



Battle River IRC
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July 27, 2021

The Hon. Jonathan Wilkinson
Minister of Environment and Climate Change Canada
Via email: ec.ministre-minister.ec@canada.ca

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Dear Sirs,

Re: *Designation Request for the Proposed Lake Diefenbaker Irrigation Expansion Project under the Impact Assessment Act*

In its letter of July 7, 2021 to Little Pine First Nation Chief Wayne Semaganis, the Impact Assessment Agency of Canada (the Agency) advised that it has received a request to designate the proposed Lake Diefenbaker Irrigation Project (the Project) for impact assessment pursuant to the federal environmental assessment regime (IA). The request was submitted by the Federation of Sovereign Indigenous Nations (FSIN) on June 16, 2021 (the Designation Request). The Project consists of three phases (the Project Phases), which are now being framed as distinct projects:

- Phase 1 adds 80,000 acres of irrigable land around the Westside Irrigation Canal.
- Phase 2 adds a further 260,000 acres of irrigable land by expanding the Westside Irrigation Canal through the addition of 400km of canals and three balancing reservoirs.
- Phase 3 would add water for multiple uses including 120,000 acres of irrigable land, through the addition of 100km of canals, a balancing reservoir and an outfall structure into Buffalo Pound Lake.

IAAC states that Phases 1 and 2 do not appear in the *Physical Activities Regulations* (the Regulations) and, unless the Minister exercises his discretion to designate Phases 1 and 2 under subsection 9(1) of the *Impact Assessment Act* (the Act), they will not be subject to IA. Phase 3 is “likely already” a physical activity undergoing IA, but no certainty has been provided yet.

Battle River IRC (BRIRC) assists the First Nations of Little Pine First Nation, Moosomin First Nation and Lucky Man Cree Nation in Crown consultation matters. This response to the Agency’s letter of July 7, 2021 is submitted on behalf of all three First Nations.

We are writing to support the Designation Request made by the FSIN, which framed the Project as one project with three phases, as opposed to three distinct projects, some of which will undergo IA and others which will not. The Minister must exercise his discretion to designate the Project for IA because, as we will expand further below:

1. The Project is a single Physical Activity pursuant to the Regulations;
2. The Project may cause adverse effects within the federal jurisdiction; and,
3. The Project may cause adverse direct or incidental effects.

Any decision taken by the Minister in regards of the Project must be made in light of the Supreme Court of Canada’s recent jurisprudence reaffirming that the fiduciary duty applies where the Crown exercises jurisdiction over Treaty and Inherent rights. It is the fiduciary duty – not just the applicable legislative scheme – that imposes substantive obligations on how the Crown exercises its discretion when Treaty and Inherent rights are at stake: *Southwind v Canada*, 2021 SCC 28. The Crown, which bears the sole decision-making authority, must consider potential breaches of Treaty and Inherent rights when making its determination due to the power and control it exercises over First Nations’ ability to continue practicing their rights.

We urge the Minister to exercise his discretion in favour of designating all three Project Phases for IA under the Act. There is no other option that he can be sure will adequately assess and manage the potential impacts to the BRIRC First Nations’ Treaty and Inherent rights.

BRIRC is challenged to provide answers to the complex questions posed by the Agency in the timeframe (20 days) and on the budget (none) provided by the Agency, the proponent and the province in this matter. Our knowledge of the project is limited to the slideshow provided to use on June 22, 2021, the Project maps that are publicly available,¹ and what we have been able to glean from our own research and public announcements about the Project. However, we offer the following preliminary comments.

¹ See, for example, Water Security Agency’s undated map, online: <https://diefenbakerirrigation.ca/our-projects/>

The Project is a single Physical Activity pursuant to the Regulations

BRIRC understands the three phases of the Project as just that: phases of one single project. For the following reasons, characterization of the Project Phases as separate and distinct projects appears to be project splitting.

It was not until recently – around the same time that decisions were being made about the environmental assessment process that the Project would undergo – that Saskatchewan ceased referring to the Project as one and it became three. In July, 2020, the Project was announced publicly as one project, being rolled out in three phases.² In December, 2021, during his remarks to the Saskatchewan Irrigation Projects Association, the Project’s Executive Sponsor, the Honourable Lyle Stewart, referred to the Project in the same way.³ As late as February, 2021, when Clifton and Associates was announced as the prime contractor on the “Lake Diefenbaker Irrigation Expansion Project”, the province was still referring to the Project in the singular.⁴ Recently, the proponent has rebranded as the “Lake Diefenbaker Irrigation Projects.”⁵ The language on its Project maps has been adjusted to reflect the change from “Phases” to “Projects”. On June 22, 2021, the Battle River IRC was informed by the Agency that, based on the information available to it, only Phase 3 would undergo IA. Has this late distinction arisen to avoid the rigours of the federal impact assessment process? Will Phase 1 – now presented as its own unique project adding only 80,000 acres of irrigable land to the province, via a canal system that was largely completed prior to 1973 – fail to qualify for any form of environmental assessment at all? If so, this meets the definition of project splitting articulated in *Mining Watch v Department of Fisheries and Oceans*, 2010 SCC 2: “a proponent could engage in “project splitting” by representing part of a project as the whole, or proposing several parts of a project as independent projects in order to circumvent additional assessment obligations.”

