

PINE COULEE NRCB/EARP JOINT REVIEW PANEL

Edmonton, Alberta

PINE COULEE RESERVOIR
WATER MANAGEMENT PROJECT
IN THE WILLOW CREEK BASIN
SOUTHWEST OF STAVELY, ALBERTA
- APPLICATION # 9401

Report of Pre-Hearing Conference on
Preliminary and Procedural Matters
June 15, 1994
Stavely, Alberta

1. INTRODUCTION

Alberta Public Works, Supply and Services (PWSS or the Applicant) requests approval to construct a water management project which includes a diversion weir on Willow Creek, a 3.5 kilometer (km) canal and a multiple use offstream storage reservoir in Pine Coulee, approximately 6 km west of Highway #2 near the Town of Stavely in southwestern Alberta (the project). The water in the reservoir would be held behind an earthfill dam standing about 21 meters above the valley floor and extending 450 meters between the valley walls across Pine Coulee just upstream of where Pine Creek meets Willow Creek. When full, the reservoir would cover 6 square kilometers (1480 acres), store 41,000 acre-feet of water and extend 13 km north from the Dam.

On December 16, 1988, the Alberta Minister of the Environment issued a press release announcing that an Environmental Impact Assessment (EIA) was required for the Pine Coulee Project.

The Applicant filed an application, including the EIA, with the Natural Resources Conservation Board (NRCB or the Board) on January 5, 1994, to obtain approval under Section 5(1) of the *NRCB Act*. A Request for Supplemental Information was prepared following independent review of the Application by NRCB staff, Alberta Environmental Protection, and other provincial government departments. The timing of key events in the review process is listed in Table A.

In addition to submitting an application to the NRCB, the Applicant applied to Transport Canada on December 13, 1993, for approval under Part 1, Section 5(1) of the *Navigable Waters Protection Act*. Transport Canada (Canadian Coast Guard) assumed the role of initiating department under the *Environmental Assessment and Review Process (EARP) Guidelines Order* and on March 31, 1994, referred the proposal to the Federal Minister of the Environment for a public review by an environmental assessment panel. The Minister of Transport identified potential unknown environmental effects and expressions of public concern from environment organizations, the Peigan Nation and Blood Tribe as the basis for a public review by a panel in accordance with Section 12(d) and Section 13 of the *EARP Guidelines Order*. Transport Canada further requested the Minister of the Environment to enter into negotiations for the establishment of a Joint Review Panel as provided for in the *Canada-Alberta Agreement for Environmental Assessment Cooperation* signed on August 6, 1993.

TABLE A: Key events in the Pine Coulee Reservoir Water Management Project Review Process

DATE	EVENT
August 6, 1993	<i>Canada-Alberta Agreement for Environmental Assessment Cooperation</i> providing for joint reviews of projects signed.
December 13, 1993	Applicant applied to Transport Canada for approval under the <i>Navigable Waters Protection Act</i> .
January 5, 1994	Application filed with NRCB for approval under Section 5(1) of the <i>NRCB Act</i> .
January 7, 1994	NRCB issued Preliminary Notice of Application.
March 4, 1994	NRCB published a Notice to Interested Parties requesting those parties wishing to address preliminary matters to register with the NRCB on or before April 7, 1994.
March 11, 1994	NRCB forwarded Request for Supplemental Information to the Applicant.
March 31, 1994	Federal Minister of Transport referred the proposal to the Federal Minister of the Environment for a panel review under Section 12(d) and Section 13 of the <i>EARP Guidelines Order</i> and requested establishment of a joint review panel under <i>Canada-Alberta Agreement for Environmental Assessment Cooperation</i> .
April 21, 1994	Applicant filed its response to the Request for Supplemental Information
May 4, 1994	Federal Government announced availability of Participant Funding for Pine Coulee Review. Deadline for submission May 27, 1994.
May 11, 1994	O/C #277/94 approved by the Lieutenant Governor in Council authorizing the NRCB to enter into an agreement with FEARO to conduct a joint review.
May 12, 1994	Chairman of the NRCB established a Division of the NRCB to review the project consisting of K. Smith, C. Weir, and G.Kupfer.
May 16, 1994	Alberta Environmental Protection advised the NRCB that the EIA was suitable for review at a public hearing.
May 19, 1994	Notice of Pre-Hearing Conference issued.
June 1, 1994	NRCB and FEARO signed a Joint Review Agreement.
June 9, 1994	Federal Minister of the Environment announced a Joint Review Panel consisting of K. Smith, Chair, C.Weir and G. Kupfer and issued its Terms of Reference.
June 15, 1994	Pre-Hearing Conference held in Stavelly, Alberta

