

SPECIFIC CLAIMS TRIBUNAL

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I	September 18, 2013	É
L	Guillaume Phaneuf	P
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Ottawa, ON		1

B E T W E E N:

AKISQ'NUK FIRST NATION

Claimant

v.

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

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*.

September 18, 2013

Guillaume Phaneuf

(Registry Officer)

TO: Assistant Deputy Attorney General, Litigation, Justice Canada
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I. Claimant (R. 41(a))

1. The Claimant, Akisq'nuk First Nation (the "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. I-5, as amended, in the Province of British Columbia.

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. The First Nation filed the Elkhorn Ranch Specific Claim with the Department of Indian Affairs, Specific Claims Branch. The claim related to breach of duty by Canada that resulted in the First Nation's loss of entitlement to Lot 108, 320 acre parcel, otherwise known as the Elkhorn Ranch ("Elkhorn Ranch").

4. In a letter dated February 21, 2011, the Department of Indian Affairs and Northern Developments stated:

...it is the decision of the Minister of the Department of Indian Affairs and Northern Development not to accept for negotiation the Elkhorn Ranch (Lot 108) Specific Claim on the basis that there is no outstanding lawful obligation on the part of the Government of Canada.

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

5. For the purposes of the claim, the First Nation does not seek compensation in excess of \$150 million.

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

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

14. (1) Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:

(b) a breach of a legal obligation of the Crown under the Indian Act or any other legislation — pertaining to Indians or lands reserved for Indians — of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;

(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))

7. Lot 108, otherwise known as the Elkhorn Ranch, comprising 320 acres, lies within the First Nation's traditional territory to the north of Columbia Lake Indian Reserve No. 3 with a legal description of District Lot 108, Kootenay District.
8. On January 6, 1876, the provincial government passed an Order in Council that provided terms of reference for the Reserve Commissioners to assign reserves.

9. On August 9, 1880, Peter O'Reilly was appointed Reserve Commissioner. He took a leave of absence in 1883.
10. On April 17, 1883, I.W. Powell, the Dominion Inspector of Indian Agents, wrote to the Superintendent of Indian Affairs emphasizing the urgency of establishing reserves for the Ktunaxa people, including the Akisq'nuk First Nation. Despite the urgency, reserve allotment did not occur.
11. On October 27, 1883, G. H. Johnston pre-empted 320 acres of land located south of Windermere Creek and east of Windermere Lake, which was historically referred to as Upper Columbia Lake. This pre-emption occurred while O'Reilly was on a leave of absence.
12. On April 10, 1884, Powell wrote to William Smithe (the Chief Commissioner of Lands and Works) to suggest that no applications to pre-empt or purchase land in Ktunaxa territory should be granted, except subject to what was deemed necessary for the Indians.
13. On August 5, 1884, Commissioner O'Reilly noted the factual circumstances of the First Nation, as well as their expectations regarding land allotment.
14. On August 7, 1884, Lot 108 was surveyed by F. W. Aylmer. The field notes and attached plan clearly show an "Indian Cabin" within the 320 acre parcel pre-empted by Johnston, as well as another "Indian Cabin" just south of Lot 108. The survey, plan, and field notes reveal that in 1884, the area identified as Lot 108 was being used by the First Nation.
15. By a Minute of Decision, dated August 9, 1884, O'Reilly allotted Kootenay Indian Reserve No. 3 to the First Nation.

16. In 1886, the Reserve was surveyed by Crown Surveyor Skinner. Both the survey and field notes of Skinner provide evidence that Lot 108 was used and occupied by the First Nation.
17. On September 23, 1896, two Water Licenses to use water from Windermere Creek for domestic and irrigation purposes were granted to the First Nation.
18. The Crown grant for Lot 108 was issued on October 19, 1889.
19. From 1924 to 1936, Lot 108 was owned by the Department of Agriculture that operated an "Experimental Farm" on Lot 108.
20. On December 28, 1939, Chief Louie Abell of the First Nation wrote a letter to Indian Affairs Branch, Department of Mines and Resources, requesting a map of the reserve and stating that the settlers were taking up their land.
21. On March 8, 1943, Chief Michel wrote to Major Donald McKay, Indian Commissioner for B.C., asserting the First Nation's understanding that Lot 108 was part of their reserve.
22. Aylmer's Field Notes, Skinner's Field Notes, and O'Reilly's Sketch Plan of the Minutes of Decision for IR No.3, were plotted on a plan by D. B. Taylor C.L.S. at Energy Mines and Resources On September 24, 1991. The Taylor Plan clearly indicates that the First Nation was using and occupying Lot 108.

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


23. This claim is based on the Crown's breach of its common law fiduciary duty and legal obligation to complete the reserve creation process relating to the Elkhorn Ranch land, to ensure that these lands were surveyed as an Indian reserve and protected for the exclusive use and benefit of the First Nation and to prevent alienation of Indian reserve lands except in accordance with statutory surrender provisions of the *Indian Act*.

VII. Relief Requested

24. The First Nation seeks:

- a. Compensation for failure to provide a 320 acre parcel, known as Lot 108 or Elkhorn Ranch, as reserve lands;
- b. Interest on compensation for failure to provide a 320 acre parcel, known as Lot 108 or Elkhorn Ranch, as reserve lands;
- c. Costs of this claim; and
- d. Such other relief or compensation as this Honourable Tribunal deems just.

Dated this 18th day of September, 2013.



Signature of Solicitor

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