

INDIAN CLAIMS COMMISSION

RED EARTH AND SHOAL LAKE CREE NATIONS QUALITY OF RESERVE LANDS INQUIRY

PANEL

Commissioner Sheila Purdy (Chair)
Commissioner Jane Dickson-Gilmore
Commissioner Alan Holman

COUNSEL

For the Red Earth and Shoal Lake Cree Nations
William A. Selnes

For the Government of Canada
Vivian Russell

To the Indian Claims Commission
Michelle Brass

December 2008

CONTENTS

| | |
|---|----------|
| SUMMARY | v |
| PART I <u>INTRODUCTION</u> | 1 |
| Background to the Inquiry | 1 |
| Mandate of the Commission | 3 |
| PART II <u>THE FACTS</u> | 9 |
| PART III <u>ISSUES</u> | 23 |
| PART IV <u>ANALYSIS</u> | 25 |
| ISSUE 1: TREATY 5 PROMISE TO PROVIDE FARMING LANDS | 25 |
| Panel’s Reasons | 25 |
| ISSUE 2: CONTENT OF THE TREATY 5 OBLIGATION TO PROVIDE FARMING LANDS | 26 |
| First Nations’ Position | 26 |
| Canada’s Position | 27 |
| Background | 28 |
| Red Earth and Shoal Lake Indians’ Membership in The Pas Band | 28 |
| The Pas Band’s Condition for Signing the 1876 Adhesion to Treaty 5 | 29 |
| Scope and Wording of Treaty 5 and the 1876 Adhesion | 30 |
| The Law | 33 |
| Panel’s Reasons | 35 |
| Step One: Examination of the Words | 35 |
| “Farming Lands” | 35 |
| “Farming” | 36 |
| Step Two: Examination of the Historical and Cultural Backdrop | 38 |
| Conclusion | 41 |
| ISSUE 3: FULFILLING THE TREATY 5 OBLIGATION TO PROVIDE FARMING LANDS | 42 |
| First Nations’ Position | 43 |
| Canada’s Position | 43 |
| Background | 44 |
| Role of Red Earth and Shoal Lake People in Reserve Creation | 44 |
| Quality of Land at Red Earth and Shoal Lake | 48 |
| Requests for Reserve Land Exchanges and Additions | 50 |
| Panel’s Reasons | 56 |
| Were the Red Earth and Shoal Lake People Consulted? | 57 |
| Did Red Earth and Shoal Lake receive “Farming Lands” and “Other Reserves”? | 59 |
| Conclusion | 61 |
| ISSUE 4: IS THERE AN OUTSTANDING OBLIGATION IN RESPECT OF FARMING LANDS? FAIRNESS IN THE RESULT: OUR SUPPLEMENTARY MANDATE | 62 62 |

| | | |
|-------------------|--|-----|
| PART V | <u>CONCLUSIONS AND RECOMMENDATIONS</u> | 67 |
| APPENDICES | | 71 |
| A | Historical Background | 71 |
| B | Red Earth and Shoal Lake Cree Nations: Quality of Reserve Lands Inquiry: Interim ruling on request of the Treaty 8 First Nations of British Columbia to intervene in mandate challenge, December 15, 2005 | 147 |
| C | Red Earth and Shoal Lake Cree Nations: Quality of Reserve Lands Inquiry: Interim ruling on Canada's objection to jurisdiction, September 26, 2006 | 157 |
| D | Notice of Application, Federal Court of Canada, October 25, 2006 | 191 |
| E | Red Earth and Shoal Lake Cree Nations: Interim ruling on Canada's objection to proposed testimony of two non-elder witnesses, October 11, 2007 | 195 |
| F | Chronology | 197 |

SUMMARY

RED EARTH AND SHOAL LAKE CREE NATIONS QUALITY OF RESERVE LAND INQUIRY Saskatchewan

The report may be cited as Indian Claims Commission, *Red Earth and Shoal Lake Cree Nations: Quality of Reserve Land Inquiry* (Ottawa, December 2008).

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

Panel: Commissioner S.G. Purdy (Chair), Commissioner J. Dickson-Gilmore,
Commissioner A.C. Holman

Treaties – Treaty 5 (1875); **Treaty Interpretation** – Reserve Clause – Farming Lands; **Saskatchewan**

THE SPECIFIC CLAIM

In May 1996, the Red Earth and Shoal Lake Cree Nations jointly submitted a specific claim to the Department of Indian and Northern Affairs Canada, alleging that Canada had breached the terms of Treaty 5 and the 1876 Adhesion by not providing “farming lands” to the Red Earth and Shoal Lake Cree Nations. In June 2004 the First Nations requested that the Indian Claims Commission (ICC) conduct an inquiry into their claim, despite not having received a decision from the Minister on the claim’s validity. The ICC agreed to hold the inquiry on the basis that the claim had been constructively rejected.

In April 2005, Canada formally challenged the ICC’s jurisdiction to conduct an inquiry into a claim that had not been rejected by the Minister. Subsequently, the Treaty 8 First Nations of British Columbia sought to intervene in the mandate challenge; this application was denied in December 2005 (see Appendix B to the report). In September 2006 the panel dismissed Canada’s motion on the mandate challenge, ruling that it is within the ICC’s jurisdiction to accept constructively rejected claims for inquiry, and that on the facts of the Red Earth and Shoal Lake First Nations’ claim, the conduct of Canada was tantamount to a rejection of that claim (see Appendix C to the report). Canada applied for judicial review of the ICC’s ruling on jurisdiction (see Appendix D to the report) but withdrew the application following the Minister’s formal rejection of the claim in December 2006.

In October 2007, the panel conducted a site visit and community session at the Red Earth and Shoal Lake reserves. Following receipt of the parties’ written submissions, the panel conducted an oral hearing in May 2008, in Saskatoon, to receive the parties’ legal arguments.

BACKGROUND

The Pas Band signed an Adhesion to Treaty 5 on September 7, 1876 at The Pas. Treaty 5 specifically provided for reserves to be set aside for “farming lands” and “other reserves” for the benefit of the Indians. At the time, The Pas Band was made up of members living at The Pas and at other locations, including the Pas Mountain (Red Earth and Shoal Lake) in Saskatchewan, within Treaty 6 territory. The Pas Band agreed to adhere to Treaty 5 on condition that the Band receive reserves where they desired. The adhesion document specified not only that a reserve would be set aside at The Pas, but that in order to provide the Band with more land fit for cultivation, reserves would also be created at the Pas Mountain and Birch River. In January 1884, The Pas Band followed up with a petition asking the government to make up its shortfall of reserve land by surveying reserves at the Pas Mountain where there was farm land. Surveys of the Red Earth and Shoal Lake reserves were completed in 1884 following consultations with these two groups.

In 1892, the government agreed to Red Earth's request that land that had been set aside for The Pas Band at Flute Creek be exchanged for a second reserve at Red Earth. Over several decades the Red Earth and Shoal Lake Bands requested and, with few exceptions, were granted additions to their reserves and exchanges of land. In 1946 the two Bands sent a petition to the government requesting additional reserve land suitable for farming and producing hay. They explained that when their reserves were established, they did not provide for cultivation of the land, but that the people at the time were content because they could continue hunting and trapping.

ISSUES

Did Canada have a lawful obligation to provide "farming lands" to the Red Earth Cree Nation and Shoal Lake Cree Nation pursuant to the terms of Treaty 5? If so, what was that obligation? Was the obligation met? Does Canada have an outstanding obligation to either or both Cree Nations in respect of farming lands?

FINDINGS

The reserves set aside for Treaty 5 bands were not intended to exist for the sole purpose of cultivating the land. The panel interprets the reserve clause in the Treaty as contemplating that reserves would contain some "farming lands" and some "other reserves." Within the category of "farming lands," at least some of that land was intended to be cultivatable land; but the remaining "farming lands" could be land suitable only for cattle-raising, growing hay, or other farming uses. Furthermore, and important to bands at the time of treaty, reserves were also to contain "other reserves," meaning land suitable for traditional activities or other non-farming uses. The proportion of cultivatable land to be set aside for bands was intentionally not defined in the Treaty, in order to enable bands and the Crown to select reserves suitable to a band's individual needs, priorities, and location within the vast territory of Treaty 5. The appropriate mix of land for each signatory band was to be determined on a case-by-case basis.

The common intention of the parties to Treaty 5 and the 1876 Adhesion was to provide reserves for multiple uses. This would enable bands to continue their traditional pursuits while becoming self-sufficient over time through agriculture. The priority of The Pas Band was to receive land on which they could pursue traditional activities as well as grow crops and raise cattle, activities that band members were already pursuing at Red Earth and Shoal Lake. This interpretation of common intention is the one that best reconciles the interests of both parties at the time of treaty.

The Crown met its obligations under Treaty 5 to provide the Red Earth and Shoal Lake Bands with "farming lands" pursuant to the terms of that Treaty. The evidence is persuasive that both Red Earth and Shoal Lake were provided with sufficient good-quality, cultivatable land to grow crops for subsistence living. Their reserves were places where they successfully cultivated a range of crops and raised cattle for decades.

Supplementary Mandate

Despite the panel's finding that the Crown fulfilled its treaty obligation to provide "farming lands" to the Red Earth and Shoal Lake Cree Nations, the reserves are no longer viable places to grow crops and raise animals due to the increase in water levels. From the Elders' testimony, the panel is struck by the possibility that the lands have been changed by forces which could not have been anticipated by these Bands or the Crown at the time of treaty and for several decades afterward. Consequently, the panel urges Canada to initiate discussions with the Red Earth and Shoal Lake Cree Nations to find a long-term solution to the problems caused by the condition of their reserve lands.

RECOMMENDATIONS

That the claim of the Red Earth and Shoal Lake Cree Nations regarding the provision of "farming lands" in Treaty 5 not be accepted for negotiation under Canada's Specific Claims Policy.

That Canada initiate discussions with the Red Earth and Shoal Lake Cree Nations to find a long-term solution to the problems resulting from the condition of their reserve lands.

REFERENCES

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

Cases Referred To

R. v. Marshall, [1999] 3 SCR 533.

ICC Reports Referred To

ICC, *James Smith Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, February 2007), reported (2008) 20 ICCP 573.

Treaties and Statutes Referred To

Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen's Printer and Controller of Stationery, 1957).

Other Sources Referred To

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982); Katherine Barber, ed., *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998).

COUNSEL, PARTIES, INTERVENORS

W.A. Selnes for Red Earth and Shoal Lake Cree Nations; V. Russell for the Government of Canada; M. Brass to the Indian Claims Commission.

PART I
INTRODUCTION

BACKGROUND TO THE INQUIRY

Treaty 5 was signed by a group of Saulteaux and Swampy Cree in September 1875. One year later, on September 7, 1876, the leaders of three bands, including the Chief and Councillors of The Pas Band, signed an Adhesion to Treaty 5 at The Pas. The territory encompassed by Treaty 5 extended throughout central Manitoba and also included small areas in Saskatchewan and Ontario. In 1908 Treaty 5 was expanded to cover almost all of northern Manitoba. Treaty 5 provided for 160 acres of reserve land for each family of five and specifically promised that reserves would be set aside for “farming lands” and “other reserves.”

The Red Earth and Shoal Lake Cree Nations are located along the Carrot River in Saskatchewan near the Manitoba border. When The Pas Band adhered to Treaty 5 in 1876, the Red Earth and Shoal Lake people, living at the Pas Mountain, were included as part of The Pas Band. The Adhesion provided that a reserve would be set aside for The Pas Band at The Pas, and, because the land fit for cultivation was limited in that area, the balance of its reserve would be established at the Pas Mountain (Red Earth and Shoal Lake) and at Birch River. Reserves for The Pas Band were surveyed first at The Pas, then Birch River, and in 1884, Red Earth and Shoal Lake. Over time, the Red Earth and Shoal Lake Bands were recognized as bands separate from The Pas Band and distinct from one another.

In May 1996 the Red Earth and Shoal Lake Cree Nations jointly submitted a specific claim to the Department of Indian and Northern Affairs Canada (INAC), alleging that Canada had breached the terms of Treaty 5 and its Adhesion by not providing farming lands to the Red Earth and Shoal Lake Cree Nations.

Canada conducted confirming research into the specific claim; however, in 2004, when the Minister had not yet made a decision either to accept or reject the claim for negotiation, the First Nations requested that the Indian Claims Commission (ICC) undertake an inquiry into their claim. On June 3, 2004, the ICC agreed to conduct the inquiry on the basis that the claim had been constructively rejected by the Minister. A planning conference was held in February 2005; however,

Canada declined to participate in the inquiry or to provide funding to the First Nations for the inquiry process.

Canada objected to the ICC's decision to commence the inquiry and notified the ICC in March 2005 that it would challenge the ICC's jurisdiction ("mandate challenge") to do so. On April 7, 2005, Canada filed a Notice of Motion requesting a ruling from the panel on whether the Commission had jurisdiction to conduct an inquiry into a claim that had not yet been rejected by the Minister. On May 20, 2005 Canada filed its legal submission on the motion. In support of the motion, Canada also filed the Affidavit of Veda Weselake, Director, Research and Policy Directorate, Specific Claims Branch, INAC. Counsel for the First Nations conducted a cross-examination of Ms. Weselake in the presence of the panel, on August 19, 2005.

Meanwhile, on July 13, 2005, the Treaty 8 First Nations of British Columbia¹ (Treaty 8 First Nations) applied for leave to intervene in Canada's mandate challenge. The Treaty 8 First Nations filed their written submission on July 13, 2005; Canada filed its submission on September 30, 2005; and the Treaty 8 First Nations filed their reply in October 2005. By letters dated September 13 and 30, 2005, the Red Earth and Shoal Lake Cree Nations, through their counsel, indicated their consent to the application for intervention, subject to certain conditions. The panel issued a ruling on December 15, 2005, denying the Treaty 8 First Nations' application to intervene: see *Red Earth and Shoal Lake Cree Nations: Quality of Reserve Lands Inquiry – Ruling on the Request of the Treaty 8 First Nations of British Columbia to Intervene in the Mandate Challenge*, at Appendix B.

On October 4, 2005, the Cree Nations filed their written submission in response to Canada's Notice of Motion on the mandate challenge; Canada filed its reply on October 21, 2005; and the panel conducted an oral hearing into the question of the ICC's jurisdiction in Saskatoon on February 9, 2006. The panel ruled on September 26, 2006 that it is within the ICC's jurisdiction to accept constructively rejected claims for inquiry, and that on the facts of the Red Earth and Shoal Lake First Nations' claim, the conduct of Canada was tantamount to a rejection of that claim: see *Interim Ruling: Red Earth and Shoal Lake Cree Nations: Quality of Reserve Lands Inquiry – Ruling on Canada's Objection to Jurisdiction*, at Appendix C.

¹ The Blueberry River First Nations, Doig River First Nation, Fort Nelson First Nation, Halfway River First Nation, Prophet River First Nation, Sauteau First Nations and West Moberly First Nations are described collectively in the Notice of Motion as the "Treaty 8 First Nations of British Columbia."

In October 2006, the Attorney General of Canada filed a Notice of Application in the Federal Court of Canada, requesting an Order setting aside the ICC's September 26, 2006 decision and prohibiting the Commission from continuing the Red Earth and Shoal Lake inquiry: see Federal Court: Notice of Application, October 26, 2006, at Appendix D. However, on December 20, 2006, Canada formally rejected the specific claim of the Red Earth and Shoal Lake Cree Nations and later withdrew its application in the Federal Court.

In response to Canada's objection to the proposed testimony of two non-elder witnesses at a community session scheduled for October 2007, the panel ruled that, in accordance with the ICC's "Guidelines to Parties," the non-elder witnesses would be permitted to testify, subject to cross-examination by Canada's counsel: see letter from Michelle Brass, October 11, 2007, at Appendix E.

The inquiry proceeded on October 16 and 17, 2007, with site visits of the Red Earth and Shoal Lake reserves and a community session at Shoal Lake to hear the testimony of Elders and other witnesses from both Cree Nations. The Red Earth and Shoal Lake Cree Nations filed their written legal submission on March 6, 2008; Canada filed its submission on April 17, 2008, and the First Nations filed their reply on May 1, 2008. The panel conducted an oral hearing to receive the parties' legal arguments on May 15, 2008 in Saskatoon.

MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission is set out in federal orders in council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."² The 1973 Specific Claims Policy is outlined in a 1982 booklet published by the Department of Indian Affairs and Northern Development, and titled

² 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.

Outstanding Business: A Native Claims Policy – Specific Claims. It states that Canada will accept claims for negotiation where they disclose an outstanding “lawful obligation” on the part of the federal government.³ The term “lawful obligation” is defined in *Outstanding Business* as follows:

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

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

- i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
- ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
- iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
- iv) An illegal disposition of Indian land.⁴

Furthermore, Canada is prepared to consider claims based on the following circumstances:

- i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of 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.⁵

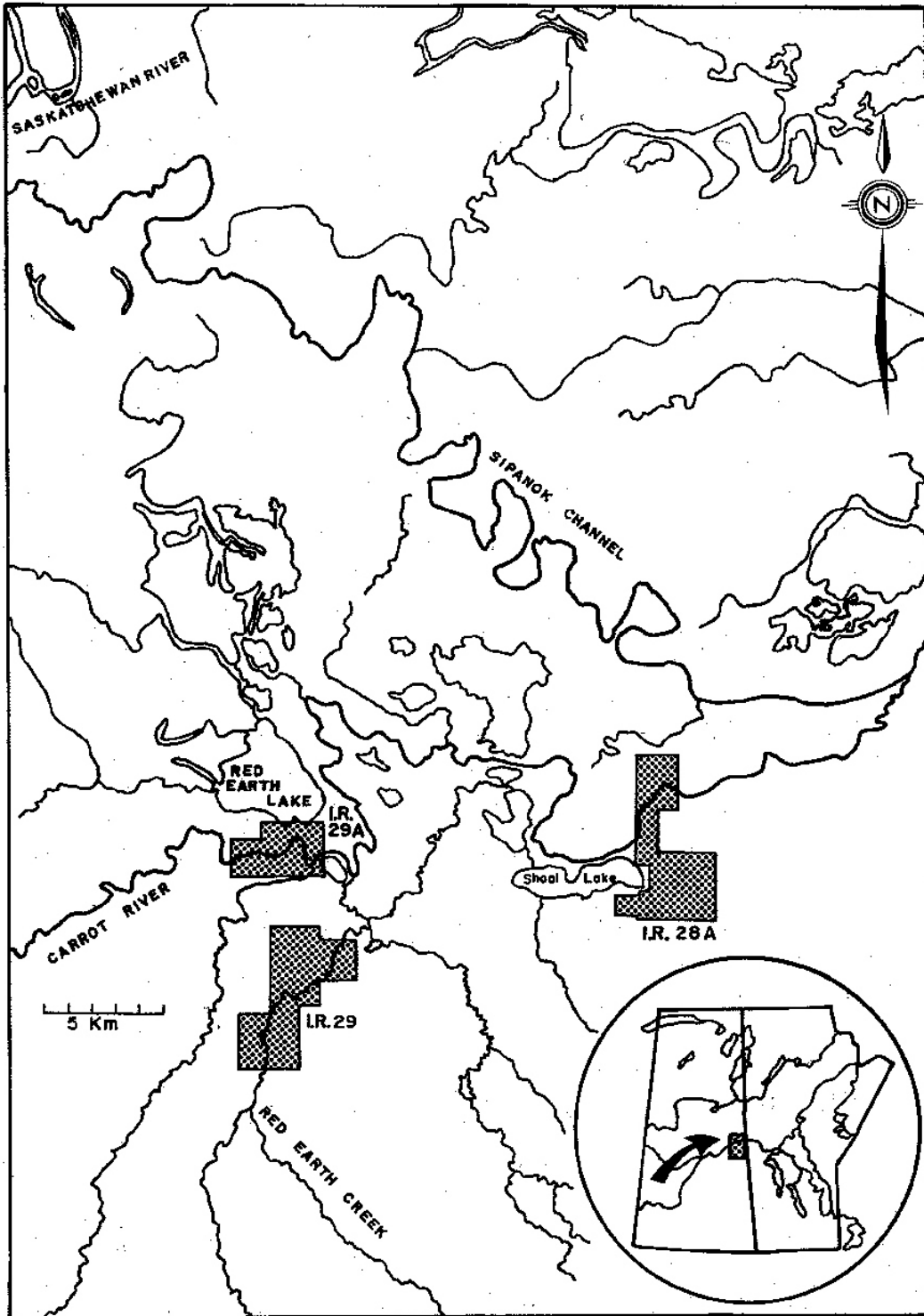
³ Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 *Indian Claims Commission Proceedings* (ICCP) 171–85 (hereinafter *Outstanding Business*).

⁴ *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 179.

⁵ *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 180.

Map 1

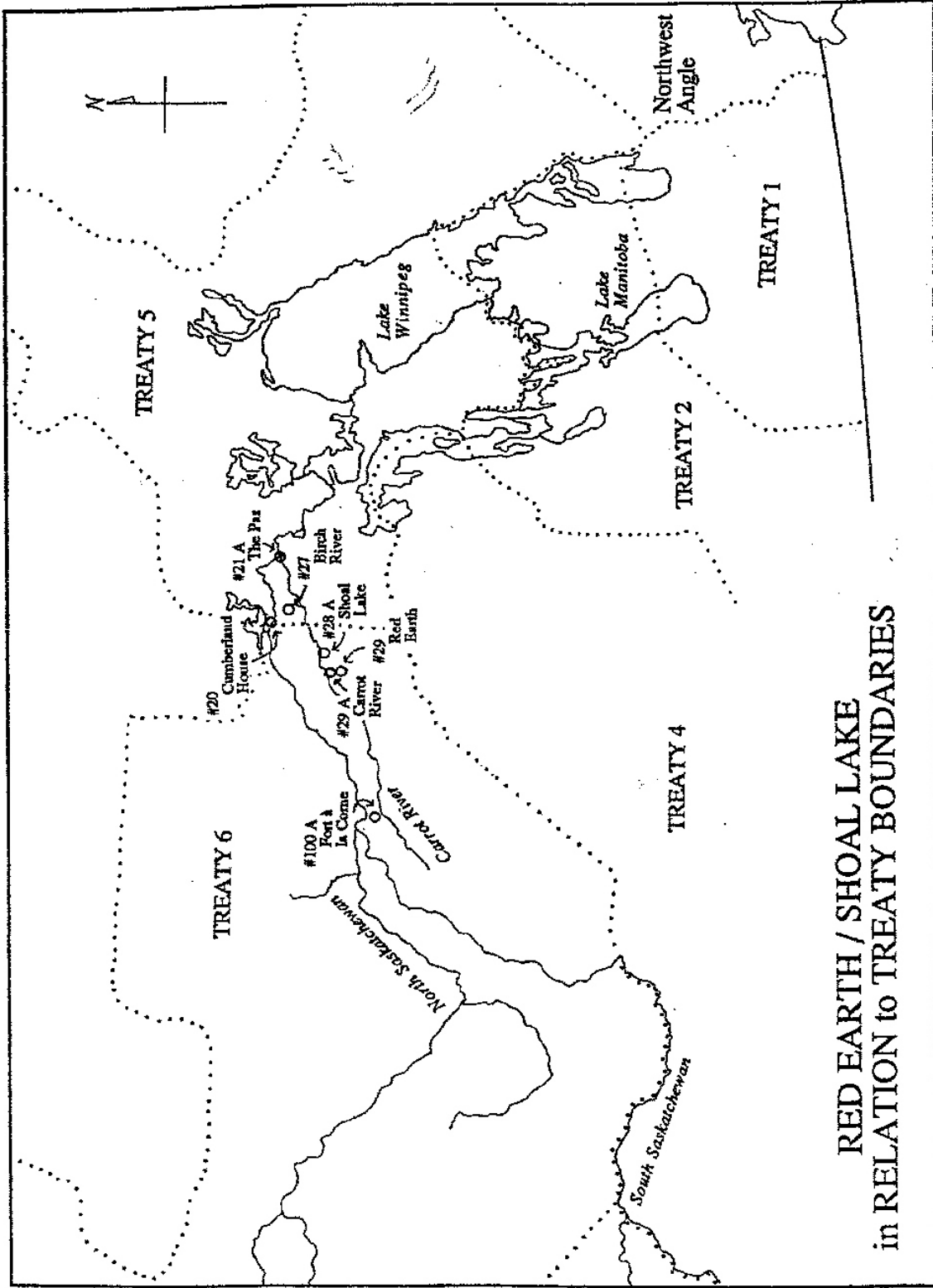
Claim Area Map



Source: David Meyer, "The Red Earth Cree, 1860-1960" (Ottawa: National Museums of Canada, Mercury Series, Canadian Ethnology Service, Paper No. 100, 1985), 8 (ICC Exhibit 8k, p. 24).

For illustrative purposes only.

Map 2 Red Earth / Shoal Lake in Relation to Treaty Boundaries

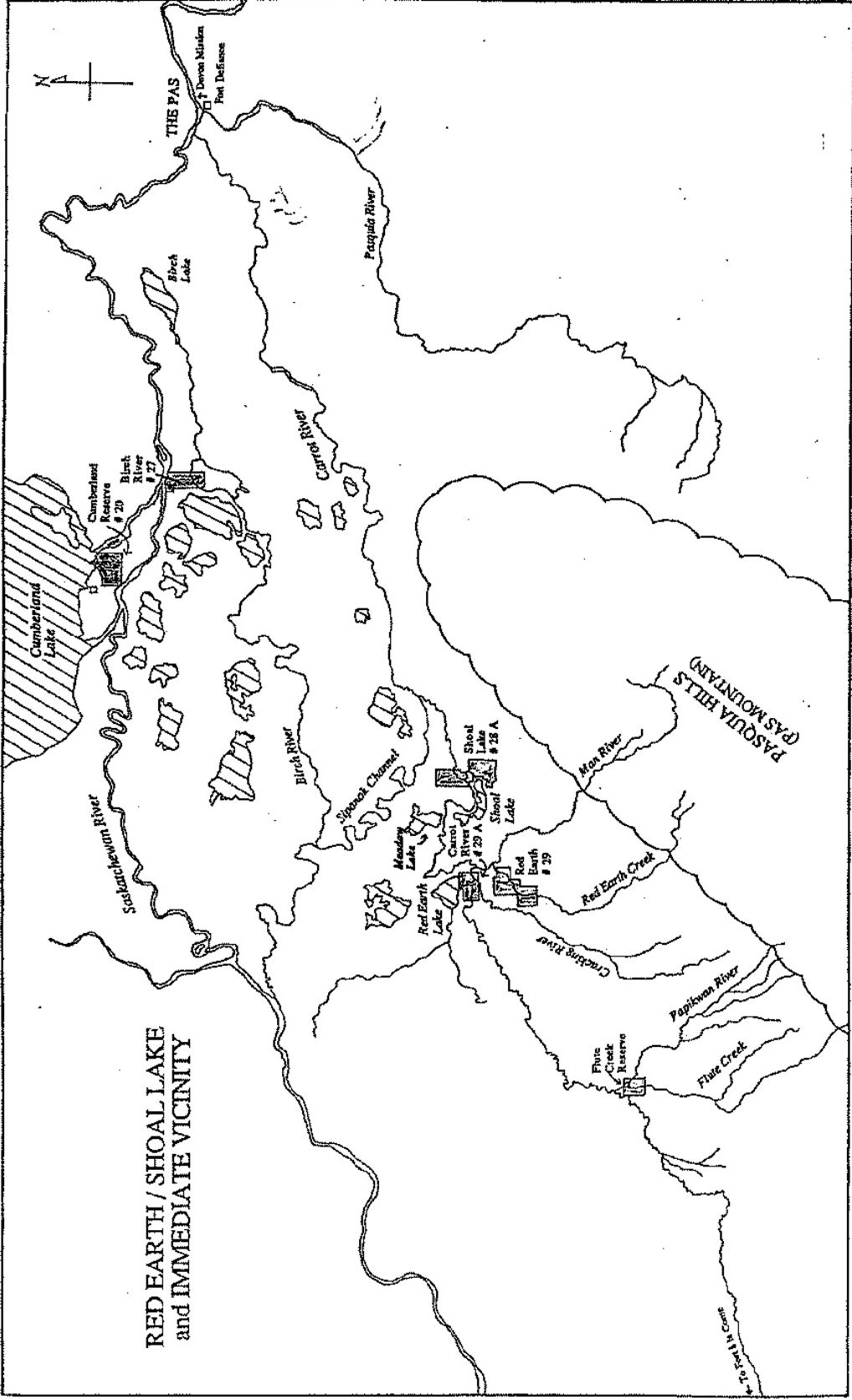


For illustrative purposes only.

Source: Joan Holmes & Associates Inc., "Red Earth and Shoal Lake Report," prepared for the Federation of Saskatchewan Indians; Red Earth First Nation and Shoal Lake First Nation, January 2002, 3 (ICC Exhibit 2c, p. 4).

Map 3

Red Earth / Shoal Lake and Immediate Vicinity



Source: Joan Holmes & Associates Inc., "Red Earth and Shoal Lake Report," prepared for the Federation of Saskatchewan Indians, Red Earth First Nation and Shoal Lake First Nation, January 2002, 4 (ICC Exhibit 2c, p. 6).

For illustrative purposes only.

PART II
THE FACTS

A group of Saulteaux and Swampy Cree signed Treaty 5 on September 20, 1875. The Treaty covered the central region of Manitoba, extending south as far as the southeastern tip of Lake Winnipeg and north to a point on the Nelson River, northeast of Thompson. Treaty 5 also took in a small area of land in mid-Saskatchewan, and a region of northwestern Ontario, west of Sandy Lake. In 1908, Treaty 5 was extended through an Adhesion to cover all of northern Manitoba except a small triangular piece of land adjacent to Hudson Bay. Treaty 5, like Treaties 1 and 2, provided for reserves to be set apart for the signatories and their followers, to the extent of 160 acres for each family of five, or 32 acres per person. Unlike Treaties 1 and 2, however, Treaty 5 specifically made reference to the setting apart of reserves for “farming lands” and “other reserves” for the benefit of the Indians.

Prior to the signing of Treaty 5 in 1875, the Minister of the Interior, David Laird, advised the Lieutenant Governor of the Northwest Territories, Alexander Morris, that the primary object of concluding a treaty that year was to meet the wishes of certain bands with a view to the early selection of their reserves. If at all possible, consultation with the Indians on reserve selection was to take place immediately.

The Red Earth and Shoal Lake First Nations are located along the Carrot River in Saskatchewan: the Red Earth Indian Reserves (IR) 29 and 29A are located approximately 77 kms east of the Town of Nipawin; Shoal Lake IR 28A is located approximately 20 kms east of the Red Earth reserves. The Pas, Manitoba, lies approximately 120 kms east of Shoal Lake. In the 1800s, the Shoal Lake people, who are Swampy Cree or Muskego, had marriage ties with The Pas Band, while the Red Earth people, who are Plains-Woodland Cree, associated with Crees at Fort à la Corne, Saskatchewan. However, by the end of the 1800s, the Red Earth and Shoal Lake people had grown closer socially and through intermarriage, which in turn resulted in fewer ties with Fort à la Corne and The Pas.

Treaty annuity paylists indicate that the Red Earth and Shoal Lake people, who were referred to as the Pas Mountain Indians, were considered to be part of The Pas Band. The first paylist for The Pas Band, in 1876, included 13 families who were identified as the Pas Mountain Indians. For the next two years, the Pas Mountain Indians had a separate paylist but received annuities at The Pas. From 1879 to 1885 they were again listed on The Pas Band paylist, and, except for two years during

that period, were not distinguished from other Pas Band members. When the Pas Mountain people complained about having to make the long journey to The Pas to receive their treaty annuities, a separate “Pas Band” payroll was created for them in 1886 and they started to be paid at Shoal Lake. Starting in 1903, Red Earth and Shoal Lake each had its own payroll in which they were called the “Red Earth Band” and the “Shoal Lake Band.” Thus, when The Pas Band signed the 1876 Adhesion to Treaty 5, and in subsequent years when reserves were being set aside for The Pas Band under treaty, Red Earth and Shoal Lake were considered to be part of The Pas Band who lived west of The Pas, along the Carrot River at the Pas Mountain.

The Pas Band, Cumberland Band, and Moose Lake Band signed the Adhesion to Treaty 5 at The Pas on September 7, 1876. It appears that a few representatives of the Pas Mountain group (Red Earth and Shoal Lake) were also present at the treaty discussions. Although The Pas Band was within the Treaty 5 territory, the Red Earth and Shoal Lake groups resided and continue to reside within Treaty 6 territory.

The three Bands each named the Chiefs and Headmen who would represent their people at the treaty discussions. The Crown’s representative, Commissioner Thomas Howard, reported that he encountered some difficulty in the negotiations with the Bands on account of their knowledge of Treaty 6, which had been signed two weeks previously. Treaty 6 provided for 640 acres of reserve land for each family of five, whereas The Pas, Cumberland, and Moose Lake Bands were told that Treaty 5 provided only 160 acres per family of five. When asked why Treaty 5 did not offer similar terms, Howard responded that the land they would be giving up would be useless to the Queen, compared to the Treaty 6 land that the Plains Indians had given up. The Pas and the other Bands then agreed to the terms of Treaty 5, but on condition that Howard give them reserves where they desired. According to Howard, he listened to the various requests for reserve land and made inquiries as to the extent of farming land in each place. With respect to The Pas Band, he reported that very little land fit for cultivation could be found at The Pas and the good land had already been cultivated.

In the Treaty 5 Adhesion document, The Pas Band signatories were described as the Band of Saulteaux and Swampy Cree Indians, known as “The Pas Band,” and residing at the “Pas,” Birch River, the Pas Mountain and File Lake. The Crown agreed to lay off a reserve for The Pas Band on both sides of the Saskatchewan River at The Pas, but because the area fit for cultivation was limited

and was insufficient to meet the Band's requirements, the Adhesion specified that the balance of the reserve was to be situated at Birch River and the Pas Mountain. Chief John Constant of The Pas Band soon requested surveys of reserves at The Pas, the Pas Mountain and Birch River. He also requested the farming implements and livestock promised in the Treaty, but the Indian Agent believed that ploughs and harrows would be useless until the Indians first received the cattle promised to them.

Inspector Ebenezer McColl reported in 1878 that the bands, including The Pas Band, were eager to adopt agriculture, but that many reserves, presumably including the reserve at The Pas, were not well adapted for agriculture, being marshy, rocky, or both. McColl added that settlers were encroaching on their reserves; that the government had supplied them with inferior cattle and supplies; and that they were receiving seed grain and potatoes too late in the season. At the same time, the government was aware that hunting and fishing were in decline.

L. Vankoughnet, Deputy Superintendent of Indian Affairs, reported to Superintendent General of Indian Affairs, Sir John A. Macdonald, in 1878 that the Indians of the newer provinces and territories should be given instruction in farming, or herding and raising cattle, depending on the character of the country inhabited by the different tribes. In August 1879, Vankoughnet instructed that The Pas Band should receive all the implements and cattle owed to them under the Treaty. He also clarified in October 1879 that the department considered it prudent not to survey reserves for the Indians until they expressed a desire to have their reserve set apart, thus indicating that they were ready to settle on the lands and cultivate them. In the same year, Inspector McColl reported that the full complement of cattle had been supplied to the Treaty 5 Indians, and that they had received good-quality twine, ammunition, and farming implements. He also stated that the government had been prompt in exchanging reserves that were unfit for cultivation for more suitable ones.

From the beginning the Indians of The Pas Band were consulted on the location of their reserve land. For one thing, The Pas, Cumberland, and Moose Lake chiefs would only agree to the terms of Treaty 5 if they were permitted to choose the locations of their reserves. Commissioner Howard confirmed that after they agreed to adhere to Treaty 5, he reviewed with them the reserve sites they had chosen. Red Earth and Shoal Lake Elders also confirmed that their ancestors chose

reserves for their proximity to hunting grounds, fishing, and trapping, and because they were the traditional gathering places at a time when their people were living a nomadic lifestyle.

In 1882 plans were made to conduct surveys of all Treaty 5 reserves, including reserve land for The Pas Band. Dominion Land Surveyor (DLS) W. A. Austin was instructed to meet with the Indian Agent, Angus Mackay, prior to commencing his work, to find out if any of the bands wished to change the location of their reserves. Austin was also instructed to consult with band leaders on their preferred point of commencement for the survey. According to Indian Agent Mackay, the population of The Pas Band in 1882, including the groups living at the Pas Mountain and Birch River, was 642; however, he later amended this figure to 669 band members – 448 at The Pas, 70 at Red Earth, 61 at Shoal Lake, and 90 at Birch River. Mackay also reported the same year that Red Earth had a common potato garden and fine herds of cattle and horses, commenting that the land at both Red Earth and Shoal Lake was good enough for farming.

In the 1880s The Pas Band included one or more Councillors from the Pas Mountain group. In addition to Samuel Moore, whom the record shows was a Councillor on The Pas Band council beginning in 1882, Baptiste Young was elected a Councillor representing the Pas Mountain in 1885, and another Councillor from Red Earth was elected in 1889. From the paysheet evidence, it appears that this arrangement was maintained until 1902, except between 1895 and 1899 when the positions were discontinued.

Austin conducted surveys of reserves at The Pas and Birch River in 1882. He reported the following year that he had laid out at The Pas reserve all the good land that the Indians pointed out and that could be found. At the conclusion of the surveys of reserves for The Pas Band at The Pas and Birch River, Austen calculated that it was still owed 3,246.57 acres, owing to the impossibility of setting aside enough good land near The Pas to fulfill the Band's reserve land entitlement under Treaty 5. Austin's recommendation was that the acreage owed to The Pas Band be used to create reserves for the two groups of Pas Band members (Red Earth and Shoal Lake) living at the Pas Mountain.

The Pas Band agreed with this recommendation. In January 1884, it petitioned the government to make up its shortfall of land by surveying reserves at the Pas Mountain, referred to as "Oopasquaya Hill." This area, they argued, had farm land and was fit for farming. Of the 10

petitioners, two men were from Red Earth and one, a Councillor, was from Shoal Lake. The petitioners were supported in their request by the Reverend J. Settee of The Pas Mission, who argued that the only good farm land he was aware of was located at the Pas Mountain. Although Inspector McColl had no personal knowledge of the Pas Mountain, he checked with others and told Vankoughnet in March that the Pas Mountain was suitable for cultivation. In turn, Vankoughnet wrote to the Deputy Minister to support the petitioners' request for reserves at the Pas Mountain; he argued that, unlike land near The Pas, which was unsuitable for farming purposes, the land at the Pas Mountain was the reverse, being fertile and thus a desirable location for an Indian reserve.

A letter from Vankoughnet, marked "draft," to Dominion Land Surveyor Thomas Green in May 1884 contained instructions similar to those given to DLS Austin in 1882, notably, to find out if any bands wanted to change their reserve location, and to consult with the leadership on the starting point of the survey. Vankoughnet's letter to Green also contained additional directives to the surveyor: he instructed Green to survey The Pas Band's outstanding acreage as indicated by the Chief, or the Headman if the Chief was absent; and he confirmed that the Red Earth and Shoal Lake reserves were occupied by people belonging to The Pas Band.

By June 1884 the department had decided to send Indian Agent J. Reader to inspect the land that The Pas Band wished to have set apart, but first he met with the Band to determine how to allocate the shortfall of 3,246.57 acres. They decided to set apart 1,500 acres at the Pas Mountain, an additional 1,500 acres northwest of the reserve already surveyed at The Pas, and 246.57 acres as timber land along the Carrot River.

Reader travelled by boat down the Carrot River, first stopping at Red Earth. He described the land near the river as swampy but gradually rising toward the southwest to a fine, arable flat of 10 acres of excellent soil. He cautioned that this land could be in danger in seasons of exceptionally high water. Once into the woods, Reader found that the Indians had cultivated small patches of land. He remarked that the soil there was of the finest class, that hay was plentiful in some places, but that some of the arable land would need draining. The next day Reader continued exploring the land and was informed that after five miles, it opened out into a fine tract of land, covered with bushes and fruit trees, along the banks of the Flute River.

After Agent Reader continued down the Carrot River – he reckoned about 20 miles – he came

to Shoal Lake, where he reported finding another camp of Indians belonging to The Pas Band. He saw small patches of cultivated ground and observed that the land was more open, well adapted to farming purposes, and with a potential to yield large crops. He cautioned, however, that some salt springs were in the area and that some of the land would require draining. Reader concluded his report by recommending three reserves – one each at Red Earth and Shoal Lake, where the Indians had already settled, and along Flute River (Flute Creek), where band members living at The Pas who had expressed a desire to settle at the Pas Mountain could relocate. He added that it was the wish of the Indians themselves. When Indian Agent Mackay filed his annual report for 1884 on Indian affairs in Treaty 5, he stated that the land was good along the Carrot, Birch and Saskatchewan Rivers, and very good at Red Earth and Shoal Lake. He praised the Red Earth Indians, in particular, for their stock-raising, gardens, root cellars, and a building where the common implements were stored. He added that the Red Earth people were requesting more farm tools.

In 1884, DLS Green surveyed the 2000-acre Flute Creek reserve southwest of Red Earth. He described the land to be of excellent quality, with one-quarter of the land clear and ready for cultivation. Green noted that an Indian from Red Earth had an excellent patch of potatoes there. Green's survey plan was titled "For Band at Pas Mission" and his sketch of the Flute Creek reserve bore the title, "Pas Mountain Division." A hand-written note on the survey plan indicates that it was cancelled by Order in Council in 1895, and no confirmation of the Flute Creek land as an Indian reserve has been found.

When Green surveyed the Shoal Lake reserve the same year, he found a considerable amount of first-class land, as well as two saltwater streams that flowed through the western part of the reserve. Band members boiled the water to obtain salt. Green's plan of Shoal Lake indicated a total of 2,190 acres, which he described on the plan as containing 1,751 acres arable land, 119 acres sandy beach and 320 acres marsh. Thus, according to the surveyor in 1884, 79% of the land at Shoal Lake was considered arable land.

At Red Earth, Green reported that the majority of the 2,711.64-acre reserve surveyed southwest of Red Earth Lake was of good quality but rather flat for grain; he added that Red Earth Lake was dry that year. The Red Earth survey plan did not describe the types of land but did contain a note that the soil was first class in the northeast part of the reserve. Along the northern boundary,

Green also noted the presence of a large tract of wet and useless land, while above the northeast boundary, he wrote the word “swamp.”

Surveyor Green reported in August 1884 that his surveys of Red Earth, Shoal Lake and other locations were complete, remarking that these reserves consisted of nearly all first-class soil. He noted that because a considerable amount of land had been cleared already, the bands could start cultivating the land immediately. It thus appears from the record that by 1884, land had been set aside as reserves for The Pas Band at The Pas, northwest of The Pas, Birch River, Red Earth, Shoal Lake, and Flute Creek, as well as some timber land.

The winter of 1885 was extremely harsh. According to Indian Agent Reader, the Pas Mountain, Birch River, and The Pas Indians suffered keenly. The next year Reader reported that the Shoal Lake Indians were not doing well at farming, although, as he said, the land was almost all that could be desired to produce excellent crops. Reader began to instruct both the Shoal Lake and the Red Earth Indians in cultivating the land and worked alongside them. The results at Shoal Lake were mixed: the potato crop was good but the wheat and barley crops failed for the most part. In comparison, at Red Earth he found excellent crops of wheat and potatoes. Reader described Red Earth as probably the finest reserve in the agency, which, he added, was fortunate because the low water levels would probably mean no fish the next winter. He concluded that the only way to prevent want amongst the Pas Mountain Indians was to cultivate the rich soil on their reserves.

From the mid-eighties to the early nineties, the Pas Mountain Indians continued to produce potatoes and barley, and raise cattle as well. By 1890 Red Earth was producing one-third of the potatoes grown by the entire Pas Agency of one thousand Indians. Indian Agent Reader continued to commend Red Earth for its advancement toward self-sufficiency and success in farming and cattle-raising, for which, he said, the land was excellent. Reader was more concerned with Shoal Lake, however; although they were advancing in cattle-raising, they had made little progress in cultivating the soil. By 1892 Reader recognized that the Shoal Lake people would prosper chiefly with cattle, for which, he said, the land was excellent. The following year he reported that the Red Earth Indians had supplied Shoal Lake with their excess potatoes, and that the Shoal Lake Indians had started to work more inland where the soil was excellent and a few already had fine gardens.

In 1892, the Pas Mountain group, now referred to as the Pas Mountain Band of Indians,

requested that the land set aside for The Pas Band at Flute Creek be exchanged for reserve land along the Carrot River at Red Earth, where the people were actually living. The original Red Earth reserve (IR 29) had been set aside south of the Carrot River, on land where the Indians farmed but did not live. The Pas Mountain Band also requested a timber limit a few miles west of Red Earth along the river. In forwarding the Band's request to Inspector McColl, Reader recommended the exchange for the reason that Flute Creek would likely not be used for many years by either the Pas Mountain or The Pas Indians, whereas the desired land at Red Earth was excellent for farming and building, and very rarely flooded for any length of time.

The government approved the exchange of land at Flute Creek for a second Red Earth reserve. Inspector McColl advised Vankoughnet in late 1892 that, compared to Flute Creek, Red Earth was on superior and higher ground, although it was still somewhat low, the banks of the river measuring only five feet above the low-water mark. His recommendation to approve the exchange was also based on his impression that the Red Earth portion of the Pas Mountain Band was most industrious, having a large herd of cattle and a large crop of potatoes every year.

In the mid-1890s the Shoal Lake reserve, IR 28, was re-surveyed with the objective of exchanging a portion of the existing reserve for land the Band wanted, some of which was already under cultivation, adjacent to the eastern end of the reserve. The reconfigured reserve became IR 28A, comprising 2,236 acres. Surveyor Samuel Bray reported in December 1894 that the Shoal Lake Councillor was pleased with the adjustment to the reserve. Bray also stated that the Chief of The Pas Band wanted Shoal Lake's share of the Flute Creek reserve to be set apart as grass land at Shoal Lake; however, Bray confirmed that all of the Pas Band's rights to Flute Creek would be transferred to the new reserve to be created at Red Earth. Bray believed that Shoal Lake did not require any additional grass land at that time, but told the Shoal Lake Councillor that they should request it again if the herd became large. He had also been informed by Indian Agent Reader that the department was interested in moving the Shoal Lake people to Red Earth, although nothing more was heard about that idea.

When Bray reported on the actual surveys of the adjusted Shoal Lake reserve and the new Red Earth reserve in January 1895, he confirmed that he "invariably" held a council with the chief and councillors of each Band prior to starting the survey to decide on the boundaries. He also told

the leadership to advise him if anything did not appear to be correct or what they desired.

Agent Reader observed in his reports between 1895 and 1897 that the Red Earth and Shoal Lake groups had the advantage of first-class soil, especially at Red Earth; with clearing and cultivation, they could grow all kinds of grain and vegetables. He added that at Red Earth, they possessed many cattle and excellent gardens and lived chiefly on potatoes and milk, whereas the fishing was limited and the fish inferior. The Red Earth Indians, he said, were at the head of all the bands, and they had received some assistance to encourage them to cultivate more land. Reader continued to believe that Shoal Lake was a good place for cattle, although the hunting was not very good.

A change in Indian agents did not produce a different view of the two Pas Mountain bands; Indian Agent Joseph Courtney reported in 1899 that Red Earth, located at the north-eastern extremity of the fertile belt, had soil that was all that could be desired. Courtney described the Shoal Lake soil, where cleared, as deep sandy loam, yielding large crops of potatoes, and also mentioned the salt springs that produced good, pure salt. Potatoes and hunting large game, he added, were the means of sustenance, but noted in the report that game was getting scarce and the Indians were starting to realize they must clear more land and give more attention to their cattle.

In 1900, however, the Inspector of Indian Agencies, S.R. Marlatt visited the Shoal Lake and Red Earth Bands. He found the Shoal Lake reserve land to be very low, with much of it covered in spruce; the soil, he said, was spongy, damp, and not well adapted for gardening. The Red Earth reserve land, on the other hand, was much higher, with good soil that was dry and free of stones. He recorded the population of both reserves at 184, two-thirds of whom lived at Red Earth. Marlatt found the Bands to be a fine lot of Indians but observed that their isolation led to few opportunities and often great privation.

