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June 6, 2022

File No. 1229-028

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Environment and Climate Change Canada
Fontaine Building
12th Floor, 200 Sacré-Coeur Blvd
Gatineau, QC K1A 0H3
Honourable Minister Steven Guilbeault

Impact Assessment Agency of Canada
757 W Hastings St.
Site 210A
Vancouver, BC V6W 3M2

Dear Honourable Minister Guilbeault and the Impact Assessment Agency of Canada:

Re: Deadhorse Coulee Reservoir Project

We are legal counsel to Siksika Nation (“**Siksika**”) with regard to the Deadhorse Coulee Reservoir Project (the “**Project**”).

Siksika recently became aware of the request to designate the proposed Project from Ecojustice on behalf of several interested parties (including multiple environmental groups and two individuals) (the “**Ecojustice Request**”).

We write on behalf of our client to request that the Minister of Environment and Climate Change Canada (the “**Minister**”) designate the Project for federal review under section 9(1) of the *Impact Assessment Act*, SC 2019, c 28, s 1 (the “**Act**”).

1.0 EXECUTIVE SUMMARY

Siksika is a party to the Blackfoot Treaty (Treaty 7) and are members of the Blackfoot Confederacy. Siksika are Aboriginal peoples and possess Aboriginal and Treaty rights protected and defined under section 35 of the *Constitution Act*, 1982.

This Project requires a federal review by the IAAC. As proposed, the Project:

- is located in the environmentally sensitive watershed of the Oldman River Basin;

- has potential adverse effects on areas of federal jurisdiction (incl. species at risk, migratory birds, federal lands, Indigenous peoples) and may have transboundary impacts in Saskatchewan and the United States;
- has the potential to cause adverse effects directly related to federal authority as it is partially funded by a federal institution – the Canada Infrastructure Bank; and
- has the potential to cause adverse impacts on the section 35 rights of the Blackfoot to take and use water and to practice traditional activities protected under the Blackfoot Treaty.

Further, this Project is part of a much larger program proposed by irrigation districts in Alberta to dramatically expand and modernize the irrigation system throughout southern Alberta. It is crucial that there is federal oversight of this program, and the projects contained within.

Siksika requests that the Minister designate the Deadhorse Coulee Reservoir Project for federal review using their discretion under section 9(1) of the *Impact Assessment Act*.

2.0 SIKSIKA NATION

Siksika is a party to the Blackfoot Treaty (Treaty 7) and are members of the Blackfoot Confederacy. Siksika are Aboriginal peoples and possess Aboriginal and Treaty rights protected and defined under section 35 of the *Constitution Act*, 1982. Siksika is an Indian band within the meaning of section 2 of the *Indian Act*, RSC 1985, c-1-15. Siksika's reserve lands cover approximately 71,087 hectares east of Calgary.

Blackfoot traditional territory extends from the Rocky Mountains in the west to the Sand Hills in the east, and from the North Saskatchewan River in the north to the Yellowstone River in the south (present day Montana). The western boundary of Blackfoot traditional territory – the Rockies – was an overlapping area of trade, war, and peace-making between the Blackfoot tribes and their neighbours.

Siksika have used and continue to use the lands, waters, and resources within Blackfoot traditional territory for a variety of purposes including: hunting, fishing, trapping, conducting ceremony, gathering, travelling, and cultural practices. The ability to use their traditional lands for a range of practices is critical to Siksika as the lands and resources underpin their governance, culture, tradition, identity, well-being, and spirituality. The traditional practices conducted on the land and waters are integral to Siksika's physical and cultural survival.

The rights contained under section 35 include a right to take and use water. Providing for the safe and abundant water for their members is a key component of Siksika governance and their responsibilities as Blackfoot.

3.0 DEADHORSE COULEE RESERVOIR PROJECT

3.1 Project Detail

Project Name:	Deadhorse Coulee Reservoir Project
Project Proponent:	Bow River Irrigation District
Proponent Contact Information:	704 – 7 Ave. NPO Box 140 Vauxhall, AB T0K 2K0 403-654-2111 (contact@brid.ca)

3.2 Project Description

The proposed construction of the Deadhorse Coulee Reservoir Project is a major project that forms part of Alberta’s nearly one billion dollar program to revamp Alberta’s irrigation infrastructure. The entire program includes constructing hundreds of kilometres of pipelines to replace canal systems and expanding or building new off-stream storage reservoirs. If approved, these changes will have major impacts throughout southern Alberta and Blackfoot traditional territory.

