

January 6, 2023

Honourable Pam Alexis
Minister of Agriculture and Food
Province of British Columbia
Via email: AGR.Minister@gov.bc.ca

Kim Grout
Chief Executive Officer
Agricultural Land Commission
Via email: kim.grout@gov.bc.ca

Dear Minister Alexis and Ms. Grout:

Re: Proposed Inclusion of KKS Territory in the Agricultural Land Reserve

I. Introduction

We are legal counsel for Katzie, Kwantlen, and Semiahmoo First Nations (“KKS”). We write on behalf of our clients with respect to the Agricultural Land Commission’s proposal to include the following federally held land in the Agricultural Land Reserve (the “Proposal”):

Address	Parcel Identifier
3884 192 nd Street, Surrey, BC	014-120-178
19218 40 th Avenue, Surrey, BC	014-119-129
19305 36 th Avenue, Surrey, BC	014-120-224
19498 40 th Avenue, Surrey, BC	014-120-291
19233 40 th Avenue, Surrey, BC	014-120-321

(the “Land”)

KKS holds and exercises inherent and Aboriginal rights, including title, in relation to the land and waters within their territories which are protected pursuant to the *Constitution Act, 1982*. KKS also holds stewardship responsibilities and decision-making authority in respect of their territories pursuant to their laws and protocols. KKS is committed to upholding their laws and protecting their rights and homelands for their current and future generations.

The Land comprises an integral component of KKS’s territories, and they collectively assert Aboriginal rights, including title, over this area based on traditional and contemporary use and occupation.

Legal obligations with respect to Aboriginal rights, including title, aside, the Agricultural Land Commission (the “ALC”) lacks the jurisdiction to create an Agricultural Land Reserve (“ALR”) on the Land.



Given the gravity of the potential impacts and infringements of the Proposal on their inherent and Aboriginal rights, and the lack of ALC jurisdiction to include the Land in the ALR, KKS strongly suggests that the ALC cancel the public hearing scheduled for January 23, 2023 (the “Hearing”) and refrain from taking any further steps to advance the Proposal.

II. Background

KKS collectively asserts (and indeed holds) Aboriginal rights, including title, over the Land based on their exclusive and sufficient occupation and control of this area at the time of the Crown’s assertion of sovereignty. KKS’s Aboriginal title claim is further supported by their customary laws regarding collective use, kinship ties, economic and social structures, and cultural and spiritual practices. As you are aware, Aboriginal title encompasses the right to make decisions about how the land is used and the right to benefit economically from the land.

KKS ancestors have occupied, governed, stewarded, and used the Land, waters, and resources of their territories, which include the Land, since time immemorial. The Land formed part of a landscape that was vital to the socio-economy of KKS including with respect to travel, trade, and the harvesting of resources. The Land continues to be culturally, spiritually, and economically important for KKS, and their members continue to exercise their rights in this area except where they have been restricted due to government regulation, displacement, and development.

KKS recently learned that, without any notification to KKS, on December 7, 2022 the ALC posted a message on its website notifying the public of its intention to include the Land in the ALR.¹ The message included a link to a document titled “Proposal Summary & Property Information” (the “Proposal Summary”), and a notification for a public hearing occurring on January 23, 2023 (the “Hearing”).²

According to the Proposal Summary, the ALC is taking steps to include the Land in the ALR pursuant to section 17(1) of the *Agricultural Land Commission Act* (the “ALCA”). The Hearing purports to satisfy the ALC’s procedural requirement under section 17(2) of the ALCA and provide an opportunity to solicit public feedback for the ALC’s consideration.

Although the ALC appears to have devised and initiated a plan to include the Land in the ALR, its actions are entirely misguided in respect of both its own jurisdiction as well as its legal obligations to KKS, as explained below.

III. The Law

A. ALC Does Not Have Jurisdiction Over the Land

Given that the ALC’s plan to designate the Land as ALR has never been discussed or even communicated to our clients, it is hard to fathom why the ALC, an agent of the Provincial government enabled by Provincial legislation, would have the impression that it has the authority or jurisdiction to designate federal public land as ALR land.

¹ See: <https://www.alc.gov.bc.ca/proposed-alr-inclusion-of-federal-lands-in-the-city-of-surrey/>

² See: https://www.alc.gov.bc.ca/assets/alc/assets/applications-and-decisions/search-for-applications-and-decisions/66884/66884_proposal_summary_and_property_information.pdf

As the ALC is aware, the Land has been used for national defence purposes for many years pursuant to Canada's jurisdiction under section 91(7) of the *Constitution Act*, 1867. The Land currently falls under Canada's jurisdiction as Public Property pursuant to section 91(1A) of the *Constitution Act*, 1867 on the basis of Canada's proprietary interest in and use of the same.³

The law regarding the application of the constitutional doctrine of interjurisdiction immunity (the "Doctrine") in respect of section 91(1A) land (which includes the Land) is clear.⁴ In brief summary, when the application of Provincial legislation on section 91(1A) land would interfere with a vital aspect of a federal undertaking, or a matter of core federal competence, the Provincial legislation must be read down to avoid the interference.

