

INDIAN CLAIMS COMMISSION

BLOOD TRIBE / KAINAIWA BIG CLAIM INQUIRY

PANEL

**Commissioner Daniel J. Bellegarde (Chair)
Commissioner Alan C. Holman**

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To the Indian Claims Commission
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SUMMARY

BLOOD TRIBE / KAINAIWA BIG CLAIM INQUIRY Alberta

The report may be cited as Indian Claims Commission, *Blood Tribe / Kainaiwa: Big Claim Inquiry* (Ottawa, March 2007).

*This summary is intended for research purposes only.
For a complete account of the inquiry, the reader should refer to the published report.*

Panel: Commissioner D.J. Bellegarde (Chair), Commissioner A.C. Holman

Treaties – Treaty 7 (1877); **Reserve** – Surrender – Reserve Creation; **Indian Act** – Surrender; **Treaty Land Entitlement** – Date of First Survey; **Fiduciary Duty** – Treaty Land Entitlement; **Alberta**

THE SPECIFIC CLAIM

The Blood Tribe has long pursued its claim to the Big Claim lands. This claim involves the area between the Kootenay (Waterton) and Belly Rivers, the location of the southern boundary of the reserve, and an outstanding treaty land entitlement. The Blood Tribe submitted its claim in July 1996 under the current Specific Claims Policy of the Department of Indian Affairs and Northern Development (DIAND). Supplemental submissions were made in December 1997. Canada, advising of its preliminary review in November 1999, stated that there was no outstanding lawful obligation with respect to the claim. The Blood Tribe made further submissions in March 2000, and, in November 2001, Canada advised that no outstanding obligation existed with respect to the treaty land entitlement aspect of the claim. All parts of the claim were rejected by Canada in November 2003.

The Blood Tribe formally requested that the Indian Claims Commission (ICC) conduct an inquiry into its rejected claim in January 2003.

BACKGROUND

The Blood Tribe is a member of the Blackfoot Confederacy, which also includes the Siksika, and the Piikani (Peigan) in Alberta, and the Blackfeet Nation of Montana. The traditional territory of the Blackfoot Confederacy is the area between the North Saskatchewan River and the Yellowstone River from the Cypress Hills to the mountains in the west, and the home base of the Blood Tribe is the area between the Kootenay (Waterton) and St Mary Rivers extending to the mountains at the international boundary.

Today, the Blood Tribe's reserve in southern Alberta is the largest Indian reserve in Canada. The reserve's northern boundary is located at the confluence of the St Mary and Belly Rivers at Kipp, and extends southward to an east-west line located 14 miles north of the international boundary. By the time Treaty 7 was concluded on September 22, 1877, the Blood Tribe's way of life in its home base was in transition. The buffalo were becoming extinct; meanwhile, colonization and settlement brought whiskey traders and new diseases to the area. Treaty 7, concluded between Canada and three tribes from the Blackfoot Confederacy, including the Blood Tribe, was intended to open lands to settlers while ensuring reserve lands for Indians. One of the terms of Treaty 7 included a joint reserve set aside for the Blood Tribe, the Blackfoot, and the Sarcee along the Bow River. Following the conclusion of Treaty 7, Red Crow, Chief of the Blood Tribe, broke camp and returned to the Blood Tribe's home base.

The Blood Tribe never moved to the joint reserve at Bow River. Instead, in 1880, an Order in Council was issued, authorizing a surrender of the Blood Tribe's portion of the joint reserve at Bow River,

with a view to setting aside a reserve near Fort Kipp. Following a surrender in September 1880, lands were selected for the Blood Tribe reserve.

The Blood Tribe reserve was surveyed twice. In 1882, a 650-square-mile reserve, large enough for 3,250 people and located between the Belly and St Mary Rivers with the southern boundary located nine miles north of the international border, was surveyed by John Nelson, Dominion Land Surveyor. The second survey, in 1883, moved the southern boundary of the reserve farther north, resulting in a 547.5-square-mile reserve surveyed for approximately 2,737 people.

In 1887, a group of Mormons arrived from Utah and settled near Lee's Creek at what eventually became the town of Cardston. The Mormons were camped within the boundary of the reserve as surveyed in 1882, but outside the boundary as surveyed in 1883. Much confusion surrounded the reserve's southern boundary, with the result that Indian Agent William Pocklington requested a map showing its exact location. Once a map was received, Pocklington met with Red Crow and showed him where the southern boundary was located. He reported that Red Crow was under the impression that his reserve extended between the two rivers back to the mountains. More specifically, Red Crow believed that the southern boundary was much farther south and ended at the mountains at the international border. Pocklington explained that, if that were the case, the Blood Tribe would have more land than it was entitled to. Following this meeting, the confusion over the location of the southern boundary was considered resolved by the Department of Indian Affairs, and in 1888, the Mormons obtained Crown grants to the lands they had camped upon.

In 1889, an Order in Council confirmed the Blood Tribe reserve as surveyed in 1882 and amended in 1883.

ISSUES

As a result of events that occurred between the making of Treaty 7 and 1880, did the Blood Tribe hold the Big Claim lands for its use and benefit? In the alternative, as a result of the events that occurred between the making of Treaty 7 and 1880, what lands did the Blood Tribe hold for its use and benefit? Was there a valid surrender of the Blood Tribe's interest in the Bow River Reserve? Was the reserve established by the Nelson survey work in 1882? If the reserve was established by the Nelson survey work in 1882 then was a surrender required to move the boundary and effectively remove approximately 102.5 square miles of reserve land as a result of the Nelson survey work in 1883? Does the formula described in the written terms of Treaty 7 with respect to the minimum sizes of reserves apply to the creation of the Blood Tribe's reserve? If the formula applies to the creation of the Blood Tribe's reserve then what is the proper date for the basis of the calculation of the treaty land entitlement? On the basis of that date, what then is the Blood Tribe Treaty Land Entitlement?

FINDINGS

The panel concludes that, although a reserve in the Blood Tribe's home base was not formally set aside by Treaty 7, the Crown was nevertheless obligated to set aside a reserve for the Blood Tribe. Historical events show that the Crown and the Blood Tribe agreed that the reserve would at least be located within the Blood Tribe's home base and, presumably, subject to the other terms of Treaty 7, including the treaty land entitlement formula. From the panel's perspective, the Blood Tribe held what could be described as a cognizable interest in its lands in the home base.

With respect to the surrender of the Blood Tribe's interest in the Bow River reserve, the panel finds that a surrender was required. The panel further finds that the statutory requirements of a meeting and a vote on the surrender did not take place, and, as a result, the *Indian Act* was breached. However, the effect of a breach of these statutory requirements is technical in nature and does not render the surrender invalid. In examining whether a breach of fiduciary duty occurred with respect to the surrender, the panel concludes that

the Blood Tribe did not abnegate its decision-making power and that the surrender was not an exploitative bargain. No breach of fiduciary duty occurred with respect to the surrender.

As for when the Blood Tribe's reserve was established, the panel concludes that John Nelson's 1882 survey established the reserve. Although the panel is mindful that the 1883 survey is acknowledged as confirming the reserve, the panel states that the circumstances surrounding the 1883 survey warrant careful examination. Because the reserve was established in 1882, a surrender was necessary in 1883 to move the southern boundary. Also, the panel concludes that the Crown failed to fulfill its fiduciary obligations with respect to the movement of the southern boundary.

With respect to the treaty land entitlement (TLE) portion of this inquiry, the panel notes that the parties had agreed to limit their arguments to the date of first survey (DOFS) only and not address the remaining TLE issues. As the panel has concluded that the Blood Tribe's reserve was established in 1882, the panel also concludes that the DOFS is 1882.

RECOMMENDATIONS

Recommendation 1: That the claim for the Big Claim lands constituting the reserve not be accepted. The panel finds that the Blood Tribe reserve would at least be located within the Blood Tribe's home base, subject to the treaty land entitlement formula and the other terms of Treaty 7. Recommendation 2: That the claim that the 1882 Nelson survey established the Blood Tribe reserve be accepted. The panel finds that the 1882 Nelson survey established the reserve and that a surrender was required to move the southern boundary. Recommendation 3: That the date of first survey for the Blood Tribe be accepted as 1882.

REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

Cases Referred To

R. v. Marshall, [1999] 3 SCR 456; *Cardinal v. R.*, [1982] 1 SCR 508; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*); *Guerin v. The Queen*, [1984] 2 SCR 335; *Semiahmoo Indian Band v. Canada* (1997), 148 DLR (4th) 523 (Fed. CA); *Lac La Ronge Indian Band v. Canada*, [2000] 1 CNLR 245; *Ross River Dena Band v. Canada*, [2002] 2 SCR 816; *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245.

ICC Reports Referred To

Moose Deer Point First Nation: Pottawatomi Rights Inquiry (Ottawa, March 1999), reported (1999) 11 ICCP 135; *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3; *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209; *Peepeekisis First Nation: File Hills Colony Inquiry* (Ottawa, March 2004); *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3; *Kahkewistahaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21; *Lucky Man Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109; *Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, November 2001), reported (2002) 15 ICCP 3; *Mamaleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199; *Nak'azdli First Nation: Aht-Len-Jees Indian Reserve 5 Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 81; *'Namgis First Nation: Cormorant Island Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 3; *'Namgis First Nation: McKenna-McBride Applications Inquiry* (Ottawa, February 1997), reported (1998) 7 ICCP 109; *Taku River Tlingit First Nation: Wenah Specific Claim Inquiry* (Ottawa, March 2006); *Williams Lake Indian Band: Village Site Inquiry* (Ottawa, March 2006).

Treaties and Statutes Referred To

Copy of Treaty and Supplemental Treaty No. 7, Made 22nd Sept., 1877, and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes at the Blackfoot Crossing of Bow River and Fort MacLeod (1877; reprint, Ottawa: Queen's Printer, 1966); Amendment to Treaty 7, June 20, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993); Amendment to Treaty 7, June 27, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993); Amendment to Treaty 7, July 2, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993); *Indian Act*, SC 1876.

Other Sources Referred To

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982); reprinted in (1994) 1 ICCP 171–85.

COUNSEL, PARTIES, INTERVENORS

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PART I
INTRODUCTION

The Blood Tribe is a member of the Blackfoot Confederacy, which also includes the Siksika, and the Piikani (Peigan) in Alberta, and the Blackfeet¹ Nation of Montana. The traditional territory of the Blackfoot Confederacy is the area between the North Saskatchewan River and the Yellowstone River from the Cypress Hills to the mountains in the west, while the home base of the Blood Tribe is the area between the Kootenay (Waterton) and St Mary Rivers extending to the mountains at the international boundary.

Today, the Blood Tribe's reserve in southern Alberta is the largest Indian reserve in Canada. The reserve's northern boundary is located at the confluence of the St Mary and Belly Rivers at Kipp, and extends southward to an east-west line located 14 miles north of the international boundary. The area between the Kootenay (Waterton) and Belly Rivers is the subject of part of this inquiry, while the location of the southern boundary of the reserve forms another part of this inquiry. In addition, the Blood Tribe states that there is an outstanding treaty land entitlement.

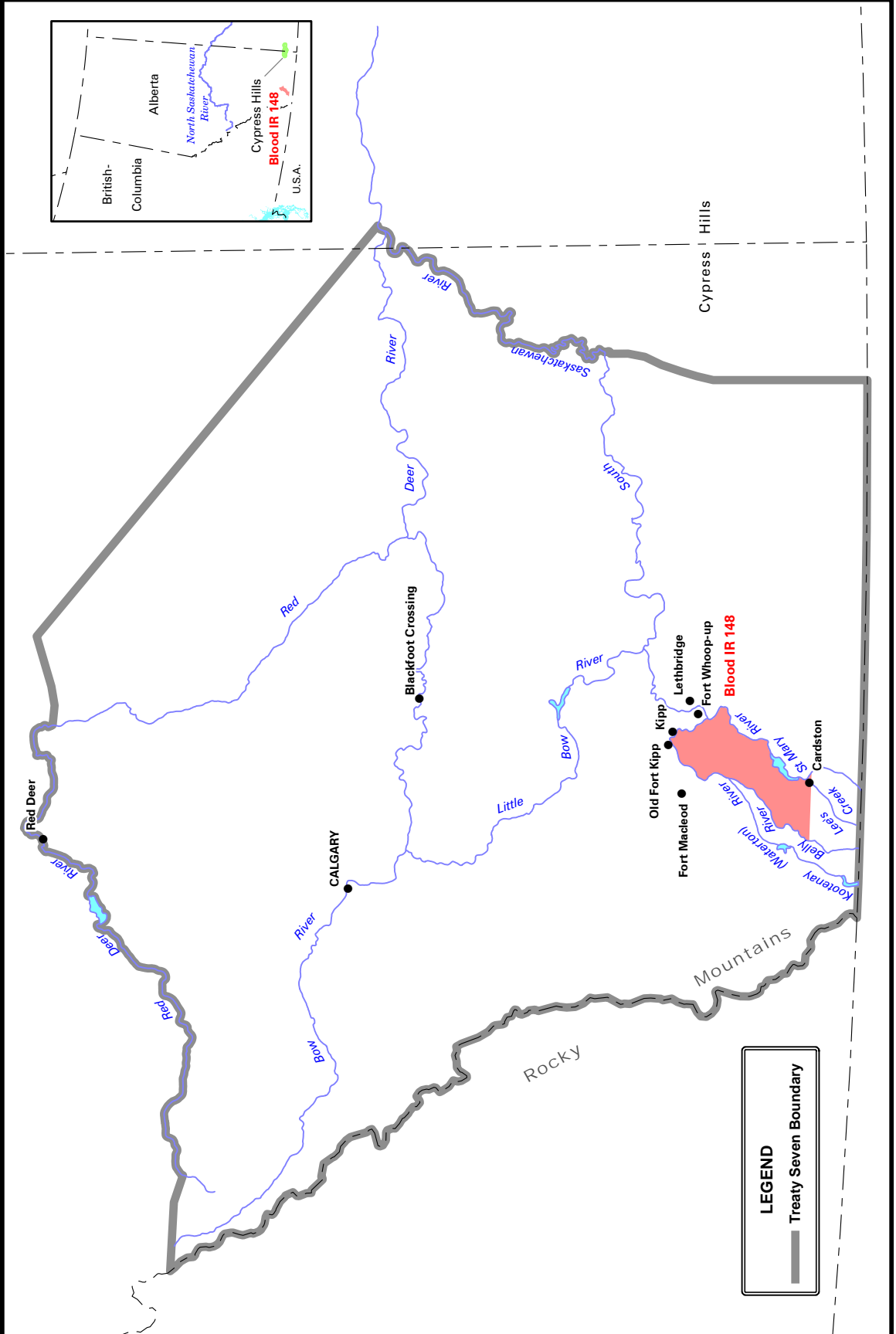
By the time Treaty 7 was concluded on September 22, 1877, the Blood Tribe's way of life in its home base was in transition. The buffalo were becoming extinct; meanwhile, colonization and settlement brought whiskey traders and new diseases to the area. Treaty 7, concluded between Canada and three tribes from the Blackfoot Confederacy, including the Blood Tribe, was intended to open lands to settlers while ensuring reserve lands for Indians. One of the terms of Treaty 7 included a joint reserve set aside for the Blood Tribe, the Blackfoot, and the Sarcee along the Bow River. Following the conclusion of Treaty 7, Red Crow, Chief of the Blood Tribe, broke camp and returned to the Blood Tribe's home base.

The Blood Tribe never moved to the joint reserve at Bow River. Instead, in 1880, an Order in Council had been issued, authorizing a surrender to be taken of the Blood Tribe's portion of the joint reserve at Bow River, with a view to setting aside a reserve near Fort Kipp. Following a surrender in September 1880, lands were selected for the Blood Tribe reserve.

¹ The Blackfeet Nation refers to the member nation located in Browning, Montana. During the time of treaty and afterwards, the term "Blackfeet Nation" was used to describe the Blackfoot Nation, known today as the Siksika.

Map 1

Claim Area Map



LEGEND

— Treaty Seven Boundary

The Blood Tribe reserve was surveyed twice. In 1882, a 650-square-mile reserve, large enough for 3,250 people and located between the Belly and St Mary Rivers with the southern boundary located nine miles north of the international border, was surveyed by John Nelson, Dominion Land Surveyor. The second survey, in 1883, moved the southern boundary of the reserve farther north, resulting in a 547.5-square-mile reserve surveyed for approximately 2,737 people.

In 1887, a group of Mormons arrived from Utah and settled near Lee's Creek at what eventually became the town of Cardston. The Mormons were camped within the boundary of the reserve as surveyed in 1882, but outside the boundary as surveyed in 1883. Much confusion surrounded the reserve's southern boundary, with the result that Indian Agent William Pocklington requested a map showing its exact location. Once a map was received, Pocklington met with Chief Red Crow and showed him where the southern boundary was located. He reported that Red Crow was under the impression that his reserve extended between the two rivers back to the mountains. More specifically, Red Crow believed that the southern boundary was much farther south, and ended at the mountains at the international border. Pocklington explained that, if that were the case, the Blood Tribe would have more land than it was entitled to. Following this meeting, the confusion over the location of the southern boundary was considered resolved by the Department of Indian Affairs, and, in 1888, the Mormons obtained Crown grants to the lands they had camped upon. In 1889, Order in Council PC 1151 was passed, confirming the Blood Indian Reserve (IR) 148 as surveyed in 1882 and amended in 1883.

The Blood Tribe has long pursued a claim related to the Big Claim lands and the setting aside of a reserve. The treaty land entitlement aspect of this claim was originally submitted in the 1970s, and, in 1980, a joint task force was formed to review the claim. In August 1981, the joint task force recommended that Canada pursue further research to review the population of the Blood Tribe at the relevant time. Canada opted to not follow the recommendation. The Blood Tribe submitted a revised claim under the current Specific Claims Policy of the Department of Indian Affairs and Northern Development (DIAND) in July 1996. Supplemental submissions were made in December 1997. Canada, advising of its preliminary review in November 1999, stated that there was no outstanding lawful obligation with respect to the claim. The Blood Tribe made further submissions in March

2000, and, in November 2001, Canada advised that no outstanding obligation existed with respect to the treaty land entitlement aspect of the claim. All parts of the claim were rejected by Canada in November 2003.

Prior to receiving a letter rejecting all aspects of its claim, the Blood Tribe formally requested that the Indian Claims Commission (ICC) conduct an inquiry into its rejected claim in January 2003. A full historical background to the First Nation's claim is found at Appendix A to this report. A chronology of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix B to this report. During the course of the inquiry, one interim ruling was issued, regarding the admission of 17 statutory declarations.²

MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."³ This Policy, outlined in DIAND's 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.⁴ The term "lawful obligation" is defined in *Outstanding Business* as follows:

The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.

² Diana Kwan, Associate Legal Counsel, Indian Claims Commission, to Ken MacLeod, Walsh Wilkins Creighton, and Douglas Faulkner, DIAND, Legal Services, April 1, 2005 (ICC file 2108-25-03). This ruling on the Admission of 17 Statutory Declarations is reproduced as Appendix C to this report.

³ Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

⁴ Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171-85 (hereafter *Outstanding Business*).

A lawful obligation may arise in any of the following circumstances:

- i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
- ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
- iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
- iv) An illegal disposition of Indian land.⁵

⁵

Outstanding Business, 20; reprinted in (1994) 1 ICCP 179–80.

PART II

THE FACTS

The Blood Tribe, a member of the Blackfoot Confederacy, is based in southern Alberta on the largest Indian reserve in Canada. The reserve's northern boundary is located at the confluence of the St Mary and Belly Rivers at Kipp, and extends southward to an east-west line located 14 miles north of the international boundary. The Blood Tribe has a long history in this area. The traditional territory of the Blackfoot Confederacy is the area between the North Saskatchewan River and the Yellowstone River from the Cypress Hills to the mountains in the west. However, the home base of the Blood Tribe is the area between the Kootenay (Waterton) and St Mary Rivers from their confluence to the mountains at the international boundary.

The area between the Kootenay (Waterton) and Belly Rivers is characterized by the Belly Buttes, a series of undulating hills which is the heart of the Blood Tribe home base. The Blood Tribe's oral history includes the story of Blood Clot, the creation story of the Belly Buttes. Blood Clot was swallowed by an animal, but was able to escape by jumping up and down and slicing the belly of the animal with a knife that was tied in his hair. The intestines of the animal became the Belly Buttes. Within these lands, the Blood Tribe was created, and it is within these lands that the Blood Tribe developed both a practical and a spiritual existence. To the Blood Tribe, the home base is sacred.

Within the home base, the Blood Tribe is governed by the clan system that exists to this day. Traditionally, the Blood Tribe was known as "the Tribe of Many Chiefs." Sixteen clans and four sacred societies exist today, and include the Lone Fighters, Many Children, Blackened Lodge Door Flaps, Fish Eaters, All Short People, All Tall People, Little Robes, and Crooked Wheels. Each clan had its own particular areas within the home base. Every year, in the summer, all of the clans would gather for the Sundance and, in the winter, all of the clans would share wintering grounds.

The Blood Tribe's traditional customs have always included consensus in decision making and *innaihtsiini*, a peacemaking approach to treaty. Essentially, a course of action is not chosen until consensus is reached. According to Blood Tribe custom, when consensus is reached, how the decision is made is not questioned and everyone is responsible for the decision. *Innaihtsiini* involves two disparate parties coming together and reaching an agreement to maintain peace.

In 1877, Treaty 7 was concluded between Canada and three tribes from the Blackfoot Confederacy, including the Blood Tribe. By this time, the Blood Tribe's way of life had changed dramatically. The buffalo had almost disappeared, and the lands were rapidly being settled. In addition, exposure to diseases like smallpox had greatly reduced the population of the Blood Tribe. Treaty 7 was intended to open lands to settlers while ensuring reserve lands for Indians. More specifically, Canada would provide treaty benefits in exchange for Crown title to the territories occupied by the Indians. One of the terms of Treaty 7 included a joint reserve set aside for the Blood Tribe, the Blackfoot, and the Sarcee along the Bow River. Following the conclusion of the Treaty 7, Red Crow, Chief of the Blood Tribe, broke camp and returned to the Blood Tribe's home base.

The Blood Tribe never moved to the joint reserve at Bow River. Instead, in 1880, Order in Council 565 was issued, authorizing Indian Commissioner Edgar Dewdney and North-West Mounted Police Commissioner Lieutenant-Colonel James Macleod to take a surrender of the Blood Tribe's portion of the joint reserve with a view to setting aside a reserve located near Fort Kipp. In September 1880, a surrender of the Bow River reserve was taken from the Blood Tribe; however, there is no evidence that it was taken in accordance with the 1876 *Indian Act* provisions. A month later, Red Crow, Indian Agent N.T. MacLeod, and others selected the area for the Blood Tribe reserve. Indian Agent MacLeod reported to Indian Commissioner Dewdney that he did not agree with Red Crow's selection for a reserve, and he selected other lands, which now form the current reserve.

By December 1881, the surveys of Indian reserves across the country became a priority in the face of rapid settlement. With respect to the Blood Tribe's reserve, instructions were given to John Nelson, Dominion Land Surveyor, in June 1882. During the summer, Nelson surveyed a 650-square-mile reserve, later to become Blood Indian Reserve (IR) 148, between the Belly and St Mary Rivers ending nine miles north of the international border. Based on the Treaty 7 land entitlement formula, this reserve was sized for a population of approximately 3,250 people. In December 1882, Nelson reported to the Department of Indian Affairs that he had completed the survey.

In 1883, a series of surrenders were taken from the Blood Tribe, the Blackfoot and the Sarcee to effect the changes to Treaty 7. In April, an Order in Council was issued, authorizing Dewdney and Macleod to obtain a surrender from the Blackfoot as it was believed that a surrender of the joint

reserve was necessary from the Blood Tribe, as well as the Blackfoot and the Sarcee. These surrenders, obtained in June and July 1883, are known as the “Amendment to Treaty 7.” However, with respect to the Blood Tribe, the 1883 surrender documents were not accompanied by an affidavit, and another surrender was taken in February 1884 to address this deficiency. In January 1885, Order in Council PC 400 was issued, approving the Amendment to Treaty 7. However, in April 1886, an error in the Amendment relating to the Blood Tribe reserve was discovered. Instead of excepting the northwest quarter section, the northeast quarter section was excepted so that Fort Whoop-Up was included in the reserve. This error was corrected in September 1886 with a sworn document.

A second survey of the Blood Tribe reserve was completed by Nelson in the summer of 1883. This time, a 547.5-square-mile reserve for approximately 2,737 people was surveyed. Generally, the reserve remained as surveyed in 1882 except for the southern boundary, which was moved farther north.

In 1887, a group of Mormons arrived from Utah and settled at Lee’s Creek at what eventually became the town of Cardston. The Blood Tribe’s oral history relates how, at the time of their arrival, the Mormons had asked Red Crow for permission to set up camp. The Blood Tribe’s oral history also describes a 99-year lease signed by Red Crow, allowing the Mormons to stay on the land. This lease has never been located. The Mormons were camped within the boundary of the reserve as surveyed in 1882, but outside the boundary as surveyed in 1883.

The presence of the Mormon colony was noted by Indian Agent Pocklington, who wrote to Indian Commissioner Dewdney, asking to be provided with the exact location of the southern boundary of the Blood Tribe’s reserve. Once a map was received, Pocklington met with Red Crow and showed him where the southern boundary was located. Pocklington reported that Red Crow was under the impression that his reserve extended between the two rivers back to the mountains. More specifically, Red Crow believed that the southern boundary was much farther south, and ended at the mountains at the international border. Pocklington explained that, if that were the case, the Blood Tribe would have more land than it was entitled to. Following this meeting, the confusion over the location of the southern boundary was considered resolved by the department, and, in 1888, the Mormons obtained Crown grants to the lands they had camped on.

In 1889, Order in Council PC 1151 was passed, confirming the Blood Indian Reserve (IR) 148 as surveyed in 1882 and amended in 1883.

PART III
ISSUES

The Big Claim Lands Should Constitute the Reserve

1. As a result of events that occurred between the making of Treaty 7 and 1880, did the Blood Tribe hold the Big Claim lands for its use and benefit?
2. In the alternative, as a result of the events that occurred between the making of Treaty 7 and 1880, what lands did the Blood Tribe hold for its use and benefit?
3. Was there a valid surrender of the Blood Tribe's interest in the Bow River Reserve?

In the Alternative, the 1882 Nelson Survey Work Established the Reserve

4. Was the reserve established by the Nelson survey work in 1882?
5. If the reserve was established by the Nelson survey work in 1882 then was a surrender required to move the boundary and effectively remove approximately 102.5 square miles of reserve land as a result of the Nelson survey work in 1883?

In the Further Alternative the Blood Tribe Claim a Treaty Land Entitlement

6. Does the formula described in the written terms of Treaty 7 with respect to the minimum sizes of reserves apply to the creation of the Blood Tribe's reserve?
7. If the formula applies to the creation of the Blood Tribe's reserve then what is the proper date for the basis of the calculation of the treaty land entitlement? On the basis of that date, what then is the Blood Tribe Treaty Land Entitlement?

PART IV
ANALYSIS

BIG CLAIM LANDS AND THE BLOOD TRIBE RESERVE

This inquiry focuses on the Big Claim lands, which are identified as the lands between the St Mary and Kootenay (Waterton) Rivers from their confluence in southern Alberta extending to the mountains at the international boundary. The Blood Tribe claims a lawful entitlement to these lands, such that the whole of the Big Claim lands should have been its reserve. Canada argues that the interest in all of the Blood Tribe's lands, including the Big Claim lands, was surrendered.

In establishing its entitlement to the Big Claim lands, the Blood Tribe argues that the lands were held by it as a result of Treaty 7. If not held by it as a result of Treaty 7, then the Blood Tribe argues that its reserve was established by an 1882 survey completed by John Nelson, which did not include the entirety of the Big Claim lands. In the further alternative, the Blood Tribe argues that there is an outstanding treaty land entitlement as Canada failed to provide sufficient reserve lands to the Blood Tribe.

More specifically, the Blood Tribe's argument that the Big Claim lands were held by it as a result of Treaty 7 and Canada's disagreement with this position are set out in these issues:

- 1 As a result of events that occurred between the making of Treaty 7 and 1880, did the Blood Tribe hold the Big Claim lands for its use and benefit?
- 2 In the alternative, as a result of the events that occurred between the making of Treaty 7 and 1880, what lands did the Blood Tribe hold for its use and benefit?
- 3 Was there a valid surrender of the Blood Tribe's interest in the Bow River Reserve?

The first two issues deal with events that occurred between the making of Treaty 7 and 1880, and ultimately, ask the panel to make findings with respect to the lands held by the Blood Tribe in this time period. As a result, the panel will analyze these two issues together.

Issues 1 and 2 Lands Held by the Blood Tribe, 1877–80***Factual Background***

In the early 1870s, the Dominion of Canada was undergoing much social and political change. Responsibility for governance and law had been transferred from the Hudson's Bay Company to the dominion, the country was being surveyed and opened for settlement, and treaties were being negotiated with Indians in the west. In establishing the treaties, the Crown intended to open lands to settlers while ensuring reserve lands for Indians. More specifically, Canada would provide treaty benefits in exchange for Crown title to the territories occupied by the Indians.

The Blood Tribe's approach to treaty making is based on *innaihtsiini*. This traditional process does not focus on surrender through treaty, but on peacemaking. At the community session, Pete Standing Alone stated:

Innaihtsiini to me, it doesn't mean a surrender. It means coming together because peacemaking and Treaty-making all stemmed out of that word, for us. *Innaihtsiini* means to come to a truce.⁶

The Elders explained that entering into a treaty did not mean that one party submitted to the other party; rather, the parties attempted to understand and accommodate one another. During treaty making, the pipe was used to symbolize peace and to bind the parties.⁷ The Blood Tribe states that this process informed the Blood Tribe's participation at the making of Treaty 7.

At the time of the treaty, the Blood Tribe was experiencing change. Members of the Blood Tribe describe the era leading to Treaty 7 as a period of transition and vulnerability. The buffalo, long the mainstay of their lives, was becoming extinct. Colonization and settlement brought whiskey traders and new diseases to the area. The Blood Tribe suffered from a smallpox epidemic, greatly reducing its numbers. Although the Blood Tribe had little contact with Europeans and its members' knowledge of English was limited, the Tribe had some prior experience with treaties, including the

⁶ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 292, Pete Standing Alone).

⁷ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 104, Andy Black Water); August 30–31, 2004 (ICC Exhibit 5a, p. 333 Louise Crop Eared Wolf).

Jay Treaty of 1794 and the Blackfoot Treaty of 1855.⁸ As well, the Blood Tribe had established peace treaties with the Sioux, the Mandan of North Dakota, and Cree throughout the past.⁹

On September 22, 1877, Treaty 7 was concluded between Canada, three tribes from the Blackfoot Confederacy – the Blood Tribe, the Blackfoot, and the Peigans – as well the Sarcees and the Stoneys (a branch of the Assiniboine). The written terms of Treaty 7 include:

- provisions for the payment of annuities;
- reserves to be provided on the basis of five persons per square mile (128 acres per person);
- provisions for the purchase of ammunition;
- a joint reserve set aside for the Blood Tribe, the Blackfoot, and the Sarcee;
- 10 axes, five handsaws, five augers, one grindstone, and the necessary files and whetstones for each chief and councillor;
- once the bands were settled upon reserves, two cows would be furnished by the government for every family of five, three cows for families with five to nine persons; and four for families of 10 and over, as well one bull for each chief and councillor. If a family wished to farm besides raising cattle, it would reduce its cattle allotment by one cow and receive instead two hoes, one spade, one scythe, and two hay forks. Three such families could collectively receive also a plough and harrow, with enough potatoes, barley, oats, and wheat to plant the broken land.¹⁰

Treaty 7 was finalized over a five-day period, beginning on September 16, 1877, when Treaty Commissioners David Laird and Lieutenant-Colonel James Macleod arrived at Blackfoot Crossing.¹¹

⁸ The Blackfoot Treaty is sometimes also referred to as the Lame Bull Treaty of 1855, the Stevens Treaty of 1855, the Yellowstone Treaty of 1855, or Otahkoi iitahtaa or the Yellow River Treaty. “Lame Bull” was a U.S. Peigan leader who was a signatory of the proceedings (ICC Exhibit 2o, pp. 23–26).

⁹ Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen’s University Press, 1996), 7 (ICC Exhibit 9e, pp. 7-9).

¹⁰ *Copy of Treaty and Supplemental Treaty No. 7, Made 22nd Sept., 1877, and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes at the Blackfoot Crossing of Bow River and Fort MacLeod* (1877; reprint, Ottawa: Queen’s Printer, 1966), 1–10 (ICC Exhibit 1b, pp. 1–10).

¹¹ Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 107 (ICC Exhibit 9a, p. 107).

The Blood Tribe Chiefs present for their arrival were Medicine Calf and Rainy Chief.¹² However, “[t]here were four leading chiefs of the Blood tribe: Red Crow of the Fish Eaters, Father of Many Children of the Buffalo Followers, Medicine Calf of the Many Tumors, and Many Spotted Horses of the Lone Fighters.”¹³ Rainy Chief was recognized as leader of the northern Blood Tribe, while Red Crow was recognized as the leader of the southern Blood Tribe.¹⁴

Blood Tribe oral history refers to Red Crow as the main leader of the Blood Tribe. Elder Andrew Black Water states: “[W]e understand there’s different leaders, different Clans, eh. But amongst them, they would rely on one individual, you know. So it turn out to be that Red Crow was sort of the one that was acknowledged to lead the people.”¹⁵ Elder Louise Crop Eared Wolf, a descendant of Red Crow, attested to his leadership abilities:

I have heard that when he was young he was brave. He went on a lot of raids. This is what got him recognition – going on raids. This shows what a courageous person he was. He also took care of the people. For these reasons people had high regard for him and because of this he became a camp leader. I also heard that he was very intelligent – it was this intelligence that gave him success on his raids. Also, if he got material goods on his raids he would not only benefit himself but when he returned home he would share with the people. It was these characteristics that caused people to have high regard for him – his generosity, courage and kindness. It was really because Red Crow went on numerous raids that he was so esteemed and became a leader. Red Crow has set an example for many succeeding Chiefs.¹⁶

¹² Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 107 (ICC Exhibit 9a, p. 107).

¹³ Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 114 (ICC Exhibit 9a, p. 114).

¹⁴ Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen’s University Press, 1996), 43 (ICC Exhibit 9e, p. 43).

¹⁵ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 93, Andrew Black Water).

¹⁶ Blood Tribe Elder Statutory Declarations dated and signed May–June 1996, forming app. B in Pillipow & Company, “Blood Tribe / Kainaiwa Land Claim Submission – The Big Claim,” July 1996 (ICC Exhibit 2c, app. B, Louise Crop Eared Wolf, pp. 198–99).

Blood Tribe oral history indicates that Red Crow was not interested in attending the treaty negotiations at Blackfoot Crossing.¹⁷ As told by Elder Rosie Red Crow:

At the time of the Treaty, he wanted the Treaty to take place at Fort Macleod. They did not listen to him. Instead, they went to Blackfoot Crossing. As a result, Red Crow went to Sweet Grass Hills instead of the Blackfoot Crossing. Then they sent a messenger to ask Red Crow to attend. ... He [Red Crow] went south. At the time there was no United States. He went south.¹⁸

Elder Mary Louise Oka offers a similar explanation of Red Crow's desire to treat on Blood Tribe territory and how he came to join the treaty parties at Blackfoot Crossing. She states:

I heard that at the time of the Treaty, that Red Crow did not attend the Treaty, they did not sign the Treaty. He wanted the Treaty at – he wanted the Treaty to be held at Fort Macleod, not at Blackfoot Crossing. Instead, the Treaty was taken to take place at Blackfoot Crossing. Red Crow was very disappointed. He packed up and moved to the Porcupine Hills.

When he did not show up at Blackfoot Crossing, the people were there waiting for him. They sent a messenger to ask him to attend the Blackfoot Crossing, and then he moved to the Blackfoot Crossing.¹⁹

Elder Rosie Red Crow states that Red Crow ultimately decided to travel to Blackfoot Crossing because “Crowfoot was a cousin to Red Crow. Crowfoot's mother was from the Bloods. When Crowfoot asked Red Crow to attend Blackfoot Crossing because of the protocol and out of respect, Red Crow was unable to refuse.”²⁰ Elder Stephen Fox explains the relationship between Red Crow and Crowfoot and why Crowfoot waited for him:

At the time of the Treaty, Crowfoot waited for Red Crow. However, because Crowfoot was already there, the non-Natives, the government people thought that

¹⁷ Blood Tribe Elder Statutory Declarations dated and signed May–June 1996, forming app. B in Pillipow & Company, “Blood Tribe / Kainaiwa Land Claim Submission – The Big Claim,” July 1996 (ICC Exhibit 2c, app. B, Louise Crop Eared Wolf, p. 194).

¹⁸ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 148–49, Rosie Red Crow).

¹⁹ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 182–83, Mary Louise Oka).

²⁰ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 149, Rosie Red Crow).

Crowfoot was superior to Red Crow, that Crowfoot was a much bigger leader than Red Crow. However, it was out of respect that they waited for each other.

... Crowfoot was not going to make any moves with regard to the Treaty, and he wouldn't – due to the protocols, he waited. He insisted on waiting until Red Crow arrived.²¹

On the evening of September 20, Red Crow and Father of Many Children arrived at Blackfoot Crossing. During the final day of negotiations, Commissioner Laird had asked the leaders of all the tribes to indicate where they wished their reserve to be located. Only the Blackfoot, Stoneys, and Peigan chose their land immediately. A joint reserve was set aside for the Blackfoot, Blood Tribe, and Sarcee Bands at Blackfoot Crossing.²² The reserve is described in Treaty 7 as

a belt of land on the north side of the Bow and South Saskatchewan Rivers, of an average width of four miles along said rivers, down stream, commencing at a point on the Bow River twenty miles north-westerly of the Blackfoot Crossing thereof, and extending to the Red Deer River at its junction with the South Saskatchewan; also for the term of ten years, and no longer, from the date of concluding of this Treaty, when it shall cease to be a portion of the said Indian Reserves, as fully to all intents and purposes as if it had not at any time been included therein, and without any compensation to individual Indians for improvements, of a similar belt of land on the south side of the Bow and Saskatchewan Rivers of an average width of one mile along said rivers, down stream; commencing at the aforesaid point on the Bow River, and extending to a point one mile west of the coal seam on said river, about five miles below the said Blackfoot Crossing; beginning again one mile east of the said coal seam and extending to the mouth of Maple Creek at its junction with the South Saskatchewan; and beginning again at the junction of the Bow River with the latter river, and extending on both sides of the South Saskatchewan in an average width on each side thereof of one mile, along said river against the stream, to the junction of the Little Bow River with the latter river.²³

In exchange, the Blood Tribe, Blackfoot, Peigan, Sarcee, and Stoney tribes were expected to

²¹ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 433, Stephen Fox).

²² This reserve is occasionally referred to in this report as the Bow River reserve.

²³ *Copy of Treaty and Supplemental Treaty No. 7, Made 22nd Sept., 1877, and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes at the Blackfoot Crossing of Bow River and Fort MacLeod* (1877; reprint, Ottawa: Queen's Printer, 1966), 4 (ICC Exhibit 1b, p. 4).

cede, release, surrender, and yield up to the Government of Canada for Her Majesty the Queen and her successors for ever, all their rights, titles, and privileges whatsoever to the lands included within the following limits, that is to say:

Commencing at a point on the International Boundary due south of the western extremity of the Cypress Hills, thence west along the said boundary to the central range of the Rocky Mountains, or to the boundary of the Province of British Columbia, thence north-westerly along the said boundary to a point due west of the source of the main branch of the Red Deer River, thence south-westerly and southerly following on the boundaries of the Tracts ceded by the Treaties numbered six and four to the place of commencement;

And also all their rights, titles and privileges whatsoever, to all other lands wherever situated in the North-West Territories, or in any other portion of the Dominion of Canada. ...²⁴

During this period, the Blood Tribe required English interpreters. As the Blackfoot language was extraordinarily complex, a number of interpreters were present at treaty, including Jerry Potts, who acted as an interpreter for the Crown. Blood Tribe oral history indicates that Potts was not the best interpreter. Elder Pete Standing Alone states:

Jerry Potts was not fluent in either language. He never went to school, he didn't live extensively with the Bloods to learn the language real well. You know, he's back and forth. And he was in Fort Benton when Macleod was coming west. No, the interpretation was, I would say ...very poor.²⁵

Elder Louise Crop Eared Wolf states:

There's a lot of stories, lot of people that I heard, and I'm still hearing it, that Jerry Potts was a drunk. He was drunk most of the time, and they had to get other interpreters to replace him.

...

²⁴ *Copy of Treaty and Supplemental Treaty No. 7, Made 22nd Sept., 1877, and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes at the Blackfoot Crossing of Bow River and Fort MacLeod* (1877; reprint, Ottawa: Queen's Printer, 1966), 3–4 (ICC Exhibit 1b, pp. 3–4).

²⁵ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 310, Pete Standing Alone).

... he interpreted some, but not that accurate. Not a bit accurate, as we can see on the signatures when he said that he couldn't even say Is sah pum khi ka. It came up with the word Chapo Mexico.²⁶

The Blood Tribe has its own interpretation of what was negotiated in Treaty 7. Elder Rosie Day Rider states:

At the time, they promised us that they would educate us, that they would take care of our health, and that they would train us and provide the funds to farm, and that they would do this as long as the sun shines, the rivers flow, and as long as the grass grows. And as long as the mountains are there.²⁷

Once the treaty was signed, registration and annuity payments took place. Ten head Chiefs, 40 minor Chiefs or councillors, and 4,342 others were paid, totalling \$52,954.²⁸

Following the conclusion of Treaty 7, as the Blood Tribe oral history consistently relates, Red Crow broke camp at Blackfoot Crossing and returned home to the Big Claim lands.²⁹ In the summer of 1878, Red Crow and his followers met with the commissioners at Fort Kipp for annuity payments, and he advised the Treaty Commissioners that he did not want to settle at Bow River. Instead, he would take his reserve on the Belly River, within their traditional territory.³⁰ The Blood Tribe's dissatisfaction with the Bow River reserve was reported by Indian Commissioner Dewdney:

[T]he Blood Indians are very desirous of having a Reserve apart from the other Indians of the Blackfeet nation and made a formal application to me at an interview I had with them about two months ago. "Mekasto", the Head Chief spoke first, then "Running Rabbit" and all the Minor Chiefs one after the other followed in the same

²⁶ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 357–58, Louise Crop Eared Wolf).