A Joint Review Panel (the Panel) consisting of K. Smith, Chair, C. Weir, and G. Kupfer has been established to review the Pine Coulee Project. The Panel will fulfill both the

role of a Division appointed pursuant to the *Natural Resources Conservation Board Act* and an EARP Review Panel as detailed in the Terms of Reference for the Panel issued pursuant to the *EARP Guidelines Order*.

A Pre-Hearing Conference on Preliminary and Procedural Matters was held on June 15, 1994, in Stavelly, Alberta. Those individuals and organizations that attended and participated in the meeting are listed in Appendix A.

The agenda items were as follows:

- a) Appropriate scope and jurisdiction of the review
- b) Advance cost requests
 - i) eligibility
 - ii) funding requests
- c) Timing of a hearing and deadline for submissions
- d) Location for a hearing

This report presents the Panel's conclusions respecting certain matters considered at the Pre-Hearing Conference. The Panel stresses the preliminary nature of the Pre-Hearing Conference and notes that further evidence brought forward at the hearing could cause the Panel to come to different conclusions on some matters. The report does not include in detail all the views presented by participants in the Pre-Hearing Conference, but the Panel had regard for those views in reaching its conclusions.

Because of the nature of the joint review process and the differing legislative requirements, where appropriate the view of the Board or that of the Panel will be noted. This relates specifically to the requirements for determination of eligibility for intervener funding under Section 10 of the *NRCB Act* and consideration of cost awards which are the sole responsibility of the Board. Generally the report will make reference to the Panel except in instances where discussions relate to the jurisdiction of the Board under the *NRCB Act*.

A transcript of the meeting is available for review at the Board's offices by appointment.

2. JOINT REVIEW PANEL JURISDICTION

The *Natural Resources Conservation Board Act* was proclaimed into law on June 3, 1991. It created a Board "...to provide for an impartial process to review projects that will or may affect the natural resources of Alberta in order to determine whether, in the Board's opinion, the projects are in the public interest, having regard to the social and economic effects of the projects and the effect of the projects on the environment". The *NRCB Act* defines certain types of projects that are subject to review and prohibits the commencement of a reviewable project unless the NRCB, on application, has granted an approval for the project. Regulations under the Act require the approval of water management projects which entail construction of a dam more

than 15 meters high, or a canal or water diversion capable of conducting more than 15 cubic meters per second. The proposed project meets these criteria.

The legal requirements for the federal environmental assessment and review process are set out in the *EARP Guidelines Order*. The process applies to proposals that are undertaken directly by the federal government; to which the federal government makes a financial commitment; that are located on federally administered land; or that may have an environmental effect on an area of federal responsibility. The EARP is to be applied early in the planning process and before irrevocable decisions are taken. Where adverse environmental effects are potentially significant, or where there is significant public concern, the decision-making department shall refer the proposal to the Minister of the Environment for public review by a panel. For this Application, the federal government retains an affirmative regulatory duty under the *Navigable Waters Protection Act* to issue an approval.

On June 1, 1994, the NRCB and the Federal Environmental Assessment Review Office (FEARO) entered into an agreement with respect to the operation of the Joint Review Panel for the Pine Coulee Reservoir Water Management Project. The agreement covers the constitution of the Panel, cost sharing arrangements and conduct of the proceedings as well as other administrative issues related to the operation of the Panel.

The Panel notes that reference was made at the Pre-Hearing Conference to the federal Participant Funding Program and the procedures agreed to by FEARO and the NRCB to ensure duplication of funding to interveners does not occur. Funding decisions under the federal program are made by a committee independent of the Panel. FEARO will have regard for any NRCB advance funding and where duplication may be apparent, may adjust the amount of the federal Participant Funding. When considering final cost awards following completion of the hearing, the NRCB will have regard of the amount of funding received by interveners through the federal Participant Funding Program.

