SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

EEL RIVER BAR FIRST NATION

Claimant

v.

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

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.*

December 7, 2016

Amy Clark

(Registry Officer)

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I. CLAIMANT (R. 41(A))

1. The Claimant, the Eel River Bar First Nation ("First Nation") confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*. The First Nation is located adjacent to the Town of Dalhousie, in the province of New Brunswick.

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;
>
> ...
>
> (d) three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister's decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.

3. This claim is for the damages suffered by the First Nation due to the removal of sand, gravel and other non-metallic substances from the First Nation's reserve. In particular, Canada failed to collect the fair and agreed-on price for the sand and gravel, and also failed to properly supervise, record and administer the sale of these valuable resources. The result of Canada's mismanagement and breach of its fiduciary obligations was the loss of much-needed revenue to the First Nation as well as damage and destruction of the reserve lands.

4. The First Nation brings this Specific Claim on the grounds that, in relation to the removal of sand, gravel and other non-metallic substances from the First Nation's reserve,[1] the Government of Canada ("Crown") violated the First Nation's treaty, Aboriginal and other rights, breached several provisions of the *Indian Act*, and failed to fulfill its fiduciary and trust-like duties to the First Nation.

5. On May 26, 1998, the Eel River Bar First Nation first filed this claim with the Minister for processing under the Specific Claims Policy.

6. On May 17, 2011, The Specific Claims Branch notified the First Nation in writing that the vast majority of First Nation's claim was not accepted for negotiations. The letter stated:

> ...The Crown breached its fiduciary obligation by failing to collect 25 cents a cubic yard for the sand sold from the reserve after the 1929 surrender.
>
> It is the Government of Canada's position that this claim does not disclose an outstanding lawful obligation in respect to all other aspects of the claim...

7. Accordingly, the condition precedent under s. 16(1)(a) of the *Specific Claims Tribunal Act* is satisfied for all aspects of this claim that were never accepted for negotiation.

8. With respect to the one aspect of the claim that was purportedly accepted for "negotiation" by the Crown, over three (3) years have elapsed since the First Nation was first advised of the Crown's decision to negotiate this aspect of the claim, and the claim has not been resolved by final agreement. Therefore, the condition precedent under s. 16(1)(d) of the *Specific Claims Tribunal Act* has been satisfied with respect to this aspect of the claim.

9. In the alternative, the one aspect of the claim that the Crown purportedly accepted for "negotiation", also satisfies the condition precedent under s. 16(1)(a) of the *Specific Claims Tribunal Act,* because there <u>never were any negotiations</u> in relation to that portion of the claim.

10. In particular, on November 23, 2011 Michael Rideout made an offer on behalf of the Government of Canada to settle the First Nation's claim. The offer included the statement:

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[1] For ease of reference (and since these are the materials that appear to be the ones most commonly removed from the reserve) "sand and gravel" is used through the remainder of this Declaration of Claim to refer to sand, gravel *and* other non-metallic substances that were removed from the reserve.

> ...if Canada does not receive a BCR accepting this settlement offer from the Eel River Bar First Nation on or before February 21, 2012 this settlement offer expires without further notice and the Sand and Gravel Specific Claim file will be closed.

In other words, the offer was final and non-negotiable.

11. The First Nation did not accept the offer by February 21, 2012 and there were no further offers or, in fact, any negotiations whatsoever regarding this portion of the claim.

12. Accordingly, since the November 23, 2011 offer by the Crown was final and non-negotiable, and since there were in fact no negotiations, that date may be taken as the date giving rise to this application to the Specific Claims Tribunal (with respect to the one aspect of the claim that was purportedly accepted for negotiations) thus satisfying the condition precedent for bringing this aspect of the claim under s. 16(1)(a) of the *Specific Claims Tribunal Act*.

III. CLAIM LIMIT (R. 41(F), ACT, S. 20(1)(B))

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

IV. GROUNDS (R. 41(D), ACT, S. 14(1))

14. 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:
>
> (a) a failure to fulfill a legal obligation of the Crown to provide lands or other assets under a treaty or other agreement between the First Nation and the Crown;
>
> (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;

(d) an illegal lease or disposition by the Crown of reserve lands;

(e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority

V. ALLEGATIONS OF FACT (R. 41(E))

A) Summary

15. The Eel River Bar First Nation has Aboriginal, Treaty and other rights to its historic lands in the region of and including its present reserve lands in New Brunswick. These rights were recognized and reaffirmed by the British Crown's Royal Proclamation of 1763 (the "Proclamation") and by the 1779 Treaty of Peace and Friendship ("Treaty"), to which the Eel River Bar First Nation is a signatory.