Other factors also favour considering the Project as one. All three Project Phases serve the same stated purpose originally described in Appendix A to the 1958 Memorandum of Understanding between Canada and Saskatchewan: “The project is to provide facilities for the irrigation of approximately 500,000 acres of land in Central Saskatchewan and in the Qu’Appelle Valley and to provide other benefits to the area, including a source of hydroelectric power, a source of rural and urban water supply, flood control and recreation facilities”: Schedule to *The South Saskatchewan River Development Commission Act, 1959*. Interpretation

² Government of Saskatchewan, “Saskatchewan Announces \$4 Billion Irrigation Project at Lake Diefenbaker”, July 2, 2020, online: <https://www.saskatchewan.ca/government/news-and-media/2020/july/02/irrigation-project>

³ The Hon. Lyle Stewart, “2020 Irrigation Conference: Lake Diefenbaker Irrigation Expansion”, December 8, 2020, online: <https://www.youtube.com/watch?v=Rc4BUtw2X8Q>

⁴ Government of Saskatchewan, “Clifton Associates Selected as Lead Engineering Team for First Stage of Lake Diefenbaker Irrigation Expansion Project”, February 4, 2021, online: <https://www.saskatchewan.ca/government/news-and-media/2021/february/04/prime-consultant-selected-for-first-stage-of-the-lake-diefenbaker-irrigation-expansion-projects>

⁵ Government of Saskatchewan, “Lake Diefenbaker Irrigation Projects”, online: <https://diefenbakerirrigation.ca/>

of the potential of the Project has changed over time, especially in light of climate change, and today the purposes of the Project include providing a competitive advantage to the Canadian agriculture industry in light of drying American aquifers; increasing food security in Canada; and attracting business investment and creating jobs in the province.⁶ The purposes of the Project can be summarized as realizing the full promise and potential of Lake Diefenbaker, a 500,000 acre irrigation project more properly regarded and assessed as *one project carrying out its purpose in three phases*.

Canada's own analysis – based on its review of the projected economic benefits of the Project – also recommended IA of the whole Project, as opposed to certain Project Phases only. Western Economic Diversification's (WED) 2020 report, "Prairie Prosperity", presented two of the Project Phases as distinct, but concluded that "the federal impact assessment process [is] expected to be a requirement for both of the projects under consideration" and that the Project would be subject to and expected to comply with conditions imposed under the IA process, to safeguard Indigenous rights: page 17.

Furthermore, if the Agency fails to consider all three phases of the Project together, the Agency risks undermining the purposes of the Act. A Project that is partly assessed under the provincial regime and partly under the federal regime may result in conflicting assessments of direct and cumulative impacts and effects on Indigenous rights, culture and way of life, with inconsistent monitoring, follow up and compliance of such effects. Further, (if both follow a similar procedure) it would result in a duplication of efforts by the relevant agencies and multiply the demand on each participating First Nations' scarce resources.

If any phase of the Project meets the definition of a physical activity under the Act – as the IAAC has acknowledged Phase 3 is likely to do – in our view, the Project as a whole must be designated for IA or risk undermining the purposes of the Act with respect to Phase 3. Such purposes include ensuring respect for the rights of the Indigenous peoples of Canada, that impact assessment takes Indigenous Knowledge into account, and that assessment of the cumulative effects of physical activities in a region occurs: s. 6. The BRIRC understands the IAAC to have recently internally interpreted the definition of "natural water body" under the Regulations for the first time. Under the Agency's definition, Lake Diefenbaker is captured as a former natural water body modified by subsequent structures including the Gardiner Dam, flowing into Buffalo Pound in Phase 3 of the Project. If Phases 1 and 2 are not assessed along with Phase 3 under the Act, the policies and processes in place in the provincial regime are not sufficiently robust – or in place at all – to meet the purposes enumerated above. For example, the province has made only \$200,000 available for consultation on all projects with 74 First Nations and 84 active Métis Locals in the province. The maximum amount available to any Indigenous nation on a project is \$10,000. This is insufficient to ensure respect for their rights –

