

"I have heard the elders say that when the terms of the treaties were deliberated the smoke from the pipe carried that agreement to the Creator binding it forever. An agreement can be written in stone, stone can be chipped away, but the smoke from the sacred pipe signified to the First Nation peoples that the treaties could not be undone."

Ernest Benedict, Mohawk Elder
Akwasasne, Ontario
June 1992

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Kahkewistahaw First Nation Settles 1907 Specific Claim

The Kahkewistahaw First Nation and the Federal government have agreed on a \$94.6 million settlement for the First Nation's 1907 specific land claim. The agreement, which will be signed during a ceremony to be held later in the summer, brings to a close years of hardship on the part of the community and much hard work by the First Nation's leadership and staff, federal negotiators, and the Indian Claims Commission.

Kahkewistahaw's Chief, Louis Taypotat, now sees a brighter future for the community of 1,385 people, located 130 kilometres east of Regina. "We have lost a lot here, but now we have a chance to get it back," Chief Taypotat says. "We have been thinking a lot in the area of where we should spend money and what we should do with it. Trust is number one, putting it into trust and making it grow for our First Nation. This is a one-time deal and we have to utilize it in the right way. We have to look to the future of our First Nation."

Most of the money will be used to set up a trust fund to support economic development, land purchases, and community infrastructure. The Band has already set aside money for a new school and housing; it is also looking into buying lands for development in the nearby communities.



Chief Kahkewistahaw (or "He Who Flies Around") would not sell his people's land.





Kahkewistahaw's Chief, Louis Taypotat.

“Historically, we were farmers and ranchers. Now, we have the opportunity to get our farmers back in place, to continue to make a living.”

- Chief Louis Taypotat

“We are planning developments in education, economic development, and agriculture,” Chief Taypotat says. “Historically, we were farmers and ranchers. Now, we have the opportunity to get our farmers back in place, to continue to make a living.”

Al Gross was the chief negotiator for Indian and Northern Affairs Canada (INAC) when the settlement was completed. Mr Gross is confident that the settlement will mean a better future for the community. “Chief Taypotat and his Council are a forward-looking group; they think about the community around them; they are people who think about economic development,” Mr Gross says. “You’ll find they will do things with the settlement that will have a lasting impact. I’m really positive about it.”

Mr Gross says the settlement will not just help the First Nation; the benefits will spread throughout the province. “If you have a First Nation like the Kahkewistahaw First Nation that wants to improve things, create jobs and an economy for the Band, then you are going to do things that will help the whole community. That means an economic contribution to Saskatchewan and to the communities around that First Nation.”

The settlement negotiations were based on a common understanding that: a settlement agreement would provide cash compensation to allow the First Nation to acquire replacement land on a willing buyer/willing seller basis; consideration would be given to third-party interests; and the settlement would represent a full and final release of Canada's obligations regarding this claim.

Less than 2 per cent of Saskatchewan's land base is currently held in reserve for the use and benefit of First Nations. To put this in perspective, First Nations represent slightly more than 10 per cent of Saskatchewan's total population.

In 1881, the 46,816-acre Kahkewistahaw Indian Reserve was surveyed. Named for a man who negotiated the reserve, Chief Kahkewistahaw (or “He Who Flies Around”), the reserve lands included ample timber and good haying lands – enough resources to provide for the members of the Band. Upon receiving their reserve, the people of Kahkewistahaw immediately set about developing its agricultural potential, and farming soon became the main economic activity for the reserve. Within a few years, the local Indian agent and the leadership of

Kahkewistahaw began to be pressured by the local government and white settlers to sell the more productive portions of the reserve.

Kahkewistahaw First Nation's current leader, Chief Taypotat, describes his distant predecessor as a visionary whose only concern was the future of his people. “He was a lifetime hereditary chief and he was a powerful man. According to the elders, a spiritual man, he could look far ahead.... He would never sell to anybody.”

For over 20 years, right up to his death in 1906, Chief Kahkewistahaw refused to sell the land that was crucial to his community's well-being. The winter after Chief Kahkewistahaw's death was a particularly brutal one. The population of the Kahkewistahaw First Nation had been affected by illness in previous years and the winter of 1907 brought more hardship in the form of hunger. It was at this time – when the people of Kahkewistahaw were leaderless and starving – that the federal government representative approached them with cash in hand and a new offer to buy the best of their lands. The offer was rejected at first, but was eventually accepted by the desperate population. Without a recognized leader of the First Nation,



the Indian agent who brokered the deal had an ordinary band member sign the affidavit for the surrender, contrary to the 1906 *Indian Act*.