16. On February 28, 1807, by an executive order of the Province of New Brunswick, the Eel River Bar Indian reserve was set aside for the use and benefit of the First Nation.

17. Three schedules of Indian reserves in New Brunswick for the years 1838, 1842, and 1847 describe the reserve at Eel River Bar as containing 400 acres of land on the north side of Eel River. In 1867 and 1870, however, tables of Indian lands in New Brunswick describe the reserve as containing only 220 acres on the north shore of the river.

18. From 1870 onwards, there were several additions, surrenders and partitions of the Eel River reserve including for various industrial uses. The end result is that the reserve has a very small land base, which is divided by two major highways, an electricity transmission line, two pipelines, and two roads created as a result of the damming of the Eel River.

19. Beginning in or around 1910 and continuing through much of the 20th century, vast quantities of sand, gravel and other non-metallic substances were removed from the First Nation's (already very small) reserve. The sand and gravel taken from the reserve was primarily used in industrial and construction projects in the surrounding areas, including for a paper mill, the Charlo dam and for several institutional and residential complexes in and around the Town of Dalhousie, such as schools and hospitals.

20. First Nation Elders recall that in the 1920's "hundreds of thousands" of yards of sand and gravel were removed from the First Nation's reserve to be used in non-First Nation industrial and construction projects, and that the removal of sand and gravel from the reserve continued through the 1960's.

21. In sum, the First Nations asserts that the Crown failed to fulfill its legal obligations to the First Nation with respect to the removal of vast quantities of sand and gravel from the reserve. The First Nation asserts that these failures include:

    i. Permitting, authorizing and/or failing to prevent the unauthorized removal of sand and gravel from the reserve;

    ii. failing to uphold the conditions of the August 6, 1929 surrender (including failing to collect the agreed-on price for the sale of this material and permitting the sale of sand and gravel which was not surrendered);

    iii. failing to properly administer the removal of sand and gravel from the reserve and the collection of payment for this removal (including failing to properly supervise and record these removals); and

    iv. failing to stop the removal of sand and gravel when it became known (or should have been known) that such removal had the potential to cause, or was in fact causing, the loss of reserve lands and severe damage to the natural environment on and around the reserve lands.

B) Failing to uphold the conditions of the August 6, 1929 Surrender

22. As noted above, sand and gravel was removed from reserve lands without proper authority or consent of the First Nation. This unauthorized removal of sand and gravel occurred over many years. Accordingly, this section is separated into the following sections.

    i. Removal from the reserve prior to the surrender on August 6, 1929;

ii. Removal from the reserve after surrender (i.e. after August 6, 1929);

iii. Removal from the former Wallace Lot; and

iv. Removal after an unequivocal request in 1952 from the First Nation to the Crown to immediately stop the removal of sand and gravel.

(1) From 1910 to August 6, 1929: Unauthorized removal of materials from the reserve, and failure to collect proper compensation

23. On August 6, 1929, several members of the First Nation agreed to a surrender of the sand and gravel on the reserve. The First Nation submits that such a surrender under the *Indian Act* was legally required for the sand and gravel to be removed from the reserve and sold to third parties. However, the First Nation submits that **sand and gravel had been removed from the First Nation's reserve lands for almost twenty (20) years prior to this surrender**. The First Nation submits that there were potentially fatal deficiencies associated with this purported surrender, which are detailed below.

24. The First Nation submits that the Crown breached its legal obligations to the First Nation by authorizing, permitting and/or failing to prevent the removal of sand and gravel without proper authority from the First Nation, and also, in the alternative, by failing to ensure that at a minimum the First Nation received adequate compensation for the unauthorized removal of this material from the reserve lands.

The Crown was aware of unauthorized removal of sand and gravel

25. The First Nation submits that the Crown was aware of these unauthorized removals (i.e. removal of sand and gravel prior to the August 6, 1929 surrender), because First Nation members had written numerous letters of complaint to the Crown about this issue. However, despite these repeated letters of complaint from the First Nation, the Crown authorized, permitted and took no steps to prevent the unauthorized removal of sand and gravel from the First Nation's reserve lands.

