



File Hills Qu'Appelle Tribal Council

Treaty Four Territory
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October 18th, 2021

Lake Diefenbaker Irrigation Expansion Projects
Impact Assessment Agency of Canada
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Jonathan Wilkinson
Minister of Environment and Climate Change Canada
House of Commons
Ottawa, ON
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Dear Sirs/Madames:

Re: Impact assessment for the Lake Diefenbaker Irrigation Expansion Project (the “Project”) under the *Impact Assessment Act*

We write on behalf of the File Hills Qu'Appelle Tribal Council (“FHQTC”) to explain that all three phases of the Project must undergo an impact assessment under the *Impact Assessment Act* (the “Act”) before it can be built. There are two reasons for this:

- First, the Project is a “designated project” under the *Physical Activities Regulation* (the “Regulation”) and s. 9 of the Act.
- Second, even if it is not, the Project meets the requirements for designation under s. 9(1) of the Act because its construction and operation will have significant adverse “effects within federal jurisdiction.” These include adverse effects on, among other things, fish, aquatic species, migratory birds, and the exercise of First Nations’ rights, culture and way of life (“Inherent and Treaty Rights”).

We note that the information contained in this letter concerning adverse effects and impacts is preliminary in nature, as FHQTC and its member Nations have not been provided with capacity funding to understand and provide more detailed information.

We understand that the current position of the Impact Assessment Agency (the “Agency”) and/or the Minister is that only Phase 3 of the Project must undergo an impact assessment under the Act. With respect, if that is still the position of the Agency and/or the Minister, this is incorrect. It appears to be an example of “splitting” the Project to avoid the impact assessment process for parts of the Project, and to reduce the burden of that process for the Project as a whole. The entire Project should go through an impact assessment. It is a single project that will have significant adverse cumulative effects beyond whatever discrete effects each Phase may have. These cumulative effects can only be assessed, and avoided or mitigated, if the Project is assessed as a whole.

Splitting the Project for impact assessment purposes will also adversely impact the ability of First Nations to be meaningfully consulted with respect to, and influence, the design, construction and operation of, the Project. This is because decisions taken in Phases 1 and 2 will impact and shape Phase 3. By the time the impact assessment for Phase 3 begins (assuming one takes place at all), which will presumably be several years after construction of Phases 1 and 2 has already started, key decisions respecting the Project as a whole will have already been made. Key design features will be baked into the Project. Opportunities for meaningful consultation will have been substantially narrowed, as the First Nations will be presented with *faits accompli*.

It is no answer to say that First Nations will be consulted in any environmental assessment that Saskatchewan may require for Parts 1 and 2. Saskatchewan’s environmental assessment process is woefully out-of-date, as are Saskatchewan’s Consultation “Guidelines.” Moreover, given the province’s headlong rush into the Project, it is not even clear whether it will even require an environmental assessment process, or meaningful consultations, for Phases 1 and 2.

We therefore respectfully urge the Minister to require the Project as a whole to undergo an impact assessment under the Act. Failure to do so could result in significant adverse impacts on the environment and First Nations in Saskatchewan.

File Hills Qu’Appelle Tribal Council

FHQTC is the umbrella organization for its 11 First Nation members in Treaty Four territory. Those First Nations are: Nekaneet First Nation; Wood Mountain Lakota First Nation; Piapot First Nation; Muscowpetung Saulteaux Nation; Pasqua First Nation; Standing Buffalo Dakota Nation; Little Black Bear’s Band of Cree & Assiniboine Nations; Okanese First Nation; Star Blanket Cree Nation; Peepeekisis Cree Nation; and Carry-The-Kettle Nakoda Nation.

FHQTC’s mandate includes the following services to its members: protecting, implementing and enforcing their Inherent and Treaty Rights; promoting their self-determination; assisting them in the development of productive and safe communities; providing technical and advisory services; and addressing all other common concerns. Consistent with its mandate, FHQTC is actively monitoring the development of the Project because of the likelihood that it will adversely impact the Inherent and Treaty Rights of its member First Nations.

The Project

The Project will divert over 600 million cubic metres of water from Lake Diefenbaker into three subprojects, each designed mainly for agricultural irrigation. The three subprojects are the Westside Irrigation Rehabilitation (“Phase 1”); the Westside Irrigation Expansion (“Phase 2”); and the Qu’Appelle Irrigation South Conveyance (“Phase 3”).

These three phases are not separate projects. They are phases of a single project with a single aim: to divert water from Diefenbaker Lake for irrigation. While each Phase may have its own unique effects, the diversion of water at each Phase will contribute to cumulative environmental effects and/or effects on our members' Inherent and Treaty Rights. Those cumulative effects can only be properly assessed and mitigated as part of an impact assessment for the Project as a whole.

