

INDIAN CLAIMS COMMISSION

REPORT ON THE MEDIATION

OF THE

QU'APPELLE VALLEY INDIAN DEVELOPMENT

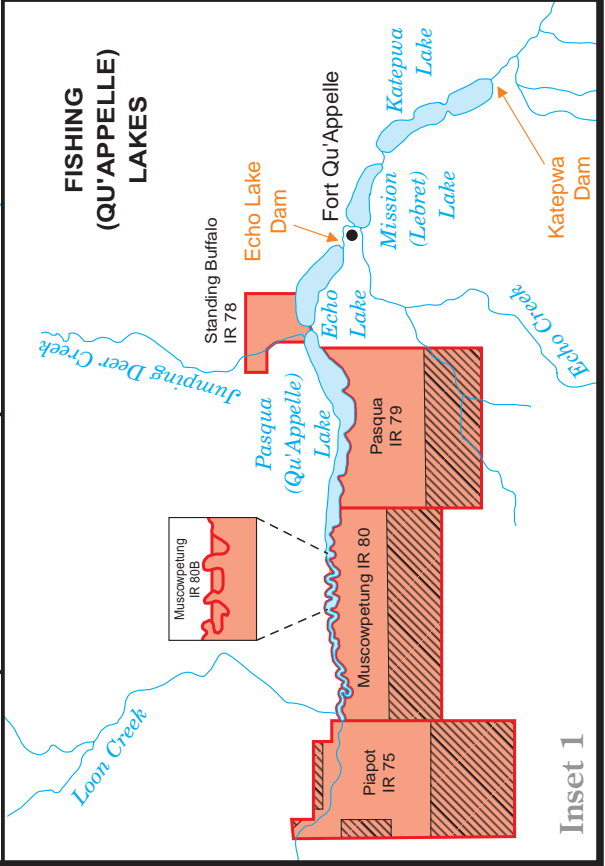
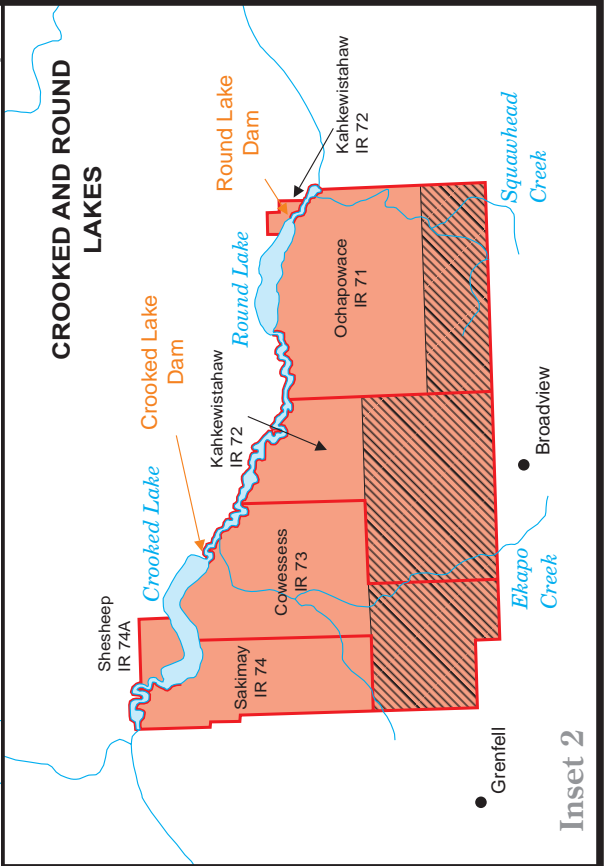
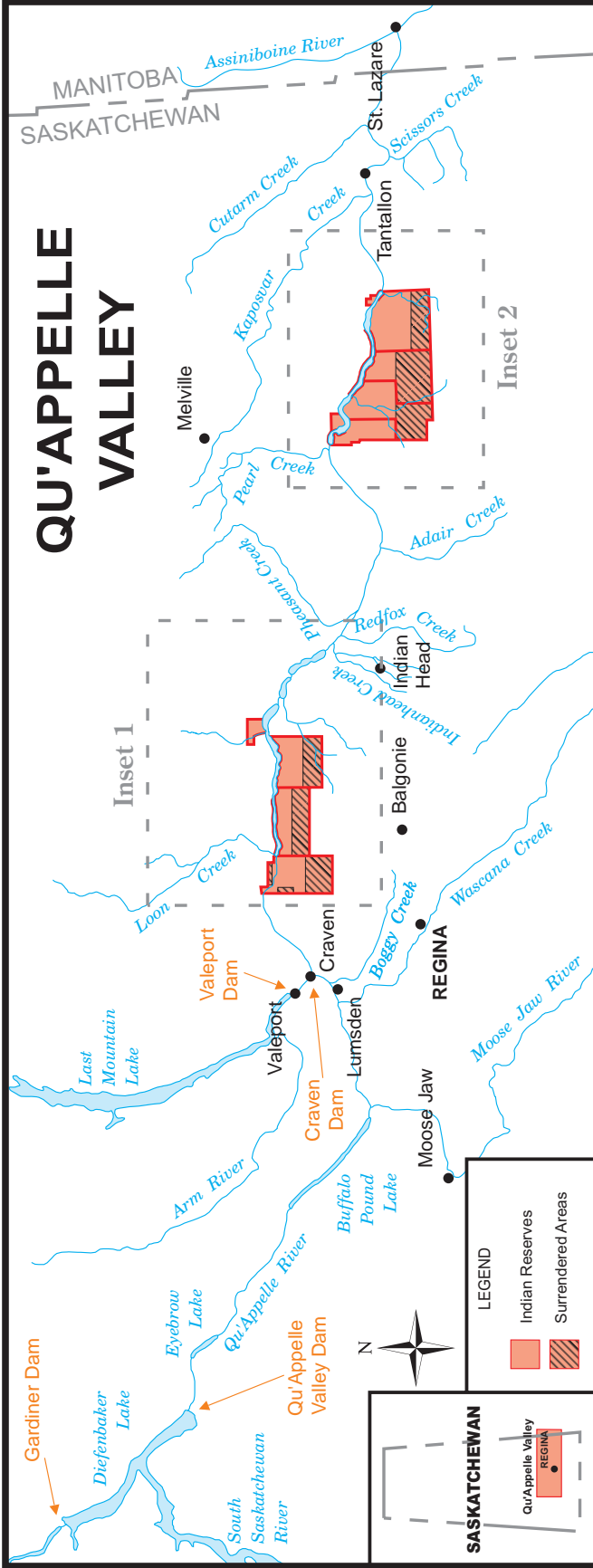
AUTHORITY (QVIDA)