²⁷ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 208, Rosie Day Rider).

²⁸ Hugh A. Dempsey, *Treaty Research Report: Treaty Seven* (Ottawa: Department of Indian Affairs and Northern Development (DIAND), 1987), app. D to Pillipow & Company, "Blood Tribe / Kainaiwa Land Claim Submission – The Big Claim," July 1996 (ICC Exhibit 2c, app. D, p. 328).

²⁹ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 210, 219, Rosie Day Rider); August 30–31, 2004 (ICC Exhibit 5a, p. 434, Stephen Fox).

³⁰ Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 122 (ICC Exhibit 9a, p. 122).

direction. They said they were all of one mind. They wanted their Reservation in the neighbourhood of Fort Kipp, where they say their Indians are mostly resided and where the bones of their Ancestors lie. Upon my informing them it was out of my power to alter the Treaty as agreed upon by them, they then requested that I would make known their wishes to the Government while at Ottawa.³¹

As a result, Order in Council 565 was issued on March 26, 1880:

...The Minister recommends that authority be given ... to E. Dewdney, Esquire, Indian Commissioner for the North West Territories and Manitoba, and Lieut. Colonel McLeod, Commissioner for the North West Mounted Police, to attend a Council of the Blackfeet Nation ... to be summoned by Mr. Dewdney for the purpose; and to submit a proposition to them to surrender such portion of the Reserve allotted to them under Treaty stipulations as would be the proper share of the Blood Band, were that Band to settle upon the said Reserve, with a view to a Reserve near Fort Kipp being assigned to the Blood Indians, in accordance with their desire; And should the Indians assent to the proposal, the gentlemen above referred to should take a surrender from them executed in accordance with the provision of the Indian Act 1876 covering the land in question.³²

The Parties' Positions

Issues 1 and 2 both focus on the outcome of Treaty 7. The Blood Tribe argues it was never its understanding that it was to give up the Big Claim lands at the time of Treaty 7. In other words, the Blood Tribe argues that the written terms of Treaty 7 as they relate to land do not reflect the agreement reached at the time of treaty. Canada argues that the effect of Treaty 7 was that the Blood Tribe surrendered its interest in the Big Claim lands. Each of these positions will be explored in detail.

Blood Tribe's Position

The Blood Tribe argues that the honour of the Crown was breached when Treaty 7 was concluded, and that the Crown's fiduciary obligations to the Blood Tribe with respect to reserve lands were also

³¹ Edgar Dewdney, Indian Commissioner, Manitoba and NWT, Department of Indian Affairs (DIA), to L. Vankoughnet, Deputy Superintendent General of Indian Affairs (DSGIA), December 15, 1879, Library and Archives Canada (LAC), RG 10, vol. 6620, file 104A-1-1 1, p. 16 (ICC Exhibit 1a, pp. 96–99).

³² Order in Council PC 565, March 26, 1880, LAC, RG 2(1), vol. 389, March 26, 1880 (ICC Exhibit 1a, pp. 160–61).

breached. The Blood Tribe does not challenge the validity of Treaty 7 and agrees that, at the very least, there was a treaty obligation to create a reserve for the Blood Tribe.³³ However, the Blood Tribe understood that it continued to have exclusive use and occupation of the Big Claim lands. To this end, the Blood Tribe argues that Treaty 7 was negotiated and concluded in a manner inconsistent with the honour of the Crown.³⁴ The basis of this argument is the oral history of the Blood Tribe Elders and, more specifically, the actions of the Blood Tribe during and following the negotiations of Treaty 7.

The key oral history evidence, some of which was set out above, can be summarized as follows:

- The Blood Tribe's approach to treaty making, *innaihtsiini*. This process informed the Blood Tribe's participation at the Treaty 7 negotiations. The Blood Tribe agreed to keep the peace in exchange for the Crown, promising to take care of the Blood people forever.
- The role and leadership of Red Crow. In particular, the Elders described his initial absence and arrival at Blackfoot Crossing, at the request of Crowfoot.
- The events at Blackfoot Crossing. The Elders described the drills that the North-West Mounted Police were conducting, and how the Blood Tribe members had been below a hill with cannons pointed in their direction.³⁵
- The lack of proper interpretation at Blackfoot Crossing, and the role of Jerry Potts. According to the Elders, Jerry Potts was drunk and not particularly fluent in either English or Blackfoot, a complex language. As a result of his inaccurate and imprecise interpretation,³⁶ the written terms of Treaty 7 do not reflect the Blood Tribe's understanding of the treaty.
- The actions of Red Crow after Treaty 7. Following the conclusion of Treaty 7, the Elders unequivocally stated that Red Crow broke camp and announced that he was "going home"³⁷ to the Belly Buttes.

³³ Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 56.

³⁴ Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 60.

³⁵ Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 35.

³⁶ Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 36.

³⁷ Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 38.

The Blood Tribe argues that the oral history of the Elders places the claim in an appropriate historical and cultural context. The oral history establishes that the Blood Tribe had a very different understanding of Treaty 7. As a result, the oral history is useful, reliable, and should be given full weight.

Ultimately, the Blood Tribe members state that their understanding of Treaty 7 with respect to land and reserves is not reflected in the written terms of Treaty 7. This discrepancy results from the failure of the Crown to act honourably in its dealings with the Blood Tribe at Blackfoot Crossing. The Blood Tribe sets out treaty interpretation principles with respect to the intention of the parties³⁸ and outlines the concept of the honour of the Crown.³⁹ Based on these principles, the Blood argues that the Crown failed to act honourably during the discussions at Blackfoot Crossing and breached its duties in the following ways:

- The Treaty Commissioners, acting for the Crown, failed to acknowledge Red Crow as the leader of the Blood Tribe and did not wait for Red Crow before commencing treaty discussions at Blackfoot Crossing.⁴⁰
- The terms of the treaty had largely been concluded prior to Red Crow's arrival at Blackfoot Crossing, resulting in no consultation with Red Crow on the issues of land and reserves.⁴¹
- The treaty was concluded without proper interpretation for the Blood Tribe.⁴²

In addition, the Blood Tribe argues that the Crown had a fiduciary duty, following the conclusion of Treaty 7, to set aside the Big Claim lands as the Blood Tribe's reserve. Since Treaty 7 set aside a joint reserve for the Blood Tribe at the Bow River, the Tribe argues that the Crown's fiduciary duty was breached because the decision to create a joint reserve was unilateral and made

³⁸ Written Submissions on Behalf of the Blood Tribe, June 15, 2005, pp. 50–52.

³⁹ Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 53.

⁴⁰ Written Submissions on Behalf of the Blood Tribe, June 15, 2005, pp. 58–59.

⁴¹ Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 59.

⁴² Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 60.

without consulting the Blood Tribe.⁴³ Setting aside a reserve at Bow River for the Blood Tribe was not in the best interests of the Tribe as the reserve was outside of its home base.

In summary, the Blood Tribe argues that it was never its intention to occupy the Bow River reserve, and immediately after the making of Treaty 7, the Blood Tribe returned home to the Big Claim lands. After Treaty 7, the Blood Tribe argues that its members continued to have the use and benefit of the Big Claim lands. In the alternative, the Blood Tribe argues that, if Treaty 7 established a reserve at Bow River, then the Blood Tribe exchanged this interest for the Big Claim lands. The surrender of the Bow River reserve interest was dependent on receipt of the Big Claim lands and the receipt of the Big Claim lands was a key term of the surrender. The Blood Tribe argues that the failure to receive the Big Claim lands as its reserve means that the surrender was invalid.

Canada's Position

Canada argues that, as a result of Treaty 7, the Blood Tribe surrendered all of its interests in the Big Claim lands in exchange for joint reserve lands at the Bow River. The surrender in Treaty 7 is effective even though the Blood Tribe never settled at Bow River. Although Canada acknowledges that the Blood Tribe returned to the Big Claim lands following treaty, Canada states that the Blood Tribe's occupation of the Big Claim lands was "at the pleasure of the Crown."⁴⁴

Canada disagrees with the Blood Tribe over the following:

- The significance of events prior to and at Blackfoot Crossing. In particular, Canada states that the location of Blackfoot Crossing for the treaty discussions was at Crowfoot's request. Several chiefs, including Red Crow, chose not to attend the discussions at Blackfoot Crossing.⁴⁵
- The role of Jerry Potts. Canada states that the Treaty Commissioners had intended Jerry Potts to act as interpreter, but, because he was incapable, James Bird, John Monroe, Isidore St Duval, and Jean L'Heureux acted as interpreters instead.⁴⁶

⁴³ Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 75.

⁴⁴ Written Submissions on Behalf of the Government of Canada, August 30, 2005, p. 2.

⁴⁵ ICC Transcript, October 4, 2005 (ICC Exhibit 5a, Douglas Faulkner, p. 70).

⁴⁶ Written Submissions on Behalf of the Government of Canada, August 30, 2005, p. 9.

- The relationship between Crowfoot and Red Crow. Canada asserts that, once Red Crow and the other Blood Tribe and Peigan Chiefs arrived, they met with Crowfoot and the other Chiefs. As a result of this meeting, Canada states that Crowfoot was chosen to lead the final negotiations.⁴⁷

Canada states that a key principle in treaty interpretation discussed in the Supreme Court of Canada's decision in *R. v. Marshall* is to seek out the common intention which best reconciles the interests of both parties at the time a treaty was signed. Accordingly, Canada argues that there is no evidence that the Crown ever intended the Big Claim lands to form the Blood Tribe's reserve.⁴⁸ Canada then focuses its argument on the effect of the 1880 Order in Council. In summary, Canada argues that the Blood Tribe did not hold the Big Claim lands for its use and benefit between Treaty 7 and 1880.

Panel's Findings

In the first two issues, the panel is asked to determine whether the Big Claim lands were held by the Blood Tribe for its use and benefit following the conclusion of Treaty 7. The following portion of Treaty 7 is relevant:

And where the said Commissioners have proceeded to negotiate a Treaty with the said Indians; and the same has been finally agreed upon and concluded as follows, that is to say: the Blackfeet, Blood, Piegan, Sarcees, Stony and other Indians inhabiting the district hereinafter more fully described and defined, do hereby cede, release, surrender, and yield up to the Government of Canada for Her Majesty the Queen and her successors for ever, all their rights, titles, and privileges whatsoever to the lands included within the following limits, that is to say:

Commencing at a point on the International Boundary due south of the western extremity of the Cypress Hills, thence west along the said boundary to the central range of the Rocky Mountains, or to the boundary of the Province of British Columbia, thence north-westerly along the said boundary to a point due west of the source of the main branch of the Red Deer River, thence southwesterly and southerly

⁴⁷ Written Submissions on Behalf of the Government of Canada, August 30, 2005, p. 10.

⁴⁸ Written Submissions on Behalf of the Government of Canada, August 30, 2005, p. 38.

following on the boundaries of the Tracts ceded by the Treaties numbered six and four to the place of commencement;⁴⁹

In addition, Treaty 7 states the following with respect to the joint reserve at Bow River:

[T]he Reserves of the Blackfeet, Blood and Sarcee Bands of Indians, shall consist of a belt of land on the north side of the Bow and South Saskatchewan Rivers, of an average width of four miles along said rivers, down stream, commencing at a point on the Bow River twenty miles north-westerly of the Blackfoot Crossing thereof, and extending to the Red Deer River at its junction with the South Saskatchewan;⁵⁰

The following principles of treaty interpretation, which have been set out in a number of previous cases, are summarized by the Supreme Court of Canada in *R. v. Marshall*, [1999] 3 SCR 456, and cited by both parties:

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation ...
2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories ...
3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed ...
4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed ...
5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties ...

⁴⁹ *Copy of Treaty and Supplemental Treaty No. 7, Made 22nd Sept., 1877, and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes at the Blackfoot Crossing of Bow River and Fort MacLeod* (1877; reprint, Ottawa: Queen's Printer, 1966), 3 (ICC Exhibit 1b, p. 3).

⁵⁰ *Copy of Treaty and Supplemental Treaty No. 7, Made 22nd Sept., 1877, and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes at the Blackfoot Crossing of Bow River and Fort MacLeod* (1877; reprint, Ottawa: Queen's Printer, 1966), 4 (ICC Exhibit 1b, p. 4).

6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time ...
7. A technical or contractual interpretation of treaty wording should be avoided ...
8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what “is possible on the language” or realistic ...
9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context ...⁵¹

The Supreme Court in *Marshall* also sets out a two-step approach to interpreting a treaty:

The fact that both the words of the treaty and its historic and cultural context must be considered suggests that it may be useful to approach the interpretation of a treaty in two steps. First, the words of the treaty clause at issue should be examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. This exercise will lead to one or more possible interpretations of the clause. As noted in *Badger, supra*, at para. 76, “the scope of treaty rights will be determined by their wording”. The objective at this stage is to develop a preliminary, but not necessarily determinative, framework for the historical context inquiry, taking into account the need to avoid an unduly restrictive interpretation and the need to give effect to the principles of interpretation.

At the second step, the meaning or different meanings which have arisen from the wording of the treaty right must be considered against the treaty’s historical and cultural backdrop. A consideration of the historical background may suggest latent ambiguities or alternative interpretation not detected at first reading. Faced with a possible range of interpretations, courts must rely on the historical context to determine which comes closest to reflecting the parties’ common intention. This determination requires choosing “from among the various possible interpretations of the common intention the one which best reconciles” the parties’ interests: *Sioui, supra*, at p. 1069. Finally, if the court identifies a particular right which was intended to pass from generation to generation, the historical context may assist the court in

⁵¹ *R. v. Marshall*, [1999] 3 SCR 456 at 511–13.

determining the modern counterpart of that right: *Simon, supra*, at pp. 402–3; *Sundown, supra*, at paras. 30 and 33.⁵²

The ICC has considered treaty interpretation principles in previous reports⁵³ dealing with Treaties 4 and 6. In *Carry the Kettle First Nation: Cypress Hills Inquiry*,⁵⁴ the ICC inquired into whether a reserve had been set aside at Cypress Hills as a result of Treaty 4, as a result of the *Indian Act*, or on a *de facto* basis. In examining whether a reserve was created by Treaty 4, the ICC concluded that Treaty 4 required the Crown to set aside a reserve:

[I]n our view the Crown's obligation under Treaty 4 was to establish a reserve for the First Nation after appropriate consultation with the band to ensure that the reserved lands were suitable for their intended purpose. Following the process of consultation, the lands selected would generally be surveyed and Canada and the band would confirm their acceptance of that survey, either formally or by way of conduct. Thus, the requisite elements in the setting aside of a reserve include:

- consultation and selection;
- survey; and
- acceptance.⁵⁵

To determine what the Blood Tribe did following Treaty 7, it is appropriate for the panel to examine the events before, during, and after Treaty 7. Prior to Treaty 7, the Blood Tribe was in a period of transition and vulnerability. Its way of life was rapidly changing as growing numbers of settlers came to occupy the same area the Tribe used and occupied in southern Alberta. The oral history of the Blood Tribe leaves no doubt about the traditional significance of these lands. The Elders were unequivocal in their perception of Red Crow as the guardian and steward of the Blood Tribe and the

⁵² *R. v. Marshall*, [1999] 3 SCR 456 at 514–15.

⁵³ ICC, *Moose Deer Point First Nation: Pottawatomi Rights Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 135; *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3; *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209; *Peepeekisis First Nation: File Hills Colony Inquiry* (Ottawa, March 2004).

⁵⁴ ICC, *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209.

⁵⁵ ICC, *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209 at 303.

Tribe's home base. The Elders also described the traditional understanding of treaty making and were adamant that this approach informed Red Crow's participation at Treaty 7.

During Treaty 7, a joint reserve at Bow River was set aside for the Blood Tribe, the Blackfoot, and the Sarcee. This clause of the treaty is unique as it sets out the location and size of the joint reserve. However, history shows that the location and the joint aspect of the reserve were not accepted by the Blood Tribe. Even though the wording in Treaty 7 is clear and unambiguous as to whom the joint reserve is for and where the joint reserve is located, the events that follow disclose a discrepancy between what was seemingly agreed to in Treaty 7 and what actually happened.

After Treaty 7 was concluded, as the oral history relates, Red Crow broke camp and returned to the Blood Tribe home base. When the Blood Tribe returned to the Big Claim lands, the Crown did not attempt to move the members to the joint reserve at Bow River. History shows that the joint reserve set out in Treaty 7 was never completely surveyed. Instead, by 1880, an order in council had been passed, effectively directing that the reserve for the Blood Tribe be relocated; eventually, the reserve was located in part of the territory occupied by the Blood Tribe prior to treaty.

Applying the *Marshall* principles, these events disclose an ambiguity not apparent on the face of the wording of Treaty 7 such that the Blood Tribe had a different understanding of *at least* the location of its reserve. If the parties had been in complete and total agreement at Treaty 7, the panel concludes, the Blood Tribe would have gone to the joint reserve at Bow River immediately after treaty or soon thereafter.

The question then becomes, what did the Blood Tribe hold following Treaty 7? The Blood Tribe argues that it held the Big Claim lands for its use and benefit, while Canada argues that the effect of treaty was to surrender these lands for the joint reserve at Bow River. Canada states that the Blood Tribe held the lands at Bow River for its use and benefit. The panel finds that the common intention of Treaty 7 was at least to set aside a reserve for the Blood Tribe. As a result, at the very least, the Blood Tribe held an interest in having a reserve set aside, and the Crown was obligated to ensure that this interest crystallized. Treaty 7 stipulated a joint reserve at Bow River, and, seemingly, the Blood Tribe held an interest in this joint reserve immediately following Treaty 7.

However, the events between 1877 and 1880 show that the Blood Tribe rejected the location of this reserve and the joint aspect of this reserve. Red Crow returned to the Blood Tribe home base,

and expressed dissatisfaction with the joint reserve at Bow River to Treaty Commissioner Laird. The effect of this rejection was to make the location of the reserve an open question following Treaty 7. In the interim, the Blood Tribe remained on its home base, without any opposition from the Crown. *Marshall* requires the panel to resolve any ambiguity in favour of the band. The panel therefore finds that these events indicate a *de facto* acceptance by the Crown that the Blood Tribe's reserve would be located within its home base. At the least, the Blood Tribe's interest in having a reserve set aside would have to be crystallized within this area.

The panel concludes that, although a reserve in the Blood Tribe's home base was not formally set aside by Treaty 7, the Crown was nevertheless obligated to set aside a reserve for the Blood Tribe. Historical events show that the Crown and the Blood Tribe agreed that the reserve would at least be located within the Blood Tribe's home base and, presumably, subject to the other terms of Treaty 7, including the treaty land entitlement formula. From the panel's perspective, the Blood Tribe held what could be described as a specific or cognizable interest in its lands in the home base.

Issue 3 Surrender of Interest in Bow River Reserve

3 Was there a valid surrender of the Blood Tribe's interest in the Bow River Reserve?

Order in Council 565, also known as the 1880 Exchange Agreement, authorized Commissioner Dewdney and Lieutenant-Colonel James Macleod to relocate the Blood Tribe reserve and specified that a surrender of the portion of the reserve allotted to the Blood Tribe under Treaty 7 be taken in accordance with the 1876 *Indian Act* once a new reserve had been located.

A surrender of the Blood Tribe's interests in the Bow River reserve was purportedly obtained on September 25, 1880. The surrender document reads as follows:

Whereas a Treaty was made and concluded on the twenty second day of September in the year of Our Lord one thousand eight hundred and seventy seven between Her Most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners, the Honorable David Laird, Lieutenant-Governor and Indian Superintendent of the North West Territories, and James Farquharson MacLeod, C.M.G., Commissioner of the North West Mounted Police, of the one part, and the Blackfeet, Blood, Piegan, Sarcee, Stony and other Indians, of the other part.

And whereas it was agreed in said Treaty that the Reserve of the Blackfeet, Blood and Sarcee Bands of Indians should consist of a belt of land on the North side of the Bow and Saskatchewan Rivers of an average width of four miles along said Rivers down stream, commencing at a point on the Bow River, twenty miles North-Westerly of the Blackfoot Crossing thereof and extending to the Red Deer River at its junction with the South Saskatchewan, I “Mekasto” or “Red Crow”, Head Chief of the Blood Indians, on behalf and with the consent of the Blood Indians included in said Treaty do hereby give up all our rights, titles and privileges whatsoever to the lands included in said Treaty, provided the Government will grant us a Reserve on the Belly River in the neighbourhood of the Mouth of the Kootenai River.⁵⁶

There is no evidence, either documentary or oral, of a surrender meeting or a vote where a majority of the adult male members of the Blood Tribe assented to the surrender. In 1883, in a memorandum to Council, Sir John A. Macdonald noted Crowfoot’s absence when the Blood Tribe surrendered its interest in the joint reserve in 1880. Macdonald believed that a surrender by the Blackfoot Tribe was required for the surrender of the Blood Tribe’s interest to comply with *Indian Act* provisions,⁵⁷ and he directed Dewdney and Macleod to obtain a surrender from the Blackfeet.⁵⁸ Macdonald, however, did not direct that a surrender be taken from the Sarcee Tribe for its interest in the Bow River reserve.

An Order in Council dated April 25, 1883, officially authorized Dewdney and Macleod to obtain the surrender from the Blackfoot Tribe.⁵⁹ The surrender was obtained June 20, 1883. The surrender document states:

Know all men by these presents, that we, the Blackfoot Indians, being a majority of the male members of the Blackfoot Band of the full age of twenty-one years, assembled in council duly called for the purpose of considering the surrender of the reserve hereinafter mentioned, and in presence of the Honourable Edgar Dewdney, the Lieutenant-Governor of the North-West Territories, and Commissioner duly authorized to attend said council, do hereby assent to ratify and confirm a certain

⁵⁶ Surrender, Blood Band to the Crown, dated September 25, 1880, in LAC, RG 10, vol. 1427, pp. 16–17 (ICC Exhibit 1a, pp. 166–67). The Kootenai River is now officially called the Waterton River.

⁵⁷ Memorandum to Council, April 12, 1883, LAC, RG 10, vol. 1083 (ICC Exhibit 1a, p. 681).

⁵⁸ Memorandum to Council, April 12, 1883, LAC, RG 10, vol. 1083 (ICC Exhibit 1a, p. 682).

⁵⁹ Order in Council, April 25, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt. 1 (ICC Exhibit 1a, pp. 687–88).

treaty made and concluded the twentieth day of June last past between Her Majesty the Queen, by Her Commissioners, the said the Honourable Edgar Dewdney and James Farquharson MacLeod, C.M.G., of the one part, and the Blackfoot Indians by their Head and Minor Chiefs, of the other part.

And in consideration of the terms of the said Treaty, we do hereby unanimously release and surrender to Her Majesty the Queen all the land reserved to the said Blackfoot Indians, under and by virtue of a certain treaty made and concluded on the twenty-seventh day of September, in the year of Our Lord one thousand eight hundred and seventy-seven.⁶⁰

On June 27, 1883, Dewdney and Macleod obtained a similar consent from the Sarcee⁶¹ and on July 2, 1883, another surrender was obtained from the Blood Tribe.⁶² In a letter dated September 24, 1883, Dewdney explained why he obtained the surrender of the Sarcees and the Blood Tribe: "It was found however desirable during these negotiations, to obtain the surrender of the Sarcee's to their interest in the Blackfeet Reservation as well as to obtain a formal surrender from the Bloods who had formerly only given a conditional one."⁶³

According to the July 2, 1883, Blood Tribe surrender, by relinquishing its interest in the Bow River reserve, the Blood Tribe would receive:

All that certain tract of land in the North-West Territories, Canada, butted and bounded as follows, that is to say: Commencing on the north bank of the St. Mary's River at a point in north latitude forty nine degrees twelve minutes and sixteen seconds (49° 12' 16"); thence extending down the said bank of the said river to its junction with the Belly River; thence extending up the south bank of the latter river to a point thereon in north latitude forty-nine degrees, twelve minutes and sixteen seconds (49° 12' 16"), and thence easterly along a straight line to the place of beginning; excepting and reserving from out the same any portion of the north-east quarter of section number three, in township number eight, in range twenty-two, west of the Fourth Principal Meridian, that may lie within the above mentioned

⁶⁰ Amendment to Treaty 7, June 20, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140-280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 130 (ICC Exhibit 1b, p. 22).

⁶¹ Amendment to Treaty 7, June 27, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140-280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 136 (ICC Exhibit 1b, p. 30).

⁶² Amendment to Treaty 7, July 2, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140-280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 134 (ICC Exhibit 1b, p. 28).

⁶³ Edgar Dewdney, Indian Commissioner, to the Superintendent General, September 24, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt. 1 (ICC Exhibit 1a, pp. 841-42).

boundaries; to have and to hold the same unto the use of the said Blood Indians forever.⁶⁴

All of these surrenders became the Amendment to Treaty 7.

However, an affidavit as required by the *Indian Act* was not included with the surrender from the Blood Tribe. On July 10, 1883, Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs (DSGIA), advised Indian Commissioner Dewdney that an affidavit, an “absolute necessity,” had not been received.⁶⁵ Dewdney was directed to obtain affidavits.⁶⁶ On January 29, 1884, Dewdney arrived on the Blood Tribe reserve to obtain a third surrender. Band members were notified on January 30 and 31 that a meeting would be held on February 1, 1884, “to make a final settlement.”⁶⁷ The meeting included “a majority of the male members of the Blood Band of the full age of 21 (twenty-one) years, assembled in council, duly called for the purpose of considering the surrender of the reserve.”⁶⁸ Shortly thereafter, both the Sarcee⁶⁹ and the Blackfoot⁷⁰ signed their surrenders as well. All documents were witnessed by James F. Macleod as a stipendiary magistrate and Edgar Dewdney in his position of Indian Commissioner and Lieutenant Governor. Dewdney then

⁶⁴ Amendment to Treaty 7, July 2, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 134 (ICC Exhibit 1b, p. 28).

⁶⁵ L. Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, July 10, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt. 1 (ICC Exhibit 1a, pp. 768–70).

⁶⁶ John A. Macdonald, Privy Council, to Edgar Dewdney, December 18, 1883, (ICC Exhibit 1a, pp. 976–77).

⁶⁷ Unidentified author, note to file, undated, H. Dempsey, “An Unwilling Diary” (1959), 7:3 *Alberta Historical Review* 9 (ICC Exhibit 1a, p. 1060).

⁶⁸ Surrender No. 203, February 1, 1884, Blood Tribe to the Queen, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 132–33 (ICC Exhibit 1b, pp. 26–27).

⁶⁹ Surrender No. 204, February 4, 1884, Sarcee Band to the Queen, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 136–37 (ICC Exhibit 1b, pp. 30–31).

⁷⁰ Surrender No. 202, February 7, 1884, Blackfoot Band to the Queen, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 128–29 (ICC Exhibit 1b, pp. 22–23).

returned the documents to Ottawa.⁷¹ The surrenders were submitted to Council on February 26, 1884,⁷² and the Amendment to Treaty 7 was approved by Order in Council PC 400 on January 24, 1885.⁷³

Yet another issue with the surrender was discovered in April 1886. Fort Whoop-Up had been erroneously included within the boundaries of the Blood Tribe reserve. The amended treaty stated that the northeast quarter of section 3 was “excepted” from the reserve when in actuality it was the northwest quarter section.⁷⁴ On September 9, 1886, the necessary changes were made through a sworn statement and the treaty was amended once more.⁷⁵ The Blood Tribe reserve, with the eastern, western, and northern boundaries established in 1882 and the southern boundary surveyed in 1883, was approved by Order in Council PC 1151, dated May 17, 1889. The Order in Council describes the reserve as follows:

It is bounded by a line beginning on the left bank of St. Mary’s River, at a point in north latitude forty-nine degrees, twelve minutes and sixteen seconds, thence down the said bank of the said river to its junction with the Belly River, thence up the southern bank of the latter river to a point thereon in latitude forty-nine degrees, twelve minutes and sixteen seconds, thence east along a straight line to the point of beginning; containing an area of five hundred and forty-seven and one half square miles, more or less. Excepting and reserving from out the reserve any portion of the north-west quarter of section three, township eight, range twenty-two, west of the fourth initial meridian that may be within the above mentioned boundaries. The greater portion of the reserve is a high dry undulating plain. Its principal topographical feature is, Belly Butte (Mokowanis) a well known landmark with lofty escarpments of clay, facing Belly River. The principal Indian settlement is on the

⁷¹ Edgar Dewdney, Indian Commissioner for Manitoba and the NWT, DIA, Regina, to Superintendent General of Indian Affairs, Ottawa, February 9, 1884, LAC, RG 10, vol. 6620, file 104A-1-1, pt.1 (ICC Exhibit 1a, pp. 1122–23).

⁷² Copy of Submission to Council, LAC, RG 10, vol. 1085, pp. 403–9 (ICC Exhibit 1a, pp. 1146–52).

⁷³ Order in Council PC 400, January 24, 1885, LAC, RG 2(1), vol. 460, January 24, 1885 (ICC Exhibit 1a, pp 1281–94).

⁷⁴ Edgar Dewdney, Indian Commissioner, to Superintendent General, April 3, 1886, LAC, RG 10, vol. 7765, file 27103-1 (ICC Exhibit 1a, pp. 1481–82).

⁷⁵ Amendment to Treaty 7, Blood Tribe to the Queen, LAC, RG 10, vol. 3622, file 4948, and Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 194–95 (ICC Exhibit 1b, pp. 22–28).

Belly River at Belly Butte, Turnip Hill (Massir-e-to-mo) is on the northern part of the reserve on the trail from Whoop-Up to Slide Out; Fishing Creek enters the reserve near the south-west corner and empties into the Belly River; and Lee's Creek which enters near the south-east corner, empties into the St. Mary's. There are two large valleys in the reserve, called respectively, Buffalo *coulée* on the western side, which opens into the valley of the Belly River and Prairie Blood or St. Mary's *Coulée* on the eastern which opens into that of the St. Mary's.⁷⁶

Blood Tribe's Position

The Blood Tribe argues that the surrender of its interest at the Bow River reserve was contingent upon the Crown acknowledging that the Big Claim lands constituted the Blood Tribe reserve. The surrender in 1880 was conditional. Absent this condition being met, the surrender of the Blood Tribe interest in the Bow River reserve was invalid.⁷⁷ In addition, the Blood Tribe argues that, if the Blood Tribe and the Crown agreed that the Blood Tribe would give up its interest in the Bow River reserve in exchange for the Big Claim lands, then the Crown failed to fulfill its part of the agreement since the Blood Tribe received less land in the exchange than was agreed upon.

In relation to the surrender itself, the Blood Tribe argues that the Crown failed to follow the requirements of the *Indian Act* to obtain a valid surrender of the Bow River reserve lands. There is no oral history regarding a surrender meeting or vote. The Blood Tribe argues that, because of the unusual nature of such a meeting, it would have been noted in the oral history.⁷⁸ In contrast, the Blood Tribe's oral history describes in detail a vote that took place later regarding a surrender of 90,000 acres on the north end of the reserve.⁷⁹

Also, the surrender documents and the affidavit are suspect. The Blood Tribe points to the Blackfoot surrender. The detailed documents supporting that surrender included a plan of the lands

⁷⁶ Order in Council PC 1151, May 17, 1889, in Nelson's Book, and LAC, RG 2(1), vol. 539, May 17, 1889 (ICC Exhibit 1e, p. 4).

⁷⁷ Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 3.

⁷⁸ Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 105.

⁷⁹ Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 105.

the Blackfoot wanted for its reserve. However, there is no corresponding detail in the purported Blood Tribe surrender.⁸⁰

The Blood Tribe argues that the Crown's fiduciary duty to prevent an exploitative bargain was breached and that the statutory requirements of the *Indian Act* were not met. With respect to the breach of fiduciary duty, the Blood Tribe argues that the surrender was exploitative because the reserve did not include all of the Big Claim lands. The Crown, as a result of the 1880 Order in Council, was obligated to ensure that the Blood Tribe received the Big Claim lands in exchange for its interest in the Bow River reserve. The Blood Tribe argues that the Crown was aware that the Blood Tribe would not surrender its interest in the Bow River reserve without receiving the entirety of the Big Claim lands, lands that were in accordance with its desire.⁸¹ The Crown did not properly ensure that the Blood Tribe understood the terms of the surrender.

With respect to the statutory requirements, the Blood Tribe argues that there is insufficient evidence showing that a meeting or vote that took place as required by the *Indian Act* on February 1, 1884. The Blood Tribe argues that, although there is no voters list or detailed description of the events at the meeting, there is a detailed letter written by Colonel James Macleod to his wife describing his dealings with Dewdney.⁸² Macleod was concerned about the request to obtain affidavits and wrote:

I think I told you about the difficulty there was about the Indian Treaties Mr. D. & I made last year. It never occurred to me that they should be made differently than the first treaties and surely the Indian Commissioners & his Agents should have known that some other ceremony should have been gone thro [sic] with.

...

... I had to swear that they were made with the consent of the male members of each Band of 21 years old & upwards. D. wrote to me to make the affidavits stating that he would make his before Col. Richardson. I replied I would do nothing of the kind as we had dealt only with the chiefs as the Treaties showed.⁸³

⁸⁰ Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 106.

⁸¹ Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 90.

⁸² Jim Macleod to Mary Macleod, February 10, 1884 (ICC Exhibit 1a, p. 1124).

⁸³ Jim Macleod to Mary Macleod, February 10, 1884 (ICC Exhibit 1a, pp. 1124–25).

Macleod eventually obtained the affidavits; nevertheless, the Blood Tribe argues that the meeting on July 2, 1883, did not meet *Indian Act* requirements. Specifically, it argues that the requirement that the surrender be assented to by a majority of the male members of the band over 21 years of age is a mandatory requirement. Given that only the Chiefs had met, this requirement was not fulfilled. As a result, given the lack of a voters list, the lack of oral history, and the clear failure to assemble a proper meeting, the Blood Tribe argues that there was no valid surrender of the Blood Tribe's interest in the Bow River reserve.

Canada's Position

Canada first states that a surrender of the Blood Tribe's interest in the Bow River reserve was unnecessary on the basis that there is a distinction between an interest in a reserve and an interest in having a reserve set aside. A surrender was not required because an actual reserve was not set aside at Bow River and what was being surrendered was an interest set out in treaty.⁸⁴ The *Indian Act* covers surrenders for land, not interests set out in treaty.

Canada acknowledges that a surrender was pursued; its position is that this surrender was valid even though there were delays in finalizing the technical aspects.⁸⁵

Panel's Findings

This issue concerns the question of whether the surrender of the Blood Tribe's interest in the Bow River reserve was valid. The parties differ over whether a surrender was required, as well as whether the statutory requirements of the surrender were met.

Was a Surrender Required?

Before addressing the question of whether a surrender was required, the panel must determine if a reserve was created in Treaty 7. Among the numbered treaties, Treaty 7 is unique in that the Bow River reserve was specifically described and set aside as a joint reserve for the Blood Tribe, the Blackfoot, and the Sarcee. The portion of the joint reserve that each Tribe was entitled to, based on

⁸⁴ Written Submissions on Behalf of the Government of Canada, August 30, 2005, p. 40.

⁸⁵ Written Submissions on Behalf of the Government of Canada, August 30, 2005, p. 3.

the formula of one square mile for each family of five, was not allocated within Treaty 7. Yet, Treaty 7 is unique; no other numbered treaty in Canada specifically describes the location and size of a reserve. Instead, every other treaty sets out an obligation to establish a reserve in consultation with the bands in the treaty. The location of the reserve is selected at some point after the conclusion of the treaty; the reserve is surveyed and then confirmed by order in council.

Following the conclusion of Treaty 7, the location of the Blood Tribe reserve was an open question. The Blood Tribe never settled at Bow River, and Red Crow had expressed dissatisfaction with the joint reserve and its location at Bow River. In 1879, the Crown and the Blood Tribe agreed that the Blood Tribe reserve would be “in the neighbourhood of Fort Kipp ... where the bones of their Ancestors lie.”⁸⁶ Order in Council 565 confirms this agreement and provides for a reserve near Fort Kipp, the specific location to be determined in consultation with the Blood Tribe and, ostensibly, within the limits of the formula set out in Treaty 7.

Order in Council 565 specified that a surrender in accordance with the 1876 *Indian Act* be taken of the portion of the reserve allotted to the Blood Tribe once a new location for its reserve was selected. The Blood Tribe argues that this Order in Council is an agreement by which the Blood Tribe agreed to surrender its interest in the Bow River reserve for the Big Claim lands. For its part, Canada argues that the Order in Council stipulates a surrender of the Bow River reserve.

The panel finds that Order in Council 565 has a dual nature. On the one hand, the Order in Council is an amendment to Treaty 7 with respect to the location of the reserve for the Blood Tribe. The Blood Tribe gave up its interest in the joint reserve at Bow River for a reserve within its home territory in southern Alberta. Therefore, the section of Treaty 7 relating to the joint reserve was replaced with an obligation to establish a reserve within the Blood Tribe’s home base. In effect, one section of Treaty 7 was rewritten, and all of the other parts of Treaty 7 remained intact.

On the other hand, Order in Council 565 stipulates that a surrender of the Blood Tribe’s portion of the Bow River reserve be taken in accordance with the surrender provisions of the 1876 *Indian Act*. This requirement indicates that officials of the day believed that a reserve was created by Treaty 7. In addition, officials of the day referred to the area as a “Reserve” in all of the

⁸⁶ Edgar Dewdney, Indian Commissioner, Manitoba and NWT, DIA, to L. Vankoughnet, DSGIA, December 15, 1879, LAC, RG 10, vol. 6620, file 104A-1-11, p. 16 (ICC Exhibit 1a, doc. 96-99).

documents. Yet, Canada has argued that because this reserve was never formally surveyed or confirmed by order in council, the reserve was never actually established and therefore never fell under the administration of the *Indian Act*. Because the Bow River reserve never fell under the administration of the *Indian Act*, Canada argues, a surrender was not necessary. In essence, Canada has applied the reserve-creation principles involving consultation, survey, and confirmation to this situation. The panel notes that these principles were developed in the context of numbered treaties that specified a reserve interest and did not specify an exact location or size of a reserve as in Treaty 7. Also, the panel is confronted in this issue with the question of how an historical situation should be examined: should modern principles be applied or should the principles of the time be applied? The panel must choose between applying modern principles to an historical event or applying historical principles to the historical event. The panel finds the intentions of the officials in the 1880s clear; they believed a reserve was created and believed a surrender was necessary to implement Order in Council 565. As a result, the panel finds that a surrender according to the *Indian Act* was required.

Were the Surrender Requirements Met?

As the panel has established that a surrender was required, the analysis moves to determining whether the statutory requirements were met. A surrender was taken from the Blood Tribe on September 25, 1880; however, there is no record of a meeting of the male members of the Blood Tribe or a vote by them at such a meeting taking place.⁸⁷ A second surrender from the Blood Tribe was taken on July 2, 1883,⁸⁸ in conjunction with surrenders from the Blackfoot and the Sarcee with respect to the joint reserve. This surrender is formally titled the “Amendment to Treaty 7.” A third surrender was taken on February 1, 1884,⁸⁹ to fulfill the requirement for an affidavit. The Blood

⁸⁷ Surrender, Blood Band to the Crown, dated September 25, 1880, in LAC, RG 10, vol. 1427, pp. 16–17 (ICC Exhibit 1a, pp. 166–67).

⁸⁸ Amendment to Treaty 7, July 2, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 134 (ICC Exhibit 1b, p. 28).

⁸⁹ Surrender No. 203, February 1, 1884, Blood Tribe to the Queen, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 136–37 (ICC Exhibit 1b, pp. 26–27).

Tribe argues that the surrender requirements were not met, specifically arguing that a surrender meeting, a mandatory requirement, never took place at any of the three surrenders. Canada argues that a surrender was not required, but, as a surrender was pursued, the statutory requirements were met and the surrender is valid.

According to the *Indian Act*, 1876:

26. No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band or of any individual Indian, shall be valid or binding except on the following conditions:-

1. The release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose according to their rules, and held in the presence of the Superintendent-General, or of an officer duly authorized to attend such council by the Governor in Council or by the Superintendent-General; Provided, that no Indian shall be entitled to vote or be present at such council, unless he habitually resided on or near and is interested in the reserve in question;

2. The fact that such release or surrender has been assented to by the band at such council or meeting, shall be certified on oath before some judge of a superior, county, or district court, or stipendiary magistrate, by the Superintendent-General or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled to vote, and when so certified as aforesaid shall be submitted to the Governor in Council for acceptance or refusal.⁹⁰

The 1885 Order in Council confirming the surrender refers to section 37 of the 1880 *Indian Act*, which is identical to section 26. The Blood Tribe specifically argues that neither a meeting nor a vote was held.

The Supreme Court of Canada has considered the meaning of section 49 of the *Indian Act*, which is similar to section 26, in the case of *Cardinal v. R.*⁹¹ In that case, Estey J provided the following summary of the Act's surrender provisions:

⁹⁰ *Indian Act*, SC 1876, c. 18, s. 26 (1, 2) (ICC Exhibit 6a, p. 9).

⁹¹ *Cardinal v. R.*, [1982] 1 SCR 508, 13 DLR (4th) 321, [1982] 3 CNLR 3.