26. The historical records confirm that sand and gravel was removed from the First Nation's reserve lands prior to the purported surrender of August 6, 1929. For example, the historical records indicate that in March of 1910, the Hilliars Lumber Co. removed sand and gravel from reserve lands, near the Bay of Chaleur shoreline. The Chief at the time, Louis Jerome, wrote to the Indian Affairs Branch to object to this unauthorized taking of the sand and gravel from reserve lands. However, sand and gravel continued to be removed from the reserve.

27. Further, on May 9, 1910 the Indian Agent advised the Secretary of the Department of Indian Affairs that Credit Foncier Canadian had taken sand and gravel from the reserve. Also, in a June 14, 1925 report, First Nation member James Pictou stated that International Paper Mills was testing the sand and gravel on the Eel River Bar Indian reserve for its use, and was asking for the price.

28. On June 25, 1929 members of the First Nation complained to the Superintendent that a Mr. Levesque was hauling sand from the reserve, that they had reported this to the Indian Agent, and that the Indian Agent had refused to take any action to address this issue. Indeed, a July 9, 1929 record by Joseph N. Levesque confirms that he and his brother removed sand from the reserve during the time period from June 6 to June 24, 1929.

The Crown's failure to properly administer the sale of sand and gravel that was removed

29. In addition to the sand and gravel being illegally removed (that is, being removed without proper authorization from the First Nation), the First Nation was also never adequately compensated for the sand and gravel taken from the reserve during this time (i.e. prior to the purported surrender on August 6, 1929). During this time, in exchange for the sand and gravel from its reserve lands, the First Nation sought a combination of fair prices (for the sand and gravel) and/or some form of employment for the First Nation members in relation to the removal of the sand and gravel. However, the First Nation never received any employment, nor did it receive adequate compensation, in relation to the removal of these materials.

30. This is confirmed through the historical records. For example, on May 14, 1929 a report by the Indian Agent indicated that sand and gravel had been removed from the reserve, but that no payment to the First Nation had been made.

31. Further complaints to the Crown were made by First Nation members in relation to the removal of sand and gravel without proper compensation during this time. For example, a June 26, 1929 complaint was made to the Crown which detailed the removal of sand bars and gravel from the reserve without the First Nation's authorization or consent, and also without compensation to the First Nation. This letter of complaint also stated that companies were continuing to place orders to remove more sand and gravel from the reserve.

32. Further, the First Nation asserts that the Crown agreed to sell the sand and gravel for prices that were unfairly low to, and exploitative of, the First Nation. The First Nation submits that the Crown agreed to these unfairly low prices without consulting with, or receiving any input from, the First Nation.

33. For example, when Credit Foncier Canadian removed the sand and gravel from the reserve in 1910, it made an offer to the Indian Agent to pay five cents per barrel. The Crown agreed to this pricing without any input, discussion or consultation with the First Nation, and without any negotiations with the company. In fact, the Indian Agent seems to have simply recommended that the pricing proposed by the company be accepted, stating:

> ...I do not consider that it is worth any more, as there is lots of it, and this is only the sea shore sand… I consider that 5 cents per barrel is a fair and reasonable charge for this san

34. On the basis of the opinion of the Indian Agent alone, the Indian Superintendent approved the sale of the sand and gravel, at 5 cents per barrel, and requested that the money be forwarded to the Department of Indian Affairs to be credited to the funds of the Band. **In other words, after assuming the responsibility for setting the price for the sand and gravel, the Crown breached its legal obligations to the First Nation by failing to collect a fair and reasonable price for sand and gravel taken from the reserve.**

35. In sum, in relation to the sand and gravel removed prior to the surrender on August 6, 1929, the First Nation submits that Canada breached its fiduciary and lawful obligations to the First Nation by permitting, authorizing and/or failing to prevent the removal of sand and gravel from the reserve without the authority or consent of the First Nation, and by failing to obtain proper compensation (e.g. a fair price for the sand and gravel) for the First Nation for the sand and gravel that was removed.

(2) August 6, 1929 to May 8, 1952: the Crown's failure to fulfill terms of the surrender

36. As noted above, on August 6, 1929 several First Nation members surrendered some of the sand and gravel on the reserve, on the following conditions: (1) that sand and gravel be sold for 25 cents per yard, and that (2) **only** the sand and gravel **on the beach** was surrendered (that is, no sand and gravel within 12 feet of the road along the shoreline was to be removed). This second condition on the surrender of sand and gravel from the reserve was included to try to ameliorate the negative impact on the reserve lands and the natural environment from the removal of these materials. As noted above, the First Nation submits that there were potentially fatal deficiencies associated with this purported surrender, which are detailed below.

