

November 1, 2022

Lower Kootenay Band
830 Simon Road
Creston, BC V0B 1G2

Dear Lower Kootenay Band Members:

Re: Information Session on the 1930s and 1950s Improvements to the Porthill Highway on IR No. 1 Specific Claim

The Lower Kootenay Band and Canada have negotiated a Settlement Agreement that will, if approved, resolve the Lower Kootenay Band's 1930s and 1950s Porthill Highway Improvements on IR No. 1 Specific Claim (the "Porthill Highway Improvements Claim") and provide the Lower Kootenay Band with financial compensation as well as the ability to add up to 1.8 acres of land to the Lower Kootenay Band's reserve base.

This briefing note provides details about the proposed settlement.

THE SPECIFIC CLAIMS PROCESS

Specific claims deal with *past wrongs committed against First Nations by Canada*. These claims, which are made by First Nations against the Government of Canada, relate to Canada's administration of land and other First Nation assets and to Canada's conduct in the fulfilment of historic treaties and other agreements. It is important to note that specific claims are separate and distinct from comprehensive land claims or modern treaties.

The specific claims process is a less adversarial and less expensive option to resolve historical grievances with Canada outside of the court system. It is also the only option to resolve claims that are time-barred by the courts (British Columbia has a general two-year limitation period, which means that claims must be brought within two years from the date that the claimant knew or ought to have known that a breach occurred).

Once a First Nation files a specific claim with Canada, Canada has three years to determine whether to negotiate a settlement. If Canada decides not to negotiate a settlement, or if Canada decides to negotiate a settlement and a settlement is not reached within 3 years, the First Nation may file the specific claim with the Specific Claims Tribunal for determination.

THE PORTHILL HIGHWAY IMPROVEMENTS CLAIM

In 2013, the Lower Kootenay Band submitted the Porthill Highway Improvements Claim to Canada under Canada's Specific Claims Policy.



The Porthill Highway Improvements Claim addresses the legality of Canada’s conduct in the course of British Columbia’s reconstruction of Porthill Highway 21 on Creston IR No. 1. More specifically, in the 1930s and the mid-1950s, British Columbia appropriated lands from Creston IR No. 1 to reconstruct and realign the Porthill Highway (which it had first built on Creston IR No. 1 in 1928). In appropriating these lands, British Columbia acted without legal authority and in contravention of the requirements of the *Indian Act*. These takings were never regularized and therefore, Canada owes the Lower Kootenay Band an outstanding lawful obligation in relation thereto, for which the Lower Kootenay Band seeks compensation.

The unlawful taking of portions of lands from Creston IR No. 1 for the reconstruction of the Porthill Highway represents not only a violation of Canada’s statutory regime for these lands, but also a breach by Canada of its fiduciary obligations to protect the Lower Kootenay Band’s legal interest in the course of its administration of Creston IR No. 1.

Attached, as Schedule “A”, is a map of IR No. 1. The sections of IR No. 1 that are marked in yellow and green are the sections (cuts and fills) that Canada unlawfully took from IR No. 1 for the reconstruction of the Porthill Highway.

On November 7, 2016, Canada accepted the Porthill Highway Improvements Claim for negotiation. By Band Council Resolution dated January 13, 2017, the Lower Kootenay Band agreed to enter into settlement negotiations with Canada.

THE SETTLEMENT OFFER

The negotiated settlement between the Lower Kootenay Band and Canada involves Canada paying the Lower Kootenay Band five hundred and fifty thousand dollars (\$550,000), minus any negotiation loan funding provided to date. Note that according to our records, the Lower Kootenay Band has received a total of \$15,150 in negotiation loan funding to date. As such, the Lower Kootenay Band can expect to receive approximately \$534,850 in compensation.

In addition to this cash payment, the Settlement Agreement includes an Addition to Reserve provision, which allows the Lower Kootenay Band to apply for reserve status for up to 1.8 acres of land that the Lower Kootenay Band may acquire.

In return, the Lower Kootenay Band agrees that the Lower Kootenay Band’s claim for compensation for the Porthill Highway Improvements Claim is settled and releases Canada from all legal responsibility related to the Porthill Highway Improvements Claim. The Lower Kootenay Band also agrees to indemnify (compensate) Canada if the Porthill Highway Improvements Claim is recommenced at some future point. In other words, if any members of the Lower Kootenay Band or any other parties commence a legal action against Canada for any aspect of the Porthill Highway Improvements Claim, the Lower Kootenay Band will have to pay Canada’s legal costs along with any awards against Canada, if the action is successful.