FLOODING NEGOTIATIONS

December 2005

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PART I
INTRODUCTION

This mediation report outlines the attempt to negotiate a complex and complicated claim, which, for reasons to be explained, the parties were unable to bring to a successful settlement.

The report will not provide a full history of the flooding claims of the First Nations in the Qu'Appelle River Valley in Saskatchewan. The issues involved in the claim and the inquiry process have already been discussed by the Indian Claims Commission (ICC) in its February 1998 report, *Qu'Appelle Valley Indian Development Authority: Flooding Inquiry*.¹ Rather, this report will summarize the historical background of the claim, its progress through the specific claims review process, and the ICC inquiry. Without breaching the confidentiality of the discussions, it will also describe the negotiating process itself, including the role of the ICC's Mediation Unit.

THE COMMISSION'S MANDATE AND MEDIATION PROCESS

The Indian Claims Commission was created as a joint initiative after years of discussion between First Nations and the Government of Canada on how the process for dealing with Indian land claims in Canada might be improved. Following the Commission's establishment by Order in Council on July 15, 1991, Harry S. LaForme, a former commissioner of the Indian Commission of Ontario, was appointed as Chief Commissioner. With the appointment of six Commissioners in July 1992, the ICC became fully operative.

The Commission's mandate is twofold: it has the authority, first, to conduct inquiries under the *Inquiries Act* into specific claims that have been rejected by Canada, and, second, to provide mediation services for claims in negotiation.