⁶ The Hon. Lyle Stewart, "2020 Irrigation Conference: Lake Diefenbaker Irrigation Expansion", December 8, 2020, available online: <https://www.youtube.com/watch?v=Rc4BUtw2X8Q>

it would not even be enough to map them. Saskatchewan has no policy on integrating Indigenous knowledge into environmental assessment and no meaningful policy or thresholds established to guide decision-making on cumulative effects of the development it authorizes, especially in regards to water. The BRIRC are very concerned about the shortcomings of the provincial environmental assessment process and what this will mean for the adequacy of the assessment of the impacts to their Treaty and Inherent rights, if the Project as a whole is not designated by the Minister.

In summary, the Project has, up until near the period when decisions were being made about environmental assessment process, been represented by the province as a single project with three phases. Now, the province has rebranded it as three Projects. This amounts to project splitting. Other reasons for interpreting the Project as one instead of three include that this is more consistent with the Project's purpose, it is consistent with the recommendations of the WED, it would prevent duplication of efforts by regulatory agencies and First Nations participating in the process, and if any phase of the Project is eligible for designation for IA, then all must be so designated or risk undermining the goals of the Act.

If the Minister continues to view the Project Phases as three separate projects, how can he be confident that this is not project splitting? We nonetheless urge the Minister to designate Phases 1 and 2 for IA for the following reasons.

The Project may cause adverse effects within the federal jurisdiction

Effects within federal jurisdiction include impacts to Indigenous peoples' physical and cultural heritage, their use of lands and resources for traditional purposes and any change to their health, social or economic condition. The Project has the potential to adversely affect all of the foregoing, especially if it is not subject to IA.

Since time immemorial, BRIRC First Nations' members have pursued their traditional lifestyle based on hunting, fishing, gathering and trapping. The right to continue practicing the Cree way of life is protected by Treaty 6 and Section 35 of the Constitution Act, 1982. BRIRC First Nations' members also have a treaty right to those activities that are necessarily incidental to the practice of Treaty rights, such a camping, gathering plants for food and medicinal purposes, cultural and ceremonial use of lands and resources and the ability to pass these practices on to future generations (collectively, "Treaty and Inherent Rights"). We understand Treaty and Inherent rights, as we have defined them here, to be what is described by "the use of lands and resources for traditional purposes" in the Act. BRIRC First Nations' members exercise their Treaty and Inherent Rights year-round.

All three BRIRC First Nations' traditional territories extend south from the Battlefords to the Cypress Hills, and capture Phases 1 and 2 of the Project. BRIRC First Nations' members practice their rights on the land on and near Lake Diefenbaker, at Saskatchewan Landing to the west, as well as further east, north of Regina, in the territory of their relations in Treaty 4 on the

Qu'Appelle River, and other locations. These are the places that stand to be impacted by the Project and its effects – including those enumerated in the Designation Request – on water security (including quality and availability), traditional food security (as opposed to farmed food), loss of lands with native habitat and associated wildlife (such as wetlands and prairie grasslands), impacts to soil, impacts to water from irrigation runoff and other side effects, impacts to fish habitat, loss of habitat for birds, localized climactic changes, impacts to sacred sites, and the long-term cumulative impacts of water withdrawals and agrochemical inputs. BRIRC First Nations' members are continuously being squeezed into smaller and smaller spaces for the exercise of their rights, spaces which are more damaged and less productive than ever before. The environmental effects of the Project have the potential to directly, indirectly and cumulatively impact BRIRC First Nations' ability to use their lands and resources for traditional purposes, and their Treaty and Inherent rights.

All phases of the Project stand to deeply affect BRIRC First Nations' use of lands and resources for traditional purposes with no foreseeable practical plan for anticipating or managing those impacts. A decline in traditional uses is likely to bring negative impacts to the social, health and economic conditions of BRIRC First Nations due to loss of lands which provide all the benefits of a pharmacy, grocery store and classroom, among other uses. Alienation from the lands brings alienation from one's culture, which has devastating effects.

Moreover, the potential impacts are not likely to be adequately addressed by the province's consultation process. Lack of capacity funding, as noted above at page 4, is not the only problem with the process. For example, the province is hampered in its assessment of potential impacts to Treaty and Inherent rights, by a complete absence of Traditional Land Use (TLU) studies, traditional territory maps or other information. Done properly, TLU studies document past, present and projected practice of Treaty and Inherent rights and are critical to the assessment of potential impacts to those rights. In the absence of those studies, Saskatchewan's approach to identifying impacted rights-bearing communities is largely guesswork. The minimal budget allocated for consultation and the absence of evidence-based evaluation of impacts are merely scratching the surface of the problems with Saskatchewan's consultation process.