Like Marlatt, Indian agents in the early 1900s continued to speak well of the quality of the land at Red Earth. Agent Courtney commented that although most of the land was still covered with timber, some would make good farming land if cleared. The remainder he described as swamp and hay land. In 1906, Courtney observed that most of Red Earth's 4,769 acres was well adapted for mixed farming, and that the Indians had large gardens and were growing excellent crops of potatoes. Shoal Lake continued to be described as a reserve with a lot of pasture and hay land, ideal for cattle

ranching, although the people there were also growing large crops of potatoes.

In 1908 the Shoal Lake Band requested that a quarter-section of land north of the Carrot River be added to the reserve, pointing out that it was impossible to get sufficient hay on the reserve in a year of high water. A similar request was made by the Red Earth Band, for land on which they could obtain more hay and timber. Surveyor Bray called the requests very reasonable and recommended their approval in spite of the fact that the Bands were not entitled to more land under the Treaty. He also reminded the Deputy Minister that Treaty 5 had provided only 160 acres per family. These requests were quickly approved by the government. In May 1908 Indian Agent Fred Fischer was sent to mark off the additional land at Shoal Lake but was prevented from doing so because the Carrot River had flooded its banks. Nevertheless, he reported that the Indians were pleased to learn that the government had agreed to grant their request. In fact, the government had agreed to set aside a half-section, or 320 acres, but later approved one section, or 640 acres. In the end, 651 acres was set aside.

Meanwhile, at Red Earth, Agent Fischer reported that the people were also pleased the government had approved additional lands for them. They asked for two separate tracts of 160 acres each, one tract containing hay land at the western boundary of the reserve and one containing timber at the eastern end. Fischer also recommended that the entire Red Earth reserve be reconfigured to incorporate the changes requested by the Band. The Band agreed in August 1910, in a "Letter of Surrender for Exchange," that they would accept the new, amended boundaries of IR 29, known as the Red Earth reserve, in exchange for a surrender of the old IR 29. The second reserve on the Carrot River, IR 29A, was to be called the Carrot River reserve.

Dominion Land Surveyor H.B. Proudfoot completed the survey of additional reserve land at Shoal Lake in the fall of 1911, although not without some difficulty. He noted that he consulted with "Albert Moore Chief" and "Councillor Francis Bear," regarding the lands to be surveyed. Proudfoot also re-surveyed Red Earth IR 29 at the same time, noting that he conferred with "Chief Jeremiah" regarding the location of the desired land. The reconfigured Red Earth IR 29 contained 3,595.95 acres, representing an increase of 884.31 acres, which was more than the Band had requested. In July 1912, the expanded Red Earth reserve, IR 29, was approved by Order in Council.

Despite the survey at Shoal Lake having been completed, J.D. McLean, Secretary of the

Department of Indian Affairs, was asked to justify to the Department of the Interior the decision to add more reserve land at Shoal Lake. McLean responded in August 1913: with a population of 89, Shoal Lake was entitled under treaty to receive 2,848 acres of reserve land; the original reserve comprised 2,237 acres; and the addition of 651 acres would give Shoal Lake 2,888 acres. This was 40 acres more than its entitlement under treaty. In McLean's opinion, compared to the much larger reserves provided for bands under some other treaties, Shoal Lake's request was very reasonable. In 1913, the addition to Shoal Lake IR 28A was approved by Order in Council.

As a result of serious flooding in the spring of 1913, the Red Earth Band asked Inspector of Indian Agencies S.J. Jackson if the Band could move to Flute Creek. The department replied to Jackson that Flute Creek had already been exchanged for the Carrot River reserve at the Band's request, because they considered the Flute Creek reserve to be too low and wet.

In December 1914 the Red Earth Band asked for an additional 320 acres of hay land, complaining that there was little hay on the reserve and none in years of high water. The Indian agent in charge, W.R. Taylor, supported this request and urged the department to act quickly in order to protect the 320 acres from settlers who were taking up land along the Carrot River. Secretary McLean, however, refused the request for additional land because the Band's treaty land entitlement had already been surpassed by almost 650 acres. McLean inquired whether the Red Earth Band would consider instead exchanging a portion of its reserve land for other land more suitable for their needs. The record contains no response to the suggestion of a land exchange.

In 1914, the Shoal Lake Band asked for an addition to IR 28A that would encompass a burial ground. Concerned that the 200-acre plot of land would soon be appropriated by the Pasquia Hills Forest Reserve, the government passed an Order in Council in June 1914 confirming the addition of 200 acres to IR 28A, for the purpose of the Band's burial grounds.

After a major flood hit Red Earth in May 1921, resulting in the death of most of the cattle and horses, the department began a search of possible areas where the Red Earth people could relocate. McLean commented that this flood was very unusual, as the Red Earth people had been living there for many years without such an experience. In late June, however, Indian Agent J.W. Waddy reported that after the flood had passed, the band members decided against relocating. He was told by the Chief that in future the Band would move its cattle to higher ground in the spring.

When, in the same year, the Red Earth Band asked for an additional 640 acres of hay land to be added to its reserve, Waddy suggested instead an exchange of land, but the Band was not interested in a trade. Waddy recognized, however, that Red Earth had no hay land on its reserve and recommended to the department that a half-mile strip of hay land along the Carrot River be procured for the Band. The department confirmed in 1921 that it was open to an exchange of land, but that it would not consent to adding more reserve land.

Five years later, in 1926, the Shoal Lake Band requested a surrender of 640 acres of a shallow lake and swamp on the reserve, in exchange for an equal amount of land containing timber and hay, northeast of IR 28A. The request was approved in the same year and a surrender for exchange was taken in June 1927. In subsequent years, minor adjustments were made to the boundaries of the Shoal Lake Band's reserve by agreement of the Band and the Crown.

In 1946, the Red Earth and Shoal Lake Cree Nations sent petitions to the Minister responsible for Indian Affairs, requesting additional reserve land suitable for farming and producing hay. The petitions focused on the need to have sufficient land for farming and to provide fodder for livestock. They also acknowledged that in that part of the country, livestock was an important part of farming operations. The petitions stated that when the reserves were established, they did not provide for cultivation of the land, but the people were content being in a location where they could continue their traditional livelihood of hunting and trapping. Furthermore, the petitions acknowledged that, with the advent of settlers, the Bands would have to look to the land for support, as the wooded lands would soon be cleared. The Red Earth Band's petition stated that with the increase in population at Red Earth, it would need an additional two townships of land for farming, and a further township for hay lands. This request, if granted, would have added over 69,000 acres to Red Earth's reserve. The petition explained that the request for a large amount of land was based on the fact that almost every section in that area contained considerable wasteland. The Shoal Lake Band's petition was similar in content. The Band requested an additional one and one-half townships of land, or about 34,500 acres, adjacent to its reserves, as well as more farm implements and livestock. This, the Band

stated, would provide for a reasonable number of livestock and contain some land suitable for cultivation.

Indian Agent Samuel Lovell was charged with investigating both these petitions, but the record only contains a report on Shoal Lake. Lovell reported in November 1946 that he visited and discussed with the Band the problems inherent in living 75 miles from the nearest market, the inability to get in or out of the reserve in the spring and fall, and the resulting difficulty of competing with other growers. Lovell also observed that the Shoal Lake Band was producing most of its own vegetables but was having to buy oats for the horses. He encouraged them to work toward self-sufficiency and offered to help them break and seed the land with oats the following spring. Lovell also reported that he would give them all the assistance possible. There is no record of any further action by the department in response to the petitions.

PART III
ISSUES

The Indian Claims Commission is inquiring into the following four issues as agreed to by the parties:

- 1 Did Canada have a lawful obligation to provide “farming lands” to the Red Earth Cree Nation and Shoal Lake Cree Nation pursuant to the terms of Treaty 5?
- 2 If so, what was that obligation?
- 3 Was that obligation met?
- 4 Does Canada have an outstanding obligation to either or both Cree Nations in respect of farming lands?

PART IV
ANALYSIS

ISSUE 1: TREATY 5 PROMISE TO PROVIDE FARMING LANDS

1 Did Canada have a lawful obligation to provide “farming lands” to the Red Earth Cree Nation and Shoal Lake Cree Nation pursuant to the terms of Treaty 5?

Panel’s Reasons

Treaty 5 contains an undertaking by the Crown to “lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, ...⁶ The First Nations have asked the panel to interpret the meaning of “farming lands” and determine whether this undertaking was met.

Issue 1, as stated, asks only whether the Crown had a lawful obligation pursuant to Treaty 5 to provide farming lands to the Red Earth and Shoal Lake Cree Nations. The simple answer is, yes, the wording of the Treaty is clear that the Crown had a lawful obligation to provide “reserves for farming lands.” On that question, both parties can agree. The Crown, however, also promised that bands would receive “other reserves” in addition to “farming lands.” The panel notes that the Treaty does not explain either of these terms, nor does it provide any guidance for determining the proportion of farming land necessary to meet the Crown’s treaty obligation, and the point at which that obligation is fulfilled.

Having agreed with the parties that the Crown was obliged to provide farming lands when setting aside reserves under Treaty 5, the panel now turns to Issue 2, which asks us to determine the meaning of “farming lands,” given the wording of the Treaty and the context of the times.

⁶ Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957) p. 4 (ICC Exhibit 1a, p. 76).

ISSUE 2: CONTENT OF THE TREATY 5 OBLIGATION TO PROVIDE FARMING LANDS**2 If Canada had a lawful obligation to provide “farming lands,” what was that obligation?****First Nations’ Position**

It is the position of the Red Earth and Shoal Lake Cree Nations that Canada had and continues to have an outstanding lawful obligation to provide “farming lands” to both Bands pursuant to the terms of Treaty 5. The First Nations argue that, in accordance with the principles of treaty interpretation enunciated in the 1999 Supreme Court of Canada judgement, *R. v. Marshall*,⁷ Canada was obligated to provide reserves to the Bands that were capable of being farmed. In particular, Canada had to provide land suitable for farming to enable the Bands to make the transition from a traditional lifestyle to one of farming.⁸ According to the Elders’ evidence, reserves were created in areas which the Bands already occupied prior to the Treaty and which met the Bands’ requirements at the time, essentially to live by hunting, fishing, and other traditional ways.⁹

The First Nations argue that reserves for farming purposes were not created for them in the early 1880s precisely because they were not yet ready to take up farming, and the petitions from 1946 confirm that fact.¹⁰ In other words, Canada undertook at the time of treaty-making to provide farm land only when the Indian people were ready to be farmers.¹¹ Indian leaders also knew that future generations would have to turn to farming, which is why they agreed to a provision for “reserves for farming” in the Treaty.¹² Treaty 5 is not ambiguous, argue the First Nations. If the parties had

⁷ *R. v. Marshall*, [1999] 3 SCR 533.

⁸ Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 450.

⁹ Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 452.

¹⁰ Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 453.

¹¹ Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 529.

¹² Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 542.

intended that reserve land would be selected without any regard for opportunities for farming, the Treaty would not have made a reference to “farming lands.”¹³ Having received only 160 acres of reserve land per family of five pursuant to Treaty 5, none of which was farming lands, the First Nations are now entitled to reserves made up of 100% farming land, 100% of which is cultivatable land.¹⁴

Canada’s Position

Canada agrees that it had a lawful obligation to provide “reserves for farming lands;” however, “other reserves” must be factored into the equation. The provision of “other reserves,” states Canada, informs our understanding that only a proportion of a band’s reserve entitlement was intended to be “farming lands.”¹⁵ Furthermore, within the category of “farming lands,” argues Canada, the Treaty contemplates that some land would be suitable for cultivation while other land, such as land for hay and pastures, would support other farming uses.¹⁶ Canada contends that the First Nations’ interpretation of “reserves for farming lands” as meaning reserves of exclusively top-quality, arable land is not supported by the wording of Treaty 5 or the intention of the parties. Canada suggests that the quantity and quality of “reserves for farming lands” set aside for bands within the Treaty 5 territory likely varied from case to case.¹⁷ The common intention of the parties at the time of the Treaty, states Canada, was not to provide lands solely for cultivation; rather, in consultation with the signatory bands, the Crown was required to provide reserves that were capable of supporting the diverse activities contemplated by the parties at the time of signing Treaty 5 and the 1876 Adhesion.¹⁸

¹³ Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, paras. 526-27.

¹⁴ Reply Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, May 1, 2008, para. 85.

¹⁵ Written Submission on Behalf of the Government of Canada, April 17, 2008, para. 227.

¹⁶ Written Submission on Behalf of the Government of Canada, April 17, 2008, para. 233.

¹⁷ Written Submission on Behalf of the Government of Canada, April 17, 2008, para. 259-61.

¹⁸ Written Submission on Behalf of the Government of Canada, April 17, 2008, para. 280.

Canada and the First Nations both agree that the *Marshall* decision provides the authoritative guide to treaty interpretation. The parties also suggest that the panel employ the two-step process for treaty interpretation enunciated in *Marshall*: first, the words in the Treaty must be examined to determine their facial meaning; and second, the meaning or different meanings which have arisen from the examination of the wording must be considered against the Treaty's historical and cultural backdrop.¹⁹

Background

The panel considers the following facts to be especially important in the interpretation of the reserve clause in Treaty 5.

Red Earth and Shoal Lake Indians' Membership in The Pas Band

The first recorded evidence that the Red Earth and Shoal Lake people living at the Pas Mountain were members of The Pas Band appears in the text of the 1876 Adhesion to Treaty 5, which identifies The Pas Band as a Band of Saulteaux and Swampy Cree Indians residing at The Pas, Birch River, the Pas Mountain, and File Lake.²⁰ Furthermore, The Pas Band's first payroll, dated September 7, 1876, the same day as the signing of the Adhesion, includes 13 families who were identified as the Pas Mountain Indians.²¹ It also appears that at least a few of the individuals from the Pas Mountain group named in the payroll were present at The Pas for the treaty Adhesion discussions.²² Had the Pas Mountain people not been part of The Pas Band during that period, it is unlikely that their representatives at the treaty talks would have permitted The Pas Band to be described in the Adhesion as a Band that included Indians residing at the Pas Mountain.

¹⁹ *R. v. Marshall*, [1999] 3 SCR 533 at para. 82-83.

²⁰ Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen's Printer and Controller of Stationery, 1957) p.10 (ICC Exhibit 1a, p. 82).

²¹ Treaty Annuity Paylist, Pas Band, September 7, 1876, LAC, RG 10, vol. 9351 (ICC Exhibit 1b, pp. 6-7).

²² Treaty Annuity Paylist, Pas Band, September 7, 1876, LAC, RG 10, vol. 9351 (ICC Exhibit 1b, pp. 6-7).

Beginning in 1882, the Pas Mountain group was represented in The Pas Band council by one Councillor from Shoal Lake;²³ throughout the 1880s other Councillors representing Shoal Lake, Red Earth, or both were elected to the band council and participated in at least one election for a new Chief for The Pas Band.²⁴ It was only in 1903 that Red Earth and Shoal Lake were each given their own payroll and referred to as the Red Earth Band and the Shoal Lake Band.²⁵ The record does not clarify when Red Earth and Shoal Lake were formally recognized as separate from The Pas Band and separate from each other; nevertheless, starting in 1913 Chiefs and Councillors of the Red Earth and Shoal Lake Bands were identified as such on the treaty annuity paylists.²⁶

The preponderance of the available evidence suggests that during the period in issue the Red Earth and Shoal Lake people living at the Pas Mountain were, indeed, members of The Pas Band and considered themselves to be part of the Band. Over time they lost that close connection to The Pas Band and by 1913 at the latest, were treated as bands in their own right.

The Pas Band's Condition for Signing the 1876 Adhesion to Treaty 5

Commissioner Howard reported to Lieutenant Governor Morris that when he met in early September 1876 at The Pas with the three bands interested in adhering to Treaty 5 – The Pas Band, Cumberland Band, and Moose Lake Band – the Chiefs were aware that Treaty 6, which had been concluded only two weeks previously, provided 640 acres of reserve land per family of five, compared to the 160 acres promised by Treaty 5. Consequently, they questioned why the Crown was reluctant to give them the same terms. According to Howard, this problem “acted most prejudicially ... against the

²³ Treaty Annuity Paylist, The Pas Band, August 18-19, 1882, LAC, RG 10, vol. 9357 (ICC Exhibit 1b, p. 46). See ticket #108, Samuel Moore.

²⁴ J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 2, 1885, Canada, *Annual Report of the Department of Indian Affairs for the year Ended 31st December 1885*, 64 (ICC Exhibit 1a, p. 449).

²⁵ Joseph Courtney, Indian Agent, to Secretary, Department of Indian Affairs, June 10, 1903, LAC, RG 10, vol. 8139, file 578/28-5, vol. 1 (ICC Exhibit 1a, p. 751).

²⁶ Treaty Annuity Paylist, Shoal Lake Band paid at Reserve, July 21, 1913, LAC, RG 10, vol. 9388 (ICC Exhibit 1b, p. 256). See ticket #200 Albert Moore and #289 John Head; Treaty Annuity Paylist, Red Earth Band paid at Reserve, July 22, 1913, LAC, RG 10, vol. 9388 (ICC Exhibit 1b, pp. 230-31). See ticket #199 Jeremiah Nawakayas, #274 Onepinotas and #283 Zac. Umpherville.

successful carrying out of [his] mission; ...”²⁷ Howard explained to them that the land they would be giving up would be useless to the Queen, whereas the land ceded by the Plains Indians in Treaty 6 territory would be valuable for settlement.²⁸ According to Howard, the Chiefs then agreed that if he gave them reserves “where they desired,”²⁹ they would accept the terms of Treaty 5. Howard added that after listening to their demands for reserves, they arrived at a satisfactory understanding the same day. The following afternoon, September 7, the Adhesion was read to the Indians and signed.

The evidence of the negotiations surrounding the signing of the treaty Adhesion, while limited, suggests that the Chiefs of the three Bands, including Chief Constant of The Pas Band, made it a pre-condition to signing the Adhesion that the Bands have the right to determine the location of their reserves.

Scope and Wording of Treaty 5 and the 1876 Adhesion

On September 7, 1876, the Chiefs and Councillors of The Pas Band, Cumberland Band, and Moose Lake Band signed an Adhesion to Treaty 5 that incorporated the terms of Treaty 5.

The Indian signatories to Treaty 5 in 1875 ceded their rights to a vast territory of land, most of which was in central and north-central Manitoba. In 1908, Treaty 5 was extended further by means of an Adhesion to cover all of northern Manitoba, except for a piece of land adjacent to Hudson Bay. The terms of Treaty 5 in 1875, its Adhesions in 1876, and the extension of Treaty 5 in 1908, provided that the signatory bands would receive reserves to the extent of 160 acres for each family of five or in that proportion for larger or smaller families. The Treaty also promised that the bands

²⁷ Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876*, xlviii (ICC Exhibit 1a, p. 133).

²⁸ Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876*, xlviii (ICC Exhibit 1a, p. 133).

²⁹ Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876*, xlviii (ICC Exhibit 1a, p. 133).

would maintain the right to hunt and fish throughout the ceded land, subject to government regulations and lands taken up for settlement or other purposes.

The treaty wording to be interpreted in this inquiry is contained in the statement:

Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for *farming lands*, due respect being had to lands at present cultivated by the said Indians, *and other reserves* for the benefit of the said Indians, ...³⁰

In order to interpret the nature and content of the Crown's undertaking to provide reserves, it is helpful to understand this statement in relation to other wording in the Treaty and the 1876 Adhesion.

In addition to the promise of reserve lands and annuity payments, the Crown promised \$500 yearly for the purchase of ammunition and twine for the said Indians. The Crown and the Indian parties also agreed to the following terms:

the following articles shall be supplied to any band of the said Indians who are now cultivating the soil, or who shall hereafter commence to cultivate the lands, that is to say: Two hoes for every family actually cultivating; also one spade per family as aforesaid; one plough for every ten families as aforesaid; five harrows for every twenty families as aforesaid; one scythe for every family as aforesaid, ...³¹

After enumerating various tools to be given, such as axes, saws, and augers, the list continues:

also for each band enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such band; also for each band one yoke of oxen, one bull and four cows – all the aforesaid articles to be given once for all for the encouragement of the practice of agriculture among the Indians.³²

³⁰ Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen's Printer and Controller of Stationery, 1957) p. 4 (ICC Exhibit 1a, p. 76). Emphasis added.

³¹ Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen's Printer and Controller of Stationery, 1957) p. 6 (ICC Exhibit 1a, p. 78).

³² Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen's Printer and Controller of Stationery, 1957) p. 6 (ICC Exhibit 1a, p. 78).

The terms of Treaty 5 were adhered to by The Pas, Cumberland, and Moose Lake Bands the following year, on September 7, 1876. The Pas Band is described in the Adhesion as,

the Band of Saulteaux and Swampy Cree Indians, residing at the “Pas,” on the Saskatchewan River, Birch River, the Pas Mountain and File Lake, and known as “The Pas Band”,³³

The Adhesion also contained explicit directions with respect to the location of the reserves to be surveyed:

For the “Pas” Band, a reserve on both sides of the Saskatchewan River at the “Pas”; but as the area of land fit for cultivation in that vicinity is very limited, and insufficient to allow of a reserve being laid off to meet the requirements of the Band, that the balance of such reserve shall be at “Birch River” and the “Pas Mountain”;³⁴

The inclusion of this wording in the document suggests that prior to The Pas Band’s agreement to enter into Treaty 5, consultations took place between the Crown’s representatives and the Chief and Councillors of The Pas Band. It is apparent that Commissioner Howard agreed with the Band beforehand that one reserve would be set aside at The Pas and, recognizing the scarcity of cultivatable land at that location, agreed to their request to set apart the balance of their reserve land at Birch River and the Pas Mountain.

In his reporting letter of October 10, 1876, Commissioner Howard described the various reserves agreed to by the bands and noted that he made inquiries as to the extent of farming land in each locality mentioned in the adhesion text.³⁵ With respect to The Pas Band, he explained that at The Pas, the available land – consisting of a vegetable garden and one field attached to the Mission,

³³ Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957) p.10 (ICC Exhibit 1a, p. 82).

³⁴ Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957) p.10 (ICC Exhibit 1a, p. 82).

³⁵ Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876*, xlviii (ICC Exhibit 1a, p. 133).

plus a few patches of potatoes – was already cultivated. Howard also reported that on both banks of the Saskatchewan River at The Pas and south-east as far as Che-ma-wa-win, less than 150 acres of land was fit for cultivation, as inland there was marsh both north and south of the river.

The historical evidence and the wording of Treaty 5 and the 1876 Adhesion lead to a number of factual findings. The Red Earth and Shoal Lake people, known as the Pas Mountain group, were members of The Pas Band at the time of its adhesion to Treaty 5. The Chief of The Pas Band made it a pre-condition to signing the Adhesion that the Band have the right to receive reserve land where they chose. Howard agreed to this demand but was also cognizant of the Crown's obligation to include farming lands as a component of the Band's reserve. Although Howard's report and the Adhesion itself do not go into further detail, the agreement to set apart a reserve for The Pas Band at three different localities – The Pas, Birch River and the Pas Mountain – suggests that Howard canvassed The Pas Band leaders regarding the extent of farming land at each place, and concluded based on the information he received from the leadership, that the three areas taken together would provide sufficient land fit for cultivation for the Band. Both the text of the Treaty 5 Adhesion and Howard's report confirm that he consulted with The Pas Band throughout the treaty negotiations.

The Law

The principles of treaty interpretation, articulated in a number of Supreme Court of Canada judgements in the 1980s and 1990s, were confirmed and summarized by the Supreme Court in its 1999 judgement, *R. v. Marshall*.³⁶ This case concerned the question of whether the appellant, Donald Marshall, a Mi'kmaq Indian, possessed a treaty right to catch and sell fish that exempted him from compliance with federal fisheries' legislation. The *Marshall* decision addressed both the principles of treaty interpretation and the process to be followed in establishing the meaning to be ascribed to disputed wording in a treaty.

The principles of treaty interpretation are set out by Madame Justice McLachlin in the minority decision in *Marshall*:

³⁶ *R. v. Marshall*, [1999] 3 SCR 456.

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: ...
2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories: ...
3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: ...
4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: ...
5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: ...
6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: ...
7. A technical or contractual interpretation of treaty wording should be avoided: ...
8. While construing the language generously, courts cannot alter the terms of the treaty be exceeding what "is possible on the language" or realistic: ...
9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context: ...³⁷

McLachlin J then outlines a two-step process for treaty interpretation which reflects these principles:

First, the words of the treaty clause at issue should be examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. This exercise will lead to one or more possible interpretations of the clause. ...

At the second step, the meaning or different meanings which have arisen from the wording of the treaty right must be considered against the treaty's historical and cultural backdrop. ... Faced with a possible range of interpretations, courts must rely on the historical context to determine which comes closest to reflecting the parties' common intention.³⁸

The majority decision in *Marshall* also affirms the rule of evidence that should be applied in treaty interpretation cases: "in the context of a treaty document that purports to contain all of the terms,

³⁷ *R. v. Marshall*, [1999] 3 SCR 456 at para. 78.

³⁸ *R. v. Marshall*, [1999] 3 SCR 456 at paras. 82-83.

... extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty.”³⁹

Panel’s Reasons

For the reasons set out below, the panel finds that the obligation under Treaty 5 to provide reserve land of a particular quality would be met, at a minimum, if the reserve set aside for a signatory band contained cultivatable land, land suitable for other farming purposes, and land suitable for non-farming uses. The appropriate mix of land for each signatory band was to be determined on a case-by-case basis. Furthermore, we find that the common intention of the parties at the time of the Treaty was to enable bands to continue their traditional pursuits while becoming self-sufficient over time through agriculture.

Step One: Examination of the Words

Treaty 5 contains a reserve clause promising that the Crown would “lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, ...”⁴⁰ In order to apply the principle stated in *Marshall* – that these words must be given the sense that they would naturally have held for the parties at the time – it is necessary to interpret the term “farming lands” as it is used in the text of the Treaty. The text does not define the proportion of the total reserve allocation that had to be “farming lands.”

“Farming Lands”

On the face of it, the promise of “farming lands” to each signatory band cannot have meant, in our view, a requirement that the total reserve entitlement consist of land for farming purposes. This is so because the words “and other reserves” follow in the same sentence, to wit: “*farming lands*, due

³⁹ *R. v. Marshall*, [1999] 3 SCR 456 at para. 11.

⁴⁰ Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957) p. 4 (ICC Exhibit 1a, p. 76).

respect being had to lands at present cultivated by the said Indians, *and other reserves.*”⁴¹ Based on this clause alone, the apparent promise was to provide a totality of reserve land comprising land suitable for a variety of purposes, both farming and other uses. The First Nations’ argument that 100% of the reserve entitlement under Treaty 5 had to be “farming lands” ignores the reality that some reserve land would be needed for other priorities of the band, such as hunting and trapping on the reserve. Although the Treaty does not define the proportion of the total reserve that had to consist of “farming lands,” we find it reasonable to conclude that the percentage mix of land types would necessarily depend on a number of factors, including the band’s traditional location within the Treaty 5 territory, its priorities, and the results of consultations held with the band regarding its preferred site or sites for reserve land. The one requirement was that some quantity of land within the total reserve entitlement had to be “farming lands.”

“Farming”

The examination of the term “farming lands” does not end here, however. The next question in understanding the facial meaning of the term is to ask what Treaty 5 meant by “farming” when it promised “farming lands.” Because there is no explanation in the treaty document of the word “farming,” the parties devote much of their argument to the proper interpretation of that word. The First Nations argue that the word “farming,” within the category of “farming lands,” means that 100% of the farming land had to be land that could be cultivated to grow crops.⁴² Canada takes the position that the word “farming” supports multiple types of land for agricultural purposes, including land that could be cultivated for crops, land for hay production, land for rearing and pasturing livestock, and other types of land for farm uses.⁴³

In order to apply a facial meaning to the word “farming” in the absence of any guidance in the treaty text, we must pay attention to certain other promises in the Treaty. Most important is the

⁴¹ Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957) p. 4 (ICC Exhibit 1a, p. 76). Emphasis added.

⁴² ICC Transcript, May 15, 2008, p. 67 (William Selnes).

⁴³ Written Submission on Behalf of the Government of Canada, April 17, 2008, para. 233.

clause promising articles to the bands of Indians who were “cultivating the soil” at that time or who would “commence to cultivate the land ...”⁴⁴ The list, reproduced above, includes two hoes and a scythe for every family; one plough for every ten families; five harrows for every twenty families; and one yoke of oxen for each band. Each band would also receive enough wheat, barley, potatoes and oats to plant the land actually broken up for cultivation. Clearly, these items were intended for “cultivating the soil.”

What is noteworthy, however, is the inclusion of a promise to give one bull and four cows to each band. It is obvious that the parties to the Treaty also contemplated the raising of cattle. Moreover, the list concludes with a statement that all of these articles (implements for crop production and animals) were to be given once only, to encourage the practice of “agriculture” among the Indians.⁴⁵ The meaning of the word “agriculture” is undisputed, in our opinion: it is the practice of cultivating the soil and rearing animals.⁴⁶ We have no reason to believe that the core meaning of “agriculture” today is significantly different from the parties’ understanding of the word in 1875.

It would appear, therefore, that the parties to Treaty 5 in 1875 and the 1876 Adhesion understood “farming” to embrace more than just crop production. Although the First Nations make a valid point that one can pasture animals or grow hay on lands suitable for cultivation but one cannot grow crops on land that is only good for pasture or hay,⁴⁷ the treaty text takes a more expansive view of “farming,” one that contemplates stock-raising and possibly other animal husbandry in addition to crop production. The enumeration of tools intended for cultivation and animals for stock-raising, followed by a general statement that all these articles were to be given to encourage the practice of “agriculture,” suggests strongly that the word “farming” in the Treaty

⁴⁴ Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957) p. 6 (ICC Exhibit 1a, p. 78).

⁴⁵ Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957) p. 6 (ICC Exhibit 1a, p. 78).

⁴⁶ See Katherine Barber, ed., *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998).

⁴⁷ ICC Transcript, May 15, 2008, p. 67 (William Selnes).

meant that some land within the category of “farming lands” had to be capable of cultivation but not necessarily all or even a majority of the land.

Step Two: Examination of the Historical and Cultural Backdrop

Pursuant to the *Marshall* decision, the second step in treaty interpretation is to examine the historical and cultural context to determine which of the meanings arising from the wording of the Treaty comes closest to reflecting the parties’ common intention.

There is little historical data in the record to inform the panel of the policies of the Crown in the 1870s and 1880s toward the practice of agriculture among Indian bands in western Canada. Canada refers us to Alexander Morris’s text on the treaties of Canada, stating:

The Crown saw treaties as enabling the areas covered by treaty to be gradually settled and developed in a peaceful, orderly fashion. Reserves would also provide an economic base through which agriculture could teach the Indians to “adopt the habits of the whites, to till land and raise food.” However, the choice of whether or not to adopt these ways was left to the Indians.⁴⁸

As we have discussed, the text of Treaty 5 promised certain implements to bands who were already cultivating land or who would commence to cultivate the land, as well as some breeding animals to each band, all intended to encourage the practice of agriculture. At the same time, Treaty 5 recognized the right of the Indians to continue hunting and fishing throughout the surrendered tract, and further recognized the need to supply them with ammunition and twine for nets for those purposes. Although only three numbered treaties – Treaties 3, 5, and 6 – specifically refer to the provision of reserves for “farming lands” and “other reserves,” most numbered treaties promised implements to encourage the practice of agriculture, as well as ammunition and the right to continue hunting in the surrendered tract of land.

The First Nations contend that the Crown was required to provide them with lands suitable for farming “to enable them to make the transition from a traditional lifestyle to a farming

⁴⁸ Written Submission on Behalf of the Government of Canada, April 17, 2008, para. 248, quoting Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Saskatoon, SK: Fifth House Publishers, 1991; facsimile reprint of the 1880 edition published in Toronto by Belfords, Clarke & Co.), 28 (ICC Exhibit 1c, p. 11).

lifestyle.”⁴⁹ They argue that the parties to Treaty 5 intended “that each family should have its own farm, utilizing a collective warehouse of tools and a collective breeding stock of farm animals.”⁵⁰ Through the provision of farming implements, tools, and animals, the Crown was assisting the First Nation families to become self-sufficient.⁵¹

Canada argues that the Treaty’s broad parameters describing the nature of reserve lands, which were to be suitable for both agricultural and traditional activities, plus the provision of ammunition and twine to assist bands to maintain their traditional activities, show that “the common intention of both parties was that First Nations would continue to use their reserves for a multitude of purposes.”⁵²

In spite of the dearth of historical information on the Crown’s overall objectives, it is clear that the settlement of Indians on reserves was seen as a gradual process. Bands could decide whether or not to sign a treaty or adhesion. Moreover, it appears that the Crown’s approach was to consult the Chiefs at the treaty talks to identify the desired location of their reserves, and to ask them afterward if they had changed their mind on the location. The Pas Band, for example, was consulted both before the Adhesion was signed and later, when they were asked if they had changed their mind on their desired location. When it came time to survey their reserve lands, the Band was again consulted on the placement of the reserve and asked to confirm the starting point of the survey.

It appears that the gradual process of settling the Treaty 5 Indians on reserves involved assisting them to adapt to subsistence farming. As the Anderson and Cerkowniak study points out, [f]arming was a different activity a century or more ago, with an emphasis on subsistence, raising crops for use on the farm, livestock kept for similar purposes, and so on.”⁵³ If bands were successful

⁴⁹ Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 450.

⁵⁰ Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 448.

⁵¹ Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 449.

⁵² Written Submission on Behalf of the Government of Canada, April 17, 2008, para. 244.

⁵³ Darwin Anderson and Darrel Cerkowniak, “Red Earth and Shoal Lake First Nations: Quality of Reserve Land Inquiry,” February 5, 2008 (ICC Exhibit 9a, p. 16).

in producing enough crops or livestock, or both, to meet their own needs, the government's objective of settlement and self-sufficiency would be met. The promise in the treaty text of certain farming equipment, animals, and seed crops did not contemplate, in our view, the growing of crops or the rearing of cattle on a scale beyond that of subsistence farming.

In respect of the needs and priorities of the Indian bands who signed Treaty 5 in 1875 or the Adhesions in 1876, one research report in the record explains that when the Treaty was signed, it was primarily the result of the insistence of the bands in that region that their aboriginal rights be recognized by the Canadian government, which had recently acquired title to their lands.⁵⁴ The authors also state that in general:

Native people in western Canada were only too aware of the rapid changes facing their lands in the last quarter of the nineteenth century. Although they valued their harvesting life, they were not blind to the necessity for change in the face of non-Native settlement and economic restructuring. They believed the treaties would provide the means to survive the anticipated dislocations.⁵⁵

This historical report suggests that Canada and the First Nations had different but compatible reasons for entering into Treaty 5 in 1875.

We also note what must have been obvious to the parties negotiating Treaty 5 in 1875: the signatory bands and the Crown officials who travelled to Beren's River and Norway House⁵⁶ to negotiate the Treaty would have been keenly aware that much of the land selected for reserves would be of mixed quality and best suited for diverse uses.

The extant evidence of the historical context leads the panel to a finding that it was the common intention of the Bands and the Crown at the time of the Treaty to select reserve lands that would support both traditional and farming uses; depending on the location and other factors, farming lands could include a smaller or larger proportion of cultivatable land.

⁵⁴ Kenneth S. Coates and William R. Morrison, "Treaty Five: 1875-1908" (Hull: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986), i, 65 (ICC Exhibit 8L, pp. 3, 71).

⁵⁵ Kenneth S. Coates and William R. Morrison, "Treaty Five: 1875-1908" (Hull: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986), 69 (ICC Exhibit 8L, p.. 75).

⁵⁶ Treaty 5 was concluded at Beren's River on September 20, and at Norway House on September 24, 1875.

This conclusion is consistent with the findings of the ICC panel in *James Smith Cree Nation: Treaty Land Entitlement Inquiry*.⁵⁷ Although the main issue in that inquiry was treaty land entitlement, which is not the case here, the panel in *James Smith* interpreted the identical reserve clause, namely, the promise to provide “farming lands” and “other reserves” within the context of Treaty 6. Although the panel in *James Smith* was not required to define the content of “farming lands” per se, it concluded that the intention of the reserve clause was that a reserve would be set aside both for “a) farming land; and b) other purposes (without limitation).”⁵⁸ In addition, it was intended that the band would be consulted on the location of the reserve land, and that its choice of location would be determined by the nature and quality of the land being selected. The panel also found that the James Smith Band chose land that would support multiple uses; some of this land “supported an agricultural use,” while other portions “supported band members’ desire to continue to hunt and fish.”⁵⁹ Consequently, the Crown fulfilled the Treaty 6 requirement to provide reserve land of a specific quality. While acknowledging the significant differences between the history and the territories encompassed by Treaties 5 and 6, we find that the *James Smith* report’s examination of the clause promising “farming lands” and “other reserves” to be analogous to the issue before us and consistent with our findings.

Conclusion

Having examined the facial meaning of the reserve clause in issue and the historical context in which Treaty 5 was signed, the panel finds that the First Nations have adopted an interpretation of “farming lands” that is unduly restrictive and not contemplated by the treaty text. The reserves to be set aside for Treaty 5 bands were not intended to exist for the sole purpose of cultivating the land. The treaty

⁵⁷ ICC, *James Smith Cree Nation: Treaty Land Entitlement Inquiry*, (Ottawa, February 2007), reported (2008) 20 ICCP 573.

⁵⁸ ICC, *James Smith Cree Nation: Treaty Land Entitlement Inquiry*, (Ottawa, February 2007), reported (2008) 20 ICCP 573 at 635.

⁵⁹ ICC, *James Smith Cree Nation: Treaty Land Entitlement Inquiry*, (Ottawa, February 2007), reported (2008) 20 ICCP 573 at 635-36.

document itself contemplates that reserves would contain some “farming lands” and some “other reserves.” Within the category of “farming lands,” the Treaty demands that at least a percentage of that land be cultivatable land; but the remainder of the land selected could be suitable only for cattle-raising or other farming uses.

Thus, according to the treaty text, the treaty obligation would be met, at a minimum, if reserves were set aside that contained cultivatable land, land suitable for other farming purposes, and land suitable for non-farming uses. The appropriate mix of land for each signatory band would be determined on a case-by-case basis.

In addition to our findings on the facial meaning of “farming lands” and “other reserves” in the treaty text, we conclude that it was the common intention of the parties to Treaty 5 at the time of treaty to provide reserves for multiple uses. The Pas Band and the other two bands who signed the 1876 Adhesion would only enter into Treaty 5 on condition that they could choose their own reserve lands. Also, there is no doubt in our minds that The Pas Band, for one, wanted reserve land on which they could pursue traditional activities as well as grow crops and raise cattle, activities that their band members were already pursuing in various locations, including Red Earth and Shoal Lake. As the *Marshall* decision states, “the goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: ...”⁶⁰ The common goal at the time of the Treaty was to enable the signatory bands to continue their traditional pursuits while becoming self-sufficient over time through agriculture.

ISSUE 3: FULFILLING THE TREATY 5 OBLIGATION TO PROVIDE FARMING LANDS

3 Was that obligation met?

The panel has determined that Canada had an obligation under Treaty 5 to provide farming lands to the First Nations, and that cultivatable lands were to be one part of a treaty land entitlement which

⁶⁰ *R. v. Marshall*, [1999] 3 SCR 456 at para. 78.

also included other types of farming lands as well as lands intended for non-farming uses, the proper proportions of which were determinable on a case-by-case basis. It remains now to determine whether that obligation was met with regard to the Red Earth and Shoal Lake Cree Nations.

First Nations' Position

The First Nations have argued that the Crown has not met this obligation, and that the Red Earth and Shoal Lake First Nations were unable to take up farming because their reserves did not contain any land that was fit for farming.⁶¹ Instead the lands they were given were characterized by poor soil quality, inadequate drainage and periodic flooding, and were unsuited to any agricultural pursuits beyond gardening, which they assert is not synonymous with farming.⁶² It is their position that, in essence, the lands they were given were marshlands and, as such, cannot be counted as land for treaty land entitlement purposes.⁶³ The First Nations further assert that these reserves were never chosen by them, nor were they consulted on the location of those lands.⁶⁴ They argue that their reserves do not contain a mix of farming lands and other lands, as none of their reserve lands are capable of sustaining farming.⁶⁵

Canada's Position

In response, Canada argues that it met its obligation to provide “reserves for farming lands” and “other reserves” as provided by Treaty 5 and requested by the bands at the time treaty was taken and afterward. While there is some imprecision in the Treaty with regard to the definition and distribution of “farming lands” and “other reserves,” this is intentional flexibility which permitted

⁶¹ Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 457.

⁶² Reply Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, May 1, 2008, para. 133.

⁶³ Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 455.

⁶⁴ Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 27.

⁶⁵ ICC Transcript, May 15, 2008, p. 75 (William Selnes).

bands to influence the quality and distribution of lands set aside under Treaty.⁶⁶ The lands provided to Red Earth and Shoal Lake were of mixed quality,⁶⁷ and the evidence shows that the people cultivated and used those lands for stock-raising before and after the reserves were set aside, as well as for the traditional activities of hunting, fishing and trapping.⁶⁸ The lands obtained by the Red Earth and Shoal Lake people pursuant to the Treaty 5 Adhesion, were an appropriate mix of lands. They agreed to the land being set aside by the Crown and intended that it would support a variety of activities relevant to their way of life. There is no evidence that during this period they were dissatisfied with the general quality of reserve land set aside for the practice of agriculture or the specific quantity of arable land included in the reserves.⁶⁹ Thus, the obligation under the Treaty was met.

Background

Role of Red Earth and Shoal Lake People in Reserve Creation

When The Pas Band and two other Bands agreed in 1876 to accept the terms of Treaty 5, it was on the condition that the Crown “would agree to give them Reserves where they desired ...”⁷⁰ The Crown agreed to this stipulation. Treaty 5 made specific reference to the setting aside of reserves for “farming lands” and “other reserves” for the benefit of the Indians, and from the outset, The Pas Band was consulted on the location of those lands. Indian Commissioner Thomas Howard met with the Band in regard to the sites of their reserves at the time of the 1876 Adhesion, and reviewed with

⁶⁶ Written Submission on Behalf of the Government of Canada, April 17, 2008, para. 242.

⁶⁷ Written Submission on Behalf of the Government of Canada, April 17, 2008, para. 270.

⁶⁸ Written Submission on Behalf of the Government of Canada, April 17, 2008, paras. 280, 254.

⁶⁹ Written Submission on Behalf of the Government of Canada, April 17, 2008, para. 265.

⁷⁰ Hon. Thos. Howard, Commissioner, to Alex. Morris, Lieutenant Governor, October 10, 1876, in Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876*, xlviii (ICC Exhibit 1a, p.133).

them the reserves they had chosen. As a result, Howard expressed concern that at The Pas there was very little land left among that requested by The Pas Band that was fit for cultivation and as yet uncultivated.⁷¹ In the end, it was agreed that the Band would make up the balance of its reserve land entitlement at the Pas Mountain (Red Earth and Shoal Lake) and Birch River.⁷² As the Adhesion and other documents reveal, the Pas Mountain people were considered to be members of The Pas Band during this period. The panel can find no evidence that the Red Earth and Shoal Lake groups disputed the decision to create reserves where they were living; on the contrary, evidence exists that some individuals representing the Pas Mountain were present at the treaty adhesion talks that led to a decision to create additional reserves at the Pas Mountain.⁷³

It is apparent from the evidence that in general, bands in the Manitoba Superintendency were ready to adopt agriculture, but faced certain challenges. Many reserves were not well adapted for agriculture; the bands had received inferior cattle and supplies from the department, and seed crops were arriving too late in the season for planting. To make matters worse, settlers were increasingly encroaching on reserved lands.⁷⁴ When The Pas Band specifically complained that they had not received their fair allowance of cattle and agricultural implements, the department ordered in August 1879 that The Pas and all other Treaty 5 bands be supplied that season with all the implements and cattle owed them under treaty.⁷⁵ Inspector McColl soon confirmed that this action had been taken

⁷¹ Hon. Thos. Howard, Commissioner, to Alex. Morris, Lieutenant Governor, October 10, 1876, in Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876*, xlvi (ICC Exhibit 1a, p.133).

⁷² Canada, *Treaty No.5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen's Printer and Controller of Stationary, 1957) 10 (ICC Exhibit 1a, p.82).

⁷³ Treaty Annuity Paylist, Pas Band, September 7, 1876, LAC, RG 10, vol. 9351 (ICC Exhibit 1b, pp. 6-7).

⁷⁴ E. McColl, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 31, 1878, Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1878*, 53-56 (ICC Exhibit 1a, pp.163-167).

⁷⁵ L. Vankoughnet, Deputy Superintendent General of Indian Affairs, Department of the Interior, to [J.F.] Graham, Acting Indian Superintendent, August 18, 1879, LAC, RG 10, vol. 3677, file 11528 (ICC Exhibit 1a, pp. 180-181).

and also commented on the promptness with which the government exchanged reserves unfit for cultivation for more suitable ones.⁷⁶

Consultations with the bands regarding their preferred reserve sites was not limited to the Treaty 5 negotiations. When it was decided in the fall of 1882 to survey all Treaty 5 reserves, Dominion Land Surveyor W.A. Austin was sent to meet with Indian Agent Mackay to determine whether any of the Treaty 5 bands were dissatisfied with their chosen sites and wished to change their location; Austin was also directed to consult with band leaders concerning their preferred point of commencement for the survey.⁷⁷

In January 1884, the Band petitioned the Crown to survey reserves at the Pas Mountain in the vicinity of "Oopasquaya Hill."⁷⁸ The petitioners included two men from Red Earth and a Councillor from Shoal Lake. It was agreed by all involved, and confirmed by good report, that the lands at the Pas Mountain were the only remaining good farm land in the region.

The following June, Indian Agent Joseph Reader met with The Pas Band to inspect the lands selected by them for their reserves, and to determine how the land shortfall was to be distributed. Again there was consultation and agreement. The Band and Reader decided that 1,500 acres would be set apart at the Pas Mountain, a further 1500 acres would be set apart northwest of the pre-existing reserve at The Pas, and 246.5 acres of timber land would be reserved along the Carrot River. As we have discussed, when Reader arrived by boat at Red Earth to inspect the land, he observed swamp and hay near the water, but as the land gradually rose from the shore, he found a 10-acre flat of fine, arable land and some gardens already cultivated in excellent soil. At Shoal Lake Reader met people who had also begun to cultivate the land, and he observed that the land there was more open

⁷⁶ E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 31, 1879, Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1879*, 61 (ICC Exhibit 1a, p.222).

⁷⁷ Jas. F. Graham, Indian Superintendent, to W.A. Austin, Dominion Land Surveyor (DLS), June 29, 1882, LAC, RG 10, vol.7776, file 27128-1 (ICC Exhibit 1a, pp.289-290).

⁷⁸ Chief John Bell and Petitioners, The Pas Band, to Superintendent General of Indian Affairs, January 3, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, pp. 391-393).

and well adapted to farming purposes, although there were salt springs in the neighbourhood and some land that required draining.⁷⁹

Reader also learned that the Shoal Lake Indians wished to have some timber land included in their desired reserve.⁸⁰ In concluding his inspection report, Reader remarked,

... as to the settling of some of the Pas Indians on Reserves at the mountain I would venture to suggest if the Department see fit that the Shoal Lake Indians should be settled where they now are, and the Red Earth Indians where they have already built houses and those Indians now at the Pas who wish to be settled at the mountain should have a Reserve along the Flute River and such is the wish of the Indians themselves.⁸¹

Ten years later, when surveys of the new Red Earth IR 29A and the reconfigured Shoal Lake 28A were accomplished, surveyor Samuel Bray heard from the Chiefs and Councillors at Red Earth and Shoal Lake regarding any additional needs or requests they may have had regarding their reserves.⁸² Bray reported in January 1895:

... I invariably engaged the chief and councillors of each band as chainmen or axemen and always held a council the evening before to decide approximately on the lands to be surveyed ... and that if anything connected with them or did not appear to them to be correct or desirable with the surveys they were at once to point it out in order that there should not be any subsequent complaints.⁸³

⁷⁹ J. Reader, Indian Agent, The Pas, Cumberland, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC, RG 10, vol.3673, file 11286 (ICC Exhibit 1a, pp.416-421).

⁸⁰ J. Reader, Indian Agent, The Pas, Cumberland, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC, RG 10, vol.3673, file 11286 (ICC Exhibit 1a, pp.416-421).

⁸¹ J. Reader, Indian Agent, The Pas, Cumberland, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC, RG 10, vol.3673, file 11286 (ICC Exhibit 1a, pp.416-421).