Canada distinguishes most claims into one of two categories: comprehensive and specific. Comprehensive claims are generally based on unextinguished aboriginal title and normally arise in areas of the country where no treaty exists between First Nations and the Crown. Specific claims generally involve a breach of treaty obligations or instances where the Crown's lawful obligations

¹ Indian Claims Commission (ICC), *Qu'Appelle Valley Indian Development Authority (Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations): Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 159.

have been otherwise unfulfilled, such as a breach of an agreement or a dispute over obligations deriving from the *Indian Act*.

These latter claims are the focus of the Commission's work. The Commission is mandated to review thoroughly a rejected claim and the reasons for its rejection with both the claimant and the government. The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, gather information, and, if necessary, subpoena evidence. If, at the end of an inquiry, the Commission concludes that the facts and the law support a finding that Canada owes an outstanding lawful obligation to the claimant, it may recommend to the Minister of Indian Affairs that a claim be accepted.

In addition to conducting inquiries, the Commission is authorized to provide mediation services at the request of the parties. From its inception, the Commission has interpreted its mandate broadly and has vigorously sought to advance mediation as an alternative to the courts. In the interests of helping First Nations and Canada negotiate agreements that reconcile their competing interests in a fair, expeditious, and efficient manner, the Commission offers the parties a broad range of mediation services tailored to meet their particular goals.

PART II
A BRIEF HISTORY OF THE CLAIM

This claim is a complicated one to summarize. There are eight First Nations with reserve land in the valley of the Qu'Appelle River in Saskatchewan, and each one is affected differently by several separate irrigation and water-storage reservoirs. As a result, they are all involved in the validation and negotiation of claims for flooding damage, both separately and together, in different combinations. As noted above, the ICC provided an extensive history in its inquiry report, and that document should be consulted for more details of the claim.

The Qu'Appelle Valley Indian Development Authority (QVIDA) was established in 1979 to represent the interests of the eight First Nations with reserves in the Qu'Appelle River Valley. Seven of the First Nations – the Muscowpetung, Pasqua, Piapot, Cowessess, Kahkewistahaw, Ochapowace, and Sakimay – all adhered to Treaty 4 in 1874 and 1875. The Standing Buffalo band members, in contrast, are descendants of Minnesota Sioux Indians who came to Canada to escape the American Sioux Wars of 1862–63, and, although they were not entitled to participate in the treaty, they were encouraged to settle in the Treaty 4 area.

Between 1876 and 1884, the various reserves for the eight First Nations were selected and surveyed in the Qu'Appelle Valley. Four reserves (Sakimay, Cowessess, Kahkewistahaw, and Ochapowace) are located in the eastern end of the valley, with their northern boundaries defined by the Qu'Appelle River, Round Lake, or Crooked Lake. Three others (Muscowpetung, Pasqua, and Standing Buffalo) are at the western end of the valley, where part of each of their reserve boundaries includes the Qu'Appelle River, Qu'Appelle Lake, and Echo Lake. The Piapot reserve, also at the western end of the valley has its northern boundary north of the Qu'Appelle River. The natural seasonal flooding of the flat lands of the river valley stimulated high yields of top-quality hay, which in turn fostered cattle raising. The economy of the valley also included firewood, farm produce, senega root, berries, small game, and fishing.

In the 1930s, an extended period of drought on the prairies coincided with the worldwide economic depression. In these circumstances, the federal government created the Prairie Farm Rehabilitation Administration (PFRA) to rehabilitate the dry, soil-eroded areas of all three Prairie provinces and to find ways to conserve surface water supplies for household use, stock watering, and

irrigation. The Qu'Appelle River Valley was one of the areas investigated for large water development projects.

In 1942, a water-control structure was built on Echo Lake, which caused flooding on parts of the Pasqua and Muscowpetung reserves. Although studies were conducted at the time to determine the extent of the damage in order to compensate the First Nations, no money was paid and the First Nations were not consulted. At about the same time, the PFRA also constructed water-control structures on Crooked Lake and Round Lake. To compensate for the resulting flooding of their reserve lands, the Sakimay, Cowessess, and Ochapowace Bands were each paid \$3,300. Again, the First Nations were not consulted. The effect of these dams was summarized in the ICC report:

The economies of the Qu'Appelle Valley First Nations before 1940 featured considerable reliance on activities and resources in the valley bottom, including native hay, timber, beaver, muskrat, deer, berries, maple sugar, and important cultural and medicinal herbs and vegetation, such as sweetgrass and senega root. The water in the river system itself was also fundamental to the Bands' existence, not only for domestic purposes but also for fishing, stockwatering, and the natural irrigation that it provided by means of seasonal flooding of low-lying lands. Lower water levels also permitted band members to cross the river to access hay and other resources on both sides. Several of the reserves "developed a strong attachment to economic, social and cultural activities based on the river habitat."