The application of the *ALCA* to the Land would result in a serious infringement of Canada's ability to manage and administer the Land pursuant to Canada's rights and obligations in respect of public lands. Accordingly, the *ALCA* does not apply to the Land.

B. The Duty to Consult and Accommodate

The Crown's duty to consult is part of a process of fair dealing and reconciliation which flows from the Crown's obligation to act honourably in its dealings with Indigenous Peoples.⁵ The duty is triggered at a low threshold – it arises whenever the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal or Treaty right and contemplates conduct which could adversely affect that right.⁶

KKS has a long-standing and public claim to rights, including title, in respect of the Land which the Province and the ALC have real or constructive knowledge of. The inclusion of the Land in the ALR will have a significant impact on the ability of KKS members to exercise their inherent and constitutionally protected rights in this area, particularly their right to benefit economically from their lands. Consequently, the duty to consult is triggered by the Proposal.

The scope of the Crown's duty to consult varies depending on the circumstances, including the seriousness of the potential adverse effect on the inherent and constitutionally protected rights at issue.⁷ Where consultation falls on the low end of the spectrum the Crown is still required to give notice, listen carefully to the affected First Nation, and attempt to minimize adverse effects.⁸ Where the duty to consult falls at the higher end of the spectrum the Crown's obligations are more extensive and require providing the affected First Nation an opportunity to participate formally in the decision-making process.⁹ Further, the Crown must seriously consider the First Nations' concerns, integrate those concerns into the proposed plan of action wherever possible,¹⁰ and be willing to make changes based on information exchanged during the

³ *British Columbia (Attorney General) v Lafarge Canada Inc.*, 2007 SCC 23 at para 56; We note that KKS rightfully holds jurisdiction over the Land by virtue of section 35 of the *Constitution Act*, 1985. However, for the purposes of this letter we will rely on the division of powers set out in the *Constitution Act*, 1867 and the constitutional doctrines which have been developed via the common law to support our client's argument that the Land is immune from the application of the *ALCA*.

⁴ *British Columbia (Attorney General) v Lafarge Canada Inc.*, 2007 SCC 23; *Vancouver International Airport Authority v British Columbia (Attorney General)*, 2011 BCCA 89.

⁵ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 32 [*Haida*].

⁶ *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 55 [*Mikisew*]; *Haida*, *supra* note 5 at para 35.

⁷ *Haida*, *supra* note 5 at para 39.

⁸ *Mikisew*, *supra* note 6 at para 64.

⁹ *Haida*, *supra* note 5 at para 44.

¹⁰ *Mikisew*, *supra* note 6 at para 64.

consultation process.¹¹ In all cases the Crown must consult in good faith with the intention of substantially addressing the First Nation's concerns.¹²

Based on the gravity of the potential impact of the Proposal on KKS's inherent and constitutionally protected rights, the Province's obligations lay at the highest end of the consultation and accommodation spectrum outlined in *Haida*.¹³ The inclusion of the Land in the ALR will have a serious and negative impact on KKS's inherent and constitutionally protected rights by restricting activities within the Land to those permitted by the ALCA and preventing KKS from stewarding the land as it sees fit.

It is well established within Canadian jurisprudence that the constitutional doctrine of the honour of the Crown and its corollary, the duty to consult, must be approached in a generous and purposive manner.¹⁴ Such an approach has led to the extension of the duty to consult to include "economic rights and benefits closely related to and derivative from Aboriginal rights."¹⁵ This means that economic rights which derive from and are closely related to Aboriginal rights are protected by the duty to consult. By effectively sterilizing the Land from many of the economic opportunities which would otherwise be available, the Proposal stands to meaningfully diminish KKS's inherent and constitutionally protected rights, including their right to benefit economically from their land and to manage the economic resources therein.

KKS has a very strong claim to the Land, as is being illustrated to Canada in an ongoing consultation and accommodation process associated with Canada's proposed disposition of the Land. The Proposal would result in significant long-term (potentially permanent) impacts. The risk of non-compensable harm is high. As such, the Province must be prepared to accommodate KKS by adjusting its plans where necessary, negotiating satisfactory interim solutions, enabling KKS's participation in the decision-making process, and ensuring adequate economic accommodation.¹⁶ To date, the ALC has failed to contact KKS in any way with respect to the Proposal, let alone engage in the deep consultation required as a result of KKS's very strong claim to the Land and the potential detrimental impact of the Proposal.

