# INDIAN CLAIMS COMMISSION

## QU'APPELLE VALLEY INDIAN DEVELOPMENT AUTHORITY INQUIRY

## FLOODING CLAIM

Muscowpetung First Nation
Pasqua First Nation
Standing Buffalo First Nation
Sakimay First Nation
Cowessess First Nation
Ochapowace First Nation

## PANEL

Commission Co-Chair P.E. James Prentice, QC
Commissioner Carole T. Corcoran
Commissioner Roger J. Augustine

## COUNSEL

For the Qu'Appelle Valley Indian Development Authority
David Knoll

For the Government of Canada
Bruce Becker

To the Indian Claims Commission
Ron S. Maurice / Kathleen Lickers / Thomas A. Gould

**FEBRUARY 1998**

# CONTENTS

# EXECUTIVE SUMMARY

## HISTORICAL BACKGROUND TO THE CLAIM

### THE QU'APPELLE VALLEY INDIAN DEVELOPMENT AUTHORITY

The Qu'Appelle Valley Indian Development Authority (QVIDA) is made up of eight member First Nations, six of which are participating in the present proceedings. The four western bands are the Piapot, Muscowpetung, Pasqua, and Standing Buffalo First Nations, and the four eastern bands are the Sakimay, Cowessess, Kahkewistahaw, and Ochapowace First Nations. Piapot and Kahkewistahaw are not involved in this inquiry.

### THE IMPORTANCE OF WATER IN THE QU'APPELLE VALLEY

There are six lakes in the Qu'Appelle Valley in the vicinity of the reserve lands at present held by the six participating First Nations. Four lakes located in close proximity to the western First Nations are known as the Fishing Lakes, including Pasqua Lake (also known as Qu'Appelle Lake), Echo Lake, Mission Lake (also known as Lebret Lake), and Katepwe Lake. The remaining two lakes are Crooked and Round Lakes, on which the three participating eastern First Nations are located.

Treaty 4, or the Qu'Appelle Treaty, was entered into on September 15, 1874, by representatives of the Government of Canada and by the Chiefs of four of the QVIDA First Nations: Cowessess ("Ka-wey-ance" or "Ka-wezauce," also known as "The Little Boy" or "The Little Child"), Pasqua ("The Plain"), Kahkewistahaw ("Him That Flies Around"), and finally Kakisheway ("Loud Voice") and Chacachas (whose bands later merged to become Ochapowace). In the years following settlement on their respective reserves, the QVIDA First Nations developed economies that took advantage of the abundant natural resources available in the Qu'Appelle Valley. The relatively flat landscape resulted in seasonal flooding of hay flats and ongoing "natural irrigation," which stimulated high yields of top-quality hay. Other products of the valley included cattle (fed on hay), firewood, farm produce, senega root, berries,

small game, and all of the First Nations took advantage of the fishing in the various lakes. The Indians also supplemented their livelihoods by freighting, hauling hay, tanning and managing cattle for the agency farm, trading, and working off the reserves.

In 1894, the federal government passed the *North-West Irrigation Act*, which was designed to vest property rights in water to the Crown throughout the North-West Territories. The Act provided that any person who already held water rights similar to those recognized under this Act, or who had constructed or was operating dams and other works, could obtain a licence or authorization within a certain period of time to continue to be able to exercise those rights. Failure to obtain a licence resulted in the water rights being forfeited to the Crown. There is no evidence that any application was made by Indian Affairs on behalf of the Qu'Appelle Valley Bands for such a licence or authorization.

During the 1930s, water in the Qu'Appelle Valley took on even greater importance as a result of extended drought conditions on the prairies and a worldwide economic depression. These events prompted the federal government to create the Prairie Farm Rehabilitation Administration (PFRA), whose mandate was to provide for the rehabilitation of the drought and of soil-drifting areas of the three Prairie Provinces and to assist in the conservation of surface water supplies for household use, stockwatering, and irrigation. The Qu'Appelle Valley was just one possible area for large water development projects, and investigations began across the Prairie Provinces to assess the viability of many potential sites for the erection of water control structures. Comprehensive field investigations, including topographical surveys and soil investigations, were required to determine the foundations needed for the structures that would have to be built.

## DEVELOPMENT OF DAMS IN THE QU'APPELLE VALLEY

### Echo Lake Project

In May 1941, the PFRA asked Indian Affairs for permission to erect a dam at the east end of Pasqua Lake that would have the effect of continuously flooding portions of the Muscowpetung and Pasqua reserves. Indian Affairs responded that it was obvious that damage would result from this project and that investigations would be undertaken to quantify the compensation that would have to be paid to the affected bands. P.A. Fetterly, an engineer with the Department of Mines and Resources, estimated that the total damages payable to the Muscowpetung and Pasqua Bands would be $8050. No recog-

nition was given to any potential flooding of lands on the Standing Buffalo reserve.

The proposed dam on Pasqua Lake was not built, but instead a structure on Echo Lake was substituted to control the water levels of both lakes. No adjustment or reconsideration of Fetterly's damage estimate was made since it was believed that, in the short term, less damage would be caused by a structure on Echo Lake and, in the long term, it was likely that a structure would also be constructed on Pasqua Lake. The dam was built shortly after approval of the project was obtained in 1942. However, Fetterly's estimate of $8050 to compensate the Muscowpetung and Pasqua Bands for damage to their reserve lands was never paid to the Bands, even though the PFRA and Indian Affairs considered the amount to be reasonable. There is no evidence that the Bands authorized the project or were even consulted regarding the dam.

### Crooked Lake and Round Lake Project

In 1941, Fetterly was asked by the PFRA to provide his opinion regarding the potential damages and benefits that might arise from the construction of dams on Crooked and Round Lakes. In the meantime, the PFRA commenced construction on the two dams without obtaining consent from affected Bands. The PFRA apparently proceeded on the advice of the Acting Director of Indian Affairs who assumed that band consent was not necessary because the PFRA had powers of expropriation. In February 1942, Fetterly recommended that, in addition to paying damages of $3300 to the Sakimay, Cowessess, and Ochapowace Bands, the PFRA should also construct a bridge west of the flooded area on Crooked Lake to replace a ford that would be made impassable by the higher water levels. Approval of the payment of $3330, including an additional $30 in respect of the Cowessess Indian Residential School, was given in November 1942, and the payment was paid to the respective Bands in May 1943.

## EFFECTS OF THE DAMS

The economies of the Qu'Appelle Valley First Nations before 1940 featured considerable reliance on activities and resources in the valley bottom, including native hay, timber, beaver, muskrat, deer, berries, maple sugar, and important cultural and medicinal herbs and vegetation, such as sweetgrass and senega root. The water in the river system itself was also fundamental to the Bands' existence, not only for domestic purposes but also for fishing,

stockwatering, and the natural irrigation that it provided by means of seasonal flooding of low-lying lands. Lower water levels also permitted band members to cross the river to access hay and other resources on both sides. Several of the reserves "developed a strong attachment to economic, social and cultural activities based on the river habitat."

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

## THE BAND COUNCIL RESOLUTIONS OF 1977

In late 1972, the PFRA determined that it had not compensated either Muscowpetung or Pasqua for damages caused by the Echo Lake dam and that there was no evidence of any agreement between the PFRA and Indian Affairs or the Bands. Negotiations commenced in September 1973, and by July 1975 all three participating western Bands had retained lawyer Roy Wellman to negotiate on their behalf. On November 16, 1976, the Bands offered to accept a lump sum settlement of $265,000 in consideration for a permit authorizing future use and occupation of reserve lands for flooding purposes as well as a release of past, present, and future damages caused by the structure.

The PFRA initially objected to this proposal, noting that the Bands had previously agreed to a settlement of $100 per acre based on the acreage determined by a joint engineering assessment. Eventually, however, the PFRA concluded that the sum of $265,000 could be justified, and the Bands passed Band Council Resolutions confirming the settlement. The settlement was approved on July 7, 1977, and payments were deposited to the credit of the respective Bands.

## DISSATISFACTION WITH THE SETTLEMENT

In October 1977, the new Chief of the Muscowpetung First Nation, Ron Rosebluff, raised concerns about the "perpetual" nature of the settlement, which he later equated to a surrender. Although Muscowpetung initially intended not to use or even accept the funds allocated to it, the evidence indicates that all three First Nations spent all or virtually all of the sums paid

to them. Despite assurances from the PFRA that the settlement did not represent a permanent alienation of land requiring a surrender and the consent of a majority of eligible band members, Muscowpetung issued a Band Council Resolution in February 1978 rescinding the 1977 Band Council Resolutions.

In addition to the objections of Chief Rosebluff, Indian Affairs was having difficulties identifying the lands to be covered by the permits contemplated by the 1977 settlement. A dispute regarding the permits developed between Indian Affairs and the Department of Regional Economic Expansion (DREE). Although the dispute was elevated to deputy ministerial level by late 1981 and early 1982, the departments reached an impasse and no permits were ever issued.

In the meantime, QVIDA had been formed in 1979 to represent the interests of its eight member First Nations. Standing Buffalo issued its own rescinding Band Council Resolution on November 10, 1980, and Pasqua followed suit on February 10, 1982. In mid-1986, the QVIDA Bands issued Band Council Resolutions approving the submission of specific claims for compensation arising from "the illegal alienation and flooding" of their respective reserves. However, owing to a lack of activity, QVIDA's claim file was closed in 1989 by the Specific Claims Branch of Indian Affairs subject to the understanding that it could be reopened when QVIDA was ready to resubmit its claim. QVIDA viewed this as a "constructive rejection" of the claim by Indian Affairs. Accordingly, in September 1994, the QVIDA First Nations requested that the Indian Claims Commission conduct an inquiry into the claim.

## ISSUES

The broad question before the Indian Claims Commission in this inquiry is whether the claims of the six QVIDA First Nations disclose a breach of the Crown's "lawful obligations" to the First Nations under the Specific Claims Policy. In answering this question, the Commission must determine whether, based on the evidence and submissions, these claims were properly rejected by Canada.

Canada and the participating QVIDA First Nations have agreed that, to assess the claims properly, the Commission must consider the following five issues:

1 Could the Crown authorize the PFRA under section 34 of the *Indian Act*, 1927, to use and occupy reserve lands for flooding purposes? If so, was the PFRA so authorized? If not, did Canada breach its fiduciary obligations

to the QVIDA First Nations by failing to obtain proper authorization under the Act?

2 If Canada could and did properly authorize the PFRA under section 34 of the *Indian Act*, 1927, to use and occupy reserve lands for flooding purposes, did the Crown nevertheless have a fiduciary obligation to consult or otherwise consider the best interests of the QVIDA First Nations before proceeding?

3 Did the terms of Treaty 4 preclude the Crown from relying on section 34 of the *Indian Act*, 1927, or otherwise require the consent of the QVIDA First Nations to authorize the PFRA to use and occupy reserve lands for flooding purposes?

4 Did the Band Council Resolutions signed by the Pasqua, Standing Buffalo, and Muscowpetung First Nations in the 1970s effectively release the Crown and the PFRA from all past, present, and future claims for damage caused by the Echo Lake control structure built in the 1940s?

5 Did those QVIDA First Nations with reserves adjacent to or on both sides of the Qu'Appelle River and lakes have common law riparian water rights, including rights to the river beds? If so, did the Crown have an obligation to ensure that these water rights were protected under the *North-West Irrigation Act*, 1894, and the *Dominion Power Act*, and to act in the First Nations' best interests when those rights might be affected? Moreover, did the Crown act in the best interests of the QVIDA First Nations when it authorized the PFRA to construct control structures that altered the First Nations' riparian interests and caused consequential losses?

## THE COMMISSION'S ANALYSIS AND FINDINGS

### Issue 1: Section 34 of the *Indian Act*, 1927

Canada acknowledged that it had not acquired the right to use and occupy reserve lands of the QVIDA First Nations by way of expropriation or surrender, so the question that remained was whether such use and occupation could be authorized by the Superintendent General of Indian Affairs under section 34 of the 1927 *Indian Act*. Based on the reasoning of the Supreme Court of Canada's recent ruling in *Opetchesaht Indian Band v. Canada*, the Commission concludes that, even if section 34 enabled the Superintendent

General to authorize the use and occupation of reserve land, the rights conveyed to the PFRA were too extensive, exclusive, and permanent to be authorized under section 34. Moreover, unlike subsection 28(2) of the later *Indian Act*, section 34 does not contemplate consent by either a band or a band council, meaning that it should be interpreted even more narrowly than subsection 28(2).

Since section 34 did not form an appropriate basis for authorizing use and occupation of reserve lands for flooding purposes in this case, it was not necessary for the Commission to consider whether Canada actually did authorize the PFRA to use and occupy reserve lands under the section. It was necessary for the PFRA to acquire by surrender or expropriation the right to use and occupy reserve lands for flooding purposes. Having failed to do so, the PFRA has trespassed on the reserve lands of all six participating First Nations from the early 1940s to at least 1977, and on the reserve lands of the Sakimay, Cowessess, and Ochapowace First Nations to this day. The impact of the 1977 settlement on the PFRA's use and occupation of the reserve lands of the Muscowpetung, Pasqua, and Standing Buffalo First Nations is addressed below.

**Issues 2 and 3: Canada's Fiduciary and Treaty Obligations**

Given that the Commission has concluded that it was inappropriate for Canada to authorize the PFRA to use and occupy reserve lands for flooding purposes under section 34 of the 1927 *Indian Act*, it is unnecessary to determine whether Canada breached a fiduciary or treaty obligation to consult or otherwise consider the best interests of the QVIDA First Nations before proceeding.

**Issue 4: Effects of the 1977 Band Council Resolutions**

For the same reasons that it was not open to Canada to authorize the use and occupation of reserve lands for flooding purposes under section 34 of the 1927 *Indian Act*, Canada could not authorize such use and occupation under subsection 28(2) of the 1970 *Indian Act* as part of the 1977 settlement discussions with Muscowpetung, Pasqua, and Standing Buffalo. The present case is distinguishable from *Opetchesaht* and the Commission's inquiry into the Eel River Bar First Nation because of the more extensive, exclusive, and permanent interest granted to the PFRA than to the British Columbia Hydro and Power Authority and the New Brunswick Water Authority in those other cases. Moreover, the 1977 settlement was void from the begin-

ning under subsection 28(1) of the *Indian Act*, either entirely or at a minimum with respect to that portion of the settlement relating to the permits and damages for future use and occupation looking forward from 1977. The effect of these conclusions is that the PFRA remained in trespass on the Muscowpetung, Pasqua, and Standing Buffalo reserves *after* 1977. The question of whether any pre-1977 trespasses were settled depends on whether the Band Councils had the power to enter into binding settlements with respect to the unauthorized use and occupation of reserve lands and whether the release clause in the 1977 Band Council Resolutions can be severed from those portions of the agreement rendered void by subsection 28(1) of the *Indian Act*.

Unless it chooses to remove the control structures at Echo Lake, Crooked Lake, and Round Lake, Canada should immediately commence negotiations to obtain, whether by surrender or expropriation, the interests in land it requires for flooding purposes from all six reserves. Canada should also commence negotiations to determine the remaining compensation, if any, payable to the Sakimay, Cowessess, and Ochapowace First Nations for flooding damages since the 1940s, taking into account the $3270 received by those First Nations as compensation in 1943. Similarly, Canada should commence negotiations to determine the remaining compensation, if any, payable to the Muscowpetung, Pasqua, and Standing Buffalo First Nations for flooding damages to those reserves, again taking into account the compensation of $265,000 paid to the three First Nations under the terms of the 1977 settlement. Whether the settlement entered into by the Band Councils in relation to damages prior to 1977 is binding on the respective Bands, and whether this part of the agreement can be severed and can operate independently to settle the damages arising during that period, are issues the parties should negotiate. If they are unable to settle those issues or any other question relating to the quantum of compensation arising out of the PFRA's use and occupation of reserve lands, the parties may return to the Commission for a further inquiry into such matters.

The Band Council Resolutions by which the three western Bands purported to rescind the 1977 Band Council Resolutions and the settlement are irrelevant to these proceedings. If the 1977 settlement was entirely void *ab initio* under subsection 28(1) of the *Indian Act*, this issue is academic since it would not have been necessary for the Bands to issue rescinding Band Council Resolutions to render the earlier resolutions ineffective. However, to the extent, if any, that the 1977 settlement can be considered valid under

section 28 of the *Indian Act*, the 1977 Band Council Resolutions were merely evidence of the intention to enter into a contract. As such, it would be contrary to basic principles of contract law to permit the First Nations unilaterally to withdraw from the 1977 settlement without the concurrence of the PFRA.

**Issue 5: Aboriginal, Treaty, and Riparian Water Rights**

It is unnecessary for the Commission to address the nature and extent of the First Nations' aboriginal, treaty, and riparian water rights in light of our findings in relation to the first four issues. Nevertheless, to the extent that the interference with such water rights constitutes an alternative cause of action, and if the PFRA and its successors can be shown to have interfered with the First Nations' water rights, we consider the First Nations to be entitled to claim compensation for the damages caused by such interference. Due regard must be had, of course, for compensation already paid to the First Nations to avoid any element of "double counting."

The evidence before the Commission is insufficient to link pollution in the Qu'Appelle River conclusively to the construction and use of the Echo Lake, Crooked Lake, and Round Lake control structures. Similarly, we have been shown no evidence that the failure by Canada to license the First Nations' consumptive rights under the *North-West Irrigation Act* of 1894 has caused any damage to the First Nations. The Commission therefore declines the invitation to decide whether the First Nations' riparian or other water rights were extinguished by that statute, or whether the Crown failed to protect those rights.

## RECOMMENDATIONS

Having found that the Government of Canada owes an outstanding lawful obligation to the First Nations of the Qu'Appelle Valley Indian Development Authority with respect to the Prairie Farm Rehabilitation Administration's acquisition of the right to use and occupy their reserve lands for flooding purposes, we therefore recommend:

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

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

(a) damages caused to reserve lands since the original construction of the dams in the early 1940s, and

(b) compensation for

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

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

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

(a) damages caused to reserve lands

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

(b) compensation for

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

subject to set-off of compensation of $265,000 paid to those First Nations in 1977.

# PART I

## INTRODUCTION

### BACKGROUND TO THE CLAIM

To understand the claim of the Qu'Appelle Valley Indian Development Authority (QVIDA) in this inquiry, it is first necessary to understand the composition and purpose of the organization as well as the geography from which it derives its name.

QVIDA was established in 1979 in response to concerns of its member First Nations that, among other things, their culture, rights, and interests were not being sufficiently protected and articulated in the use and development of land and water resources in the Qu'Appelle Valley. Of particular relevance to this inquiry, the organization sought to obtain redress for damage caused to reserve lands by control structures erected by the Prairie Farm Rehabilitation Administration (PFRA) in the early 1940s, and to exert greater influence over the future operation of the water régime in the valley.

Eight First Nations constitute QVIDA's membership – from west to east, Piapot, Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, Kahkewistahaw, and Ochapowace – although only six are participants in the present inquiry. Since the inquiry relates strictly to damages caused by the PFRA's control structures at Echo Lake, Crooked Lake, and Round Lake, Piapot is not involved because it is located too far upstream to have been affected by those structures. It may initiate a separate claim in relation to damages alleged to have been caused by structures constructed on the river in the 1970s.

Similarly, Kahkewistahaw is not a participant in this inquiry because, in rejecting QVIDA's flooding claim, Canada did not understand that the flooding may have affected Kahkewistahaw's reserve lands and did not address the issue at that time. As a result, Canada has more recently undertaken to review further submissions from Kahkewistahaw with regard to damages, to determine what (if any) compensation was paid to the First Nation for the flooding

of its reserve lands, and to provide a response. In the meantime, to allow the inquiry to proceed without further delay, Kahkewistahaw has elected to proceed separately should its claim be rejected by Canada after the First Nation has submitted additional claim materials.

At the centre of the QVIDA claims is the Qu'Appelle River (see map on page 186). At its west end, the river originates at Lake Diefenbaker, where the Gardiner and Qu'Appelle Dams have made a long, winding lake of the South Saskatchewan River reaching upstream almost to the boundary between Saskatchewan and Alberta. In dry years, water from the South Saskatchewan can be diverted around the Qu'Appelle Dam and down the valley to the thirsty farmlands below.

As the Qu'Appelle River meanders through the flat Saskatchewan landscape, its flow is first impeded by a control structure near Eyebrow, Saskatchewan, which creates tiny Eyebrow Lake. From there the river continues to the southeast until its current is again slowed by Buffalo Pound Lake, the product of another man-made control structure. Immediately below the dam, the river swings to the northeast, its volume augmented by the combined flows of the Moose Jaw River and Thunder Creek. Farther east it is joined just upstream of Lumsden by Wascana Creek, coming from Regina and supplemented by Cottonwood Creek. At Lumsden the Qu'Appelle River passes beneath Highway 11, the major roadway connecting Regina and Saskatoon, and extends northeast to Craven. There, the Craven and Valeport control structures permit water to be diverted northward into the huge storage capacity of Last Mountain Lake for later release to irrigate the Valeport Flats and other areas downstream.

Having passed Craven, the Qu'Appelle River maintains its northeast heading until it reaches Highway 6 directly north of Regina, where it veers to the east. At this point it enters the Piapot First Nation's Indian Reserve (IR) 75, which spans both sides of the river for several miles. Following a tortuous journey eastward, the river is joined from the north by Loon Creek, then traverses the northern edge of Muscowpetung's IR 80 and Pasqua's IR 79. Across the river from IR 80 is IR 80B, a hay reserve set apart for Muscowpetung and other bands, including Standing Buffalo. As the river flows along the northern boundary of the Pasqua reserve, it slows and empties into Pasqua Lake (at one time also known as Qu'Appelle Lake), the first of four lakes in quick succession which have come to be known collectively as the Fishing Lakes or the Qu'Appelle Lakes. Pasqua's reserve occupies almost the

entire southern shore of Pasqua Lake, other than the most easterly mile or so.

Jumping Deer Creek drains from the north into the east end of Pasqua Lake about a half-mile upstream of the short channel between that lake and the second of the Fishing Lakes – Echo Lake. Standing Buffalo's IR 78 straddles Jumping Deer Creek along portions of the north shores of both Pasqua and Echo Lakes and the intervening reach of the river. Situated at the lower east end of Echo Lake, the Echo Lake Dam controls the water levels of both Pasqua Lake and Echo Lake. The structure floods valley lands on the Muscowpetung, Pasqua, and Standing Buffalo reserves, and it is this flooding that constitutes one aspect of the present claim before the Indian Claims Commission (the Commission).

Immediately below the dam are the town of Fort Qu'Appelle and the confluence of the Qu'Appelle River with the northward-flowing Echo Creek. As the river snakes to the southeast, it flows past the towns of Lebret and Katepwa and into Mission Lake and Katepwa Lake – the last two Fishing Lakes – before being restrained yet again by another control structure at the lower end of Katepwa Lake. From that point it continues to the southeast, supplementing its flow with drainage from Pheasant Creek to the north and Indianhead Creek, Redfox Creek, and Adair Creek to the south. Once again the river angles to the northeast, joining forces with Pearl Creek before resuming a southeasterly course and entering another Indian reserve just upstream of Crooked Lake. This land belongs to the Sakimay First Nation, including IR 74 on the south shore of the river and the western third of Crooked Lake, as well as Shesheep IR 74A on the opposite bank of the river and the western half of the lake.

Occupying the remaining south bank of Crooked Lake and some miles of the river downstream is Cowessess IR 73. Kahkewistahaw's IR 72A – a small fishing station – was initially positioned on the north shore near the Crooked Lake Dam at the lake's eastern outlet. The south end of the dam sits on land that originally formed part of the Cowessess reserve, although the First Nation and the PFRA disagree on the current status of title to the dam site. The dam is used to control the level of Crooked Lake and has resulted in certain portions of the Sakimay and Cowessess reserves being flooded. Immediately east of the dam, Ekapo Creek drains into the Qu'Appelle River from the south through IR 73.

As the river winds its way to the southeast, Kahkewistahaw's IR 72 occupies some five miles of the south shore of the river midway between Crooked

and Round Lakes and adjacent to the eastern boundary of the Cowessess reserve. Kahkewistahaw's eastern neighbour is Ochapowace, whose IR 71 fronts the entire south shore of Round Lake and some distance both upstream and down. On the north side of the river and the east end of Round Lake are former Round Lake Indian Residential School lands which Kahkewistahaw purchased from the federal government in 1960 as an addition to IR 72. At Round Lake's eastern outlet, the eighth and last control structure was erected – its south end located on Ochapowace reserve lands – to store water in the lake for irrigation purposes. This dam caused flooding on the Ochapowace reserve at the west end of the lake. As noted at the outset, the full measure of the dam's impact on Kahkewistahaw's land remains to be determined and may form the subject matter of separate proceedings before the Commission.

The Qu'Appelle River finally meanders eastward to the Manitoba border, gaining additional flows from Squawhead Creek and Scissors Creek to the south and Kaposvar Creek and Cutarm Creek to the north. Ultimately, it reaches its confluence with the Assiniboine River just inside the Manitoba border at St Lazare, where it is swallowed up by the larger river before continuing eastward to its ultimate union with the Red River in central Winnipeg.

We have already alluded to the fact that the issues at the heart of this inquiry arise from the effects of the PFRA's construction and operation of dams on Echo Lake, Crooked Lake, and Round Lake on the reserves of the six QVIDA First Nations participating in these proceedings. The evidence is clear that the dams were constructed in the aftermath of severe drought conditions during the 1930s to store annual spring runoffs for later use in irrigating lands during periods of scant precipitation. It is just as clear that, although the PFRA and Indian Affairs were aware that the dams would flood Indian lands, the Bands themselves were not consulted and never authorized the projects to proceed. Three of the participating Bands – Muscowpetung, Pasqua, and Standing Buffalo – were not even paid the compensation to which the two government departments had agreed they were entitled. As a result, the first three issues in this inquiry consider whether section 34 of the *Indian Act* permitted Indian Affairs to authorize the flooding of reserve lands without Band consent; whether Indian Affairs did in fact authorize such flooding; and, if authorization *was* given, whether Indian Affairs was nevertheless required by treaty or as a fiduciary to consult with the Bands before allowing the PFRA to proceed.

In 1977, after Canada's failure to pay the Muscowpetung, Pasqua, and Standing Buffalo Bands had been discovered, the Band Councils of the day negotiated a settlement with the PFRA that would pay them the combined sum of $265,000 as compensation for past, present, and future damages caused by the dams. The Bands also agreed to allow permits to be issued pursuant to subsection 28(2) of the *Indian Act* that would allow the PFRA to continue flooding reserve lands. However, soon after Band Council Resolutions (BCRs) had been executed to authorize the settlement, and after the election of a new Muscowpetung Band Council, the three First Nations became concerned that they had permanently alienated reserve lands without obtaining surrenders approved by majorities of their respective voting memberships. All three First Nations purported to rescind the 1977 settlement Band Council Resolutions with later resolutions. These facts give rise to certain additional issues – namely, whether the settlement could be effected by way of Band Council Resolutions and permits issued under subsection 28(2), and whether it was open to the First Nations unilaterally to rescind the settlement, particularly since they had already received and have since spent the settlement proceeds of $265,000.

Finally, the Commission has been asked to consider the First Nations' water rights, whether arising as part of aboriginal title or as a result of treaty or riparian rights. The First Nations question whether their water rights were protected when the federal government laid claim to the beds and waters of non-navigable rivers by enacting the *North-West Irrigation Act* in 1894. If those rights *were* protected, the First Nations claim another basis for the damages caused by the construction and operation of the three dams without their consent. If the water rights were *not* protected, the First Nations claim that Canada breached fiduciary obligations to the First Nations in failing to protect those rights.

## THE MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission's mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued on September 1, 1992. It directs:

> that our Commissioners on the basis of Canada's Specific Claims Policy . . . by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and

(b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[1]

The Specific Claims Policy is set forth in a 1982 booklet published by the Department of Indian Affairs and Northern Development entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[2] In considering a specific claim submitted by a First Nation to Canada, the Commission must assess whether Canada owes an outstanding lawful obligation to the First Nation in accordance with the guidelines provided in *Outstanding Business*:

> 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.
>
> 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 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.
>
> . . .
>
> In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:
>
> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or its agencies under authority.
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[3]

## BACKGROUND TO THE INQUIRY

QVIDA submitted a claim to Indian Affairs in 1986 requesting compensation for the damages caused by the flooding of reserve lands.[4] On November 5,

1 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 (Consolidated Terms of Reference).

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

3 DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20.

4 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986 (ICC Exhibit 5).

1992, Carol Cosco of Indian Affairs advised Chief Lindsay Cyr, then President of QVIDA, that, owing to inactivity on QVIDA's claim since 1989, the Department intended to close the organization's file.[5] In that letter and follow-up correspondence on November 17, 1992, Cosco made it clear that the step was being taken primarily as a housekeeping measure and that the claim could be reopened from the point at which QVIDA had left off, without having to "start from scratch" or be delayed in handling.[6] Nevertheless, these letters were interpreted by the First Nations as a constructive rejection of their claim, and in October 1994, the claim was forwarded to the Indian Claims Commission with a request for an inquiry.[7]

On December 1, 1994, the Honourable Robert F. Reid, the Commission's Legal and Mediation Advisor, advised the parties that, having accepted QVIDA's request for an inquiry, the Commission sought to convene a planning conference.[8] Just over one week later, Rem Westland, the Director General of the Specific Claims Branch, expressed concern that the Commission would agree to conduct an inquiry in the QVIDA claim and in others that were "still in the research phase."[9] Nevertheless, counsel for Canada agreed to attend the first planning conference on January 30, 1995, and to discuss QVIDA's options in advancing its claim.

In fact, six planning conferences were conducted, and the parties were able to clarify and narrow the issues to be considered by the Commission. The first three conferences took place in Regina on January 30, June 6, and September 28, 1995. Before the fourth planning conference, which was held on April 3, 1996, Canada had completed its research into QVIDA's claims and provided its preliminary position in two "without prejudice" letters dated

5 Carol J. Cosco, Claims Analyst, Specific Claims West, Department of Indian and Northern Affairs, to Chief Lindsay Cyr, President, QVIDA, November 5, 1992, DIAND file BW8260/SK8552-C1, vol. 2 (ICC Documents, p. 1349).

6 Carol J. Cosco, Claims Analyst, Specific Claims West, Department of Indian and Northern Affairs, to Chief Lindsay Cyr, President, QVIDA, November 17, 1992, DIAND file BW8260/SK8552-C1, vol. 2 (ICC Documents, p. 1350).

7 Matthew Bellegarde, Claims and Policy Development Officer, Federation of Saskatchewan Indian Nations, to Kim Fullerton, Commission Counsel, Indian Claims Commission, October 11, 1994, enclosing Qu'Appelle Valley Indian Development Authority Record of Decision, September 12, 1994, with respect to a request by Chief Mel Isnana, Standing Buffalo, Chief Todd Peigan, Pasqua, Chief Eugene Anaquod, Muscowpetung, and Chief Joe Fourhorns, Piapot, to have the Indian Claims Commission carry out an inquiry into Canada's rejection of the QVIDA claim; Angela Delorme, Executive Secretary, Yorkton Tribal Council, to Kim Fullerton, Commission Counsel, Indian Claims Commission, October 26, 1994, enclosing Qu'Appelle Valley Indian Development Authority Record of Decision, September 12, 1994, with respect to a request by Chief Louis Taypotat, Kahkewistahaw, Chief Denton George, Ochapowace, Chief Terry Lavallee, Cowessess, and Chief Lindsay Kaye, Sakimay, to have the Indian Claims Commission carry out an inquiry into Canada's rejection of the QVIDA claim.

8 Justice Robert F. Reid, Legal and Mediation Advisor, Indian Claims Commission, to Matthew Bellegarde, Claims and Policy Development Officer, Federation of Saskatchewan Indian Nations, and Bruce Becker, Legal Counsel, Specific Claims West, DIAND Legal Services, December 1, 1994.

9 Rem Westland, Director General, Specific Claims Branch, Department of Indian and Northern Affairs, to Justice Robert Reid, Legal and Mediation Advisor, Indian Claims Commission, December 9, 1994.

March 29, 1996. In the first of these letters relating to the four western First Nations, Jack Hughes of Specific Claims West advised QVIDA Co-ordinator Gordon Lerat that Canada was prepared to recommend acceptance of the claim as it related to Standing Buffalo, but not with regard to Pasqua or Muscowpetung:

> **Muscowpetung and Pasqua Reserve Lands**
> It is our position that the PFRA obtained proper authorization for the use and occupancy of land on the Muscowpetung and Pasqua reserves pursuant to section 34 of the *Indian Act* of 1927. Canada did not compensate the Muscowpetung and Pasqua bands in respect of their flooded reserve lands in the 1940's, but eventually paid adequate compensation in 1977. In addition, the Muscowpetung and Pasqua band councils have provided Canada with effective releases with respect to compensation for the flooding of their lands by way of Band Council Resolutions authorizing the flooding. Accordingly, it is Canada's view that no lawful obligation is owed to either the Muscowpetung or Pasqua bands.
>
> **Standing Buffalo Reserve Lands**
> Upon our review of the file it does not appear that Canada was aware that Standing Buffalo reserve lands would be affected by flooding in the 1940's. Although the Standing Buffalo band council passed a Band Council Resolution in 1977 releasing Canada for the flooding of the band's land, it does not appear that Canada issued a permit at that time for the flooding. Therefore, we are prepared to negotiate based on the band's submission that there exists no authority for the flooding of their lands. Any compensation paid to the band in exchange for their consent for the Minister to issue a permit should take into account the compensation paid to the band in 1977 by way of set-off.[10]

Canada was not prepared to deal with the claim as it related to Piapot, since the flooding of that reserve appeared to result from upstream releases of water rather than the construction and use of the Echo Lake Dam. Hughes added that Canada had three means of authorizing the flooding of reserve lands – surrender, expropriation, or authorization under section 34 of the *Indian Act* – and that it had apparently authorized use and occupation under section 34.[11]

In the second letter, which dealt with the four eastern First Nations, Hughes informed Lerat that Canada had reached the preliminary position that

10 Jack Hughes, Research Manager, Prairies, Specific Claims West, Department of Indian and Northern Affairs, to Gordon Lerat, QVIDA Co-ordinator, March 29, 1995. Note that the date on the letter appears to be in error and that the proper date should be March 29, 1996.

11 Jack Hughes, Research Manager, Prairies, Specific Claims West, Department of Indian and Northern Affairs, to Gordon Lerat, QVIDA Co-ordinator, March 29, 199[6].

it owed no lawful obligation because, again, it had authorized the use and occupation of reserve lands under section 34. However, Canada was prepared to consider additional submissions from QVIDA with regard to the adequacy of the compensation paid for the use and occupation of these lands as well as compensation to Sakimay for funds expended to move a house to higher ground and for damages associated with road flooding.[12]

At the fourth planning conference, Canada acknowledged that its rejection of the flooding claim in relation to the four eastern First Nations had not addressed the impact, if any, suffered by Kahkewistahaw. It was at this point that Canada agreed to review Kahkewistahaw's claim and provide a response. Canada also conceded that it had not proceeded by way of "surrender [or]expropriation nor did it secure a permit for the lands now flooded by construction of the dams at Echo Lake, Round Lake or Crooked Lake."[13]

The fifth planning conference was convened in Regina on May 14, 1996. The parties agreed that, because Canada had accepted Standing Buffalo's claim for negotiation, Standing Buffalo would no longer be a party to the inquiry. Kahkewistahaw at that time intended to remain a party to the inquiry "unless and until Canada offers to accept Kahkewistahaw's claim for negotiation and that offer is accepted by the First Nation."[14]

By the time the last planning conference took place on February 28, 1997, however, Canada had changed its position with regard to Standing Buffalo and informed the First Nation that it was no longer willing to negotiate the First Nation's flooding claim. Kahkewistahaw's submission was still not complete, however, and Chief Amanda Louison considered withdrawing the First Nation's portion of the claim to allow the inquiry to proceed without further delay.[15] In short order, Standing Buffalo had elected to participate in the inquiry, and Kahkewistahaw had decided it would not participate.

## THE INQUIRY

To assist the Commission in its deliberations, the parties tendered more than 1300 pages of historical documents, a further 35 exhibits consisting of several thousand more pages of material, and a video prepared by the Federa-

12 Jack Hughes, Research Manager, Prairies, Specific Claims West, Department of Indian and Northern Affairs, to Gordon Lerat, QVIDA Co-ordinator, March 29, 199[6].

13 Indian Claims Commission Planning Conference, Qu'Appelle Valley Indian Development Authority, April 3, 1996, p. 3.

14 Indian Claims Commission Planning Conference, Qu'Appelle Valley Indian Development Authority, May 14, 1996, p. 6.

15 Indian Claims Commission Planning Conference, Qu'Appelle Valley Indian Development Authority, March 4, 1997, pp. 3-4.

tion of Saskatchewan Indian Nations. In four separate community sessions, the Commission also received oral evidence from elders of the six participating First Nations, as well as testimony from elders of the Kahkewistahaw First Nation, which, at the time of the community session in which its members took part, was still part of the inquiry.

The first community session was a joint meeting of the four eastern QVIDA First Nations held in the Community Hall on the Sakimay reserve on September 18, 1996. The Commissioners heard from elders George Ponicappo, Alex Wolfe, Marie Kaye, Raymond Acoose, Edna Sangwais, Emma Panipekeesick, Jimmy Wahpooseywan, and Leonard Kequahtooway of Sakimay; Joseph Crowe, John Alexson, Mervin Bob, Allan McKay, and Urbin Louison of Kahkewistahaw; Henry Delorme of Cowessess; and Margaret Bear, Marlowe Kenny, Arthur George, and Calvin George of Ochapowace.

The second session was conducted in the Pasqua Band Hall on October 2, 1996. The participants included the following elders from the Pasqua First Nation: David Obey, Stanley Pasqua, Clara Pasqua, Andrew Gordon, Raymond Gordon, Clayton Cyr, Lawrence Stevenson, Jimmy Iron Eagle, George Kahnapace, Lawrence Chicoose, Agnes Cyr, Dora B. Stevenson, Marsha Gordon, Bernard Gordon, Edith Merrifield, and Ina Kahnapace. The following day the Commissioners convened another community session in the Muscowpetung School gymnasium to hear the evidence of 11 elders of the Muscowpetung First Nation: Calvin Poitras Sr, Violet Keepness, Isabelle Keepness, William Pratt, Evelyn Cappo, Winonah Toto, Ervin Toto, Earl Cappo, Paul Poitras, Norma Cappo, and Eugene Anaquod.

Finally, after Standing Buffalo's participation in the inquiry had been confirmed, the fourth and final community session was held on April 4, 1997, at the Standing Buffalo Cultural Centre to hear from that First Nation's elders. Testifying were Charlie Buffalo, Susan Yuzicappi, Isabelle Jackson, Felix Bearshield, Ken Goodwill, Clifford Goodwill, Tony Yuzicappi, and – through Band Councillor Velma Bear – Cecil Wajunta, Victor Redman, Catherine Goodfeather, and Celina Wajunta.

Counsel for the QVIDA First Nations submitted written arguments to the Commission on May 5, 1997, to which counsel for Canada replied on June 6, 1997. Oral submissions were made at a final session in Regina on June 26, 1997.

A complete summary of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix A of this report.

# PART II

## HISTORICAL BACKGROUND

### TREATY 4

The circumstances forming the backdrop to the present claim of the QVIDA First Nations originated in the signing of Treaty 4 in 1874 by representatives of the government of Canada and by the Cree, Saulteaux, and other Indians of what is now southern Saskatchewan. By that time, white settlers and traders had arrived in the British North-West Territories. The demise of the buffalo, to which many Indians owed their existence, was already foreseen. It was a time of considerable upheaval and turmoil, as bands and individual Indians sought, in many tragic cases unsuccessfully, to find the best way to survive in a rapidly changing world. People were on the move, both geographically and from band to band, as they tried to identify whether their prospects would be better served by continuing the hunt or by settling on reserves and taking up agriculture and other pursuits. Canada and the prairie Indians recognized that, with the expected arrival of more and more white settlers, it was essential to formalize relations to give some protection to aboriginal interests.

In its previous reports dealing with the treaty land entitlement inquiries of the Kawacatoose and the Kahkewistahaw First Nations, the Commission has already reviewed at some length the events that spurred Canada and the Indians to enter into Treaty 4.[16] We do not propose to consider those events further in this report, other than to identify the relevant signatories to the treaty and to note the specific treaty provisions spawned by the negotiations.

Treaty 4, which became known as the Qu'Appelle Treaty, was first executed at the Qu'Appelle Lakes on September 15, 1874, with the initial signatories including the Chiefs of four of the present eight QVIDA First Nations: Cowessess ("Ka-wezauce," also known as "The Little Boy" or "The Little

16 Indian Claims Commission (ICC), *Report on Kawacatoose First Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1996), (1996) 5 *Indian Claims Commission Proceedings* (ICCP) at 73; ICC, *Report on Kahkewistahaw First Nation Treaty Land Entitlement Inquiry* (Ottawa, February 1996).

Child"), Pasqua ("The Plain"), Kahkewistahaw ("Him that flies around"), and finally Kakisheway ("Loud Voice") and Chacachas (whose bands later merged to become Ochapowace). At the subsequent meeting with bands in the Fort Ellice area on September 21, 1874, the Treaty Commissioners included the Sakimay ("Mosquito") people as members of Waywaysecappo's band. Cheekuk signed an adhesion to the treaty on behalf of Muscowpetung on September 8, 1975, and Piapot ("Payepot") adhered the next day.

The lone exception was the Standing Buffalo Band, which descended from Minnesota Sioux Indians who came to Canada as refugees of the American Sioux War of 1862-63. As such, they were apparently excluded from Treaty 4, although they were later encouraged to settle within the Treaty 4 area as long as the location they chose was not close to the American border.[17]

Under the terms of Treaty 4, the adhering Indians agreed to "cede, release, surrender and yield up" to Canada "all their rights, titles and privileges" to some 75,000 square miles of land encompassed by the treaty. In exchange, Canada agreed to set apart reserves for the Indians,

> such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families; provided, however, that it be understood that, if at the time of the selection of any reserves, as aforesaid, there are any settlers within the bounds of the lands reserved for any band, Her Majesty retains the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to the Indians; and provided, further, that *the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained, but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.*[18]

The treaty further stipulated that Canada would provide treaty annuities to each Indian man, woman, and child, as well as agricultural implements and seed to assist those bands that were ready to settle and convert to an agrarian lifestyle. For those Indians who were not yet ready to settle, the treaty pro-

17 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, p. 7 (ICC Exhibit 5).

18 *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), p. 6. Emphasis added.

vided that they were to receive "powder, shot, ball and twine" and assured the following rights with regard to hunting, fishing, and trapping:

> And further, Her Majesty agrees that Her said Indians shall have right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining or other purposes, under grant or other right given by Her Majesty's said Government.[19]

Finally, for the purposes of the present inquiry, the following provision of the treaty is also relevant:

> It is further agreed between Her Majesty and Her said Indian subjects that *such sections of the reserves above indicated as may at any time be required for public works or building of whatsoever nature may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land or money for the area of the reserve so appropriated.*[20]

## SELECTION OF RESERVES

Within a few years of the initial signing of Treaty 4, survey work on the reserves for the six QVIDA First Nations participating in this inquiry had been commenced, and by 1884 all had been allocated their principal reserves within the Qu'Appelle Valley.[21] The government's policy of promoting reserve agrarianism had begun.

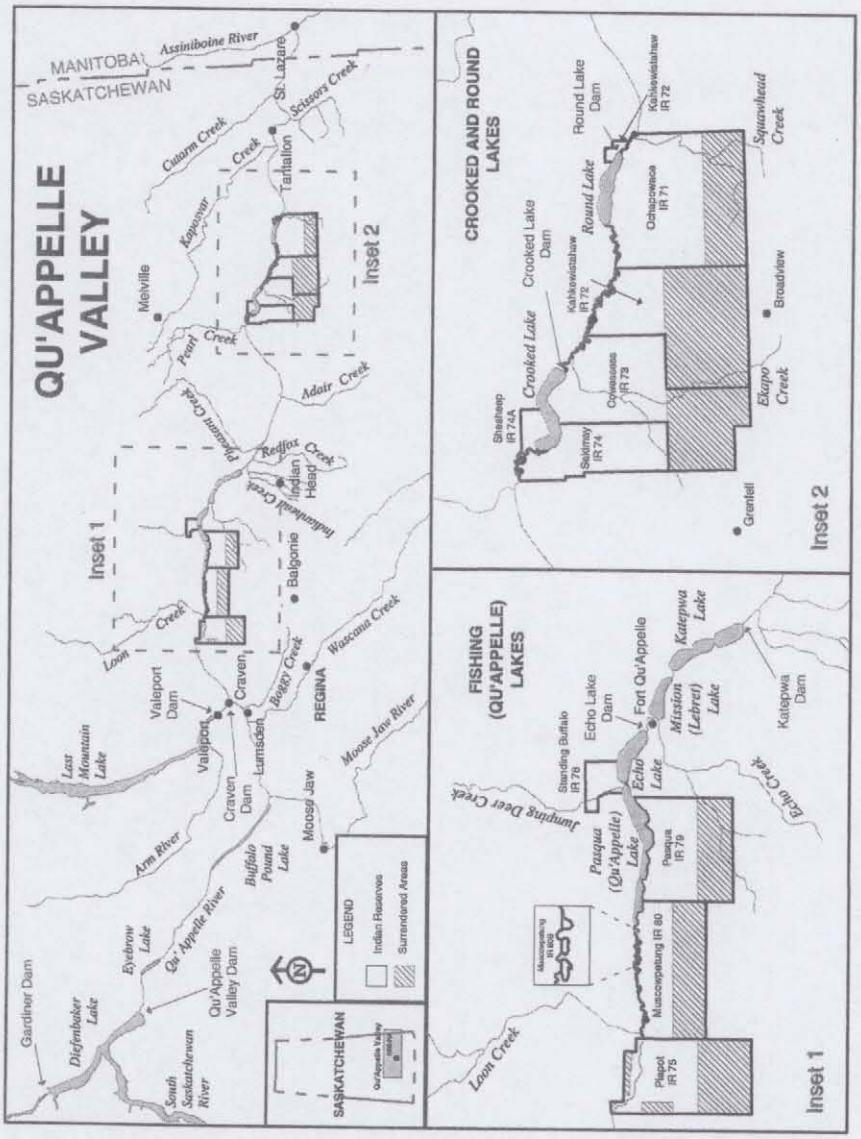
### Pasqua

Pasqua's IR 79 was surveyed in October 1876 by Dominion Land Surveyor (DLS) William Wagner along most of the south shore of Pasqua Lake – the most westerly of the four Fishing Lakes – and further upstream for a couple

19 *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), p. 7.

20 *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), p. 7. Emphasis added.

21 It should be noted that the dates of first survey for treaty land entitlement purposes for some of the QVIDA First Nations are or have been in issue before the Commission. The respective dates of first survey for these First Nations are not in issue in these proceedings, however. Any statements that the Commission may make in this report regarding survey dates for any of the First Nations are merely for the purpose of setting the general historical context for this inquiry, based on the limited evidence before us at this time, and do not represent the findings or views of the Commission on the subject of the respective First Nations' dates of first survey.


QU'APPELLE VALLEY
MANITOBA
SASKATCHEWAN
Assiniboine River
St. Lazare
Scissors Creek
Tantallon
Melville
Inset 2
Inset 1
Indian Head
Balgonie
REGINA
Wascana Creek
Moose Jaw River
Moose Jaw
Craven
Lumsden
Valeport
Valeport Dam
Craven Dam
Last Mountain Lake
Arm River
Buffalo Pound Lake
Qu'Appelle River
Eyebrow Lake
Qu'Appelle Valley Dam
Diefenbaker Lake
Gardiner Dam
South Saskatchewan River
Loon Creek
Redfox Creek
Pheasant Creek
Pearl Creek
Adair Creek
Kapoose Creek
Cutarm Creek
Boggy Creek
LEGEND
Indian Reserves
Surrendered Areas
SASKATCHEWAN
CROOKED AND ROUND LAKES
Crooked Lake
Crooked Lake Dam
Round Lake
Round Lake Dam
Kahkewistahaw IR 72
Sheshepp IR 74A
Saskimay IR 74
Ochapowace IR 71
Broadview
Grenfell
Ekapo Creek
Squawhead Creek
FISHING (QU'APPELLE) LAKES
Standing Buffalo IR 78
Echo Lake Dam
Fort Qu'Appelle
Echo Lake
Pasqua (Qu'Appelle) Lake
Pasqua IR 79
Mission (Lebret) Lake
Katepwa Lake
Katepwa Dam
Muscowpetung IR 80
Piapot IR 75
Jumping Deer Creek
Echo Creek
Loon Creek
Inset 1
Inset 2

of miles along the meandering course of the Qu'Appelle River. The original reserve contained 60.15 square miles, or 38,496 acres,[22] described by Wagner in these terms:

> The soil in this reserve is a clay loam of first quality. The surface is level, and undulating, and partially wooded with poplar and willow. Fish and wild-fowl abound in the lake and swamps in the valley of the Qu'Appelle.[23]

### Muscowpetung

Muscowpetung's band attempted to survey its own reserve immediately after adhering to Treaty 4 in 1875, but Cheekuk, who had signed the adhesion, died during the final leg of the work and it was never completed.[24] Eventually, in November 1881, district land surveyor John C. Nelson began to mark off IR 80 along the south side of the Qu'Appelle River immediately upstream of Pasqua's reserve, but he was interrupted by the onset of winter. He returned in May 1882 to find that, at the request of the Chief and the Band, Indian Agent Alan McDonald had extended the proposed reserve four miles west along the Qu'Appelle River, and had reduced its depth by 2½ miles, to provide the Band with more building wood.[25] Ultimately, IR 80 contained 58.8 square miles, or 37,632 acres, and the Band received a further 472.9 acres as Hay Reserve 80B, which it was to share with other bands.[26] With regard to IR 80, Nelson reported:

> Like most of the choice land of the Qu'Appelle district the soil of this reserve is nearly all first-class. There are groves of small poplar and clumps of willow, and in the gullies leading to the Qu'Appelle Valley there is a considerable supply of good poplar for building and fencing purposes, and a few small maples. The bottoms along the

22 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, p. 8 (ICC Exhibit 5). On June 5, 1906, the Pasqua Band surrendered 25.12 square miles, or 16,077 acres (41.8%), of its reserve, leaving it with 35.03 square miles, or 22,419 acres: 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, p. 18 (ICC Exhibit 5).

23 Treaty No. 4, North-West Territories, Indian Reserve No. 79, Chief "Pasquaw," surveyed by William Wagner, DLS, October 1876 (ICC Exhibit 29B).

24 Blair Stonechild, Indian Consultant Enterprises, "A Historical Overview of the Occupancy in the Valley of the Qu'Appelle Valley Bands" (March 1992), tab 2, p. 22, in Indian Consultant Enterprises, "Past Damages Compensation Study" (March 1992) (ICC Exhibit 3).

25 A. McDonald, Indian Agent, Treaty 4, to Superintendent General of Indian Affairs, May 9, 1882, Canada, Department of Indian Affairs, *Annual Report*, 1882 (ICC Documents, p. 18).

26 Blair Stonechild, Indian Consultant Enterprises, "A Historical Overview of the Occupancy in the Valley of the Qu'Appelle Valley Bands" (March 1992), tab 2, p. 22, in Indian Consultant Enterprises, "Past Damages Compensation Study" (March 1992) (ICC Exhibit 3). On January 4, 1909, the Muscowpetung Band surrendered 27.5 square miles, or 17,600 acres (46.8%), of IR 80, leaving it with 31.3 square miles, or 20,032 acres, from that reserve: 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, p. 18 (ICC Exhibit 5).

> river are valuable for the immense quantity of hay which can be cut on the less elevated parts of them. The best bottom is at the north-west corner of the reserve at the mouth of Prairie Creek and nearly opposite Long Valley Creek.[27]

Nelson also described the hay lands in IR 80B as being "of the best quality."[28]

### Standing Buffalo

Standing Buffalo died in 1869, but some of his followers had already camped in the vicinity of Fort Qu'Appelle. Although the Band was not permitted to adhere to Treaty 4, Lieutenant Governor Alexander Morris encouraged the Band to select a reserve, and in early November 1881 Nelson surveyed IR 78 along the north side of Pasqua and Echo Lakes and the intervening reach of the Qu'Appelle River. Since the Band was not a signatory to Treaty 4, IR 78 contained only 7.6 square miles, or 4864 acres – an allocation of only 80 acres per family of five rather than the one square mile per family of five stipulated by the treaty.[29] Of this reserve, Nelson commented:

> This reservation has a remarkably beautiful situation. It has an area of seven and a half square miles, bounded on the west side by Jumping Creek, and on the front by the Qu'Appelles. The soil is a clay loam of the first order, and there is [an] abundance of wood. Hay is scarce and consequently a small meadow was reserved at the extensive hay grounds farther up the river.[30]

### Sakimay, Cowessess, and Ochapowace

In 1876, surveyor William Wagner surveyed reserves for the Sakimay, Starblanket, and Kakisheway Bands along the entire north shore of the Qu'Appelle River from a point upstream of Crooked Lake to a point below Round Lake. Two other reserves were surveyed on the other side of the river

27 John C. Nelson, DLS, Indian Reserve Survey, to Superintendent General of Indian Affairs, December 29, 1882, Canada, Department of Indian Affairs, *Annual Report*, 1882 (ICC Documents, p. 33).

28 Treaty No. 4, North-West Territories, Indian Reserve No. 80B, Hay-Lands for the Bands of "Muscowpetung" & Others, surveyed by John C. Nelson, DLS, November 1881 (ICC Exhibit 29B).

29 Blair Stonechild, Indian Consultant Enterprises, "A Historical Overview of the Occupancy in the Valley of the Qu'Appelle Valley Bands" (March 1992), tab 2, pp. 33-34, in Indian Consultant Enterprises, "Past Damages Compensation Study" (March 1992) (ICC Exhibit 3); 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, pp. 7 and 9 (ICC Exhibit 5). The Band surrendered 2.59 acres on January 12, 1897, but later received additional areas of 406 acres on May 23, 1930, 144 acres on June 7, 1956, and 187.4 acres on July 12, 1956, for a reserve that eventually totalled 8.75 square miles, or 5598.81 acres: 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, pp. 9 and 18 (ICC Exhibit 5).

30 John C. Nelson, DLS, Indian Reserve Survey, Treaties Nos. 4 and 7, January 10, 1882, Canada, Department of Indian Affairs, *Annual Report*, 1881 (ICC Documents, p. 9). The upstream hay grounds referred to by Nelson likely meant IR 80B, which had been set apart for Muscowpetung and "others."

in the vicinity of Round Lake for Kahkewistahaw and Chacachas. In 1880, O'Soup (joined later by Cowessess) was situated by surveyors Allan Poyntz Patrick and William Johnson on the south shore of eastern Crooked Lake and a few miles of the Qu'Appelle River downstream.

By 1881, the three bands on the north side of the river were expressing their dissatisfaction with the lack of wood and other resources on their reserves, and Nelson extensively revised the boundaries of all six reserves. Sakimay was moved to IR 74 south of the river at the west end of Crooked Lake, while Kakisheway and Chacachas were consolidated on IR 71 along the south shore of Round Lake and some distance both upstream and down. O'Soup's IR 73 remained in much the same location south of Crooked Lake and east along the Qu'Appelle River, although five miles of river frontage at the east end became the new Kahkewistahaw IR 72 flanked by Cowessess to the west and Ochapowace to the east. Starblanket relocated to a more northerly site outside the Qu'Appelle Valley.

Nelson's impressions of the 33.88 square mile (21,683.2 acre) Sakimay reserve were as follows:

> The reserve is undulating prairie interspersed with groves of poplar and clumps of willow, with the exception of the part along the Qu'Appelle Valley, which is broken by ravines and heavily wooded with poplar and balm of Gilead. Ponds frequently occur throughout the prairie portion. The land throughout is of the choicest quality.[31]

This reserve was extended to the north shore of the Qu'Appelle River at the west end of Crooked Lake in 1884 to provide separate land for a faction of the Band that refused to take government assistance. The new Shesheep IR 74A comprised 5.6 square miles, or 3584 acres, about which Nelson wrote:

> This reserve is greatly cut up with coulées in which there is a considerable supply of poplar and maple. Along the Qu'Appelle River the land is swampy. On the high prairie the soil is a very good black loam with some boulders on the surface.[32]

In 1883, Nelson added 15 square miles, or 9600 acres, to the 63 square mile (40,320 acre) reserve he had surveyed for O'Soup in 1881. He explained his reasons in describing the reserve:

31 Treaty No. 4, North-West Territories, Indian Reserve No. 74, Chief "Sakimay," surveyed by John C. Nelson, DLS, November 1881 (ICC Exhibit 29B).

32 Treaty No. 4, North-West Territories, Indian Reserve No. 74A at Crooked Lake, "Sheesheep's" Band, surveyed by John C. Nelson, DLS, 1884 (ICC Exhibit 29B).

This reserve is well watered by "Ecapo" or Weed Creek, which flows through an immense wooded ravine and empties into the Qu'Appelle River. Along the creek it is heavily wooded with poplar, balm of Gilead and some elm. The south-western part is undulating prairie with clumps of willow and poplar. The soil throughout is of choice quality. There are several mill sites on Weed Creek.

This reserve was originally allotted to the band of Chief "O'Soup", and contained an area of sixty-three square miles, which was considered sufficient to meet the requirements of the band at that time. An extension of fifteen square miles was subsequently added by special order of the Department, as it was thought "Cowessess" would bring many Indians with him from the plains, when he assumed the chieftainship.[33]

Following the death of Kakisheway in 1884, his son Ochapowace was elected as the new chief of the combined Kakisheway and Chacachas Bands. The consolidated IR 71 set apart for Ochapowace's band in 1881 comprised 82.6 square miles, or 52,864 acres, about which Nelson commented:

The southern portion of the reserve is an undulating prairie with numerous ponds, hay swamps and scattering bluffs and poplar and clumps of willow. The northern part slopes gently towards the Qu'Appelle River, and is thickly wooded with poplar and balm of Gilead. Along the valley of the Qu'Appelle and the eastern boundary, the land is much broken by immense ravines which extend back from the river, and are heavily wooded with poplar, willow, a few oaks, ash and birch. The soil is a rich sandy loam, with some gravelly spots and a few boulders.

The fishing in Round Lake is said to be good.[34]

## DEVELOPMENT OF AGRARIAN ECONOMIES

Although the record in this inquiry includes the annual reports of Canada's Indian agents and other representatives until only 1905, these reports speak for themselves as to the kind of progress made by the Qu'Appelle Valley Bands in the early years following the selection of their reserves. There are also many comments that illustrate the resources available to the Bands and some of the difficult conditions that the people were forced to endure.