The construction of the dams resulted in the continuous flooding of certain areas of the reserves, with other areas occasionally flooded and still other areas damaged by capillary action and salinization. Various trees, shrubs, and nutrient rich grasses were replaced by saline plants, and the loss of shelter and food resulted in the reduction of small game. At the same time, the Indian economies were undermined by the shift away from large-scale use of horse-drawn wagons for transport and wood for heating fuel.²

BAND COUNCIL RESOLUTIONS, 1977

In the early 1970s, native organizations and individual First Nations began extensive archival research into issues relating to their treaties and reserve lands. In 1972, the Chief of the Muscowpetung Band asked officials if either his Band or the neighbouring Pasqua First Nation had

² ICC, *Qu'Appelle Valley Indian Development Authority (Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations): Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 165-66.

been compensated for the flooding rights from the 1940s. The PFRA conducted its own research into the issue and confirmed that there had been neither compensation nor consent, and in September 1973 it commenced negotiations with Muscowpetung and Pasqua. In September 1974, officials with the Department of Indian Affairs suggested that Piapot and Standing Buffalo were also affected by the flooding.

In September 1975, with negotiations stalled, the four western bands hired lawyer W. Roy Wellman to represent their interests in the negotiations. By August 1976, the PFRA had quantified the acreage affected by the flooding on the Muscowpetung, Pasqua, and Standing Buffalo reserves, but determined that the Piapot reserve was unaffected by the Echo Lake structure.³ At this point, Piapot elected to proceed independently, though Mr Wellman continued to represent the other three bands in their negotiations.

In November 1976, the three bands offered to accept a lump-sum settlement of \$265,000 for both past and present damage to their reserve lands and permission for future use, the money to be divided by mutual consent according to the acreage affected by the flooding: Muscowpetung, \$150,000; Pasqua, \$100,000; and Piapot, \$15,000. After some deliberation, the PFRA accepted the offer. Each of the three First Nations passed Band Council Resolutions (BCRs) on February 8 and February 15, 1977, confirming the agreement. The Pasqua and Standing Buffalo BCRs released the PFRA

from all past, present and future claims *in respect to erection of the said control structure and consequential flooding*, and further agrees to authorize the issuance of a permit to PFRA in respect of the continued operation of the said control structure.⁴

³ E. Caligiuri, Planning Engineer, Engineering Service, PFRA, Department of Regional Economic Expansion, to W.M. Berry, Chief Engineer, PFRA, August 4, 1976, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1035), as reported in ICC, *Qu'Appelle Valley Indian Development Authority (Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations): Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 275.

⁴ Pasqua and Standing Buffalo BCRs, both dated February 8, 1977, both in PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 1069 and 1070), as reported in ICC, *Qu'Appelle Valley Indian Development Authority (Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations): Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 280. Emphasis added.

The Muscowpetung BCR had a slightly different wording. It released the PFRA

from all past, present and future claims *in respect to lands now flooded by the said control structure*, and further agrees to authorize the issuance of a permit to PFRA in respect of the continued operation of the said control structure.⁵

The agreement was accepted by Order in Council PC 1977-10/1949, dated July 7, 1977, and, shortly after, payments were deposited to the credit of the respective Bands.

DISSATISFACTION WITH THE SETTLEMENT AND SUBMISSION OF A SPECIFIC CLAIM

Months after the settlement agreement, a new Chief was elected at Muscowpetung. He raised concerns about the perpetual nature of the agreement and, in February 1978, he and his council issued a new resolution, rescinding the 1977 BCR. Standing Buffalo did the same on November 10, 1980, and Pasqua followed suit on February 10, 1982. At the same time, the government departments responsible for drafting the permits for future use could not agree on the wording, and no permits were ever issued.

