 63." The reserve contained 18.25 square miles, which was a larger amount of land than the 15 square miles surrendered.

51. Order in Council P.C. 1895-3844, approved on January 8, 1896, set apart and reserved the area of land at Valley River "for the purposes of the 'Gambler's Band' of Indians".

52. In October, 1895 it was reported that the "Indians of the Valley River Band", referred to as an "offshoot of the Gambler's Band", elected a chief without the sanction of the Agent. Later, in 1897 a chief was elected with the sanction of the Agent.

53. In summary, the Crown says that, considering the complex movements within the Fort Ellice Group, Agent Markle properly assessed the eligible voters at the time of surrender. He lawfully took a surrender according to the wishes of the majority of the eligible voters for a reserve of equal or better land quality in another location. That reserve was set aside for the benefit of the Claimant.

#### **V. Relief (R. 42(f))**

54. The Crown seeks dismissal of the claim.

55. To the extent that the Crown may be found liable to pay compensation for losses incurred by the Claimant as a result of the 1892 surrender, the Crown seeks an offset pursuant to s. 20(3) for any such losses, because the Claimant was provided with the same, or greater, amount of lands in exchange for the lands surrendered.

56. The Crown seeks costs in these proceedings.

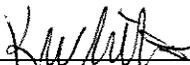
57. Such other relief as this Honourable Tribunal deems just.

**VI. Communication (R. 42(g))**

The Respondent's address for service is:

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Dated: October 1, 2015

  
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