33 Treaty No. 4, North-West Territories, Indian Reserve No. 73, Chief "Cowessess," surveyed by John C. Nelson, DLS, August 1881 (ICC Exhibit 29B). On January 29, 1907, the Cowessess Band surrendered 32.35 square miles, or 20,704 acres (41.5%), of its reserve. It surrendered a further 350 acres on November 13, 1908, leaving it with 45.1 square miles, or 28,866 acres: 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, p. 19 (ICC Exhibit 5).

34 Treaty No. 4, North-West Territories, Indian Reserve No. 71 at Round Lake, Chiefs "Kakeesheway" and Chacachas, surveyed by John C. Nelson, DLS, August, 1881 (ICC Exhibit 29B). After the First World War, the Ochapowace Band surrendered 28.5 square miles, or 18,240 acres (34.5%), of its reserve on June 30, 1919, leaving it with 54.1 square miles, or 34,624 acres: 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, pp. 19-20 (ICC Exhibit 5).

## The Eastern Bands

By 1883, the federal government had introduced its policy of removing Indians from the Cypress Hills and the vicinity of the American border,[35] and Indians who had made their way south to continue the hunt were rejoining – at times under armed guard – their bands as the great herds of buffalo dwindled to near extinction. Although there were obvious adjustments to be made by both settled Indians and returning nomads, Indian Commissioner Edgar Dewdney's tone was optimistic:

> The eastern section of Treaty 4, under [Indian Agent] Col. Macdonald, has made great strides during the past season, although the new arrivals from the south somewhat demoralized them for a time. The Crooked Lakes Reserve, upon which "O'Soup," "Little Child," "Mosquito" and "Kah-kee-wis-ta-how" are settled, has raised very fine crops of wheat, barley, Indian corn and vegetables. Most of the Indians have abandoned their blankets, and many earn money working along the line of railway, which passes close to the reserve. A few more cattle and implements given these Indians will, our Agent thinks, render them self-sustaining.[36]

Indian Agent Alan McDonald commented that Muscowpetung possessed "one of the best reserves in the Treaty for agricultural purposes, but I regret to say there is but a limited supply of wood."[37]

Three years later, in 1886, McDonald trumpeted the progress made by the bands in his Crooked Lake Agency:

> Taking our crops of wheat and potatoes as a whole, and comparing them with the settlers, the Indians on these reserves have not much reason to complain. . . .
>
> The Indians have worked most creditably this spring: the ploughing, seeding and fencing being equal to that of the settler, and it is my opinion the Indian fairly realizes the advantage gained by work.[38]

The following year, McDonald commented on the prodigious quantities of hay that the reserves were capable of producing:

35 Details of this policy were fully canvassed in the Commission's report on the treaty land entitlement inquiry for the Lucky Man Band: see ICC, *Report on Lucky Man Band Treaty Land Entitlement Inquiry* (Ottawa, February 1997).

36 E. Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, October 2, 1883, Canada, Department of Indian Affairs, *Annual Report*, 1883, (ICC Documents, p. 47).

37 A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, July 6, 1883, Canada, Department of Indian Affairs, *Annual Report*, 1883, (ICC Documents, p. 38).

38 A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, August 26, 1886, Canada, Department of Indian Affairs, *Annual Report*, 1886, (ICC Documents, p. 75).

> After sufficient hay was secured for wintering the stock, several Indians put up a quantity for sale. "Yellow Calf" and his party [from Sakimay] sold sufficient to pay for two mowing machines and horse rakes, and to purchase tea and other necessaries for the winter. The total amount realized from the sale of hay was $476. Sixty-four tons were sold to the Commissioner of the North-West Mounted Police, and shipped to Regina *viá* Canada Pacific Railway.[39]

The critical importance of precipitation and moisture to farming efforts in the valley was evident in McDonald's report in 1888. He also remarked on the already declining trapping industry:

> [T]his is the first season, since the Indians came on these reserves, that prospects look so bright, and I am glad to say that several Indians, who have kept aloof from farming, have now commenced, *with the hope of having wet seasons* and good crops for the next five years. . . .
>
> Owing to the decrease of fur-bearing animals over the district in which these Indians trap, the catch last winter was much smaller than formerly. On careful enquiry I think there could not have been more than $1,100 realized from furs, and about $150 from fish, the latter being mostly consumed by themselves. Very little was sold.[40]

To this report, Dewdney added:

> They [the Sakimay Band] put up in last season 350 tons of hay, which will be sufficient to feed their cattle, of which animals they own 55, and individual members possess 50, and will leave a surplus of 75 tons for sale.[41]

By 1889 it was recognized that lands in the vicinity of Round and Crooked Lakes were subject to periodic droughts, and steps were already being taken to counteract the effects of these dry years:

> This has been the driest year since 1874, and judging from the crops raised by one of the Indians on Reserve No. 73 (Coweses) I am confident if the above system [of summer fallowing] is carried out an average return will be forthcoming in our dryest [sic] seasons. The crops up to the middle of June looked most promising, but the hot winds of the 28th June checked the growth, and had we not had rain in the beginning of July the crop with the exception of Gaddie's would have been a total loss. . . .

39 A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, September 13, 1887, Canada, Department of Indian Affairs, *Annual Report*, 1887, (ICC Documents, p. 83).

40 A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, September 13, 1887, Canada, Department of Indian Affairs, *Annual Report*, 1887, (ICC Documents, p. 83). Emphasis added.

41 E. Dewdney, Superintendent General of Indian Affairs, to Sir Frederick Arthur Stanley, Governor General, January 1, 1889, Canada, Department of Indian Affairs, *Annual Report*, 1888, (ICC Documents, p. 101).

> The Indians having secured a large quantity of hay for the wintering of their stock, the cattle turned out in the spring in excellent condition.[42]

McDonald's subsequent report showed that his guarded optimism in 1889 had been dashed by further hot, dry weather:

> The crops of last year were a failure. At one time they looked promising, but the continuous dry weather checked their growth.
>
> The hay crop also suffered. It was with great difficulty the Indians on Cowesess' Reserve, number 73, and Sakimay's Reserve, number 74, secured sufficient hay for wintering their stock. Without mowing machines it would have been impossible for them to cut what they required, as two or three acres in some cases had to be gone over before a ton was procured. The Indians on the other two reserves, viz.: Ochapowace, number 71, and Kah-ke-wis-ta-haw, number 72, were more fortunate; for, in addition to that which they required for their cattle, about thirty tons were put up for sale. . . .
>
> She-Sheep's party on reserve number 74, secured a large quantity of hay, with which they were able to winter fifty-one head of stock for settlers adjacent to their reserve, realizing therefrom, $250.[43]

In succeeding years, McDonald and his successors as Indian agent commented frequently on the successes achieved by the Bands of the Crooked Lake Agency in producing hay, cattle, grain, and root crops. Digging senega root became an important and relatively lucrative alternative source of income for these Bands.[44] The reserves also contained supplies of dry wood that could be sold as firewood. Fishing in Crooked and Round Lakes consistently supplemented the diet of Band members, but little or no excess was caught for sale. McDonald reported again in 1892 and 1893 on the "steadily decreasing" catch of furs, "owing partly to fur-bearing animals being scarcer, and the fact of the best hunters being now the best farmers who have to stay at home on their farms";[45] by 1895 "[t]he catch of furs is so small now as to be of no account in finance."[46]

42 A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, September 20, 1889, Canada, Department of Indian Affairs, *Annual Report*, 1889, (ICC Documents, p. 105).
43 A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, September 25, 1890, Canada, Department of Indian Affairs, *Annual Report*, 1890, (ICC Documents, p. 115).
44 A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, July 31, 1893, Canada, Department of Indian Affairs, *Annual Report*, 1893, (ICC Documents, p. 160).
45 A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, July 30, 1892, Canada, Department of Indian Affairs, *Annual Report*, 1892, (ICC Documents, p. 150).
46 A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, July 20, 1895, Canada, Department of Indian Affairs, *Annual Report*, 1894/95, (ICC Documents, p. 197).

The most important variable in the economic life of the Bands was the weather. The early 1890s in particular were marked by mixed success, with some years providing encouraging results and others ending with crop failures and damage from heat and drought, notwithstanding improvements in the Bands' farming practices. In 1891, McDonald reported:

> The last year's crop was the best we have had since these Indians commenced farming. . . .
>
> The hay crop was much better than last year, but owing to unfavourable weather there was not much made for sale.[47]

In 1892, he commented:

> I am glad to say the crops, taken as a whole, for the last year were very favourable, and for quantity were greatly in excess of all former years, but the prices realized by the Indians for their wheat ruled rather lower. . . .
>
> The hay crop was a favourable one, the Indians stacking nine hundred and seventy tons, of which they sold ninety tons, the balance being used to feed their stock. . . .
>
> The crops are looking well, but are short in the straw, owing to the long continued dry weather and lack of rain in June, but just at the last of the month a good supply came, and although I do not anticipate an extraordinary crop, I certainly expect an average one, as the good effect of the deferred rain, when it came, was apparent at once.[48]

The 1893 report stated:

> The crops raised by my Indians last year were rather less in quantity than was the case the previous year, which was due to the season and not to inferior farming, as I am pleased to report that a steady advance is observable in the methods adopted in agricultural operations on nearly all the Indian farms. . . .
>
> The hay crop was an average one, the Indians stacking nine hundred and eighty-eight tons, which was about the usual quantity they were accustomed to put up, and which of late years has been sufficient to carry their stock well through the winter and give them some hay to sell in the spring.[49]

The dry 1894 season proved to be particularly discouraging:

47 A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, August 12, 1891, Canada, Department of Indian Affairs, *Annual Report*, 1891, (ICC Documents, p. 126).

48 A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, July 30, 1892, Canada, Department of Indian Affairs, *Annual Report*, 1892, (ICC Documents, pp. 147-49 and 151).

49 A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, July 31, 1893, Canada, Department of Indian Affairs, *Annual Report*, 1893, (ICC Documents, pp. 158 and 161).

Seeding this spring commenced about the usual time and the early promise of a good crop was assuring, but the great scarcity of rain later on makes it look as if the coming harvest was to be the lightest yield my Indians have ever known, which is very discouraging as they not only worked well, but were amenable to the practical advice given them as to summer-fallowing, etc., and put in their seed on land which for the most part could not have been much better prepared. . . .

The farmers sowed nineteen acres of oats for the use of their horses, the yield from which will be very poor owing to the excessive drought.

The hay crop, owing to the dry season, will be light, although enough will be secured for winter provision.[50]

Although 1895 promised favourable returns, McDonald continued his lament on the poor 1894 season:

As prognosticated in my last report, the crop harvested during the current year has proved very light. . . .

This was entirely due to the extraordinarily dry season, which was the dryest [sic] I have seen in this country for the past twenty years. . . .

The comparative failure is owing to the dry season. . . .

There is a greater acreage under crop than last year by 22½ acres, and the crop has been properly put in on land better prepared than in any previous year, and with the present favourable weather a remarkably good return may be expected this coming harvest. . . .

The hay crop, owing to drought, was a poor one, although sufficient was obtained to winter all the stock comfortably. . . .

One well was dug during the winter on Kahkewistahaw's Reserve, No. 72, owing to a supply running short that had never failed before. . . .

The hay harvest promises to be excellent this summer, and the crop abundant.[51]

In subsequent years, the reporting requirements for the Indian agents changed and, in terms of the Bands' economic development, focused more on reserve resources and Band occupations than on weather conditions and production levels. Even so, Indian Agent J.P. Wright commented in 1898:

I regret to report that owing to the extreme dry season we have had this year so far, and to the severe and frequent frosts, our crops are about a total failure. . . .

50 A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, July 20, 1894, Canada, Department of Indian Affairs, *Annual Report*, 1893/94, (ICC Documents, p. 174).

51 A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, July 20, 1895, Canada, Department of Indian Affairs, *Annual Report*, 1894/95, (ICC Documents, pp. 193-94 and 196).

> This has been an exceptionally unfortunate year for farming operations in this district, and most discouraging to the Indians, the whole of their hard work being destroyed.[52]

In summary, these later reports demonstrated the reliance of the Crooked Lake Agency Bands on sales of hay, firewood, and senega root, together with mixed farming and, using the Bands' own hay supplies, raising stock. Fishing provided an important supplementary food supply for the Ochapowace and Sakimay Bands, and to a lesser extent for Cowessess, but did not constitute a significant source of income.

### The Western Bands

The Muscowpetung Agency, which served the four western Qu'Appelle Valley Bands, opened under the stewardship of Indian Agent J.B. Lash on July 1, 1885, after the North-West Rebellion. The hay grounds in the agency already formed a significant component of the Bands' economies:

> The hay grounds on Piapot's and Muscowpetung's Reserves have been turned to good account, and the result of last year's work has encouraged the Indians and in a substantial manner proved to them the benefit of assisting themselves. Two hundred tons of hay were sold and delivered in Regina to the North-West Mounted Police and others.[53]

The problems posed by the weather were no less daunting for the western Bands than for those to the east. Lash commented in 1886 on the impact of drought conditions the preceding year and his attempts to encourage the Indians to diversify their operations:

> The result of last year's experience in trying to farm successfully in the valley in this agency thoroughly convinced me that a change was necessary, as the changes in the temperature had more effect on the crops in the low land. However, to convince the Indians was not so easy, as to come on the bench necessitated breaking and fencing new land. The Indians were notified in good time that seed grain would only be issued for farming on the bench land, and I am pleased to report that the result has been satisfactory, as our crop on the whole promises a fair return. The root crops last year on Piapot's and Muscowpetung's Reserves were very light, owing to the summer

52 J.P. Wright, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, August 25, 1898, Canada, Department of Indian Affairs, *Annual Report*, 1897/98, (ICC Documents, p. 266).

53 J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 5, 1886, Canada, Department of Indian Affairs, *Annual Report*, 1886, (ICC Documents, p. 73).

drought; on Pasquah's Reserve there was a fair yield, and on the Sioux [Standing Buffalo] Reserve a very good crop.

The ground was so hard and dry that very little fall ploughing could be done.

Fully 200 tons of hay were sold and delivered off the reserves. This industry encourages the Indians, as also the freighting from the railway of contract supplies, the result of which can been seen in useful articles, clothing and supplies purchased with the proceeds.[54]

In both 1887 and 1888, Lash remarked on the scarcity of game in the western reserves, which limited the food supply from that source. This scarcity was offset to some degree by good fishing in Pasqua Lake and the successes the Bands were able to achieve in digging senega root and raising cattle.[55] The 1888 crop season also proved productive, but dry conditions prevailed the following year:

The bountiful harvest of last season and the proceeds from the sale of hay, wood, freighting and general work placed the Indians in this agency in a very independent position and reduced the demands on the Department for food supplies to a large extent. . . .

The acreage under grain this spring was increased fifty per cent. over last year, and the prospects were most encouraging up to the early part of June, but the continuous drought from that date injured the crop and our returns this season will be comparatively small.[56]

Although it appeared that 1889 would have been a productive year for hay, fire swept the Muscowpetung and Pasqua reserves in early October and 572 tons of hay were lost.[57]

In 1890, Lash noted the favourable farming conditions and returns to the Bands:

54 J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 7, 1887, Canada, Department of Indian Affairs, *Annual Report*, 1887, (ICC Documents, p. 81).

55 J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 7, 1887, Canada, Department of Indian Affairs, *Annual Report*, 1887, (ICC Documents, p. 81); J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 5, 1888, Canada, Department of Indian Affairs, *Annual Report*, 1888, (ICC Documents, pp. 94-95); J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 27, 1889, Canada, Department of Indian Affairs, *Annual Report*, 1889, (ICC Documents, p. 103).

56 J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 27, 1889, Canada, Department of Indian Affairs, *Annual Report*, 1889, (ICC Documents, pp. 103-04).

57 J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 1, 1890, Canada, Department of Indian Affairs, *Annual Report*, 1890, (ICC Documents, p. 113).

The stock is in fine condition, and the increase most encouraging.

The crops this season are turning out splendidly, and the Indians are contented and happy with the prospect of enjoying the fruit of their labour.[58]

As their operations flourished, the Bands became increasingly self-reliant, as Lash remarked in 1891:

The Indians of this agency are steadily advancing in civilization and becoming more independent every year, thereby reducing the assistance required from the Department. The returns from the harvest were very good, and some Indians are still using their own flour.

Pasquah's Band were almost entirely self-supporting from October to April. During the winter they were kept busy selling firewood at Fort Qu'Appelle. Muscowpetung's and Piapot's Bands also supported themselves for several months, but they have not had the advantage of the sale of wood during the winter on account of the distance from their reserves to the towns.

During the year we sold and delivered at Regina and other points five hundred tons of hay.[59]

The 1891 season yielded the best results Lash had seen during his tenure as Indian Agent, but his comments regarding 1892 were more subdued:

The past year [1891] has been the most prosperous since the agency was opened and the Indians have practically supported themselves for the past eight months. The crops were excellent, so that in addition to supplying their own flour until the next harvest, they had a surplus of wheat for sale; this with oats, hay and wood sold furnished them cash sufficient to make a very comfortable living. . . .

The Indians are becoming more independent and so long as they can find sale for their hay and wood, are quite willing to support themselves. . . .

The stock herd has prospered, and in the coming year we will supply all the beef required within the agency, and work cattle to Indians commencing farming on their own account. . . .

There has been an increase in the acreage, this year, under crop of two hundred acres. I regret to state the grain at Piapot's has been considerably damaged by a severe hail-storm. The crops on the other reserves are short in the straw, but otherwise looking fairly well.[60]

58 J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 1, 1890, Canada, Department of Indian Affairs, *Annual Report*, 1890, (ICC Documents, p. 113).

59 J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 29, 1891, Canada, Department of Indian Affairs, *Annual Report*, 1891, (ICC Documents, p. 131).

60 J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 23, 1892, Canada, Department of Indian Affairs, *Annual Report*, 1892, (ICC Documents, pp. 153-54).

In 1893, drought conditions damaged crops in the Muscowpetung Agency but, by virtue of hay and wood production, which Lash referred to as "our great industries," the Indians continued to progress towards economic self-sufficiency:

> Regina takes the bulk of the hay, and Fort Qu'Appelle and the adjoining settlement the wood, in both cases the demand is not large enough, and when our contracts are filled, a few loads glut the market.[61]

Lash also noted that "[t]he number of individual Indians that go out working off the reserve is increasing."[62]

The following year, Lash wrote that "sales of hay and wood have increased, and during the time the Indians are engaged in this work they are entirely self-supporting."[63] Despite the demonstration during the 1894 season that Indian farming remained vulnerable to the weather and global events, the Bands were still able to rely on hay and wood production to sustain a relative degree of independence:

> The past year has been the most trying our Indians have experienced since settling on the reserves; the general depression the world over and total failure of all crops in this district through continued drought and excessive heat, cutting off all returns from farming operations, left the Indians entirely dependent on other sources to pass over the crisis. The hay and wood industries were utilized to the utmost, and the assistance we required from the department was very little.[64]

Senega root formed a lucrative alternative source of income for the western Bands, but Lash grew concerned about the effects its harvesting was having on more conventional farming operations:

> The Indians derived a large amount of money this summer from gathering seneca root; but, as this work takes them off the reserves for weeks at a time, and keeps up the old habit of roaming over the prairies, I am of the opinion the benefit is counter-

61 J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 9, 1893, Canada, Department of Indian Affairs, *Annual Report*, 1893, (ICC Documents, p. 165).

62 J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 9, 1893, Canada, Department of Indian Affairs, *Annual Report*, 1893, (ICC Documents, p. 165).

63 J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 31, 1894, Canada, Department of Indian Affairs, *Annual Report*, 1893/94, (ICC Documents, p. 179).

64 J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 23, 1895, Canada, Department of Indian Affairs, *Annual Report*, 1894/95, (ICC Documents, p. 200).

acted by their absence from the reserves, and consequently there is not the attention given to gardens, root crops and ploughing which should be given at that time.[65]

Still, Lash considered that the seeding in the spring of 1895 had been well done "and the prospect of a bountiful harvest is most excellent."[66]

With the change in agency reporting requirements in the mid-1890s, Lash and his successors as Indian agent focused their attention on reserve resources and Band occupations. Muscowpetung's reserve featured good farm land, valuable hay meadows, and supplies of firewood, although by 1899 Indian Agent John Mitchell reported that "[t]here is now very little timber worthy of the name left on the reserve, and in a few years the fuel problem will have to be faced."[67] In fact, Mitchell was forced to make an example of one settler caught trespassing to steal firewood from the reserves because, "as wood grows scarcer and more valuable, there is a tendency to do more stealing."[68] The listed occupations of Band members were selling hay and wood, farming, raising stock, working off the reserve, freighting, tanning, hauling hay and managing cattle for the agency farm, gathering senega root, trading, and hunting and fishing.

The main resources on the Pasqua reserve were firewood and fish, with the ravines leading into the valley reputed to contain large quantities of wood. The reserve also included farm land and hay meadows, although the hay supply was "nothing like the quantity cut on the two first mentioned reserves [Piapot and Muscowpetung]."[69] Still, there was sufficient hay to supply the Band's own stock, as long as the herd was maintained at a smaller size. The major Band vocations were mixed farming and selling firewood, supplemented by employment off the reserve, freighting, tanning, hunting and fishing, and gathering senega root and berries. Lash noted in 1897 that the Band built a "very good dam" of its own on the "brush land" to secure a supply of water, and that "[t]his was found very useful last season, as water in the neighbourhood was scarce."[70]

65 J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 23, 1895, Canada, Department of Indian Affairs, *Annual Report*, 1894/95, (ICC Documents, pp. 200-01).

66 J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 23, 1895, Canada, Department of Indian Affairs, *Annual Report*, 1894/95, (ICC Documents, p. 200).

67 John A. Mitchell, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 23, 1899, Canada, Department of Indian Affairs, *Annual Report*, 1898/99, (ICC Documents, p. 279).

68 John A. Mitchell, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 23, 1899, Canada, Department of Indian Affairs, *Annual Report*, 1898/99, (ICC Documents, pp. 283-84).

69 W.M. Graham, Inspector of Indian Agencies, to Frank Pedley, Deputy Superintendent General of Indian Affairs, August 1, 1905, Canada, Department of Indian Affairs, *Annual Report*, 1904/05, (ICC Documents, p. 320).

70 J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 25, 1897, Canada, Department of Indian Affairs, *Annual Report*, 1896/97, (ICC Documents, p. 226).

The Standing Buffalo reserve, proportionally smaller to begin with, featured little hay, nor was there a good supply in the vicinity. Moreover, Mitchell noted that "it is doubtful whether cultivated grasses can be grown successfully in the light soil," making it difficult to raise cattle.[71] To feed their herd, Band members obtained permits to cut hay on government lands.[72] William Graham, the Inspector of Indian Agencies, later commented that "[t]he soil is very light and unless there is a wet season grain-growing is not a success."[73] To make their living, the members of this Band worked extensively off the reserve, where they were highly regarded and much in demand. They also raised grain and root crops, hunted and fished, and sold firewood, although in later years their wood supply diminished and they were required to obtain their own supply from outside sources.

## THE *NORTH-WEST IRRIGATION ACT* AND EARLY WATER DEVELOPMENTS

By 1894, the federal government had come to view the drought conditions and scarcity of water in the North-West Territories as an obstacle to development and settlement, and it began taking steps to deal with the problem. One legislative initiative was the implementation of the *North-West Irrigation Act*,[74] which vested in the Crown the property in, and the rights to use water in, the North-West Territories. The statute further provided that no future grant of land by the Crown was to vest in the grantee "any exclusive or other property or interest in or any exclusive right or privilege with respect to any lake, river, stream or other body of water, or in or with respect to the water contained or flowing therein, or the land forming the bed or shore thereof." Similarly, no riparian owner or other person acquired the right to divert water permanently, or use it exclusively, by duration of use or otherwise, except in accordance with the provisions of the Act, unless that right had already been acquired by some pre-existing agreement or undertaking. The

71 John A. Mitchell, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 23, 1899, Canada, Department of Indian Affairs, *Annual Report*, 1898/99, (ICC Documents, p. 282).

72 R.L. Ashdown, Indian Agent, Assiniboia-Qu'Appelle Agency, to Superintendent General of Indian Affairs, August 25, 1904, Canada, Department of Indian Affairs, *Annual Report*, 1903/04, (ICC Documents, p. 312); W.M. Graham, Inspector of Indian Agencies, to Frank Pedley, Deputy Superintendent General of Indian Affairs, August 1, 1905, Canada, Department of Indian Affairs, *Annual Report*, 1904/05, (ICC Documents, p. 322). Ashdown described the reserve as being "deficient in hay."

73 W.M. Graham, Inspector of Indian Agencies, to Frank Pedley, Deputy Superintendent General of Indian Affairs, August 1, 1905, Canada, Department of Indian Affairs, *Annual Report*, 1904/05) (ICC Documents, p. 321).

74 *North-West Irrigation Act, 1894*, 57-58 Vict., c. 30.

key provision of the Act for the purposes of the present inquiry was section 7, which stated:

> 7. Any person who holds water rights of a class similar to those which may be acquired under this Act, or who, with or without authority, has constructed or is operating works for the utilization of water, shall obtain a license or authorization under this Act within twelve months from the date of the passing of this Act.
>
> 2. If such license or authorization is obtained within the time limited, the exercise of such rights may thereafter be continued, and such works may be carried on under the provisions of this Act, *otherwise such rights or works, and all the interest of such person therein, shall without any demand or proceeding be absolutely forfeited to Her Majesty and may be disposed of or dealt with as the Governor in Council sees fit.*[75]

Section 8 stipulated that any water vested in the Crown could be acquired for domestic, irrigation, or other purposes on application in accordance with the Act. Applications were given priority, first, on the basis of use (with domestic uses given highest priority; irrigation, next; and "other purposes," lowest priority) and, second, on the basis of the date of the application being made.

Early efforts at water management were numerous but "haphazard":

> Although the Dominion Government did not establish a systematic plan for water control in this early period, local efforts to moderate seasonal changes were made under the *Northwest Irrigation Act*. These projects, however, were administered and overseen by succeeding government agencies; between 1877 and 1892 by the Dominion Government through the Lieut[enant]-Governor of the NWT, as an agent for the Department of the Interior, then by the Legislative Assembly of the Territorial Government of the NWT until 1897, then by the Federal Public Works Department until 1931, when water, as a natural resource, was transferred to the provinces under the *Natural Resources Transfer Agreement*. Some 196 individual or group projects such as wells, dams, and dugouts as well as spill off and drainage ditches had been constructed by the time the Department of Public Works recorded the number of waterworks in the Qu'Appelle Valley in 1898. The exception to this pattern of haphazard development was the original Craven Dam built in 1906 by the Federal Government. The dam was for irrigation purposes and flooded an extensive area upstream from the dam between Craven and Lumsden, including the Val[e]port Flats.[76]

75 *North-West Irrigation Act, 1894*, 57-58 Vict., c. 30, s. 7. Emphasis added. The 12-month period referred to in the first subsection of section 7 of the 1894 statute was later amended to require the acquisition of a licence before July 1, 1898: see *North-West Irrigation Act, 1898*, 61 Vict., c. 35, s. 7; *Irrigation Act*, RSC 1906, c. 61, s. 9; and *Irrigation Act*, RSC 1927, c. 104, s. 9.

76 Kathleen FitzPatrick, Specific Claims West, Department of Indian Affairs and Northern Development, "General Historical Background to the PFRA and Water Development in the Qu'Appelle Valley," September 25, 1995, p. 4 (ICC Exhibit 28).

Another report described early water development efforts in these terms:

> The early water control projects were not designed for flood control. More often than not they were constructed during periods of drought by individuals whose main concern was the containment of surface runoff for domestic use during the critically dry months. In such cases, the flow of water downstream was completely curtailed until the small reservoirs were filled. This, of course, served to accentuate the moisture problem for those living downstream of the dam.
>
> At the other extreme, during periods of excessive rainfall the areas upstream of the dams would experience sustained high water levels while the lower reaches would suffer from uncontrolled overflow and occasional washouts causing flash flooding, erosion and sedimentation.[77]

The first project recorded by the Indian Affairs Branch as having the potential to affect Indian lands was a dam that Alphonse Besson proposed in 1891 to erect downstream of Round Lake so he could operate a grist mill. When Indian Agent McDonald met with Besson to review the proposal, he concluded that it would flood 40 acres of land on the Ochapowace reserve; in McDonald's opinion, however, Band members had never made use of this land and were unlikely to do so.

The proposal was submitted to the Deputy Superintendent General of Indian Affairs with a request for instructions as to "whether the Department will allow the Indians to be asked to give their consent to the erection of a dam, which will affect their Reserve to the extent estimated."[78] The Indian Commissioner replied that, "in a matter of such importance the opinion of an engineer as to the land that would be affected by the erection of the dam is absolutely necessary to determine the extent of damage that would be done to the Ochapowace Reserve No. 71, and the consequent compensation which should be required before such dam is allowed to be constructed."[79] Surveyor John Nelson, instructed to assess the dam, likened it to a large beaver dam, and believed that raising the water level would benefit the "scrubby

77 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, p. 15 (ICC Exhibit 5).

78 A.E. Forget, Assistant Commissioner of Indian Affairs, to Deputy Superintendent General of Indian Affairs, August 8, 1891, National Archives of Canada (NA), RG 10, vol. 6613, file 6108-4 (ICC Documents, p. 125).

79 Indian Commissioner, Manitoba and the North-West Territories, to A.E. Forget, Assistant Commissioner, August 17, 1891, NA, RG 10, vol. 6613, file 6108-4 (ICC Documents, pp. 129-30). Both Kathleen FitzPatrick, Specific Claims West, Department of Indian Affairs and Northern Development, in "General Historical Background to the PFRA and Water Development in the Qu'Appelle Valley," September 25, 1995, p. 5 (ICC Exhibit 28), and counsel for the QVIDA First Nations in his written submission at p. 18 suggest that the Indian Commissioner stated that "the consent of Ochapowace was absolutely necessary." We read the passage as saying that "the opinion of an engineer was absolutely necessary," and it was on the basis of this instruction that surveyor John C. Nelson attended the site to provide his expert opinion on the effects of the proposed project.

river bottoms which may be flooded." He viewed the proposed grist mill as "a boon to the Indians in this part of the Reserve as they will have a mill at their door." He concluded that the Indians should not be entitled to any compensation.[80] However, Hayter Reed, the Commissioner of Indian Affairs, later reported that, although the Ochapowace Band had been prepared to consent to the flooding, the dam had in any event washed out and Besson had left the country.[81]

Six years later, in 1897, the impact of the *North-West Irrigation Act* became apparent. In response to a succession of dry years, two unauthorized dams had been constructed by the Department of Marine and Fisheries in the Qu'Appelle River at Fort Qu'Appelle and Katepwe because water levels had diminished to such an extent that the water had become "stagnant and offensive." The dams had the desired beneficial effects for residents of the valley as well as for fish stocks, but they also flooded reserve lands belonging to the Muscowpetung and Pasqua Bands. On receiving instructions to assess the damage caused by the dams, surveyor A.W. Ponton reported that the flooded lands were marshes that had become dry during the prolonged drought. Still, he suggested that steps might be taken to regulate the water levels, and thereby protect the reserve lands from flooding, without causing damage to other lands. He also noted that, if Indian Affairs chose to object to the flooding, it could make a formal complaint. Such an objection might lead to an order for the removal of the unauthorized structures pending compliance with the *North-West Irrigation Act*.[82]

A complaint was duly filed by Indian Agent Lash and forwarded by Indian Commissioner A.E. Forget to J.S. Dennis, Acting Chief Inspector of Surveys and Irrigation in the federal Department of Public Works, on April 30, 1897, with a request for an order that the illegal dams be removed.[83] Dennis travelled to the Qu'Appelle Valley from Calgary in August of that year to find that the dam at Katepwe had washed out with the spring runoff, resulting in low water levels and exposed banks above the dam site. He recommended that the dam be rebuilt, although he suggested that it be redesigned to permit

80 John C. Nelson, DLS, to Hayter Reed, Commissioner, Indian Affairs, September 19, 1891, NA, RG 10, vol. 6613, file 6108-4 (ICC Documents, pp. 132-33).

81 Hayter Reed, Commissioner of Indian Affairs, to Deputy Superintendent General of Indian Affairs, October 8, 1892, NA, RG 10, vol. 6613, file 6108-4 (ICC Documents, p. 155).

82 A.W. Ponton, in charge of Indian Reserve Surveys, to Indian Commissioner, April 15, 1897, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, pp. 213-16).

83 A.E. Forget, Indian Commissioner, to J.S. Dennis, [Acting] Chief Inspector of Surveys and Irrigation, Canada, Department of Public Works, April 30, 1897, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 217).

greater control of water levels.[84] He disclaimed Public Works' responsibility for the project, asserting instead that "representations regarding its construction should be sent to the Deputy Minister of Dept. of Marine and Fisheries, Ottawa."[85]

Although Dennis indicated that he also intended to inspect the dam at Fort Qu'Appelle, there is no evidence that he did so. The issue became academic, however, in light of complaints received from the Reverend J. Huggonard, principal of the Indian Industrial School at Qu'Appelle, concerning the unsanitary and offensive-smelling plant and animal remains left uncovered by the receding waters above the Katepwe dam.[86] Huggonard noted the impact of the large number of water control structures in the Qu'Appelle Valley:

> Compared with the large area draining into the Qu'Appelle Valley and the quantity of water it used to receive 10 or 20 years ago from the numerous creeks, very little now flows in, on account of the numerous dams on all the creeks and ravines, some of which are very deep and bank-back the water for miles, this is not including the large dams at Regina and Moose Jaw.
>
> Previous to the creation of these dams on tributaries in the Qu'Appelle, the lakes and rivers used to rise from two to four or five feet every season, no such rise has taken place since 1894 and last year our lake did not rise two inches above low water level of the previous year and then went down fully ten feet, leaving over one hundred feet of decaying vegetable and animal matter exposed in the bay in front of the school.[87]

In the months that followed there were discussions among officials of Indian Affairs, the Department of Public Works, the Department of Marine and Fisheries, and the territorial government about which department should undertake the work and whether an interim structure should be erected. Public Works assigned an engineer to report on the matter and, by July 1898, it had been decided that reconstruction of a "substantial structure" should

84 J.S. Dennis, Acting Chief Inspector, Department of Public Works, to Secretary, Department of the Interior, August 27, 1897 (ICC Documents, pp. 228-29).

85 J.S. Dennis, Acting Chief Inspector, Department of Public Works, to D.W. McDonald, MLA, Regina, November 17, 1897, NA, RG 10, vol. 7548, file 6114-1, part 1 (ICC Documents, p. 230A).

86 Extract from *Annual Report* of Rev. J. Huggonard, Principal, Indian Industrial School, Qu'Appelle, December 9, 1897, NA, RG 10, vol. 7548, file 6114-1, part 1 (ICC Documents, p. 231A); Rev. J. Huggonard, Principal, Indian Industrial School, Qu'Appelle, to Indian Commissioner, December 11, 1897, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 232A); Rev. J. Huggonard, Principal, Indian Industrial School, Qu'Appelle, to Indian Commissioner, December 13, 1897 (ICC Documents, pp. 233A-34A).

87 Rev. J. Huggonard, Principal, Indian Industrial School, Qu'Appelle, to Deputy Minister, Department of Marine and Fisheries, January 20, 1898, NA, RG 10, vol. 7548, file 6114-1, part 1 (ICC Documents, pp. 243A-44A). This document is difficult to read, and it is not clear whether Huggonard stated that the water had not risen since 1884 or 1894.

commence soon.[88] It is interesting to note that, at this time, settlers in the valley below the dam were opposed to its being rebuilt "on the ground that it would take too long to fill the lakes, thereby preventing the water from running in the river and over-flowing their hay meadows which would be detrimental to their hay crops."[89]

The record in this inquiry is strewn with evidence of other proposed projects which had the potential to affect reserve lands. In 1914, members of the Pasqua Band asked for financial support to assist them in erecting two dams so they would not have to haul water to their farm lands above the valley.[90] Authorization was granted, with the costs to be charged to the Band's interest account,[91] but no further evidence is available about the project. Later, in 1921, the Fort Qu'Appelle Board of Trade petitioned the federal government for a dam to raise the water level in the river near Fort Qu'Appelle to make it more suitable for motorboating. Indian Commissioner W.M. Graham raised the concern that building a dam would probably cover the hay meadows of the western Qu'Appelle Valley Bands,[92] but the matter was ultimately referred to the Department of Public Works, since the river at that time was considered to be *navigable*,[93] contrary to later evidence in this inquiry.[94] There is also no further evidence regarding this proposal.

88 J.S. Dennis, Deputy Commissioner, Department of Public Works, to Secretary, Department of Indian Affairs, July 14, 1898 (ICC Documents, p. 260). In a letter dated August 30, 1898, Indian Commissioner A.E. Forget reported that, with grading done by members of the Pasqua reserve, "[a] larger dam is under construction and when finished will be of great benefit to the Reserve": A.E. Forget, Indian Commissioner, to Secretary, Department of Indian Affairs, August 30, 1898, NA, RG 10, vol. 10314, file 675/8-4-3-79 (ICC Documents, p. 268A). It is not clear whether these comments relate to reconstruction of the dam at Katepwe or improving the one upstream at Fort Qu'Appelle, but the latter seems more likely if, as reported, the dam affected the Pasqua reserve.

89 Rev. J. Huggonard, Principal, Indian Industrial School, Qu'Appelle, to Deputy Minister, Department of Marine and Fisheries, January 20, 1898, NA, RG 10, vol. 7548, file 6114-1, part 1 (ICC Documents, p. 242A).

90 K. Nichol, Indian Agent, Qu'Appelle Agency, to J.D. McLean, Secretary, Department of Indian Affairs, July 8, 1914, NA, RG 10, vol. 7584, file 6114-1, Part 1 (ICC Documents, p. 331).

91 J.D. McLean, Secretary, Department of Indian Affairs, to K. Nichol, Indian Agent, Qu'Appelle Agency, July 14, 1914, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 332).

92 W.M. Graham, Indian Commissioner, to Secretary, Department of Indian Affairs, March 4, 1921, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 333).

93 E.F. Drake, Director, Reclamation Service, Department of the Interior, to Secretary, Department of Indian Affairs, April 26, 1921, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 339).

94 On January 16, 1976, after investigating title to the bed of the Qu'Appelle River passing through the Muscowpetung reserve, G.A. Poupore advised A.H. Markuson:

> According to the Ministry of Transport the waters at the above site are not considered navigable within the meaning of the Navigable Waters Protection Act. The Marine Aids Division informed that the uses of the river passing through Reserves 80 and 80B would be the watering of livestocks [sic]and provide also for the spawning ground for the fishing game.

In 1922, the problem was again too much water, and requests were made to raise the level of the Craven Dam, upstream from the Piapot reserve, to contain the waters inundating the hay lands. Public Works noted that the existing dam, built in 1905, was in poor condition and leaking badly, so that steps to correct it would likely be expensive and perhaps a waste of time, since it might well wash away in any event. In the course of its response, Public Works also illustrated how containment of the Qu'Appelle River might operate as a double-edged sword:

> Up to recently the people who are now asking that the dam be raised complained that this very dam was holding back too much water and that their hay lands along the Qu'Appelle River as well as the cattle suffered owing to low or shortage of water. If this dam were raised 1,300 acres of expropriated land belonging to the Department of Public Works would be more or less permanently flooded. And undoubtedly another hay acreage would require to be expropriated between the lake and the Craven dam, in addition to flooding the Lumsden Valley on the Qu'Appelle River.
>
> It seems to me that during low water years those people below the dam would like to see the dam removed completely and during the high water years they would like to see it raised to suit their purpose, without any consideration being given to other properties above the dam. . . .
>
> The Craven Dam should be partly rebuilt and provisions made so that the elevation of the water could be controlled.[95]

In 1924 a proposal surfaced that would have resulted in the construction of ditches to enable flood waters to drain from the hay flats as required.[96] Although surveyor H.W. Fairchild was dispatched to take levels and determine

See G.A. Poupore, Director, Lands and Membership, Department of Indian and Northern Affairs, to A.H. Markuson, Regional Supervisor of Lands, Saskatchewan Region, Department of Indian and Northern Affairs, January 16, 1976, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1001). A year later, Markuson passed this information on to A.J. Gross, with the following additional comments:

> On reviewing the interpretations of navigable waters, we note that interpretations of his Honour Judge Whitfield in 1914 indicating rivers may be navigable though not such as will bear boats or barges for the accommodation of travellers. If they are sufficient for the transportation of property, e.g., for floating logs or timber [sic]. A navigable river is a public highway and anyone has a right to use it as such having regards to the rights of others. Provincial legislation cannot authorize interference with the right of navigation that such under Section 91 of the BNA Act being under the exclusive jurisdiction of Canada. The title to the bed of a non-tidal navigable river is presumed to be in the riparian owner (in this instance since the band owns the land on both sides of the river, this would apply).

See A.H. Markuson, Regional Supervisor of Lands, Saskatchewan Region, Department of Indian and Northern Affairs, to A.J. Gross, Acting Assistant Regional Director, Economic Development, Saskatchewan Region, Department of Indian and Northern Affairs, January 31, 1977, DIAND file E4320-06566 (ICC Documents, p. 1066).

95 Department of Public Works, District Engineer's Office, "Excerpts from District Engineer's Report," September 29, 1922, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, pp. 349-50).

96 W.M. Graham, Indian Commissioner, to Secretary, Department of Indian Affairs, July 25, 1924, NA, RG 10, vol. 6615, file 7114-2 (ICC Documents, pp. 357-58).

the feasibility of the ditches,[97] there is no evidence of what became of this project.

In summary, it appears that, to the end of the 1920s, there were major floods in 1852, 1904, and 1916, with "high water" or "moderate flooding" also recorded in 1858, 1882, 1892, 1902, 1917, 1922, 1923, 1925, and 1927.[98] There were no large floods for the 20-year period between 1882 and 1902,[99] as the reports of the Indian agents at that time attest. However, in addition to the many seasons of drought described by the agents during that period, there were more dry years in 1910, 1914, 1917, 1918, and 1919.[100]

## CREATION OF THE PRAIRIE FARM REHABILITATION ADMINISTRATION

In a few short years, the excessive water that plagued farmers in the 1920s became the fond hope of the "Dirty Thirties" as, in a complete reversal of the weather cycle, the parched prairies endured year after year of relentless drought. Indian Commissioner William Graham pleaded with Indian Affairs Secretary A.F. MacKenzie to request the Department of Public Works to open the dam at Craven for a few days, since "[t]he river on the East side of the dam has nearly dried up and if something is not done there will be a shortage of water for cattle this winter."[101] MacKenzie complied, but his counterpart in Public Works, K. Desjardins, replied with the following report from the District Engineer:

> [T]he stoplogs in the dam have been removed since early in the spring. On the 20th instant the elevation of water above the dam was practically two feet below the bottom

97 A.F. MacKenzie, Acting Assistant Deputy and Secretary, Department of Indian Affairs, to H.W. Fairchild, September 2, 1924, NA, RG 10, vol. 6615, file 7114-2 (ICC Documents, p. 360).

98 Department of Agriculture, Prairie Farm Rehabilitation Administration, "Hydrology Report #21: Floods and Flooding Problems in the Qu'Appelle Valley," May 1958, p. 11 (ICC Exhibit 15); Department of Agriculture, Prairie Farm Rehabilitation Administration, "Hydrology Report #24: Drought and Flood in the Qu'Appelle Watershed (Summary Report)," May 1958, pp. 22-23 and 47 (ICC Exhibit 15); Saskatchewan Water Resources Commission, Investigation and Planning Branch, Economics Division, "Qu'Appelle Flood Study, Appendix C: A Historical Review of Flooding in the Qu'Appelle River Basin 1852-1971," April 1972, p. 104 (ICC Exhibit 23). It should be noted that evidence of "high water" and "flood" years prior to 1904 is largely anecdotal since records were apparently not kept before that time.

99 Department of Agriculture, Prairie Farm Rehabilitation Administration, "Hydrology Report #21: Floods and Flooding Problems in the Qu'Appelle Valley," May 1958, p. 11 (ICC Exhibit 15).

100 Department of Agriculture, "Prairie Farm Rehabilitation Act: What It Means to the Prairie Provinces," October 1961, p. 4 (ICC Exhibit 17).

101 W.M. Graham, Indian Commissioner, to A.F. MacKenzie, Secretary, Department of Indian Affairs, September 5, 1930, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 365).

of the sluice-ways, or four feet below the top of the dam, so that it will be impossible to let any water down the Qu'Appelle river through the dam.[102]

The crisis had only begun. The Prairie provinces had assumed responsibility for natural resources under the terms of the *Natural Resources Transfer Agreements* of 1930, but the magnitude of the problems caused by drought and the "severely deflated market prices" associated with the worldwide economic depression soon overwhelmed them.[103] The gravity of the situation was captured in the following excerpt from an article by E.S. Archibald:

> During its period of development, prairie agriculture has suffered many set-backs, but none so severe as that which accompanied the eight-year period of drought between 1929 and 1938. Throughout that period, repeated crop failures arising from unprecedented conditions of drought and soil drifting have been experienced over an extensive area covering south-western Manitoba, southern Saskatchewan and south-eastern Alberta. The area affected coincided almost exactly with Palliser's "arid" triangle[104] and contains over one-half of the farms in the Prairie Provinces. Furthermore, this drought period occurred simultaneously with the worldwide economic depression which started in 1929. The combined effect of drought and depression was devastating. Within the territory most severely affected, the farm income from wheat, the principal crop, declined by an average of seventy per cent during the years 1930 to 1937 inclusive. In 1937, the worst year of drought, the average yield of wheat in Saskatchewan was only 2.6 bushels per acre as compared with a long time average of 15 bushels.

102 K. Desjardins, Secretary, Department of Public Works, to A.F. MacKenzie, Secretary, Department of Indian Affairs, September 29, 1930, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 368).

103 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, p. 20 (ICC Exhibit 5).

104 Archibald's article also discusses the early history of the area, including the "Palliser triangle":

> During the years 1857 to 1860, Captain John Palliser explored the territory between Lake Superior and the Rocky Mountains in the interests of the British Government, with a view to determining the possibilities for agricultural settlement. Palliser came to the conclusion that the south-central portion of this territory was unfit for agriculture by reason of arid climate and infertile soil. This "arid" area, covering roughly 100,000 square miles, constitutes the famous "Palliser triangle". . . . The same opinion was expressed in 1859 by Professor H.Y. Hind, who explored part of the same area for the Government of Canada. These opinions were based largely on the condition and distribution of native vegetation. Thus, towards the year 1860, the prospects for agricultural settlement in the southern parts of the Prairie Provinces did not appear very hopeful.
>
> Twenty years later, however, a much more optimistic appraisal of the Palliser triangle was made by Professor John Macoun, botanist to the Engineer-in-Chief of the Canadian Pacific Railway. Macoun reduced Palliser's "arid" area to some 20,000 square miles and described the remainder of the triangle as suitable for agriculture.
>
> The somewhat divergent views expressed by Palliser and Hind on the one hand, and by Macoun on the other, may be explained on the basis of cyclic variations in rainfall, the observations of Palliser and Hind being made during a dry cycle of years, and those of Macoun during a wet cycle.
>
> See E.S. Archibald, "Prairie Farm Rehabilitation," in *Canadian Geographical Journal*, October 1940, p. 159 (ICC Exhibit 7).

> As a result of the foregoing conditions a very large number of farmers in the affected area suffered heavy losses and experienced hardship and even destitution. Many people abandoned their holdings to seek new homes in more favoured sections, the resulting internal migration assuming considerable magnitude. Much of the abandoned land, unprotected by crop or grass growth, became subject to soil drifting to the detriment of neighbouring occupied land. Shrinkage of income rendered many farmers incapable of dealing with the soil drifting menace, or even of continuing normal farming operations. In whole municipalities the capital value of the community farm enterprise declined to less than its mortgaged indebtedness. Large governmental expenditures for relief, and to enable farmers to continue operations, became necessary. Under such circumstances the economic structure of the region was subjected to severe strain, and social services were threatened with disruption.
>
> The nation-wide repercussion of the drought crisis led the Dominion Government to introduce various measures for the alleviation of distress and the reorganization of agricultural economy, in the affected region.[105]

One such measure was the passage of the *Prairie Farm Rehabilitation Act*[106] and the establishment of the Prairie Farm Rehabilitation Administration (PFRA) under the federal Minister of Agriculture in 1935. The Act was very short, its primary operative section providing for the creation of an advisory committee "to consider and advise the Minister as to the best methods to be adopted to secure the rehabilitation of the drought and soil drifting areas of the Provinces of Manitoba, Saskatchewan and Alberta and to develop and promote within those areas systems of farm practice, tree culture and water supply that will afford greater economic security."[107] The Act further provided for the appointment of "such temporary technical, professional and other officers and employees" as the Minister might require to carry out the objectives of the Act, and established a budget of $750,000 for the first year of the PFRA's operation and $1 million for each subsequent year of its initial five-year mandate.[108]

In 1937, the PFRA's jurisdiction was extended to include the development of systems of land use and land settlement in addition to the original terms of reference comprising farm practice, tree culture, and water supply. In addition, the $1 million ceiling on expenditures in the last three fiscal years of the PFRA's mandate was eliminated, with the amount for each year to be set in Parliament's annual appropriations.[109]

105 E.S. Archibald, "Prairie Farm Rehabilitation," in *Canadian Geographical Journal*, October 1940, pp. 160-61 (ICC Exhibit 7).
106 *Prairie Farm Rehabilitation Act*, SC 1935, c. 23.
107 *Prairie Farm Rehabilitation Act*, SC 1935, c. 23, s. 4.
108 *Prairie Farm Rehabilitation Act*, SC 1935, c. 23, ss. 6 and 8.
109 *An Act to amend the Prairie Farm Rehabilitation Act*, SC 1937, c. 14, ss. 2 and 4.

Two years later, the five-year limit on the PFRA's mandate was also eliminated. The Minister of Agriculture was further authorized to enter into agreements with any provincial or municipal government in the three Prairie provinces, or with "any person, firm, or corporation, with respect to the development, promotion, construction, operation and maintenance of any project or scheme undertaken ... or which may be deemed necessary or desirable for the conservation of water." In conjunction with this power, the amending legislation permitted the Minister to "purchase, lease or otherwise acquire ... any lands or premises" required or to "purchase or rent whatever machinery or equipment may be required" for any project or scheme.[110]

The Act was amended again in 1941. However, whereas previous amendments had extended and broadened the PFRA's mandate, the new provision narrowed its jurisdiction by requiring the Governor in Council to approve any project or scheme that would cost in excess of $5000.[111]

As PFRA District Engineer L.D. McMillan wrote in 1941:

> The object of the Act is to remedy the severe effects of drought and soil drifting in the drought area of Western Canada. Under the terms of the Act, measures are provided to assist farmers in the affected areas to reduce the effect of drought and soil drifting. This included assistance in the conservation of surface water supplies for household use, stockwatering and irrigation, re-grassing, tree planting and reclamation of lands damaged by soil drifting. Assistance was also provided under the Act to the Universities of the western provinces in continuing and extending soil surveys and for an economic survey of the province.
>
> In 1937 the Act was extended by amendment to provide for the establishment of community pastures in certain areas where the soil and climate have been found to be unsuited for grain growing.[112]

The PFRA supported small, community, and large water development projects. For small projects, it provided financial and engineering assistance to individual farmers to construct dugouts and small dams to conserve surface runoff for stockwatering and domestic use, and to develop small irrigation projects for the production of forage crops. In the first five years of the program, the PFRA received 31,089 applications for assistance on small-scale

110 *An Act to amend the Prairie Farm Rehabilitation Act*, SC 1939, c. 7, ss. 1 and 2.
111 *An Act to amend the Prairie Farm Rehabilitation Act*, SC 1941, c. 25, s. 1.
112 L.D. McMillan, District Engineer, PFRA, "Qu'Appelle River Development," February 24, 1941, PFRA file 928/7Q2, vol. 2 (ICC Documents, p. 441).

projects, of which it approved 19,897 and completed 14,222: 9945 dugouts, 3447 stockwatering dams, and 830 irrigation projects.[113]

Community projects were usually built to develop secondary tributaries to serve the needs of the inhabitants of a particular area. They often involved the restoration and improvement of natural water bodies that tended to dry up during droughts, either by installing control works on them or by diverting drainage into them. Such projects were usually implemented through cooperative arrangements among the PFRA, the provincial government, and the local community, with the community or the local agricultural district generally responsible for operating the projects after their construction.[114]

Large water development projects consisted of "all those projects which have been fully constructed and paid for from the P.F.R.A. vote [such as] large stockwatering dams, irrigation and water supply projects." By March 31, 1940, 63 of these projects had been completed or were under development, "representing a total water storage capacity of more than 300,000 acre feet, and the development of new irrigation facilities serving over 100,000 acres of irrigable land."[115]

## WATER DEVELOPMENT BY THE PFRA IN THE QU'APPELLE VALLEY

Requests for the construction of dams and other structures in the Qu'Appelle Valley to alleviate the drought conditions came quickly after the establishment of the PFRA. On February 8, 1935, Regina lawyer George S. Kennedy, acting on behalf of Leslie H. Hoskins of Craven and 25 other farmers in the valley, forwarded the following petition to Member of Parliament F.W. Turnbull for personal delivery to Hugh A. Stewart, the Minister of Public Works:

> We, the undersigned, farmers residing along the Qu'Appelle River Valley in the province of Saskatchewan, HEREBY HUMBLY PETITION the Government of Canada to construct a number of dams on the Qu'Appelle River for the purpose of flooding the hay land in the spring.
>
> For some five years these lands which formerly produced good crops of hay have been completely dried out and the farmers along this area have been dependent on the Government for fodder to see them through.
>
> WE, therefore, RESPECTFULLY REQUEST that the Govern[ment]construct a number of such dams for the purpose aforesaid, and we individually undertake to release

113 Department of Agriculture, "Report on Activities under the Prairie Farm Rehabilitation Act for the Fiscal Year ending March 31, 1940," PFRA, Annual Reports, 1939/40 (ICC Documents, pp. 418 and 422).
114 Department of Agriculture, "Prairie Resources and PFRA," 1969 (ICC Exhibit 19, pp. 42-44).
115 Department of Agriculture, "Report on Activities under the Prairie Farm Rehabilitation Act for the Fiscal Year ending March 31, 1940," PFRA, Annual Reports, 1939/40 (ICC Documents, p. 423).

the Government from any claims for damages occasioned by the flooding of our lands as a result of the said dams.

AND we hereby agree that in the event of the construction of the said dams we individually agree each for himself that we will assume full responsibility for any hay which we may have in the Valley on March 1st in each year, either in stacks or otherwise and hereby waive any claim to damages occasioned by the said dams and flooding of our said lands as a result thereof.[116]

Turnbull delivered the petition to Stewart with his own entreaty:

> These farmers who live along the valley are to some extent in the cattle business and to some extent produce hay for market. If the waters could be controlled it would help them very considerably.[117]

Noting that a statement had recently been made in the House of Commons by Minister of Agriculture Robert Weir about the creation of the PFRA and the development of works in drought areas, Stewart advised Kennedy that he was referring the petition to Weir.[118]

The Qu'Appelle Valley was just one possible area for large water development projects and, across the Prairie provinces, investigations began to assess the viability of many potential sites for the erection of water control structures. Comprehensive field investigations, including topographical surveys and soil investigations, were required, as well as tests to determine the foundations needed for the structures that would have to be built.[119]

In 1937, drought conditions reached their peak but, to the dismay of farmers along the Qu'Appelle, the preliminary investigations in their valley were not promising for water development:

> Reports received indicate that the most serious drought ever experienced in the area now prevails over a greater part of the open plains area in Saskatchewan and the east half of southern Alberta. By the end of May crops south of the Canadian Pacific main line in Saskatchewan and most of east-central Alberta were dried out beyond recovery and with only light scattered showers along with high prevailing temperatures throughout the month of June, crops generally are a total failure. It is expected many

116 George S. Kennedy, Secord & Kennedy, Barristers & Solicitors, to Minister of Public Works, February 8, 1935, enclosing Petition from "Leslie H. Hoskins, SE 24-20-21 W 2nd, Craven, and approximately 25 other farmers" to Minister of Public Works, undated, NA, RG 17, vol. 3281, file 559-13 (ICC Documents, pp. 371-72).

117 F.W. Turnbull, MP, to Hugh A. Stewart, Minister of Public Works, February 11, 1935, NA, RG 17, vol. 3281, file 559-13 (ICC Documents, p. 373).

118 Hugh A. Stewart, Minister of Public Works, to F.W. Turnbull, MP, February 14, 1935, NA, RG 17, vol. 3281, file 559-13 (ICC Documents, p. 374).

119 Department of Agriculture, "Report on Activities under the Prairie Farm Rehabilitation Act for the Fiscal Year ending March 31, 1940," PFRA, Annual Reports, 1939/40 (ICC Documents, p. 423).

districts will not ship even one car load of wheat, while the feed situation and water supply has become exceedingly desperate.

This calamity after several years of a most serious drought condition in the area has greatly intensified the needs and demands for prairie farm rehabilitation work including water development in particular. . . .

QU'APPELLE VALLEY

. . . Generally speaking, development in the Qu'Appelle Valley is not too promising. In the first place, there is lack of unanimity among the individuals who would be affected and topographical conditions would make it very expensive if not impossible to irrigate by means of gravity from ditches. Pumping is probably the only means by which any amount of this land could be irrigated other than by naturally flooding large acreages periodically, but pumping is likely to prove expensive since the lift in projects so far inspected is from 25' to 35'. The intention, therefore, is not to continue with any more reconnaissance survey in the Qu'Appelle Valley this year particularly since drought conditions in other parts of the province are much more serious.[120]

Nevertheless, the PFRA continued its investigations, and by 1940 a major water development project encompassing the four Fishing Lakes as well as Crooked and Round Lakes was under active consideration. According to L.D. McMillan, the first priority was to restore the four Fishing Lakes (also known as the Qu'Appelle Lakes) to their normal levels:

It has been pointed out by residents of the valley in the vicinity of the Qu'Appelle Lakes that due to the heavy decline in lake levels in recent years, the fishing industry has been seriously affected, the summer camping grounds made less attractive, and the valuable hay lands at the west end of Qu'Appelle [Pasqua] Lake, which in former years was [sic] quite productive, has [sic] become entirely non-productive due to the decline in lake levels in this area. Furthermore, at the west end of Qu'Appelle Lake there existed a natural breeding ground for ducks when the lake levels were normal and that to restore this area to its former useful purpose the Qu'Appelle Lake should be raised four feet. Also as the levels of lakes referred to above become lowered the water becomes stagnant.