In June 1979, the Chiefs of the eight bands in the Qu'Appelle Valley passed a unanimous resolution to form the Qu'Appelle Valley Indian Development Authority (QVIDA). The Authority had two main goals: to present members' claims in a unified voice, and to work towards more effective flood control and improved water quality in the valley. In May 1986, QVIDA submitted a historical report and legal analysis to the Department of Indian Affairs and Northern Development (DIAND), accompanied by BCRs from at least seven of the bands which approved the submission of the specific claim "for compensation arising from the illegal alienation and flooding" of the reserves.⁶

⁵ Muscowpetung BCR, February 15, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1074), as reported in ICC, *Qu'Appelle Valley Indian Development Authority (Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations): Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 280. Emphasis added.

⁶ See ICC, *Qu'Appelle Valley Indian Development Authority (Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations): Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 303.

In January 1988, after its initial review, DIAND's Specific Claims Branch wrote to QVIDA to say that the claim, as submitted, was not strong enough to forward to the Department of Justice for review. In November 1992, with no further activity on the file, the Specific Claims Branch closed the file, subject to its being reopened when QVIDA was ready to resubmit its claim.⁷

ICC INQUIRY, 1994–98

In September 1994, the eight bands of QVIDA asked the ICC to conduct an inquiry on the flooding claims, on the grounds that the closure of the file constituted a constructive rejection of the claim. The first three planning conferences in the inquiry process dealt with a narrowing of the issues while Canada completed its research and analysis of the file. On March 29, 1996, the Specific Claims Branch notified the four western First Nations that (a) it accepted the Standing Buffalo claim for negotiations, (b) it found no lawful obligation owing to either Muscowpetung or Pasqua, based on the 1977 settlement and BCRs, and (c) Piapot was not a party to this claim because it was too far away to be affected by the Echo Lake water-control structure. On February 28, 1997, however, Canada changed its position with regard to Standing Buffalo and was no longer willing to negotiate the claim.

In March 1996, the Specific Claims Branch also notified the four eastern bands that there was no lawful obligation with respect to their flooding claims because the *Indian Act*, section 34 (re expropriations), authorized the use and occupation of reserve lands. Canada was, however, willing to consider additional submissions regarding the inadequacy of compensation paid. At the fourth ICC planning conference, it was noted that the Specific Claims Branch and the Justice Department claim review had not addressed the impact, if any, of flooding on the Kahkewistahaw reserve. Canada agreed to review the claim and to provide a response. Since Kahkewistahaw's submission was not ready for review, it withdrew its claim from the ICC process so the inquiry could proceed.

The ICC was, therefore, left to inquire into the claims of Standing Buffalo, Muscowpetung, and Pasqua in the west, and Cowessess, Ochapowace, and Sakimay in the east. After six planning

⁷ ICC, *Qu'Appelle Valley Indian Development Authority (Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations): Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 302–4.

conferences, four community sessions to hear elders' testimony, and legal arguments, and after reviewing six volumes of primary documents and 35 technical and historical reports, the Commission reported and made its recommendations in February 1998. It found that Canada did owe the six First Nations an outstanding lawful obligation with respect to the flooding and made three specific recommendations:

RECOMMENDATION 1

That Canada immediately commence negotiations with the QVIDA First Nations to acquire by surrender or expropriation such interests in land as may be required for the ongoing operation of the control structures at Echo Lake, Crooked Lake, and Round Lake or, alternatively, remove the control structures.

RECOMMENDATION 2

That the flooding claims of the Sakimay, Cowessess, and Ochapowace First Nations be accepted for negotiation under Canada's Specific Claims Policy with respect to

- (a) damages caused to reserve lands since the original construction of the dams in the early 1940s, and
- (b) compensation for
 - (i) the value of any interest that Canada may acquire in the reserve lands, and
 - (ii) future damages to reserve lands,

subject to set-off of compensation of \$3270 paid to those First Nations in 1943.

