



**DECISION REPORT ON THE
STONEY NAKODA NATIONS'
JANUARY 20, 2021
APPLICATIONS**

NRCB Application No. 1701

Alberta Transportation

Springbank Off-Stream Reservoir
Project in Springbank, Alberta

February 9, 2021

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SECTION 1: BACKGROUND

On December 10, 2020, the Board (or NRCB) issued a Pre-Hearing Conference Decision Report (PHC decision report) following a pre-hearing conference held virtually on December 2, 2020. The Bears paw First Nation, Chiniki First Nation, or Wesley First Nation did not formally participate in the pre-hearing conference. The decision report reflected the Board's determination on issues including standing, advance intervener funding, and timing of the public interest hearing into the Springbank Off-Stream Reservoir Project (Project or SR1). Among other things, the PHC decision report scheduled the public interest hearing to begin on March 22, 2021.

On January 20, 2021, the Bears paw First Nation, Chiniki First Nation, and Wesley First Nation, collectively the Stoney Nakoda Nations (the Stoney Nakoda), submitted a letter to the Board. The letter, from legal representative Rae and Company, requested that each of the three First Nations be granted standing in the hearing and be deemed eligible interveners. The letter also requested that advance funding be granted and that the hearing be adjourned for a minimum of three months.

On January 28, 2021, the Board issued a Notice of Adjournment Application (Notice), advising it would hold an oral hearing at 1:30 p.m. on Thursday, February 4, 2021, of the Stoney Nakoda's application for an adjournment of the public interest hearing. The Board invited directly affected parties who had not yet done so to file submissions on that issue by February 3, 2021.

The Notice also advised that the Board had determined that the Stoney Nakoda are directly affected parties and are eligible for advance intervener funding, with reasons to follow in this decision report.

On February 4, 2021, the Board heard oral arguments both in support of and opposed to adjournment. Submissions were received from Alberta Transportation, City of Calgary, Calgary River Communities Action Group and Flood Free Calgary, SR1 Concerned Landowner Group, and the Stoney Nakoda.

SECTION 2: WRITTEN SUBMISSIONS

Alberta Transportation (AT or proponent): On January 27, 2021, AT submitted that it has no objection to the request for standing, that it would forward 50 per cent of the total requested advance funding to Rae and Company, and that it would suffer prejudice should the Board grant a three month extension to the current hearing schedule.

City of Calgary (Calgary): On January 27, 2021, Calgary submitted that it wishes to express concern over further delay of this Project, and does not take any position or have any comment with respect to the other matters raised.

Calgary River Communities Action Group (CRCAG) and Flood Free Calgary (FFC): On January 27, 2021, CRCAG and FFC submitted that the request for a three month extension should be denied. They took no position on the other requests.

SR1 Concerned Landowners Group (SCLG): On February 2, 2021, SCLG submitted that it supports the application for an adjournment. It did not comment on the other requests.

Blood Tribe/Kainai (Kainai): On February 3, 2021, Kainai submitted that it does not take any position or have any comment with respect to the application to adjourn. It did not comment on the other requests.

Ermineskin Cree Nation (Ermineskin): On February 3, 2021, Ermineskin submitted that it does not take any position or have any comment with respect to the application to adjourn. It did not comment on the other requests.

The Stoney Nakoda: In addition to submissions made in the January 20, 2021 letter, the Stoney Nakoda submitted exhibits supporting their request on February 2 and 3, 2021.

SECTION 3: THE STONEY NAKODA STANDING AND BEING DEEMED ELIGIBLE INTERVENERS

The Stoney Nakoda has asserted treaty and constitutional rights and has been engaged in active consultation with AT. The Board grants standing to the Bearspaw First Nation, Chiniki First Nation, and Wesley First Nation, to be represented in their collective as the Stoney Nakoda, and deems them eligible interveners.

In oral submissions, Mr. Rae stated he also represented the Stoney Nakoda Nations' wholly-owned company, Woste Igic Nabi Ltd., an owner of land about 10 km west of the Project's proposed dry reservoir. The Board recognizes Woste Igic Nabi Ltd. as a separate party, but will treat the Stoney Nakoda as including the land interest held by Woste Igic Nabi Ltd. In addition, Woste Igic Nabi Ltd. will not receive separate funding and will not be a separate intervener in terms of participation in the public interest hearing.