A point which I believe is worth consideration in the study of lake levels in the Qu'Appelle Valley is that there are literally thousands of springs along the valley bed, especially between Katepwe Lake and Crooked Lake, that in normal years when the lake levels were high, ran freely but as the lake levels recede a corresponding drop is noticed in spring flow. It is believed therefore that by increasing the volume of water in the Qu'Appelle Lakes that [sic] an additional underground pressure will be created and a better flow from springs obtained.

120 Prairie Farm Rehabilitation Administration, "Progress Report for Month ending June 30th, 1937, including Water Development and Farm Survey," June 30, 1937, NA, RG 17, vol. 3284, file 559-13-4(2) (ICC Documents, pp. 388 and 400).

> In order to improve the adverse conditions caused by low water levels in the lakes, and to store water for irrigation purposes lower down the valley, it would be necessary to build control structures at the outlet of each lake.[121]

Although detailed survey work had not yet been completed around Crooked Lake and Round Lake, it was believed that erecting control structures at the outlet of each lake would also bring water levels there back to "normal," for the benefit of hunting, and boating, and for irrigating downstream lands. The six control structures, plus a seventh on Buffalo Pound Lake, would create 105,150 acre feet of additional water storage capacity.[122]

Residents of the Qu'Appelle Valley continued to press for dams to be built. On June 1, 1940, H.M. Salter, Secretary of the Qu'Appelle Valley Associated Boards of Trade, advised PFRA Director George Spence that the following motion had been adopted by the Boards' executive:

> 2. That a Damn [sic] be built at the East End of Round Lake raising the water level in the lake 2½ feet.
>
> The purpose of this being to provide water storage so that it could be released in the fall to provide water to the farmers below the lake for stock purposes.[123]

A delegation met with Spence in the early summer of that year, and Spence agreed to have the land along the shores and to the east of Round Lake surveyed. When no immediate report was forthcoming, P.W. Tinline, Secretary of the Whitewood Board of Trade, followed up with Spence in October to determine whether the survey had been completed, "as we feel that this is one project that is very necessary for this end of the Qu'Appelle Valley."[124] The PFRA had not been idle, however:

> During the last two or three seasons survey parties have been at work in the Qu'Appelle Valley making a detailed survey of all the valley lands from the western end near the town of Eyebrow on down through Lumsden, Ft. Qu'Appelle and to the Crooked Lake area. Up to the present time a detailed survey of all the valley lands has been completed from Eyebrow to Crooked Lake, a distance of approximately 150

121 L.D. McMillan, District Engineer, PFRA, to J.I. Mutchler, Senior Survey Engineer, PFRA, January 25, 1940, PFRA file 928/7Q2, vol. 2 (ICC Documents, pp. 404-05).

122 L.D. McMillan, District Engineer, PFRA, to J.I. Mutchler, Senior Survey Engineer, PFRA, January 25, 1940, PFRA file 928/7Q2, vol. 2 (ICC Documents, pp. 405-06).

123 H.M. Salter, Secretary, Qu'Appelle Valley Associated Boards of Trade, to George Spence, Director of Rehabilitation, Department of Agriculture, June 1, 1940, PFRA file 928/7R1, vol. 1 (ICC Documents, p. 433).

124 P.W. Tinline, Secretary, Whitewood Board of Trade, to George Spence, Director of Rehabilitation, Department of Agriculture, October 31, 1940, PFRA file 928/7R1, vol. 1 (ICC Documents, p. 438).

miles, and since the valley is from a mile to a mile and a half wide our surveys have covered an area of over 140,000 acres of land. . . .

In studying the information gained as a result of our field work to date there are three important questions which arise:

1. The drainage area and the average annual runoff of water in the Qu'Appelle River.

2. The location of possible reservoir sites where water might be stored for irrigation or other purposes and their capacities.

3. The location and acreage of lands that may be irrigated. . . .

With regard to construction work completed so far we have the Buffalo Pound Lake dam recently completed at a cost of approximately $70,000.00; a control dam between Craven and Long Lake was also completed last season. At the present time there are also a large number of small irrigation schemes in operation along the valley between Buffalo Pound Lake and Ft. Qu'Appelle.

In regard to future developments it is expected that the next construction work undertaken will be in the vicinity of the Fishing Lakes. Plans and estimates have already been prepared for the proposed dams at Sioux bridge [located between Pasqua and Echo Lakes] and Fort Qu'Appelle. It might be mentioned here that it would not be too much to expect that at some future date water may be brought from the Saskatchewan River into the Qu'Appelle Valley to supplement present valley supplies.[125]

Additional work was required in the area of Crooked and Round Lakes, but the PFRA was ready to proceed farther west at the Fishing Lakes.

## THE ECHO LAKE DAM

As already noted, the PFRA originally intended to build dams on each of the four Fishing Lakes, and it was foreseen that the dam on Pasqua Lake would flood portions of the Pasqua and Muscowpetung reserves. Spence wrote to the Superintendent General of Indian Affairs to inform him of the likely damage and to seek approval of the project:

[I]t is proposed to construct a dam in the vicinity of Sioux Bridge, which is located between Qu'Appelle and Echo Lakes, for the purpose of raising the water level in Qu'Appelle Lake to Elevation 1574.0, which is 5.8 feet above the elevation of this lake in August of 1939. This will extend the lake westward approximately 6½ miles beyond its present western boundary and will flood approximately 201 acres in the Pasqua

125 L.D. McMillan, District Engineer, PFRA, "Qu'Appelle River Development," February 24, 1941, PFRA file 928/7Q2, vol. 2 (ICC Documents, pp. 442-43).

Indian Reserve, No. 79, and approximately 1103 acres in the Muscowpetung Reserve, No. 80.

The purpose of raising this lake is to provide storage water for irrigation purposes and when the complete project has been developed the lake will be drawn down below f.s.l. [full supply level] from 2 to 3 feet during June and July, which will remove water from approximately 500 acres of land in the Muscowpetung Reserve and make this land available for the cutting of hay. The other 600 acres in this Reserve and the 200 acres in Pasqua Reserve will, however, be almost continuously under water except in years of extremely low flow when it will be necessary to lower the lake down to its present level. The fact, however, that water will be standing on this land more or less continuously will probably mean that Marsh Grass will substitute itself for the existing grasses. Marsh Grass is not of any particular value for hay.

In consideration of the fact that this land is being unfavourably effected [sic], I believe we would be prepared to construct diversion works in the Qu'Appelle River bed in the western portion of Muscowpetung Reserve for the purpose of giving the hay flats in this area an annual flooding even in years of low flow in place of the intermittent flooding which they now get and which occurs only in years of high flow. This would have the effect of increasing the gross hay production on the Reserve considerably above its present level.

I would also ask you to note that it will be necessary to construct a small dyke, approximately 6 feet high, on the north side of the present Sioux Bridge to a point near the N.E. corner of Section 20, Township 21, Range 14, West of the 2nd Meridian, which will be located on Standing Buffalo Reserve, No. 78. The land on which this dyke will be constructed is of no particular value and is not used at the present time for any purpose.

I may say that we have had an opportunity of discussing these proposals with your Mr. Christianson, who is of the opinion that our proposals will be of benefit to the Indian Reserves affected.

We should like very much to obtain the Flooding Rights on these land[s], if possible, in return for our undertaking to construct works in the western portion of Muscowpetung Reserve for the purpose of flood irrigating hay lands in this area as mentioned above, if this can be arranged.

As we propose to commence the construction of this project as soon as possible it would be appreciated if you would give this matter your earliest consideration in order that any necessary negotiations may be completed with as little delay as possible.[126]

Interestingly, although a dam was being considered at the outlet of Echo Lake, it does not appear that this project was raised with Indian Affairs, nor does it appear that any potential damage to the Standing Buffalo reserve was foreseen.

126 George Spence, Director of Rehabilitation, Department of Agriculture, to Superintendent General of Indian Affairs, Department of Mines and Resources, May 16, 1941, DIAND file 675/8-4, vol. 2 (ICC Documents, pp. 462-63).

Harold McGill, Director of the Indian Affairs Branch (which was then within the federal Department of Mines and Resources), acknowledged to Spence that the Muscowpetung and Pasqua reserves would be "very considerably affected" by the dam at Pasqua Lake and noted that it would be necessary for Indian Affairs to give the proposed development careful consideration.[127] McGill's letter was followed by a letter from Charles Camsell, Deputy Minister of Mines and Resources, to G.S.H. Barton, his counterpart in the Department of Agriculture:

> It is obvious from an examination of the key plan which accompanied Mr. Spence's report, that substantial, if not quite serious, damage will be done to both of the Reserves and in the interests of these Indians this Department will, of course, expect payment of satisfactory compensation. Those portions of these two Reserves which it is now proposed to flood are the sources of substantial revenues to both of these Bands, and it is our view that the local situation should first be carefully examined for the purpose of ascertaining definitely the extent of the damage to which both will be subjected.[128]

Barton replied that, while Spence had been prepared to construct diversion works to ensure annual flooding in Muscowpetung's hay flats that would offset "any loss occasioned" by the proposal to raise Pasqua Lake, he was prepared to abide by the course of action suggested by Camsell and to provide the full cooperation of Spence and his staff.[129] He instructed Spence that no further action could be taken "until the Department of Mines and Resources has been advised by one of its own officers that the proposed works are actually in the best interests of the Indian bands concerned."[130]

In the meantime, McGill recognized that Indian Affairs did not have the technical expertise to assess the project, and on June 10, 1941, he solicited help from J.M. Wardle, Director of the Surveys and Engineering Branch of the Department of Mines and Resources, to consider the following questions:

Pasqua Reserve

1. Possible loss of revenue from rentals, etc.

127 Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to George Spence, Director of Rehabilitation, Department of Agriculture, May 23, 1941, DIAND file 675/8-4, vol. 2 (ICC Documents, p. 464).

128 Charles Camsell, Deputy Minister, Department of Mines and Resources, to G.S.H. Barton, Deputy Minister, Department of Agriculture, May 29, 1941, DIAND file 675/8-4, vol. 2 (ICC Documents, p. 466).

129 G.S.H. Barton, Deputy Minister, Department of Agriculture, to Charles Camsell, Deputy Minister, Department of Mines and Resources, June 3, 1941, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 468).

130 G.S.H. Barton, Deputy Minister, Department of Agriculture, to George Spence, Director of Rehabilitation, Department of Agriculture, June 3, 1941, PFRA file 928/7Q1, vol. 1 (ICC Documents, p. 469).

2. Loss of revenue from flooding of marsh lands, with particular reference to Antipa Point and Leader's Point.
3. Estimated loss of revenue to Indians through employment as guides, etc., and from other incidental seasonal occupations.

Muscowpetung Reserve

1. Estimate of damage to hay lands (600 acres reported producing 1,000 tons annually)[.]
2. Estimate of damage to marsh lands or shooting grounds and incidental employment of Indians, if any.

General

It is our understanding that these flooding operations will affect quite a number of buildings on one or both of these reserves, such buildings being now located close to the existing shore of Qu'Appelle Lake, and that considerable damage will also be done to lands presently occupied by members of these Bands, either for agriculture or other purposes.

Compensating Benefits

It has been reported that the raising of the level of Qu'Appelle Lake in the manner indicated will result in certain compensating benefits to the Indians of these reserves and the Director of Rehabilitation [Spence] has stated that he was prepared to construct diversion works which would ensure annual flooding of hay flats in the western portion of the Muscowpetung Reserve in order to offset any loss occasioned by the raising of the lake level. This phase of the situation should be very carefully examined in advance. . . .[131]

Just four days later, on June 14, 1941, having heard that the project might not proceed, McGill wrote to Wardle to withdraw until further notice his request for engineering assistance.[132] That same day, he also asked Spence for further information, adding that he did not want to incur the expense of sending an engineer to the Qu'Appelle Valley "until your plans are further advanced."[133] Word of the delay was received with disappointment by R.M. Pugh of the Fort Qu'Appelle Board of Trade,[134] to whom Spence wrote:

131 Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to J.M. Wardle, Director, Surveys and Engineering Branch, Department of Mines and Resources, June 10, 1941, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, pp. 471-72).

132 Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to J.M. Wardle, Director, Surveys and Engineering Branch, Department of Mines and Resources, June 14, 1941, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, pp. 474).

133 Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to George Spence, Director of Rehabilitation, Department of Agriculture, June 14, 1941, DIAND file 675/8-4, vol. 2 (ICC Documents, p. 475).

134 R.M. Pugh, Secretary, Fort Qu'Appelle Board of Trade, to George Spence, Director of Rehabilitation, Department of Agriculture, July 7, 1941, PFRA file 928/7Q1, vol. 1 (ICC Documents, p. 479).

> After surveys had been completed it was found that some valuable farm property would be flooded. It was also found that large tracts of land in the Muscowpetung Indian Reserve and the Pasqua Indian Reserve would also be flooded. The Department of Indian Affairs at Ottawa has raised certain objections to the proposed development and wish to make a further investigation on their own behalf, and what the outcome will be we are unable to say.[135]

Within two weeks of McGill's letter of June 14, 1941, however, Spence had met with Minister of Agriculture James G. Gardiner, who advised that Indian Affairs should instruct its engineer to proceed to the Qu'Appelle Valley. Nevertheless, Spence assured McGill that "[n]othing will be done in the way of letting contracts until we get the matter satisfactorily settled between your department and our own."[136] McGill immediately reissued his request to Wardle to have an engineer meet with Spence and other PFRA staff to review the plans and location of the proposed project.[137]

When McGill had not replied by July 15, 1941, Spence wrote again, indicating that the PFRA had allotted a certain amount of money for work in the Qu'Appelle Valley and, pending the outcome of discussions between the two departments, was anxious to make a decision.[138] The next day, Controller V. Meek of the Department of Mines and Resources informed O.H. Hoover, the Department's Acting District Chief Engineer in the Dominion Water and Power Bureau in Calgary, that the engineering assistance requested by McGill had been authorized.[139] On July 18, 1941, Hoover advised Spence that Assistant Hydraulic Engineer P.A. Fetterly would visit Regina the following week to meet with representatives of the PFRA and to inspect the reserves to be flooded.[140]

135 George Spence, Director of Rehabilitation, Department of Agriculture, to R.M. Pugh, Secretary, Fort Qu'Appelle Board of Trade, July 9, 1941, PFRA file 928/7Q2, vol. 2 (ICC Documents, p. 481).

136 George Spence, Director of Rehabilitation, Department of Agriculture, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, June 27, 1941, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 478).

137 Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to J.M. Wardle, Director, Surveys and Engineering Branch, Department of Mines and Resources, June 14, 1941, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 480).

138 George Spence, Director of Rehabilitation, Department of Agriculture, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, July 15, 1941, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 482).

139 V. Meek, Controller, Department of Mines and Resources, to O.H. Hoover, Acting District Chief Engineer, Dominion Water and Power Bureau, Department of Mines and Resources, July 16, 1941, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, p. 483).

140 O.H. Hoover, Acting District Chief Engineer, Dominion Water and Power Bureau, Department of Mines and Resources, to George Spence, Director of Rehabilitation, Department of Agriculture, July 18, 1941, PFRA file 928/7Q1, vol. 1 (ICC Documents, p. 485).

Within a week, Fetterly had completed his inspection and issued his report. As this report is of considerable importance in the present inquiry, its terms are set forth at some length:

III. Findings

(1) Pasqua Reserve

The first proposed dam is at the lower end of Qu'Appelle [Pasqua] Lake, at Sioux Crossing, 6 miles west of Fort Qu'Appelle. The sectional maps indicate that the normal level of the Lake prior to 1923 was 1572.0 feet. It is 1569.0 at present. The proposal is to raise it to 1574.0 in the spring and lower it to 1572 in the summer. It will never go below 1572.0.

The Pasqua Reserve, which lies south of the lake only, includes most of the open water of the lake together with a few hundred yards of its transition area from open water through rushes, etc., to potentially flooded bottom lands.

The possible detrimentally affected areas in this Reserve are three in number.

Three capes or points, shooting rights.

Marginal road along the bottom of the steep hill, and about one foot above the present level of the lake, flooded.

Fodder along the south side, inundated. . . .

(c) Fodder

Marsh grass extends immediately north of the beforementioned road for about two miles to a width of two hundred feet or so. This area is, of course at about present water level (1569). Some of it is now being cut and it will all be cut in time. The white people on the north side are cutting and stacking marsh hay. It is understood that this marsh grass, if cut at the right time and before frost, and properly cured, makes good fodder. It apparently yields from ½ to a ton, or even more, per acre. Even two feet will probably permanently cover it and it is to be remembered that the permanent low elevation will be 1572.

. . . This flooding will be permanent.

Incidentally, the Pasqua Indians are said to be resentful of the fact that they were not consulted by P.F.R.A. before surveys started, and are sure to vote against any change.

(2) Muscowpetung Reserve

Conditions on this Reserve are somewhat different from those on Pasqua Reserve. The marsh grass just enters Muscowpetung and gradually merges within a thousand feet into hay flats, which are subject to flooding as they are only a few inches above water level. . . . The area affected consists of 1103.5 acres. This includes all the area under 1574 contour. . . .

The P.F.R.A. propose to carry out any diversion works necessary, either for irrigation purposes or for drainage of pools. However, their apparent intention is to hold the water at [15]74 until summer and then lower it to [15]72. This means that all land under the 1572 contour will be permanently flooded. Thus approximately 500 acres will be available for cutting of hay later in the summer (above [15]72 contour)

while 600 acres will be, to all intents and purposes, permanently flooded. The accompanying topographical map indicates the levels of the different areas and a study of this data would indicate that it is difficult to understand how the 500 acres can be reclaimed even at 1572 level, unless dyked. This area is said to produce over 1½ tons per acre. Even at a ton per acre it would produce 500 tons.

No buildings are affected on either Reserve.

IV. Conclusions

First it will be necessary to secure the promise of the P.F.R.A. to construct any diversion works necessary on the Muscowpetung Reserve to reclaim lands annually flooded so they will produce the usual crop of hay. This refers to the area flooded in the spring only. . . .

(a) Pasqua Reserve

Benefits - No benefits noticeable.

Damages - Shooting rights, say 20%, or $50 capitalized, or $1,250.

Marginal roads, say $400

Fodder, 200 acres at $8, or $1600.

This totals $3,250 damages.

(b) Muscowpetung Reserve

Benefits – Possible beneficial flooding of 500 acres of land, although it is difficult to understand that the benefits will be very large, since the soil is moist already and the crops appear to be about as healthy as can be, under present conditions.

Damages - Removal entirely of 600 acres of presently good grass-producing land from the side of production to at least partial uselessness.

600 acres at $8 per acre damage, or $4,800.

In the opinion of the writer the flooding of these lands for two or three months every year will gradually decrease the quality and quantity of grasses until because of lack of air for such long periods they will degenerate into mere rushes etc; and eventually disappear.

It may be repeated that all the above remarks are the opinions of the writer, only, particularly the price per acre ($8) set as the value of the inundated lands. Obviously no inspecting engineer can do more than state his own views.[141]

The total compensation payable to the Muscowpetung and Pasqua Bands, in Fetterly's opinion, was $8050.

On receipt of this report, the Acting Director of Indian Affairs expressed his appreciation to Wardle for Fetterly's services: "The work appears to have been done with painstaking care and the report will be of value to us in arriving at a settlement with the P.F.R.A. people should they decide to pro-

141 P.A. Fetterly, Assistant Hydraulic Engineer, "Report on Indian Reserves in Qu'Appelle Valley," July 25, 1941, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, pp. 487-91).

ceed with the work."[142] The Acting Director then forwarded the report to Spence with the following comments:

> Mr. Fetterly's method of arriving at the figures would appear to be fair and reasonable, and it is suggested that they form a satisfactory foundation of negotiation toward settlement should it be your intention to proceed. We should be glad to have a statement as to whether or not you intend to proceed with the works, and in case you do we would like to have any observations you care to make on the question of compensation to the bands affected.
>
> This Branch is assuming that you have all necessary powers of expropriation of privately owned lands in which case it would not appear to us that the consent of the Indian bands concerned would be necessary. Should you wish to proceed all arrangements in connection with damages or compensation to the Indians might be made through this office acting on their behalf.[143]

The PFRA's Senior Consulting Engineer, B. Russell, concurred that Fetterly's estimates appeared "suitable as a basis for settlement in the case of Indian lands," but he noted that rights-of-way were still to be negotiated on private lands. He added:

> The Acting Director of Indian Affairs appears to assume that because we have the necessary powers of expropriation of privately owned lands, we do not require the consent of the Indian Bands. If this is the case, we are in a position to proceed at any time using Mr. Fetterly's estimates as a basis for negotiations.[144]

Spence, too, was surprised by the free rein that the Acting Director's letter appeared to convey to the PFRA:

> It was my understanding that the consent of the Indian Bands was necessary before any works could be proceeded with which would affect the lake levels. If, however, as stated in the above letter, Indian lands can be expropriated in a similar manner to private lands, there would seem to be nothing to prevent us proceeding with the work, so far as Indian lands are concerned.[145]

142 Acting Director, Indian Affairs Branch, Department of Mines and Resources, to J.M. Wardle, Director, Surveys and Engineering Branch, Department of Mines and Resources, August 12, 1941, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, p. 499).

143 Acting Director, Indian Affairs Branch, Department of Mines and Resources, to George Spence, Director of Rehabilitation, Department of Agriculture, August 12, 1941 (ICC Documents, pp. 500-01).

144 B. Russell, Senior Consulting Engineer, Department of Agriculture, to George Spence, Director of Rehabilitation, Department of Agriculture, undated, PFRA file 928/7Q1, vol. 1 (ICC Documents, p. 502).

145 George Spence, Director of Rehabilitation, Department of Agriculture, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, August 18, 1941, DIAND file 675/8-4, vol. [illegible] (ICC Documents, p. 503).

After this exchange of correspondence, the Pasqua Lake project was temporarily deferred because of budget limitations and shortages of labour and building materials during the Second World War.[146] In the meantime, the PFRA turned its attention to planning the dams on Crooked Lake and Round Lake, as will be discussed below.

When the PFRA returned its focus to the western part of the valley a year later, its engineers proposed, for cost-cutting purposes, to eliminate the dam on Pasqua Lake for the time being and to erect only the dam on Echo Lake, to maintain the water level on both lakes at the same elevation.[147] On June 3, 1942, Spence sought Deputy Minister Barton's authorization to proceed, adding:

> It should be noted that construction of the dam need not necessarily be delayed until all negotiations for flooded area has [sic] been completed, as if it should become necessary the dam can be constructed and stoplogs left out of same till negotiations covering flooded area have been completed.[148]

Barton requested additional information about the scaled-down project,[149] and, in response, Spence wrote:

> Compensation for Indian lands amounting to $8,050 relates to the earlier proposal for two dams. However, the new proposal for a single dam will not appreciably affect flooded area on the Pasqua Indian Reserve and while it will reduce the area of flooded lands at full supply level on the Muscowpetung Reserve from 1100 acres to 728 acres it was our opinion that in order to have any damages paid to the Department of Indian Affairs it would be necessary to have an additional report made to them and this would probably delay the project beyond this year's construction season.
>
> The greatest reduction which could be anticipated in this connection would be a 50% reduction in the area removed from good grass production land which would result in a temporary saving of $2,400.00. As the dam at the east end of Qu'Appelle Lake will probably be constructed eventually, it would seem advisable to compensate the Department of Indian Affairs once and for all rather than make a partial settlement on the basis of a single dam at Echo Lake at the present time and later a further settlement when the second dam is constructed.

146 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, p. 36 (ICC Exhibit 5).

147 J.I. Mutchler, Senior Survey Engineer, PFRA, to George Spence, Director of Rehabilitation, Department of Agriculture, June 3, 1942, PFRA file 928/7E4, vol. 1 (ICC Documents, p. 571).

148 George Spence, Director of Rehabilitation, Department of Agriculture, to G.S.H. Barton, Deputy Minister, Department of Agriculture, June 3, 1942, PFRA file 928/7E4, vol. 1 (ICC Documents, p. 573).

149 G.S.H. Barton, Deputy Minister, Department of Agriculture, to George Spence, Director of Rehabilitation, Department of Agriculture, June 16, 1942, PFRA file 928/7E4, vol. 1 (ICC Documents, p. 576).

> If you consider it advisable, however, we can arrange to have a re-inspection made of the Indian lands and a re-evaluation of these lands in the new proposal can be made.[150]

Spence also commented on the utility of the project and the benefits that it was likely to bestow on the affected Bands:

> The usefulness of a project pending formation of an irrigation district consists of maintaining sufficient water in storage from flood years to permit a continuous flow being kept up in the Qu'Appelle River during the summer and fall months when this river ordinarily becomes stagnant and this will considerably improve its value for stockwatering purposes. . . .
>
> It is our opinion that Indians depend to some degree for their livelihood on fish obtained from these lakes and the increased water levels will, of course, improve conditions for the propagation of fish. It should be noted that under conditions of extremely low water which have been prevalent during last years a large number of the fish contained in these lakes have died and, while this is not a primary reason for the construction of a dam by this Department, the fact is that the construction of a dam will incidentally remedy this condition and I believe this fact should be given some consideration.[151]

Eventually, the bid of contractor Mamczasz & Rollack of Prince Albert for the construction of the Echo Lake dam was approved by Order in Council dated September 3, 1942,[152] and in short order the dam was built. Fetterly's estimate of $8050 to compensate the Muscowpetung and Pasqua Bands for damage to their reserve lands was never paid, notwithstanding the apparent concurrence of the PFRA and Indian Affairs that the amount was reasonable. There is no evidence that the Bands authorized the project or were even consulted regarding it, nor is there evidence that the diversion works proposed by Spence and viewed by Fetterly as "necessary . . . to reclaim lands annually flooded so they will produce the usual crop of hay" were ever built. Moreover, the potential effects of the Echo Lake dam on Standing Buffalo's reserve do not appear to have troubled the collective consciousness of either the Department of Agriculture or the Department of Mines and Resources.

150 George Spence, Director of Rehabilitation, Department of Agriculture, to G.S.H. Barton, Deputy Minister, Department of Agriculture, June 29, 1942, PFRA file 928/7E4, vol. 1 (ICC Documents, p. 577).

151 George Spence, Director of Rehabilitation, Department of Agriculture, to G.S.H. Barton, Deputy Minister, Department of Agriculture, June 29, 1942, PFRA file 928/7E4, vol. 1 (ICC Documents, pp. 577-78).

152 Order in Council PC 7900, September 3, 1942, NA, RG 17, vol. 3294, file 559-13-74 (ICC Documents, p. 601).

## THE DAMS AT CROOKED LAKE AND ROUND LAKE

While Fetterly was in Regina in July 1941, Spence made use of the opportunity to have him inspect the proposed sites of the dams to be erected at Crooked Lake and Round Lake. After receiving Fetterly's initial report dealing with the dam at Pasqua Lake, Spence suggested to McGill that Fetterly prepare a second report providing his estimate of the damage that would result from the dams in the lower Qu'Appelle Valley.[153] Spence provided maps outlining the areas to be affected, and on September 8, 1941, Fetterly was instructed to prepare an addendum to his earlier work.

Three days later, the report was completed:

> II. Crooked Lake.
>
> This lake lies in the bottom of Qu'Appelle Valley and immediately adjacent to Sakimay, Cowessess and Shesheep Reserves in Townships 18 and 19, Ranges 5 and 6, west of 2nd mer[idian]. A dam is proposed to be built on the eastern end. The normal water level up to 1923 seems to have been, according to the sectional maps, 1484. It is assumed that this is according to the same datum as that of P.F.R.A.
>
> The proposed land flooding will be on the Shesheep Reserve on the west end of the lake, while the dam will be on the Cowessess Reserve on the eastern end.
>
> (a) Flooded area
>
> The flooded area is on the western end, north of the river, and consequently on Shesheep Reserve. At present (summer of 1941) it is quite dry although the marginal lands are covered with rushes. The transition area is much less than in Qu'Appelle Lake, being only a few hundred feet in length. The whole area is only a foot or two above the present level of the lake. . . .
>
> The level of the lake in September 1939 was 1478.2. In July 1941 it had risen to 1480. The dam will raise it to 1482. At the time of inspection the potentially flooded area was roughly estimated at about 300 acres. The accompanying map shows 360 acres. An estimate of the area covered by rushes, between the open water and dry land, would be, say, 80 acres. The remainder, 280 acres, is on dry land which will be flooded to the 1482 contour as indicated on the map.
>
> Obviously no benefits are caused by the dam. The damages to Shesheep Reserve are as follows:-
>
> | | |
> |---|---|
> | 80 acres of rushes area at $3 per acre | $ 240 |
> | 280 acres of dry land at $8 per acre | 2,240 |
> | Total damages | $2,480 |
>
> The area covered by rushes is included because under natural conditions the water might recede to such an extent as to render it arable to some extent.

153 George Spence, Director of Rehabilitation, Department of Agriculture, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, August 18, 1941, DIAND file 675/8-4, vol. [illegible] (ICC Documents, p. 503).

(b) Dam

The dam will be located on the Cowessess Reserve and, together with the borrow pit will occupy 3 acres. Damages would be 3 acres at $10 per acre, or $30. . . .

III. Round Lake.

This lake lies to the north of Ochapowace Reserve, in township 18, ranges 3 and 4, west of 2nd mer[idian].

According to the sectional maps the normal elevation of the lake up to 1923 was 1454 feet above sea level. The present W. L. [water level] is 1448.4. A dam now exists at the lower or eastern end of the lake which raises the water one foot. Evidently, this dam is a private local enterprise. Last year the elevation was probably 1447.4. This lake can be raised by P.F.R.A. dam to 1451. The land affected, which lies between the river (which flows to the north-east at this point) and the open water of the lake is principally covered with rushes and consists of about 40 acres. An arbitrary value of $120 might be placed on this area. The area contiguous to the dam affected consists of one acre. This is higher than the flats and might be valued at $10, or a total of $130 damages.[154]

Fetterly's estimated damages totalled $2640, although he was uncertain about the damages that might be caused to summer resort buildings in the vicinity of Grenfel Beach that were situated just above the lake's proposed full supply level. Wardle forwarded the completed addendum to McGill on September 18, 1941.[155]

In the meantime, apparently buoyed by the advice of the Acting Director of Indian Affairs that, assuming the PFRA had powers of expropriation, the consent of affected Bands would not be required, the PFRA obtained bids for construction of the dams at Crooked and Round Lakes. On October 8, 1941, Phil South of Regina was awarded the contract by Order in Council PC 7764.[156] Construction commenced that fall, to the consternation of M. Christianson, the General Superintendent of Indian Agencies:

> I wish to bring to your attention that during my recent visit to the Crooked Lake Agency I was informed that the P.F.R.A. were building two dams, one near the Round Lake Indian Residential School and the other near the Crooked Lake Indian Residential School. I asked Mr. Kerley [the Indian agent] if they had permission from our

154 P.A. Fetterly, Assistant Hydraulic Engineer, "Addendum to Report on Indian Reserves in Qu'Appelle Valley, Crooked Lake and Round Lake," September 11, 1941, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, pp. 512-15).

155 J.M. Wardle, Director, Surveys and Engineering Branch, Department of Mines and Resources, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, September 18, 1941, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 519).

156 Order in Council PC 7764, October 8, 1941, NA, RG 2, Series 1 (ICC Documents, p. 522).

Department to build these dams and he informed me that as far as he knew they did not have any authority.

Consequently I went over to the headquarters of the P.F.R.A. here in Regina and the following is the information obtained from there. One site, I think, covers only about one acre of Indian Reserve and the other 2 acres. Very little land will be flooded at Round Lake but considerable acreage will be flooded on the Shesheep Reserve and at Sakimay. The P.F.R.A. know, of course, that they should have had permission from our Department before building the dams and they are now writing. I presume you will receive a letter from them in the course of the next few days.[157]

As Christianson had predicted, Spence wrote to McGill within a week:

I am enclosing herewith for your information prints of plans showing proposed development work to be carried out by this Department in connection with increasing the storage capacity of Crooked and Round Lakes in the Qu'Appelle River Valley.

You will note from the plan showing the development of Crooked Lake that an area of approximately three acres will be required for dam site and borrow pits on the Cowessess Reserve, No. 73, and I wish to advise you that construction work on this project is at present under way. As soon as required legal survey has been completed we shall be in a position to file plan in the Land Titles Office and make an offer for this area through your Department.

In the meantime you will note that when the lake is raised to its new full supply level, which may not occur for two or three years, that an area of approximately 360 acres will be flooded on Shesheep Reserve No. 74A, and an area of approximately 70 acres will be flooded on Sakimay Reserve, No. 74.

Mr. P.A. Fetterley [sic] inspected these areas on his visit to the Qu'Appelle Valley in July of this year and will no doubt be in a position to place a valuation on these lands. If you consider it advisable for us to institute expropriation proceedings on the strength of Mr. Fetterley's [sic] valuation, we shall be glad to have this done.

With regard to Round Lake development, you will know that there is an area required for the dam site on the Ochapowace Reserve, No. 71, amounting to one acre and that approximately 39½ acres on this same reserve will be flooded when the lake is raised to its new fall supply level. Mr. Fetterley [sic] also inspected this area and will no doubt be in a position to place a valuation on these lands also.

I wish to advise you that while the dams themselves will be completed and ready for operation before next spring that we do not intend to raise the water levels to flood out the Indian lands until satisfactory negotiations have been completed to compensate them for any damages which may be incurred.[158]

157 M. Christianson, General Superintendent of Indian Agencies, to Secretary, Indian Affairs Branch, Department of Mines and Resources, November 28, 1941, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 523).

158 George Spence, Director of Rehabilitation, Department of Agriculture, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, December 4, 1941, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, pp. 524-25).

On receiving this letter, McGill considered that it raised concerns about flooding of the Ochapowace and Sakimay reserves that were not addressed in Fetterly's addendum report. He therefore asked Wardle to have Fetterly prepare a supplementary report,[159] and advised Spence accordingly.[160]

In Fetterly's defence, his immediate superior, Acting District Chief Engineer Hoover, noted on January 24, 1942, that Fetterly's inspection in July 1941 had been performed without the benefit of topographical maps, which had not yet been prepared, making it impossible for him to assess potential damages. He also suggested that Fetterly's area of 80 acres to be flooded on the Shesheep reserve corresponded with the 70-acre area mentioned in Spence's letter, although he was unsure because all the maps had been forwarded to Ottawa. In conclusion, Hoover recommended to Controller Meek that, if an immediate report on damages was necessary, Fetterly should promptly make a further visit to the Qu'Appelle Valley.[161]

Meek had the maps and he could see that the 70- and 80-acre areas were in fact in two discrete locations, but he concurred that Fetterly should return to make a further inspection.[162] The following day, Fetterly commenced a four-day tour with PFRA engineers, which concluded on January 30, 1942, and four days later he issued his second addendum report:

> III. Crooked Lake.
>
> (a) Flooded Hay Lands. . . .
>
> As will be noted by a study of the accompanying maps the area to be flooded at F.S.L. [full supply level] reaches contour 1482 at the north western end of the lake. The potential and actual hay land at the extreme west end covers an area of 290 acres (the original visual estimate of 280 acres was too small by 10 acres). In addition an area of 110 acres of rushes and much less valuable land lies between this 290 acres and the actual water. It is not likely that rushes will form on the new shore.
>
> On what might be called the north side of the Qu'Appelle River channel is a further area of potentially flooded land containing 70 acres. This area is considered to be of better potential value than the "rushes" area but less than the hay land.

159 Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to J.M. Wardle, Director, Surveys and Engineering Branch, Department of Mines and Resources, December 12, 1941, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, p. 528).

160 Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to George Spence, Director of Rehabilitation, Department of Agriculture, December 12, 1941, PFRA file 928/7R1, vol. 1 (ICC Documents, p. 529).

161 O.H. Hoover, Acting District Chief Engineer, Dominion Water and Power Bureau, Department of Mines and Resources, to V. Meek, Controller, Dominion Water and Power Bureau, Department of Mines and Resources, January 24, 1942, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, p. 532).

162 V. Meek, Controller, Dominion Water and Power Bureau, Department of Mines and Resources, to O.H. Hoover, Acting District Chief Engineer, Dominion Water and Power Bureau, Department of Mines and Resources, January 26, 1942, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, p. 533).

It is considered that the potential damages would be as follows:-

| | |
|---|---|
| 290 acres at $8.00 per acre | 2320 |
| 110 acres at 3.00 per acre | 330 |
| 70 acres at 5.00 per acre | 350 |
| 3 acres Borrow Pit at $10 | 30 |
| | 3030. . . . |

(d) Travel between Sakimay and Shesheep Reserves.

The Indians have been travelling between Sakimay and Shesheep Reserves for many years using fords at various points on the river immediately west of the lake and in the potentially flooded area. The level of the bottom of the river is about 1476 and the former summer water level in the river was about 1478 or thereabouts. The new F.S.L. will mean that at flood time an added four feet or thereabouts will exist at the fords. The nearest bridge, a steel one, on the east, lies at the "Mission" one half mile from the lake. The nearest bridge on the west is about 8 or 9 miles away. Either bridge means an added 20 mile drive for the Indians on their trips between the Reserves e.g. for fodder harvesting, when the lake is at F.S.L. which will designedly be existant only during the early part of the season.

It is therefore recommended that an inexpensive bridge be constructed with a floor above F.S.L. at some convenient point a short distance west of the flood line. This would be for the use of the Indians only and for vehicular traffic only.

As far as the latter item is concerned there exists an element of doubt in the mind of the writer as to the advisability of demanding a bridge. The evidence and obvious facts are all set forth in (d) but the distance across from bank to bank is upward of 100 [?] feet and even an inexpensive bridge could be constructed only at considerable cost. It would have to be at least seven feet high. However this matter can be settled by negotiation or consultation between the P.F.R.A. and Indian Affairs.

It is to be remembered, however, that the possible cost is the only question that causes the above mentioned doubt. The necessity seems to be apparent.

The Indians stated that they wished to have the flood water off their hay lands by July 15 but they must remember that the full compensation has been awarded and any hay they cut is added profit, as compensation is computed as if there were to be no further returns from hay-cutting. Ordinarily speaking, they probably will still be able to cut most or all of the hay by hay-cutting time as the water should all be removed much prior to that time.

IV Round Lake

The remarks found in "III Round Lake" of the Addendum Report of September 11, 1941 are applicable in this report except for the acreage. This has now been definitely found to be slightly different from the approximate area given in the former report, owing to the exact survey made since that time. The area affected consists of 27 acres and should be worth a total of $160 or about $6 per acre, average value. The area of one acre at the dam is valued at $10.00.

| | |
|---|---|
| 27 acres hay land and rushes | $160.00 |
| 1 acre at dam (Borrow pit) | 10.00 |
| Total. | $170.00[163] |

Fetterly concluded that the total compensation should be $3,300 plus the construction of the inexpensive bridge to replace the natural fords that, before the flooding, permitted members of the Sakimay Band to access their lands on both sides of the river. He also reconsidered potential damages at the Grenfel Beach resort area, but found that, with the possible exception of one building that was still located above the full supply line, no buildings would have to be moved, and thus no damages were payable. His report was forwarded by Wardle to McGill on February 14, 1942.[164]

In reporting to Deputy Minister Camsell regarding Fetterly's investigations, McGill expressed concern about whether Indian Affairs could justify requesting the bridge at Sakimay. He recommended suggesting that Spence give "sympathetic consideration to the very great inconvenience which will, no doubt, be caused the Indians of the Sakimay and Shesheep Reserves by the raising of the waters at points where they have for many years been accustomed to crossing the river." McGill also proposed that "when payment of this compensation is made consent will be given to the proposed development."[165]

Before authorizing McGill to negotiate with Spence, Camsell's Chief Executive Assistant suggested that the local Indian agent be consulted to determine whether he considered Fetterly's estimate of damages to be fair and reasonable.[166] McGill put the question to both Christianson, the General Superintendent of Indian Agencies, and Agent W.J.D. Kerley, with the latter's attention directed in particular to the travel between the Sakimay and Shesheep

163 P.A. Fetterly, Assistant Hydraulic Engineer, "Addendum No. 2 to Report on Indian Reserves in Qu'Appelle Valley," February 3, 1942, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, pp. 534-39).

164 J.M. Wardle, Director, Surveys and Engineering Branch, Department of Mines and Resources, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, December 12, 1941, DIAND file 675/8-4, vol. 2 (ICC Documents, p. 543).

165 Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to Charles Camsell, Deputy Minister, Department of Mines and Resources, February 27, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 545).

166 Chief Executive Assistant, Department of Mines and Resources, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, March 3, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 547).

reserves and the nature of the demand that should be put to the PFRA.[167] Christianson and Kerley expressed their satisfaction with Fetterly's valuation, and Kerley continued:

> I also concur in that portion of his report referring to the bridge between Sakimay and Shesheep Reserves. I consider this is an absolute necessity, as even in dry years there would be at least four months of the year when the Indians would be unable to ford the river, and a longer period in wet years.
>
> I feel certain that the Indians would be well satisfied with the proposed compensation, but I feel equally certain that the Indians of Sakimay and Shesheep Reserves would raise a vigorous protest if the proposed bridge were not built and they were forced to travel twenty extra miles when they wished to cross.[168]

The Indians of Crooked Lake were not impressed with the project. They registered their complaints with Member of Parliament E.E. Perley, who in turn conveyed them to McGill:

> Their first complaint was that a dam was constructed last fall at the mouth of Crooked Lakes and raised the water three feet at the present time and is flooding their hay lands and it is doubtful if they will be able to cut any hay there this fall. They stated they had been offered a lump sum as compensation, but what they really want and think is their rights [sic] is, that they should receive an annual sum for damages which would be an amount sufficient to purchase hay for their cattle. They stated in their statement made to me that there was about three hundred and sixty acres of their hay land flooded on which they had been cutting annually from two hundred to three hundred tons. They also stated they have in the neighbourhood of three hundred head of cattle and a great many horses and any hay they put up over and above what they required for their own stock, had been sold off the Reserve and resulted in some little revenue. They also state they have to move their stock down in the valley on the flats in the winter time in order to have the water supply for their stock, as well as being near the hay.[169]

Notwithstanding these objections, McGill wrote to Spence, setting out the compensation estimated in Fetterly's second addendum report as well as the

167 Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to W.J.D. Kerley, Indian Agent, Crooked Lake Agency, Indian Affairs Branch, Department of Mines and Resources, March 12, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 549A); Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to M. Christianson, General Superintendent of Indian Agencies, Indian Affairs Branch, Department of Mines and Resources, March 14, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 550).

168 W.J.D. Kerley, Indian Agent, Crooked Lake Agency, Indian Affairs Branch, Department of Mines and Resources, to Secretary, Indian Affairs Branch, Department of Mines and Resources, April 4, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 559).

169 E.E. Perley, MP, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, May 11, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, pp. 562-63).

comments of both Fetterly and Kerley about the importance of the bridge at Sakimay. He then concluded:

> The position of this Department with reference to your construction program already completed in the Qu'Appelle Valley is, therefore, that subject to the condition that your organization construct a bridge above F.S.L. at a convenient point a short distance west of the flood line so as to provide and maintain road communication between the Sakimay and Shesheep Indian Reserves we are prepared to accept the sum of $3,300.00 in satisfaction of the claim of the various bands of Indians for flood damage.[170]

In a separate letter to Perley to address the concerns of the Indians at Crooked Lake, McGill stated that "*this Department could not in the first instance prevent the construction of this dam*, but we were definitely interested in obtaining reasonable and satisfactory compensation for our Indians for any flooding damage which might result." He noted that Fetterly had undertaken thorough investigations of the damages that would be caused by the dams at Crooked and Round Lakes, and that his opinions, supported by Christianson and Kerley, had formed the basis of the compensation demanded from the Department of Agriculture.[171]

On June 6, 1942, PFRA District Engineer H.G. Riesen met with the Reverend V. de Varennes, the principal of the Cowessess Indian Residential School, about damages caused to school lands by the construction of the Crooked Lake dam. Following the meeting, Riesen informed Senior Survey Engineer Mutchler that the lands did not form part of the Cowessess reserve, and that the damages totalled $75, including $30 for damage to three acres of alfalfa caused by the development of a borrow pit, a further $30 for flooding three acres of hay land, and $15 for 60 pounds of alfalfa seed. De Varennes indicated that he would be satisfied with payment of $75, if the PFRA would also level the edges of the borrow pit developed in the school's alfalfa field.[172]

In a memorandum dated July 2, 1942, to Spence, Mutchler suggested that the school's claim should be reduced to $60 because the PFRA could obtain replacement seed, presumably at no charge, from the Experimental Farms Branch of the Department of Agriculture. He also noted that de Varennes and

170 Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to George Spence, Director of Rehabilitation, Department of Agriculture, May 14, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 565).

171 Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to E.E. Perley, MP, May 20, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 569). Emphasis added.

172 H.G. Riesen, District Engineer, PFRA, to J.I. Mutchler, Senior Survey Engineer, PFRA, June 16, 1942, PFRA file 928/7C19, vol. 1 (ICC Documents, p. 575).

Kerley had acknowledged that the three acres of school land claimed to be flooded were the same three acres referred to in Fetterly's report as lands flooded on the Cowessess reserve.[173] In a second memorandum of the same date to Spence, Mutchler suggested that the $3300 compensation proposed for the Cowessess, Sakimay, and Ochapowace Bands be reduced by $30 to reflect the claim for school lands. He further observed that Riesen and Kerley had agreed that the construction of a ford for approximately $750 would meet the requirements of Indian Affairs to provide a crossing to serve the Sakimay Band.[174]

Spence in turn wrote to McGill asking for withdrawal of the $30 claim for flooding of lands on the Cowessess reserve.[175] However, the Acting Director of the Indian Affairs Branch replied that the claim of the Cowessess Indian Residential School was unrelated to the damages estimated by Fetterly.[176] In the face of competing claims, the PFRA was faced with the dilemma of identifying the owner of the land on which the Crooked Lake dam and borrow pit were situated, and John Vallance, Superintendent of Water Development, appealed to de Varennes for evidence of title.[177]

In the meantime, Perley wrote again to McGill, seeking payment of the compensation due to the Indians of Crooked Lake. Although the PFRA's Riesen had earlier proposed to lower the water level on Crooked Lake "to enable the Indians to cut some hay at the west end of the lake, which land is now flooded,"[178] Perley noted that

> they have *not* received any compensation and . . . they have not been able to cut any hay sufficient to feed their three hundred head of cattle and around one hundred and fifty horses and will be in desperate circumstances this winter. They say that the Government has encouraged the raising of cattle and that this question should have your immediate attention. They complain that the agent doesn't seem to be anxious or to have proper interest in their affairs and that the problems set out above are not dealt

173 J.I. Mutchler, Senior Survey Engineer, PFRA, to George Spence, Director of Rehabilitation, Department of Agriculture, July 2, 1942, PFRA file 928/7C19, vol. 1 (ICC Documents, p. 579).

174 J.I. Mutchler, Senior Survey Engineer, PFRA, to George Spence, Director of Rehabilitation, Department of Agriculture, July 2, 1942, PFRA file 928/7C19, vol. 1 (ICC Documents, p. 580).

175 George Spence, Director of Rehabilitation, Department of Agriculture, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, July 29, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, pp. 587-88).

176 Acting Director, Indian Affairs Branch, Department of Mines and Resources, to George Spence, Director of Rehabilitation, Department of Agriculture, August 25, 1942, PFRA file 928/7C19, vol. 1 (ICC Documents, p. 597).

177 John Vallance, Superintendent of Water Development, Department of Agriculture, to Rev. V. de Varennes, Principal, Cowessess Indian Residential School, September 11, 1942, PFRA file 928/7C19, vol. 1 (ICC Documents, pp. 602-03).

178 H.G. Riesen, District Engineer, PFRA, to J.I. Mutchler, Senior Survey Engineer, PFRA, August 5, 1942, PFRA file 928/7C19, vol. 1 (ICC Documents, p. 589).

with in proper time. They think that the dam should be lowered to permit the draining of the hay and their cutting hay thereon.[179]

D.J. Allan, the Superintendent of Reserves and Trusts, replied to Perley on October 3, 1942, by reiterating the steps taken by Indian Affairs to quantify and secure compensation on behalf of the Bands. He added that "[w]e have taken advantage of the opportunity afforded by the receipt of your letter to again press Mr. Spence strongly for an immediate settlement of both the damage claim and their claim for the erection of the bridge above referred to."[180] McGill followed up the same day with a strongly worded letter to Spence, referencing Perley's letter and asking for the matter to be brought to an immediate conclusion.[181] On October 21, 1942, Spence referred the matter to his Deputy Minister, recommending that Barton proceed to deal with the damage and bridge claims and that he "consider that Rev. de Varennes is to make his claim to the Department of Indian Affairs and not this Department."[182]

By October 27, 1942, Deputy Minister Camsell of the Department of Mines and Resources was warning Barton that "a good deal of uneasiness and impatience is being exhibited by the bands concerned."[183] At the same time, de Varennes, noting that the PFRA had levelled the borrow pit and promised to supply seed, pleaded with McGill to agree that $60 in compensation should be payable to the Cowessess Indian Residential School "because we are the losers in this affair."[184]

Pressed for a decision, Barton asked Spence for further information and his recommendation. Spence replied:

With reference to your memorandum of October 28th regarding the above I wish to advise you that the claim of the Cowessess Indian School for the flooding of 4 acres

179 E.E. Perley, MP, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, September 23, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 606).

180 D.J. Allan, Superintendent, Reserves and Trusts, Indian Affairs Branch, Department of Mines and Resources, October 3, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 609).

181 Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to George Spence, Director of Rehabilitation, Department of Agriculture, October 3, 1942, PFRA file 928/7C19, vol. 1 (ICC Documents, p. 610).

182 George Spence, Director of Rehabilitation, Department of Agriculture, to G.S.H. Barton, Deputy Minister, Department of Agriculture, October 21, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 619A).

183 Charles Camsell, Deputy Minister, Department of Mines and Resources, to G.S.H. Barton, Deputy Minister, Department of Agriculture, October 27, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 621).

184 Rev. V. de Varennes, Principal, Cowessess Indian Residential School, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, November 2, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 623A).

of hay land has been reduced to 3 acres and is the 3 acres referred to in Mr. Fetterley's [sic] report to the Department of Indian Affairs and the Director of Indian Affairs' letter to us of May 18th, 1942, and referred to as Cowessess Indian Reserve, No. 73, 3 acres at $10.00, etc.

This land will be permanently flooded at f.s.l. of Crooked Lake. There is a part of the Indian School's claim which is not included in Mr. Fetterley's [sic] report or Dr. McGill's letter of May 18th and that is the loss of 5 tons of alfalfa hay on 3 acres of borrow pit immediately below the Crooked Lake Dam amounting to $30.00 in addition to 60 lbs. of alfalfa seed. I wish to advise you that the 60 lbs. of alfalfa seed has not yet been turned over to the School by the Experimental Farms Branch as this has been held pending final settlement of the claim. As the situation now stands therefore, $30.00 for payment for 3 acres of flooded land should be paid to the Department of Indian Affairs and by them to the Cowessess Indian School and is included in the total of $3,300.00 claimed. The loss of 5 tons of alfalfa, amounting to $30.00, had not occurred when Mr. Fetterley [sic] visited Crooked Lake and, therefore, could not be included in his report. This $30.00 should be added to the previous claim, making a total of $3,330.00 and be passed on by the Department of Indian Affairs to the Cowessess Indian School. This will make a total of $60.00 payable by the Department of Indian Affairs to the Cowessess Indian School and as soon as your approval has been received arrangements will be made for the delivery of 60 lbs. of alfalfa seed to this school.

I should also like at this time to call your attention to the fact that it will be necessary to construct a bridge over the Qu'Appelle River between Sakimay and Shesheep Reserves before this claim will be entirely settled. An effort was made by us to substitute a ford for a bridge and while this was agreeable to officials of the Indian Department the Indians themselves were not agreeable to this substitution. Consequently, it will be necessary for us to construct a timber bridge over the river as part of next year's operations. We are not in a position to submit a definite estimate of cost of this bridge at the present time but as soon as plans of same have been prepared and approved by the Department of Highways cost estimate will be furnished to you for authorization. If it is necessary for you to have an estimate of the cost of the bridge at the present time I would recommend that an outside figure of $2,000.00 be used for this purpose. This is considerably in excess of the cost of the ford but as the Indians will not accept the ford there does not appear to be much which could be done except build the bridge.[185]

Spence's recommendation received approval by Order in Council on November 19, 1942, although the instrument itself makes no reference to the

185 George Spence, Director of Rehabilitation, Department of Agriculture, to G.S.H. Barton, Deputy Minister, Department of Agriculture, November 3, 1942, PFRA file 928/7C19, vol. 1 (ICC Documents, p. 624).

Sakimay bridge.[186] Nine days later, F.M. Schrader of Deputy Minister Barton's office forwarded a copy of the Order in Council to Spence with a request for a cheque requisition so that payment could be made.[187] When payment had still not been forthcoming by April 26, 1943, the Acting Deputy Minister of Mines and Resources wrote to his counterpart in Agriculture to inquire.[188] By May 14, 1943, $3330 had been paid to Indian Affairs to the credit of the Cowessess, Sakimay, and Ochapowace Bands and the Cowessess Indian Residential School.[189]

In February 1944, when the school had not yet received its share of the proceeds, Christianson implored the Department on the school's behalf to requisition a cheque for $60.[190] Philip Phelan, Chief of the Department's Training Division, replied that he did not see how Indian Affairs could justify paying the school more than $30.[191] After consulting with engineer Gordon McKenzie of the PFRA, Christianson explained how the Residential School was entitled to $30 for damage to its alfalfa crop and a further $30 for flooded hay land, and he noted that the PFRA's records showed both amounts as having been paid.[192] The question whether the flooded hay lands belonged to the school or the Cowessess Band had now landed in the lap of Indian Affairs, and Indian Agent Kerley was asked to resolve the matter.[193] He con-

186 *Order in Council PC 10476*, November 19, 1942, NA, RG 2, Series 1 (ICC Documents, p. 628). However, a later PFRA report states: "In addition, by authority granted to PFRA January 18, 1943, Canada agreed to contract a bridge across the Qu'Appelle River between Crooked and Round Lakes, for the convenience of the Indians; the bridge to cost an estimated $3,000. Construction of the bridge took place during 1943." See Canada, Department of Regional Economic Expansion, Prairie Farm Rehabilitation Administration, Land Administration Division, "Report on Crooked and Round Lakes Projects in the Qu'Appelle Valley – Saskatchewan," October 1979 (ICC Exhibit 27, p. 24). *It is not clear whether this report refers to the same bridge, since the Sakimay bridge would presumably have been built at the west end of Crooked Lake and not between Round and Crooked Lakes.*

187 F.M. Schrader, Deputy Minister's Office, Department of Agriculture, to George Spence, Director of Rehabilitation, Department of Agriculture, November 26, 1942, PFRA file 928/7C19, vol. 1 (ICC Documents, p. 629).

188 Acting Deputy Minister, Department of Mines and Resources, to G.S.H. Barton, Deputy Minister, Department of Agriculture, April 26, 1943, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 636).

189 Credit Memorandum, Department of Agriculture (Payer), on account of compensation for flooding Qu'Appelle River Irrigation Damages, May 14, 1943, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 638).

190 M. Christianson, General Superintendent of Indian Agencies, Indian Affairs Branch, Department of Mines and Resources, to Indian Affairs Branch, Department of Mines and Resources, February 8, 1944, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 648).

191 Philip Phelan, Chief, Training Division, Department of Mines and Resources, to M. Christianson, General Superintendent of Indian Agencies, Indian Affairs Branch, Department of Mines and Resources, February 17, 1944, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 649).

192 M. Christianson, General Superintendent of Indian Agencies, Indian Affairs Branch, Department of Mines and Resources, to Indian Affairs Branch, Department of Mines and Resources, February 21, 1944, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 653).

193 D.J. Allan, Superintendent, Reserves and Trusts, Indian Affairs Branch, Department of Mines and Resources, to W.J.D. Kerley, Indian Agent, Crooked Lake Agency, Indian Affairs Branch, Department of Mines and Resources, March 1, 1944, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 654).

firmed that the Residential School was entitled to $60,[194] and a cheque in that amount was forwarded to the principal on March 27, 1944.[195]

At that point, the only remaining issue was title to the dam site for the Round Lake dam. R.F.B. Donald on behalf of the PFRA's Land Ownership Investigator wrote to D.J. Allan, the Superintendent of Reserves and Trusts:

> You will remember that we paid $3,300.00 in connection with the Indian lands which were affected by the construction of this dam and included in that was a small dam site. We would like to get title to the dam site in order to be in the position to register easements from other owners at the west end of the lake and it is necessary to have this in order that these easements may be registered directly against the other owners' lands as servient tenements.[196]

Spence prepared a briefing note for A.L. Stevenson in the office of the Deputy Minister of Agriculture, but Stevenson responded that he did not recall any correspondence in which Indian Affairs "promised to transfer land to us for dam site purposes."[197] In reply, Spence explained:

> Replying to your memorandum of June 7th, I have looked up Mr. Mutchler's letters to Dr. McGill and to Dr. Barton at the time a settlement was made for damage claims to the Indians for $3300.00 and while the dam site appears to have been obscured at the time the summit was made, it nevertheless was our intention to obtain title to the one acre required and on which the dam was constructed.
>
> I am attaching hereto copies of several letters dealing with the matter and I would refer you particularly to the second paragraph on the second page of our letter to Dr. McGill dated December 4th, 1941 wherein we stated that there is an area required for the dam site on the Ochapowace Reserve No. 71 amounting to one acre and that approximately 39½ acres on the same reserve would be flooded. According to our interpretation of the matter we expected the flooding rights to be paid for in the matter of damages but we expected also that the dam site on Round Lake would be transferred to us as is usual, and also the dam site on Crooked Lake belonging to the reservation would be transferred to us. The reason the matter is being brought up now is due to the fact that we need to own a piece of land so that we can tie in

194 W.J.D. Kerley, Indian Agent, Crooked Lake Agency, Indian Affairs Branch, Department of Mines and Resources, to Indian Affairs Branch, Department of Mines and Resources, March 18, 1944, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 655).

195 D.J. Allan, Superintendent, Reserves and Trusts, Indian Affairs Branch, Department of Mines and Resources, to Principal, Cowessess Indian Residential School, March 27, 1944, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 657).

196 R.F.B. Donald for Land Ownership Investigator, PFRA, Department of Agriculture, to D.J. Allan, Superintendent, Reserves and Trusts, Indian Affairs Branch, Department of Mines and Resources, May 27, 1944, PFRA file 928/7R1, vol. 4 (ICC Documents, p. 662).