37. The First Nation submits that this surrender remained in place until May 8, 1952, when the First Nation unequivocally resolved to immediately cease any and all further removal of sand and gravel from the reserve by way of a Band Council Resolution. In other words, the surrender ended on May 8, 1952.

38. The First Nation asserts that the Crown failed to uphold both of the conditions of this surrender. The failure of the Crown to uphold these conditions is evident from the historical records.

39. **Critically, the Crown permitted and authorized the sale of sand and gravel at rates less than 25 cents per yard** (a rate that was required as a condition of the surrender). By failing to fulfill this condition of the surrender, the First Nation submits that it was deprived of badly-needed revenue for the community. This loss of revenue was extremely

detrimental to the First Nation because, at the time, the community was economically depressed with many members living in poverty.

40. In addition, the First Nation submits that the Crown authorized or permitted the removal of sand and gravel from areas that were not subject to the surrender, including within 12 feet of the shoreline road (including the removal of sand and gravel right "from the doors" of the First Nation members) and from areas of the reserve other than the beach area (as noted above, the surrender was **only** for the sand and gravel on the beach area).

41. The First Nation further submits that the Crown authorized or permitted the sale of sand and gravel that was not subject to the surrender by allowing the sale of sand and gravel that had "backfilled" onto the beach area from other areas of the reserve. In particular, when vast quantities of sand and gravel were excavated from the beach area, this created large holes. Through natural processes, the holes created on the beach area were then "backfilled" with sand and gravel from other (non-surrendered) areas of the reserve. The First Nation submits that the surrender did not apply to the sand and gravel which had, through natural causes, back-filled into the beach area <u>from other areas of the reserve</u>.

42. In other words, the surrender authorizing the removal of sand and gravel did not authorize the removal on such a scale and in such a manner as to cause massive land shifts and movements of adjoining lands. That is, similar to various common law concepts such as nuisance, the surrender did not authorize major effects on adjoining lands. The fact that large amounts of sand and gravel shifted to fill the previous excavations did not create a right to remove that "backfilled" sand and gravel (since that land should never have been caused to shift in the first place), but in fact showed that the original removal was improperly destructive. The First Nation submits that this over-removal and the corresponding "backfilling" (and the subsequent removal of "backfilled" sand and gravel) occurred because of the Crown's gross mismanagement of this resource.

43. The First Nation further submits that the Crown's failure to fulfill the conditions of the surrender resulted in the over-removal of sand and gravel from the reserve, which caused extensive damage to the reserve lands, including through increased erosion which

resulted in the loss of reserve lands. That is, by selling the sand and gravel for prices that were lower than required under the surrender (i.e. lower than 25 cents per yard), and by allowing or failing to prevent the sale and removal of sand and gravel that was not subject to the purported surrender (including the "backfilled" sand and gravel), much more sand and gravel was taken from the reserve than would have been the case if the Crown had upheld the conditions of the surrender.

44. In other words, the Crown's failure to obtain a fair price for the sand and gravel that was removed as well as its failure to prevent the removal of sand and gravel that was not subject to the purported surrender, resulted in the companies and individuals removing higher quantities of sand and gravel from the reserve than was contemplated and approved according to the August 6, 1929 surrender. Accordingly, the Crown, in effect, permitted more sand and gravel to be sold than was authorized by the purported surrender.

45. In sum, in relation to the removal and sale of sand and gravel from the reserve after August 6, 1929, Canada breached its lawful obligations to the First Nation by failing to uphold the conditions of the surrender, which resulted in loss of revenue to the First Nation, as well as extensive damage to the reserve lands.

(3) Removal from Wallace Lot

46. Mr. Wallace owned a lot adjacent to the reserve, and which was only accessible by crossing reserve lands. The First Nation submits that the Crown breached its legal obligations to the First Nation in relation to removal of sand and gravel from this lot.

Sale of sand and gravel without authorization or consent of First Nation

47. First, the First Nation submits that when the companies and individuals removed the sand and gravel from the Wallace lot, the sand and gravel that was taken was then "back-filled", through natural processes, with sand and gravel from the First Nation's reserve lands (through the same processes as detailed above). Accordingly, the First Nation submits that large quantities of the sand and gravel that were removed from the Wallace lot were, in fact, sand and gravel from the reserve (that had back-filled onto the Wallace

lot). The First Nation submits that there was no authorization or authority to remove this sand and gravel, and that, accordingly, the Crown breached its legal obligation to the First Nation by authorizing and/or permitting this removal.