Lastly, the impacts of an activity, and the Crown's corresponding obligations, must be assessed within the larger context, including the cumulative effects of previous activities on the exercise of the right.¹⁷ Where past activities have resulted in an infringement, the relatively small impact of a new activity must be "placed within the context of the damage that had already been done."¹⁸

KKS's territories have been subject to ongoing and extensive restrictions since the arrival of the first European settlers. KKS members have seen the land base available to them for the exercise of their inherent and constitutionally protected rights continually diminished. The Proposal would further erode their ability to exercise their rights and cannot be viewed in isolation from the detrimental cumulative impacts of regulations and development within KKS's territories.

¹¹ *Mikisew*, *supra* note 6 at para 54.

¹² *Ibid* at paras 39, 42. See also *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41 at para 44 [*Chippewas*].

¹³ *Haida*, *supra* note 5.

¹⁴ *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758 at para 8.

¹⁵ *Ibid*.

¹⁶ *Haida*, *supra* note 5 at para 44; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 79.

¹⁷ *Chippewas*, *supra* note 6 at para 42.

¹⁸ *Saugeen First Nation v Ontario (MNRF)*, 2017 ONSC 3456 at para 29.

While the Province holds the ultimate legal responsibility for consultation,¹⁹ and legal obligations pursuant to the *Declaration on the Rights of Indigenous Peoples Act* (“DRIPA”) and associated DRIPA Action Plan, as a representative and agent of the Crown, the ALC owes KKS a duty to consult and accommodate with respect to the Proposal.

As outlined above, KKS is entitled to the highest degree of consultation and accommodation based on the strength of its claim to the Land and the serious detrimental effect of the Proposal on its inherent and constitutionally protected rights. However, contrary to even the most basic and minimum consultation requirements, at no time prior or subsequent to posting the December 7th, 2022 message on its website did the ALC inform KKS of Proposal. The ALC has made no attempt to contact KKS to provide notification or information related to a decision which stands to significantly impact KKS’s rights. It appears the ALC has already decided on its course of action and is taking steps to advance the process as quickly as possible without due regard for KKS’s constitutionally protected rights.

Given the strength of KKS’s claim to the Land, the Province and the ALC have a constitutional obligation to be prepared to adjust their plans as necessary to accommodate KKS’s concerns, and to provide KKS an opportunity to participate formally in the decision-making process.²⁰ However, it is evident from the Proposal Summary and the scheduling of the Hearing on short notice over the holiday season that the ALC has unilaterally pre-determined that it will advance the Proposal process without any consultation with KKS. Such pre-determination and lack of consultation constitutes a grave failure of the Province’s constitutional obligation to consult and accommodate KKS with respect to the Proposal.

IV. Conclusion

As outlined above, the ALC’s conduct in respect of the Proposal constitutes a failure of the Province’s obligation to meaningfully consult and accommodate KKS which rises to the level of a breach of the honour of the Crown. The Province is legally required to rectify this breach immediately.

KKS strongly suggests that the ALC cancel the Hearing and refrain from taking any further steps to advance this Proposal on the basis that the Proposal and the ALC’s process for advancing the same represent a fundamental misunderstanding of the ALC’s own jurisdiction, will cause significant impacts and infringements on the inherent and constitutionally protected rights of KKS as detailed above, and is an egregious failure of the ALC’s constitutional obligation to consult and accommodate KKS.

Our clients can be available for further dialogue as may be necessary with the ALC or the Province to provide additional clarity and build better understanding. We respectfully await your timely response.

Sincerely,

First Peoples Law LLP, Counsel for Katzie First Nation

Per:  _____

John Burns

¹⁹ *Haida*, *supra* note 5 at para 53.

²⁰ *Mikisew*, *supra* note 6 para 54; *Haida*, *supra* note 5 at para 44.