SECTION 4: REQUEST FOR ADJOURNMENT OF THE HEARING

The Stoney Nakoda has sought a minimum three month adjournment to the start of the public interest hearing into SR1, including the associated submission timelines.

The Board had considered submissions and evidence from all participants in the pre-hearing conference when coming to its decision to start the hearing on March 22, 2021. Similarly, the Board considered the positions of all directly affected parties in addressing the Stoney Nakoda application to adjourn on February 4, 2021. While there were parties in support of the adjournment and parties opposed to the adjournment, as this was Stoney Nakoda's application it was their burden to discharge. In particular, the Board considered the strength of a link between the COVID-19 pandemic situation suffered by the Stoney Nakoda, and the prejudice to meaningful participation by the Stoney Nakoda in the public interest hearing. The Board also considered the potentially open-ended nature of the reason for seeking adjournment.

The arguments and evidence against the adjournment application were presented by AT, CRCAG and FFC, and Calgary. AT submitted that the Stoney Nakoda have been engaged in consultation with the Project proponent since 2014, and that the consultation process has included numerous in-person meetings and a number of hosted site visits; and that should they be successful in obtaining a favourable decision from the NRCB, a delay in the hearing process would result in potentially consequential construction delays. CRCAG and FFC

submitted that the combined failure of the Stoney Nakoda to raise timing issues at the pre-hearing conference and the urgency to have a decision on proposed flood control measures should result in the Board's denial of the request for a three month delay. Calgary submitted that the May to June time period is very busy for its flood management professionals who would be engaged in the SR1 public interest hearing, whether there is a large flood during that time or not. The Board had already considered many of these arguments and evidence in coming to its decision on timing of the hearing in its PHC decision report.

Following careful consideration of the evidence, and for the reasons below, the Board denies the Stoney Nakoda's application to adjourn the March 22, 2021 hearing (in relation to the Springbank Off-Stream Reservoir Project). The Board also considered SCLG's renewed request to adjourn and denies it as well. The denials are based on the following reasons.

4.1 Stoney Nakoda

1. Consultation on SR1 and Flood Mitigation on Bow River

In its oral argument, the Stoney Nakoda stated that they need additional time to be consulted on and to gather information related to a comprehensive flood management plan for both the Bow and Elbow Rivers. The Board appreciates the Stoney Nakoda's concern about the impact of Bow River flooding on its lands. However, the only project before the Board at this time is the SR1. Consultation with First Nations and the public on flood mitigation on the Bow River does not fall under the jurisdiction of the Board until such time as a project has reached a stage where it is deemed a reviewable project under the *Natural Resources Conservation Board Act*. As such, the Board finds no merit to adjourn the hearing based on this matter.

AT, in its response to the application for adjournment, stated that it has been in consultation with the Stoney Nakoda on SR1 since 2014. This consultation has included nine meetings with the Stoney Nakoda and eleven days of on-site visits for band members. In addition, the proponent has funded all requests supported by budget amounts for studies by the Stoney Nakoda in relation to SR1, including a Traditional Land Use Study (TLU study).

The Board notes that the consultation process with the Stoney Nakoda is ongoing and includes the NRCB's pre-hearing conference and the public interest hearing. The Board is awarding advance funding to assist the Stoney Nakoda in preparing for the SR1 hearing.

2. The Pre-hearing Conference

The Stoney Nakoda referred to two local states of emergency. As confirmed by the Stoney Nakoda, their first notice of local emergency related to the COVID-19 pandemic ended on June 17, 2020, and the second was declared on January 11, 2021. Between those two states of local emergency, on October 5, 2020, the NRCB issued a Notice establishing the time, date, and virtual format for the pre-hearing conference. The Stoney Nakoda were included in the distribution list for this Notice. The NRCB held the pre-hearing conference on December 2, 2020; Stoney Nakoda representatives did not participate. The NRCB issued the PHC decision report establishing the hearing dates on December 10, 2020. The NRCB then published official Notice of the public interest hearing on SR1 on December 21, 2020.

The Stoney Nakoda were not under a state of emergency at the time of the pre-hearing conference. There is no evidence before the Board that the Stoney Nakoda could not have

made representation at the pre-hearing conference on December 2, 2020, which was the appropriate venue for discussion of hearing issues, timing, and intervener funding.

