



August 30, 2017

Via Email (SiteCSubmission@bcuc.com)

Commission Secretary
BC Utilities Commission
Sixth Floor, 900 Howe Street
Vancouver, BC V6Z 2N3

Attention: Patrick Wruck

Re: BC Utilities Commission Review of Site C

We act as legal counsel for the Mikisew Cree First Nation in regards to the BC Utilities Commission's Site C Inquiry.

On behalf of the Mikisew Cree First Nation, we attach Mikisew's written submission in this Inquiry.

Yours truly,

JFK Law Corporation

Per: s/

Mark Gustafson

MAG/b

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File No. 1051-069



MIKISEW CREE
FIRST NATION

**SUBMISSION OF THE MIKISEW CREE FIRST NATION
TO THE BC UTILITIES COMMISSION'S
INQUIRY RESPECTING THE SITE C DAM**



GOVERNMENT & INDUSTRY RELATIONS

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A. Introduction

About the Mikisew Cree First Nation

1. The Mikisew Cree First Nation (“Mikisew”) is a Treaty 8 First Nation whose traditional territory includes the Peace Athabasca Delta in northeastern Alberta where the Peace River meets the Athabasca River to form one of the world’s largest freshwater inland deltas.
2. Mikisew’s way of life is grounded in a generations-old relationship between Mikisew people and the superlative network of wetlands, reed banks, lakes, and waterways that form the Peace Athabasca Delta, or *Ayapaskaw* in Cree. How Mikisew members think and how they see the world is based on the relationship with Ayapaskaw. Ayapaskaw is where Mikisew elders were born. Ayapaskaw is the Mikisew grocery store. Ayapaskaw is the Mikisew classroom. Ayapaskaw is Mikisew’s primary highway. Ayapaskaw is the Mikisew photo album.
3. The Peace Athabasca Delta is also the “disproportionately important and disproportionately vulnerable” part of the Wood Buffalo National Park World Heritage Site and home to myriad species of birds, wildlife and plants.¹
4. BC Hydro’s existing dams on the Peace River have had a real and devastating effect on the Peace Athabasca Delta and Mikisew’s way of life. Mikisew has raised serious concerns that the Site C Dam could further impact the Peace Athabasca Delta while also making efforts at corrective actions more difficult or even impossible.

Analysis of the World Heritage Centre and the International Union for the Conservation of Nature (IUCN) regarding the Site C Dam

5. In December 2014, Mikisew petitioned UNESCO’s World Heritage Committee to inscribe the Wood Buffalo National Park World Heritage Site on the Committee’s

¹ *Report of the Reactive Monitoring Mission to Wood Buffalo National Park, Canada, 25 September - 4 October 2016*, dated March 2017 [Reactive Monitoring Mission Report] (Available online: http://whc.unesco.org/en/sessions/41com/documents/#mission_reports)

List of World Heritage in Danger due to the many serious ascertained and potential dangers to the Park's Outstanding Universal Value ("OUV"), which includes the Peace Athabasca Delta. Concerns about the review process for the Site C Dam and how the Site C Dam may impact the Peace Athabasca Delta were forefront in Mikisew's petition.

6. At the request of the World Heritage Committee, a joint World Heritage Centre/IUCN reactive monitoring mission took place in the fall of 2016 to assess the state of conservation of Wood Buffalo National Park. The terms of reference for the reactive monitoring mission tasked the mission to review and assess the impacts of the Site C Dam on the OUV of Wood Buffalo National Park, including the Peace Athabasca Delta.
7. With respect to the Site C Dam, the reactive monitoring mission made the following conclusion:

Although this project is still more than 1,000 km upstream of the PAD², many expect the project to contribute to further flow impedance down the Peace River on top of impacts from the existing Bennett and Peace Canyon dams. Surprisingly, the Joint Review Panel (JRP) established to shed light on the massive and controversial project concluded that "the Project would not have any measureable effect on the Peace-Athabasca Delta" (JRP, 2014), without providing a conceivable technical rationale for this conclusion. As an explanation for the lack of consideration of the PAD it is stated elsewhere in the report that it "was not within the spatial boundaries of the environmental assessment because the proponent calculated that there would be no detectable project effects at the PAD" (JRP, 2014). Given the enormous complexity of both the effects of river regulation and the PAD itself, the

² PAD refers to the Peace Athabasca Delta

*mission respectfully disagrees with this simplistic approach. From a technical perspective, it is clear that there are important effects which should be understood to inform decision-making, including as regards mitigation options.*³