On March 2, 1989, the Kahkewistahaw First Nation submitted a claim under the federal Specific Claims Policy, seeking “recognition of [its] claims and compensation for the losses and damage sustained” as a result of the 1907 surrender. The Specific Claims Branch of INAC completed a review of the claim in January 1992. Canada’s preliminary position was that the 1907 surrender was valid and that Canada had no obligation to compensate Kahkewistahaw for any loss. On August 31, 1994, at the request of the First Nation, the Indian Claims Commission began to conduct an inquiry into Kahkewistahaw’s specific land claim. The ICC inquiry concluded that the 1907 land surrender was valid and unconditional. However,

the Commission also found that Canada owed a fiduciary obligation to the First Nation and that Canada had breached that obligation.

In procuring the surrender, Canada’s agents engaged in “tainted dealings” by taking advantage of the Band’s weakness and lack of leadership to induce its members to consent to a surrender that, for a period of 22 years, they steadfastly refused.... In short, Canada breached its fiduciary obligations by subordinating the interests of the Band to the interests of the surrounding communities as well as Canada’s own political interests.

- “Report on the Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry” (Ottawa: Indian Claims Commission, February 1997)

Ralph Brant, Director of Mediation for the ICC, says that the Commission completed its inquiry and recommended that the government accept the claim for negotiation.

The ICC facilitated the creation of extensive loss-of-use studies to value the economic potential of the surrendered land from 1907 until the present day. “Everyone recognized, and it is very obvious if you go to the reserve, that the best quality lands were taken in the surrender,” Mr Brant says. The numerous studies took time and Kahkewistahaw’s negotiating team was meticulous in preparing for the studies. They wanted Canada’s agreement on all of the terms of reference in order to get results with which everyone could agree.

Archival photo of Jack Bob from Kahkewistahaw, hauling wood to Broadview. He received \$1.50 per load.





“It will be good to look back in 10 years and see what this settlement has done. I’m optimistic that it is going to have a very positive impact on the community.” - Al Gross

Al Gross, Indian and Northern Affairs Canada's chief negotiator for the Kahkewistahaw claim.

Once the studies and the reports were on the table and the parties agreed on the results, the negotiation of a settlement agreement began in earnest. At this time in the claims process, negotiations occur between the lawyers and representatives of the First Nation and the federal government. However, the ICC was brought back to the table to mediate problem areas.

“They had a lot of difficulty agreeing on specific issues, so they called us back in to help them resolve some of these issues,” says Mr Brant, who acted as mediator and chaired the meetings. “It took them well over a year to develop a settlement agreement, which is very unusual, so we held several settlement agreement meetings where I chaired the meeting and we tried to resolve some of the issues regarding the settlement.” The problems were eventually worked out through hard work by all the parties involved. On November 25, 2002, the members of the Kahkewistahaw First Nation voted to accept the settlement.

The Kahkewistahaw claim was one of Mr Gross’ first experiences working with the ICC and he was pleasantly

surprised at the Commission’s effectiveness in mediating between the parties on particular issues and keeping the process flowing. “That is a very significant role. It takes the burden off the parties, the parties can concentrate on the issues they are talking about, nothing falls through the cracks. The contribution of the ICC in that role cannot be overlooked. Kahkewistahaw and Fishing Lake were the first claims I did with the ICC and, at first I thought, let’s just get things done, we should not worry about a third party, and after, I have to say they are very useful, very helpful.”

Mr Gross says the ICC’s inquiry reports give the negotiating parties a platform from which to begin. They do not need to discuss many historical details if they agree to use the ICC report as a basis.

Mr Gross is excited about what the settlement will mean for Kahkewistahaw First Nation. “It is particularly satisfying



See inset next page.



when you have a community that has that kind of need, who has lost their land, and who has lost their ability to really become involved in agriculture. To see it all come back, and to see it come back to people that want to do it, want some progress, they want to go ahead, it is very great... It will be good to look back in 10 years and see what this settlement has done. I'm optimistic that it is going to have a very positive impact on the community."