48. After much sand and gravel had already been removed from the lot, the Crown purchased this lot from Mr. Wallace. This was done in two stages. First, Mr. Wallace sold the bulk of his lot to the Crown, yet retained a one-chain wide strip at the front of the lot. Then, on May 19, 1930 the Crown purchased the second portion of the lot, the one-chain wide portion.

49. The First Nation submits that the Crown further breached its legal obligations to the First Nation by authorizing and/or permitting the unauthorized sale of sand and gravel from the one-chain wide portion of the reserve after May 19, 1930. The First Nation never permitted or authorized the sale of sand or gravel from this lot.

The Crown authorized continued Trespass over reserve lands

50. The First Nation asserts that the Crown breached its legal obligations to the First Nation by permitting and/or authorizing repeated trespasses over reserve lands to access sand and gravel on the Wallace lot. The First Nation members complained to the Crown about these repeated trespasses. However, despite these complaints, the Crown failed to take any steps to stop or prevent the numerous trespasses over the reserve lands. The First Nation submits that these trespasses occurred both before and after the sale of this lot to the Crown.

51. It appears to be the Crown's position that, when Mr. Wallace sold the first portion of his lot to the Crown, he retained certain rights of ingress and egress (i.e. over reserve lands) to the one chain wide strip (which he retained until May 19, 1930).

52. Indeed, on July 10, 1929, after Wallace had sold the first portion of his lot to the Crown (but before he had sold the one-chain wide strip to the Crown), Joseph and Arthur Levesque reported that Mr. Wallace had agreed to sell the sand and gravel from the one-chain wide strip at the front of his former lot to them to fulfill their contracts with the International Paper Company and the Foundation Company.

53. However, the First Nation submits that the alleged rights of ingress and egress were either not properly retained by Mr. Wallace, or did not apply to the reserve lands, or that these rights (if any such rights were retained) did not allow or permit Mr. Wallace (or those he purported to authorize) to engage in invasive commercial activity of numerous and continued trespasses across the reserve lands to remove vast amounts of sand and gravel from this one-chain wide strip (at the front of his former lot).

54. In the alternative, if such rights of ingress and egress were held by Mr. Wallace (which the First Nation disputes), the First Nation submits that the Crown failed to fulfill its legal obligations to the First Nation by allowing such rights to be retained by Mr. Wallace when it negotiated to purchase the lot.

Damage to reserve lands (from removal of sand and gravel from Wallace Lot)

55. The Crown also breached its legal obligations to the First Nation by supporting and/or failing to take steps to prevent the removal of huge amounts of sand and gravel from the Wallace lot when it was known or ought to have been known that this removal would cause (and did ultimately cause) irreparable damage to the reserve lands and natural environment.

56. In a January 24, 1930 letter the Crown confirmed that all the sand that could safely (that is, without causing further environmental damage to the reserve lands) be removed from the Wallace lot had been removed. Both before and after this date, First Nation members had repeatedly complained that the continued removal of sand and gravel from this lot was severely and irreparably damaging the reserve lands. Despite the January 24, 1930 letter and these complaints, the removal of sand and gravel from this lot continued.

57. In sum, the First Nation submits that the Crown breached its legal obligations to the First Nation by authorizing, permitting or failing to prevent the unauthorized sale and removal of sand and gravel from the Wallace lot, including removal of sand and gravel that had "backfilled" onto the lot as well as removal from the lot after it was purchased by the Crown on May 30, 1930, by failing to prevent the repeated trespasses over reserve lands, and also by failing to stop these removals once it was known or should have been known that the continued removal was causing environmental damage to the reserve lands.

C) Removal from reserve lands after unequivocal request to cease removal in 1952

58. On May 8, 1952, the First Nation's Band Council resolved **to <u>immediately stop the removal of sand and gravel from the reserve</u>**. The First Nation asserts that the Crown was aware of this Band Council Resolution. The First Nation Band Council made this request to the Crown in large part due to the extensive environmental destruction caused to the reserve lands from the removal of these materials.

59. This Band Council Resolution effectively ended the August 6, 1929 surrender, as no further sand and gravel was to be removed from the reserve.

60. As noted above, the First Nation submits that the August 6, 1929 surrender was *void ab initio* because the requirements for a valid surrender under the *Indian Act* were not satisfied. For example, among other things, it appears that at the surrender meeting no vote was taken nor voters list used, and there appears to be no documentation or indication if the surrender is a permit or a lease.