8. The reactive monitoring mission went on to issue the following recommendation:

Recommendation 4

*Conduct, in line with the IUCN World Heritage Advice Note on Environmental Assessment, an environmental and social impact assessment of the Site C project and, if moved forward, any other hydropower projects potentially affecting the Outstanding Universal Value of the property*⁴

9. In June 2017, when providing advice to the World Heritage Centre regarding Wood Buffalo National Park, the World Heritage Centre and IUCN concluded:

*The ongoing absence of a specific assessment of Site C's potential impacts on the OUV of the property does not permit an informed judgment about irreversible decisions, and this absence should be rectified. It is therefore recommended that the Committee request the State Party to make every effort to understand the possible impacts of the Site C project on the OUV of the property before any further decisions are made that may be difficult to reverse...*⁵

³ *Supra*, note 1 at page 17.

⁴ *Ibid*, at page 21.

⁵ WHC/17/41.COM/7B.Add, June 2 2017 at page 9 (Available online: <http://whc.unesco.org/archive/2017/whc17-41com-7BAdd-en.pdf>).

July 2017 Decision of the World Heritage Committee

10. In July 2017, UNESCO's World Heritage Committee rendered a decision requesting that Canada "make every effort to assess and understand the potential impacts of the Site C hydropower project and of the various major dams on the Peace River on the OUV of the property".⁶
11. The World Heritage Committee also requested that Canada implement all 17 recommendations made in the Report of the Reactive Monitoring Mission.

Action Plan for Wood Buffalo National Park

12. Canada has committed to develop an Action Plan to implement the 17 recommendations of the Reactive Monitoring Mission by December 2018. The development of the Action Plan will include, among things, work to define optimal flow needs for the Peace River to support the ecological integrity of the Peace Athabasca Delta.
13. The Site C Dam, should it proceed, may limit or impede Canada's ability to protect and restore the Peace Athabasca Delta through the Action Plan. Additionally, as described later in this submission, any Action Plan that is developed may require changes in the operation of the Site C Dam (for example by requiring alterations in the release of water in order to properly restore the PAD) and so may alter the costs of operation of the Site C Dam and the effectiveness of the Site C Dam from a cost-perspective.

⁶ 41 COM 7B.2 at para 6 (Available online <http://whc.unesco.org/archive/2017/whc17-41com-18-en.pdf>)

B. The Commission's Terms of Reference for this Inquiry

This Inquiry is not an environmental review

14. Subsection 3(e) of the Terms of Reference for this Inquiry confirms that this Inquiry is not an environmental review of the Site C Dam.⁷
15. As such, this Inquiry is not responsive to Recommendation 4 of the Reactive Monitoring Mission to the Wood Buffalo National Park World Heritage Site or Paragraph 6 of World Heritage Committee decision 41 COM 7B.2 insofar as it does not include a review of the Project's environmental effects on the Peace Athabasca Delta.
16. However, this Inquiry *may* be responsive to these recommendations and requests if the Commission advises that the Site C Dam should be terminated and remediated. Such a recommendation, if implemented, would eliminate the risk of adverse impacts to the Peace Athabasca Delta and the associated environmental and social costs of the Site C Dam.

C. Costs of Continuing the Site C Dam as planned

BC Hydro has overstated benefits and understated costs of the Site C Dam

17. Mikisew supports the following submissions and reports, which identify serious flaws in BC Hydro's unrealistically overstated benefits and understated costs of the Site C Dam:
 - a. R. Hendriks, P. Raphals and K. Bakker, "Reassessing the need for Site C," Program on Water Governance, University of British Columbia, 2017;
 - b. Submission of Marc Eliesen to the Inquiry on Site C, dated August 16, 2017; and

⁷ British Columbia, Order in Council 244, approved August 2, 2017

- c. Submission of Harry Swain to the Inquiry on Site C, dated August 28, 2017.
18. These submissions confirm that continuing with the Site C Dam as planned will likely have significant costs to ratepayers.