Now that the land claim has been settled, Chief Taypotat is thankful for the all the support the Kahkewistahaw First Nation received. The Chief says that, without the help of his staff, the lawyers, and the researchers, the claim might never have been settled. He is also grateful for the support and information he received from the elders of his community. "Spiritually, we got a lot of support from the grandfathers and grandmothers for what we were trying to seek for the First Nation," Chief Taypotat says. "I want to thank all those elders, who came from far and near, to give us their testimonies. That is something First Nations that have claims should think of; it is the elders who know

"I must say they [ICC] did all right, really good. I have to commend them for their support also. You could say, if it wasn't for them, we would still be fighting an uphill battle." - Chief Louis Taypotat

about these things and there are getting to be fewer elders left. If you listen and be a good listener you will go a long way."

Chief Taypotat also wanted to thank the ICC for the work it did. "I must say they did all right, really good. I have to commend them for their support also. You could say, if it wasn't for them, we would still be fighting an uphill battle."



The Kahkewistahaw First Nation is located 130 kilometres east of Regina, Saskatchewan.



The *Specific Claims Resolution Act* Moving Through The Legislative Process



Photo by Tom Littlemore. Photo reproduction authorized by the Library of Parliament.

Bill C-6, the Specific Claims Resolution Act, is currently working its way through the legislative process.

The *Specific Claims Resolution Act*, if passed, will create a centre that would replace the Indian Claims Commission. The act would establish the Canadian Centre for the Independent Resolution of First Nations Specific Claims to provide for the filing, negotiation, and resolution of specific claims.

IMPACT OF BILL C-6 ON CLAIMS CURRENTLY BEFORE ICC

Bill C-6 passed third reading in the House of Commons on March 18, 2003 and is now being reviewed by the Senate's Standing Committee on Aboriginal Peoples.

The Indian Claims Commission will continue to exercise its mandate to inquire – at the request of a First Nation – into specific land claims that have been rejected by the federal government. It will be business as usual for the Commission until Bill C-6, proposed legislation to establish a new, permanent claims body, has received Royal Assent.

The Commission will address claims currently in our system in a way that will minimize any inconvenience or disruption to First Nations claimants.



THE CANADIAN CENTRE FOR THE INDEPENDENT RESOLUTION OF FIRST NATIONS SPECIFIC CLAIMS

The new Canadian Centre for the Independent Resolution of First Nations Specific Claims would eventually replace the Indian Claims Commission, which was created as an interim measure in 1991.

The new Centre would have two separate bodies, a commission and a tribunal, and would take charge of the funding for First Nation participation in the specific claims process. The commission would facilitate negotiated settlements using mediation, negotiation, and other means of dispute resolution. The commission would provide these services for all claims, regardless of the potential amount of the claim. The second body, the tribunal, would be a quasi-judicial body able to make final decisions on the validity of claims and compensation that did not reach a negotiated settlement. This tribunal would have a \$7 million cap on the settlements.

On November 26, 2002, the Indian Claims Commission (ICC) presented its comments on the *Specific Claims Resolution Act* (Bill C-6), before the Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources. The ICC's comments, presented by Chief Commissioner Phil Fontaine, were developed with the belief that Canadians want to see justice and fairness in the settlement of First Nation specific land claims. Drawing upon the ICC's 11 years of experience holding inquiries and mediating into specific land claim negotiations, Mr Fontaine identified eight principles which are seen by all Commissioners as fundamental and should be reflected in the new body.

"We believe that such a claims body must be independent, must have authority to make binding decisions, must be a viable alternative to litigation, must include the right to First Nations to provide oral testimony of their history, must provide mechanisms for alternative dispute resolution, must ensure access to justice, must ensure access to information, and finally, the new claims body must ensure the primacy of the fiduciary relationship between First Nations and the federal Crown," Mr Fontaine said.