It has also been argued that the interpretation which is now being considered is one which exposes the membership of the band to a risk of loss of property and other rights, contrary to the general pattern and spirit of the *Indian Act*. It is perhaps well to observe in this connection that there are precautions built into the procedures of Pt. I of the Act, dealing with surrender. Firstly, the meeting must be called to consider the question of surrender explicitly. It may not be attended to at a regular meeting or one in respect of which express notice has not been given to the band. Secondly, the meeting must be called in accordance with the rules of the band. Thirdly, the chief or principal men must certify on oath the vote, and that the meeting was properly constituted. Fourthly, only residents of the reserve can vote, by reason of the exclusionary provisions of subs. (2) of s. 49. Fifthly, the meeting must be held in the presence of an officer of the Crown. And sixthly, even if the vote is in the affirmative, the surrender may be accepted or refused by the Governor in Council. It is against this background of precautionary measures that one must examine the manner in which the assent of eligible members of the band is to be ascertained under s. 49.⁹²

The main issue in *Cardinal* was the definition of the requisite “majority” pursuant to section 49(1) of the Act. Estey J held that a valid consent to a surrender did not require that an absolute majority of all eligible voting members vote in favour; rather, he held that the section required only that a majority of eligible voters be in attendance at the meeting, and that a majority of those in attendance give their assent to the surrender. The ICC has considered the statutory requirements regarding a surrender in many past reports. A specific analysis of the technical requirements was undertaken in *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry*.⁹³

Determining whether a meeting and subsequent vote took place involves a finding of fact. In this case, the panel notes that the oral history does not refer to a meeting or vote of this nature. The Blood Tribe oral history does contain a reference to another vote that took place after Red Crow’s leadership; however, there is no history of a vote during Red Crow’s leadership. Given that a meeting and vote would be unusual in Blood Tribe custom, the Elders believe that the event would

⁹² *Cardinal v. R.*, [1982] 1 SCR 508, 13 DLR (4th) 321, [1982] 3 CNLR 3 at 10.

⁹³ ICC, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 61.

have been passed down through oral history. In addition, Colonel James Macleod wrote a letter to his wife, Mary, in 1884, explicitly stating that no meeting had taken place to discuss the surrender.

Based on this evidence, the panel concludes that a meeting and vote on the surrender did not take place, and, as a result, section 26 of the *Indian Act* was breached. The effect of a breach of these statutory requirements was examined by McLachlin J in *Apsassin*, where she noted:

The true object of ss. 51(3) and 51(4) of the *Indian Act* was to ensure that the surrender was validly assented to by the Band. The evidence, including the voter's list, in the possession of the DIA amply established valid assent. Moreover, to read the provisions as mandatory would work serious inconvenience, not only where the surrender is later challenged, but in any case where the provision was not fulfilled, as the Band would have to go through the process again of holding a meeting, assenting to the surrender, and then certifying the assent. I therefore agree with the conclusion of the courts below that the "shall" in the provisions should not be considered mandatory. Failure to comply with s. 51 of the *Indian Act* therefore does not defeat the surrender.⁹⁴

The 1927 *Indian Act* was the subject of this analysis; however, the provisions are similar to the 1876 provisions. Essentially, a technical breach has occurred such that the surrender is not rendered invalid. For a surrender to be void *ab initio*, a breach of fiduciary duty must have occurred. The Supreme Court of Canada in *Guerin v. The Queen*⁹⁵ established the existence of a fiduciary relationship between the Crown and the Indians. The case dealt with a proposal to lease part of the Musqueam Indian Band Reserve to a golf club. The Band had surrendered its lands for lease on the basis of specific lease conditions. Ultimately, the final lease contained different terms from those which the Band had agreed to, and it resulted in a loss to the Band. Although the original claim was a breach of trust action, the Supreme Court of Canada held that the Crown's obligation was not a trust; rather, the Crown has a fiduciary duty to deal with the land for the benefit of the Indians.

The Crown's fiduciary duty, triggered upon the surrender of Indian land, interposes the Crown in any deal between Indians and a third party. The *Royal Proclamation of 1763* and the surrender provisions of the *Indian Act* highlight a general inalienability of Indian reserve land except

⁹⁴ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 374–75 (sub nom. *Apsassin*).

⁹⁵ *Guerin v. The Queen*, [1984] 2 SCR 335.

for surrender to the Crown. No third party can purchase land from Indians directly. A sale of reserve lands can only be effected by the Indians first surrendering land to the Crown, with the Crown completing the transaction on their behalf. The purpose is to prevent exploitation.

The Court then discussed the specific breach of fiduciary duty that occurred:

The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the fields of discretion within which the Crown was free to act. After the Crown's agents had induced the band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore these terms. When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the band to explain what had occurred and seek the band's counsel on how to proceed. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.⁹⁶

In summary, the Court in *Guerin* found that a special fiduciary relationship exists between the Crown and the Indians. When reserve land is surrendered, a fiduciary duty arises. This duty is defined by the terms of surrender.

The standard of conduct of the Crown as a fiduciary was further discussed by the Supreme Court of Canada in *Apsassin*. In analyzing the Band's contention that the Crown had a fiduciary duty to prevent it from surrendering its reserve as a surrender was not in its best long-term interests, McLachlin J examined the underlying policy of the *Indian Act* provisions:

My view is that the *Indian Act*'s provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation.⁹⁷

⁹⁶ *Guerin v. The Queen*, [1984] 2 SCR 335 at 388.

⁹⁷ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 370–71 (sub nom. *Apsassin*).

Ultimately, the decision to surrender is made by the Band:

[I]f the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.⁹⁸

In *Apsassin*, the Court confirmed the ruling in *Guerin* that the Crown's obligation is limited to preventing exploitative bargains. In other words, a fiduciary duty is triggered upon the approval of the surrender in the post-surrender period.

The definition and scope of the Crown's fiduciary duty was further refined in *Semiahmoo Indian Band v. Canada* (1997), 148 DLR (4th) 523 (FCA). Following *Guerin* and *Apsassin*, the Federal Court of Appeal held that the Crown owed a fiduciary duty to the Band to prevent an exploitative bargain:

I should emphasize that the Crown's fiduciary obligation is to withhold its own consent to surrender where the transaction is exploitative. In order to fulfil this obligation, the Crown itself is obliged to scrutinize the proposed transaction to ensure that it is not an exploitative bargain. As a fiduciary, the Crown must be held to a strict standard of conduct. Even if the land at issue is required for a public purpose, the Crown cannot discharge its fiduciary obligation simply by convincing the Band to accept the surrender, and then using this consent to relieve itself of the responsibility to scrutinize the transaction.⁹⁹

Generally, the decision to surrender ultimately rests with the First Nation, and the Crown's role is to withhold its consent where this decision is foolish, improvident, or exploitative to the point where the First Nation is not truly making an autonomous decision.

In this inquiry, in order to find a breach of fiduciary duty, the panel must conclude that the Blood Tribe was not truly making an autonomous decision with the result that the surrender was exploitative. At the time of the surrender, the Blood Tribe was led by a number of leaders, the most significant being Red Crow. As consistently related by the Blood Tribe oral history, Red Crow was

⁹⁸ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 371 (sub nom. *Apsassin*).

⁹⁹ *Semiahmoo Indian Band v. Canada* (1997), 148 DLR (4th) 523 at 538.

a strong leader who did his best to retain the Blood Tribe home base for the Tribe. Consequently, the panel finds, the Blood Tribe was autonomous and did not abnegate decision-making power to the Crown. With respect to whether the surrender was exploitative, the panel notes that the Blood Tribe's oral history confirms that the Blood had no interest in settling at Bow River and wanted to remain within its members' home base. As a result, the surrender could not have been exploitative. The fiduciary duty of the Crown in this case has been fulfilled.

In summary, the panel finds that the statutory requirements of a meeting and a vote on the surrender did not take place, resulting in a breach of the *Indian Act*. The effect of a breach of statutory requirements is technical and does not invalidate the surrender. In addition, no breach of fiduciary duty occurred with respect to the surrender as the common intent of the parties was to locate the Blood Tribe reserve in its home base.

ESTABLISHMENT OF THE BLOOD TRIBE RESERVE

Earlier in this report, the panel concluded that, following Treaty 7, the Blood Tribe's reserve had not yet been formally set aside but that it would be set aside in the Blood Tribe's home base, subject to the terms of the treaty. The panel must now consider the alternative arguments presented by the Blood Tribe, specifically, that the lands surveyed in 1882 formed its reserve. The Blood Tribe acknowledges that this survey did not include all of the Big Claim lands, which resulted in a much smaller reserve for the Blood Tribe. Canada argues that the 1882 survey was incomplete and not approved to become the reserve. Essentially, the panel must determine when the reserve for the Blood Tribe was established.

The parties' positions are set out in the following issues:

- 4 Was the reserve established by the Nelson survey work in 1882?
- 5 If the reserve was established by the Nelson survey work in 1882 then was a surrender required to move the boundary and effectively remove approximately 102.5 square miles of reserve land as a result of the Nelson survey work in 1883?

Issue 4 Effect of Nelson's Survey***Factual Background***

In this issue, the panel's attention is directed to specific events between 1880 and 1882. In late 1880, Red Crow, Indian Agent N.T. MacLeod, his son, N.T. MacLeod Jr, Father Lacombe, Jerry Potts, and Fred Pope selected the area for the Blood Tribe reserve.¹⁰⁰ N.T. MacLeod Jr described the trip:

I followed to where he [Red Crow] was sitting at the edge of the high bank opposite the Belly Buttes. As interpreted by Jerry [Potts], this is what he said:

“That is where I wish to live the rest of my life and to die there.”¹⁰¹

In his report to Indian Commissioner Dewdney, Indian Agent MacLeod wrote that he did not agree with Red Crow's choice:

I ... accompanied by “Red Crow” Head Chief of the Blood Indians to select a location for their Reservation. I went to the Forks of the Kootenai and Belly Rivers where I found a large bottom, the upper portion of which is occupied by Mr. Fred K. Wachter's Ranch; and below him a man of the name of Murray has a small ranch; the remaining portion of the bottom is chiefly gravel and sand, with very little soil and had been all overflowed during the higher waters in summer, there is no quantity of building timber available. This is the bottom which “Red Crow” once desired to settle upon but I considered it unfit.¹⁰²

Indian Agent MacLeod went on to report his choice of the northern, eastern, and western boundaries of the reserve:

On the occasion of your visit to this treaty, in September, you made arrangements with the head chief, “Red Crow”, to take a location on the Belly River, and to begin with his people to settle there until you could make arrangements to have the reservation finally decided upon. By your instructions I proceeded to this place and

¹⁰⁰ The reserve of the Blood Tribe is sometimes referred to as Kainai or Kainaiwa.

¹⁰¹ Newspaper clipping, N.T. MacLeod, c. 1880, in Glenbow Archives, J. Higinbotham Papers, M517, Scrapbook, vol. 1 (ICC Exhibit 1a, p. 107).

¹⁰² N.T. MacLeod, Indian Agent, to Edgar Dewdney, Indian Commissioner, DIA, Regina, October 15, 1880, LAC, RG 10, vol. 1427, pp. 34–37 (ICC Exhibit 1a, p. 171).

selected suitable land on the south side of the Belly River from the fork of the Kootenai eastward.¹⁰³

Although the Blood Tribe reserve had been located, it remained unsurveyed until June 1882 when Lawrence Vankoughnet, DSGIA, reported that Indian Commissioner Edgar Dewdney had instructed John C. Nelson to survey the Blood Tribe reserve.¹⁰⁴ On October 5, 1882, E.T. Galt, Assistant Indian Commissioner, informed Commissioner Dewdney that the survey of the Blood Tribe reserve had been “completed” in the summer.¹⁰⁵

On December 29, 1882, Nelson submitted his report of Indian reserves surveyed in Treaties 4 and 7 to the Superintendent General of Indian Affairs. Nelson described the limits of the Blood Tribe reserve as follows:

This large reserve occupies a tract of country lying between, and bounded by, the St. Mary’s and Belly rivers, from their junction below Whoop-up to an east and west line which forms its south boundary, as shown by the accompanying sketch marked (e). This east and west line lies about nine miles north of the International Boundary.

Commencing near Whoop-up, a careful traverse was made of the St. Mary’s River, up to the International Boundary.¹⁰⁶

¹⁰³ N.T. MacLeod, Indian Agent, Treaty 7, Office of Indian Agent, Fort Macleod, to Edgar Dewdney, Indian Commissioner, Ottawa, December 29, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880*, 97–100 (ICC Exhibit 1a, p. 181). There is no consistency to how the geography of the reserve is described. At times, it is described as being south of the Belly River and, at other times, as being east of the Belly River. Regardless, the reserve is bounded by the Belly River on the east side.

¹⁰⁴ L Vankoughnet, DSGIA, to E.T. Galt, Assistant Indian Commissioner, June 27, 1882, LAC, RG 10, vol. 4452, pp. 153–54 (ICC Exhibit 1a, pp. 407–8).

¹⁰⁵ E.T. Galt, Assistant Indian Commissioner, to E. Dewdney, Indian Commissioner, October 5, 1882, LAC, RG 10, vol. 3637, file 7134 (ICC Exhibit 1a, pp. 534–35).

¹⁰⁶ John C. Nelson, Dominion Land Surveyor, to the Superintendent General of Indian Affairs, December 29, 1882, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1882* (ICC Exhibit 1a, p. 601).

Nelson also stated in this report that the area of the Blood Tribe reserve measured 650 square miles and that the best quality land was found in the southern portion of the reserve and at Lee's Creek.¹⁰⁷ As noted, in correspondence dated October 5, 1882, E.T. Galt, Assistant Indian Commissioner, acknowledged that the survey of the Blood Tribe reserve had been completed in the summer.¹⁰⁸ Later, Nelson would confirm that the survey of the Blood Tribe reserve was completed by October 12, 1882.¹⁰⁹

In January 1883, Nelson wrote to the DSGIA, providing additional information about the uncertain boundaries of the Blood Tribe reserve and advising of squatters near the reserve:

If this reserve is to extend all the way to the junction of these rivers it will include the old whiskey trading post called Whoop-Up and the bottom upon which it stands. This place is still occupied by a Mr. David Akers one of the pioneer Indian traders of the country.

I do not see any special advantage in taking Whoop-Up and the surrounding bottom into the reserve for the following reasons viz:

(1) Mr. Akers may ask a big figure for his improvements the intrinsic value of these to the department lies only in the logs of cotton-wood timber of which the buildings are composed.

(2) The bottom at Whoop-Up is very gravelly and Mr. Akers has his farm or field on the north side of Belly River on that account.

...

By keeping out of the reserve the section of land partly bounded by the pink margin on the sketch, the people at Whoop-Up will have no claims against the Department.¹¹⁰

¹⁰⁷ John C. Nelson, Dominion Land Surveyor, to the Superintendent General of Indian Affairs, December 29, 1882, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1882* (ICC Exhibit 1a, pp. 595 and 601).

¹⁰⁸ E.T. Galt, Assistant Indian Commissioner, to E. Dewdney, Indian Commissioner, October 5, 1882, LAC, RG 10, vol. 3637, file 7134 (ICC Exhibit 1a, pp. 534–35).

¹⁰⁹ John C. Nelson, Dominion Land Surveyor, Indian Reserve Surveys, Ottawa, to Superintendent General of Indian Affairs, December 29, 1882, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1882*, 221 (ICC Exhibit 1a, p. 602).

¹¹⁰ John C. Nelson, Dominion Land Surveyor, Indian Reserve Surveys, DIA, Ottawa, to DSGIA, Ottawa, January 15, 1883, LAC, RG 10, vol. 3622, file 4948 (ICC Exhibit 1a, pp. 634–35). David Akers was a squatter on a part of what was the Blood reserve on the west side near the St Mary River. The "Akers claim" is another specific claim filed by the Blood Tribe; it has been accepted for negotiation and has nothing to do with this claim.

Much of southern Alberta was subject to grazing leases granted by the Crown to ranchers. In the early 1880s, the dominion government made the settlement of the west a priority and began to develop policies to this end.

One of the purposes of the National Policy of Sir John A. Macdonald's Conservative government was to exercise Canadian governmental authority over the largely uninhabited territories of the Northwest. An important aspect of that policy involved the encouragement of large, well-capitalized companies or syndicates to acquire vast tracts of land considered too dry for ordinary agriculture, to carry on the business of ranching. To carry out the policy, the Dominion Government approved new grazing regulations in May 1881 which allowed non-residents to acquire up to 100,000 acres of land at a nominal rent for up to twenty-one years, and a number of large ranching companies were organised by eastern Canadian investors to take advantage of the new scheme.¹¹¹

An Order in Council issued in April 1882 granted a total of 46 leases in the North-West Territories, a number of which were in the immediate vicinity of the Blood Tribe reserve and the Big Claim lands.¹¹² Three of the more significant leases are the leases granted to Cochrane, Parks, and the York Grazing Company.

The Cochrane Ranch lease was located between the Belly and Kootenay Rivers.¹¹³ Cochrane acquired this land through two leases which were transferred from the Eastern Townships Ranch Company (lease no. 34)¹¹⁴ and the Rocky Mountain Cattle Company (lease no. 25).¹¹⁵ In September 1891, an Order in Council was passed, approving the relocation of the Cochrane Ranch from between the Kootenay and Belly Rivers, to land south of the Blood Tribe reserve within the Big

¹¹¹ Teresa Homik, "Kainaiwa Big Claim Confirmation Report," February 11, 1998 (ICC Exhibit 3a, p. 16). All of this information is based on Order in Council PC 803 (a), May 20, 1881, as amended by Order in Council PC 1710 (a), December 23, 1881. These Orders in Council are not part of the record for this inquiry.

¹¹² Order in Council PC 722, April 11, 1882, LAC, RG 2 (ICC Exhibit 1a, pp. 376–84).

¹¹³ "Leases Adjoining the Blood Reserve," author unknown, undated (ICC Exhibit 7n).

¹¹⁴ Order in Council PC 834, April 17, 1883, LAC, RG 2 (ICC Exhibit 1a, p. 683).

¹¹⁵ Order in Council PC 835, April 17, 1883, LAC, RG 2 (ICC Exhibit 1a, p. 684).

Claim lands area.¹¹⁶ It should be noted that, aside from the name, there is no obvious connection between the Cochrane Ranch Co. and the “squatter” named Cochrane who was paid to surrender his homestead at Standoff when the Blood Tribe reserve was established there.¹¹⁷

On December 30, 1882, John H. Parks leased 66,000 acres (lease no. 30), comprising all of the land south of the reserve to the international boundary,¹¹⁸ more particularly described as follows:

Township one, and part [east] of Lee’s creek of Township two, in Range twenty-six. That part West of the St. Mary’s River of the Northern one-third of Township one, also all West of said River of Township two, in Range twenty-five, and the portion West of said River of Township two Range twenty-four, and the East-half of Township one in Range twenty-seven, all West of the Fourth Principal Meridian ...¹¹⁹

In April 1883, this lease was transferred to the North West Land and Grazing Company, of which Parks was president.¹²⁰ By June 1883, the Department of the Interior realized that the Parks lease was included within the Blood Tribe reserve and commended that the lease be reduced to exclude the 15,000 acres overlapping with the reserve. The department’s position was based on the 1882 southern reserve boundary, since the 1883 survey was not undertaken until July of that year.¹²¹

By July 1883, Nelson received instructions from Indian Commissioner Dewdney to re-survey the southern boundaries of the reserve “in conformity with the terms of the amended Treaty.”¹²² Nelson began the survey on July 12, 1883, and noted “that owing to the rapidly decreasing census

¹¹⁶ Order in Council PC 2149, September 12, 1891, LAC, RG 2 (ICC Exhibit 1a, pp. 2049–50, 2052).

¹¹⁷ L. Vankoughnet, DSGIA, to unidentified recipient, April 2, 1855, LAC, RG 10, vol. 3637, file 7134, pp. 550–54, Deputy Superintendent General’s letterbook (ICC Exhibit 1a, pp. 1320–24).

¹¹⁸ “Leases Adjoining the Blood Reserve” (ICC Exhibit 7n).

¹¹⁹ Indenture, Deputy Minister of Interior and John H. Parks, December 30, 1883, file 241713] (ICC Exhibit 1a, pp. 611–14); Schedule, December 30, 1883, [LAC, RG 15, vol. 1233, file 241713] (ICC Exhibit 1a, p. 618).

¹²⁰ John H. Parks, Saint John, NB, to Sir John A. Macdonald, Minister of the Interior, Ottawa, April 12, 1883, LAC, RG 10, vol. 1233, file 241713 (ICC Exhibit 1a, p. 636).

¹²¹ A. Russell, Department of the Interior, to W. Pugsley, Secretary, North West Land & Grazing Co. (Ltd), Saint John, NB, June 22, 1883, LAC, RG 15, vol. 1233, file 241713 (ICC Exhibit 1a, pp. 740–41).

¹²² John C. Nelson, In Charge Indian Reserve Surveys, to E. Dewdney, Indian Commissioner, December 1, 1883, LAC, RG 10, vol. 3668, file 10525 (ICC Exhibit 1a, pp. 941–42).

of this tribe, the area of the Reserve surveyed by me last year required considerable reduction. This was effected by shifting the south boundary further northward as shewn [sic] by the maps."¹²³ Nelson's survey map shows an area of 547.5 square miles.

Parks requested in September 1883 that he be allowed to retain his lease and asked that the southern boundary of the Blood Tribe reserve be moved to accommodate his lease:

Having Received a Report from the Manager who went out for the purpose of commencing operations, he finds that the portion sought to be deducted is by far the most valuable part of the range, having the most eligible site for the home farm and corral, and – what is an important matter when there is danger of raids by American Indians across the border – it is the portion furthest from the American boundary.

The Manager also writes that the Indian Commissioner informs him that the Reserve is not actually located yet, and Mr. Parks wishes me to ask if it will not be possible to retain the lease as it now is, and have the Southern boundary of the Reserve on the Northern line of the Second Township. He would respectfully submit that he made this selection, when nearly the whole of the grazing lands were open to him to choose from, and if, at that time, this piece, consisting of nearly half of one township and portions of two others, probably 20,000 acres in all, had not been included, he says that he would likely not have taken the tract at all, and he certainly would not have done so with the information since obtained from the Manager, but would have selected a ranche in some other locality, nearly the whole, as before stated, being at that time open.

Under the circumstances he feels that he is only asking what is reasonable and just in urging that the lease may be allowed to stand as now executed.¹²⁴

On February 25, 1885, the department informed the North West Land and Grazing Company that the boundary confusion was considered settled, stating as follows:

I am directed to say, that a few days ago, a plan was received in this Department from the Department of Indian Affairs, showing the boundaries of the Blood Indian Reserve, by which I see that the reserve as it is now established, does not interfere with the grazing lands leased by this Department to Mr. John H. Parks.

¹²³ John C. Nelson, In Charge Indian Reserve Surveys, to E. Dewdney, Indian Commissioner, December 1, 1883, LAC, RG 10, vol. 3668, file 10525 (ICC Exhibit 1a, pp. 954–55).

¹²⁴ W. Pugsley, Jr, Secretary, Office of the North West Land and Grazing Company (Limited), Saint John, NB, to John A. Macdonald, Minister of the Interior, September 5, 1883, LAC, RG 15, vol. 1233, file 241713 (ICC Exhibit 1a, pp. 824–26).

I am to say that on receipt at this office of an assignment of the lands question in duplicate from Mr. Parks to the North West Land and Grazing Company, together with the registration fee of \$2.00 and ground rent of the lands described in the lease, amounting to \$1405.80 / 100, the Minister of the Interior will recommend to Council that the assignment be registered in this Department.¹²⁵

The lease to Parks was subsequently cancelled by Order in Council PC 1837, dated July 18, 1890, owing to failure to “comply with the provisions” contained therein.¹²⁶

On April 11, 1882, York Grazing Company was granted a lease consisting of 77,000 acres on land on the southwest side of the southern Big Claim lands to the Belly River (lease no. 13). The description is as follows:

That part west of Lee’s Creek of Township two in Range twenty-six, Township two in Range twenty-seven; that part east of Belly River of Township two in Range twenty-eight; the west half of Township one, Range twenty-seven, and Township one, Range twenty-eight, all west of the fourth meridian.¹²⁷

The York lease was affected by the confusion concerning the Blood Tribe reserve’s southern boundary. Order in Council PC 147 of February 6, 1886, was passed to address the situation:

The Minister further submits, that under date 8th January, 1886, an Order in Council was passed, cancelling the Order above recited, for the failure on the part of the Company to comply with the conditions imposed by the several Regulations and Orders in Council, governing the disposal of grazing lands.

The Company now state that this failure, on their part, to comply with the said Regulations arose from the fact, that subsequent to the passing of the Order in Council of the 11th April, 1882, before mentioned, an alteration was made in the Southern boundary of the Blood Indian Reserve, by which a portion of the tract accorded to the Company was included in the reserve, reducing the area of their ranche from Seventy-seven thousand acres, to Forty-nine thousand three hundred acres, and that owing to this reduction of area, they were prevented from making the

¹²⁵ P.B. Douglas, Assistant Secretary, Department of the Interior, Ottawa, to W. Pugsley, Secretary, North West Land and Grazing Co., Saint John, NB, February 25, 1885, LAC, RG 15, vol. 1223, file 241713 (ICC Exhibit 1a, pp. 1304–6).

¹²⁶ Order in Council PC 1837, July 18, 1890, LAC, RG 2 (ICC Exhibit 1a, pp. 1987–88).

¹²⁷ Order in Council PC 722, April 11, 1882, LAC, RG 2 (ICC Exhibit 1a, pp. 376–84).

financial arrangements necessary to enable them to comply with the Regulations in question.

The Minister represents that the statement made by the Company's Agent concerning the Southern boundary of the Blood Indian Reserve is correct, and that now the Southern boundary of the Blood Indian Reserve has been moved so far to the North as not to cover any part of the tract formerly promised to the Company, he, the Minister, recommends upon the request of the Company through their Agent, that the original area of Seventy-seven thousand acres be granted to them, and that he be authorized, under the Regulations and Orders in Council in that behalf now in force, to issue a lease for grazing purposes to the "York Grazing Company," for the tract of land hereinbefore described, upon payment being made of the rental for the same for the half-year commencing on the 1st March, 1886 ...¹²⁸

This lease was eventually cancelled, by Order in Council, on December 22, 1888, owing to the failure of York to comply with lease stipulations.¹²⁹

Also related to the confusion over the southern boundary following the 1883 survey is the settlement of the Mormons at Lee's Creek in the spring of 1887.¹³⁰ On September 13, 1887, J.S. Dennis, Inspector of Surveys, wrote to the Surveyor General stating that he had almost completed the subdivision of township 3, range 25, west of the 4th Meridian on behalf of the Mormons.¹³¹ This area was located within the 1882 southern boundary of the Blood Tribe reserve but outside the 1883 southern boundary.

The establishment of the Mormon Colony at Lee's Creek prompted Red Crow to inquire into the southern boundary. The arrival of the Mormons is noted in the Blood Tribe's oral history. At the community session, Elder Mary Louise Oka related the following:

Many Wives, which are the Mormons, came from the south to this area. They were tired. They used the cows, and that's how they travelled. There were more children

¹²⁸ Order in Council PC 147, February 6, 1886, LAC, RG 2 (ICC Exhibit 1a, pp. 1460–66).

¹²⁹ Order in Council PC 2718, December 22, 1888, LAC, RG 2 (ICC Exhibit 1a, pp. 1800–1).

¹³⁰ "Kainaiwa Big Claim Historical Report," prepared by Joan Holmes and Associates Inc., September 1994, p. 58 (ICC Exhibit 2a, p. 58); ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 352, Louise Crop Eared Wolf).

¹³¹ J.S. Dennis, Inspector of Surveys, Calgary, to Surveyor General, Department of the Interior, September 13, 1887, LAC, RG 15, vol. 544, file 157337 (ICC Exhibit 1a, p. 1644).

than there were men. There were more women than there were men. They asked to see the leader. They met with Red Crow. They asked if they could rest there until summer. They promised to move and they never did. They are still there.

Later on, people from the government came to meet with Red Crow, and they asked if the Mormons would be able to temporarily stay there, to lease the area for 99 years. Red Crow only knew that they asked to stay temporarily. He did not know what a 99-year lease was.

...

I never heard of Red Crow signing a piece of paper or signing a 99-year lease. All I heard was that later on there was a document with Red Crow's mark on it, the X that indicated his mark was very neat.

Today when we have Elders that sign a document or put their mark to a document and they are unable to write, they mark the paper so hard, they use the pen so hard trying to put their X on it, that they just about tear the paper, and their mark or their X is very crooked. It's not neat or even.¹³²

Elder Pete Standing Alone recounts a similar history about the 99-year lease:

What I heard was that they journeyed from Salt Lake, Utah. And by the time they got to where they are today, they – it was getting late, towards winter, in the fall, and they were in bad shape. And I guess they wanted to talk to the leader which is Red Crow, and they did.

And what I heard, you know, after, that they were headed for the Peace River country. That's where they were going to. But they couldn't go any further that year because they were exhausted, the animals and themselves. So they asked Red Crow to spend the winter there, and Red Crow agreed. And the 99-year lease, that's where it came about. And Red Crow did not know it was a 99-year lease. He thought it was just for that one winter and they'll be on their way to Peace River country.

And I also heard that this guy from Montana was the witness of that transaction. And at his death bed, he confessed that he did crooked work for the Mormons as interpreter or whatever. That's what I heard.¹³³

The presence of the Mormon Colony was noted by the Blood Tribe and Indian Agent Pocklington. Pocklington wrote to Dewdney, asking to be provided with the exact location of the

¹³² ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 186–87, 189, Mary Louise Oka).

¹³³ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 303–4, Pete Standing Alone).

southern boundary of the Blood Tribe reserve. On September 26, 1887, Pocklington acknowledged that he had received a map with the information he requested from Dewdney.¹³⁴

On December 2, 1887, J.C. Nelson, who surveyed the Blood Tribe reserve in 1882 and 1883, responded to Assistant Indian Commissioner Hayter Reed's request for information on Red Crow's claim by confirming the Blood Tribe reserve boundaries as amended by treaty in July 1883.¹³⁵ However, some confusion remained as Nelson went on to state:

I may add that a large number of colonists came into the country last spring, from Salt Lake Utah, U.S.A., & formed a settlement along the south boundary of the Blood Reserve near it's south-east corner, & this influx of American settlers may possibly have alarmed Red Crow & caused him to lay claim to the country lying west of the reserve.¹³⁶

The Mormons had settled near the southern boundary of the reserve, yet Nelson is referring to Red Crow's complaints about the western boundary of the reserve. Nelson continued his report by stating:

The Department of the Interior has, last summer, subdivided the land adjacent to the south boundary of the reserve with a view apparently of permitting the colonists from Utah to take up homesteads.

It is almost unnecessary to add, in conclusion, that the boundaries of the Blood Reserve have been established in strict conformity with the description in the amended Treaty already referred to that I was present when that Treaty was made, & that the Indians were satisfied as they had every reason to be with the Reserve between the Belly & St. Mary's Rivers, given to them in exchange for their interest in the four mile belt along the Bow and South Saskatchewan Rivers assigned to them in the Treaty of 1887 [sic].¹³⁷

¹³⁴ William Pocklington, Indian Agent, Blood Agency, to Indian Commissioner, Regina, September 26, 1887, LAC, RG 10, vol. 1555, p. 739 (ICC Exhibit 1a, p. 1649).

¹³⁵ John C. Nelson, Indian Office, Regina, NWT, to Hayter Reed, Assistant Indian Commissioner, Manitoba and NWT, December 2, 1887, LAC, RG 10, vol. 3793, file 45995 (ICC Exhibit 1a, pp. 1650–52).

¹³⁶ John C. Nelson, Indian Office, Regina, NWT, to Hayter Reed, Assistant Indian Commissioner, Manitoba and NWT, December 2, 1887, LAC, RG 10, vol. 3793, file 45995 (ICC Exhibit 1a, p. 1650).

¹³⁷ John C. Nelson, Indian Office, Regina, NWT, to Hayter Reed, Assistant Indian Commissioner, Manitoba and NWT, December 2, 1887, LAC, RG 10, vol. 3793, file 45995 (ICC Exhibit 1a, pp. 1651–52).

On January 30, 1888, a meeting was held between the Chiefs of the Blood Tribe, the Peigans, Indian Agent Pocklington, Indian Department representative Springett, Superintendent P.R. Neale of the North-West Mounted Police detachment at Fort Macleod, and two interpreters. A transcript of this meeting describes the Blood Tribe's view of the signing of treaty at Blackfoot Crossing and the subsequent survey of the Blood Tribe reserve:

Red Crow (Chief of Bloods) asked that the Hon. J.F. Macleod be present. That gentleman being asked to attend replied that he was unable to do so as he was busy, White Calf (Blood) said he thought it was strange that Judge Macleod could always attend to the Whites and would not come to hear the Indians. Red Crow, after expressing his annoyances at Judge Macleod's refusal to come said:

[Red Crow:] Everyone knows what was said to us at the Blackfoot Crossing when the Treaty was made. We were satisfied. We did not at first want to make treaty. White men spoke and told us to say where we wanted Reserve. God made the mountains for us and put the timber there and we said at that time that we wanted the country where the mountains and the timber were. The Government said they would be good to us. We took what the Government offered us. At one time we owned all the country and kept other Indians out. Since the treaty they are all together again. We are all friends and God has taken all the game away. Judge Macleod runs this part of the country. Why does he not come here and hear us talk? If a white man is shot by Indians by accident the Indian gets into trouble. When we were here to talk about my horses and the killing of six Bloods he said if the horses came back we would not do any wrong. We have not done wrong but now the whites are trying to do us wrong. Have the Indians done anything to the whites?

Mr. Pocklington: Not that I am aware of.

White Calf to Mr. Pocklington: You are treating our little children badly. The whites are cutting the reserve off, and we know nothing of it. We claim between the two rivers (Belly & St. Marys) up to the mountains. Now where we get the timber is on the white man's ground.

Mr. Pocklington: Who interpreted when you were told where the boundaries of your Reserve were to be placed?

Red Crow: Dave Mills.

Mr. Pocklington to Mills: Did you explain for Mr. Nelson where the line was to run?

Red Crow and Mills: (Mills asks Red Crow) Red Crow says: I never told him where to mark out the reserve.¹³⁸

In his account of the meeting, Indian Agent Pocklington stated:

As regards the Reserve “Red Crow” said he claimed the whole of the country between the St. Mary’s & Belly rivers from Fort Kipp to the mountains. He spoke of the good behaviour of the Blood generally, that they had never shed any blood in their country and could not understand why the Police should shove the Indians. As regards his Reserve, he wished to know why, when the survey was being made he was not asked to go and see it as he would not have accepted any Reserve that did not run back to the mountains. He spoke a long time about the rations and said they were not getting as much as usual or so much as they required, the rations were too poor altogether and more of the kind. “North Axe” spoke of the same thing, though his talk was chiefly about the Indian being shot by [illegible] but of course he had to talk about rations very freely as also did the other Piegan Chiefs.

I informed the Indians that the “River bank Mormons” would surely be compensated that you had already started the matter and read your telegram to them on the subject, also that the shoving was a mistake. I endeavoured to explain to “Red Crow” that when the Treaty was made with the Indians they were to receive so many acres of land for every family of five and that when the survey was made the amount of land given them was in accordance with the Treaty however he did not seem satisfied and still said he claimed back to the mountains. I think it was a great pity that when the survey was made “Red Crow” had not been there.¹³⁹

In August 1888, Indian Agent Pocklington and Surveyor Nelson accompanied Red Crow and others to the southeast corner of the reserve, where an iron post was placed in a mound and the line of the reserve explained. Pocklington later reported to the Indian Commissioner:

Red Crow said that when the amended treaty was made in 1883, he claimed all the land between the two rivers back to the mountains. I explained to him that there was far more land in the area he claimed than they were entitled to under treaty. I have explained to him that, as a matter of fact, the present Reserve contained far more land

¹³⁸ P.R. Neale, Superintendent (Commanding Macleod District), NWMP, Macleod, February 2, 1888, LAC, RG 18, vol. 19 (ICC Exhibit 1a, pp. 1658–59).

¹³⁹ William Pocklington, Indian Agent, Blood Agency, to Indian Commissioner, Regina, February 4, 1888, LAC, RG 10, vol. 1556, pp. 259–64 (ICC Exhibit 1a, pp. 1671–73).

than they were entitled to. He and the two minor chiefs expressed themselves as well satisfied and pleased that we were going to take them over the boundary line.

We found the mounds and posts in a good state of preservation at mile intervals, and in every instance the mounds were renewed arriving at the S or corner another post was placed in the centre of the mound. "Red Crow" said he now knew where his Reserve ran and was satisfied.¹⁴⁰

In his account of the meeting with Red Crow, Surveyor Nelson stated that Red Crow had a "notion that he owned the territory lying between the Belly and St. Mary's Rivers, from their confluence to the mountains."¹⁴¹ Following this meeting, the confusion over the southern boundary was considered resolved, resulting in an Order in Council dated December 17, 1888, allowing the Mormons to purchase the land upon which they had settled¹⁴² and additional lands for homesteading purposes.¹⁴³

The Blood Indian Reserve (IR) 148 was confirmed by Order in Council PC 1151, dated May 17, 1889. The Order in Council describes the reserve as follows:

It is bounded by a line beginning on the left bank of St. Mary's River, at a point in north latitude forty-nine degrees, twelve minutes and sixteen seconds, thence down the said bank of the said river to its junction with the Belly River, thence up the southern bank of the latter river to a point thereon in latitude forty-nine degrees, twelve minutes and sixteen seconds, thence east along a straight line to the point of beginning; containing an area of five hundred and forty-seven and one half square miles, more or less. Excepting and reserving from out the reserve any portion of the north-west quarter of section three, township eight, range twenty-two, west of the fourth initial meridian that may be within the above mentioned boundaries. The greater portion of the reserve is a high dry undulating plain. Its principal

¹⁴⁰ William Pocklington, Indian Agent, Blood Agency, to Indian Commissioner, August 30, 1888, LAC, RG 10, vol. 3791, file 45995 (ICC Exhibit 1a, pp. 1730–31).

¹⁴¹ John C. Nelson, In Charge, Indian Reserve Surveys, to Superintendent General, November 12, 1888, LAC, RG 15, vol. 544, file 15737 (ICC Exhibit 1a, p. 1775).

¹⁴² Section 9, township 3, range 25, W4M. The Mormons also purchased land on the west side of the Belly River; see E.J. Wood, Latter Day Saints, Cardston, to J.D. McLean, Assistant Deputy and Secretary, DIA, Ottawa, February 15, 1926, LAC, RG 10, vol. 7765, file 27103-1 (ICC Exhibit 1a, p. 2260). They also purchased land in the southwest corner of the reserve; see Indian Agent, Blood Agency, Cardston, to Secretary, DIA, Ottawa, February 20, 1926, LAC, RG 10, vol. 7765, file 27103-1 (ICC Exhibit 1a, p. 2261).

¹⁴³ Order in Council PC 2547, December 17, 1888, LAC, RG 2(1) (ICC Exhibit 1a, pp. 1796–98).

topographical feature is, Belly Butte (Mokowanis) a well known landmark with lofty escarpments of clay, facing Belly River. The principal Indian settlement is on the Belly River at Belly Butte, Turnip Hill (Massir-e-to-mo) is on the northern part of the reserve on the trail from Whoop-Up to Slide Out; Fishing Creek enters the reserve near the south-west corner and empties into the Belly River; and Lee's Creek which enters near the south-east corner, empties into the St. Mary's. There are two large valleys in the reserve, called respectively, Buffalo *coulée* on the western side, which opens into the valley of the Belly River and Prairie Blood or St. Mary's *Coulée* on the eastern which opens into that of the St. Mary's.¹⁴⁴

Blood Tribe's Position

The Blood Tribe states that, if the panel does not find that the Big Claim lands formed the reserve, then the lands surveyed by Nelson in 1882 formed the reserve. Nelson completed the survey of the Blood Tribe reserve in the summer of 1882, and this survey was accepted by the Department of the Interior and the Department of Indian Affairs.¹⁴⁵

The Blood Tribe cites the reserve-creation requirements outlined in the *Lac La Ronge Indian Band v. Canada* case:

...[F]or an Indian reserve to be created there must be a clear intention on the part of the Crown to set apart a defined tract of land as an Indian reserve. The Crown must carry out this intention by, for example a positive act of an official properly "deputed" or authorized to carry out the intention.¹⁴⁶

In applying these principles to this issue, the Blood Tribe argues that the 1880 Order in Council reflects the intentions of the Crown to create a reserve. The Blood Tribe acknowledges that a form of consultation regarding the location of the reserve occurred when the Blood Tribe rejected the joint reserve at Bow River and, through Red Crow, chose to remain at its home base. In June 1882, Nelson received clear instructions from Dewdney to survey the Blood Tribe reserve. He completed the survey in 1882, which he reported to the Superintendent General of Indian Affairs in December

¹⁴⁴ Order in Council PC 1151, May 17, 1889, in Nelson's Book, and LAC, RG 2(1), vol. 539, May 17, 1889 (ICC Exhibit 1e, p. 4).

¹⁴⁵ Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 114.

¹⁴⁶ Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 115.

1882. The Blood Tribe argues that the 1882 survey was consistently acknowledged by the Crown, and this acknowledgment had the effect of ratifying the 1882 survey. In particular, the Blood Tribe points to the correspondence between the Crown and the North West Land and Grazing Co., regarding a grazing lease that had been entered into in April 1882, as well as an 1886 Order in Council, as manifestations by the Crown that the lands surveyed in 1882 constituted the reserve.

Canada's Position

Canada argues that the 1882 Nelson survey was incomplete and not confirmed. Nelson was sent back in 1883 to address the incomplete 1882 survey and provide further survey plans. As a result, the 1882 survey was not sufficient evidence of an exercise of the Crown prerogative to create a reserve for the following reasons:

- Nelson's survey lacked adequate traverses and failed to meet technical standards;
- the quantum of land surveyed was based on an inflated population number. A more accurate population figure was reached after the list of members was reduced and the reserve was reduced by 102.5 square miles;
- the survey failed to include the property of the Cochrane ranch lands that the Crown had been unable to purchase;
- the survey failed to show the Band's timber limit;
- the survey included lands that had already been the subject of grazing permits, resulting in a dual legal interest; and
- Nelson only surveyed the reserve and did not have the power to create the reserve.¹⁴⁷

Canada cites the steps outlined in *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816, to create a reserve. In addition, Canada states that the intent to create a reserve for the Blood Tribe is set out in Treaty 7, and that the remaining steps in reserve creation are the setting apart of the lands and acceptance by the Crown. Both of these steps were met with the 1882 survey, and in doing so, Canada has met its fiduciary obligations.