61. Regardless of whether or not the surrender was technically invalid *ab initio*, the ongoing damage to the reserve lands and the Crown's continued and large scale breaches of the terms of the "surrender" and its fiduciary obligations were of such a scale that the First Nation was entitled in 1952 to terminate any authority or permission or right to take any further sand or gravel after that date.

62. However, the First Nation submits that the removal of sand and gravel continued throughout 1952 and well into the 1960's. First Nation members recall the continued removal of sand and gravel from the reserve during this time, and repeated complaints to the Crown about this removal. Despite these complaints, and the Crown's knowledge of the Band Council Resolution to stop these removals, the Crown failed to take any action to stop the continued removal of sand and gravel from the reserve.

63. The First Nation submits that the Crown breached its legal obligations to it by authorizing, permitting and/or failing to take steps to prevent the continued removal of

sand and gravel from the reserve after the First Nation explicitly informed the Crown that the removal of sand and gravel was to stop immediately.

D) Failure to supervise and record removal and properly administer funds re all sand and gravel taken

Failure to supervise

64. In addition to the above-detailed breaches of its legal obligations to the First Nation, the Crown further breached its legal obligation to the First Nation by failing to properly supervise and administer the removal of sand and gravel from the reserve.

65. The First Nation submits that the Crown's gross mismanagement of this precious resource exacerbated the environmental destruction of the reserve, and also resulted in lost (and badly needed) revenues to the First Nation. The Crown's mismanagement occurred in various ways, including the failure of the Crown to: properly supervise or record these removals; collect (on behalf of the First Nation) a fair and reasonable price for these removals; properly distribute the funds that were collected to the First Nation; and the Crown's failure to consider and take into account how the removal of vast quantities of sand and gravel had the potential to, and did in fact cause, severe and permanent environmental damage to and destruction of reserve lands.

66. The First Nation asserts that, rather than adequately supervising the removal of the sand and gravel from the reserve, the Crown allowed the removal of sand and gravel without any supervision, and relied almost entirely on the companies or individuals who were removing these materials to keep track of the amounts removed and the payments required.

67. The First Nation submits that, by implementing this "self-reporting" system (by the third parties that were removing the sand and gravel), the Crown breached its lawful obligation to the First Nation, because this system promoted and allowed for the under-reporting of the actual amount of sand and gravel taken from the reserve, resulting in the loss of

revenue to the First Nation and increased environmental damage to the reserve lands, as detailed below.

68. Critically, the Crown had no system or method in place to protect against abuse of the Crown's self-reporting "system". The First Nation submits that the third parties removing these materials did, in fact, abuse this system by under-reporting the actual quantities of sand and gravel removed (including by not reporting any removal on some occasions, and also by under-reporting the actual amount taken on other occasions).

69. The First Nation members complained to the Crown about these serious issues including the underreporting of sand and gravel taken, under-payment to the First Nation, and increased damage to the reserve. However, the Crown took no steps to correct these issues or to attempt to ensure that all sand and gravel that was removed was properly recorded and paid for. Indeed, from the historical records it appears that the Crown was often unable to reconcile the removal of sand and gravel with payments received from the third parties.

70. As a result of this breach of the Crown's legal obligation to the First Nation (through its imprudent and careless record keeping and absence of proper supervision of the third parties removing these materials from the reserve), the First Nation submits that sand and gravel was removed without any record, and that many payments for sand and gravel taken from the reserve were only partially made, or were not made at all.

Failure to properly collect and administer funds

71. In addition to failing to properly record and supervise the vast quantities of sand and gravel removed from the reserve, the Crown breached its legal obligations to the First Nation by failing to properly collect payment for the removal of sand and gravel from the reserve, and also by failing to properly administer the funds when such funds were collected.

72. This failure is evident in the historical records. For example, in relation to one instance of removal of materials by Credit Foncier Canadian, the Superintendent had instructed the

Indian Agent to collect the money for deposit into the Band's funds. However, contrary to these instructions, the Indian Agent collected the funds himself, allegedly for distribution to the First Nation members. There does not seem to be a record as to whether or not these funds were actually distributed to First Nation members, but it seems apparent that the Crown's system of distributing funds to the First Nation was seriously flawed and easily abused to the detriment of the First Nation.

73. Subsequently, a Constable made a complaint to the Superintendent regarding the collection and distribution of funds to the First Nation from the sale of sand and gravel from the reserve. The Superintendent made the suggestion that a formal process be established for collections of the funds. However, despite this internal and, in the First Nation's view, responsible suggestion to implement much-needed formal procedures regarding the administration of the revenues received, no formal procedure was ever implemented by the Crown.