- Independence from the federal government is a crucial element for a body that is to have an objective perspective on disputes between a First Nation and Canada. Specific land claims arise when a First Nation alleges that the federal government has not honoured its treaties, agreements, or legal responsibilities. Only a body that is independent of influence from the federal government will be seen by First Nations as a better alternative than litigation.
- Such an independent body should have the authority to make binding decisions and compel the federal government and First Nations to act on its decisions. Without the teeth to compel the parties to act and comply with the Centre's timelines it is possible that the federal government or a First Nation could delay the process.
- It should be remembered that First Nations have, and will continue to have, the option to take their land claims to the courts. For the new body to be successful, First Nations must see it as a viable alternative to the courts and litigation.
- The use of oral history has proven invaluable to the ICC process, and the Commission applauds the federal government for including it in the new legislation.



Robert Nault, Minister of Indian and Northern Affairs Canada.

INDIAN AND NORTHERN AFFAIRS CANADA

Robert Nault, Minister of Indian and Northern Affairs Canada, introduced Bill C-6 to the House of Commons as part of a package of legislation. He feels the new legislation is progressive and will enable First Nations to accelerate their transition towards self-government and greater economic independence. His presentation on the bill to the Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources preceded the ICC's presentation.

"While the current backlog of claims won't be erased overnight, the Centre will create a more efficient and cost-effective method of settling these claims," Mr Nault said.

Mr Nault said that Bill C-6 flowed from commitments made in the Liberal Party's Red Book and is a result of many years of study and discussion.

Many of the Standing Committee's questions for Mr Nault at the end of his presentation concerned the tribunal's \$7 million cap. Mr Nault responded by pointing out that the Centre's emphasis was on negotiation and that the tribunal would only be used as a last resort. If the tribunal is not an acceptable avenue for a claim, the court system will still be an option open to First Nations.





*The Assembly of First Nations Grand Chief,
Matthew Coon Come.*

ASSEMBLY OF FIRST NATIONS

On November 28, 2002, the Grand Chief of the Assembly of First Nations, Matthew Coon Come, gave the AFN's opinions on the *Specific Claims Resolution Act*. The AFN is a national organization which represents a large segment of First Nation citizens in Canada.

The AFN views the proposed legislation as fundamentally flawed. In its view, the bill should be withdrawn and revamped through a co-operative effort on the part of both the federal government and First Nations. The AFN pointed to the 1988 *Report of the Joint First Nations-Canada Task Force on Specific Claims Policy Reform* as a document that has the support of First Nations.

The AFN has concerns about the new Centre's independence from INAC. "The federal government retains the sole authority over appointments to the commission and tribunal and retains authority over the processing of claims. This undermines the perceived independence of the tribunal and the commission," Mr Coon Come said.

The AFN sees the possibility of the new legislation creating institutionalized delay since it does not give any time lines for the new process. Mr Coon Come also said that the cap on the tribunal would be a "step backwards" and would severely limit the ability of First Nations to use the tribunal.

Mr Coon Come ended his presentation by saying that partnership was the basis of the original relationship between First Nations and Canadians and should be a key component of future relations.

- The new body should provide the ability and means for the parties to choose an alternative means of dispute resolution. The ICC endorses an approach that encourages the use of mediation as a central component of the claims process.

- Providing the means, process, and venue for First Nations to have access-to-justice is an important principle that should be reflected in the new Centre. Access to justice should include the financial resources for a First Nation to hire the experts, lawyers, and staff necessary to make a claim. It should also include the creation of a claims process that is open to First Nation culture; this includes the use of oral history as a means of maintaining a link with the past.

The Canadian Centre for the Independent Resolution of First Nations Specific Claims would have a tribunal as a last resort to the resolution of claims. The legislation puts a \$7 million cap on any land claim that goes to the tribunal. The claimant would have to waive any excess over the \$7 million claim limit before the claim would be adjudicated. In the last 10 years, the ICC has held inquires into 56 rejected claims. Of these, 24 of the claims were accepted for negotiation or settled. Of those, only three have been under \$7 million. The ICC is concerned that the \$7 million cap for the tribunal may have a negative effect on the access-to-justice principle.

- First Nations need access to information to be able to bring forward claims. They must be able to obtain access to government documents. The new act would not enable the new Centre to compel disclosure or research.

