

Position Paper of the

Berens River First Nation Chief and Council

-on behalf of-

The Berens River First Nation membership & community

-presented Wednesday, February 11, 2015 to the-

Manitoba Clean Environment Commission (The Panel)

Manitoba Hydro application for a final license to regulate Lake Winnipeg waters

Community Hearings process at Berens River, Manitoba

Presented by:

Chief Jackie Everett & Council
Berens River First Nation

"This submission to the Manitoba Clean Environment Commission is not intended to fulfill the meaningful consultation requirements and the duty to consult as required by the Supreme Court of Canada's jurisprudence on aboriginal and treaty rights."

1. The Berens River First Nation Position:

The Berens River First Nation is a growing community along the east side of Lake Winnipeg. The community relies heavily on Lake Winnipeg for its existence. The lake has been the very heart and soul of the community from time immemorial. Fishing, trapping, hunting, travel, ceremonial and spiritual usages have been the historical socio-economic relevance of Lake Winnipeg to the people of the Berens River First Nation. The lake has been a source of pride for our people.

Today the lake is sick; Lake Winnipeg is now listed as one of the most threatened and polluted lakes in the world. Our people have not caused this sickness for the lake. Our people have never harmed the lake. Today the lake is no longer the same lake we had prior to the 1970s when Manitoba Hydro began to use the lake as a reservoir to store water for hydro power generation. The lake levels have steadily increased since the 1970s, which has caused heavy damage to the shoreline all around the lake and to our lands in Berens River. Since our community is situated on the east side of Lake Winnipeg, the prevailing northwest winds drive these high waters against our shores causing much destruction and damage to our community and its livelihood. Our people were told back in the 1970s that the lake would rise very little and that the increased water levels would be hardly noticeable: the opposite is true given all the damage we see today. The dam erected at Jenpeg near Cross Lake is akin to putting a plug in a bathtub; the lake can no longer drain itself properly and it has become a toxic pool of waste water from cities like Winnipeg.

And recently, Lake Winnipeg has become a dumping ground for floodwaters diverted through the Portage La Prairie diversion channel into Lake Manitoba. Furthermore, a new drainage channel from Lake St. Martin to Lake Winnipeg was constructed in 2012 to increase water drainage into Lake Winnipeg. Our community of Berens River was never consulted with in terms of the impact of these additional waters being dumped into Lake Winnipeg. It is troubling for our people and our community that we have to suffer from these high waters in order to save people in the southern parts of Manitoba that would normally suffer the consequences of living on a flood plain. This problem is not of our choosing but of the people who decided to live in these high flood risk areas. Today these extra burdens are being placed on Lake Winnipeg and the communities all along its shores to suffer from the extra waters being unnaturally diverted from southern Manitoba flood plain areas.

Our position on Lake Winnipeg is based on our Treaty No. 5, signed, September 20, 1875. In our treaty with the Queen (now the Crown in Right of Canada), nothing was said about the waters of Lake Winnipeg, we agreed to share land for farming and nothing else. However, we did grant the Queen the right to sail ships on Lake Winnipeg through our waters, which is stated in Treaty No. 5. This fact points to our ownership of Lake Winnipeg and its waters. We were promised lands suitable for farming but more than half of our lands are swamp. The surveyors back in 1875/77 were too lazy to insure that all of the land set aside for our reservation was "land suitable for farming:" Instead, the surveyors marked out straight lines that included

muskeg and swamp for our people. The Chief and Council of the day protested this fact fiercely to no avail. This issue is still outstanding for our people today.

Since the signing of Treaty No. 5 in 1875, the farmers of Canada have received hundreds of billions of dollars to create a social farming economy for mainstream Canadian farmers. To date our people have received no such help to create farming on our reservation except for the one oxen granted in 1877, but he died long ago. Today our people are accused of being a social burden on Canada, but if you add up the billions of dollars spent on farmers and creating value added businesses for them, shipping ports, railways, grain storage facilities and so on, our social costs are a pittance in comparison. This fact remains today.