74. In sum, the First Nation submits that the Crown breached its fiduciary and other legal obligations to the First Nation by not establishing a process for supervising and monitoring the removal of sand and gravel (other than the irresponsible voluntary "self-reporting" system), by failing to ensure that proper records of the removal of sand and gravel were made and kept, by failing to collect funds from the removal of sand and gravel for the benefit of the First Nation, and by failing to properly administer and distribute these funds to the First Nation when any such funds were collected.

75. As a result of these failures by the Crown, the First Nation submits that sand and gravel was removed from the reserve without any compensation, and that when funds were collected for the First Nation they were not properly distributed or administered. The First Nation further submits that these failures of the Crown (i.e. lack of reporting procedures and proper supervision of removal of sand and gravel from the reserve) also contributed to the over-removal of sand and gravel and the corresponding environmental damage to the reserve, as detailed below.

D) Permanent damage to reserve lands and the First Nation's way of life

76. The sand and gravel removed from the reserve was predominately taken from the main residential area of the reserve, which is the portion of the reserve adjacent to the Bay of Chaleur and the Eel River. This area is located on a protruding landmass, surrounded by water on three sides. This portion of reserve land is known as "the beach".

77. Houses of the First Nation's community members are located on the shore land, only separated from the shoreline by the Shoreline Road. This road is a replacement for the former Old Post Road, which is now completely covered by water due to the extensive erosion of the reserve lands caused by the removal of sand and gravel.

78. Critically, the over-removal of sand and gravel, which the First Nation submits is a direct result of the Crown's failures to fulfill its legal obligations to the First Nation as detailed above, resulted in much land loss as a result of the shoreline moving dozens of feet "into" the reserve. For example, some of the front yards of the houses are now underwater; many of the lots of First Nation Members were significantly reduced or lost because of the removal of sand and gravel and the corresponding erosion of reserve lands. Some houses even had to be relocated due to this extensive erosion. The First Nation has never been compensated for these losses of its reserve lands.

79. In addition to the loss of reserve lands, the removal of huge amounts of sand and gravel from the First Nation's reserve caused permanent environmental damage. The First Nation submits that the Crown breached its legal obligation to the First Nation by permitting, authorizing or failing to take steps to prevent this damage and destruction of the reserve (i.e. loss of reserve lands and damage to the natural environment) as a result of this removal.

80. The Treaty of 1779 specifically protected the First Nation's hunting, fishing and resources. The Crown breached its legal obligations to the First Nation, including the First Nation's Treaty rights, by authorizing, permitting and taking no steps to prevent the destruction of the reserve through the removal of vast quantities of sand and gravel.

81. The First Nation sent several letters of complaint to the Crown detailing how the removal of so much sand and gravel from the reserve was causing destruction to the reserve lands, the environment, and the way of life of the First Nation members. However, rather than take steps to address these serious concerns, the Crown authorized or permitted the continued removal of sand and gravel, including by agreeing to sell the sand for unreasonably low prices, and by failing to properly supervise and record the sand and gravel that was removed, as detailed above.

82. These failures of the Crown caused more sand and gravel to be removed than would have been the case if the Crown had fulfilled its legal obligations to the First Nation and directly contributed to the loss of reserve lands and damage to the natural environment of the reserve.

83. Put simply, the many failures of the Crown combined to created a situation where companies and individuals were essentially permitted "free rein" to remove sand and gravel, at low (or no cost) to the companies, but at a great cost to the First Nation, the reserve lands, and the natural environment.

84. Even when it became apparent (and was recognized by the Crown) that the removal of sand and gravel was causing severe environmental destruction and loss of reserve lands, the Crown continued to permit the removal of sand and gravel, and took no steps to stop or slow down such removal.

Removal caused severe damage to the environment and First Nation's way of life

85. The over-removal of sand and gravel, including the complete removal of the sand bars in front of the beach, caused a rapid increase in the rate of erosion of the reserve lands (i.e. the loss of reserve lands from erosion), damaged or destroyed habitats for fish, birds and other wildlife, and had a severe negative impact on the First Nation members' way of life (which, for example, included sustenance fishing and hunting of these animals).

86. Importantly, the removal of vast quantities of sand and gravel caused damage to the way of life of the First Nation's members, including by destroying the areas on which the First Nation members laid out and repaired their fishing nets. These important areas and the

habitat of the fish, birds and other animals were lost as a direct result of the over-removal of sand and gravel, which further increased erosion of the reserve lands.