- The new act should not infringe on the federal government's fiduciary obligation to First Nations. The recognition, contained in Bill C-6, that the federal government's legal obligation to a First Nation may include a fiduciary obligation is an important improvement in the Specific Claims Policy. A fiduciary obligation arises, for example, when the Crown, as owner of Indian reserve land, intercedes as fiduciary between a First Nation and a third party interested in purchasing reserve land to ensure that the deal is in the best interests of the First Nation. Also, the fiduciary relationship is a bilateral relationship between First Nations and the federal Crown, and, in the Commission's view, should not be diminished by requiring a First Nation in some cases to seek recourse against a third party, in particular a provincial Crown.



Looking Back

The Two-Row Wampum Belt

The Two-Row Wampum Belt is the visual record of the very first treaty made between the Iroquois of the Six Nations and Europeans. It is a symbolic representation of the ideals the Six Nations people saw as part of the treaty, which was first concluded with the Dutch concerning their North American colonies in 1645 and extended to the British when they removed the Dutch in 1664. The meaning contained within the belt is often used as an example of how First Nation people viewed and understood the treaty process.

Although the Iroquois of the Six Nations, the Haudenosaunee, in their own language, had a strong oral tradition, they also used small clam shells to create symbolic representations of important documents or events. These shells, and later on the beads put to the same use, were referred to as wampum.

When the Haudenosaunee first came into contact with the European Nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah or Two Row Wampum. There is a bed of white wampum which symbolized

the purity of the agreement. There were two rows of purple, and these rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect...

- Excerpt from presentations to the Special Committee on Indian Self Government by the Haudenosaunee Confederacy and the Wampum Belt by Tehanetorens.

The Two-Row Wampum Belt is composed of two purple lines on a white background. The white background symbolizes the purity of the agreement. The two rows of purple represent the two nations making the agreement as two vessels travelling down the same river together. One canoe represents the First Nation people, their laws, customs, and ways. The second vessel is for the Europeans and their laws, customs, and ways. The two nations travel down the river of time together as equal, distinct, and separate partners. Neither will be able to steer the course of the other.

Canadian Museum of Civilization, catalogue no. III-I-2058, image no. D2002-13306.

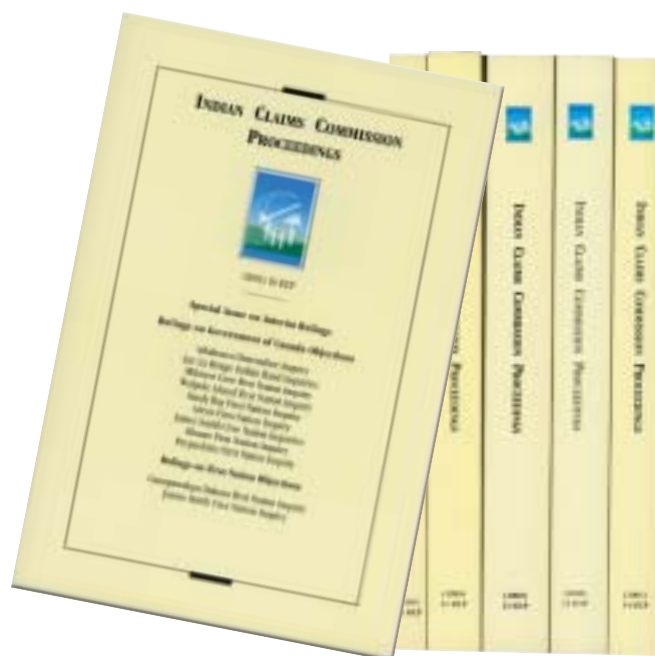
A replica of the Two Row Wampum Belt, which represents the lasting relationship between Europeans and the Iroquois of the Six Nations.

Publications

The ICC has recently published volume 16 of the *Indian Claims Commission Proceedings* (ICCP 16). This Special Issue on Interim Rulings contains the following rulings on Government of Canada objections: Athabasca Denesuline Inquiry, Lac La Ronge Indian Band Inquiries, Mikisew Cree First Nation Inquiry, Walpole Island First Nation Inquiry, Sandy Bay First Nation Inquiry, James Smith Cree Nation Inquiries, Alexis First Nation Inquiry, Kluane First Nation Inquiry and Peepeekisis First Nation Inquiry.

ICCP 16 also contains the following rulings on First Nation objections: Canupawakpa Dakota First Nation Inquiry and James Smith Cree Nation Inquiry.