This Project will include a new reservoir on the Bow River Irrigation District main canal – located approximately 10 kilometres southeast of Enchant, AB. According to the Alberta Water Portal website, the new reservoir capacity will be approximately “20,000-acre feet (24 million cubic metres), with a maximum depth of approximately nine metres”. The Project requires flooding approximately 500 hectares.

It is important to place this Project in the context of the proposed expansion and modernization of irrigation in Alberta. The larger program, proposed by Irrigating Alberta Inc. (a corporate entity wholly-owned by ten of Alberta’s irrigation districts), consists of: the modernization of 85 components of irrigation infrastructure, and construction of four off-stream reservoirs (incl. this Project).

As identified in the designation requested submitted by Ecojustice on April 12, 2022 (the “**Ecojustice Request**”), this would be the “largest expansion of irrigation infrastructure and irrigated lands in Alberta’s history” and would include “over 200 kilometers of new or converted pipelines and canals, over 1,850 hectares of new reservoir footprint, and over 95,000 hectares of newly irrigated land”.¹

4.0 DESIGNATION REQUEST

Please see the responses to the questions posed by the *Operational Guide: Designating a Project under the Impact Assessment Act* below.

¹ Ecojustice Request at p 2.

4.1 The Project is part of a broader expansion of Alberta's irrigation system

While the Project, taken as an individual activity, does not near the threshold for federal review under ss. 58-61 of the *Physical Activities Regulation*, the Project is part of a broader program of expansion and modernization of Alberta's irrigation system that will certainly exceed these thresholds. The impacts of the project will be felt in conjunction with each individual project proposed under the larger program and cannot not be isolated or split-up like the projects.

4.2 The Project is near an environmentally sensitive location

The sensitive nature of this ecosystem is sufficient to warrant a federal review. The Minister should exercise their discretion to designate the Project under the *Impact Assessment Act*.

The Project is located within the Oldman River Basin, a watershed suffering from increasingly high water demand. The South Saskatchewan Regional Plan ("**SSRP**"), which governs the Oldman River Basin, notes that the headwaters of the Bow and Oldman rivers are critical to water supply and water quality throughout the region. Generally, there is "significant" pressure on water resources in the region. The SSRP notes that "demands and the resulting pressure on water resources are compounded by periods of natural low flow and drought experienced periodically by the region".²

The SSRP states that degradation of riparian lands and reduction in viable wetlands throughout the prairies has contributed "to altered flow regimes and degraded water quality".³ Wetlands, native grasslands, and other sensitive ecosystem components are integral to the continued practice of the Blackfoot way of life. By preserving and protecting critical species and ecosystems we are also preserving and protecting the conditions necessary for the practice of Blackfoot rights by Siksika members.

4.3 The Project has the potential to cause adverse effects that fall within federal jurisdiction

The Project has the potential to cause adverse effects on multiple areas of federal jurisdiction that are of importance to Siksika. The designation request prepared by ecojustice contained detailed account and description of the specific effects on:

- (a) fish and fish habitat, and aquatic species, as defined in subsection 2(1) of the Species at Risk Act;
- (b) species at risk; and
- (c) effects on migratory birds.

We do not need to reiterate these concerns as Ecojustice has adequately summarized them. However, we stress that the impacts on these three areas is felt directly and acutely

² SSRP at 25.

³ SSRP at 27.

by Siksika and its members that engage in traditional activities on the rivers and lands within Blackfoot territory.

(d) Changes to the environment on federal lands

The Project would impact the aquatic ecosystems within Siksika's traditional lands as well as federal lands including the Piikani Reserve No. 147 and Blood Reserve No. 148, which are in the Oldman River Basin. The withdrawal of large quantities of water and altered flow through the Oldman River Basin will likely impact quality and quantity of water available to support Treaty and Aboriginal rights, and in particular the Treaty rights of Piikani and Kainai to the water resources that are necessary for their respective reserve lands. These impacts should be assessed on a regional and cumulative basis by the IAAC.

(e) Changes to the environment that occur outside of Canada

The river systems effected by this Project, and the larger program, flow into Saskatchewan and the United States. The Project will have transboundary effects. In addition to effects in the United States generally, it will also impact the Blackfeet Indian Reservation. The St. Mary River flows northwards from the Blackfeet Indian Reservation and although the expansion is downstream, the upstream impacts of additional storage and irrigation are unclear.