The Panel shall conduct its review in a manner which discharges the responsibilities of a Division of the NRCB under the *NRCB Act* and regulations, and in accordance with the requirements set out in the Terms of Reference issued by the Federal Minister of the Environment under the *EARP Guidelines Order*.

The Panel's Final Report will incorporate the Board's decisions on matters that fall within provincial jurisdiction in accordance with the provisions of the *NRCB Act* and will include recommendations on matters that fall within federal jurisdiction in accordance with the requirements of the *EARP Guidelines Order*.

3. APPROPRIATE SCOPE AND JURISDICTION OF THE REVIEW

3.1 Views of the Interveners

Willow Creek Irrigators Association

The Willow Creek Irrigators Association (the Association) identified five issues it believed should be included in the scope of the review. First, it proposed that the Panel consider the history of flows and uses of Willow Creek water. The negative economic impact of the drought cycle on the local cattle industry was a second issue that the Association raised. The Association believed the benefits from stability of production of feed for local consumption should be studied. Third, it requested that the review address the expansion of irrigation that would result from the increased availability of water following completion of the project. Fourth, it asked the Panel to consider the positive environmental effects of irrigation which, in its view, would offset the environmental impact of land lost to the reservoir. The fifth issue that the Association identified was possible changes to the management of Chain Lakes Reservoir as a result of reduced water demand and potential benefits to Pekisko and Stimson Creek Basins and ultimately thereby to the Highwood Basin.

The Willow Creek Irrigators Association stated they support the request by the Area Land Owners Group that a drainage ditch be incorporated into the design of the project to mitigate potential affects of soil salinization.

Area Land Owners Group

The Area Land Owners Group (the Land Owners) observed that certain land owners in the West Stavely Sub-Basin are concerned that a substantial portion of their land would be affected by long term salinization. Approximately 7,000 acres of land in this sub-basin are below the full supply level of the proposed reservoir and certain portions of these lands would be subject to salinization. Three possible mechanisms of salinization were identified: surface water induced salinization, side hill seeps and artesian drainage largely through sand channels. The Land Owners proposed that a primary drainage channel be constructed to mitigate this potential impact, pointing out that this had first been requested by the Land and Leaseholders Sub-Committee in 1992 during the Applicant's public consultation program.

Pine Coulee Coalition

The Coalition believed the Terms of Reference for the EIA issued by Alberta Environmental Protection may or may not meet the full requirements of the *NRCB Information Guidelines*. The long term impacts on the Willow Creek Basin were specifically cited as not having been documented.

In addition, the Coalition noted that there is no definitive Alberta legislation that provides for the maintenance of preferred aquatic habitat. The present *Water Resources Act* addresses allocation for consumptive purposes. The *South Saskatchewan Basin Policy and Regulations* refer to instream flow, but do not establish definitive criteria or a priority for instream uses. Therefore, the Coalition believed consideration should be given to deferring the Application until a revised *Water Resources Act* has been enacted.

The Coalition also questioned the funding of the project and believed that specific information should be provided as to how the financing of the project will impact both the current provincial deficit and the provincial government's long term debt reduction policy.

The Coalition stated that it believed that the Municipal Councils of Stavely and Claresholm should be participating in the hearing process. The Coalition also referred to *Special Places 2000, Toward 2000 Together* and Integrated Resource Planning as indicating a need for the Panel to understand the long term impact of future municipal water uses on the environment. The Coalition believed that the scope of the review as represented in the EIA is far too narrow and that impacts associated with the project go far beyond the project area.

Trout Unlimited Canada

Trout Unlimited Canada (Trout Unlimited) took the position that the proposal should be evaluated from a "watershed or ecosystem perspective". This approach would include an examination of the effects of current water management strategies on fish habitat and consideration of basin-wide management strategies to enhance fish habitat should the Pine Coulee Project be approved. Specifically, Trout Unlimited believed that the creation of the Pine Coulee Reservoir presents an opportunity to revisit operating plans for the upstream Chain Lakes Reservoir. The Chain Lakes Reservoir could be operated to provide flows between the two reservoirs adequate to sustain trout on a year-round basis. With adequate flows, Trout Unlimited sees the potential to develop a 50-60 km section of Willow Creek into a major stream rehabilitation and enhancement program. In its view, a cold water fisheries enhancement program would add social and economic value to the Pine Coulee Project.