197 A.L. Stevenson, Deputy Minister's Office, Department of Agriculture, to George Spence, Director of Rehabilitation, Department of Agriculture, June 7, 1944, PFRA file 928/7R1, vol. 4 (ICC Documents, p. 664).

> easements that are necessary to be taken from farmers or cattlemen at the west end of these lakes. . . .
>
> There is no doubt that the acre which we required in order to build the dam has been fully paid for at the rate of $10.00 per acre as shown in the breakdown of the $3300.00. The land was simply rough, scrubby stuff at the end of the lake.
>
> If you could therefore take this matter up with the Indian Department and obtain the necessary Deed for the one acre and at the same time, the three acres at Crooked Lake, same would be appreciated.[198]

In due course, Deputy Minister Barton requested that Deputy Minister Camsell of Mines and Resources "take the necessary steps to have title to the two small areas in question transferred to this Department."[199] Camsell replied that, from the plans on hand in his Department, the area to be conveyed could not be properly described, and he asked that the engineers in the Department of Agriculture furnish sketches or certified legal descriptions of the property required for each dam site.[200]

Spence proposed that one way around the problem might be to register caveats rather than the easements themselves against farmers' titles, using the Crown's titles to the lands on which the dams stood as the dominant tenements.[201] However, since the dams were situated on reserve lands, Saskatchewan's Land Titles Office was unable to provide a legal description for the dominant tenement.[202] This prompted Donald to comment:

> We have considered Dr. Barton's letter again and we are advising Ottawa that as we have had some difficulty in connection with easements and alleged damage claims for further compensation owing to flood conditions, that [sic] the method we will follow from now on is one of taking title to lands affected by water. This, I think, will let us out of a lot of grief.[203]

198 George Spence, Director of Rehabilitation, Department of Agriculture, to A.L. Stevenson, Deputy Minister's Office, Department of Agriculture, July 7, 1944, PFRA file 928/7R1, vol. 2 (ICC Documents, pp. 665-66).

199 G.S.H. Barton, Deputy Minister, Department of Agriculture, to Charles Camsell, Deputy Minister, Department of Mines and Resources, July 17, 1944, PFRA file 928/7R1, vol. 4 (ICC Documents, p. 668).

200 Charles Camsell, Deputy Minister, Department of Mines and Resources, to G.S.H. Barton, Deputy Minister, Department of Agriculture, August 12, 1944, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 670).

201 George Spence, Director of Rehabilitation, Department of Agriculture, to A.L. Stevenson, Deputy Minister's Office, Department of Agriculture, August 16, 1944, PFRA file 928/7R1, vol. 4 (ICC Documents, p. 671).

202 Registrar, Land Titles Office, Registration District of Moosomin, to Land Ownership Investigator, Department of Agriculture, August 17, 1944, PFRA file 928/7R1, vol. 2 (ICC Documents, p. 673).

203 R.F.B. Donald for Land Ownership Investigator, PFRA, Department of Agriculture, to A.J. Reece, Agricultural Assistant, PFRA, Department of Agriculture, August 17, 1944, PFRA file 928/7R1, vol. 2 (ICC Documents, p. 674).

Spence made the same recommendation to Barton.[204]

Eventually, Stevenson met with lawyers in the Department of Justice to discuss Spence's proposal to protect easements using caveats:

> This morning I discussed the proposal contained in your memorandum with Mr. Olmsted and Mr. Driedger of the Department of Justice. They assure me that as far as registering the easement is concerned, it does not matter whether the land on which the dam has been constructed and which is to serve as the "dominant tenement" is under the control of the Department of Mines and Resources, as at present, or the Department of Agriculture. It still remains land which is the property of His Majesty the King in the right of Canada, and that is all that is necessary. Any transfer which may be effected from one Department to the other would be for administrative purposes only and would not affect the title. We will be glad to pursue this matter further if you think there is any additional information which you would like to have concerning it.
>
> As to the transfer of the lands in question from the Department of Mines and Resources to this Department, we are enclosing, for your information, a copy of an exchange of letters between Dr. Barton and the Deputy Minister of Mines and Resources. Perhaps you will not wish to proceed any further, in view of the opinion of the officers of the Department of Justice referred to above.[205]

In view of this memorandum and the opinion of the Department of Justice, title to the dam sites on Crooked and Round Lakes was not pursued further by the PFRA.

## WATER CONTROL OPERATIONS TO 1970

After the construction of the dams in the Qu'Appelle Valley, they were used and operated for their intended purpose, which was primarily to store water for irrigation purposes. From time to time, when periodic flooding inundated farm lands in the valley, the PFRA received complaints and requests for compensation from farmers and Indians alike, but the responses typically attributed much of the blame to natural conditions. For example, on May 31, 1943, the PFRA's Superintendent of Water Development, John Vallance, provided the following answer to farmer Charles J. Kallio of Tantallon, Saskatchewan:

204 George Spence, Director of Rehabilitation, Department of Agriculture, to G.S.H. Barton, Deputy Minister, Department of Agriculture, August 17, 1944, PFRA file 928/7R1, vol. 2 (ICC Documents, p. 675).

205 A.L. Stevenson, Deputy Minister's Office, Department of Agriculture, to George Spence, Director of Rehabilitation, Department of Agriculture, October 18, 1944, PFRA file 928/7R1, vol. 4 (ICC Documents, p. 692).

I have for acknowledgment your letter of May 26th in which you state your dissatisfaction with the way this Department has handled the control of water at Round and Crooked Lakes.

It is a little difficult for us to see how the flooding in the Qu'Appelle Valley this year was entirely due to any negligence of ours. These records would show that the flow of water in the Qu'Appelle Valley during the spring of 1943 was one of the highest on record and I am sure that if you have lived in this valley for any length of time you will recall floods which have occurred there in previous years before any dams or control works had been constructed at any point in the valley.

There is no doubt that if it were possible to leave the lakes empty in the fall a certain amount of water from the spring runoff could be stored in them in the spring. Unfortunately, no one can anticipate in the fall the amount of water which will flow down the Qu'Appelle Valley the following spring and as the purpose of these storage works is to store water from years of high runoff for use in years when there is very little flow in the Qu'Appelle River, the draining out of these lakes at any time before we were assured of an adequate supply of water in the spring would defeat this purpose.

It might be possible for us to let water out of these lakes early in the spring before the spring floods commenced, when we were sure that there would be sufficient water to refill them, but this is the only improvement that we believe could be made in the operation of these projects.

For your information I have to advise you that both Round and Crooked Lakes, as well as other lakes in the Qu'Appelle Valley, were filled far above their normal full supply level this spring and more flood water was placed in temporary storage in these lakes than could ever have been done without our structures, even though these lakes were supposedly full last fall. Round Lake was filled with an additional three feet of water over its level last fall and Crooked Lake had over four and one-half feet placed in it during the peak of spring runoff. If this had not been done floods in the lower portion of the river would have been even greater than they were. While it is possible that if Round and Crooked Lakes had been entirely empty some slight alleviation of flood conditions in the Qu'Appelle River below these lakes might have occurred, I should like to point out that flood control in the Qu'Appelle River is the secondary purpose of these reservoirs, their primary purpose being the storage of water for drought years. Consequently, as previously mentioned, it is not possible for us to empty these lakes until we can be sure that they will be filled again.

In view of the fact that we can prove to the satisfaction of any disinterested body that the operation of the control structures at Round and Crooked Lakes did nothing to cause additional flooding of lands above that which would have occurred normally under this spring's flood conditions, we do not believe that it would be possible to consider the purchase of low lying lands in the Qu'Appelle Valley which have undoubtedly been flooded in previous years of high runoff.

For your information we are fully aware of conditions as they were throughout the entire length of the Qu'Appelle Valley this spring as we were able to have this area photographed by the Royal Canadian Air Force at the peak of the flood flow. We cannot agree that the flood conditions occurring in the Qu'Appelle Valley this year were brought about by the "negligence, carelessness and misjudgment of those in

charge of P.F.R.A. projects", as if necessary we can prove that any actions of officials of this Department eased the flood conditions in the Qu'Appelle Valley rather than making them worse.[206]

Similar complaints were made in subsequent years, although in some years the objection was that, rather than causing flooding, the dams were *preventing* lands from receiving sufficient supplies of water. In some cases, individuals actually took matters in their own hands rather than simply registering complaints. In early 1947, for example, when a fish lock on the Round Lake dam had frozen in place, a farmer by the name of John Soloshy chopped open the lock to release water and permit him to water his stock.[207] Similarly, in 1968, a member of the Piapot Band constructed a small earth-fill dam across the river to gain access to the Band's land on the other side and to prevent the flooding of Band haylands.[208]

In the mid-1950s, the Qu'Appelle Valley experienced a high precipitation cycle that led to several years of flooding, culminating in the massive inundation of 1955 and lesser, but still serious, flooding in 1954, 1956, and other years. Property damage was extensive, but the PFRA continued to deny its own responsibility:

> Flooding of the flat land in the Qu'Appelle Valley would have occurred in 1955 whether there were control structures in the valley or not, the Prairie Farm Rehabilitation Administration said in a report released for publication Saturday[, January 7, 1956].
>
> The report was prepared by D.W. Kirk of the P.F.R.A. staff and summarized the history of water control in the valley and particularly during the 1955 flood year.
>
> There have been some criticisms from those with property in the valley of the manner in which the excess water was handled.
>
> "It can be stated that the P.F.R.A. structures on Echo, Crooked and Round lakes had no effect on the damage which the floods caused this year," the report said. Reclamation of some of the areas may take several years.
>
> According to the statement, the flood climaxed a nine-year period beginning in 1946 during which there was above normal precipitation. Water levels throughout the drainage basin had gradually risen until in the fall of 1954 the land could no longer absorb further moisture and all the sloughs, pot-holes, and marshy areas were filled to over-flowing.

206 John Vallance, Superintendent of Water Development, PFRA, Department of Agriculture, to Charles J. Kallio, May 31, 1943, PFRA file 928/7R1, vol. 2 (ICC Documents, pp. 639-40).

207 H.W. LaRocque, Agricultural Inspector, PFRA, Department of Agriculture, to George Spence, Director of Rehabilitation, Department of Agriculture, PFRA file 928/7R1, vol. 2 (ICC Documents, pp. 702-03).

208 Allan R. Guy, Minister in Charge, Saskatchewan Water Resources Commission, to Jean Chrétien, Minister, Department of Indian Affairs and Northern Development, September 18, 1969, DIAND file 675/8-4, vol. 1 (ICC Documents, p. 758).

> The lake levels in the Qu'Appelle valley also rose steadily until by 1954 they had reached the highest record[ed] level since 1881.
>
> "Recognizing the imminent flood danger, P.F.R.A. undertook to drain the Qu'Appelle lakes as much as possible during the winter 1954-55 so that in the event of a heavy runoff in the spring of 1955 storage would be available in the lakes to assimilate some of the excess flood waters which might be expected," the report said.
>
> . . .
>
> "But the draining process was slowed down and limited by the capacity of the natural drainage channel which was a flat grade and torturous meanders."[209]

In the late 1950s, the flooding conditions spurred the Muscowpetung and Piapot Bands to pass Band Council Resolutions authorizing PFRA personnel to enter the reserves to study channelization and other means of expediting river flows. Entry was for survey purposes only and the PFRA was specifically precluded from works such as dredging or earth removal unless the Bands had been consulted, had been shown exactly what was required, and had given their consent.[210]

In 1960, the Piapot Band registered a complaint that "P.F.R.A. have flooded farm lands and hay lands without ever obtaining permission to do so," and asked to "be compensated or keep the water out off [sic] our Reserve."[211] It was the first of several such complaints by the Band. In an internal memorandum, M.G. Jutras, Superintendent of the File Hills-Qu'Appelle Indian Agency, acknowledged that channel clearing and irrigation work in the Lumsden area upstream from the Piapot reserve "contributes to flooding but I doubt that it is the cause as I understand that these conditions existed prior to the P.F.R.A. work."[212] Jutras maintained that the channelization work should have continued through the Piapot, Muscowpetung, and Pasqua reserves, but it is not entirely clear from the evidence before the Commission in the present inquiry whether the benefits of channelization would have outweighed its alleged drawbacks, such as increased erosion and sedimentation.

209 "P.F.R.A. Denies Onus for Flood Damage," Regina *Leader-Post*, January 7, 1956, PFRA file 928/7Q2, vol. 3 (ICC Documents, p. 715).

210 N.J. McLeod, Superintendent, File Hills-Qu'Appelle Indian Agency, Indian Affairs Branch, Department of Citizenship and Immigration, to E.S. Jones, Regional Supervisor of Indian Agencies, Indian Affairs Branch, Department of Citizenship and Immigration, July 12, 1956, DIAND file 675/30-1, vol. 1 (ICC Documents, p. 720).

211 Piapot Band, Petition to Indian Affairs Branch, Department of Citizenship and Immigration, August 14, 1960, DIAND file 675/8-4, vol. 1 (ICC Documents, p. 732).

212 M.G. Jutras, Superintendent, File Hills-Qu'Appelle Indian Agency, Indian Affairs Branch, Department of Citizenship and Immigration, to Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, November 7, 1960, DIAND file 675/8-4, vol. 1 (ICC Documents, pp. 738-39).

In 1967, more flooding occurred and further complaints arose regarding the Echo Lake dam. H.A. Matthews, who replaced Jutras as Superintendent of the File Hills-Qu'Appelle Indian Agency, noted that the dam had been erected in response to drought conditions in the 1930s. He continued:

> Because of the drop in the lake level [in the 1930s], it was possible to harvest hay and pasture cattle on land which was normally covered with water. The P.F.R.A. conducted a survey and determined that the mean level of Echo and Pasqua Lakes was 1,571.5 feet above sea level. In 1942 a damn [sic] was constructed near Fort Qu'Appelle which has resulted in the lakes being maintained at this level.
>
> As a result of the lake being returned to its original level, some land, approximately 160 acres on the Pasqua Reserve which had been used for cutting hay and pasturing cattle, was covered with water. According to the P.F.R.A. engineers, the lake has been maintained at the level it was in the years prior to the drought period and at the level it was when the reserves were established.
>
> Flooding also occurs on the Muscowpetung and Piapot Reserves where water overflows the shallow river banks during the spring runoff and is trapped on the hay lands. P.F.R.A. officials have made an exhaustive study of this problem and have drawn up a comprehensive plan of dikes and channel improvements which is at present being studied by the Saskatchewan Provincial Government.[213]

By the late 1960s, the Province of Saskatchewan had begun to assume more responsibility for operating the control structures on the Qu'Appelle River. Although the earlier practice of lowering water levels in the fall to permit the Indians to "efficiently harvest their hay" had already been discontinued by the PFRA,[214] steps were taken to warn bands of anticipated flooding so they could remove machinery, grain, livestock, baled hay, and other property that might be damaged by high waters.[215]

In December 1969, J.J. LeVert, Indian Affairs' Regional Director for Saskatchewan, proposed the creation of a committee to "review ways and means

213 H.A. Matthews, Superintendent, File Hills-Qu'Appelle Agency, Indian Affairs Branch, Department of Citizenship and Immigration, to H.T. Vergette, Head, Land Surveys and Titles Section, Indian Affairs Branch, Department of Citizenship and Immigration, July 27, 1967 (ICC Documents, p. 746).

214 R.B. Godwin, Chief, Hydrology Division, PFRA, Department of Regional Economic Expansion, to G.T. Forsyth, Planning and Investigations Engineer, PFRA, Department of Regional Economic Expansion, April 30, 1975, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 972).

215 See, for example, S.R. Blackwell, Assistant Director, Investigation and Planning Branch, Saskatchewan Water Resources Commission, to Resource Development Division, Indian Affairs Branch, Department of Indian Affairs and Northern Development, September 25, 1968, DIAND file 675/8-4, vol. 1 (ICC Documents, p. 750); N.J. Bowering, Acting Superintendent of Economic Development, Touchwood File Hills Qu'Appelle District, Department of Indian Affairs and Northern Development, to Chief Rose Desjarlais, Piapot Band, September 27, 1971, DIAND file 675/8-4, vol. 2 (ICC Documents, p. 837); N.J. Bowering, Junior Development Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to Stanley Pasqua, Chief, Pasqua Band, Patrick Fourhorns, Chief, Piapot Band, David Benjoe, Chief, Muscowpetung Band, and Alex Buffalo, Chief, Standing Buffalo Band, April 4, 1974, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 933A).

of alleviating the [flooding] problem [on the Qu'Appelle River] as much as possible." LeVert suggested that the committee should include a member of the Piapot Band, the Superintendent of the File Hills-Qu'Appelle Indian Agency, the Department's Regional Senior Resource Development Officer, the Saskatchewan Water Resources Commission's Chief Engineer, and the PFRA's Regional Engineer.[216] Several meetings of this Flood Control Committee were in fact held, and at one such meeting Piapot Chief Rose Desjarlais raised the question of compensating bands for flooding. Federal and provincial committee members expressed no knowledge of compensation programs, but undertook to explore the possibility within their respective governments.[217] Assistant Deputy Minister J.B. Bergevin eventually responded that periodic flooding in the Qu'Appelle Valley was a problem of long standing, attributable primarily to natural causes, and that "no compensation has been paid to any land holder in the Valley because of flooding." He added that Saskatchewan's Department of Agriculture was undertaking steps to devise a system of water control measures to alleviate the conditions that had caused losses suffered in the past by the valley's inhabitants.[218]

Meanwhile, as the process of transferring control of Qu'Appelle River operations from the federal government to the province continued, the question of title to the dam sites at Crooked and Round Lakes – and how title could be conveyed – resurfaced. C.J. Peterson, Head of Indian Affairs' Land Section, reported with regard to the Round Lake Dam:

> [I]t appears the Department of Indian Affairs was compensated for the Indian lands affected. However, the administration and control of this land was not transferred to PFRA and it might be desirable to request it.[219]

However, in a note to file, the PFRA's Assistant Regional Engineer, J.G.S. McMorine, commented that transferring title from Indian Affairs might be premature:

216 J.J. LeVert, Regional Director, Saskatchewan, Department of Indian Affairs and Northern Development, to Chief Rose Desjarlais, Piapot Band, December 15, 1969, DIAND file 675/8-4, vol. 1 (ICC Documents, pp. 769-70).

217 Minutes, Flood Control Committee Meeting, February 11, 1970, PFRA file 928/7Q2, vol. 9 (ICC Documents, p. 773).

218 J.B. Bergevin, Assistant Deputy Minister (Indian and Eskimo Affairs), Department of Indian Affairs and Northern Development, to Chief Rose Desjarlais, Piapot Indian Band, August 19, 1970, DIAND file 675/8-4, vol. 2 (ICC Documents, p. 815).

219 C.J. Peterson, Head, Land Section, PFRA, Department of Regional Economic Expansion, to J.G.S. McMorine, Assistant Regional Engineer, PFRA, Department of Regional Economic Expansion, May 15, 1970, PFRA file 928/7R1, vol. 4 (ICC Documents, p. 792).

> Since I believe it is intended that ownership and control of all the Qu'Appelle Valley dams will be relinquished to the Saskatchewan Water Resources Commission in the fairly near future, it would seem pointless for P.F.R.A. finally (after 28 years) to arrange for the title to this land to be put in the name of this Department.
>
> It would seem reasonable that title should be obtained by the new owner at the time the transfer of the property is made. . . .
>
> (Since the Indian Affairs Branch has got along O.K. with the situation for 28 years, they shouldn't mind waiting another year or two.)[220]

Chief Engineer J.G. Watson conveyed this position to Indian Affairs on June 8, 1970.[221]

## EFFECTS OF THE QU'APPELLE RIVER DAMS

Before continuing with the chronology leading up to the 1977 settlements between the PFRA and the Muscowpetung, Pasqua, and Standing Buffalo Bands, we will briefly document part of the impact of the dams at Echo, Crooked, and Round Lakes as described by members of the Bands and some of the experts who were retained to study the impact of those control structures.

In his oral submissions, counsel for the First Nations referred to the following excerpt from the testimony of Alex Wolfe of the Sakimay First Nation about conditions prior to the erection of the dams:

> And the people throughout this reserve here, and across the lake, they made their living by hauling wood, selling hay, and at this time of the year, selling the different kinds of berries that we find here, like the Saskatoons, the choke-cherries, the cranberries, and this sort of thing. The people here at that time did not receive cash for what they produced, it was in trade, like eggs, butter, cream, potatoes, maybe a quarter for the old man so he could buy tobacco, and that was the same there as it is -- as it was here. That's how our old people made a living in those years.[222]

Similarly, in a statutory declaration, George Ponicappo of Sakimay stated:

> Before the dams were built people made hay in the valley. Trees grew right up to the river. The people used to make pickets from the trees along the valley. They then

220 Note to file, J.G.S. McMorine, Assistant Regional Engineer, PFRA, Department of Regional Economic Expansion, May 25, 1970, PFRA file 928/7R1, vol. 4 (ICC Documents, p. 799).

221 J.G. Watson, Chief Engineer, Western Region, Department of Regional Economic Expansion, to C.A. Artibise, Acting District Supervisor, Yorkton District, Department of Indian Affairs and Northern Development, June 8, 1970, DIAND file 673/30-4-71, vol. 1 (ICC Documents, pp. 802-03).

222 ICC Transcript, September 18, 1996, pp. 55-56 (Alex Wolfe).

could sell these pickets to make a living. We used to be able to hunt rabbits and fish. We used to trap muskrats. There were maple trees in the valley. People used to make maple syrup. There used to be a camping place where the bridge used to be.[223]

David Obey of the Pasqua First Nation observed:

> And along the valley, all the people, there was quite a few of the band members used to live along the valley, right from one end to the other, from the west to the east, and there was a lot of livestock at the time, as far as I could remember. There was a lot of cattle and horses here. It seemed like everybody on the reserve owned these animals, not just one person. They shared quite a bit with the things that they were doing. If there was any hard times they made deals on their own with the people from across the lakes. It wasn't only wood or anything like that, it was everything, it's too numerous for me to mention, but I could just mention a few things. Like there's wood, there's pickets, and there's hay, sometimes they'd trade for grain. Like it's just more or less of a survival deal they were going through.[224]

When asked whether people lived in the valley only at certain times of the year, he answered:

> They lived there year round. Most of them lived there year round. The ones that were farming had to come up top of the hills. See there was, like there was maybe just temporary buildings set up for themselves. Just like more or less of a shelter, just to survive, for the spring, right through the summer. But all the people lived along the valleys there because it was a better place for them. There was not only the trees and the grass, what I'm talking about, there was a lot of environment in there that the people used along that valley. See there was a lot of herbs in those days that they picked off the earth in order for the people to be healthy.[225]

Lawrence Stevenson of Pasqua stated:

> Now why I say this, or the way I express it is this, that in the winter months most of our Native people lived in the valley for water, for fish, for all kinds of ways to make their living. Now the hay meadows that we had in both this reserve and the Muscowpetung, there was quite an agreement with them, that they went on share basis either through work or through compensation of monies.[226]

223 Statutory Declaration of George Ponicappo of Sakimay Indian Reserve No. 74, April 10, 1997, p. 1 (ICC Exhibit 35A).
224 ICC Transcript, October 2, 1996, p. 18 (David Obey).
225 ICC Transcript, October 2, 1996, pp. 24-25 (David Obey).
226 ICC Transcript, October 2, 1996, p. 71 (Lawrence Stevenson).

Earl Cappo of the Muscowpetung First Nation offered the following remarks regarding the impact of the Echo Lake dam on water quality and haying:

> But I went to school for seven years and I come out, and everything was so different, lots of water, no hay, no trees, nothing. Then I quit school when I was 15-and-a-half-year old, didn't go back to Lebret. And there I noticed all these things getting dry and no hay, nothing. So then I noticed that dam coming through there, I was wondering what is going on, there's no natural flow of water there, they were building a dam across there, cutting off all the corners and putting them straight through, and I don't know what is going on. And I asked my dad, I said, "What's going on dad?" Well, he said, "They're making a swimming pool for you boys to swim in," he says. Because we used to be in the river, and that water was clean and we were able to swim in there and do everything. In them days the river was nice and clear, but today it's all – I don't know what's in there, muck, I guess. So I remember we used to sell hay, even haul it into Regina with the horses, sell hay for exhibition and everything, our groceries. All of a sudden that went, nothing, no sales, nothing. So we really did live off the land on the reserve and everything was pretty good in them days. Now today everything is all dried out. We used to cut pickets along the river, everything, really. But now there's nothing at all there, can't do nothing with the water. So I don't really know. I miss those days though, it was nice.[227]

In short, the economies of the Qu'Appelle Valley First Nations before 1940 featured considerable reliance on activities and resources in the valley bottom, including native hay, timber, beaver, muskrat, deer, berries, maple sugar, and important cultural and medicinal herbs and vegetation such as sweetgrass and senega root. The water in the river system itself was also fundamental to the Bands' existence, not only for domestic purposes but also for fishing, stockwatering, and the natural irrigation it provided by means of seasonal flooding of low-lying lands. Lower water levels also permitted Band members to cross the river to access hay and other resources on both sides. Hay and water were particularly important to those individuals who raised cattle on the reserves, but several of the reserves "developed a strong attachment to economic, social and cultural activities based on the river habitat."[228] The valley provided more than mere economic sustenance: it represented a way of life.

The testimony of the elders speaks eloquently to the consequences of flooding and other factors on this way of life. Marie Kaye of the Sakimay First

227 ICC Transcript, October 3, 1996, pp. 42-43 (Earl Cappo).
228 James C. MacPherson Consultants Ltd., "The Qu'Appelle Subsidiary Agreement: Bands' Perspectives," March 1984, p. 4-34 (ICC Exhibit 4).

Nation described the importance of the Qu'Appelle Valley to her as a child and the changes brought about by the flooding:

> There came a time when I remember my grandmother, we went to the river with my grandfather, and they wanted to catch fish. My grandmother, we brought these fish back, she cleaned them and she cut them in strips and she dried them. These fish went in a bag and they got hung out in the shed. The berries along the river were choke-cherries, Saskatoons, high-bush cranberries, and there was a little red berry that grew on grey trees, those were called buffalo berries, and there was black currants and there was gooseberries, also there were hazelnuts. These are things that we gathered along the river, not to mention the maple sugar trees which my grandmother and grandfather hauled sap from. They made maple sugar and they made maple syrup. All of these things are gone. After the flood water killed, drowned, you name it, whatever they gave the fancy name what happened to these trees. It hit us hard because out of our food, what we'd stored for the winter, a lot of the berries and the rest of the stuff were gone, we had to then travel to the top of the hill to go and pick these berries, which my grandmother always said didn't taste as good as the ones by the river.[229]

Henry Delorme spoke of the loss to the Cowessess First Nation, of which he is a member:

> Land is sacred to us Indian people. We get our medicine, maple syrup. Trapping was a way of life all along the rivers. The dam flooding caused the trees and plants to die, and the wild life to deteriorate. Under the treaty we received gathering places, which meant fishing lakes, haying, et cetera. . . . Land was flooded while I was in residential school. The whole land in the valley was a big lake. This was because of the dam on the east end of Round Lake. Similarly, the dam on the east of Crooked Lake caused flooding on Sakimay and Shesheep. I used to go there with my grandmother and visit our relations who were camped along the lake and river fishing and trapping. We had to move to higher ground due to rise of the water.[230]

Raymond Acoose of Sakimay testified:

> First of all, I guess before the dam was built our people used to cross the river, the west end of the lake. At that time the water was, say, two to four feet deep because you were able to cross that river with the wagons and team. And our people used to make hay down there. They made tons of hay. . . . [O]ur people used to live in that area. George Ponicapo's [sic] grandfather lived in that area year round. He had built a house there, I suppose maybe George told you some of his story about his grandfa-

229 ICC Transcript, September 18, 1996, p. 66 (Marie Kaye).
230 ICC Transcript, September 18, 1996, p. 50 (Henry Delorme).

ther. He had like cattle, he pastured them just across the river there, and our people used to live off that land down there. They sold hay, they sold pickets, and our old people even then used to have their ceremonies down there, like spiritual gatherings at times, you know. There was a lot of things that happened after the floods. After that dam was built there was less communicating with our own people across that river. We didn't get to see one another as often as we did before. Also, that some of the animals that they used to trap down there had disappeared. Like mink, beaver and muskrats, and also that some of the trees down there that what was there was drowned out. Some of the people from the south side used to come on the north side to chop wood, pickets. After the floods they couldn't do that, and some of our elders whenever they wanted to visit our people on the south side here, you know, it was just a short distance from them to cross the river, and they were on the south side, but after that they could no longer do that because they had to go quite a few miles around.[231]

Pasqua's Raymond Gordon commented on how flooding had forced people to leave the valley:

I can't remember a way back in the '20s and the teens, but I can remember back in the '30s when that land was used. There wasn't hardly anybody living up here on this reservation [on the bench], everybody was found living in the valley. And a lot of these people here know that. The people lived in the valley because they fished down there and like Stanley was talking about, they fished, the fish was good; today you can't eat that fish. And in the hills there was rabbits there was deers. They made a good living down in that place. And I believe Lawrence Stevenson can verify that, there was nobody living, hardly anybody, up here, they were all in the valley.

And since they flooded that land and since they did this, you don't see anybody down there now because you can't eat that fish. The ducks or whatever, the natural habitat, you don't find it around there any more.[232]

Susan Yuzicappi of Standing Buffalo described the loss of haylands and trap lines:

The only thing I remember is like camping at this marsh across Muskowpetung [sic]land [likely IR 80B]. But at that time nobody ever told me that it belonged to Muskowpetung [sic] or if it was Standing Buffalo. Nobody said anything, we just went and cut hay from 1935 to '39 we cut hay there. But we didn't go back after the flooding and all that, you know. But I know there was a lot of trapping lines on the valley before that, before the floods, because I know my husband used to come down and trap muskrats and that, like. But after the flood there was nothing. Mostly just

231 ICC Transcript, September 18, 1996, pp. 74-76 (Raymond Acoose).
232 ICC Transcript, October 2, 1996, pp. 57-58 (Raymond Gordon).

snakes, you walk by the river there, and the lake and that, there was lots of snakes after the flooding.[233]

Finally, George Ponicappo recounted the impact of the changes in the valley to his people:

> The flooding hurt all of the Sakimay Band. Our lands in the valley were flooded. The people used to have camps all over the valley in the summer. Today you cannot camp there. You cannot go there in a car in summer. There used to be a lot of ducks in the valley. The area that we used to hunt ducks is now flooded. The flooding affected the ability of the people on the reserve to make a living. The flooding hurt the farming, hunting and trapping. It destroyed cabins along the lake shore. The maple trees died and the maple syrup industry was destroyed. We had sweet grass and berries in the valley, today all that is gone. I went to the valley and I could not find one stick of sweet grass. The berries and the black currants are all gone. People used to sell them. We used roots to make medicine. Now the roots are all under water. . . .
>
> The flooding damaged the trees. The trees that are left are all dry and dead. In summer it is not green like it used to be.
>
> The valley was a gathering place. It was important to the social life on the reserve. People would gather together in the valley. The old people would sit and tell stories. They would pass on the stories. The old people would visit. There were camps where people would help each other make hay for the winter. People used to work together. There was a lot of cooperation. We would have celebrations in the valley. I remember that as a kid we had lots of fun along the river. We used to have races. There used to be sweats along the river. Now you cannot go to the area that these activities [took] place because it is flooded.
>
> The water itself is not as good as it used to be. We used to be able to drink the water. We used to swim in the water. Now you cannot drink the water. You cannot even swim in it because of the pollution. We used to be able to ice fish. Now we cannot fish. You used to be able to see the bottom. Not anymore.[234]

These comments by Band members are echoed in the studies undertaken by experts retained on behalf of the First Nations to study the damages caused by the PFRA dams in the Qu'Appelle Valley. Unfortunately, most of this evidence is some 15 years old because, for financial and other reasons, the flooding claim of the QVIDA First Nations has languished since the mid-1980s. However, certain aspects of these opinions appear to remain valid in light of current circumstances, and counsel for Canada did not challenge them.

233 ICC Transcript, April 4, 1997, pp. 16-17 (Susan Yuzicappi).

234 Statutory Declaration of George Ponicappo of Sakimay Indian Reserve No. 74, April 10, 1997, pp. 1-2 (ICC Exhibit 35A).

D. Cameron and J.W. Hamm assessed the degree of soil degradation caused by the flooding, which they measured using soil salinity as the indicator:

> The degree of soil degradation due to flooding is directly related to the total salt content of the soil. In other words, we have used salinity as our indicator or "yardstick" to measure soil degradation due to flooding. The extent of soil degradation due to flooding is correlated with the extent, frequency, and duration of flooding. Over a period of time, land use tends to be a direct indicator of flooding characteristics. . . . Soil salinity tends to be most severe in the flood-prone lands. . . .
>
> According to our measured areas [for the four western Indian reserves in the Qu'Appelle Valley] there are a total of 847 acres (11% of the valley land area [of 7,765 acres]) that are permanently flooded due to raised lake levels. There are another 788 acres (10%) that are semi-permanently flooded and basically unusuable [sic] for agricultural production. Approximately 2,686 acres (34%) of the valley land is moderately to severely degraded due to frequent flooding. This land is generally used for pasture and hayland, although some of it appears to be abandoned because of the high salinity. . . .
>
> Approximately 293 acres (4%) of land that was flooded by the 1969 floods did not appear to have any evidence of degradation. In years of higher flood waters, this estimate would increase. A large portion (40%) of the land did not appear to be flooded and would generally not be affected by infrequent, short duration flooding. . . .
>
> The total valley land area occupied by the [four eastern] Reserves amounted to 6,506 acres of which 578 acres (9%) were classified as either permanently or semi-permanently flooded. According to our "yardstick" of soil degradation (which is the salinity index) there were only 451 acres (7%) of severely degraded soils which occur in Sakimay and Shesheep. Approximately, 1,560 acres of flooded land (24%) were moderately degraded while 911 acres (14%) were flooded, but showed local evidence of salinity degradation. A total of 3,006 acres (46%) were not flooded according to the 1969 flood lines.
>
> The western and eastern Reserves show some distinct differences in terms of flood degradation with the western Reserves showing more intense and more acres of degraded land. In the western Reserves 21% of the land base has been lost due to permanent or semi-permanent flooding while only 9% has been permanently lost in the eastern Reserves. Similarly, 24% of the land base was severely degraded in the western Reserves while only 7% was severely degraded in the eastern Reserves. It was estimated that 24% of the land base in the eastern Reserves was moderately degraded while 10% was moderately degraded in the western Reserves. In the Western Reserves about 45% of the land area did not appear to be affected by floods, while in the eastern Reserves about 60% of the land area was generally not affected by floods.[235]

235 D. Cameron, Normac Consultants, and J.W. Hamm, darWall Consultants, "A Study on the Degree of Soil Degradation Due to Flooding in the Eight (8) Indian Reservations in the Qu'Appelle Valley," November 1981, pp. 73-77 (ICC Exhibit 3, tab 5).

In summary, Cameron and Hamm viewed the affected areas of the valley as being more than just those permanently or semi-permanently flooded. However, it is important to recognize that factors other than the three dams at issue in these proceedings must also have been at work to cause these effects, as is apparent from the statistical data relating to salinity on the Piapot reserve. The evidence before this Commission is that flooding on the Piapot reserve, while perhaps due to other dams and conveyancing works along the Qu'Appelle River, cannot be caused by any of the dams on Echo, Crooked, or Round Lakes, since the full supply levels of these structures are at elevations below the lowest river banks on the Piapot reserve.

David R. M. Hatch was commissioned by QVIDA to study the impact on flora and fauna in the Qu'Appelle Valley caused by flooding on the reserves resulting from the construction of dams in the river. He reported that, before the dams were built, "virtually all of the land adjacent to the Qu'Appelle River in the valley was fringed by trees and shrubs." After an examination of these sites, he found that these areas had trees in the 1940s "*but no longer do.*" He added:

> These trees had been able to withstand periodic flooding over countless decades of years [sic] *prior to the construction* of the dams, however once the dams were constructed floods became much more frequent and some more prolonged. This meant that the trees stood in water for long periods of time and consequently suffocated due to lack of sufficient oxygen reaching their roots. Some denuded tree trunks still stand, however the vast majority of these have been washed away by repeated flooding.[236]

In Hatch's opinion, no species of trees or plants had been eradicated due to flooding, but some species – notably Manitoba maple, American elm, and ash trees, and Saskatoon berry, chokecherry, and pincherry shrubs – had been dramatically reduced in number and largely replaced by grasses. He also found that nutrient-rich grasses "have been replaced by saline plants which are of minimal value as a food for cattle," resulting in a reduction of cattle production as a source of income.[237] The loss of trees as shelter and berries as food resulted in the decline of the white-tailed deer and coyotes, both sources of food supply for the Bands. Muskrat and beaver left owing to

236 David R.M. Hatch, David R.M. Hatch & Associates, "A Study on the Impact to the Flora and Fauna of the Flooding in the Eight (8) Indian Reservations in the Qu'Appelle Valley," March 1982, pp. 1-2 (ICC Exhibit 3, tab 6).

237 David R.M. Hatch, David R.M. Hatch & Associates, "A Study on the Impact to the Flora and Fauna of the Flooding in the Eight (8) Indian Reservations in the Qu'Appelle Valley," March 1982, pp. 2 and 6 (ICC Exhibit 3, tab 6).

the decline in small shrubs and the unstable river bank, which made it difficult to maintain dens. The dams have also widened and deepened the river, leading to prolonged flooding and the inability of the Indians to ford the river as they had previously done.[238] Hatch concluded that returning the floor of the Qu'Appelle Valley to its formerly productive state "would require a great ... expenditure of money and a tremendous length of time," although he doubted whether it could be economically justified.[239]

At least one consultant retained by QVIDA recognized that factors beyond the dams at Echo, Crooked, and Round Lakes contributed to the problems currently faced by the First Nations, although it must be emphasized that the foregoing effects of the dams on the reserves were not ignored or downplayed. James C. MacPherson commented that declines in the agricultural economies were compounded by successive wet seasons in the 1960s and 1970s, and by increased flows in the Qu'Appelle River resulting from upstream water management and higher volumes of water.[240] He added that the trend away from a "smaller, more labour intensive pattern of farming" common on the reserves, and towards an "increasingly mechanized, larger capital intensive farm unit," further reinforced the "shift from a viable transitional economy in the valley to a very marginal economic base on the bench" above the valley.[241] It seems self-evident to the Commission that, with developments in technology that have effectively put an end to large-scale use of horse-drawn wagons for transport and wood as a heating fuel, the primary urban markets for the reserve economies in the first half of this century have largely disappeared. Clayton Cyr of the Pasqua First Nation appeared to recognize a certain inevitability in this trend:

> You know, like even this afternoon, I've been sitting here listening to losing a way of life. We would have lost that through time anyway, you know. . . . I know I raised cattle and horses and the amount of land that we lost down there, I'd be hard pressed to put up enough hay to feed them for the winter, because I need 250 round bales, 1,500-pound round bales to put my animals through the winter. You know, when you live in a realistic world you have to look at these things. But you also have to look at

238 David R.M. Hatch, David R.M. Hatch & Associates, "A Study on the Impact to the Flora and Fauna of the Flooding in the Eight (8) Indian Reservations in the Qu'Appelle Valley," March 1982, pp. 3-4 (ICC Exhibit 3, tab 6).

239 David R.M. Hatch, David R.M. Hatch & Associates, "A Study on the Impact to the Flora and Fauna of the Flooding in the Eight (8) Indian Reservations in the Qu'Appelle Valley," March 1982, pp. 8-9 (ICC Exhibit 3, tab 6).

240 James C. MacPherson Consultants Ltd., "The Qu'Appelle Subsidiary Agreement: Bands' Perspectives," March 1984, pp. 4-11 (ICC Exhibit 4).

241 James C. MacPherson Consultants Ltd., "The Qu'Appelle Subsidiary Agreement: Bands' Perspectives," March 1984, pp. 4-17 (ICC Exhibit 4).

> what you lost over time, you know. Like we did not, we did not lose a way of life, like I said, we would have lost it anyway.[242]

Hand in hand with these developments was the "dissatisfaction with Reserve conditions, particularly housing and lack of employment," expressed by members of the QVIDA First Nations. Some migrated away from the reserves, while others increasingly came to depend on social assistance commencing in the 1950s.[243]

## THE BAND COUNCIL RESOLUTIONS OF 1977

### Discovery of the Failure to Compensate Muscowpetung and Pasqua

In the early 1970s, claims activity by Indian bands increased as developments in technology and changes in government policy simplified the process of developing claims. The Commission has already commented on this phenomenon in its report on with the treaty land entitlement claim of the Kawacatoose First Nation:

> [B]efore records were readily available on microfilm and computers in the 1970s, it was difficult for a band to research a treaty land entitlement case. Most of the records were available only in Ottawa, and, with funding difficult to obtain, the expense of research made the cost of developing a claim prohibitive.
>
> These barriers to claim development started to come down in the early 1970s, particularly following Canada's confirmation in the 1973 *Statement on Claims of Indian and Inuit People* that it "recognized two broad classes of native claims –'comprehensive claims': those claims which are based on the notion of aboriginal title; and 'specific claims': those claims which are based on lawful obligations." The commitment of funds by government and, in some cases, by non-government organizations and band councils further enhanced claim activity.[244]

It was perhaps inevitable in this climate of increased awareness and funding that an inquiry would eventually be made into the failure to compensate the Muscowpetung and Pasqua Bands for those portions of their reserve lands flooded by the Echo Lake dam. In fact, Indian Affairs already had some inkling of the problem. In 1968, in response to a request from Surveyor General R. Thistlethwaite of the federal Department of Energy, Mines and

242 ICC Transcript, October 2, 1996, pp. 119-20 (Clayton Cyr).
243 James C. MacPherson Consultants Ltd., "The Qu'Appelle Subsidiary Agreement: Bands' Perspectives," March 1984, pp. 4-18, 4-23 (ICC Exhibit 4).
244 Indian Claims Commission, *Kawacatoose First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), (1996) 5 ICCP 73 at 125-26.

Resources for information about flooding on the Muscowpetung reserve, H.T. Vergette, Head of Indian Affairs' Land Surveys and Titles Section, had replied:

> In 1941 the Federal Department of Agriculture proposed the establishment of a system of irrigation and storage reservoirs in the Qu'Appelle River valley which would have resulted in the flooding of some land on the Muscowpetung and Pasqua Reserves. However, we have found nothing in our records to indicate that any reserve land was taken for this purpose or of any compensation having been paid to the Band in this connection.[245]

It appears that nothing further came of this inquiry.

Four years later, however, Lumsden MLA Gary Lane was approached by Muscowpetung Chief Dave Benjoe to inquire into a number of issues on the Band's behalf, including the question of whether the Band and the neighbouring Pasqua Band had ever been paid for the flooding rights obtained by the federal government in the early 1940s. Lane's inquiry on September 6, 1972,[246] to Jean Chrétien, the Minister of Indian Affairs and Northern Development, prompted a fruitless investigation by J.G. Watson, who by then had been made Director of the PFRA:

> The file indicates that the matter was discussed with the Director of Indian Affairs, Department of Mines and Resources, and at that time that Department estimated the value of the damages to be $4,800 on the Muscowpetung Reserve and $3,250 on the Pasqua Reserve. Our files however do not show that compensation was ever made [sic] and we do not appear to have title to or an easement over this property. However with the considerably better hydrologic information now available to us we believe that the effect of the construction of this dam on the water levels and flooding would be considerably less than was estimated at the time of the construction.[247]

On receipt of this information, Vergette advised the Indian Affairs Departmental Secretariat that, since areas of the Muscowpetung reserve had been flooded by the Echo Lake dam, "this Department will be approaching PFRA

245 H.T. Vergette, Head, Land Surveys and Titles Section, Department of Indian Affairs and Northern Development, to R. Thistlethwaite, Surveyor General, Legal Surveys and Aeronautical Charts Division, Department of Energy, Mines and Resources, August 21, 1968, DIAND file 675/30-2-80, vol. 1 (ICC Documents, p. 747).

246 Gary Lane, MLA, Lumsden Constituency, Province of Saskatchewan, to Jean Chrétien, Minister, Department of Indian Affairs and Northern Development, September 6, 1972, DIAND file 675/8-4, vol. [2] (ICC Documents, pp. 840-41).

247 J.G. Watson, Director, PFRA, Department of Regional Economic Expansion, to R.A. Letilley, Western Region, Department of Regional Economic Expansion, September 27, 1942, PFRA file 928/7E4, vol. 4 (ICC Documents, p. 843).

with a view to obtaining compensation for the Muscowpetung Band."[248] Lane was similarly informed.[249]

On February 23, 1973, P.B. Lesaux, Director of the Indian-Eskimo Economic Development Branch of Indian Affairs, finally brought the matter up with Watson:

> In 1943 P.F.R.A. completed construction of the Echo Lake water storage dam, the contract for the construction being authorized by P.C. 7900 dated September 3, 1942. The dam affected the water level of the lake bordering Muscowpetung Indian Reserve No. 80 and the Pasqua Indian Reserve No. 79. The Muscowpetung Band has recently made inquiries as to the amount of compensation paid by P.F.R.A. for the loss of Indian reserve lands; however, *a review of our records has indicated no authority or agreement for such flooding by P.F.R.A.*, nor is there any evidence that compensation was paid to this Department for the benefit of the Indian Bands concerned.
>
> In a letter dated November 1, 1972 (your file reference 928/7E4) Mr. R.A. Letilley, Western Region, DREE, indicated that the Department of Regional Economic Expansion, as well, had not been able to locate any record of such an agreement being made or compensation paid. Accordingly, it appears that the Band has a legitimate claim for monetary compensation, or for lands in exchange for those that were flooded.
>
> In view of the above I would appreciate your arranging for officers of your department to meet with representatives of the Muscowpetung and Pasqua Bands to reach a mutual settlement of this claim.[250]

On March 1, 1973, incoming PFRA Director W.B. Thomson responded that, since it was 30 years since the Echo Lake dam had been built, it would take the PFRA some time to search its files and assess the effect of the works. In particular, he noted that, because the Pasqua Lake project on which Fetterly based his estimate of damages had been abandoned in favour of the dam on Echo Lake with its lower full supply level, "the flooded acres referred to [in Fetterly's report] . . . must be considerably greater than what has actually occurred." Thomson nevertheless committed the PFRA to undertake

248 H.T. Vergette, Chief, Lands Division, Department of Indian and Northern Affairs, to Departmental Secretariat, Department of Indian and Northern Affairs, November 14, 1972, DIAND file 675/8-4, vol. [2] (ICC Documents, p. 849).

249 Russell C. Moses, Special Assistant, Departmental Secretariat, Department of Indian and Northern Affairs, to Gary Lane, MLA, Government of Saskatchewan, November 22, 1972, DIAND file 675/8-4, vol. [2] (ICC Documents, p. 850).

250 P.B. Lesaux, Director, Indian-Eskimo Economic Development Branch, Department of Indian and Northern Affairs, to J.G. Watson, Director, PFRA, Department of Regional Economic Expansion, February 23, 1973, DIAND file F-4320-9, vol. 1 (ICC Documents, p. 852). Emphasis added.

studies to determine the effect of the structure on Indian lands and to contact Indian Affairs with the results.[251]

Within the month, R.B. Godwin, Chief of the PFRA's Hydrology Division, reported three findings to Planning and Investigations Engineer W.M. Berry:

1. The average level of Pasqua Lake is from 1 to 1.5 feet higher than it was prior to construction of the Echo Lake control structure.
2. The new control structure has almost no effect on flood flows in high-flow years.
3. The greatest difference in lake levels occur in the fall of each year [i.e., haying time] when the new Echo Lake control structure is closed to control the levels of both Echo and Pasqua Lake.[252]

Berry relayed this information to Thomson, adding that the structure had been operated to maintain a water level of 1571.5, or six inches higher than originally planned. He also noted that the structure increased the duration of flooding at lower water levels.[253] In a separate memorandum, Regional Engineer G.T. Forsyth estimated "a vertical range of 2.2 feet within which haying has been adversely affected" by the erection of the dam, which translated into flooded areas of 60 acres on the Pasqua reserve and 560 acres on the Muscowpetung reserve. However, he added:

> The effects of the operation of the Echo Lake Structure on these Reserves cannot have been entirely harmful. Certain beneficial effects must have been experienced including:
>
> a) Increased productivity from lands subject to some limited flooding, which, without the structure, would have received none.
>
> b) Increased fish production as a result of greatly improved spawning conditions associated with sustained higher lake levels. . . .
>
> c) Improved nesting conditions for and productivity of water fowl, also related to more stable water levels.

251 W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, to P.B. Lesaux, Director, Indian-Eskimo Economic Development Branch, Department of Indian and Northern Affairs, March 1, 1973, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 854).

252 R.B. Godwin, Chief, Hydrology Division, PFRA, Department of Regional Economic Expansion, to W.M. Berry, Planning and Investigations Engineer, PFRA, Department of Regional Economic Expansion, March 23, 1973, PFRA file 928/7Q2, vol. 10 (ICC Documents, p. 861).

253 W.M. Berry, Planning and Investigations Engineer, PFRA, Department of Regional Economic Expansion, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, March 27, 1973, PFRA file 928/7E4, vol. 4 (ICC Documents, pp. 867-68).

d) Enhancement of the value of Indian lands adjacent to the lake-shore due to relatively more constant water levels.[254]

With this data in hand, the PFRA was ready to commence negotiations. In asking Berry on April 10, 1973, to calculate a confidential settlement figure for bargaining purposes, Thomson suggested a cash settlement "representing the present value of future and past annual losses to the Bands," using the discounted value of native hay as the basis for evaluating "the net annual income lost per year."[255]

Before these calculations were prepared, Thomson held a preliminary meeting the same day with F. Clark, Indian Affairs' Regional Director for Saskatchewan, to outline the basis for negotiations. In a note to file following the meeting, he commented:

> As a first step in settling this claim, it was agreed that PFRA would determine the area of land detrimentally affected by the operation of the structure. This would involve the determination of the amount of land that has been removed from hay production or grazing on the two reserves as a result of the operation of the Echo Lake structure. The Indian Affairs people feel that the Indians would want to confirm these figures, possibly through the services of an outside consultant; consequently our calculations will have to be clearly prepared and illustrated.
>
> It was stressed that the Indians would in all probability not wish to give up title to the land, and that settlement should be for flooding rights or flood easements. The amount of the settlement would have to be retroactive to the time the structure was built.[256]

The following day, Berry provided Thomson with preliminary calculations based on Fetterly's original estimated damages of $8050, reduced by $2400 to $5650 to reflect the lowering of the full supply level by three feet when the proposed Pasqua Lake dam was replaced by the structure on Echo Lake. Berry then applied interest at various rates over the 30-year interval since the dam's construction, arriving at compensation ranging from $13,712 at 3 per

254 G.T. Forsyth, Regional Engineer, PFRA, Department of Regional Economic Expansion, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, April 9, 1973, PFRA file 928/7E4, vol. 4 (ICC Documents, pp. 873-74).

255 W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, to W.M. Berry, Planning and Investigations Engineer, PFRA, Department of Regional Economic Expansion, April 10, 1973, PFRA file 928/7E4, vol. 4 (ICC Documents, pp. 867-68).

256 Memorandum to file, W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, April 10, 1973, PFRA file 928/7E4, vol. 4 (ICC Documents, p. 876).

cent to $24,419 at 5 per cent.[257] Thomson forwarded these figures to Acting Assistant Deputy Minister M.J. Fitzgerald, commenting:

> It is very doubtful if the Indians at the present time would settle for anything near this figure. It is quite probable they would demand a figure several times this amount.[258]

A week later Thomson had another reason to doubt that the Indians would be prepared to accept Berry's preliminary figures. On April 19, 1973, Berry reported again, this time employing the parameters set forth in Thomson's memorandum of April 10, 1973:

> The method of evaluation sums the past and future losses of hay production to the Bands. Our study has assumed:
>
> | | |
> |---|---|
> | Period of past losses | 1943-1972 (years) |
> | Elev. range of new flooding | 1570.0-1572.0 (geodetic) |
> | Acreage lost within flooding range: | |
> | - in Muscowpetung Reserve | 500 acres |
> | - in Pasqua Reserve | 50 acres |
> | Value of tame hay from Annual Reports of Sask. Dept. Of Agriculture | |
> | Value of native hay is 60% of tame. | |
> | Costs of production from DBS statistics | |
> | Future net return/acre/year | $3.50 |
> | Av. interest rate applicable to compounding past losses to present | 4 & 5% |
> | Interest rate applicable to discounting future losses to present | 6 & 8% |
>
> Based on the foregoing assumptions, the following results were obtained.[259]

257 W.M. Berry, Planning and Investigations Engineer, PFRA, Department of Regional Economic Expansion, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, April 11, 1973, PFRA file 928/7E4, vol. 4 (ICC Documents, p. 878).

258 W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, to M.J. Fitzgerald, Acting Assistant Deputy Minister (Western Region), Department of Regional Economic Expansion, April 11, 1973, PFRA file 928/7E4, vol. 4 (ICC Documents, p. 880).

259 W.M. Berry, Planning and Investigations Engineer, PFRA, Department of Regional Economic Expansion, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, April 19, 1973 (ICC Exhibit 3, tab 4, pp. 19-20).

| | LOSS PER ACRE | |
|---|---|---|
| | Interest on past losses | |
| | 4% | 5% |
| Present value of past production (per acre) | $141.55 | $169.65 |
| Estimated value of 1973 production (per acre) | $3.50 | $3.50 |
| Present value of future production | | |
| – at 6% discount rate | $58.33 | $58.33 |
| – at 8% discount rate | $43.75 | $43.75 |
| **Total of Losses** | | |
| **– at 6% discount rate** | **$203.38** | **$231.48** |
| **– at 8% discount rate** | **$188.80** | **$216.90** |

| | TOTAL LOSSES | | | |
|---|---|---|---|---|
| | 500 acres on Muscowpetung Reserve | | 50 acres on Pasqua Reserve | |
| | Interest on past lossses | | Interest on past losses | |
| | 4% | 5% | 4% | 5% |
| Present value of past production | $70,775 | $84,825 | $7,078 | $8,483 |
| Value of 1973 production | $1,750 | $1,750 | $175 | $175 |
| Present value of future production | | | | |
| – at 6% discount rate | $29,165 | $29,165 | $2,816 | $2,916 |
| – at 8% discount rate | $21,875 | $21,875 | $2,187 | $2,187 |
| **Total of Losses** | | | | |
| **– at 6% discount rate** | **$101,690** | **$115,740** | **$10,169** | **$11,574** |
| **– at 8% discount rate** | **$ 94,400** | **$108,450** | **$ 9,440** | **$10,845** |

Clearly, based on these calculations, Thomson could see that damage calculations for the Pasqua and Muscowpetung Bands alone might reach close to $130,000.

Fitzgerald reported the matter to the Deputy Attorney General to obtain approval to negotiate a settlement with the Bands.[260] Authority to proceed was given on July 11, 1973,[261] and, on August 31, 1973, Thomson wrote to Indian Affairs' Acting Regional Director for Saskatchewan, W.D.G. McCaw, to request that he arrange a meeting to discuss the claim.[262]

Two weeks later, on September 13, 1973, Thomson met with representatives of Indian Affairs, the Piapot and Muscowpetung Bands, and the Province of Saskatchewan, but the discussions quickly reached an impasse:

> The Chief of the Muscowpetung Reserve quoted $10,000 per year for 24 years (since 1959) or $240,000 as settlement for damages caused by the Echo Lake structure. Mr. Thompson [sic] then stated PFRA were prepared to settle for $20-25,000 based on the amount ($5,600) which should have been paid to the Band in 1941-42 with compounded interest to date. Because of the wide variation of the two amounts very little discussion followed.
>
> Before departing, Mr. Thomson told me he had asked the Chief of the Muscowpetung Reserve to submit a written claim substantiating the amount acceptable to him.[263]

Muscowpetung Chief Benjoe also noted that no water control works had ever been built on the reserve as complete or partial consideration for the flooding damages, and that the dam had not benefited the Band, "either from the point of view of water level stability or improved fish and waterfowl habitat." Muscowpetung Councillor William Pratt asked whether the lakes could be lowered to their original levels, but S.R. Blackwell of Saskatchewan's Department of the Environment responded that it would not be feasible. The Band

260 W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, to F.A. Clark, Regional Director, Saskatchewan, Department of Indian and Northern Affairs, April 30, 1973, PFRA file 928/7E4, vol. 4 (ICC Documents, p. 882).

261 M.J. Fitzgerald, Acting Assistant Deputy Minister (Western Region), Department of Regional Economic Expansion, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, July 11, 1973, PFRA file 928/7E4, vol. 4 (ICC Documents, p. 888).

262 W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, to W.D.G. McCaw, Acting Regional Director, Saskatchewan, Department of Indian and Northern Affairs, August 31, 1973, DIAND file 675/8-4, vol. 2 (ICC Documents, p. 889).

263 J. Stoyko, Agriculture Specialist, Department of Indian and Northern Affairs, to W.D.G. McCaw, Regional Superintendent of Economic Development, Saskatchewan Region, Department of Indian and Northern Affairs, September 14, 1973, DIAND file 675/8-4, vol. 2 (ICC Documents, pp. 892-93). Stoyko later wrote that the Bands based their claim on the loss of 500 acres of hay land which would have annually produced 500 tons of hay, or one ton per acre, worth $20 per ton (or $10,000 per year) for 24 years: "Information for File," J. Stoyko, Regional Agriculture Specialist, Saskatchewan Region, Department of Indian and Northern Affairs, October 16, 1973, DIAND file F4320-9, vol. 1 (ICC Documents, p. 908).

representatives also raised the need for a bridge across the river to permit haying operations on IR 80B.[264]

**The PFRA Investigates the Damages**

In the wake of this meeting, Thomson instructed his staff to investigate five aspects of the Indians' claims:

1. Reassess the "top elevation" affected by flooding.
2. Reassess the "bottom elevation" to be used in defining the flood zone.
3. Review old files to determine the basis of settlement used for deeded land in 1942, and perhaps use the same for Indian lands.
4. Review Mr. Berry's calculation of net return foregone, using figures of 4% and 8% for past interest and future discount.
5. Evaluate the severance factor.[265]

McMorine, now a Special Projects Engineer, visited the Muscowpetung reserve with Dr Jan Looman of the the federal Department of Agriculture Research Station to "assess the type, yield, and probable value of native hay growing in the area immediately adjacent to the present water edge" to determine whether flooded hay lands had been replaced by new hay lands at a higher elevation. Looman found that the average annual yield from the hay lands would have been two tons per acre.[266] McMorine reported finding " 'slough hay' occurring just above the margin of the present lake, and presumably of that which would have been growing in the elevation zone 1570-1572 if the Echo Lake Dam had not been built."[267]

Later, McMorine also reviewed historical water level figures "to determine the years in which it would have been impossible to harvest hay in the flats at the west end of Pasqua (Qu'Appelle) Lake during the period 1943-1972, *if the Echo Lake Dam had not been built*." Assuming August 1 of each season "as the date later than which flooding of hay land could not be tolerated and still allow a harvest," McMorine found that in 15 of the 30 years from 1943 to 1972, hay would not have been harvested owing to wet conditions. The

264 G.T. Forsyth, Regional Engineer, PFRA, Department of Regional Economic Expansion, "Notes of Meeting at Fort Qu'Appelle Offices of Canada DIAND," September 13, 1973, PFRA file 928/7E4, vol. 4 (ICC Documents, p. 891).