THE SETTLEMENT AGREEMENT

Here is an overview of the main terms of the Porthill Highway Improvements Claim Settlement Agreement (the “Settlement Agreement”) as well as the main legal implications of entering into the Settlement Agreement:

- Sections 2.1 and 2.2: Canada will provide the Lower Kootenay Band with compensation in the amount of \$550,000 (which includes negotiation and ratification costs) minus any negotiation loan funding provided to date. Note that according to our records, the Lower Kootenay Band has received a total of \$15,150 in

negotiation loan funding to date. As such, the Lower Kootenay Band can expect to receive approximately \$534,850 in compensation.

- Section 3: The Lower Kootenay Band is entitled to make one or more applications to have one or more parcels of land that do not exceed 1.8 acres in total set apart as reserve land. The Lower Kootenay Band will be responsible for any and all costs related to the acquisition and setting apart of any additional lands as reserve lands.
- Section 4: The Lower Kootenay Band will release Canada from all legal responsibility with respect to Canada's breaches, as outlined in the Porthill Highway Improvements Claim. Under the Settlement Agreement, the Lower Kootenay Band agrees not to pursue legal action against Canada for: any aspect of the Porthill Highway Improvements Claim; negotiation costs; the negotiation and approval procedures set out in the Settlement Agreement; the adequacy of the compensation to be provided by Canada; and/or the deposit of the compensation and any use of the compensation, including any financial losses resulting from a financial institution's failure, and the use and management of the settlement funds by the Lower Kootenay Band.

This means that once the Settlement Agreement is signed, the Lower Kootenay Band and its members cannot bring any claims in the future, or try to sue Canada, for any aspect of the Porthill Highway Improvements Claim, or anything related to it. This includes not being able to bring claims against Canada for: the amount of compensation paid, the negotiation costs and the way in which the Lower Kootenay Band's compensation money is invested.

- Section 5: The Lower Kootenay Band agrees to protect Canada through an "indemnity clause". This means that if any past, present or future members of the Lower Kootenay Band or other parties commence a legal action against Canada, its Ministers or employees for the matters that the Lower Kootenay Band has provided a release for, then the Lower Kootenay Band will have to pay Canada's legal costs along with any damages awarded against Canada, if the action is successful. The terms of the Settlement Agreement also ensure that if a party sues Canada, then Canada must use all reasonable efforts to defend itself. The Settlement Agreement also protects the Lower Kootenay Band's right to participate in any lawsuit.
- Section 7: The Lower Kootenay Band ratifies (approves) of the Settlement Agreement if it passes a Band Council Resolution indicating that Council approves the terms and conditions of and agrees to execute the Settlement Agreement on behalf of the Lower Kootenay Band. The Band Council Resolution must indicate that Council has held an Information Meeting to inform membership about the terms of the settlement (in other words, it must be signed after the Information Meeting is held).
- Sections 2.4 and 10: Once the Settlement Agreement is signed by both Canada and the Lower Kootenay Band, the money will be released within 45 days into the Lower Kootenay Band's bank account.
- Section 2.3, 4.1(e) and 11.1(d): Once the compensation funds have been released to the Lower Kootenay Band's bank account, Canada is not responsible in any way for how that money is spent or what kind of interest the Lower Kootenay Band earns on that money. Other than paying the money to the Lower Kootenay Band, Canada has no other responsibilities or obligations in respect of the money.
- Section 11.1(e): The Lower Kootenay Band represents that it intends to use the compensation for the benefit of the Lower Kootenay Band.

QUESTIONS AND ANSWERS

1. How is the compensation figure determined?

Both parties had different legal theories about how damages should be calculated.

The Lower Kootenay Band hired an expert appraiser to estimate the current market value of the lost lands and the value of the loss of use in relation to the lost lands from the time of the wrongdoing to present. The expert appraiser concluded that the Porthill Highway Improvements Claim was worth a maximum “best case” scenario of \$612,600.

While Canada did not hire an expert appraiser, Canada did provide the Lower Kootenay Band with some information and data in relation to its position, which the Lower Kootenay Band’s expert appraiser considered in preparing their estimate.

The parties met on several occasions to discuss their respective legal theories, and the application of said theories to the expert appraiser’s estimate. Then, on July 22, 2021, Canada provided the Lower Kootenay Band with an initial global settlement offer in the amount of \$500,000. The global settlement offer also contained an Additions to Reserve provision.

In light of the gap between Canada’s global settlement offer and the Lower Kootenay Band’s “best case” scenario, the Lower Kootenay Band continued to negotiate with Canada in an effort to obtain a higher global settlement offer. Based on the productive nature of these discussions, the Lower Kootenay Band ultimately rejected Canada’s July 22, 2021 global settlement offer on December 16, 2021.