3. The Stoney Nakoda's Ability to Prepare In-Person due to COVID-19 Restrictions

Since the Board issued its PHC decision report on December 10, 2020, the Stoney Nakoda declared its second local state of emergency on January 11, 2021.

The Stoney Nakoda stated that they are not able to effectively prepare for and participate in the hearing because of the COVID-19 pandemic. The Board recognizes that COVID-19 has impacted everyone, and First Nation communities disproportionately. The Stoney Nakoda asserted that an adjournment would provide additional time for its members, especially elders, to be vaccinated and afford time for in-person preparation for the hearing, probably in May.

The Board respectfully acknowledges that the Stoney Nakoda culture is aligned with in-person sharing of information and knowledge. However, there remains significant uncertainty related both to the availability and distribution of vaccines and the duration of the COVID-19 pandemic. The Board finds that the basis for the request to adjourn until the Stoney Nakoda can prepare in-person is subject to factors beyond the control of either the Stoney Nakoda or the NRCB.

On a related note, the Board is mindful of provincial health regulations and had already decided that the scheduled March 22, 2021 hearing will be in a virtual format due to the COVID-19 pandemic. The potential for the hearing to be held in-person in 2021 is extremely remote. Therefore, the Stoney Nakoda will need to ensure that it has the capability to participate electronically in the NRCB's public interest hearing.

The Stoney Nakoda also indicated that they have limited access to documentary and traditional records. The Board understands that the Stoney Nakoda have already completed a TLU study for the Project. It is unclear to the Board how much more referential work is required in relation to their documentary and traditional records beyond what was included in the TLU study, which the NRCB understands remains confidential.

4.2 SCLG

The SCLG supported the Stoney Nakoda's request for an adjournment in its February 2, 2021 written submission, and in oral argument renewed its own request for an adjournment on additional grounds.

The Board finds that SCLG's request is primarily focused on providing additional reasons why SCLG prefer a later hearing date and supported the Stoney Nakoda's application for adjournment. SCLG provided four rationales for adjournment:

1. Stantec's (AT's consultant) Project construction schedule

The SCLG in its written submission asserted that the Stantec construction schedule in the Preliminary Design Report (PDR) shows that "regulatory approval" from the NRCB is not expected until December 2021. SCLG further asserted that a hearing adjournment of

three months could be accommodated within this proposed Project construction schedule.

In oral response, AT clarified that the December 6, 2021 construction start date in the PDR is contingent on more than NRCB approval of the Project. Following the NRCB decision, an authorization of the NRCB decision by the Lieutenant Governor in Council is required. Following that Order in Council, all the necessary Alberta Environment and Parks, Alberta Public Lands, and federal government approvals would need to be obtained before project construction can commence.

AT asserted that its application is prejudiced should an adjournment be awarded. The prejudice is predicated on the delay in construction and the risk that an additional year without the Project in place to provide flood mitigation may occur.

The Board's hearing process is not driven by proposed Project construction schedules. The Board is concerned with providing the parties appropriate notice and timelines to fully participate in the hearing, and providing a fair and efficient regulatory process. In any event, the SCLG raised the issue of Project construction and regulatory approval timelines. The Board finds the SCLG's assertion that a three month adjournment is inconsequential to the proponent's Project schedule is unsupported. Further, the objective of this application is to provide flood mitigation and a timely decision either to approve or deny is warranted.

2. Late filing of Preliminary Design Report and Appendices

The Board agrees with SCLG that the PDR and appendices B through F submitted on December 18, 2020 and February 1, 2021 respectively are voluminous. The Board notes that the PHC decision report issued on December 10, 2020 awarded funding to SCLG to review these materials. Additionally, AT clarified that the PDR is not an entirely new document. It is an iteration of the Interim PDR which has been on the public record since November 2017. Finally, the Board notes, while not determinative of the present application, that similar material has been provided as part of the EIA with past reviewable projects and has not been integral to the Board's public interest decision.

3. Mr. Secord's Schedule

The Board previously considered the trial schedule of Richard Secord, senior counsel for SCLG, during its deliberations following the December 2, 2020 pre-hearing conference. While the Board endeavours to accommodate intervener participant and legal counsel scheduling conflicts, it is not always possible to do so. The Board notes that the current hearing commencement date of March 22, 2021 should allow for Mr. Secord's participation.