87. The removal of sand from the sand bars was a major contributing factor to the severe environmental damage and loss of reserve lands. The sand bars are a natural protector of the other land and operate as a breakwater. When the companies removed extensive amounts of sand from these critical sand bars (through the failures of the Crown, including failing to properly supervise the removals, failing uphold the conditions of the surrender, and failing to stop the removals when it was known or ought to have been known that it would cause damage to the reserve lands) the sand bars were effectively destroyed. As a result, waves constantly pounded the beach and the reserve land was further and further eroded.

88. The beach and the shoreline were of great importance to the First Nation and its economic well-being. The removal of the sand bars and other sand and gravel created a domino effect and caused damage to other parts of the reserve.

89. In sum, the Crown breached its legal obligations to the First Nation by promoting and authorizing the continued removal of huge amounts of sand and gravel from the reserve lands when it was known or should have been known that continuing to do so was causing (and did in fact cause) extensive damage to the reserve, including loss of reserve lands through erosion, and destruction to the natural environment on and around the reserve.

VI. THE BASIS IN LAW ON WHICH THE CROWN IS SAID TO HAVE FAILED TO MEET OR OTHERWISE BREACHED A LAWFUL OBLIGATION

90. The Crown breached its legal obligations to the First Nation in relation to long-term and extensive removal of huge amounts of sand and gravel and other materials from the reserve, including by failing to fulfill its fiduciary and trust-like duties to the First Nation (i.e. to act in the best interest of the First Nation and all of the First Nation members), and by breaching the Treaty of 1779, the *Indian Act*, and the First Nation's other legal rights.

91. The Crown breached its legal obligations to the First Nation in many ways, including by:

i. Failing to uphold and abide by the conditions of the August 6, 1929 surrender;

ii. permitting, authorizing or failing to take steps to prevent the removal of sand and gravel without proper authorization from the First Nation, including removals prior to the August 6, 1929 surrender, removal from the Wallace lot (as detailed above) and removals after the First Nation directed the Crown to cease all removals on May 8, 1952;

iii. permitting, authorizing and supporting (and taking no steps to prevent) the continued and repeated trespasses on reserve lands by third parties removing materials from the one-chain wide portion of the Wallace Lot;

iv. failing to properly supervise and record the removal of vast quantities of sand and gravel from reserve lands by third parties from 1910 through the 1960's;

v. failing to properly collect and, when such funds were collected, failure to properly administer and distribute the funds received for the benefit of the First Nation; and

vi. permitting, authorizing and/or not taking any steps to prevent the continued removal of sand and gravel when it was known or should have been known that this would cause and/or was causing permanent environmental damage (including loss of important wildlife habitats), loss of reserve lands, and severe negative impacts on the traditional way of life of the First Nation members.

92. In addition, with respect to the portion of this claim regarding the Crown's failure to obtain 25 cents per yard for sale of sand and gravel after the purported surrender in August 1929, the Crown breached its legal obligations to the First Nation (including its obligation of good faith dealings), by, in response to the First Nation's specific claim submission in this regard, making the final, "take it or leave it" offer dated November 23, 2011, thereby refusing to engage in any negotiations, and then unilaterally closing the file.

VII. RELIEF SOUGHT

93. In light of Canada's breaches of its fiduciary duties and other lawful obligations to Eel River Bar First Nation and its failure to obtain proper compensation for reserve lands taken or damaged, the First Nation seeks the following relief:

i. compensation for the unauthorized taking of sand and gravel from the reserve;

ii. compensation for the difference between the unfairly low and inadequate price at which the Crown agreed to sell the sand and gravel and a fair price for the First Nation (for all sand and gravel taken, from 1910 through the 1960's including both before and after the surrender of August 1929);

iii. a complete accounting of all sand and gravel taken, all payments made to the Crown for same, and all payments made to or distributed to the First Nation, including compensation for all sand and gravel taken for which no payment was received;

iv. compensation for the repeated trespasses on the reserve lands;

v. compensation for the loss of reserve lands through erosion, the destruction of reserve lands and the natural environment and the severe negative impact this had on the traditional way of life of the First Nation members caused by the over-removal of sand and gravel;

vi. compound interest on all payments owing to the First Nation, and other adjustments to any such compensation as appropriate;

vii. other equitable compensation;

viii. costs in relation to these proceedings; and

ix. such other relief as this Honourable Tribunal deems just.

All of which is respectfully submitted this 7th day of December, 2016.

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