RECOMMENDATION 3

That the flooding claims of the Muscowpetung, Pasqua, and Standing Buffalo First Nations be accepted for negotiation under Canada's Specific Claims Policy with respect to

- (a) damages caused to reserve lands
 - (i) since the original construction of the dams in the early 1940s, or
 - (ii) alternatively, since 1977, if these First Nations can be bound by the 1977 Band Council Resolutions and if the release for damages prior to 1977 can be severed from the invalid part of the settlement, and

- (b) compensation for
 - (i) the value of any interest that Canada may acquire in the reserve lands,
and
 - (ii) future damages to reserve lands,

subject to set-off of compensation of \$265,000 paid to those First Nations in 1977.⁸

On November 26, 1998, DIAND's Acting Assistant Deputy Minister for Claims and Indian Government accepted the claims for negotiation. This response was followed by a letter dated December 3, 1998, from the Minister of Indian Affairs, Jane Stewart, notifying each of the six First Nations participating in the inquiry that Canada had reviewed the ICC's findings and agreed with the recommendations. She accepted each claim for negotiation, on the basis that Canada did not properly authorize the flooding of reserve lands.⁹

⁸ ICC, *Qu'Appelle Valley Indian Development Authority (Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations): Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 369–70.

⁹ Responses, Re: Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Claim Inquiry, Jane Stewart, Minister of Indian Affairs and Northern Development, to Chiefs of Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations, all dated December 3, 1998, reported (1999) 11 ICCP 304–9.

PART III
NEGOTIATION AND MEDIATION OF THE CLAIM

The Commission's role in the process of settling the claim would normally have ended as soon as its inquiry was completed and the claim accepted for negotiation by Canada. In this case, however, the QVIDA First Nations asked that the ICC's Mediation Unit be involved in the negotiation process as a neutral facilitator, and Canada agreed. Negotiations between QVIDA and Canada began in April 1999, and the federal negotiator and the First Nations negotiation teams met in April, June, and October before they asked the ICC to join the process on October 26, 1999.

For the most part, facilitation focused on matters relating to process. With the agreement of the negotiating parties, the Commission chaired the negotiation sessions, provided an accurate record of the discussions, followed up on undertakings, and consulted with the parties to establish mutually acceptable agendas, venues, and times for the meetings. The Commission was also available to mediate disputes when requested to do so by the parties, to assist them in arranging for further mediation, and to coordinate any research that might be undertaken by the parties to support negotiations.

Claims for only five First Nations were actively negotiated in this process: Pasqua, Cowessess, Ochapowace, Sakimay, and Muscowpetung. The Standing Buffalo claim was accepted for negotiation, but that Band opted to negotiate its claim separately from the QVIDA table. Piapot and Kahkewistahaw were still in the process of submitting claims for review by Canada, and, although they were participants at the table, even when negotiations broke down, they still did not have claims accepted for negotiation.

The parties agreed that the negotiations would be conducted in two phases. In the first, they would negotiate a preliminary settlement agreement covering the common issues, identified by the parties, which would apply to all the First Nations. The second phase would involve the negotiation of issues specific to each First Nation.¹⁰

As part of the first phase, discussion focused on issues relating to riparian rights and the navigability of the Qu'Appelle River, beneficiaries of common hay lands, the procedural validity of

¹⁰ Protocol Agreement Relating to the Qu'Appelle Valley Flood Claims Negotiations, August 30, 2000, para. 5.1 (ICC file 2107-22-1M, vol. 1).

BCRs, compensation to individual band members for losses due to flooding, and the legal mechanism for alienating the flooded lands should the parties reach a settlement.

In order to determine the amount of land both permanently and semi-permanently flooded as a result of the water control, the QVIDA Chiefs hired a surveying firm and a separate surveying consultant to try to identify the original river and lake boundaries of the various reserves. Because most of the original mounds and posts were under water, they would use old survey plans, field notes, reports, and whatever physical evidence they could locate.

To determine what additional research was needed, the parties reviewed the studies that had been produced for the claim submission and the ICC inquiry. The ICC assisted in this process by providing the parties with executive summaries of each report and locating various maps and plans at Library and Archives Canada. The QVIDA Chiefs hired a contractor to review all the material, and he reported in December 2001 that, in his opinion, a total of seven loss-of-use studies were required. No action was taken on this recommendation until January 2003, when, with the assistance of the ICC Mediation Unit's study coordinator, the parties developed joint terms of reference and agreed on a single firm to produce a report on the combined loss-of-use issues.