The Project is a “designated project” under the Act

The Act prohibits proponents of “designated projects” from carrying out almost any work on those projects (a) until the Agency decides no impact assessment is required; or (b) unless the proponent complies with conditions imposed by the Agency.¹ A project may be a “designated project” under the Act in two different ways. First, if it is prescribed by the Regulation. Second, if it is designated by the Minister under s. 9(1) of the Act.

The Project is a “designated project” because it is prescribed by regulation

The following physical activities are designated by the *Physical Activities Regulations*,² and are therefore “designated projects” under the Act:

60 The construction, operation, decommissioning and abandonment of a new structure for the diversion of 10 000 000 m³/year or more of water from a natural water body into another natural water body.

61 The expansion of an existing structure for the diversion of water from a natural water body into another natural water body, if the expansion would result in an increase in diversion capacity of 50% or more and a total diversion capacity of 10 000 000 m³/year or more.

The Project falls within the scope of one or both of these “physical activities.” It will involve the diversion of significantly more than 10,000,000 m³/year of water each year. Each Phase will involve the construction and/or expansion of existing structures for the diversion of water, and the diversion of water from a natural water body to another. Based on the very limited information that is publicly available about the Project, Phases 1 and 2 will involve the diversion of water that would have flowed from the North Saskatchewan River and the South Saskatchewan River. Phase 3 will involve the diversion of water from the South Saskatchewan River via Lake Diefenbaker to Buffalo Pound Lake with irrigation control infrastructure.

For these reasons, the Project is a “designated project” and is subject to the requirements of the Act.

The Minister should designate the project because of its anticipated effects within federal jurisdiction

If the Project is not a “designated project” for the reasons set out above, the Minister may designate a project if the project “may cause adverse effects within federal jurisdiction or adverse direct or incidental effects, or public concerns related to those effects warrant the designation.”

The Act defines “effects within federal jurisdiction” broadly to include impacts on:

¹ The Act, ss. 7(3)

² SOR/2019-285

- fish and fish habitat;
- aquatic species;
- migratory birds; and
- with respect to the Indigenous peoples of Canada, an impact — occurring in Canada and resulting from any change to the environment — on (i) physical and cultural heritage, (ii) the current use of lands and resources for traditional purposes, or (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

The Project will have significant adverse effects on each of these areas within federal jurisdiction, and others. Some of those effects are discussed below under the headings “Impacts on the environment” and “Impacts on First Nations’ Inherent and Treaty Rights.”

Impacts on the environment. There is a high likelihood that the construction of new and/or repair of existing water conveyance channels will intersect existing streams, wetlands and other bodies of water. Among other things, this work would very likely impact fish, their habitat and breeding grounds, other aquatic species, and migratory and other bird species. These are “effects within federal jurisdiction.” Increased overland flow of water may also impact runoff patterns, increasing the run-off into these or other water bodies. Increased run-off means an increased probability of agricultural chemicals, such as fertilizers, being transported into water bodies, which could also harm fish, aquatic species and migratory birds.

These and other potential environmental impacts are described in detail in the attached letter from Dr. Leavitt, a Professor in the Faculty of Biology at the University of Regina. Dr. Leavitt is a world-leading expert in freshwater environments with 28 years of experience studying Lake Diefenbaker. In the attached letter, he recommends that the Project be designated under the Act. He identifies the following serious potential environmental effects the Project may have, among others, which warrant subjecting the entire Project to an impact assessment under the Act:

- “[...] there was insufficient water to completely replenish water levels in Lake Diefenbaker during the 2021 200 prairie drought. **Together, these studies show suggest [sic] that both natural and human induced changes in river flow have the capability of severely depleting water flow in the South Saskatchewan River, and infer that industrial-scale extraction of water for the LDIP will not be sustainable in the future”** [emphasis added].
- “Reduced flow out of Lake Diefenbaker due withdrawals for irrigation is likely to further impact the health and navigability of the South Saskatchewan River due to increased silt build up in the main river channel [...] **Additional reductions in peak flow due to extraction of up to 20% of the volume of Lake Diefenbaker for irrigation may further influence the health and navigability of the South Saskatchewan River”** [emphasis added].
- “Further changes in lake level associated with increases water withdrawal for the [Lake Diefenbaker Irrigation Project] is likely to affect habitat for threatened and endangered species including but not limited to Piping Plover (*Charadrius melanotos*), Whooping Crane (*Grus americana*), and Northern Leopard Frogs (*Lithobates pipiens*). Several of these taxa are protected by *Species at Risk Act*. In addition, Lake Diefenbaker and downstream waterbodies in the Qu’Appelle River drainage basin are critical habitat for Bigmouth Buffalo (*Ictiobus cyprinellus*), a fish considered at risk in Saskatchewan.”