With respect to the Project specifically, the consultation process to date has been severely lacking. We understand that Water Security Agency (WSA) has attended several meetings with First Nations with a full complement of a dozen executives and often its legal counsel. No resourcing has been provided to First Nations – including the BRIRC – for attending such meetings, much less with their own technical experts. Participants from the WSA were unable to provide any details about what consultation would look like, how much it would cost, and when it would start. BRIRC Leadership has been invited to an open house at which we understand WSA's experts will be present. Again, there is no capacity funding. Individual one-on-one sessions where the expertise is one-sided are no substitute for a jointly agreed-to process where the parties on both sides have the necessary resources. WSA sent out its open house invitation with a scant two weeks' notice of the date, which also falls on the deadline for

these comments, adding pressure on our limited resources. WSA states that this forum constitutes engagement, not consultation, but many Chiefs fear, justifiably, that this will become part of the consultation record. Finally, the WSA's First Nations and Métis Engagement webpage promises economic spinoffs and job creation.⁷ It says nothing of the duty to consult, its obligations and how it will fulfill them, or Treaty and Inherent rights. The WSA's approach to date bypasses rights and impacts and jumps straight to accommodation – without acknowledging any aspect of the duty to consult procedure or providing any benefits that are not also promised to the rest of the province – jobs and economic spinoffs.

The shortcomings in the province and the proponent's process to date leaves us with serious doubts about their willingness and ability to understand, much less mitigate and accommodate, any impacts to Treaty and Inherent rights that arise as part of Phases 1 and 2 of the Project.

British Columbia's Supreme Court recently confirmed that the pressure of natural resource development and other settlement activities that squeeze the practice of traditional rights into smaller, more damaged and less productive areas will cause Treaty and Inherent rights infringement: *Yahey v British Columbia*, 2021 BCSC 1287. We know that cumulative effects analysis is critical in determining when – due to the intensity of existing permits, licences, authorizations, and other takings-up of land – Treaty and Inherent rights are or will be subject to infringement. Yet the province has no process for evaluating the amount of land and water that is necessary to allow BRIRC First Nations to continue to practice their Treaty and Inherent rights – including their culture and their way of life – much less determining whether cumulative effects are already infringing on their rights. *Yahey* points to the need to do a full IA on all phases of the Project, to determine the direct, indirect and cumulative impacts on our rights, culture and way of life. Consultation on individual phases of the Project will ignore or downplay the larger, cumulative impacts and effects. That is precisely what was cautioned against in *Yahey*. Absent this critical information, it is difficult to understand how the federal government would have sufficient information to engage in consultation, much less to uphold its fiduciary duties and the honour of the Crown.

Further, the provincial regime lacks critical thresholds for assessing when the “tipping point” of cumulative effects is reached, and is decades behind on the policies, processes and relationships necessary to manage these effects. How can decision makers know whether they are affecting Treaty and Inherent rights, culture and way of life absent a competent cumulative impacts assessment and absent any thresholds for evaluating impacts? As such, Phases 1 and 2 of the Project – if they undergo provincial environmental assessment at all – are very likely to cause or exacerbate existing infringements to BRIRC First Nations' rights due to the shortcomings in the provincial process.

⁷ Saskatchewan, “First Nations and Metis Engagement”, Lake Diefenbaker Irrigation Projects, available online: <https://diefenbakerirrigation.ca/engagement/>.

As we have already shown, assessment of the cumulative effects of the Project Phases should occur under one IA. Doing otherwise risks duplication of the cumulative assessment process, or worse – that analysis of cumulative effects will not occur in any meaningful way at all, if the Minister elects not to designate all three Project Phases for IA. If we do not assess the Project as one, but instead as three, how will the direct and cumulative impacts and effects be understood? There is no other process to do so. As per *Yahey v British Columbia*, project-specific consultation is not adequate for assessing cumulative effects.

With respect to physical and cultural heritage, we are unable to provide meaningful comment at this time, except that we are aware of no process under the provincial assessment and consultation regime designed to identify and protect such sites. This is an example of the limitations of the information that we can reasonably be expected to come up with in the timeframe and on the budget provided by the Agency with respect to seeking BRIRC First Nations' view on this Project.