⁸² S. Bray, Assistant Chief Surveyor, to Hayter Reed, Deputy Superintendent General of Indian Affairs, January 23, 1895, LAC, RG 10, vol.7537, file 27128-1-6 (ICC Exhibit 1a, pp.670-677).

⁸³ S. Bray, Assistant Chief Surveyor, to Hayter Reed, Deputy Superintendent General of Indian Affairs, January 23, 1895, LAC, RG 10, vol.7537, file 27128-1-6 (ICC Exhibit 1a, pp.670-677).

Quality of Land at Red Earth and Shoal Lake

In reporting on the Red Earth and Shoal Lake reserves in 1884, Indian Agent Mackay remarked that the land at both places was very good, and in particular, the Indians at Red Earth were doing very well, possessing fine cattle, gardens, and root cellars.⁸⁴ Throughout the 1880s, similar reports praising the Red Earth and Shoal Lake Indians and the quality of their land persisted. For example, Shoal Lake was described as having a significant amount of first-class soil and Red Earth good-quality land, although rather flat for grain.⁸⁵

In 1885, after Red Earth and Shoal Lake had experienced a severe winter which left Shoal Lake, in particular, struggling, Agent Reader commenced working along side both communities, providing instruction and support.⁸⁶ Later that year, Reader was prompted to report that at Red Earth, which he described as possibly the finest reserve in the agency, the crops of wheat and potatoes were excellent.⁸⁷

It appears that by 1889 at the latest, both Red Earth and Shoal Lake people were actively engaged in some form of farming. The Red Earth Indians were reported to be excellent farmers, whilst the Shoal Lake Band were focusing their efforts on raising cattle. Agent Reader observed that at Red Earth and Shoal Lake, “they put down about 140 bushels of potatoes, and three of barley, in some thirteen acres of land. Their returns of potatoes were 660 bushels ...”⁸⁸ He asserted that “[i]f

⁸⁴ A. Mackay, Indian Agent, Beren’s River Agency, to Superintendent General of Indian Affairs, September 13, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1884*, 76-77 (ICC Exhibit 1a, pp. 431-433).

⁸⁵ T.D. Green, Dominion Land Surveyor (D.L.S.), to Superintendent of Indian Affairs, March 9, 1885, LAC, RG 10, vol.3685, file 13033 (ICC Exhibit 1a, pp.434-442).

⁸⁶ J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 2, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, 73-79 (ICC Exhibit 1a, pp. 470-477).

⁸⁷ J. Reader, Indian Agent, to Superintendent General of Indian Affairs, September 6, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1887*, 73-79 (ICC Exhibit 1a, pp. 479-484).

⁸⁸ J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 3, 1888, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1888*, 74-77 (ICC Exhibit 1a, pp.537-539).

the Pas Mountain Indians cultivate the fine, rich soil of their respective reserves, they need never, under ordinary circumstances, suffer from starvation.”⁸⁹

Over the ensuing years, the Red Earth and Shoal Lake people appear to have prospered. Reports of the Bands’ activities emphasized that “these two off-shoots from the Pas Band have the advantage of first-class soil, especially that at Red Earth, and it only needs clearing and cultivating to raise all kinds of ordinary grain and vegetables.”⁹⁰ Reader described the Red Earth people in 1896 as “good gardeners, [who] live largely upon potatoes and milk, having a goodly number of private animals.”⁹¹ The people were given help that year to cultivate more land. Of Shoal Lake, Reader remarked that it was a good place for cattle, and the people “are thriving better than formerly, as is shown by some new houses which are, I think, the best in the agency, ...”⁹²

The sole exception to these good reports was that of S.R. Marlatt, Inspector of Indian Agencies, who visited Red Earth and Shoal Lake in 1900. Marlatt remarked that Shoal Lake was an isolated spot, characterized by damp and spongy soil which was not well adapted to gardening. Red Earth, while occupying higher ground than Shoal Lake, was also hard to get to, but had soil that was good, quite dry, and free from stones. Marlatt cited the principal occupations of both Red Earth and Shoal Lake as “hunting, gardening and cattle-raising; ...”⁹³

Indian Agent Reader’s replacement in 1899, however, continued the positive accounts of the Red Earth and Shoal Lake Indians and their reserves. Agent Joseph Courtney’s 1906 report praised

⁸⁹ J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 3, 1888, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1888*, 74-77 (ICC Exhibit 1a, pp.537-539).

⁹⁰ Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, August 9, 1895, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1895*, 192-194 (ICC Exhibit 1a, pp. 680-682).

⁹¹ Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, July 3, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1896*, 126-128 (ICC Exhibit 1a, pp. 690-693).

⁹² Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, July 3, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1896*, 126-128 (ICC Exhibit 1a, pp. 690-693).

⁹³ S.R. Marlatt, Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, October 1, 1900, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900*, 95-108 (ICC Exhibit 1a, pp. 723-737).

Red Earth's large gardens and excellent crops of potatoes, while observing that they had little interest in stock-raising. Courtney also praised Shoal Lake for its large pastures and hay lands, excellent for cattle-raising, as well as the fact that they grew large crops of potatoes on the reserve. He confirmed that some of the reserve was suitable for cultivation.⁹⁴

Requests for Reserve Land Exchanges and Additions

In 1892, the Pas Mountain Indians requested that the land set aside at Flute Creek for a reserve for The Pas Band be exchanged for lands reserved along the Carrot River at Red Earth, where the Red Earth people had built their houses. Reader supported this request,⁹⁵ and within two years the government had approved the exchange of lands at Flute Creek for a second Red Earth reserve, which eventually became known as the Carrot River reserve, IR 29A. The exchange seemed to have been a good one. Inspector McColl reported that Flute Creek had very good but low land, whereas the land at Red Earth was "very superior," although it too, was "somewhat low."⁹⁶

In the mid-1890s, the Shoal Lake people also requested an exchange: they asked for permission to surrender some reserve land in exchange for some cultivated land outside the reserve, and to create a small reserve at their grave site. The government agreed to re-survey the reserve and protect the grave site.⁹⁷ It appears, however, that the burial ground was not incorporated into Shoal Lake IR 28A until 1914.⁹⁸

⁹⁴ Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, June 30, 1906, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1906*, 88-91 (ICC Exhibit 1a, pp. 755-757).

⁹⁵ J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, January 14, 1892, LAC, RG 10, vol. 1814, Series A and LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, pp. 580-581).

⁹⁶ E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to Deputy Superintendent General of Indian Affairs, December 16, 1892, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, pp. 597-598).

⁹⁷ Memorandum of Interview, S. Bray, Assistant Chief Surveyor, with Councillor Joseph Head, Shoal Lake Band, December 1, 1894, LAC, RG 10, vol. 7537, file 27128-1-8 (ICC Exhibit 1a, p. 664); S. Bray, Assistant Chief Surveyor, to Hayter Reed, Deputy Superintendent General of Indian Affairs, January 23, 1895, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, p. 671).

⁹⁸ See Historical Background, "Requests for Additions to the Red Earth and Shoal Lake Reserves (1914 - 1921)," at Appendix A to this report.

In 1908 the Shoal Lake Indians requested that the department add to their reserve an additional quarter-section of land to enable them to obtain much-needed hay “in a year [of] high water,” as the requested lands were “higher than the reserve and consequently free from the overflow.”⁹⁹ Red Earth made a similar request, citing the need for “sufficient hay and spruce timber land.”¹⁰⁰ The department acceded to the Bands’ requests and sent Agent Fischer to mark out the requested land, although he was prevented from doing so in May of 1908 owing to spring flooding.¹⁰¹ The department also agreed to Red Earth’s amended request that they receive two separate parcels of 160 acres each, one containing timber and the other hay. In August 1910, the Red Earth Band agreed to surrender the ‘old’ IR 29 in exchange for a ‘new’ IR 29 by way of a “Letter of Surrender for Exchange.”¹⁰² The survey of the reconfigured IR 29 was completed in 1911, following consultations with Chief Jeremiah.¹⁰³ The reconstituted IR 29 contained 3,595.95 acres – 884.31 acres more than the addition requested by the Band.¹⁰⁴ The new IR 29 was approved by Order in Council in July of 1912.¹⁰⁵

Similarly, the survey of additional reserve land at IR 28A was completed in the fall of 1911, with the full involvement of the Shoal Lake leadership, in particular, Chief Albert Moore and

⁹⁹ [Fred] Fischer, Indian Agent, to Secretary, Department of Indian Affairs, March 6, 1908, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 764).

¹⁰⁰ Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs, March 6, 1908, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, pp. 765-766).

¹⁰¹ J.D. McLean, Secretary, to Fred Fischer, Indian Agent, March 27, 1908, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 768); Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs, May 29, 1908, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 769); Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs, May 29, 1908, DIAND, file 672/30-28 (ICC Exhibit 1a, pp. 770-771).

¹⁰² Letter of Surrender for Exchange, Red Earth Band, August 15, 1910, DIAND, 672/30-28, vol. 1 (ICC Exhibit 1a, pp. 785-786).

¹⁰³ H.B. Proudfoot, D.L. Surveyor, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, March 21, 1912, in “Field Notes of Indian Reserve No. 29 Red Earth and Tie Line between I.R. No. 29 and the 14 Base,” surveyed by H.B. Proudfoot, D.L.S., October 9 - November 5, 1911, p. 25, Office of the Treaty Commissioner (ICC Exhibit 1a, p. 793).

¹⁰⁴ Order in Council, PC 2019, July 20, 1912 LAC RG 15, D-II-1, vol.686, file 32961(ICC Exhibit 1a, pp.829-832).

¹⁰⁵ Order in Council, PC 2019, July 20, 1912, LAC RG 15, D-II-1, vol.686, file 32961(ICC Exhibit 1a, pp.829-832).

Councillor Francis Bear. Government approval, however, was not as easily achieved as for Red Earth; the Minister of the Interior questioned the need for more land at Shoal Lake and requested an explanation from Indian Affairs.¹⁰⁶ Secretary McLean responded that with a population of 89, the addition of 651 acres to Shoal Lake would result in an addition of only 40 acres more than the Band's entitlement under Treaty 5; compared to bands under treaties that allowed 640 acres per family, Shoal Lake's request was very reasonable.¹⁰⁷ This explanation sufficient, the 651-acre addition to Shoal Lake IR 28A was confirmed by Order in Council on August 30, 1913.¹⁰⁸

Two further requests for additions to the Shoal Lake and Red Earth reserves occurred in 1914. In the early months of that year the Shoal Lake Band approached the department for an addition to IR 28A of 200 acres which encompassed a burial ground. This request was hastily granted by the Department, as it involved lands which were sought to be included in the new Pasquia Hills Forest Reserve.¹⁰⁹

The following December, the Red Earth Band asked for an additional 320 acres of hay land, on grounds that their reserves contained little hay and what was available was lost completely in years of high water.¹¹⁰ Although the Indian Agent, W.R. Taylor, supported the Band's request and argued its merits to the department, Secretary J.D. McLean demurred for the reason that the Band's treaty land entitlement had already been exceeded by close to 650 acres.¹¹¹ Although McLean later

¹⁰⁶ N.O. Coté, Controller, Land Patents Branch, Department of the Interior, Ottawa, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, Ottawa, August 15, 1913, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 835).

¹⁰⁷ J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to N.O. Coté, Controller, Land Patents Branch, Department of the Interior, August 20, 1913, LAC, RG 15, D-II-1, vol. 723, file 387790 (ICC Exhibit 1a, pp. 836-837).

¹⁰⁸ Order in Council, PC 2256, August 30, 1913, DIAND, Indian Lands Registry, Instrument No. XII394 (ICC Exhibit 1a, pp.838-839).

¹⁰⁹ N.O. Coté, Controller, Land Patents Branch, Department of the Interior, to W.W. Cory, Deputy Minister of the Interior, May 13, 1914, LAC, RG 15, vol. 723, file 387790 (ICC Exhibit 1a, pp. 847-849); Order in Council PC 1492, June 9, 1914, DIAND, Indian Land Registry, Instrument No.XI1395 (ICC Exhibit 1a, pp.851-852).

¹¹⁰ W.R. Taylor, Indian Agent, The Pas, Manitoba, to Assistant Deputy and Secretary, Department of Indian Affairs, Ottawa, December 9, 1914 DIAND file 578/30-47-27A, vol.1 (ICC Exhibit 1a, p.854).

¹¹¹ J.D. McLean, Assistant Deputy and Secretary, to S.L. Macdonald, Acting Indian Agent, April 9, 1918, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 860).

asked Indian Agent S.L. Macdonald to raise with the Red Earth Band the question of an exchange of a portion of their reserve for land “more suitable for their purposes,”¹¹² the record contains no evidence that the Band considered a land exchange.

The Red Earth community was seriously impacted by flooding in 1913 and 1921. In the spring of 1913, Red Earth was subjected to a massive flood, and asked the agent to pursue a possible relocation to Flute Creek. This was not an option, however, as the Band had requested and obtained an exchange of the Flute Creek reserve in 1893 for the Carrot River reserve, on the basis that the former was considered to be too low and wet.¹¹³ In the spring of 1921 the Red Earth reserve was again flooded, with far more serious consequences. Indian Agent J.W. Waddy, reporting on news of the community brought to his office by a Shoal Lake Band member, advised the department that:

...practically all the cattle and horses are already drowned, and that the Indians are living on the top of the flat roofed barns. The Indians say that even the moose are drowned as the whole country is a flood. ... My reason for reporting this matter is that I understand that the Indians want to move to some other district and that they will probably bring the matter up at treaty time, June 18th, next, and if you had any place in mind where we could locate them I could talk the subject over with the band. Red Earth Reserve has about 140 people, all Crees. They live on the fringe of the river, a strip about 500 yards wide, the balance being swamp.¹¹⁴

Although flooding of this magnitude was considered to be an aberration, the department agreed that a move was advisable. W.M. Graham, Indian Commissioner, requested J.D. McLean to contact Waddy and begin discussions with the Band on the matter of relocation:

¹¹² J.D. McLean, Assistant Deputy and Secretary, to S.L. Macdonald, Indian Agent, January 14, 1919, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 879).

¹¹³ J.D. McLean, Assistant Deputy and Secretary, to S.J. Jackson, Inspector of Indian Agencies, December 5, 1913, DIAND, file 672/30-28, vol.1 (ICC Exhibit 1a, p.842).

¹¹⁴ J.W. Waddy, Indian Agent, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, May 16, 1921, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 883).

Will you be good enough to instruct the agent to the effect that the Indians should select a tract of land to which they can move and which may be available for the purpose of a new Reserve, and as soon as this Department is informed of it, steps will be taken to obtain it for them, if at all possible, in exchange for their present reserve.¹¹⁵

However, when Waddy travelled to Red Earth and met with the Band to discuss the matter of relocation, he found them unwilling to move. He reported that “[t]hey have had time since the high flood to have forgotten most of their troubles and they said that they did not want to move now.”¹¹⁶ What the Band did desire, however, was another addition to their reserves, this time in the form of a small strip of land lying adjacent to the Carrot River. This land, comprising a strip two miles long and one-half-mile wide on the west side of the river, was desired as hay lands for the Band. Waddy argued on their behalf that they “own no hay ground at all and if the district is settled, they will certainly require a little hay ground.”¹¹⁷ The Band also told Waddy that they were not interested in a trade of land. The department noted, however, that the Band was currently in possession of lands exceeding their treaty land entitlement by 1,155 acres, and that, unless “the band desires to make an exchange, ... there does not appear to be sufficient ground for making a request for additional land.”¹¹⁸

In 1926, the Shoal Lake Band requested and was granted an exchange of 640 acres of IR 28A, consisting largely of a shallow lake and swamp, for an equal amount of land containing timber and hay, northeast of the reserve.¹¹⁹ Nearly a decade later, this land, known as IR 28B, was exchanged, this time for land adjoining IR 28A.

¹¹⁵ J.D. McLean, Assistant Deputy and Secretary, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, May 27, 1921, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 885).

¹¹⁶ J.W. Waddy, Indian Agent, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, June 26, 1921, DIAND, 672/30-28, vol. 1 (ICC Exhibit 1a, p. 886).

¹¹⁷ J.W. Waddy, Indian Agent, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, June 26, 1921, DIAND, 672/30-28, vol. 1 (ICC Exhibit 1a, p. 886).

¹¹⁸ A.F. Mackenzie, for Assistant Deputy and Secretary, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, July 15, 1921, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 887).

¹¹⁹ J.W. Waddy, Indian Agent, to Assistant Deputy and Secretary, Department of Indian Affairs, March 15, 1926, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 896).

In 1946 the Red Earth and Shoal Lake Cree Nations sent petitions to the Minister of Indian Affairs, requesting additional reserve land suitable for farming and producing hay. Red Earth Chief Robert McKay's covering letter stated that they had no agricultural land on the reserve, and that on a small reserve, useless for farming, they would soon have no means of making a living.¹²⁰ The Red Earth petition asserted that

When our Reserves were set apart for us we had no thought at that time of any change in our circumstances and were quite content to have a place set aside for us where we could live and continue our traditional method of living by hunting and trapping. With the approach of the settlers both from the East and from the West, the time will soon come when we will have to look to the land for our support. ...

We think, therefore, that we are entitled to consideration such as is granted to other Indian Bands in the country, that is, sufficient land to provide for farming for the support of our people and also sufficient land to provide fodder for livestock which in this part of the country would be a very important part of any farming operations which are undertaken. Our contention is that our Reserves, when they were set aside for us did not provide for cultivation of the land and no thought was given to the fact that we would now be forced to look in the direction for our future existence. We feel we should be granted whatever land is necessary so that the future of our people will be assured. ...

We are of the opinion that we should have two townships of land for farming and another township set aside for hay land. We might point out that in this northern area, there is only a percentage of each quarter section which is suitable for all farming purposes."¹²¹

The petitions would have added three townships, or approximately 69,000 acres to Red Earth's reserve lands, and in the case of the Shoal Lake's petition, an additional one and one-half townships, or about 34,500 acres. Although Indian Agent Samuel Lovell reported that he conducted an inspection trip to both Shoal Lake and Red Earth, he described only Shoal Lake. Lovell discussed the challenges of their reserve's isolated location and his willingness to work with them to improve

¹²⁰ Chief Robert McKay, Red Earth Band, to Hon. J.A. Glen, Minister of Mines and Resources, including Petition, Red Earth Band, June 21, 1946, DIAND file 672/30-28, vol.1 (ICC Exhibit 1a, pp.935-939).

¹²¹ Chief Robert McKay, Red Earth Band, to Hon. J.A. Glen, Minister of Mines and Resources, including Petition, Red Earth Band, June 21, 1946, DIAND file 672/30-28, vol.1 (ICC Exhibit 1a, pp.935-939).

farming on the land they currently held.¹²² There is no indication of any formal response to the petitions by the department.

Panel's Reasons

The panel has been asked to enquire into whether there was an obligation on the Crown to provide farming lands to the Red Earth and Shoal Lake Cree Nations pursuant to the terms of Treaty 5, and if so, what was that obligation and was it fulfilled by the Crown. With regard to the first and second issues, it has been found that the Crown did have a duty to provide farming lands, but that the reserves which were to be set aside for the Treaty 5 bands were not intended to exist for the sole purpose of cultivating the land. The obligation contained within the Treaty contemplates that reserves would contain some "farming lands" and some "other reserves." As such, the lands contemplated by Treaty 5 included a mix of land suited to cultivation, cattle-raising, and other farming purposes, as well as such other reserve land as was necessary to support a band whilst undergoing the transition to a self-sufficient, agrarian lifestyle. The actual nature of the land mix would vary across individual bands consistent with their location, needs and evolving subsistence, and was to be determined on a case-by-case basis.

The panel has also found that it was the common intention of the parties to Treaty 5 at the time the Treaty was signed to provide reserves for multiple purposes, only one of which was cultivating the land; as a result, the lands selected for reserves were of mixed quality and best suited for diverse purposes such as those outlined above.

Based on the evidence and oral testimony of this inquiry, and with due consideration to the appropriate legal principles, the panel concludes, for the reasons to follow, that the Crown met its obligations under Treaty 5 to provide the Red Earth and Shoal Lake Bands with "farming lands" pursuant to the terms of that Treaty.

¹²² Samuel Lovell, Indian Agent, to A.G. Hamilton, November 16, 1946, DIAND, file 672/30-30, vol. 1 (ICC Exhibit 1a, pp. 940-941).

Were the Red Earth and Shoal Lake People Consulted?

The historical record is clear that the Red Earth and Shoal Lake people were members of The Pas Band at the time the Band took treaty in 1876, and took part in a number of consultations to determine the location and parameters of their reserve lands. These consultations were initiated when The Pas Band stipulated as a condition for their entrance into Treaty 5 that the Crown “would agree to give them reserves where they desired.”¹²³ In fulfillment of this undertaking, Commissioner Thomas Howard met with the signatory bands, listened to their requests for reserve land, and “made every inquiry as to the extent of farming land in each locality mentioned.”¹²⁴ Although no evidence exists to confirm whether the representatives from Red Earth and Shoal Lake present at the 1876 treaty adhesion talks actively participated in the negotiations, the treaty wording that provides for additional reserve land at the Pas Mountain suggests that they played a role in that request. Reserves of 160 acres per family of five were to be “granted at places selected for them by an officer of the Privy Council, with their approval.”¹²⁵

Consultation did not cease at this early juncture, however, and the record is clear that the Crown maintained open communication and consultation with the signatory bands regarding their reserve lands. Thus we see that, in the fall of 1882, when a surveyor was sent out to survey all Treaty 5 reserves, the surveyor met with band leaders to determine whether any of the bands were dissatisfied with their reserves and wished to change their location; he also consulted with those leaders on the preferred points of departure of the survey for each reserve. We note, in particular, that the January 1884 petition of The Pas Band, requesting the survey of additional reserve land at the Pas Mountain where there was farm land, contained the names of three petitioners from Red Earth and Shoal Lake. In June of 1884, Indian Agent Reader met with the Red Earth and Shoal Lake

¹²³ Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876*, xlvi (ICC Exhibit 1a, p. 133).

¹²⁴ Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876*, xlvi (ICC Exhibit 1a, p.133).

¹²⁵ Hon. Alex. Morris, Lieutenant-Governor, to Hon. Thos. Howard and J. Lestock Reid, July 14, 1876, in Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876*, pp. xlix-1 (ICC Exhibit 1a, pp. 113-115).

people at the Pas Mountain to inspect their lands. He concluded that reserves should be created for the two groups where they were already settled, and that any Indians living at The Pas who wanted to relocate to the Pas Mountain should have a separate reserve along the Flute River.

In 1892, when Red Earth wished to exchange lands at Flute Creek for land along the Carrot River at Red Earth, this request was supported by the Indian agent and approved by the Crown. Three years later, when surveyors arrived at Red Earth and Shoal Lake to document the altered boundaries of the reserves, Samuel Bray (Dominion Land Surveyor) met with the leadership of Red Earth and Shoal Lake to consult with them regarding any additional needs or requests they may have had regarding their reserves.

When the Shoal Lake Band wished to add a quarter-section of additional hay lands to their reserve in 1908, the agent and department again supported this request, and worked assiduously to achieve it. They were also diligent in communicating with the Red Earth Band in their efforts to add hay- and timber land to their reserve and were open to accommodating the Band's request to add two separate parcels at opposite ends of their reserve, as opposed to their original request for one quarter-section of land on the north side of the Carrot River. In granting additional lands to Red Earth, the department proposed a re-configuration of Red Earth reserve IR 29, which involved a surrender and exchange of those lands for a larger reserve to be known as IR 29A. This process and the subsequent surveying of the new reserve was completed in 1911 with the full consultation and involvement of the Bands.

In the wake of the flooding of the Red Earth reserve in 1921, the band requested relocation, initially to the surrendered reserve at Flute Creek, and later simply to higher ground. The department was supportive of this request, and in May of 1921, Secretary McLean directed that the Indian agent begin discussions with the Band regarding a possible move. Agent Waddy's instructions were to ask the Band to select an available tract of land, which the department would obtain for them, if at all possible, in exchange for their present reserve.

Although the Red Earth Band subsequently decided not to move, it is noteworthy that in this case, as in so many of those previous, the Crown was clearly open to consultation with the Band on relocation. A similar open and supportive approach is evident in the numerous surrenders and exchanges which transpired after 1926 and until as late as 1968. Indeed there are only two contexts

in which it appears the Crown did not engage with these Bands regarding their reserves, including the 1921 request for a strip of hay lands along the Carrot River, which was rejected because the Band's two reserves already contained 5,635.95 acres, 1,155 acres in excess of their treaty land entitlement, and with regard to the 1946 petitions, which if agreed to, would have added close to 100,000 acres to the Red Earth and Shoal Lake reserves. Indeed, it is possible there was consultation even then, but the record is silent on this matter.

On the basis of this evidence, the panel finds that the Red Earth and Shoal Lake Bands were consistently consulted by the Crown on the location and boundaries of their reserves, and further, that the outcome of those consultations was, with limited exception, invariably positive for the Bands.

Did Red Earth and Shoal Lake receive “Farming Lands” and “Other Reserves”?

The historical record in this inquiry is clear that the Red Earth and Shoal Lake Bands received a mix of “farming lands” that were suitable for cultivation and for cattle-raising, as well as other reserve lands which would enable them to continue to practice traditional subsistence activities such as hunting and trapping whilst they engaged the transition to an agrarian economy.

Pursuant to the terms of the Adhesion to Treaty 5 and with the agreement of The Pas Band, lands were set aside for the Red Earth and Shoal Lake people at the Pas Mountain in 1884. In fact, the Adhesion and a follow-up petition from The Pas Band urging the government to create reserves at “Oopasquaya Hill” indicate that they wanted part of their reserve entitlement fulfilled at the Pas Mountain precisely because it contained some land fit for cultivation. When Indian Agent Reader travelled down the river to inspect these lands, the reserves he described were characterized not only as lands containing excellent soil and well adapted to farming, but also a mixture of lands suited for diverse purposes which were anticipated by the Treaty. At Red Earth, he reported that the lands, while swampy near the river and possibly prone to flooding in seasons of high water, rose nicely to a fine, arable flat of 10 acres of excellent soil. In the wooded region of these lands, Reader encountered patches of land already cultivated by the Red Earth Indians, and noted that “here the soil

is of the finest class;”¹²⁶ he also observed an abundance of hay along the river as well as additional arable land which would benefit from draining. Twenty miles further along the river Reader came upon the Shoal Lake people, who had also begun to cultivate the land, observing that their land was “more open and well adapted to farming purposes[.] Large, flat pieces might easily be broken up and sown and would probably yield large crops. There are, however, some salt springs in the neighbourhood and some of the land require [sic] draining.”¹²⁷ In consultation with the Shoal Lake Band, Reader learned of lands near the foot of the mountain which contained timber, and which the “Shoal Lake Indians wish to be included in their desired Reserve.”¹²⁸ In concluding his report on the inspection of these lands and his consultations with the Red Earth and Shoal Lake people, Reader remarked that it was the wish of the Indians themselves that those settled at Red Earth and Shoal Lake should have reserves created for them there, while a third reserve should be created at Flute Creek for other Pas Band members. In reporting on these reserves later that year, Indian Agent A. Mackay, of the Beren’s River Agency, remarked that the Indians at Red Earth and Shoal Lake “are doing very well indeed; their cattle (which they purchased and raised themselves) are very fine looking; their gardens well attended to, with good root houses or cellars, and a building in which they store their implements in common.”¹²⁹

It is clear that, not only did the Red Earth and Shoal Lake Bands receive “farming lands” that included some cultivatable land, consistent with the terms of Treaty 5, but also that they were for

¹²⁶ J. Reader, Indian Agent, The Pas, Cumberland, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC RG 10, vol.3673, file 11286 (ICC Exhibit 1a, pp.416-421).

¹²⁷ J. Reader, Indian Agent, The Pas, Cumberland, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC RG 10, vol.3673, file 11286 (ICC Exhibit 1a, pp.416-421).

¹²⁸ J. Reader, Indian Agent, The Pas, Cumberland, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC RG 10, vol.3673, file 11286 (ICC Exhibit 1a, pp.416-421).

¹²⁹ A. Mackay, Indian Agent, Beren’s River Agency, to Superintendent General of Indian Affairs, September 13, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1884*, 76-77 (ICC Exhibit 1a, pp. 431- 433).

many years highly successful in cultivating those lands.¹³⁰ As discussed previously, it is also clear that when their reserves proved inadequate with respect to farming or hay lands, and they asked the Crown to rectify these limitations, whether by additions to reserves or land exchanges, the Crown supported the majority of these requests.

Conclusion

The panel finds that the Red Earth and Shoal Lake Bands were not only consulted about the location of their reserves, but were given a mix of farming and other lands, consistent with the terms of Treaty 5. The reserves that were set aside for them, initially as members of The Pas Band, were places where they successfully cultivated a range of crops and raised cattle for many decades after reserve creation.

The evidence detailed above is persuasive that at both Red Earth and Shoal Lake, the Bands had sufficient cultivatable land to grow crops for subsistence living at the time of the treaty adhesion and in the ensuing years.

The panel has been asked to answer the question of whether the Crown fulfilled its treaty obligation to provide “farming lands.” That obligation is not open-ended. In this case, the evidence points to a finding that the Treaty was fulfilled when the Red Earth and Shoal Lake people indicated that they were ready to take up farming – in fact were already doing so – and reserves containing cultivatable land were set aside with their approval. Moreover, in the years following reserve creation, Red Earth and Shoal Lake did not complain about the quality of their reserves, which suggests that they were capable of providing for themselves through a mixed economy of agriculture

¹³⁰ See, for example, the report of T.D. Green in 1885 which reports that these reserves consisted of “first class soil” and considerable cleared lands which the bands had begun cultivating almost immediately (T.D. Green, Dominion Land Surveyor (D.L.S.), to Superintendent of Indian Affairs, March 9, 1885, LAC, RG 10, vol.3685, file 13033 (ICC Exhibit 1a, pp.434-442)); reports of “excellent farmers” at Red Earth, and successful cattle-raising at Shoal Lake in 1889 and the bands’ production of 660 bushels of potatoes on “the fine, rich soil of their respective reserves” (J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 3, 1888, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1888*, 74-77 (ICC Exhibit 1a, pp.537-539)); in 1895 and 1896, reports emerged that the Shoal Lake people were “thriving better than formerly” and that the “advantage of first class soil, especially at Red Earth” held the potential “to raise all kinds of ordinary grain and vegetables” (Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, August 9, 1895, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1895*, 192-194 (ICC Exhibit 1a, pp. 680-682; and Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, July 3, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1896*, 126-128 (ICC Exhibit 1a, pp. 690-693)).

and traditional activities such as hunting and trapping. Based on the documentary record of this inquiry, and informed by the relevant legal principles, the panel concludes that the treaty obligation of the Crown to provide “farming lands” to the Red Earth and Shoal Lake Bands was met.

ISSUE 4 IS THERE AN OUTSTANDING OBLIGATION IN RESPECT OF FARMING LANDS?

4 Does Canada have an outstanding obligation to either or both Cree Nations in respect of farming lands?

Based on the documentary record of this inquiry, and with due regard to the law and legal principles informing treaty interpretation, it is the finding of the panel that Canada fulfilled its obligation to both Cree Nations in the provision of “farming lands” pursuant to Treaty 5; thus, no outstanding treaty obligation in respect of farming lands remains.

FAIRNESS IN THE RESULT: OUR SUPPLEMENTARY MANDATE

Since its inception, the Indian Claims Commission has understood that it has a responsibility to fairness, both in the process of its inquiries and in their outcome. This responsibility entails not only the conduct of a full and fair hearing of the evidence, arguments and testimony from the parties to an inquiry within a process untainted by bias, but also a commitment to ensuring that, to the greatest degree possible, the end result of that process is fair and just. The latter is not always obtained by ensuring that the findings of inquiries accord with the law and the Specific Claims Policy; indeed, in some cases, the legally correct conclusion may not accord with a just outcome. In such cases, the Commission may invoke its Supplementary Mandate. This mandate, first articulated by the Minister of Indian Affairs in November 1991, provides that:

If, in carrying out its review, the Commission concludes that the policy was implemented correctly, but the outcome is nonetheless unfair, I would again welcome its recommendations on how to proceed.¹³¹

¹³¹ Tom Siddon, Minister of Indian Affairs and Northern Development, to Ovide Mercredi, Chief, Assembly of First Nations, November 22, 1991.

This direction was underscored two years later in a letter to the Commission from then Minister of Indian Affairs Pauline Browes, when she confirmed that

(1) I expect to accept the Commission's recommendations where they fall within the Specific Claims Policy; (2) I would welcome the commission's [sic] recommendations on how to proceed in cases where the commission [sic] concluded that the policy had been implemented correctly, but the outcome was nonetheless unfair.¹³²

The Commission has only on rare occasions exercised this aspect of its authority,¹³³ and only in cases where the circumstances of a claim are such that they give rise to a demonstrable inequity or unfairness which we feel strongly must be communicated to the Government of Canada in order that a First Nation may obtain a just resolution to its claim. Such is the situation of the Red Earth and Shoal Lake people with regard to the quality of their reserve lands.

The record in this inquiry is clear: the Government of Canada had an obligation to provide "farming lands" to the Red Earth and Shoal Lake Cree Nations, and this obligation required that they be provided with an appropriate mix of "farming lands" which, the panel has concluded, had to contain at least some land suitable for cultivation, but could also contain land fit for other farming purposes, and "other reserves" of non-farming land. Taken together, the reserves met the diverse uses necessary for these Bands to continue their traditional activities while gaining proficiency in agriculture. It is also clear that the First Nations were consulted not only on the location of their initial reserves, but that an open communication was maintained between them and the Crown from the time the Adhesion to Treaty 5 was taken until the present, and that in the great majority of cases, where those consultations pertained to additions or adjustments to reserve lands, the Crown was

¹³² Paulines Browes, Minister of Indian Affairs and Northern Development, to Harry S. LaForme, Chief Commissioner, Indian Claims Commission, October 13, 1993.

¹³³ See for example, ICC, *Young Chipeewayan: Stoney Knoll Indian Reserve 107 Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 175 at 203; ICC, *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209 at 322; ICC, *Roseau River Anishinabe First Nation: Medical Aid Inquiry* (Ottawa, February 2001), reported (2001) 14 ICCP 3 at 166; ICC, *Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry* (Ottawa, July 2003), reported (2004) 17 ICCP 263 at 346.

consistently supportive and assented to the Bands' requests. Given this, we have found that the Government of Canada does not possess an outstanding treaty obligation to the Red Earth and Shoal Lake Cree Nations with regard to the quality of their reserve lands.

Although the Crown met its legal obligations to these First Nations, it is nonetheless clear that the lands they obtained under Treaty 5 have experienced considerable degradation over a lengthy period of time. Although these lands were initially able to support a robust subsistence lifestyle based on cultivation and stock-raising, it is clear that the high levels of moisture in spring, which characterized some parts of the reserves early on, have been exacerbated by a number of factors. Among these was the building of the E.B. Campbell Dam, formerly known as the Squaw Rapids Dam, which became operational in 1963, and which altered water levels in the region and may well have rendered much of the Red Earth and Shoal Lake Bands' lands untenable.

After the building of the dam, the occasional major floods which occurred early in the reserves' history became more frequent until, as Shoal Lake Elder Gerald Bear stated, "it's been steady now ... the lake here, it's flooded all year round now."¹³⁴ Shoal Lake Elder Emil Flett, speaking through an interpreter, confirmed that he learned from his Elders that "[t]he soil was always good ... ;"¹³⁵ but he spoke compellingly about the role of the E.B. Campbell Dam in diminishing the quality of their land:

in the springtime there used to be lots of flooding and that was the only time that they had flooding ... according to the Elders before [me]. And the land, they were able to use that land for hay land, to get hay. And then when they built the dam, ... that's when the waters came towards our area, and now there was water there all summer.¹³⁶

Elder Gilbert Flett added that "[i]t was around 1965 when they started receiving floods and all the people from near the lake moved up into the core area of the reserve," and "[e]very year since then

¹³⁴ ICC Transcript, October 16, 2007 (Exhibit 5, p. 38, Gerald Bear).

¹³⁵ ICC Transcript, October 16, 2007 (ICC Exhibit 5, p. 24, Emil Flett). See also the testimony of Red Earth Elder Leona Head, who stated through an interpreter that at the time of her parents, the land was good to grow potatoes and other garden produce, but now, because of the flood, the land has changed and the houses are always flooded: ICC Transcript, October 17, 2007 (ICC Exhibit 5, pp. 224-225, Leona Head).

¹³⁶ ICC Transcript, October 16, 2007 (ICC Exhibit 5, p. 18, Emil Flett).

they've been getting more water, and they've been getting it annually."¹³⁷ Although one part of the Shoal Lake reserve was always known to contain two saltwater streams, several Elders recounted that the land no longer grows anything because it is too salty.¹³⁸ Red Earth Elder Lizette McKenzie corroborated the testimony of other Shoal Lake Elders when she stated through an interpreter that the soil changed over time. She also stated that there were no floods before the dam.¹³⁹ Elder Reta Nawakayas stated through an interpreter that her family was successful at growing gardens, but when the floods started, things got worse and both reserves IR 29 and IR 29A were under water.¹⁴⁰

It is possible that the rising water levels have also been caused in some measure by other dams and even climate change. Whatever the cause, the impacts of this phenomenon cannot be underestimated, and are readily apparent to visitors to the Red Earth and Shoal Lake reserves.

We undertook site visits to the reserves in October 2007, and were overwhelmed by what we witnessed there. While there was clear evidence of the efforts by these Bands to work with and improve the lands they possess, their efforts cannot help but be undermined by the persistently wet conditions. The communities have been riven by the rising waters, so that houses are clustered onto isolated pockets of dry land – even here, however, the basements and foundations are rotting from moisture.¹⁴¹ The land is no longer cultivated, and stock-raising is impossible due to the lack of pasture land. We observed horses crowded into small enclosures or onto patches of dryer land, where even then they stood in mud. Touring the reserves was made difficult as the roads had clearly been damaged by water and erosion, and it was easy to envisage that they could quickly be rendered impassable even by the slightest additional precipitation.

¹³⁷ ICC Transcript, October 16, 2007 (ICC Exhibit 5, pp. 65-66, Gilbert Flett).

¹³⁸ See, for example, ICC Transcript, October 16, 2007 (Exhibit 5, p. 73, Edith Whitecap; p. 34, Gerald Bear).

¹³⁹ ICC Transcript, October 17, 2007 (Exhibit 5, pp. 203-204, Lizette McKenzie).

¹⁴⁰ ICC Transcript, October 17, 2007 (Exhibit 5, pp. 184-186, Reta Nawakayas).

¹⁴¹ ICC transcript, October 16, 2007 (Exhibit 5, p. 39, Gerald Bear). Mr Bear spoke of the houses shifting every winter and the school, built six years ago, already rotting at the foundation.

Many of the Elders asserted that, while keeping vegetable gardens, cattle, and horses was their ancestors' way of life at the time they took treaty,¹⁴² they were also mindful of the need to continue to hunt, trap and fish, and that the lands they selected reflected these different priorities.¹⁴³ In the present tense, however, trapping and fishing are limited, as is the hunt, and farming has been rendered virtually impossible by the rising water levels. At this juncture, then, it matters little that the ancestors of the Red Earth and Shoal Lake people were consulted and chose the lands they currently reside upon, or that the Crown was consistently supportive of their requests for additions to reserve – the lands have been changed by forces which could not have been anticipated by these Bands or the Crown at the time of treaty and for much of the time after it.¹⁴⁴

While the Crown met its lawful obligations to these Bands under the Treaty, the present conditions on the reserves created by a combination of the limitations characterizing the land base and the damming of rivers upstream of their communities are unjust and should not be tolerated in Canada. We would thus urge Canada to meet with the Red Earth and Shoal Lake Cree Nations and initiate discussions on finding a long-term solution to the problems caused by the condition of their reserve lands. To do so would constitute a confirmation of the honour of the Crown in its dealings with the Red Earth and Shoal Lake people, and would ensure, upon the achievement of a consensus on an equitable outcome to the land quandary posed by these reserves, a lasting and just resolution of this land claim.

¹⁴² See, for example, ICC Transcript, October 16, 2007 (ICC Exhibit 5, pp. 15-21, Emil Flett).

¹⁴³ See, for example, the testimony of Charles Whitecap, Shoal Lake Cree Nation, who confirmed in direct examination that he was told the Shoal Lake reserve was chosen for the abundance of wildlife, water fowl, and trapping: (ICC Transcript, October 16, 2007, p. 100, Charles Whitecap); and the testimony of Elder Hector Head, Red Earth Cree Nation, who stated that the main purpose for choosing the reserve at Red Earth was for hunting, fishing, and trapping (ICC Transcript, October 17, 2007, p. 169, Hector Head).

¹⁴⁴ A report summarizing soil surveys since the 1950s, submitted by the First Nations for this inquiry, is a useful resource in understanding the impact of high water levels on the reserves and the resultant problems facing the Red Earth and Shoal Lake communities today. See Darwin W. Anderson and Darrel Cerkowniak, "Red Earth and Shoal Lake First Nations: Quality of Land Inquiry," Saskatoon, February 5, 2008, prepared for the Red Earth and Shoal Lake First Nations (ICC Exhibit 9a).

PART V
CONCLUSIONS AND RECOMMENDATIONS

In arriving at our interpretation of the disputed words in the reserve clause of Treaty 5, we are mindful of the principle stated in *Marshall* that “the words of the Treaty must be given the sense which they would naturally have held for the parties at the time ...”¹⁴⁵ The reserves to be set aside for Treaty 5 bands were not intended to exist for the sole purpose of cultivating the land. We interpret the treaty document as contemplating that reserves would contain some “farming lands” and some “other reserves.” Within the category of “farming lands,” the Treaty demands that at least some of that land be cultivatable land; but the remainder of the “farming lands” could be land of a quality that was only suitable for cattle-raising, hay, or other farming uses. In addition, and important to bands at the time of treaty, reserves were to contain “other reserves,” which we interpret to mean land suitable for traditional activities such as hunting, trapping and gathering, or for other non-farming uses. Other wording in the Treaty, in particular, the modest list of farming implements, breeding animals and crops to be given to each band, strongly suggests that the objective was the attainment of self-sufficiency, not farming on a larger scale.

Thus, the treaty obligation would be met if reserves were set aside that contained at least some cultivatable land. Treaty 5 does not define the proportion of such land that must be set aside; but we find that the reserve clause was intentionally drafted broadly enough to enable bands and the Crown to select reserves suitable to a band’s individual needs, priorities, and location within the vast territory of Treaty 5. The appropriate mix of land for each signatory band was to be determined on a case-by-case basis.

The panel concludes that it was the common intention of the parties to Treaty 5 at the time of treaty to provide reserves for multiple uses. It was a pre-condition of The Pas Band and the other two bands who signed the 1876 Adhesion to signing Treaty 5 that they be able to choose their own reserve lands. It is clear from this demand that the priority of The Pas Band was to receive reserve land on which they could pursue traditional activities as well as grow crops and raise cattle, activities that band members were already pursuing in various locations such as Red Earth and Shoal Lake. We find that the common goal at the time of treaty was to enable the signatory bands to continue

¹⁴⁵ *R. v. Marshall*, [1999] 3 SCR 456 at para. 78.

their traditional pursuits while becoming self-sufficient over time through agriculture. This interpretation of common intention is the one that best reconciles the interests of both parties at the time of treaty.

The panel concludes that the Crown met its obligations under Treaty 5 to provide the Red Earth and Shoal Lake Bands with “farming lands” pursuant to the terms of that Treaty. The evidence is persuasive that at the time of treaty and reserve selection, both Red Earth and Shoal Lake were provided with sufficient good-quality, cultivatable land to grow crops for subsistence living. And this is what both Bands did. The reserves set aside for the Red Earth and Shoal Lake people, who were members of The Pas Band at the time, were places where they successfully cultivated a range of crops and raised cattle for many decades after reserve creation.

In spite of the panel’s finding that the Crown fulfilled its treaty obligation to provide “farming lands” to the Red Earth and Shoal Lake Cree Nations, we have seen and the Elders have told us that the reserves are no longer viable places to grow crops and raise animals due to the increase in water levels on the land. In particular, Elders have spoken about the fact that since the building of the E.B. Campbell Dam in the 1960s, their land is consistently wet not only in spring but throughout the year. From the testimony of the Elders, the panel is struck by the possibility that the lands have been changed by forces which could not have been anticipated by these Bands or the Crown at the time of treaty and for several decades afterward. Consequently, the panel urges Canada to initiate discussions with the Red Earth and Shoal Lake Cree Nations to find a long-term solution to the problems caused by the condition of their reserve lands.

We therefore recommend to the parties:

That the claim of the Red Earth and Shoal Lake Cree Nations regarding the provision of “farming lands” in Treaty 5 not be accepted for negotiation under Canada’s Specific Claims Policy.

That Canada initiate discussions with the Red Earth and Shoal Lake Cree Nations to find a long-term solution to the problems resulting from the condition of their reserve lands.

FOR THE INDIAN CLAIMS COMMISSION



Sheila G. Purdy
Commissioner (Chair)



Alan C. Holman
Commissioner



Jane Dickson-Gilmore
Commissioner

Dated this 18th day of December, 2008

APPENDIX A
HISTORICAL BACKGROUND

RED EARTH AND SHOAL LAKE CREE NATIONS
QUALITY OF RESERVE LANDS INQUIRY

Indian Claims Commission

CONTENTS

| | |
|---|-----|
| Introduction | 75 |
| Background | 75 |
| Treaty 5 (1875) | 75 |
| Adhesion to Treaty 5 (1876) | 81 |
| Treaty Annuity Paylists (1876 - 1885) | 82 |
| Red Earth and Shoal Lake (Pas Mountain) People | 82 |
| Territory of the Red Earth and Shoal Lake Creees | 84 |
| Moving Toward Agriculture at The Pas | 86 |
| The Pas Band at The Pas | 91 |
| Survey of Reserves at The Pas and Birch River (1882) | 94 |
| Survey of the Red Earth and Shoal Lake Reserves (1884) | 98 |
| Separate Paylists (1886) and Leadership at Red Earth and Shoal Lake (1882 - 1902) | 103 |
| Farming and Development at Red Earth and Shoal Lake (1885 - 1891) | 105 |
| Red Earth Band Requests Exchange of Flute Creek for Carrot River (1892) | 109 |
| Addition of Carrot River Reserve and Re-Survey of Shoal Lake Reserve (1894) | 111 |
| Farming and Development at Red Earth and Shoal Lake (1892 - 1906) | 116 |
| Separate Paylists Created for the Red Earth and Shoal Lake Bands (1903) | 122 |
| Additions and Adjustments to the Red Earth and Shoal Lake Reserves (1908 - 1913) | 123 |
| Formal Survey of Additions to Shoal Lake IR 28A and Red Earth IR 29 (1911) | 126 |
| Chiefs and Councillors Identified on the Paylists of the Red Earth and Shoal Lake Bands (1913) | 130 |
| Requests for Additions to the Red Earth and Shoal Lake Reserves (1914 - 1921) | 130 |
| Additions and Adjustments to Shoal Lake IR 28A (1926 - 1927) | 134 |
| Red Earth and Shoal Lake Cree Nations Petition the Government for Better Land (1946) | 137 |
| Final Adjustments to the Shoal Lake Reserve (1957 - 1968) | 139 |
| Oral Evidence Relating to the Quality of Red Earth and Shoal Lake Reserve Lands | 140 |

INTRODUCTION

The Red Earth and Shoal Lake Cree Nations allege that the lands reserved for them, after their adhesion to Treaty 5, were of no agricultural potential, resulting in a breach of the government's treaty obligation to supply the First Nations with "farming lands."

BACKGROUND

Treaty 5 (1875)

In September 1875, Treaty 5 was signed between a group of Saulteaux and Swampy Cree and representatives of the Dominion of Canada at Beren's River and Norway House in what is now the central region of the Province of Manitoba.¹⁴⁶ A treaty was desired by both the Dominion government and the Aboriginal people occupying what would become Treaty 5 territory. The government's interest lay in securing title to land for trade routes and future settlement,¹⁴⁷ while the Aboriginal inhabitants were interested in receiving benefits similar to other groups who had already signed treaties.¹⁴⁸

Similar to Treaties 1 and 2, Treaty 5 provided for reserves to be set apart for the various First Nations to the extent of 160 acres for each family of five, or 32 acres per person. However, unlike Treaties 1 and 2, Treaty 5 specifically made reference to the setting apart of reserves for "farming lands." The Treaty states:

Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada,

¹⁴⁶ Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen's Printer and Controller of Stationery, 1957) 3-7 (ICC Exhibit 1a, pp. 75-79).