And since the 1970s, Manitoba Hydro has compounded our loss of lands by the fact that high water, high water tables and erosion have taken more of our lands. For hundreds of years, if not thousands of years, the shoreline of Lake Winnipeg in our community remained unchanged. Since the 1970s we have seen points become islands, many beaches destroyed and rivers and creeks our people use to navigate by boat are now blocked by silt (Canoe Making Creek, Leaf River, Flour Creek, etc.) And yet in the 1970s our people were told that the increased water levels by Manitoba Hydro would be hardly noticeable. History has proved this claim wrong.

The lands on our reservation have become water logged to the point where many of our houses are molding and rotting from underneath. In 2009, our First Nation identified 108 houses with rotting floors and mold due to high ground water tables. We had 320 houses on reserve at the time, therefore one third of our housing stock is being destroyed by high water table issues. Our lands along the area we call "the point" are severely impacted by high water levels and high ground water tables. This part of our reserve is along the shore of Lake Winnipeg and it is clear to see it is no longer safe to build along the shore like our people did in historic times and prior to the 1970s. Our commercial fishers in our community have a lot of problems with docks being washed away due to high waters. We have watched as other communities have been granted financial compensation, land compensation, revenue sharing, new housing, dykes, docks, new roads, recreation centers, business partnerships and so on to compensate for losses suffered due to hydro development by the Province of Manitoba and Manitoba Hydro.

To date, we have never been compensated for any of the damages and hardships our community has suffered due to the unnaturally high water on Lake Winnipeg; created by Manitoba Hydro in the 1970s. Our lake had a natural ebb flow of high water and low water periods which could last for a decade; this natural fluctuation allowed for stable shorelines and habitat for wildlife. This is all gone now. Prior to the 1970s, muskrats were abundant and empty clam shells were piled high on the shores in the spring by feeding muskrats. This is no longer the case. We have lands at Pigeon River, ten miles south of Berens River that use to be hay lands, these lands are now all willows and unusable.

Our position on the current application by Manitoba Hydro to seek a final license to regulate Lake Winnipeg for another 50 years beginning on or about 2026 is unacceptable to our community and the leadership of the Berens River First Nation.

2. Our position on the Terms of Reference for the Lake Winnipeg Regulation Review 2014:

On Page 6: The Mandate states:

Manitoba Hydro is to receive a final license to regulate Lake Winnipeg subject to the fulfillment of the terms and conditions of the interim licenses granted to Manitoba Hydro in 1970 and 1972.

The Berens River First Nation opposes the granting of the final license to Manitoba Hydro to regulate Lake Winnipeg due to the fact that our shorelines now have disappeared by four feet and more since the 1970s instead of the promise that the rise in the lake level would be hardly noticeable. And the promise that a lake level of 715 feet above sea level would not be a frequent event has proven to be incorrect. Manitoba Hydro has failed in its promise to ensure that very little impact would be felt by our community. Today we see these changes and we can prove that water levels are much higher than originally promised by Manitoba Hydro. Photos from the 1960s and prior years of Berens River shores show the loss of shoreline due to the high water levels we see today.

We also oppose the granting of a final license to Manitoba Hydro due to the fact that inflows have been drastically altered by the cutting of a new channel from Lake St. Martin into Lake Winnipeg (2012). And further channels are being planned from Lake Manitoba into Lake St. Martin to increase water flows even further. We oppose the granting of a final license to Manitoba Hydro due to the fact that a high water mark of 715 above sea level is an impossible level to achieve with more water being drained into Lake Winnipeg. We also note that the Winnipeg Floodway was increased in size to flow more water into Lake Winnipeg during major flooding events; eg. The Flood of the Century in 1997.

We oppose the granting of a final license to Manitoba Hydro due to the fact it is impossible to regulate Lake Winnipeg with the old structure built at Jenpeg near Cross Lake. There is no mention that the increased water into Lake Winnipeg from the Lake St. Martin channel will require a new dam at Jenpeg to increase outflows to accommodate the extra water from the Lake St. Martin drainage channel built in 2012.

On Page 7: the Mandate states:

Review broader public policy rationale leading up to the regulation of lake levels on Lake Winnipeg via the interim license granted in 1970.

The policy thinkers of the day back in 1970 and their rationale for raising Lake Winnipeg lake levels was that there would be very minimal impact to Lake Winnipeg by raising the lake level by a maximum of two feet. It was obviously a huge mistake to grant Manitoba Hydro the authority to unilaterally regulate Lake Winnipeg due to their conflict of interest position. It is obvious that more water stored means more profits made; at the expense of damages to the lake and the communities around the lake.