Canada then provided the Lower Kootenay Band with the current settlement offer on March 4, 2022. Note that in discussing the offer, Canada confirmed that it is highly unlikely that it would be able to obtain a mandate for a higher compensation amount in the event that the Lower Kootenay Band decides not to proceed with the settlement

2. How was the addition to reserve amount calculated?

The Addition to Reserve amount (1.8 acres) is based on the evidence set out in the Porthill Highway Improvements Claim, information and data from the Lower Kootenay Band’s expert appraiser, and information and data, including a map of the lands at issue, from Natural Resources Canada.

The evidence, information and data referenced above demonstrates that in the 1930s and the mid-1950s, British Columbia unlawfully appropriated 1.8 acres of land from Creston IR No. 1 to reconstruct and realign the Porthill Highway.

3. Is the Lower Kootenay Band required to use the funds to purchase lands?

No. This is a decision for the Lower Kootenay Band to make. The Lower Kootenay Band must, however, use the funds for the benefit of the Lower Kootenay Band.

4. Does Canada have to provide reserve status to any lands selected?

No. The Settlement Agreement provision simply provides assistance in securing additional reserve lands. While it does not guarantee an outcome, it provides the Lower Kootenay Band with a significantly greater likelihood that Canada will provide reserve status to any lands selected.

5. Does this settlement have anything to do with the BC Treaty Process?

No. The Specific Claims process is entirely separate from the Treaty process.

6. Does this settlement affect the Aboriginal rights or title of the Lower Kootenay Band?

No. The settlement is strictly limited to the resolution of the Porthill Highway Improvements Claim. In other words, it relates to Canada's breaches of legal obligation in relation to British Columbia's reconstruction of Porthill Highway 21 on Creston IR No. 1.

7. Are there any alternatives to a settlement?

The Lower Kootenay Band could complete the Porthill Highway Improvements Claim at the Specific Claims Tribunal. The Specific Claims Tribunal is an independent adjudicative body that provides First Nations with a further alternative to settle specific claims. The Specific Claims Tribunal has jurisdiction over specific claims that Canada has refused to negotiate, that have not been accepted for negotiation within three years of submission, or, if accepted, have been in negotiation for three years without a settlement being reached.

In order to expedite the process before the Specific Claims Tribunal, claims are often "bifurcated" (split) so the hearing of validity and compensation proceed in separate stages.

In the validity phase, the result could be that the Specific Claims Tribunal determines that the Porthill Highway Improvements Claim does not disclose an outstanding lawful obligation on Canada's part and therefore, no compensation is owing from Canada to the Lower Kootenay Band.

If the Specific Claims Tribunal determines that the Porthill Highway Improvements Claim discloses an outstanding lawful obligation on Canada's part, during the compensation phase, the Specific Claims Tribunal could award a figure that is lower than or equal to the negotiated dollar figure. It could also award a figure that is higher.

The entire process before the Specific Claims Tribunal would likely take several years. The Lower Kootenay Band or Canada then could challenge the Specific Claims Tribunal's findings in Court which could add years to the resolution process. While funding is available to support the participation of First Nation's in the Specific Claims Tribunal process, the funding is partial only.

The Lower Kootenay Band could also attempt reopen negotiations in an effort to obtain a more favourable compensation figure. Canada, may, however, refuse to do so. As indicated in item 1 above, Canada confirmed that it is highly unlikely that it would be able to obtain a mandate for a higher compensation amount in the event that the Lower Kootenay Band decides not to proceed with the settlement. Canada may also agree to re-enter negotiations but may seek to renegotiate on terms that are less favourable than those currently proposed.

8. How can I get more information?

I would be pleased to answer any questions that you may have about any of the above, either at the Information Meeting or at any time afterwards. I can be reached at nsikka@firstpeoples.com or at 604-668-4272.