265 Memorandum to file, J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, October 11, 1973, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 903-04).

266 J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, to W.M. Berry, Planning and Investigations Engineer, PFRA, Department of Regional Economic Expansion, October 9, 1973, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 899).

267 Memorandum to file, J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, September 27, 1973, PFRA file 928/7E4, vol. [4] (ICC Documents, p. 895).

number rose to 18 years with no harvest if June 1 was substituted as the critical cut-off date, resulting in a reduction of Looman's "effective" annual yield from two tons to roughly one ton per acre.[268]

In a comprehensive report dated October 11, 1973, McMorine verified the existence of a ford across the Qu'Appelle River that had likely been used to access Muscowpetung's hay flats north of the river before 1943:

> The existence of this old ford . . . should have considerable bearing on the obligation to construct, or the desirability of constructing, a bridge to provide access to hay flats north of the river, which are presently severed by the river from the main part of the Reserve.[269]

Although McMorine suggested checking with residents of the reserve to determine whether the ford had been used to access the northern hay flats and whether this use had been ended by construction of the dam, he believed that construction of a bridge might assist in reaching a settlement of the flooding issue in any event.[270]

McMorine found further evidence to suggest that, first, the elevation of Echo Lake in years of "ordinary or average runoff" before 1942 was the reservoir's authorized full supply level of 1571; second, the full supply level was quietly raised to 1571.5 in 1948 (being "a more desireable [sic] level from the point of view of the general public");[271] and, third, to permit haying operations at the west end of Pasqua Lake, it had been necessary to drop the level to 1570.8. He recommended that settlement be made up to elevation 1574 since settlements with private land owners had been made on that basis, and since a higher figure than 1572 should be used "in view of capil-

268 J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, to W.M. Berry, Planning and Investigations Engineer, PFRA, Department of Regional Economic Expansion, October 9, 1973, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 899). In later work, McMorine revised these figures using 1570 rather than 1570.5 as the elevation below which haying operations would not have been possible, absent the dam. He concluded that, at elevation 1570, if June 1 was the critical date "later than which flooding of hay land could not be tolerated," there would be 19 out of 30 years with no hay harvested, as opposed to 18 years at elevation 1570.5. The figures dropped to 18 of 30 years if either July 1 or August 1 was used as the critical date at elevation 1570, rather than 17 years for July 1 or 15 years for August 1 at elevation 1570.5: J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, to G.T. Forsyth, Regional Engineer, PFRA, Department of Regional Economic Expansion, October 9, 1973, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 899).

269 Memorandum to file, J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, October 11, 1973, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 900).

270 Memorandum to file, J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, October 11, 1973, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 906-07).

271 J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, to G.T. Forsyth, Regional Engineer, PFRA, Department of Regional Economic Expansion, October 30, 1973, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 923).

lary action and freeboard," which appeared to cause increased salinity and to adversely affect vegetation even above the full supply level. He also recommended that the affected areas be surveyed, rather than relying on old small-scale mapping, since he anticipated that the Bands would retain independent consultants to verify the PFRA's figures.[272]

In the course of his investigations, McMorine reviewed the land acquisitions relating to the dams at Round and Crooked Lakes. He discovered that one private owner, G.R. Walberg, had been paid $2500 for a flooding easement, but other owners had provided flood agreements at no cost to the PFRA. With regard to calculating the area of affected reserve lands, he found:

> Acreage involved was taken from *topographic* plans made by PFRA in 1942 (not from legal surveys) and covered land *up to FSL* [full supply level] *only* (1451.0), in contrast to the situation in regard to landowners adjacent to the Echo Lake Reservoir, where easements were obtained and paid for to an elevation *3 feet above FSL*.[273]

Thomson toured the Muscowpetung and Pasqua reserves on October 12, 1973, and advised Band representatives that the PFRA would survey that fall to quantify the land flooded. J. Stoyko, Indian Affairs' Regional Agricultural Specialist, recommended that his Department refrain from becoming "too involved" at that time since "[t]here are a number of ways of determining compensation for flood damage to lands over a period of years and PFRA, I am confident, are competent to prepare initial proposal for presentation to the Bands involved."[274]

### The Negotiations Resume

On October 31, 1973, Thomson forwarded a revised offer to Indian Affairs. Whereas the PFRA's initial offer had discounted Fetterly's estimated damages of $8,050 to reflect lower levels of flooding caused by the Echo Lake dam, the new offer eliminated this discount on the basis that the PFRA had agreed in 1941 to Fetterly's approach:

272 Memorandum to file, J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, October 11, 1973, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 900-07).

273 Memorandum to file, J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, October 29, 1973, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 916-17). This difference of three feet is likely attributable to the decision in 1942 to build only the Echo Lake dam and to forgo the structure at Pasqua Lake.

274 "Information for File," J. Stoyko, Regional Agriculture Specialist, Saskatchewan Region, Department of Indian and Northern Affairs, October 16, 1973, DIAND file F4320-9, vol. 1 (ICC Documents, p. 908).

The point I wish to make is that in 1941 agreement was reached between our Departments in regard to the procedures to be followed and the amount of the settlement to the affected Indian Bands. On this basis, PFRA commenced construction in 1942 and completed the structure in 1943. The only omission appears to be the transfer of funds from our Department to the Indian Affairs Branch, although records do indicate that settlements were made at the same time for flooding easements on privately owned lands.

We consider this matter can now best be resolved by our Department requisitioning a cheque which would include allowance for interest, compounded since 1943, using a rate of 4½% which is somewhat above the average which prevailed throughout the period. The amount of the payment would be $17,978 for the Muscowpetung Band and $12,172 for the Pasqua Band [for a total of $30,150.00]. I am prepared to recommend to officials of our Department that this payment now be processed as full and final settlement of this matter.

While it is appreciated that it is possible that this payment will not fully satisfy the Indian Bands today, we nevertheless consider it represents a fair settlement based on the conditions at the time the structure was built and, furthermore, it is based on the amount agreed upon in 1941 between our Departments. It is most unlikely that we would have proceeded with the construction of the Echo Lake structure had the settlement been substantially different or had officials of your Department not agreed to its construction. It should also be understood that the structure has been operated to stabilize the levels of Pasqua and Echo Lakes since the time of its construction at levels corresponding to the natural level in years of average runoff (prior to 1942). It is hard to accept that this regulation has not been very beneficial in itself to the Indian Bands.[275]

Stoyko anticipated that the "PFRA will undoubtedly be asking us [Indian Affairs] to attend any meetings they arrange as they are anxious to find a way of inducing the Indians to lower their claim substantially."[276]

The PFRA's proposal was forwarded to Chiefs David Benjoe and Stanley Pasqua of the Muscowpetung and Pasqua Bands on December 17, 1973, with a request that Band Council Resolutions be prepared either accepting or rejecting the offer.[277] Three months later, Senior Development Officer N.J. Bowering of Indian Affairs replied to headquarters on behalf of the Bands:

275 W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, to J.W. Evans, Acting Director, Indian-Eskimo Economic Development Branch, Department of Indian and Northern Affairs, November 5, 1973, DIAND file 675/8-4, vol. 2 (ICC Documents, pp. 925-26).

276 J. Stoyko, Agricultural Specialist, Department of Indian and Northern Affairs, to W.D.G. McCaw, Regional Superintendent of Economic Development, Saskatchewan Region, Department of Indian and Northern Affairs, November 27, 1973, DIAND file F4320-9, vol. 1 (ICC Documents, p. 929).

277 N.J. Bowering, Senior Development Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to Chief David Benjoe, Muscowpetung Band, and Chief Stanley Pasqua, Pasqua Band, December 17, 1973, DIAND file F4320-9, vol. 1 (ICC Documents, p. 931).

> Letters were sent to the respective Chiefs on December 17, 1973 and copies were sent to Mr. Stoyko at Regional office. Today the Council of Muscowpetung met here (I should say the Chief and 2 Councillors) and they approached me regarding the noted subject. It appears that the Council will not accept the $17,978.00 as final settlement and we, no doubt, will receive a Band Council Resolution to this effect soon, I hope. It was necessary to have the B.C.R. agreed to and signed by Councillors who were absent today, therefore the Resolution will be forthcoming. Those present would accept the $17,978.00 as "initial" settlement only.
>
> We have not had any response to our same letter sent to Pasqua Band and we can expect the same decision from them as was made by Muscowpetung.[278]

When no further response had been received from either Band by July 12, 1974, Bowering sought instructions as to whether he should pursue the matter or wait for the Bands to act. He added that "[t]he heavy flooding this past spring has not improved feelings whatsoever and the high water is expected to remain all summer."[279] H.R. Phillips, Indian Affairs' Acting Chief of Land Administration, replied:

> [I]t is regrettable that the two Band Councils still appear reluctant to make a decision on this matter.
>
> As you will appreciate, however, it is in the interest of the Bands to reach a settlement with P.F.R.A. and I therefore suggest that you contact the Band Councils again in this regard.[280]

Although an approach was made, it did not result in a response,[281] but the Muscowpetung Band Council soon expressed concern about "the flooding of Hay Grounds and the loss of hay for the farmers who depend on the valley floor for feed." The Council asked Bowering to determine what Band members might "expect by way of compensation or funds with which to purchase

278 N.J. Bowering, Senior Development Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to H.T. Vergette, Chief, Lands Division, Department of Indian and Northern Affairs, March 27, 1974, DIAND file 675/8-4, vol. [illegible] (ICC Documents, p. 932).

279 N.J. Bowering, Senior Development Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to Acting Chief, Land Administration, Department of Indian and Northern Affairs, July 12, 1974, DIAND file 675/8-4, vol. 2 (ICC Documents, p. 941).

280 H.R. Phillips, Acting Chief, Land Administration, Department of Indian and Northern Affairs, to N.J. Bowering, Senior Development Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, July 23, 1974, DIAND file 675/8-4, vol. 2 (ICC Documents, p. 942).

281 W.A.S. Barnes, District Supervisor, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to H.R. Phillips, Acting Chief, Land Administration, Department of Indian and Northern Affairs, August 1, 1974, DIAND file 675/8-4, vol. [illegible] (ICC Documents, p. 945).

feed for their livestock," assuming a loss of 70,000 bales at $1.00 per 50-pound bale.[282]

When Bowering put the question to M.A. Irvine, Indian Affairs' Regional Agrologist and Land Use Specialist, Saskatchewan Region, Irvine answered:

> It is difficult to deal with five or six farmers or even one reserve as an isolated case, for all individuals and all reserves are entitled to the same equitable treatment.
>
> Indian farmers throughout the Province suffer annual losses for a variety of reasons, unfortunately available funds are insufficient to cope with subsequent requests.
>
> The question of compensation for flooded hay meadows along the Qu'Appelle Basin, as a special case, is presently under study; hopefully a satisfactory solution is forthcoming.[283]

Irvine had considerable sympathy for the plight of the Muscowpetung and Pasqua Bands, however, and in a paper entitled "A Viewpoint on the Qu'Appelle Valley Indian Band Damage Claims" he noted that Standing Buffalo also deserved consideration:

> Prior to the construction of PFRA dams along the Qu'Appelle River there were suggestions of acquiring the consent of affected Bands or expropriating Indian lands. A search of the records has failed to divulge that either course of action was taken. Indian Bands suffering damage from high floodwaters are requesting compensation and it appears difficult to dispute the legitimacy of their claims.
>
> One body of opinion suggests that had a final settlement been reached at that time present negotiations would not have been required. This is not necessarily true. The Bands were advised prior to construction of the dam that flood damage would be minimal and suggestions were made that much of the flooding would benefit affected haylands. The extensive flooding presently encountered was not foreseen at that time. . . .
>
> In light of subsequent events and circumstances these Bands feel the original estimate [by Fetterly], as well as the interest rate used [by the PFRA in its offer], is unrealistically low. In addition, Piapot and Standing Buffalo Indian Bands are involved in the dispute. . . .
>
> The question of determining accumulative damages involves annual estimates of hay crops, varying prices and other factors. A final settlement for past damages is desirable. It is extremely doubtful that a total final settlement can be negotiated due to

282 N.J. Bowering, Senior Development Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to A. Gross, Acting Regional Superintendent of Economic Development, Saskatchewan Region, Department of Indian and Northern Affairs, August 28, 1974, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 946).

283 M.A. Irvine, Regional Agrologist and Land Use Specialist, Department of Indian and Northern Affairs, to N.J. Bowering, Senior Development Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, September 11, 1974, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 947).

the uncertainties involved in predicting future damages. Land exchange appears be the only lasting solution. This would require the full concurrence of the Bands involved and the acquisition of suitable land for exchange.

The possibility of exchanging land depends on:

1. The quantity, quality and location of land offered in exchange.
2. The nature and extent of recoverable damage losses.
3. Whether or not the Bands would exchange land under any circumstances.

The possibility of land exchange should be discussed, however, most Bands are not likely to settle for any reasonable exchange, leaving annual damage negotiations as the only obvious alternative.

PFRA argue that most Reserve flood damage is from natural causes and suggest Piapot hay meadows have not been damaged as a result of the Fort Qu'Appelle dam. If these arguments are valid, they should be accompanied by an engineer's report which fully and adequately describes the situation for the benefit of the Indian Bands.[284]

On November 29, 1974, W.A.S. Barnes, Indian Affairs' District Supervisor for the Touchwood File Hills Qu'Appelle District, reported that no further progress had been made with regard to compensation for flooding damages to the Muscowpetung and Pasqua reserves. He had been advised, however, that the Bands' claims would be handled by the Federation of Saskatchewan Indians (FSI).[285] In light of this information, G.A. Poupore, Manager of Indian Lands, drew the matter to the attention of the Indian Affairs' Office of Claims Negotiation in January 1975.[286]

Gary Lane, the Saskatchewan MLA who had originally inquired about the failure to compensate the Muscowpetung and Pasqua Bands and had made several follow-up inquiries, continued to intervene on the Bands' behalf. He contacted Saskatchewan's Minister of Co-operation and Co-operative Development, Don Cody, to ask why Indian farmers had not been permitted to benefit from provincial flood compensation programs in the same manner as private farmers. Cody responded:

When the flood assistance program was being established last spring, we worked in conjunction with Federal officials to ensure that the policies were not inconsistent

284 M.A. Irvine, "A Viewpoint on the Qu'Appelle Valley Indian Band Damage Claims," September 12, 1974, DIAND file F4320-9, vol. 1 (ICC Documents, pp. 949-52).

285 W.A.S. Barnes, District Supervisor, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to H.R. Phillips, Acting Chief, Land Administration, Department of Indian and Northern Affairs, November 29, 1974, DIAND file 675/8-4, vol. [illegible] (ICC Documents, p. 956).

286 G.A. Poupore, Manager, Indian Lands, Department of Indian and Northern Affairs, to Director, Office of Claims Negotiation, January 9, 1975, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 958).

with federal guidelines and that there would not be duplication of assistance programs.

Because the Indian Reserve lands are administered by the Federal Government, we were advised that the cost of flood assistance on these lands would be borne directly by the Federal Department of Indian Affairs and Northern Development.

It appears therefore that any future correspondence relating to possible claims for flood damage on Indian lands should be directed to the appropriate federal authorities.[287]

Lane made similar inquiries of Indian Affairs, and Saskatchewan Regional Director O.N. Zakreski replied that, although the Department did not pay compensation for flood damage to hay lands or other property on Indian reserves, it did pay for "emergency measures such as sandbagging, movement of stored grain, testing and treatment of water, sanitation, disinfecting, etc., as well as any emergency dyking or evacuation." However, Zakreski disputed Cody's claim that the province of Saskatchewan was not responsible for compensating Indian bands:

{I}t is our contention that as citizens of the Province of Saskatchewan Indian people are entitled to the benefit of Provincial programs, whether or not they reside on Indian reserves. Flood assistance as a result of damage done by dams, construction or other interference caused by other Departments or Agencies, should not be considered the responsibility of our Department.[288]

On a trip to Saskatchewan on February 28, 1975, the Minister of Indian Affairs undertook to look into the issue.[289]

### The Bands Retain Counsel

Although Indian Affairs had been advised that further negotiations on behalf of the western Qu'Appelle Valley Bands would be conducted by the Federation of Saskatchewan Indians, lawyer Roy Wellman of Regina informed PFRA Director Thomson on July 28, 1975, that he had been retained by the Piapot, Pasqua, Muscowpetung, and Standing Buffalo Bands with regard to the damages caused by the Echo Lake dam. Wellman noted that the Bands had not

287 Don Cody, Minister, Department of Co-operation and Co-operative Development, Government of Saskatchewan, to Gary Lane, MLA, Government of Saskatchewan, January 15, 1975, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 959).

288 O.N. Zakreski, Regional Director, Saskatchewan, Department of Indian and Northern Affairs, to Gary Lane, MLA, Government of Saskatchewan, January 28, 1975, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 960).

289 Les Healy, Special Assistant to the Minister, Department of Indian and Northern Affairs, to Arthur Kroeger, Deputy Minister, Department of Indian and Northern Affairs, March 11, 1975, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 962).

consented to the project, flooding had been more extensive than foreseen at the time of construction, and damages were not minimal as initially suggested. On behalf of the Bands, he submitted the following claim:

(1) The representatives would like their hay lands to be put back in the same state as they were prior to construction of PFRA dams;
(2) The reserves to be compensated for every year since construction of the dams;
(3) Marshes drained and seeded to grass;
(4) Reserves to be fully compensated until such time as hay could be cut;
(5) The water to be channeled so as to by-pass marshes and diking.[290]

Wellman proposed that a meeting be convened to determine whether any common ground existed to form the basis for discussions.

In reply, Thomson noted that the Echo Lake structure and its effect on the reserve lands of the Pasqua and Muscowpetung Bands had been under review by the PFRA and Indian Affairs for approximately two years, and that he was awaiting "advice" from Indian Affairs. In the meantime, he forwarded Wellman's letter to the PFRA's lawyers.[291]

Wellman, however, demanded a meeting for preliminary discussions not later than September 30, 1975, failing which he was instructed to examine other legal options open to the Bands.[292] Thomson responded with a request for information:

> We have had representation from the Indians with respect to the Echo Lake control structure and its effect on the Pasqua and Muscowpetung Reserves. We are not, however, familiar with claims on the Piapot or Standing Buffalo Reserves. We would have to have some form of statement of claim or background information relating to these two Reserves before a meaningful meeting can be held.
>
> If this can be supplied to us, I am sure we could arrange for a meeting during the month of October at your convenience.[293]

Thomson's letter was met with silence. However, on March 24, 1976, Wellman and the Chiefs and other members of the Muscowpetung and Pasqua Bands assembled in the lawyer's office to discuss the claim. Wellman advised

290 W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, July 28, 1975, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 978-79).
291 W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, to W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, August 1, 1975, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 980).
292 W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, August 13, 1975, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 981).
293 W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, to W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, August 18, 1975, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 983).

his clients that the PFRA had acknowledged that the two reserves had sustained marsh damage from the erection of the Echo Lake dam, and Indian Affairs had encouraged the Bands to submit damage claims. However, the preparation of a claim had been hampered by the lack of survey evidence to quantify the area flooded.

The discussion then turned to the damages sustained by the Bands, including loss of marshlands, a reduction in game and waterfowl, the need to reduce cattle herds, and increased reliance on welfare as increasing numbers of Band members were forced to subsist on fewer resources. Moreover, the Bands claimed that they had never benefited from the irrigation opportunities for which the dam had been constructed in the first place. However, Band members indicated that they would be prepared to accept replacement lands in exchange for those flooded. Finally, the minutes of the meeting indicate that, when asked by a member of the Muscowpetung Band whether flooded areas would be sold or leased, Wellman stated that "[i]t was just a damage claim . . . not giving it up, it would still belong to Muscowpetung."[294]

Finally, Wellman initiated contact again with Thomson on April 20, 1976, when he wrote to ask for information about the number of cattle and the number of welfare recipients on the Piapot, Muscowpetung, Pasqua, and Standing Buffalo reserves in 1943 and 1975.[295] No further claims or demands were made by Wellman at that time. However, the interests of the Bands were being pursued on another front by R. Van Slyck, Indian Affairs' District Superintendent of Economic Development for the area:

> [Philip Desjarlais of the Piapot Band] mentioned the monies that the Federal and Provincial governments intend to spend in the Qu'Appelle, and felt some of this should be perhaps used to recover losses due to flooding. Since his visit here, I have found that those dollars were intended for the future development and improvement of the valley, as opposed to payment of losses due to flooding.
>
> As I see it at present, flood conditions will continue, and we perhaps should be thankful for water but at the same time can there not be something arranged, whereby other lands could be made available for hay, etc., (2,400 acres - Piapot) to replace those lands which has [sic] been lost to flooding.[296]

294 Minutes of meeting, "Damages Marshland Settlement," March 24, 1976, PFRA file 928/7E4-2, vol. 1 (ICC Documents, pp. 1006-07).

295 W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, April 20, 1976, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1011).

296 R. Van Slyck, District Superintendent of Economic Development, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to A.J. Gross, Acting Assistant Regional Director, Economic Development, Saskatchewan Region, Department of Indian and Northern Affairs, June 7, 1976, DIAND file 675/8-4, vol. 3 (ICC Documents, pp. 1017-18).

Van Slyck also suggested that the creation of a holding reservoir or lake on the Piapot or Muscowpetung reserves for recreational purposes might create considerable employment opportunities. A.J. Gross, Acting Assistant Regional Director of Economic Development, Saskatchewan Region, replied that Indian Affairs was prepared to entertain a proposal from the Bands, although he understood they had retained counsel and were preparing a submission to the PFRA.[297]

On July 14, 1976, representatives of Indian Affairs and the PFRA met in Regina to discuss the status of the claim:

> This situation so far as P.F.R.A. is concerned has not changed since their offer of settlement which was made some four years ago, to which they have received no response from the Bands. The Band Councils, by the way, who were involved were in fact invited to reply one way or the other, which they never did. It was assumed from this meeting, and agreed, that the next move would have to be by those persons involved namely, Pasqua and Muscowpetung Councils.
>
> Our feeling was unanimous in that we had to clear up one point, were the Bands waiting for us, or for the P.F.R.A., or were they employing the services of a legal firm. Mr. Markuson [Indian Affairs' Regional Supervisor of Lands, Saskatchewan Region] made an appointment with Mr. R. Wellman, who appeared to represent the two Bands in their effort to obtain a large claim as compensation for flood damages caused by the aforementioned structure.
>
> In discussion with Mr. Wellman, we were advised that he was in fact acting for the two Bands in respect to the one claim, that claim which resulted from the damage caused by the Echo Lake control structure. He is not acting for these Bands on any of the other land claims. The Federation of Saskatchewan Indians is not involved in the aforementioned claims either, but they are, as you know, involved with "Land Claims" as we know them.
>
> Mr. Wellman will be providing his first "draft" of his submission by July 23, this will not be as good a draft as he would like, but will get something started. He also assured us that there would be no further activities [for example, channelization] consented to upstream from Fort Qu'Appelle, until this one issue is settled.[298]

While anticipating receipt of the Bands' claim, Indian Affairs also felt pressure to secure a quick resolution of the matter. Other projects in the

297 A.J. Gross, Acting Assistant Regional Director, Economic Development, Saskatchewan Region, Department of Indian and Northern Affairs, to N.J. Bowering, District Lands and Resources Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, June 18, 1976, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1019).

298 N.J. Bowering, District Lands and Resources Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to A.J. Gross, Acting Assistant Regional Director, Economic Development, Saskatchewan Region, Department of Indian and Northern Affairs, July 15, 1976, DIAND file F4320-9, vol. 1 (ICC Documents, pp. 1024-25).

Qu'Appelle Valley were being hampered as the Indians became increasingly unwilling to participate or cooperate while the flooding claims remained outstanding. As J.D. Leask, the Acting Director General for the Saskatchewan Region, commented:

> [T]he Bands affected have engaged legal council [sic] who will be presenting a claim shortly. We understand it will be for a large sum and based on social and economic deprivation that resulted from the loss of land flooded. . . .
>
> While no comments were made, it may be anticipated that our trust responsibility in not settling this matter or ever discussing it with the Bands (we see no evidence that it ever was discussed although obviously they were aware at the time), will be raised. We also anticipate that the interests already expressed by both Members of Parliament and the Saskatchewan Legislative Assembly will be utilized to support an early settlement especially in view of the need to control the floodwaters of the basin.[299]

As promised, Wellman delivered the claim on July 23, 1976. The Bands' demands were virtually identical to those set forth in Wellman's letter of July 28, 1975, but the claim for compensation had been quantified:

> In determining the appropriate principle or formula on which damages could be assessed it was the consensus of the Band Councils that they would accept the sum of $100.00 per acre for each acre that was actually flooded as a result of the erection of the dams.
>
> It would appear that by virtue of the records on file it is possible to determine with a fair degree of accuracy the exact acreage that were [sic] flooded. The information that I have, (this would be subject to confirmation by your Department), is that some 600 acres were flooded on the Muscowpetung Reserve and some 406 acres were flooded on the Pasqua Reserve and a lesser acreage on the Standing Buffalo Reserve and Piapot Reserve, particulars of which we do not have at this time.
>
> Accordingly, I have been authorized to advise your Department that my clients will accept settlement on the basis they will receive $100.00 an acre per acre flooded as a result of the erection of the dams. This amount would include the damages suffered by the Reserves insofar as reduction of the respective herds, resulting in radical changes in life style on the Reserves. Consequently, it meant that there was less food available, resulting in more people becoming welfare recipients than otherwise might have. Therefore, our position is that this will be inclusive compensation for any and all damages suffered for [sic] the Reserves with respect to this matter.[300]

299 J.D. Leask, Acting Director General, Saskatchewan Region, Department of Indian Affairs and Northern Development, to J.W. Ritchie, Acting Head, Lands Advisory Services, Department of Indian Affairs and Northern Development, July 16, 1976, DIAND file F4320-9, vol. 1 (ICC Documents, pp. 1026-27).

300 W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, July 23, 1976, PFRA file 928/7E4-2, vol. 1 (ICC Documents, pp. 1029-30).

At $100 per acre, this proposal would have provided compensation somewhat in excess of $100,000. In a follow-up letter, Wellman added that the Bands' claim was supported by the Treaty Rights and Research Section of the Federation of Saskatchewan Indians.[301]

With this proposal in hand, the PFRA took further steps to quantify the claim. Planning Engineer E. Caligiuri calculated the acreages detrimentally affected by the construction of the Echo Lake dam, based on the following parameters:

> Elevation 1570 is the bottom elevation below which, under normal conditions without the structure, lands could not support production of hay or grazing. Elevation 1574 is the top elevation above which the structure has no detrimental effect on lands under production. This elevation includes an allowance of 1.6 feet for any capillary action which might occur.[302]

He concluded that the affected areas on the Muscowpetung, Pasqua, and Standing Buffalo reserves were 670 acres, 45 acres, and 50 acres, respectively. However, he found that the Piapot reserve was unaffected by the structure because the lowest elevation of the river banks on that reserve was six feet above elevation 1574.[303]

Wellman, Thomson, Peter Dubois of the Muscowpetung Band, and L.G. Ganne of the Department of Justice met in Regina on August 17, 1976. Wellman confirmed that his clients included Muscowpetung, Pasqua, and Standing Buffalo, but that Piapot had elected to proceed independently. Dubois agreed that Wellman was authorized to represent all three Bands, and affirmed that the negotiations could result in a final settlement. On the substantive issues, the parties appeared to agree that the Bands had never consented to the construction of the dam, but they differed on whether Indian Affairs had granted permission to proceed. Thomson noted that Indian Affairs had been fully informed of the project, and had negotiated and agreed on a damage settlement on behalf of the Bands.

With regard to quantifying the claim, Wellman confirmed that $100 per acre flooded constituted "an all-inclusive settlement for past and future dam-

301 W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, July 28, 1976, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1031).

302 E. Caligiuri, Planning Engineer, Engineering Service, PFRA, Department of Regional Economic Expansion, to W.M. Berry, Chief Engineer, PFRA, Department of Regional Economic Expansion, August 4, 1976, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1035).

303 E. Caligiuri, Planning Engineer, Engineering Service, PFRA, Department of Regional Economic Expansion, to W.M. Berry, Chief Engineer, PFRA, Department of Regional Economic Expansion, August 4, 1976, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 1035-36).

ages." According to the minutes of the meeting, Thomson may have suggested that this figure was "an acceptable sum for settlement." However, the parties were unable to agree on the acreages of the areas flooded. Thomson referred to Caligiuri's figures of 670 acres and 45 acres for the Muscowpetung and Pasqua reserves, but indicated that he had no acreage for the Standing Buffalo reserve. Dubois countered that the affected area on the Pasqua reserve was more like 400 acres, and he suggested 40 to 50 acres for Standing Buffalo. To resolve this issue, the parties agreed to a joint engineering determination of the areas affected.[304]

After this meeting, the three Bands passed Band Council Resolutions requesting Indian Affairs "to have a survey done soon, to indicate what areas were in fact flooded as a result of the instalation [sic] and operation of the control structure at the lower end of Echo Lake in 1941 or 1942."[305] In forwarding the survey request to Regional Surveyor S.J. Zeldenrust, Markuson noted that the acreages had been estimated in an earlier engineering study, but "the bands are concerned that more acreage was flooded than originally anticipated."[306] Zeldenrust prepared a sketch showing the extent and acreage of lands flooded in the Muscowpetung reserve, but he commented that "it is difficult to determine the extent of the flooding as it fluctuates from year to year and one does not know, which year would be acceptable to both parties." He added that he would have similar plans prepared for the other two reserves if the one prepared for Muscowpetung was acceptable.[307]

Before the survey work could be completed, however, Wellman wrote to Ganne on November 19, 1976:

304 L.G. Ganne, Legal Advisor, Department of Justice, "Summary of Discussion Had at Meeting Held in the Office of W.B. Thomson, Director, PFRA, at 2:00 p.m., Tuesday, August 17, 1976," August 18, 1976, PFRA file 928/7E4, vol. 2 (ICC Documents, pp. 1039-41).

305 M.R. St. Pierre, Acting District Superintendent of Economic Development, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to A.H. Markuson, Regional Supervisor of Lands, Saskatchewan Region, Department of Indian and Northern Affairs, September 29, 1976, DIAND file E4320-06569 (ICC Documents, p. 1044); Pasqua Band, Band Council Resolutions 209 and 210, August 18 and 31, 1976, DIAND file E4320-06569 (ICC Documents, pp. 1042-43); Muscowpetung Band, Band Council Resolution 218, October 7, 1976, DIAND file E4320-06566 (ICC Documents, p. 1049). The Standing Buffalo BCR is not in evidence before the Commission but is referred to in M.R. St. Pierre, Acting District Superintendent of Economic Development, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to A.H. Markuson, Regional Supervisor of Lands, Saskatchewan Region, Department of Indian and Northern Affairs, October 7, 1976, DIAND file E4320-06569 (ICC Documents, p. 1048).

306 A.H. Markuson, Regional Supervisor of Lands, Saskatchewan Region, Department of Indian and Northern Affairs, to S.J. Zeldenrust, Regional Surveyor, Department of Energy, Mines and Resources, October 12, 1976, DIAND file E4320-06569 (ICC Documents, p. 1050).

307 S.J. Zeldenrust, Regional Surveyor, Department of Energy, Mines and Resources, to N.J. Bowering, District Lands and Resources Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, October 15, 1976, DIAND file E4320-06566 (ICC Documents, p. 1051).

> This is to further advise that the Chiefs in Council of the respective Reserves have indicated that they would be prepared to accept a lump sum settlement of $265,000.00 on the condition of course, that the appropriate releases would be signed with respect to past damages, present damages and anticipated future damages with respect to the structure.
>
> The reason why the Reserves have reached this decision was the fact that the general feeling is that the other alternatives will be one that will mean there will be considerable lapse of time before a settlement can be reached and also, there will be considerable expense.
>
> We would accordingly request that you review this matter with your appropriate superiors and in due course indicate to us whether or not a settlement can be proceeded with on that basis.[308]

Ganne quickly replied that the PFRA was not opposed to the idea of a lump-sum settlement, but it could not consider the figure proposed by Wellman without "substantiation and detailed information as to the basis on which this figure was arrived at." After outlining the process that had been agreed upon during the meeting of August 17, 1976 – $100 per acre as an all-inclusive settlement for past, present, and future damages, subject to a joint engineering determination of the number of acres affected – Ganne stated that Thomson was "wondering what happened to the furthering of this proposal which, it was felt by all concerned, would be the most effective method of bringing about an early settlement of this outstanding problem."[309]

In the first of two subsequent letters, Wellman simply advised Ganne that the Bands had held a further meeting during which they had agreed to accept a settlement on the basis set forth in his letter of November 19, 1976.[310] However, on December 8, 1976, he clarified the Bands' position:

> The respective Reserves have a felt position that has developed over the years as to the extent of the lands that were flooded. The positions have evolved by virtue of the information that has been given to them by the elders of the respective tribes and the information we have is that Muscowpetung had an acreage flood of about 1,500 acres, Pasqua 1,000 acres and Standing Buffalo from 50 to 100 acres.
>
> In discussing this matter with the representatives they have indicated to me that former Chief John Gambler of Muscowpetung is prepared to take an affidavit to this effect and one of the elder Peigans could take the affidavit with respect to Pasqua.

308 W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to L.G. Ganne, Legal Advisor, Department of Justice, November 19, 1976, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 1053-54).

309 L.G. Ganne, Legal Advisor, Department of Justice, to W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, November 19, 1976, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 1055-56).

310 W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to L.G. Ganne, Legal Advisor, Department of Justice, December 1, 1976, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 1057-58).

> Therefore, the position which we are putting to you is the position which the Reserves have a reasonable belief to be a correct one and this is corroborated by virtue of the fact that the lump sum settlement would be divided in accordance with the traditional position of the Reserves.[311]

Wellman stressed the importance of acting quickly:

> Accordingly, if the Department is prepared to act on the basis of the affidavits, we will arrange to get these affidavits to you as quickly as we can and once again we would like to reiterate that in the event the matter is not settled prior to February, there will be new Chiefs and Counsellors [sic] and I cannot assure you as to whether or not they will support our present position.[312]

After discussing the matter with Thomson, Ganne replied that the Bands' position was "totally unacceptable to the PFRA," particularly "the suggestion that consideration be given to affidavit evidence based on memory and reasonably [sic] belief designed to establish flooded acreage." Thomson was prepared to proceed only on the basis of the joint engineering arrangement previously agreed to by the parties.[313]

With his February deadline fast approaching, Wellman wrote directly to Berry, by then the Acting Director of the PFRA, to reiterate the Bands' willingness to settle for a lump sum of $265,000, subject to appropriate releases of past, present, and anticipated future damages.[314] The government relented, and steps to implement the settlement commenced.

### Terms of the Settlement

The terms of the settlement appeared relatively straightforward. Of the proceeds of $265,000, Muscowpetung was to receive $150,000, Pasqua $100,000, and Standing Buffalo $15,000. The Bands were to provide the PFRA with appropriate releases and would authorize permits to allow future flooding.

Berry provided a memorandum to his superiors in the Department of Regional Economic Expansion so they could alert the Treasury Board of the

311 W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to L.G. Ganne, Legal Advisor, Department of Justice, December 1, 1976, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 1059-60).

312 W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to L.G. Ganne, Legal Advisor, Department of Justice, December 1, 1976, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1060).

313 L.G. Ganne, Legal Advisor, Department of Justice, to W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, December 13, 1976, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1061A).

314 W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to W.M. Berry, Acting Director, PFRA, Department of Regional Economic Expansion, January 24, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 1062-63).

PFRA's upcoming submission with regard to the settlement. After laying out the background to the claim and the proposed terms of settlement, Berry stated:

> Surveys completed by PFRA have shown that a total of 1,540 acres of reserve lands has been adversely affected by the Echo Lake control structure. Of this area, 935 acres are considered to have been productive hay lands before the lakes were raised. Based on studies of past damages (i.e. loss of production, access and developmental opportunities, shooting rights and shoreline erosion) and on the present market value of this land PFRA has concluded that the lump sum settlement of $265,000 can be justified.[315]

In advising Treasury Board of the proposed settlement, Assistant Deputy Minister J.D. Collinson suggested that "the most appropriate way of proceeding is by way of an ex gratia payment, since the settlement of the matter can be considered to fall in the category of moral obligation."[316]

On March 4, 1977, Wellman provided Berry with Band Council Resolutions from each of the three Bands "in trust and on the understanding that in due course the sum of $265,000.00 will be deposited in trust and to the credit of the respective Reserves to be divided in the proportion mutually agreed upon by the Reserves."[317] The terms of the Pasqua and Standing Buffalo resolutions were virtually identical:

> WHEREAS PFRA constructed a control structure on the Qu'Appelle River downstream of the outlet of Echo Lake in 1942; and
>
> WHEREAS the control structure raised the level of water in Echo Lake and in Pasqua Lake and as a consequence caused flooding of hay lands located within the boundaries of the Muscowpetung, Standing Buffalo and Pasqua Indian Reserves; and
>
> WHEREAS such flooding has resulted in a loss of hay production, a reduction of reserve lands previously available for hay production, a reduction of the number of cattle which the Bands were able to raise, and a consequential reduction of economic growth; and
>
> WHEREAS the Bands have never been paid compensation with respect to such losses;
>
> NOW, THEREFORE, BE IT RESOLVED that

315 W.M. Berry, Acting Director, PFRA, Department of Regional Economic Expansion, to M.W. White, Western Region, Department of Regional Economic Expansion, February 9, 1977, with attached notes entitled "Claim for Flooding Damages to Indian Lands, Echo Lake Dam, Qu'Appelle River," undated, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 1071-73).

316 J.D. Collinson, Assistant Deputy Minister, Western Region, Department of Regional Economic Expansion, to J.D. Love, [Treasury Board], February 18, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1075).

317 W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to W.M. Berry, Acting Director, PFRA, Department of Regional Economic Expansion, March 4, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1077).

> for and in consideration of the payment of $100,000 [$15,000] to the credit of the Pasqua [Standing Buffalo] Band, the Band does hereby release PFRA from all past, present and future claims in respect to erection of the said control structure and consequential flooding, and further agrees to authorize the issuance of a permit to PFRA in respect of the continued operation of the said control structure.[318]

The Muscowpetung Band Council Resolution contained one significant difference. Rather than releasing the PFRA from all claims "in respect to erection of the said control structure and consequential flooding," the Muscowpetung resolution released all claims "in respect to lands now flooded by the said control structure."[319]

That same day, Berry forwarded the Band Council Resolutions and the formal Treasury Board submission to Collinson to commence the approval process.[320] The submission defended the settlement in these terms:

> A mutually acceptable lump sum of exactly $265,000 as full compensation for past and future damages has been negotiated between PFRA and the Indian Bands. Studies by PFRA have concluded that this sum is reasonable and justifiable on the following basis:
>
> Affected area – 1540 acres, consisting of 935 acres of hay lands and 605 acres of lower, marginal lands, on the three Reserves, within the vertical interval between the pre-dam long-term lake level and the elevation to which easements were purchased from non-Indian landowners.
>
> Unit values of compensation for damages to hay lands
> - $133 per acre, representing present value of lost returns to the land between 1943 and the present.
> - $125 per acre, representing the present value of future damages and being the current market value of this class of land.
>
> Unit value of compensation for damages to marginal lands
> - $40 per acre in consideration of damages to hunting and fishing capabilities, interference with access and loss of development opportunities along shorelines and on the Reserves generally.

318 Pasqua Band, Band Council Resolution, February 8, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1069); Standing Buffalo Band, Band Council Resolution, February 8, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1070).

319 Muscowpetung Band, Band Council Resolution, February 15, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1074).

320 W.M. Berry, Acting Director, PFRA, Department of Regional Economic Expansion, to J.D. Collinson, Assistant Deputy Minister, Western Region, Department of Regional Economic Expansion, March 4, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1076).

| Total Compensation | |
|---|---|
| Haylands – 935 acs. @ $258/ac = | $241,230 |
| Marginal lands – 605 acs. @ $40/acre = | 24,200 |
| Total | $265,430[321] |

After a minor procedural error was caught in the initial formal submission,[322] the PFRA resubmitted the documents to Treasury Board and, by Order in Council PC 1977-10/1949 dated July 7, 1977, the settlement received Cabinet approval.[323] On July 19, 1977, a copy of the Order in Council was forwarded to Berry,[324] and two days later Ganne provided a copy to J.D. Leask, by that date Indian Affairs' Director General for the Saskatchewan Region. Leask, who had previously concurred that the settlement was "fair and just,"[325] also acknowledged receipt of an Interdepartmental Settlement Advice in the amount of $265,000 payable to Indian Affairs.[326]

Berry himself notified Wellman of completion of the settlement:

> This is to advise you that we delivered today to the Department of Indian Affairs and Northern Development a check for $265,000 in settlement of the land claims on Pasqua Lake. A draft copy of the receipt of this cheque from that Department is attached hereto. This concludes our commitments on this matter.[327]

This was *not* the end of the matter, however.

### Aftermath of the Settlement

By the autumn of 1977, Harry M. Hill had been appointed as the new Director of the PFRA and Berry had resumed his position has Chief Engineer. On October 21, 1977, Berry and Ganne met with new Muscowpetung Chief Ron Rosebluff, who had been in the position just ten days and who had questions regarding the settlement. In particular, Chief Rosebluff was concerned that

321 Department of Regional Economic Expansion, Submission to Treasury Board, March 23, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1092).

322 W.M. Berry, Acting Director, PFRA, Department of Regional Economic Expansion, to W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, May 5, 1977, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1103).

323 Order in Council PC 1977-10/1949, July 7, 1977, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1104).

324 R.G. Lagimodiere, Program Co-ordinator, Western Region, Department of Regional Economic Expansion, to W.M. Berry, Acting Director, PFRA, Department of Regional Economic Expansion, July 19, 1977, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1108).

325 J.D. Leask, Director General, Saskatchewan Region, Department of Indian and Northern Affairs, to J.W. Ritchie, Head, Lands Advisory Services, Department of Indian and Northern Affairs, March 8, 1977, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1078).

326 L.G. Ganne, Legal Advisor, Department of Justice, to J.D. Leask, Director General, Saskatchewan Region, Department of Indian and Northern Affairs, July 21, 1977, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1109).

327 W.M. Berry, Acting Director, PFRA, Department of Regional Economic Expansion, to W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, July 22, 1977, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1110).

"the $150,000 settlement allowed the flooding of their hay lands for ever and ever." After the history of the negotiations and the basis for the settlement had been explained to him, Chief Rosebluff expressed his intention to discuss the settlement with members of his Band to consider whether the Band should challenge the validity of the authorizing Band Council Resolution.[328]

In January 1978, Rosebluff advised Indian Affairs that the Muscowpetung Band did not intend to use or accept the $150,000 deposited in its revenue account. The Band disagreed with the wording since it released future claims and "gives P.F.R.A. any authority needed to raise or lower lake levels at their discretion." Rosebluff also indicated that the Band was prepared to go to court over the question of whether the resolution was null and void.[329] It should be noted, however, that, notwithstanding the suggestion that the Muscowpetung Band would not use or accept its share of the settlement proceeds, it is common ground between the parties to this inquiry that, by the date of these proceedings, all three Bands had in fact spent all or virtually all of the funds allocated to them.[330]

In a memorandum to his District Manager, Bowering, by this time the District Lands Administration Officer for the Touchwood File Hills Qu'Appelle District, suggested that carefully defining the area of the permit might satisfy the Band:

> Some assurance should be set forth to convince them that the established acres . . . would not be exceeded should the area again become flooded in the future and if the area was exceeded, then another claim for damages may result.
>
> It was my understanding that before any monies were paid out, that [sic] a permit arrangement was to be entered into covering the period upon which P.F.R.A. had flooding rights. I haven't seen this permit nor has anyone mentioned it again.
>
> While Mr. Len Ganne, legal advisor, worked, I assume, in close harmony with the Bands legal adviser, Wellman and McIssac [sic], it does not appear that the Muscowpetung Council is at all happy with the result. There may also be a conflict between this council and the council responsible for the settlement.[331]

328 W.M. Berry, Chief Engineer, PFRA, Department of Regional Economic Expansion, to Harry M. Hill, Director, PFRA, Department of Regional Economic Expansion, October 21, 1977, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1116).

329 N.J. Bowering, District Lands Administration Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to J.D. Drummond, District Manager, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, DIAND file 675/8-4, vol. 4 (ICC Documents, pp. 1118-19).

330 ICC Transcript, June 26, 1997, pp. 205-06 (Bruce Becker and David Knoll).

331 N.J. Bowering, District Lands Administration Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to J.D. Drummond, District Manager, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, DIAND file 675/8-4, vol. 4 (ICC Documents, pp. 1118-19).

E. Korchinski, Director of Operations for the Saskatchewan Region, recommended that the permit be drafted and forwarded to the Band for its review.[332] On February 24, 1978, Lands Branch Director G.A. Poupore provided a draft permit to Korchinski for this purpose.[333]

At the time the settlement had been concluded in March 1977, M.R. St. Pierre, District Superintendent of Economic Development, had indicated that the "procedure is to arrange for a permit to be dated retroactive to 1942 to run continuous [sic] or as long as is required to control the levels of the Pasqua and Echo Lakes."[334] However, the initial draft permit provided for a commencement date of January 1, 1972, among the following terms:

> This letter shall be your authority, pursuant to the Indian Act to use and occupy for flooding purposes those parcels of land in Muscowpetung Indian Reserve No. 80, Hay Grounds Indian Reserve No. 80B, Pasqua Indian Reserve No. 79 and Standing Buffalo Indian Reserve No. 78 shown on the sketches attached hereto.
>
> This permit is granted subject to the following terms and conditions:
>
> 1. That this permission or permit shall be valid for an indeterminate period commencing from January 1, 1972 and for as long as the land is required for flooding purposes.
> 2. That the Department of Regional Economic Expansion shall pay, on execution hereof, the sum of $265,000 as full and final payment for the use of the said land for the duration of this permit.
> 3. That the land shall be used only for the purpose of flooding occasioned by the construction and operation of the Echo Lake Dam.
> 4. That the Department of Regional Economic Expansion shall be solely liable for any actions, demands, damages or claims arising from, under or in respect of its use of the aforesaid land.[335]

332 E. Korchinski, Director of Operations, Saskatchewan Region, Department of Indian and Northern Affairs, to G.A. Poupore, Director, Lands Branch, Department of Indian and Northern Affairs, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1123).

333 G.A. Poupore, Director, Lands Branch, Department of Indian and Northern Affairs, to E. Korchinski, Director of Operations, Saskatchewan Region, Department of Indian and Northern Affairs, February 24, 1978, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1124).

334 M.R. St. Pierre, District Superintendent of Economic Development, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to A.H. Markuson, Regional Lands Administrator, Saskatchewan Region, Department of Indian and Northern Affairs, March 8, 1977, DIAND file E4320-06566 (ICC Documents, p. 1079).

335 R.D. Brown, Assistant Deputy Minister – Programs, Department of Indian and Northern Affairs, to J.D. Love, Deputy Minister, Department of Regional Economic Expansion, undated, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1087). This document was never signed.

In providing the draft permit to Korchinski, Poupore noted that "[t]he sketches mentioned in the permit are those prepared by the Regional Surveyor's office, signed, dated October 1976, April 1977 and January 1978 and are *not attached*."[336]

It is important to emphasize that this draft permit was never signed, but it still included two key facets that have become pivotal to the issues in this inquiry:

- In clauses 1 and 3, it provided for an "indeterminate" term "for as long as the land is required for flooding purposes," with the land to be used "only for the purpose of flooding occasioned by the construction and operation of the Echo Lake Dam."
- It referred to *attached* sketches that specified the land to be subject to the permit, but the sketches were not attached.

On February 13, 1978, the Muscowpetung Band Council passed a resolution purporting to rescind the 1977 resolution by which the previous Band Council had accepted the settlement. The rescinding resolution stated:

> 1. That the Muscowpetung Band Council deems the land flood situation to be a matter requiring a conditional surrender persuant to Sec. 37 and Sec. 38 of the Indian Act.
>
> 2. That the Band Council views the settlement non-constitutional on the basis that it is non-advisable and not proper to enter into an agreement of perpetuity.
> In the Alternative:
>
> 3. That such a settlement, if not subject to Sec. 37 and Sec. 38; that it should and could only be approved by the electors of the Muscowpetung Band or at least by a majority of a Band Council in a properly constituted meeting.
>
> It is with the above points in mind that we rescind the previous B.C.R. file #225 and are therefore seeking further negotiations.[337]

On receiving this Band Council Resolution, Korchinski forwarded it to Poupore, asking whether the authorizing Order in Council had been passed and what Indian Affairs' position would be. Although his Minister, J. Hugh Faulk-

336 G.A. Poupore, Director, Lands Branch, Department of Indian and Northern Affairs, to E. Korchinski, Director of Operations, Saskatchewan Region, Department of Indian and Northern Affairs, February 24, 1978, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1124). Emphasis added.

337 Muscowpetung Band, Band Council Resolution, February 13, 1978, DIAND file 675/8-4, vol. 4 (ICC Documents, p. 1122).

ner, had initially expressed sympathy for the Band's stance that the settlement amounted to an illegal surrender,[338] Poupore in his response to Korchinski on March 29, 1978, did not:

> The Muscowpetung Band Council has evidently misinterpreted the provision of the *Indian Act*. In this case a surrender of land is not appropriate as the Department would be unable to lease to the Department of Regional Economic Expansion. In view of this, a permit is the appropriate vehicle and a draft permit was forwarded to you on February 20, 1978. The Muscowpetung Band Council is in error in stating that the settlement proposed is not constitutional. The settlement was sanctioned by the Band Council of the day and was negotiated between the Band's solicitors, Mr. R. Wellman and Mr. L.G. Ganne, of the Department of Justice. The proposed permit is not in perpetuity as the Band Council states, but will permit the land to be used by D.R.E.E. for flooding purposes as required. The proposal was negotiated with the approval of the Band Council of the day and there was no requirement for the Council to put it before the Band members.
>
> It is noted that the Band has received $150,000.00, the monies agreed in the negotiations with D.R.E.E. It is considered therefore that as the agreement was properly negotiated with D.R.E.E. and that the monies agreed to have been paid to Muscowpetung Band funds we cannot agree with the proposal put forward by the new Band Council in their B.C.R. dated February 13, 1978.[339]

At this point, a letter from Marcel Lessard, the Minister of Regional Economic Expansion, had been drafted to convey the same sentiments to the Band. However, with a view to heading off the problem, Markuson instructed Touchwood File Hills Qu'Appelle District Manager J.D. Drummond to meet with the Band to explain the draft permit:

> When reviewing the draft permit with the Band Council you should be prepared to clarify why a surrender was not necessary. That the proposed settlement was approved by the Band Council. That the Bands had received the monies and all that remained was to provide a letter permit outlining the right to use and occupy the lands flooded by the erection of the Echo Lake Dam built in 1952.
>
> This does not grant any flooding beyond that affected by the level of the dam.[340]

338 J.R. Lane, Director General, Saskatchewan, Department of Regional Economic Expansion, to Harry Hill, Director, PFRA, Department of Regional Economic Expansion, March 22, 1978, DIAND file 675/8-4, vol. 4 (ICC Documents, p. 1132).

339 G.A. Poupore, Director, Lands Branch, Department of Indian and Northern Affairs, to E. Korchinski, Director of Operations, Saskatchewan Region, Department of Indian and Northern Affairs, March 29, 1978, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1133).

340 A.H. Markuson, Supervisor of Lands, Saskatchewan Region, Department of Indian and Northern Affairs, to J.D. Drummond, District Manager, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, April 6, 1978, DIAND file E4320-06566 (ICC Documents, p. 1137).

Drummond's efforts obviously did not have the desired effect, as Lessard's letter went out on May 2, 1978:

> You indicated your concern that surrender of Indian lands could be interpreted as being part of the agreement. Our legal advisor states this interpretation cannot be substantiated.
>
> It was never contemplated by the staff of my Department that surrender of lands would be part of the agreement, and, with the supporting opinion of our legal advisor, let me assure you that such an interpretation cannot legitimately be made. Insofar as land use is concerned, the agreement only makes provision for an appropriate permit to be granted pursuant to Section 28, Subsection (2) of the Indian Act.
>
> With regard to your concern over waiving of future claims, the agreement precludes claims against the Crown, or any future owner of the water control structure, resulting from the continued existence and operation of the structure in its present form, but does not preclude future claims arising from other activities that might adversely affect your Reserve lands.[341]

Indian Affairs Minister Faulkner sent a similar letter to Chief Rosebluff on July 11, 1978.[342]

Both letters prompted immediate and vigorous replies from the Band's newly retained solicitor, William J. Pillipow. To Lessard, Pillipow wrote:

> [W]e cannot agree with you or with the opinion of your legal advisor with respect to interpretation that must be placed as to how a settlement of this type can be effectively agreed to by a Band. Section 28, subsection 2 of the Indian Act referred to a permit being issued by the Minister for a one year period only. As a result that Section cannot grant the rights to the Minister which you assert. We wish to bring to your attention Section 37 of the Indian Act, which says that Indian land cannot be dealt with as set out therein except as provided under Sections 37, 38 & 39.
>
> Furthermore, we cannot agree at all that a Band can forever waive its rights to flooding of their lands without eliminating [sic] the right of the land to future generations. It is our opinion that The Band can settle a claim for damages which occurred in the past but certainly cannot bind their future generations without complying with Sections 37, 38 & 39 of the Indian Act.[343]

341 Marcel Lessard, Minister, Department of Regional Economic Expansion, to Ron Rosebluff, Chief, Muscowpetung Band, May 2, 1978, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1145).

342 J. Hugh Faulkner, Minister, Department of Indian and Northern Affairs, to Ron Rosebluff, Chief, Muscowpetung Band, July 11, 1978, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1155).

343 William J. Pillipow, Pillipow, Kolyk & Owen, Barristers & Solicitors, to Marcel Lessard, Minister, Department of Regional Economic Expansion, May 17, 1978, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1148).

In his letter to Faulkner, Pillipow added that "the agreement which was entered into with DREE and PFRA could be held to be null and void based on alienation."[344]

Lessard's reply reiterated his earlier comments that it had not been intended by the settlement to dispose of an interest in land such that the surrender provisions of section 37 of the *Indian Act* would be triggered:

> It was our intention simply to acquire the right to maintain the existing control structure, built by PFRA in 1942, at its present location, and further, to compensate the Band for the past, present and future consequences of any flooding that might result from the continuing existence of this structure.
>
> This is certainly not an alienation of these lands so far as the Band is concerned, inasmuch as flooding may or may not occur from year to year. The extent of flooding in any year will be determined primarily by natural causes, and flooding of the low-lying land concerned could occur whether or not the PFRA control structure existed.
>
> Section 28(2) authorizes the Minister of Indian Affairs and Northern Development to grant by permit, for any period longer than one year, with the consent of the Band Council, the right to occupy or use a reserve. This is the right that we were seeking with respect to the control structure. The permit was intended to be limited in its application to this structure and was not intended to provide any rights in relation to reserve land adjoining the structure.
>
> The February 15, 1977 Band Council Resolution, which the Band adopted, acknowledged that the payment to be made to the credit of the Band was for past, present and future claims in respect of flooding, with no suggestion that the acquisition of any interest in land was acquired thereby. It further expressed agreement on behalf of the Band to consent, in effect, to the Minister's granting a permit to PFRA for access on the Reserve to maintain its structure, which had been located there since 1942.
>
> As indicated above, one of the purposes of the Band Council Resolution was to convey the consent of the Council to the Minister authorizing him to grant a permit to cover the existence of the control structure for a period in excess of the one year to which he is limited without the benefit of Council consent. This is a situation falling completely within the purview and intent of Section 28(2) and clearly does not contemplate a disposition of reserve land within the meaning of Section 37, which necessitates a surrender.
>
> Furthermore, in our opinion, the Band has not waived its right to the flooding of their land. The Band has agreed to a negotiated amount as settlement for the effects of flooding in the past, present and future, which they, at the time of negotiated settlement, adopted by a Band Council Resolution.
>
> This is an agreement that has been fully performed by the payment of the agreed amount of consideration and which is not capable of being disturbed simply by a

344 William J. Pillipow, Pillipow, Kolyk & Owen, Barristers & Solicitors, to J. Hugh Faulkner, Minister, Department of Indian and Northern Affairs, July 26, 1978, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1157).

subsequent Council deciding to rescind the previous Band Council Resolution, which expressed the consent of the Band to the agreement.[345]

Assistant Deputy Minister R.D. Brown of Indian Affairs followed with a similar letter to Pillipow.[346] However, notwithstanding the official position taken by Canada in the correspondence with the Band's solicitors, Indian Affairs was uncertain about its ability to issue a permit under subsection 28(2), and Korchinski stated that "it is on this basis the permit has not been issued."[347]

The matter appears to have languished for a year until Chief Rosebluff brought it up again during a meeting with Owen A. Anderson, the Saskatchewan Region Director General, on June 20, 1979, following an unusually high spring runoff. In a follow-up letter dated July 9, 1979, Anderson assured Chief Rosebluff that the 1977 Band Council Resolution did not deal with damages that might be caused by additional dams, and he provided the Chief with topographic surveys prepared by the Regional Surveyor to define the area and the acreage flooded. He asked Chief Rosebluff to review the draft permit "and advise if you see anything that does not conform to the structure nor the compensation that your Band's previous council negotiated." He concluded by noting that Indian Affairs believed that the Department of Regional Economic Expansion had "acted in good faith in securing the Treasury Board approve [sic] the compensation that had been negotiated by your solicitor, Mr. Wellman."[348]

Despite Anderson's cajoling, he had to report to Leask that "Chief R. Rosebluff is not very happy with Headquarters [sic] response and is insisting that the Department should explore all possible means to get the Band out of this commitment." Anderson asked Leask to reconsider the Department's opinion of March 29, 1978, in which Poupore had supported the PFRA's position.[349] In a separate memorandum, to satisfy an undertaking given by the Minister to Chief Rosebluff, Assistant Deputy Minister Brown also asked Leask

345 Marcel Lessard, Minister, Department of Regional Economic Expansion, to William J. Pillipow, Pillipow, Kolyk & Owen, Barristers & Solicitors, August 1, 1978, DIAND file 675/8-4, vol. 3 (ICC Documents, pp. 1159-61).