¹⁴⁷ Written Submissions on Behalf of the Government of Canada, August 30, 2005, pp. 48–49.

Panel's Findings

In this issue, the panel is asked to determine when the Blood Tribe reserve was established. The parties differ in their approach to reserve creation. The Blood Tribe argues from a perspective based on intention and facts, while Canada argues from a perspective based on procedure. There is no doubt that there was a definite intention to create a reserve and that a reserve was created. The parties disagree over the date of creation; the Blood Tribe argues that the reserve was created in 1882, while Canada argues that the proper date is 1883.

In addressing this issue, the panel is guided by case law presented by both parties and past ICC inquiry reports. In *Lac La Ronge Indian Band v. Canada*, the court considered the steps of reserve creation with respect to the Treaty 6 area and stated:

There is no single method to create a Reserve. However, there are certain things which are essential. The Crown must make a deliberate decision to establish a Reserve; there must be consultation with the Indians; there must be a clear demarcation of the lands; and there must be some manifestation by the Crown that the lands will constitute an Indian Reserve.

The position of the plaintiffs is that if there is consultation and demarcation, whether by survey or reference to the township plan, then a Reserve comes into existence. In my opinion, that approach is too broad and simplistic. There were times when this happened and a Reserve did result. There were instances when the surveyor was instructed to create the Reserve. No further approval was needed. There were other instances when the instructions were not all inclusive and the Crown did not expressly give its approval, but by its silence and subsequent attitude the Crown manifested its acquiescence in the land being constituted a Reserve. Then there were other instances when the instructions clearly limited the authority. In such a case a survey in itself was not sufficient.

It is my conclusion that the land was not “set apart” until the Crown treated it as such. That could happen in more than one way, including an absence of protest.

As best I can make out, on the prairies all of the Reserves are the subject of an Order-in-Council. However, I do not consider such Orders to be an essential part of the process of establishing a Reserve ... The Orders-in-Council were no more than an administrative act which confirmed or clarified what already was a reality.”¹⁴⁸

¹⁴⁸

Lac La Ronge Indian Band v. Canada, [2000] 1 CNLR 245 at 337–38.

More recently, the question of reserve creation in the *Indian Act* was dealt with by the Supreme Court of Canada in *Ross River Dena Council Band v. Canada*.¹⁴⁹ The Supreme Court stated the following with respect to reserve creation:

Thus, in the Yukon Territory as well as elsewhere in Canada, there appears to be no single procedure for creating reserves, although an Order-in-Council has been the most common and undoubtedly best and clearest procedure used to create reserves. (See: *Canadian Pacific Ltd. v. Paul*, [1998] 2 S.C.R. 654, at pp. 674–75; Woodward, *supra*, at pp. 233–37.) Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown. For example, this intention may be evidenced either by an exercise of executive authority such as an Order-in-Council, or on the basis of specific statutory provisions creating a particular reserve. Steps must be taken in order to set apart land. The setting apart must occur for the benefit of Indians. And, finally, the band concerned must have accepted the setting apart and must have started to make use of the lands so set apart. Hence, the process remains fact-sensitive. The evaluation of its legal effect turns on a very contextual and fact-driven analysis. Thus, this analysis must be performed on the basis of the record.¹⁵⁰

The Court also stated that fiduciary duties apply in the reserve-creation process:

It must be kept in mind that the process of reserve creation, like other aspects of its relationship with First Nations, requires that the Crown remain mindful of its fiduciary duties and of their impact on this procedure, and taking into consideration the *sui generis* nature of native land rights.¹⁵¹

The nature of the Crown's fiduciary duties in reserve creation was further discussed in *Wewaykum Indian Band v. Canada*.¹⁵² Although this case deals specifically with reserve creation in British Columbia, the case is also the Supreme Court of Canada's most recent statement regarding the Crown / Aboriginal fiduciary relationship and when this relationship gives rise to a fiduciary duty.

¹⁴⁹ *Ross River Dena Band v. Canada*, [2002] 2 SCR 816.

¹⁵⁰ *Ross River Dena Band v. Canada*, [2002] 2 SCR 816 at 850–51.

¹⁵¹ *Ross River Dena Band v. Canada*, [2002] 2 SCR 816 at 851.

¹⁵² *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245.

In *Wewaykum*, two different bands claimed the other band's reserve or compensation from the Crown over the allocation of the reserves. The Supreme Court of Canada dismissed the appeals of both bands. In doing so, the Court said the following regarding fiduciary law:

1. The content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity.
2. Prior to reserve creation, the Crown exercises a public law function under the *Indian Act* – which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown's duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.
3. Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation.¹⁵³

Essentially, the Supreme Court confirmed that the Crown / Aboriginal relationship is a fiduciary relationship, and that “not all obligations existing between the parties to a fiduciary relationship are fiduciary in nature.”¹⁵⁴ The Court also acknowledged that “[t]he fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.”¹⁵⁵ In *Wewaykum*, this specific Indian interest was identified as land.

An Indian band's interest in specific lands that are subject to the reserve-creation process and where the Crown acts as the exclusive intermediary with the province can trigger a fiduciary duty. The Court said the following with respect to the content of a pre-reserve-creation fiduciary duty:

Here ... the nature and importance of the appellant bands' interest in these lands prior to 1938, and the Crown's intervention as the exclusive intermediary to deal with

¹⁵³ *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 289–90.

¹⁵⁴ *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 288.

¹⁵⁵ *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 286.

others (including the province) on their behalf, imposed on the Crown a fiduciary duty to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with “ordinary” diligence in what it reasonably regarded as the best interest of the beneficiaries.¹⁵⁶

The Court advised that consideration must be given to the context of the time at reserve creation and the likelihood of the Crown facing conflicting demands. The Crown is not an ordinary fiduciary and must balance the public interest with the Aboriginal interest:

When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting: *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 (C.A.).¹⁵⁷

The question of reserve creation has been dealt with in numerous ICC reports, both in a treaty¹⁵⁸ and a non-treaty¹⁵⁹ context. More specifically, in the *Carry the Kettle First Nation: Cypress Hills Inquiry*, cited earlier in this report, the Commission inquired into whether a reserve had been set aside at Cypress Hills for the Carry the Kettle First Nation. The Commission held that the three requisite elements in setting aside a reserve included consultation and selection, survey, and acceptance. The key issue in the Cypress Hills inquiry was the element of acceptance in reserve

¹⁵⁶ *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 294.

¹⁵⁷ *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 293.

¹⁵⁸ ICC, *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209; *Kahkewistahaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 3; *Lucky Man Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109.

¹⁵⁹ ICC, *Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, November 2001), reported (2002) 15 ICCP 3; *Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199; *Nak'azdli First Nation: Aht-Len-Jees Indian Reserve 5 Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 81; *'Nqmgis First Nation: Cormorant Island Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 3; *'Nqmgis First Nation: McKenna-McBride Applications Inquiry* (Ottawa, February 1997), reported (1998) 7 ICCP 109; *Taku River Tlingit First Nation: Wenah Specific Claim Inquiry* (Ottawa, March 2006); *Williams Lake Indian Band: Village Site Inquiry* (Ottawa, March 2006).

creation.¹⁶⁰ In finding that the Cypress Hills reserve was not accepted by Canada, the Commission stated the following:

The Commission does not accept the contention that the setting aside of reserve land, in the context of the numbered prairie treaties, was simply a matter of royal prerogative. The treaties contemplated the involvement of both parties in the reserve creation process and, in our view, a true meeting of the minds was fundamental to the selection, surveying, and setting aside of reserves. In the result, there must exist some evidence of the intent of both Canada and the First Nation that the lands identified should be set aside as Indian reserves. In the circumstances of this case, we are unable to conclude that the Government of Canada was party to such a consensus.¹⁶¹

Acceptance of the reserve by both parties is critical to the establishment of the reserve. As well, while an order in council is evidence of acceptance, the ICC has stated, in the past, that the order in council is not strictly necessary in creating a reserve:

Although the Commission does not make any findings on whether a federal order in council is necessary before an Indian reserve can be created, the fact that the survey plan submitted by Nelson was accepted by Canada by means of an Order in Council provides evidence that the Crown agreed to the reserve surveyed by Nelson in 1881.¹⁶²

In addition, the Commission has noted that reserves which had been surveyed could be rejected by either the First Nation or Canada prior to being formally set aside.¹⁶³

With respect to this inquiry, there is no doubt that a reserve was intended to be created. The parties at least agree that, following 1880, a reserve was intended to be established within the home base of the Blood Tribe in southern Alberta. What the parties do not agree on is the date the reserve

¹⁶⁰ ICC, *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209 at 309.

¹⁶¹ ICC, *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209 at 318.

¹⁶² *Kahkewistahaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21 at 87.

¹⁶³ ICC, *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209 at 314.

was actually established and, ultimately, the date of first survey for treaty land entitlement purposes. The panel is faced with the following questions:

- When was the reserve established?
- Were the fiduciary duties of the Crown met when the reserve was established?

To address these questions, the panel is guided by the principle of a fact-based analysis established in *Lac La Ronge* and *Ross River*. The panel is also guided by the elements of consultation and selection, survey, and acceptance as set out in previous ICC reports.

With respect to consultation and selection, the panel notes the Blood Tribe has acknowledged that a form of consultation had occurred when Red Crow chose to remain in the Blood Tribe's home base. The panel also notes N.T. MacLeod Jr's description of Red Crow's choice of land, Indian Agent MacLeod's disagreement with this choice, and his subsequent selection of land for the reserve. The Blood Tribe's extensive oral history and traditional knowledge of Red Crow leave little doubt that Red Crow had selected land between the Kootenay (Waterton) and St Mary Rivers. This area would have included the Belly Buttes and the area where the Blood Tribe originally held the Sundance ceremony. While the panel is intrigued by this set of facts, the focus and the arguments presented in this particular issue are on the two surveys of the reserve, the impact of these surveys on the southern boundary of the reserve, and the acceptance of the reserve by the parties.

Two surveys of the reserve were completed, and the second survey altered the southern boundary of the reserve. Order in Council PC 1151, issued on May 17, 1889,¹⁶⁴ concluded the formal process of establishing the reserve and approved the 1882 survey of the reserve, as amended in 1883. However, given the unique occurrence of two surveys and the parties' arguments, the panel is compelled to examine closely the facts behind these two surveys and what led to the change in the southern boundary. The panel states that the 1882 survey established the Blood Tribe's reserve. Although mindful of the significance of the 1889 Order in Council and its role in the reserve-creation process, the panel believes that an exception is warranted in this case based on the facts and

¹⁶⁴ Order in Council PC 1151, May 17, 1889, in Nelson's Book, and LAC, RG 2(1), vol. 539, May 17, 1889 (ICC Exhibit 1e, p. 4).

evidence. The panel states the following evidence shows that the Crown believed the Blood Tribe's reserve to have been established in 1882:

- In a letter to the Indian Commissioner dated October 5, 1882, E.T. Galt, the Assistant Indian Commissioner, acknowledged that the survey of the Blood Tribe reserve had been completed in the summer.¹⁶⁵
- Indian Agent C.E. Denny wrote in his annual report to the Superintendent General of Indian Affairs, dated November 10, 1882, that the Blood had “been anxious to have their reserves laid out. This has now been done as far as the Bloods, Peigans, Sarcees and Stoneys are concerned.”¹⁶⁶
- In his annual report to the Superintendent General of Indian Affairs dated December 15, 1882, Edgar Dewdney, the Indian Commissioner, wrote that he had visited the Blood Tribe reserve and he reported on the extent of settlement on the reserve.¹⁶⁷
- In his report to the Superintendent General of Indian Affairs dated December 29, 1882, Surveyor John C. Nelson wrote that he had completed the survey of the reserve for the Blood Tribe. The reserve was 650 square miles, enough land for 3,250 people.¹⁶⁸
- Between April 9, 1883, and June 14, 1883, correspondence between Indian Agent Denny and Indian Commissioner Dewdney discussed the issue of D.J. Cochrane, who occupied a farm included within the Blood Tribe reserve.¹⁶⁹

¹⁶⁵ E.T. Galt, Assistant Indian Commissioner, to Indian Commissioner, Winnipeg, October 5, 1882, LAC, RG 10, vol. 3637, file 7134 (ICC Exhibit 1a, p. 534).

¹⁶⁶ C.E. Denny, Indian Agent, to Superintendent General of Indian Affairs, Ottawa, November 10, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 168–77 (ICC Exhibit 1a, p. 558).

¹⁶⁷ Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, Ottawa, December 15, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 193–203 (ICC Exhibit 1a, p. 586).

¹⁶⁸ John C. Nelson, Dominion Land Surveyor, to the Superintendent General of Indian Affairs, December 29, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 221 (ICC Exhibit 1a, p. 602).

¹⁶⁹ C.E. Denny, Indian Agent, to Edgar Dewdney, Indian Commissioner, April 9, 1883, LAC, RG 10, vol. 1550, p. 121 (ICC Exhibit 1a, p. 676); C.E. Denny, Indian Agent, to Edgar Dewdney, Indian Commissioner, April 24, 1883, LAC, RG 10, vol. 1550, p. 171 (ICC Exhibit 1a, p. 685); L. Vankoughnet, DSGIA, to John A. Macdonald, Superintendent General of Indian Affairs, Ottawa, June 7, 1883, LAC, RG 10, vol. 3637, file 7134 (ICC Exhibit 1a, pp. 723–25); Edgar Dewdney, Indian Commissioner, June 14, 1883, LAC, RG 10, vol. 3637, file 7134 (ICC Exhibit 1a, pp. 726).

There is no question that Nelson conducted a survey in 1882 or that the Blood Tribe had settled in the area where its reserve was surveyed. The question that the parties disagree upon is whether the 1882 survey firmly established the reserve. All of the above correspondence confirms that the Blood Tribe reserve was surveyed and acknowledged by the Crown as being complete by the end of 1882. At this stage, all of the criteria outlined in *Lac La Ronge* have been met: there was a deliberate decision to establish a reserve, consultation with respect to the general location of the reserve had occurred, Nelson's 1882 survey clearly demarcated the lands, and, most importantly, the completion of the reserve was acknowledged by the Crown.

However, an order in council confirming the reserve was not issued immediately, and a second survey took place in 1883. Therefore, the panel is compelled to examine all of the facts in this situation. The existence of the 1883 survey is not in dispute between the parties; rather, the significance of this survey is in dispute. The panel states that the circumstances surrounding the 1883 survey are suspicious and warrant careful consideration with respect to the issue of reserve creation. Notably, the panel focuses on the following facts:

- Concurrent with the 1882 survey, the Department of Indian Affairs actively pursued a policy to curtail what was perceived to be fraudulent claims for rations. This policy was driven by economic concerns.¹⁷⁰
- In June 1883, the Department of the Interior realized that the Parks lease overlapped with the southern boundary of the Blood Tribe reserve, as surveyed in 1882.¹⁷¹ The department had recommended that the lease be reduced to accommodate the reserve.
- A second surrender, the Amendment to Treaty 7, was taken on July 2, 1883. The surrender describes the Blood Tribe reserve and specifically locates the southern boundary at 49 degrees, 12 minutes and 16 seconds. The location of this southern boundary is the re-surveyed southern boundary, or the boundary that was moved north 10 miles.
- Surveyor Nelson, however, received instructions on June 28, 1883, and completed his re-survey after the July 2, 1883, surrender. The survey was completed by August 1883;

¹⁷⁰ E. T. Galt, Assistant Indian Commissioner, to Indian Commissioner, Winnipeg, October 5, 1882, LAC, RG 10, vol. 3637, file 7134 (ICC Exhibit 1a, pp. 537–38).

¹⁷¹ A. Russell, Department of the Interior, to W. Pugsley, Secretary, North West Land & Grazing Co. (Ltd), Saint John, NB, June 22, 1883, LAC, RG 15, vol. 1233, file 241713 (ICC Exhibit 1a, pp. 740–41).

however, Nelson's field notes and plans, as of August 1884, had not been forwarded to the department for examination.¹⁷² In his December 1883 report, Nelson wrote that he had received instructions with respect to changing the boundaries of the Blood Tribe reserve on June 28, 1883, and shifted the southern boundary northward to reflect "the rapidly decreasing census of this tribe."¹⁷³

- With respect to the population, there was acknowledgment of movement across the border.¹⁷⁴ However, the population numbers between September 1882 and June 1883 are consistent. The 1882 payroll completed in September 1882 shows that 3,542 people were paid.¹⁷⁵ Between September 1882 and June 1883, the numbers found in historical documents that refer to a population number for the Blood Tribe range between 3,400 and 3,600.¹⁷⁶
- In the interim between 1883 and 1889, when the Order in Council was issued, there was much confusion over where exactly the southern boundary of the Blood Tribe reserve was and whether the Parks lease overlapped with this part of the reserve.

The panel's attention is specifically drawn to the fact that the July 2, 1883, Amendment to Treaty 7 or surrender contains an exact bearing description for the southern boundary of the Blood Tribe reserve. The bearing description locates the southern boundary north of the original boundary surveyed in 1882. In effect, the size of the reserve was reduced with the movement of the southern boundary. Nelson received instructions on June 28, 1883, to adjust the boundary based on the change in the population. His second survey of the southern boundary was not completed until August 12, 1883, after the surrender.

¹⁷² R. Sinclair, Acting Superintendent General of Indian Affairs, to A.M. Burgess, Deputy Minister, Department of the Interior, August 8, 1884 (ICC Exhibit 1a, pp. 1230–31).

¹⁷³ Letter from Indian Reserve Surveys to the Commissioner of Indian Affairs, December 1, 1883 (ICC Exhibit 1a, p. 954).

¹⁷⁴ John C. Young, United States Indian Agent, to the Commissioner of Indian Affairs, August 11, 1882 (ICC Exhibit 1a, p. 490).

¹⁷⁵ Treaty annuity paylists, Blood Tribe, 1877–1910 (ICC Exhibit 1g).

¹⁷⁶ E.T. Galt, Assistant Indian Commissioner, to the Indian Commissioner, October 5, 1882 (ICC Exhibit 1a, p. 535); Newspaper clipping, October 6, 1882 (ICC Exhibit 1a, p. 544); C.E. Denny, Indian Agent, to Superintendent General of Indian Affairs, November 10, 1882 (ICC Exhibit 1a, p. 561); T.P. Wadsworth, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, December 9, 1882 (ICC Exhibit 1a, p. 567); John A. Macdonald, Superintendent General of Indian Affairs, to Sir John Douglas Sutherland Campbell, Marquis of Lorne, December 31, 1882 (ICC Exhibit 1a, p. 626); Report of D. Bruce Payne, Church Missionary Society for Africa and the East, 1883–84 (ICC Exhibit 1a, p. 631).

However, all of the historical documentation that refers to a population for the Blood Tribe consistently cites it in the range of 3,400 to 3,600. There is no documentation discussing the adjustment of the population in the period between the 1882 survey and June 1883, when Nelson received new instructions. There is a letter suggesting that there are irregularities with the 1882 payroll, but these irregularities are related to sizes of families changing from the previous payroll without explanation.¹⁷⁷ Also, Indian Agent Denny wrote on July 10, 1883, that a reduction in the number of Indians who had received rations on the Blood Tribe reserve was made after a correct census was done.¹⁷⁸ However, no updated census or population number is provided until September 1883, after the reserve was reduced. There are no other records providing a background for Nelson's instructions to re-survey the Blood Tribe reserve's southern boundary in June 1883.

Based on the same evidence, Canada has argued that the reduced lists were necessary to ensure an accurate population count and an adequate reserve. Canada has also argued that Nelson had been instructed to correct survey errors from the previous year. However, the panel's examination of the evidence, particularly during the period between the two surveys, does not indicate that Nelson had made errors. Nor does the historical documentation provide any explanation for reducing the population so drastically. There are far too many gaps in the evidence to reach a reasonable conclusion as to why the July 2, 1883, surrender contains the bearing description for the relocated southern boundary and how the decision to move the southern boundary was reached.

The panel finds the lack of an explanation and the lack of a population number at the time Nelson received his instructions to re-survey the southern boundary disturbing. Once the southern boundary was moved, the reserve contained 547.5 square miles, enough land for a population of 2,727 people based on the Treaty 7 land entitlement formula. The population would have to have been reduced by almost one thousand people in a short period of time in order to effect this change in the reserve's size by June 28, 1883, when Nelson received his new instructions, or by July 2, 1883, when the surrender containing the bearing description of the southern boundary was signed. With

¹⁷⁷ L. Vankoughnet, DSGIA, to E.T. Galt, Assistant Indian Commissioner, February 21, 1882 (ICC Exhibit 1a, p. 643).

¹⁷⁸ C.E. Denny, Indian Agent, to Superintendent General of Indian Affairs, July 10, 1883 (ICC Exhibit 1a, p. 763).

such a great reduction, the panel reasons that an explanation must have been given or documented. Yet, no records exist. As a result, the panel cannot solely rely on the argument of a population decrease to explain the movement of the southern boundary.

Instead, the panel's attention is drawn to the fact that Parks was granted a lease that was shown to overlap with the Blood Tribe reserve on the 1882 surveyed southern boundary. In June 1883, the Department of the Interior had recommended a reduction in the acreage of the lease and had advised Parks. The panel reasons that, if the acreage of the lease had been reduced, then there would have been no need to move the southern boundary of the Blood Tribe reserve. Instead, the surrender document signed by the Blood Tribe contained a description of the southern boundary that had already been moved north. The panel reasons that the movement of the southern boundary was more likely the result of accommodating the Parks lease rather than a decrease in the Blood Tribe's population.

Canada has argued that the Crown was balancing competing interests between settling the west and addressing the needs of the Blood Tribe for a reserve. Canada has stated that the Crown had duties to different groups of people in the west and these groups include settlers as well as First Nations. Although the panel is mindful of the Crown's duty to balance competing interests, the panel states that these competing interests are not necessarily equal interests. As a result, the Crown will inevitably be required to prioritize competing interests. In this situation, the Crown certainly had a duty to Parks and other settlers, but the Crown had a concurrent and more pressing duty to fulfill a treaty obligation to the Blood Tribe. When the Crown is faced with a duty to fulfill a treaty obligation to establish a reserve and a duty to fulfill a lease, the panel believes that a proper balancing of the interests would place the Blood Tribe's interest in having a reserve established ahead of ensuring the location of the Parks lease. Essentially, the southern boundary should not have been arbitrarily moved and the Parks lease should have been reduced to accommodate the reserve.

On the balance of this evidence, the panel cannot find that the Crown met its basic fiduciary obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the Aboriginal beneficiaries. The Crown failed to provide full disclosure with respect to the movement of the southern boundary and, in moving the southern boundary, the Crown failed to

properly balance the competing interests of a lease obligation and a treaty obligation. As a result, the panel concludes that the Crown breached its basic fiduciary duties with respect to the creation of the Blood Tribe reserve.

To further illustrate the panel's reasoning, attention is drawn to the confusion caused by the re-survey of the southern boundary. By the end of 1882, correspondence between department officials indicates that they believed the survey of the Blood Tribe reserve was complete. There are no documented instructions regarding the 1883 re-survey. A serious gap in the historical documentation exists. The confusion that this gap created is reflected historically by the arrival of the Mormons in 1887. This event prompted Red Crow to inquire about the location of the southern boundary, which, in turn, prompted Indian Agent Pocklington to request a map setting out the exact location of the southern boundary. Red Crow's understanding of the location of the southern boundary appears to be consistent with the 1882 survey. In 1887, the Blood Tribe believed that the southern boundary was farther south than as surveyed in 1883. The oral history of the Blood consistently relates the Mormon arrival in the winter and how Red Crow was asked permission for them to camp at Lee's Creek. As well, the oral history consistently refers to a 99-year lease that was signed by Red Crow allowing the Mormons to stay; however, this lease has never been found. The panel reasons that, if the reserve had been established clearly, and there was no issue regarding acceptance of the boundary, then the confusion regarding the location of the southern boundary would not have occurred.

All of these facts point to the Crown failing to fulfill its fiduciary obligations with respect to the movement of the southern boundary. The second survey was not completed in a transparent fashion such that the Blood Tribe had received full disclosure. In fact, the Department of Indian Affairs was not completely aware that the second survey had occurred. These actions do not show that the Crown acted with ordinary prudence with a view to the best interests of the Blood Tribe. Because the panel cannot find that the Crown met its fiduciary obligations with respect to the creation of the Blood Tribe reserve in 1883, the panel concludes that the Blood Tribe reserve was established in 1882.

Issue 5 Was a Surrender Required after the 1883 Survey?

5 If the reserve was established by the Nelson survey work in 1882 then was a surrender required to move the boundary and effectively remove approximately 102.5 square miles of reserve land as a result of the Nelson survey work in 1883?

As the panel has concluded that the reserve was established by the 1882 Nelson survey, the panel also concludes that a surrender was required to move the boundary as a result of the 1883 Nelson survey.

A surrender was not taken in this case, and an outstanding lawful obligation exists with respect to this surrender. The panel does not feel it is necessary to examine this issue in depth.

TREATY LAND ENTITLEMENT CLAIM

Issue 6 Treaty 7 Formula and the Blood Tribe Reserve

6 Does the formula described in the written terms of Treaty 7 with respect to the minimum sizes of reserves apply to the creation of the Blood Tribe's reserve?

In this issue, the Blood Tribe argues that, primarily, the TLE formula does not apply as the reserve consists of the Big Claim lands. However, the Blood Tribe argues that the TLE formula in Treaty 7 applies to the creation of the reserve on the basis that the Crown is obligated to provide a reserve sufficient for the Blood Tribe's population. Treaty 7 contains a formula for minimum sizes of reserves based on population, and this formula is a minimum amount of land to be allotted. The Blood Tribe further argues that the failure to provide the minimum amount is a breach of fiduciary duty.

Canada argues that the formula in Treaty 7 applies.

The panel notes that the parties generally agree that the formula with respect to land entitlement applies to the creation of the Blood Tribe reserve. Given the panel's conclusions in the previous issues, it is not necessary to go any further in this issue.

Issue 7 Date for Calculation of Treaty Land Entitlement

- 7 If the formula applies to the creation of the Blood Tribe's reserve then what is the proper date for the basis of the calculation of the treaty land entitlement? On the basis of that date, what then is the Blood Tribe Treaty Land Entitlement?**

On this issue, the parties had agreed to limit their arguments to the date of first survey (DOFS) only, and not address any other treaty land entitlement issues. As the panel has concluded that the Blood Tribe reserve was established in 1882, the panel also concludes that the date of first survey for the Blood Tribe is also 1882.

PART V
CONCLUSIONS AND RECOMMENDATIONS

The panel concludes that, although a reserve in the Blood Tribe's home base was not formally set aside by Treaty 7 in 1877, a joint reserve along the Bow River was set aside for the Blood Tribe, the Blackfeet, and the Peigan. Subsequent to 1877, historical events show that the Crown and the Blood Tribe agreed that the Blood would give up its interest in the joint reserve at Bow River in exchange for a reserve in its homelands on the Belly Buttes. The reserve would at least be located within the Blood Tribe's home base and, presumably, subject to the other terms of Treaty 7, including the treaty land entitlement formula. From the panel's perspective, the Blood Tribe held what could be described as a cognizable interest in its lands in the home base.

With respect to the surrender of the Blood Tribe's interest in the Bow River reserve, the panel finds that a surrender was required. The panel further finds that the statutory requirements of a meeting and a vote on the surrender did not take place, and, as a result, the *Indian Act* was breached. However, the effect of a breach of these statutory requirements is technical in nature, and a technical breach does not render the surrender invalid. In examining whether a breach of fiduciary duty occurred with respect to the surrender, the panel concludes that the Blood Tribe did not abnegate its decision-making power and that the surrender was not an exploitative bargain because the common intent of the parties was to locate the Blood Tribe reserve in its home base. No breach of fiduciary duty occurred with respect to the surrender.

As for when the Blood Tribe's reserve was established, the panel concludes that the 1882 survey conducted by John Nelson established the reserve. Although mindful that the 1883 survey is acknowledged as confirming the reserve in an 1889 Order in Council, the panel states that the circumstances surrounding the 1883 survey warranted careful examination. Because the reserve was established in 1882, a surrender was necessary in 1883 to move the southern boundary. Also, the panel concludes that the Crown failed to fulfill its fiduciary obligations with respect to the movement of the southern boundary.

With respect to the treaty land entitlement portion of this inquiry, the panel notes that the parties had agreed to limit their arguments to the date of first survey only and not address the

Elder Andrew Black Water states that the international border conflicted with the Blood Tribe's traditional way of knowing its land, which relied heavily on the use of natural boundaries such as the rivers and mountains.²⁷ The Jay Treaty was significant because it permitted unrestricted cross-border travel for the First Nations residing in both countries. More specifically, the Jay Treaty allowed First Nations peoples, such as the Blood Tribe, the freedom to move across borders to visit their brethren and to follow the buffalo without restriction. Elder Frank Weasel Head explained that the Blood Tribe has always had close relations with the South Peigans in the United States, which often necessitated cross-border travel:

My dad had relations in Browning, Montana; in Siksika; in the North Peigan. ... my maternal grandmother on my mother's side was from the Southern Peigans. I have cousins there. At one time my mother owned a little piece of land from her mother, her grandfather's estate, that her and her sister shared.²⁸

Another "peace treaty" the Blood Tribe participated in was the Blackfoot Treaty of 1855,²⁹ which was concluded between representatives of the Blackfoot Confederacy and the U.S. government and allowed authorities to build railways and maintain other transportation systems in the west. The historical documentation indicates that Blood Tribe members were present at the negotiations:

According to the preamble to the Treaty, the United States authorities were entering into relations with the Blackfoot Nation residing East of the Rockies, and the Blackfoot Nation was described as consisting of the Peigan, Blood, Blackfoot and Gros Ventres tribes, but no hint is given anywhere that the leaders of these tribes all reside on the United States side of the international boundary. In fact, I am informed that among the signatories on behalf of the Bloods – Onis-tay-say-que-im, The Father of all Children, the Bull's Back Fat, Heavy Shield, Nah-tose-onistah, and The Calf

²⁷ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 91–92, Andrew Black Water).

²⁸ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 449, Frank Weasel Head).

²⁹ The Blackfoot Treaty is sometimes also referred to as the Lame Bull Treaty of 1855, the Stevens Treaty of 1855, the Yellowstone Treaty of 1855, or Otahkoi iitahtaa or the Yellow River Treaty. "Lame Bull" was a U.S. Peigan leader who was a signatory of the proceedings (ICC Exhibit 2o, pp. 23–26).

remaining TLE issues. As the panel has concluded that the Blood Tribe's reserve was established in 1882, the panel also concludes that the date of first survey is 1882.

We therefore recommend to the parties:

RECOMMENDATION 1

That the claim for the Big Claim lands constituting the reserve not be accepted. The panel finds that the Blood Tribe reserve would at least be located within the Blood Tribe's home base, subject to the treaty land entitlement formula and the other terms of Treaty 7.

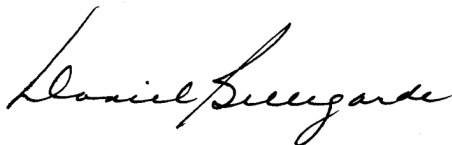
RECOMMENDATION 2

That the claim that the 1882 Nelson survey established the Blood Tribe reserve be accepted. The panel finds that the 1882 Nelson survey established the reserve and that a surrender was required to move the southern boundary.

RECOMMENDATION 3

That the date of first survey for the Blood Tribe be accepted as 1882.

FOR THE INDIAN CLAIMS COMMISSION



Daniel J. Bellegarde
Commissioner (Chair)



Alan C. Holman
Commissioner

Dated this day of 30th day of March, 2007.

APPENDIX A
HISTORICAL BACKGROUND

BLOOD TRIBE / KAINAIWA
BIG CLAIM INQUIRY

Indian Claims Commission

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INTRODUCTION TO THE BLOOD TRIBE

The Blood Tribe¹ is a member of the Blackfoot Confederacy,² which consists of the Peigan, the Blackfoot, the Blood, and the South Peigan (U.S.)³ Tribes. The area between the North Saskatchewan River and the Yellowstone River from the Cypress Hills to the mountains in the west forms the Confederacy's traditional territory,⁴ and according to Blood Tribe oral history, this territory was managed by all members of the Blackfoot Confederacy. As described by Elder Pete Standing Alone, the Tribes are closely bound together:

They have to be to protect their vast territory. Like the Blackfeets in Montana, they live in the south. They kind of take care of that, those borders, and us who kind of take care of the east. Siksika kind of takes care of the north, Peigans takes care of the mountains. So they are very close. And each one of those Nations have their own Head Chief.⁵

The home base of the Blood Tribe, in the eastern corridor of this territory, is the area between the Kootenay (Waterton) and St Mary Rivers to the mountains at the international boundary. Today, the Blood Tribe's reserve in southern Alberta is the largest Indian reserve in Canada. Its northern boundary is located at the confluence of the St Mary and Belly Rivers at Kipp, and the reserve extends southward to an east–west line located 14 miles north of the international boundary.

The area between the Kootenay (Waterton) and Belly Rivers is characterized by the Belly Buttes, a series of undulating hills, which symbolize the Blood home base. At the community session, Elder Rosie Day Rider told the story of Blood Clot, the creation story of the Belly Buttes. Blood Clot is swallowed by an animal, but he has a knife tied in his hair and is able to escape by jumping up and down and slicing the belly of the animal. The intestines of the animal became the

¹ For the purposes of this historical report, the term "Blood Tribe" will be used.

² Also referred to as the Blackfoot Nation.

³ Also referred to as the South Peigans.

⁴ Canadian Blackfoot Indians to the Honourable John Munro, Minister of Indian Affairs, "Position Paper re: the Blackfoot Nation of Indians and the Stevens or Blackfoot Treaty of 1855," August 4, 1990, p. 1 (ICC Exhibit 8b, p. 1).

⁵ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 289–90, Pete Standing Alone).

Belly Buttes.⁶ The Elders explained that it is within the Big Claim lands that the Blood Tribe was created.⁷ Elder Rosie Day Rider states:

when Red Crow says or our people say, We're going home, it's related to the story. Even when ... I was growing up, rather, whenever my family travelled to Browning or visit other relatives in our territory, we always longed for the Belly Buttes. When we see them, we feel very good that we are at home again.⁸

Within the home base, the Blood Tribe is governed by the clan system that exists to this day. Today's 16 to 20 clans include the Lone Fighters, Many Children, Blackened Lodge Door Flaps, Fish Eaters, All Short People, All Tall People, Little Robes, and Crooked Wheels.⁹ Each clan settled in its own particular areas within the home base. Every summer, all of the clans gather for the Sundance and, in the winter, the clans all share wintering grounds.¹⁰

At the community session, Elder Louise Crop Eared Wolf stated: “[W]e lived by the clan system.”¹¹ The effect of the clan system on the social and political organization of the tribe is considerable. Each clan had its own leader, whom the clan members would follow. One of these clan leaders would be “chosen” as the leader of the tribe. For most of the period covered by this report, the tribal leader was Red Crow, leader of the Blood Tribe's Fish Eaters Clan.¹² The Blood Tribe in fact acquired its name because it provided so many leaders; loosely translated, it is “Tribe of Many

⁶ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 191–99, Rosie Day Rider).

⁷ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 119, 120, 133, Andrew Black Water; p. 154, Rosie Red Crow; p. 200, Rosie Day Rider; p. 256, Adam Delaney); August 30–31, 2004 (ICC Exhibit 5a, p. 348, Louise Crop Eared Wolf; pp. 458, 472, 473, Frank Weasel Head).

⁸ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 203, Rosie Day Rider).

⁹ Blood Tribe / Kainaiwa Clan System Diagram (ICC Exhibit 5e).

¹⁰ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 278, Adam Delaney; pp. 284, 287, Pete Standing Alone).

¹¹ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 330, Louise Crop Eared Wolf).

¹² ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 93–94, Andrew Black Water). Red Crow was also known as Mekasto. The Fish Eaters clan is also known as *Ma My Yiktsi*.

Leaders, [or] Kaiani.”¹³ It can be assumed that, when reference is made by Canada to the Chief and minor Chiefs of the Blood Tribe (in the text of Treaty 7, for example), Canada is referring to traditional clan leaders, since the concept of Head Chief was introduced into Blood Tribe culture at the time of treaty.¹⁴

It is Blood Tribe custom to follow its leaders and live as a clan. For example, at treaty annuity time, Blood Tribe members would collect their treaty money according to their clan.¹⁵ During the Sundance ceremony, the Blood Tribe members would camp according to their clan at designated places at the Sundance grounds.¹⁶ It is also Blood Tribe custom to settle matters by consensus: “[W]hen there is a matter of importance, their leaders come together and they talk about it. They don’t settle it right then and there, but they talk about it and they always come to a consensus, and they go by a consensus. They don’t argue and they don’t go up against another Clan.”¹⁷

TREATY MAKING AND THE BLOOD TRIBE

The Blood Tribe’s approach to treaty making is based on *innaihtsiini*, a traditional process that does not focus on surrender in treaty, but on peacemaking. At the community session, Pete Standing Alone stated:

Innaihtsiini to me, it doesn’t mean a surrender. It means coming together because peacemaking and Treaty-making all stemmed out of that word, for us. *Innaihtsiini* means to come to a truce.¹⁸

Blood Tribe oral history describes the “peace treaties” as a traditional mechanism of conflict resolution. Elder Louise Crop Eared Wolf expands on this point:

¹³ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 331, Louise Crop Eared Wolf).

¹⁴ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 354, Louise Crop Eared Wolf).

¹⁵ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 347, Louise Crop Eared Wolf).

¹⁶ See ICC Exhibit 5e, “Blood Tribe / Kainaiwa Clan System Diagram,” held at the Gladstone Hall, Blood Tribe Indian Reserve, Alberta, and submitted as an Exhibit on August 30, 2004.

¹⁷ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 341, Louise Crop Eared Wolf).

¹⁸ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 292, Pete Standing Alone).

We made Treaty with several of the different Tribes. And when it comes to making Treaty, we made Treaty with the Crows and all those southern Tribes of Indian people. We didn't take away their lands when we made Treaty. It was just we want to make peace with them. And the meaning of Treaty, *innaihtsiini*, is something that's practiced. It was practiced in those days.

Two Nations, when they want to make Treaty, they come together with goods. They send a messenger, and then they – if they agree, if the other one agrees, then they come forward together, two powerful Nations. And they smoke the pipe which ... symbolizes peace. And once a Treaty is made, it's never to be broken by either party. It lasts forever.

And each party, they would exchange gifts, and they would never take away the land from the other Tribe. It's just a gesture of peace, peacemaking, that they would never – their friendship would last forever.¹⁹

Her reference to the pipe is important to note. Blood Tribe oral history makes clear that the use of the pipe is not to be taken lightly. Elder Andrew Black Water states that “And the usage of the sacred pipe. It's not really the X, but we rely on that. The sacred pipe is binding. That binds everything, makes it final, finalizes any agreement.”²⁰ Furthermore, Elder Black Water connects the significance of the pipe to the Blood Tribe's understanding of the treaty-making process:

The whole notion of Treaty-making is a mechanism to settle, whether it's a dispute or an agreement. But based on the usage of our pipe, which was used at Treaty 7. A pipe is offered. One party would offer a pipe to the other party, whether that's the party that you've made some transgression, you violated that person's life or whatever. Being that, that you don't want to continue to live in being insecure, then you decide to, for the sake of your family, decide to make Treaty. So you take your pipe and then you approach a person. Of course, it's associated with providing gifts. And once the pipe is accepted by that party and it's lit and you smoke, that is what is binding that Treaty. Now, that is, the understanding today, it's the same understanding that we have today, and we still utilize our own Treaty at various times where we have to make Treaty.²¹

¹⁹ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 333, Louise Crop Eared Wolf).

²⁰ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 98, Andrew Black Water).

²¹ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 103, Andrew Black Water).

In a series of interviews conducted by the Tribal Council of Treaty 7, Elders of the Blood Tribe recounted various interpretations of what “treaty” meant to them. Fred Gladstone said that a treaty meant having peace between peoples or tribes; it was a “negotiation between two peoples.” Rosie Red Crow indicated that the treaty meant that “we all agreed to be on friendly terms.” Wallace Mountain Horse described the treaty process as it had affected the Bloods when they made treaty with both the Cree and the Crow peoples at various times in his memory. He reiterated that the treaty meant an agreement “not to fight anymore.”²²

The Blood states that this process informed the Tribe’s participation in earlier treaties with other bands, as well as the U.S. government. In 1810, the Blood Tribe and the Sioux met in the Cypress Hills to establish a peace between the two nations that set a boundary point of hunting territories, with the Sioux claiming the lands east of Cypress Hills and the Blood claiming those to the west.²³ In the early 1830s, the Blood made peace with the Mandan of North Dakota,²⁴ and during the winter of 1870–71 a peace alliance was agreed to by the Cree and Blackfoot nations after a “devastating battle that resulted in tremendous loss to the Cree.”²⁵

The Jay Treaty of 1794 was entered into by Canadian and American governments and had an impact on both Canadian and American First Nations peoples. The separation of North America into Canada and the United States of America had affected the traditional territory of the Blackfoot Confederacy because “the Canada–U.S.A. boundary arbitrarily divided the Blackfoot Nation.”²⁶

²² Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen’s University Press, 1996), 113–14 (ICC Exhibit 9e, pp. 113–114).

²³ Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen’s University Press, 1996), 7 (ICC Exhibit 9e, p. 7).

²⁴ Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen’s University Press, 1996), 7 (ICC Exhibit 9e, p. 7).

²⁵ Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen’s University Press, 1996), 8–9 (ICC Exhibit 9e, pp. 8–9).

²⁶ “Border Issues: Blood Tribe Position Paper” (Stand-off, Alberta, August 4, 1978), p. 1 (ICC Exhibit 8a, p. 1).