Trout Unlimited observed that operation of the Chain Lakes Reservoir is discussed in the Application within the context of mitigation strategies and questioned how the Chain Lakes could not be within the appropriate scope of the Panel's review given that the Applicant has seen fit to provide evidence on the matter. Trout Unlimited indicated that its participation in the upcoming hearing will hinge on the decision to include consideration of the upstream impacts of the project in relation to operating plans for the Chain Lakes Reservoir.

Peigan Nation

The Peigan Nation is of the view that the Oldman River will be affected by the proposed project. It observed that the proposed Pine Coulee Project will reduce flows in Willow Creek during periods of storage. Further, it contends that the project will result in additional consumption of water from Willow Creek which will affect the quality and quantity of flow in the Oldman River downstream of Willow Creek. It is of the view that reductions in flow from Willow Creek into the Oldman River will be offset by releases from the Oldman River Dam. Such releases would, it claims, reduce the amount of water available for allocation to the Peigan Nation and alter the flow regime through the Peigan Reserve. In its view, such issues should be included in the review.

The major issues identified by the Peigan Nation are primarily related to the effects that flow changes may have in the Oldman River. These issues include: effects on the operation of the Oldman River Dam; impacts on Peigan water rights; the effects of diversions from the Lethbridge Northern Irrigation District (LNID) Main Canal to Willow Creek; and potential effects on aquatic resources, riparian ecosystems and wildlife along the Oldman River. The Peigan Nation also identified the effects of the project on hunting rights and on heritage, cultural and spiritual resources in the project area. The Peigan Nation were particularly concerned about water releases from the LNID Headworks Canal, which begins on the Peigan Reserve and relies on water from the Oldman River Dam, into Willow Creek would be required to supplement flows and to meet irrigation needs in the lower reaches of Willow Creek. The Peigan believed there is a need to determine impacts of the Pine Coulee Project on the need for releases from the Headworks Canal to Willow Creek created by increased irrigation in the Willow Creek watershed.

With regard to the issue of water rights, the Peigan Nation stated that Section 35 of the *Constitution Act (1982)* protects treaty rights and that the nature of the rights is currently before the courts. In the Peigan's view, the Panel does not have jurisdiction over water allocation, however the Panel must be cognizant of this issue and must examine the potential effects that the project may have on Peigan water rights and consider any appropriate mitigation strategies to protect those rights. It concluded that, any decision or recommendation by the Panel should not restrict the ability of the government to meet any determination by the courts on the water rights claim by the Peigan Nation.

The Peigan Nation, in discussing the Terms of Reference issued by the federal Minister of the Environment, pointed out that these Terms of Reference specifically instruct the Panel to address the impacts of the project "relating to the concerns and interests of aboriginal people". Based on this statement, it concluded that the issues identified by the Peigan Nation should be included in the scope of the review. In addition, it noted that the *NRCB Act* and the *EARP Guidelines Order* give the Panel a broad scope.

Alberta Environmental Protection

In its written submission, Alberta Environmental Protection (AEP), Water Resources Services, stated that the allocation of water should not be included in the scope of this review. It brought to the Panel's attention the *South Saskatchewan Basin Water Allocation Regulation (Alberta Regulation 307/91)* established pursuant to the *Alberta Water Resources Act*. This regulation prescribes the total amount of water allocated for irrigation purposes from the Oldman River Basin. Further, the regulation establishes an allocation of water from Willow Creek Projects (defined in the regulation as "diversions from the proposed Pine Coulee Reservoir or Willow Creek downstream of the outlet from the proposed Pine Coulee Reservoir, or both, for irrigation of land within the Municipal District of Willow Creek") sufficient for the irrigation of an additional 13,000 acres. AEP believed that the Panel should not interfere with the discretion of the Controller of Water Resources although it was recognized that the Controller's discretion had previously been limited by the Lieutenant Governor-in-Council. AEP concluded that the topic of water allocation has been dealt with by the *Water Resources Act* and regulation and that this topic was not within the scope of the review.