¹⁴⁷ Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Saskatoon, SK: Fifth House Publishers, 1991; facsimile reprint of the 1880 edition published in Toronto by Belfords, Clarke & Co.), 143-144 (ICC Exhibit 1c, pp. 127-128).

¹⁴⁸ Kenneth S. Coates and William R. Morrison, *Treaty Five: 1875-1908*, (Hull: Indian and Northern Affairs Canada, Treaties and Historical Research Centre, 1986), 11-12 (ICC Exhibit 8L, pp. 17-18).

provided all such reserves shall not exceed in all one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families ...¹⁴⁹

The Treaty also specified the regions where these reserves would be set apart for various signatory groups. Treaty 5 stipulated, for example, that the Saulteaux of the Beren's River region would receive a reserve at the mouth of the Beren's River on Lake Winnipeg, although a "reasonable addition" would be made to their reserve to compensate for swampy land in that region.¹⁵⁰

Treaty 5 also included promises to supply articles "for the encouragement of the practice of agriculture among the Indians":

It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band of the said Indians who are now cultivating the soil, or who shall hereafter commence to cultivate the land, that is to say: Two hoes for every family actually cultivating; also one spade per family as aforesaid; one plough for every ten families as aforesaid; five harrows for every twenty families as aforesaid; one scythe for every family as aforesaid, and also one axe; – and also one cross-cut saw, one hand-saw, one pit-saw, the necessary files, one grindstone, and one auger for each band; and also for each Chief, for the use of his band, one chest of ordinary carpenter's tools; also for each band enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such band; also for each band one yoke of oxen, one bull and four cows – all the aforesaid articles to be given once for all for the encouragement of the practice of agriculture among the Indians.¹⁵¹

¹⁴⁹ Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen's Printer and Controller of Stationary, 1957) 4 (ICC Exhibit 1a, p. 76).

¹⁵⁰ Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen's Printer and Controller of Stationary, 1957) 4 (ICC Exhibit 1a, p. 76).

¹⁵¹ Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen's Printer and Controller of Stationary, 1957) 6 (ICC Exhibit 1a, p. 78).

The Treaty also guaranteed “the right to pursue their avocations of hunting and fishing throughout the tract surrendered,” and promised yearly distributions of ammunition and twine for the First Nations in the Treaty area.¹⁵²

Shortly after the signing of Treaty 5, Alexander Morris, Lieutenant Governor of the Province of Manitoba and the North-west Territories, wrote to the Minister of the Interior to provide an overview of the treaty negotiations. Morris noted that the actual boundaries of the treaty area had been adjusted somewhat from those initially proposed by the Minister for a number of reasons.¹⁵³

The extended treaty boundaries encompassed the territory of The Pas Cree¹⁵⁴ despite the fact that they were not signatories to the 1875 Treaty. That being the case, Morris strongly urged that the Dominion government approach The Pas group in order to obtain its adhesion to the Treaty the following summer.¹⁵⁵

Acting on Morris’s advice, in September 1876, the Dominion government sent Commissioners Thomas Howard and J. Lestock Reid to secure adhesions to Treaty 5 from the Swampy Cree of The Pas and other groups. Prior to their departure, the Commissioners received instructions from Morris for their task. Commissioner Howard was given the responsibility of securing an adhesion from the Indians of The Pas, Cumberland and Moose Lake:

¹⁵² Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationary, 1957) 5-6 (ICC Exhibit 1a, pp. 77-78).

¹⁵³ Alexander Morris, Lieutenant Governor of the Province of Manitoba and the North-west Territories, to the Minister of the Interior, October 11, 1875, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Saskatoon, SK: Fifth House Publishers, 1991; facsimile reprint of the 1880 edition published in Toronto by Belfords, Clarke & Co.), 151 (ICC Exhibit 1c, p. 135 and ICC Exhibit 1a, p. 99).

¹⁵⁴ When referring to “The Pas Cree,” “The Pas Band,” and “The Pas Agency,” the “T” is capitalized as was done in the treaty 5 text in reference to “The Pas Band.” When referring to the “Pas Mountain Band,” the “t” is not capitalized, as no examples of this have been found in the historical documents.

¹⁵⁵ Alexander Morris, Lieutenant Governor of the Province of Manitoba and the North-west Territories, to the Minister of the Interior, October 11, 1875, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Saskatoon, SK: Fifth House Publishers, 1991; facsimile reprint of the 1880 edition published in Toronto by Belfords, Clarke & Co.), 151 (ICC Exhibit 1c, p. 135 and ICC Exhibit 1a, p. 99).

Mr. Howard will secure the adhesion of the Indians at the Pas to the treaty providing that reserves of one hundred and sixty acres to each family of five will be granted at places selected for them by an officer of the Privy Council, with their approval; but it will probably be necessary to give them a reserve at the Pas where they reside, reserving carefully free navigation and access to the shores. As the extent of land there [i]s very narrow, it may be desirable to indicate localities where farming reserves will be granted, subject to the approval of the Privy Council.¹⁵⁶

On September 5, 1876, Howard arrived at The Pas (also known as Devon Mission), where he was to meet with the groups interested in adhering to Treaty 5.¹⁵⁷ In his report to Alexander Morris, Commissioner Howard described the land from the southeast to The Pas as follows:

On entering the [Saskatchewan] river after leaving Cedar Lake the whole aspect of the country changes, and from there to the ‘Pas’, and, I understand, for fully one hundred miles above it, nothing but marsh can be seen; so much so that it was difficult along the bank of the river to find a spot dry enough to camp upon, and I was, consequently, obliged to eat and sleep in my boat.¹⁵⁸

At The Pas, situated on the south bank of the Saskatchewan River, the Church Missionary Society had constructed a church, school and parsonage, and the Hudson’s Bay Company operated

¹⁵⁶ Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Saskatoon, SK: Fifth House Publishers, 1991; facsimile reprint of the 1880 edition published in Toronto by Belfords, Clarke & Co.), 165 (ICC Exhibit 1c, p. 149). See also: ICC Exhibit 1a, p. 115.

¹⁵⁷ Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Saskatoon, SK: Fifth House Publishers, 1991; facsimile reprint of the 1880 edition published in Toronto by Belfords, Clarke & Co.), 161 (ICC Exhibit 1c, p. 145). See also: Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876*, xlvii (ICC Exhibit 1a, p. 132).

¹⁵⁸ Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Saskatoon, SK: Fifth House Publishers, 1991; facsimile reprint of the 1880 edition published in Toronto by Belfords, Clarke & Co.), 161 (ICC Exhibit 1c, p. 145). See also: Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876*, xlvii (ICC Exhibit 1a, p. 132).

a post.¹⁵⁹ Howard noted that approximately 500 Indians had gathered to meet him for the proposed adhesion to treaty. He found that The Pas and Cumberland groups of Indians had selected representative Chiefs as previously instructed, while the Moose Lake group had not, owing to the fact that the Indians based at Che-ma-wa-win desired to be a distinct band, apart from Moose Lake. However, Commissioner Howard discouraged the division of the band as he had observed the “unfitness of the locality for a reserve” at Che-ma-wa-win, and had been told that a “suitable locality” existed at Moose Lake.¹⁶⁰ Howard instructed each of the three bands (The Pas, Cumberland and Moose Lake) to confirm their Chiefs and Headmen and prepare for discussions the following morning, on September 6, 1876.

That morning, the Commissioner encountered more difficulty than he had expected in the negotiations. The Indians were aware of the terms of Treaty 6, which had been negotiated with the Indians at Fort Carlton only two weeks previously, impeding Howard’s efforts to have them agree to the less generous terms of Treaty 5. Howard explained to the Chiefs and Headmen the reason for the disparity between the two treaties, noting:

I at last made them understand the difference between their position and the Plain Indians, by pointing out that the land they would surrender would be useless to the

¹⁵⁹ Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Saskatoon, SK: Fifth House Publishers, 1991; facsimile reprint of the 1880 edition published in Toronto by Belfords, Clarke & Co.), 161 (ICC Exhibit 1c, p. 145). See also: Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876*, xlvi (ICC Exhibit 1a, p. 132).

¹⁶⁰ Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Saskatoon, SK: Fifth House Publishers, 1991; facsimile reprint of the 1880 edition published in Toronto by Belfords, Clarke & Co.), 162 (ICC Exhibit 1c, p. 146). See also: Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876*, xlvi (ICC Exhibit 1a, p. 133).

Queen, while what the Plain Indians gave up would be of value to her for homes for her white children.¹⁶¹

Having received that explanation, the bands agreed to the terms of treaty provided by Commissioner Howard on the condition that he “would agree to give them reserves where they desired, ...”¹⁶² Howard listened to the bands’ requests for reserve lands and noted that he “made every inquiry as to the extent of farming land in each locality mentioned.”¹⁶³ With respect to The Pas and Cumberland Indians, Howard stated that he had to mention several localities in order to obtain agreement on land to be set aside.¹⁶⁴ Howard noted:

[a]t the Pas all the land obtainable is now cultivated, and consists of a vegetable garden and one field attached to the Mission, and a few patches of potatoes here and there. A short distance from the river the marsh begins, and extends to the south for miles; and the same thing occurs to the north. In fact, on both banks of the river at

¹⁶¹ Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Saskatoon, SK: Fifth House Publishers, 1991; facsimile reprint of the 1880 edition published in Toronto by Belfords, Clarke & Co.), 162 (ICC Exhibit 1c, p. 146). See also: Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876*, xlvi (ICC Exhibit 1a, p. 133).

¹⁶² Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Saskatoon, SK: Fifth House Publishers, 1991; facsimile reprint of the 1880 edition published in Toronto by Belfords, Clarke & Co.), 162 (ICC Exhibit 1c, p. 146). See also: Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876*, xlvi (ICC Exhibit 1a, p. 133).

¹⁶³ Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Saskatoon, SK: Fifth House Publishers, 1991; facsimile reprint of the 1880 edition published in Toronto by Belfords, Clarke & Co.), 162 (ICC Exhibit 1c, p. 146). See also: Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876*, xlvi (ICC Exhibit 1a, p. 133).

¹⁶⁴ Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Saskatoon, SK: Fifth House Publishers, 1991; facsimile reprint of the 1880 edition published in Toronto by Belfords, Clarke & Co.), 163 (ICC Exhibit 1c, p. 147). See also: Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876*, xlvi (ICC Exhibit 1a, p. 133).

this point, and from the Che-ma-wa-win up to it, one hundred and fifty acres of land fit for cultivation cannot be found; and about Cumberland the country in every respect is similar.¹⁶⁵

Adhesion to Treaty 5 (1876)

On September 7, 1876, three groups of Saulteaux and Swampy Cree Indians, referred to as The Pas Band, the Cumberland Band and the Moose Lake Band, adhered to Treaty 5. The Pas Band was described in the adhesion as the “Saulteaux and Swampy Cree Indians, residing at the “Pas,” on the Saskatchewan River, Birch River, the Pas Mountain, and File Lake, and known as “The Pas Band”; ...”¹⁶⁶ The treaty adhesion also outlined the general locations of the reserves to be set apart for the bands. Regarding The Pas Band, the Dominion of Canada agreed to lay off

a reserve on both sides of the Saskatchewan River at the “Pas”; but as the area of land fit for cultivation in that vicinity is very limited, and insufficient to allow of a reserve being laid off to meet the requirements of the Band, that the balance of such reserve shall be at “Birch River” and the “Pas Mountain” ...¹⁶⁷

The groups who took up reserve land in the vicinity of the Pas Mountain are the ancestors of the Red Earth and Shoal Lake Cree people.

¹⁶⁵ Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Saskatoon, SK: Fifth House Publishers, 1991; facsimile reprint of the 1880 edition published in Toronto by Belfords, Clarke & Co.), 163 (ICC Exhibit 1c, p. 147). See also: Hon. Thos. Howard, Commissioner, to Hon. Alex. Morris, Lieutenant Governor, October 10, 1876, in Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876*, xlvi (ICC Exhibit 1a, p. 133).

¹⁶⁶ Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen's Printer and Controller of Stationary, 1957) 10 (ICC Exhibit 1a, p. 82).

¹⁶⁷ Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen's Printer and Controller of Stationary, 1957) 10 (ICC Exhibit 1a, p. 82).

Treaty Annuity Paylists (1876 - 1885)

The initial treaty annuity payroll for The Pas Band, dated September 7, 1876, identifies 13 families as “Pas Mountain Indians.”¹⁶⁸ In the following two years, these families were paid on a separate payroll entitled “Pas Mountain” (1877) and “Pas Mountain Band” (1878), but still received annuities at The Pas.¹⁶⁹ In 1879, the members from the Pas Mountain were again paid treaty annuities on “The Pas Band” payroll, but were not distinguished from other band members.¹⁷⁰ The names of those families continued to be recorded on the main Pas Band paylists from 1879 to 1885. They were not usually distinguished from other band members, except in 1883 and 1885, when notations beside their ticket numbers identified Red Earth, Shoal Lake and Birch River families.¹⁷¹ It should be noted that, beginning in 1882, the Pas Mountain group was represented among The Pas Band leadership by one Councillor from Shoal Lake.¹⁷²

Red Earth and Shoal Lake (Pas Mountain) People

In the early 1970s, anthropologist David Meyer conducted research at Red Earth with the aim of understanding “the changing subsistence-settlement patterns and social organization of the Crees in the Red Earth region.”¹⁷³ Meyer tracked the origin of the Pas Mountain people, identifying the parent communities from which the Red Earth and Shoal Lake people originated. Meyer concluded that:

¹⁶⁸ Treaty Annuity Paylist, Pas Band, September 7, 1876, LAC, RG 10, vol. 9351 (ICC Exhibit 1b, pp. 6-7).

¹⁶⁹ Treaty Annuity Paylist, “Pas Mountain” paid at The Pas, August 11, 1877, LAC, RG 10, vol. 9352 (ICC Exhibit 1b, p. 201); Treaty Annuity Paylist, “Pas Mountain Band” paid at The Pas, September 6, 1878, LAC, RG 10, vol. 9353 (ICC Exhibit 1b, p. 202).

¹⁷⁰ Treaty Annuity Paylist, Pas Band, September 8, 1879, LAC, RG 10, vol. 9354 (ICC Exhibit 1b, pp. 20-26).

¹⁷¹ Treaty Annuity Paylists, Pas Band, 1879-1885, LAC, RG 10, vols. 9354-9360 (ICC Exhibit 1b, pp. 20-71).

¹⁷² Treaty Annuity Paylist, The Pas Band, August 18-19, 1882, LAC, RG 10, vol. 9357 (ICC Exhibit 1b, p. 46). See ticket #108, Samuel Moore.

¹⁷³ David Meyer, *The Red Earth Crees, 1860-1960*, (Ottawa: National Museums of Canada, Mercury Series Paper No. 100, 1985), iii (ICC Exhibit 8k, p. 4).

in the mid 19th century the local bands in the Red Earth area were part of a larger Cree group centred about Ft. a la Corne. Similarly, the Crees of the Shoal Lake area were members of a marriage universe centred about Opaskweyaw [The Pas]. By the end of the 19th century it is clear that both the Red Earth and Shoal Lake Crees were loosening their ties with their parent groups. In fact, by 1900 the Pas Mountain Indians were obtaining the majority of their marriage partners from within their own ranks. At this point it is no longer possible to assign the Red Earth Crees to the Ft. a la Corne group, the Shoal Lake Crees to the Opaskweyaw group or the Pas Mountain Indians as a whole to either of the parent bodies.¹⁷⁴

Meyer stated that, from around 1850 to 1870, three family groups belonging to the Fort à la Corne Crees spent their winters in the central Carrot River area (Red Earth region), where they had access to good populations of fur-bearing animals and moose. In the spring, the families reportedly moved back to the vicinity of Fort à la Corne, where fish were abundant in the Saskatchewan River.¹⁷⁵ Fort à la Corne (which lay in the vicinity of the current town of Nipawin, Saskatchewan) was situated west of Red Earth on the Saskatchewan River and had historically been a major seasonal gathering location, as well as the location of a Hudson's Bay Company post.¹⁷⁶ According to Meyer, the patrons of Fort à la Corne were largely Plains Cree, with a territory extending south into the parklands and eastward to the western edge of the Saskatchewan River delta, which was the western boundary of the Opaskweyaw Cree of The Pas.¹⁷⁷

By the mid-1800s, the Opaskweyaw Cree were loosely situated in the region around The Pas. Meyer stated that a group of Swampy Cree occupied the Shoal Lake area at that time.¹⁷⁸ Meyer identified an individual by the name of Osawask as one of the first to settle at Shoal Lake around

¹⁷⁴ David Meyer, *The Red Earth Crees, 1860-1960*, (Ottawa: National Museums of Canada, Mercury Series Paper No. 100, 1985), 82 (ICC Exhibit 8k, p. 98).

¹⁷⁵ David Meyer, *The Red Earth Crees, 1860-1960*, (Ottawa: National Museums of Canada, Mercury Series Paper No. 100, 1985), 60-61 (ICC Exhibit 8k, pp. 76-77).

¹⁷⁶ David Meyer, *The Red Earth Crees, 1860-1960*, (Ottawa: National Museums of Canada, Mercury Series Paper No. 100, 1985), 37 (ICC Exhibit 8k, p. 53).

¹⁷⁷ David Meyer, *The Red Earth Crees, 1860-1960*, (Ottawa: National Museums of Canada, Mercury Series Paper No. 100, 1985), 37 (ICC Exhibit 8k, p. 53).

¹⁷⁸ David Meyer, *The Red Earth Crees, 1860-1960*, (Ottawa: National Museums of Canada, Mercury Series Paper No. 100, 1985), 37 (ICC Exhibit 8k, p. 53).

1850, having selected the site for a base camp because of its remoteness from European settlement.¹⁷⁹

The Shoal Lake Crees exhibited a lifestyle characteristic of the northern Algonkians, “incorporating a summer subsistence pattern oriented to the exploitation of aquatic environments with the use of the canoe.”¹⁸⁰

Meyer concluded that, in the 1870s, the Red Earth and Shoal Lake people “differed in culture, acceptance of Christianity and relations with traders.”¹⁸¹ With time, however, the two groups began to converge. They eventually withdrew from the strong connections they had with their groups of origin, at Fort à la Corne and The Pas, to focus more on connections between the two communities. The increasingly close social relationship between these two groups was evidenced by an increase in intermarriage.¹⁸²

Territory of the Red Earth and Shoal Lake Crees

The Red Earth Cree Nation currently occupies two reserves: Indian Reserve (hereafter IR) 29 (Red Earth) and IR 29A (Carrot River). IR 29A is located approximately 77 km east of the Town of Nipawin, Saskatchewan, and contains an area of 2,040 acres bisected by the Carrot River. The main village of the First Nation is located on IR 29A, while IR 29 (containing 3,596 acres) is located approximately 2 km south of IR 29A.

The Shoal Lake Cree Nation occupies IR 28A, which is located approximately 20 km east of the Red Earth Reserves. IR 28A also straddles the Carrot River.¹⁸³ It should be noted that,

¹⁷⁹ David Meyer, *The Red Earth Crees, 1860-1960*, (Ottawa: National Museums of Canada, Mercury Series Paper No. 100, 1985), 40 (ICC Exhibit 8k, p. 56).

¹⁸⁰ David Meyer, *The Red Earth Crees, 1860-1960*, (Ottawa: National Museums of Canada, Mercury Series Paper No. 100, 1985), 134 (ICC Exhibit 8k, p. 150).

¹⁸¹ David Meyer, *The Red Earth Crees, 1860-1960*, (Ottawa: National Museums of Canada, Mercury Series Paper No. 100, 1985), 144 (ICC Exhibit 8k, p. 160).

¹⁸² David Meyer, *The Red Earth Crees, 1860-1960*, (Ottawa: National Museums of Canada, Mercury Series Paper No. 100, 1985), 147 (ICC Exhibit 8k, p. 163).

¹⁸³ David Meyer, *The Red Earth Crees, 1860-1960*, (Ottawa: National Museums of Canada, Mercury Series Paper No. 100, 1985), 10 (ICC Exhibit 8k, p. 26).

although the Red Earth and Shoal Lake Cree Nations adhered to Treaty 5, their reserves actually lie within the territory of Treaty 6.¹⁸⁴

These reserves are located in the lower Saskatchewan River Valley, which traverses the Saskatchewan-Manitoba border, extending a distance of about 280 km from Squaw Rapids in the west to Lake Winnipeg in the east. The river valley is much longer than it is wide, extending only about 80 km north to south, from Namew Lake to the Pasquia Hills.¹⁸⁵ The Red Earth and Shoal Lake Crees occupy the southwestern extremity of the river valley. Meyer described the lowland occupied by the First Nations as:

delta-like in its low-lying terrain, branching river channels and leveed stream borders. There is no land elevated above a few metres, the only dry land being the levees which border the water course.¹⁸⁶

Meyer added that the delta-like terrain was well-suited to the adapted practices of the northern Algonkians; during the summer months people with small canoes could move between lakes and rivers with only small portages.¹⁸⁷ However, the terrain of Red Earth IR 29 is somewhat influenced by the flank of the Pasquia Hills to the south. The hill flank is better drained than the lowlands and was attractive to the Red Earth people, as it allowed for easy overland movement in the summer and provided dry camping areas.¹⁸⁸

Red Earth and Shoal Lake First Nations Elders recall that the reserves eventually set aside for them were chosen for their proximity to traditional hunting grounds and because they included

¹⁸⁴ Historical Atlas of Canada, "Native Reserves in Western Canada to 1900 (Plate 34)," in *Historical Atlas of Canada, Volume II: The Land Transformed, 1800-1891*, ed. R. Louis Gentilcore (Toronto, Buffalo, London: University of Toronto Press, 1993) (ICC Exhibit 7ee, p. 3).

¹⁸⁵ David Meyer, *The Red Earth Crees, 1860-1960*, (Ottawa: National Museums of Canada, Mercury Series Paper No. 100, 1985), 7 (ICC Exhibit 8k, p. 23).

¹⁸⁶ David Meyer, *The Red Earth Crees, 1860-1960*, (Ottawa: National Museums of Canada, Mercury Series Paper No. 100, 1985), 14 (ICC Exhibit 8k, p. 30).

¹⁸⁷ David Meyer, *The Red Earth Crees, 1860-1960* (Ottawa: National Museums of Canada, Mercury Series Paper No. 100, 1985), 14 (ICC Exhibit 8k, p. 30).

¹⁸⁸ David Meyer, *The Red Earth Crees, 1860-1960* (Ottawa: National Museums of Canada, Mercury Series Paper No. 100, 1985), 15 (ICC Exhibit 8k, p. 31).

traditional camps and meeting places used by the ancestors of both First Nations.¹⁸⁹ Shoal Lake Elder Edith Whitecap explained that the people were nomadic, and that the area of the present day Shoal Lake reserve “was one of the places where a lot of times they would meet other people,” “just like a campsite.”¹⁹⁰ Similarly, Red Earth Elder Hector Head says that the main purpose of the lands chosen “was for hunting, fishing and trapping.”¹⁹¹ Red Earth member Ian McKay understands that the areas within IR 29 and 29A were among several traditional gathering sites.¹⁹²

Moving Toward Agriculture at The Pas

In the fall of 1877, Indian Agent Willoughby Clark wrote to the Department of Indian Affairs stating that Chief John Constant of The Pas Band had requested that the Dominion government survey reserves that were promised in the Treaty to his people at The Pas, the Pas Mountain and Birch River.¹⁹³ In addition, the Band requested to be furnished with the farming implements and livestock promised under treaty. Referring to an apparent inquiry as to whether the Band was in a “condition” to receive the implements and cattle, Clark reported:

I have the honor to inform you, that the necessary articles of this description were furnished them this year, and I should say from my knowledge of their condition, that they were entitled to them, but of course the Ploughs and Harrows will be useless to them, until they receive the Cattle stipulated for in the Treaty, which they are anxious to obtain.¹⁹⁴

¹⁸⁹ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 77, Edith Whitecap; p. 100, Charles Whitecap).

¹⁹⁰ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 77, Edith Whitecap).

¹⁹¹ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 169, Hector Head; pp. 198-99, Lizette McKenzie). See also ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 257, 261, Ian McKay).

¹⁹² ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 261, Ian McKay).

¹⁹³ Willoughby Clark, Indian Agent, to Lt. Col. [J.A.N.] Provencher, Indian Department, October 10, 1877, LAC, RG 10, vol. 3677, file 11528 (ICC Exhibit 1a, p. 159).

¹⁹⁴ Willoughby Clark, Indian Agent, to Lt. Col. [J.A.N.] Provencher, Indian Department, October 10, 1877, LAC, RG 10, vol. 3677, file 11528 (ICC Exhibit 1a, pp. 160-161).

The following summer, Ebenezer McColl, Inspector of the Manitoba Superintendency of the Department of Indian Affairs, visited the bands under his jurisdiction (which included The Pas Band) and reported on their progress in agriculture. He stated that they understood the necessity of moving toward agriculture for their livelihood and relying less on hunting and gathering, as every year subsistence from the latter became more uncertain.¹⁹⁵ As an example of their eagerness to adopt agriculture, McColl reported that:

[n]umerous instances can be cited where the members of Bands with ploughs and harrows, but without cattle or horses, have actually harnessed themselves and ploughed and harrowed their fields – ingenious use of ropes and portage straps.¹⁹⁶

McColl also reported that the bands were making “urgent” requests for farmers to teach them how to cultivate land.¹⁹⁷ Although McColl was pleased with the various bands’ eagerness to adopt agriculture and was optimistic about their future prospects, he felt that there were a number of things working against the Indians’ development in the region. McColl considered it

unfortunate that many of the Reserves are not well adapted for agricultural purposes, the land being either marshy or rocky and often both. The expressed desire for a change of limit in such cases upon the part of the Bands is but reasonable an[d] deserving of consideration.

In listening to the complaints of the Chiefs and headmen of the several Bands, [I] found that considerable dissatisfaction is created by the encroachment of Whi[te] settlers upon their Reserves. I would therefore suggest the expediency of surveying, at as early a date as practicable, the locations they had pointed out as reserved...

To say that the Indians are entirely satisfied with the manner in which the terms of the several treaties have been carried out, would be saying what is inconsistent with their character. To complain is a chronic feature of their nature. I am forced however to admit, from personal intercourse with them, and from

¹⁹⁵ E. McC[o]ll, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 31, 1878, Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1878*, 54 (ICC Exhibit 1a, p. 165).

¹⁹⁶ E. McC[o]ll, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 31, 1878, Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1878*, 54 (ICC Exhibit 1a, p. 165).

¹⁹⁷ E. McC[o]ll, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 31, 1878, Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1878*, 54 (ICC Exhibit 1a, p. 165).

abundant data at hand, that the manner treaty stipulations have been observed in this Superintendency in the past has given them just ground for complaint. They have been furnished – by no fault of the Government which paid the price of prime supplies and implements – with inferior and old worn out cattle, or cattle too wild for working or dairy purposes, and with supplies of all kinds of the most inferior quality, which would not be accepted at any price by the ordinary consumer.

...

The Indians complain that seed grain, potatoes, &c., are received too late in spring for sowing and planting in time to mature. This might be considerably obviated by the purchase of these articles in the neighborhood of many of the Reserves. Thus securing their early delivery, as well as the saving of expensive freightage to distant points.¹⁹⁸

The Dominion government appeared to recognize the necessity of farming and, in fact, encouraged First Nations people to take up agriculture, especially given the predicted decline in wildlife resources. In his annual report for the year 1878, the Deputy Superintendent General of Indian Affairs (hereafter DSGIA) L. Vankoughnet wrote of the challenges confronting the Indians of the “newer Provinces” and territories, stating:

as there is every indication of these Indians at an early date being deprived of the staples of life above referred to, it becomes incumbent upon the Government to adopt early and energetic measures to prepare them for the change in their mode of living and sustaining themselves and families, which must inevitably take place, when they can no longer kill sufficient buffalo and fish wherewith to feed themselves and families.

Instructions in farming, or herding and raising cattle (as the character of the country inhabited by the different tribes may indicate to be best) should be furnished to the Indians, and in such manner as will effectually accomplish, within the shortest period, the object sought for, namely, to make them self-supporting.¹⁹⁹

On August 18, 1879, the DSGIA wrote to Acting Indian Superintendent J.F. Graham, informing him that he had received complaints from The Pas Indians that they had not yet received their fair

¹⁹⁸ E. McC[o]ll, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 31, 1878, Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1878*, 54-55 (ICC Exhibit 1a, pp. 165-166).

¹⁹⁹ L. Vankoughnet, Deputy Superintendent General of Indian Affairs, Indian Branch, Department of the Interior, to John A. MacDonald, Superintendent General of Indian Affairs, December 31, 1878, Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1878*, 5 (ICC Exhibit 1a, p. 169).

allowance of cattle or agricultural implements. He instructed that any cattle due them, or any other Treaty 5 bands in a position to take care of livestock, should be furnished to them as soon as was possible.²⁰⁰

At about the same time, members of the Cumberland Band, which signed an adhesion to Treaty 5 with The Pas and Moose Lake Bands, made detailed complaints regarding the Dominion's failure to fulfil certain treaty obligations. Their first complaint was that no surveyor had been sent by the department to lay out the areas selected for reserves, which they were very anxious to have done. They stated that a great deal of the land was either rock or muskeg and that they wanted reserves set apart on the best land possible, recognizing that their future largely depended on raising crops and livestock. They also claimed that they never received the cattle and oxen promised them under the Treaty and, since they possessed no work animals, were required to pull the plough themselves. This information was conveyed by an individual named C.H. Brydges.²⁰¹ A few days later, on September 11, 1879, Brydges wrote to Sir John A. Macdonald, commenting on the government's failure to supply treaty Indians as promised. He stated that this obligation, "one of the main features of the Treaty, has been simply absolutely ignored for 5 or 6 years."²⁰²

On October 1, 1879, DSGIA Vankoughnet wrote to the Superintendent General of Indian Affairs (hereafter SGIA), Sir John A. Macdonald, with a lengthy response to some of the matters raised by Brydges the previous month. Vankoughnet stated that progress was being made in the region, with eight reserves in Treaty 5 territory having been surveyed, leaving five unsurveyed —

²⁰⁰ L. Vankoughnet, Deputy Superintendent General of Indian Affairs, Department of the Interior, to [J.F.] Graham, Acting Indian Superintendent, August 18, 1879, LAC, RG 10, vol. 3677, file 11528 (ICC Exhibit 1a, pp. 180-181).

²⁰¹ C.H. Brydges, Cumberland House, to [Unidentified recipient] September 8, 1879, LAC, RG 10, vol. 3700, file 17027 (ICC Exhibit 1a, pp. 182-183). Note: C.H. Brydges is presumed by ICC Research to be one and the same as Charles John Brydges, a Hudson's Bay Company land Commissioner in Manitoba and the Northwest Territories. See: Alan Wilson and R.A. Hotchkiss, "Brydges, Charles John," in Frances G. Halpenny, ed., *Dictionary of Canadian Biography*, Vol. XI, 1881 to 1890. (Toronto, Buffalo, London: University of Toronto Press, 1982), 124 (ICC Exhibit 8g, p. 5).

²⁰² C.H. Brydges, to John A. Macdonald, September 11, 1879, LAC, RG 10, vol. 3700, file 17027 (ICC Exhibit 1a, p. 191).

although he did not identify those of either group.²⁰³ He noted that a prudent procedure was followed in setting apart reserves:

The rule followed by the Department has been, when the Agent reports a Band to be desirous of having their Reserve set apart for them, which implies that they are prepared to settle down upon the Reserve, and cultivate the same, the application of the Agent is referred to the Surveyor General, for action.

There is no provision in the Treaty to which these Indians were parties for the Reserves being surveyed within any fixed period, and consequently the Department has considered it prudent not to have the Reserves surveyed until the Indians were prepared to settle on the lands and cultivate them.²⁰⁴

Concerning Brydges' report that the First Nations of Treaty 5 did not receive the cattle they were promised, Vankoughnet noted that Inspector McColl of the Manitoba Superintendency had already set about to attend to the matter and that the farming implements required had been supplied.²⁰⁵ Vankoughnet also stated that, if there was any deficiency in the implements supplied, the problem would be remedied.²⁰⁶

In his annual report to the SGIA dated December 31, 1879, Inspector McColl stated that the "full complement of cattle" had been supplied to the Indians of Treaty 5 and that, having done so, "one of the most fruitful sources of their [the Indians] grievances is effectually removed."²⁰⁷ McColl added that the twine, ammunition and farming implements supplied to the Indians were of the finest

²⁰³ L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to John A. Macdonald, Superintendent General of Indian Affairs, October 1, 1879, LAC, RG 10, vol. 3700, file 17027 (ICC Exhibit 1a, pp. 199-200).

²⁰⁴ L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to John A. Macdonald, Superintendent General of Indian Affairs, October 1, 1879, LAC, RG 10, vol. 3700, file 17027 (ICC Exhibit 1a, p. 200).

²⁰⁵ L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to John A. Macdonald, Superintendent General of Indian Affairs, October 1, 1879, LAC, RG 10, vol. 3700, file 17027 (ICC Exhibit 1a, pp. 201-202).

²⁰⁶ L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to John A. Macdonald, Superintendent General of Indian Affairs, October 1, 1879, LAC, RG 10, vol. 3700, file 17027 (ICC Exhibit 1a, pp. 211-212).

²⁰⁷ E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 31, 1879, Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1879*, 61 (ICC Exhibit 1a, p. 222).

quality, and that complaints from The Pas and Cumberland originated from damage to provisions of flour, tea and tobacco, all of which were replaced.²⁰⁸

McColl stated that the government had also been prompt in exchanging reserves “unfit for cultivation” for more suitable ones, to the satisfaction of the inhabitants. He commented, however, that there was “some discontent among them created by the encroachment of other settlers upon their reserves” and that they had requested that the government immediately determine the boundaries of their reserves and prevent future trespass.²⁰⁹

On March 16, 1880, Indian Superintendent J.F. Graham informed DSGIA Vankoughnet that The Pas Indians, along with other Indians of Treaty 5, had been furnished with the cattle and farming implements they requested, provided they were considered to be in a position to properly care for them.²¹⁰

The Pas Band at The Pas

In the fall of 1877, Indian Agent Willoughby Clark wrote to the Department of Indian Affairs stating that Chief John Constant of The Pas Band had requested that the Dominion government survey reserves for his people at The Pas, the Pas Mountain and Birch River, and that the Band “be allowed at each place the amount [of land] agreed upon in their Treaty,” based on the number of people permanently residing at each of the localities.²¹¹ Two years later, in September 1879, The Pas Band again requested that their reserves be surveyed “in as good land as possible, as their living depended

²⁰⁸ E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 31, 1879, Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1879*, 61 (ICC Exhibit 1a, p. 222).

²⁰⁹ E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 31, 1879, Canada, *Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1879*, 61 (ICC Exhibit 1a, p. 222).

²¹⁰ [J.F. Graham], Manitoba Superintendency, to L. Vankoughnet, [Deputy Superintendent General of Indian Affairs], March 16, 1880, LAC, RG 10, vol. 3677, file 11528 (ICC Exhibit 1a, p. 227).

²¹¹ Willoughby Clark, Indian Agent, to Lt. Col. [J.A.N.] Provencher, Indian Superintendent, October 10, 1877, LAC, RG 10, vol. 3677, file 11528 (ICC Exhibit 1a, p. 159).

upon [fishing] and the crops they could raise.”²¹² Three more years elapsed, however, before a surveyor was sent to formally set apart reserve lands for the Band.

In 1880, however, Indian Agent A. Mackay wrote that Chief Constant and a number of other families living at The Pas had requested a transfer to better farm land at Fort à la Corne because it was “impossible to make a living by farming at the Pas.”²¹³ In his annual report on The Pas Band the same year, Mackay noted that the whole region along the Saskatchewan River had been flooded, resulting in great difficulty for the people procuring hay for their cattle. Mackay also stated that 20 families belonging to The Pas Band resided at Birch River and described it as “altogether the most desirable location for an Indian reserve on the Lower Saskatchewan, good timber and excellent dry land, but only large enough for about forty families.”²¹⁴ Mackay also mentioned the Pas Mountain Band, which he described as inhabiting a remote area of “[v]ery good land, high and dry, but very difficult to get to,” about 75 miles, by water, west of The Pas Mission.²¹⁵

In his annual report for 1881, Mackay reported that the Indians residing on the Lower Saskatchewan River, including those at Birch River, the Pas Mountain, The Pas, and Cumberland, suffered greatly as a result of more flooding the previous winter and spring. Mackay stated that few of the Indians paid attention to farming and preparation for the winter months, planting only a few bushels of potatoes and other vegetable seeds.²¹⁶ Together with the disappearance of fur-bearing animals in the district, the people found themselves lacking food by the end of the winter.²¹⁷ The

²¹² C.H. Brydges, Cumberland House, to [Unidentified recipient], September 8, 1879, LAC, RG 10, vol. 3700, file 17027 (ICC Exhibit 1a, pp. 182-183).

²¹³ A. Mackay, Indian Agent, to J.F. Graham, Acting Indian Superintendent, September 21, 1880, LAC, RG 10, vol. 3555, file 10 (ICC Exhibit 1a, p. 232).

²¹⁴ A. Mackay, Indian Agent, to J.F. Graham, Acting Indian Superintendent, November 26, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880*, 322 (ICC Exhibit 1a, p. 237).

²¹⁵ A. Mackay, Indian Agent, to J.F. Graham, Acting Indian Superintendent, November 26, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880*, 322 (ICC Exhibit 1a, p. 237).

²¹⁶ A. Mackay, Indian Agent, to Superintendent General of Indian Affairs, September 6, 1881, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881*, 72 (ICC Exhibit 1a, p. 251).

²¹⁷ A. Mackay, Indian Agent, to Superintendent General of Indian Affairs, September 6, 1881, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881*, 73 (ICC Exhibit 1a, p. 251).

Agent again reported the desire of a number of families to relocate farther up the Saskatchewan River in the vicinity of Fort à la Corne where the land was better adapted for farming:

The rapid failure of the fisheries and hunt, in this part of the Treaty, is alarming these Indians, and compelling them to leave their old hunting grounds, they assert that, unless the Department allows them to go to better farming lands, they will be obliged to look to the Government for food in the future, as it is impossible to make a living by farming where they are at present, on account of the low, swampy and stony nature of the country.²¹⁸

On September 16, 1881, Indian Superintendent J.F. Graham sent the Minister of Indian Affairs a list of names of The Pas Band and Cumberland Band members²¹⁹ who wished to relocate to the vicinity of Fort à la Corne. On October 5, 1881, Graham recommended to the SGIA that the transfers be granted.²²⁰

On April 15, 1882, DSGIA Vankoughnet replied to Indian Superintendent Graham regarding the request of some members of The Pas and Cumberland Bands to be relocated to Fort à la Corne. Vankoughnet said he feared that “serious complications” would arise if Indians were allowed to move from the lands of one treaty to the lands of another, especially since the stipulations of the treaties in question (Treaties 5 and 6) differed considerably.²²¹ In June 1882, Indian Agent Mackay was informed of the DSGIA’s objections to the transfer;²²² however, five years later land was surveyed for some Cumberland Indians at Fort à la Corne.²²³

²¹⁸ A. Mackay, Indian Agent, to Superintendent General of Indian Affairs, September 6, 1881, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881*, 73 (ICC Exhibit 1a, p. 251).

²¹⁹ A. Mackay, Indian Agent, to J.F. Graham, Indian Superintendent, September 16, 1881, LAC, RG 10, vol. 3555, file 10 (ICC Exhibit 1a, pp. 253-255).

²²⁰ [J.F. Graham] Office of the Commissioner of Indian Affairs, to Minister, October 5, 1881, LAC, RG 10, vol. 3555, file 10 (ICC Exhibit 1a, p. 256).

²²¹ L. Vankoughnet, Deputy of the Superintendent General of Indian Affairs, to J.F. Graham, Indian Superintendent, April 15, 1882, LAC, RG 10, vol. 3555, file 10 (ICC Exhibit 1a, p. 280).

²²² [J.F. Graham], Indian Office, to Angus Mackay, [Indian Agent], June 16, 1882, LAC, RG 10, vol. 3555, file 10 (ICC Exhibit 1a, pp. 286-287).

²²³ John C. Nelson, In charge – Indian Reserve Surveys, to Superintendent General of Indian Affairs, December 30, 1887, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1887*, 274-275 (ICC Exhibit 1a, pp. 506-507).

It appears that at this time some individuals from the Pas Mountain were also living at or near Fort à la Corne, at least temporarily, although it is uncertain whether any settled on the Cumberland Indians' reserve. Indian Agent Reader reported that, following the Northwest Rebellion of 1885, "some Pas Mountain Indians who, I believe had been living at or near Fort à la Corne, fled back to the mountain, not wishing to join the rebellion."²²⁴ In the following year, 1886, two Pas Mountain families moved to Fort à la Corne. The treaty annuity paylists show that they were formally "transferred" there in 1888, although the widow of one man later returned.²²⁵

Survey of Reserves at The Pas and Birch River (1882)

On June 29, 1882, Acting Indian Superintendent Graham instructed Dominion Land Surveyor W.A. Austin to proceed to The Pas, among other places, for the "purpose of Surveying and defining the boundaries of the several Indian Reserves which are indicated upon the map of part of Keewatin."²²⁶

Graham also directed Austin

to call upon Mr. Angus Mackay Indian Agent at Grand Rapids, before commencing work explaining to him what is proposed to be done, and learning from him whether he his [sic] aware that any one of the Bands is likely to express a wish to have a change made in the locality of the Reserve of such land from the position indicated on the plan, ... also you are requested that you will in all cases before commencing the survey of a Reserve, confer with the Chief or, in the case of his absence, with the Head men of the Band interested and consult their wishes as to the point of commencement of the Survey of the land to be reserved.

²²⁴ J. Reader, Indian Agent, Pas Agency, to the SGIA, July 2, 1885, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1885*, 65 (ICC Exhibit 1a, p. 449).

²²⁵ Treaty Annuity Paylist, "The Pas Band paid at Shoal Lake," July 31, 1888, LAC, RG 10, vol. 9363 (ICC Exhibit 1b, p. 148). See ticket #64 (Eyatakwanahewas) and #175 (Antoine Henderson.)

Antoine Henderson was "absent" at Fort à la Corne starting in 1886 and finally "transferred" in 1888. It is not known whether this family was paid on another band's paylist. See: Treaty Annuity Paylists, The Pas Band paid at Shoal Lake, 1886-87, LAC, RG 10, vols. 9361-62 (ICC Exhibit 1b, pp. 142, 145). See ticket #175.

Eyatakwanahewas apparently went to Fort à la Corne sometime in 1886 and received annuity payments there in 1887, but not in subsequent years. His widow returned from Fort à la Corne in 1892 and eventually received arrears for herself and her husband for the years 1888 to 1891. See: Treaty Annuity Paylists, "Pas Band paid at Red Earth," August 1, 1892, LAC, RG 10, vol. 9367 (ICC Exhibit 1b, p. 138); and, Treaty Annuity Paylists, Pas Band paid at Red Earth and Shoal Lake, 1893-1896, LAC, RG 10, vols. 9368-72 (ICC Exhibit 1b, pp. 159, 163, 168, 172, 176). See ticket #64.

²²⁶ Jas. F. Graham, Indian Superintendent, to W.A. Austin, Dominion Land Surveyor (DLS), June 29, 1882, LAC, RG 10, vol. 7776, file 27128-1 (ICC Exhibit 1a, p. 288).

I am to state that the Superintendent General of Indian Affairs considers it very undesirable that any change not absolutely required should be made, and it is hoped inasmuch as the localities of the several Reserves shown upon the plan here laid down from the description given by the Indians themselves, that it will not be necessary to make any changes of site at the present time.²²⁷

To aid in his survey work, Austin was supplied with the population “of each band” requiring a reserve to be surveyed. In a note dated September 1882, Indian Agent Mackay informed the surveyor that there were 421 people at The Pas, 90 at Birch River, and 131 at Pas Mountain (642 people in total). A note in the margin divided the Pas Mountain group into Shoal Lake 55 and Red Earth 76.²²⁸ Later that month, however, Mackay amended those figures, stating that there were 448 people at The Pas, 90 at Birch River, 61 at Shoal Lake and 70 at Red Earth (669 people in total).²²⁹

In his annual report of September 30, 1882, Indian Agent Mackay stated that, while passing through The Pas on September 7, he encountered Surveyor Austin, who was in the process of surveying the reserve at The Pas village, and learned that Austin intended to survey the Red Earth, Shoal Lake and Birch River reserves.²³⁰ In his report, Mackay also provided some description of the aforementioned “reserves.” He noted that, at Red Earth, there was a very nice common potato garden as well as very good land and timber, and stated:

[t]he Indians here appear to take more interest in taking care of the implements supplied to them. This was the only reserve were [sic] I noticed that a building had been put up expressly for the purpose, and all the tools and implements snugly stored therein. Their cattle they had purchased themselves, and I must say that they were as fine a looking lot of animals of the kind as I have ever seen. They are also well stocked with native ponies of all of which they seem to take very good care.²³¹

²²⁷ Jas. F. Graham, Indian Superintendent, to W.A. Austin, DLS, June 29, 1882, LAC, RG 10, vol. 7776, file 27128-1 (ICC Exhibit 1a, pp. 289-90). The survey plan referred to in this correspondence has not been located.

²²⁸ A. Mackay, Indian Agent, to W.A. Austin, DLS, September, 1882, LAC, RG 10, vol. 7776, file 27128-1 (ICC Exhibit 1a, p. 294).

²²⁹ A. Mackay, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 47 (ICC Exhibit 1a, p. 301).

²³⁰ A. Mackay, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 47 (ICC Exhibit 1a, p. 301).

²³¹ A. Mackay, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 47 (ICC Exhibit 1a, p. 301).

As for Birch River, Mackay stated that their potato gardens were looking “unusually” good and that there was some very nice wheat and barley. He made little mention of Shoal Lake, but reported that the groups at Red Earth, Shoal Lake and Birch River found it difficult to make the 350 mile round trip to The Pas every year for annuity payments and had requested that, in following years, they be paid on their respective reserves.²³² He did, however, state that “the land at both these places [Red Earth and Shoal Lake] was good enough for farming purposes.”²³³

In the spring of 1883, Surveyor Austin provided the SGIA with an outline of the reserves surveyed the previous season in the Treaty 5 area. Despite the fact that Austin had indicated to Indian Agent Mackay the previous fall that he would travel to Red Earth and Shoal Lake to survey reserves there,²³⁴ it does not appear from Austin’s report that he ventured beyond Birch River. Austin reported in detail on the setting apart of reserves at The Pas and Birch River, but not at Red Earth and Shoal Lake.²³⁵

At The Pas, Austin described the various locations he set aside for reserves. He noted that the land on the banks of the Saskatchewan River around The Pas, about half a mile in width, contained class 1 and 2 soil, but was largely enclosed by swamp to the rear of it. Austin surveyed several portions of land for The Pas Band, which were largely pockets of good land surrounded by swamps.²³⁶ At Birch River, Austin described the land as “very good, being class No. 1” and noting that “[t]here is not a particle of stone on the Reserve.”²³⁷ He added that the Reserve contained the

²³² A. Mackay, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 47 (ICC Exhibit 1a, p. 301).

²³³ A. Mackay, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 47 (ICC Exhibit 1a, p. 301).

²³⁴ A. Mackay, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 47 (ICC Exhibit 1a, p. 301).

²³⁵ W.A. Austin, D.L.S, to Superintendent General of Indian Affairs, April 1883, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 158-168 (ICC Exhibit 1a, p. 331 and pp. 332-369).

²³⁶ W.A. Austin, D.L.S, to Superintendent General of Indian Affairs, April 1883, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 162 (ICC Exhibit 1a, p. 328).

²³⁷ W.A. Austin, D.L.S, to Superintendent General of Indian Affairs, April 1883, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 164 (ICC Exhibit 1a, p. 329).

“finest gardens” that he had seen cultivated by Indians and that there was also an abundance of hay. He did note, however, that the spring freshets overflowed a large portion of the Reserve.²³⁸

After completing the survey at The Pas proper and Birch River, Austin noted that The Pas Band was still owed 3,246.57 acres. As it was “impossible to get good land for them near the [sic] Pas to complete the quantity needful for their Reserve,”²³⁹ he confirmed, after consulting with the Indian Agent, that the balance of the land entitled to The Pas Band would be set aside as two small reserves near the Pasquia Hills on the Carrot River.²⁴⁰ This plan was consistent with the agreement set out in the 1876 Adhesion to situate part of The Pas Band’s reserve at the Pas Mountain.