Shirt – are some who are regarded by the Canadian Bloods as being among their ancestors and having lived on the Canadian side of the border.³⁰

Red Crow's uncle, Piinakkoyim, or Seen From Afar, was present at the negotiations of the Blackfoot Treaty, as was his mentor, Rainy Chief.³¹

PRELUDE TO THE SIGNING OF TREATY 7

By the early 1870s, rapid social and political change was transpiring in the Canadian northwest. Responsibility for government and the administration of laws was transferred from the Hudson's Bay Company to the Canadian government, lands were being surveyed and opened for settlement, and treaties were being negotiated with Canadian Indians on the prairies. Generally speaking, this was not a peaceful time for the Blood Tribe:

The Buffalo were hunted to almost extinction by the outsiders, there was no other, just small game to sustain our existence. And, of course, whiskey traders came in and did further damage to our people, and we did not understand the perils of the use of alcohol. And there's something new that just kind of went rampant. And, of course, we went through great suffering with the smallpox.³²

The whiskey trade proved problematic to the Blood Tribe as the traders encroached upon the Blood's hunting territories and made alcohol readily available.³³ "Whiskey forts" were established to traffic liquor, and repeating rifles depleted vulnerable buffalo herds.³⁴

³⁰ An Opinion by L.C. Green, University of Alberta, "The Treaty of 1855 and The Blood Indians" (undated), pp. 2–3 (ICC Exhibit 8c, pp. 2–3).

³¹ Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen's University Press, 1996), 17 (ICC Exhibit 9e, p. 17).

³² ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 97, Andrew Black Water).

³³ Hugh A. Dempsey, *Treaty Research Report: Treaty Seven* (Ottawa: Department of Indian Affairs and Northern Development (DIAND), 1987), app. D to Pillipow & Company, "Blood Tribe / Kainaiwa Land Claim Submission – The Big Claim," July 1996 (ICC Exhibit 2c, pp. 305–6).

³⁴ Hugh A. Dempsey, *Treaty Research Report: Treaty Seven* (Ottawa: DIAND, 1987), app. D to Pillipow & Company, "Blood Tribe / Kainaiwa Land Claim Submission – The Big Claim," July 1996 (ICC Exhibit 2c, p. 305).

In 1875, a meeting was held in which all tribes of the Blackfoot Nation were present. The purpose of this meeting was to discuss the increased and notable presence of non-Confederacy persons within the territory.³⁵

In 1876, the Chiefs of the Blackfoot Nation, including Red Crow, sent a petition to Lieutenant Governor Alexander Morris. In their petition, the Chiefs referred to the meeting they convened to discuss the encroachment on their lands:

That in the winter of 1871, a message of Lieut. Govt. Archibald was forwarded into the Saskatchewan by W.J. Christie a member of your honourable [illegible] Council and the contain of said message was duly communicated to all your petitioners.

That your petitioners [illegible] that a promise was made to them in that document that the Government of the White men will not take the Indians lands without a council of Her Majesty's Indian Commissioners and the respective Indian Chiefs ...³⁶

The petition went on to state:

That the white men have already taken the best of locations and built houses in any place they please into your petitioners hunting grounds.

...

That Americans ... and others are founding a large settlement in Belly River, the best hunting quarters of your petitioners. ... That your petitioners do pray for an Indian Commissioner to visit us this summer ... so we could meet him and hold a Council for putting a rule to the invasion of our country til our treaty be made with the government.³⁷

In his research report on Treaty 7, Hugh Dempsey states that the government's motive in seeking a treaty with the Blackfoot Confederacy was simple:

³⁵ Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen's University Press, 1996), 19 (ICC Exhibit 9e, p. 19).

³⁶ Unidentified author to Alexander Morris, Lieutenant Governor of Manitoba and NWT, Winnipeg, June 12, 1876, in Provincial Archives of Manitoba, Alexander Morris Papers, doc. 1265 (ICC Exhibit 1a, pp. 27–29).

³⁷ Unidentified author to Alexander Morris, Lieutenant Governor of Manitoba and NWT, Winnipeg, June 12, 1876, in Provincial Archives of Manitoba, Alexander Morris Papers, doc. 1265 (ICC Exhibit 1a, pp. 27–29).

As part of the terms of bringing British Columbia into Confederation in 1871, the Canadian government had promised to build a trans-continental railway within ten years. Such a line would have to traverse the newly-acquired western territories, through land still nominally in control of Indian tribes. Huge land concessions would need to be offered to the company building the railway and later, the existence of the line would encourage large scale immigration to the western provinces.³⁸

The Blood viewed the opportunity to sign a treaty with the Canadian government in the same respect as the Blackfoot peace treaty that it had signed some 20 years previously with the American government; in that case, it was a treaty of peace to allow the construction of a railway through its traditional territory. In effect, the Blood's approach to "treaty" differed greatly from the Canadian government's interpretation of land cessation.

THE SIGNING OF TREATY 7, SEPTEMBER 22, 1877

In early September 1877, Lieutenant Governor David Laird, acting as Treaty Commissioner, visited the Blood Tribe at Fort Macleod with a view to getting the Blood to enter into treaty at Blackfoot Crossing. Hugh Dempsey indicates that some members of the Peigan and Blood Tribe were contemplating not attending the treaty negotiations because they planned to go buffalo hunting.³⁹ Blood Tribe oral history indicates that Red Crow was not interested in attending the treaty negotiations at Blackfoot Crossing.⁴⁰ Elder Rosie Red Crow states:

At the time of the Treaty, he wanted the Treaty to take place at Fort Macleod. They did not listen to him. Instead, they went to Blackfoot Crossing. As a result, Red Crow went to Sweet Grass Hills instead of the Blackfoot Crossing. Then they sent a

³⁸ Hugh A. Dempsey, *Treaty Research Report: Treaty Seven* (Ottawa: DIAND, 1987), 1 (ICC Exhibit 2c, app. D, p. 300).

³⁹ Hugh A. Dempsey, *Treaty Research Report: Treaty Seven* (Ottawa: DIAND, 1987), 16 (ICC Exhibit 2c, app. D, p. 315).

⁴⁰ Blood Tribe Elder Statutory Declarations dated and signed May–June 1996, forming app. B in Pillipow & Company, "Blood Tribe / Kainaiwa Land Claim Submission – The Big Claim," July 1996 (ICC Exhibit 2c, app. B, p. 194, Louise Crop Eared Wolf).

messenger to ask Red Crow to attend. ... He [Red Crow] went south. At the time there was no United States. He went south.⁴¹

Elder Mary Louise Oka similarly explains Red Crow's desire to treat on Blood Territory and how he came to join the treaty parties at Blackfoot Crossing:

I heard that at the time of the Treaty, that Red Crow did not attend the Treaty, they did not sign the Treaty. He wanted the Treaty at – he wanted the Treaty to be held at Fort Macleod, not at Blackfoot Crossing. Instead, the Treaty was taken to take place at Blackfoot Crossing. Red Crow was very disappointed. He packed up and moved to the Porcupine Hills.

When he did not show up at Blackfoot Crossing, the people were there waiting for him. They sent a messenger to ask him to attend the Blackfoot Crossing, and then he moved to the Blackfoot Crossing.⁴²

Elder Rosie Red Crow states that Red Crow ultimately decided to travel to Blackfoot Crossing because “Crowfoot was a cousin to Red Crow. Crowfoot's mother was from the Bloods. When Crowfoot asked Red Crow to attend Blackfoot Crossing because of the protocol and out of respect, Red Crow was unable to refuse.”⁴³ Elder Stephen Fox explains the relationship between Red Crow and Crowfoot and why Crowfoot waited for him:

At the time of the Treaty, Crowfoot waited for Red Crow. However, because Crowfoot was already there, the non-Natives, the government people thought that Crowfoot was superior to Red Crow, that Crowfoot was a much bigger leader than Red Crow. However, it was out of respect that they waited for each other.

... Crowfoot was not going to make any moves with regard to the Treaty, and he wouldn't – due to the protocols, he waited. He insisted on waiting until Red Crow arrived.⁴⁴

⁴¹ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 148–49, Rosie Red Crow).

⁴² ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 182–83, Mary Louise Oka).

⁴³ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 149, Rosie Red Crow).

⁴⁴ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 433, Stephen Fox).

On September 16, 1877, Laird and his fellow Commissioner, Colonel James Macleod of the North-West Mounted Police (NWMP), arrived at Blackfoot Crossing to begin treaty negotiations with some of the Chiefs of the five tribes: three from the Blackfoot Confederacy (the Blood Tribe, the Blackfoot, the Peigans), the Sarcees, and the Stoneys (a branch of the Assiniboine).⁴⁵ The only Blood Chiefs present for the Commissioners' arrival were Medicine Calf and Rainy Chief.⁴⁶ As Hugh Dempsey has written, "[t]here were four leading chiefs of the Blood tribe: Red Crow of the Fish Eaters, Father of Many Children of the Buffalo Followers, Medicine Calf of the Many Tumors, and Many Spotted Horses of the Lone Fighters."⁴⁷ Rainy Chief was recognized as leader of the northern Blood Tribe, while Red Crow was recognized as the leader of the southern Blood Tribe.⁴⁸

Blood Tribe oral history refers to Red Crow as the main leader of the Blood Tribe. Elder Andrew Black Water states: "[W]e understand there's different leaders, different Clans, eh. But amongst them, they would rely on one individual, you know. So it turn out to be that Red Crow was sort of the one that was acknowledged to lead the people."⁴⁹ Elder Andrew Black Water also comments on the leadership of Red Crow: "[H]e didn't really have to go out and ask the people to follow him. When he broke camp, just people just naturally just follow him. And you would follow a person that is going to provide you with the best, you know, protection and survival."⁵⁰

Elder Louise Crop Eared Wolf described Red Crow's leadership qualities:

I have heard that when he was young he was brave. He went on a lot of raids. This is what got him recognition – going on raids. This shows what a courageous person

⁴⁵ Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), (ICC Exhibit 9a, p. 107).

⁴⁶ Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), (ICC Exhibit 9a, p. 107).

⁴⁷ Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), (ICC Exhibit 9a, p. 114).

⁴⁸ Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen's University Press, 1996), 43 (ICC Exhibit 9e, p. 43).

⁴⁹ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 93, Andrew Black Water).

⁵⁰ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 93–94, Andrew Black Water).

he was. He also took care of the people. For these reasons people had high regard for him and because of this he became a camp leader. I also heard that he was very intelligent – it was this intelligence that gave him success on his raids. Also, if he got material goods on his raids he would not only benefit himself but when he returned home he would share with the people. It was these characteristics that caused people to have high regard for him – his generosity, courage and kindness. It was really because Red Crow went on numerous raids that he was so esteemed and became a leader. Red Crow has set an example for many succeeding Chiefs.⁵¹

Also present at treaty was Jerry Potts, an interpreter for the Crown. Blood Tribe oral history indicates that Potts was not the best interpreter. Elder Pete Standing Alone states:

Jerry Potts was not fluent in either language. He never went to school, he didn't live extensively with the Bloods to learn the language real well. You know, he's back and forth. And he was in Fort Benton when Macleod was coming west. No, the interpretation was, I would say is very poor.⁵²

Elder Louise Crop Eared Wolf states:

There's lot of stories, lot of people that I heard, and I'm still hearing it, that Jerry Potts was a drunk. He was drunk most of the time, and they had to get other interpreters to replace him.

...

... he interpreted some, but not that accurate. Not a bit accurate, as we can see on the signatures when he said that he couldn't even say Is sah pum khi ka. It came up with the word Chapo Mexico.⁵³

A specific language issue at Treaty 7 was the misinterpretation of the Blood Tribe's custom to say "Ahh" when someone is speaking. Elder Rosie Red Crow states:

At the time of the Treaty, the interpreter told the Commissioners that the people were in agreement because the people sitting there were saying "ahh". However, the

⁵¹ Blood Tribe Elder Statutory Declarations dated and signed May–June 1996, forming app. B in Pillipow & Company, "Blood Tribe / Kainaiwa Land Claim Submission – The Big Claim," July 1996 (ICC Exhibit 2c, app. B, pp. 198–99, Louise Crop Eared Wolf).

⁵² ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 310, Pete Standing Alone).

⁵³ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 357–58, Louise Crop Eared Wolf).

people that were sitting in there were only acknowledging the speaker as the speaker. They were not agreeing to whatever was being discussed. They were only acknowledging him as a speaker by saying “ahh”.

When the interpreter was asked by the Commissioners, What are they saying, he because he did not understand, he was not a full member of the Blood Tribe, he did not understand, he told them that the people were in agreement.

To this day, we still use that practice. When somebody is speaking, the listener is sitting there and the listener will say “ahh”, but it is not to indicate that the listener is in agreement.⁵⁴

On the evening of September 20, 1877, Red Crow and Father of Many Children arrived at Blackfoot Crossing and immediately began discussions with the other leaders. By the next day, consensus was reached among the parties and, on September 22, Treaty 7 was presented for the signature of the chiefs. “First to sign was Crowfoot, followed by the leading chiefs, minor chiefs and councillors of five tribes.”⁵⁵ The written terms of Treaty 7 closely followed the terms of treaties previously negotiated with First Nations peoples by the government, including:

- provisions for the payment of annuities;
- reserves to be provided on the basis of five persons per square mile (128 acres per person);
- provisions for the purchase of ammunition;
- each Chief and councillor would receive 10 axes, five handsaws, five augers, one grindstone, and the necessary files and whetstones;
- once the bands were settled upon reserves, two cows would be furnished by the government for every family of five, three cows for families with five to nine persons; and four for families of 10 and over; as well as one bull for each chief and councillor. If a family wished to farm besides raising cattle, it would reduce its cattle allotment by one cow and receive instead two hoes, one spade, one scythe, and two hay forks. Three such families could

⁵⁴ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 167–68, Rosie Red Crow).

⁵⁵ Hugh A. Dempsey, *Treaty Research Report: Treaty Seven* (Ottawa: DIAND, 1987) (ICC Exhibit 2c, App. D, p. 29).

collectively receive also a plough and harrow, with enough potatoes, barley, oats, and wheat to plant the broken land.⁵⁶

To illustrate the Blood understanding of what happened at Blackfoot Crossing, Louise Crop Eared Wolf related this story:

At the signing of the treaty at Blackfoot Crossing, Red Crow pulled out the grass and gave it to the White officials and informed them that they will share the grass of the earth with them. Then he took some dirt from the earth and informed them that they could not share this part of the earth and what was underneath it, because it was put there by the Creator for the Indians' benefit and use.⁵⁷

In addition, Elder Rosie Day Rider states:

At the time, they promised us that they would educate us, that they would take care of our health, and that they would train us and provide the funds to farm, and that they would do this as long as the sun shines, the rivers flow, and as long as the grass grows. And as long as the mountains are there.⁵⁸

Under the written terms of Treaty 7, a joint communal reserve was set aside for the Blackfeet, Blood, and Sarcee Bands at Blackfoot Crossing.⁵⁹ The reserve is described as

a belt of land on the north side of the Bow and South Saskatchewan Rivers, of an average width of four miles along said rivers, down stream, commencing at a point on the Bow River twenty miles north-westerly of the Blackfoot Crossing thereof, and extending to the Red Deer River at its junction with the South Saskatchewan; also for the term of ten years, and no longer, from the date of concluding of this Treaty, when it shall cease to be a portion of the said Indian Reserves, as fully to all intents

⁵⁶ *Copy of Treaty and Supplemental Treaty No. 7, Made 22nd Sept., 1877, and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes at the Blackfoot Crossing of Bow River and Fort MacLeod* (1877; reprint, Ottawa: Queen's Printer, 1966), 1–10 (ICC Exhibit 1b, pp. 1–10).

⁵⁷ Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen's University Press, 1996), 113–14 (ICC Exhibit 9e, pp. 113–14).

⁵⁸ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 208, Rosie Day Rider).

⁵⁹ This reserve is known as the Bow River reserve.

and purposes as if it had not at any time been included therein, and without any compensation to individual Indians for improvements, of a similar belt of land on the south side of the Bow and Saskatchewan Rivers of an average width of one mile along said rivers, down stream; commencing at the aforesaid point on the Bow River, and extending to a point one mile west of the coal seam on said river, about five miles below the said Blackfoot Crossing; beginning again one mile east of the said coal seam and extending to the mouth of Maple Creek at its junction with the South Saskatchewan; and beginning again at the junction of the Bow River with the latter river, and extending on both sides of the South Saskatchewan in an average width on each side thereof of one mile, along said river against the stream, to the junction of the Little Bow River with the latter river.⁶⁰

In exchange, the Blood, Blackfoot, Peigan, Sarcee, and Stoney Tribes were expected to

cede, release, surrender, and yield up to the Government of Canada for Her Majesty the Queen and her successors for ever, all their rights, titles, and privileges whatsoever to the lands included within the following limits, that is to say:

Commencing at a point on the International Boundary due south of the western extremity of the Cypress Hills, thence west along the said boundary to the central range of the Rocky Mountains, or to the boundary of the Province of British Columbia, thence north-westerly along the said boundary to a point due west of the source of the main branch of the Red Deer River, thence south-westerly and southerly following on the boundaries of the Tracts ceded by the Treaties numbered six and four to the place of commencement;

And also all their rights, titles and privileges whatsoever, to all other lands wherever situated in the North-West Territories, or in any other portion of the Dominion of Canada. ...⁶¹

During the final day of negotiations, Commissioner Laird had asked the leaders of all the tribes to indicate where they wished their reserve to be located. Only the Blackfoot, Stoney, and Peigan chose their land immediately. When Commissioner Macleod asked Red Crow where he wanted his reserve, the Blood chief was not interested. Both the Blood Tribe and the Sarcee went along with Crowfoot's

⁶⁰ *Copy of Treaty and Supplemental Treaty No. 7, Made 22nd Sept., 1877, and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes at the Blackfoot Crossing of Bow River and Fort MacLeod* (1877; reprint, Ottawa: Queen's Printer, 1966), 4 (ICC Exhibit 1b, p. 4).

⁶¹ *Copy of Treaty and Supplemental Treaty No. 7, Made 22nd Sept., 1877, and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes at the Blackfoot Crossing of Bow River and Fort MacLeod* (1877; reprint, Ottawa: Queen's Printer, 1966), 3-4 (ICC Exhibit 1b, pp. 3-4).

idea that having the three tribes reside on one communal reserve would allow them to be in a strong position to confront the government in the future.⁶² Hugh Dempsey states:

Red Crow revealed that he had no clear grasp of the land aspects of the treaty. The idea of the Bloods living on a small parcel of prairie land – on the basis of five people per square mile – was utterly foreign to him. Since time immemorial, the Bloods had wandered from place to place, always pursuing the buffalo, going wherever the rumbling herds has roamed. In the heat of summer the Indians drifted onto the bare plains near Sweetgrass Hills ... in winter the blizzards drove them into the valleys of the Belly, Oldman, and Highwood rivers ...

Always to the west of them was Chief Mountain, that distinctive peak which protruded from the Backbone of the World, while out on the plains the Belly Buttes were a familiar landmark that showed the Bloods they were at home.⁶³

After the treaty was signed, the registration and payment of annuities to the signatories and their followers occurred over the next several days. In all, the government paid 10 head chiefs, 40 minor Chiefs or councillors, and 4,342 others, expending a total of \$52,954.⁶⁴

In a letter written on April 13, 1879, two years after Treaty 7 was signed, Constantine Scollen, a missionary serving on the Blackfoot Reserve, wrote to Major A.G. Irvine of the NWMP relaying a conversation he had had with Crowfoot about the signing of Treaty 7. In this letter, Scollen stated:

Did these Indians, or do they now, understand the real nature of the treaty made between the Government and themselves in 1877? My answer to this question is unhesitatingly negative, and I stand prepared to substantiate this proposition.

It may be asked if the Indians did not understand what the treaty meant, why did they sign it? Because previous to the treaty they had always been kindly dealt with by the Authorities, and did not wish to offend them, and although they had many doubts in their mind as to the meaning of the treaty, yet with this precedent before

⁶² Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen's University Press, 1996), 246 (ICC Exhibit 9e, p. 246).

⁶³ Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 116 (ICC Exhibit 9a, p. 116).

⁶⁴ Hugh A. Dempsey, *Treaty Research Report: Treaty Seven* (Ottawa: DIAND, 1987), 29 (ICC Exhibit 2c, app. D, p. 328).

them: and besides this, many outside influences were brought to bear upon them. They hoped that it simply meant to furnish them with plenty of food and clothing, and particularly the former every time they stood in need of them; but I repeat, they were not actuated by any intuitive comprehension of what they were called upon to do.⁶⁵

The letter went on to state:

What was the cause of the Indians not understanding the treaty? The immediate cause was the absence of competent Interpreters, although they could have been procured ... The remote causes were many. ... It is true, Crowfoot, who, beyond a doubt is considered the leading Chief of the Plains, did seem to have a faint notion of the meaning of the treaty, as his last speech would go to show. ...

All the other Chiefs followed Crowfoot, and the substance of their speeches was that they agreed with him in all he had said.

Then followed the signing of the treaty and if you remember, Crowfoot would not touch the pen. This recalls to my mind a conversation between him and me last fall. After the payments, I and my companion travelled with the Blackfoot Camp until late in October. Crowfoot one day asked me what was the meaning of making the Indians touch the pen at the treaty. I explained to him that when making a bargain, the contracting parties draw it up in writing and sign their names so as to make it binding, and as the treaty was a bargain between the Government and the Indians, and the latter could not write they were made to touch the pen which was equivalent to signing their names. "Ah!" said he "they are out there for I did not touch it."⁶⁶

The oral history of the Blood Tribe contains a clear and consistent interpretation of Treaty 7 based on past treaty experiences and cultural contexts. Elder Louise Crop Eared Wolf is adamant that at Treaty 7 negotiations:

There was no signing. I never want to say that we signed Treaty. Because all I heard while I was growing up from lots of old people, and I still hear it very recently with some of our old people that have gone before us, that we make Treaty. When they mention the 1877, they always say [Speaking Blackfoot]. I never once heard anybody

⁶⁵ Copy of letter, Constantine Scollen, OMI, to Major A.G. Irvine, Assistant Commissioner, North-West Mounted Police, April 13, 1879 (ICC Exhibit 1h, pp. 2–3).

⁶⁶ Copy of letter, Constantine Scollen, OMI, to Major A.G. Irvine, Assistant Commissioner, North-West Mounted Police, April 13, 1879 (ICC Exhibit 1h, pp. 3–4).

saying, When we signed Treaty with Queen Victoria. They always say, When we make Treaty with Queen Victoria.⁶⁷

Elder Mary Louise Oka elaborates on what happened at Blackfoot Crossing:

According to Mu ka kin, Bob Tail Chief, who was very young at the time of the Treaty, maybe 12 years old, said that he was very inquisitive and he was present at the Treaty at Blackfoot Crossing. He was so inquisitive that he went around to find out and to see for himself what was taking place.

He never saw any of the Blackfoot people there with a pen. He never saw Red Crow touch a pen. He never saw Red Crow touch a piece of paper. The only people that had paper were the white people that were present. Jerry Potts, who was the interpreter, was neither fluent in Blackfoot nor in English. Jerry Potts, as he was interpreting, never fully translated what Red Crow was saying.

...

... The government people promised Red Crow that they would take care of the people, they would place them in the palms of their hands and take care of all of their needs. They would provide health care, education, and they would provide rations, Treaty payments that were to be \$12. The \$12 decreased to \$5. Today the Treaty payment is still \$5. They would provide and continue with their hunting. Ammunition would be provided for. Red Crow was told that this is what was promised, and he said they could use the land but they were not to touch the subsurface.⁶⁸

Blood Tribe oral history does not depict Red Crow as a passive observer at Blackfoot Crossing. Elder Louise Crop Eared Wolf recounts the popular story of the actions taken by Red Crow in getting his wishes across to the Treaty Commissioners:

[W]hat I heard was that he said at the time of the Treaty and other times, he made it clear. He said that, he picking up dirt on one hand and plucked some grass and he let the grass go back. He said that this will share with the settlers, the newcomers. But the dirt, he said this, we will never sell our land.

And a lot of times when old people at our home were telling stories, I often hear this phrase. They would say, Mah tsi sta tapiska topa, and I kept those words in

⁶⁷ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 329, Louise Crop Eared Wolf).

⁶⁸ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 183, Mary Louise Oka).

my mind and in my heart. ... They said, they always say, the old people, We never sold – we didn't sell anything under the ground, under the earth.⁶⁹

Blood Tribe oral history is clear that the Blood Tribe understood what was happening at Treaty 7, but what the people understood was in reference to their concept of what a treaty is and what it is meant to accomplish. Elder Andrew Black Water explains the Blood Tribe's understanding of Treaty 7 and what the Tribe had agreed to:

The spirit and intent of Treaty 7 is a Peace Treaty. We would lay down our arms, you know, then we would share, occupy this land, allow people to talk. But the Treaty provisions was clearly understood by our people that whatever you require today will be provided and into the future as long as the sun shines, you know.⁷⁰

Many Elders have stories relating to how the younger generation present at Treaty 7 did not support the idea of entering into treaty with the Crown. Elder Adam Delaney states:

The younger generation when they knew, there are two leaders, Red Crow and Crowfoot, are going to have Treaty with the government. The younger generation most of them (indiscernible). Just, you know, they were excited. They didn't want to make Treaty. In es tsi sini, they will still fight for what they own. But respect. One man would get up and turn around and talk to the younger people. Oh, it's about time you quit fighting, you know. So that's how it is.⁷¹

Elder Pete Standing Alone elaborates:

[T]he young men, they were not ready to make Treaty. They were ready to fight. But with Red Crow and the other leaders, kept them from doing that. I guess one of the reasons is that they do have lot of respect for their leaders. And I heard that they were not going to wave their arms just because the government wanted them to.⁷²

⁶⁹ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 349, Louise Crop Eared Wolf).

⁷⁰ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 104, Andrew Black Water).

⁷¹ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 235, Adam Delaney).

⁷² ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 293, Pete Standing Alone).

Treaty 7 was confirmed by Order in Council on February 6, 1878.⁷³

LOCATION OF RED CROW AND HIS FOLLOWERS, 1877–80

According to Blood Tribe oral history, immediately following the conclusion of Treaty 7, Red Crow broke camp at Blackfoot Crossing and went home. Elder Rosie Day Rider asserts that “[h]e went back home to where he was raised, where he lived, and this is the land that he loved. ... he moved where he was born, and that is the Belly Buttes.”⁷⁴ Elder Stephen Fox explains that, after treaty, the Confederacy nations stated that

they were going back to their territory. The Peigans also indicated that they were going back to the Porcupine Hills after Red Crow said, if they were born at the Belly Buttes, then they can tell me where to live, but I am going home to the Belly Buttes.⁷⁵

The oral history relating to this event is consistent – Red Crow went home to the Belly Buttes area.

Hugh Dempsey reports that, with the proceedings at Blackfoot Crossing concluded, Red Crow took his band northwest to Cypress Hills, seeking the last herds of buffalo on Canadian soil.⁷⁶ The following summer, Red Crow and his followers met with the Commissioners at Fort Kipp for the 1878 treaty payments. Red Crow told the Commissioners that he did not want to settle at Bow River; instead, he would take his reserve on the Belly River in an area which he and his followers considered to be within their traditional territory.⁷⁷ After the annuity payments, some Blood Tribe members followed the buffalo to Bear Paw Mountain in Montana, while others, including Red Crow,

⁷³ Order in Council PC 400, February 6, 1878, Library and Archives Canada (LAC), RG 2, Series 1, vol. 154, February 6, 1878 (ICC Exhibit 2o, pp. 49–51).

⁷⁴ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 210, 219, Rosie Day Rider).

⁷⁵ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 434, Stephen Fox).

⁷⁶ Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 120 (ICC Exhibit 9a, p. 120).

⁷⁷ Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 122 (ICC Exhibit 9a, p. 122).

returned to Cypress Hills.⁷⁸ Red Crow and his followers did not spend the winter of 1878 at Cypress Hills and, instead, went to their winter camp at the mouth of the Red Deer River, where there was enough buffalo for sustenance.⁷⁹ The following spring, Red Crow and his followers travelled to Fort Walsh, on the east side of Cypress Hills, where the summer was spent. Upon learning of large herds of buffalo across the international border, Red Crow followed other bands into Montana, settling near the Little Rocky Mountains for the winter of 1879.⁸⁰

SURVEY OF THE BOW RIVER RESERVE, SEPTEMBER 1878

In September 1878, Dominion Land Surveyor William Ogilvie commenced the survey of the Bow River reserve for the benefit of the Blackfoot, Blood, and Sarcee First Nations. Ogilvie reported that he had conferred with Crowfoot, Chief of the Blackfoot, and set out the limits of the reserve to which Crowfoot agreed.⁸¹ The reserve consisted of 117,986.4 square miles or 75,511.32 acres, approximately enough land for 590 people.⁸² By the end of October, Ogilvie had completed his survey of the reserve. A plan was submitted, but it covered only the northern portion of the reserve on the Bow River.⁸³ However, there is no evidence that Ogilvie's survey was confirmed or that any other survey work was completed with respect to the joint reserve.⁸⁴

⁷⁸ Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 123 (ICC Exhibit 9a, p. 123).

⁷⁹ Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 124 (ICC Exhibit 9a, p. 124).

⁸⁰ Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 124 (ICC Exhibit 9a, p. 124).

⁸¹ W.M. Ogilvie, Dominion Land Surveyor, to the Minister of the Interior, May 31, 1879, Canada Lands Surveys Records (CLSR), Fieldbook 803, pp. 97–98 (ICC Exhibit 7d, p. 51).

⁸² “Treaty No. 7 Blackfoot Reserve Chief Crowfoot Band shewing that portion of Reserve above Blackfoot Crossing, Bow River N.W.T.,” William Ogilvie, Surveyor, signed May 30, 1879, DIAND Indian Land Registry, Plan 1137 (ICC Exhibit 2o, map NM-22). This calculation is based on 128 acres per person as stipulated by Treaty 7.

⁸³ “Treaty No. 7 Blackfoot Reserve Chief Crowfoot Band shewing that portion of Reserve above Blackfoot Crossing, Bow River N.W.T.,” William Ogilvie, Surveyor, signed May 30, 1879, DIAND Indian Land Registry, Plan 1137 (ICC Exhibit 2o, map NM-22).

⁸⁴ Joan Holmes, “Kainaiwa / Blood Tribe Big Claim Report on Additional Research,” prepared for Kainaiwa / Blood Tribe, November 2004 (ICC Exhibit 2o, p. 4).

1880 EXCHANGE AGREEMENT

Red Crow was not interested in settling on the Bow River reserve at Blackfoot Crossing. Oral history indicates that the Blood Tribe never had any intention of settling at the Bow River reserve. Elder Adam Delaney explains why:

If the Bow River – one of the things important for us in those days, you know, for firewood, you know. And on the other side, the land is not as good as in this area, one part.

Okay, the main part of it in this area is, like I said earlier, mention our culture, especially our religion. Like I said earlier, everything's here. Everything's here, in the east of the Rockies. This one is the most important thing in our culture, in our religion. We get that in that area, okay. The pipes we made, we get them here, too. The stuff we paint ourselves with, we get it here, too. And the ones that you talk about, the pines, the sweet grass pine, they all in this area. And our tobacco, too, for instance. ... We get them in the mountains. And there's a lot of herbs, too, not only that that we use for medicine, they're in that area, too, you know. ... So, in other words, we don't have to go two 2, 3, 400 miles to get what we want, you know. It's all in this area.⁸⁵

Furthermore, there is no recognition within Blood Tribe oral history that, following Treaty 7, the Blood had land at Bow River. When asked if any members of the Blood Tribe stayed and settled at Blackfoot Crossing after Treaty 7, Elder Andrew Black Water answered: "Not to my knowledge. Basically wanted to go home, so they all went home. Of course there might be a few people that stayed around to visit their relatives in Siksika. ... No, no. Not to settle."⁸⁶

Referring to the Big Claim lands in general, Elder Louise Crop Eared Wolf spoke of Red Crow's preference for the Big Claim lands over that of the land offered at Bow River. She also offered insight into where Red Crow would have selected his reserve:

What I heard, that they were, the Bloods were given a tract of land someplace around where the badlands or in the Drumheller. Yeah, a strip of land that extended to the east, Saskatchewan border, that Red Crow never want to leave his territory which is between the Chief Mountain, the mountains and the Belly Buttes. That's where his

⁸⁵ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 256, Adam Delaney).

⁸⁶ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 143– 44, Andrew Black Water).

main territory. He wanted to stay here with his people because his ancestors were buried among these lands, and it was his special – our special territory.⁸⁷

In 1879, members of the Blood Tribe expressed dissatisfaction with the Bow River reserve to Indian Commissioner Edgar Dewdney. Dewdney reported that the Blood Tribe was

desirous of having a Reserve apart from the other Indians of the Blackfeet nation and made a formal application to me at an interview I had with them about two months ago. “Mekasto”, the Head Chief spoke first, then “Running Rabbit” and all the Minor Chiefs one after the other followed in the same direction. They said they were all of one mind. They wanted their Reservation in the neighborhood of Fort Kipp, where they say their Indians are mostly resided and where the bones of their Ancestors lie. Upon my informing them it was out of my power to alter the Treaty as agreed upon by them, they then requested that I would make known their wishes to the Government while at Ottawa.⁸⁸

The government agreed and Order in Council 565 was issued on March 26, 1880, authorizing

E. Dewdney, Esquire, Indian Commissioner for the North West Territories and Manitoba, and Lieut. Colonel Macleod, Commissioner for the North West Mounted Police, to attend a Council of the Blackfeet Nation ... to be summoned by Mr. Dewdney for the purpose; and to submit a proposition to them to surrender such portion of the Reserve allotted to them under Treaty stipulations as would be the proper share of the Blood Band, were that Band to settle upon the said Reserve, with a view to a Reserve near Fort Kipp being assigned to the Blood Indians, in accordance with their desire; And should the Indians assent to the proposal, the gentlemen above referred to should take a surrender from them executed in accordance with the provision of the Indian Act 1876 covering the land in question.⁸⁹

A surrender of the Blood Tribe’s interest in the Bow River reserve was purportedly obtained on September 25, 1880. The surrender document states:

⁸⁷ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 348, Louise Crop Eared Wolf).

⁸⁸ Edgar Dewdney, Indian Commissioner, Manitoba and NWT, Department of Indian Affairs (DIA), to L. Vankoughnet, Deputy Superintendent General of Indian Affairs (DSGIA), December 15, 1879, LAC, RG 10, vol. 6620, file 104A-1-11, p. 16 (ICC Exhibit 1a, doc. 96–99).

⁸⁹ Order in Council PC 565, March 26, 1880, LAC, RG 2(1), vol. 389, March 26, 1880 (ICC Exhibit 1a, pp. 160–61).

Whereas a Treaty was made and concluded on the twenty second day of September in the year of Our Lord one thousand eight hundred and seventy seven between Her Most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners, the Honorable David Laird, Lieutenant-Governor and Indian Superintendent of the North West Territories, and James Farquharson MacLeod, C.M.G., Commissioner of the North West Mounted Police, of the one part, and the Blackfeet, Blood, Piegan, Sarcee, Stony and other Indians, of the other part.

And whereas it was agreed in said Treaty that the Reserve of the Blackfeet, Blood and Sarcee Bands of Indians should consist of a belt of land on the North side of the Bow and Saskatchewan Rivers of an average width of four miles along said Rivers down stream, commencing at a point on the Bow River, twenty miles North-Westerly of the Blackfoot Crossing thereof and extending to the Red Deer River at its junction with the South Saskatchewan, I "Mekasto" or "Red Crow", Head Chief of the Blood Indians, on behalf and with the consent of the Blood Indians included in said Treaty do hereby give up all our rights, titles and privileges whatsoever to the lands included in said Treaty, provided the Government will grant us a Reserve on the Belly River in the neighbourhood of the Mouth of the Kootenai River.⁹⁰

There is no evidence that a surrender meeting was held or an assenting vote of a majority of the adult male members of the Blood Tribe obtained, as was required by the 1876 *Indian Act* which was in force at the time of the surrender. According to the *Indian Act, 1876*:

26. No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band or of any individual Indian, shall be valid or binding except on the following conditions:—

1. The release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose according to their rules, and held in the presence of the Superintendent-General, or of an officer duly authorized to attend such council by the Governor in Council or by the Superintendent-General; Provided, that no Indian shall be entitled to vote or be present at such council, unless he habitually resided on or near and is interested in the reserve in question;

2. The fact that such release or surrender has been assented to by the band at such council or meeting, shall be certified on oath before some judge of a superior, county, or district court, or stipendiary magistrate, by the Superintendent-General or by the officer authorized by him to attend such council or meeting, and by some one of the

⁹⁰ Surrender, Blood Band to the Crown, dated September 25, 1880, in LAC, RG 10, vol. 1427, pp. 16–17 (ICC Exhibit 1a, pp. 166–67). The Kootenay River is now officially called the Waterton River.

chiefs or principal men present thereat and entitled to vote, and when so certified as aforesaid shall be submitted to the Governor in Council for acceptance or refusal.⁹¹

Blood Tribe oral history does not reference a meeting or vote of this kind. The Elders are certain that such an event would have been so contrary to their traditions and so unusual that it would have been the subject of stories. Elder Frank Weasel Head says that he would have heard his grandfather tell such a story: “[H]e was around, and he was at Treaty 7. He would have talked about a vote being taken in Red Crow’s time. So as far as I know, those people never talk of a vote during Red Crow’s time.”⁹² Elder Louise Crop Eared Wolf states: “[O]ur people didn’t know anything about voting, and they were not allowed to vote. Just at one time they – some of our people were coerced to vote, to sell the land that’s the north part of our Reserve.”⁹³ Elder Andrew Black Water further added:

I have not really heard about ... an event that took place like that, but my question has always been on that. If there was a meeting that took place like what you referred to, then my question is, how did they arrive to a consensus on that, and that is what I have not heard anybody talk about ...

... there has to be some form of a process that they would arrive to consensus. It’s always been very, very important part of our ways in terms of decision-making, is always trying to come to consensus. This way, everybody has ownership of the decision, ensuring there is ownership of the decision and along with the responsibility of the decision. It’s a strong belief that we have.⁹⁴

SELECTION OF THE BLOOD RESERVE LANDS

Later in 1880, with the requisite surrender ostensibly secured, Red Crow, Indian Agent N.T. MacLeod, N.T. MacLeod Jr, Father Lacombe, Jerry Potts, and Fred Pope went to the area where Red Crow wished the reserve to be situated.⁹⁵ The experience was recounted by N.T. MacLeod Jr:

⁹¹ *Indian Act*, SC 1876, c. 18, s. 26 (1, 2) (ICC Exhibit 6a, p. 9).

⁹² ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 461, Frank Weasel Head). Also see ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 294, Pete Standing Alone; p. 168, Rosie Red Crow).

⁹³ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 354, Louise Crop Eared Wolf).

⁹⁴ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 117, Andrew Black Water).

⁹⁵ The reserve of the Blood Tribe is sometimes referred to as Kainai or Kainaiwa.

I followed to where he [Red Crow] was sitting at the edge of the high bank opposite the Belly Buttes. As interpreted by Jerry [Potts], this is what he said:

“That is where I wish to live the rest of my life and to die there.”⁹⁶

It is not clear which high bank Red Crow was sitting on; it could have been on the Belly or the Kootenay River.

In October 1880, Indian Agent MacLeod reported to Indian Commissioner Dewdney that he did not agree with Red Crow’s choice of location.

I ... accompanied by “Red Crow” Head Chief of the Blood Indians to select a location for their Reservation. I went to the Forks of the Kootenai and Belly Rivers where I found a large bottom, the upper portion of which is occupied by Mr. Fred Wachter’s Ranch; and below him a man of the name of Murray has a small ranch; the remaining portion of the bottom is chiefly gravel and sand, with very little soil and had been all overflowed during the higher waters in summer, there is no quantity of building timber available. This is the bottom which “Red Crow” once desired to settle upon but I considered it unfit.⁹⁷

Indian Agent MacLeod further reported that 300 members of the Blood Tribe were already living in the area and making improvements on the land,⁹⁸ but the letter does not specify the exact location of those improvements.

Indian Agent MacLeod chose the current northern, eastern, and western boundaries of the reserve. He reported his choice in 1880 to Indian Commissioner Dewdney:

On the occasion of your visit to this treaty, in September, you made arrangements with the head chief, “Red Crow”, to take a location on the Belly River, and to begin with his people to settle there until you could make arrangements to have the reservation finally decided upon. By your instructions I proceeded to this place and

⁹⁶ Newspaper clipping, N.T. MacLeod, c. 1880, in Glenbow Archives, J. Higinbotham Papers, M517, Scrapbook, vol. 1 (ICC Exhibit 1a, p. 107).

⁹⁷ N.T. MacLeod, Indian Agent, to Edgar Dewdney, Indian Commissioner, DIA, Regina, October 15, 1880, LAC, RG 10, vol. 1427, pp. 34–37 (ICC Exhibit 1a, p. 171).

⁹⁸ N.T. MacLeod, Indian Agent, to Edgar Dewdney, Indian Commissioner, DIA, Regina, October 15, 1880, LAC, RG 10, vol. 1427, pp. 34–37 (ICC Exhibit 1a, pp. 172–73).

selected suitable land on the south side of the Belly River from the fork of the Kootenai eastward.⁹⁹

Later in 1880, MacLeod noted in a letter that the Blood Tribe had settled “on their reservation at the junction of the Belly and Kootenay Rivers.”¹⁰⁰ In his annual report for the year 1880, Indian Commissioner Dewdney stated that, at the time of the agreement, he

informed the Blood Chief that if he would give a release of all his interest in the reserve situated at the Blackfoot Crossing, provided the government would give him a reserve at the point he indicated, I would send an instructor with him and his band to the spot selected by himself, where he could build houses and prepare some ground for the next season, and that I would recommend on my arrival below that a reserve be given to him at the point.¹⁰¹

In May 1881, the reserve was described as being “situated on the east side of the Belly River near its confluence with the Kootanie. [sic]”¹⁰² In September 1881, the Blackfoot Confederacy met with the Governor General, the Marquess of Lorne, on his visit to the area.¹⁰³ The exact details of this meeting are not known; however, it has been reported that the Confederacy, specifically the Blood Tribe, took this opportunity to present a list of grievances to the Governor General regarding reserve land selection. In a letter published in the *Fort Macleod Gazette*, an anonymous author going by the alias “Gambler No. 1” reported that

⁹⁹ N.T. MacLeod, Indian Agent, Treaty 7, Office of Indian Agent, Fort Macleod, to Edgar Dewdney, Indian Commissioner, Ottawa, December 29, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1880*, 97–100 (ICC Exhibit 1a, p. 181). There is no consistency to how the geography of the reserve is described. At times it is described as being south of the Belly River and, at other times, as being east of the Belly River. Regardless, the reserve is bounded by the Belly River on the east side.