From a public policy perspective in today's world, we see that crown corporations including Manitoba Hydro are subject to review by the Manitoba Public Utilities board. In the present license application for a final license, Manitoba Hydro is once again seeking unilateral authority to regulate Lake Winnipeg as it did back in 1970s. Public policy has changed today and it is improper and we submit illegal for Manitoba Hydro to regulate Lake Winnipeg, which is technically a public asset now since it is now a reservoir and not a lake (nature no longer regulates it). Manitoba Hydro is in a conflict of interest and therefore should not be granted unilateral authority to regulate Lake Winnipeg. And given the growth of aboriginal and treaty rights in Canada since the 1970s and Section 35 of the Charter of Rights, 1982, and the duty to accommodate and consult; the jurisprudence in Canada requires that the Berens River First Nation and all other First Nations around Lake Winnipeg have a right to manage the waters of Lake Winnipeg and share in the benefits from these waters. At the very least a partnership with Manitoba Hydro is needed to meet today's public policy requirements as called for by the duty to accommodate and consult.

Therefore the Berens River First Nation opposes the granting of a final license to Manitoba Hydro to unilaterally regulate Lake Winnipeg lake levels. The Berens River First Nation submits that it is now required by law that our First Nation has a right to regulate Lake Winnipeg and participate in all and any matters relating to Lake Winnipeg in a meaningful way.

On Page 7: the Mandate states:

Hear evidence on the effects and impacts of Lake Winnipeg Regulation and review the successes and failures of the public policy goals that led to the regulation of Lake Winnipeg.

Our position as stated above is that Manitoba Hydro has caused great damages to our community and people with their ill fated plan to regulate water levels on Lake Winnipeg. Today, Lake Winnipeg is a lake that can no longer clean itself due to the Jenpeg dam. There are no successes for the regulation of water on Lake Winnipeg. In fact the situation has gotten worse with the new Lake St. Martin channel being built in 2012. The evidence is easy to see by visiting our community during the summer. Our elders have lived on the lake before the 1970s and today they see a vastly different lake. A lake that no longer provides drinking water. And furthermore, a lake that is quickly eroding shores and beaches at an unprecedented rate. The shoreline on our reservation is becoming more unstable as time goes by and there is a serious need to protect our lands against this destruction, if possible. This situation exists in all communities situated around Lake Winnipeg.

3. Conclusion:

The Berens River First Nation position is that there needs to be a complete assessment and review of the issues raised in this position paper. The provincial and federal governments are responsible for the all the damages and hardships suffered by the people of the Berens River First Nation. We note that the panel has not heard from Aboriginal and Northern Affairs Canada (AANDC) regarding their participation and support for our First Nation in this hearing process. AANDC owes our First Nation a fiduciary obligation to assist in the protection of our lands and waters. We state that this process can not proceed without the full and willing engagement of AANDC to assist our First Nation with all the costs of this hearing process and the experts we require to insure our concerns and issues are dealt with in a meaningful manner. Public policy demands that the Supreme Court of Canada has made it clear that we are owed a duty to consult and accommodate by all levels of government in this country, including Manitoba Hydro.

The Berens River First Nation is opposed to the granting of a unilateral final license to Manitoba Hydro to regulate the waters of Lake Winnipeg. The Berens River First Nation is requesting that serious negotiations be funded by both levels of government to address all the issues and concerns raised in this position paper. The Berens River First Nation is requesting fair and equitable compensation for all damages suffered due to high water levels caused by Manitoba Hydro on Lake Winnipeg. The Berens River First Nation

is requesting that this review process immediately take measures to insure that the concerns of the Berens River First Nation are addressed before any further consideration be given to the regulation of Lake Winnipeg waters by Manitoba Hydro.

In closing, we note that there are arbitrary deadlines to meet in this hearing process and we submit that the funding available for our First Nations participation is far too inadequate to meet the high standards demanded by today's public policy requirements. We have made this clear in this submission. This process today is based on the old 1970s assumptions that the Province of Manitoba and Manitoba Hydro have the unilateral authority and jurisdiction to regulate Lake Winnipeg water levels. This position by provincial and federal governments and their crown agencies such as Manitoba Hydro is no longer valid. Canadian jurisprudence states otherwise.