The Pas Band’s reserve was laid out in several portions. Seven portions (A through G) were laid out at The Pas proper, ranging in size from 6.51 acres to 4,299.93 acres. Three additional portions (Nos. 1 to 3) were laid out at Indian Pear Island, as well as a 2,493.65-acre portion at Birch River.²⁴¹ Austin indicated that The Pas Band had a population of 421, a figure acquired from Mackay (see above), and was therefore entitled to 13,472 acres of reserve land. As previously noted, however, Austin was able to survey only 10,225.43 acres, which left The Pas Band with an unfulfilled entitlement of 3,246.57 acres.²⁴²

At Birch River, Austin surveyed 2,880 acres for the 90 people belonging to the “Birch River Band,” whom he represented as a separate entity from The Pas Band.²⁴³ Therefore, the Birch River

²³⁸ W.A. Austin, D.L.S, to Superintendent General of Indian Affairs, April 1883, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 164 (ICC Exhibit 1a, p. 329).

²³⁹ W.A. Austin, D.L.S, to Superintendent General of Indian Affairs, April 1883, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 167 (ICC Exhibit 1a, p. 330).

²⁴⁰ W.A. Austin, D.L.S, to Superintendent General of Indian Affairs, April 1883, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 167 (ICC Exhibit 1a, p. 330).

²⁴¹ W.A. Austin, D.L.S, to Superintendent General of Indian Affairs, April 1883, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 166 (ICC Exhibit 1a, p. 330). See also: “Plan of Part of The Pas Indian Reserve, Saskatchewan River,” surveyed February 1883 by W.A. Austin, DLS (ICC Exhibit 7a).

²⁴² W.A. Austin, D.L.S, to Superintendent General of Indian Affairs, April 1883, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 167 (ICC Exhibit 1a, p. 330).

²⁴³ W.A. Austin, D.L.S, to Superintendent General of Indian Affairs, April 1883, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 167 (ICC Exhibit 1a, p. 330).

reserve contained a total of 5,373.65 acres, being the total amount allocated to the Birch River Band and The Pas Band at Birch River.²⁴⁴

Survey of the Red Earth and Shoal Lake Reserves (1884)

By January 1884, The Pas Band had still not received the balance of its reserve lands (3,246.57 acres), which were to be surveyed for them. The Band sent a petition to the Superintendent General of Indian Affairs on January 3, 1884, asking that its remaining reserve land entitlement be surveyed for them toward the Oopasquaya Hill (Pas Mountain), where the land was thought to be more suitable for farming.²⁴⁵ The petition contained ten signatures, including those of one Councillor from Shoal Lake and two men from Red Earth.²⁴⁶

The Band also claimed that they lacked seed for the coming spring, as frost had destroyed their crops the previous season. In addition, they submitted a request for numerous farming implements, oxen and cows.²⁴⁷ A letter of support for The Pas Band's petition was sent by the Reverend J. Settee of The Pas Mission to Inspector E. McColl on January 9, 1884. Reverend Settee stated that he had lived at The Pas for 40 years and that the only good farm land he was aware of was located at Oopasquaya Hill. With respect to Birch River, Settee acknowledged that the land was "tolerably good" in dry seasons, but said that this was unusual, as the rains some years were "copious."²⁴⁸

On March 7, 1884, Inspector McColl wrote to the SGIA with his recommendations regarding The Pas Band's petition. Although he said he had no personal knowledge of that area, McColl reported that he had been told by others that the Oopasquaya Hill, or Pas Mountain, was suitable for

²⁴⁴ Canada Lands Surveys Records (CLSR) SK Plan 244, "Plan of Birch River Indian Reserve South of the Great Saskatchewan River," surveyed March 1883 by W.A. Austin, DLS (ICC Exhibit 7b, p. 2).

²⁴⁵ Chief John Bell and Petitioners, The Pas Band, to Superintendent General of Indian Affairs, January 3, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, pp. 391-393).

²⁴⁶ Chief John Bell and Petitioners, The Pas Band, to Superintendent General of Indian Affairs, January 3, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, p. 393).

²⁴⁷ Chief John Bell and Petitioners, The Pas Band, to Superintendent General of Indian Affairs, January 3, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, pp. 392-393).

²⁴⁸ J. Settee, Devon or the Pas Mission, to E. McColl, January 9, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, pp. 402-403).

cultivation.²⁴⁹ Regarding the Band's request for additional provisions of food, McColl recommended that "their petition in this respect be not entertained for the granting of it would only make them lazy paupers instead of thrifty farmers."²⁵⁰ Noting the failure of the crops the previous year, McColl stated he had included an amount in the estimates for the purchase of 150 bushels of potatoes, 10 of wheat and 16 of barley, along with a number of farming implements.²⁵¹ On March 19, 1884, DSGIA Vankoughnet wrote to the Deputy Minister of the Interior, inquiring whether there was any objection to the balance of the land entitled to The Pas Band being granted at the Pas Mountain.²⁵² On that same day, Vankoughnet also wrote to Inspector McColl, requesting that Indian Agent Reader be sent to the Pas Mountain in the spring to inspect and report on the locality that The Pas Band wished to have set apart.²⁵³

On June 6, 1884, Indian Agent Reader reported to Inspector McColl that, prior to leaving for the Pas Mountain, he had held discussions with members of The Pas Band about how the remaining 3,246.57 acres would be allocated to the Band. Reader stated that it had been decided that 1,500 acres would be set apart at the Pas Mountain, an additional 1,500 acres would be set apart northwest of the northern portion already surveyed at The Pas, and the remaining 246.57 would be reserved as timber land along the Carrot River.²⁵⁴ These lands were to be set aside for The Pas Band.

Reader encountered considerable difficulty on his trip to see the reserve lands desired by the Red Earth people. After abandoning his journey by boat down the Carrot River (due to the river being blocked by trees), Reader and his companions traversed two and a half miles of swamp until

²⁴⁹ E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, March 7, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, pp. 404-405).

²⁵⁰ E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, March 7, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, p. 406).

²⁵¹ E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, March 7, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, pp. 406-407).

²⁵² [L. Vankoughnet], to A.M. Burgess, Deputy of the Minister of the Interior, March 19, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, p. 408).

²⁵³ [L. Vankoughnet], E. McColl, Inspector of Indian Agencies, March 19, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, p. 409).

²⁵⁴ J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, p. 416).

the ground gradually began to rise toward the southwest.²⁵⁵ Reader noted that the swamp eventually gave way to

a fine arable flat of some 10 acres of excellent soil which however in seasons of an exceptional high water might be in danger. Thence I proceeded into the woods (the ground gradually rising) where the Indians have already cultivated small patches of land. Here the soil is of the finest class. ... In places both here and along the River there is an abundance of Hay; and some of the arable land requires draining.²⁵⁶

Afterwards, Reader left Red Earth for Shoal Lake. Along the way, he encountered a “fine piece of land” that ran along the banks of the Flute River, a stream that “runs out of the Carrot River toward the Mountain [Pasquia Hills].”²⁵⁷

Reader travelled down the Carrot River to Shoal Lake, where he found another camp of Indians belonging to The Pas Band. Upon arrival at Shoal Lake, he observed

small patches cultivated but for the most part very imperfectly. Here the land is more open and well adapted to farming purposes. Large flat pieces might easily be broken up and sown and would probably yield large crops. There are however some salt springs in the neighbourhood and some of the land require [sic] draining. Nearer the foot of the mountain there is some timber land which the Shoal Lake Indians wish to be included in their desired Reserve.²⁵⁸

Reader concluded his report by recommending that reserves be set apart for the groups of Indians of The Pas Band already settled at Red Earth and Shoal Lake, with an additional reserve at Flute River for the Indians at The Pas who wished to settle at Pas Mountain. He wrote:

²⁵⁵ J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, p. 417).

²⁵⁶ J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, p. 418).

²⁵⁷ J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, p. 419).

²⁵⁸ J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, p. 420).

If I may be allowed to make any remarks as to settling of some of the Pas Indians on Reserves at the mountain I would venture to suggest if the Department see fit that the Shoal Lake Indians should be settled where they are, and the Red Earth Indians where they have already built houses, and those Indians now at the Pas who wish to be settled at the mountain should have a reserve along the Flute River and such is the wish of the Indians themselves. One or two however of Red Earth Indians have this year planted potatoes near Flute River.²⁵⁹

Reader stated that, if reserves were allocated as recommended, he saw no reason why the Indians could not be self-supporting in a few years. He did suggest, however, that a yoke of oxen be supplied to each of the three reserves.²⁶⁰ A few months later, Indian Agent Mackay reported (presumably on behalf of Indian Agent Reader) on the status of the Red Earth and Shoal Lake people and their reserves. He stated that the land on the banks of the Carrot River was very good and that, at Red Earth in particular, the Indians were thriving. They had cattle, which they purchased themselves, their gardens were well-tended, and they had good root cellars.²⁶¹

On March 9, 1885, Dominion Land Surveyor Thomas Green reported to the SGIA on surveys conducted of Indian reserves the previous year (i.e. the summer of 1884). Included among those lands surveyed for The Pas Band was 2,000 acres at Flute Creek, situated approximately 30 miles southwest of Red Earth Lake. Green described the land to be of “excellent quality” and stated that 400 or 500 acres of it along the banks of the creek was clear of wood and ready to be cultivated.²⁶² He commented that “[o]ne of the Indians from Red Earth had an excellent patch of potatoes here.”²⁶³ Plan 243 shows the “Pas Mountain Division” reserve (i.e. the Flute Creek reserve) surveyed “For

²⁵⁹ J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, p. 420).

²⁶⁰ J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, p. 421).

²⁶¹ A. Mackay, Indian Agent, Beren’s River Agency, to Superintendent General of Indian Affairs, September 13, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1884*, 76-77 (ICC Exhibit 1a, p. 433). MacKay was the Agent for the Beren’s River Agency, which was created in 1885 from the part of the original Pas Agency.

²⁶² T.D. Green, DLS, to Superintendent General of Indian Affairs, March 9, 1885, LAC, RG 10, vol. 3685, file 13033 (ICC Exhibit 1a, p. 436).

²⁶³ T.D. Green, DLS, to Superintendent General of Indian Affairs, March 9, 1885, LAC, RG 10, vol. 3685, file 13033 (ICC Exhibit 1a, p. 436).

Band at Pas Mission,” containing 2000 acres.²⁶⁴ No Order in Council confirming this land as an Indian reserve has been located.

Green also surveyed a reserve at Shoal Lake, where he stated that “a considerable amount of first class land is found.”²⁶⁵ He noted that two saltwater streams flowed through the western part of the reserve, and that the inhabitants boiled the water and obtained good salt from it.²⁶⁶

Green then proceeded to Red Earth to survey a reserve. He reported:

I surveyed a reserve for the band located there. The greater part of the land of this reserve is of good quality but is rather flat for grain and is situated South West of Red Earth Lake which was dry at the end of July last. These Indians appear to be very willing to work and are hardy and active looking men. The houses and improvements on the banks of the Carrot River were not included in the reserve as they were built before the treaty and the Indians claim that the government promised to recognize their rights to the same.²⁶⁷

While Green’s surveys of the Red Earth and Shoal Lake reserves were conducted in the summer of 1884, the first survey plans of the reserves are dated January 1885. Plan 245 shows the original configuration of the Shoal Lake reserve, containing a total of 2,190 acres, comprised of 1,751 acres arable land, 119 acres sandy beach and 320 acres marsh.²⁶⁸ Plan 4089 shows the original

²⁶⁴ Natural Resources Canada, Plan 243, “Plan of Part of Indian Reserve for Band at Pas Mission, Treaty No. 5, Saskatchewan District,” surveyed by T.D. Green, D.L.S., season 1884 (ICC Exhibit 7jj); see also: Natural Resources Canada, Field Book 131, “Treaty No. 5 N.W.T. Indian Reserve No. 21 Pas Mission, 3250 acres,” surveyed by T.D. Green, D.L.S., 1884 (ICC Exhibit 7kk, pp. 15-18).

²⁶⁵ T.D. Green, DLS, to Superintendent General of Indian Affairs, March 9, 1885, LAC, RG 10, vol. 3685, file 13033 (ICC Exhibit 1a, pp. 436-437).

²⁶⁶ T.D. Green, DLS, to Superintendent General of Indian Affairs, March 9, 1885, LAC, RG 10, vol. 3685, file 13033 (ICC Exhibit 1a, pp. 436-437).

²⁶⁷ T.D. Green, DLS, to Superintendent General of Indian Affairs, March -9, 1885, LAC, RG 10, vol. 3685, file 13033 (ICC Exhibit 1a, pp. 437-438).

²⁶⁸ CLSR SK Plan 245 (Microplan 1211), “Treaty No. 5, Plan of the Indian Reserve at Shoal Lake, Saskatchewan District,” accepted January 1885 by T.D. Green, DLS (ICC Exhibit 7c, p. 2); see also: CLSR SK Plan 4090 (Microplan 1211), “Treaty No. 5, Plan of the Indian Reserve at Shoal Lake, Saskatchewan District,” prepared January 1885 By T.D. Green, DLS- (ICC Exhibit 7e, p. 1).

configuration of the Red Earth reserve, which contained a total of 2,711.64 acres.²⁶⁹ None of the available plans indicates the respective areas of arable land, beach or marsh on the Red Earth reserve. However, the land along the north boundary is labelled on the plans as a “large tract of wet and useless land,” and swampy areas are noted along other boundaries as well. At the northeast end of the reserve, the plans include a notation stating: “soil 1st class but flat.”²⁷⁰ No Orders in Council confirming these parcels as Indian reserves have been located.

The area of land surveyed by Surveyor Green for the Red Earth and Shoal Lake groups was not deducted from the outstanding reserve entitlement (3,250 acres) of The Pas Band. The reserves at Red Earth and Shoal Lake were set apart for them as individual bands, as was done at Birch River for the Birch River Band. The Pas Band’s remaining allocation was distributed as follows: 1,310 acres near the Indian Agent’s house at The Pas, 250 acres as a timber limit at the junction of the Carrot River and Mountain Point Creek, and the remaining 2,000 acres set apart at Flute Creek.²⁷¹

Separate Paylists (1886) and Leadership at Red Earth and Shoal Lake (1882 - 1902)

On September 4, 1885, Indian Agent Reader reported that the Pas Mountain Indians were anxious to receive treaty annuities at their own reserves, rather than making the long journey to The Pas at

²⁶⁹ CLSR SK Plan 4089 (Microplan 1224), “Treaty No. 6, Plan of the Indian Reserve at Red Earth, Saskatchewan District,” prepared January 1885 by T.D. Green, DLS (ICC Exhibit 7d, p. 2); see also: CLSR SK Plan 247, “Treaty No. 5, Plan of the Indian Reserve at Red Earth No 29, Saskatchewan District,” prepared January 1885 by T.D. Green, DLS (ICC Exhibit 7f, p. 2); and DIAND, Indian Lands Registry, Plan T662 (Microplan 882), “Treaty No. 5, Plan of the Indian Reserve at Red Earth No.29, Saskatchewan District,” surveyed January 1885 by T.D. Green, DLS (ICC Exhibit 7g, p. 2).

²⁷⁰ CLSR SK Plan 4089 (Microplan 1224), “Treaty No. 6, Plan of the Indian Reserve at Red Earth, Saskatchewan District,” prepared January 1885 by T.D. Green, DLS (ICC Exhibit 7d, p. 2).

²⁷¹ T.D. Green to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, August 21, 1884, [LAC, RG 10, vol. 3685, file 13033] (ICC Exhibit 1a, p. 430); see also: Natural Resources Canada, Plan 243, “Plan of Part of Indian Reserve for Band at Pas Mission, Treaty No. 5, Saskatchewan District,” surveyed by T.D. Green, D.L.S., season 1884 (ICC Exhibit 7jj).

treaty time.²⁷² In the following year, 1886, a separate “Pas Band” payroll was created for the members living at Red Earth and Shoal Lake.²⁷³

As noted above, the Pas Mountain group was included in the leadership of The Pas Band beginning in 1882, with the election of one Councillor from Shoal Lake. In 1885, Indian Agent Reader reported that a “deputation” from Pas Mountain had recently participated in a Pas Band election:

In the month of April there was an election of a new chief for the Pas Band, and one councillor for the Pas Mountain, held at the Pas. Deputations came from the Pas Mountain and Birch River. On the 8th of April the Indians made their election in a very quiet, peaceable manner. Antoine Constant, jun., was elected chief for the whole band, and Baptiste Young as councillor for the Pas Mountain.²⁷⁴

According to the paysheets, an additional Councillor from Red Earth was elected in 1889. It appears that this arrangement was maintained until 1902, except for a brief interlude from 1895 through 1899, when the positions were discontinued.²⁷⁵ A notation on the 1895 annuity paylists beside the former Red Earth and Shoal Lake Councillors’ ticket numbers reads: “Term of office as Councillor completed, not to be re-elected. See letter ... 22 May 1895.”²⁷⁶ No further information regarding this decision is available, and this letter is not on the documentary record of this inquiry. The positions

²⁷² J. Reader, Indian Agent, Pas Agency, to the SGIA, September 4, 1885, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1886*, 73 (ICC Exhibit 1a, p. 453).

²⁷³ See: Treaty Annuity Paylists, Pas Band paid at Red Earth and/or Shoal Lake, 1886-1902, LAC, RG 10, vols. 9361-9377 (ICC Exhibit 1b, pp. 142-200).

²⁷⁴ J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 2, 1885, Canada, *Annual Report of the Department of Indian Affairs for the year Ended 31st December 1885*, 64 (ICC Exhibit 1a, p. 449).

²⁷⁵ Treaty Annuity Paylists, The Pas Band, 1882-1885, LAC, RG 10, vols. 9357-9360 (ICC Exhibit 1b, pp. 46, 52, 59, 68), see ticket #108, Samuel Moore (1882-84) and #155, Baptiste Young (1885); Treaty Annuity Paylist, “The Pas Band paid at Shoal Lake,” 1886-91, LAC, RG 10, vol. 9361-9366 (ICC Exhibit 1b, pp. 142-158), see ticket #115, Baptiste Young (1886-91) and #95, Mikwunakascum (1889-1891); Treaty Annuity Paylist, “The Pas Band paid at Red Earth,” August 1, 1892, LAC, RG 10, vol. 9367 (ICC Exhibit 1b, p. 138-41), see ticket #66, Joseph Head and #95, Mikwunakascum; Treaty Annuity Paylist, “The Pas Band paid at Red Earth and Shoal Lake,” 1893-95, LAC, RG 10, vol. 9370 (ICC Exhibit 1b, p. 168), see ticket #66, Joseph Head (1893-95) and #95, Mikwunakascum (1893-95).

²⁷⁶ Treaty Annuity Paylist, “Pas Band paid at Red Earth and Shoal Lake,” July 29-30, 1895, LAC, RG 10, vol. 9370 (ICC Exhibit 1b, p. 168). See tickets #66 and #95.

were apparently reinstated in 1900, when separate Councillors from both Red Earth and Shoal Lake were again identified on the paylists.²⁷⁷

Despite the sometimes confusing terminology relating to the status of the Red Earth and Shoal Lake groups, it appears that the department still viewed them as part of The Pas Band as late as 1897. On August 3, 1897, the Chief of The Pas Band, Antoine Constant, signed a Consent of Band to Commutation of Annuity “on behalf of that portion of this Band settled at Shoal Lake Reserve Pas Mountain.”²⁷⁸

Farming and Development at Red Earth and Shoal Lake (1885 - 1891)

Indian Agent Joseph Reader reported that the winter of 1885 was very harsh. The Indians of The Pas, Birch River and Pas Mountain “suffered keenly,” and it was impossible to supply the food that was required by them as there was insufficient in the district.²⁷⁹

In his 1886 report, Agent Reader paid particular attention to developments on the Shoal Lake reserve. Arriving at Shoal Lake in the late fall of 1885, Reader reported:

[a]t Shoal Lake Reserve, at the foot of the mountain, the Indians had made but poor attempts at farming. The fact is that until recently they did not possess an ox, and they are not the men to labor hard with the hoe, although the land is almost all that could be desired to produce excellent crops. During my visit the subject of farming was plainly put before them, and I promised that I would again visit the reserve in the spring in order to teach and encourage them to cultivate the soil.²⁸⁰

²⁷⁷ Treaty Annuity Paylist, “Pas Band paid at Shoal Lake,” July 30, 1900, LAC, RG 10, vol. 9375 (ICC Exhibit 1b, pp. 189 and 191). See ticket #199, Jeremiah Nawakayas and #200, Albert Moore Young. The documentary record only contains The Pas Band paylists up to 1893. Therefore, it is not possible to confirm the number of Councillors from the Red Earth and Shoal Lake identified on The Pas Band paysheets after 1893.

²⁷⁸ Consent of Band to Commutation of Annuity, August 3, 1897, LAC, RG 10, vol. 8166, file 578/28-8-25 (ICC Exhibit 1a, p. 699).

²⁷⁹ J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 2, 1885, Canada, *Annual Report of the Department of Indian Affairs for the year Ended 31st December 1885*, 64 (ICC Exhibit 1a, p. 449).

²⁸⁰ J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 2, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, 74 (ICC Exhibit 1a, p. 472).

In May 1886, Reader returned to Red Earth and Shoal Lake to instruct the inhabitants how to “cultivate the splendid soil on their reserves.”²⁸¹ Reader began at the Shoal Lake reserve:

The plan generally followed, was as follows: First, the ground was cleared of rubbish, the corners and other parts not utilized were broken up with hoes, and the whole harrowed. Then I sowed the wheat, after which two of the boatmen followed with ox and harrow. One garden completed, another was treated in the same manner. Only a portion, however, of each garden was sown with wheat, the rest was reserved for potatoes.²⁸²

Reader then proceeded to Red Earth, where similar work was to be done. He noted that there was great difficulty in arriving at the garden plots at Red Earth as everything had to be carried from the Carrot River through wood, mud or water. In the absence of oxen, the harrow had to be pulled by men.²⁸³ After visiting Red Earth, Reader returned to Shoal Lake, where, in his absence, the Band had prepared two large pieces of land for ploughing and had drawn the plough themselves through half an acre of land.²⁸⁴ Reader felt that the prospects for Red Earth and Shoal Lake were much brighter for the coming winter owing to the quantity of seed sown as compared to previous years.²⁸⁵

In the summer of 1886, Reader returned to Red Earth and Shoal Lake to pay annuities and check on the progress of the Bands. At Shoal Lake, Reader observed “a fair crop of potatoes,” but noted that the wheat and barley, for the most part, had failed. Despite his previously optimistic

²⁸¹ J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 2, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, 76 (ICC Exhibit 1a, p. 474).

²⁸² J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 2, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, 76-77 (ICC Exhibit 1a, pp. 474-475).

²⁸³ J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 2, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, 77 (ICC Exhibit 1a, p. 475).

²⁸⁴ J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 2, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, 77 (ICC Exhibit 1a, p. 475).

²⁸⁵ J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 2, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, 78 (ICC Exhibit 1a, p. 476).

expectation, Reader said he thought the Band would suffer from want of food during the approaching winter.²⁸⁶ At Red Earth, however, Reader described quite a different situation:

Red Earth is probably the finest reserve in the agency. The crops here were excellent. The wheat sown in the spring promised good returns, while the potatoes the Indians themselves had preserved and planted were all that could be desired. It is a providential occurrence that these Indians have good crops, for they probably will have no fish next winter, owing to the very low stage of water.²⁸⁷

Reader visited the Red Earth and Shoal Lake reserves again in the summer of 1887 to pay annuities and to examine the crops. At Red Earth he found some of the crops to be excellent, but one large field of potatoes suffered from heavy rains. As well, all the barley seed that had been sent to the Band in the spring had been eaten by band members in order to sustain them while sowing their other seeds. While Reader did not comment specifically on Shoal Lake, he concluded with a statement about the Pas Mountain generally:

[t]he Pas Mountain has hitherto been a bad place for Indians to live at, but the increased cultivation of the soil is gradually placing them in a better position hitherto to support themselves.²⁸⁸

In his annual report dated July 3, 1888, Indian Agent Reader noted that the gardens at Shoal Lake were not well cared for, but their cattle were in excellent condition, “there being excellent land everywhere.”²⁸⁹ At Red Earth, he described the people as “more thrifty,” having better gardens, houses and cattle than were to be found at Shoal Lake. Reader added,

²⁸⁶ J. Reader, Indian Agent, to Superintendent General of Indian Affairs, September 6, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1887*, 85 (ICC Exhibit 1a, p. 482).

²⁸⁷ J. Reader, Indian Agent, to Superintendent General of Indian Affairs, September 6, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1887*, 86 (ICC Exhibit 1a, p. 483).

²⁸⁸ J. Reader, Indian Agent, to Superintendent General of Indian Affairs, September 12, 1887, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1888*, 72 (ICC Exhibit 1a, p. 502).

²⁸⁹ J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 3, 1888, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1888*, 75 (ICC Exhibit 1a, p. 538).

[i]f the Pas Mountain Indians cultivate the fine, rich soil of their respective reserves, they need never, under ordinary circumstances, suffer from starvation. Efforts are made to induce them to do so, but it is by no means easy to wean them from habits inherited from their forefathers.²⁹⁰

Indian Agent Reader's annual report for 1889 was very similar to the previous year's, describing Shoal Lake's gardens as being poor compared to those at Red Earth. He noted, however, that the cattle at both localities were in excellent condition, "for it would be difficult to surpass the feed which is to be found at the Pas Mountain."²⁹¹

Reader repeated similar observations in his 1890 report. At Shoal Lake, the only advancement he noted was with respect to cattle raising, while he described the overall advancement toward self-sufficiency at Red Earth as "remarkable," adding that it was an "excellent place for farming and cattle-raising."²⁹² Reader's generally positive observations at Red Earth and Shoal Lake, however, did not apply to The Pas Agency as a whole. In Inspector McColl's 1890 report to the SGIA, McColl noted that little progress in farming was made by the Indians in the agency. He stated that they still largely earned their livelihood from hunting, as the surrounding marshes and forests had not yet been encroached upon by settlers.²⁹³

On July 6, 1891, Indian Agent Reader submitted his eighth annual report to the SGIA for The Pas Agency, again describing the progress at Red Earth and Shoal Lake quite differently:

The Indians at these two places are, strange to say, characterized by opposite tendencies; for while the Shoal Lake Band makes but little progress in cultivating the soil or in general improvement, the Red Earth Indians are thrifty, have a good supply

²⁹⁰ J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 3, 1888, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1888*, 76 (ICC Exhibit 1a, p. 539).

²⁹¹ J. Reader, Indian Agent, to Superintendent General of Indian Affairs, August 12, 1890, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1890*, 124 (ICC Exhibit 1a, p. 561).

²⁹² J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 11, 1889, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1889*, 50 (ICC Exhibit 1a, p. 568).

²⁹³ E. McColl, Superintending Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, November 18, 1890, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1890*, 202-203 (ICC Exhibit 1a, p. 572).

of potatoes for food in winter and summer and for seed in spring, and present at the agents's visit of inspection tidy houses and premises generally. It is remarkable what these Indians have done, so far removed from the outside world.²⁹⁴

Red Earth Band Requests Exchange of Flute Creek for Carrot River (1892)

On January 14, 1892, Indian Agent Reader reported in a letter to Inspector McColl that the "Pas Mountain Band of Indians" had requested that a tract of land, upon which the Red Earth group resided along the Carrot River, be set apart as a reserve in exchange for the reserve laid out for The Pas Band at Flute Creek. They also requested that a timber limit be surveyed in the vicinity of Red Earth in lieu of the proposed exchange.²⁹⁵ Reader noted that "the Red Earth Indians do not live but only farm in their Reserve of that name" (presumably IR 29, south of the Carrot River). He therefore recommended that their request be granted, as the land they desired on the Carrot River (although it was also susceptible to flooding at times) was excellent for farming and building.²⁹⁶ It should be recalled that the 2,000-acre Flute Creek reserve was set apart for The Pas Band in 1884, as part of its remaining treaty land entitlement.²⁹⁷ The request for exchange was forwarded by Inspector E. McColl to DSGIA Vankoughnet for consideration.²⁹⁸ Vankoughnet replied that McColl should investigate the matter further and provide a recommendation after he had formed an opinion.²⁹⁹

²⁹⁴ J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 6, 1891, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1891*, 67 (ICC Exhibit 1a, p. 578).

²⁹⁵ J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, January 14, 1892, LAC, RG 10, vol. 1814, Series A and LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, pp. 580-581).

²⁹⁶ J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, January 14, 1892, LAC, RG 10, vol. 1814, Series A and LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, p. 580).

²⁹⁷ T.D. Green to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, August 21, 1884, LAC, RG 10, vol. 3685, file 13033 (ICC Exhibit 1a, p. 430).

²⁹⁸ E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, January 27, 1892, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 582).

²⁹⁹ [L. Vankoughnet] to E. McColl, Inspector of Indian Agencies, February 10, 1892, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, pp. 583-584). See the following plan for the original locations of the Red Earth and Flute Creek reserves: Department of Indian Affairs, "Sketch showing the positions of Red Earth and Flute River Reserves, traced from Map of Manitoba & North West Territories issued by the Department of the Interior, June 1891," traced by W.A. Austin on July 18, 1893 (ICC Exhibit 7j).

On December 16, 1892, Inspector McColl reported to the DSGIA, recommending that the exchange be approved:

I beg to inform you that the land at Flute River is very good but somewhat low, and in rainy seasons rather two [sic] such. The land at Red Earth is very superior but is also somewhat low, the banks of the river are about five feet above low water mark. At Red Earth [Carrot River] there are eleven dwelling houses, and ten stables, as well as eight gardens. On the reserve about five miles west of Red Earth there are fourteen garden patches of excellent potatoes raised on them.

The timber limit asked by them is about a mile or two west of Red Earth further up the river. The timber is principally spruce (white) and suitable for building, and for logs for making lumber by whip-saws for their houses.

As the Indians are most desirous for the exchange, and as they have built houses and stables at Red Earth and made considerable clearings around their dwellings, I would recommend that their request be granted, more especially as this portion of the Pas Mountain Band is most industrious having a large herd of cattle and raising a large crop of potatoes every year.³⁰⁰

On April 27, 1893, Assistant Surveyor Samuel Bray wrote the Deputy Minister of Indian Affairs regarding the exchange of the Flute Creek reserve for a reserve on the Carrot River for the Red Earth Band. Bray suggested that, because the Red Earth people were “exceptionally industrious,” their interests differed widely from those of the people at Shoal Lake. He explained that because of the distance between the two reserves, “trouble may ensue if they continue as one band and in the near future may prevent the surrender or subdivision of any of their reserves or of the execution of any measure requiring the vote of the entire band.”³⁰¹ Therefore, he proposed that steps be taken “to permanently separate the two portions of the Pas Mountain band into two separate bands.”³⁰² On May 2, 1893, the DSGIA wrote to Indian Inspector McColl for his opinion on this

³⁰⁰ E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to Deputy Superintendent General of Indian Affairs, December 16, 1892, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, pp. 597-598).

³⁰¹ Samuel Bray, Department of Indian Affairs, to Deputy Minister, April 27, 1893, LAC, RG 10, vol. 6246, file 539-1, part 1 (ICC Exhibit 1a, pp. 607-608).

³⁰² Samuel Bray, Department of Indian Affairs, to Deputy Minister, April 27, 1893, LAC, RG 10, vol. 6246, file 539-1, part 1 (ICC Exhibit 1a, p. 608).

suggestion.³⁰³ Following McColl's objection to the proposal, Vankoughnet advised the Lands Branch of the Department of Indian Affairs on June 13, 1893, that the Pas Mountain Band would not be formally separated to form the Red Earth and Shoal Lake Bands.³⁰⁴

On May 4, 1893, the DSGIA asked A.M. Burgess, Deputy Minister of the Department of the Interior, if there was any objection to exchanging the "Flute River" reserve, which contained 2,008 acres, for an equal area at Carrot River, where the Red Earth Band resided.³⁰⁵ In response, the Department of the Interior asked to be furnished with a sketch of the proposed location of the reserve and commented that it was understood that a reserve had already been set aside for the Band in the Carrot River area.³⁰⁶ Vankoughnet replied that the reserve already surveyed for the Red Earth Band was situated three miles south from the proposed location of the additional reserve, and he enclosed a plan indicating the lands desired on the Carrot River in exchange for the "Flute River" reserve.³⁰⁷

On June 30, 1893, Order in Council PC 1849 was approved, allowing for the exchange of the 2,008 acre "Flute Creek reserve" for an equal area of land at Red Earth on the Carrot River, for the use of the Pas Mountain Band.³⁰⁸

Addition of Carrot River Reserve and Re-Survey of Shoal Lake Reserve (1894)

On July 26, 1894, Hayter Reed, now DSGIA, wrote to Indian Agent Reader, informing him of the survey work required within The Pas Agency. Reed reminded the Indian Agent that an Order in Council had authorised the exchange of the Flute River (Creek) reserve for an equal amount of land

³⁰³ L. Vankoughnet, to E. McColl, Inspector of Indian Agencies, May 2, 1893, LAC, RG 10, vol. 6246, file 539-1, part 1 (ICC Exhibit 1a, pp. 611-612).

³⁰⁴ [L. Vankoughnet], Deputy Minister, Department of Indian Affairs, to Lands Branch, June 13, 1893, LAC, RG 10, vol. 6246, file 539-1, part 1 (ICC Exhibit 1a, p. 627).

³⁰⁵ Deputy Superintendent General of Indian Affairs to A.M. Burgess, Deputy Minister of the Interior, May 4, 1893, LAC, RG 15, vol. 686, file 329611 (ICC Exhibit 1a, p. 613).

³⁰⁶ Lyndwode Pereira, Assistant Secretary, Department of the Interior, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, May 13, 1893, LAC, RG 15, vol. 686, file 329611 (ICC Exhibit 1a, p. 622).

³⁰⁷ L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to A.M. Burgess, Deputy Minister of the Interior, June 2, 1893, LAC, RG 15, vol. 686, file 329611 (ICC Exhibit 1a, pp. 624-626).

³⁰⁸ Order in Council PC 1849, June 30, 1893, LAC, RG 2, Series 1, vol. 563 (ICC Exhibit 1a, pp. 637-639).

at Red Earth on the Carrot River, and that it had been agreed that a timber limit would also be set apart for the Pas Mountain Band. Reed instructed that those reserves were to be surveyed.³⁰⁹ In addition, Agent Reader was informed that an adjustment to the reserve at Shoal Lake was required, as it had been recommended that the Band be allowed to abandon part of its reserve in exchange for better, adjacent land.³¹⁰ On July 27, Surveyor Samuel Bray was advised of the new surveys required at Red Earth and Shoal Lake.³¹¹

The details of the changes to the Red Earth and Shoal Lake reserves were finalized in a meeting between Indian Agent Reader, Inspector McColl and Surveyor Bray on August 13, 1894. The following decisions were recorded in the minutes of that meeting:

The 'Pas Band'

...

A portion of Shoal Lake Reserve to be surrendered and a piece at the Easterly end of the same Reserve to be added to it, retaining that portion in the woods where the houses are – but cutting off the Westerly portion although there are houses on it.

The Flute Creek Reserve to be abandoned for a Reserve on the Carrot River at Red Earth Village including the Village and a portion of Carrot from the rear (prairie land) and a timber limit up the River (a few miles).³¹²

In November and December 1894, Bray re-surveyed the reserve at Shoal Lake and laid out the new Carrot River reserve for Red Earth.³¹³ In a memorandum recording an interview with Councillor Joseph Head of the “Shoal Lake Band,” Bray reported that the Councillor was pleased with the adjustments made to the Shoal Lake reserve. Bray also noted that “[h]is Chief, Antoine

³⁰⁹ Hayter Reed, Deputy Superintendent General of Indian Affairs, to J. Reader, July 26, 1894, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, pp. 647-649).

³¹⁰ Hayter Reed, Deputy Superintendent General of Indian Affairs, to J. Reader, July 26, 1894, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, p. 649).

³¹¹ Hayter Reed, Deputy Superintendent General of Indian Affairs, to Samuel Bray, DLS, Technical Branch, Department of Indian Affairs, July 27, 1894, LAC, RG 10, vol. 3920, file 116756 (ICC Exhibit 1a pp. 650-652).

³¹² Meeting Minutes, E. McColl, J. Reader & S. Bray, August 13, 1894, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, p. 657). The timber limit at Mountain Point Creek was set apart for The Pas Band by Surveyor Green in 1884.

³¹³ Diary, S. Bray, Assistant Chief Surveyor, August 3, 1894, to December 18, 1894, LAC, RG 10, vol. 3920, file 116756-2 (ICC Exhibit 1a, p. 654).

Constant (chief of the Pas bands) has written to him advising him to have his share of the abandoned Flute River Reserve” set apart as hay land. Councillor Head had therefore chosen a piece of land on the north side of the Carrot River and requested that it be surveyed.³¹⁴ Bray commented:

[m]y instructions are to lay out all the area of the Flute Creek Reserve at Red Earth; whatever rights he and his band had in the Flute Creek Reserve they would now have in the lands at Red Earth [now] about to be surveyed. In fact, the Department considered the Red Earth band and the Shoal Lake band to be only one band with two councillors* [Marginalia – *Pas Mountain Band]. Between them they will therefore have three reserves, viz. the Shoal Lake Reserve, the Red Earth Reserve South of the Carrot River, and the Red Earth Reserve on the Carrot River.³¹⁵

Bray added that, if the Shoal Lake Band had a large number of cattle, he would take the responsibility to lay aside more hay land, but since they did not have many cattle and already possessed pasture land, he thought it unnecessary. The Councillor of the Shoal Lake group also asked Bray whether additional grass land would be laid out for the Band if the people were to acquire a large number of cattle. He replied that he could not make any promise that more land would be set apart, but thought that the Band “would not do wrong to ask.”³¹⁶

On January 23, 1895, the Assistant Chief Surveyor, Samuel Bray, reported to DSGIA Hayter Reed regarding the surveys at Red Earth and Shoal Lake. At Shoal Lake, Bray noted that the old reserve excluded some lands that were under cultivation and other lands that were desired by the Band. He described the old reserve as an irregular oblong lying northeast and southwest, which he re-surveyed to a nearly square block with boundaries parallel to the township lines.³¹⁷ He noted that the new boundaries enclosed “all the lands desired by the Indians,” except for a small graveyard,

³¹⁴ Memorandum of Interview, S. Bray, Assistant Chief Surveyor, with Councillor Joseph Head, Shoal Lake Band, December 1, 1894, LAC, RG 10, vol. 7537, file 27128-1-8 (ICC Exhibit 1a, p. 664).

³¹⁵ Memorandum of Interview, S. Bray, Assistant Chief Surveyor, with Councillor Joseph Head, Shoal Lake Band, December 1, 1894, LAC, RG 10, vol. 7537, file 27128-1-8 (ICC Exhibit 1a, pp. 664-665).

³¹⁶ Memorandum of Interview, S. Bray, Assistant Chief Surveyor, with Councillor Joseph Head, Shoal Lake Band, December 1, 1894, LAC, RG 10, vol. 7537, file 27128-1-8 (ICC Exhibit 1a, pp. 665-666).

³¹⁷ S. Bray, Assistant Chief Surveyor, to Hayter Reed, Deputy Superintendent General of Indian Affairs, January 23, 1895, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, pp. 670-671).

which Bray surveyed “as a small separate reserve” of approximately half an acre.³¹⁸ Bray also reported that he did not survey additional hay land for the Band, as requested by them, because there was no immediate use for it and “this action would probably retard the removal of these Indians to Red Earth which I understood from Agent Reader was the desire of the Department.”³¹⁹

Survey Plan 246, dated November 30, 1894, shows the resurvey of the Shoal Lake reserve (renamed IR 28A) set aside for the “Shoal Lake Band of Indians, a branch of the Pas Mountain Band,” and containing an area of 2,236 acres.³²⁰ This resurvey included a slight increase in area compared with the original reserve (IR 28), which had an area of 2,190 acres. The plan also shows the old reserve boundaries and includes notations stating that those parts of the old reserve that fell outside the new boundaries had been “abandoned.” Finally, the plan shows a small graveyard of one acre outside the southwest corner of the new reserve boundaries.³²¹

After surveying the Shoal Lake reserve, Bray proceeded to Red Earth. He stated that it had been previously determined that three small separate reserves would be surveyed for the Band but, upon examination of the sites, Bray determined that “all the three localities could be enclosed in one reserve and the whole would not exceed the area of the abandoned reserve at Flute Creek.”³²² Survey Plan 248, dated December 8, 1894, shows the new reserve allocated to the “Red Earth band of Indians, a branch of the Pas Mountain band” on the banks of the Carrot River, named the Carrot

³¹⁸ S. Bray, Assistant Chief Surveyor, to Hayter Reed, Deputy Superintendent General of Indian Affairs, January 23, 1895, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, p. 671). *There are some discrepancies in the documentary record regarding the size of this small burial ground. While Bray’s report states that it contained approximately half an acre, Plan 246 shows an area of 1.00 acre. See: CLSR SK Plan 246, “Treaty No. 5 Saskatchewan Shoal Lake Indian Reserve,” surveyed by S. Bray, November 30, 1894 (ICC Exhibit 7k, p. 2).*

³¹⁹ S. Bray, Assistant Chief Surveyor, to Hayter Reed, Deputy Superintendent General of Indian Affairs, January 23, 1895, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, p. 672).

³²⁰ CLSR SK Plan 246, “Treaty No. 5 Saskatchewan Shoal Lake Indian Reserve,” surveyed by S. Bray, November 30, 1894 (ICC Exhibit 7k, p. 2).

³²¹ CLSR SK Plan 246, “Treaty No. 5 Saskatchewan Shoal Lake Indian Reserve,” surveyed by S. Bray, November 30, 1894 (ICC Exhibit 7k, p. 2).

³²² S. Bray, Assistant Chief Surveyor, to Hayter Reed, Deputy Superintendent General of Indian Affairs, January 23, 1895, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, p. 672).

River IR 29A, containing a total of 2,040 acres. A notation on the plan states: “This Reserve is substituted for the abandoned reserve at Flute River.”³²³

In concluding his survey report, Bray commented that efforts were made to ensure that the Red Earth and Shoal Lake Bands were satisfied with the reserves as surveyed, stating:

I invariably engaged the chief and councillors of each band as chainmen or axemen and always held a council the evening before to decide approximately on the lands to be surveyed and I made these men thoroughly understand that I held them responsible for the correct location of the reserves and that if anything connected with them or with the surveys did not appear to them to be correct or desirable they were at once to point it out in order that there should not be any subsequent complaints.³²⁴

On August 8, 1895, the Department of the Interior was sent the new survey plans with the adjustments to the reserves in The Pas Agency.³²⁵

These changes were confirmed and the lands withdrawn from the *Dominion Lands Act* by Order in Council PC 3027 on October 18, 1895.³²⁶ The Order confirmed IR 28A “for the Shoal Lake Band,” and the “Red Earth Reserve (No. 29A).” It also cancelled the former “Indian Reserves” that had been “abandoned by the Department of Indian Affairs,” including “The Pas Mountain Division Reserve at Flute Creek containing 2,008 acres” and the 2,237 acre former Shoal Lake reserve.³²⁷

A few Red Earth Elders recall hearing about a reserve at Flute Creek, although there is very little oral history evidence regarding what happened to it. Red Earth Elder John James Head recalls hearing about a meeting that resulted in “the transfer of Flute Creek” land to IR 29, although it is

³²³ CLSR SK Plan 248, “Treaty No. 5 Saskatchewan Red Earth Carrot River Indian Reserve No. 29A,” surveyed by S. Bray, December 8, 1894 (ICC Exhibit 7L, p. 2).

³²⁴ S. Bray, Assistant Chief Surveyor, to Hayter Reed, Deputy Superintendent General of Indian Affairs, January 23, 1895, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, p. 676).

³²⁵ S. Bray, to John R. Hall, Acting Deputy Minister of the Interior, August 8, 1895, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, pp. 678-679).

³²⁶ Order in Council PC 3027, October 18, 1895, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, pp. 685-686).

³²⁷ Order in Council PC 3027, October 18, 1895, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, p. 686).

unclear exactly when that meeting took place.³²⁸ Red Earth member Ian McKay recalls hearing his grandfather, Abel Head, speak about a time when he was staying at Flute Creek for one season. He said that a “leader” came back from a trip to The Pas and told him “to move from Flute Creek to 29A,” but that Abel did not understand the reason why he was asked to move.³²⁹ The timing of this event is uncertain as well, although Mr. McKay stated during the Community Session that Abel Head was born in 1922.³³⁰

Farming and Development at Red Earth and Shoal Lake (1892 - 1906)

On April 4, 1892, Indian Agent Reader wrote to the Indian Commissioner in Regina concerning the fortunes of the people residing at the Pas Mountain, and Shoal Lake in particular. He felt that the people at Shoal Lake would never prosper unless they could “be in a position to live chiefly by raising stock, and it is an excellent place for that.”³³¹ To meet this end, he recommended (as he had done some years previously) that a resident instructor be sent to Shoal Lake and Red Earth to instruct the people in agriculture.³³² A few months later, in June 1892, Agent Reader submitted his annual report for The Pas Agency, which reflected the same trends highlighted in previous years’ reports. Principally, he stated that Red Earth was thriving in comparison to its neighbours at Shoal Lake and added that “[f]or raising stock, agricultural operations, and carrying out the department’s instructions of sanitary measures, Red Earth Band is an example to the whole agency.”³³³

In Indian Agent Reader’s 1893 report, his comments were similar to those of previous years. He noted that the Red Earth people were a model for the other reserves and that they “cultivate

³²⁸ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 216-21, John James Head).

³²⁹ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 255, Ian McKay).

³³⁰ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 250, Ian McKay).

³³¹ J. Reader, Indian Agent, to Indian Commissioner, April 4, 1892, LAC, RG 10, vol. 1814, Series A (ICC Exhibit 1a, p. 589).

³³² J. Reader, Indian Agent, to Indian Commissioner, April 4, 1892, LAC, RG 10, vol. 1814, Series A (ICC Exhibit 1a, p. 589).

³³³ Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, June 25, 1892, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1892*, 165 (ICC Exhibit 1a, p. 594).

potatoes in abundance, and not only have sufficient for themselves, but some to spare for their less energetic neighbours at Shoal Lake.”³³⁴ He also remarked on the number of cattle and horses in their possession, many of which were acquired with their own money.³³⁵ As for Shoal Lake, Reader stated:

[t]hese Indians have been too fond of camping near the lake and the river, depending upon fish and game. They have therefore, as a whole, made but little progress in the cultivation of the soil. They have now decided to work more inland, where there is excellent soil and where a few have fine gardens. Piles of rubbish have been burnt, and houses and premises generally present a much better appearance than formerly.³³⁶

In 1894, Acting Indian Agent H. Reader reported more favourably on the Shoal Lake Band. He noted that their condition was improving, they had fair gardens and had relocated their houses to higher ground. He added, however, that they would “do better along with their thrifty neighbours at Red Earth,” but stated that they were not interested in relocating.³³⁷ The Acting Indian Agent’s commentary on Red Earth was similar to previous years, describing them as “the cleanest and tidiest of all the Indians in this agency.”³³⁸ He noted that they raised “comparatively large quantities of potatoes” (presumably with respect to Shoal Lake) but were in need of farming implements. He concluded that “[w]ere they taught to farm properly, and raise stock (of which they already have a number of head), they would without doubt support themselves entirely.”³³⁹

³³⁴ Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, June 29, 1893, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1893*, 69 (ICC Exhibit 1a, p. 635).

³³⁵ Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, June 29, 1893, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1893*, 69 (ICC Exhibit 1a, p. 635).

³³⁶ Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, June 29, 1893, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1893*, 70 (ICC Exhibit 1a, p. 636).

³³⁷ H. Reader, Acting Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, August 20, 1894, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1894*, 192 (ICC Exhibit 1a, p. 661).

³³⁸ H. Reader, Acting Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, August 20, 1894, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1894*, 193 (ICC Exhibit 1a, p. 661).

³³⁹ H. Reader, Acting Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, August 20, 1894, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1894*, 193 (ICC Exhibit 1a, p. 661).