A representative from AEP's Water Resources Services spoke to matters related to upstream effects of the proposed project on the management of the Chain Lakes Reservoir. It was stated that the current operating strategy was developed with input from the public and has general user support. It was stated that the current operating plan for the Chain Lakes Reservoir was used as a basis for developing the operating plan for the proposed project. If changes are required to the operation of the Chain Lakes Reservoir in the future, it was stated that AEP would seek input into changes through a public process at that time.

In addition to the above submission, the representative from AEP's Water Resources Services was requested by the Applicant to address the issue of potential downstream water flow impacts associated with the management of the proposed reservoir. It was stated that the downstream effect on the Oldman River of retaining water in the proposed reservoir would be minimal. In quantitative terms, the Pine Coulee Project total irrigation and evaporation losses would equal about 0.24% of the South Saskatchewan River average flow. It was stated that any impact of the project on Alberta's commitment to Saskatchewan under the *Prairie Provinces Water Board Apportionment Agreement* would therefore be negligible. It was further stated that any water required to meet apportionment commitments would likely come from sources other than the Oldman River Basin. It was indicated that the proposed Pine Coulee Project could have an effect on the operation of the Oldman Reservoir when releases are required to meet instream flow needs and consumption needs downstream of the Willow Creek confluence. This would be an infrequent occurrence. On these occasions the effect could be to increase or decrease the amount of water released from the reservoir. In either case, it was stated that the effects would be minimal in terms of magnitude.

C.K. Waters/W.C. Waters/S.B. Waters

Mr. W.C. Waters stated that he is in favour of the Pine Coulee Project but that he and another resident, Ms. C.K. Waters, have concerns regarding the proposed road. They feel that the proposed road will lessen their privacy and lead to problems with hunters and trespassers on their lands. They stated that the money to be spent on constructing this road could be better spent elsewhere and requested compensation for extra travel distances that would result from creation of the reservoir.

Mr. S.B. Waters indicated in a written submission that he is in favour of the project but opposed to the proposed construction of Waters Road. His concern was loss of privacy related to potential tourist and hunting traffic. Mr. Waters sought compensation for the extra travel distances that would result from creation of the reservoir.

Oldman River Regional Planning Commission (ORRPC)

The Commission stated it was requested to make a submission by the Municipal District of Willow Creek as the proposed project will have impacts on local land use. In the view of the ORRPC, the Panel has jurisdiction to review appropriate land use as the proposed project will impact domestic water users, irrigators and recreational use of the land surrounding the project.

Public Advisory Committee - Pine Coulee Project

The Public Advisory Committee was appointed by Ministerial Order in 1989 to provide advice on matters relating to the construction of the project. The Committee stated that its mandate is to consider concerns relating to regional interests, road relocation, fish and wildlife, recreation, land use, and historical and cultural issues. The Panel was told that the Public Advisory Committee had resolved many issues concerning the design and mitigation of the proposed project. It noted that there were a few outstanding issues, however, it is of the view that these cannot be resolved until the final design stage. Further, it stated that once the project is approved it would work with other groups to ensure that their needs are met.

The Public Advisory Committee indicated its support of the project and stated that it was vital for the future of the area. It observed that without the Pine Coulee Project, water management options in the Willow Creek Basin will be extremely limited. In summary, the Committee urged the Panel to ensure that its deliberations are thorough but brief and cost effective.

Doug Leeds

Mr. Doug Leeds appeared both as an individual and later as spokesman for the Willow Creek Irrigators Association. As an individual, he indicated that his family has farmed in

the area for three generations. His grandfather developed one of the first irrigation projects in the Willow Creek Basin. Mr. Leeds said he was prepared to provide historical information that could serve to place the current proposal in the context of the history of the Willow Creek farming community. Mr. Leeds asked whether written submissions could be tendered as an alternative to a public hearing.

3.2 Views of the Applicant

In commenting on the scope of the review, the Applicant submitted that the Panel does not have the jurisdiction to decide water allocation issues. Reference was made to the *Water Resources Act*, including the mandate of the Controller of Water Resources, and to the *South Saskatchewan Basin Water Allocation Regulation*. The Panel should not review the allocation of water as this could fetter the jurisdiction of the Controller of Water Resources, who oversees a public review process established specifically for the purpose of making decisions on water allocation. Further, the matter of the public interest pertaining to allocation issues has already been determined, as there is a specified acreage provided for by *Alberta Regulation 307/91*.