This volume is available on-line at www.indianclaims.ca, and upon request. Call (613) 947-3939 or fax (613) 943-0157 or e-mail: mgarrett@indianclaims.ca.





What's New

COMMISSIONER AUGUSTINE HONOURED WITH GOLDEN JUBILEE MEDAL

On March 1, 2003, ICC Commissioner Roger Augustine was presented with a Golden Jubilee Medal in Miramichi, New Brunswick. Mr Augustine was presented the award by the Lieutenant Governor of New Brunswick, Hon. Marilyn Trenholme Counsell.

Mr Augustine is a Mi'kmaq born at Eel Ground, New Brunswick, where he served as Chief from 1980 to 1996.

He was appointed Commissioner to the Indian Claims Commission in July 1992.

The Golden Jubilee Medal of Queen Elizabeth II commemorates the 50th anniversary of Her Majesty's reign as Queen of Canada. The medal is awarded to Canadians who have made a significant contribution to their fellow citizens, their community or to Canada.

CLAIMS IN INQUIRY

- Blood Tribe/Kainaiwa (Alberta) - Big Claim
- Conseil de Bande de Betsiamites (Quebec) - Highway 138 and the Betsiamites reserve
- Conseil de Bande de Betsiamites (Quebec) - Bridge over the Betsiamites River
- Cowesses First Nation (Saskatchewan) - 1907 surrender - Phase II
- Cumberland House Cree Nation (Saskatchewan) - Claim to IR 100A
- James Smith Cree Nation (Saskatchewan) - Chakastaypasin IR 98
- James Smith Cree Nation (Saskatchewan) - Peter Chapman IR 100A
- James Smith Cree Nation (Saskatchewan) - Treaty land entitlement
- Mississaugas of the New Credit First Nation (Ontario) - Toronto Purchase
- Nadleh Whut'en Indian Band (British Columbia) - Lejac School
- Opaskwayak Cree Nation (Manitoba) - Streets and Lanes
- Pasqua First Nation (Saskatchewan) - 1906 surrender
- Paul Indian Band (Alberta) - Kapasawin Townsite
- Roseau River Anishinabe First Nation (Manitoba) - 1903 surrender

- *Sandy Bay Ojibway First Nation (Manitoba) - Treaty land entitlement
- Siksika First Nation (Alberta) - 1910 surrender
- *Stanjikoming First Nation (Ontario) - Treaty land entitlement
- Stó:lo Nation (British Columbia) - Douglas reserve
- Sturgeon Lake First Nation (Saskatchewan) - 1913 surrender
- Taku River Tlingit First Nation (British Columbia) - Wenah Specific claim
- U'Mista Cultural Society (British Columbia) - The Prohibition of the Potlatch
- Williams Lake Indian Band (British Columbia) - Village site
- Wolf Lake First Nation (Quebec) - Reserve lands

CLAIMS IN FACILITATION OR MEDIATION

- Blood Tribe/Kainaiwa (Alberta) - Akers Surrender
- Chippewa Tri-Council (Ontario) - Coldwater-Narrows Reservation
- Chippewas of the Thames First Nation (Ontario) - Clench Defalcation
- Cote First Nation No.366 (Saskatchewan) - Pilot Project
- Fort Pelly Agency (Saskatchewan) - Pelly Haylands Negotiation

- Fort William First Nation (Ontario) - Pilot Project
- Keeseekoowenin First Nation (Manitoba) - 1906 Lands Claim
- Michipicoten First Nation (Ontario) - Pilot Project
- Moosomin First Nation (Saskatchewan) - 1909 Surrender
- *Nekaneet First Nation (Saskatchewan) - Treaty Benefits
- Qu'Appelle Valley Indian Development Authority - Q.V.I.D.A. (Saskatchewan) - Flooding
- Thunderchild First Nation (Saskatchewan) - 1908 Surrender
- Touchwood Agency (Saskatchewan) - Mismanagement

CLAIMS WITH REPORTS PENDING

- Canupawakpa Dakota First Nation (Manitoba) - Turtle Mountain surrender
- Chippewa Tri-Council (Ontario) - Coldwater-Narrows Reservation
- Peepeekisis First Nation (Saskatchewan) - File Hills Colony
- Standing Buffalo First Nation (Saskatchewan) - Flooding - Mediation

** in abeyance*