One of the roadblocks to progress in these negotiations was the fact that the table was mandated to deal with both past and present damages as well as issues relating to the current and continued operation of the control structures. The breadth of this mandate meant that, although Canada and the First Nations could negotiate compensation for past damages, decisions about the continued operation of the water-control structures and discussions of future compensation relating to them required the involvement of the Prairie Farm Rehabilitation Administration (a division of the federal Department of Agriculture), which owns and operates the dams, as well as the provincial Saskatchewan Watershed Authority, which manages the water levels in the province.

Although compensation was paid in 1943 and 1977, no permits were ever issued, and, from the perspective of the First Nations, the operation of the reservoirs was and continued to be an illegal trespass. In April 2002, the Piapot, Pasqua, Muscowpetung, Sakimay, Cowessess, Kahkewistahaw, and Ochapowace First Nations unilaterally prepared a "Treaty Water Resources Permission License," which set out their terms, financial and otherwise, for Canada's "continued trespass" for the next fiscal year. This letter was sent to the Regional Minister of Saskatchewan, the Minister of Natural

Resources, the Minister of Indian Affairs and Northern Development, and the Minister of Agriculture and Agri-Food.¹¹ The problem with the proposed licence is that it was outside the legislative authority of the *Indian Act*, and the financial terms were beyond what the federal and provincial governments could consider in these negotiations.

On November 6, 2002, the QVIDA First Nations and Canada signed a Memorandum of Understanding to set out the principles under which they would resume active negotiations.¹² The parties continued to meet, but made little progress. In the summer of 2003, the ICC proposed shuttle mediation to explore the positions of the parties. In this process, the mediator meets separately with each party, so that direct communication is with the mediator only; as the participants remain in separate rooms, the mediator relays information, defines issues, and suggests possible solutions. At the end of the period allotted, Canada declared that there were still several areas of impasse and that there did not appear to be any possibility of successful negotiations at the large table. In August 2003, Canada gave QVIDA the 90-day notice required by the November 2002 Memorandum of Understanding to cease negotiations, adding that it was prepared to enter into negotiations with individual First Nations that have accepted claims.

¹¹ Piapot, Pasqua, Muscowpetung, Sakimay, Cowessess, Kahkewistahaw, and Ochapowace First Nations, Saskatchewan, to the Regional Minister for Saskatchewan, Minister of Natural Resources, Minister of Indian Affairs and Northern Development, and Minister of Agriculture and Agri-Food, Ottawa, April 20, 2002, with attachment (ICC file 2107-22-1M, vol. 6).

¹² Pasqua, Muscowpetung, Piapot, Sakimay, Cowessess, and Ochapowace First Nations and Her Majesty the Queen in right of Canada, Memorandum of Understanding, November 6, 2002 (ICC file 2107-22-1M, vol. 7).

PART IV
CONCLUSION

Although the Commission is not at liberty to disclose the discussions that took place during the negotiations, it is worth noting the reasons why the negotiations were unable to produce a settlement.

From the outset, the number of individuals at the negotiating table was problematic. Between May 10, 2000, and July 10, 2003, 20 full-table meetings averaging approximately 40 participants were held, in addition to a number of smaller technical meetings and conference calls. As a result, a considerable amount of time was taken up with matters of process, and, as the negotiations progressed, competing issues and interests began to distract the parties from keeping focused on matters relating to the overall claim. An attempt to reduce the number of participants was rejected.

In addition, many of the participants lacked familiarity with the Specific Claims Policy, the *Indian Act*, and other primarily provincial legislative authorities. This inexperience also contributed to delays, as some representatives advanced or defended positions that could not be dealt with in the negotiations.

Three of the First Nations that once were part of the QVIDA table are now in separate negotiations with Canada. The ICC was asked to provide mediation services to these tables, and talks are proceeding.

FOR THE INDIAN CLAIMS COMMISSION



Renée Dupuis
Chief Commissioner

Dated this 1st day of December, 2005.