The Applicant took the position that the Oldman River water rights claimed by the Peigan Nation are based on implication and not an explicit reading of the treaty and that, as these rights as claimed are in dispute before the courts, no legal meaning can be given to the claim at this time by the Panel.

The Applicant's opinion was that the operation plan for the Chain Lakes Reservoir facility is not within the scope of the review as the operation plan is and has been established by the Controller of Water Resources independent of the proposed Pine Coulee Project. The ongoing management of the Chain Lakes Reservoir is not within the mandate of the Panel.

3.3 Views of the Panel

The following items were discussed within the context of the scope of the review:

- the *Water Resources Act and Regulations*
- the *Navigable Waters Protection Act*
- the *Prairie Provinces Water Board Apportionment Agreement*
- the Operation of the Oldman River Dam
- the Operation of the Chain Lakes Reservoir
- the *Constitution Act, Indian Act and Treaty #7*

- the *Fisheries Act*
- the Lethbridge Northern Irrigation District Headworks Canal
- Other Issues Raised by Participants

The Application raised a number of issues of public concern, some of which relate directly to the mandate and jurisdiction of the Panel, and some of which may be beyond the proper scope of the Panel hearing and review. It is the intention of the Panel to restrict the scope of the review and hearing to those matters relevant to the reviewable project.

The Panel notes that it is a joint review panel and the scope of the review includes all project effects within provincial and federal jurisdictions.

The Water Resources Act and Regulations

The Panel agrees with the participants in the Pre-Hearing Conference who stated that the matter of the reservation and allocation of water within the Oldman River Basin generally, and the Willow Creek Basin particularly, is not the proper subject of the current review. The Panel is cognizant of the authority of the Lieutenant Governor-in-Council, pursuant to Section 12 of the *Water Resources Act*, to reserve water within the Oldman River Basin and thereafter to authorize the allocation of water in the public interest. The Panel agrees with the Applicant and Alberta Environmental Protection that the public interest in the reservation and allocation of water in the Oldman River Basin has been expressed in the *South Saskatchewan Basin Water Allocation Regulation (Alberta Regulation 307/91)*. The Panel notes in particular the allocation of water sufficient for the irrigation of an additional 13,000 acres of land associated with Willow Creek Projects pursuant to Section 5(3) of the regulation.

The Panel adopts the view that the reservation and allocation of water for irrigation expansion along Willow Creek is relevant to the review of the effects of the proposed project. The Panel's review will have regard for *Alberta Regulation 307/91* as expressing the public interest in the current reservation and allocation of water in the Willow Creek Basin, as a part of the context when considering the effects of the Application. The Panel notes that the current reservation and allocation of water as expressed in the regulation provides the opportunity to consider the Willow Creek Project in the context of water available within the Oldman River Basin and particularly the Willow Creek Basin and sets a limit on the amount of water that would be available within the Willow Creek Basin for irrigation purposes.

No specific licence to divert and use water from the Pine Coulee Project has been applied for pursuant to the *Water Resources Act*. Actual construction of works requires authorization by a licence issued under the *Water Resources Act*. No person may commence a reviewable project unless an approval under the *NRCB Act* has been granted. The Board may

order that no licence may be issued under any other enactment to any person with respect to a reviewable project until such time as an approval in respect of the project has been granted under the *NRCB Act*. In the view of the Panel, the consideration of an application pursuant to the *Water Resources Act* for a licence to divert and use water associated with the Pine Coulee Project may be appropriate following the review. The right to divert and use water pursuant to the *Water Resources Act*, although a very important component of the project, is only one of many features of the project before the Panel. The Panel has no jurisdiction to make a decision regarding approval of a licence to divert and use water pursuant to the *Water Resources Act*. The licensing responsibilities of the Controller of Water Resources as they pertain to the proposed project are responsibilities the Panel should have regard for in determining whether the project is in the public interest. No specific evidence concerning the Controller's decision making responsibilities pertaining to the reviewable project was presented by Alberta Environmental Protection at the Pre-Hearing Conference and the Panel would be interested in obtaining additional information on the Controller's responsibilities during the hearing as they pertain to the project. The Panel, in addition to the aspects of water quantity and use, must have regard for all aspects of the project, including the social and economic effects as well as all aspects of the environmental effects of the project, one of which would be effects on water quantity.

