

**SPECIFIC CLAIMS TRIBUNAL**

BETWEEN:

**OSOYOOS INDIAN BAND**

**CLAIMANT**

v.

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

**RESPONDENT**

SPECIFIC CLAIMS TRIBUNAL		
F I L E D	TRIBUNAL DES REVENDICATIONS PARTICULIÈRES  September 27, 2011  Guillaume Phaneuf	D E P O S E
Ottawa, ON	7	

---

**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: OSOYOOS INDIAN BAND  
As represented by Hannah McDonald, of  
Boughton Law Corporation,  
Suite 700 – 595 Burrard Street  
Vancouver, BC, V7X 1S8  
Email: [hmcDonald@boughton.ca](mailto:hmcDonald@boughton.ca)

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

1. The Osoyoos Indian Band (the “Band”) submitted its claim to the Minister in August, 2005 alleging that the Crown had breached its fiduciary obligations to the Band.
2. The Minister notified the Band in writing on February 16, 2011 that its specific claim had not been accepted for negotiation.

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

3. The Crown does not accept the validity of any of the claims set out in the Declaration of Claim, and in particular:
  - a. The breach of a duty to ensure that the land at issue reverted to the Crown for the benefit of the Band following abandonment of the railway line; and
  - b. The breach of an obligation to ensure the land at issue was returned to the Crown for the benefit of the Band.
4. The Crown does not accept the validity of the claim that the Band has suffered any damages. The Band has already been compensated in full for the fair market value of the land in fee simple.
5. Under Part IV of its Declaration of Claim, the Band relies on grounds described in ss. 14(a), (b) and (d) of the *Specific Claims Tribunal Act* (the “Act”). The Crown does not accept the validity of claims based on such grounds as these allegations have no basis in fact and were not contained in the claim submitted to the Minister.

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

6. The facts as set out in paragraphs 4 through 8 of the Declaration of Claim are irrelevant and refer to documents that are privileged.

7. In reply to paragraphs 9 and 27 of the Declaration of Claim, the fact that the Minister rejected the claim in writing is admitted in paragraph 2 above. Beyond the fact of rejection, the contents of the letter of February 16, 2011 are irrelevant and privileged.
8. The Crown admits the facts as set out in the following paragraphs of the Declaration of Claim: 12, 13, 15, 17, 18, 20, 21, 22, 23, 24, 25, 26 and 27.
9. The Crown admits the facts as set out in paragraph 14 of the Declaration of Claim except that, at the time, the subject land was part of a proposed reserve. In addition, the acreage amount noted at paragraph 2 of the referenced portion of Order-in-Council 2317 should be 3.97.
10. The Crown admits the facts as set out in paragraph 19 of the Declaration of Claim to the extent that the paragraph refers to the abandonment of the portion of the Kettle Valley Railway line that passed across the right of way land.
11. The Crown denies the facts as set out in paragraph 16 of the Declaration of Claim.
12. The statements at paragraphs 28 and 29 of the Allegations of Fact in the Declaration of Claim are submissions, rather than facts.

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

13. In 1877, the Joint Indian Reserve Commission allotted Osoyoos Indian Reserve No. 1 for the Band. However, until July 29, 1938 the Province of British Columbia held legal title to the land.
14. The 1902 Dominion of Canada Schedule of Indian Reserves indicates that the size of the proposed reserve is 32,097 acres.
15. By way of statute, in 1911 the Kettle Valley Railway Company was authorized to construct a branch line of railway from Penticton, British Columbia, to the international border at a point near the shoreline of Osoyoos Lake. Kettle Valley Railway Company applied to the Department of Indian Affairs for a right of way across the proposed reserve for the purpose of constructing the railway line.

16. The sale of 3.97 acres of the proposed reserve to Kettle Valley Railway Company for right of way purposes, pursuant to s. 46 of the *Indian Act*, was authorized on November 7, 1922 by Dominion Order-in-Council 2317.

17. The Letters Patent for the "sale and disposal" of the 3.97 acres were issued on November 30, 1922. By way of this document, the federal Crown did "grant, sell, alien, convey and assure unto the said the Kettle Valley Railway Company their successors and assigns forever" the right of way across the proposed reserve.

18. The Letters Patent indicate that the Kettle Valley Railway Company paid \$894.00 to the Crown, for the benefit of the Band, for the "absolute purchase" of the right of way.

19. The compensation paid to the Crown for the benefit of the Band was the fair market value of the land in fee simple. It was based on a valuation of the land conducted by Indian Agent Ball at the request of the Department of Indian Affairs earlier that year. Agent Ball valued the land at \$200/acre plus \$100 for severance. In his report to the Department of Indian Affairs, Agent Ball noted that "[t]he valuation which I placed upon No. 1 Reserve is the same as that paid to owners of the same class of land on either side of the Reserve line." He also noted that the Band agreed to the valuation.

20. By Order-in-Council 1036, dated July 29 1938, the Crown in right of British Columbia "conveyed to His Majesty the King in the right of the Dominion of Canada in trust for the use and benefit of the Indians of the Province of British Columbia" certain lands set out in a schedule attached to the Order-in-Council. One of the lands listed in the schedule was described as Osoyoos Indian Reserve No. 1 having a size of 32, 097 acres. By this act, the provincial Crown transferred administration and control to the federal Crown of provincial land on which the reserves were to be established.

21. In the 1943 Schedule of Indian Reserves in the Dominion of Canada, the size of the reserve was adjusted to 32;073.716 acres. A notation to the schedule indicates that the decrease in size reflects the right of way acreage as well as other transactions.

22. In 1956 the assets, railways and undertakings of the Kettle Valley Railway Company were vested in the Canadian Pacific Railway Company ("CPR"). CPR abandoned portion of the railway line that passed across the right of way land on or about June 21, 1978.

23. Several years later, in 1981, the Band wrote to the Department of Indian Affairs for information concerning the right of way on the reserve. The Department of Indian Affairs responded by providing documentation related to the "sale of 3.97 acres of Osoyoos Indian Reserve No. 1 to the Kettle Valley Railway Company for the sum of \$894.00".

24. In early 1987, the Band advised Indian and Northern Affairs Canada ("INAC") that it had learned that CPR was conveying the right of way land to the Province of British Columbia. The Band asked that INAC seek to have the lands returned to reserve status. However, INAC advised that the federal Crown would not be seeking recovery of the right of way land on the ground that, at the time that the right of way land was given to the Kettle Valley Railway Company in 1922, it was Provincial Crown land.

25. On February 5, 1990, the Land Title Office formally registered the transfer of the right of way land to the Province of British Columbia.

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

26. The Crown seeks to have the claim dismissed in its entirety.

27. If the Crown is liable, which is not admitted, the Crown seeks to have the Band's claim for damages dismissed on the basis that the Band was already compensated in full for the lands at issue in 1922.

28. The Crown pleads and relies on section 20 of the Act.

29. The Crown seeks its costs in the proceedings.

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

Respondent's address for service: Department of Justice  
900 – 840 Howe Street  
Vancouver, BC V6Z 2S9  
Attention: Brian McLaughlin

Fax number address for service: (604) 666-2710

E-mail address for service: Brian.McLaughlin@justice.gc.ca

Dated: September 27, 2011



Signature of

Respondent       lawyer for Respondent

**Myles Kirvan,**

Deputy Attorney General

**Per: Brian McLaughlin**

Department of Justice

British Columbia Regional Office