¹⁰⁰ N.T. MacLeod, Indian Agent, Fort Macleod, to unidentified recipient, November 2, 1880, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1880*, 85–87 (ICC Exhibit 1a, pp. 177–79).

¹⁰¹ Edgar Dewdney, Indian Commissioner, DIA, Regina, to the Superintendent General of Indian Affairs (SGIA), December 31, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1880*, 80–81 (ICC Exhibit 1a, pp. 189–90).

¹⁰² Unidentified author to unidentified recipient, May 30, 1881, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881*, xxiv–xxv (ICC Exhibit 1a, p. 225).

¹⁰³ “The Governor General of Canada’s Tour,” *The Times* (London), September 26, 1881; Glenbow Archives, M314 (ICC Exhibit 1a, p. 253).

[l]ast year, '81, they, the Bloods, went en mass to state their grievances to the Governor General, Lord Lorne. What His Excellency told them, I am not in a position to say, only from report. The Bloods wanted Stand Off bottom, where they could raise something, and came back with the impression that the Governor General had given it to them, and commenced building in the bottom accordingly. Then Mr. Dewdney, through his agents, told the Indians their reservation was 17 miles down and 17 miles up on the south side of Belly river, which seemed to be satisfactory, as they all made for the other side of the river and disposed of their buildings on the Stand Off bottom.¹⁰⁴

In 1882, Indian Commissioner Dewdney reported that “the Blood Indians always objected to taking their reserve with the Blackfeet.”¹⁰⁵

Determining the Population of the Blood Tribe

Since the Blood Tribe had not yet settled on its reserve, the Department of the Interior, and subsequently the Department of Indian Affairs, had some difficulty in calculating its population. These difficulties would continue until 1884.¹⁰⁶ The Department of Indian Affairs was faced with the obligation to pay annuity and distribute food rations to an unpredictably fluctuating Blood Tribe population while maintaining its policy of economic efficiency. As a result, efforts were made to verify the names of Blood Tribe members on the ration list and payroll.

Indian Commissioner Dewdney, when he was appointed to that post in May 1879, was instructed by the Department of the Interior to employ

the strictest possible economy consistent with the efficient administration of the affairs placed under your charge. You will be good enough to exercise special supervision over the details of expenditure called for in connection with the proposed farming agencies.¹⁰⁷

¹⁰⁴ Newspaper clipping, Gambler No. 1, *Fort Macleod Gazette*, July 8, 1882 (ICC Exhibit 1a, p. 412).

¹⁰⁵ Edgar Dewdney, Indian Commissioner, Ottawa, to Minister, Department of Interior, Ottawa, February 28, 1882, LAC, RG 10, vol. 3580, file 750 (ICC Exhibit 1a, p. 361).

¹⁰⁶ William Pocklington, Indian Agent, Treaty 7, Fort Macleod to Edgar Dewdney, Indian Commissioner, Manitoba and the North-West Territories, September 20, 1884, LAC, RG 10, vol. 1552, pp. 55–59; LAC, RG 10, vol. 3698, file 16106 (ICC Exhibit 1a, p. 1237).

¹⁰⁷ J.S. Dennis, Deputy Minister, Department of the Interior, Ottawa, to Edgar Dewdney, Indian Commissioner, Ottawa, May 30, 1879, LAC, RG 10, vol. 3635, file 6567 (ICC Exhibit 1a, p. 74).

In 1879, in one of his first acts as Indian Commissioner, Dewdney intervened in the distribution of rations to the Blackfoot and Sarcee, which he concluded to be excessive.¹⁰⁸ In his report dated January 2, 1880, Dewdney recounted his statements to the Blackfoot and Sarcee First Nations:

I informed them that I could not feed them here any longer, but that if they went to the Blackfeet Crossing and picked out a piece of land and assisted my men to get out fencing &c. I would feed those who worked and the sick.
They refused ...¹⁰⁹

Faced with the cost of feeding such a large population on a daily basis, the department attempted to be conscious of any perceived fraudulent claims being made by the First Nations against its system of ration distribution and the payment of annuities. Dewdney issued instructions to Colonel Macleod of the North-West Mounted Police on how he should issue rations to the Blood Tribe. In his report of January 2, 1880, Dewdney stated that

Col. MacLeod [*sic*] was very anxious to get distinct instructions about feeding the Indians. He stated that he expected some 2,000 Bloods at Fort MacLeod shortly ...

...

I was prepared, under the circumstances, to take my share of the responsibility of feeding the Indians, but I did not feel inclined to authorize any fixed rations, and I told him that the officers of the post must be guided by circumstances as they arose, and must use every precaution to economize and see that they were not imposed on by the Indians.

It appeared to me that the police officers of the different posts had been in the habit of issue supplies, more or less, to the Indians for some time, and they thought all they had to do was go to the forts and beg, and get what they wanted.

It thus made it very difficult to deny them food, but I do believe that there were occasions when the Government was imposed upon.¹¹⁰

¹⁰⁸ Edgar Dewdney, Indian Commissioner, NWT, Ottawa, to SGIA, Ottawa, January 2, 1880, Canada, *Report of the Deputy Superintendent-General of Indian Affairs 1879*, pp. 76–103 (ICC Exhibit 1a, p. 117).

¹⁰⁹ Edgar Dewdney, Indian Commissioner, NWT, Ottawa, to SGIA, Ottawa, January 2, 1880, Canada, *Report of the Deputy Superintendent-General of Indian Affairs 1879*, pp. 76–103 (ICC Exhibit 1a, p. 117).

¹¹⁰ Edgar Dewdney, Indian Commissioner, NWT, Ottawa, to SGIA, Ottawa, January 2, 1880, Canada, *Report of the Deputy Superintendent-General of Indian Affairs 1879*, pp. 76–103 (ICC Exhibit 1a, p. 119).

In 1880, the population of the Blood Tribe was recorded as 1,039 on the payroll. The comments indicate that most of the Tribe was south of the international boundary during the July 26–30, 1880, payments at Fort Macleod.¹¹¹ Missionary Samuel Trivett recorded the Blood Tribe's population at 3,400 in total, but only approximately 800 were living on the Canadian side of the international boundary.¹¹²

Dewdney also proposed a new system of distributing food rations. He wanted to connect the payment of the annuity to the receipt of rations with a ticket system. Those who received an annuity payment would receive a ticket entitling them to rations. For those without a ticket, a ration would not be issued. Since the government was obligated only to feed First Nations who received annuity payments, this ticket system was intended to control the ration system.¹¹³ The documentary record does not indicate if, or when, Dewdney's proposal was officially adopted; however, there is documentary evidence which suggests that Treaty 7 members were given one ticket to prove their entitlement to annuity payments and a separate ticket to prove their entitlement to rations.¹¹⁴

In 1881, the number of Blood Tribe members receiving rations was 3,146.¹¹⁵ In addition,

the Instructor [was] working under very great difficulties, in consequence of the large number of Indians who have lately arrived from across the line. His numbers have increased in the course of a few weeks from 800 to 3,300.¹¹⁶

¹¹¹ Paylist for 1880, July 26–30, 1880, Indian Affairs, Treaty annuity paylists, Treaties 4, 6, and 7, 1881, LAC, RG 10, vol. 9414 (ICC Exhibit 1g).

¹¹² Letter from Samuel Trivett, Missionary, to unidentified recipient, LAC, MG 17, B2, C.1 / 0, No. 10 (ICC Exhibit 1a, p. 184).

¹¹³ Edgar Dewdney, Indian Commissioner, NWT, Ottawa, to SGIA, Ottawa, January 2, 1880, Canada, *Report of the Deputy Superintendent-General of Indian Affairs 1879*, pp. 76–103 (ICC Exhibit 1a, p. 138).

¹¹⁴ C.E. Denny, Indian Agent, Treaty 7, DIA, Fort Macleod, NWT, to Edgar Dewdney, Indian Commissioner, DIA, Ottawa, January 22, 1882, LAC, RG 10, vol. 3574, file 167 (ICC Exhibit 1a, p. 350); C.E. Denny, Indian Agent, DIA, Fort Macleod, NWT, to SGIA, Ottawa, November 10, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 168–77 (ICC Exhibit 1a, p. 561).

¹¹⁵ Indian Agent N.T. MacLeod to unidentified recipient, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1881*, xxiv–xxv (ICC Exhibit 1a, p. 225); T.P. Wadsworth, Inspector of Indian Agencies and Farms, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1881*, 116–22 (ICC Exhibit 1a, p. 283).

¹¹⁶ Indian Agent N.T. MacLeod to unidentified recipient, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1881*, xxv–xxvi (ICC Exhibit 1a, p. 229).

In October 1881, Indian Agent N.T. MacLeod recorded a population at the “Blood Reserve [of] about 3,640 Indians.”¹¹⁷ The 1881 payroll indicates that 3,561 people were paid annuity during the August 10 and October 6, 1881, payments.¹¹⁸

By January 1882, it was clear to Department of Indian Affairs officials that the “ticket system” was not providing efficient ration distribution or annuity payments in the Treaty 7 territory. Indian Agent C.E. Denny reported on the difficulties:

I understand that a great deal of trouble is caused at the Crossing by the differences existing between the ration ticket the Indians hold and their Treaty ticket – It seems that a great many of them were paid for more people than they really have in their families, and as their ration ticket shew [sic] only the number they really have they think they are cheated. If you would allow me, I could get all their Treaty tickets back and issue them with new ones shewing [sic] the real number they have in their families – This will take a little time, and when I can get time, I will do it myself.¹¹⁹

The department continued to issue food rations and pay annuity to the Blood Tribe despite difficulties in determining its actual population. The department also continued to reduce the amount of food rationed to the Tribe. Inspector of Indian Agencies and Farms T.P. Wadsworth reported:

I returned here after making my Inspection of the Blood Reservation the day before yesterday. Whilst there it brought to my recollections, that it was at my visit there a year ago I fixed the flour ration at what it is 1/2 lb per soul. The Indians are as contented today as they were then when getting 1 lb, altho the Agent then thought it would not work at such a reduction. It is from making such savings as this to the Department I have my title to increase of pay. I know it is only my duty to cause retrenchment in expenditure, but I [say] the difference between one man and another is to make retrenchment without injury to the service, and I think too it is an honour

¹¹⁷ N.T. MacLeod, Indian Agent, “Statement of Number of Indian Reserves in Treaty 7,” LAC, RG 10, vol. 1549, p. 16 (ICC Exhibit 1a, p. 271).

¹¹⁸ Paylist for 1881, July 26–30, 1881, Indian Affairs, Treaty annuity paylists, Treaties 4, 6, and 7, 1881, LAC, RG 10, vol. 9415 (ICC Exhibit 1g, p. 125).

¹¹⁹ C.E. Denny, Indian Agent, Treaty 7, DIA, Fort Macleod, NWT, to Edgar Dewdney, Indian Commissioner, DIA, Ottawa, January 22, 1882, LAC, RG 10, vol. 3574, file 167 (ICC Exhibit 1a, p. 350).

to be the first to conceive just where and when to do it: I trust Sir you will not overlook my claims to either promotion or increase of salary.¹²⁰

In August 1882, Wadsworth reorganized the administration of the Treaty 7 agency, making Indian Agent Denny solely responsible for the “Bloods, Piegans, and Pincher Creek Supply Farm.”¹²¹

Wadsworth instructed Denny as follows:

You will also be able to give much personal attention to the office of the Agency which from my own observation I found sadly in need of it. I must particularly urge upon you the necessity of being present as often as possible at the killing, receiving and issuing of the beef to the Indians upon the Blood and Piegan Reservation as I have already instructed Mr. Pocklington to be at the Blackfeet, Sarcee and Stoney. I am sure the Department will expect this duty of you as it takes in the largest expenditure in this Treaty.

...

The system of issuing rations has been very loosely conducted almost everywhere in this Treaty, in a measure this might have been owing to poor scales, now that we have good scales I trust that you will see that the Indians receive their full ration of 1/2 lb flour and 1 lb meat per soul. The issuer of rations must be notified that every pound of provisions issued by him must be entered immediately in his books and the true reason (if it is an extra issue) given why it is issued the system has prevailed to save both beef and flour in rationing and then issue this surplus without “rhyme or reason” and make no note of it as the quantity has already been covered by the entry for the days rations.¹²²

Inspector Wadsworth reported his displeasure with the distribution of rations in Treaty 7 in another report in August 1882:

¹²⁰ T.P. Wadsworth, [Inspector of Indian Agencies and Farms], Pincher Creek Supply Farm, DIA, Pincher Creek, to L. Vankoughnet, DSGIA, Ottawa, June 13, 1882, DIAND, Enclosure file B8260-157, vol. 2d (ICC Exhibit 1a, pp. 396–97).

¹²¹ T.P. Wadsworth, Inspector of Indian Agencies and Superintendent of Farms, Fort Macleod, NWT, to C.E. Denny, Indian Agent, Fort Macleod, NWT, August 5, 1882, LAC, RG 10, vol. 3609, file 3380 (ICC Exhibit 1a, pp. 484–85).

¹²² T.P. Wadsworth, Inspector of Indian Agencies and Superintendent of Farms, Fort Macleod, NWT, to C.E. Denny, Indian Agent, Fort Macleod, NWT, August 5, 1882, LAC, RG 10, vol. 3609, file 3380 (ICC Exhibit 1a, pp. 484–86).

You will no doubt learn from my letters that I am a good deal upset by Mr. Denny's conduct ...

... [Although] there were 200 Indians visiting at Fort MacLeod the ration list was very little reduced as they had left their ration tickets behind, and as I suppose Mr. Denny fed these Indians here the Gov't was rationing them twice over.¹²³

In September 1882, Assistant Indian Commissioner E. T. Galt instructed Indian Agent Denny as follows:

Issuing of Rations to Indians on Reserves.

The daily ration issued to Destitute Indians while living in their reservations must not exceed one pound of beef and one half pound of flour, and where Indians have harvested vegetables, the ration of flour should be reduced as much as possible. Extra rations should be issued only for work in connection with the operating of the respective farm Agencies, or in matters connected with the management of the Indian Agency, and then [may] Beef and Flour only be issued. Where the Head Chief has been receiving extra rations, the same practices may be continued. Where it is known that Indians are away from other Reserves, the ration issued to the parties representing them must be correspondingly reduced. Indians should be required to present their ration tickets before food is issued to them.¹²⁴

Following the September 25, 1882, treaty annuity payments on the Blood reserve, Indian Agent Denny reported: "We made a reduction on last year's payments, finding several cases of duplicate tickets. ... I had new ration tickets issued to correspond with the pay tickets."¹²⁵

The department continued to work on reducing rations and curtailing what it perceived to be fraudulent claims. On October 5, 1882, Assistant Indian Commissioner Galt reported as follows:

Food Issues.

There are 7,850 Indians on the Ration list in this Treaty, to whom is issued a daily ration of 1 pound of Beef and 1/2 pound of Flour, at a cost to the Government of

¹²³ T.P. Wadsworth to unidentified recipient, [c. August 31, 1882], LAC, RG 10, vol. 3609, file 3380 (ICC Exhibit 1a, pp. 506–7).

¹²⁴ E. T. Galt, Assistant Indian Commissioner, DIA, Fort [Macleod], Alta., to C.E. Denny, Indian Agent, Treaty 7, DIA, Fort [Macleod], Alta., September 30, 1882 (ICC Exhibit 1a, pp. 517–22).

¹²⁵ C.E. Denny, Indian Agent, DIA, Fort Macleod, NWT, to SGIA, Ottawa, November 10, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 176 (ICC Exhibit 1a, p. 561).

about \$981 per day. It is anticipated, however, that the crops raised by the Indians this year will permit a reduction of 1/4 pound in the Flour ration, which will effect a saving to the Gov. in money value of about \$157 per day, or a diminution in the total ration of 17%.

... I have impressed upon the Indian Agent [Denny], and the Sub Indian Agent [Pocklington] the necessity of seeing for themselves that the issuing of rations at the various Reservations is made with the greatest possible economy, and start a [illegible] check is established to prevent Indians from drawing rations for members of their families who may at the time be absent from their Reserves and also, that a few extra rations as possible be issued.¹²⁶

In his annual report to the Governor General, John A. Macdonald, Superintendent General of Indian Affairs (SGIA), reported:

The Bloods, Blackfeet and Sarcees are said to be decreasing in number; while the population of the Piegiens and Stonies remains about the same.

The annuity payments under this treaty were considerably curtailed in the aggregate amount disbursed when compared with the payments of previous years. Owing to the Indians being all on their reserves for a length of time previous to pay day, an opportunity, which they never previously had, was afforded the officers of the Department to detect a number of frauds which had been systematically practised in previous years by the Indian annuitants on the paying officers. Similar frauds in connection with issues of rations having been detected, a corresponding reduction under that head has also been made.¹²⁷

According to the 1882 Blood Tribe payroll, 3,542 members were paid annuity during the September 25–28 payments.¹²⁸ One month later, Assistant Indian Commissioner Galt reported that “[t]he number of Indians living on this Reserve is very large, there being no less than 3,600 souls in all.”¹²⁹

¹²⁶ E. T. Galt, Assistant Indian Commissioner, to Indian Commissioner, Winnipeg, Man., October 5, 1882, LAC, RG 10, vol. 3637, file 7134 (ICC Exhibit 1a, pp. 537–38).

¹²⁷ John A. Macdonald, SGIA, Ottawa, to Sir John Douglas Sutherland Campbell, Marquis of Lorne, Governor General of Canada, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, ix–xix, xliii (ICC Exhibit 1a, p. 628).

¹²⁸ Paylist for 1882, September 25–28, 1882, Indian Affairs, Treaty annuity paylists, Treaties 4, 6, and 7, 1882, LAC, RG 10, vol. 9415A (ICC Exhibit 1g, 154).

¹²⁹ E. T. Galt, Assistant Indian Commissioner, to Indian Commissioner, LAC, RG 10, vol. 3637, file 7134 (ICC Exhibit 1a, p. 535).

SURVEY OF THE BLOOD RESERVE, 1882–83

The government was aware that reserves in the prairies had not yet been surveyed. Sir John A. Macdonald, then Superintendent General of Indian Affairs, realized that surveys had to be a priority if the department was to prevent “future complications,” given the “rapid settlement” in the area.¹³⁰

In June 1882, Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs (DSGIA), reported that Indian Commissioner Edgar Dewdney had instructed John C. Nelson to lay out the limits of the Blood reserve.¹³¹ On October 5, 1882, E.T. Galt, Assistant Indian Commissioner, informed Indian Commissioner Dewdney that the survey of the Blood reserve was “completed” in the summer and stated:

These Indians have been living on their Reserve pretty steadily since last Fall, and have built for themselves 200 houses. Their main camp is located on the Belly River, about 2 miles below where the Kootenie River joins it, and smaller camps are scattered along the banks of the Belly River, for about 5 miles above, and 6 miles below the main camp. The land chosen last spring for farming operations was well selected, small patches of land being broken for them along the river bottom. ...

The number of Indians living on this Reserve is very large, there being no less than 3,600 souls in all.¹³²

On December 29, 1882, John C. Nelson submitted his report of the surveyed boundaries of Indian reserves in Treaties 4 and 7 to the Superintendent General of Indian Affairs. Nelson described the limits of the Blood reserve as follows:

This large reserve occupies a tract of country lying between, and bounded by, the St. Mary’s and Belly rivers, from their junction below Whoop-up to an east and west line which forms its south boundary, as shown by the accompanying sketch marked (e). This east and west line lies about nine miles north of the International Boundary.

¹³⁰ John A. Macdonald, SGIA, Ottawa, to John Douglas Sutherland Campbell, Marquis de Lorne, Governor General of Canada, Ottawa, December 31, 1881, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1881* (ICC Exhibit 1a, pp. 297–302).

¹³¹ L. Vankoughnet, Deputy Superintendent General, to E.T. Galt, Assistant Indian Commissioner, June 27, 1882, LAC, RG 10, vol. 4452, pp. 153–54 (ICC Exhibit 1a, pp. 407–8).

¹³² E.T. Galt, Assistant Indian Commissioner, to E. Dewdney, Indian Commissioner, October 5, 1882, LAC, RG 10, vol. 3637, file 7134 (ICC Exhibit 1a, pp. 534–35).

Commencing near Whoop-up, a careful traverse was made of the St. Mary's River, up to the International Boundary.¹³³

Nelson also stated in this report that the area of the Blood reserve measured some 650 square miles (416,000 acres, or enough land for approximately 3,250 people according to the terms of Treaty 7) and that by mid September he had begun to survey the Peigan reserve, leaving "a part of the Blood Reserve to be finished later in the season."¹³⁴ Nelson went on to mention that the best quality land was found in the southern portion of the reserve and at Lee's Creek. Nelson also noted that "a man named Cochrane has improvements on the reserve near Stand-off."¹³⁵ Nelson returned to the Blood reserve on October 6, 1882, and "finished" the survey by October 12, 1882.¹³⁶

In January 1883, Nelson wrote to the DSGIA, providing additional information about the uncertain boundaries of the Blood reserve, and stated that other squatters were living in the area of the reserve:

If this reserve is to extend all the way to the junction of these rivers it will include the old whiskey trading post called Whoop-Up and the bottom upon which it stands. This place is still occupied by a Mr. David Akers one of the pioneer Indian traders of the country.

I do not see any special advantage in taking Whoop-Up and the surrounding bottom into the reserve for the following reasons viz:

(1) Mr. Akers may ask a big figure for his improvements the intrinsic value of these to the department lies only in the logs of cotton-wood timber of which the buildings are composed.

(2) The bottom at Whoop-Up is very gravelly and Mr. Akers has his farm or field on the north side of Belly River on that account.

¹³³ John C. Nelson, Dominion Land Surveyor, to SGIA, December 29, 1882, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1882* (ICC Exhibit 1a, p. 601).

¹³⁴ John C. Nelson, Dominion Land Surveyor, to SGIA, December 29, 1882, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1882* (ICC Exhibit 1a, pp. 595 and 601).

¹³⁵ John C. Nelson, Dominion Land Surveyor, Indian Reserve Surveys, DIA, Ottawa, to SGIA, December 29, 1882, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1882*, 220 (ICC Exhibit 1a, p. 601). Cochrane had a lease in this area and is discussed further below.

¹³⁶ John C. Nelson, Dominion Land Surveyor, Indian Reserve Surveys, DIA, Ottawa, to SGIA, December 29, 1882, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1882*, 221 (ICC Exhibit 1a, p. 602).

By keeping out of the reserve the section of land partly bounded by the pink margin on the sketch, the people at Whoop-Up will have no claims against the Department.¹³⁷

In the summer of 1883, Nelson received instructions from Indian Commissioner Dewdney to re-survey the southern boundaries of the reserve “in conformity with the terms of the amended Treaty.”¹³⁸ Nelson began the survey on July 12, 1883, and noted “that owing to the rapidly decreasing census of this tribe, the area of the Reserve surveyed by me last year required considerable reduction. This was effected by shifting the south boundary further northward as shewn [sic] by the maps.”¹³⁹ Nelson’s survey map shows an area of 547.5 square miles (350,400 acres, or enough land for approximately 2,737 people according to the terms of Treaty 7).

Also in July 1883, prior to the 1883 annuity payments, Indian Agent Denny reported that he had succeeded in further reducing the number of Blood Tribe members receiving rations.¹⁴⁰ In his report regarding the Blood Tribe’s 1883 annuity payments, Indian Agent Denny confirmed his reduction of the number of Blood Tribe members receiving both annuity and rations, eliminating 936 names from the payroll:

I have the honor to forward the Blood Pay-Sheets for this year, and to report that against \$18,110 paid last year, we have paid out this year \$13,190 being a reduction of \$4,930 or 936 people less. The money has been given to the Bloods at former payments as they asked for it, and as I have known for some time back that there was not the number represented, I determined to get them down to their number this year, but the work was not a pleasant one.

...

¹³⁷ John C. Nelson, Dominion Land Surveyor, Indian Reserve Surveys, DIA, Ottawa, to DSGIA, Ottawa, January 15, 1883, LAC, RG 10, vol. 3622, file 4948 (ICC Exhibit 1a, pp. 634–35). David Akers was a squatter on a part of what was the Blood reserve on the west side near the St Mary River. The “Akers claim” is another specific claim filed by the Blood Tribe; it has been accepted for negotiation and has nothing to do with this claim.

¹³⁸ John C. Nelson, In Charge Indian Reserve Surveys, to E. Dewdney, Indian Commissioner, December 1, 1883, LAC, RG 10, vol. 3668, file 10525 (ICC Exhibit 1a, pp. 941–42).

¹³⁹ John C. Nelson, In Charge Indian Reserve Surveys, to E. Dewdney, Indian Commissioner, December 1, 1883, LAC, RG 10, vol. 3668, file 10525 (ICC Exhibit 1a, pp. 954–55).

¹⁴⁰ C.E. Denny, Indian Agent, Treaty 7, DIA, Fort Macleod, NWT, to SGIA, Ottawa, July 10, 1883, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1883*, 78–84 (ICC Exhibit 1a, p. 763).

I have not yet got the Bloods down to their proper number, but am getting near it. It is not so much the money the Dept. saves by this reduction as the amount saved in rations which by this payment, will be very large indeed, as we shall now ration them by the new numbers.

I issued new pay tickets all around.

Your instructions to me were to make the last years pay-books a basis to pay on, this I could not do, the Indians being so much overpaid but I should recommend that the pay-books of this year, be taken in future as a basis to go by.

...

The reduction has been great and the saving in rations will be very large.¹⁴¹

Elder Andrew Black Water explains that a reduced population may have occurred at this time because “they had another distribution and there was lesser people that came for the distribution. But most of our people would be way down south in the Sweet Grass Hills and east of that.”¹⁴²

In a memorandum dated September 29, 1883, Chief Surveyor W.A. Austin noted in his examination of Nelson’s return of Indian reserve surveys that

[i]t is useless to examine this Reserve without further data. ...

The Blood Indian reserve plan is made out at 6 miles to an inch and no traverses could be laid down to be correctly checked on such a scale considering the short distances of some of the lines.¹⁴³

On a related note, there are references in the members’ oral history to survey markers being seen around the current Blood Tribe Reserve. It should be noted that the exact location of these markers is unknown and some do not refer to the Big Claim lands at all. Elder Margaret Hind Man states:

¹⁴¹ C.E. Denny, Indian Agent, DIA, Fort Macleod, NWT, to Edgar Dewdney, Indian Commissioner, September 28, 1883, LAC, RG 10, vol. 3637, file 7130; vol. 1550, pp. 669–74 (ICC Exhibit 1a, pp. 844–54).

¹⁴² ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 123–24, Andrew Black Water).

¹⁴³ Memorandum of W.A. Austin, Chief Surveyor, c. September 29, 1883, LAC, RG 10, vol. 3621, file 4753 (ICC Exhibit 1a, p. 861). See also “Plan on a scale of forty chains to one inch, showing the Survey of the Southern Boundary of the Blood Indian Reservation lying between the Belly & St. Mary’s Rivers with a Key Plan on a scale of six miles to an inch,” John C. Nelson, DLS, August 1883, [Natural Resources Canada, 323 CLSR AB] (ICC Exhibit 7a, M-06).

I personally saw some survey markers in and around where [I] lived, and [I] also talked with Alfred Blood that worked at the Mike McIntyre ranch near the Milk River area where he used to ride. And that there were survey markers there, too, and on the sign it was very clear Blood Indian Reserve was on them. And when we started bringing up these land claim issues, they started disappearing.

...

He said the markers were about six inches diameter and looked like brass, yellow / gold top that encircled the marker. But they were also worn by the cattle scratching against those markers. ... There were several of them that were along the Milk River close to the U.S. border.¹⁴⁴

Elder Pat Eagle Plume states that he also personally saw survey markers on leased land in “an area southeast of Cardston” for the Blood Tribe Reserve or, rather, what he referred to as survey pails:¹⁴⁵

I was working at a ranch for a rancher by the name of Mellenberg. And there were five families from Cardston that were prominent at that time, and they used to round the people up for different duties.

And while I was working for Mr. Mellenberg, we were having a branding. And while we were getting the cattle together, my boss came to me and said, you come with me. And we went to a place northwest from where we were. And there was a hill that we went up to, and there was the pail ...

...

There were government documents that were in there and that when the lease expires, they would be retrieved. And we would go according to what’s contained in the lease, and that was to give the land back.¹⁴⁶

Elder Pat Eagle Plume further states:

When the whole discussion really picked up about the Big Claim, Mr. Edward Little Bear came to pick me up and asked me to take him to the place where I saw this marker. We went to that very place, the same place where the gate was. We went

¹⁴⁴ ICC Transcript, August 30–31, 2004 (Exhibit 5a, pp. 384, 389, 399, Margaret Hind Man). Elder Margaret Hind Man could have lived in the area of “Thirty Trees” or Lee’s Creek; see ICC Transcript, August 30–31, 2004 (Exhibit 5a, p. 379, Margaret Hind Man).

¹⁴⁵ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 387, Pat Eagle Plume, and p. 388, Diana Kwan).

¹⁴⁶ ICC Transcript, August 30–31, 2004 (Exhibit 5a, pp. 387, 389, Pat Eagle Plume).

through, and there were roads right by the oil patch. And we got there, and it wasn't there anymore.

...

And, furthermore, his boss took him to some other markers from there. And around one of the markers, there were a lot of tepee rings, including one that was a prominent leader, a person that was in charge and leader of where they would camp, when they would break camp, and where they would go. And the tepee rings and where the rocks are laid out indicate such a person.¹⁴⁷

Elder Stephen Fox also has stories about survey markers.

I was told at the south side there were markers. On the south side of the Reserve, south end of the Reserve, towards the United States, what we call the United States, the south, there were markers.

There was a marker, it was a cylindrical pipe. It had the identifications BIR identifying the Blood Indian Reserve. The people that were marking them went east. I don't know how many miles, but maybe it was six miles. This is where they had – that they had another marker. They put another marker there.

Then they went south. I don't know the directions. They said it was used to mark the west side of Raymond. The McIntyre ranch, the people that were working at the McIntyre ranch saw the pipe, they saw the marker. They said they then went that way.

...

... I don't know how far they went. They went on the west side and put another marker there. The hired hands used that. They would follow the trail. Across the side by Lee's Creek, there was another marker. Our leader at that time, Eh man na – his relations were Tall Man. Mike Blood told me. He was on horseback. He was riding beside his grandfather. His grandfather was riding in a wagon. They were shortening our original territory. Our land went right up to Montana. He asked them, why are you decreasing our Reserve? He said he was not going to accompany them anymore.¹⁴⁸

Elder Stephen Fox also states:

Some years ago, we went by BB Flats, which was by the Timber Limits. Before the highway was widened, I drove there with Mike Eagle Speaker. We were

¹⁴⁷ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 390, 399, Pat Eagle Plume).

¹⁴⁸ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 427–28, Stephen Fox).

on Lifetime Council at the time, we were members of the Lifetime Council. We were told to go check the widening of the highway.

Mike Eagle Speaker said he was going to go down and check the side of the road. When we were there, we saw another marker. The marker clearly indicated it was the Blood Indian Reserve.

...

I was told that the survey went along right up to the Kootenay River. There was another marker or another pipe that was located there. They then went along the Kootenay River. The river was the natural boundary. They did not need to place a marker there. They said that the natural boundary was the indication of our territory.¹⁴⁹

Significance of the Big Claim Lands

The Blood Tribe does not accept the boundaries of its reserve as surveyed by John C. Nelson in 1882 and 1883. Instead, the Blood Tribe's oral history consistently describes the spiritual / cultural and practical significance of the Big Claim lands, and consistently maintains that the land which Red Crow retained for the Tribe is the Big Claim lands area. Elder Mary Louise Oka describes it:

I heard that from the confluence of the river to the Kootenay to Chief Mountain, Red Crow always used the Belly River, Red Crow always camped by the water. He always also camped at the Belly Buttes. His parents were buried at the Belly Buttes along with his relatives.

When he said he was moving home, he was moving home to this area and to the Belly Buttes. He did not say that he was surrendering any land.¹⁵⁰

Elder Frank Weasel Head offered further insight into what Red Crow meant when he announced that he was "going home" after treaty and where Red Crow understood his home to be at the time:

When Red Crow moved home, he said I'm going home to the Belly Buttes and Chief Mountain, to the mouths of these rivers. To him, he still wasn't conscious of the border, because the mouth of the St. Mary's River goes into Montana. Chief Mountain is located between the two rivers. Why would he say I'm going home to Chief Mountain and the Belly Buttes? So he wasn't fully – yes, he might have been – but it didn't matter to him. A lot of us today take it as an artificial boundary. Doesn't matter to us. It's there, that it is there.

¹⁴⁹ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 428–29, Stephen Fox).

¹⁵⁰ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 184, Mary Louise Oka).

So this is again referred the home base, the area. ... This was the best land. This was the best land.¹⁵¹

The home base of the Blood Tribe is bounded on the west by the Kootenay (Waterton) River and extends to the mountains at the border. While a portion of the Blood Tribe's present-day reserve includes the Blood home base, the Big Claim area covers portions that are considered to be sacred grounds to the Blood Tribe. Sacred grounds are explained as

the very essence of our people, ... that's where our perception comes from. In terms of our relationship with what's out there. Every part of creation. And we go back once a year to relive, to reexperience, to revive, and to sustain that essence.¹⁵²

Blood Tribe oral history and custom indicates that land which has been deemed sacred remains sacred in perpetuity.¹⁵³

The Elders explained the spiritual and practical significance of the area between the Kootenay (Waterton) River and the Belly River, as well the area south of the current reserve's boundary.

Confluence of the Belly and Kootenay (Waterton) Rivers¹⁵⁴

Indian Agent N.T. MacLeod described the Blood reserve as being located "at the junction of the Belly and Kootenay Rivers."¹⁵⁵ According to Blood Tribe oral history, the tribe had lived on the land between the Kootenay (Waterton) and Belly Rivers and the area is significant to the Blood Tribe.

¹⁵¹ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 459–60, Frank Weasel Head).

¹⁵² ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 15, Andrew Black Water).

¹⁵³ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 18, Andrew Black Water).

¹⁵⁴ Sometimes referred to as "Willows into the Creek" or "Willows into the River."

¹⁵⁵ N.T. MacLeod, Indian Agent, Fort Macleod, to unidentified recipient, November 2, 1880, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1880*, 85–87 (ICC Exhibit 1a, pp. 177–79). In some of the historical documents, the point at which the Belly and Kootenay Rivers meet is referred to as the confluence, the junction, or the fork. In this history, confluence will be used.

Elder Rosie Red Crow testified that the Blood Tribe once held its sacred Sundance ceremonies on the land between the Waterton and Belly Rivers.¹⁵⁶ Hugh Dempsey reports that “there is ample evidence that the holy Sun Dance ceremonies were held between the Waterton and Belly rivers in the 1880s.”¹⁵⁷ Elder Pat Eagle Plume also supports this knowledge, stating: “It was an important area, and the place of many spirits, a place that was considered sacred. And we still use it today as they used it back then.”¹⁵⁸

Elder Adam Delaney spoke of other reasons for the spiritual significance attributed to this area:

[T]he most important thing in our culture as an Indian and the religion especially. Where the two rivers meet, right at the end, way up there where the Belly River and the Kootenay or Waterton River, I’m going to show you guys. The most important thing in our religion, this is where the root, the strongest in our religion, that’s where we got it, and I got one.¹⁵⁹

Elder Frank Weasel Head was born and raised on this parcel of land near the confluence of the Kootenay and Belly Rivers and is familiar with the history of his people’s relationship to this land. He stated:

I did see some ... frameworks or foundations and tepee rings with the land that is now owned – I shouldn’t say owned. I should really say to us, the Hutterites are borrowing or trespassing in that area. I seen that, and he told us of what we now have, the gathering of the Tribe, our sacred grounds on top.

And from what – I heard ... a lot of the camps were held there, ceremonies were held there, until we were forced or chased across the river to the top there.¹⁶⁰

¹⁵⁶ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 152–53, Rosie Red Crow).

¹⁵⁷ Hugh A. Dempsey, “Report on Research for The Big Claim Blood Tribe / Kainaiwa” (July 8, 1997), 24 (ICC Exhibit 2f, p. 24).

¹⁵⁸ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 394–95, Pat Eagle Plume).

¹⁵⁹ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 248, Adam Delaney).

¹⁶⁰ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 464–65, Frank Weasel Head).

Elder Rosie Day Rider also spoke of the Tribe's use of this land:

[W]e still use it today, and even in the past we always felt a part of the place where the river flows from the mountains. And back then, our people went up there to use it for various reasons, including getting tepee poles as well as for some of the berries or plants we using for flooring. We use them for medicinal purposes. It was those things that we used back then are still true today, it helps for our healthy bodies – to have healthy bodies.¹⁶¹

Elder Andrew Black Water further emphasized:

[I]t's so important for us to try and regain that land so we can continue to utilize, you know, the resources as well as having access to those sacred grounds that we hold very dearly and for our survival. And then, of course, going up the other way sii tookata – land between the two rivers, our people did a lot of hay cutting and sold the hay to this rancher, and we utilize that area quite a bit grazing our horses.¹⁶²

Elder Louise Crop Eared Wolf indicated that the river bottoms in this area were traditionally used “for wintering in the wintertime. The water's nearby and the firewood is nearby. The game is plentiful, and the herbs are there in the fall, that when they get ripe, that's when we pick them. That everything is there for the living.”¹⁶³

Elder Margaret Hind Man summarized both the practical and the spiritual significance of this area to the Blood Tribe. She recalled the reasons why the Blood Tribe chose to winter there, stating “it was close to getting wood for kindling, and the water source was there, and we didn't have to go too far. We carried the kindling on our backs, and the water wasn't far.”¹⁶⁴ Elder Margaret Hind Man further states that the Blood Tribe used this land “[f]or some of our most sacred ceremonies, some

¹⁶¹ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 210, Rosie Day Rider).

¹⁶² ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 88, Andrew Black Water).

¹⁶³ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 372, Louise Crop Eared Wolf).

¹⁶⁴ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 378, Margaret Hind Man).

of the plants that were used were all along that area, from the confluence all the way up to Waterton Lakes.”¹⁶⁵

It is not clear how the Blood Tribe lost the use of this area. Elder Rosie Red Crow tells the story of how “[t]hey told us to leave that area, there was going to be a flood. They also told us not to have the Sundance anymore. They scared us of everything.”¹⁶⁶ Elder Margaret Hind Man offered another explanation:

There was a white man that we referred to as the person with a tall house. And he had longhorns, and he sent his herd on where we used to camp. And he told us that these longhorns were very dangerous, that you better move back across the river. And that was another way of them taking land from us, of what we used to use it for.¹⁶⁷

Land South of Present-Day Reserve and Chief Mountain

Prior to the 1882 and 1883 surveys of the Blood Tribe Reserve, the Tribe enjoyed a long history of living on and using the land that extended south of the present-day reserve to Chief Mountain. Elder Louise Crop Eared Wolf indicates that the Blood Tribe had used the land near

Lee Creek, what they call Lee Creek now. It’s south of the place where they – our people call the Place of Thirty Trees, and that was around that place where Red Crow was residing at that time.

And he – the reason why he called the place the Place of Thirty Trees was that our people were cutting down the trees and getting them to dry up and using them as firewood, and one day Red Crow was walking in the woods, and he noticed that there were only thirty big trees left. So he took some rag, and he tied on the trees in strips. He tie them, he counted, there were thirty. And he went to his people and he told them, there’s only thirty big trees there. I don’t want you to cut anymore. We leave those trees there.

So they call it the place of Thirty Trees, Ne ip uks ku. And so Lee Creek is not that far from it. That’s the place around where the Heavy Runner’s family are today. That’s around there.¹⁶⁸

¹⁶⁵ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 379, Margaret Hind Man).

¹⁶⁶ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 153, Rosie Red Crow).

¹⁶⁷ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 382, Margaret Hind Man).

¹⁶⁸ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 352, Louise Crop Eared Wolf).

The Blood Tribe used the southern portion of the Big Claim lands for subsistence and ceremonial needs. Elder Rosie Red Crow elaborated on this point, saying that “[t]he timber that we used was from that area and we would float them down the river.”¹⁶⁹ Elder Andrew Black Water stated “that was the only place that we can still secure lodge poles, but now we’re able to access those from other areas, you know, along the Foothills. But our people relied on that area.”¹⁷⁰

This area was also used for berry harvesting. Elder Andrew Black Water further stated, “depending on the time of the year as to when berries ripe, eh, they would ripe a little earlier going east from the mountains, and then they would ripe quite late in the mountains, so our people still kind of in the fall time go up to that, we call BB Flat, to harvest.”¹⁷¹ Elder Adam Delaney explained the ceremonial significance of berries to Blood Tribe culture by explaining their use. “That’s what we use, our religion, you know. That’s all it would take. And the hymns, you know, the Holy Communion. Only we use berries, you know. You know, that’s when we have our Sundance, we have to have fresh berries, you know. They grew by that time.”¹⁷²

Elder Frank Weasel Head summarized the multipurpose uses of this land:

That area was important for its resources to sustain our people. There was a lot of deer, antelope, small game. And today, as we sit in here, we get hot, we get very uncomfortable if we’re overly dressed in thick clothing. The buffalo, the elk, their hides were quite thick. The deer and the antelope, their hides were thinner. Those were used for our summer clothing.

And, again, plants grow. And, again, as I said before, I’m not going to go into the medicinal and spiritual part, but trying to also go into the practical part of it. Certain plants grow there that were good for nutritional value, to supplement our diets. Again, I go back to my grandmother. She used to dig up plants from the Mother Earth and wash them. And as children, not for medicinal purposes, to make – but to feed us for nutritional value, to sustain our diets. So all our resources were, part of our resources were also there. So it’s important.¹⁷³

¹⁶⁹ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 157, Rosie Red Crow).

¹⁷⁰ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 120, Andrew Black Water).

¹⁷¹ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 120, Andrew Black Water).