Additional costs associated with the Site C Dam that may be born by ratepayers, directly or indirectly

19. Parks Canada Agency, Environment and Climate Change Canada, the Athabasca Chipewyan First Nation and Mikisew all provided evidence and submission during the review process for the Site C Dam that confirmed that existing BC Hydro dams on the Peace River have caused ecological damage to the Peace Athabasca Delta and Indigenous rights and identified that there is a real risk that the Site C Dam may cause further damage to that area.⁸
20. Because downstream effects on the Peace Athabasca Delta were improperly scoped out of the Joint Review Panel process,⁹ the following costs that may be incurred directly or indirectly by ratepayers were not considered during that review but should be considered here:
 - a. costs for undertaking the environmental review of the Site C Dam on the Peace Athabasca Delta requested by the World Heritage Centre, IUCN and the World Heritage Committee;

⁸ *Final Submissions of the Mikisew Cree First Nation and Athabasca Chipewyan First Nation to the Joint Review Panel for the Environmental Assessment of the Proposed Site C Project*, February 3, 2014 at paras 186-192, 263-460. (Site C Registry document 2760: <http://www.ceaa.gc.ca/050/documents/p63919/98312E.pdf>) [*Final Submissions*]

⁹ The impropriety of this approach was forcefully articulated in the Reactive Monitoring Mission Report. The reactive monitoring mission reached this conclusion after hearing directly from BC Hydro, the BC Environmental Assessment Office and multiple federal departments. *Supra*, note 1.

- b. costs associated with BC Hydro causing further environmental impacts to the Peace Athabasca Delta and restricting or depriving Indigenous groups (including those of Mikisew, the Athabasca Chipewyan First Nation, Fort Chipewyan Metis, among others) that depend on the Peace Athabasca Delta for their beneficial use of their Treaty entitlements;
 - c. costs associated with the increased complexity and cost of restoring the flow rates of the Peace River and flooding cycle required to maintain and protect the OUV of the Wood Buffalo National Park World Heritage Site, should the Site C Dam proceed;
 - d. costs associated with impairments to good will and other assets should the Site C Dam contribute to Wood Buffalo National Park being inscribed on the List of World Heritage in Danger; and
 - e. increased operational costs associated with ongoing assessments, additional monitoring and operational modifications required to verify and correct potential impacts to the Peace Athabasca Delta from the Site C Dam.
21. Mikisew also notes that the issue of whether or not the Site C facility constitutes an unjustified infringement of the Treaty 8 rights of certain First Nations has been left to be determined in future proceedings. This raises the very real potential for a future judicial determination that the Site C dam has to be de-commissioned, its operations significantly altered or damages paid.
22. These costs may be born directly by ratepayers through costs arising from First Nation compensation and/or settlement costs, increased operational costs or litigation costs. Additional costs may be born indirectly by ratepayers through the need for provincial or federal governments to secure funds to cover such costs or address other costs associated when individuals are deprived of their ability to secure their livelihood. In Mikisew's submission, the Terms of Reference for this

Inquiry are broad enough to allow the Commission to consider direct and indirect costs to ratepayers.

23. Mikisew acknowledges that these costs cannot be readily quantified at present, given the lack of an adequate assessment of the effects of the Site C Dam on the OUV of Wood Buffalo National Park and the limited timeframes for this Inquiry. However, recent history clearly demonstrates that there may in fact be additional costs associated with the pursuing the Site C Dam, like those described above, that have been previously ignored by BC Hydro. For example, in 1998 a panel of Indian Claims Commission, co-chaired by the late Jim Prentice, QC, concluded that members of the Athabasca Chipewyan First Nation suffered extreme hardship and economic loss as a result of the destruction of the Peace Athabasca Delta and environmental damages to its reserve lands from the W.A.C. Bennett Dam.¹⁰ The Indian Claims Commission went on to conclude that the Athabasca Chipewyan First Nation should be entitled to:

seek full compensation for the destruction of the First Nation's economic livelihood, for damages to IR 201, and for the substantial infringement on its food harvesting rights under Treaty 8¹¹

and

The extensive infringement on these treaty rights and entitlements has essentially deprived the First Nation of a large measure of the benefits and consideration provided for under the terms of Treaty 8. It is for this reason that members of the First Nation are, at the very least, entitled to compensation for its damages.¹²

¹⁰ Indian Claims Commission, *Athabasca Chipewyan First Nation Inquiry: WAC Bennett Dam and Damage to Indian Reserve 201* (March 1998) ["Indian Claims Commission"] at 78 (Available online: http://www.ceaa.gc.ca/050/documents_staticpost/63919/96375/1-March_1998-ACFN_Inquiry_WAC_Bennett_Dam_and_Damage_to_Indian_Reserve_201.pdf).

¹¹ *Ibid* at 78.

¹² *Ibid* at 78.