Finally, we urge the Minister to exercise his discretion to designate all three Project Phases for IA under the Act as this is the only decision that is consistent with the precautionary principle articulated in the Purposes of the Act. Given the uncertainty with respect to the effects on the environment, on sites of cultural and physical heritage, and on Treaty and Inherent rights posed by the Project, it is critical that the Minister apply the higher standard of scrutiny reflected in the federal IA process on this Project. This principle is often perverted by industry to mean that if there is any uncertainty they should have licence to do whatever they want. However, its true meaning is that uncertainty calls for the most conservative course of action. The BRIRC argues that choosing the more conservative course of action – in this case, designating the Project – is more consistent with the principles and purpose of the Act than allowing the Project to be split into subprojects which may or may not be assessed under the provincial environmental assessment process.

Saskatchewan's current approach to consultation leads to the systematic erosion of Treaty and Inherent rights. This is antithetical to reconciliation, particularly given the limited or non-existent consultation with BRIRC First Nations on the various takings-up which have led to this situation. The right of BRIRC First Nations' members to engage in their traditional pursuits is protected by the Constitution and must be safeguarded for future generations. The province has a key role to play in protecting Treaty and Inherent rights, but it does not have the policies or processes in place to do so.

In summary, the Project has the potential to have direct, indirect and cumulative impacts on Treaty and Inherent rights or the use of lands and resources for traditional purposes. Similar impacts may occur or are likely to occur in respect of sites of physical or cultural heritage, and to the social, economic and health condition of the BRIRC First Nations. Such impacts are not likely to be addressed by the province's consultation practices. Any uncertainties as to the impacts should, in keeping with the precautionary principle, be resolved in favour of the most conservative course of action, which is to designate the Project and all its Phases for IA.

The Project may cause adverse direct or incidental effects

Adverse direct or incidental effects are those that are “directly linked or necessarily incidental to a federal authority’s exercise of a power or performance of a duty or function that would permit the carrying out, in whole or in part, of a physical activity or designated project, or to a federal authority’s provision of financial assistance to a person for the purpose of enabling that activity or project to be carried out, in whole or in part.”

WED’s Prairie Prosperity report states that the Canadian Infrastructure Bank, which facilitates large capital projects through privately backed loans or investments, is a possible source of funding for the Project and the only one identified by the WED. In his remarks the Project Sponsor also stated that WSA would be seeking funding from Canada to complete the Project. Canada has facilitated the Project in other ways. In other words, Canada’s support for the Project is crucial. The potential impacts to Treaty and Aboriginal rights described in these comments would not be issues of concern, but for the federal funding making the Project possible.

The Battle River IRC First Nations have urged Canada to use its considerable leverage as a major funder of this Project to ensure that Saskatchewan brings its relationship with First Nations into the 21st century. Canada can do so by ensuring that First Nations have the resourcing and capacity necessary to identify the Treaty and Aboriginal rights in issue, predict potential impacts to them, and mitigate and accommodate those impacts in compliance with the honour of the Crown, *under the IA process*.

Other issues

As we have noted earlier – BRIRC First Nations are challenged by the very short timeline provided for response to the Agency’s extensive questions. This is because our team of one full time staff is operating without the resources necessary to conduct the depth of inquiry that questions about potential adverse impacts deserve, and have been asked to do so on less time than Canada had to draft its letter requesting our input. Of the 90-day timeline, the bulk of the time appears to be reserved for the Agency and Minister as opposed to the participants, whose rights are again at stake in a process that is not designed to meet their needs and interests. It is troubling that the IAA would simply assume that First Nations can easily respond to requests of the sort in your letter in a few weeks, and particularly without sufficient human and financial resources to do so. That request demonstrates a lack of seriousness and understanding of our rights, culture and way of life.

As noted above, these are preliminary comments only. We request the opportunity to co-design a process going forward that deals with our procedural and substantive concerns and assesses the cumulative impacts of all phases of the Project on our rights, culture and way of life, including thresholds to determine such adverse impacts. We also request the significant resourcing required in order to participate meaningfully in the review process.

Conclusion

For the foregoing reasons, the BRIRC urges the Minister to designate all three Project Phases for IA under the Act. We request a written reply to the questions posed in this letter. We ask that you kindly copy the author on the Minister's decision and reasons.

Regards,

<Original signed by>

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- cc. Chief and Council, Moosomin First Nation
Chief and Council, Lucky Man Cree Nation
Chief and Council, Little Pine First Nation
The Hon. Melanie Joly, Minister Responsible for Western Economic Diversification
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The Hon. Catherine McKenna, Minister Responsible for Infrastructure and the Canadian
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The Hon. Bernadette Jordan, Minister of Fisheries and Oceans
The Hon. Carolyn Bennett, Minister of Crown-Indigenous Relations and Northern Affairs
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