First Peoples Law LLP, Counsel for Kwantlen First Nation

Per:  _____

Tumia Knott

Munnings Law, Counsel for Semiahmoo First Nation

Per:  _____

Adam Munnings

cc: Honourable Murray Rankin, Ministry of Indigenous Relations, *via email:* IRR.Minister@gov.bc.ca
Heinz Dyck, *via email:* Heinz.Dyck@gov.bc.ca
Deanna Amos, *via email:* Deanna.M.Amos@gov.bc.ca
Ben Black, Regional Manager, Real Estate Services, Public Services and Procurement Canada, *via email:* Ben.black@pwgsc-tpsgc.ca
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Agricultural Land Commission

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January 10, 2023

ALC File 66884

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Vancouver, B.C. V6B 1A1
Email: fscott@firstpeopleslaw.com, jburns@firstpeopleslaw.com,
tknott@firstpeopleslaw.com, adam@munnings.ca

Attention: John Burns, Tumia Knott and Adam Munnings

Re: Agricultural Land Commission (the “ALC” or the “Commission”) proposal for inclusion in the Agricultural Land Reserve (“ALR”) of lands located at 3884 – 192 Street, Surrey, B.C. (the “Lands”) (the “Proposal”)

The ALC confirms receipt of your letter of January 6, 2023. Your letter will be included as part of the record for the Commission’s consideration of the Proposal.

As you are aware, the Commission gave public notice on December 7, 2022 that it will be conducting a public hearing on the Proposal. Earlier notice of the Proposal was provided to the registered owner of the Lands, His Majesty the King in Right of Canada c/o the Regional Office Department of Communications (Vancouver) and Public Service and Procurement Canada by letter dated November 9, 2022.

The Commission welcomes the opportunity to hear further from the Katzie First Nation, Kwantlen First Nation and Semiahmoo First Nation (together “KKS”) with respect to the Proposal. Representatives of KKS are welcome to attend and participate at the public hearing, details of which are, as stated on the Commission’s website, as follows:

January 23, 2023
7:00 pm
KPU Langley Campus Auditorium
20901 Langley Bypass, Langley, B.C.

More information about the Proposal, including a proposal summary and other documents relating to the Proposal, are publicly available at <https://www.alc.gov.bc.ca/proposed-alr-inclusion-of-federal-lands-in-the-city-of-surrey/>. Copies of those documents are enclosed for your convenience.

The above-noted webpage states that all written submissions on the Proposal must be received by the Commission by 4:30 pm PST on January 23, 2023 for inclusion in the record to be considered by the Commission and that “[n]o representations will be accepted by the Commission after the Public Hearing has concluded”.

To ensure reasonable time for preparation of submissions, the Commission will waive this deadline for written submissions by or on behalf of KKS. Correspondingly, we anticipate that the Commission will, after hearing from those in attendance on January 23, 2023, adjourn the public hearing for the limited purpose of receiving written submissions from potentially affected First Nations and His Majesty the King as registered owner of the Lands. If KKS wish to provide written submissions on the Proposal, please send them to ALC.Referrals@gov.bc.ca on or before **March 6, 2023**.

The Commission has not made a decision on whether or not the Lands should be included in the ALR. Consideration of the Proposal will be informed by the record before the Commission.

Further correspondence regarding the Proposal may be sent to the attention of Mike Bandy, ALC Regional Planner, at ALC.Referrals@gov.bc.ca.

Yours truly,

PROVINCIAL AGRICULTURAL LAND COMMISSION



Kim Grout
Chief Executive Officer

Enclosure: Proposal Summary and Property Information

CC: Honourable Pam Alexis, Minister of Agriculture and Food: AGR.Minister@gov.bc.ca
Honourable Murray Rankin, Ministry of Indigenous Relations and Reconciliation: IRR.Minister@gov.bc.ca
Heinz Dyck: Heinz.Dyck@gov.bc.ca
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Grout, Kim ALC:EX

From: Grout, Kim ALC:EX
Sent: January 12, 2023 8:41 AM
To: 'tknott@firstpeopleslaw.com'; 'jburns@firstpeopleslaw.com'; 'adam@munnings.ca'
Subject: ALC proposal for inclusion in ALR of lands located at 3884 - 192 Street, Surrey, B.C.

Good morning

Further to the Agricultural Land Commission's letter of January 10 regarding its inclusion proposal, ALC staff would be pleased to meet with KKS representatives before or after the January 23 public hearing date to facilitate getting KKS perspectives on the record to be considered by the Commission. ALC staff would generate a written meeting report summarizing the key points discussed during that meeting for inclusion in the public hearing record. ALC staff would provide the report in draft to KKS for the purposes of confirming its accuracy before it is finalized and put on the record. The meeting report would be in addition to any verbal submissions KKS representatives might make at the January 23 public hearing and any written submissions KKS might provide as referred to in the ALC's letter of January 10.

Please let me know if you wish to schedule a meeting so that we can arrange a mutually convenient date, time, and location.

Sincerely,

Kim Grout P.Ag, MCIP, RPP | Chief Executive Officer | Agricultural Land Commission
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