4. Local Landowners – Calving Season Concerns

Mary Robinson is a landowner and part of the SCLG, and she participated in the adjournment application on February 4, 2021. Ms. Robinson advised the Board that

February, March, and April are very busy months for the local ranching community due to calving. As a result, some of them may not be able to participate as fully as they would like in a hearing held during these months, so an adjournment until June would be preferable. The Board is sympathetic to this concern and understands that calving season can vary from operation to operation. Given that many of these local ranchers are members of SCLG, the Board finds that SCLG should have raised this concern at the December 2, 2020 pre-hearing conference. Further, the Board notes that scheduling the hearing to accommodate calving seasons that can vary widely from operator to operator would be challenging. For these reasons the Board is unwilling to re-schedule the hearing based on this matter.

SECTION 5: THE STONEY NAKODA ADVANCE FUNDING

The Bears paw, Chiniki, and Wesley First Nations have made a request for advance funding, predominantly for legal counsel to prepare and participate in the Board's public interest hearing of the Project.

Rae and Company is acting as counsel for all three Nations and the major issues identified for inclusion in the submission to the Board are the same in all three funding requests.

The Board finds that the individual requests by each Nation and the collective total are reasonable with the following minor adjustments.

- The Bears paw, Chiniki, and Wesley First Nations funding requests each include \$1100 for intervener honoraria and expenses for attending the hearing. The Board views these amounts as reasonable; however, these amounts don't need to form part of the advance funding award. The Board expects these amounts to be included in the interveners' final costs claims.
- The hourly rate requested for senior counsel is above the adopted \$350/hour tariff and appearance fees for counsel were based on a total of 48 hours for each of the Bears paw, Chiniki, and Wesley First Nations. Mr. Rae indicated he was comfortable with the adopted tariff. The requested total of 144 hours does not appear to be appropriate for a 10-day hearing where the issues of concern to the three interveners are substantially similar, and with the attendance efficiencies associated with a topic-based virtual hearing.

Reducing the hourly rate for senior legal counsel from \$370 to \$350 and removing the \$1100 from the intervener category, reduces the advance funding requests for each Nation to \$20,800. The Board is prepared to provide advance funding based on 50 per cent of the adjusted estimated claim of \$20,800 for a total of \$10,400 for each of the Bears paw, Chiniki, and Wesley First Nations. As indicated above, the Board expects that the final cost claim for legal counsel fees will reflect any efficiencies that can be achieved with a topic-based approach.

- **Advance funding award for Bears paw First Nation is 50 per cent (\$20,800 x 50 per cent = \$10,400)**

- **Advance funding award for Chiniki First Nation is 50 per cent (\$20,800 x 50 per cent = \$10,400)**
- **Advance funding award for Wesley First Nation is 50 per cent (\$20,800 x 50 per cent = \$10,400)**

SECTION 6: DECISION SUMMARY

On the question of standing, the Stoney Nakoda is recognized as a directly affected party, and as an eligible intervener.

On the question of advance funding, Bears paw, Chiniki, and Wesley First Nations are awarded 50 per cent of the requested amount following the minor adjustments to senior counsel fees noted with the total advance award amounting to \$31,200.

Following careful consideration of the evidence provided through written submissions and oral argument, the Board denies the Stoney Nakoda's application and SCLG's renewed request to adjourn the March 22, 2021 hearing.

Accommodation

The Board appreciates that a virtual hearing may not be consistent with the Stoney Nakoda's cultural background and practices. The Board is open to discussing potential options to accommodate virtual meetings among the Stoney Nakoda members and representatives to prepare for the hearing. Further, the Board acknowledges AT's commitment to provide funding immediately and open dialogue with the Stoney Nakoda on any matters outstanding.

DATED at EDMONTON, ALBERTA, this 9th day of February 2021.

Original signed by:

Peter Woloshyn, Panel Chair

Sandi Roberts

Walter Ceroici

Daniel Heaney

APPENDIX A: PARTICIPANTS

The Stoney Nakoda Nations

Douglas Rae

William Snow

Alberta Transportation

Ronald Kruhlak

Gavin Fitch

City of Calgary

Melissa Senek

Frank Frigo

Calgary River Communities Action Group (CRCAG) and Flood Free Calgary (FFC)

Gino Bruni

SR1 Concerned Landowners Group (SCLG)

Richard Secord

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