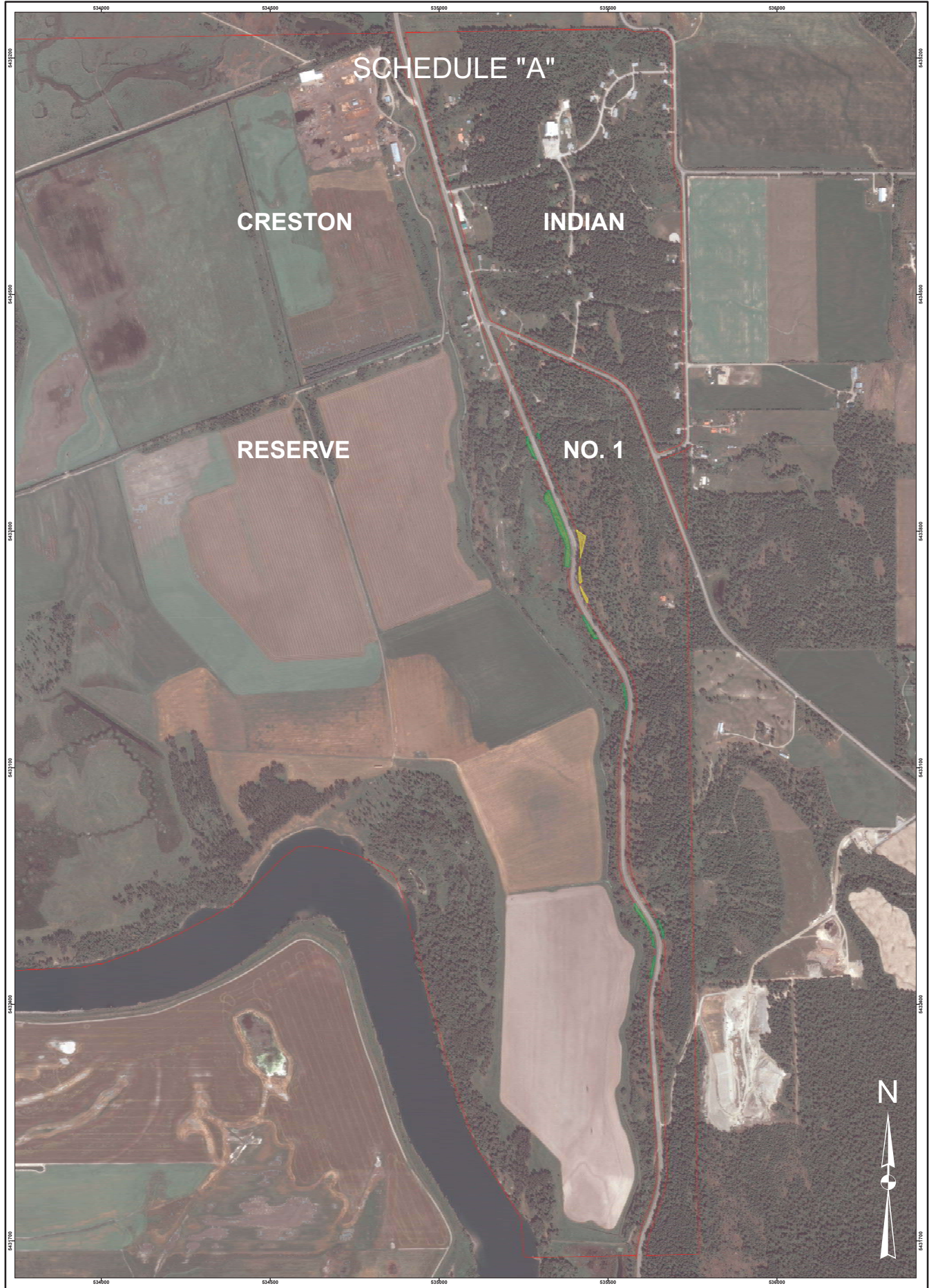
CONCLUSION

After years of research and negotiation with Canada, the Lower Kootenay Band has arrived at a proposed settlement of the Lower Kootenay Band's Porthill Highway Improvements Claim. Council views this Settlement Agreement as highly beneficial for the Lower Kootenay Band.

Yours truly,

A handwritten signature in black ink, appearing to be 'Nisha Sikka', written over a faint, illegible printed name.

Nisha Sikka
First Peoples Law LLP



CRESTON IR 1 HIGHWAY 21 CUT/FILL AREAS

Approximate Fill Area: 6054 m² (1.5 acres)
Approximate Cut Area: 1261 m² (0.3 acres)



Legend

- Reserve Boundary
- Cut Areas
- Fill Areas

Coordinate System: NAD 1983 UTM Zone 11 North
SGB Project: 2016 10 009
Date Produced: August 24, 2018

Sources:
Reserve boundary line work derived from Canada Lands Digital Cadastral Data (Natural Resources Canada - Geogatis).

Highway 21 and Cut/Fill areas derived from Canada Lands Cadastral Data and MOTI sketch (RESP rcrds PS2491 RRRR[2] TRA-00112).

NATURAL RESOURCES CANADA
SURVEYOR GENERAL BRANCH - BC/CU
1138 MELVILLE ST, VANCOUVER, BC
www.sgb.nrcan.gc.ca

This map is illustrative only and is not to be used for defining boundaries, administrative decisions should be based on legal documents and survey plans