Indian Agent J. Reader's 1895 annual report concerning Red Earth and Shoal Lake again echoed previous reports. He wrote:

[t]hese two off-shoots from the Pas Band have the advantage of first-class soil, especially that at Red Earth, and it only needs clearing and cultivating to raise all kinds of ordinary grain and vegetables. The Red Earth Indians are more thrifty than their neighbours at Shoal Lake, and have a goodly number of cattle, as well as some excellent gardens. They raise large crops of potatoes upon which and milk they chiefly live, for there are but few fish there, and those of an inferior kind.

There is no school at Red Earth, but one at Shoal Lake, which, however, is temporarily closed. The Indians at the latter place have done better since removing from the low, salty grounds to the woods where the soil is good.³⁴⁰

In the summer of 1896, Reader reported some positive developments on the Shoal Lake reserve. He noted that the Band was doing much better than formerly, citing the construction of new houses and the residents' attention to sanitary issues. Reader commented that, while hunting was not very good at Shoal Lake, it was a good place for cattle.³⁴¹ At Red Earth, Reader stated that the Band was progressing well, although his commentary was almost identical to the previous year:

The Red Earth Indian are, perhaps, at the head of all the bands in this agency for keeping their premises clean and tidy, and in supplying their houses with firewood. They are good gardeners, and live largely on potatoes and milk, having a goodly number of private animals. This year, as it was obvious they should cultivate the land to a greater extent than heretofore, they have received some assistance and this has been an encouragement to them.³⁴²

In the early summer of 1897, Indian Agent Reader submitted a report that was much more detailed than in previous years and examined topics including resources, health and sanitary conditions, education, religion, band characteristics, temperance and morality. Regarding the Shoal Lake reserve, Reader wrote that it "possesses some excellent patches for cultivation. Salt springs

³⁴⁰ Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, August 9, 1895, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1895*, 193 (ICC Exhibit 1a, p. 681).

³⁴¹ Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, July 3, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1896*, 128 (ICC Exhibit 1a, p. 693).

³⁴² Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, July 3, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1896*, 128 (ICC Exhibit 1a, p. 693).

abound in the neighbourhood, and there is fine fodder for cattle.”³⁴³ He reported that the Shoal Lake people had not been very successful in cattle production, but this was improving.³⁴⁴ With respect to Red Earth, Reader described the Band’s reserves as well adapted for cultivation, with large crops of potatoes that sustained them most of the year.³⁴⁵ He stated that the Band possessed sixty head of cattle and some horses and described the people as “thrifty” and well dressed despite their remote location.³⁴⁶

The subsequent annual report for The Pas Agency was submitted on September 30, 1899, by the new Indian Agent, Joseph Courtney. Commenting on Shoal Lake, Courtney stated:

The soil of this reserve, where cleared, is a deep sandy loam, and yields large crops of potatoes, There are several salt springs in the neighbourhood that produce a good, pure salt.

The only means of support here has been confined to the potato crop and hunting large game; but, owing to the encroachment of civilization from the south and west, game is getting scarce, and the Indians are beginning to realize the necessity of clearing off and breaking up more land and giving more attention to their cattle.³⁴⁷

At Red Earth, Agent Courtney observed that the Band was apparently regressing somewhat with respect to agriculture. As in Indian Agent Reader’s reports, Courtney described the soil at Red Earth as “all that could be desired.”³⁴⁸ However, the Band’s cattle herd had dwindled to 30 head and their

³⁴³ Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, June 25, 1897, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1897*, 103 (ICC Exhibit 1a, p. 696).

³⁴⁴ Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, June 25, 1897, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1897*, 103 (ICC Exhibit 1a, p. 696).

³⁴⁵ Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, June 25, 1897, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1897*, 103 (ICC Exhibit 1a, p. 696).

³⁴⁶ Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, June 25, 1897, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1897*, 104 (ICC Exhibit 1a, p. 697).

³⁴⁷ Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, September 30, 1899, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1899*, 90 (ICC Exhibit 1a, p. 715).

³⁴⁸ Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, September 30, 1899, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1899*, 90 (ICC Exhibit 1a, p. 715).

horses had all but disappeared. He noted that they depended largely on their potato crop and hunting large game for subsistence, but as with Shoal Lake, they recognized the necessity of concentrating more on farming.³⁴⁹

The following year, Courtney wrote similarly of the Red Earth and Shoal Lake Bands. He described the Shoal Lake reserve as “a most suitable piece of country for an Indian reserve,” and found that the band members occupied themselves by cultivating small gardens of potatoes, attending to their cattle, and hunting and trapping.³⁵⁰ Courtney described the Red Earth reserves as containing several hundred acres of land good for cultivation, with the rest being timber and hay lands. The agent commented that the cattle herd had not increased in some years, but that there was “a nice band of horses which they seem to prize more than cattle.”³⁵¹

In the fall of 1900, S.R. Marlatt, Inspector of Indian Agencies for the Manitoba Superintendency, reported on the condition of the Red Earth and Shoal Lake Bands. Marlatt’s account differed from that of Indian Agent Courtney with respect to the Shoal Lake reserve, describing it as “very low; the greater part of it is covered with a heavy forest of spruce, the soil is spongy and damp and not well adapted for gardening.”³⁵² By contrast, he noted that the soil at Red Earth was “good, quite dry enough and free from stones.”³⁵³

In his annual report, written in the summer of 1903, Indian Agent Courtney described the Shoal Lake reserve as largely covered with timber, with the remainder consisting of swamp or hay

³⁴⁹ Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, September 30, 1899, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1899*, 90 (ICC Exhibit 1a, p. 715).

³⁵⁰ Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, July 31, 1900, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900*, 92 (ICC Exhibit 1a, p. 720).

³⁵¹ Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, July 31, 1900, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900*, 93 (ICC Exhibit 1a, p. 721).

³⁵² S.R. Marlatt, Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, October 1, 1900, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900*, 105 (ICC Exhibit 1a, p. 734).

³⁵³ S.R. Marlatt, Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, October 1, 1900, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900*, 105 (ICC Exhibit 1a, p. 734).

land. Courtney reported a marked improvement in the condition and development of the Shoal Lake Band in comparison to previous years, noting that the Band had taken “quite an interest in stock-raising,” and that the herd was increasing rapidly.³⁵⁴ Furthermore, he observed that the houses were well built and clean and that the Band was growing large crops of potatoes. Courtney stated that the Shoal Lake reserve “contains two thousand two hundred and forty acres, a large portion of which is covered with timber. The remainder consists of swamp and hay land.”³⁵⁵ However, he noted there existed “an inclination to be industrious... as far as their surroundings would permit.”³⁵⁶ Courtney’s depiction of the Red Earth Band was not as complimentary as it was for Shoal Lake. While pointing out that they raised large crops of potatoes, he stated that only a few individuals had cattle and were not inclined to increase their numbers. Nevertheless, he stated that the Band made a good living from the potatoes and hunting and trapping, which he deemed necessary as there was no opportunity for outside employment due to the remoteness of the reserve.³⁵⁷

In 1906, Indian Agent Courtney reported that the Shoal Lake Band had reached a population of 70 and described their reserve as having some land suitable for cultivation, and a “large extent” of pasture and hay land ideal for cattle ranching. Although band members produced large crops of potatoes and had a few cattle, he noted that hunting was the principal occupation of the Shoal Lake people. Courtney added that the reserve had “hay and pasture enough for several hundred head of

³⁵⁴ Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, July 6, 1903, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1903*, 91 (ICC Exhibit 1a, p. 753).

³⁵⁵ Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, July 6, 1903, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1903*, 91 (ICC Exhibit 1a, p. 753).

³⁵⁶ Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, July 6, 1903, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1903*, 91 (ICC Exhibit 1a, p. 753).

³⁵⁷ Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, July 6, 1903, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1903*, 92 (ICC Exhibit 1a, p. 754).

cattle, but being so isolated and far from an outlet, there has been no inducement to increase the herd beyond their own requirements.”³⁵⁸

At Red Earth, Courtney assessed the Band’s population to be 123.³⁵⁹ He noted that they had large gardens and produced excellent crops of potatoes, on which they relied between hunting seasons, but stated that the “few cattle which they have on this reserve seem to be more trouble than benefit to them, and until radical change takes place, very little interest will be taken in stock-raising.”³⁶⁰

The DSGIA’s annual report for 1906 emphasized the importance of developing agriculture on reserves. While it was noted that First Nations devoted themselves to a variety of occupations, including hunting and trapping, farming and wage labour, agriculture was considered to have a comparative advantage over other occupations for its civilising effect. Although it was difficult for the department to control which occupations certain bands dedicated themselves to, the DSGIA concluded that

[t]he only direction in which the department can appreciably control the selection of occupation is among those emerging from aboriginal conditions, for whom agriculture is clearly the best and often the only available employment.³⁶¹

Separate Paylists Created for the Red Earth and Shoal Lake Bands (1903)

Prior to 1903, the Red Earth and Shoal Lake Bands had been described on the pay sheets as the ‘Pas Band paid at Red Earth and Shoal Lake.’ It was decided in that year, however, that, since those Bands had “no connexion [sic] with the Pas Band in any way whatever,” they would be given their

³⁵⁸ Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, June 30, 1906, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1906*, 89 (ICC Exhibit 1a, p. 756).

³⁵⁹ Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, June 30, 1906, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1906*, 89 (ICC Exhibit 1a, p. 756).

³⁶⁰ Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, June 30, 1906, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1906*, 90 (ICC Exhibit 1a, p. 757).

³⁶¹ Report of the Deputy Superintendent General of Indian Affairs, June 30, 1906, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1906*, xxiii (ICC Exhibit 1a, p. 759).

own paylists.³⁶² From that year forward, separate annuity paylists were maintained for the Red Earth and Shoal Lakes Bands.³⁶³ From 1903-1912, one Councillor was identified on each Band's paysheets.³⁶⁴

Additions and Adjustments to the Red Earth and Shoal Lake Reserves (1908 - 1913)

In the spring of 1908, both the Shoal Lake and Red Earth Bands requested additions to their respective reserves. The Shoal Lake Band asked for approximately one quarter-section (160 acres) on the north side of the Carrot River opposite its existing reserve, because band members claimed to be unable to procure enough hay in years of high water.³⁶⁵ Similarly, the Red Earth Band requested the addition of a quarter-section of land north of the Carrot River for timber and hay lands. The Red Earth Band members claimed that they presently had to go outside their reserve boundaries to obtain adequate amounts of both hay and timber. They feared that, in the future, the encroachment of settlers would confine them to the reserve for those resources.³⁶⁶

In a memo to the Deputy Minister dated March 25, 1908, Chief Surveyor Samuel Bray recommended that the Bands' requests be granted, saying he considered them "very reasonable," and suggesting that the Indian Agent be instructed to delineate tracts of land not exceeding half a section (320 acres) to secure the lands until they could be surveyed in the regular manner.³⁶⁷

³⁶² Joseph Courtney, Indian Agent, to Secretary, Department of Indian Affairs, June 10, 1903, LAC, RG 10, vol. 8139, file 578/28-5, vol. 1 (ICC Exhibit 1a, p. 751).

³⁶³ See: Treaty annuity payroll for "Red Earth Band" and "Shoal Lake Band" 1903, LAC, RG 10, vol. 9378, pp. 379-384 and pp. 377-378 (ICC Exhibit 1b, pp. 207-209 and p. 246).

³⁶⁴ Treaty Annuity Paylist, "Shoal Lake Band paid at Shoal Lake," 1903-1912, LAC, RG 10, vol. 9378-9387 (ICC Exhibit 1b, p. 246-55); Treaty Annuity Paylist, "Red Earth Band paid at Red Earth," 1903-1912, LAC, RG 10, vol. 9378-9387 (ICC Exhibit 1b, pp. 207-229).

³⁶⁵ [Fred] Fischer, Indian Agent, to Secretary, Department of Indian Affairs, March 6, 1908, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 764).

³⁶⁶ Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs, March 6, 1908, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 765).

³⁶⁷ S. Bray, Department of Indian Affairs, to Deputy Minister, March 25, 1908, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 767).

On March 27, 1908, the Secretary of the Department of Indian Affairs, J.D. McLean, instructed Indian Agent Fred Fischer to survey the additions to the Red Earth and Shoal Lake reserves. As a formal re-survey of the reserves was not likely to take place for some time, he was told to lay out the desired tracts of land to the best of his ability, not in excess of 320 acres for each Band. McLean stated that the Bands should be informed that the land was not finally secured for them until approval was given by Order in Council.³⁶⁸

Indian Agent Fischer attempted to mark out the additions to the reserves in May 1908. Due to extensive flooding in the region, however, it was impossible for him to undertake that work.³⁶⁹ With respect to Red Earth, Fischer wrote that the Band was pleased that its request had been granted and asked that the addition to its reserve be made as two tracts of 160 acres each because the hay and timber lands were located in different areas.³⁷⁰ The department agreed to this request and informed the Indian Agent, directing him to provide a sketch or plan of the requested lands as soon as possible.³⁷¹

In May 1908, Agent Fischer suggested that, in order to distinguish between the two reserves belonging to the Red Earth Band, that the original reserve, which was traversed by Red Earth Creek, be referred to as Red Earth IR 29, and that the reserve on the Carrot River be called Carrot River IR (29A).³⁷² These suggestions were subsequently approved by Secretary J.D. McLean.³⁷³

³⁶⁸ J.D. McLean, Secretary, to Fred Fischer, Indian Agent, March 27, 1908, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 768).

³⁶⁹ Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs, May 29, 1908, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 769). See also: Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs, May 29, 1908, DIAND, file 672/30-28 (ICC Exhibit 1a, p. 770).

³⁷⁰ Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs, May 29, 1908, DIAND, file 672/30-28 (ICC Exhibit 1a, p. 770).

³⁷¹ J.D. McLean, Secretary, to Fred Fischer, Indian Agent, June 17, 1908, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 772).

³⁷² Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs, May 29, 1908, DIAND, file 672/30-28 (ICC Exhibit 1a, p. 770).

³⁷³ J.D. McLean, Secretary, to Fred Fischer, Indian Agent, June 17, 1908, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 772).

On March 26, 1910, Indian Agent Fischer submitted his sketch of the proposed addition to the Shoal Lake reserve to the department.³⁷⁴ The historical record indicates Fischer submitted a sketch of the hay lands requested by the Red Earth Band on the same day.³⁷⁵ Indian Agent Fischer had suggested to Secretary McLean that the lands already held by the Red Earth Band be re-configured to incorporate the changes requested by the Band. In response, the Indian Agent was instructed to ascertain all the changes requested and report on the necessity of those changes, to then be considered by the department. If the reconstruction was approved, Fischer was told the Band would have to surrender the old reserve in exchange for the new one.³⁷⁶ The matter was placed before the Red Earth Band at the time of the annuity payments.³⁷⁷ On August 15, 1910, the Red Earth Band signed a letter, agreeing to accept the new boundaries of Red Earth IR 29 in exchange for a surrender of the old IR 29.³⁷⁸ The letter was signed with ‘X’ marks by Councillor Jeremiah Nawakayas and twelve other members of the Red Earth Band.³⁷⁹

On April 12, 1910, Secretary J.D. McLean wrote to the Secretary of the Department of the Interior, proposing an addition to the Shoal Lake reserve of one square mile (640 acres) north of the Carrot River.³⁸⁰ On July 12, 1910, the Assistant Secretary of the Department of the Interior

³⁷⁴ Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs, March 26, 1910, No file reference available (ICC Exhibit 1a, p. 773).

³⁷⁵ Secretary, to Fred Fischer, Indian Agent, April 5, 1910, DIAND, file 672/30-28 (ICC Exhibit 1a, p. 774).

³⁷⁶ Secretary, to Fred Fischer, Indian Agent, April 5, 1910, DIAND, file 672/30-28 (ICC Exhibit 1a, p. 774).

³⁷⁷ Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs [September 1, 1910], DIAND, file 672/30-28 (ICC Exhibit 1a, p. 776).

³⁷⁸ Letter of Surrender for Exchange, Red Earth Band, August 15, 1910, DIAND, 672/30-28, vol. 1 (ICC Exhibit 1a, pp. 785-786).

³⁷⁹ Letter of Surrender for Exchange, Red Earth Band, August 15, 1910, DIAND, 672/30-28, vol. 1 (ICC Exhibit 1a, pp. 785-786).

³⁸⁰ J.D. McLean, Secretary, Department of Indian Affairs, to P.G. Keyes, Secretary, Department of the Interior, April 12, 1910, LAC, RG 15, D-II-1, vol. 723, file 387790 (ICC Exhibit 1a, p. 777).

acknowledged that the application for the addition had been received and stated that consideration of the proposal was pending the receipt of a survey plan for the area.³⁸¹

It appears that, by the fall of 1910, the addition to the Shoal Lake reserve and the reconstruction (with additions) of the Red Earth reserve had been approved by the Department of the Interior. On October 14, 1910, Indian Agent Fischer wrote to the Department of Indian Affairs requesting that a surveyor be sent to those reserves to define the new boundaries.³⁸²

Formal Survey of Additions to Shoal Lake IR 28A and Red Earth IR 29 (1911)

On May 6, 1911, J.D. McLean instructed Dominion Land Surveyor H.B. Proudfoot to survey a one-square-mile block of land north of the Carrot River as an addition to the Shoal Lake reserve. Proudfoot was asked to take special care not to include lands that had been set aside by the Department of the Interior as a timber berth, and to verify that this timber berth had not encroached on lands already belonging to the Shoal Lake Band.³⁸³ Instructions concerning the re-survey of the Red Earth reserve are not on the documentary record for this inquiry.

Proudfoot completed the survey of the Shoal Lake reserve in the fall of 1911. Writing to Secretary McLean on November 17, 1911, however, Proudfoot stated that it was difficult to set aside additional land that would adjoin the north end of the reserve while encompassing the hay lands desired by the Band. For that reason, the addition to the reserve took the form of an inverted letter “L,” which was illustrated in the margin of Proudfoot’s letter.³⁸⁴ An undated survey plan produced by Proudfoot circa 1911 illustrates in greater detail the addition to Shoal Lake IR 28A.³⁸⁵ Later plans

³⁸¹ Pereira, Assistant Secretary, Department of the Interior, J.D. McLean, Secretary, Department of Indian Affairs, July 12, 1910, LAC, RG 10, vol. 7776, file 27128-1 (ICC Exhibit 1a, p. 784).

³⁸² Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs, October 14, 1910, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 787).

³⁸³ J.D. McLean, Assistant Deputy and Secretary, to H.B. Proudfoot, Department of Indian Affairs, May 6, 1911, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 788).

³⁸⁴ H.B. Proudfoot, Indian Office, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, November 17, 1911, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 798).

³⁸⁵ Source unknown, “Indian Reserve 28A Carrot River [Shoal Lake], Plan showing the addition to Indian Reserve 28A and the tie line between IR 28A and the 14th base line as surveyed by J.N. Wallace DLS, 1906, and the correction to be applied to Wallace’s tie line,” surveyed by H.B. Proudfoot, DLS, circa 1911 (ICC Exhibit 7n).

show the addition to the reserve as containing an area of 651 acres, slightly more than the anticipated 640 acres.³⁸⁶

In his official report, dated March 21, 1912, Surveyor Proudfoot noted that he conferred with “Albert Moore Chief” and “Councillor” Francis Bear regarding the lands to be surveyed.³⁸⁷ (This is the first reference in departmental correspondence to a Chief at Shoal Lake.) Both Proudfoot’s report and his diary reflect considerable difficulty with the survey, owing primarily to confusion amongst band members regarding the boundaries of their reserve and which lands were desired for the addition.³⁸⁸ He commented in his diary that “These Indians have a very small idea of locality. There was no one on the Reserve that had ever seen any of the lines except at the S.W. corner ... so a good deal of hunting had to be done to locate the boundaries of the Reserve.”³⁸⁹

Regarding the timber berth, Proudfoot reported that timber berth 920 covered the greater part of the existing Shoal Lake reserve (IR 28A).³⁹⁰ McLean immediately informed the Department of the Interior accordingly and requested that the owners of the berth be informed of its cancellation.³⁹¹

In the fall of 1912, Secretary J.D. McLean of the Department of Indian Affairs wrote the Department of the Interior requesting that an Order in Council be drafted to confirm the addition of 651 acres to Shoal Lake IR 28A.³⁹² Before this could be done, however, the Department of the

³⁸⁶ DIAND, Indian Lands Registry, Plan 1225 (Microplan 1211), “Indian Reserve 28A Shoal Lake, Plan showing the addition to Indian Reserve 28A and the tie line between IR 28A and the 14th base line as surveyed by J.N. Wallace DLS, 1906, and the correction to be applied to Wallace’s tie line,” surveyed by H.B. Proudfoot, DLS, circa 1911 (ICC Exhibit 7o, p. 1).

³⁸⁷ H.B. Proudfoot to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, March 21, 1912, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 809).

³⁸⁸ H.B. Proudfoot to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, March 21, 1912, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, pp. 809-10); Diary of H.B. Proudfoot, September 9, 1911 - January 24, 1912, LAC, RG 10, vol. 4055, file 385,392 (ICC Exhibit 1a, pp. 814-16).

³⁸⁹ Diary of H.B. Proudfoot, September 9, 1911 - January 24, 1912, LAC, RG 10, vol. 4055, file 385,392 (ICC Exhibit 1a, p. 816).

³⁹⁰ H.B. Proudfoot, Indian Office, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, November 17, 1911, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 799).

³⁹¹ J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Secretary, Department of the Interior, November 29, 1911, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 800).

³⁹² J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Secretary, Department of the Interior, September 13, 1912, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 833).

Interior requested justification for the addition to the Shoal Lake reserve, and inquired whether there was not sufficient land on the existing reserve for the Band's population.³⁹³ In his reply, McLean stated:

the population of Shoal Lake Band is eighty-nine souls. As these people are given land under the provisions of treaty No. 5, which allows one hundred and sixty acres for a family of five they are therefore entitled to two thousand eight hundred and forty-eight acres. The original reserve consisted of two thousand two hundred and thirty-seven acres. The addition requested is six hundred and fifty-one acres which would make a total of two thousand eight hundred and eighty-eight acres. It will also be remembered that most of the treaties allow six hundred and forty acres for each family of five. It is therefore considered that the lands asked for by this band are very reasonable.³⁹⁴

It appears that McLean's explanation was sufficient for the Department of the Interior to justify the addition to the reserve. Order in Council PC 2256 was approved on August 30, 1913, confirming the addition of 651 acres to Shoal Lake IR 28A.³⁹⁵

In the fall of 1911, H.B. Proudfoot also completed the re-survey of Red Earth IR 29. He adjusted the boundaries of the reserve in order to incorporate the hay lands desired by the Band, and adjusted the orientation of the reserve so that the boundaries ran north-south and east-west rather than northeast to southwest.³⁹⁶ Proudfoot's report on this survey notes that he conferred with "Chief Jeremiah" regarding the reserve boundaries and the location of the desired hay lands.³⁹⁷ (This is the

³⁹³ N.C. Coté, Controller, Land Patents Branch, Department of the Interior, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, August 15, 1913, LAC, RG 10, vol 7776, file 27128-10 (ICC Exhibit 1a, p. 835).

³⁹⁴ J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to N.O. Coté, Controller, Land Patents Branch, Department of the Interior, August 20, 1913, LAC, RG 15, D-II-1, vol. 723, file 387790 (ICC Exhibit 1a, p. 836).

³⁹⁵ Order in Council PC 2256, August 30, 1913, DIAND, Indian Lands Registry, Instrument No. X11394 (ICC Exhibit 1a, pp. 838-839).

³⁹⁶ Field Notes, H.B. Proudfoot, October 9, 1911 to November 5, 1911, Office of the Treaty Commissioner (ICC Exhibit 1a, p. 793).

³⁹⁷ H.B. Proudfoot, D.L. Surveyor, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, March 21, 1912, in "Field Notes of Indian Reserve No. 29 Red Earth and Tie Line between I.R. No. 29 and the 14 Base," surveyed by H.B. Proudfoot, D.L.S., October 9 - November 5, 1911, p. 25, Office of the Treaty Commissioner (ICC Exhibit 1a, p. 793).

first reference in departmental correspondence to a Chief at Red Earth.) Proudfoot commented in his diary that “[t]he Chief knows nothing about the Reserve lines on either of the Reserves 29 or 29A, but is to bring a man in the morning, who was a former chief, and is said to know them all.”³⁹⁸ It appears that the hay lands desired by the Band north of the Carrot River were abandoned for more land added to the reconfigured IR 29.

As Proudfoot pointed out, the newly surveyed Red Earth IR 29 encroached on timber berth 1670.³⁹⁹ Attached to a letter written by Secretary McLean is a sketch of the newly defined reserve boundaries in relation to those of the old Red Earth IR 29.⁴⁰⁰ Survey Plan 1200, dated November 1, 1911, displays the position of the reconfigured Red Earth IR 29, containing an area of 3,595.95 acres.⁴⁰¹ This represented an increase of 884.31 acres, as the original IR 29 contained 2,711.64 acres.

By Order in Council PC 2019, dated July 20, 1912, the addition to and reconfiguration of IR 29 was confirmed, and the reserved lands were withdrawn from the operation of the *Dominion Lands Act*.⁴⁰² No adjustments were made to the boundaries of Carrot River IR 29A.

³⁹⁸ Diary of H.B. Proudfoot, September 9, 1911 - January 24, 1912, LAC, RG 10, vol. 4055, file 385,392 (ICC Exhibit 1a, p. 817).

Proudfoot’s report notes that “the rest of the Indians of the Reserve” were equally unaware of where the reserve boundaries were located. See, H.B. Proudfoot, D.L. Surveyor, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, March 21, 1912, in “Field Notes of Indian Reserve No. 29 Red Earth and Tie Line between I.R. No. 29 and the 14 Base,” surveyed by H.B. Proudfoot, D.L.S., October 9 - November 5, 1911, p. 25, Office of the Treaty Commissioner (ICC Exhibit 1a, p. 793).

³⁹⁹ Field Notes, H.B. Proudfoot, October 9, 1911 to November 5, 1911, Office of the Treaty Commissioner (ICC Exhibit 1a, p. 794).

⁴⁰⁰ J.D. McLean, Assistant Deputy and Secretary, to H.B. Proudfoot, care of F. Fischer, Indian Agent, November 30, 1911, No file reference available (ICC Exhibit 1a, p. 804).

⁴⁰¹ DIAND, Indian Lands Registry, Plan 1200 (Microplan 1224 and 882), “Plan showing Indian Reserve No. 29, Red Earth, and the tie line connecting that Reserve with I.R. 29A Carrot River also tie line from Indian Reserve 29A Carrot River to 14th Base Line, The plan also shows the old position of the Indian Reserve No. 29,” surveyed by H.B. Proudfoot, November 1, 1911 (ICC Exhibit 7p); see also: DIAND, Indian Lands Registry, Plan T1200 (Microplan 1224 and 882), “Plan showing Indian Reserve No. 29, Red Earth, and the tie line connecting that Reserve with I.R. 29A Carrot River also tie line from Indian Reserve 29A Carrot River to 14th Base Line, The plan also shows the old position of the Indian Reserve No. 29,” surveyed by H.B. Proudfoot, November 1, 1911 (ICC Exhibit 7q).

⁴⁰² Order in Council PC 2019, July 20, 1912, LAC, RG 15, D-II-1, vol. 686, file 32961 (ICC Exhibit 1a, p. 829).

Chiefs and Councillors Identified on the Paylists of the Red Earth and Shoal Lake Bands (1913)

Chiefs of the Red Earth and Shoal Lake Bands were identified as such on the treaty annuity paylists for the first time in 1913. The Shoal Lake Band payroll for that year identifies Albert Moore as Chief, in addition to one Councillor.⁴⁰³ The Red Earth Band payroll similarly identifies Jeremiah Nawakayas as Chief, along with two Councillors.⁴⁰⁴

Requests for Additions to the Red Earth and Shoal Lake Reserves (1914 - 1921)

Shortly after the additions and adjustment were made to Red Earth IR 29 and Shoal Lake IR 28A, the Bands put forth additional requests for land to the Department of Indian Affairs. At Red Earth, extensive flooding in 1913 led the Red Earth Band to consider relocating to drier lands. Inspector S.J. Jackson informed the department on November 29, 1913 that:

While at the Red Earth reserve during the treaty payments the band brought up the question of their upper reserve at Float River, and desired me to find out in what shape that part of the reserve is. Last Spring their present reserve was almost completely flooded and they may have to move. ... Do they own the upper reserve or not?⁴⁰⁵

In reply, Assistant Deputy and Secretary J.D. McLean noted that the reserve at Flute Creek was surrendered in exchange for the Carrot River reserve (IR 29A) in 1894, “in accordance with their own request.”⁴⁰⁶ The principal reason advanced by the Band at that time for the exchange was that the Flute Creek reserve was too low and wet, an assertion supported by Inspector McColl.⁴⁰⁷

⁴⁰³ Treaty Annuity Paylist, Shoal Lake Band paid at Reserve, July 21, 1913, LAC, RG 10, vol. 9388 (ICC Exhibit 1b, p. 256). See ticket #200 Albert Moore and #289 John Head.

⁴⁰⁴ Treaty Annuity Paylist, Red Earth Band paid at Reserve, July 22, 1913, LAC, RG 10, vol. 9388 (ICC Exhibit 1b, pp. 230-31). See ticket #199 Jeremiah Nawakayas, #274 Onepinotas and #283 Zac. Umpherville.

⁴⁰⁵ S.J. Jackson, Inspector of Indian Agencies, Lake Manitoba Inspectorate, to Assistant Deputy and Secretary, Department of Indian Affairs, November 29, 1913, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 841).

⁴⁰⁶ J.D. McLean, Assistant Deputy and Secretary, to S.J. Jackson, Inspector of Indian Agencies, December 5, 1913, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 842).

⁴⁰⁷ J.D. McLean, Assistant Deputy and Secretary, to S.J. Jackson, Inspector of Indian Agencies, December 5, 1913, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 842).

Subsequently, the Band requested an addition of a half-section (320 acres) of land to be added to the north end of Red Earth IR 29. On January 12, 1914, Secretary J.D. McLean directed Indian Agent W.R. Taylor to gather information and report on the details of the additional lands requested.⁴⁰⁸

At about the same time, the Shoal Lake Band requested an addition to IR 28A that would encompass the Band's burial grounds. This request was forwarded to the Department of the Interior by Assistant Deputy and Secretary of Indian Affairs J.D. McLean. McLean acknowledged that, under Treaty 5, the Band had received its full land entitlement (160 acres per family of five), but stated that, since nearly all the other treaties allowed 640 acres per family of five, he felt it reasonable that the small addition be granted.⁴⁰⁹ The subject land consisted of 200 acres located outside the southwest portion of Shoal Lake IR 28A.⁴¹⁰ The parcel appears to encompass the "small separate reserve" surveyed by Samuel Bray in 1894, which was intended to enclose the burial ground and to form part of IR 28A.⁴¹¹ However, that small "reserve" does not appear on the plans of IR 28A produced after Bray's 1894 survey. Controller N.O. Coté of the Land Patents Branch of the Department of the Interior stated that some haste was required to secure these lands before legislation established the Pasquia Hills Forest Reserve; if not, the land would be unavailable to the Band.⁴¹² On June 9, 1914,

⁴⁰⁸ J.D. McLean, Assistant Deputy and Secretary, to W.R. Taylor, Indian Agent, January 12, 1914, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 844).

⁴⁰⁹ J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Secretary, Department of the Interior, April 11, 1914, LAC, RG 10, vol. 723, file 387790 (ICC Exhibit 1a, p. 845).

⁴¹⁰ N.O. Coté, Controller, Land Patents Branch, Department of the Interior, to W.W. Cory, Deputy Minister of the Interior, May 13, 1914, LAC, RG 15, vol. 723, file 387790 (ICC Exhibit 1a, p. 847); see also: DIAND, Indian Lands Registry, Plan 1225 (Microplan 1211), "Indian Reserve 28A Shoal Lake, Plan showing the addition to Indian Reserve 28A and the tie line between IR 28A and the 14th base line as surveyed by J.N. Wallace DLS, 1906, and the correction to be applied to Wallace's tie line," surveyed by H.B. Proudfoot, circa 1911 (ICC Exhibit 7o).

⁴¹¹ DIAND, Indian Lands Registry, Plan 1225 (Microplan 1211), "Indian Reserve 28A Shoal Lake, Plan showing the addition to Indian Reserve 28A and the tie line between IR 28A and the 14th base line as surveyed by J.N. Wallace DLS, 1906, and the correction to be applied to Wallace's tie line," surveyed by H.B. Proudfoot, circa 1911 (ICC Exhibit 7o); CLSR SK Plan 246, "Treaty No. 5 Saskatchewan Shoal Lake Indian Reserve," surveyed by S. Bray, November 30, 1894 (ICC Exhibit 7k, p. 2).

⁴¹² N.O. Coté, Controller, Land Patents Branch, Department of the Interior, to W.W. Cory, Deputy Minister of the Interior, May 13, 1914, LAC, RG 15, vol. 723, file 387790 (ICC Exhibit 1a, p. 848).

Order in Council PC 1492 confirmed the addition of 200 acres to Shoal Lake IR 28A for the purpose of including the Band's burial grounds within the reserve.⁴¹³

On December 9, 1914, Indian Agent W.R. Taylor reported that the Red Earth Band was again requesting an addition of 320 acres to its reserve. The Band complained that there was little hay on its reserve and, in certain years of high water, none at all. The Indian Agent suggested that the Band's request be granted without delay, as settlers were spreading along the Carrot River toward Red Earth and the area would soon be homesteaded.⁴¹⁴

Three and a half years later, the department responded to this request. Secretary McLean wrote to Acting Indian Agent S.L. Macdonald on April 9, 1918, advising that IR 29 and 29A contained a greater area than the Band was entitled to under treaty and, therefore, applications for additional land would not be considered unless it could be shown that it was absolutely necessary.⁴¹⁵ On January 8, 1919, Macdonald replied to McLean regarding the necessity of additional land at Red Earth. The Agent described the hay land given to the Band in 1911 as made up of mostly "alkali land" and "impassable swamp," and stated that in the previous summer they cut all the hay available, which only yielded half their total requirement. He argued that it would be to the Band's advantage to have an additional three or four hundred acres of hay land.⁴¹⁶ McLean responded that the Band already had two reserves, amounting to a total area of 5,635.95 acres, exceeding its treaty land entitlement by almost 650 acres, and inquired whether the Band would be "willing to surrender some portion of their present reserve in exchange for another portion which may be considered more suitable for their purposes."⁴¹⁷ The historical record contains no response to this proposal.

⁴¹³ Order in Council PC 1492, June 9, 1914, DIAND, Indian Lands Registry, Instrument No. X11395 (ICC Exhibit 1a, p. 851).

⁴¹⁴ W.R. Taylor, Indian Agent, to Assistant Deputy and Secretary, Department of Indian Affairs, December 9, 1914, DIAND, file 578/30-47-27A, vol. 1 (ICC Exhibit 1a, p. 854).

⁴¹⁵ J.D. McLean, Assistant Deputy and Secretary, to S.L. Macdonald, Acting Indian Agent, April 9, 1918, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 860).

⁴¹⁶ S.L. Macdonald, Indian Agent, to Assistant Deputy and Secretary, Department of Indian Affairs, January 8, 1919, No file reference available (ICC Exhibit 1a, p. 878).

⁴¹⁷ J.D. McLean, Assistant Deputy and Secretary, to S.L. Macdonald, Indian Agent, January 14, 1919, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 879).

In the spring of 1921, the Red Earth community experienced a large flood. A resident from Shoal Lake reported to the Indian Agent that practically all the cattle and horses had drowned at Red Earth and the people were forced to retreat to the roofs of their houses. The Indian Agent requested that the department consider possible areas where the Red Earth people could relocate. Presumably referring to IR 29A, the Agent noted in this request that the Band was living “on the fringe of the river, a strip about 500 yards wide, the balance being swamp.”⁴¹⁸ On May 27, 1921, Secretary McLean wrote that “[t]here must be some very unusual and special reasons for the cause of the flooding as the Indians have been at the Red Earth Reserve for a number of years without having such an unusual experience.”⁴¹⁹ He added that the Indian Agent should identify a tract of land for a new reserve, which the department would consider granting in exchange for the current reserve (Carrot River IR 29A).⁴²⁰ On June 26, 1921, Indian Agent Waddy wrote a reply to the department in which he noted that, since the spring flood, the band members had “forgotten most of their troubles”⁴²¹ and had decided against relocating. The Chief informed Waddy that, in the future, they would move their cattle to higher ground (IR 29) in the spring and keep them there until the flood danger had passed. Still, the Band requested additional hay land on the “west side” of the Carrot River, containing approximately one section of land (640 acres). Waddy suggested to the Band that it exchange some of its current reserve for lands elsewhere, but the Band was reportedly not interested in that arrangement. Nevertheless, Waddy recommended that hay land should be procured for the Red Earth people.⁴²²

On July 15, 1921, A.F. Mackenzie wrote to Indian Commissioner Graham on behalf of the Assistant Deputy and Secretary of Indian Affairs regarding the additional hay lands requested by the

⁴¹⁸ J.W. Waddy, Indian Agent, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, May 16, 1921, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 883).

⁴¹⁹ J.D. McLean, Assistant Deputy and Secretary, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, May 27, 1921, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 885).

⁴²⁰ J.D. McLean, Assistant Deputy and Secretary, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, May 27, 1921, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 885).

⁴²¹ J.W. Waddy, Indian Agent, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, June 26, 1921, DIAND, 672/30-28, vol. 1 (ICC Exhibit 1a, p. 886).

⁴²² J.W. Waddy, Indian Agent, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, June 26, 1921, DIAND, 672/30-28, vol. 1 (ICC Exhibit 1a, p. 886).

Red Earth Band. He noted that the Band had received an excess of reserve land according to its treaty land entitlement and added “[i]f the band desires to make an exchange, their request might be considered but there does not appear to be sufficient ground for making a request for additional land.”⁴²³ This appears to be the final discussion on the matter, as no further adjustments were made to the reserve lands of the Red Earth people.

Additions and Adjustments to Shoal Lake IR 28A (1926 - 1927)

On March 15, 1926, Indian Agent Waddy informed the Department of Indian Affairs that the Shoal Lake Band had requested a surrender for exchange of 640 acres of its reserve. The area the Band wished to surrender was comprised of a shallow lake and swamp. In exchange, the Band wanted to acquire lands south of the Sipanok Channel (located northeast of IR 28A), which contained timber and hay resources. The Indian Agent noted that, while the land requested was better than the section to be surrendered, it was “not valuable,” as the “whole district up there floods at certain times.”⁴²⁴ That same month, the request was forwarded by the Department of Indian Affairs to the Department of the Interior with a request that the latter determine whether the desired lands lying north of the reserve (south half of sections 5 and 6, township 53, range 4, W of 2nd meridian) were available for exchange.⁴²⁵ Controller N.O. Coté of the Department of the Interior replied that the lands requested appeared to be available with the exception of a portion of land that lay within timber berth 2946. Coté also wished to be provided with reasons why the exchange of land was desired.⁴²⁶ Secretary McLean replied, on April 19, 1926, that the purpose of the exchange was to obtain “additional hay lands for the use of these Indians and also a small amount of timber.”⁴²⁷

⁴²³ A.F. Mackenzie, for Assistant Deputy and Secretary, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, July 15, 1921, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 887).

⁴²⁴ J.W. Waddy, Indian Agent, to Assistant Deputy and Secretary, Department of Indian Affairs, March 15, 1926, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 896).

⁴²⁵ J.D. McLean, Assistant Deputy and Secretary, to Controller, Land Patents Branch, Department of the Interior, March 20, 1926, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 897).

⁴²⁶ N.O. Coté, Controller, Department of the Interior, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, April 16, 1926, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 898).

⁴²⁷ J.D. McLean, Assistant Deputy and Secretary, to Controller, Land Patents Branch, Department of the Interior, April 19, 1926, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 899).

In December 1926, the Department of the Interior determined that the lands requested by the Department of Indian Affairs on behalf of the Shoal Lake Band had been recently withdrawn from timber berth 2946 and were therefore unencumbered. On that basis, it was recommended to the Deputy Minister of the Interior that the requested lands be made available to the Band.⁴²⁸

On December 28, 1926, Indian Agent Waddy was informed by Secretary McLean that the surrender for exchange desired by the Shoal Lake Band had been approved. McLean provided Waddy with a description of the IR 28A land to be surrendered, along with a plan showing the subject area, namely, the northwest quarter of the block reserve surveyed by S. Bray in 1894.⁴²⁹ A clearer depiction of the portion of the reserve to be surrendered was sketched on a township plan prepared by E. Deville in 1919.⁴³⁰ McLean noted that, by surrendering the proposed area, IR 28A would be separated from the 651-acre addition of 1911 and asked Waddy whether he considered that to be detrimental to the reserve.⁴³¹ Waddy replied in early 1927 that “[t]he piece of land we are surrendering is practically all covered with water, and is no loss and will do no harm to the reserve by being taken away from same.”⁴³²

On June 18, 1927, the Chief and Principal Men of the Shoal Lake Band surrendered 640 acres of Shoal Lake IR 28A to be exchanged for an equal amount of land comprised of the south half of sections 5 and 6, township 53, range 4, W of 2nd meridian.⁴³³ An affidavit attesting to the validity of the surrender was signed on the same day by Chief Albert Moore and Louis Young of the Shoal

⁴²⁸ [S.B.] Taylor, Land Patents Branch, Department of the Interior, to N.O. Cote, Controller, December 10, 1926, LAC, RG 10, vol. 723, file 387790 (ICC Exhibit 1a, pp. 900-901).

⁴²⁹ J.D. McLean, Assistant Deputy and Secretary, to J.W. Waddy, Indian Agent, December 28, 1926, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, pp. 902, 904).

⁴³⁰ Department of the Interior, “Plan of Township 52 Range 5 West of the Second Meridian (showing Shoal Lake Indian Reserve No. 28A),” approved and confirmed by E. Deville, Surveyor General, November 21, 1919 (ICC Exhibit 7x).

⁴³¹ J.D. McLean, Assistant Deputy and Secretary, to J.W. Waddy, Indian Agent, December 28, 1926, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 903).

⁴³² J.W. Waddy, Indian Agent, to Assistant Deputy and Secretary, Department of Indian Affairs, January 11, 1927, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 907).

⁴³³ Surrender, Shoal Lake Band to the Crown, June 18, 1927, DIAND, Indian Lands Registry, Instrument No. X11396 (ICC Exhibit 1a, pp. 911-913). The surrender contains the signatures of Chief Albert Moore, Councillor Louis Young and five others.

Lake Band, as well as by Indian Agent J. Waddy.⁴³⁴ On August 11, 1927, the surrender for exchange was accepted by Order in Council PC 1534.⁴³⁵

With that acceptance, the Department of Indian Affairs requested that the Department of the Interior proceed with the necessary actions to complete the exchange.⁴³⁶ On October 31, 1927, Order in Council PC 2117 was approved, withdrawing the new lands from the operation of the *Dominion Lands Act* while applying the provisions of that statute to the land previously forming part of the reserve.⁴³⁷ The new land set aside for the Shoal Lake Band was named IR 28B and is shown on a survey plan attached to subsequent Order in Council PC 1957-128.⁴³⁸ According to a notation on the same survey plan, IR 28B was surrendered ten years later in exchange for other lands adjoining IR 28A.⁴³⁹

Following the surrender of the 640-acre parcel from IR 28A in 1927 and its subsequent transfer to the Department of the Interior, the Surveyor General informed that department that:

An aerial photograph indicates that the tract is largely comprised within an extensive area of marsh land subject to flooding during high water in Carrot River. It does not appear therefore, that it will be desirable for settlement within a reasonable length of time and it is recommended that it be offered to be included in the [Pasquia] Forest Reserve.⁴⁴⁰

⁴³⁴ Affidavit, Chief Albert Moore and Louis Young, Shoal Lake Band, and J. Waddy, Indian Agent, DIAND, Indian Lands Registry, Instrument No. X11396 (ICC Exhibit 1a, p. 917).

⁴³⁵ Order in Council PC 1534, August 11, 1927, DIAND, Indian Lands Registry, Instrument No. X11396 (ICC Exhibit 1a, p. 920).

⁴³⁶ A.F. MacKenzie, for Assistant Deputy and Secretary, to Controller, Land Patents Branch, Department of the Interior, September 17, 1927, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 921).

⁴³⁷ Order in Council PC 2117, October 31, 1927, DIAND, Indian Lands Registry, Instrument No. 16619 (ICC Exhibit 1a, pp. 922-923).

⁴³⁸ Order in Council PC 1957-128, January 31, 1957, DIAND, Indian Lands Registry, Instrument No. X11400 (ICC Exhibit 1a, p. 945).

⁴³⁹ Order in Council PC 1957-128, January 31, 1957, DIAND, Indian Lands Registry, Instrument No. X11400 (ICC Exhibit 1a, p. 945).

⁴⁴⁰ Memorandum, Commissioner, Department of the Interior, to Hume, January 13, 1928, [LAC, RG 15, vol. 723, file 387,790] (ICC Exhibit 1a, p. 926).

Red Earth and Shoal Lake Cree Nations Petition the Government for Better Land (1946)

On June 21, 1946, the Red Earth and Shoal Lake Cree Nations sent formal petitions to the Minister of Mines and Resources (which, at that time, was also responsible for what was then called the Indian Affairs Branch), requesting additional reserve land. The petitions from each First Nation were similar in wording and asserted that, in order to secure a future for their children, it was necessary to have farming land set aside for their use. The Red Earth petition outlined the Band's arguments:

Indian Reserves 29 and 29A, situated as they are on the Carrot River, provide very little or no land suitable for farming or the production of hay. Our Band is becoming of considerable size and there are a great number of young people and children coming along who, in the course of a very short time, will have to look to the land for their living. When our Reserves were set apart for us we had no thought at that time of any change in our circumstances and were quite content to have a place set aside for us where we could live and continue our traditional method of living by hunting and trapping. With the approach of the settlers both from the East and from the West, the time will soon come when we will have to look to the land for our support. The settlers will cut down the trees and clear off the wooded land around us and what was formerly a very good trapping area will no longer be of much use for that purpose.⁴⁴¹

The Red Earth Band requested two townships of land for farming and one township for hay land, pointing out that "there is only a portion of each quarter section which is suitable for all farming purposes."⁴⁴² The Shoal Lake Band's petition is similar in content to that of the Red Earth Band, also requesting farming implements and instruction. The Shoal Lake Band asked for one and one-half townships adjacent to their reserve to provide for sufficient land for livestock and some land suitable for cultivation.⁴⁴³

⁴⁴¹ Chief Robert McKay, Red Earth Band, to Hon. J.A. Glen, Minister of Mines and Resources, including Petition, Red Earth Band, June 21, 1946, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 936).

⁴⁴² Chief Robert McKay, Red Earth Band, to Hon. J.A. Glen, Minister of Mines and Resources, including Petition, Red Earth Band, June 21, 1946, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 936).

⁴⁴³ Chief Robert McKay, Red Earth Band, to Hon. J.A. Glen, Minister of Mines and Resources, including Petition, Shoal Lake Band, June 21, 1946, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, pp. 937-938). It should be noted that one section of the Shoal Lake petition erroneously refers to its reserve land as IR 29 and 29A, which are the reserves belonging to the Red Earth First Nation.

Shoal Lake Elder Gerald Bear recalls that the 1946 petitions of the Red Earth and Shoal Lake Bands were made because “nothing was growing and that they needed more land.”⁴⁴⁴ Red Earth Elder John James Head recalls a meeting that took place around 1945 between Indian Superintendent Neil Wart and the Red Earth Councillors, asking for farming lands.⁴⁴⁵ Another Shoal Lake Elder, Edith Whitecap, understood that those petitions were made because of an attempt to take land away from the reserve.⁴⁴⁶

It appears that the department took the arguments outlined in the Bands’ petitions into consideration, requesting that Indian Agent Lovell investigate the matter. Agent Lovell, however, only reported back to the department on matters pertaining to Shoal Lake.⁴⁴⁷

“I would like to point out here that this reserve is at [least] seventy-five miles from any market, and in the fall and spring, it is practically impossible to get in or out of this reserve. I pointed this matter out to the Indians, and also the competition that they would have to meet in addition to the handicap of a seventy-five mile haul. They seemed to realize this, after discussing the problem for a length of time, and agreed to work on a more self-supporting basis; by this I mean, to break land, grow their own oats, start raising chickens, and grow all their own vegetables. At the present time, on this reserve, they grow most of their own vegetables, but they have been buying oats for their horses. I agreed to help them to break a small piece of land, with the understanding that, if they would show me that they were willing to co-operate and work, I would take it up with the Department to extend the breaking program, but I made it clearly understood that it was up to them to show me that they were willing to work.... In the spring, I intend to break from fifteen to twenty acres, and help them to seed this down in oats, and will watch their progress carefully, and give them all the assistance possible under the circumstances.”⁴⁴⁸

There is no record of any further departmental response to the 1946 petitions.