Therefore, our First Nation is requesting that the provincial and federal governments take a step back from this entire flawed process and setup a proper process to meet public policy as it stands today. The Berens River First Nation has the right to participate and become a legal partner in setting up a new process to regulate Lake Winnipeg under the terms of a new final license (2026 and beyond) to cover the operation of Lake Winnipeg as a reservoir; not a natural lake as was the case, since time immemorial.

Megwetch.

On behalf of the Berens River First Nation and its people:

Chief Jackie Everett
And Council:

Council Members:

Hartley Everette, Gerald Kemp, George Green, Roland Whiteway and Norman Mckay.

Submission Prepared by:
George Kemp, Berens River First Nation
Final Edition, February 9, 2015.

Band Council Resolution

Whereas the Berens River First Nation is a community situated on the east side of Lake Winnipeg in the Province of Manitoba, and;

Whereas the Berens River First Nation and its people hold treaty and aboriginal rights to all of its lands and waters; on its reserve lands and traditional lands and territories beyond the boundaries of its reserve lands, and;

Whereas the Province of Manitoba and Manitoba Hydro have drastically altered the natural state of Lake Winnipeg since the granting of a license to Manitoba Hydro to unilaterally regulate water levels on Lake Winnipeg since 1970, and;

Whereas the legal role of First Nations participation and meaningful input and benefits accruing for major natural resources development has been altered by The Charter of Rights, Section 35, 1982, and subsequent Supreme Court of Canada decisions that holds governments in Canada hold a duty to consult and accommodate First Nations treaty and aboriginal rights in any and all decisions impacting these rights, and;

Whereas, the public policy and goals of governments in Canada have been drastically altered by the legal jurisprudence evolving since 1970 until this day:

Therefore Be it Resolved, that the Berens River First Nation and its people hereby submit this Position Paper to the Manitoba Clean Environment Commission, The Province of Manitoba, Manitoba Hydro and the federal department of Aboriginal and Northern Affairs (AANDC) to clearly reject the current license renewal process as purportedly mandated by the Manitoba Clean Environment Commission, 2014, and;

Be it Further Resolved that, the Berens River First Nation clearly states that the submission of this Position Paper to the Manitoba Clean Environment Commission is in no way; direct or implied, intended to fulfill the legal duty of all governments and crown agencies to meaningfully accommodate and consult the Berens River First Nation and its people regarding this current Lake Winnipeg Regulation Review 2014, Final License Application by Manitoba Hydro as purportedly mandated by the Minister of Conservation, Bill Blaikie; July 5, 2011: Terms of Reference.

Therefore, the Berens River First Nation and its people request that current review process in its current flawed legal mandate must be revised to meet today's public policy realities, goals and objectives. The federal department of Aboriginal and Northern Development Canada is also requested to assist our First Nation with establishing a new Lake Winnipeg Regulation Review process to address our concerns and issues as stated; in a fair, equitable and meaningful way.


Terry Sargeant
The Chair
Manitoba Clean Environment Commission
Ste. 305 – 155 Carlton Street
Winnipeg, Manitoba.
R3C 3H8
terry.sargeant@gov.mb.ca

Attention: The Chair

Please be advised that the Berens River First Nation Chief and Council on behalf of its people and community hereby submit this attached Position Paper and Band Council Resolution (BCR) to the Manitoba Clean Environment Commission.

We are requesting an immediate meeting with yourself; government to government regarding the Lake Winnipeg Regulation Review 2014, process. As you will gather from our Position Paper, our First Nation is requesting that current process as it now stands is flawed and it is urgent we meet to insure all of concerns and issues are dealt with as identified by our First Nation. We are also requesting that Aboriginal Affairs and Northern Development Canada assist us with the process.

Respectfully,



Chief Jackie Everett
And Council.
Berens River First Nation, Mb.

cc.

The Honourable Minister Bernard Valcourt
Minister of Aboriginal Affairs and Northern Development Canada
bernard.valcourt@aandc-aandc.gc.ca

The Honourable James Bezan
MP, Selkirk Interlake Riding, Manitoba
ottawa@jamesbezan.com