(f) Changes to the environment that could affect the Indigenous peoples of Canada

The Project will have direct and adverse effects on land within Blackfoot territory.

The Project will impact Blackfoot historical resources. By flooding 500 hectares of land, there is a high likelihood that historical resources and artefacts belonging to the Blackfoot will be lost. It is not Siksika's preference to identify, dig up, and move important items. These items are tied to place and linked to stories. Their movement and relocation will diminish the value they hold and potentially destroy them. Despite best efforts, many would likely be lost. The areas around streams and rivers in southern Alberta are of significant historical and cultural importance to Siksika.

The Project will impact the ecosystem necessary for the continued practice of Blackfoot ways of life. As described above, the Project will have impacts on wildlife, birds, fish and aquatic species, native grasslands, and wetlands. These are all critical components for the continued practice of Blackfoot ways of life, which include: hunting, ceremonial uses, fishing, gathering plants and medicines, and camping.

4.4 The Project has the potential to cause adverse effects that are directly related or incidental to a federal authority

The larger irrigation expansion and modernization program is funded by the Canada Infrastructure Bank. This Project may not have been proposed nor could it have been carried out (in whole or in part) without this funding. Its impacts can be tied directly or incidentally to a federal authority – the Canada Infrastructure Bank.

4.5 The Project has the potential to cause adverse impacts on Siksika's section 35 rights

Canada and Alberta must ensure that the changes proposed to irrigation in Alberta will not adversely impact Treaty and Aboriginal rights, particularly those in relation to the rights promised by Canada under the terms of the Blackfoot Treaty. Water resources are an acute issue in the Blackfoot Treaty region. Any significant misstep by Canada and Alberta in the management of water resources in the Blackfoot Treaty region could risk a serious breach of the Treaty.

This right to water is enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (“**UNDRIP**”) in several places. Article 25 states that:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Further, the obligation for Canada to obtain free, prior, and informed consent on projects of this nature is included in Article 32, which states:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. [emphasis mine]

In addition to direct impacts to the section 35 right to take and use water, the Project will also have impacts on the conditions necessary for the practice of traditional activities protected under section 35. As noted above, the Project will have significant impacts to fish and aquatic species, wildlife, and migratory birds – all components of the ecosystem in Blackfoot traditional territory that support the practice of their section 35 rights. Further, the large footprint of the Project will reduce the overall landscape available for the practice of traditional activities. Although the lands are private, flooding will render them permanently and irreversibly unusable for traditional use.

The substantial impacts to Siksika's section 35 rights warrant a federal review of this Project.

In addition, the IAAC must consider the impacts of the Project on Indigenous groups (including Blackfoot peoples) located south of the border. As noted above, there are potential impacts on the use and enjoyment of the waterways located within Canada. These impacts may extend to Indigenous peoples south of the border who access and use resources within Canada. Given the result in *R v Desautel*, 2021 SCC 17, it is incumbent on Canada (once they are put on notice of a potential impact on a right of an outside group within Canadian territory) to determine whether a duty to consult arises and

the scope of the duty in these circumstances.⁴ This is a transboundary impact that Alberta cannot assess on its own.

5.0 CONCLUDING REMARKS

This Project requires a federal review. As proposed, the Project:

- is located in an environmentally sensitive watershed;
- has potential adverse effects on areas of federal jurisdiction (incl. species at risk, migratory birds, federal lands, Indigenous peoples) and may have transboundary impacts in Saskatchewan and the United States;
- has the potential to cause adverse effects directly related to federal authority as it is partially funded by a federal institution – the Canada Infrastructure Bank; and
- has the potential to cause adverse impacts on the section 35 rights of the Blackfoot to take and use water and to practice traditional activities protected under the Blackfoot Treaty.

Further, we think it is incumbent on the IAAC to play a role in the review of a Project that forms part of a concentrated effort to expand and modernize the irrigation system throughout southern Alberta. Although this Project (taken alone) does not meet the thresholds established by the *Physical Activities Regulation*, the program certainly does. As such, we support the submission made in the Ecojustice Request to consider all of the broader Alberta program's physical activities and their cumulative effects together. This would both be efficient from a regulatory perspective and also account for the scale of the efforts.

Siksika requests that the Minister designate the Deadhorse Coulee Reservoir Project using their discretion under section 9(1) of the *Impact Assessment Act*.

Yours truly,

JFK Law LLP

Per:

Blair Feltmate

Associate

BLF/jlw

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⁴ R v Desautel at paras 74-76.