346 R.D. Brown, Assistant Deputy Minister – Programs, Department of Indian and Northern Affairs, to William J. Pillipow, Pillipow, Kolyk & Owen, Barristers & Solicitors, September 12, 1978, PFRA file 928/7E4-2, vol. 1 (ICC Documents, pp. 1163-64).

347 E. Korchinski, Director of Operations, Saskatchewan Region, Department of Indian and Northern Affairs, to M. Irene Lane, Acting Chief, Departmental Secretariat, Department of Indian and Northern Affairs, August 15, 1978, DIAND file 675/8-4, vol. 4 (ICC Documents, p. 1162).

348 Owen A. Anderson, Director General, Saskatchewan Region, Department of Indian and Northern Affairs, to Ronald Rosebluff, Chief, Muscowpetung Band, July 9, 1979, DIAND file E4320-06566 (ICC Documents, pp. 1169-70).

349 Owen A. Anderson, Director General, Saskatchewan Region, Department of Indian and Northern Affairs, to J.D. Leask, Director General, Reserves and Trusts, Department of Indian and Northern Affairs, July 17, 1979, DIAND file 675/8-4, vol 4 (ICC Documents, p. 1171).

to look into the legality of the February 15, 1977, Band Council Resolution in terms of "concluding the arrangement with PFRA."[350]

Leask responded by asking Anderson for additional information:

> To support the Band in this problem, we require, as soon as possible, the following information:-
>
> 1. Were individual Band members consulted or made aware of the proposal and B.C.R. 225 prior to it passing? Was the B.C.R. signed by a quorum of this Band at a regular meeting?
> 2. Did the Band have Departmental assistance in its negotiations with D.R.E.E.? It is noted that a Mr. Wellman was appointed by the Bands.
> 3. It is noted that B.C.R. 225 is identical to B.C.R.'s prepared by the Pasqua and Standing Buffalo Bands for a similar purpose. Were these B.C.R.'s drafted by the Bands, D.R.E.E. or this Department?
> 4. When were the monies paid by D.R.E.E. to the Band?
>
> In addition it is requested that you meet with D.R.E.E. at an early date and ascertain their views on re-negotiating the agreement reached between D.R.E.E. and the Band.[351]

Markuson drafted the response for Anderson:

> 1. Doubtful if Council consulted band members. Signed by quorum. Not likely at band meeting but at lawyer's office.
> 2. No, we were not involved. Attended a meeting with Wellman, and we were advised to stay out of the process as he could provide better emotional objectives.
> 3. District or Region did not draft the BCR. Expect Wellman did.
> 4. Funds were paid to Revenue Trust Fund.[352]

350 R.D. Brown, Assistant Deputy Minister – Programs, Department of Indian and Northern Affairs, to J.D. Leask, Director General, Reserves and Trusts, Department of Indian and Northern Affairs, July 27, 1979, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1175).

351 J.D. Leask, Director General, Reserves and Trusts, Department of Indian and Northern Affairs, to Owen A. Anderson, Director General, Saskatchewan Region, Department of Indian and Northern Affairs, August 2, 1979, DIAND file E4320-06566 (ICC Documents, p. 1176). In fact, as already noted, the Muscowpetung Band Council Resolution was *not* identical to the Band Council Resolutions passed by the Pasqua and Standing Buffalo Bands.

352 A.H. Markuson, Director, Lands and Membership, Saskatchewan Region, Department of Indian and Northern Affairs, to Paul Jaiswal, Community Affairs, Department of Indian and Northern Affairs, August 8, 1979, DIAND file E4320-06566 (ICC Documents, p. 1177).

It should be noted that Markuson's view that Wellman had prepared the Band Council Resolution contradicted an earlier statement by Chief Rosebluff that Ganne was the draftsman.[353]

Indian Affairs continued to deal with the Muscowpetung Band to try to make the settlement work. On September 14, 1979, the Band issued a new Band Council Resolution that, in consideration for the $150,000 payment already received, purported to release the PFRA from only past and present claims – the previous reference to future claims was conspicuously absent – and to permit the PFRA to continue to flood an area of 671.1 acres.[354] In conjunction with this resolution, Assistant Deputy Minister Brown forwarded a second draft permit to his counterpart, J.D. Collinson, in the Department of Regional Economic Expansion. This permit was identical to the earlier draft, except that it applied only to the Muscowpetung Band and purported to grant permission to flood the same 671.1 acres referred to in the Band's new Band Council Resolution.[355]

This limitation on the flooded areas was unacceptable to Collinson:

> Your letter refers to certain parcels of land to which the permit applies, and in supporting Band Council Resolution No. 295, these parcels are particularly identified and total 671.1 acres.
>
> A Muscowpetung Band Council Resolution (copy attached for your information) dated February 15, 1977, which resulted from our negotiations with the Indian Band, identifies the area involved as ". . . lands now flooded by the said control structure . . . ." On this basis, Treasury Board authority for the $150,000 settlement was granted, and the subsequent Order in Council, P.C. 1977-10/1949, authorized compensation for ". . . lands bordering Pasqua and Echo Lakes required as a result of the construction in 1942-43 of a dam at the outlet of Echo Lake on the Qu'Appelle River . . . ."
>
> At the time of negotiations with the Band, an engineering review indicated that under certain circumstances approximately 1,190 acres (lands below elevation 1,574 feet) could be affected by flooding from the existing control structure. Our negotiations with the Band and our request for Treasury Board and Order in Council authority were based on this premise. With this as background, you will see that the limita-

353 N.J. Bowering, District Lands Administration Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to J.D. Drummond, District Manager, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, January 4, 1978, DIAND file 675/8-4, vol. 4 (ICC Documents, p. 1118).

354 Muscowpetung Band, Band Council Resolution, September 14, 1979, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1179).

355 R.D. Brown, Assistant Deputy Minister – Programs, Department of Indian and Northern Affairs, to J.D. Collinson, Assistant Deputy Minister, Western Region, Department of Regional Economic Expansion, October 12, 1979, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1181).

tions imposed by your letter and by Band Council Resolution No. 295 on land that could be affected by the Echo Lake Dam are at variance with our negotiated position.

In summary, the Band Resolution of 15th February, 1977 . . . is the true and legitimate basis for the payment of the $150,000 to the credit of the Muscowpetung Band. The permit must be granted on the same basis.[356]

To this, Brown replied:

The purpose of our October 12 letter was to implement the agreement reached between your officers and the Muscowpetung Band to allow PFRA to use lands flooded in 1977 as a result of the construction of a dam at the outlet of Echo Lake on the Qu'Appelle River. The Chief of the Band has been concerned that a general permit for flooding would grant PFRA unrestricted right to flood reserve lands without the Band having any recourse for future damages arising from these actions. Accordingly, it was agreed that the permit should cover those areas flooded in 1977 and covered by the February 15, 1977 Band Council Resolution which states: . . . . claims in respect to lands *now* flooded by the said control structure . . . .

The acreages and plans were drawn up by the Regional Land Surveyor for the Department of Energy, Mines and Resources.

Since the 1977 flooding arrangement appears to have been negotiated directly between your officers and the Band, we are not privy to the full extent of the points agreed upon. However, we would be reluctant to change the description of the lands covered by the permit area without the concurrence of the Muscowpetung Band. If you are not satisfied with the area described in the October 12 permit, I suggest you arrange a meeting with the Band Council and our Regional officers to discuss the matter.[357]

Collinson then took the matter up with J.D. Nicholson, the Indian Affairs' Assistant Deputy Minister for Indian and Inuit Affairs:

It would appear that while your Department may be under some pressure from a new Chief to change the settlement terms, there is little or no choice but to accept the settlement entered into and as authorized by Order in Council P.C. 1977-10/1949, dated July 7, 1977. This Order in Council relates to [Treasury Board] Minute 749611, which confirmed the settlement agreed upon, established a total number of acres on three Reservations considered affected by the PFRA Echo Lake Dam, and set the compensation to be paid per acre on such affected areas. The agreement with the Muscowpetung Band, and two other Bands which were also involved in the negotiations,

356 J.D. Collinson, Assistant Deputy Minister, Western Region, Department of Regional Economic Expansion, to R.D. Brown, Assistant Deputy Minister – Programs, Department of Indian and Northern Affairs, October 26, 1979, PFRA file 928/7E4-2, vol. 1 (ICC Documents, pp. 1183-84).

357 R.D. Brown, Assistant Deputy Minister – Programs, Department of Indian and Northern Affairs, to J.D. Collinson, Assistant Deputy Minister, Western Region, Department of Regional Economic Expansion, December 4, 1979, PFRA file 928/7E4-2, vol. 1 (ICC Documents, pp. 1185-86).

did not provide a breakdown of the exact acreage on each Reserve affected by the flooding. The Bands agreed among themselves as to allocation of monies, and the allocation was also confirmed and authorized by the Treasury Board Minute.

Because of the difficulties or near impossibility of precisely establishing the number of acres that could be flooded or otherwise affected on each Reserve by the PFRA control structure, and to bring finality to a long-standing claim, the Bands, through their lawyer, and the Crown, each agreed on a straight lump-sum payment which the Bands would allocate among themselves. This agreement was reflected in the Band Council Resolutions passed by each of the three Bands subsequent to agreement on the settlement proposals. The Crown by Order in Council confirmed the settlement. . . .

It is evident from engineering computations of the area affected by the Echo Lake Dam that the acreage calculated to be affected by the structure on the Muscowpetung Reserve is substantially larger than the acreage set out in B.C.R. 295, dated September 14, 1979, on which Mr. Brown relies. In my letter of October 24, 1979, I have already indicated that this acreage is at variance with our negotiated position and that it was not intended that the settlement be made on a precise acreage basis.

The following points seem pertinent to this situation:

- Both DIAND and DREE-PFRA are branches of the government for purposes of administration. The settlement was made between the Crown on the one part and the three Bands on the other. Both Departments are bound by the settlement on the side of the Crown. The Bands represented throughout by the lawyer of their choice are also bound by the settlement, having accepted and received full payment of the settlement monies.
- The Deputy Attorney General is solely (through his agents) authorized and entitled to effect settlement and compromises of claims for and against the Crown. The present case, being a claim by the Bands against the Crown for flooding damages, was settled by agreement between the Crown as represented by the Deputy Attorney General and by the Bands represented by their lawyer. In settling the Bands' claims, the Deputy Attorney General was acting for both DIAND and DREE.
- An Order in Council, being the act of the Executive, has authorized the settlement on behalf of the Crown and has provided for the monies in payment of the settlement agreement. This Order in Council sets out a total acreage which is the acreage agreed upon as being affected, and sets forth the price to be paid per affected acre. Needless to say, the words "now flooded" contained in B.C.R. dated February 12, 1977, refer to the flooding caused by the control structure at any time and do not mean flooding as it existed on February 12, 1977.
- Mr. Brown's suggestion that PFRA originate another meeting to renegotiate with one of the three Bands a settlement already agreed upon by the Deputy Attorney General on behalf of the Crown and authorized by the Executive is not practical, and in fact would not be acceptable.

With the above as background, it would seem desirable to review the permit which was incorporated in Mr. Brown's letter of October 12, with particular attention to

removing acreage limitations related to consequential flooding by the PFRA structure.[358]

When after several inquiries the PFRA had not yet received its permit by August 20, 1981, Hill asked Murray R. Skelton, the Manager of Land Administration, to follow up.[359] Skelton did so by providing for Hill's review a draft memorandum to Deputy Minister Robert C. Montreuil to propose that he write directly to Paul Tellier, Indian Affairs Deputy Minister, to request the permit. The memorandum stated in part:

> To date a reply to Mr. Collinson's letter [dated March 28, 1980] has not been received.
>
> It is now essential to acquire a permit to flood, which is consistent with the negotiated terms of the 1977 settlement. Failure to obtain same and as soon as possible is leaving PFRA vulnerable to such diverse and contemplated claims as economic and environmental damages, adverse social and cultural effects and rehabilitative costs, etc.[360]

Eventually, a letter requesting a permit went out over Montreuil's signature to Tellier on January 4, 1982.[361]

Assistant Deputy Minister Donald K. Goodwin finally replied on Tellier's behalf in a letter dated May 7, 1982, to Collinson. Goodwin attributed the delay in responding to the time spent by Indian Affairs to examine the situation, but even after this close scrutiny Goodwin's response was not what the Department of Regional Economic Expansion had been hoping to hear:

> As your Department is aware, the three new Chiefs and Councils of the Bands involved in the issue have expressed their dissatisfaction to DIAND that the cash settlement of 1978, consented to by the previous Chiefs and Band Councils, was unjust. In view of this allegation, I believe it will be advisable to seriously consider a renegotiation of certain points in your agreement with the Bands prior to the issuance of any

358 J.D. Collinson, Assistant Deputy Minister, Western Region, Department of Regional Economic Expansion, to J.D. Nicholson, Assistant Deputy Minister, Indian and Inuit Affairs, Department of Indian and Northern Affairs, March 28, 1980, PFRA file 928/7E4-2, vol. 2 (ICC Documents, pp. 1191-93).

359 H.M. Hill, Director General, PFRA, Department of Regional Economic Expansion, to D.H. Brannen, Chief, Administration and Program Service, Department of Regional Economic Expansion, August 20, 1981, PFRA file 928/7E4-2, vol. 2 (ICC Documents, p. 1218).

360 J.D. Collinson, Assistant Deputy Minister, Western Region, Department of Regional Economic Expansion, to Robert C. Montreuil, Deputy Minister, Department of Regional Economic Expansion, undated draft, PFRA file 928/7E4-2, vol. 2 (ICC Documents, p. 1222).

361 Robert C. Montreuil, Deputy Minister, Department of Regional Economic Expansion, to Paul Tellier, Deputy Minister, Department of Indian Affairs and Northern Development, January 4, 1982, PFRA file 928/7E4-2, vol. 2 (ICC Documents, pp. 1223-24).

permits to your Department. To issue these permits against the expressed wishes of the current Band Councils may lead to serious repercussions.[362]

On this note, correspondence between the two Departments on the subject ceased.

## CREATION OF QU'APPELLE VALLEY INDIAN DEVELOPMENT AUTHORITY

While the Departments haggled over the terms of the permits, the Indian Bands of the Qu'Appelle Valley had been taking steps to better present their claims with a unified voice. On June 20, 1979, the Chiefs of the eight Bands passed a unanimous resolution to form QVIDA, with Chief Roland Crowe of the Piapot Band as the organization's first President. The primary concerns that QVIDA's members sought to address were:

- perceived violations of their rights, including unfulfilled treaty land entitlements, reduced treaty and riparian water rights, deterioration of the visual environment and water quality, loss of sources of livelihood, displacement of Band members to urban centres, inadequate resources to protect rights and develop reserve economies, and, of particular interest in this inquiry, damages to land and improvements caused by water level control decisions; and
- the future role of Qu'Appelle Valley Bands in maintaining, shaping, and directing the local economy, land use, Indian culture and history, and the water regime.

In particular, the organization intended to work towards more effective flood control and improved water quality in the Qu'Appelle Valley. It also pledged to document, verify, and assess historical flooding damages to reserve lands, and to seek retroactive compensation for those damages.[363]

To this end, on October 9, 1980, Chief Crowe advised Rabi Alam, Indian Affairs' Director of Regional Planning, that the Muscowpetung, Pasqua, and

362 Donald K. Goodwin, Assistant Deputy Minister, Indian and Inuit Affairs, Department of Indian and Northern Affairs, to J.D. Collinson, Assistant Deputy Minister, Western Region, Department of Regional Economic Expansion, May 7, 1982, PFRA file 928/7E4-2, vol. 2 (ICC Documents, p. 1244).

363 Qu'Appelle Valley Indian Development Authority, "Directional Plan 1979-1983," October 1979, pp. 5-6 and 9 (ICC Exhibit 1).

Standing Buffalo Bands intended to rescind their 1977 Band Council Resolutions. He continued:

> In view of the above, there is no way the P.F.R.A. can continue to flood Indian lands within the Qu'Appelle until this matter is settled. The P.F.R.A. permit would be useless in this regard. The Qu'Appelle Valley Indian Development Authority is the negotiating mechanism for these Bands.[364]

At a subsequent meeting between QVIDA representatives and Indian Affairs' regional management team, Chief Crowe made a further statement:

> Chief Crowe advised that before any Indian lands are surrendered a band referendum is required. This was never done in the case of three Qu'Appelle Bands allowing P.F.R.A. to flood their lands. As a result these three bands are now rescinding their Band Council Resolutions. Regardless of a band referendum being held one does not have the right to surrender land for more than one year.[365]

Chief Crowe later quantified the damage claim as a lump sum of $10.5 million, coupled with annual "flooding lease" payments of $500,000 to be adjusted for inflation.[366]

On being advised by Chief Crowe of the three Bands' intent to rescind their 1977 Band Council Resolutions, Alam requested background information. Markuson replied:

> I would like to point out that the three bands involved engaged their own lawyer, R. Wellman, who did the negotiations with DREE. *When we attended the meeting with Mr. Wellman we were informed that the Department should stay out of the negotiations as he could plead better using the tangible and intangible losses where we would be more inclined to use land value only. Therefore the Department did not get involved.* Wellman acquired the B.C.R.'s and agreement, Justice reviewed the proposal and Treasury Board approved the expenditure of $265,000.
>
> No permit is required under Section 28 as it only requires a letter of agreement between the two Ministers.[367]

364 Chief Roland Crowe, President, Qu'Appelle Valley Indian Development Authority, to Rabi Alam, Director, Planning and Review, Saskatchewan Region, Department of Indian and Northern Affairs, October 9, 1980, DIAND file E4320-06566 (ICC Documents, p. 1202).

365 Qu'Appelle Valley Indian Development Authority, Minutes of meeting with [Indian Affairs] Regional Management Team, November 17, 1980, DIAND file E4320-9, vol. 1 (ICC Documents, p. 1209).

366 Memorandum to file, M.R. Skelton, Manager, Land Administration, Department of Indian and Northern Affairs, April 5, 1982, PFRA file 928/7E4-2, vol. 2 (ICC Documents, p. 1243).

367 A.H. Markuson, Director, Lands and Membership, Saskatchewan Region, Department of Indian and Northern Affairs, to Rabi Alam, Director, Planning and Review, Saskatchewan Region, Department of Indian and Northern Affairs, October 23, 1980, DIAND file E4320-06566 (ICC Documents, p. 1204). Emphasis added.

On November 10, 1980, the Standing Buffalo Band issued its rescinding Band Council Resolution.[368]

Four months later, the QVIDA Chiefs met with Leask to address their grievances with regard to valley flooding and to implore Indian Affairs not to issue permits to the PFRA. Leask noted:

> They were anxious that no permits be issued to DREE in respect to the developments in the valley until further discussion had taken place and I advised them that I was not aware of any intention on our part to issue permits immediately and that we would want to support the Band in discussions which they had if they were successful in re-opening them.[369]

However, it is apparent that a new permit had already been sent to the Department of Regional Economic Expansion, although it is not clear whether it was the permit of October 12, 1979, that sparked the exchange between Assistant Deputy Ministers Brown and Collinson or yet another draft permit. Markuson commented to Alam:

> I was not aware that a new permit had been sent to DREE. I believe that they have firm grounds for including future flooding as that was the whole intent of the structure to hold and release flood waters.
>
> If the entire valley problem is looked at, the Bands of the valley may well have a case against the Federal Government for allowing development to take place that has led to the accessive [sic] flooding of the reserve lands. Other control structures are involved. I doubt if the matter will be settled any other way.
>
> You are in receipt of my letter of February 8th, 1982 that outlined the situation as I believe it developed. I believe that the various surveys conducted by Q.V.I.D.A. shows [sic] that most of the flooding was due to high run offs and newly formed channels unrelated to PFRA structures. The other factor, I think, that has been well documented by the Qu'Appelle Valley Authority is the land clearing upstream that results in quicker runoff at certain times.
>
> While it is fine to criticize what was done in the past I am as concerned that the bands are not looking to the future on how best they can co-ordinate their interest with others for future protection of these lands. I agree the proposals by the Qu'Appelle Authority was [sic] not to the bands interests, from my unprofessional

368 Standing Buffalo Band, Band Council Resolution, November 10, 1980, DIAND file E4320-06566 (ICC Documents, p. 1208).

369 J.D. Leask, Director General, Reserves and Trusts, Department of Indian and Northern Affairs, to D.J. Singleton, Director, Lands Directorate, Department of Indian and Northern Affairs, and E.M. Hobbs, Director, Economic and Employment Development, Department of Indian and Northern Affairs, March 12, 1982, DIAND file E4320-06566 (ICC Documents, p. 1234).

view of planning, but unless they come forward with alternatives I believe nothing will happen unless serious flooding occurs.[370]

By February 10, 1982, the Pasqua Band, too, had issued a rescinding Band Council Resolution,[371] but W.F. Bernhardt, Head of Land Transactions for the Saskatchewan Region, advised the District Office that there was no action that could be taken in relation to the resolution at that time.[372] On March 30, 1982, however, Markuson finally replied to Pasqua Chief Lindsay Cyr:

> You know [sic] doubt are aware that the Department and Treasury Board approved the compensation as a result of your Band's [sic] B.C.R.'s of 1977 as negotiated on your behalf by your solicitor R. Wellman with P.F.R.A.
>
> It was not necessary to hold a surrender to alienate the land. When an Act of Parliament of Canada is empowered to take or *use* lands or any interest therein without the consent of the owner, the power may, with the concent [sic] of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relationship to lands in a reserve or any interest therein (Section 35 of the Indian Act). Section 9 of the Prairie Land [sic] Rehabilitation Act grants them the right and to compensate Order in Councils [sic] were obtained achieving the construction of the works. As a result your Band Funds were credited with the moneys your Band Council of the time had negotiated.
>
> We are obliged to believe that, your Band Council of the time was speaking for the people and they had agreed to the settlement negotiated on the terms. *Therefore it does not appear to be a subject that can be renegotiated as it is concluded.*[373]

At about that time, Indian Consultant Enterprises released a report entitled "Past Damages Compensation Study," which had been commissioned by QVIDA. The report included a historical overview of Indian occupancy of the Qu'Appelle Valley; transcribed interviews with valley residents; the studies of

370 A.H. Markuson, Director, Lands and Membership, Saskatchewan Region, Department of Indian and Northern Affairs, to Rabi Alam, Director, Planning and Review, Saskatchewan Region, Department of Indian and Northern Affairs, March 25, 1982, DIAND file E4320-06566 (ICC Documents, pp. 1237-38).

371 Pasqua Band, Band Council Resolution, February 10, 1982, DIAND file E4320-06569 (ICC Documents, p. 1231). On receiving Pasqua's Band Council Resolution, E.J. Belfry, the District Superintendent of Reserves and Trusts, noted that the Band had received the $100,000 contemplated by the 1977 resolution "and have expended all but $7500.00 of this amount": E.J. Belfry, District Superintendent of Reserves and Trusts, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to W.F. Bernhardt, Head, Land Transactions, Saskatchewan Region, Department of Indian and Northern Affairs, February 22, 1982, DIAND file E4320-06569 (ICC Documents, p. 1232).

372 W.F. Bernhardt, Head, Land Transactions, Saskatchewan Region, Department of Indian and Northern Affairs, to District Manager, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, March 15, 1982, DIAND file E4320-06569 (ICC Documents, p. 1235).

373 A.H. Markuson, Director, Lands and Membership, Saskatchewan Region, Department of Indian and Northern Affairs, to Lindsay Cyr, Chief, Pasqua Band, March 30, 1982, DIAND file E4320-06569 (ICC Documents, p. 1241). Emphasis added.

the Qu'Appelle River system and control structures, soil degradation in the valley caused by flooding, and the impact of flooding on flora and fauna; and a recommended approach to claiming compensation for these damages.[374] Over the next several months, Indian Affairs and Saskatchewan's Department of Intergovernmental Affairs reviewed the report and considered its implications.[375] Associate Deputy Minister Newton C. Steacy of the provincial department inquired whether the report was intended to be merely an information document to support a claim or the claim itself, noting that, if the latter, combining conveyance, compensation, and economic development issues in the report made it difficult to separate and deal effectively with the compensation issues. He recommended to QVIDA President Eugene Anaquod that the claim be submitted to the federal Department of Justice and the provincial Department of the Attorney General to determine whether it had any legal basis.[376]

Eventually, in early 1983, Chief Lindsay Cyr, Chairman of QVIDA's Technical Sub-Committee, invited PFRA Director General Hill to attend a meeting to discuss the report. Hill declined, concurring with Steacy's observations about the report. However, he also stated:

> Further, settlements have already been effected on outstanding claims arising from PFRA's activities in the Valley. In view of this, PFRA's attendance at meetings of this nature would serve no useful purpose.[377]

On September 1, 1983, Planning and Review Director Alam forwarded the report to R.M. Connelly, Director of the Specific Claims Directorate, with a view to having QVIDA's claims considered by the Office of Native Claims. On Connelly's behalf, Senior Claims Analyst Richard Berg advised Alam that QVIDA would first have to establish a valid claim within the context of the specific claims policy, meaning that the Department of Justice would have to conduct a full factual review and provide its opinion on whether the Bands were owed an outstanding lawful obligation. Berg thought it "highly unlikely,

374 Indian Consultant Enterprises, "Past Damages Compensation Study," March 1982 (ICC Exhibit 3).

375 A.H. Markuson, Director, Lands and Membership, Saskatchewan Region, Department of Indian and Northern Affairs, to Rabi Alam, Director, Planning and Review, Saskatchewan Region, Department of Indian and Northern Affairs, June 29, 1982, DIAND file E4320-9, vol. 1 (ICC Documents, pp. 1245-47); Newton C. Steacy, Associate Deputy Minister, Indian and Native Affairs, Department of Intergovernmental Affairs, Government of Saskatchewan, November 12, 1982, DIAND file E4320-9, vol. 1 (ICC Documents, pp. 1248-49).

376 Newton C. Steacy, Associate Deputy Minister, Indian and Native Affairs, Department of Intergovernmental Affairs, Government of Saskatchewan, November 12, 1982, DIAND file E4320-9, vol. 1 (ICC Documents, p. 1248).

377 Harry M. Hill, Director General, PFRA, Department of Agriculture, to Chief Lindsay Cyr, Chairman, QVIDA Technical Subcommittee, April 15, 1983, DIAND file E4320-9, vol. 1 (ICC Documents, p. 1258).

however, that the government would agree to re-open negotiations in those cases where settlements have been reached and the provisions of the agreements fully respected."[378]

Notwithstanding Berg's pessimism, new QVIDA President Henry Delorme informed Connelly on October 21, 1983, that QVIDA intended to submit the "Past Damages Compensation Study" and a brief to update the Office of Native Claims about QVIDA's future plans.[379] However, Connelly advised Chief Delorme that the Office of Native Claims did not normally become involved in claims until the validity of a band's claim had been established, and he recommended that QVIDA deal with Indian Affairs' regional representatives.[380]

A year later, after reviewing the "Past Damages Compensation Study," Ian B. Cowie of Saskatchewan's Indian and Native Affairs Secretariat disclaimed provincial responsibility for flood damages on the reserves, advising Chief Cyr that "[t]he fact that the federal government has paid compensation to Indian Bands for flooding damages establishes a precedent which serves to indicate that any further compensation is a federal matter." However, Cowie suggested that the Bands work jointly with the provincial and federal governments towards economic development of the area and in implementing conveyancing improvements in the Qu'Appelle River valley.[381]

In October 1984, two of the Bands in the eastern Qu'Appelle Valley – Kahkewistahaw and Sakimay – issued Band Council Resolutions submitting specific claims for damage to and loss of reserve lands caused by the flooding associated with the dams at Round and Crooked Lakes.[382] The following February, Anita Gordon of the Federation of Saskatchewan Indian Nations advised PFRA Director Hill that the Federation had been asked to assist all four eastern Bands. In connection with the Federation's review of the issue,

378 Richard Berg, Senior Claims Analyst, Specific Claims Branch, Office of Native Claims, Department of Indian and Northern Affairs, to Rabi Alam, Director, Planning and Review, Saskatchewan Region, Department of Indian and Northern Affairs, October 3, 1983, DIAND file BW8260/SK8552-C1, vol. 1 (ICC Documents, pp. 1273-74).

379 Chief Henry Delorme, President, QVIDA, to R.M. Connelly, Director, Specific Claims Directorate, Office of Native Claims, Department of Indian and Northern Affairs, October 21, 1983, DIAND file BW8260/SK8552-C1, vol. 1 (ICC Documents, p. 1275).

380 R.M. Connelly, Director, Specific Claims Directorate, Office of Native Claims, Department of Indian and Northern Affairs, to Chief Henry Delorme, President, QVIDA, November 7, 1983, DIAND file BW8260/SK8552-C1, vol. 1 (ICC Documents, pp. 1276-77).

381 Ian B. Cowie, Secretary, Indian and Native Affairs Secretariat, Government of Saskatchewan, to Chief Lindsay Cyr, QVIDA, September 4, 1984, DIAND file E4320-9, vol. 1 (ICC Documents, p. 1278).

382 Kahkewistahaw Band, Band Council Resolution, October 12, 1984, DIAND file E4320-9, vol. 1 (ICC Documents, p. 1281); Sakimay Band, Band Council Resolution, October 17, 1984, DIAND file E4320-9, vol. 1 (ICC Documents, p. 1282).

Gordon asked Hill "on what authority PFRA in 1941 constructed the Crooked Lake Dam and the Round Lake Dam."[383]

Hill's response was interesting, both for the bases on which it claimed that the PFRA had been authorized to construct the two dams and for those bases on which it did not rely. Hill pointed to the appropriations clause in Treaty 4 as well as section 9 of the *Prairie Farm Rehabilitation Act* as the PFRA's authority to build the dams, but he made no mention of any authorization being given by the Bands or by Indian Affairs under the *Indian Act*.[384]

In the autumn of 1985, as the PFRA considered repairs to the Crooked Lake dam, PFRA Project Engineer Donald Forsythe and Senior Land Representative Frank Luchinski met with representatives of the eastern Bands to discuss the project. When Forsythe stated that he did not have the authority to discuss all aspects of the dams, QVIDA President Lindsay Cyr invited Hill to a meeting to address certain concerns before the Bands would agree to permit the PFRA to "renovate."[385] Once again, however, Hill refused to meet:

> It appears from your letter that the request for a meeting relates to concerns other than the specific matter of our request for permission to enter upon a particular reserve to conduct inspection surveys on an existing dam. In this connection, you will recall our letter to you of April 15, 1983, which clearly spelled out PFRA's position relative to the settlement of claims. In regard to the concerns referred to in your letter, may we suggest that a meeting with PFRA is not the proper forum to air and to resolve such concerns. Because of the foregoing, PFRA takes the position that it has no authority to enter into discussions or negotiations with your Association in matters that would properly form the subject matter of discussions with officials of the Department of Indian Affairs and Northern Development. Accordingly, PFRA will not attend the meeting scheduled for September 18, 1985.
>
> PFRA, for purely technical and maintenance purposes, requires a right of entry upon the Cowessess Reserve to inspect the existing structure on Crooked Lake. We wish that Chief Delorme and his Council would supply PFRA with the required permit by way of Band Council Resolution for such purposes. My officials are prepared to meet with Chief Delorme and his Council, at their convenience, to outline our requirements and to negotiate compensation if required.[386]

383 Anita Gordon, Research Director, Indian Rights and Treaties Research, Federation of Saskatchewan Indian Nations, to H.M. Hill, Director General, PFRA, Department of Regional Economic Expansion, February 20, 1985, PFRA file 928/7R1-11, vol. 1 (ICC Documents, p. 1283).

384 Harry M. Hill, Director General, PFRA, Department of Regional Economic Expansion, to Anita Gordon, Research Director, Indian Rights and Treaties Research, Federation of Saskatchewan Indian Nations, April 23, 1985, PFRA file 928/7R1-11, vol. 1 (ICC Documents, pp. 1292-93).

385 Chief Lindsay Cyr, President, QVIDA, to Harry M. Hill, Director General, PFRA, Department of Regional Economic Expansion, September 9, 1985, DIAND file E4320-9, vol. E4 (ICC Documents, p. 1298).

386 Harry M. Hill, Director General, PFRA, Department of Regional Economic Expansion, to Chief Lindsay Cyr, President, QVIDA, September 11, 1985, DIAND file E4320-9, vol. E4 (ICC Documents, pp. 1299-1300).

Chief Cyr was disappointed with Hill's reply:

> In reviewing past recent history of Indian Band and P.F.R.A. meetings, your Department went to extra lengths to secure flooding rights on Pasqua, Muscowpetung, and Piapot (sirca [sic] 1976). It is with regret that similar action cannot be carried through to negotiate and settle present important issues and concerns of the Bands.
>
> In discussion with Chief Delorme, this action leaves the Bands little avenue except to follow through with the legal route. Eventually the issues will be resolved, however our attempts at establishing a working relationship towards resolution of our concerns will be delayed.
>
> One question here is: since you state that you "have no authority to enter in negotiations on discussions with Bands", how do you expect to gain legal permission to enter the Reserves without permission from the Bands? You are aware that two of your Dams are situated on Reserves and the process by which the Indian land access was achieved is under research at this time. The Bands will be developing a legal position with respect [to this] very soon. Their legal rights with respect to land and the process for gaining access to an[d] acquiring land under the Indian Act will have to be reviewed.
>
> Given the above facts you can understand QVIDA's interest in attempting to resolve this longstanding issue since 1940's, consequently QVIDA will continue overtures to the responsible Departments for discussions and settlement.[387]

In response to Chief Cyr's query about the way the PFRA expected to gain access without permission from the Bands, Hill stated on October 29, 1985:

> Our view on this matter is that settlements have been effected on all outstanding flood damage claims arising from PFRA's construction activities in the Qu'Appelle Valley. As a result of your continued requests to negotiate other issues and concerns with PFRA, it appears that our respective positions on these matters will not be reconciled.
>
> In addition, may I advise that our Engineering Service, upon re-evaluating all available technical data relating to the structure, have determined that the Crooked Lake Project need not be implemented at this time. Therefore, the request for right of entry dated July 10, 1985, and submitted to Chief Henry Delorme and the Cowessess Band Council is hereby withdrawn. *However, since the structure itself is not situated on Reserve land, any future rehabilitation thereof will be undertaken on land controlled by Canada (PFRA).*[388]

387 Chief Lindsay Cyr, President, QVIDA, to Harry M. Hill, Director General, PFRA, Department of Agriculture, September 23, 1985, DIAND file E4320-9, vol. E4 (ICC Documents, pp. 1301-02).

388 Harry M. Hill, Director General, PFRA, Department of Agriculture, to Chief Lindsay Cyr, President, QVIDA, October 29, 1985, DIAND file E4320-9, vol. 4 (ICC Documents, p. 1303). Emphasis added.

This response stirred controversy within both QVIDA and Indian Affairs, each of which believed that at least the south end of the Crooked Lake dam sat on the Cowessess reserve.[389] Chief Cyr's response was not long in coming:

> 1. Our official position is that settlements have *not* been made with respect to any of the flood damage claims arising from P.F.R.A.'s construction activity in the Qu'Appelle Valley. We are in fact in the process of submitting a claim to the "Office of Native Claims" on land damaged and alienated as a result of the said flooding.
>
> We do not want any further initiatives to be taken by your Department until this matter has been fully resolved.
>
> 2. We also take issue with your statement that [the] Crooked Lake Structure is not situated on Reserve lands. Our position is that the structure is on the Cowessess Reserve and therefore cannot be modified without the consent of the Band Council.[390]

A.J. Gross, by this time Indian Affairs' Director of Reserves and Trusts for the Saskatchewan Region, also pressed Hill for clarification.[391] Hill replied that those portions of the dam situated on the bed of the Qu'Appelle River belonged to the Province of Saskatchewan as the owner of the bed. He also provided Gross with copies of the documentation illustrating that the PFRA had paid for the damsite areas on the Cowessess and Ochapowace reserves, but that, on advice from the Department of Justice, title had never been transferred to the Minister of Agriculture.[392]

At this point, QVIDA was advised by its solicitors that its claims were facing a statutory limitations problem and that steps had to be taken immediately to submit a claim to the federal government.[393] A historical and legal statement of the claim entitled "Qu'Appelle Valley Indian Development Authority Land

389 Lloyd J. Sparvier, Land Management Officer, Yorkton District, Department of Indian and Northern Affairs, to A.J. Gross, Director, Reserves and Trusts, Saskatchewan Region, Department of Indian and Northern Affairs, November 16, 1985, DIAND file E4025-6-361 (ICC Documents, p. 1304).

390 Chief Lindsay Cyr, President, QVIDA, to Harry M. Hill, Director General, PFRA, Department of Agriculture, November 21, 1985, DIAND file E4320-9, vol. E4 (ICC Documents, p. 1305).

391 A.J. Gross, Director, Reserves and Trusts, Saskatchewan Region, Department of Indian and Northern Affairs, to Harry M. Hill, Director General, PFRA, Department of Agriculture, November 21, 1985, DIAND file E4320-9, vol. E4 (ICC Documents, p. 1307).

392 Harry M. Hill, Director General, PFRA, Department of Agriculture, to A.J. Gross, Director, Reserves and Trusts, Saskatchewan Region, Department of Indian and Northern Affairs, December 18, 1985, DIAND file E4025-6-361 (ICC Documents, pp. 1309-10).

393 Chief Lindsay Cyr, President, QVIDA, to David Crombie, Minister, Department of Indian and Northern Affairs, May 27, 1986, DIAND file BW8260/SK8552-C1, vol. 2 (ICC Documents, p. 1324).

Claim" was prepared on QVIDA's behalf by 116782 Canada Ltd.[394] At least seven of the Bands issued new Band Council Resolutions approving submission of the "specific claim for compensation arising from the illegal alienation and flooding" of the reserves.[395] Perhaps the most critical fact at this time, however, was that QVIDA ran into financial difficulties and was forced to seek additional funding to press its claims.[396] Indian Affairs Minister McKnight advised Chief Cyr that, although QVIDA had received considerable direct funding in the past and might receive additional funding through Indian Affairs' regional office pending acceptance of the claim for negotiation, it should seek other sources of funding, such as the Bands themselves or other agencies already receiving government funding.[397]

By October 1, 1986, QVIDA had supplied the historical documents supporting its claim to Indian Affairs, and Berg directed the preparation of a document summary prior to forwarding the claim to the Department of Justice for legal review.[398] A year later, the process of reviewing the claim was well under way, but the results were not favourable to the Bands. With regard to three western Bands that had participated in the 1977 settlement, Acting Senior Claims Analyst Barbara Wilgress noted with regard to the work done by the PFRA's Caligiuri:

> A. Mr. Caligiuri of PFRA outlined the following criteria used by PFRA in calculating *in 1977* compensation paid the 3 bands at that time:

394 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986 (ICC Exhibit 5).

395 Pasqua Band, Band Council Resolution, May 1, 1986, DIAND file E4320-9, vol. 6 (ICC Documents, p. 1318); Ochapowace Band, Band Council Resolution, undated [circa May 1, 1986], DIAND file E4320-9, vol. 6 (ICC Documents, p. 1319); Kahkewistahaw Band, Band Council Resolution, May 6, 1986, DIAND file E4320-9, vol. 6 (ICC Documents, p. 1320); Cowessess Band, Band Council Resolution, May 8, 1986, DIAND file E4320-9, vol. 6 (ICC Documents, p. 1321); Muscowpetung Band, Band Council Resolution, May 22, 1986, DIAND file E4320-9, vol. 6 (ICC Documents, p. 1322); Piapot Band, Band Council Resolution, May 27, 1986, DIAND file E4320-9, vol. 6 (ICC Documents, p. 1323); Sakimay Band, Band Council Resolution, June 12, 1986, DIAND file E4025-6-364 (ICC Documents, p. 1325).

396 A.J. Gross, Director, Reserves and Trusts, Saskatchewan Region, Department of Indian and Northern Affairs, to Chief Lindsay Cyr, President, QVIDA, March 26, 1986, DIAND file E4320-9, vol. 6 (ICC Documents, p. 1317); Chief Lindsay Cyr, President, QVIDA, to David Crombie, Minister, Department of Indian and Northern Affairs, May 27, 1986, DIAND file BW8260/SK8552-C1, vol. 2 (ICC Documents, p. 1324); Rodney Soonias, Barrister & Solicitor, to Bill McKnight, Minister, Department of Indian and Northern Affairs, July 11, 1986, DIAND file BW8260/SK8552-C1, vol. 2 (ICC Documents, p. 1326); Minutes of QVIDA meeting, August 21, 1986, DIAND file BW8260/SK8552-C1, vol. 2 (ICC Documents, pp. 1327-29); Chief Lindsay Cyr, President, QVIDA, to Rem Westland, Director, Specific Claims Branch, Department of Indian and Northern Affairs, January 18, 1988 (ICC Documents, pp. 1340-44).

397 Bill McKnight, Minister, Department of Indian and Northern Affairs, to Chief Lindsay Cyr, President, QVIDA, October 16, 1986, DIAND file E-4320-9, vol. 6 (ICC Documents, pp. 1334-36).

398 Richard Berg, Senior Claims Analyst, Specific Claims Branch, Office of Native Claims, Department of Indian and Northern Affairs, to Chief Lindsay Cyr, President, QVIDA, October 1, 1986 (ICC Documents, pp. 1332-33).

1. Revenues foregone (i.e. that could have pertained if the land had not been flooded);
2. Revenues due "forever" (i.e. as if the land were leased "forever")
3. Delay in making payment

B. He indicated that the land valuations in 1941 were done by a PFRA engineer, and the $ value per acre of compensation paid by PFRA to non-Indians established by him. The engineer's valuation had been the basis, or first step, in the 1977 calculation of what had to be paid to the Indians. It came to about $17,000. *The three bands had, therefore, received a monumentally generous amount in settlement.*[399]

Three weeks later, Wilgress informed Chief Cyr that "[t]he record of events respecting the compensations previously paid is such that Mr. Westland greatly doubts that the QVIDA claim is strong enough to merit a presentation to the Department of Justice."[400]

Finally, in November 1992, after three years of inactivity on the claim, Carol Cosco of Specific Claims West advised Chief Cyr that QVIDA's file was being closed, subject to being reopened when QVIDA was ready to resubmit its claim.[401] There is no evidence of any further progress on the claim until QVIDA decided to commence the present inquiry before the Commission in September 1994.[402]

We now turn to the legal issues arising in this inquiry by virtue of the foregoing historical background.

399 Note to file, Barbara Wilgress, Acting Senior Claims Analyst/Assistant Negotiator, Specific Claims Branch, Department of Indian and Northern Affairs, December 22, 1987, DIAND file BW8260/SK8552-C1, vol. 2 (ICC Documents, p. 1337). It should be noted that the reference to the land valuations in 1941 "done by a PFRA engineer" obviously relates to Fetterly, who was clearly *not* with the PFRA.

400 Barbara Wilgress, Acting Senior Claims Analyst/Assistant Negotiator, Specific Claims Branch, Department of Indian and Northern Affairs, to Chief Lindsay Cyr, President, QVIDA, January 18, 1988, DIAND file BW8260/SK8552-C1, vol. 2 (ICC Documents, p. 1337).

401 Carol J. Cosco, Claims Analyst, Specific Claims West, Department of Indian and Northern Affairs, to Chief Lindsay Cyr, President, QVIDA, November 5, 1992, DIAND file BW8260/SK8552-C1, vol. 2 (ICC Documents, p. 1349).

402 Matthew Bellegarde, Claims and Policy Development Officer, Federation of Saskatchewan Indian Nations, to Kim Fullerton, Commission Counsel, Indian Claims Commission, October 11, 1994, enclosing Qu'Appelle Valley Indian Development Authority Record of Decision, September 12, 1994, with respect to a request by Chief Mel Isnana, Standing Buffalo, Chief Todd Peigan, Pasqua, Chief Eugene Anaquod, Muscowpetung, and Chief Joe Fourhorns, Piapot, to have the Indian Claims Commission carry out an inquiry into Canada's rejection of the QVIDA claim; Angela Delorme, Executive Secretary, Yorkton Tribal Council, to Kim Fullerton, Commission Counsel, Indian Claims Commission, October 26, 1994, enclosing Qu'Appelle Valley Indian Development Authority Record of Decision, September 12, 1994, with respect to a request by Chief Louis Taypotat, Kahkewistahaw, Chief Denton George, Ochapowace, Chief Terry Lavallee, Cowessess, and Chief Lindsay Kaye, Sakimay, to have the Indian Claims Commission carry out an inquiry into Canada's rejection of the QVIDA claim.

# PART III

## ISSUES

The broad question before the Indian Claims Commission in this inquiry is whether the claims of the participating QVIDA First Nations disclose a breach of the Crown's "lawful obligations" to the First Nations under the Specific Claims Policy. In answering this question, the Commission must determine whether, based on the evidence and submissions, these claims were properly rejected by Canada.

Canada and the participating QVIDA First Nations have agreed that, to assess the claims properly, the Commission must consider the following five issues:

1 Could the Crown authorize the PFRA under section 34 of the *Indian Act*, 1927, to use and occupy reserve lands for flooding purposes? If so, was the PFRA so authorized? If not, did Canada breach its fiduciary obligations to the QVIDA First Nations by failing to obtain proper authorization under the Act?

2 If Canada could and did properly authorize the PFRA under section 34 of the *Indian Act*, 1927, to use and occupy reserve lands for flooding purposes, did the Crown nevertheless have a fiduciary obligation to consult or otherwise consider the best interests of the QVIDA First Nations before proceeding?

3 Did the terms of Treaty 4 preclude the Crown from relying on section 34 of the *Indian Act*, 1927, or otherwise require the consent of the QVIDA First Nations to authorize the PFRA to use and occupy reserve lands for flooding purposes?

4 Did the Band Council Resolutions signed by the Pasqua, Standing Buffalo, and Muscowpetung First Nations in the 1970s effectively release the Crown

and the PFRA from all past, present, and future claims for damage caused by the Echo Lake control structure built in the 1940s?

5 Did those QVIDA First Nations with reserves adjacent to or on both sides of the Qu'Appelle River and lakes have common law riparian water rights, including rights to the river beds? If so, did the Crown have an obligation to ensure that these water rights were protected under the *North-West Irrigation Act*, 1894, and the *Dominion Power Act*, and to act in the First Nations' best interests when those rights might be affected? Moreover, did the Crown act in the best interests of the QVIDA First Nations when it authorized the PFRA to construct control structures that altered the First Nations' riparian interests and caused consequential losses?

The Commission will now consider each of these issues in turn.

# PART IV

## ANALYSIS

### ISSUE 1 SECTION 34 OF THE *INDIAN ACT*, 1927

Could the Crown authorize the PFRA under section 34 of the *Indian Act*, 1927, to use and occupy reserve lands for flooding purposes? If so, was the PFRA so authorized? If not, did Canada breach its fiduciary obligations to the QVIDA First Nations by failing to obtain proper authorization under the Act?

The fundamental premises of Canada's position in relation to this issue are twofold: first, that under section 34 of the 1927 *Indian Act*, it was open to the Superintendent General of Indian Affairs or his delegate to authorize the PFRA to erect control structures on the Qu'Appelle River and thereby flood Indian lands; and, second, that the Superintendent General of Indian Affairs or his delegate actually issued such authorization to the PFRA. QVIDA takes the opposite view on each issue.

Before considering section 34, it is important to point out that, in 1941, alternative means by which Canada might have acquired fee simple or lesser interests in reserve lands for flooding purposes were provided by sections 48 and 51 of the 1927 *Indian Act*. Section 48 comprised the expropriation provision, stating:

> **48.** No portion of any reserve shall be taken for the purpose of any railway, road, public work, or work designed for any public utility *without the consent of the Governor in Council*, but any company or municipal or local authority having statutory power, either Dominion or provincial, for taking or using lands or any interest in lands without the consent of the owner may, *with the consent of the Governor in Council as aforesaid*, and subject to the terms and conditions imposed by such consent, exercise such statutory power with respect to any reserve or portion of a reserve.[403]

403 *Indian Act*, RSC 1927, c. 98, s. 48. Emphasis added.

The requirements for surrenders were set forth in section 51:

> **51.** Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, *unless 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 the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.
>
> 2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.
>
> 3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before any person having authority to take affidavits and having jurisdiction within the place where the oath is administered.
>
> 4. When such assent has been so certified, as aforesaid, *such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.*[404]

It will be seen from the highlighted portions of these sections that an expropriation requires the consent of the Governor in Council, and a surrender requires the consents of both the Governor in Council and the band. Canada acknowledged at an early stage in the planning conferences preceding the inquiry that the facts in this case demonstrate that neither expropriation nor surrender took place with respect to any of the reserves in question.[405] It is therefore necessary for the Commission to consider whether section 34 formed a valid means by which the PFRA could be authorized to flood Indian lands and, if so, whether authorization under section 34 was in fact given.

### Interpretation of Section 34

Section 34 of the *Indian Act*, 1927, states:

> **34.** No person, or Indian other than an Indian of the band, shall *without the authority of the Superintendent General*, reside or hunt upon, occupy or use any

404 *Indian Act*, RSC 1927, c. 98, s. 51. Emphasis added.

405 Indian Claims Commission, "Summary, Indian Claims Commission [4th] Planning Conference, Qu'Appelle Valley Indian Development Authority," April 3, 1996, p. 5.

land or marsh or reside upon or occupy any road, or allowance for road, running through any reserve or belonging to or occupied by such band.

2. All deeds, leases, contracts, agreements or instruments of whatsoever kind made, entered into, or consented to by any Indian, purporting to permit persons or Indians other than Indians of the band to reside or hunt upon such reserve, or to occupy or use any portion thereof, shall be void.[406]

In their submissions, the parties have addressed the following issues that arise out of their differing interpretations of section 34:

- Is the PFRA a "person" under section 34?
- Does section 34 permit the occupation or use of reserve lands for flooding purposes?

In light of the Commission's findings in relation to the latter issue, we do not find it necessary to deal with the question of whether the PFRA is a "person" under section 34.

As to whether section 34 permits the occupation or use of reserve lands for flooding purposes, this simple statement of the issue belies the complexity of its substance. The first question that the issue raises is whether section 34 is intended to be a *permitting* or *enabling* provision at all, or whether it is merely intended to *prohibit* trespass. Assuming that section 34 *is* an enabling provision, the second question is whether the occupation or use of reserve lands for flooding purposes represents a disposition of reserve lands that is beyond the ambit of section 34 in any event.

### *Permission or Prohibition*

The QVIDA First Nations submit that the fundamental purpose of section 34 was to prohibit trespasses by non-members of a band on Indian reserves belonging to that band. The means by which a non-member could avoid being in trespass while on a reserve was to be there under the authority of the Superintendent General, since section 34 contemplates that no person is to reside, hunt upon, occupy, or use reserve land "*without* the authority of the Superintendent General." However, since the section is framed in the negative, the positive right to be on the reserve, according to the First Nations, must be found in other sections of the Act. As counsel stated:

406 *Indian Act*, RSC 1927, c. 98, s. 34. Emphasis added.

> Section 34 *prohibits* a trespass, it doesn't *permit* a trespass. In order to avoid a trespass a person under the *Indian Act*, the 1927 *Indian Act*, had to obtain authority to be on a reserve, and that is pursuant to other provisions of the *Indian Act*. In other words, you don't look to section 34 for permission to trespass on the reserve, you look to other authorities under the Act which permitted them to be on the land.
>
> Section 34 provides that unless you have authority from the Superintendent General no person other than an Indian or of a band can reside on the reserve or use and occupy the reserve. Persons receiving this type of authority from the Superintendent General would have to do it under other provisions of the Act, not under section 34.[407]

Canada asserts that section 34 was an *enabling* provision that provided a separate source of authorization for non-members of a band to be on that band's reserve.

In the final analysis, however, we do not believe that it is necessary for the Commission to decide in the context of this inquiry whether section 34 comprises an independent enabling provision. As will be seen, counsel for Canada argues that section 34 is the legislative forerunner of the present subsection 28(2) and should be interpreted consistently with the jurisprudence that has considered the meaning and scope of the later provision. Without deciding the issue, we are prepared to assume for the moment that section 34, like subsection 28(2), is an enabling provision for the purpose of considering whether Canada properly authorized the PFRA to use and occupy reserve lands in the Qu'Appelle Valley for flooding purposes.

### *Nature of the Disposition to the PFRA*

The QVIDA First Nations submit that, even if section 34 of the 1927 *Indian Act* conferred an independent basis for Canada to authorize encroachment on Indian reserves, Parliament did not intend to permit "permanent" flooding to be authorized under that provision:

> [I]t is submitted that the flooding of the reserve lands is not the type of occupation and use of reserve lands contemplated under section 34. The permanent flooding and alienation of reserve lands cannot be taken in *ejusdem generis* with the particular words under section 34. The types of uses of land contemplated under section 34 ("reside or hunt upon", "occupy or use land or marsh" or "roads"), are of a transitory or at least a non-permanent nature. In contrast, the flooding of certain reserve lands appears to be permanent. The flooded reserves cannot be used by the First Nations. They have been as effectively removed from their reserve land base as if they

407 ICC Transcript, June 26, 1997, p. 68 (David Knoll). Emphasis added.

> had been alienated to a private third party through the surrender or expropriation provisions. Therefore, the claimants submit that section 34 does not contemplate the permanent alienation of land and that if such permanent alienation were to be legally permitted it would have to be made in accordance with the surrender or expropriation provisions of the 1927 *Act*, not under section 34.[408]

For its part, Canada contended that the flooding of reserve lands in this case did not constitute a permanent alienation requiring an expropriation or surrender. In taking this position, Canada relied on the reasons of the Supreme Court of Canada in *Opetchesaht Indian Band v. Canada*,[409] a decision issued on May 22, 1997, shortly after the First Nations in the present case had submitted their written argument.

In *Opetchesaht*, the Crown in 1959, with the consent of the Band Council, granted the British Columbia Hydro and Power Authority (Hydro) a right of way for an electric power transmission line across the Band's reserve to convey electricity to consumers off the reserve. The agreement provided for the right of way to comprise an area 150 feet wide over 7.87 acres of the reserve (approximately 2.5 per cent of the reserve land base) "for such a period of time as the said right of way is required for the purpose of" the transmission line. The total consideration paid to the Band was a single payment of $125 per acre for the land included in the right of way. There was no evidence that the Band was paid less than fair market value.

The right of way was granted by means of a permit issued under subsection 28(2) of the *Indian Act*, which states:

> **28.**(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

The permit gave Hydro "the rights to construct, operate and maintain an electric power transmission line" and the exclusive right to occupy the portions of the surface of the reserve where poles were erected and that part of the air space where the wires were strung. The Band retained the right to use and occupy the balance of the right-of-way area, subject to specified restrictions. It should be noted that the right of way was granted only after "protracted" bargaining among Hydro, the Crown, and the Band, "with a variety

408 Submission on Behalf of the QVIDA First Nations, May 5, 1997, p. 46.
409 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file No. 24161).

of proposals from each side, including yearly rental payments for a term of 20 years, free electricity for members of the Band, various offers on a per acre value, as well as expropriation under s. 35 of the *Indian Act*."[410]

In the late 1980s, the Band chose to develop its reserve, with the proposed improvements to include a private road, a reservoir access road, and a drainage ditch located within Hydro's right of way. Hydro offered to consent to the construction, provided, among other things, that the Band would agree to take responsibility for any lost generation of power to third parties, submit to Hydro's safety and construction concerns, and not interfere with Hydro's use of the right of way.[411]

In 1992, the Band applied to the Supreme Court of British Columbia for a declaration that the permit was void and unenforceable, claiming that section 28(2) did not authorize the grant of a right of way for electric power transmission lines over the reserve for an indefinite period of time. The relief sought also included an order for possession of the right of way lands and an award of damages for trespass. Lander J allowed the application, but the Court of Appeal set aside the judgment, concluding that subsection 28(2) allowed grants of interests for periods having no predetermined termination date.

The Supreme Court of Canada dismissed the appeal, but split 7-2 on the question of whether the permit in that case was properly issued under subsection 28(2). On behalf of the majority, Major J determined that there were three issues to be determined:

> First, it is necessary to identify the nature and scope of the rights granted by the permit; second, whether the termination of the permit is defined by the happening of a reasonably ascertainable event; and finally, whether the permit constitutes a "sale, alienation, lease, or other disposition" under s. 37 of the *Indian Act* rather than a grant of rights under s. 28(2).[412]

He then made the following findings:

- The permit comprised a statutory right of way or easement, and Hydro's rights in the land were not exclusive. As Major J noted:

410 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file No. 24161), p. 3, Major J.
411 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 6, Major J.
412 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 8, Major J.

> The respondent Hydro can only use the land for the power transmission line and related maintenance purposes and the appellant Band retains the right to use the right-of-way. The Band's ability to use the land is restricted only in that they cannot erect buildings on it or interfere with the respondent Hydro's easement. *Both Hydro and the Band share use of the right-of-way.*[413]

- The right of way was granted for an indeterminate period. Although it was unknown exactly *when* Hydro's rights would terminate, it was clear that the right of way *would* terminate when it was no longer required for a transmission line. That point in time would not be at the sole discretion of Hydro, but rather would be at that "justiciable" moment when the line was objectively no longer required.[414]
- The phrase "any longer period" in subsection 28(2) can be measured either by dates or events. Its end date "need not be defined in terms of a specific calendar date as long as it is ascertainable," in which case the grant will not be considered to be in perpetuity. Major J included this caution, however:

> There could be a grant where the terminable event is so remote and uncertain that the period is, in fact, perpetual. That would be a matter of fact in the particular case.[415]

- As to whether a surrender under section 37 was the more appropriate means of disposing of the interest in land, Major J stated that "surrenders are required *as a general rule* not only when the Indian band is releasing all its interest in the reserve forever, but whenever any interest is given up for any duration of time."[416] Section 37 states:

> 37. Except where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart.[417]

However, Major J concluded that the voluntary disposition of an interest in Indian reserves is not limited to surrender:

413 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 10, Major J. Emphasis added.
414 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), pp. 11-12, Major J.
415 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 14, Major J.
416 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 16, Major J. Emphasis added.
417 *Indian Act*, RSC 1952, c. 149, s. 37.