- “All phases of the [Lake Diefenbaker Irrigation Project] have the strong potential to pollute surface waters with excess fertilizer associated with intensive irrigation practises [...] excess nutrients from agricultural runoff will have several interacting effects on prairie water quality [...] **Our 2013 survey of 100 lakes in southern SK, including some basins potentially impacted by the proposed project, showed that more than 40% of all sites have toxin levels above drinking water limits. Furthermore, many lakes exhibit toxin levels that exceeded recreational limits, while several lakes in farming regions pose acute health risks to humans due to poor water quality**” [emphasis added].

These and other serious environmental impacts of the Project highlight the critical need for, and glaring lack of, a mechanism under Saskatchewan law to measure the cumulative effects of development on lands and waters in the province.

Impacts on First Nations’ Inherent and Treaty Rights. These and other impacts the Project may have on the environment will adversely impact the Inherent and Treaty Rights of First Nations. For example:

- To the extent the Project adversely impacts the wildlife described in the preceding paragraphs, it will adversely impact the Inherent and Treaty Rights of First Nations that rely on that wildlife.
- Water withdrawals from Lake Diefenbaker could reduce the navigability of the South Saskatchewan River, impacting our members’ ability to use, and travel along, that river for the exercise of their Inherent and Treaty Rights.
- Increased flooding for irrigation on lands within the Project’s boundary may have adverse impacts on our members’ ability to travel on those lands for the exercise of Inherent and Treaty rights.
- Increased flooding and/or water shortages could impact fishing stations First Nations maintain along the South and North Saskatchewan Rivers system.
- Increased flooding could also inundate archaeological and other sites of cultural importance to our members.
- Water diversion and changes in water flows may significantly impact wetlands, river deltas and other riparian habitats where our members exercise their Inherent and Treaty Rights.
- Increased run-off flowing into natural water bodies may cause increased toxicity in these water bodies, threatening the physical health of our members.
- Increased flooding may cause and/or increase methylmercury in fish/biota, a common side-effect of flooding large swaths of land.
- Changes in water flows could cause increased erosion of islands and shorelines, further reducing the lands available for our members’ exercise of their Inherent and Treaty Rights.

There is also the potential for the Project to have novel and cumulative impacts that will change the environment on Treaty Four Reserve Grounds 77, which is located adjacent to Fort Qu'Appelle,

Saskatchewan at the shores of the Qu'Appelle River which flows from the South Saskatchewan River. These lands are held collectively by 34 First Nations in Saskatchewan and Manitoba. To the extent the Project will impact or alter the environment on these lands, it will have further “effects within federal jurisdiction,” requiring an impact assessment under the Act.

Conclusion: the Project must undergo an impact assessment under the Act

These and other adverse impacts on First Nations’ Inherent and Treaty rights are in addition to the extensive impacts caused by unchecked development, and taking up of lands, in Saskatchewan. To date, there has been no analysis of the cumulative effects of that development on First Nations’ Inherent and Treaty rights. This is not surprising, as there is no mechanism in Saskatchewan law to measure the scale or extent of cumulative impacts, or to determine how future developments may exacerbate those impacts. The only opportunity for a cumulative impacts assessment is an assessment under the Act.

In the absence of a cumulative impacts assessment, it is impossible to know whether the Project will push us past the “tipping point beyond which the right to meaningfully exercise our Inherent and Treaty Rights is lost.”³ That is a reasonable possibility here, given that the Government of Saskatchewan describes the Project as “the largest infrastructure venture ever undertaken in the history of Saskatchewan.”

Saskatchewan may claim that the Project will not have adverse impacts on the Inherent and Treaty Rights of our members because some or all of it will be built on lands that have already been “taken up” under the Treaty. But that is exactly the problem we highlight in this letter: the lands available to our members for the exercise of their Inherent and Treaty Rights decrease every year as lands are taken up, and because of the cumulative impacts of development. The Project will only further contribute to this problem.

For the foregoing reasons, it is critical that the Project undergo an impact assessment under the Act.

Respectfully,

<Original signed by>

Edmund Bellegarde
Tribal Chief & CEO
File Hills Qu'Appelle Tribal Council

³ *Yahey v British Columbia*, 2021 BCSC 1287 (CanLII), para. 1116

CC:

Chief Brady O'Watch, Carry the Kettle First Nation
Chief Clarence Bellegarde, Little Black Bear First Nation
Chief Melissa Tavita, Muscowpetung First Nation
Chief Alvin Francis, Neekaneet First Nation
Chief Richard Stonechild, Okanese First Nation
Chief M. Todd Peigan, Pasqua First Nation Chief
Chief Francis Dieter, Peepeekisis First Nation
Chief Mark Fox, Piapot First Nation
Chief Roberta Soo-OyeWaste, Standing Buffalo First Nation
Chief Michael Starr, Star Blanket First Nation
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