⁴⁴⁴ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 40, Gerald Bear).

⁴⁴⁵ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 216-21).

⁴⁴⁶ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 74, Edith Whitecap).

⁴⁴⁷ Samuel Lovell, Indian Agent, to A.G. Hamilton, November 16, 1946, DIAND, file 672/30-30, vol. 1 (ICC Exhibit 1a, p. 940).

⁴⁴⁸ Samuel Lovell, Indian Agent, to A.G. Hamilton, November 16, 1946, DIAND, file 672/30-30, vol. 1 (ICC Exhibit 1a, pp. 940-941).

Records of crops sown and harvested in the Pas Agency between 1936 and 1947 reflect a total of between 10 and 19 acres under cultivation at Red Earth, and between six and 17 acres under cultivation at Shoal Lake.⁴⁴⁹ The documentary record contains no further discussion of agricultural activity on the Shoal Lake or Red Earth reserves.

Final Adjustments to the Shoal Lake Reserve (1957 - 1968)

On January 31, 1957, Order in Council PC 1957-128 was approved, setting apart an additional 649.4 acres for the Shoal Lake Band, adjoining the north and west portions of IR 28A.⁴⁵⁰ Attached to the Order in Council is a copy of the survey plan originally produced by H.B. Proudfoot in 1911, with notations outlining the new addition to the reserve.⁴⁵¹ This new addition adjoins the northern and western boundaries of IR 28A. This land had been set apart in exchange for IR 28B (640 acres), which was set apart for the Band in 1927. That exchange was performed to acquire land more suitable for farming.⁴⁵² In 1968, the Department of Indian Affairs realized that a 6.9 acre parcel of land had mistakenly been excluded from the addition to Shoal Lake IR 28A in 1957. To remedy this, Order in Council PC 1968-1496 was approved on July 31, 1968, setting apart that parcel as part of IR 28A.⁴⁵³

In 1965, the final major addition was made to Shoal Lake IR 28A. Order in Council PC 1965-1924 confirmed the addition to IR 28A of 545.4 acres that had been purchased by the Shoal Lake Band, roughly the same amount of land and in the same location as the land surrendered in 1927, in

⁴⁴⁹ “Record of Crops sown and harvested” in the Pas Agency, 1936, LAC, RG 10, vol. 8453, file 578/23-12 (ICC Exhibit 1a, p. 930); “Record of Crops sown and harvested” in the Pas Agency, 1940, LAC, RG 10, vol. 8453, file 578/23-12 (ICC Exhibit 1a, p. 933); “Record of Crops sown and harvested” in the Pas Agency, 1942, LAC, RG 10, vol. 8453, file 578/23-12 (ICC Exhibit 1a, p. 934); “Record of Crops sown and harvested” in the Pas Agency, 1947, LAC, RG 10, vol. 8453, file 578/23-12 (ICC Exhibit 1a, p. 942).

⁴⁵⁰ Order in Council PC 1957-128, January 31, 1957, DIAND, Indian Lands Registry, Instrument No. X 11400 (ICC Exhibit 1a, p. 944).

⁴⁵¹ Order in Council PC 1957-128, January 31, 1957, DIAND, Indian Lands Registry, Instrument No. X11400 (ICC Exhibit 1a, p. 945).

⁴⁵² H.T. Vergette, Superintendent, Carlton Indian Agency, to Head, Land Surveys and Title Section, [DIAND], November 25, 1968, No file reference available (ICC Exhibit 1a, p. 954).

⁴⁵³ Order in Council PC 1968-1496, July 31, 1968, DIAND, Indian Lands Registry, Instrument No. R3584 (ICC Exhibit 1a, pp. 952-953).

exchange for IR 28B.⁴⁵⁴ Survey Plan 1225 illustrates the series of adjustments made to Shoal Lake IR 28A, resulting in the reserve's current configuration.⁴⁵⁵

Oral Evidence Relating to the Quality of Red Earth and Shoal Lake Reserve Lands

At the Community Sessions, Elders of the Red Earth and Shoal Lake Cree Nations described how, in the past, band members made their living mainly from the traditional pursuits of hunting and trapping, supplemented by gardens and small numbers of livestock.⁴⁵⁶ The experience of Shoal Lake Elder Edith Whitecap's family is fairly representative of the testimony from both First Nations. She explained that, although her family did some gardening and had a few livestock, "they couldn't be the same as a farmer around here because the land was not sufficient enough to do any farming."⁴⁵⁷ Instead, they made their living mainly through hunting and trapping, and kept gardens, cattle, and horses for their own use. "We didn't sell anything, but they just helped the people out through that."⁴⁵⁸ Elders recalled small-scale gardening and raising livestock for their own families' use; no one spoke about successful larger-scale agricultural or livestock operations being carried out within the reserves.

⁴⁵⁴ Order in Council PC 1965-1924, November 1, 1965, DIAND, Indian Lands Registry, Instrument No. X11402 (ICC Exhibit 1a, pp. 947-948).

⁴⁵⁵ DIAND, Indian Lands Registry, Plan 1225 (Microplan 1211), "Indian Reserve 28A Shoal Lake, Plan showing the addition to Indian Reserve 28A and the tie line between IR 28A and the 14th base line as surveyed by J.N. Wallace DLS, 1906, and the correction to be applied to Wallace's tie line," surveyed by H.B. Proudfoot, circa 1911 (ICC Exhibit 7o).

⁴⁵⁶ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 15-16, 21, Emil Flett; p. 29, Gerald Bear; pp. 44-45, Ella Bear; p. 49, Madeline Young; p. 60, Lillian Lathlin; p. 63, Gilbert Flett; pp. 70-71, 77, Edith Whitecap; pp. 169-70, Hector Head; p. 176, 179-81, Angeliqye McKay; pp. 183-84 Reta Nawakayas; pp. 195-96, Rebecca Head; p. 212, Arabella Nawakayas; pp. 222, 224-25, Leona Clara Head; pp. 227-29, Sylvia McKay; p. 234, Ellen Head; pp. 236-37, Clara Nawakayas).

⁴⁵⁷ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 81, Edith Whitecap).

⁴⁵⁸ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 71, Edith Whitecap).

A number of Elders noted that there was never a farming instructor sent to their reserves,⁴⁵⁹ and the agricultural tools they received were inadequate.⁴⁶⁰

A number of Shoal Lake Elders also expressed the view that the land in their reserve is not good. Elder Lillian Lathlin stated that:

according to her ancestors, all the people before her, they always talked about this land, the promises that were given to them, that they did not receive adequate promises, the benefits of the land. The land is not a good place. The government did not give all that they promised to the people of this community ...

...

We never got sufficient land, we only got land that was under muskeg, lots of water, a body of water. ... And our land today is still under muskeg, it's still in the salty area. You can't really plant anything in these areas. You can't grow anything on a salty area or a muskeg area. The land is not good for any agriculture.⁴⁶¹

Shoal Lake Elder Gerald Bear says that “the land was good before, before the water. Now it's no good for gardening.”⁴⁶² Gerald Bear remembers First Nation members having gardens and livestock, such as horses, cattle and chickens, but “they couldn't really get anything from the land because it was – there was too much water and there was too much – it was swamp, a swamp area. And salt ... There was lots of those salt deposits that they mentioned.”⁴⁶³ Madeline Young remembers her husband's family saying that “There wasn't enough good land.”⁴⁶⁴ Shoal Lake Elder Emil Flett stated that there is “no land for agriculture” on the reserve, but there were some hay lands and “lots of

⁴⁵⁹ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 16, Emil Flett; p. 59, Lillian Lathlin; p. 171, Hector Head; p. 177, Angeliqye McKay).

⁴⁶⁰ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 15-16, Emil Flett; pp. 27, 36-37, Gerald Bear; p. 57, Lillian Lathlin; p. 80, Edith Whitecap).

⁴⁶¹ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 57-58, Lillian Lathlin). See also: ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 37-38, Gerald Bear; p. 43, Ella Bear; pp. 63-64, 67, Gilbert Flett; p. 73, Edith Whitecap).

⁴⁶² ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 34, Gerald Bear).

⁴⁶³ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 34, Gerald Bear). See also: ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 49-50, Madeline Young; pp. 71, 73, Edith Whitecap).

⁴⁶⁴ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 50, Madeline Young).

timber and lots of trees all over.”⁴⁶⁵ Several Shoal Lake Elders recalled using hay lands both on and off reserve for their livestock.⁴⁶⁶

Similarly, many Red Earth Elders expressed the view that the land is not good for farming because of flooding and excess water.⁴⁶⁷ Many also remembered having to leave the reserve to find enough hay for their cattle.⁴⁶⁸ Red Earth Elder Hector Head says that there was not enough hay on the reserve to raise cattle, explaining that his brother’s attempts to raise cattle had been a failure for that reason.⁴⁶⁹

The oral evidence heard in this inquiry indicates that lands at Red Earth and Shoal Lake have always been prone to seasonal flooding but that the extent and severity of flooding has increased since the E.B. Campbell dam⁴⁷⁰ was constructed in the 1960s. It should be noted, however, that no studies were undertaken as part of this inquiry to corroborate the Elders’ accounts or to determine the environmental impact of the dam.

Red Earth Elders recall seasonal flooding, as well as more catastrophic floods, before the dams were built. Red Earth Elder Richard Nawakayas, born in 1935, recalls flooding at Red Earth every year, noting that the floods subsided quickly some years, but took a long time to subside in other years.⁴⁷¹ Elder Ellen Head, also born in 1935, recalls flooding when she was younger, and how they would stay on top of their barns when it flooded and use canoes to get around the reserve.⁴⁷² Elder Reta Nawakayas recalls regular flooding of both IR 29 and 29A since she began living at Red

⁴⁶⁵ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 16, 19 Emil Flett).

⁴⁶⁶ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 30-31, Gerald Bear).

⁴⁶⁷ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 172, Hector Head; p. 210, Richard Nawakayas; p. 213, Arabella Nawakayas; pp. 225-26, Leona Clara Head).

⁴⁶⁸ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 172-73, Hector Head; p. 187, Reta Nawakayas; p. 212, Arabella Nawakayas).

⁴⁶⁹ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 172-74, Hector Head).

⁴⁷⁰ The E.B. Campbell dam (which formed Tobin Lake) is located on the Saskatchewan River, upstream from the Red Earth and Shoal Lake reserves.

⁴⁷¹ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 207, Richard Nawakayas).

⁴⁷² ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 233-35, Ellen Head).

Earth in the early 1950s.⁴⁷³ This evidence seems to concur with the documentary record, which records occasional catastrophic flood events at Red Earth (such as those in 1913 and 1921⁴⁷⁴), as well as annual seasonal flooding.⁴⁷⁵

The Shoal Lake reserve was also susceptible to seasonal flooding before the dams were built. Shoal Lake Elder Emil Flett, born in 1937, recalls that:

in the springtime there used to be lots of flooding and that was the only time that they had flooding from – according to the Elders before him. And the land, they were able to use that land for hay land, to get hay. And then when they built the dam ... that's when the waters came towards our area, and now there was water there all summer. And there was – like it used to be so shallow that we were able to walk into those areas and do our haying with the horses and all that, but as soon as the dam was built, they could no longer go there because there was too much water coming towards that area.⁴⁷⁶

Aside from seasonal flooding, Shoal Lake Elder Gerald Bear recalls a big flood in 1949, when the graveyard at the southwest corner of IR 28A was covered with two feet of water.⁴⁷⁷

At Shoal Lake, salt deposits and underwater streams flowing from the Pasquia Hills present additional obstacles to agriculture. The record shows that, from the time when the reserve was first

⁴⁷³ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 185-86, 192, Reta Nawakayas).

⁴⁷⁴ S.J. Jackson, Inspector of Indian Agencies, Lake Manitoba Inspectorate, to Assistant Deputy and Secretary, Department of Indian Affairs, November 29, 1913, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 841); J.W. Waddy, Indian Agent, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, May 16, 1921, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 883).

⁴⁷⁵ See for example: A. MacKay, Indian Agent, to SGIA, September 6, 1881, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881*, 72 (ICC Exhibit 1a, p. 251); J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, January 14, 1892, LAC, RG 10, vol. 1814, Series A (ICC Exhibit 1a, p. 580); Fred Fischer, Indian Agent, to the Secretary, Department of Indian Affairs, May 29, 1908, DIAND file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 770); Samuel Lovell, Indian Agent, to A.G. Hamilton, November 16, 1946, DIAND, file 672/30-30, vol. 1 (ICC Exhibit 1a, p. 940).

⁴⁷⁶ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 18, Emil Flett).

⁴⁷⁷ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 31-32, Gerald Bear).

surveyed, there have been two streams of salt water in the western part of the reserve.⁴⁷⁸ Many Elders mentioned that salt deposits within the reserve hindered their ability to grow anything successfully. Elder Madeline Young, who moved to the Shoal Lake reserve from Red Earth in 1946, recalls hearing her husband's family talk about how they had "tried to plough out some land on different areas, but it was too salty an area, nothing grew there."⁴⁷⁹

There is some difficulty sorting out the impact that dam construction in the 1960s had on the reserve lands at Red Earth and Shoal Lake, as distinct from pre-existing conditions. However, there seems to be consensus among the Elders that the lands have changed to some extent since the dams were built.

Some Shoal Lake Elders noted that there used to be large gardens on the reserves, but an increase in water and salt in the soil has made it difficult to grow anything. Increased flooding has also forced some members to move from formerly habitable lands, and rendered some of the lands formerly used for gardening and hay lands unusable.⁴⁸⁰ Elder Edith Whitecap explained that although her family used to garden, "[w]e can't really plant anything now because the land is – nothing is growing on the land now that much for garden stuff."⁴⁸¹ She remembered that near the place she used to have her house, "somebody came around there and ploughed the land, however, the land was never – never grew anything, it was just salty, too salty."⁴⁸² She continued, explaining that the Shoal Lake reserve is mostly salt and swampy land, aside from a small area where the main community is located on solid ground, and that "we can't really do anything with this land that we have."⁴⁸³ Elder Gerald Bear explained that "we don't have any land to really plant anything any more because of the flood,

⁴⁷⁸ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 29, 35, Gerald Bear; pp. 89-90, 109-11, Charles Whitecap); T.D. Green, DLS, to Superintendent General of Indian Affairs, March 9, 1885, LAC, RG 10, vol. 3685, file 13033 (ICC Exhibit 1a, p. 437). See also: Darwin Anderson and Darrel Cerkowniak, "Red Earth and Shoal Lake First Nations: Quality of Reserve Land Inquiry," February 5, 2008 (ICC Exhibit 9a, p. 12).

⁴⁷⁹ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 49, Madeline Young).

⁴⁸⁰ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 50-55, Madeline Young; pp. 65-66, Gilbert Flett; p. 72, Edith Whitecap).

⁴⁸¹ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 71, Edith Whitecap).

⁴⁸² ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 73, Edith Whitecap).

⁴⁸³ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 73, Edith Whitecap).

the water, and there's lots of water all over."⁴⁸⁴ He further noted that flooding now is more extensive and lasts much longer than it used to before the dams were built.⁴⁸⁵

Some Red Earth Elders have noticed changes over time as well. Red Earth Elder Reta Nawakayas says that her family was successful in gardening until "the floods came in."⁴⁸⁶ Elder Leona Head recalls that there were good hay lands and land good for gardening in earlier times, but the higher water table and flooding has changed the land.⁴⁸⁷

⁴⁸⁴ ICC Transcript, October 16-17, 2007 (Exhibit 5a, p. 38, Gerald Bear).

⁴⁸⁵ ICC Transcript, October 16-17, 2007 (Exhibit 5a, p. 38, Gerald Bear).

⁴⁸⁶ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 184, Reta Nawakayas).

⁴⁸⁷ ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 224-26, Leona Head). See also: ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 203-204, Lizette McKenzie).

APPENDIX B

Red Earth and Shoal Lake Cree Nations: Quality of Reserve Lands
Inquiry: Interim ruling on request of the Treaty 8 First Nations of British Columbia to intervene
in mandate challenge, December 15, 2005

INDIAN CLAIMS COMMISSION

**RED EARTH AND SHOAL LAKE CREE NATIONS:
QUALITY OF RESERVE LANDS INQUIRY**

**INTERIM RULING
RULING ON THE REQUEST OF THE TREATY 8 FIRST NATIONS OF
BRITISH COLUMBIA TO INTERVENE IN THE MANDATE CHALLENGE**

PANEL

Commissioner Jane Dickson-Gilmore (Chair)
Commissioner Alan C. Holman
Commissioner Sheila G. Purdy

COUNSEL

For the Red Earth and Shoal Lake Cree Nations
William A. Selnes

For the Treaty 8 First Nations of British Columbia
Christopher G. Devlin

For the Government of Canada
Perry Robinson

To the Indian Claims Commission
John B. Edmond / Julie McGregor

DECEMBER 2005

BACKGROUND

This ruling addresses the application of the seven Treaty 8 First Nations of British Columbia¹ to intervene in the Government of Canada's motion before the Indian Claims Commission (ICC), dated April 7, 2005, for a ruling to determine whether the Commission has jurisdiction to conduct an inquiry into the specific claim of the Red Earth and Shoal Lake Cree Nations (hereinafter "Red Earth and Shoal Lake").

Red Earth and Shoal Lake jointly submitted a specific claim to Canada in May 1996 on the question of the quality of their reserve lands. When the Minister of Indian Affairs and Northern Development had not made a decision by 2004 either to accept or reject the claim for negotiation, Red Earth and Shoal Lake requested that the ICC conduct an inquiry. On June 2, 2004, the ICC agreed to conduct the inquiry on the basis that the claim was deemed to have been rejected by the Minister. A planning conference was held on February 24, 2005. Shortly thereafter, Canada notified the parties that it would challenge the jurisdiction of the ICC under the Specific Claims Policy, on the basis that the ICC lacked the jurisdiction to conduct an inquiry into a claim that had not been rejected by the Minister.

The applicants for intervener status in this motion, the Treaty 8 First Nations of British Columbia, are the Blueberry River, Doig River, Fort Nelson, Halfway River, Prophet River, Saulteau and West Moberly First Nations. In March 1993, the Treaty 8 Tribal Association, on behalf of the Treaty 8 First Nations of B.C., submitted a specific claim to Canada respecting annuity arrears. The claim asserted that Canada owed each respective First Nation outstanding annuity arrears under Treaty 8, from the date the Treaty was signed in 1899 to the date that each First Nation adhered to the Treaty.

In August 2003, the Treaty 8 Tribal Association requested that the ICC conduct an inquiry, on the basis that the Treaty 8 claim should be deemed to have been rejected because of the ten-year period in which it had been under review by Canada. In November 2003, the ICC agreed to conduct this inquiry. Since the Treaty 8 claim had been accepted on the basis of a "deemed rejection", Treaty

¹ In a letter of August 21, 2003, Deborah Smithson, Director, Treaty and Aboriginal Rights Research, Treaty 8 Tribal Association, Fort St. John, B.C., requesting an inquiry on behalf of the First Nations now applicants on this motion, described them as "The Treaty 8 First Nations in B.C." We therefore refer to the applicants for brevity as "the Treaty 8 First Nations of British Columbia", "Treaty 8 First Nations", or simply "Treaty 8".

8 did not receive funding from Canada to participate in the inquiry process. As a result, the inquiry has been delayed from August 2003 to the present.

On May 20, 2005, the ICC's Commission Counsel advised counsel for Treaty 8 of Canada's motion for a ruling on the ICC's jurisdiction to accept a claim for inquiry on the basis of constructive or deemed rejection. Treaty 8's counsel was also advised that Canada indicated that it would likely bring motions to challenge the ICC's jurisdiction in other inquiries accepted by the ICC on the basis of a deemed rejection. On July 14, 2005, Treaty 8 made an application for intervener status in the April 7, 2005 motion brought by Canada in the Red Earth and Shoal Lake Inquiry.

ISSUES

1. Should the ICC grant the Treaty 8 First Nations standing to intervene in Canada's motion for a ruling on the ICC's mandate to conduct an inquiry into the Red Earth and Shoal Lake Cree Nations' specific claim?
2. If the Treaty 8 First Nations are granted standing to intervene in the motion, what should be the nature and extent of this intervention?

DECISION

For the reasons that follow, Treaty 8 will not be permitted to intervene in Canada's motion challenging the mandate of the ICC in the Red Earth and Shoal Lake Cree Nations Inquiry.

POSITION OF THE TREATY 8 FIRST NATIONS

In Treaty 8's submissions dated July 13, 2005, their legal counsel sets out the legal principles that apply to their application for intervener status. Counsel for Treaty 8 argues that while judicial authorities have no direct application to the proceedings of the Commission, they are instructive respecting the question before the Commission. Accordingly, Rule 109 of the *Federal Court Rules, 1998*², provides guidance in determining when the Commission may grant leave to intervene. Rule 109 states in part:

² *Federal Courts Rules*, r. 109.

- 109 (1) The Court may, on a motion, grant leave to any person to intervene in a proceeding.
- (2) Notice of motion under subsection (1) shall
- (a) ...
 - (b) describe how the proposed intervener wishes to participate in proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

Treaty 8 also points to the jurisprudence of the Federal Court³ which states that applications for leave to intervene often address the following factors:

- (a) the nature of the proposed intervener's interest in the proceeding
- (b) the position the proposed intervener would take in the proceeding, and
- (c) the timeliness of the intervention.

Based on these principles, the Treaty 8 First Nations ground their application in three propositions:

1. The Treaty 8 First Nations have a direct interest in the mandate challenge in the Red Earth and Shoal Lake Inquiry.
2. The Treaty 8 First Nations offer a different perspective from that of the Red Earth and Shoal Lake Cree Nations.
3. The Treaty 8 First Nations' application to intervene is timely, given the circumstances and the proceedings in the Red Earth and Shoal Lake Inquiry.

Direct Interest

The Treaty 8 First Nations argue that if Canada is successful in challenging the ICC's mandate to conduct the Red Earth and Shoal Lake Inquiry on the basis that it is a "deemed rejection," such decision will have a direct impact on the Treaty 8 Inquiry. Given that Canada has already indicated an intention to bring individual motions challenging the ICC's jurisdiction to conduct inquiries on

³ *Wewayakum Indian Band v. Wewayakai Indian Band*, [1994] 3 CNLR 204. See also *Maracle v. Six Nations of the Grand River Band of Indians* (1998), 146 FTR 208, and *Canada (Minister of Citizenship and Immigration) v. Katriuk* (1998), 150 FTR 137.

the basis of a “deemed rejection,” Treaty 8 argues that Canada will use a successful ruling against them. As such, counsel argues, Treaty 8 has a direct interest in the result of this mandate challenge.

In addition, counsel for Treaty 8 points out that it would be unreasonable to expect the Red Earth and Shoal Lake First Nations to take Treaty 8's interests into consideration when making their submissions.

Different Perspective

The Treaty 8 First Nations argue that they bring a unique perspective to the mandate challenge because of their different geographical and historical circumstances, and their experience with the specific claims process.

Treaty 8 points to the fact that currently, they have approximately 15 claims that are in the specific claims process. These claims have not been accepted or rejected for negotiation by Canada. Treaty 8 further asserts that their particular experience with the specific claims process is indicative of the more general experience of British Columbia First Nations that have filed specific claims. Treaty 8 points to the fact that 58% of the claims awaiting a legal opinion by Canada originate in British Columbia. The Red Earth and Shoal Lake Cree Nations, in comparison, have no claims in the process other than that which is the subject of Canada's mandate challenge. According to Treaty 8, therefore, Red Earth and Shoal Lake are not in a position to speak to the detrimental effect a successful mandate challenge would have on the claims process in general.

In addition, Treaty 8 argues that allowing its intervention application would serve the broader public interest as well as judicial economy. In particular, states Treaty 8, the perspective that it brings “is that of the class of First Nations who are in similar circumstances but who have not yet had the opportunity of facing mandate challenges by Canada in their own inquiries.” Treaty 8 claims that it can effectively represent other First Nations requesting an inquiry on the basis of a deemed rejection.

Timeliness

Treaty 8 argues that their application to intervene was submitted in a timely manner, given that they were informed of Canada's motion in the Red Earth and Shoal Lake Inquiry on May 16, 2005, and

that each of the Treaty 8 First Nations has its own counsel. Further, the intervention, they argue, would pose no prejudice to Canada since it has already indicated its intention to bring mandate challenges in the Treaty 8 claim if it proceeds before the ICC. A minor delay of a few weeks in the mandate challenge would be reasonable in the circumstances, they say, particularly in light of the position taken by Canada. Furthermore, Treaty 8 would accommodate whatever time requirements the Commission might impose.

POSITION OF CANADA

Canada opposes intervener status for Treaty 8 on the basis that they have not fulfilled the legal requirements for an intervention application, as set out in the Commission's *Interim Ruling on the Long Plain First Nations Request to Intervene in the Sandy Bay Ojibway First Nation Inquiry*⁴. In the *Long Plain First Nation Interim Ruling*, the Commission referred to *Pfizer Canada Inc. v. Canada (Attorney General)*,⁵ in which the Federal Court set out three criteria for intervener status, as follows:

1. The applicant for intervention must have an interest in the outcome;
2. The rights of the applicant will be seriously affected by the outcome of the litigation; and
3. The applicant, as intervener, will bring a different perspective to the proceedings.

In determining whether the proposed intervener can bring a unique or different perspective to the proceedings, two other considerations should be included:

- Whether the position of the proposed intervener is adequately defended by one of the parties, and

⁴ Indian Claims Commission, *Sandy Bay Ojibway First Nation: Treaty Land Entitlement Inquiry Interim Ruling* (ICC File: 2106-10-01).

⁵ *Pfizer Canada Inc v. Canada (Attorney General)* 2001 FCT 1168

- Whether the court can hear and decide the case on its merits without the proposed intervenor.⁶

Canada submits that an applicant for intervenor status must have an interest that is more than “jurisprudential” in nature. Also, an intervenor must bring a unique or different perspective to the proceeding. Merely assisting in the interpretation of the jurisprudence surrounding the main issue - in this case the jurisdiction of a Commission established pursuant to the *Inquiries Act* - is not sufficient to be considered a “different perspective.” Canada argues that where a proposed intervenor will only restate what others will be arguing, intervenor status should be denied.

Canada’s counsel states that Treaty 8 and Red Earth and Shoal Lake have a similar legal position in regard to the Commission’s jurisdiction respecting “deemed rejections.” This position, states Canada, will be thoroughly presented by counsel for Red Earth and Shoal Lake. Furthermore, if the Commission were to allow the intervention of any party with similar issues before the Commission, then, once this precedent was established, the Commission would have no principled way of excluding applications to intervene in subsequent inquiries.

Canada submits that the introduction of evidence in an unrelated claim will not serve the interests of justice in deciding the merits of the Red Earth and Shoal Lake mandate challenge. It is important, states Canada, to ensure that the contribution of an intervenor is sufficient to counterbalance the disruption to the process. Canada’s motion has already been delayed by more than three months because of difficulties in scheduling. Canada notes that the Treaty 8 First Nations’ proposal to introduce further affidavit evidence would cause further delay.

POSITION OF RED EARTH AND SHOAL LAKE CREE NATIONS

The Red Earth and Shoal Lake Cree Nations, which we understand are not being provided funding in this inquiry, have declined to make submissions in Treaty 8’s application to intervene. However, in a letter dated September 30, 2005, counsel for the First Nations stated,

⁶ *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.* [2000] F.C.J. No. 220, at para 8.

... the Red Earth and Shoal Lake First Nations will consent to the Treaty 8 Bands becoming intervenors on the mandate challenge if the intervention is limited to presenting legal arguments. Red Earth and Shoal Lake will not consent to participation if the Treaty 8 Bands seek to file evidence on the mandate challenge⁷.

ANALYSIS & RULING

ISSUE 1

Should the ICC grant the Treaty 8 First Nations standing to intervene in Canada's motion for a ruling on the ICC's mandate to conduct an inquiry into the Red Earth and Shoal Lake Cree Nations' specific claim?

We have carefully considered the application by Treaty 8 for leave to intervene in Canada's mandate challenge motion in the Red Earth and Shoal Lake Inquiry. We conclude that Treaty 8 has failed to demonstrate a direct interest or unique perspective that would assist the Panel in making a determination on the jurisdiction of the Commission. The Panel notes that the criteria for intervenor status in an administrative tribunal setting are similar to the criteria outlined in the jurisprudence of the Federal Court. However, the discretion of an administrative tribunal to grant intervenor status is broader. As the Commission stated in the *James Smith Cree Nation Inquiry*:

... the Indian Claims Commission, pursuant to its Order in Council and the *Inquiries Act*, has the power to exercise its discretion to hear any evidence and argument it deems requisite to the full investigation of the matters it is mandated to examine. In this regard, the Commission panel in this case is not limited to hearing the evidence and/or argument of only Bands that have submitted a claim or only those Bands who have a rejected claim⁸.

The Panel agrees that it has the authority to determine whether or not to grant intervenor status in this motion.

At issue in Canada's motion is whether or not the Commission has the jurisdiction to deem the Red Earth and Shoal Lake claim to have been rejected by the Minister. The issue of the

⁷ William A. Selnes to John Edmond, September 30, 2005 (ICC file 2107-54-01).

⁸ Indian Claims Commission, *James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Surrender Inquiry Interim Ruling* (Ottawa, July 2003), reported (2003) 16 ICCP 139.

Indian Claims Commission

8

Interim Ruling – Red Earth and Shoal Lake Cree Nations: Quality of Reserve Lands Inquiry

Commission’s jurisdiction is a question of law, which in our view will be adequately canvassed by the parties, Canada and Red Earth and Shoal Lake. Therefore, we are not convinced that the perspective of Treaty 8 would provide further insight or assistance to the Panel in determining the issues raised by the mandate challenge. Nor are we satisfied that the British Columbia Treaty 8 First Nations can act as a representative body for other First Nations.

In addition, while the Panel acknowledges that the claims of both Treaty 8 and Red Earth and Shoal Lake have been accepted for inquiry on the basis of a “deemed rejection,” these claims are not interrelated nor are they dependant on the resolution of shared facts, as was the case in Long Plain First Nation’s application to intervene in the Sandy Bay First Nation’s inquiry. Although a ruling on the ICC’s jurisdiction will affect any First Nation that wishes to have its specific claim reviewed by the Commission, where that claim has not yet been rejected, the outcome of Canada’s motion will not prejudice Treaty 8’s claims on the merits.

Therefore, the Panel directs that the application to intervene by the Treaty 8 First Nations be denied.

ISSUE 2

If the Treaty 8 First Nations are granted standing to intervene in the motion, what should be the nature and extent of this intervention?

As we have denied the application to intervene by the Treaty 8 First Nations, it is not necessary to consider this question.

FOR THE INDIAN CLAIMS COMMISSION



Jane Dickson-Gilmore (Chair)
Commissioner



Alan C. Holman
Commissioner



Sheila G. Purdy
Commissioner

Dated this 15th day of December, 2005.

APPENDIX C

**Red Earth and Shoal Lake Cree Nations: Quality of Reserve Lands
Inquiry: Interim ruling on Canada's objection to jurisdiction,
September 26, 2006**

INDIAN CLAIMS COMMISSION

**INTERIM RULING: RED EARTH AND SHOAL LAKE CREE NATIONS
QUALITY OF RESERVE LANDS INQUIRY**

RULING ON CANADA'S OBJECTION TO JURISDICTION

PANEL

Commissioner Jane Dickson-Gilmore (Chair)
Commissioner Alan C. Holman
Commissioner Sheila G. Purdy

COUNSEL

For the Red Earth and Shoal Lake Cree Nations
William A. Selnes

For the Government of Canada
Perry Robinson

To the Indian Claims Commission
John B. Edmond / Julie McGregor

September 2006

INTRODUCTION

The Indian Claims Commission (the Commission or ICC) was created by the Government of Canada in 1991¹ as a neutral, independent body to facilitate the fair and expeditious resolution of specific claims.² The Commission engages this function by conducting public inquiries into disputed claims and providing mediation services at any stage of the process. As one of four pillars³ of a policy intended to improve relations between Canada and the First Nations following the land conflict at Oka, Quebec, in 1990, the Commission was a direct response to the weaknesses of the Specific Claims Policy and the failed claim at Oka. Created under the authority of Part I of the *Inquiries Act*, the Commission was given a broad authority through Order in Council to “review the application by the Government of Canada of the specific claims policy to individual claims”⁴ and to interpret this mandate as it considers best to achieve that end.⁵

Central to this mandate, and consistent with the government’s direction that the ICC provide an alternative to the courts for resolving disputed claims, the Commission established a process to inquire into and review government decisions not to accept a specific claim for negotiation.⁶ Where a First Nation and Canada disagree on the merits of a claim, the First Nation may request an inquiry.

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) (hereinafter Order in Council PC 1991-1329, July 15, 1991, amended by PC 1992-1730, July 27, 1992).

² Government policy divides land claims into two categories: specific claims arise from the breach or non-fulfillment of government obligations found in treaties, agreements, or statutes; comprehensive claims are based on unextinguished Aboriginal title.

³ Canada, House of Commons, *Debates* (September 25, 1990), 13320, “Government Orders, Indian Affairs, Situation at Oka and Châteauguay.” In this statement, then Prime Minister Brian Mulroney specified: “The agenda I believe we ought to be addressing will have four main pillars: land claims, the economic and social conditions on reserves, the relationship between aboriginal peoples and government, and concerns of Canada’s aboriginal peoples in contemporary Canadian life.”

⁴ Order in Council PC 1991-1329, July 15, 1991, amended by PC 1992-1730, July 27, 1992.

⁵ On Canada’s recognition of the Commission’s right to interpret its own mandate, see Canada’s arguments in Indian Claims Commission (ICC), *James Smith Cree Nation: Treaty Land Entitlement and Cumberland 100A Reserves Inquiries Interim Ruling* (Ottawa, May 2000), reported (2003) 16 *Indian Claims Commission Proceedings* (ICCP) 67 at 71; see also *U.E.S., Local 298 v. Bibeault*, [1998] 2 SCR 1048.

⁶ The ICC also has the authority under Part B of its mandate to inquire into compensation criteria, where appropriate. This aspect of its work is not relevant to the present application.

If granted, the Commission brings Canada and the First Nation together in a structured and open process that inquires into the oral and documentary history of the claim and considers whether Canada owes a lawful obligation to the First Nation. The inquiry process produces a detailed history and legal analysis of the claim which, in turn, provides the foundation for the Commission's recommendations to Canada either to reject or to accept a claim for negotiation. These recommendations are intended to assist the parties in resolving the dispute, and are not binding on either Canada or the First Nation.

Canada's Position

Canada is seeking a ruling from the Panel that it is in excess of its jurisdiction in relation to the conduct of the inquiry concerning the specific claim of the Red Earth and Shoal Lake First Nations. Canada submits that the ICC's authority to conduct inquiries is circumscribed by its enabling Order in Council which was enacted by the Governor in Council pursuant to the *Inquires Act*, Part I, and which confines the Commission's jurisdiction to inquire into and report on claims that have already been rejected by the Minister of Indian Affairs. The specific claim of the Red Earth and Shoal Lake First Nations has not already been rejected by the Minister. In Canada's view, the term "rejection" carries a plain and ordinary meaning in the specific claims context, that is, a rejection requires some explicit or unequivocal act of refusal by the Minister to accept the claim. Rejection is thus a readily discernable event in the claims process and is manifested in a ministerial letter which sets out the fact that a claim has been rejected as well as the basis for that rejection. In the absence of an overt rejection by the Minister, the Commission has no authority to conduct an inquiry or investigate and report on claims. Had the Governor in Council intended the Commission to have jurisdiction to inquire into and report on claims that had not been rejected, the scope of such a mandate would be clearly set out in the authorizing Order in Council.

Red Earth and Shoal Lake Cree Nations's Position

The First Nations argue that the ICC has considered the Order in Council and found that it does not contain any direction on how a claim can be rejected. Moreover, the Commission has previously and consistently ruled that claims can be rejected by Canada through means other than a letter of

rejection. In considering whether to accept a request for inquiry into a claim, the Commission is guided by a purposive interpretation of rejection in which the ordinary use of the term is balanced with the Commission's objectives of fairness, flexibility, and recognition of the actual situation of the First Nation. Canada's analysis of the Order in Council fails to consider how the fiduciary relationship between Canada and the First Nations impacts legislation.

The First Nations take the position that Canada's failure to act has had significant negative consequences and has hampered their ability to assemble evidence for their claims. Over a decade has passed since the claim was submitted to DIAND, and there is no indication from the department when a determination will be made on the Red Earth and Shoal Lake claim. During this time, six elders who possessed evidence relevant to the claim have died, and the oral history they maintained is no longer available to assist in establishing the First Nations' claim. This loss of evidence is that much more important, argues the First Nations, given the resource constraints placed upon them by DIAND, which refuses to provide funding to any First Nation before the Commission whose claim has not been expressly rejected. The First Nations are experiencing ongoing frustration, loss of hope and loss of confidence in the commitment of Canada to the fair and expeditious resolution of specific claims.

NATURE OF THE MOTION

On June 2, 2004, the Indian Claims Commission considered the request of the Red Earth and Shoal Lake Cree Nations to inquire into their claim regarding the quality of the reserve lands set apart for them under Treaty 5. This claim had been submitted to the Minister of Indian Affairs and Northern Development (the Minister) in May 1996, but had not yet been accepted or definitively rejected by way of a letter to the First Nations. Notwithstanding the absence of an express act of rejection, the Commission accepted the First Nations' request for an inquiry. The Government of Canada objected to this exercise of the Commission's jurisdiction, asserting that express rejection by the Minister is required before the Commission's jurisdiction can be engaged and, as such, the Commission had no mandate to inquire into the claim. The Minister, his officials, and counsel declined to participate in the inquiry or to provide funding to the First Nations to enable them to participate in the inquiry process. Counsel for the Commission thereupon advised the Minister's counsel that, unless the

Minister brought a motion before the panel to determine the jurisdictional issue, the panel would exercise the subpoena powers available to it under the *Inquiries Act* to obtain the documents in the possession of the Minister necessary for the inquiry to proceed. The Minister chose to challenge, by way of motion, the jurisdiction of the Commission to hold the inquiry. The Minister's motion, served April 7, 2005, was heard on February 9, 2006, by way of written and oral submissions on behalf of the parties. For the reasons that follow, we have concluded that the Commission possesses the jurisdiction to hold this inquiry.

THE ISSUES

This motion raises the following issues:

- 1 Is it within the Commission's jurisdiction to accept a claim for inquiry where there has not been an express written rejection of that claim by the Minister?
- 2 If yes, on the facts of the Red Earth and Shoal Lake Cree Nations' claim, was Canada's conduct tantamount to a rejection of that claim, thereby engaging the Commission's authority to review the claim?

ISSUE 1: THE COMMISSION'S JURISDICTION

The decision to create the Indian Claims Commission was informed by the government's belief that "on no issue is action more urgent than on land claims" and by the need to "accelerate the settlement of specific claims ... that result from past government non-performance or malfeasance with respect to existing treaties and to the Indian Act."⁷ The Commission was central to this new approach, as was the Prime Minister's commitment of increased resources dedicated to the claims process.⁸

The Commission's Order in Council

The central role of the Commission in accelerating the resolution of claims is evident in Order in Council PC 1992-1730, made under Part I of the federal *Inquiries Act*, which defines the terms of

⁷ Canada, House of Commons, *Debates* (September 25, 1990), 13320, "Government Orders, Indian Affairs, Situation at Oka and Châteauguay."

⁸ Canada, House of Commons, *Debates* (September 25, 1990), 13320, "Government Orders, Indian Affairs, Situation at Oka and Châteauguay."

its existence. In the preamble to the Order, which section 13 of the *Interpretation Act*⁹ provides must be “read as part of the enactment intended to assist in explaining its purport and object,” the Commission is tasked with a strong supervisory role over the specific claims policy:

WHEREAS the Government of Canada and the First Nations agree that an interim process to review the application by the Government of Canada of the Specific Claims Policy to individual claims is desirable...¹⁰

These powers of review are detailed further in the Order in Council as follows:

AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter “the Minister”), 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.¹¹

The Panel understands the operating provisions of the mandate as provided in paragraphs (a) and (b), quoted above, to be broad and remedial in nature, and it has consistently reinforced this

⁹ *Interpretation Act*, RSC 1985, c. I-21.

¹⁰ Order in Council PC 1991-1329, July 15, 1991, amended by PC 1992-1730, July 27, 1992.

¹¹ Order in Council PC 1991-1329, July 15, 1991, amended by PC 1992-1730, July 27, 1992.

position in executing that mandate.¹² This understanding is consistent with the direction contained in section 12 of the *Interpretation Act*, which provides:

Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best enables the attainment of its objectives.¹³

The Panel takes the position that its inquiry function must be read in conjunction with the objective defined in the preamble to the Order in Council, whereby the Commission is directed to review the government's application of the specific claims policy. Thus the Commission is not only required to provide elucidation of individual claims through the inquiry process but must also oversee the ongoing application of the specific claims policy by the government. Insofar as this policy is an important element of the Crown's dealings with First Nations, the Panel believes that its mandate requires it to be vigilant in ensuring that the goal of the specific claims policy – namely, the fair and expeditious resolution of claims – is pursued in a manner consistent with the preservation of the honour of the Crown.

Canada's Specific Claims Policy

Canada's Specific Claim Policy, commenced in 1973, was set out in 1982 *Outstanding Business: A Native Claims Policy – Specific Claims*.¹⁴ This policy was the culmination of the government's efforts to address First Nations' concerns over their limited ability to have their specific claims resolved in a fair and equitable manner. As such, it sets out the process for the government's review of claims and establishes criteria for determining whether a lawful obligation to a First Nation exists.

¹² See ICC, *Alexis First Nation: TransAlta Utilities Rights of Way Inquiry Interim Ruling* (Ottawa, April 2000), reported (2003) 16 ICCP 47 at 59 and (2004) 17 ICCP 21 at 165; ICC, *Lac La Ronge Indian Band: Treaty Land Entitlement Inquiry Interim Ruling* (Ottawa, May 1995), reported (2003) 16 ICCP 13 at 20; ICC, *Walpole Island First Nation: Boblo Island Inquiry Interim Ruling* (Ottawa, September 1998), reported (2003) 16 ICCP 33 at 36; ICC, *Sandy Bay First Nation: Treaty Land Entitlement Inquiry Interim Ruling* (Ottawa, June 1999), reported (2003) 16 ICCP 39 at 44; ICC, *James Smith Cree Nation: Treaty Land Entitlement and Cumberland 100A Reserve Inquiries Interim Ruling* (Ottawa, May 2000), reported (2003) 16 ICCP 67 at 71.

¹³ *Interpretation Act*, RSC 1985, c. I-21.

¹⁴ 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 (hereafter *Outstanding Business*).

In presenting the views of First Nations, the policy states: “They [First Nations] believe that claims should be based on moral and equitable grounds as well as lawful obligation and these should be clearly set out.”¹⁵ With regard to the assessment of claims, the policy provides that negotiation rather than litigation is the preferred means for the resolution of claims.¹⁶ In fact, the policy purports to adopt a more liberal approach than the court process by eliminating some of the existing barriers to negotiation¹⁷ and by stressing that the resolution of specific claims must be characterized by “mutual respect and cooperation” and achieved “without further delay.”¹⁸

Regrettably, since its inception in 1973, the specific claims process has been marked by persistent delays and backlog which have become endemic to the process and a significant barrier to the goals of “justice, equity and prosperity” which were intended to characterize the process.¹⁹ The Department of Indian and Northern Affairs finds itself in a constant state of overload as it faces continuing and mounting backlogs. In the period from 1973 to 2005, approximately 1,305 claims were filed with the Specific Claims Branch of Indian and Northern Affairs; of these, 67 claims have been rejected, 635 are “in review,” 113 are in negotiation, 268 have been settled, 35 have been resolved through administrative remedy, 84 have been closed, 68 are in litigation, and 36 are currently within the Indian Claims Commission process.²⁰ Given that approximately 70 new claims

¹⁵ *Outstanding Business*, 15.

¹⁶ *Outstanding Business*, 19; see also ICC, *Kluane First Nation: Kluane Game Sanctuary and Kluane National Park Reserve Creation Inquiry Interim Ruling* (Ottawa, December 2000), reported (2003) 16 ICCP 75 at 96 and 101.

¹⁷ *Outstanding Business* states at 21: “With respect to Canadian Indians, however, the government has decided to negotiate each claim on the basis of the issues involved. Bands with longstanding grievances will not have their claims rejected before they are even heard because of the technicalities provided under the statutes of limitation or under the doctrine of laches. In other words, the government is not going to refrain from negotiating specific claims with Native people on the basis of these statutes or this doctrine. However, the government does reserve the right to use these statutes or this doctrine in a court case.”

¹⁸ *Outstanding Business*, 3.

¹⁹ *Outstanding Business*, 3.

²⁰ ICC Transcript, cross-examination of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Saskatoon, Saskatchewan, August 19, 2005, pp. 21–23.

enter the specific claims process yearly, at a rate of five or six claims per month, any diminution in the current number of claims or in the delays characterizing their review and resolution is unlikely.²¹

Upon filing, each claim must be assessed by the department for the thoroughness of the historical record submitted with the claim as well as for clarification of the issues relevant to the claim. Waiting times for this review range from three to six years, and it is not clear what might distinguish the amount of waiting time characterizing different claims. The sole statements of the department on the issue of process are that claims are reviewed on a “first in, first reviewed” basis and that review “may be time-consuming if the claim issues are numerous, or complex, or involve areas that require further consultation with experts.”²² Evidence filed by the department in relation to this application does not reveal the presence of any objective mechanism within the specific claims review process which can track the progress of individual claims through the process or ensure equity across the rates at which those claims are reviewed.²³

Upon completion of this preliminary assessment, the claim is sent to the Department of Justice (DOJ) for legal review. Canada observes that, “due to the large volume of claims currently with DOJ, it sometimes takes considerable time to obtain DOJ’s analysis of a claim.”²⁴ Current estimates indicate that the Department of Justice completes approximately 15 reviews per year, each of which requires an average of 12 to 18 months to complete. This record constitutes an improvement over the estimate of 30 months given by Canada in the Alexis First Nation Inquiry interim ruling in April 2000.²⁵ Nevertheless, the current rate of review implies that the Specific

²¹ ICC Transcript, cross-examination of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Saskatoon, Saskatchewan, August 19, 2005, p. 20.

²² Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, paras. 7 and. 10.

²³ Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005.

²⁴ Letter from Robert Nault, Minister of Indian Affairs, to Chief Nawakayas, September 16, 2002, Exhibit 23, Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005; see also Weselake Affidavit, para. 40.

²⁵ ICC, *Alexis First Nation: TransAlta Utilities Rights of Way Inquiry Interim Ruling* (Ottawa, 2000), reported (2003) 16 ICCP 47 at 63 and (2004) 17 ICCP 21 at 169.

Claims Branch continues to fall behind on claims review at a rate of 55 claims per year.²⁶ When this backlog is juxtaposed with the average of 13.5 claims that reach the Minister for decision each year, it is difficult to be optimistic about possible reductions in the claims backlog. It is also important to remember that, for many First Nations, acceptance of their claim is merely the beginning of yet another long, complex, and expensive process of negotiations over the terms of settlement of the claim, a process that can add many more years onto the claims resolution process.

It is difficult to recognize within the processes outlined above the “accelerated,” fair, or expeditious resolution of claims that is the central goal of Canada’s specific claims policy. Nor is the honour of the Crown apparent in a claims process characterized by the magnitude of delay seen here and by the failure of the government to provide sufficient resources to ensure that those charged with administration of its policy are able to do so in a timely and efficient manner. First Nations bring their claims to Canada and insert them into Canada’s process in good faith, believing that their claims will be processed in a manner commensurate with the importance of the claim to their people. This expectation on the part of First Nations is not unreasonable. Yet, when their claims languish within the process for more than a decade, and in the absence of any apparent structure within that process which monitors the progress of individual claims and may provide firm and accurate estimates for completion of the review and decision, it is not surprising that some claimants experience a loss of faith in Canada’s commitment to the resolution of claims.