Also apparent on the face of s. 37 from the qualification at the beginning of s. 37 is the legislative intention that it operate *in conjunction with and subject to* other provisions of the *Indian Act*. There is in this qualification an express recognition that other provisions of the *Indian Act* also deal with sales, alienations, leases or other dispositions of lands in a reserve. . . .

The practice of the Minister demonstrates that in his view, some sections of the *Indian Act* could be used interchangeably depending on the circumstances. The Agreed Statement of Facts dated May 16, 1996, illustrates that the practice which occurred in Canada after the 1956 amendments to the *Indian Act* was to grant power line rights of way across reserve lands both by way of surrender and conveyance (s. 37), expropriation (s. 35) and by permit (s. 28(2)). . . .

The question is whether the permit was properly granted under s. 28(2). Perhaps the easement in the permit could have been granted under s. 37, but that section must be read subject to other provisions in the *Indian Act*. *The proper question is to decide the circumstances in which s. 28(2) could not apply, the default provision being the general rule in s. 37 against alienation without a surrender.*

In my view, s. 28(2) cannot apply any time a portion of the Indian interest in any portion of reserve land is permanently disposed of. . . .

In the instant case, the respondent Hydro was accorded limited rights of occupation and use *for an indeterminate but determinable and ascertainable period of time. There was no permanent disposition of any Indian interest. Furthermore, the Band and Hydro were obligated to share the rights of use and occupation of the land*, with the limited exceptions of the area of ground giving support to the poles and the air space occupied by the poles. Consequently, the surrender requirement of s. 37 does not apply to the present permit and more importantly, no rights exceeding those authorized by s. 28(2) were granted. The indeterminate easement granted on the face of this permit is a disposition of a limited interest in land that does not last forever.

Surely it was intended that the band council could at least have the right to grant that type of easement. Surrender involves a serious abdication of the Indian interest in land and gives rise to both a broad discretion and an equally onerous fiduciary obligation on the Crown to deal with the Indian lands thus surrendered. The case law establishes that in the case of an unconditional and absolute surrender the Indian interest in land actually *disappears*. . . .[418]

Major J further considered whether the permit granted under section 28(2) should be struck down on policy grounds:

The remaining question is whether the grant of rights for an indeterminate period conflicts with the policy of prohibiting use of reserve land by third parties absent approval of the Minister and the band. This leads to a consideration of the policy

418 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), pp. 17-20, Major J. Emphasis added.

behind the rule of general inalienability. Both the common law and the *Indian Act* guard against the erosion of the native land base through conveyances by individual band members or by any group of members. Government approval, either by way of the Governor in Council (surrender) or that of the Minister, is required to guard against exploitation: *Blueberry River Indian Band, supra*, at p. 370, *per* McLachlin J.

On the other hand, the *Indian Act* also seeks to allow bands a degree of autonomy in managing band resources for commercial advantage in the general interest of the band. Collective consent of the Indians, either in the form of a vote by the band membership (surrender) or by a resolution of the band council, is required to ensure that those affected by the transfer assent to it. *The extent to which individual band members participate in the approval process depends on the extent to which the proposed disposition affects individual or communal interests.* In the case of sales, dispositions and long-term leases or alienations permanently disposing of any Indian interest in reserve land, surrender is required, involving the vote of all members of the band. On the other hand in the case of rights of use, occupation or residence for a period of longer than one year, only band council approval is required.

It is important that the band's interest be protected but on the other hand the autonomy of the band in decision making affecting its land and resources must be promoted and respected. These sometimes conflicting values were identified by McLachlin J. in *Blueberry River Indian Band, supra*, at p. 370:

> My view is that the *Indian Act's* provisions for surrender of band reserves strikes [sic] a balance between the two extremes of autonomy and protection.

Gonthier J. at p. 358, speaking for the majority, accepted this principle:

> As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured.

With the twin policies of autonomy and protection in mind, s. 37 and s. 28(2) reflect that, depending on the nature of the rights granted, different levels of autonomy and protection are accorded. Section 37 demonstrates a high degree of protection, in that the approval of the Governor in Council and the vote of all of the members of the band are required. *This indicates that s. 37 applies where significant rights, usually permanent and/or total rights in reserve lands are being transferred.* On the other hand, under s. 28(2), lesser dispositions are contemplated and the interest transferred must be temporary. It is evident from a review of this permit that it does not violate the balance between autonomy and protection struck by the *Indian Act*. This is not a case where surrender, with all of its administrative and legal impositions was required in terms of the overall policy of the *Indian Act*. . . .

This appeal deals with the narrow issue of whether the permit was an indeterminate or perpetual grant of rights in reserve land and whether the provisions of s. 28(2) to grant indeterminate and limited rights violated the overall scheme of the

> *Indian Act*. I have concluded that the grant of limited indeterminate rights in reserve land is permissible under s. 28(2) as a question of law.[419]

In summary, Hydro's right to use the land was not exclusive, and the term of the permit was for a period that, rather than being permanent, was "indeterminate but determinable and ascertainable." Moreover, Major J concluded that a sufficient balance between autonomy and protection would be achieved in the circumstances of the *Opetchesaht* case by leaving the decision-making power in relation to the permit in the hands of the Band Council. Since no permanent disposition was being made and the rights granted were not entirely exclusive, subsection 28(2) *could* apply to grant the interest by means of a permit. This meant that, although it would have been possible to dispose of the interest by invoking the "default" surrender provisions of section 37, it was not necessary to do so. However, Major J acknowledged that, depending on the facts of a given case, a permit's terminating event could be so remote and uncertain that the period would, in fact, be perpetual. Significantly, he concluded that "s. 37 applies where significant rights, usually permanent and/or total rights in reserve lands are being transferred."

On behalf of the minority, McLachlin J agreed that the term of the permit in *Opetchesaht* was not "perpetual" in the sense of being "totally within Hydro's control" or "a span of time which we may predict with certainty will never end."[420] However, she still viewed the term as sufficiently lengthy, and the alienated interest sufficiently important, that the surrender provisions should have been triggered:

> At the same time, however, it must be acknowledged that the easement has the *potential* to continue forever (or at least until the world ends and its continuance becomes academic). In terms relevant to the concerns of the Opetchesaht people, it shows every promise of binding not only the current generation which never agreed to it, but many generations to come. The permit may without exaggeration be characterized as an alienation of reserve lands for an indefinite period, a period which has the potential to extend to future generations of the Opetchesaht people for as far forward as we can see. Is this, we must ask, the type of disposition Parliament intended to allow under the summary procedures of s. 28(2) of the *Indian Act* upon agreement between the Minister and the current band council? Or is it the sort of alienation of interest in land which Parliament sought to safeguard by the surrender and transfer provisions of s. 37 of the Act?

419 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), pp. 21-22, Major J. Emphasis added.

420 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 6, McLachlin J.

> The fact that the band can still use the land in many ways cannot be determinative. The fact is, the band cannot use it in ways it deems important to the welfare of the current generation. It cannot build houses on the land and it cannot put roads or a reservoir on the land. And the problem transcends the needs of this generation. Doubtless future generations of band members will have their own needs and their own proposals for the use of the land. If the respondents are right, the future generations will be precluded from doing so by a decision made by a temporary band council and a minister decades, not inconceivably centuries, before.[421]

McLachlin J considered the phrase "or any longer period" in subsection 28(2) of the *Indian Act* to be ambiguous because it has no single plain meaning. Based on principles of construction of statutes relating to Indians as set forth in cases like *Nowegijick v. The Queen*[422] and *Mitchell v. Peguis Indian Band*,[423] she reasoned that statutory provisions aimed at maintaining Indian rights should be broadly interpreted, whereas provisions aimed at limiting or abrogating such rights should be narrowly construed.[424] Having regard for the balance to be sought in the *Indian Act*'s surrender provisions between the two extremes of autonomy and protection, McLachlin J concluded:

> Section 28 was never intended to deal with major long-term alienations of Indian interests in their reserve lands. It was aimed rather at the short-term, non-exclusive occupant -- the itinerant worker, service provider or agricultural lessee. The phrase "any longer period", consistent with this interpretation, is best understood as a period defined in relatively short terms of months and years. This makes sense in textual terms as well. The phrase "any longer period" relates to the earlier phrase "a period not exceeding one year". This suggests that what Parliament intended by "any longer period" was also a term capable of being expressed in finite calendar terms.
>
> The question arises: how long is the short or temporary use contemplated by s. 28(2)? For the purposes of this case, it is unnecessary to decide this issue; certainly an alienation which has the potential to go on as long as anyone can foresee falls outside the scope of s. 28(2). However, for purposes of guidance in other cases, I would suggest that commitments longer than the two-year mandate of band councils should not be transacted through s. 28(2).
>
> This interpretation is consistent with the policy of the *Royal Proclamation of 1763*, and the principle that the long-term alienation of interests in Indian lands may be effected only through surrender to the Crown and consent of the band member-

421 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), pp. 6-7, McLachlin J.
422 *Nowegijick v. The Queen*, [1983] 1 SCR 29.
423 *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85.
424 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), pp. 8-10, McLachlin J.

> ship as a whole. To accept the views of the respondents in this case is to accept that parties seeking to obtain long-term or indefinite interests in reserve lands short of outright ownership could use the s. 28 permit provisions to circumvent the surrender requirements of the *Indian Act* and proceed to dispose of long-term interests in land with only the consent of the band council. It would be to attribute to Parliament the intention to establish two alternative and inconsistent ways for alienation of major interests in reserve lands -- one strictly limited and regulated under s. 37, the other requiring only the approval of the Minister and the band council. Finally, it would attribute to Parliament the intention to accord the entire band membership the right to decide on alienation under s. 37, while depriving the membership of that power for transfers that may represent equally serious alienations under s. 28(2), and this despite the fact that s. 37 establishes consent of the band members as a condition of alienation not only of outright transfers of land, but of "leases" or other "dispositions". I cannot accept that these were Parliament's intentions.[425]

From the interplay of the majority and minority decisions in *Opetchesaht* – and particularly in light of Justice Major's comment that "s. 37 applies where significant rights, usually permanent and/or total rights in reserve lands are being transferred" – the Commission discerns that the rights conveyed by a specific instrument or transaction must be measured with reference to two sliding scales: one *temporal*, relating to the length of the term and the ascertainability of its termination, and the other *substantive*, relating to the content of the interest granted.

As the ruling in *Opetchesaht* demonstrates, an interest in land or a right to use land can be granted under subsection 28(2) for a considerable period of time if the nature and extent of the interest is not substantial. This statement is, however, subject to the overriding qualification that the full procedural protections of the *Indian Act*'s surrender provisions will apply if the terminating event of the authorization given is so remote and uncertain that the period would, in fact, be perpetual. On the other hand, it can readily be seen that the surrender provisions of the Act might be called for where a substantial interest in land is conveyed, although for a very short period of time. For example, a lease purporting to give a tenant exclusive use of an entire reserve for a period of one year or less, and requiring all resident members of the band to vacate the reserve during the term, might be considered sufficiently onerous that it should be put to a vote of all eligible band members and not just the Band Council. The clear cases would be short-term, minor interests in reserve lands, for which provisions like section 28 of the 1952 *Indian Act*

425 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), pp. 15-17, McLachlin J.

(as amended in 1956) or section 34 of the 1927 statute (still assuming that it is similar in substance to section 28) would suffice, and long-term or permanent dispositions of significant interests, for which surrenders would have to be obtained. The more difficult cases are those like *Opetchesaht* and the present one, in which it becomes necessary to draw the lines to demarcate acceptable dispositions under sections 28 or 34 from those that are not acceptable.

Where the majority and the minority in *Opetchesaht* differed was in where to draw those lines. Major J characterized the interest in that case as a non-exclusive statutory easement within which "Hydro can only use the land for the power transmission line and related maintenance purposes" and "[t]he Band's ability to use the land is restricted only in that they cannot erect buildings on it or interfere with the respondent Hydro's easement."[426] Conversely, McLachlin J focused not on the retained ability of the Band to use the right of way, but instead on the limits that the right of way placed on the Band's freedom to develop the land in a manner of its own choosing for the foreseeable future. Similarly, whereas Major J highlighted the "ascertainable" and "justiciable" termination of the right of way (when it would no longer be required for power transmission purposes) to show that the interest conveyed was not permanent, McLachlin J emphasized that the term was temporary only "in the sense of a span of time which we may predict with certainty will never end."[427]

The Commission has recently had the opportunity to carefully review the *Opetchesaht* case in our inquiry into the flooding claim of the Eel River Bar First Nation.[428] In the Eel River case, the Town of Dalhousie built a dam in 1963 on the Eel River reserve and flooded reserve lands without any specific authority to do so and without compensating the Band until 1970. At that time, following lengthy negotiations with the Band Council, an agreement was reached to transfer administration and control of reserve lands required for a headpond to the New Brunswick Water Authority (NBWA) and to grant an easement to additional lands for a pumping station, pipeline right of way, and access road to maintain the Eel River water supply system. The Band received $15,000 ($130 per acre) for the required land, $25,000 for damages caused by the erection and operation of the dam and water supply system, and a

426 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 10, Major J.
427 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 6, McLachlin J.
428 Indian Claims Commission, *Eel River Bar First Nation Inquiry: Report on Eel River Dam Claim* (Ottawa, December 1997).

one-time payment of $9,591.12 plus annual payments from $10,000 to $27,375 for 20 years based on the quantity of water pumped from the system. In the Eel River Bar inquiry, the First Nation also asserted that valid authority to use and occupy reserve lands could be accomplished only by means of a surrender, and not by using the *Indian Act*'s expropriation and subsection 28(2) permit provisions. The Commission, however, concluded that the use and occupation of reserve land for the pipeline, access road, and pumping station were properly authorized by a permit granted under section 28(2) for a right of way because the nature and extent of the interest granted was not substantial and the permit was for an ascertainable period.

The Commission has had close regard for the following similarities – and significant differences – between the facts in this inquiry and those in *Opetchesaht* and the Eel River Bar inquiry:

- In *Opetchesaht*, the Supreme Court of Canada considered a permit under subsection 28(2) of the 1952 *Indian Act*, whereas in this case we are asked to address the more nebulous rights conferred by section 34 of the 1927 statute. Subsection 28(2) dealt with permits for periods of up to one year, "or any longer period," while section 34 made reference to neither permits nor periods. Moreover, subsection 28(2) contemplates band council consent to the use or occupation of a reserve, whereas section 34 requires the consent of neither a band nor a band council.
- *Opetchesaht* dealt with a linear power line, and the Band retained the right to use the surface of the land, subject to being unable to interfere with or use the land in which Hydro's power poles were anchored or the airspace in which its transmission lines were strung. In this sense, the Supreme Court of Canada concluded that Hydro's use of the land was exclusive, but not substantial. Similarly, in the Eel River Bar inquiry, the Commission found that the NBWA's rights to the access road were not exclusive, and that the rights to use 2.43 acres of reserve land for the pumping station and pipeline right of way were not substantial even though they were essentially exclusive. Based on the limited evidence presented to the Commission in that inquiry, the facts did not disclose that the pumping station and pipeline right of way substantially interfered with the Eel River Bar First Nation's use of its reserve land. Conversely, the nature and extent of the interest granted in the present case was substantial because the QVIDA Bands relinquished a much larger area, although they retained the right to use the surface of those areas not subject to continuous flooding. In this

respect, although the Bands in all three cases were entirely precluded from using certain areas of their reserves, the pivotal difference lies in the *scale* of the Bands' exclusion.

- In *Opetchesaht* and the Eel River Bar inquiry, the Band Councils were involved in the negotiations for the rights of way and consented to the grants. Conversely, the evidence indicates that the QVIDA Bands and their councils were not party to either the negotiations undertaken or the consent given to the PFRA in the 1940s to flood reserve lands.
- Major J concluded in *Opetchesaht* that the right of way interest acquired in that case was temporary even though the circumstances of its termination were unforeseen and speculative:

> The permit provides that the respondent Hydro is entitled to use the reserve lands in question for as long as it requires a transmission pole line to pass through the portion of the reserve over which it is currently constructed. It is not difficult to imagine a number of circumstances in which this requirement would expire. *While all are speculative*, there is the possibility that the generating station at Sproat Falls might be abandoned, that demographic changes in the area might affect the location, size and requirement of the transmission poles. More remote is the possibility of electricity being replaced by another energy source. It is obvious that technology has affected the way we live in ways that were earlier unimaginable. The example of the Canadian experience with the railways is apposite. Even 50 years ago, this country's railroads appeared to be a permanent fact of Canadian travel and transportation. Today, we have seen many railway lines abandoned in favour of airlines and highways.[429]

In the Eel River Bar inquiry, the Commission concluded that the grant of the right of way to the NBWA was for an indeterminate but readily ascertainable period of time, and therefore we considered that case to fall squarely within the reasons of the Supreme Court of Canada in *Opetchesaht*. In the present case, it will be difficult to forecast the termination of use of reserve lands for the control structures on the Qu'Appelle River as long as irrigation is required to make lands serviced by the dams arable. Moreover, the dams also serve as flood control structures and regulate the water levels in the Qu'Appelle Valley for the benefit of residential and recreational uses that have developed along the shorelines. The dams have thus become multi-use structures, and we have no hesitation in concluding that, although the initial pri-

429 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 11, Major J.

> mary use of the dams – and perhaps the only recognized permissible use under the PFRA's governing legislation – was irrigation, it was clearly foreseen at the time of their construction that they would serve other needs. By way of contrast, we can see no alternative uses for the transmission lines in *Opetchesaht* other than as transmission lines. For this reason, although Major J was prepared to concede that the termination of use of the transmission lines in that case was speculative and unforeseen, we find the termination of use of the control structures in this case to be even more speculative, remote, and unlikely, if such is possible.

Canada takes the position that the general statements by Major J with regard to the interplay between the various provisions of the *Indian Act* illuminate the applicability of section 34 to this case, since they demonstrate that the surrender provisions are not the only way to convey a relatively long-lasting right over reserve lands. The test set out by Major J, according to counsel, is "to decide the circumstances in which s. 28(2) [in this case, section 34] could not apply, the default provision being the general rule in s. 37 [section 50 of the 1927 *Indian Act*] against alienation without a surrender."[430]

Can section 34 apply in this case? We do not think so. In deciding this question, we believe it is necessary to look at the terms of the authorization granted to the PFRA to use and occupy reserve lands for flooding purposes. We agree with Canada's submission that, assuming section 34 and subsection 28(2) are parallel provisions, any authorization granted pursuant to section 34 would have to be subject to at least the same limitations as a permit issued under subsection 28(2). That is, to the extent that the terminating event of the authorization is so remote and uncertain that the period would, in fact, be perpetual, the authorization would not be permitted under section 34 and the surrender provisions would apply by way of default. Likewise, where the nature and extent of the interest granted is sufficiently substantial, section 34 cannot apply.

By Canada's own admission, the authorization in this case, assuming that it was granted, was given *implicitly* rather than *explicitly*, and we cannot point to any specific period for which it was granted. Therefore, we can only conclude that, assuming authorization was given, the term of that authorization,

430 Submission on Behalf of the Government of Canada, June 6, 1997, p. 38.

by necessary implication, and having regard for the PFRA's mandate, must have been for such period as the dams would be required for irrigation purposes. If we look only to this use and not to other uses for the dams that have since arisen, we cannot conclude that the use in this case is any more permanent than the uses in *Opetchesaht* or the Eel River Bar inquiry. If we are permitted to consider flood control, as well as residential and recreational purposes, we would then consider the use in this case to be more permanent.

The more telling features of this case, however, are the *exclusivity* and *extent* of the PFRA's use of the continuously flooded areas. The transmission lines in *Opetchesaht* were linear but, in the view of the minority, they nevertheless had a significant effect on the Band's ability to use the right of way and its remaining land.

In the present case, by way of contrast, we are faced with large areas of land that, except in periods of extended drought, are more or less continuously flooded, and are thereby rendered completely useless to the QVIDA First Nations. The PFRA must be considered to have exclusive use of these areas. Other large areas are subject to flooding only at certain times of year, or are less frequently inundated. There is some evidence before the Commission to suggest that some of these lands may actually benefit from being occasionally flooded, while other areas may be sufficiently saturated to be unfit for haying or other purposes. The exclusivity of the PFRA's use will depend on the capacity of these lands to be used for other purposes notwithstanding being under water from time to time. The point is that, unlike the *Opetchesaht* and Eel River cases, in this case there are large areas of land involved, and much of the land is *completely unavailable* to the First Nations *all of the time*. Moreover, in this case the flooded lands were of considerable economic, cultural, and social value to the Bands, as the evidence of the elders demonstrated. In our view, these are the features that distinguish the QVIDA First Nations from the Opetchesaht Band and the Eel River Bar First Nation, and that lead us to the conclusion that, in this case, section 34 was not an appropriate vehicle for authorizing the use and occupation of reserve lands for flooding purposes.

Moreover, the fact that section 34 contemplates the consent of neither a band nor a band council justifies, in our view, a more restrictive interpretation being placed on section 34 than on subsection 28(2). The fact that the Band Council *consented* to the disposition of the right of way in *Opetchesaht* played a significant role in shaping the decision of the majority in that case.

As the Supreme Court of Canada concluded in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*,[431] the underlying scheme and purpose of the *Indian Act* is to maintain intact for bands of Indians the reserves set apart for them. Therefore, in cases involving surrenders, the consent of both the band and the Crown is required, for the following reasons set forth by McLachlin J:

> 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.
>
> As Dickson J. characterized it in *Guerin* [*v. The Queen*[432]] (at p. 383):
>
> > The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.
>
> It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if 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.[433]

Gonthier J wrote in similar terms:

> As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured.[434]

In *Opetchesaht*, Major J extended these principles to dispositions by way of permit under subsection 28(2):

---

431 *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development) et al.*, [1988] 1 CNLR 73, 14 FTR 161 (TD); appeal and cross-appeal dismissed in *Apsassin v. Canada*, [1993] 3 FC 28, 100 DLR (4th) 504, 151 NR 241, [1993] 2 CNLR 20 (FCA); appeal and cross-appeal allowed in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25, 130 DLR (4th) 193 (SCC). This case is subsequently referred to in the text of this report as *Apsassin*.

432 *Guerin v. The Queen*, [1985] 1 CNLR 120 (SCC).

433 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 (SCC) at 370-71 (SCR), McLachlin J.

434 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 (SCC) at 358 (SCR), Gonthier J.

> This leads to a consideration of the policy behind the rule of general inalienability. Both the common law and the *Indian Act* guard against the erosion of the native land base through conveyances by individual band members or by any group of members. Government approval, either by way of the Governor in Council (surrender) or that of the Minister, is required to guard against exploitation. . . .
>
> On the other hand, the *Indian Act* also seeks to allow bands a degree of autonomy in managing band resources for commercial advantage in the general interest of the band. Collective consent of the Indians, either in the form of a vote by the band membership (surrender) or by a resolution of the band council, is required to ensure that those affected by the transfer assent to it. The extent to which individual band members participate in the approval process depends on the extent to which the proposed disposition affects individual or communal interests. In the case of sales, dispositions and long-term leases or alienations permanently disposing of any Indian interest in reserve land, surrender is required, involving the vote of all members of the band. On the other hand in the case of rights of use, occupation or residence for a period of longer than one year, only band council approval is required.
>
> *It is important that the band's interest be protected but on the other hand the autonomy of the band in decision making affecting its land and resources must be promoted and respected.*[435]

If the underlying purpose and scheme of the *Indian Act* is to guard against the erosion of the Indian land base, and if the autonomy of Indians with respect to the disposition of reserve lands is to be honoured and respected in the manner suggested in *Apsassin* and *Opetchesaht*, can section 34(1) be used by the Crown unilaterally to grant an interest in land as intrusive and long term as flooding without any autonomous Indian approval of such a grant by an Indian band or its members? We think not. Given the dual policies of autonomy and protection identified in *Apsassin* and *Opetchesaht*, we can only conclude that any rights that could have been authorized by the Superintendent General under section 34 must have been even more limited than the interests available for disposition under subsection 28(2). To repeat the words of Major J, "[t]he extent to which individual band members participate in the approval process depends on the extent to which the proposed disposition affects individual or communal interests." It follows that, if neither band members nor band council participate in the approval process, the extent to which the proposed disposition can affect individual or communal interests should be very limited indeed. To find otherwise would permit ready circumvention of the surrender and expropriation processes of the

435 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), pp. 21-22, Major J. Emphasis added.

*Indian Act*, and would seriously compromise the autonomy of a band in dealing with its reserve lands.

That being said, we might be prepared to conclude that an authority or permit issued pursuant to section 34 of the 1927 *Indian Act* or subsection 28(2) of later Acts would be sufficient to authorize occasional and perhaps even beneficial flooding of those areas of the reserves that remain available to the First Nations for haying or other purposes. Such a conclusion would not solve Canada's problem in this case, since the large areas of land that are *continuously* flooded – the areas that are obviously most critical to the ongoing operation of the structures – would still not fall within the scope of the subsection. However, it might reduce the quantum of compensation payable if it can be demonstrated that certain lands have benefited, or at least not been adversely affected, and have thus remained available for productive use. As we have not been asked to comment on quantification issues in this inquiry, we will not comment further on this subject at this time.

**Actual Authorization**

In the written and oral submissions before the Commission, counsel for the parties addressed the issues of (a) whether the Deputy Minister of Mines and Resources, the Director of the Indian Affairs Branch, and the Acting Director of the Branch were appropriate statutory delegates of the Superintendent General of Indian Affairs in relation to his power to authorize the use and occupation of reserve lands for flooding purposes; and (b) whether such authorization was *actually*, if only *impliedly*, given to the PFRA by one of those statutory delegates. However, having concluded that it was not open to Canada to rely on section 34 to authorize the use and occupation of reserve lands for flooding purposes, the Commission is not required to answer these questions.

It should be noted that Canada, by its own admission, concedes that no authorization, express or implied, was ever given to flood land on the Standing Buffalo reserve. The evidence clearly shows that no one contemplated that any portion of the Standing Buffalo reserve would be affected by the project. For this reason, we cannot conclude that Indian Affairs acquiesced in the use and occupation of these lands, and accordingly we find that, even if authority to encroach could have been granted under section 34, no such authority was given. In short, Canada trespassed on the flooded portions of the Standing Buffalo reserve from the early 1940s until at least 1977 – and

perhaps longer, depending on our analysis below in relation to the 1977 Band Council Resolutions.

With regard to the remaining five Bands that are party to this inquiry, while Indian Affairs *may* have authorized the PFRA to use and occupy reserve lands for flooding purposes – and we make no finding on this point – such authorization could not be validly given under section 34 of the 1927 *Indian Act*. The result is that, in addition to trespassing on Standing Buffalo's land by virtue of Canada's failure to authorize flooding on that reserve, the PFRA was likewise in trespass on the reserve lands of the Muscowpetung and Pasqua First Nations from the early 1940s to at least 1977, and remains in trespass to this day on the reserve lands of the Cowessess, Ochapowace, and Sakimay First Nations. We will address the question of Canada's continuing presence after 1977 on reserve lands of the three western First Nations later in this report.

## ISSUE 2 CANADA'S FIDUCIARY OBLIGATIONS

If Canada could and did properly authorize the PFRA under section 34 of the *Indian Act*, 1927, to use and occupy reserve lands for flooding purposes, did the Crown nevertheless have a fiduciary obligation to consult or otherwise consider the best interests of the QVIDA First Nations before proceeding?

In framing their case relating to the alleged breaches by Canada of its fiduciary duties in relation to the disposition of the lands flooded by the Qu'Appelle Valley dams, the QVIDA First Nations rely in large measure on the decisions of the Supreme Court of Canada in *Guerin v. The Queen*[436] and *Apsassin*, the findings of the Ontario Court of Appeal in *Chippewas of Kettle and Stony Point v. Canada*,[437] and the recent reports of this Commission regarding the surrender claims of the Kahkewistahaw and Moosomin First Nations.[438] They analogize Canada's duties arising on surrenders of reserve lands to the context of authorized use and occupancy under section 34 of the 1927 *Indian Act*.

In its reports on the Kahkewistahaw and Moosomin inquiries, the Commission analysed pre-surrender breaches of fiduciary obligations in three contexts: where a band's understanding of the surrender is inadequate or the

436 *Guerin v. The Queen*, [1985] 1 CNLR 120 (SCC).
437 *Chippewas of Kettle and Stony Point v. Canada* (1996), 31 OR (3d) 97 (Ont. CA).
438 ICC, *Kahkewistahaw First Nation Report on 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997); ICC, *Moosomin First Nation Report on 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997).

Crown's conduct has tainted the dealings in a manner that makes it unsafe to rely on the band's understanding and intention; where a band has ceded or abnegated its decision-making power to or in favour of the Crown; and where a band's decision to surrender reserve land is foolish or improvident and thus exploitative. With regard to the first of these contexts, the QVIDA First Nations submit:

> The historical evidence in the QVIDA Specific Claim clearly demonstrates that the Crown was in a conflict of interest by purporting to represent the best interests of the First Nations, on one hand, and by assisting PFRA in the construction of the dams on the other hand. The claimants submit that the Crown has failed to establish that the authorization under section 34 was not intended to benefit any one other than PFRA and the Crown itself. The Department in fact has acknowledged that these dams would adversely affect the reserves which would suffer "substantial damage". Accordingly, Canada breached its fiduciary obligation by allowing PFRA to construct the dams which were clearly not in the best interests of the First Nations.[439]

Under section 34 of the 1927 *Indian Act*, there could be no cession or abnegation of decision-making power by the QVIDA Bands because the Superintendent General was clothed with the power to authorize encroachments on reserve lands. Nevertheless, the First Nations argue that, having this discretion, the Superintendent General had a fiduciary obligation to exercise it in their best interests:

> [S]ection 34, at a minimum, imposes upon the Crown, particularly in a situation where it has total discretion to decide on how reserve lands should be "used or occupied", an obligation on its part to act in the First Nations' best interests, and . . . equity will hold a fiduciary to a "strict standard of conduct" and ensure that the power is exercised with "loyalty and care". The claimants submit that Canada has breached its fiduciary duty by having failed to act in the First Nations' best interests by not only failing to have informed them of the dams' construction and its implications but also having proceeded with the section 34 authorization knowing full well that the First Nations' best interests would be adversely affected.[440]

Finally, with regard to whether the authorizations granted to the PFRA in this case amounted to exploitation, the First Nations argue:

439 Submission on Behalf of the QVIDA First Nations, May 5, 1997, p. 51.
440 Submission on Behalf of the QVIDA First Nations, May 5, 1997, pp. 50-51.

> [W]here under the *Act*, the Band has no control, as opposed to a "measure of control" over the alienation of their interests in land, then if there is evidence of exploitation, the *Act* imposes a fiduciary obligation on the Crown to prevent the alienation of their interests in the reserve.
>
> The claimants submit that the flooding of their lands resulted in the permanent disposition of those lands, as well as the destruction of the habitat upon which many of them relied upon [sic] for their livelihood, all without consultation with or approval by the First Nations. This constituted exploitation such that Canada breached its fiduciary obligation by allowing PFRA to flood these lands knowing that adverse consequences would result.[441]

For its part, Canada submits that "there was no obligation to consider solely the interests of the First Nations affected in cases such as this, involving an expropriation or a non-consensual authority granted to use reserve lands for public purposes . . . [but rather] it is the function of the Crown to balance the various interests at stake."[442] In drawing this conclusion, counsel for Canada relied on the decision of the Federal Court of Appeal in *Kruger v. The Queen*, in which Urie J adopted the following reasons of Mahoney J at trial:

> Parliament cannot have intended that the Governor in Council consider only the best interest of the Band concerned in deciding whether or not to consent to an expropriation of reserve lands. It is rarely in the best interest of an occupant to be dispossessed or of an owner to be deprived of his property against his will. Certainly, here, it was not in the best interest of the Band.
>
> The defendant's duty to the Band, as trustee, was by no means the only duty to be taken into account. Evidence is clear that those officials responsible for the administration of the Indian Act urged a lease while those responsible for the airport ultimately urged expropriation. The Governor in Council was entitled to decide on the latter. There was no breach in trust in doing so.[443]

Once it had been determined that the Qu'Appelle Valley dams would flood and cause damage to reserve lands, Canada acknowledges that it owed a fiduciary obligation to the First Nations affected to ensure that they were adequately compensated for any damages caused to them. The existence of a fiduciary obligation where there is an involuntary disposition of land finds support in the reasons of Heald J in *Kruger*:

441 Submission on Behalf of the QVIDA First Nations, May 5, 1997, p. 52.
442 Submissions on Behalf of the Government of Canada, June 6, 1997, p. 49.
443 *Kruger v. The Queen*, [1985] 3 CNLR 15 at 42 (FCA), Urie J.

> Accordingly, I think it clear that the fiduciary obligation and duty being discussed in *Guerin* would also apply to a case such as this as well and that on the facts in this case, such a fiduciary obligation and duty was a continuing one – that is, it arose as a consequence of the proposal to take Indian lands and continued throughout the negotiations leading to the expropriations and thereafter including the dealings between the Crown and the Indians with respect to the payment of the compensation to the Indians in respect of Parcels A and B.[444]

As to the content of the fiduciary obligation, Canada relies on the highlighted portion of the following excerpt from the decision of Urie J in *Kruger*:

> When the Crown expropriated reserve lands, being Parcels A and B, there would appear to have been created the same kind of fiduciary obligation, vis-à-vis the Indians, as would have been created if their lands had been surrendered. *The precise obligation in this case was to ensure that the Indians were properly compensated for the loss of their lands as part of the obligation to deal with the land for the benefit of the Indians*, just as in the *Guerin* case, the obligation was to ensure that the terms of the lease were those agreed to by the Indians as part of the general obligation to them to ensure that the surrendered lands be dealt with for their use and benefit. How they ensured that lies within the Crown's discretion as a fiduciary and so long as the discretion is exercised honestly, prudently and for the benefit of the Indians there can be no breach of duty.[445]

Canada argues that it fulfilled its fiduciary obligation to the QVIDA First Nations by paying compensation to the eastern First Nations in 1943, and by agreeing with the western First Nations in 1977 to settle past, present, and future damages caused by the Echo Lake control structure.

Although we have considered the parties' arguments, we believe that it is unnecessary to address this issue in the circumstances of the present inquiry. Had we found that Canada could and did properly authorize the PFRA under section 34 of the 1927 *Indian Act* to use and occupy reserve lands for flooding purposes, we would then need to determine whether, before proceeding, the Crown nevertheless had a fiduciary obligation to consult or otherwise consider the best interests of the QVIDA First Nations. However, we have concluded that Canada should have proceeded by way of surrender or expropriation rather than under section 34. Since it did not do so, Canada failed to comply with the *Indian Act*, and any authority granted would thus have been invalid. Accordingly, there is little to be gained by determining whether

444 *Kruger v. The Queen*, [1985] 3 CNLR 15 at 61(FCA), Heald J.
445 *Kruger v. The Queen*, [1985] 3 CNLR 15 at 41 (FCA), Urie J.

Canada was also in breach of its fiduciary obligations. We therefore decline to do so.

## ISSUE 3 CANADA'S OBLIGATIONS UNDER TREATY 4

Did the terms of Treaty 4 preclude the Crown from relying on section 34 of the *Indian Act*, 1927, or otherwise require the consent of the QVIDA First Nations to authorize the PFRA to use and occupy reserve lands for flooding purposes?

The QVIDA First Nations argue that Treaty 4 provides an independent means for finding that, before Canada can sell, lease, or otherwise dispose of reserve lands, it must obtain the consent of the affected band. Specifically, the First Nations rely on the following treaty provision:

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families; provided, however, that it be understood that, if at the time of the selection of any reserves, as aforesaid, there are any settlers within the bounds of the lands reserved for any band, Her Majesty retains the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to the Indians; and provided, further, that *the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained*, but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.[446]

According to the First Nations, this provision means that "[t]he federal government assumes a fiduciary role in the context of its legal power to dispose of reserve lands, a power which can only be exercised with the consent of the First Nations and for their use and benefit."[447] First Nations thus have the corresponding "right to be consulted by Canada before Canada makes any disposition of reserve lands; they have the right to grant or withhold their

446 *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer and Controller of Stationery, 1966), p. 6. Emphasis added.
447 Submissions on Behalf of the QVIDA First Nations, May 5, 1997, p. 54.

consent to such a disposition; and they have the right to have the reserve land remain intact, in the absence of granting their consent to a disposition."[448]

As to what would happen should Treaty 4 and the *Indian Act* differ in their requirements for dispositions of reserve lands, the First Nations submit that the important distinction is in the test employed to reconcile those differences:

> Prior to the passage of section 35 of the *Constitution Act* in 1982, the courts generally considered that federal legislation was paramount and could supersede the terms of the treaties with the First Nations. However, the extent to which the *Indian Act* would have prevailed over Treaty No. 4 depends upon the tests used: overlap, inconsistency or conflict. If the *Indian Act* prevailed wherever it overlapped with provisions of Treaty No. 4 then the *Indian Act* surrender provisions would effectively replace Treaty No. 4 obligations, which required consent to reserve dispositions. On the other hand, if a more restrictive test is adopted, then the *Indian Act* would have less [sic]limits on the rights and obligations under Treaty No. 4.[449]

The First Nations then relied on the decision of Cory J in *R. v. Badger*[450] as authority for the proposition that a restrictive test should be employed, such that federal legislation should be held to prevail over a treaty right only in cases of direct conflict and not where there is mere inconsistency or overlap. Accordingly, the foregoing treaty rights should, in QVIDA's submission, remain intact, since the provisions of Treaty 4 "were not superseded by any legislation."[451]

Canada disagrees with the First Nations' analysis, contending that the terms of the *Indian Act* prevail to the extent that they are inconsistent with Treaty 4. However, Canada also approaches the issue from a different perspective, relying on the following provision of Treaty 4:

> It is further agreed between Her Majesty and Her said Indian subjects that such sections of the reserves above indicated as may at any time be required for public works or building of whatsoever nature may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land or money for the area of the reserve so appropriated.[452]

448 Submissions on Behalf of the QVIDA First Nations, May 5, 1997, p. 56.
449 Submissions on Behalf of the QVIDA First Nations, May 5, 1997, p. 56.
450 *R. v. Badger*, [1996] 4 WWR 457.
451 ICC Transcript, June 26, 1997, pp. 81-82 (David Knoll).
452 *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer and Controller of Stationery, 1966), p. 7.

In Canada's submission, the word "appropriated" in this provision relates to both expropriations and "lesser" dispositions such as a permit under section 28 of later versions of the *Indian Act* and presumably authority granted under section 34 of the 1927 statute. It can also apply to dispositions of the full fee simple interest or to lesser interests such as easements or rights of way. In short, this provision, according to Canada, allows it to rely on section 34 to grant authority to use and occupy reserve lands without the consent of the band affected. As for the First Nations' interpretation of the treaty, Canada argued:

> It is also notable that such an interpretation would also mean that lesser, non-consensual (or at least not expressly consensual) interests, such as a permit granted by the Minister for less than one year under section 28(2), would also arguably constitute a violation of treaty. Indeed, even a permit for more than one year issued with the consent of the Band Council could be attacked as not expressing the consent of the band (i.e. merely the consent of the band council). It is submitted that this is not a reasonable interpretation of the treaty provision.[453]

The First Nations respond that the appropriation provision of Treaty 4 is limited to the expropriation context, and that Canada has already acknowledged that there was neither an expropriation nor a surrender in this case.

For the same reasons that we gave in relation to QVIDA's claim regarding Canada's fiduciary obligations, we believe that it is unnecessary to address this issue in the circumstances of the present inquiry. The nature and term of the disposition to the PFRA were such that Canada should have obtained the consents of the Bands and the Governor in Council under the surrender provisions of the *Indian Act*, or it should have at least obtained the consent of the Governor in Council to expropriate the required interest. Its failure to do so means that Canada failed to comply with the *Indian Act* and that any authority granted would thus have been invalid. As before, there is little to be gained by determining whether Canada was also in breach of its treaty obligations. We again decline to do so.

## ISSUE 4 EFFECTS OF THE 1977 BAND COUNCIL RESOLUTIONS

Did the Band Council Resolutions signed by the Pasqua, Standing Buffalo, and Muscowpetung First Nations in the 1970s effectively release the Crown

453 Submissions on Behalf of the Government of Canada, June 6, 1997, pp. 52-53.

and the PFRA from all past, present, and future claims for damage caused by the Echo Lake control structure built in the 1940s?

It will be recalled that, in 1977, as a result of the discovery that Muscowpetung, Pasqua, and Standing Buffalo had never been compensated for the flooding of their reserve lands, these Bands entered into a settlement agreement with the PFRA. Under the terms of that agreement, evidenced by separate Band Council Resolutions executed by the respective Bands, the Bands were paid the sum of $265,000.00 and the PFRA was released, in relation to Pasqua and Standing Buffalo, "from all past, present and future claims in respect to erection of the said [Echo Lake] control structure and consequential flooding." For Muscowpetung, the release related to "lands now flooded by the said control structure." The three western Bands further agreed "to authorize the issuance of a permit to [the] PFRA in respect of the continued operation of the said control structure."[454] Although the Bands received and spent most, if not all, of the settlement funds, no permit for the continued operation of the control structures and flooding of reserve lands was ever issued, owing to concerns raised by the Bands regarding the perpetual nature of the settlement and the area of land to be flooded. The Bands subsequently purported to rescind the Band Council Resolutions and any authority conveyed in them to flood reserve lands.

These facts give rise to three key issues that the Commission must consider:

- Were the Band Council Resolutions invalid because they effected permanent dispositions of interests in reserves?
- Did the Band Council Resolutions release Canada and the PFRA from liability?
- Could the Bands rescind the 1977 Band Council Resolutions?

We will now consider each of these issues in turn.

454 Band Council Resolution, Pasqua Band, February 8, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1069); Band Council Resolution, Standing Buffalo Band, February 8, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1070); Band Council Resolution, Muscowpetung Band, February 15, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1074).

## Were the Band Council Resolutions Invalid?

### *Permit vs Expropriation or Surrender*

The Commission has already reviewed at length the recent decision of the Supreme Court of Canada in *Opetchesaht* in the context of our consideration of whether the Superintendent General of Indian Affairs could grant authority to use and occupy reserve lands for flooding purposes under section 34 of the 1927 *Indian Act*. Even if it can be assumed that section 34 is similar in nature to subsection 28(2) of the 1952 *Indian Act*, as amended, we concluded that, although the majority of the Court found that the disposition in *Opetchesaht* fell within the scope of subsection 28(2), the present case is distinguishable on its facts because of the more substantial nature of the interest granted to the PFRA and the possibly more remote likelihood of its termination.

That being the case, we must also conclude that it was not open to Canada, even with the consent of the respective Band Councils, to authorize the PFRA to occupy or use reserve land for flooding purposes under subsection 28(2) of the 1970 *Indian Act* in force at the time the settlements were reached. For ease of reference, we will restate subsection 28(2):

> **28.**(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.[455]

In its written argument, Canada suggests that, by disposing of a mere right of way under subsection 28(2) rather than allowing the PFRA to expropriate the full fee simple interest in the flooded lands, Indian Affairs was acting in an appropriate manner "to affect the Indians' interest as little as possible."[456] In making this statement, Canada referred to the Commission's decision in its inquiry into the railway right of way claim of the Sumas Band, in which the Commission held:

> Was there a breach of fiduciary duty in the failure to exercise this discretion to grant less than the full fee simple? The Crown had an obligation to consider the public interest in a railway, as well as the interests of the Sumas Band. An expropriation of land will not be in the best interests of a Band; therefore, a "best interests" standard

455 *Indian Act*, RSC 1970, c. I-6, s. 28.
456 Submission on Behalf of the Government of Canada, June 6, 1997, p. 52.

is not applicable. In our view, the obligation on the Crown in this context is to do as little injury as possible to the Indians' interests. The public interest could have been satisfied by a grant of a right of way as long as the land was needed by the railway. Any grant beyond that did not further the public purpose, and was nothing more than a gratuitous disposition of Indian lands in favor of the railway company. We thus find that, if the letters patent were effective to transfer absolute title to VV & E, the Crown failed in its fiduciary duty by granting the right-of-way lands without a railway-purposes limitation.[457]

The Federal Court of Appeal recently reached a similar conclusion in *Semiahmoo Indian Band v. Canada*, in which Isaac CJ agreed with the finding of the Trial Judge that there had been a breach of Canada's fiduciary duty to the Band. Certain reserve lands had been surrendered by the Band in 1951, although the evidence demonstrated that the Band would not have surrendered its land without the threat of expropriation. The lands were apparently required to expand Canada's customs facilities at the Douglas Border Crossing, but they remained unused after surrender and eventually became the subject of a consultant's study, commissioned at the request of the federal Department of Public Works, to develop portions of the land for commercial purposes. The record further showed that, over the years, the Band had made a number of requests to have the land returned to it when no apparent steps were being taken to use the land for public purposes; these requests had been refused on the basis that studies were underway to determine how to use the property, or that use of the land for expanding the customs facilities was imminent. No public use of the land had been made for some 40 years when, following the Band's receipt of the consultant's report proposing that the land be used for a resort, the Band commenced the action for breach of fiduciary duty. On the question of Canada's fiduciary obligations to the Band in such circumstances, Isaac CJ stated:

It is in the context of these findings that the Trial Judge defined the respondent's pre-surrender fiduciary duty, and then concluded that this duty was breached in the 1951 surrender. The Trial Judge described the nature and scope of the respondent's duty as follows:

> When land is taken in this way and it is not known what, if any, use will be made of it, or whether the land is going to be used for government purposes, I think there is an obligation on the fiduciary to condition the taking by a reversionary provision, or ensure by some other mechanism that the least possible impairment

457 ICC, *Report on Inquiry into Sumas Band Indian Reserve No. 6 Railway Right of Way Claim* (Ottawa, February 1995), (1996) 4 ICCP 3 at 40.

> of the plaintiffs' rights occurs. I am persuaded there was a breach of the fiduciary duty owed to the plaintiffs.
>
> Did the respondent breach its pre-surrender fiduciary duty?
>
> Having regard to the circumstances of this case, I am in respectful agreement with the Trial Judge's characterization of the respondent's pre-surrender fiduciary duty. I also agree with the Trial Judge's conclusion, based on the facts, that the respondent breached this duty when it consented to the 1951 surrender. In my view, the 1951 surrender agreement, assessed in the context of the specific relationship between the parties, was an exploitative bargain. There was no attempt made in drafting its terms to minimize the impairment of the Band's rights, and therefore, the respondent should have exercised its discretion to withhold its consent to the surrender or to ensure that the surrender was qualified or conditional.[458]

We agree that Canada should seek to minimize its impairment of a band's rights with regard to its reserve lands. In this context, it may have been entirely appropriate for Canada to acquire an interest in the nature of a right of way or easement rather than the full fee simple in the lands continuously or occasionally flooded as a result of the control structures erected in the Qu'Appelle Valley. By obtaining this lesser interest, Canada allowed the QVIDA Bands to retain a reversionary interest in the land as well as the right to use those portions of the lands that may not be flooded from time to time.

However, as we discussed previously in relation to section 34 of the 1927 *Indian Act*, it is the interplay of the *nature* and *duration* of the interest being conveyed that determines whether the appropriate mechanism for disposing of the interest is expropriation or surrender, on the one hand, or a mere permit under subsection 28(2), on the other. Furthermore, Canada is not obliged to acquire the entire fee simple interest when it proceeds by way of expropriation or surrender; it can instead expropriate or obtain a surrender of a lesser interest, such as a right of way or easement. However, if the interest being obtained, while less than the full fee simple, is still sufficiently important in nature and lengthy in duration, then even that lesser interest should be obtained by means other than subsection 28(2). In *Opetchesaht*, Major J used the example of a mineral lease as one situation in which a lesser interest than the fee simple should be acquired using a surrender:

> In my view, s. 28(2) cannot apply any time a portion of the Indian interest in any portion of reserve land is permanently disposed of. For example, before permission to extract minerals in a reserve is granted by the Minister, surrender is required. I

458 *Semiahmoo Indian Band v. Canada*, [1997] FCJ No. 842 (unreported, June 24, 1997), para. 40-41.

> would note that this would be true whether the right to exploit and extract minerals were granted forever or for limited duration under a lease. For example, the mineral rights could well be disposed of under a document entitled a "lease". One must always look to the true nature of the rights granted. Even if the right to extract were granted only temporarily under the lease, in fact such a grant would forever deprive the band of a resource which formed part of the reserve. Surrender of mineral rights has been required under successive *Indian Acts* before disposition thereof to third parties.[459]

From this example, it can be seen that, although the duration of the mineral lease may be "ascertainable," the nature of the interest being disposed of is sufficiently "permanent" or important as to lie beyond the scope of subsection 28(2). A surrender or expropriation is therefore required.

In the result, we must reiterate our conclusion that, even with the consent of the Muscowpetung, Pasqua, and Standing Buffalo Band Councils, Canada could not rely, on the facts of this case, on subsection 28(2) as the basis for authorizing the PFRA to occupy or use reserve lands for flooding purposes.

### *Effects of Subsection 28(1)*

Even if the Commission is wrong in the foregoing conclusion regarding the meaning and scope of subsection 28(2), we would nevertheless conclude that the 1977 Band Council Resolutions were ineffective to grant such authority. This is because subsection 28(1) of the 1970 *Indian Act* provided:

> **28.**(1) Subject to subsection (2), a deed, lease, contract, instrument, document or agreement of any kind whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

The only permitted exceptions to subsection (1) exist under subsection (2), where an appropriate authorizing permit may be issued by the Minister for a use or occupation or other exercise of rights on a reserve for a period not exceeding one year, or by the Minister, with the consent of the band council, for any longer period.

A plain reading of subsection 28(2) suggests that, to allow occupation or use of reserve lands for a period of longer than one year, band council consent must be obtained *and* the Minister must permit the occupation or

459 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), pp. 19-20, Major J.

use in writing. Without satisfying both requirements, an agreement for use and occupation appears to be void. But does the case law interpreting section 28(2) support this interpretation?

The philosophy underlying subsection 28(2) has a long history that predates the subsection itself and finds its roots in the *Royal Proclamation of 1763*. The jurisprudence supports the conclusion that a written permit from the Minister was a required element for an effective authorization to occupy or use reserve lands under subsection 28(2).[460]

The policy rationale behind the provision can be seen in the decision of the Exchequer Court of Canada in *R. v. McMaster*.[461] In that case, a property known as Thompson's Island, which formed part of St Regis Indian Reserve, was leased in 1817 by the Chiefs of the occupying Band to David Thompson for a period of 99 years. The lease contained a renewal clause that would have permitted it to be extended to a full term of 999 years. In 1872, McMaster sought to acquire the lease from Thompson's successor, McDonald, and, concerned that the validity of title might be open to challenge, McMaster inquired if the Department of Indian Affairs would recognize the title to the lease if he could show that it had been properly assigned to him and if he would pay rental arrears that had been accumulating since 1862. After protracted negotiations, the parties in 1882 agreed that the Department would recognize McMaster as assignee on payment of the past due rentals, but that he could not obtain a new title in his own name because the property, never having been surrendered by the Band to the Crown, could not be sold or leased. In 1883, McMaster paid the arrears, and the following year the Department of Justice provided its opinion that McMaster had sufficiently proven his title to be considered the holder of the lease originally granted to Thompson, and that his possessory title as against anyone but the Crown was admitted.

In 1915, McMaster applied to the Department of Indian Affairs to renew the lease, as the first 99-year period was due to expire the following year. The Department replied that he had been given no assurance that the lease would be renewed, but only that his rights under the lease would be recognized as far as this could legally be done. Disclaiming liability for payment of

460 No cases have confirmed that a grant of reserve land under section 28 can be effective in the absence of such a permit, although in *Port Franks Properties v. The Queen*, [1981] 3 CNLR 86 at 95 (FCTD), the Court found that a surrender was lawful even though a lease was granted prior to formal surrender. Approximately one year later the Band made a formal surrender of the land at issue, and an order in council was then passed approving the surrender and confirming the lease.

461 *R. v. McMaster*, [1926] Ex. CR 68.

the penalty provided in the original lease for non-renewal, the Department refused to issue a renewal, provided McMaster with notice to quit the property, and later commenced action against him. In the Exchequer Court, Maclean J stated:

> The proclamation of 1763, as has been held, has the force of a statute, and so far therein as the rights of the Indians are concerned, it has never been repealed. The proclamation enacted that no private person shall make any purchase from the Indians of lands reserved to them, and that all purchases must be on behalf of the Crown, etc. Throughout the subsequent years all legislation in the form of Indian Acts continued the letter and spirit of the proclamation in respect of the inalienability of Indian reserves by the Indians. As was said by Lord Watson in the *St. Catherine Milling and Lumber Company* case, since the date of the proclamation Indian affairs had been administered successively by the Crown, by the provincial governments, and since the passing of the British North America Act, 1867, by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract duly ratified in a meeting of their chiefs or head men convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty, and as determined in the *St. Catherine Milling and Lumber Company case*. There can be no doubt but that the property in question was part of an Indian Reserve covered by the proclamation. *For these reasons I am clearly of the opinion that the lease to Thompson in 1817 was void*, and that the Indians never had such an interest in the lands reserved for their occupancy, that they could alienate the same by lease or sale. The Crown could not itself lease, or ratify any lease, made by the Indians of such lands at any time since the proclamation, save upon a surrender of the same by the Indians to the Crown. If the lease was void anything that the Department of Indian Affairs or any other authorized body or person administering Indian affairs did, or could do in the way of adoption or ratification of the same, would be contrary to the enactment of the proclamation and of the subsequent statutes relating to Indian affairs, and which in this respect were declaratory of the provisions of the proclamation and not binding on the Crown.[462]

Very similar facts were considered by the Supreme Court of Canada in *Easterbrook v. The King*,[463] in which certain lands on Cornwall Island in the St Lawrence River were leased in 1821 by the British Indian Chiefs of St Regis to Solomon Y. Chesley. The document purported to lease the lands to Chesley

462 *R. v. McMaster*, [1926] Ex. CR 68 at 72-73. Emphasis added.
463 *Easterbrook v. The King*, [1931] SCR 210.

for 99 years, "and at the expiration thereof for another and further like period of 99 years and so on until the full end and term of 999 years shall be fully ended and completed." The Department of Indian Affairs remained unaware of the lease until 1875, at which time, in response to an inquiry about the validity of the lease, Assistant Superintendent General Lawrence Vankoughnet confirmed that Chesley "has a right to sublet the land as he has been in the habit of doing for years." On the expiry of the initial 99-year period in 1920, however, the Department provided Chesley's successor with notice to quit, and refused to receive any further rent or to continue to recognize the tenancy. Newcombe J of the Supreme Court of Canada concluded that Audette J of the Exchequer Court had properly refused to uphold the lease:

> The learned judge found no difficulty in disposing of the case, and I have no doubt that his conclusions must be maintained. By the formal judgment he declared that the lease of 10th March, 1821, was and is null and void *ab initio*, and that the King was entitled to recover forthwith the possession of the lands described with their appurtenances.[464]

The *McMaster* and *Easterbrook* cases clearly demonstrate the longstanding general policy of inalienability without the consent or permission of the Crown in situations in which a leasehold interest has ostensibly been granted by a band. Although subsection 28(1) of the 1970 *Indian Act* was not yet in force, the Courts nevertheless found the purported dispositions to be void.

By the time *R. v. Devereux*[465] appeared on the docket of the Supreme Court of Canada, subsection 28(1) *had* been enacted. In *Devereux*, the Court considered whether a non-Indian, Devereux, had rights to reserve land purportedly devised to him in a will by Rachel Ann Davis, the widow of a member of the Six Nations Band. Devereux had assisted Davis in working her farm commencing in 1934, at which time the two had entered into a private leasing arrangement. The Court viewed this arrangement as void under subsection 34(2) of the 1927 *Indian Act*, which was the legislative predecessor of subsection 28(1) of the 1952 statute. However, at the joint request of Davis and Devereux, the Crown had leased the property to Devereux for a period of 10 years expiring November 30, 1960, and then granted two successive permits to Devereux under section 28(2) of the *Indian Act* (as amended in

464 *Easterbrook v. The King*, [1931] SCR 210 at 218.
465 *The Queen v. Devereux*, [1965] SCR 567.

1952) to use and occupy the lands for agricultural purposes. The second permit expired on November 30, 1962. In the meantime, Davis died and in her will purported to leave Devereux an ongoing right to possess and use the lands.

Since Devereux was not entitled to reside on a reserve, the Crown sought to remove him under the trespass provisions of section 31, and to dispose of Davis's interest by tender to eligible residents. In the subsequent proceedings, Thurlow J of the Exchequer Court dismissed the Crown's claim on the separate ground that an action to remove a trespasser from a reserve under section 31 of the Act must be commenced on behalf of the party having the right to possess the lands. Having concluded that the right to possession was vested in Band members Hubert Clause or Arnold and Gladys Hill, Thurlow J concluded that the Crown was in error when it initiated proceedings claiming possession on behalf of the entire Band.

However, the Supreme Court of Canada also held that Devereux had no right to possess or use the lands in question. Once the second permit expired, Devereux's interest in the land was governed by the provision in section 50 of the 1952 *Indian Act* that "[a] person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve." Judson J for the majority (Cartwright J dissenting) held:

> The scheme of the *Indian Act* is to maintain intact for bands of Indians, reserves set apart for them regardless of the wishes of any individual Indian to alienate for his own benefit any portion of the reserve of which he may be a locatee. This is provided for by s. 28(1) of the Act. If s. 31 were restricted as to lands of which there is a locatee to actions brought at the instance of the locatee, agreements void under s. 28(1) by a locatee with a non-Indian in the alienation of reserve land would be effective and the whole scheme of the Act would be frustrated.
>
> Reserve lands are set apart for and inalienable by the band and its members apart from express statutory provisions even when allocated to individual Indians. By definition (s. 2(1) (o)) "reserve" means
>
> > a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band.
>
> By s. 2(1)(a), "band" means a body of Indians
>
> > (i) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart. . .
>
> By s. 18, reserves are to be held for the use and benefit of Indians. They are not subject to seizure under legal process (s. 29). By s. 37, they cannot be sold, alien-

> ated, leased or otherwise disposed of, except where the Act specially provides, until they have been surrendered to the Crown by the band for whose use and benefit in common the reserve was set apart. There is no right to possession and occupation acquired by devise or descent in a person who is not entitled to reside on the reserve (s. 50, subs. (1)).
>
> One of the exceptions is that the Minister may lease for the benefit of any Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered (s. 58(3)). It was under this section that the Minister had the power to make the ten-year lease to the defendant which expired on November 30, 1960.
>
> Under this Act there are only two ways in which this defendant could be lawfully in possession of this farm, either under a lease made by the Minister for the benefit of any Indian under s. 58(3), or under a permit under s. 28(2).
>
> Evidence was given of attempted arrangements between the defendant and the purchaser and the assignee of the purchaser under s. 50(2) which would have enabled the defendant to remain in possession at a rental which would have made it possible for the purchaser to make his installment payments. The Crown took the position that these attempted arrangements were irrelevant, the Department not having consented to any further lease or permit. This objection was properly taken and the attempted arrangements do not assist in any way the defendant's claim to remain in possession.[466]

The importance of the *Devereux* decision is in its finding that Crown consent in the guise of a lease or permit is a necessary condition precedent to occupation or use of reserve land.