¹⁷² ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 276, Adam Delaney).

¹⁷³ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 470–71, Frank Weasel Head).

Blood Tribe oral history asserts that the southern portion of the Big Claim lands are significant in terms of maintaining the integrity of the Blackfoot Confederacy and the relations and connections among the Confederacy's constituting nations. Elder Pat Eagle Plume states:

That was our connection to our relations, the South Peigan. Our land goes all the way down to Yellowstone, and we have interests in all of our traditional land. Very important to us.

Some of the South Peigan came up north to where the Porcupine Hills are now, and now they're the North Peigan. And where we made Treaty at Blackfoot Crossing is where the Siksika are now today. We are all related.

We speak the same language. We all have relations, the same ceremonies. So our connection to our relatives are those lands in question.¹⁷⁴

Traditionally, the nations of the Blackfoot Confederacy travelled freely within its territory, which was divided by the international boundary. The southern portion of the Big Claim lands allowed the Blood Tribe access to its southern relations, the Blackfeet or South Peigans, and vice versa. Because of the establishment of the current reserve's southern boundary, the Confederacy's mobility and the north / south connection were disrupted. Elder Andrew Black Water elaborated on this point:

[W]e have our southern brothers and sisters, the Blackfeet. Now, we're very close to them and we have relatives across there too, and I always had – the understanding was that we need to continue to link up the two land bases so we can continue to have movement north and south, you know. And today it really is unfortunate that we're not able to communicate or at least remain connected with our relatives down there. My grandfather's sister, that's where she married and located, and today I don't even know my relatives down there. So it becomes quite serious for some of us in terms of marriages, if we don't know who our relatives [are] now. Chances might be that we might marry our own relatives, and basically that's a no-no in Indian culture, especially with ours. So we do – we did a lot of trading, exchanging items with our southern brothers.¹⁷⁵

¹⁷⁴ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 396, Pat Eagle Plume).

¹⁷⁵ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 90–91, Andrew Black Water).

Chief Mountain is located within Glacier National Park in northwestern Montana, due south of Waterton Lakes National Park, in southwestern Alberta. Blood Tribe oral history consistently emphasizes the importance of Chief Mountain. Elder Andrew Black Water states:

There's a long history behind Chief Mountain, and some of the gifts in terms of sacred items and songs were secured there by way of vision quests of our people. Blackfoot name is [Spkg Blackfoot]. That's Chief Mountain in our language. Today there's still quite a few of our people that travel up there to do their vision quests.¹⁷⁶

Elder Andrew Black Water also made it clear that Red Crow claimed the land between the two rivers to the source in the mountains, and that Waterton Lake is the source of the Kootenay and St Mary Rivers in the mountains.¹⁷⁷ Elder Louise Crop Eared Wolf speaks of the spiritual significance of this area:

[T]he mountains are sacred. Whenever we go to Waterton Lake or we go past the mountains, and we think about the mountains as a lot of power coming, and we feel the presence. We always feel some tranquility when we go into the mountains, and we feel a presence, and we know they are sacred.¹⁷⁸

An explanation of the sacredness of this area was offered by Elder Pete Standing Alone.

One of the Beaver Bundles was acquired at Waterton Lakes. This Blood Indian, his name is Pah khi khi ka, Muddy Feet, I guess. His wife was taken in by the, I guess you would call them underground people, or Su et apiksi.

... And she was given the pipe, this Beaver Bundle pipe. And then they went back south to – back into this world, and they had a ceremony where the under people talked about. All the songs, anything that needs to be known about the Beaver Bundle, how to use it.

¹⁷⁶ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 39, Andrew Black Water).

¹⁷⁷ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 91–92, Andrew Black Water).

¹⁷⁸ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 371, Louise Crop Eared Wolf).

And up to now, they're still in existence and people are still using them as instructed, and that is one of the important things that I heard about the lands between these two rivers.¹⁷⁹

AMENDMENT TO TREATY 7

Three errors were made by the Crown in the surrender of the Blood Tribe's interest in the Bow River reserve. The first mistake occurred in 1880, when Red Crow purportedly agreed on behalf of the Blood Tribe to exchange its "rights, titles and privileges whatsoever to the lands included in said Treaty, provided the Government will grant [them] a Reserve on the Belly River in the neighbourhood of the Mouth of the Kootenai River," apparently with no vote of the adult male members taken at a meeting of the Tribe, as required by the *Indian Act*.¹⁸⁰

A second error in the surrender of the Blood Tribe's interest in the Bow River reserve, the failure to obtain a surrender of the joint interest from the Blackfoot Tribe, was noticed by Sir John A. Macdonald in 1883. In the spring of 1883, construction of the Canadian Pacific Railway had reached Alberta, and land was required for railway purposes in an area previously assigned to the Blood Tribe within the Bow River reserve. In a Memorandum to Council, Macdonald wrote that, at the time of the Blood Tribe's interest in 1880, Crowfoot, the Chief of the Blackfoot, was absent from the reserve, hunting buffalo in the United States, and did not return until the spring of 1881. Macdonald considered it "imperative" that the surrender by the Blackfoot Tribe was required in order for the surrender of the Blood Tribe's interest to comply with *Indian Act* provisions.¹⁸¹ Macdonald recommended "His Honour Lieut-Governor Dewdney, Commissioner of Indian Affairs, conjointly with Col. James Macleod, Stipendiary Magistrate, be empowered to hold a council of the Blackfeet Indians and obtain the Surrender required."¹⁸² It is unclear why Macdonald did not extend the same principle to the Sarcee Tribe's interest in the Bow River reserve.

¹⁷⁹ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 419, Pete Standing Alone).

¹⁸⁰ Surrender, Blood Band to the Crown, dated September 25, 1880, in LAC, RG 10, vol. 1427, pp. 16–17 (ICC Exhibit 1a, pp. 166–67).

¹⁸¹ Memorandum to Council, April 12, 1883, LAC, RG 10, vol. 1083 (ICC Exhibit 1a, p. 681).

¹⁸² Memorandum to Council, April 12, 1883, LAC, RG 10, vol. 1083 (ICC Exhibit 1a, p. 682).

An Order in Council dated April 25, 1883, officially authorized Dewdney and Macleod to obtain the surrender from the Blackfoot Tribe.¹⁸³ In his report, Dewdney stated that he met with the “Blackfeet Indians in Council”¹⁸⁴ and obtained the surrender on June 20, 1883. The surrender document states:

Know all men by these presents, that we, the Blackfoot Indians, being a majority of the male members of the Blackfoot Band of the full age of twenty-one years, assembled in council duly called for the purpose of considering the surrender of the reserve hereinafter mentioned, and in presence of the Honourable Edgar Dewdney, the Lieutenant-Governor of the North-West Territories, and Commissioner duly authorized to attend said council, do hereby assent to ratify and confirm a certain treaty made and concluded the twentieth day of June last past between Her Majesty the Queen, by Her Commissioners, the said the Honourable Edgar Dewdney and James Farquharson MacLeod, C.M.G., of the one part, and the Blackfoot Indians by their Head and Minor Chiefs, of the other part.

And in consideration of the terms of the said Treaty, we do hereby unanimously release and surrender to Her Majesty the Queen all the land reserved to the said Blackfoot Indians, under and by virtue of a certain treaty made and concluded on the twenty-seventh day of September, in the year of Our Lord one thousand eight hundred and seventy-seven.¹⁸⁵

On June 27, 1883, Dewdney and Macleod obtained a similar consent from the Sarcee,¹⁸⁶ and on July 2, 1883, another surrender was taken from the Blood Tribe.¹⁸⁷ In a letter dated September 24, 1883, Dewdney explained why he obtained the surrender of the Sarcees and the Blood Tribe: “It was found however desirable during these negotiations, to obtain the surrender of the Sarcees to their

¹⁸³ Order in Council, April 25, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt. 1 (ICC Exhibit 1a, pp. 687–88).

¹⁸⁴ Edgar Dewdney, Blackfoot Crossing, to SGIA, Ottawa, June 20, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt. 1 (ICC Exhibit 1a, p. 736).

¹⁸⁵ Amendment to Treaty 7, June 20, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 130 (ICC Exhibit 1b, p. 22).

¹⁸⁶ Amendment to Treaty 7, June 27, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 136 (ICC Exhibit 1b, p. 30).

¹⁸⁷ Amendment to Treaty 7, July 2, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 134 (ICC Exhibit 1b, p. 28).

interest in the Blackfeet Reservation as well as to obtain a formal surrender from the Bloods who had formerly only given a conditional one.”¹⁸⁸

According to the July 2, 1883, Blood Tribe surrender, by relinquishing its interest in the Bow River reserve, the Blood Tribe would receive:

All that certain tract of land in the North-West Territories, Canada, butted and bounded as follows, that is to say: Commencing on the north bank of the St. Mary's River at a point in north latitude forty nine degrees twelve minutes and sixteen seconds (49° 12' 16"); thence extending down the said bank of the said river to its junction with the Belly River; thence extending up the south bank of the latter river to a point thereon in north latitude forty-nine degrees, twelve minutes and sixteen seconds (49° 12' 16"), and thence easterly along a straight line to the place of beginning; excepting and reserving from out the same any portion of the north-east quarter of section number three, in township number eight, in range twenty-two, west of the Fourth Principal Meridian, that may lie within the above mentioned boundaries; to have and to hold the same unto the use of the said Blood Indians forever.¹⁸⁹

However, no affidavits were sent with the surrender documents. On July 10, 1883, DSGIA L. Vankoughnet wrote to Indian Commissioner Dewdney, stating: “Blackfoot surrender received but no Affidavit by yourself and Chief before a Judge or Stipendiary Magistrate attached. This absolutely necessary under Act. Please have one made also to the Surrender by the Bloods and Sarcees when taken.”¹⁹⁰ Although the July 2, 1883, document is described as “Articles of a Treaty,” it essentially comprised a surrender of the Blood Tribe’s interest in the Bow River reserve in exchange for new reserve lands. As there was no provision to “amend the treaty” in the *Indian Act*, it can be assumed that Vankoughnet wanted the surrender provisions of the 1880 *Indian Act* followed.¹⁹¹ By the time Vankoughnet’s note was written, all three surrenders had been taken by Dewdney and Macleod; each

¹⁸⁸ Edgar Dewdney, Indian Commissioner, to the Superintendent General, September 24, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt. 1 (ICC Exhibit 1a, pp. 841–42).

¹⁸⁹ Amendment to Treaty 7, July 2, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 134 (ICC Exhibit 1b, p. 28).

¹⁹⁰ L. Vankoughnet, Deputy Superintendent General, to Edgar Dewdney, Indian Commissioner, July 10, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt. 1 (ICC Exhibit 1a, pp. 768–70).

¹⁹¹ *Indian Act*, SC 1880, c. 26, s. 37 (1, 2). The difference between the 1876 and 1880 *Indian Acts* with reference to surrenders is the section number. The clauses are identical.

of them having been signed by Dewdney, Macleod, and the head Chief and minor Chiefs of the respective tribes.

In a letter to Dewdney dated July 7, 1883, Vankoughnet wrote:

I regret to have to inform you that the articles of Treaty enclosed by you cannot be submitted to His Excellency in Council for acceptance until the fact that the Release or Surrender of the portion of the old Reserves ceded by said articles of Treaty are assented to by a majority of the male members of the Band at a Council or meeting summoned for the purpose shall have been certified on oath before a Judge or Stipendiary Magistrate by yourself and fellow Commissioners and by the Head Chief or one of the Principal men of the Blackfoot Indians.

I have further to call your attention to the fact that the Release or Surrender made by the Blood Indians on the 25th of September, 1880 has never been forwarded to this Department. A copy of the same was sent in your letter of the 30th of November 1880; but it is necessary that the original should be submitted to His Excellency in Council for acceptance and that it should subsequently be registered in the Registrar General's Office; and unless the same has been certified on oath in the manner before described by yourself and Col. McLeod, who was appointed by Order in Council of the 26th of March, 1880 Joint Commissioner with you to hold council of the Blackfoot Indians at that time, and by one of the Chiefs or Principal men of the Blood Band, the same will not be legal, nor can it be submitted to His Excellency for acceptance.

A certified copy of the Articles of Treaty last made with the Blackfoot Indians and referred to in the first part of this letter is enclosed herein, with a view to the Certificate of them being made and attached thereto. It is considerably safer to retain the original in the Department and the certified copy will answer sufficiently all purposes for the Certificate under oath required by the Act.

...

P.S. There would appear to be no objection, if it is found more convenient to do so, to the Certificate under oath being made separately before Judge or Stipendiary Magistrate by each of the Special Commissioners and by the Chief or one of the Principal men, as it would not appear necessary that the Certificate should be made jointly by the above parties at the same time and before the same Judge or Stipendiary Magistrate.¹⁹²

In reply to Vankoughnet's request, Macleod wrote to Dewdney, stating:

¹⁹² L. Vankoughnet, Deputy Superintendent General, DIA, Ottawa, to Edgar Dewdney, Indian Commissioner, DIA, Regina, July 7, 1883, LAC, RG 10, vol. 4469, pp. 667-73 (ICC Exhibit 1a, pp. 754-58).

I regret very much to state that I was quite unaware of the provisions of section 37 of the Indian Act. My attention was never directed to it and I have had very little to do with Indian affairs for the last four years. It never occurred to me but that the Indians could release their reserves in the same manner as they released their rights to the larger territories by the first treaties.

It is of course impossible for me, and I could not ask any Chief or principal man, to certify as required by the Act, for the simple reason that the releases were not assented to by a majority of the male members of the Bands of the full age of 21 years, at a meeting or council thereof, summoned for that purpose according to their rules.

The Council held was composed of the Chiefs and minor Chiefs. The Indians in question have no rules for summoning such a Council as the Act speaks of. I may be wrong, but I feel quite certain that neither "Crowfoot" nor "Meekasto", nor indeed "Bulls Head" would sit in such a council where any "Buck" of twenty one had the same voice as either of them. You will remember at the Blackfoot Crossing how touchy Crowfoot was [illegible] the minor Chiefs taking part in the discussion.¹⁹³

Edgar Dewdney forwarded Macleod's letter to Vankoughnet on October 24, 1883. Dewdney recounted his version of the negotiations:

I think his remarks are worthy of consideration & I agree with his views in regard to the advisability of conferring upon the Chiefs more power in important deliberations of this nature than upon ordinary Indians of the Band.

He is mistaken however when he states that the releases were not assented to by a majority of the male members of the Bands of the full age of 21.

The Chief was notified for what purpose the Council met & the meeting was held I believe in accordance with the rules governing the Band & in compliance with S. S. I sec 37, & all the male members of the band attended who took an interest in the negotiations, in fact on an occasion of that kind it would be impossible to keep them away.

Although the Chiefs were the ones who took the most active part in the negotiations, before the signing took place numbers of the minor Chiefs & some of the ordinary Indians expressed satisfaction at the decision & were unanimous in their consent, there was not a dissentient voice in the whole of the negotiations, consequently there was no occasion for a vote.

¹⁹³ James Macleod, Fort Macleod, to Edgar Dewdney, Indian Commissioner, DIA, Regina, July 31, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt.1 (ICC Exhibit 1a, pp. 802-3).

If it is found absolutely necessary that the affidavits should be taken, I see no other course but to ask Col. Richardson to accompany me to Treaty 7 and take them. Col. Macleod being one of the Commissioners I presume would not be eligible.

I would suggest however in view of future negotiations [sic] whether it would not be well to amend claim 37 & its sub-sections 1 & 2 so as to give the Chief & Minor Chiefs more power and allow them to express the voice of the Band.

It is most difficult at times to persuade the Indians to make their marks & far more difficult to persuade them to kiss the bible. Crowfoot has never yet made his mark but deposes another to do it for him.¹⁹⁴

In reply to Dewdney's suggestion that the Chiefs be given greater power to unilaterally surrender reserve land, Deputy Superintendent General Vankoughnet advised Superintendent General Macdonald, that,

however inconvenient the omission to comply with these requirements in the case of the surrender of a portion of the Blackfoot Indian Reserve obtained by the Indian Commissioner and by Stipendiary Magistrate McLeod, he does not, consider that it would be well to give by legislation the powers suggested by the Indian Commissioner of the North West Territories to Chiefs and Headmen of surrendering on behalf of their Bands the lands held in common by the Tribe or Band. Every member of the Band has as much interest in the Reserve so held as the Chief or Chiefs have; and it appears to the undersigned that, if the suggestion to give power to the Chiefs to surrender their lands were acted upon, it might open the door to serious abuses, as all that would be required in order to obtain a surrender of a Reserve or part of a Reserve would be to induce the Chiefs to grant the same, and this would soon result it is feared in the subversion of Indian rights in their lands to their prejudice.

It is in the opinion of the undersigned safer to let the law remain as it is, It has worked well hitherto, and it should not be changed unless after long deliberation it is concluded that it will be in the interests of the Indians to make a change.¹⁹⁵

On December 18, 1883, Superintendent General Macdonald wrote to Dewdney attaching the "treaties" and requesting that he and Macleod get them verified under the Act. Macdonald stated:

¹⁹⁴ Edgar Dewdney, Indian Commissioner, DIA, Regina, to SGIA, Ottawa, October 24, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt. 1 (ICC Exhibit 1a, pp. 879–81).

¹⁹⁵ L. Vankoughnet, DSGIA, Ottawa, to John A. Macdonald, SGIA, Ottawa, November 20, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt. 1 (ICC Exhibit 1a, pp. 928–31).

Vankoughnet has sent you back your Blackfeet Treaties in order to get them verified under the Act.

The provision is not a new one as MacLeod supposes.

It is to be found in the Act of 1876. The original treaties of surrender with the Indians are with the Nations & can therefore be dealt with by the Chiefs.

But where a specific Indian Reserve has been established each member of the band has a legal interest in the Reserve, a title in fact of which he cannot be deposed [sic] without his assent.

You had better take MacLeod with you. He can administer the affidavits as Stipendiary Magistrate, though he was a Commr. The assent of the majority present is only required and if they were aware of the terms of the Treaty & did not dissent, it may be held & properly held to be a unanimous decision.¹⁹⁶

In his annual report of the Department of Indian Affairs to the Governor General in Council, Superintendent General Macdonald referred to the 1883 surrenders and stated: “[S]o soon as some slight informalities in connection with the execution of the surrender have been rectified – which is necessary in order to render the same strictly legal – the documents will be submitted to Your Excellency for confirmation.”¹⁹⁷

On January 29, 1884, Dewdney arrived on the Blood reserve to obtain a third surrender from Red Crow and his followers. Band members were notified on January 30 and 31 that a meeting would be held on February 1, 1884, “to make a final settlement.”¹⁹⁸ The meeting included “a majority of the male members of the Blood Band of the full age of 21 (twenty-one) years, assembled in council, duly called for the purpose of considering the surrender of the reserve.”¹⁹⁹ Shortly thereafter,

¹⁹⁶ John A. Macdonald, Privy Council, to Edgar Dewdney, December 18, 1883, (ICC Exhibit 1a, pp. 976–77).

¹⁹⁷ John A. Macdonald, Superintendent General, to Marquess of Lansdowne, Governor General in Council, January 1, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year ended 31st December 1883*, liv (ICC Exhibit 1a, p. 1035).

¹⁹⁸ Unidentified author, note to file, undated, H. Dempsey, “An Unwilling Diary” (1959) 7:3 *Alberta Historical Review* 9 (ICC Exhibit 1a, p. 1060).

¹⁹⁹ Surrender No. 203, February 1, 1884, Blood Tribe to the Queen, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 132–33 (ICC Exhibit 1b, pp. 26–27).

both the Sarcee²⁰⁰ and the Blackfoot²⁰¹ signed their surrenders as well. All documents were witnessed by James F. Macleod as a Stipendiary Magistrate and Edgar Dewdney in his position of Indian Commissioner and Lieutenant Governor.

In compliance with the instructions given to him by Macdonald, Dewdney forwarded

the original Articles of Surrender and Treaty made the 20th June 1883 between Her Majesty the Queen, represented by myself and James Farquharson Macleod, C.M.G. as Commissioners of the one part and the Blackfoot Indians by their Head and Minor Chiefs of the other part, also similar Articles of Surrender and treaty between Her Majesty and the Sarcee Indians dated 27th June 1883 as well as the original of those signed by the Blood Indians on 2nd July 1883 and represented in the same manner.

Annexed to each of the foregoing will be found articles duly signed by the Chief representing a majority of the male members of the tribe, over the age of twenty one years confirmatory of the original surrender duly executed in accordance with sub-section one of section 37 of the Indian Act –

Attached to each of the latter are certificates on oath to comply with the requirements of the second sub-sec. of the Act.²⁰²

The surrenders were submitted to Council on February 26, 1884.²⁰³ The Amendment to Treaty 7 was approved by Order in Council PC 400 on January 24, 1885.²⁰⁴

The third error in securing the surrender of the Blood Tribe's interests in the Bow River reserve was noticed in April 1886. Fort Whoop-Up had been erroneously included within the boundaries of the Blood reserve. The amended treaty stated that the northeast quarter of section 3

²⁰⁰ Surrender No. 204, February 4, 1884, Sarcee Band to the Queen, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 136–37 (ICC Exhibit 1b, pp. 30–31).

²⁰¹ Surrender No. 202, February 7, 1884, Blackfoot Band to the Queen, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 128–29 (ICC Exhibit 1b, pp. 22–23).

²⁰² Edgar Dewdney, Indian Commissioner, Manitoba and NWT, DIA, Regina, to SGIA, Ottawa, February 9, 1884, LAC, RG 10, vol. 6620, file 104A-1-1, pt.1 (ICC Exhibit 1a, pp. 1122–23).

²⁰³ Copy of Submission to Council, LAC, RG 10, vol. 1085, pp. 403–9 (ICC Exhibit 1a, pp. 1146–52).

²⁰⁴ Order in Council PC 400, January 24, 1885, LAC, RG 2(1), vol. 460, January 24, 1885 (ICC Exhibit 1a, pp. 1281–94).

was “excepted” from the reserve when in actuality it was the northwest quarter section.²⁰⁵ Assistant Indian Commissioner Hayter Reed wrote to James Macleod, explained the situation, and provided instructions to correct the error. Reed stated that,

in the making of the Treaty with the Blood Indians made on the 3rd of July 1883 & signed by you as one of Her Majesty’s Commissioners, a Clerical error appears to have occurred, by which the N.E. of Section three in Township 8 Range 22, West of the 4 principal meridian is reserved from the land set aside for the use of these Indians instead of the N.W. of that section which it was desired to exclude from the Blood Res. on account of the claim which David Evans Akers would have to it. Whoop-up being located thereon.

It is therefore desired to have this mistake rectified and this would have to be done in the presence & with the consent of the Indians by one of the Commissioners who made the treaty with them & the fact that it was so done would have to be sworn to by him & one of the Chiefs before a Stipendiary Magistrate.²⁰⁶

On September 9, 1886, the necessary changes were made through a sworn statement.²⁰⁷ The Blood reserve, with the eastern, western, and northern boundaries established in 1882 and the southern boundary surveyed in 1883, was approved by Order in Council PC 1151, dated May 17, 1889. The Order in Council describes the reserve as follows:

It is bounded by a line beginning on the left bank of St. Mary’s River, at a point in north latitude forty-nine degrees, twelve minutes and sixteen seconds, thence down the said bank of the said river to its junction with the Belly River, thence up the southern bank of the latter river to a point thereon in latitude forty-nine degrees, twelve minutes and sixteen seconds, thence east along a straight line to the point of beginning; containing an area of five hundred and forty-seven and one half square miles, more or less. Excepting and reserving from out the reserve any portion of the north-west quarter of section three, township eight, range twenty-two, west of the fourth initial meridian that may be within the above mentioned boundaries. The greater portion of the reserve is a high dry undulating plain. Its principal

²⁰⁵ Edgar Dewdney, Indian Commissioner, to Superintendent General, April 3, 1886, LAC, RG 10, vol. 7765, file 27103-1 (ICC Exhibit 1a, pp. 1481–82).

²⁰⁶ Hayter Reed, Regina, to James Macleod, Fort Macleod, May 10, 1886, LAC, RG 10, vol. 3622, file 4948 (ICC Exhibit 1a, pp. 1490–91).

²⁰⁷ Amendment to Treaty 7, Blood Tribe to the Queen, LAC, RG 10, vol. 3622, file 4948, and Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 194–95 (ICC Exhibit 1b, pp. 22–28).

topographical feature is, Belly Butte (Mokowanis) a well known landmark with lofty escarpments of clay, facing Belly River. The principal Indian settlement is on the Belly River at Belly Butte, Turnip Hill (Massir-e-to-mo) is on the northern part of the reserve on the trail from Whoop-Up to Slide Out; Fishing Creek enters the reserve near the south-west corner and empties into the Belly River; and Lee's Creek which enters near the south-east corner, empties into the St. Mary's. There are two large valleys in the reserve, called respectively, Buffalo *coulée* on the western side, which opens into the valley of the Belly River and Prairie Blood or St. Mary's *Coulée* on the eastern which opens into that of the St. Mary's.²⁰⁸

It is important to note that the surrenders, or attempts to obtain them from the Blood Tribe, were sought during a time when the boundaries of the Blood reserve were still unknown by the Blood Tribe. It was not until 1888 that Red Crow was shown the boundaries of the reserve. In a letter to the Superintendent General dated November 12, 1888, Surveyor John C. Nelson recounted showing the boundaries to Red Crow:

I found these Indians had no idea of an artificial boundary, such as a line of mounds, their method of defining a tract of land being by means of natural boundaries, such as rivers, lakes and mountains, and they seemed to be unable to understand any other. Red Crow said he would visit the south boundary with us, and after seeing it would know what it was and where it was. Mr. Pocklington explained that the area of land allotted them, is in excess of what their number called for, according to the stipulations of the original treaty at the Blackfoot Crossing; and some of the land claimed by Red Crow is in the United States.²⁰⁹

SETTLEMENT OF THE BIG CLAIM LANDS

Grazing Leases on the Big Claim Lands

According to the documentary record, the first non-Blood Tribe occupants of the Big Claim lands acquired the land through grazing leases. In the early 1880s, the dominion government made the settlement of the west a priority and began to develop policies to this end.

²⁰⁸ Order in Council PC 1151, May 17, 1889, in Nelsons' Book, and LAC, RG 2(1), vol. 539, May 17, 1889 (ICC Exhibit 1e, p. 4).

²⁰⁹ John C. Nelson, In Charge, Indian Reserve Surveys, to Superintendent General, November 12, 1888, LAC, RG 15, vol. 544, file 15737 (ICC Exhibit 1a, p. 1775). This event will be covered more thoroughly in the next section of this history.

One of the purposes of the National Policy of Sir John A. Macdonald's Conservative government was to exercise Canadian governmental authority over the largely uninhabited territories of the Northwest. An important aspect of that policy involved the encouragement of large, well-capitalized companies or syndicates to acquire vast tracts of land considered too dry for ordinary agriculture, to carry on the business of ranching. To carry out the policy, the Dominion Government approved new grazing regulations in May 1881 which allowed non-residents to acquire up to 100,000 acres of land at a nominal rent for up to twenty-one years, and a number of large ranching companies were organised by eastern Canadian investors to take advantage of the new scheme.²¹⁰

Blood Tribe oral history includes few references to leases. Elder Pete Standing Alone stated:

I don't really hear anything off the Blood Reserve. I heard they were, the lands south of Cardston were leased out to ranchers.

...

They leased the whole Reserve, anything that is not fenced.²¹¹

An Order in Council issued in April 1882 granted a total of 46 leases in the North-West Territories, a number of which were in the immediate vicinity of the Blood reserve and the Big Claim lands.²¹² The documentary record indicates there were four major leases of Big Claim land that are at issue here; details are provided in the following sections.

Leases between the Belly and Kootenay (Waterton) Rivers

Fred Wachter Lease

Although little is known about this lease (no. 33), it appears that it was granted to G.F. Wachter in 1880.²¹³ In a letter dated October 15, 1880, Indian Agent MacLeod reported that the Wachter Ranch

²¹⁰ Teresa Homik, "Kainaiwa Big Claim Confirmation Report," February 11, 1998 (ICC Exhibit 3a, p. 16). All of this information is based on Order in Council PC 803(a), May 20, 1881, as amended by Order in Council PC 1710(a), December 23, 1881. These Orders in Council are not part of the record for this inquiry.

²¹¹ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 299, 240, Pete Standing Alone).

²¹² Order in Council PC 722, April 11, 1882, LAC, RG 2 (ICC Exhibit 1a, pp. 376–84).

²¹³ Pamela Keating, Research Manager, Specific Claims Branch, Policy and Research Directorate, DIAND, Ottawa, to Lesia S. Ostertag, Barrister, Phillipow and Company, Saskatoon, Sask., October 27, 1997 (ICC Exhibit 1a, p. 2516). The 1880 Order in Council referred to in this document is not part of the record for this inquiry.

was located at the confluence of the Kootenay and Belly Rivers.²¹⁴ Order in Council 722, issued on April 11, 1882, described the location more accurately as “[t]hat portion north-west of Belly River of Township number six, Range twenty-five, west of the fourth meridian,” totalling 7,000 acres.²¹⁵

Cochrane Ranch Lease

The Cochrane Ranch lease was located between the Belly and Kootenay Rivers, adjacent to the Wachter Ranch.²¹⁶ Cochrane acquired this land through two leases, which were transferred to him by the Eastern Townships Ranch Company (lease no. 34)²¹⁷ and the Rocky Mountain Cattle Company (lease no. 25).²¹⁸

The Eastern Townships Ranch Company held a lease for

[t]hose portions between the Belly and Kootenai Rivers of Townships Five and six in Range Twenty-six and Township Five in Range Twenty-seven all West of the Fourth Meridian in the North-West Territories, containing Thirty-three thousand acres more or less.²¹⁹

The Rocky Mountain Cattle Company leased 73,500 acres of:

The land between the Belly River and the Kootanie [sic] River, and its north fork and between the northern limit of Township number four, and the northern limit of Township number one, and extending westwardly to the western limit of Range twenty-nine.²²⁰

²¹⁴ N.T. MacLeod, Indian Agent, Blood Reserve, to Edgar Dewdney, Indian Commissioner, DIA, Regina, NWT, October 15, 1880 (ICC Exhibit 1a, p. 171).

²¹⁵ Order in Council PC 722, April 11, 1882, LAC, RG 2 (ICC Exhibit 1a, p. 379).

²¹⁶ “Leases Adjoining the Blood Reserve,” author unknown, undated (ICC Exhibit 7n).

²¹⁷ Order in Council PC 834, April 17, 1883, LAC, RG 2 (ICC Exhibit 1a, p. 683).

²¹⁸ Order in Council PC 835, April 17, 1883, LAC, RG 2 (ICC Exhibit 1a, p. 684).

²¹⁹ Indenture, Deputy Minister of Interior and Eastern Townships Ranch Co., March 20, 1883 (ICC Exhibit 1a, pp. 611–14).

²²⁰ Order in Council PC 722, April 11, 1882, LAC, RG 2 (ICC Exhibit 1a, p. 378).

The Cochrane Ranch also leased 100,000 acres of land (lease no. 42) south of the first lease and west of the York lease (see below). The description is as follows:

The part north of Elbow River of Township twenty-four, and Township twenty-five in Range three; Townships twenty-five and twenty-six, in Range four, and the east halves of Townships twenty-five and twenty-six in Range 5, all west of the 5th meridian.²²¹

In August 1891, it was proposed through a Submission to Council that the Cochrane Ranch lease be exchanged for an equal area of other lands, the lease of which would allow homesteading entry.²²² In September 1891, an Order in Council approved the relocation of the ranch from between the Kootenay and Belly Rivers, to land south of the Blood Tribe reserve within the Big Claim lands area.²²³ It should be noted that, aside from the name, there is no obvious connection between the Cochrane Ranch Co. and the “squatter” named Cochrane who was paid to surrender his homestead at Standoff when the Blood Tribe Reserve was established thereon.²²⁴

Leases on Southern Big Claim Lands

Parks / North West Land and Grazing Company Lease

On December 30, 1882, John H. Parks leased 66,000 acres (lease no. 30) comprising all of the land south of the reserve to the international boundary,²²⁵ more particularly described as follows:

Township one, and part [east] of Lee’s creek of Township two, in Range twenty-six. That part West of the St. Mary’s River of the Northern one-third of Township one, also all West of said River of Township two, in Range twenty-five, and the portion

²²¹ Order in Council PC 722, April 11, 1882, LAC, RG 2 (ICC Exhibit 1a, p. 380).

²²² Edgar Dewdney, Minister, Department of Interior, Ottawa, to Governor General in Council, Privy Council Office, Ottawa, August 26, 1891 (ICC Exhibit 1a, pp. 2046–48).

²²³ Order in Council PC 2149, September 12, 1891, LAC, RG 2 (ICC Exhibit 1a, pp. 2049–50, 2052).

²²⁴ L. Vankoughnet, Deputy Superintendent General, DIA, Ottawa, to unidentified recipient, April 2, 1855, LAC, RG 10, vol. 3637, file 7134; Deputy Superintendent General’s letterbook, LAC, RG 10, vol. 1087, pp. 550–54 (ICC Exhibit 1a, pp. 1320–24).

²²⁵ “Leases Adjoining the Blood Reserve” (ICC Exhibit 7n).

West of said River of Township two Range twenty-four, and the East-half of Township one in Range twenty-seven, all West of the Fourth Principal Meridian.²²⁶

In April 1883, Parks transferred the lease to the North West Land and Grazing Company, of which he was president.²²⁷ In June 1883, the North West Land and Grazing Company was notified that its lease conflicted with the southern boundary of the Blood Tribe Reserve. The Department of the Interior's position was based on the 1882 southern reserve boundary, since the 1883 survey was not undertaken until July of that year.²²⁸ It was proposed that the description of the lease be amended as follows:

Township one, and part East of Lee's Creek of the South half of Township 2 in Range 26. That part west of and adjacent to the St. Mary's river, of the Northern one-third of Township one, also all West of and adjacent to said river, of the South half of Township 2, in Range 25, The East half of Township one, and that part East of and adjacent to Lee's Creek of the South half of Township 2 in Range 27, containing an area of 62,000 acres more or less, all West of the 4th Meridian in the North West Territories.²²⁹

In September, 1883, Parks replied (through his secretary):

Having Received a Report from the Manager who went out for the purpose of commencing operations, he finds that the portion sought to be deducted is by far the most valuable part of the range, having the most eligible site for the home farm and corral, and – what is an important matter when there is danger of raids by American Indians across the border – it is the portion furthest from the American boundary.

The Manager also writes that the Indian Commissioner informs him that the Reserve is not actually located yet, and Mr. Parks wishes me to ask if it will not be

²²⁶ Indenture, Deputy Minister of Interior and John H. Parks, December 30, 1883 (ICC Exhibit 1a, pp. 611–14); Schedule, December 30, 1883 (ICC Exhibit 1a, p. 618).

²²⁷ John H. Parks, Saint John, NB, to Sir John A. Macdonald, Minister of the Interior, Ottawa, April 12, 1883, LAC, RG 10, vol. 1233, file 241713 (ICC Exhibit 1a, p. 636).

²²⁸ A. Russell, Department of Interior, to W. Pugsley, Secretary, North West Land & Grazing Co. (Ltd), Saint John, NB, June 22, 1883, LAC, RG 15, vol. 1233, file 241713 (ICC Exhibit 1a, pp. 740–41).

²²⁹ A. Russell, Department of Interior, to W. Pugsley, Secretary, North West Land & Grazing Co. (Ltd), Saint John, NB, June 22, 1883, LAC, RG 15, vol. 1233, file 241713 (ICC Exhibit 1a, pp. 740–41).

possible to retain the lease as it now is, and have the Southern boundary of the Reserve on the Northern line of the Second Township. He would respectfully submit that he made this selection, when nearly the whole of the grazing lands were open to him to choose from, and if, at that time, this piece, consisting of nearly half of one township and portions of two others, probably 20,000 acres in all, had not been included, he says that he would likely not have taken the tract at all, and he certainly would not have done so with the information since obtained from the Manager, but would have selected a ranche in some other locality, nearly the whole, as before stated, being at that time open.

Under the circumstances he feels that he is only asking what is reasonable and just in urging that the lease may be allowed to stand as now executed.²³⁰

On February 25, 1885, the Department of the Interior informed the North West Land and Grazing Company that the boundary confusion was considered settled, stating as follows:

I am directed to say, that a few days ago, a plan was received in this Department from the Department of Indian Affairs, showing the boundaries of the Blood Indian Reserve, by which I see that the reserve as it is now established, does not interfere with the grazing lands leased by this Department to Mr. John H. Parks.

I am to say that on receipt at this office of an assignment of the lands question in duplicate from Mr. Parks to the North West Land and Grazing Company, together with the registration fee of \$2.00 and ground rent of the lands described in the lease, amounting to \$1405.80 / 100, the Minister of the Interior will recommend to Council that the assignment be registered in this Department.²³¹

The lease to John H. Parks and the North West Land and Grazing Company was subsequently cancelled by Order in Council PC 1837, dated July 18, 1890, due to failure to “comply with the provisions” contained therein.²³²

²³⁰ W. Pugsley, Jr, Secretary, Office of the North West Land and Grazing Company (Ltd), Saint John, NB, to John A. Macdonald, Minister of the Interior, September 5, 1883, LAC, RG 15, vol. 1233, file 241713 (ICC Exhibit 1a, pp. 824–26).

²³¹ P.B. Douglas, Assistant Secretary, Department of the Interior, Ottawa, to W. Pugsley, Secretary, North-West Land and Grazing Co., Saint John, NB, February 25, 1885, LAC, RG 15, vol. 1223, file 241713 (ICC Exhibit 1a, pp. 1304–6).

²³² Order in Council PC 1837, July 18, 1890, LAC, RG 2 (ICC Exhibit 1a, pp. 1987–88).

York Grazing Company Lease

On April 11, 1882, York Grazing Company was granted a lease consisting of 77,000 acres on land on the southwest side of the southern Big Claim lands to the Belly River (lease no. 13). The description is as follows:

That part west of Lee's Creek of Township two in Range twenty-six, Township two in Range twenty-seven; that part east of Belly River of Township two in Range twenty-eight; the west half of Township one, Range twenty-seven, and Township one, Range twenty-eight, all west of the fourth meridian.²³³

The York lease was also affected by the confusion concerning the Blood reserve's southern boundary. Order in Council PC 147 of February 6, 1886, was issued to rectify the situation. It reads:

The Minister further submits, that under date 8th January, 1886, an Order in Council was passed, cancelling the Order above recited, for the failure on the part of the Company to comply with the conditions imposed by the several Regulations and Orders in Council, governing the disposal of grazing lands.

The Company now state that this failure, on their part, to comply with the said Regulations arose from the fact, that subsequent to the passing of the Order in Council of the 11th April, 1882, before mentioned, an alteration was made in the Southern boundary of the Blood Indian Reserve, by which a portion of the tract accorded to the Company was included in the reserve, reducing the area of their ranche from Seventy-seven thousand acres, to Forty-nine thousand three hundred acres, and that owing to this reduction of area, they were prevented from making the financial arrangements necessary to enable them to comply with the Regulations in question.

The Minister represents that the statement made by the Company's Agent concerning the Southern boundary of the Blood Indian Reserve is correct, and that now the Southern boundary of the Blood Indian Reserve has been moved so far to the North as not to cover any part of the tract formerly promised to the Company, he, the Minister, recommends upon the request of the Company through their Agent, that the original area of Seventy-seven thousand acres be granted to them, and that he be authorized, under the Regulations and Orders in Council in that behalf now in force, to issue a lease for grazing purposes to the "York Grazing Company," for the tract of land hereinbefore described, upon payment being made of the rental for the same for the half-year commencing on the 1st March, 1886 ...²³⁴

²³³ Order in Council PC 722, April 11, 1882, LAC, RG 2 (ICC Exhibit 1a, pp. 376–84).

²³⁴ Order in Council PC 147, February 6, 1886, LAC, RG 2 (ICC Exhibit 1a, pp. 1460–66).

This lease was eventually cancelled, by Order in Council, on December 22, 1888, due to the failure of York to comply with lease stipulations.²³⁵

Mormon Colony and the Blood Reserve Boundary Dispute

In the spring of 1887, a Mormon colony was established at Lee's Creek or the Place of Thirty Trees.²³⁶ The colony was located within the 1882 southern boundary of the Blood reserve (nine miles from the U.S. border) but outside of the 1883 southern boundary (14 miles from the U.S. border). Lee's Creek is also situated north of the Parks lease. The colonists met on June 19, 1887, and decided to move the colony's townsite:

[I]t was thought best to locate the town on the bench on the south side of Lee's Creek, provided water could easily be obtained, if not, to build on the creek ... but owing to quicksands the wells, which the settlers attempted to dig, caved in; hence that location was given up as a townsite and in July (following) the present Cardston townsite was selected and surveyed."²³⁷

The historical documents indicate that the establishment of the Mormon Colony at Lee's Creek prompted Red Crow to complain about and inquire into the southern boundary. The presence of the Mormon Colony was noted by the Blood Tribe and Indian Agent Pocklington. Pocklington wrote to Dewdney asking to be provided with the exact location of the southern boundary of the Blood reserve, about which he was apparently uncertain despite his position of authority on the reserve at that time. On September 13, 1887, J.S. Dennis, Inspector of Surveys, wrote to the Surveyor General stating that he had almost completed the subdivision of township 3, range 25, west of the

²³⁵ Order in Council PC 2718, December 22, 1888, LAC, RG 2 (ICC Exhibit 1a, pp. 1800–1).

²³⁶ "Kainaiwa Big Claim Historical Report," prepared by Joan Holmes and Associates Inc. (September 1994), p. 58 (ICC Exhibit 2a, p. 58); ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 352, Louise Crop Eared Wolf).

²³⁷ Mormon Archives, Salt Lake City, Excerpts of the Manuscript History of the Alberta Stake and the Historical Minutes of the Cardston Ward, 1886–1894 (ICC Exhibit 1a, p. 1629).

