



OKANESE FIRST NATION

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July 26, 2021

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The Hon. Jonathan Wilkinson

Minister of Environment and Climate Change Canada

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**Re: Designation Request for the Proposed Lake Diefenbaker Irrigation
Expansion Project ("the Project")**

We are writing in reply to your letter of July 7, 2021. In that letter, you have asked for information about the potential "effects" of the Project on physical and cultural heritage, current use of lands and resources for traditional purposes and other information. You have also asked for information on whether and how the Project may result in changes to health, social and economic conditions (among other things), as well as on how the Project may impact our section 35 rights.

As rights holders, our First Nation and Citizens have inherent and Treaty rights that are protected by section 35 of the *Constitution Act, 1982*. As described below, there are a number of ways that a project of this size and scope stands to adversely affect our rights, culture and way of life. There are potential direct, indirect and cumulative adverse impacts to our rights, culture and way of life.

We begin by noting that you sent your letter on July 7, 2021 and have asked for a response by July 27, 2021. Giving us 20 days to respond to this letter is entirely unreasonable and not in keeping with the honour of the Crown. In particular, we are concerned that:

- no capacity funding has been given to our First Nation to participate in the review of the Project
- there is no consultation process in place to share information and to respond to our issues and concerns, whether procedural or substantive
- the information that you seek cannot be produced in a few days or even a few weeks, and particularly absent significant capacity funding

Please consider this to be an initial response, as we lack the capacity and time to answer your questions in any detail – and we are, quite frankly, surprised that you would assume that we can provide detailed responses without capacity and without any real understanding of details of the Project, phases, etc.

We offer the following information:

- we support the designation request put forward by FSIN on June 16, 2021
- it is our strong view that all phases need to be assessed under the *Impact Assessment Act*- absent a full assessment, this will result in impacts to our rights, culture and way of life being down played or ignored and will be yet another example of “project splitting” to avoid dealing with our concerns
- In *Mining Watch v Department of Fisheries and Oceans*, 2010 SCC 2, the Supreme Court of Canada cautioned against “project splitting” for the purpose of narrowing or avoiding an environmental assessment. Here, we understand that the IAA will subject phase 3 of the Project to a full assessment, but it is unclear whether phases 1 and 2 will be subject to a full impact assessment. The Project is a single project with phases – the purposes of the phases are not different and are all related to irrigation and related matters. We do not understand why the IAA would consider reviewing some, but not all of the phases. The failure to do so (as more fully set out below) puts our rights, culture and way of life at risk, because there is no other process in which to do a cumulative impacts and effects assessment – and as cautioned against in the *Yahey* case, a “one off” consultation process is not a proper substitute for a cumulative impacts and effects assessment and certainly not where (as is the case here), large amounts of land have already been taken up, which has already adversely affected and infringed our rights, culture and way of life
- we also note the recent decision of the BC Supreme Court in the *Yahey* case and its relevance to the Project:
 - we are deeply concerned that a significant amount of land has already been taken up in our Territory – there has been no process in place to assess the cumulative impacts and effects of such takings up nor are there any thresholds in place to determine such potential adverse impacts
 - we are already in a position where our rights, culture and way of life are adversely impacted if not infringed

- the Project, given its size and scope, has the potential to further adversely impact and infringe our rights, culture and way of life
- a federal impact assessment of all phases is one of the only ways to ensure a full consideration of such adverse impacts – we do not understand why this would not be done for all phases – even if there is an assessment of all phases, we would expect to be involved in the design of any such process to ensure that it does the job of assessing the cumulative impacts to our rights culture and way of life
- we are concerned that there are no thresholds or measures in place to assess such impacts, which raises the question of how the federal and provincial governments can possibly make decisions on this Project and we again note our concern that there is no agreed-upon consultation process in place
- we are concerned that there is a wide potential for unstructured decision making about the procedural and substantive aspects of the Project and we fear that, given various reports that Canada has produced and funded and the potential funding of parts of the Project by Canada, you have already essentially made a decision to support the Project, absent any consultation or assessment of all phases
- we are also concerned that you have not considered your actions in light of your fiduciary duties owed to our Nation

The FSIN letter sets out in a general way some of the ways in which the Project could potentially affect our rights, culture and way of life and why an assessment for all phases is needed. We agree with those comments and add that there are potential adverse impacts related to:

- our Treaty and inherent rights – this Project would represent a significant further takings up of land; fragmentation of habitat; taking away yet more places where we exercise our rights, practice and teach and pass down our culture and on our way of life generally (please see the expansive description of way of life in the *Yahey* decision)
- further adverse cumulative impacts when added to the existing dams and reservoirs
- further limitations on access to places where we exercise our rights, practice our culture and way of life
- adverse impacts to water quality, quantity and water levels

These are initial comments. We need funding and a proper process and time to fully explore such potential adverse impacts in more detail.

In closing, we request the following:

- design of a consultation process that deals with our procedural and substantive concerns – as one example, we do not know what criteria or process you are using to consider the designation request

- co-design of a process to assess the cumulative impacts of all phases of the Project on our rights, culture and way of life, including thresholds to determine such adverse impacts (which are all lacking)
- significant funding to participate in the review of the Project
- that all phases be assessed under federal legislation for the reasons stated above

This is far too large and significant a Project for Canada to ignore our rights, culture and way of life or for Canada to unilaterally determine how, when or if all phases will be assessed. Such a decision would be the antithesis of the honour of the Crown and a breach of your fiduciary duties.

Sincerely,

Chief <Original signed by>

Okaneese First Nation

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