*M.D. Sloan Consultants Ltd. v. Derrickson*[467] is a recent authority confirming the necessity of a written permit under section 28. In that case, the British Columbia Court of Appeal was asked to consider the effect of a purported agreement between a Band member (a "locatee") and a third party to lease a marina on reserve lands. The Court, after reviewing *Easterbrook* and *Devereux*, confirmed that the only way a locatee could validly grant an interest in reserve land to a third party was either by way of a permit under subsection 28(2) or a lease under subsection 58(3). Goldie JA stated:

> To the extent that the plaintiff's claims rest upon the validity of the lease arrangements of October 21, 1986, in respect to the use and occupation of the land portion of the Shelter Bay marina, they must fail. The policy behind s. 28(1) has been clearly stated by the Supreme Court of Canada: see *Easterbrook v. The King*, [1931]1 DLR

466 *The Queen v. Devereux*, [1965] SCR 567 at 572-73.
467 *M.D. Sloan Consultants Ltd. v. Derrickson* (1991), 85 DLR (4th) 449 (BCCA).

628, [1931] SCR 210, and *The Queen v. Devereux* (1965), 51 DLR (2d) 546, [1965] SCR 567.

In the *Devereux* case the defendant went into possession of a parcel of reserve land under an arrangement with a band member who was the locatee of the land. This arrangement was held to be void under s. 28(1) and afforded Devereux no right of possession and occupation after expiration of a lease from the Crown in his favor made under the provisions of s. 58(3). . . .

But for s. 28(1) I would have concluded that the lease arrangement evidenced by the memorandum in writing dated October 21, 1986, supported Sloan's contention that it had a leasehold interest in the lands in question for a period of 10 years.[468]

In fact, the Court severed that portion of the agreement dealing with reserve lands and found the defendant Derrickson in breach of the remainder of the agreement dealing with chattels and non-reserve lands.

In neither *Devereux* nor *Derrickson* did the Courts indicate that lack of band consent was the determinative factor. Subsection 28(1) voids any attempt by a band to agree unilaterally to a grant of reserve land unless the necessary ministerial authorization is obtained. Therefore, the clear words of the subsection mean that even a clear intention on the part of a band, or a band member, will fail in the face of a lack of the necessary authorization by way of permit.

This approach to subsection 28(1) is supported by *Re Attorney-General of Nova Scotia and Millbrook Indian Band*,[469] in which the Nova Scotia Court of Appeal considered whether an agreement between the Band and a non-Indian, Ruth Rushton, purporting to allow occupation of reserve land was void by virtue of the operation of subsection 28(1). The Court placed great emphasis on the fact that there was no permit supporting the agreement between the Band and the occupier, and held that this deficiency rendered the agreement void:

The reserve land on which the mobile park is situated is unsurrendered reserve land and the Minister of Indian Affairs and Northern Development has issued no permit authorizing the use or occupation of the land pursuant to s. 28(2) of the *Indian Act*, RSC 1970, c. I-6, and, in particular, has issued no permit authorizing the use or occupation of the land by Mrs. Rushton.

Section 28(2) permits the Minister to authorize a person, not a member of the band, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve. It is a validating provision qualifying s. 28(1), which reads as follows:

468 *M.D. Sloan Consultants Ltd. v. Derrickson* (1991), 85 DLR. (4th) 449 at 455 (BCCA).
469 *Re Attorney-General of Nova Scotia and Millbrook Indian Band* (1978), 93 DLR (3d) 230 (NSCA).

> 28(1) Subject to subsection (2), a deed, lease, contract, instrument, document or agreement of any kind whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.
>
> Any agreement by Mrs. Rushton with the Millbrook Indian Band respecting her occupancy of reserved land in the mobile park is clearly void by virtue of s. 28(1).[470]

The decision of Mahoney J of the Federal Court's Trial Division in *Springbank Dehydration Ltd. v. Charles*[471] further illustrates that the lack of a permit under subsection 28(2) voids an agreement attempting to convey a right of occupation and use of reserve lands. In that case, Mahoney J declined to grant an injunction to the plaintiff corporation on the basis that the statement of claim was predicated upon, but failed to disclose, an interest in certain reserve lands.

The plaintiff was the sublessee of about 400 acres of reserve land under a lease in which the Minister of Indian and Northern Affairs had covenanted that, if the head lease should be terminated, a new lease for the balance of the term of the sublease would be granted to the plaintiff. On June 26, 1976, the plaintiff and the Band entered into an agreement in writing whereby it was agreed that 160 acres of other reserve lands would be leased to the plaintiff in substitution for 180 acres of the leased lands, the resulting parcel of some 380 acres being referred to in the judgment as the "Consolidated lands." Soon thereafter, the head lessee decided to surrender its lease effective September 30, 1976, and on September 2, 1976, pursuant to his covenant, the Minister made an offer, open to September 29, 1976, to lease the original 400-acre parcel to the plaintiff. On September 28, the Band Council, by resolution, ratified, approved, and confirmed the agreement of June 26 and requested the Minister to grant a lease of the Consolidated lands to the plaintiff. Relying on the agreement of June 26 and the resolution of September 28, the plaintiff did not accept the Minister's offer and expended money on the Consolidated lands. No permit had been issued pursuant to subsection 28(2) of the *Indian Act*, however.

The Band then decided to go into business for itself on the Consolidated lands and the plaintiff commenced an action seeking, among other things, injunctive relief. Mahoney J. concluded:

470 *Re Attorney-General of Nova Scotia and Millbrook Indian Band* (1978), 93 DLR (3d) 230 at 231 (NSCA).
471 *Springbank Deyhdration Ltd. v. Charles*, [1978] 1 FC 188 (TD).

> As I indicated at the close of the hearing, I am satisfied that, if the statement of claim discloses that the plaintiffs now have an interest in any of the lands, the injunction ought to issue in respect thereof.
>
> . . . The interest in the Consolidated lands depends entirely on the effect of the agreement of June 26, 1976 and the subsequent resolution of the Band Council. . . .
>
> *The agreement as to the Consolidated lands would appear to be clearly void by virtue of subsection 28(1). That matter has been dealt with too often to be open to any doubt in spite of apparent equities. Likewise, the resolution can have no effect, the agreement being void.*[472]

Because the plaintiff's claim for injunctive relief was premised entirely on its ability to establish a subsisting legal interest in the Consolidated lands, and because no such interest was made out, the injunction was not granted.

In its earlier reports dealing with the surrenders of reserve lands by the Kahkewistahaw and Moosomin First Nations, the Commission has had occasion to review at length the competing policies of autonomy and protection inherent in the *Indian Act*, and the discussion of those policies in cases like *Apsassin* and *Chippewas of Kettle and Stony Point*. The central principles in those cases have recently been renewed afresh in *Opetchesaht*, in which Major J, as already noted, stated:

> With the twin policies of autonomy and protection in mind, s. 37 and s. 28(2) reflect that, depending on the nature of the rights granted, different levels of autonomy and protection are accorded. Section 37 demonstrates a high degree of protection, in that the approval of the Governor in Council and the vote of all of the members of the band are required. This indicates that s. 37 applies where significant rights, usually permanent and/or total rights in reserve lands are being transferred. On the other hand, under s. 28(2), lesser dispositions are contemplated and the interest transferred must be temporary. It is evident from a review of this permit that it does not violate the balance between autonomy and protection struck by the *Indian Act*. This is not a case where surrender, with all of its administrative and legal impositions was required in terms of the overall policy of the *Indian Act*.[473]

On one hand, autonomy is achieved by respecting and honouring decisions that bands make with regard their reserve lands. On the other hand, protection of the Indian land base is achieved by requiring Crown consent to many transactions contemplated under the *Indian Act*. The scheme of the Act is to

472 *Springbank Deybdration Ltd. v. Charles*, [1978] 1 FC 188 at 191 (TD). In reaching this conclusion, Mahoney J footnoted the *McMaster* and *Easterbrook* cases and the further decision of the Exchequer Court in *The King v. Cowichan Agricultural Society*, [1950] Ex. CR 448.

473 *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 21, Major J.

attempt to balance these competing policies by requiring both the band and the Crown to consent to dispositions of land. If a court were to uphold an agreement unilaterally entered into by a band or band member purporting to transfer an interest in reserve land without Crown consent, the entire underlying purpose of protecting the Indian land base against erosion would be frustrated. As the Commission recently stated in its report dealing with the claim of the Eel River Bar First Nation:

> If use and occupation of reserve lands through means other than those specified in the *Indian Act*, including uses allowed solely by the Band, were sanctioned, the Crown would be released from its protective responsibility, contrary to the intent of the *Indian Act* and the policy that underlies it. Accordingly, unless the use and occupation has been authorized by the Crown in one of the forms contemplated by the Act – surrender, expropriation, or permit – the use and occupation of reserve land is contrary to the Act.[474]

With these considerations in mind, we must now consider the 1977 Band Council Resolutions and any written or oral agreement or agreements underlying them. These instruments must surely constitute one or more of the deeds, leases, contracts, instruments, documents, or agreements "of any kind whether written or oral" enumerated in subsection 28(1), and thus they must fall within the scope of this subsection. As a result, since no permits have ever been issued under subsection (2), but subject to our comments below, the clear terms of subsection (1) provide that the Band Council Resolutions and any underlying written or oral settlement agreements must be considered void.

Moreover, while it may have been arguable that the failure to issue permits in 1977 might be cured even at this late date by issuing them now, that option is not available in this case because the nature of the interest granted to the PFRA is not amenable to being authorized under subsection (2) in any event. The Commission is thus faced with the dilemma of a settlement that was wrongly conceived, but pursuant to which funds were paid over to the three western Bands and apparently spent by them.

Bearing in mind the Commission's earlier conclusion that a permit under subsection 28(2) could not be used to authorize the flooding of reserve lands given the scope of the interest involved, we would conclude that, but for subsection 28(1), the settlements evidenced by the 1977 Band Council

474 Indian Claims Commission, *Eel River Bar First Nation Inquiry: Report on Eel River Dam Claim* (Ottawa, December 1997), 116.

Resolutions would have been valid. However, subsection 28(1) drives us to the conclusion that the settlement was void insofar as it purported to permit the PFRA "to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve."

The next question we must consider is whether the settlement, which released the PFRA "from all past, present and future claims" arising from the flooding caused by the dams, is effective to preclude the QVIDA First Nations from claiming damages notwithstanding subsection 28(1) of the *Indian Act*.

## Did the Band Council Resolutions Release Canada and the PFRA from Liability?

### *Powers of Band Councils*

The QVIDA First Nations contend that, if the Commission concludes that the Band Council Resolutions were *not* void *ab initio*, only then does it become necessary to determine whether a Band Council Resolution can release a third party from liability. The corollary to the First Nations' assertion is that, if the Band Council Resolutions *were* void *ab initio*, it should be unnecessary to consider whether a Band Council Resolution can have such a releasing effect.

Canada's position is, of course, premised on the assumption that a Band Council Resolution *can* be used to release a third party from liability. It derives this conclusion from the principle that the ability to pursue an action is a power that is necessarily incidental to the powers expressly granted to a band council under the *Indian Act*. In its written submission, Canada stated:

> The court in *Whitebear Band Council* v. *Carpenters Provincial Council of Saskatchewan and Labour Relations Board of Saskatchewan*[475] describes the roles and powers of a band council as follows:
>
> > (iii) The nature of the Band Council
> > As *municipal councils* are "creatures" of the Legislatures of the Provinces, so *Indian band councils* are the "creatures" of the Parliament of Canada. Parliament in exercising the exclusive jurisdiction conferred upon it by s. 91(24) of the *British North America Act, 1867* to legislate in relation to "Indians and Lands Reserved for the Indians" enacted the *Indian Act*, RSC 1970, c. I-6, which provides – among its extensive provisions for Indian status, civil rights, assistance, and so on, and the use and management of Indian reserves – for the election of a

475 *Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan and Labour Relations Board of Saskatchewan* (1982), 135 DLR (3d) 128 at 133 and 134 (Sask. CA).

chief and 12 councillors by and from among the members of an Indian band resident on an Indian reserve. These elected officials constitute Indian band councils who in general terms are intended by Parliament to provide some measure – even if rather rudimentary – of local government in relation to life on Indian reserves and to act as something of an intermediary between the band and the Minister of Indian Affairs.

More specifically s. 81 of the Act clothes Indian band councils with such powers and duties in relation to an Indian reserve and its inhabitants are usually associated with a rural municipality and its council: a band council may enact by-laws for the regulation of traffic; the construction and maintenance of public works; zoning; the control of public games and amusements and of hawkers and peddlers; the regulation of the construction, repair and use of buildings, and so on. Hence a band council exercises – by way of delegation from Parliament – these and other municipal and governmental powers in relation to the reserve whose inhabitants have elected it.

I think it worth noting that the *Indian Act* contemplates a measured maturing of self-government on Indian reserves. Section 69 of the Act empowers the Governor in Council "to permit" a band to manage and spend its revenue moneys – pursuant to regulation by the Governor in Council – and by s. 83 the Governor in Council may declare that a band "has reached an advance[d] stage of development" in which event the band council may, with the approval of the Minister, raise money by way of assessment and taxation of reserve lands and the licensing of reserve businesses. Until then the band council derives its funds principally from the government of Canada. . . .

In addition to their municipal and governmental function, band councils are also empowered, by the *Indian Act*, to perform an advisory role and in some cases to exercise a power of veto, with respect to certain activities of the Minister in relation to the reserve, including, the spending of Indian moneys, both capital and revenue, and the use and possession of reserve lands.

Moreover, in light of the provisions of the single contribution agreement and some of the terms of the consolidated contribution agreement, it appears that in practice, Indian band councils from time to time act as agents of the Minister of Indian Affairs and representatives of the members of the reserve with respect to the implementation of certain federal Government programmes designed for Indian reserves and their residents – a complimentary role consistent with their function.

The powers of band councils to contract as a necessary incident of the powers expressly granted to them under the *Indian Act* is discussed directly in the decision of the Alberta Court of Queen's Bench in *Telecom Leasing Canada (TLC) Ltd. v. Enoch Indian Band of Stony Plain Indian Reserve No. 135*.[476] This case dealt with whether a band council could enter into a guarantee of a lease to a corporate lessee

476 *Telecom Leasing Canada (TLC) Ltd. v. Enoch Indian Band of Stony Plain Indian Reserve No. 135*, [1993] 1 WWR 373, [1994] 1 CNLR 206 at 208 and 209 (Alta. QB).

of certain road construction equipment. The court concluded that the band council was so authorized:

> The more significant question is whether the band council had the power to enter into such an agreement on behalf of the band. The defendant submits that it did not. The defendant argues that the band council derives its powers solely from statute, and entering into a contract of guarantee is not among the powers enumerated in the *Indian Act*. Rather, the defendant argues, approval of the band as a whole and not just the council was needed.
>
> I disagree. Although the band council is clearly a creature of statute, deriving its authority solely from the *Indian Act* (*Paul Band (Indian Reserve No. 133)* v. *R.*, [1984] 2 WWR 540, 29 Alta. LR (2d) 310 (sub nom. *R.* v. *Paul Indian Band*) [1984] 1 CNLR 87, 50 A.R. 190 (C.A.), at p. 549 [WWR, p. 94 CNLR], *it by necessity must have powers in addition to those expressly set out in the statute*. This was recognized by the British Columbia Supreme Court in *Lindley* v. *Derrickson* (March 29, 1976), [1978] CNLB (No. 4) 75, wherein it was held that a "band council must have the implied power to bring legal proceedings on behalf of the band" (p. 84). In this regard I accept the suggestion Jack Woodward advances in his book *Native Law* (Toronto: Carswell, 1989), at p. 166: . . .
>
> > It may be said that band councils possess at least all the powers necessary to effectively carry out their responsibilities under the *Indian Act*, even when not specifically provided for. There is an implied power to contract, without the need for authority in the *Indian Act*.

The British Columbia Supreme Court arrived at a similar conclusion in *Joe* v. *Findlay and Findlay*.[477] In this case the band council was attempting to recover possession of some reserve lands from a band member that had stopped paying rent. In response to the question of whether the band council had authority to pursue the action, the court states:

> To say that [the council] has the power to allocate reserve land but no status to recover possession when rights it has granted have expired would, it seems to me, be to deny the council the ability effectively to carry out this important function. Council cannot exercise the legal authority vested in it if it has not the status in law to bring such an action as this against those who overhold.

Accordingly, it is submitted that the band councils had the authority to, and did, bind their respective First Nations with respect to releasing Canada and the PFRA from all damages as set out in the correspondence and the BCRs.[478]

The QVIDA First Nations submitted that, if the Commission were to conclude that the Band Council Resolutions were not void *ab initio*, the case law

477 *Joe v. Findlay and Findlay* (1987), 12 BCLR (2d) 166, [1987] 2 CNLR 75 at 81 (BCSC).
478 Submissions on Behalf of the Government of Canada, June 6, 1997, pp. 58-60.

suggests that a Band Council Resolution may be used for the purpose of releasing a third party from liability:

> [W]hile a BCR cannot release Canada or the Band from their obligations under the Act, can a BCR release another party from liability to the First Nation? Case law has established that a Council of a First Nation can institute, prosecute and defend a legal action, and can bind a First Nation in a contractual sense.
>
> These cases suggest that if the BCRs releasing PFRA were validly passed by the Councils of the First Nations, they will likely be found to be binding on the First Nations. A release is essentially a contractual agreement by which one party, in return for valuable consideration, agrees to give up a claim against the other. The power to release a cause of action would be necessarily an attribute of the power to "institute, prosecute and defend a court action". In this case, the releases appear to have been entered into by the First Nations in return for the $265,000 in compensation from PFRA, and the First Nations appear to have been acting with legal advice. Based on these factors, it appears that the BCRs could bind the First Nations, in so far as they release PFRA from liability for past, present and future damages due to flooding.[479]

Although it appears that a band council may, by resolution, "institute, prosecute and defend a legal action, and can bind a First Nation in a contractual sense," in the Commission's view the question is by no means without doubt on the facts in this case. However, in light of our reasons that follow, it is not necessary for the Commission to decide the question here.

### *Extent of Release*

Assuming that a band council can release a third party from liability for the unauthorized use and occupation of reserve land, it is questionable whether the Band Council Resolutions in this case release Canada generally from liability, or only the PFRA. The First Nations point to cases like *Apsassin* as authority for the proposition that the courts are "showing an increasing willingness to treat different arms of the federal government as distinct entities for purposes of determining liability to First Nations for past wrongs."[480] In *Apsassin*, the Supreme Court of Canada held that the Department of Indian Affairs was under a fiduciary obligation to undo a land transaction that had

479 Submissions on Behalf of the QVIDA First Nations, May 5, 1997, pp. 68-69. In making the statement that "[c]ase law has established that a Council of a First Nation can institute, prosecute and defend a legal action, and can bind a First Nation in a contractual sense," the First Nations relied on the following authorities: *Wewayakum Indian Band v. Wewayakai Indian Band* (cited as *Roberts v. R)*, [1991] 3 FC 420 at 428-29 (TD), Addy J; *Telecom Leasing Canada (TLC) Ltd. v. Enoch Indian Band*, [1993] 1 WWR 373 at 376-77 (Alta QB), Wachowich J; *Gitanmaax Indian Band v. British Columbia Hydro and Power Authority* (1991), 84 DLR (4th) 562 (BCSC).

480 Submissions on Behalf of the QVIDA First Nations, May 5, 1997, p. 69.

been discovered to be unfavourable to the Band, whereas no such obligation was explicitly imposed on the Veterans' Land Administration, notwithstanding its status as another arm of the federal Crown. The QVIDA First Nations claim that the release in this case applies only to the PFRA. They say that, because Indian Affairs was only minimally involved in the settlement negotiations, it failed to uphold its fiduciary responsibility to ensure that the provisions of the *Indian Act* were complied with, and failed to protect the Bands' interests with regard to the foreseeable damage that would result from the erection of the Qu'Appelle Valley dams.

Canada takes a different view. Counsel argued that the *Prairie Farm Rehabilitation Act* simply set up a pool of money to be administered by the federal Minister of Agriculture to deal with drought and soil-drifting problems in Manitoba, Saskatchewan, and Alberta:

> Now the Minister of Agriculture is, of course, a minister of the government, just like the Minister of Indian Affairs or, at that time, the Minister of the Interior, and is Canada inasmuch as any Department of Her Majesty can represent Canada.[481]

In short, the argument is that, by releasing the PFRA, which is one arm of Canada, the QVIDA Bands released Canada.

In the Commission's view, it is not necessary to determine whether the First Nations are correct in their assertion that it is possible to sever the PFRA, to which the releases were granted, and pursue the unreleased remainder of the federal government. The real difficulty in this case centres on the fact that there is considerable doubt, based on the evidence before the Commission, whether the Pasqua, Muscowpetung, and Standing Buffalo First Nations suffered any damages for which they have not been fully compensated in 1977. Furthermore, to succeed on this ground, the First Nations would have to demonstrate that Canada was in breach of its fiduciary obligations by failing to protect them from entering into an exploitative bargain with the PFRA. In our assessment of the evidence, it is difficult to see how this transaction could be characterized as exploitative in either the procedural sense of the word or in the end result.

Presumably, in the context of the 1977 settlement negotiations between the PFRA and the western QVIDA Bands, Canada's obligation was to ensure that those dealings did not result in a transaction that was, in the words of McLachlin J in *Apsassin*, foolish or improvident and thus exploitative of the

481 ICC Transcript, June 26, 1997, pp. 119-20 (Bruce Becker).

Bands. In this case, the Bands had the benefit of independent legal advice. Indeed, Indian Affairs was asked to stay out of the negotiations because it was believed that lawyer Roy Wellman would not be limited in the way the Department would be, and that he would be better able to plead the Bands' case. To Wellman's credit, he was successful in negotiating a settlement of $265,000, which was roughly 10 times higher than the PFRA's opening position and double its "confidential" position. In fact, the final settlement figure of $265,000 was proposed by the Bands in the first place. It is difficult to understand how Canada, having seen that the Bands received the benefit of independent legal advice, and having reviewed the settlement and accepted the recommendation of the Department of Regional Economic Expansion that the settlement was "reasonable and justifiable," can be said to have failed in fulfilling its fiduciary obligations to the Bands. In this context, we find the following words of Urie JA in the *Kruger* case to be apt:

> In essence, however unhappy [the members of the First Nation] were with the payments made, they accepted them. The payments were for sums which could be substantiated by the independent valuations received by both parties and which were determined after extensive negotiations and forceful representations on the Indians' behalf by the Indian Agent and other high officials of the Indian Affairs Branch. *If the submissions advanced by the appellants were to prevail, the only way that the Crown could successfully escape a charge of breach of fiduciary duty in such circumstances would have been, in each case, to have acceded in full to their demands or to withdraw from the transactions entirely. The competing obligations on the Crown could not permit such a result.* The Crown was in the position that it was obliged to ensure that the best interests of all for whom its officials had responsibility were protected. The Governor in Council became the final arbiter. *In the final analysis, however, if the appellants were so dissatisfied with the expropriations and the Crown's offers, they could have utilized the Exchequer Court to determine the issues.* For whatever reasons, they elected not to make these choices. They accepted the Crown's offers and, at least *in the case of Parcel B, the offer was at the figure which they had suggested.* I fail to see, then, how they could now successfully attack, after so many years, the settlements to which they agreed.[482]

*Kruger* was clearly decided in the context of an expropriation, with independent valuations and forceful representations on the Band's behalf by officials in Indian Affairs. Despite the obvious differences in *Kruger*, there are important analogies to the facts before us. First, the QVIDA Bands had independent legal advice from Wellman, who forcefully represented their interests

482 *Kruger v. The Queen*, [1985] 3 CNLR 15 at 51 (FCA), Urie JA.

throughout the negotiations leading up to the 1977 settlement. Second, the Bands also could have rejected the 1977 settlement in favour of a litigated resolution, but chose not to do so. Finally, J.D. Leask, Indian Affairs' Director General for the Saskatchewan Region, reviewed the settlement and concluded that it was "fair and just."

The only manner in which it might be said that Indian Affairs fell short was in the fact that no independent valuations were obtained by either party. It will be recalled that the parties had initially agreed to proceed by having the PFRA prepare engineering assessments to quantify the areas affected. The Bands later asked to proceed in the absence of such assessments to avoid prolonging the process and incurring greater expense. In the result, the valuation chosen was the Bands' own figure, to which the PFRA initially made strident objection. Ultimately, to use the language of Urie JA in *Kruger*, the PFRA "acceded in full" to the Bands' proposed terms. The PFRA rationalized the Bands' proposal as "reasonable and justifiable" by claiming to have paid the "present value of lost returns to the land between 1943 and the present [1977]," and fair market value for the flooded areas with regard to future damages, but clearly the settlement represented the Bands' figure. With these circumstances in mind, we would be hard pressed to conclude that the absence of independent valuations operated to the Bands' detriment in 1977.

### *Severability of the 1977 Settlement*

Even if the 1977 settlement was fair and reasonable, subsection 28(1) renders void any agreement whether written or oral "by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve." What, then, are we to make of a settlement that contemplates damages for past trespasses as well as compensation and permits for future use and occupation, particularly where proceeding by way of such a permit was, in our view, invalid? Moreover, what is the effect of the money actually having been paid by the PFRA to the benefit of the Bands, and having been spent by them? Finally, what is the effect of the Bands having passed later Band Council Resolutions purporting to rescind the resolutions adopting the settlement?

We will address the last question later in this report. With regard to the first two questions, we believe that the issue to be decided is whether subsection 28(1) of the *Indian Act* renders the entire 1977 settlement void, or whether parts of the settlement can be severed and can remain effective not-

withstanding the fact that other parts of the settlement are clearly illegal and thus void.

To understand the effect of the words in subsection 28(1) that render an agreement "void" unless the requirements of subsection 28(2) have been met, it is instructive to consider the following analysis by G.H.L. Fridman regarding "illegal" contracts:

> · Invalidity through illegality. . . .
>
> (b) Illegality and other kinds of invalidity. . . .
> A contract for a purpose regarded by the law as improper, though it conforms to all other requirements of a valid transaction, will lack essential validity, and, therefore, will be void. Invalidity through illegality refers to the infringement by a contract of some statute or doctrine of the common law relating to the purpose or object to be achieved by such contract. The term "illegality", in this sense, does not mean "criminal". An illegal contract, though invalid and therefore void, does not necessarily involve the contracting parties in liability for criminal conduct. However, the term "illegality" has been used to cover contracts which may have consequences in the criminal law, under the Criminal Code in Canada (or under statute or the common law in England), as well as the consequence of contractual invalidity.
>
> (c) Illegality and voidness
> In the history of contracts which are invalid at common law the courts have frequently used the expression "illegal" to mean not only a contract which is undoubtedly illegal under statute or under one of the heads of public policy to be examined later, but also a contract which at common law is not completely and truly illegal. As clarified by Denning L.J. in the English case of *Bennett v. Bennett*,[483] some of these "illegal" contracts at common law were not, and are not now, illegal in the fullest sense. They are really void to the extent of their illegality, but may be enforced as to the rest, if the illegal part can be severed from the legal. Thus, a contract in restraint of trade is void, but not illegal; insofar as it is possible to excise the illegal restraint from the rest of the contract, this will be done. In the more sophisticated language and ideas of the twentieth century, contracts may be invalid, in whole or in part, without being illegal, and such invalidity may arise under statute or by virtue of the common law. Canadian cases, however, do not appear to make the same subtle distinctions. They seem to use the phrases "illegal" and "void" interchangeably, and to make no real differentiation between different classifications of invalidity, even though they have accepted and apply the English doctrines as to severability in relation to contracts in restraint of trade and others, upon the basis of which the distinction between voidness and illegality may be said to rest. . . .
>
> One distinction does merit recognition, and that is the distinction between invalidity under statute and by virtue of the common law. There are sufficient differences between the nature of the invalidity in question and the operation of the relevant

483 *Bennett v. Bennett*, [1952] 1 KB 249 at 160 (CA).

doctrines to justify classification of the types of invalidity in accordance to whether the source is some statute or some rule of the common law.

2. Statutory illegality

(a) Prohibition by statute

In this context the statutes concerned are not *per se* criminal, that is, the Criminal Code. They are statutes of a regulatory nature, the infringement of which may involve illegality. The prohibition of a contract by such a statute renders the contract void and of no effect. . . .[484]

In the present case, there is no question that subsection 28(1) of the *Indian Act* gives rise to the sort of statutory illegality contemplated by Fridman. Unless the requirements of subsection 28(2) have been satisfied, an agreement by which a band or a member of a band purports to permit a person other than a member of that band to occupy or reside or otherwise exercise any rights on a reserve is void, at least to the extent of its illegality. However, the balance of such agreements may be enforced, if, to use Fridman's words, "the illegal part can be severed from the legal."

On the question of severance, Fridman continues:

A . . . very important qualification of the doctrine of the voidness of illegal contracts is the idea of *severance*. Sometimes a court will recognize the separation of valid from objectionable parts of a contract, and, while refusing to enforce the latter, will give effect to the former. In this connection it should be mentioned that the argument that there is a distinction between illegal and void (but not illegal) contracts, whether by statute or common law, may depend upon the application of the idea of severance. If the consideration for a promise or set of promises is illegal, then all the promises which rest on, or are dependent upon such consideration will be invalid. If some of the promises are dependent upon such illegal consideration, whether illegal at common law or under statute, while others have an independent existence, and rest upon consideration which is not itself illegal, then such independent promises may be enforceable against the other party. This distinction lies at the root of the illegal-void dichotomy. To quote from one English case which is said to support this

> . . . there are two kinds of illegality of differing effect. The first is where the illegality is criminal, or *contra bonos mores*, and in those cases . . . such a provision, if an ingredient in a contract, will invalidate the whole, although there may be other provisions in it. There is a second kind of illegality which has no such taint; the other terms in the contract stand if the illegal portion can be severed, the illegal portion being a provision which the court, on the grounds of public policy, will not enforce.[485]

484 G.H.L. Fridman, *The Law of Contract in Canada*, 2d ed. (Toronto/Calgary/Vancouver: Carswell, 1986), 321-25.
485 *Goodinson v. Goodinson*, [1954] 2 QB 118 at 120-21 (CA), Somervell LJ.

> It is suggested, by way of response, that in reality the test of the effect of the contract, in terms of its being wholly illegal or only partially void, must depend upon: (1) the policy of the common-law rule or statutory provision that is invoked, namely, can it be limited in its scope and application; and (2) whether, in the circumstances, not only is the contract one that is potentially severable, but severable in fact, having regard to the way the parties have contracted. Thus, the operation of the doctrine of severance rests upon its applicability to the type of contract that is in issue, as well as upon the practical question whether the particular contract before the court, though potentially severable, admits of severance.[486]

Therefore, to determine whether the 1977 settlement must be considered wholly illegal or only partially void, it would be necessary to consider, first, whether the scope and application of subsection 28(1) can and should be limited, and, second, whether the settlement itself is severable in fact, having regard to the manner in which the parties have contracted.

However, in light of the positions the parties have taken in this inquiry, it would be premature for the Commission to decide these questions at this stage. Neither party has addressed the important question of severability of contractual terms in its written submission because each has taken an "all or nothing" approach – Canada seeking to uphold the entire settlement, and the QVIDA First Nations submitting that it should be declared entirely void.

As already stated, the Commission is of the view that Canada's position cannot be sustained. By virtue of subsection 28(1), the settlement must be either completely void, as the First Nations contend, or, if the settlement is severable, it is at the very least void in relation to the proposed permit and any pre-paid damages from 1977 into the future.

Assuming, without deciding the point, that the entire 1977 settlement is void, and assuming that the dams will continue to remain in place, it will be necessary for the parties to enter into negotiations to obtain the proper authority to flood reserve lands and to determine whether any compensation is still owed to the QVIDA First Nations on account of damages from the 1940s to the present and into the future. In that event, the position of Pasqua, Muscowpetung, and Standing Buffalo would be no different from that of Sakimay, Cowessess, and Ochapowace, except to the extent of the set-off to be factored into the negotiations. Any amount negotiated with regard to Muscowpetung, Pasqua, and Standing Buffalo would have to set off $265,000 in 1977 dollars, whereas a settlement with the three eastern First Nations would

486 G.H.L. Fridman, *The Law of Contract in Canada*, 2d ed. (Toronto/Calgary/Vancouver: Carswell, 1986), 399-401.

have to reflect the compensation of $3330 paid to them in 1943, less the $60 credited to the Cowessess Indian Residential School.

Alternatively, and again without deciding the point, if the portion of the settlement dealing with the damages for trespass before 1977 can be severed and remain in effect, it will still be necessary for the three western First Nations to renegotiate compensation from 1977 to the present and into the future. It is true that the effect of severing the settlement in this fashion would be to reduce by 35 years the period with respect to which compensation must be renegotiated, again subject to set-off of some portion of the compensation already paid in 1977. However, the important point is that, regardless of whether the settlement is severable, further negotiations between Canada and the three western First Nations seem inevitable in view of the fact that subsection 28(2) of the *Indian Act* could not be used to grant authority to the PFRA to flood reserve lands in the Qu'Appelle Valley. Similarly, since it was not open to Canada to authorize use and occupation of reserve lands commencing in the early 1940s under section 34 of the 1927 *Indian Act*, negotiations with the three eastern First Nations are likewise required.

Because we are without the benefit of argument on the question of severability, we do not know whether the parties differ on this issue. We assume that the three western First Nations will continue to assert that the 1977 settlement should be considered entirely void. However, it is not inconceivable that Canada might also wish to take this position in preference to severing the settlement if it believes that the compensation paid in 1977 adequately compensated the First Nation for its damages. Since all six First Nations participating in this inquiry will in any event be required to negotiate or renegotiate some or all aspects of the compensation paid to them, we recommend that the question be resolved in the following fashion.

Unless Canada chooses to remove the control structures at Echo Lake, Crooked Lake, and Round Lake, it should take immediate steps to secure the necessary land rights required from all six participating First Nations to continue the operation of those structures. Whether it chooses to acquire the fee simple or some lesser interest such as a right of way should be based on two considerations: ensuring that the interest acquired from each First Nation is sufficient to achieve the objectives for which that interest is acquired, while at the same time (to quote from the Commission's decision in the Sumas

inquiry) doing "as little injury as possible to the Indians' interests."[487] Similarly, whether Canada acquires the required interests in land by surrender – assuming that the First Nations would be prepared to consent – or expropriation is a decision best left to Canada after weighing and balancing the various interests of the First Nations with those of the other parties that Canada must consider.

Canada and the six First Nations should also negotiate the remaining compensation, if any, payable to the First Nations for the use and occupation of the lands flooded by the control structures. As noted, the compensation paid to the three western Bands in 1977, and the use and occupation of their reserve lands by Canada since the early 1940s, should be factored into the compensation payable. Similarly, the compensation paid to the eastern Bands in 1943, and the PFRA's use and occupation of the lands since that time, should be factored into the compensation payable to those First Nations. If Canada and the western First Nations are unable to agree on whether the period from the early 1940s to 1977 can be severed and treated as settled, or if any First Nation is otherwise unable to agree with Canada on the outstanding compensation, if any, owed to that First Nation, it is open to the parties to bring those issues back before the Commission for its recommendation following the submission of appropriate evidence and argument.

### Could the Bands Rescind the 1977 Band Council Resolutions?

The QVIDA First Nations argue by analogy to municipal law that, "where a body is delegated the power to pass bylaws or resolutions, that power includes the power to repeal the bylaws and resolutions," subject to restrictions where repealing a bylaw or resolution would affect "vested rights of third parties." In this case, the First Nations contend that, while it might appear that the PFRA had vested rights as a result of the preceding construction and operation of the Echo Lake dam, the PFRA should not be protected by the vested rights doctrine since the 1977 Band Council Resolutions did not *create* vested rights and the flooding before 1977 was not authorized. Therefore, in the First Nations' submission, it should have been open to them to rescind the 1977 Band Council Resolutions as they subsequently purported to do.

487 Indian Claims Commission, *Sumas Inquiry: Report on Indian Reserve #6 Railway Right of Way Claim* (Ottawa, February 1995), 4 ICCP 3 at 40. As already noted, this principle was affirmed by the Federal Court of Appeal on June 24, 1997, in *Semiahmoo Indian Band v. Canada* (unreported), [1997] FCJ No. 842.

If the 1977 settlement was entirely void *ab initio* under subsection 28(1) of the *Indian Act*, as the First Nations submit, this issue becomes academic since it would not have been necessary for the Bands to issue rescinding Band Council Resolutions to render the earlier resolutions ineffective. However, to the extent, if any, that the 1977 settlement can be considered valid under section 28 of the *Indian Act*, the Commission agrees with counsel for Canada that the 1977 Band Council Resolutions were merely one form of evidence of an agreement between the PFRA and the western Bands regarding the settlement of damages for past flooding as well as the compensation and permits for future use and occupation of reserve lands. Other documents – such as correspondence among the parties, payment of the sum of $265,000 by the PFRA to Indian Affairs for deposit to the respective Bands' trust accounts, and the receipt and expenditure of those funds by the Bands – would represent substantial evidence of this agreement even in the absence of the 1977 Band Council Resolutions.

We do not consider the execution of these Band Council Resolutions by the Bands as an exercise of their legislative power to pass bylaws or resolutions, but rather as independent evidence of an intention to enter into a contract. As parties to a contract, the Bands are subject to the ordinary principles of offer and acceptance, consideration, capacity and so forth, assuming that such principles apply to this *sui generis* field of law. To permit one party to an agreement to withdraw unilaterally from that agreement without the concurrence of the other party would be contrary to basic principles of contract law.

Therefore, regardless of whether the 1977 settlement was valid in part or entirely void, we conclude that the rescinding Band Council Resolutions are irrelevant for the purposes of determining the interests of the parties in this case.

**Conclusions**

To summarize, the Commission concludes that it was not open to Canada in the early 1940s to authorize the PFRA under section 34 of the 1927 *Indian Act* to use and occupy reserve lands of the six participating QVIDA First Nations for flooding purposes. That being the case, the purported authorizations granted by Canada at that time must be considered ineffective, such that the PFRA has been in trespass on the eastern reserve lands ever since, and on the western reserve lands until at least 1977.

With regard to the western First Nations, the 1977 settlement was void *ab initio* under subsection 28(1) of the *Indian Act*, either entirely or at minimum with respect to that portion of the settlement relating to the permits and damages for future use and occupation looking forward from 1977. In any event, the nature and duration of the future right to use and occupy reserve land, as intended by the parties to be granted by the settlement, fell outside the scope of the permits authorized by subsection 28(2). The effect of these conclusions is that the PFRA remained in trespass on the Muscowpetung, Pasqua, and Standing Buffalo reserves after 1977. However, whether the portion of the settlement dealing with pre-1977 trespasses can be severed and operate independently is an issue the parties should negotiate. If they are unable to settle that issue or any other question relating to the quantum of compensation arising out of the PFRA's unauthorized use and occupation of reserve lands, it is open to the parties to return to the Commission for a further inquiry into such matters.

## ISSUE 5 ABORIGINAL, TREATY, AND RIPARIAN WATER RIGHTS

Did those QVIDA First Nations with reserves adjacent to or on both sides of the Qu'Appelle River and lakes have common law riparian water rights, including rights to the river beds? If so, did the Crown have an obligation to ensure that these water rights were protected under the *North-West Irrigation Act*, 1894, and the *Dominion Power Act*, and to act in the First Nations' best interests when those rights might be affected? Moreover, did the Crown act in the best interests of the QVIDA First Nations when it authorized the PFRA to construct control structures that altered the First Nations' riparian interests and caused consequential losses?

As the final aspect of their claim, the QVIDA First Nations claim to retain aboriginal title and treaty rights to the bed and waters of the Qu'Appelle River adjoining their respective reserves, in addition to the riparian rights accruing at common law to those in possession of land adjacent to a body of water. The parties agree that riparian rights include the right of access to the water; the right of drainage; rights relating to the flow, quality, and use of water; and the right of accretion. The First Nations also contend that the Qu'Appelle River is non-navigable, meaning that, by virtue of the common law principle of *ad medium filum aquae*, a presumption arises that the First Nations, as holders of riparian rights, also own the bed of the river and lakes to the

centre line (where a given First Nation owns land on one side of the body of water) or the entire bed (where a First Nation owns land on both sides of the body of water).

In the first instance, the First Nations contend that Canada's implementation of the *North-West Irrigation Act* in 1894 did not demonstrate the necessary "clear and plain intention" that case authorities may indicate is required to extinguish their aboriginal, treaty, and riparian rights. Alternatively, if their interests *were* damaged by Canada's implementation of the *North-West Irrigation Act* and its failure to protect those interests by licensing the Bands' rights to use water for "domestic, irrigation and other purposes," then the First Nations argue that Canada breached fiduciary obligations to them. Further breaches arose, in the First Nations' submission, when Canada failed "to protect those treaty and riparian interests which were not forfeited by the *North-west Irrigation Act*, in permitting the flooding to take place which resulted in not only economic losses but a loss of treaty hunting, fishing and trapping rights."[488]

Counsel for Canada was perplexed by the First Nations' claim under this heading and contended that, for the following reasons, the Commission should find no outstanding lawful obligation owing by Canada for breach of the First Nations' water rights:

- The role of the Commission, Canada submits, is to assess whether a claim is "eligible for negotiation" – in other words, "a claim must show *some loss or damage that is capable of being negotiated under the [Specific Claims] Policy*."[489] The Commission's mandate does *not* permit it to issue declarations of legal rights or legal opinions concerning rights that are not brought directly into issue by the loss or damage that forms the subject matter of the claim.
- The claim in this inquiry is for loss of income from farming, hay production, wood products, hunting, and trapping as a result of damage caused by permanent and semi-permanent flooding of reserve lands. Canada contends that the First Nations' claim does not disclose which riparian rights were affected by the *North-West Irrigation Act*, nor how a licence issued under the Act would have preserved the rights claimed to have been affected. Moreover, Canada further questions how the losses alleged relate to the water rights claimed, and "how any such damages differ from the

488 Submissions on Behalf of the QVIDA First Nations, May 5, 1997, p. 77.
489 Submissions on Behalf of the Government of Canada, June 6, 1997, p. 61. Emphasis added.

damages that are already being claimed as a result of the alleged illegal flooding of the reserves."[490] Even if the Commission should find a breach of the Bands' water rights giving rise to a separate cause of action, Canada submits that there is still only one set of damages eligible to be compensated, whether it be under the water rights claim or under the preceding claims for illegal use of reserve lands or breach of fiduciary duties.

In rebuttal, the First Nations added that they lost the ability to use the waters of the Qu'Appelle River in the same manner as they had prior to the erection of the dams, owing to pollution and other factors. Counsel also noted that there could be other damages besides those contemplated by the first four issues in these proceedings, such as special damages and punitive damages.[491]

In the Commission's view, it is unnecessary to address this issue in light of our findings earlier in this report. Canada contends that any sustainable claims by the First Nations arising out of aboriginal, treaty, or riparian water rights appear to represent alternative causes of action giving rise to the same damages dealt with in our comments relating to Canada's inappropriate use of section 34 of the 1927 *Indian Act*. If that is the case, then to the extent the PFRA and its successors can be shown to have interfered with the Bands' riparian or other water rights – whether rights of drainage, water quality, or others in the catalogue of such rights – as a result of the erection and operation of the Qu'Appelle Valley dams, we are of the opinion that the First Nations are entitled to claim compensation from the PFRA for the damages caused by that interference. Those damages must be assessed with caution to ensure that there is no element of "double counting" in compensating the First Nations for their losses arising under alternative causes of action. Care must also be taken in considering the compensation of $3270 paid to the Cowessess, Ochapowace, and Sakimay Bands in 1943 and the settlement for $265,000 with the Muscowpetung, Pasqua, and Standing Buffalo Bands in 1977 to prevent duplicate awards for the same damages. Canada takes the position that all the First Nations have received all the compensation to which they are entitled, subject to further investigations being undertaken regarding the fairness of the $3270 paid to the eastern Bands in light of the possible limitations in P.A. Fetterly's abilities as an appraiser. While we are not prepared at this stage to conclude that the First Nations have been fully compen-

490 Submissions on Behalf of the Government of Canada, June 6, 1997, p. 62.
491 ICC Transcript, June 26, 1997, pp. 216-18 (David Knoll).

sated, we recognize that such a finding represents one possible outcome of the steps we recommend the parties take at this time.

Near the end of the oral session, counsel for the First Nations in rebuttal raised the question of damages caused by pollution. The evidence before us is equivocal at best as to whether raising the water levels in the Qu'Appelle Valley has had the effect of increasing or mitigating pollution levels. On one hand, some of the elders testified that water quality has decreased as the dams have impeded the flow of the river and its natural "flushing" action. On the other hand, there is documented historical evidence to show that, during long periods of drought in the 1930s and at other times, low water levels contributed to stagnation, leading to requests for dams to increase water levels and enhance the diluting effects of having more water in the system. There is also some technical evidence to suggest that all river systems have a natural cycle in which they tend to become increasingly filled with sediment, algae, and other natural "contaminants" over the course of time, although this process "can be accelerated by human activities which increase the rate at which nutrients are contributed to the water."[492] Without better evidence to demonstrate how pollution levels have changed and how those levels can be linked to the construction of the Echo Lake, Crooked Lake, and Round Lake dams and other control structures in the Qu'Appelle Valley, we are unable to decide this point.

Finally, we do not believe it is necessary to comment on Canada's alleged failure to obtain licences in a timely manner to protect the Bands' riparian or other water rights following Canada's passage of the *North-West Irrigation Act* in 1894. As counsel for Canada argued, such licences appear to deal with rights of consumption for domestic, agricultural, and other purposes, and no damages arising from the failure to protect such consumptive rights have been demonstrated to the Commission. For this reason, we will refrain from deciding whether riparian or other water rights were extinguished by the *North-West Irrigation Act* or other statutes, or whether the Crown failed to protect these rights, such as they may be, on behalf of the Bands.

492 E.E. Gillespie, Regional Engineering and Architectural Advisor, Department of Indian and Northern Affairs, to W.A.S. Barnes, District Supervisor, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, March 19, 1975, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 966); Canada-Saskatchewan-Manitoba, "Report of the Qu'Appelle Basin Study Board," 1972 (ICC Exhibit 22, p. 13).

# PART V

## FINDINGS AND RECOMMENDATIONS

### FINDINGS

The Commission has been asked to inquire into and report on whether the Government of Canada properly rejected the specific claim of the QVIDA First Nations. In assessing the validity of the claim, we have considered the following issues:

1 Could the Crown authorize the PFRA under section 34 of the *Indian Act*, 1927, to use and occupy reserve lands for flooding purposes? If so, was the PFRA so authorized? If not, did Canada breach its fiduciary obligations to the QVIDA First Nations by failing to obtain proper authorization under the Act?

2 If Canada could and did properly authorize the PFRA under section 34 of the *Indian Act*, 1927, to use and occupy reserve lands for flooding purposes, did the Crown nevertheless have a fiduciary obligation to consult or otherwise consider the best interests of the QVIDA First Nations before proceeding?

3 Did the terms of Treaty 4 preclude the Crown from relying on section 34 of the *Indian Act*, 1927, or otherwise require the consent of the QVIDA First Nations to authorize the PFRA to use and occupy reserve lands for flooding purposes?

4 Did the Band Council Resolutions signed by the Pasqua, Standing Buffalo, and Muscowpetung First Nations in the 1970s effectively release the Crown and the PFRA from all past, present, and future claims for damage caused by the Echo Lake control structure built in the 1940s?

5 Did those QVIDA First Nations with reserves adjacent to or on both sides of the Qu'Appelle River and lakes have common law riparian water rights, including rights to the river beds? If so, did the Crown have an obligation to ensure that these water rights were protected under the *North-West Irrigation Act*, 1894, and the *Dominion Power Act*, and to act in the First Nations' best interests when those rights might be affected? Moreover, did the Crown act in the best interests of the QVIDA First Nations when it authorized the PFRA to construct control structures that altered the First Nations' riparian interests and caused consequential losses?

Our findings are summarized as follows.

**Issue 1: Section 34 of the *Indian Act*, 1927**

Canada acknowledged that it had not acquired the right to use and occupy reserve lands of the QVIDA First Nations by way of expropriation or surrender, so the question that remained was whether such use and occupation could be authorized by the Superintendent General of Indian Affairs under section 34 of the 1927 *Indian Act*. Based on the reasoning of the Supreme Court of Canada in *Opetchesaht*, the Commission concludes that, even if section 34 is assumed to be an *enabling* provision rather than merely prohibitory, the rights conveyed to the PFRA were too extensive, exclusive, and permanent to be authorized under section 34. Moreover, unlike subsection 28(2) of the later *Indian Act* considered by the Court in *Opetchesaht*, section 34 does not contemplate consent by either a band or a band council, meaning that it should be interpreted even more narrowly than subsection 28(2).

Since section 34 did not form an appropriate basis for authorizing use and occupation of reserve lands for flooding purposes in this case, it was not necessary for the Commission to consider whether Canada actually did authorize the PFRA to use and occupy reserve lands under the section. Therefore, it was necessary for the PFRA to acquire by surrender or expropriation the right to use and occupy reserve lands for flooding purposes. Having failed to do so, the PFRA has trespassed on the reserve lands of all six participating First Nations from the early 1940s to at least 1977, and on the reserve lands of the Sakimay, Cowessess, and Ochapowace First Nations to this day. The impact of the 1977 settlement on the PFRA's use and occupation of the reserve lands of the Muscowpetung, Pasqua, and Standing Buffalo First Nations is addressed below.

**Issues 2 and 3: Canada's Fiduciary and Treaty Obligations**

Given that the Commission has concluded that it was inappropriate for Canada to authorize the PFRA to use and occupy reserve lands for flooding purposes under section 34 of the 1927 *Indian Act*, it is unnecessary to determine whether Canada breached a fiduciary or treaty obligation to consult or otherwise consider the best interests of the QVIDA First Nations before proceeding.

**Issue 4: Effects of the 1977 Band Council Resolutions**

For the same reasons that we concluded that it was not open to Canada to authorize the use and occupation of reserve lands for flooding purposes under section 34 of the 1927 *Indian Act*, Canada could not authorize such use and occupation under subsection 28(2) of the 1970 *Indian Act* as part of the 1977 settlement discussions with Muscowpetung, Pasqua, and Standing Buffalo. The present case is distinguishable from *Opetchesaht* and the Eel River Bar First Nation inquiry because of the more extensive, exclusive, and permanent interest granted to the PFRA than to the British Columbia Hydro and Power Authority and the New Brunswick Water Authority in those other cases. Moreover, the 1977 settlement was void *ab initio* under subsection 28(1) of the *Indian Act*, either entirely or at minimum with respect to that portion of the settlement relating to the permits and damages for future use and occupation looking forward from 1977. The effect of these conclusions is that the PFRA remained in trespass on the Muscowpetung, Pasqua, and Standing Buffalo reserves *after* 1977. The question of whether any pre-1977 trespasses were settled by the 1977 settlement depends on whether the Band Councils had the power to enter into binding settlements with respect to the unauthorized use and occupation of reserve lands and whether the release clause in the 1977 Band Council Resolutions can be severed from those portions of the agreement rendered void by subsection 28(1) of the *Indian Act*.

Unless it chooses to remove the control structures at Echo Lake, Crooked Lake, and Round Lake, Canada should immediately commence negotiations to obtain, whether by surrender or expropriation, the interests in land it requires for flooding purposes from all six reserves. Canada should also commence negotiations to determine the remaining compensation, if any, payable to the Sakimay, Cowessess, and Ochapowace First Nations for flooding damages since the 1940s, taking into account the $3270 received by those First Nations as compensation in 1943. Similarly, Canada should commence negotiations to determine the remaining compensation, if any, payable

to the Muscowpetung, Pasqua, and Standing Buffalo First Nations for flooding damages to those reserves, again taking into account the compensation of $265,000 paid to the three First Nations under the terms of the 1977 settlement. Whether the settlement entered into by the Band Councils in relation to damages prior to 1977 is binding on the respective Bands, and whether this part of the agreement can be severed and can operate independently to settle the damages arising during that period, are issues the parties should negotiate. If they are unable to settle those issues or any other question relating to the quantum of compensation arising out of the PFRA's use and occupation of reserve lands, the parties may return to the Commission for a further inquiry into such matters.

The Band Council Resolutions by which the three western Bands purported to rescind the 1977 Band Council Resolutions and the settlement are irrelevant to these proceedings. If the 1977 settlement was entirely void *ab initio* under subsection 28(1) of the *Indian Act*, this issue is academic, since it would not have been necessary for the Bands to issue rescinding Band Council Resolutions to render the earlier resolutions ineffective. However, to the extent, if any, that the 1977 settlement can be considered valid under section 28 of the *Indian Act*, the 1977 Band Council Resolutions were merely evidence of the intention to enter into a contract. As such, it would be contrary to basic principles of contract law to permit the First Nations unilaterally to withdraw from the 1977 settlement without the concurrence of the PFRA.

**Issue 5: Aboriginal, Treaty, and Riparian Water Rights**

It is unnecessary for the Commission to address the nature and extent of the First Nations' aboriginal, treaty, and riparian water rights in light of our findings in relation to the first four issues. Nevertheless, to the extent that the interference with such water rights constitutes an alternative cause of action, and if the PFRA and its successors can be shown to have interfered with the First Nations' water rights, we consider the First Nations to be entitled to claim compensation for the damages caused by such interference. Due regard must be had, of course, for compensation already paid to the First Nations to avoid any element of "double counting."

The evidence before the Commission is insufficient to link pollution in the Qu'Appelle River conclusively to the construction and use of the Echo Lake, Crooked Lake, and Round Lake control structures. Similarly, we have been shown no evidence that the failure by Canada to license the First Nations'

consumptive rights under the *North-West Irrigation Act* of 1894 has caused any damage to the First Nations. The Commission therefore declines the invitation to decide whether the First Nations' riparian or other water rights were extinguished by that statute, or whether the Crown failed to protect those rights.

## RECOMMENDATIONS

Having found that the Government of Canada owes an outstanding lawful obligation to the First Nations of the Qu'Appelle Valley Indian Development Authority with respect to the Prairie Farm Rehabilitation Administration's acquisition of the right to use and occupy their reserve lands for flooding purposes, we therefore recommend:

### RECOMMENDATION 1

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

### RECOMMENDATION 2

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

**(a) damages caused to reserve lands since the original construction of the dams in the early 1940s, and**

**(b) compensation for**

**(i) the value of any interest that Canada may acquire in the reserve lands, and**

**(ii) future damages to reserve lands,**

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

**RECOMMENDATION 3**

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

**(a) damages caused to reserve lands**

**(i) since the original construction of the dams in the early 1940s, or**

**(ii) alternatively, since 1977, if these First Nations can be bound by the 1977 Band Council Resolutions and if the release for damages prior to 1977 can be severed from the invalid part of the settlement, and**

**(b) compensation for**

**(i) the value of any interest that Canada may acquire in the reserve lands, and**

**(ii) future damages to reserve lands,**

**subject to set-off of compensation of $265,000 paid to those First Nations in 1977.**

FOR THE INDIAN CLAIMS COMMISSION

| P.E. James Prentice, QC | Carole T. Corcoran | Roger J. Augustine |
|---|---|---|
| Commission Co-Chair | Commissioner | Commissioner |

Dated this 19th day of February, 1998

# APPENDIX A

## QU'APPELLE VALLEY INDIAN DEVELOPMENT AUTHORITY INQUIRY FLOODING CLAIM

**1 Planning conferences**

Regina, January 30, 1995
Regina, June 6, 1995
Regina, September 28, 1995
Regina, April 3, 1996
Regina, May 14, 1996
Regina, February 28, 1997

**2 Community sessions**

The Commission conducted the following community sessions:

- *September 18, 1996*: The Commission held a joint community session of the Sakimay, Cowessess, Kahkewistahaw, and Ochapowace First Nations in the Community Hall on the Sakimay reserve. Testifying were elders George Ponicappo, Alex Wolfe, Marie Kaye, Raymond Acoose, Edna Sangwais, Emma Panipekeesick, Jimmy Wahpooseywan, and Leonard Kequahtooway of Sakimay; Joseph Crowe, John Alexson, Mervin Bob, Allan McKay, and Urbin Louison of Kahkewistahaw; Henry Delorme of Cowessess; and Margaret Bear, Marlowe Kenny, Arthur George, and Calvin George of Ochapowace.
- *October 2, 1996*: The second session involved testimony from elders of the Pasqua First Nation who were heard in the Pasqua Band Hall. The participants included David Obey, Stanley Pasqua, Clara Pasqua, Andrew Gordon, Raymond Gordon, Clayton Cyr, Lawrence Stevenson, Jimmy Iron Eagle, George Kahnapace, Lawrence Chicoose, Agnes Cyr, Dora B. Stevenson, Marsha Gordon, Bernard Gordon, Edith Merrifield, and Ina Kahnapace.
- *October 3, 1996*: The Commissioners convened in the Muscowpetung School gymnasium to hear the evidence of 11 elders of the Mus-

cowpetung First Nation: Calvin Poitras Sr, Violet Keepness, Isabelle Keepness, William Pratt, Evelyn Cappo, Winonah Toto, Ervin Toto, Earl Cappo, Paul Poitras, Norma Cappo, and Eugene Anaquod.

- *April 4, 1997*: The final community session was held at the Standing Buffalo Cultural Centre to hear from that First Nation's elders. Providing oral testimony were Charlie Buffalo, Susan Yuzicappi, Isabelle Jackson, Felix Bearshield, Ken Goodwill, Clifford Goodwill, Tony Yuzicappi, and, through Band Councillor Velma Bear, Cecil Wajunta, Victor Redman, Catherine Goodfeather, and Celina Wajunta.

**3 Legal argument** Regina, June 26, 1997

**4 Content of formal record**

The formal record for the QVIDA Inquiry consists of the following materials:

- the documentary record (6 volumes of documents)
- 35 exhibits tendered during the inquiry, including transcripts from community sessions (4 volumes)
- transcript of oral submissions (1 volume)
- written submissions of counsel for Canada and the QVIDA First Nations, including authorities submitted by counsel with their written submissions and supplemental authorities submitted during oral submissions

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.