24. The public record, as well as the evidentiary record for the Site C Dam Joint Review Panel process, is replete with information confirming that Mikisew's food harvesting rights and the economic livelihood of many Mikisew households depend on the Peace Athabasca Delta in ways similar to those noted by the Indian Claims Commission.¹³
25. While the Indian Claims Commission considered Crown liability, recent case law supports the ability of First Nations to pursue tort claims against proponents when a project harms Indigenous rights.¹⁴ Indeed, the Crown argued in the Indian Claims Commission process referenced above that First Nations should pursue claims for damages for nuisance, trespass, or interference with its Treaty rights against those entities, like BC Hydro, who are responsible for the damages.
26. Mikisew's recent experience with BC Hydro is that its hostile approach to communities around the Peace Athabasca Delta and scientists working for Environment and Climate Change Canada and the Parks Canada Agency make it more likely that BC Hydro will fail to take steps that may reduce these costs to ratepayers should the Site C Dam proceed.

D. Costs of suspending or terminating the Site C Dam

27. As noted by other participants in this Inquiry, BC Hydro has not provided adequate information to verify claims regarding the size of irrevocable contracts or other costs associated with terminating the Site C Dam; nor has BC Hydro provided information to allow the Commission to evaluate the ability of vendors to mitigate their damages.¹⁵ The Commission must obtain and provide such

¹³ See, Firelight Group, *Mikisew Cree First Nation Report on Peace River Knowledge and Use for BC Hydro's Proposed Site C Project*, September 2013 (Site C Registry document 1814: [http://www.ceaa.gc.ca/050/documents_staticpost/63919/96375/2-September_20_2013-MCFN_Report_on_Peace_River_Knowledge_and_Use_\(Craig_Candler\).pdf](http://www.ceaa.gc.ca/050/documents_staticpost/63919/96375/2-September_20_2013-MCFN_Report_on_Peace_River_Knowledge_and_Use_(Craig_Candler).pdf)); See also, *Final Submissions*, *supra* note 8 at paras 105-164.

¹⁴ *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan Inc*, 2015 BCCA 154.

¹⁵ Submissions of the Clean Energy Association of B.C. in this Inquiry, dated August 17 and 25 2017, respectively.

information to participants in this Inquiry as well as a right for participants to make reply submissions once the information has been received and reviewed.

28. What is clear is that terminating the Site C Dam would limit the potential direct and indirect costs to ratepayers from adverse impacts to the Peace Athabasca Delta and the Indigenous communities, like Mikisew, that depend on the Peace Athabasca Delta to sustain their rights.
29. When considering the cost of terminating the Site C Dam, Mikisew submits that the Commission should also consider the economic benefits to individuals, families and communities from being able to continue farming and engage in other rights-based activities that may be lost or diminished under a scenario where the Site C Dam proceeds. Many of those that may be economically disadvantaged by the Site C Dam because of a diminished ability to maintain their livelihood will be ratepayers.

E. Concluding Remarks

30. No less than hundreds of academic scientists and two separate United Nations bodies have noted, just as Mikisew has done, that BC Hydro has not conducted the necessary assessments or Indigenous engagement required to proceed with the Site C Dam.¹⁶
31. History has shown, through serious environmental impacts and devastating impacts to the Mikisew community, that BC Hydro dams on the Peace River come at a huge cost.
32. While many of those costs have been born by Mikisew elders who are no longer able to consistently access their cabins in Wood Buffalo National Park to pass

¹⁶ See <https://www.rsc-src.ca/en/about-us/our-people/our-priorities/over-200-leading-scholars-call-government-to-suspend-site-c-dam>; 41 COM 7B.2, *supra* note 6; and http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/CERD_C_CAN_CO_21-23_28714_E.pdf, respectively

Mikisew culture and history on to younger generations – and the spiralling social costs that arise from loss of culture – continuing with the reckless pursuit of the Site C Dam may put BC ratepayers on the hook for future costs.

33. The unfortunate reality is that costs, however one defines that term, to Canada's largest and arguably most at risk World Heritage Site have been ignored from each and every evaluation of existing and planned dams on the Peace River in British Columbia. Mikisew urges the Commission to take into account the potential costs of the Site C Dam's effects on Mikisew's way of life and its cherished landscape – the Peace Athabasca Delta – in this Inquiry.
34. In Mikisew's respectful submission, doing so will lead to the same conclusion made by former President and CEO of BC Hydro, Marc Eliesen, namely that ratepayers are better off if the Site C Dam is terminated. Certainly the unique and globally important Peace Athabasca Delta would be better off.

Dated: August 30, 2017