First Nations in this position are often loath to pursue vindication of their claims in the courts, as this action brings the review of their claim in the specific claims process to an immediate and full halt by DIAND, consistent with its policy that resources do not permit staff to both review a single claim and argue it in court.²⁷ Faced with this reality, and reluctant to step away from a process in which they have often been invested for more than a generation, First Nations are at the

²⁶ ICC Transcript, cross-examination of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Saskatoon, Saskatchewan, August 19, 2005, pp. 20 and 26.

²⁷ ICC, *Alexis First Nation: TransAlta Utilities Rights of Way Inquiry Interim Ruling* (Ottawa, April 2000), reported (2003) 16 ICCP 47 at 61-2 and (2004) 17 ICCP 21 at 167-8; ICC, *Lac La Ronge Indian Band: Treaty Land Entitlement Inquiry Interim Ruling* (Ottawa, May 1995), reported (2003) 16 ICCP 13 at 16 17.

mercy of the department, its limited resources, and an absolute absence of any legal or bureaucratic imperative that might require it to process claims and reach a decision in a reasonable time period.

Given this dilemma, some First Nations have turned to the Indian Claims Commission for review of their apparently stalled claims. Since 1996, the Commission has entertained 21 applications for inquiry of claims that have not yet been expressly rejected by the Minister. Of these applications, the Commission has refused 11 applications for inquiries and agreed to 10 such requests. Canada disputes the Commission's jurisdiction to conduct these inquiries. However, as will be seen, the Commission is both guardian of its own process and empowered to interpret its own mandate. This mandate provides strong legal and moral grounds supporting the exercise of this jurisdiction.

The Commission's Interpretation of Its Mandate

The essence of Canada's objection to this exercise of the Commission's jurisdiction resides in its emphasis on the ICC's authority to inquire into claims "already rejected" by the Minister. Canada takes the position that in the absence of an express act of rejection, defined by Canada as the letter of rejection of a claim which passes from the Minister to the claimant First Nation, the Commission has no jurisdiction to conduct an inquiry. The Panel does not accept this argument or the very narrow view of its mandate that it implies. It has been the stated position of the Commission since its ruling in the 1993 Athabaska Denesuline Inquiry²⁸ that there is nothing in the terms of reference defined by the Order in Council which confines the Commission to claims rejected in a particular manner. In addition, the empowering Order in Council defines a mandate that is both broad and remedial; one that requires the Commission to oversee the application of the specific claims process to ensure that it proceeds in a manner which respects the importance of claims, the rights of First Nations, and the honour of the Crown – a factor that must infuse all its dealings with Aboriginal people. The preamble to this Order, which must be read as an important and interpretive aspect of that Order, cradles the particular functions of both inquiry and report. Insofar as the Commission is charged with

²⁸ ICC, *Athabaska Denesuline: Treaty Harvesting Rights Inquiry Interim Ruling* (Ottawa, May 1993), reported (1994) 1 ICCP 159 at 163. The interim ruling on the mandate challenge in this inquiry is found in (2003) 16 ICCP 3, which contains the reports of rulings on Government of Canada objections from 1993 onward.

facilitating the resolution of specific claims and ensuring that this process advances fairly and expeditiously, it is impossible and inappropriate to sever the obligation to review the application of the specific claims policy from the individual claims to which that policy applies.

In executing this aspect of the Commission's mandate, the Panel has taken the view that, in the absence of any jurisprudence defining what constitutes rejection and without any federal policy statement that might clarify the term, rejection should not be confined to an express communication, either written or verbal, but can be the result of certain action, inaction, or "other conduct" by the Crown in its management of its claims review process.²⁹ Where such conduct has been found to characterize Canada's review of a claim, the Commission may find that the claim has, in effect, been "constructively rejected". The essential question is thus what constitutes rejection and, in the particular case, whether the actions or inactions of the Crown are such that they may give rise to a reasonable apprehension on the part of the claimant First Nation that its claim is rejected.

Over the decade in which the Commission has been receiving and considering applications for inquiries into such claims, a determination of constructive rejection has been guided by consideration of three factors, any or all of which may lead to a reasonable apprehension on the part of the First Nation that its claim is rejected:

1. delay without reasonable explanation;
2. lapsed undertakings to the First Nation by Canada; and/or
3. proportionality between complexity of the claim and apparent time in review.

In the Commission's experience, delay is the single most common issue raised by claimant First Nations seeking an inquiry. However, in considering this issue, the Panel distinguishes between those delays that are unavoidable and those that can, and should, be overcome by the parties. Here, the Panel is mindful of resource constraints that characterize both parties' participation in the process, and it requires some evidence that these constraints have been managed as effectively and

²⁹ ICC, *Alexis First Nation: TransAlta Utilities Rights of Way Inquiry Interim Ruling* (Ottawa, April 2000), reported (2003) 16 ICCP 47 at 59 and (2004) 17 ICCP 21 at 165; see also ICC, *Athabaska Denesuline: Treaty Harvesting Rights Inquiry Interim Ruling* (Ottawa, May 1993), reported (1994) 1 ICCP 159 at 163.

efficiently as possible to limit the degree to which they contribute to delays. The issue is not whether delays might be reasonable in some circumstances, but whether delay is reasonable in the immediate case – a matter that must be determined on a case by case basis having regard not only to the duration of the delay but also to its justification and its impact on the process and the parties.

As acknowledged by the Supreme Court of Canada, and as evidenced in the Commission’s inquiry processes, most First Nations must rely on oral history to vindicate their claims; as such, extensive delays may permanently damage a First Nation’s case as elders in possession of evidence pass on and the evidence is lost. The Court has confirmed the importance of “com[ing] to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past.”³⁰ and cautioned that “the failure to [keep written records] would ‘impose an impossible burden of proof’ on aboriginal peoples, and ‘render nugatory’ any rights that they have.”³¹ Insofar as such evidence is almost certainly critical to the success of the First Nation’s claim, the harm caused by the loss of oral evidence in a specific claim is irreparable.

By the same measure, if a claim takes a decade or more to obtain a ministerial determination of rejection, the loss of elders constitutes a serious blow to the case to be made should Canada reject the claim and the First Nation pursue an inquiry before the Commission. As the Panel observed in the *Peepeekisis First Nation: File Hills Colony Inquiry – Interim Ruling*:³²

In our view, the nature of the harm caused to the First Nation by Canada’s delay in addressing this claim, namely by the loss of Elders and other people with a depth of knowledge and developed expertise regarding the claim, imputes the kind of prejudice which today prevents the First Nation from presenting its best case had the claim been responded to in a timely manner.³³

³⁰ *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at para. 84.

³¹ *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at para. 87, quoting *Simon v. The Queen*, [1985] 2 SCR 387 at 408.

³² ICC, *Peepeekisis First Nation: File Hills Colony Inquiry Interim Ruling* (Ottawa, November 2001), reported (2003) 16 ICCP 111.

³³ ICC, *Peepeekisis First Nation: File Hills Colony Interim Ruling* (Ottawa, September 14, 2001), reprinted in ICC, *Peepeekisis First Nation: File Hills Colony Inquiry* (Ottawa, March 2004), app. A.

These consequences of delay must be added to the impact on communities of compiling and filing a claim which may not see resolution for a generation or more, leading to a loss of faith in the Crown's perceived commitment to the resolution of claims. As well, in some cases, the likelihood of increased activism by some First Nations, convinced that this is the only way to generate attention to their claim, is enhanced when claims languish in the process with no resolution in sight. In short, then, what matters about delay is not the simple magnitude of the delay as defined by the passage of time, but rather the impact of that delay on the process and those who must place their faith in that process. Insofar as the fair and expeditious resolution of claims is in the interest of all Canadians, the consequences of delay have importance far beyond the parameters of the specific claims process.

Although it is rare for the Panel to find a claim to have been constructively rejected on the basis of delay alone, the most compelling instances of delay have ranged up to 15 years. However, even in such cases, delay has never been the sole factor impelling a finding that the claim had been rejected. For example, in the *Peepeekisis First Nation: File Hills Colony Inquiry*,³⁴ delay was accompanied by ongoing undertakings by the Crown to the First Nation that a determination of the claim was imminent, only to have the promised date of determination specified by the Crown pass without any comment or fulfilment of that undertaking. There was also no explanation at any point in the 15-year review of the claim by the Crown of the reasons for the amount of time taken to complete the process. This oversight is especially important insofar as the department confirms that review may take more time where the claim is, as noted above, characterized by issues "[which] are numerous, or complex, or involve areas that require further consultation with experts"³⁵ – factors that were not present in the *Peepeekisis* claim.

Significant lapsed undertakings by the Crown in reviewing claims exacerbate delays and may also constitute compelling evidence of constructive rejection. In the *Alexis First Nation: TransAlta Utilities Rights of Way Inquiry*,³⁶ Canada repeatedly informed the First Nation that a "preliminary

³⁴ ICC, *Peepeekisis First Nation: File Hills Colony Inquiry Interim Ruling* (Ottawa, September 14, 2001), reprinted in ICC, *Peepeekisis First Nation: File Hills Colony Inquiry* (Ottawa, March 2004), app. A.

³⁵ Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, para. 10.

³⁶ ICC, *Alexis First Nation: TransAlta Utilities Rights of Way Inquiry Interim Ruling* (Ottawa, April 2000), reported (2003) 16 ICCP 47 and (2004) 17 ICCP 21 at 153.

position was forthcoming” on its claim and yet consistently failed to follow through on that undertaking; in addition, research into this modest and straightforward right-of-way claim was promised to the First Nation, but was never in fact shared with it. When, three years after filing its claim, the First Nation had received no research and no indication from the Crown when or whether it might obtain a determination on the claim, it informed the department that it would be commencing litigation on the claim. The First Nation further specified that it would be prepared to suspend the court action on receiving notification that the claim was validated. After waiting nearly a full year to respond to this communication by the Band, the department informed the First Nation that it would not continue to process a claim that was being actively litigated, but, if the Band would suspend its court action, the department could promise a prompt response to the claim. There is no evidence that any response to the claim was expedited, and, after nearly a year had passed following the First Nation’s suspension of its litigation and the promise of rapid response by the Crown, with no determination on the claim in sight, the Alexis First Nation successfully requested an inquiry from the Commission into its claim.

The Commission’s attention to the Alexis claim demonstrates the value of public inquiries in such contexts and, in particular, the freedom of commissions of inquiry to interpret their mandates in a broad and remedial fashion. The claim of the Alexis First Nation had not been “rejected” in a manner consistent with Canada’s interpretation of that term, and yet, had the Indian Claims Commission not accepted the claim as constructively rejected, important information about the specific claims process and potential unfairness within it would have gone unnoticed by the Canadian public. Thus, while there were clear benefits to the parties in obtaining the insights of an independent investigation of the claim, the inquiry also revealed two important points. First, that Canada was inserting into the Specific Claims Policy aspects not seen anywhere in *Outstanding Business* - namely, the requirement that claims may not proceed in the specific claims process if they are concurrently in litigation. Although this practice may be reasonable in some cases, the fact that it was neither publicly known nor part of the policy creates a profound unfairness for First Nations and a significant deviation from the policy adopted by government. Second, the admission within the inquiry process by Canada’s counsel that review of a claim by the Department of Justice required

an average of 30 months shed important light on the location of delay within an already intractably lengthy process.

There can be little question that the ability to intervene in circumstances in which a First Nation has been subjected to myriad delays and failed undertakings is consistent with the remedial nature of the ICC's mandate. The Commission has this obligation as a body charged with making public inquiry into specific claims as matters that are of significance to the Canadian people. Canada objects to the Commission's decade-old policy of constructive rejection both on practical grounds as well as for reasons attached to Canada's interpretation of the Commission's mandate. The Government of Canada argues that the willingness of the Commission to accept claims not yet formally rejected by the Minister creates a manifest unfairness in the system by permitting "queue-jumping" by those First Nations that are able to access the Commission. In addition, Canada argues that in applying the designation of constructive rejection, the Commission is usurping Canada's powers of review and determination of claims.

With respect, neither of these arguments is sound. In order for concerns over queue-jumping to be sustained, there must be some clear evidence of a queue, and some reasonably objective criteria that are consistently applied to claims and that thus define a clear and relatively systematic queue³⁷. Canada has not been able to establish that there is any objective standard by which claims may be ranked in a consistent fashion, thereby ensuring some systematic movement through the specific claims process.³⁸ Rather, it appears that the queue is arbitrary and that the "first in, first-reviewed" approach may be undermined by a wide range of factors, including the complexity of the claim, the state of the research filed, the nature of the issues in the claim, and the amount of time the First Nation takes to review Canada's research report confirming the information submitted by the First Nation. By Canada's own admission, the "amount of time [a review requires] will vary depending

³⁷ ICC Transcript, cross-examination of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Saskatoon, Saskatchewan, August 19, 2005, pp. 118-21.

³⁸ Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, paras. 5-12; see also ICC Transcript, cross-examination of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Saskatoon, Saskatchewan, August 19, 2005, pp. 21-23.

on the circumstances.”³⁹ It is difficult to understand Canada’s concerns about a First Nation attempting to shift its unknown location in an unsystematic or unverified queue, when Canada itself is apparently unable either to elucidate that queue or to monitor the progress of claims through it. In the absence of any evidence by Canada documenting the queue and indicating some means of tracking the various claims’ movements through it (thereby enabling some determination of whether, in fact, the queue has been jumped), arguments of queue-jumping ring decidedly hollow.

Canada asserts that when the Commission reaches a determination that a claim has been constructively rejected, the Commission has effectively usurped the power of the Minister to reach his or her own determination on a claim. However, in reaching such a conclusion and accepting a constructively rejected claim for inquiry, the Commission is not presuming to usurp the Crown’s right to administer its own policy. When a First Nation approaches the Commission and requests an inquiry based on a finding that its claim has been constructively rejected, the Commission is not stating an opinion on whether the claim should be rejected or accepted. Rather, the Commission is making a determination, based on a systematic analysis guided by the three-point criteria that underlies the Commission’s constructive rejection policy, of the claim’s experience in the system and whether the conduct of the Crown in processing that claim is such that the First Nation may reasonably perceive its claim to have been rejected. In short, the Commission is asked whether the Crown has acted in a manner that is tantamount to a rejection of the claim. Such an analysis has no impact on the power of the Minister to reach his or her own determination on the merits of the claim and on whether that claim is actually rejected. The latter remains a separate and distinct question that is outside the province of the Commission.

Analysis

In our view, a claim may be construed as rejected based on a record of sufficiently unreasonable conduct by the Minister’s officials, which may manifest in any or all of the following ways: delay without reasonable explanation; lapsed undertakings by Canada to the First Nation; or lack of proportionality between complexity of the claim and apparent time in review. Canada rejects this

³⁹ Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, paras. 8–11.

construction of the Commission's mandate. Consistent with its position that the sole legitimate articulation of "rejection" resides within a ministerial letter following a determination on the claim, Canada asserts that any alternative understanding of that term, such as the expression of rejection contained within the Commission's constructive rejection policy, is inconsistent with the intention of the Minister as expressed in *Outstanding Business*. Had the Minister intended to impose time constraints on the making of a determination on a claim, Canada argues, this would have been clearly articulated within the policy. Canada similarly argues that, had the Governor in Council intended to grant the Commission the authority to inquire into and report on delay in the specific claims process, such a role would have been explicitly stated in the Order in Council creating the Commission. What is absent from these arguments, however, is recognition not only of the remedial nature of the Commission's mandate but also of the intended role of the Commission in facilitating the fair and expeditious resolution of claims - a role which is consistent with the goals of the specific claims policy it is mandated to review.

Insofar as the Commission has been charged with such tasks, it is difficult to see how the Crown can succeed with an argument that this work would not include ensuring an absence of unfairness in the process, whether it resides in delays that are unreasonable and/or unexplained by the Crown or in lapsed undertakings. Canada replies that the Commission should not take questions of reasonableness or justice into consideration in interpreting its mandate. Yet, as is clear from the principles expressed by the Minister in *Outstanding Business*, it is precisely justice that the specific claims policy of 1982 promised to provide to First Nations. If there is, in fact, patent unreasonableness in the administration of a specific claims review process that allows relatively simple claims to wait more than 15 years without any decision, that is an absence of justice that must be remedied. The Commission was given the responsibility to review the specific claims process and that responsibility will be discharged mindful of the imperatives of "mutual respect and cooperation" which were intended to characterize the resolution of specific claims "without further delay."⁴⁰

There is no legal or bureaucratic force compelling the Minister to reach a decision on a claim, and the prerogative remedy of mandamus is not available to a claimant seeking a decision on a claim

⁴⁰ *Outstanding Business*, 3.

that may, in the claimant's view, be unreasonably delayed. However, the present issue is not whether the Minister may be required to reach a decision on a claim, but, rather, whether, having not done so in a reasonable fashion, the decision may be assumed to be unfavourable to the claimant so as to engage the Commission's jurisdiction. If the Commission is found to lack the power to deem the Minister's actions to have been tantamount to a rejection of the claim, there are limited options available to a First Nation that reasonably perceives its claim to be stalled in the specific claims process. First, there will be the option of continuing to await a determination by the Minister on the validity of its claim, in the absence of any firm estimate, or ability to estimate, when a determination might be reasonably expected. In such a case, the First Nation will also be mindful of the possibility that the delays may stretch out indefinitely and result in the loss of elders and evidence germane to the claim, as well as the negative implications for the hopes and morale of a community awaiting resolution of its claim. Confronted by these realities, the option of continuing to occupy some unknown place in an unsystematic queue in a process lacking in transparency may not be attractive to the First Nation. This realization takes the First Nation to its second alternative, the courts, where it will face excessive costs, possible additional delays, and the risk of winner-take-all outcomes, all of which the 1982 specific claims policy was designed to avoid. The limited attractiveness of both these options constitutes a further unfairness to the First Nation, which, as noted above, files its claims and enters the specific claims process in good faith and anticipating a fair and expeditious resolution of its claim, as promised by *Outstanding Business*.

Although there is nothing in the current specific claims policy and process that requires the Minister to reach a decision within a reasonable time period, the courts have not been slow to place an obligation upon decision makers to reach a decision even where a mandatory time-frame for decision making is absent within the relevant legislation. In *Austin v. Canada (Minister of Consumer and Corporate Affairs)*, Dube J, denying mandamus on the grounds that the delay in question was not unreasonable, noted that delay even in the absence of a time limit may be unreasonable:

Subsection 20(4) of the Competition Act imposes no time limit for the Minister to act. Obviously, he cannot procrastinate ad infinitum. In the absence of any time

limitation he must exercise his discretion and make it known to the applicant within a reasonable time.⁴¹

In *Bhatnager v. Canada (Minister of Employment and Immigration)*, Strayer J (as he then was) equated unreasonable delay in reaching a decision to a refusal to make a decision:

The decision to be taken by a visa officer pursuant to section 6 of the Regulations with respect to issuing an immigrant visa to a sponsored member of the family class is an administrative one and the Court cannot direct what that decision should be. But mandamus can issue to require that some decision be made. Normally this would arise where there has been a specific refusal to make a decision, but it may also happen where there has been a long delay in the making of a decision without adequate explanation.⁴²

Strayer J reached a similar conclusion in *Ermineskin Band Council v. Canada (Registrar, Indian and Northern Affairs)*:

While there has been no express rejection of this demand [for a decision respecting the Council's protest against the registration of certain persons as band members], more than enough time has passed for a response and none has been forthcoming. This is tantamount to a refusal to decide.⁴³

Although the submissions on behalf of the Minister fall short of asserting that the Minister need never reach a decision on a specific claim, that is the clear implication of the government's position if, indeed, a claimant has no recourse to the Commission should the Minister choose never to make a decision.

Conclusion

Commissions of inquiry have a wide discretion in interpreting their Terms of Reference. The Indian Claims Commission has consistently interpreted its mandate broadly and liberally, having regard to

⁴¹ *Austin v. Canada (Minister of Consumer and Corporate Affairs)* (1986), 10 FTR 86.

⁴² *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1985] 2 FC 315.

⁴³ *Ermineskin Band Council v. Canada (Registrar, Indian and Northern Affairs)*, [1986] 3 FC 447 at para

the purposes for which it was established and the fact that it does not determine rights but, instead, provides a considered evaluation with recommendation to the Minister of Indian Affairs and the claimant First Nation. The Commission's terms of reference do not define when or how a claim has been rejected. Thus, the Panel considers this issue to be a question of fact based on the record in a particular claim. Indeed, in the vast majority of cases, a claim will have been expressly rejected by the Minister; however, if no formal rejection has been communicated and the First Nation requests an inquiry, the Commission will examine the conduct of the Crown in the specific claims process, as well as any other relevant facts, to determine whether to hold an inquiry on the basis of a constructive rejection.

Conduct by Canada, whether of delay without reasonable explanation, lapsed undertakings by Canada to the First Nation, or lack of proportionality between complexity of the claim and apparent time in review, any of which may give rise to a reasonable apprehension of rejection of the claim on the part of the claimant First Nation, may be regarded as equivalent to a rejection of the claim. In essence, what the Panel is asserting is not a determination of rejection based on the merits of the claim, but, rather, the determination of rejection based on a systematic assessment of the conduct of the Crown in administering its specific claims policy with regard to that claim. The equation is one in which the failure to decide, or to give any reasonable indication that a decision is in progress, is deemed to be equivalent to a refusal to decide. In such a situation, the First Nation must be provided with a fair and accessible remedy to the Crown's refusal to reach a determination of its claim.

Lacking recourse to a legal remedy such as *mandamus* to compel a timely review of their claims, and without any other avenue such as the Commission, claimant First Nations must abandon their claim, turn to the courts, or simply accept that their claim will remain undecided. Such a situation is antithetical to the spirit and context of the ICC's constating Order in Council, and it cannot have been the promise of the specific claims policy in 1982 or of the creation of the Commission in 1991. This review of the statements and recitals set out above, made by government in the spirit of reconciliation, compels the Panel to this conclusion. As we see it, a promise of reasonably expeditious review of First Nations' specific claims was made, and the Commission was given charge of its mandate to inquire into and comment on the mechanism by which that promise

is to be kept. Consistent with the views of the Supreme Court in *Badger* and in *Haida*, the Commission has “always assumed that the Crown intends to fulfill its promises.”⁴⁴ The current specific claims process does not always function in a manner that meets this expectation and, as such, it falls to the Commission, consistent with the obligations contained in its Order in Council, to assist the parties to adhere to the principles of the policy.

To maintain the honour of the Crown and the integrity of the claims process, the promise of the policy outlined in *Outstanding Business* must be kept. That can be achieved only if, once the delays and lapsed undertakings in question become unreasonable, the First Nation can take another path to facilitate the resolution of its claim. In determining whether the Commission has jurisdiction to inquire into a claim that has not been expressly rejected by the Minister, we find that the Commission does indeed have, in certain circumstances, the jurisdiction to hold an inquiry in the absence of express ministerial rejection.

We now address whether the circumstances of the review by the Minister and his officials of the claim of the Red Earth and Shoal Lake Cree Nations is such as to engage the jurisdiction of the Commission.

ISSUE 2: JURISDICTION TO INQUIRE INTO THE CLAIM OF THE RED EARTH AND SHOAL LAKE CREE NATIONS

Where there has been no formal communication of a rejection of the claim, as in this case, we must consider whether the action, lack of action, or other conduct on the part of Canada is sufficient to conclude that the claim has been rejected. As stated, a finding of constructive rejection by the Commission is a question of fact based on the record in a particular claim, in this case the combined claim of the Red Earth and Shoal Lake Cree Nations. The Commission determines whether the facts amount to a reasonable apprehension of rejection by considering three factors which may characterize Canada’s review of a claim: delay without reasonable explanation; lapsed undertakings by Canada to the First Nation; and the proportionality between the claim and the apparent time in review.

⁴⁴ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 20 quoting *R. v. Badger*, [1996] 1 SCR 771 at para. 41.

Background to the Claim and the Request for Inquiry

The claim of the Red Earth and Shoal Lake Cree Nations pertains to questions of the quality and location of lands reserved for these Saskatchewan First Nations under the terms of Treaty 5. The claims were jointly submitted to the Minister of Indian Affairs and Northern Development on May 3, 1996. On August 29, 1996, the Research Manager of the Specific Claims Branch of the Department of Indian Affairs and Northern Development contacted the First Nations to acknowledge receipt of the claim, and the preliminary analysis of the claim was initiated on March 17, 1997. The First Nations were informed on May 26, 1997, that the initial analysis was complete and that Canada's historical research was scheduled to commence the following November. Additional information on the claim was requested from the First Nations by Specific Claims.

Chief Roy Head of the Red Earth First Nation contacted the Specific Claims Branch on May 1, 1997, to request a copy of the confirming research report, and again on August 15, 1997, requesting an update on the status of the claim and confirming research. Canada's reply to this letter does not address the request for a copy of the research. On September 17, 1997, the Chief again contacted Specific Claims, on this occasion to request a copy of the preliminary analysis and the name of the researcher assigned to the claim. On July 10, 1998, Specific Claims informed Chief Head that a researcher had been contracted to conduct the historical research and that the department expected this work to be completed in "early October."⁴⁵ The researcher's contract was later extended to November 27, 1998, and the report was completed and reviewed by the Specific Claims Branch in January 1999.

On March 29, 1999, Specific Claims found that the research report failed to comply with the standards of the Specific Claims Branch, and on May 13 a new researcher was contracted to complete a second confirmation research report. The First Nations were contacted regarding this development, albeit without elucidation of the grounds for rejection of the initial report, and provided with the terms of reference under which the new research was to be conducted. An estimated completion date for the report was given as August 9, 1999. This second report also failed to meet with Specific Claims Branch standards when first received, and on October 18, 1999, the

⁴⁵ Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 12.

First Nations were informed by the Specific Claims Branch that the second researcher's contract had been extended, but that no date of completion for the requested revisions had been finalized.

On February 15, 2000, the Specific Claims Branch completed its review of the confirmation research report and forwarded the report to the First Nations for their review. On December 7, 2000, the Federation of Saskatchewan Indian Nations (FSIN), an organisation of representatives from Saskatchewan Treaty First Nations, contacted the Specific Claims Branch on behalf of the Red Earth and Shoal Lake First Nations and communicated that the First Nations' review was complete. Citing the "several years" that had passed since the claim's initial submission to the Specific Claims Branch, the Federation's Vice Chief requested that Specific Claims appoint a lawyer from the Department of Justice immediately to prepare a legal opinion on the claim.⁴⁶ At the same time, the First Nations submitted Band Council Resolutions to Canada echoing that request.

The Specific Claims Branch advised the First Nations that their claim had been referred to the Department of Justice for review on March 16, 2001. On July 15, 2002, having had no contact from the Specific Claims Branch regarding their claim, the First Nations contacted the Minister of Indian and Northern Affairs Canada, Robert Nault, to express their frustration with the delay and to request that a decision be reached on their claim in the near future. The Minister replied on September 16, 2002:

The situation has been brought to the attention of the Director of Policy and Research, SCB, and I have asked that the SCB and DOJ work together to expedite this claim as soon as possible.⁴⁷

It was not until April 3, 2003, that the First Nations received confirmation that a Department of Justice lawyer had, in fact, been appointed to review their claim and provide a legal opinion. The appointment of a lawyer for this purpose took from March 16, 2001, until April 3, 2003 – a span of just over two years. On November 13, 2003, the Acting Senior Advisor, Specific Claims Branch, informed the First Nations that the review of their claim was under way and that the claim was being

⁴⁶ Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, 2005, Exhibit 20.

⁴⁷ Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, 2005, Exhibit 23.

processed as quickly and expeditiously as possible.⁴⁸ No estimated date for completion of this review was given. Six days later, on November 19, 2003, Chief Miller Nawakayas of the Red Earth Cree Nation and Chief Marcel Head of the Shoal Lake Cree Nation contacted Minister Nault, expressing concerns about the six-year delay in the processing of their claim:

... it was only recently that the claim has even been assigned to a Justice Department lawyer. Your officials plead 'limited resources'. They are unable to provide us with any time frame for the legal review, not to mention the review which the Department [of Indian Affairs] must make afterwards.... We consider this situation to be the equivalent of a rejection of the claim.⁴⁹

There is no record of any reply to this letter from the Minister's office. On November 19, 2003, citing approximately seven years in the processing of their claim, the Red Earth and Shoal Lake First Nations requested that the Indian Claims Commission conduct an inquiry into their claim, which they perceived as effectively rejected by the department.⁵⁰

On February 3, 2004, the Specific Claims Branch contacted the First Nations and asserted, "the This claim has been identified as a priority for DOJ."⁵¹ One week later, on February 10, 2004, Andy Mitchell, Minister of Indian and Northern Affairs Canada, advised the First Nations that their claim was still under review by the Department of Justice.⁵²

On June 2, 2004, following careful contemplation of the situation of the Red Earth and Shoal Lake First Nations' claim, the Indian Claims Commission accepted the claim for inquiry based on

⁴⁸ Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 25.

⁴⁹ Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 26.

⁵⁰ Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 27.

⁵¹ Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 28.

⁵² Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 29.

its constructive rejection policy.⁵³ Informed of the Commission's acceptance of the request for inquiry, Minister of Indian and Northern Affairs Canada Andy Scott contacted the First Nations and informed them that a "decision has not yet been made on whether this claim should be accepted or rejected."⁵⁴ Given the department's position that funding to participate in the Indian Claims Commission's processes is provided "when an Indian Band disagrees with my rejection of a claim ... and has an Indian specific claim in that situation," the implication is that no funding would be provided to the Red Earth and Shoal Lake Bands to permit them to participate in the inquiry.⁵⁵ The Minister chose to challenge, by way of motion, the jurisdiction of the Commission to hold the inquiry. The Minister's motion, served April 7, 2005, was heard on February 9, 2006, by way of written and oral submissions on behalf of the parties.

As of the date of the hearing of this application, February 9, 2006, the Department of Justice lawyer appointed on April 3, 2003, to review the claim of the Red Earth and Shoal Lake First Nations had s yet to complete that review, and there is no evidence of any estimated time frame for its completion. It is the Panel's understanding that once the legal opinion is completed by the Department of Justice, it will be returned to the Specific Claims Branch of the Department of Indian and Northern Affairs for a further internal review. Following completion of this phase of review, the file, complete with legal opinion, will be sent to the Department of Indian Affairs' Claims Advisory Committee. This Committee will conduct its own review and make a recommendation to the Minister of Indian and Northern Affairs whether to accept the claim for negotiation of a settlement.

Analysis

Delay

Over 10 years have passed since the Red Earth and Shoal Lake Cree Nations submitted their claim to the Specific Claims Branch. To date, the Department of Justice has yet to render its legal opinion

⁵³ Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 30.

⁵⁴ Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 31.

⁵⁵ Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 31.

on the validity of the claim. The evidence given by Ms Veda Weselake, Director of the Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, confirms that it has taken the Specific Claims Branch three and half years to conduct a preliminary analysis and to produce a satisfactory historical report.⁵⁶ It has taken a further two and a half years for the Department of Justice to assign a lawyer to the claim and, after three years, that lawyer has yet to complete a legal opinion on this claim – a span well outside the 12–18 months cited by the Department of Justice as constituting the average time taken to complete such reviews. The delay continues notwithstanding the direction of the Minister, given in 2002, to the Department of Indian and Northern Affairs and the Department of Justice work together to expedite the review of this claim.

It has been acknowledged by both parties that Canada has provided updates on the processing of the claim by correspondence and by telephone. In fact, over the five years punctuating the claim's submission to the Specific Claims Branch on May 3, 1996, and the transfer of the claim to the Department of Justice on March 16, 2001, the claim appeared to be progressing toward a timely decision, given what is known about the processing of claims submitted to the Specific Claims Branch. It is also evident that one year of that initial processing period was taken up by the First Nations' review of Canada's research confirmation report. However, on reaching the Department of Justice, the processing of the claim decelerated to the point of apparent inactivity, and five years on there is no indication that any progress has been made on completing the legal opinion or on whether or when that opinion will be completed. It is also at this point that communication by the Specific Claims Branch with the First Nations regarding the progress of the claim apparently broke down, as the Specific Claims Branch is unable to establish clearly that its representatives communicated with the First Nations regarding the progress of their claim or the reasons for the delays.⁵⁷ Such delay and the absence of any apparent effort to keep the First Nations informed about

⁵⁶ Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, paras 13 and 35..

⁵⁷ According to Ms Weselake's evidence, in March 2001 Canada advised the First Nations that their claim had been referred to the Department of Justice for a review: Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, para 37. A Department of Justice lawyer was not assigned to the claim until April 2003. The only correspondence from Canada on record during this time frame is the Minister's letter of September 2002.

their claim's review are hardly reminiscent of the "mutual respect and cooperation" in the resolution of specific claims anticipated in *Outstanding Business*.⁵⁸ It is the view of the Panel that the totality of time taken to date by the Specific Claims Branch to complete its review of the claim has been characterized by an unreasonable measure of delay for which, especially over the past five years, no reasonable explanation has been either forthcoming or communicated to the claimants.

In considering delay, however, the issue is not solely one of the magnitude of time taken to review a claim. As noted in the analysis of Issue 1 of this ruling, what is equally important is the impact the delay has had on the First Nation and its ability to present a full and cogent case for validation of its claim. In the present case, the claimants have waited a decade for the Crown to complete the review of their claim and to determine either to reject or to accept the claim for negotiation. For half of this period of delay, the waiting has not been eased by the Crown's failure to provide any justification for those delays or any hint of when their claim might be decided by the Crown. More significantly, while they wait for the Crown, the First Nations have watched the evidentiary record of their claim be diminished and disadvantaged by the deaths of six elders whose historical evidence is no longer available to assist in establishing the validity of the claim. The First Nations adduced evidence that the Red Earth First Nation has witnessed the passing of Elders Abel Head, John McKay, and Ralph Head, while the Shoal Lake First Nation has lost Elders Jeremiah Whitecap, Joe Bear, and Horace Kitchener.⁵⁹ As was stressed in the elucidation of the Commission's mandate earlier in this ruling, as societies whose historical records were, until relatively recently, retained orally in the memories of elders and others who were present at treaty signing or told of the event by their ancestors, such oral evidence is often a First Nation's primary, if not sole, source of evidence. Canada's delay in addressing this claim has prejudiced the Red Earth and Shoal Lake Cree Nations' ability to effectively present their claim and, in the words of the First Nations' counsel⁶⁰, has led to feelings of "frustration, anger, disappointment, depression, loss of hope, and loss of

⁵⁸ *Outstanding Business*, 3.

⁵⁹ Affidavit of Ian McKay, Red Earth First Nation, Melfort, Saskatchewan, July 6, 2005, para. 9.

⁶⁰ Reply Submissions on Behalf of the Red Earth and Shoal Lake Cree Nations, para. 75.

confidence” on the part of the First Nations in the commitment of Canada to the fair and expeditious resolution of specific claims.

In summary, the Panel finds that the conduct of the Crown in its review of the claim of the Red Earth and Shoal Lake First Nations over the period of May 3, 1996, through to the present, but most notably since 2001, has created an unacceptable situation of delay for which no reasonable explanation has been provided to the First Nations. Furthermore, Canada has not provided evidence to this Panel which might justify either the delay or the Specific Claims Branch’s failure to communicate with the First Nations to explain the delay. Conversely, the First Nations have provided compelling evidence not only of the delay but also of the deleterious consequences the passage of time has created for the First Nations through the death of elders and the resulting erosion of the historical record of the claim.

Lapsed Undertakings

In addition to delay, the Panel considers, as relevant to a determination of constructive rejection, evidence of lapsed undertakings regarding such matters as the rate of progress in the processing of the claim and the estimated time frames for a decision on a claim. In the present case, and as detailed above, there are three instances of statements by the Crown which may be reasonably seen as creating an expectation on the part of the First Nations that review of their claim would be expedited when, in fact, there is no evidence to indicate that this undertaking initiated any shift in the approach of the Specific Claims Branch towards the claim. It is significant that the first of these statements originated with the Minister of Indian and Northern Affairs. As previously stated, in September 2002, the Minister communicated by letter to the First Nations that their claim had been brought to the attention of the Director of Policy and Research and that the Specific Claims Branch and the Department of Justice would work together to expedite review of the claim.⁶¹ One year later, in November 2003, in reply to a query from the First Nations concerning the ongoing lack of progress on their claim, an official from the Specific Claims Branch assured the First Nations that their claim

⁶¹ Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 23.

was being processed “as quickly and expeditiously as possible.”⁶² Then, in 2004, the claim was identified to the claimants as a “priority” by the Specific Claims Branch.⁶³ Although Canada continues to suggest that a decision is forthcoming, it has not provided a certain date within which it will make a decision.

It may reasonably be suggested that any of the above statements could have created a sense of false encouragement on the part of the First Nations regarding the commitment of the Crown to the resolution of their claim. That these undertakings to expedite review of the claim transpired in the apparent absence of any such accelerated review is problematic in itself; that such unfounded undertakings may have influenced the claimants’ willingness to remain in the Specific Claims Branch queue as elders passed away and evidence was lost, rather than pursuing litigation or earlier intervention by the Commission, is an unacceptable but quite possible consequence of the Crown’s lapsed undertakings.

The Panel finds that the Minister of Indian and Northern Affairs and officials of the Specific Claims Branch made undertakings to the Red Earth and Shoal Lake First Nations to expedite review of the claim, but that no evidence exists to indicate that these undertakings were fulfilled.

Proportionality between the Delay and the Complexity of the Claim

The Red Earth and Shoal Lake Cree Nations’ claim involves a determination of Canada’s obligation, according to the terms of Treaty 5, to provide lands of adequate quality and quantity to support the farming economy encouraged by the department and adopted by the claimants. Although Canada has significant experience on the matter of land quantum under the numbered Treaties, it asserts that the issue of the quality of farming land is a novel treaty interpretation issue which may have broad legal significance for other Treaty 5 First Nations. As such, Canada alleges that this aspect of the claim has contributed significantly to the delay in processing the claim. Canada argues that, while the processing of historical claims is by its very nature complex and time consuming, responding to

⁶² Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 25.

⁶³ Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 28.

novel treaty interpretations in a Specific Claims Branch characterized by inadequate and highly strained human and financial resources requires considerably more time and effort.

While the Panel is all too familiar with the challenges implicit in resolving historical claims, it is not able to agree with Canada's arguments linking the land quality question in this claim with the delays that have characterized its review. Canada has not brought any evidence before the Panel which links the land quality question with the pace of review, and thus it is impossible to make any conclusions about the implications of the question in the absence of such evidence.

At least in part, Canada's concerns that the claim presents questions of "novel treaty interpretation" appear to have less to do with the complexity of the issue of land quality than with the possible precedential effect of any determination of that issue by the Specific Claims Branch. While it is reasonable that officials would wish to take especial care in reviewing a claim where some aspects may be expected to have "broad legal significance," the main issue in this claim – and, indeed, in many other claims submitted to the Specific Claims Branch – is whether there are unfulfilled treaty obligations within the meaning of the specific claims policy. Questions of precedential effect should not bear any relationship to the legal question in this or any other claim. As was stated by Commission Counsel on behalf of the Panel stated in the *Mikisew Cree First Nation Inquiry*:

Even if the Commission were to conclude that it is justifiable for Canada to consider the broader policy implication of accepting the claim, the apparent lack of clarity in the [Specific Claims] policy (which was developed 14 years ago) cannot provide a justifiable reason for the patent delay in this case.⁶⁴

Canada maintains that it is subject to limited resources, both human and financial, and that these limitations become especially confounding when claimants raise new and unexpected treaty interpretations. While there are abundant statements in the evidence by various officials of the Specific Claims Branch lamenting the limitation in resources, these limitations cannot become an excuse by the Crown to avoid its obligations to manage claims in a fair and expeditious fashion. Delays due to resource constraints are reasonable in some contexts. However, when those delays lead

⁶⁴ ICC, *Mikisew Cree First Nation: Treaty 8 Economic Benefits Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 183 at 215.

to permanent harm to the evidence in a claim – as in the deaths of six elders over 10 years in the present case – the challenges characterizing the process are shifted onto the claimant party and result in significant unfairness.

Because Canada has failed to present evidence to support a link between the complexity of the claim of the Red Earth and Shoal Lake First Nations and the delays, it is impossible to accept its assertion that the complexity of the claim explains the delay in completing the review. To the degree that precedential effect goes to the question of complexity, concerns regarding the possible precedential impacts arising from the management of the land quality issue should not bear any relationship to the legal questions in this claim. As regards the impact of resources, or lack thereof, within the Specific Claims process, the Commission has long held the view that it is the responsibility of the parties to manage their resource constraints as effectively as possible and in a manner that will not have any impact on the fairness of the claims review process. If, in fact, resource constraints are responsible for some portion of the considerable delay characterizing Canada's Specific Claims process in the present case, this fact would go to the question of Canada's ability to effectively manage those resources to ensure that they impair the integrity of the claims process as little as possible.

With regard to the Red Earth and Shoal Lake First Nations, the delays experienced indicate an absence of effective resource management by Canada which has had a direct and deleterious impact on the fairness of the specific claims review process and the ability of the First Nations to establish their claim.

CONCLUSION

The Panel finds in the affirmative on both issues in this motion. First, it is within the Commission's jurisdiction to accept constructively rejected claims for inquiry. Second, on the facts of the Red Earth and Shoal Lakes First Nations' claim, the conduct of Canada was tantamount to a rejection of that claim. The Commission therefore possesses the jurisdiction to conduct an inquiry into this claim.

Canada's motion is hereby dismissed.

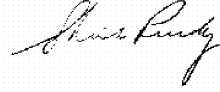
FOR THE INDIAN CLAIMS COMMISSION



Jane Dickson-Gilmore (Chair)
Commissioner



Alan C. Holman
Commissioner



Sheila G. Purdy
Commissioner

Dated this 26th day of September, 2006.

APPENDIX D

Notice of Application, Federal Court of Canada, October 25, 2006

11/07/2006 09:15 FAX #139414217

CIVIL LITIGATION

0003

Court File No. T-1864-06

FEDERAL COURT

BETWEEN:

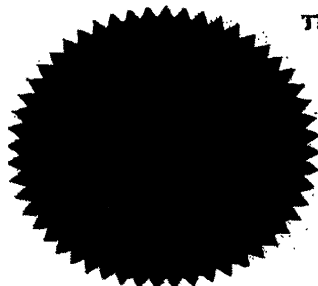
THE ATTORNEY GENERAL OF CANADA

Applicant

and

RED EARTH INDIAN BAND and
SHOAL LAKE CREE NATION

Respondents



NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Ottawa, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules, 1998*, and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Court Rules, 1998*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

October 25, 2006

2

Original signed by
Kathy Craigie
Original signé par

Issued by: _____
(Registry Officer)

Address of
local office: _____

Federal Court of Canada
Lorne Building
90 Elgin Street
1st Floor
Ottawa, ON K1A 0H9

TO: Kapoor, Selnes & Klimm
417 Main St.
P.O. Box 2200
Melfort, SK S0E 1A0
Tel: (306) 752-5777
Fax: (306) 752-2712

William A. Selnes
Solicitor for the Respondents,
Red Earth Indian Band and Shoal Lake Cree Nation

APPLICATION

This is an application for judicial review in respect of the Indian Specific Claims Commission (the "Commission") established by Order in Council P.C. 1991-1329; as amended (the "Order in Council"). The Applicant seeks judicial review of the decision of the Commission dated September 26, 2006, entitled "Ruling on Canada's Objection to Jurisdiction", whereby the Commission purported to take jurisdiction over the Respondents' request for an inquiry into their claim. The decision was communicated to counsel for the Department of Indian and Northern Affairs on the same date.

The Applicant makes application for an Order of the Court:

- (a) quashing or setting aside the said decision of the Commission;
- (b) declaring that the Commission erred in its interpretation of its constituting Order in Council;
- (c) prohibiting the Commission from continuing with the said inquiry;
- (d) costs; and
- (e) such further and other relief as counsel may advise or this Honourable Court permit.

The grounds for the application are:

- (a) the Commission's constituting Order in Council provides that the Commission shall inquire into and report on "whether a claimant has a valid claim ... where that claim has already been rejected by the Minister";
- (b) at the time of the decision, the Minister had not rejected the claim of the Respondents;


- (c) the Commission erred in law in its interpretation of the said Order in Council by finding that the Commission nonetheless has jurisdiction to carry out an inquiry into the claim;
- (d) the Commission exceeded its jurisdiction in deciding to proceed with the said inquiry; and
- (e) such further or other grounds as counsel may advise and this Honourable Court may permit.

The application will be supported by the following material:

- (a) the decision of the Commission dated September 26, 2006;
- (b) the affidavit of Jillian Russell, not yet sworn; and
- (c) such other material as counsel may advise and this Honourable Court may permit.

October 25, 2006

I HEREBY CERTIFY that the above document is a true copy of the original. / Filed in the Court on the 25th day of October 2006.
 Dated this 25th day of October 2006.
 Registry Clerk
 Registry Officer
 Agent du Greffe


 John H. Stins
 Deputy Attorney General of Canada
 Per: John S. Tyhurst
 Department of Justice
 234 Wellington Street
 East Tower, Room 1251
 Ottawa, ON K1A 0H8
 Tel: (613) 957-4860
 Fax: (613) 954-1920
 Solicitor for the Applicant

APPENDIX E

Red Earth and Shoal Lake Cree Nations: Interim ruling on Canada's
objection to proposed testimony of two non-elder witnesses,
October 11, 2007

*Indian Claims
Commission*

*Commission
des revendications
des Indiens*

October 11, 2007



William Selnes
Kapoor, Selnes, Klemm & Brown
417 Main Street
Melfort, SK
S0J 1M0

-and-

Vivian Russell
DIAND, Legal Services
319 - 400 Cooper Street
Ottawa, ON
K1A 0H4

**RE: Red Earth and Shoal Lake Cree Nations: Quality of Reserve Land Inquiry
ICC File: 2107-54-01**

Dear Counsel:

This letter is in response to Canada's objection to the proposed testimony of the non-elder witnesses Ian McKay and Charles Whitecap.

The Panel has considered the submissions of the parties and has ruled as follows, pursuant to paragraph 42 of the Commission's "Guidelines for Parties."

Mr. McKay and Mr. Whitecap will be permitted to testify. Their testimony will be given in an open hearing, following the conclusion of the Elders' testimony in the respective sessions at each First Nation community. The order of examination will be as follows:

- Mr. Selnes for the First Nations: Examination in chief;
- Ms Brass, counsel to the Commission: Questions;
- Panel: Questions;
- Ms Russell, counsel for Canada: Cross-examination;
- Mr. Selnes: Re-examination, restricted to matters raised by the Commission or in cross-examination.

Mailing address/Adresse postale
P.O. Box/C.P. 1750
Station/Succursale "B"
Ottawa, Canada K1P 1A2

Physical address/Adresse municipale
Ed. Enterprise Building
Suite 400 - 427 Ouest, av. Laurier Ave. West
Ottawa, Canada K1R 7Y2



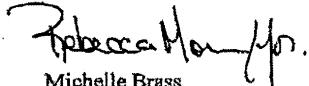
Tel (613) 943-2737 Fax (613) 943-0157
www.Indtanclaims.ca

Red Earth and Shoal Lake Cree Nations: Quality of Reserve Land Inquiry
October 11, 2007

Page 2

Please do not hesitate to contact me should you have any questions or comments.

Sincerely,



Michelle Brass
Associate Counsel

cc. Chief Miller Nawakayas and Ian McKay, Red Earth First Nation
Chief Marcel Head and Charles Whitecap, Shoal Lake Cree Nation
Richard Yen, DIAND, Specific Claims Branch
Rarihokwats, Researcher, Red Earth/Shoal Lake Cree Nations

Reserve Lands Inquiry – Ruling on Canada’s Objection to Jurisdiction,
September 26, 2006

Intervention in Mandate Challenge:

- Submission on Behalf of the Treaty 8 First Nations of British Columbia,
July 13, 2005
- Submission on Behalf of the Government of Canada, September 30, 2005
- Interim Ruling: Red Earth and Shoal Lake Cree Nations: Quality of
Reserve Lands Inquiry – Ruling on Canada’s Objection to Jurisdiction,
December 15, 2005

Testimony by non-elders at community session:

- Interim Ruling: Letter from Michelle Brass, Associate Counsel, ICC,
October 11, 2007

6 Content of formal record

The formal record of the Red Earth and Shoal Lake Cree Nations: Quality of Reserve Lands Inquiry consists of the following materials:

- Exhibits 1 - 9 tendered during the inquiry, including transcript of community session
- Transcript of oral legal submissions on inquiry
- Transcript of oral legal submissions on mandate challenge

The report of the Commission and letter of transmittal to the parties will complete the formal record of this inquiry.