4th meridian on behalf of the Mormons.²³⁸ On September 26, 1887, Pocklington acknowledged that he had received a map with the information he requested from Dewdney.²³⁹

On December 2, 1887, John C. Nelson, the surveyor who had surveyed the Blood reserve in 1882 and 1883, wrote to Assistant Indian Commissioner Hayter Reed in reply to a letter of November 22, 1887, in which Reed had requested a report “on the claim of Chief Red Crow (Mekasto) to the country situated to the west of the present recognized boundary of his reserve and between it & the Rocky Mountains.”²⁴⁰ Surveyor Nelson responded that the Blood Tribe “have no claim to the country above mentioned, vide amended Treaty of July 2nd, 1883.”²⁴¹ In a marginal notation on this letter an unidentified person wrote “should be south probably.”²⁴² Nelson went on to state:

I may add that a large number of colonists came into the country last spring, from Salt Lake Utah, U.S.A., & formed a settlement along the south boundary of the Blood Reserve near It’s south east corner, & this influx of American may possibly have alarmed Red Crow & caused him to lay claim to the country lying west of the reserve.²⁴³

Another marginal notation appears on the document questioning, “South?”²⁴⁴ This letter demonstrates the confusion that still prevailed in 1888. The Mormons had settled adjacent to the

²³⁸ J.S. Dennis, Inspector of Surveys, Calgary, to Surveyor General, Department of the Interior, September 13, 1887, LAC, RG 15, vol. 544, file 157337 (ICC Exhibit 1a, p. 1644).

²³⁹ William Pocklington, Indian Agent, Blood Agency, to Indian Commissioner, Regina, September 26, 1887, LAC, RG 10, vol. 1555, p. 739 (ICC Exhibit 1a, p. 1649).

²⁴⁰ John C. Nelson, Indian Office, Regina, NWT, to Hayter Reed, Assistant Indian Commissioner, Manitoba and NWT, December 2, 1887, LAC, RG 10, vol. 3793, file 45995 (ICC Exhibit 1a, pp. 1650–52).

²⁴¹ John C. Nelson, Indian Office, Regina, NWT, to Hayter Reed, Assistant Indian Commissioner, Manitoba and NWT, December 2, 1887, LAC, RG 10, vol. 3793, file 45995 (ICC Exhibit 1a, pp. 1650–52).

²⁴² John C. Nelson, Indian Office, Regina, NWT, to Hayter Reed, Assistant Indian Commissioner, Manitoba and NWT, December 2, 1887, LAC, RG 10, vol. 3793, file 45995 (ICC Exhibit 1a, p. 1650).

²⁴³ John C. Nelson, Indian Office, Regina, NWT, to Hayter Reed, Assistant Indian Commissioner, Manitoba and NWT, December 2, 1887, LAC, RG 10, vol. 3793, file 45995 (ICC Exhibit 1a, p. 1650).

²⁴⁴ John C. Nelson, Indian Office, Regina, NWT, to Hayter Reed, Assistant Indian Commissioner, Manitoba and NWT, December 2, 1887, LAC, RG 10, vol. 3793, file 45995 (ICC Exhibit 1a, p. 1651).

south boundary of the reserve, yet Nelson refers to Red Crow's complaints about the western boundary of the reserve, which was still in question. Nelson continued his report by stating:

The Department of the Interior has, last summer, subdivided the land adjacent to the south boundary of the reserve with a view apparently of permitting the colonists from Utah to take up homesteads.

It is almost unnecessary to add, in conclusion, that the boundaries of the Blood Reserve have been established in strict conformity with the description in the amended Treaty already referred to that I was present when that Treaty was made, & that the Indians were satisfied as they had every reason to be with the Reserve between the Belly & St. Mary's Rivers, given to them in exchange for their interest in the four mile belt along the Bow and South Saskatchewan Rivers assigned to them in the Treaty of 1887 [sic].²⁴⁵

Indian Agent Pocklington, in communication with Dewdney, confirmed that the Department of Indian Affairs was aware that Red Crow continued to claim the western lands all the way to the mountains and suggested a method of resolving Red Crow's claims to the government's satisfaction. He stated:

Red Crow has always claimed the whole of the lands lying between the Belly & St. Mary's Rivers from their junction at old Fort Kipp clear back to the mountains.

I have on more than one occasion informed "Red Crow" that that was more land than his people were entitled to.

I would suggest that as it is more than probable a good many of the posts have been knocked down and mounds destroyed by cattle, that Mr. Nelson should come here during the year, and run the line again replacing posts & mounds, when I would take "Red Crow" with me and accompany the party over the limit.²⁴⁶

On January 30, 1888, a meeting was held between the Chiefs of the Blood Tribe, the Peigans, Indian Agent Pocklington, Indian Department representative Springett, Superintendent P.R. Neale of the North-West Mounted Police detachment at Fort Macleod, and two interpreters. A transcript

²⁴⁵ John C. Nelson, Indian Office, Regina, NWT, to Hayter Reed. Assistant Indian Commissioner, Manitoba and NWT, December 2, 1887, LAC, RG 10, vol. 3793, file 45995 (ICC Exhibit 1a, pp. 1651–52).

²⁴⁶ William Pocklington, Indian Agent, Blood Agency, to Indian Commissioner, Regina, January 31, 1888, LAC, RG 10, vol. 1556 (ICC Exhibit 1a, pp. 1656–57).

of this meeting describes the Blood Tribe view of the signing of treaty at Blackfoot Crossing and the subsequent survey of the Blood reserve:

Red Crow (Chief of Bloods) asked that the Hon. J.F. Macleod be present. That gentleman being asked to attend replied that he was unable to do so as he was busy, White Calf (Blood) said he thought it was strange that Judge Macleod could always attend to the Whites and would not come to hear the Indians. Red Crow, after expressing his annoyances at Judge Macleod's refusal to come said:

[Red Crow:] Everyone knows what was said to us at the Blackfoot Crossing when the Treaty was made. We were satisfied. We did not at first want to make treaty. White men spoke and told us to say where we wanted Reserve. God made the mountains for us and put the timber there and we said at that time that we wanted the country where the mountains and the timber were. The Government said they would be good to us. We took what the Government offered us. At one time we owned all the country and kept other Indians out. Since the treaty they are all together again. We are all friends and God has taken all the game away. Judge Macleod runs this part of the country. Why does he not come here and hear us talk? If a white man is shot by Indians by accident the Indian gets into trouble. When we were here to talk about my horses and the killing of six Bloods he said if the horses came back we would not do any wrong. We have not done wrong but now the whites are trying to do us wrong. Have the Indians done anything to the whites?

Mr. Pocklington: Not that I am aware of.

White Calf to Mr. Pocklington: You are treating our little children badly. The whites are cutting the reserve off, and we know nothing of it. We claim between the two rivers (Belly & St. Marys) up to the mountains. Now where we get the timber is on the white man's ground.²⁴⁷

Mr. Pocklington: Who interpreted when you were told where the boundaries of your Reserve were to be placed?

Red Crow: Dave Mills.

Mr. Pocklington to Mills: Did you explain for Mr. Nelson where the line was to run?

²⁴⁷

It is uncertain who is identifying the names of these two rivers – either the Constable or White Calf.

Red Crow and Mills: (Mills asks Red Crow) Red Crow says: I never told him where to mark out the reserve.²⁴⁸

In his account of the meeting, Indian Agent Pocklington stated:

As regards the Reserve “Red Crow” said he claimed the whole of the country between the St. Mary’s & Belly rivers from Fort Kipp to the mountains. He spoke of the good behaviour of the Blood generally, that they had never shed any blood in their country and could not understand why the Police should shove the Indians. As regards his Reserve, he wished to know why, when the survey was being made he was not asked to go and see it as he would not have accepted any Reserve that did not run back to the mountains. He spoke a long time about the rations and said they were not getting as much as usual or so much as they required, the rations were too poor altogether and more of the kind. “North Axe” spoke of the same thing, though his talk was chiefly about the Indian being shot by [illegible] but of course he had to talk about rations very freely as also did the other Piegan Chiefs.

I informed the Indians that the “River bank Mormons” would surely be compensated that you had already started the matter and read your telegram to them on the subject, also that the shoving was a mistake. I endeavoured to explain to “Red Crow” that when the Treaty was made with the Indians they were to receive so many acres of land for every family of five and that when the survey was made the amount of land given them was in accordance with the Treaty however he did not seem satisfied and still said he claimed back to the mountains. I think it was a great pity that when the survey was made “Red Crow” had not been there.²⁴⁹

In August 1888, Indian Agent Pocklington and Surveyor Nelson accompanied Red Crow and others to the southeast corner of the reserve, where an iron post was placed in a mound, and the line of the reserve explained. Pocklington later reported to the Indian Commissioner:

Red Crow said that when the amended treaty was made in 1883, he claimed all the land between the two rivers back to the mountains. I explained to him that there was far more land in the area he claimed than they were entitled to under treaty. I have explained to him that, as a matter of fact, the present Reserve contained far more land than they were entitled to be. He and the two minor chiefs expressed

²⁴⁸ P.R. Neale, Superintendent (Commanding Macleod District), North-West Mounted Police, Fort Macleod, February 2, 1888, LAC, RG 18, vol. 19 (ICC Exhibit 1a, pp. 1658–59).

²⁴⁹ William Pocklington, Indian Agent, Blood Agency, to Indian Commissioner, Regina, February 4, 1888, LAC, RG 10, vol. 1556, pp. 259–64 (ICC Exhibit 1a, pp. 1671–73).

themselves as well satisfied and pleased that we were going to take them over the boundary line.

We found the mounds and posts in a good state of preservation at mile intervals, and in every instance the mounds were renewed arriving at the S or corner another post was placed in the centre of the mound. "Red Crow" said he now knew where his Reserve ran and was satisfied.²⁵⁰

In his account of the summer meeting with Red Crow, Surveyor Nelson stated that Red Crow had a "notion that he owned the territory lying between the Belly and St Mary Rivers, from their confluence to the mountains."²⁵¹ Nelson recounted:

[I]t was decided that we should go over the boundaries of the reserve with Red Crow and the more influential of the minor chiefs, and point out to them the limits of their land, as Red Crow had been promised at the treaty, that I would show him the boundaries of his reserve when laying it out, but owing to his absence in the United States to recover stolen horses, at the time of survey, this had not been done ...

... He [Red Crow] said that Jerry Potts, who acted as interpreter, did not translate correctly; but here I was able to correct him, for I was present at the treaty, and heard Potts tell him that the south boundary of the reserve would run from Lee's Creek to Fish Creek. Besides I knew Potts was thoroughly acquainted with the topography of the country and was competent to describe the boundaries in a manner the Indians could not well misunderstand. I also knew, and told Red Crow, that Potts had, subsequent to the survey shown the line to Chief "One Spot" ...

... On the 25th we completed the renewal of the mounds and placed an iron post at the south-west corner on Belly River. The Indians carefully located the position of every post. Red Crow was now asked if he was satisfied, and he answered in the affirmative.²⁵²

Nelson reported that the Blood Tribe expressed discontent with the unauthorized cutting of reserve timber by the Mormons at Lee's Creek, but considered the matter settled. Nelson reported:

²⁵⁰ William Pocklington, Indian Agent, Blood Agency, to Indian Commissioner, August 30, 1888, LAC, RG 10, vol. 3791, file 45995 (ICC Exhibit 1a, pp. 1730–31).

²⁵¹ John C. Nelson, In Charge, Indian Reserve Surveys, to Superintendent General, November 12, 1888, LAC, RG 15, vol. 544, file 15737 (ICC Exhibit 1a, p. 1775).

²⁵² John C. Nelson, In Charge, Indian Reserve Surveys, DIA, Regina, to SGIA, November 12, 1888, LAC, RG 15, vol. 544, file 15737 (ICC Exhibit 1a, pp. 1772–78).

When passing the Mormon colony White Calf had drawn my attention to some poplar saplings which had been cut and taken off the reserve, apparently by the settlers. I counted the stumps, and sent for Mr. Card, the head man of the community, who, upon being told what had been done, apologized to the Indians for one of his people having unwittingly committed a trespass, and promptly settled the claim. Whereupon the Indian chiefs expressed their good will towards their white neighbours at Lee's Creek. Some benefit may result from the settlement of these people in the neighbourhood of the reserve. They have been very successful this season in their farming operations, and informed me that their number would be greatly increased by further immigration.²⁵³

Within the same report, Nelson further commented that "I found these Indians had no idea of an artificial boundary, such as a line of mounds, their method of defining a tract of land being by means of natural boundaries, such as rivers, lakes and mountains, and they seem to be unable to understand any other."²⁵⁴

With the controversy over the southern boundary considered remedied, the government issued an Order in Council dated December 17, 1888, allowing the Mormons to purchase the land upon which they had settled²⁵⁵ and additional lands for homesteading purposes.²⁵⁶ Blood Tribe oral history is inconclusive regarding the arrival and settlement of the Mormons in present-day Cardston. There is awareness among the Elders of the rumoured existence of a 99-year lease, which covered the Mormon's land at Cardston, but no concrete evidence has been found.

At the community session, Elder Frank Weasel Head stated that "... it was always a common knowledge that there was a 99-year lease."²⁵⁷ In contrast, Elder Pete Standing Alone stated: "Yeah,

²⁵³ John C. Nelson, In Charge, Indian Reserve Surveys, DIA, Regina, to SGIA, November 12, 1888, LAC, RG 15, vol. 544, file 15737 (ICC Exhibit 1a, pp. 1772–78).

²⁵⁴ John C. Nelson, In Charge, Indian Reserve Surveys, DIA, Regina, to SGIA, November 12, 1888, LAC, RG 15, vol. 544, file 15737 (ICC Exhibit 1a, pp. 1772–78).

²⁵⁵ Section 9, township 3, range 25, W4M. The Mormons also purchased land on the west side of the Belly River: see E.J. Wood, Latter Day Saints, Cardston, to J.D. McLean, Assistant Deputy and Secretary, DIA, Ottawa, February 15, 1926, LAC, RG 10, vol. 7765, file 27103-1 (ICC Exhibit 1a, p. 2260). They also purchased land in the southwest corner of the reserve: see Indian Agent, Blood Agency, Cardston, to Secretary, DIA, Ottawa, February 20, 1926, LAC, RG 10, vol. 7765, file 27103-1 (ICC Exhibit 1a, p. 2261).

²⁵⁶ Order in Council PC 2547, December 17, 1888, LAC, RG 2(1) (ICC Exhibit 1a, pp. 1796–98).

²⁵⁷ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 478, Frank Weasel Head).

I've heard of the 99-year lease. I heard that they had this interpreter from Montana that wrote up the agreement. And later years, that guy said that the Mormons, Red Crow did not know it was a 99-year lease. And nobody has seen that document."²⁵⁸ Elder Mary Louise Oka told the following story of the arrival and settlement of the Mormons in the area, a story that is not refuted by any other story. She stated:

Many Wives, which are the Mormons, came from the south to this area. They were tired. They used the cows, and that's how they travelled. There were more children than there were men. There were more women than there were men. They asked to see the leader. They met with Red Crow. They asked if they could rest there until summer. They promised to move and they never did. They are still there.

Later on, people from the government came to meet with Red Crow, and they asked if the Mormons would be able to temporarily stay there, to lease the area for 99 years. Red Crow only knew that they asked to stay temporarily. He did not know what a 99-year lease was.

...

I never heard of Red Crow signing a piece of paper or signing a 99-year lease. All I heard was that later on there was a document with Red Crow's mark on it, the X that indicated his mark was very neat.

Today when we have Elders that sign a document or put their mark to a document and they are unable to write, they mark the paper so hard, they use the pen so hard trying to put their X on it, that they just about tear the paper, and their mark or their X is very crooked. It's not neat or even.²⁵⁹

Elder Pete Standing Alone also tells a similar story of the 99-year lease.

What I heard was that they journeyed from Salt Lake, Utah. And by the time they got to where they are today, they – it was getting late, towards winter, in the fall, and they were in bad shape. And I guess they wanted to talk to the leader which is Red Crow, and they did.

And what I heard, you know, after, that they were headed for the Peace River country. That's where they were going to. But they couldn't go any further that year because they were exhausted, the animals and themselves. So they asked Red Crow to spend the winter there, and Red Crow agreed. And the 99-year lease, that's where it came about. And Red Crow did not know it was a 99-year lease. He thought it was just for that one winter and they'll be on their way to Peace River country.

²⁵⁸ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 422, Pete Standing Alone).

²⁵⁹ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 186–87, 189, Mary Louise Oka).

And I also heard that this guy from Montana was the witness of that transaction. And at his death bed, he confessed that he did crooked work for the Mormons as interpreter or whatever. That's what I heard.²⁶⁰

Mormon history tells a different story about the establishment of Cardston.

In the summer of 1886, when anti-Mormon persecutions were at their height in the United States, John Taylor, president of the Church of Jesus Christ of Latter-day Saints and former resident of Upper Canada, advised Charles O. Card, president of Cache Valley Stake in northern Utah and southern Idaho, to venture north of the 49th parallel and locate a suitable place for Latter-day Saint families to settle. Leaving with three companions in September 1886, Card explored the country south of Calgary to the international boundary, paying special attention to the region north of Lee Creek, a tributary of the St. Mary River, 14 miles north of the United States boundary. Satisfied that they had found a suitable location for settlement, they dedicated the land and returned to Utah where they reported to President Taylor. He instructed them to select forty families and lead them there the next Spring.²⁶¹

Apparently Cardston was not the site at which Card preferred to settle, however: "Between the Kootenai (Waterton) and Belly rivers near present-day Stand Off they found the country for which they were searching. ... This area was also in the heart of Indian country, and thus an advantageous place for a mission"²⁶²

According to Mormon history, the Mormon colonists

arrived at Stand Off on April 16, during a severe storm. Upon finding that the land that they favored for settlement was under lease or owned by ranchers and

²⁶⁰ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 303–4, Pete Standing Alone).

²⁶¹ Leonard J. Arrington, "Historical Roots of the Mormon Settlement in Southern Alberta," in Brighton Y. Card et al., eds., *The Mormon Presence in Canada* (Edmonton: University of Alberta Press, 1990), 3 (ICC Exhibit 9s, p. 6).

²⁶² Brighton Y. Card, "Charles Ora Card and the Founding of the Mormon Settlements in Southwestern Alberta, North-West Territories," in Brighton Y. Card et al., eds., *The Mormon Presence in Canada* (Edmonton: University of Alberta Press, 1990), 86 (ICC Exhibit 9s, p. 53). This area is the "confluence" or the land between the Kootenai and Belly Rivers and is also included in the Big Claim lands.

unavailable, Card wrote from Fort Macleod to Taylor, suggesting that the church supply funds to purchase land near the Blood Indian Reserve ...²⁶³

Shortly thereafter, Card learned of an expired lease adjacent to the Blood reserve upon which he decided the colony should settle.²⁶⁴ The first Mormon colonists arrived in present-day Cardston on May 1, 1887.²⁶⁵

The Mormon colonists who settled in Cardston diversified their method of settlement. Canada apparently did not seem as open as they had thought.

The assumption that Mormons in Alberta followed the pattern established in Utah, where unclaimed lands could be freely distributed among settlers, is flawed, however. When the first Mormons in Cardston settled on a half section registered in the name of Charles Ora Card, it was made clear that title to the surrounding land could not be purchased by the group cooperatively, and that the Saints, like other immigrants, would be required to abide by homesteading regulations or purchase land at going rates. ...

What actually occurred in Mormon settlement was a combination of homesteading and hamlet dwelling, of land obtained by pre-emption and homestead claim.²⁶⁶

Responding to reports that the Mormons were practising polygamy, Canada initially expressed apprehension about their intentions.²⁶⁷ Impressed with the Mormons' progress, eventually

²⁶³ Brighton Y. Card, "Charles Ora Card and the Founding of the Mormon Settlements in Southwestern Alberta, North-West Territories," in Brighton Y. Card et al., eds., *The Mormon Presence in Canada* (Edmonton: University of Alberta Press, 1990), 88 (ICC Exhibit 9s, p. 55).

²⁶⁴ Brighton Y. Card, "Charles Ora Card and the Founding of the Mormon Settlements in Southwestern Alberta, North-West Territories," in Brighton Y. Card et al., eds., *The Mormon Presence in Canada* (Edmonton: University of Alberta Press, 1990), 88 (ICC Exhibit 9s, p. 55).

²⁶⁵ Brighton Y. Card, "Charles Ora. Card and the Founding of the Mormon Settlements in Southwestern Alberta, North-West Territories," in Brighton Y. Card et al., eds., *The Mormon Presence in Canada* (Edmonton: University of Alberta Press, 1990), 88 (ICC Exhibit 9s, p. 55).

²⁶⁶ Maureen Ursenbach Beecher, "Mormon Women in Southern Alberta: The Pioneer Years," in Brighton Y. Card et al., eds., *The Mormon Presence in Canada* (Edmonton: University of Alberta Press, 1990), 216 (ICC Exhibit 9s, p. 80).

²⁶⁷ A.M. Burgess, Deputy Minister, Department of the Interior, Ottawa, to Charles O. Card, Lee's Creek, January 24, 1888, LAC, RG 15, vol. 544, file 157337 (ICC Exhibit 1a, p. 1938).

Canada cooperated in the emigration and settlement of the colonists, going as far as appointing Charles Ora Card Sub-Agent of Dominion Lands for the Lethbridge District in 1898.²⁶⁸ Card's responsibilities were explained to him in a letter from the Assistant Secretary of the Department of the Interior.

It will be your duty to accept any application for a homestead entry which may be made to you accompanied by a fee of \$10.00, excepting in the case of cancelled lands as hereinafter provided, and to give an Interim Receipt therefor on one of the forms which will be supplied to you for that purpose, taking care to insert after the description of the land the following words: "Provided such land is open for entry". ...

...

You are also authorized to accept applications of any kind relating to Dominion Lands, such, for instance, as applications to cancel existing entries, etc.,

You are also empowered to take applications for patents for Dominion Lands and the necessary affidavits in connection therewith.²⁶⁹

There is no 99-year lease in the documentary record nor any record of the Mormons approaching the Blood Tribe about acquiring land from it other than to build a mission on the reserve in 1923.²⁷⁰ It is also clear that the Mormon colonists spread out into settlements, with Cardston becoming the core settlement. An explanation of this settlement is twofold. First, the settlement of many Mormons who chose to immigrate to Cardston was facilitated by Card's concurrent positions as Sub-Agent of Dominion Lands and Stake president of the settlement. Second, the Mormons had influential friends, which gave them access to lucrative leases. An article entitled "The Mormons Come to Canada" comments on the relationship between the Mormons, the Northwest Coal and Navigation Company, and the Galt family:

²⁶⁸ Wm. Pearce, Superintendent, Office of the Superintendent of Mines, Calgary, to Secretary, Department of the Interior, Ottawa, October 17, 1888, LAC, RG 15, vol. 544, file 157337 (ICC Exhibit 1a, p. 1753).

²⁶⁹ Assistant Secretary, Department of the Interior, Ottawa, to C.O. Card, Cardston, January 12, 1898, LAC, RG 15, vol. 743, file 455748 (ICC Exhibit 1a, pp. 2161–63).

²⁷⁰ J.T. Faunt, Indian Agent, Blood Agency, Fort Macleod, to D.C. Scott, DSGIA, Ottawa, February 28, 1923, LAC, RG 10, vol. 8287, file 773 / 7-3-2 L.D.S. (ICC Exhibit 1a, p. 2248).

A partnership which was portentous for the future of Mormon Colonization in Alberta developed between the church and the Northwest Coal and Navigation Company, the most important corporate enterprise in the Territories. The company's land agent, Charles A. Magrath, who was a friend of the colonists and had formerly been a Dominion land surveyor, negotiated the sale of approximately 20,000 acres to the Mormons. Included in the acreage was some fine grazing land, and the General authorities notified Card that they were sending five hundred head of cattle from the Church herd to be pastured there.

In October, 1889, the First Presidency ... spent several weeks in Alberta. They inspected the land which had recently been purchased from the Northwest Coal and Navigation Company, and they were taken to view additional properties that might be acquired. In Lethbridge they conferred with Elliot T. Galt, son of Sir Alexander T. Galt and manager of the Northwest Coal and Navigation Company. Here undoubtedly were forged the bonds of understanding that eventually led to the construction of the great St. Mary's River irrigation canal and to the founding of Mormon towns as Stirling, Magrath, and Raymond.²⁷¹

Historically, there has been tension in the relationship between the Mormons and the Blood Tribe. Many Blood Tribe Elders have commented on the 1980 blockade in Cardston. Elder Rosie Red Crow stated the blockade took place

when we were really pursuing the Big Claim, especially the area where the Mormons have now settled in Cardston. My sister, Mary Louise Oka, and I were present. We were in a tepee, and we were also in there with Many Grey Horses. We were praying.

...

I was late arriving at the scene the next morning. Dan Chief Moon, an extremely old man at the time, was being dragged by the hair by the time I had arrived. John Chief Moon was being dragged as well. Esther Tail Feathers was being pulled in either direction, and she was sent to jail. Binky Blood was also sent to jail as well. There was no recourse for us. We could not appeal to anyone.

...

They were ready to shoot our people. They were on top of the service station that was in close proximity. They were very ready to shoot.²⁷²

²⁷¹ Lawrence B. Lee, "The Mormons Come to Canada, 1887-1902" (1968) 59:1 *Pacific Northwest Quarterly* 18-19 (ICC Exhibit 9q, pp. 9-10).

²⁷² ICC Transcript, June 22-25, 2004 (ICC Exhibit 5a, pp. 168-69, Rosie Red Crow).

Waterton Lakes National Park²⁷³

On May 30, 1895, Waterton Lakes National Park was created in the southwestern portion of the Big Claim lands, contiguous to the border of British Columbia and the international boundary.²⁷⁴ The establishment of this park became controversial for the Blood Tribe members when they realized they no longer had access to this sacred area and to Chief Mountain, which was located across the international boundary.

Waterton Lakes National Park was made part of the Waterton Glacier International Peace Park on May 26, 1932.²⁷⁵ In the 1930s, park officials expressed concerns about the proximity of Blood Indian Reserve 148A, timber limit, within the park and road access to the park through that reserve.²⁷⁶

Hutterites

Another religious group, the Hutterites, also settled on the Big Claim lands between the Kootenay and Belly Rivers, although the only reference to that community in the documentary record of this claim is found in Blood Tribe oral history. As stated above, this land has considerable ceremonial significance to the Blood Tribe. Elder Louise Crop Eared Wolf states:

The original Kainai was on the west side of the Belly River. We used these areas in the early 1900's. Then the white man slowly took this land away from us. The Hutterites only arrived here at the time of the first World War. They said they did not wish to be in the War and that is why they fled here. Their religion forbade them to be in the War. The Federal Government gave our lands to the Hutterites. Our

²⁷³ For a more complete history of the establishment of Waterton Lakes National Park, see excerpts from C.A. MacInnes, *In the Shadow of the Rockies* (London: Rivingtons, 1930), 136–37, 150–55 (ICC Exhibit 9n); excerpts from Jack Holterman, *Place Names of Glacier / Waterton National Parks* (Helena, Montana: Falcon Press Publishing Co., 1985) (ICC Exhibit 9g); and Ian Getty, “The History of Waterton Lakes National Park,” a research paper prepared for the National and Historic Parks Branch, revised February 1972 (ICC Exhibit 2c, app. K, pp. 687–765).

²⁷⁴ Order in Council PC 1621, May 30, 1895, LAC, RG 84, vol. 2165, file W-2, pt. 1 (ICC Exhibit 1a, pp. 2154–55); F.W. Godsall to Wm. Pearce, Superintendent of Mines, Calgary, Alta., September 12, 1893, LAC, RG 84, vol. 2165, file W-2, pt. 1 (ICC Exhibit 1a, p. 2099).

²⁷⁵ *An Act respecting the Waterton Glacier International Peace Park*, SC 1932, c. 55 (ICC Exhibit 6c, p. 1).

²⁷⁶ J.A. Wood, Assistant Controller, National Parks Service, Ottawa, to Mr Smart, May 4, 1949 (ICC Exhibit 1a, pp. 2311–13).

people were very unhappy about this but we were scared with the law and with violence. Many of our people were arrested. Our people were afraid of the Hutterites.²⁷⁷

Elder Louise Crop Eared Wolf states, furthermore:

I don't know why they stay there but – because they said that there was a white man that lived there before. One of our people, our woman was married to that white man. And after he died, then they saw the Hutterites coming in to settle.

And that place where they settled down today is a very sacred place to our people. All that field that they're using up today, that they are commercializing and they getting all the benefits from that land was ours. It was a sacred land for us. Our people held it very sacred because they had their – Medicine Lodge women held their Sacred Lodge there, and they held an encampment there, what I was talking about, and all the Clans were there. It's a big area. You see it when you pass. It's a real big area, and they took that away from us. The Waterton River.²⁷⁸

Elder Pete Standing Alone offers a similar time frame for the arrival of the Mormons.

[T]here used to be the main trail going through the Hutterites, and there used to be a big barn, you know those old big barns, built in 1924. And I would think they were there in the late '20s. I think they were the first Hutterites to arrive in the southern Alberta, and for Alberta for that matter.²⁷⁹

Elder Margaret Hind Man recalled that there was also a police outpost located in this area, near the Hutterites:

[T]here were people that live by the police outpost, in that area where the Hutterites live, in that vicinity today, where the outpost was.

... some of our people [were] living there when one of the North West Mounted Police came in a wagon and told them that they're going to build a jail for criminals and that it would be dangerous if they stayed around there in case these

²⁷⁷ Blood Tribe Elder Statutory Declarations dated and signed May–June 1996, forming app. B in Pillipow & Company, “Blood Tribe / Kainaiwa Land Claim Submission – The Big Claim,” July 1996 (ICC Exhibit 2c, app. B, p. 197, Louise Crop Eared Wolf).

²⁷⁸ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 350–51, Louise Crop Eared Wolf).

²⁷⁹ ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 299, Pete Standing Alone).

criminals get out. That they might start shooting. And they said that to scare them off, and they pulled up their stakes and moved back across the Belly River.²⁸⁰

²⁸⁰ ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 383, Margaret Hind Man).

**APPENDIX B
CHRONOLOGY**

BLOOD TRIBE / KAINAIWA: BIG CLAIM INQUIRY

1 Planning conference Lethbridge, August 12, 2003

2 Community session June 22–25, 2004
The Commission heard from Andrew Black Water, Rosie Red Crow, Pete Standing Alone, Frank Weasel Head, Mary Louise Oka, Rosie Day Rider, Adam Delaney, Councillor Randy Bottle.

August 30–31, 2004

The Commission heard from Louise Crop Eared Wolf, Margaret Hind Man, Pat Eagle Plume, Rosie Day Rider, Pete Standing Alone, Stephen Fox, Frank Weasel Head, Rosie Red Crow, Councillor Randy Bottle.

3 Interim rulings
Ruling into the Admission of 17 Statutory Declarations, April 2005 (Appendix C)

4 Written legal submissions

Submissions with respect to Admission of 17 Statutory Declarations

- Submission on Behalf of the Blood Tribe / Kainaiwa, March 15, 2005
- Submission on Behalf of the Government of Canada, March 18, 2005

Submissions to oral session

- Submission on Behalf of the Blood Tribe / Kainaiwa, June 15, 2005
- Submission on Behalf of the Government of Canada, August 30, 2005

5 Oral legal submissions Lethbridge, October 4–6, 2005

6 Content of formal record

The formal record of the Blood Tribe / Kainaiwa: Big Claim Inquiry consists of the following materials:

- Exhibits 1–10 tendered during the inquiry, including transcripts of community session (2 volumes) (Exhibit 5a)
- transcript of oral session (1 volume)

The report of the Commission and letter of transmittal to the parties will complete the formal record of this inquiry.

APPENDIX C

INTERIM RULING: ADMISSION OF 17 STATUTORY DECLARATIONS

INDIAN CLAIMS COMMISSION

**BLOOD TRIBE / KAINAIWA
BIG CLAIM INQUIRY**

**INTERIM RULING
ADMISSION OF 17 STATUTORY DECLARATIONS**

PANEL

Commissioner Daniel J. Bellegarde (Chair)
Commissioner Alan C. Holman

COUNSEL

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To the Indian Claims Commission
Diana Kwan

APRIL 2005

BACKGROUND

The Blood Tribe / Kainaiwa (hereinafter “Blood Tribe”) has requested that 17 statutory declarations from Blood Tribe elders be admitted into the formal record of inquiry. Canada has objected to the inclusion of these declarations into the record. This ruling addresses whether or not the Statutory Declarations should be admitted into the record.

In April 1975, the Blood Tribe submitted a Treaty Land Entitlement (hereinafter “TLE”) claim to the Office of Native Claims. This claim was rejected on June 20, 1978. In 1980, a Joint Task Force was formed with a mandate to review and present recommendations to the Minister of Indian Affairs on a number of outstanding Blood Tribe claims, including a TLE. The Joint Task Force concluded its work in August 1981; however, its recommendations were not adopted by the Minister.

In 1996, the Blood Tribe submitted their claim to the Specific Claims Branch for review. A Supplementary Legal Submission was made in February 1998. The Specific Claims Branch rejected the claim in November 1999. This rejection prompted further supplemental legal submissions, resulting in another rejection in November 2001 and November 2003.

In January 2003, the Blood Tribe requested the Indian Claims Commission (“ICC”) to conduct an inquiry into its claim. The Commissioners accepted this request, and notice was given to the parties in February 2003. A planning conference was held in August 2003. Two separate community sessions were held in June 2004 and August 2004.

At the community sessions, held in June and August 2004, 11 elders testified. Prior to the June 2004 community session, the Blood Tribe’s legal counsel had indicated that statutory declarations may be forthcoming for admission into the record. These statutory declarations were received in September 2004, with an additional declaration added in February 2005. Canada expressed objections to the inclusion of this evidence.

Canada provided its objections on February 22, 2005, stating that the statutory declarations were not oral history evidence, and that there was no knowledge of the process behind them.

Written submissions from the Blood Tribe were received on March 15, 2005, and Canada’s reply was received on March 18, 2005.

ISSUE

Should the statutory declarations be admitted into the formal record?

POSITIONS OF THE PARTIES

Summary of Blood Tribe's Submissions

The Blood Tribe argue that the 17 statutory declarations should be admitted to the record. The submissions on this issue can be summarized as follows:

1. The statutory declarations contain evidence directly related to the issues of the inquiry and are therefore relevant.
2. The following questions should guide whether or not the evidence should be admitted:
 1. Is the evidence relevant?
 2. Will the Panel be assisted in its assessment of the issues by examining the proffered evidence?
 3. Does the proposed evidence have a circumstantial guarantee of trustworthiness?
 4. Does the type of evidence proposed for admission fall within the Commission's mandate and expertise?¹
3. The evidence falls within the ICC guidelines; ie, the ICC has the discretion to accept a wide range of relevant material.
4. The evidence is important.
5. The admissibility of the statutory declarations is consistent with the treatment of other evidence.
6. Any of Canada's concerns can be addressed. The Blood Tribe continues to extend an invitation to have Canada or the ICC interview or any other necessary steps to assess or test the evidence in the statutory declarations.
7. Admissibility of the evidence is distinct from the weight assigned to the evidence.

¹ Written Submission on Behalf of the Blood Tribe / Kainaiwa, March 15, 2005, p. 4.

Summary of Canada's Submissions

Canada opposes the inclusion of the 17 statutory declarations for the following reasons:

1. The statutory declarations are not oral history evidence; instead, these declarations are written documents.
2. If the declarations are oral history evidence, then the ICC guidelines for taking oral history evidence were not followed, and neither the ICC nor Canada has had the opportunity to hear or test the evidence contained in the statutory declarations.
3. Evidence that is unreliable and entered in the record could potentially be relied upon by the ICC in its report and could call into question the reliability of the report. According to Canada:

The existence of evidence in the record that has not been properly presented raises the prospect that any Report based upon that record will also be subject to concerns regarding the reliability of the Report. This would tend to severely undermine the validity of the work product of the ISCC.²

4. In addition, admitting evidence which fails to adhere to the ICC guidelines would “further undermine the credibility of the process whereby evidence is permitted into the claim record.”³
5. If these statutory declarations are considered to be oral history evidence, then Canada argues the statutory declarations do not meet any standards for evaluating oral evidence.
6. Canada had no role in planning the community session. If it had, Canada would have argued that the FN “should be permitted to put forward as many witnesses as it determined were necessary to address every matter raised in the Statement of Issues.”⁴
7. If the statutory declarations are admitted into the record as “relevant and not a simple duplication of material already on the record”⁵, Canada believes that the evidence should be taken as per paragraph 44 of the ICC guidelines or the community session should be re-opened.

² Written Submission on Behalf of the Government of Canada, March 18, 2005, para. 4.

³ Written Submission on Behalf of the Government of Canada, March 18, 2005, para. 5

⁴ Written Submission on Behalf of the Government of Canada, March 18, 2005, para. 8

⁵ Written Submission on Behalf of the Government of Canada, March 18, 2005, para. 8

ANALYSIS

The issue before the Panel is whether or not the statutory declarations should be admitted as evidence into the formal record of inquiry.

The ICC is not bound by traditional rules of evidence. Paragraph 48 of the June 1, 2004 guidelines states:

The Commission may receive evidence that might be inadmissible in a court of law. The strict rules of evidence do not necessarily apply to determine the admissibility of evidence. The Panel will determine whether to admit the evidence on the basis of its relevance.⁶

This proposition is supported by the courts in many cases; it is a well-established common law principle that administrative agencies are not courts and are not bound by the rules of evidence. In *Bortolotti v. Ontario (Ministry of Housing)*, the court stated:

The Commission of Inquiry is charged with the duty to consider, recommend and report. It has a very different function to perform from that of a court of law, or an administrative tribunal, or an arbitrator, all of which deal with rights between parties ... It is quite clear that commission appointed under the Public Inquiries Act, 1971, is not bound by the rules of evidence as applied traditionally in the Court, with the exception of the exclusionary rule as to privilege (s. 11) ... The approach of the Commission should not be technical or unduly legalistic one. A full and fair inquiry in the public interest is what is sought in order to elicit all relevant information pertaining to the subject matter of the inquiry.⁷

While the ICC is not bound by the rules of evidence, the Panel is aware of the purpose for the rules of evidence. According to Macaulay and Sprague in *Hearings Before Administrative Tribunals*, the rules of evidence exist to:

1. Establish a sound factual basis for decisions;
2. Ensure a proper balance between the harm in accepting evidence and the value in doing so; and
3. Maintain a fair and effective process⁸

⁶ Indian Claims Commission "Inquiry Process, Guidelines for Parties", June 1, 2004, para. 48.

⁷ *Bortolotti v. Ontario (Ministry of Housing)*, (1977) 15 OR (2nd) 617 (Ont. CA) at 623-24.

⁸ Macaulay and Sprague in *Hearings before Administrative Tribunals* (1995: Carswell) at 17-26.

More specifically, Macaulay and Sprague suggest that the following questions be addressed when dealing with a question of whether or not to admit certain evidence:

1. Is this evidence capable, if believed, of creating a factual basis for the decision in question, and if so, how far can it logically be taken to do so?
2. If it is capable of supporting the necessary factual base, is there some other reason why it should be rejected? Will its receipt lead to some greater social harm than the good likely to be accomplished by accepting it?
 - (a) How necessary is the information in accomplishing your mandate?
 - (b) How necessary is the evidence for one of the parties to make his case?
 - (c) Is the disputed evidence really of the nature claimed by the party disputing its admission?
 - (d) How much harm will result from its disclosure to the person opposing its use? Will there also be some harm to some public interest from its admission? If so, how does this harm compare to the value hoped to be achieved through your proceedings?
 - (e) Is there any way to minimize this harm?
3. Assuming that the evidence meets the first two concerns, is there anything about the way the evidence is coming which threatens the fairness or the smooth operation of your hearing? And if so, is this threat of sufficient importance, in light of your mandate, to warrant its exclusion?⁹

The submissions reflect the distinct needs of each party. The Blood Tribe is attempting to provide as much evidence in support of its claim as possible, while working within the practical requirements of the ICC's community session. Their submissions also distinguish the issue of admissibility of the evidence from the weight given to the evidence. On the other hand, Canada's needs relate to the integrity of the evidence gathering process and subsequently, the results of that process. Canada has submitted that the process of gathering the statutory declarations is outside of the ICC process and if these declarations are admitted, then the entire ICC inquiry and the resulting report's credibility is potentially undermined.

⁹ Macaulay and Sprague in *Hearings before Administrative Tribunals* (1995: Carswell) at 17-2.6 and 17-2.11.

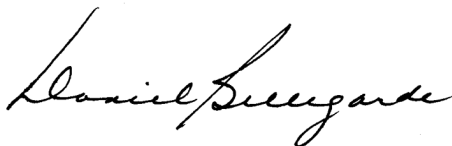
Both parties also differ in how the evidence should be characterized. The Blood Tribe argue that the evidence is oral history evidence, while Canada argues that the evidence is in the nature of documents. Canada has not made any arguments regarding the relevance of the evidence.

RULING

With consideration to the above matters, the Panel has determined that the 17 statutory declarations should be admitted to the record for the following reasons:

- As a commission of public inquiry, part of the role of the ICC involves eliciting all relevant information or fact finding. Fulfilling this role means not being tied to strict rules of evidence or procedure.
- The Panel notes that there is a distinction between oral testimony and oral history. Essentially, this is a distinction between the form of the evidence and the nature of the evidence. The nature of the evidence given at an ICC community session is oral history evidence, and this evidence is received through oral testimony. This process is covered by ICC guidelines.
- The 17 elders who each provided a statutory declaration did not provide oral testimony at the community session, but have sworn that the information provided has been passed to them through oral tradition. As such, the declarations are sworn statements of a person's knowledge on certain issues.
- The 17 statutory declarations contain information related to the issues of the inquiry and, as a result, the statutory declarations are relevant. However, the Panel notes that there is a distinction in receiving this evidence in a statutory declaration as opposed to receiving the evidence through oral testimony in a community session.
- The Panel further notes that the question of admissibility of evidence is distinct from the weight given to the evidence.

FOR THE INDIAN CLAIMS COMMISSION



Daniel J. Bellegarde
Commissioner (Chair)



Alan C. Holman
Commissioner

Dated this 1st day of April, 2005