The Navigable Waters Protection Act

The Panel notes that the proposed project is subject to the *Navigable Waters Protection Act*, and must be approved by Transport Canada before the project could commence. The Panel has no jurisdiction to decide on an approval pursuant to the *Navigable Waters Protection Act*. The Panel will have regard for those matters that are relevant to that jurisdiction and may provide recommendations for consideration by the federal Minister of Transport. The Panel has a similar view regarding the *Navigable Waters Protection Act* as it held regarding approvals under the *Water Resources Act*. The Panel believes that its report and recommendations regarding the proposed Pine Coulee Project are to be completed prior to the issuance of any navigable waters approvals as contemplated in Section 3 of the *EARP Guidelines Order*. The *Navigable Waters Protection Act* has served as the trigger for the EARP in this case, and that process has the effect of ensuring that all appropriate environmental effects associated with various aspects of federal jurisdiction will be examined prior to any substantive federal regulatory decisions being made regarding the Pine Coulee Reservoir Water Management Project.

The Prairie Provinces Water Board Apportionment Agreement

The Panel notes that some participants made reference to the *Prairie Provinces Water Board Apportionment Agreement* (the Agreement) administered on behalf of Alberta, Saskatchewan, Manitoba, and Canada by the Prairie Provinces Water Board. The Agreement serves to apportion or allocate water between the Prairie Provinces and commits Alberta to meeting certain flow requirements at the Alberta/Saskatchewan border. The Agreement has implications for water management throughout Southern Alberta, including the Oldman River Basin and Willow Creek as one of its tributaries. The Panel, in reviewing the effects of the proposed Pine

Coulee Project, may have regard for the Agreement. The Panel has no jurisdiction with respect to the *Prairie Provinces Water Board Apportionment Agreement*.

The Operation of the Oldman River Dam

Participants in the Pre-Hearing Conference made reference to the Oldman River Dam and its regulation of the flow of the Oldman River. The Panel recognizes that there may be some interaction between the operating regime of the Oldman River Dam and the contributing flows of Willow Creek to the Oldman River. The proposed Pine Coulee Reservoir would have the ability to regulate flows in Willow Creek, especially during low flow periods. Compared to the flows observed in the Oldman River, the flows of Willow Creek are relatively small and its contribution to Oldman River flows are, therefore, relatively small. During low flow conditions, flows from all sources can become more important. The Panel recognizes that the operation of the Oldman River Dam has no direct effect on the flows of Willow Creek, but the operation of the proposed Pine Coulee Reservoir could have an effect on the Oldman River that could be taken into account in the operation of the Oldman River Dam. Whether or not those effects would be significant enough to consider changing the operating regime of the Oldman River Dam is not clear to the Panel at this time. However, the Panel expresses the view that the determination of the operating regime for flow regulation on the Oldman River by the Oldman River Dam is not for the Panel to determine. In its deliberations, the Panel will have regard for the potential effects of the proposed project on the Oldman River.

Lethbridge Northern Irrigation District (LNID) Headwaters Canal

The Peigan Nation stated that it is concerned about possible impacts associated with changes to the operation of the LNID Headworks Canal which begins on the Peigan Reserve and relies on water from the Oldman River. It is of the belief that water quality and quantity impacts should be addressed as a result of water releases from the canal into the lower reaches of Willow Creek. Also, the Peigan expressed concern regarding possible impacts associated with the need for water releases from the Headworks Canal into Willow Creek resulting from increased irrigation demands in the Willow Creek watershed.

The Panel has previously concluded that it is not within its jurisdiction to review decisions related to water allocation. However, in assessing the merits of the Application, the Panel believes that it will be necessary for it to have regard for impacts suggested by the Peigan Nation as they relate to the proposed project.

The Operation of the Chain Lakes Reservoir

The Panel's view is that the operation of the Chain Lakes Reservoir may be a factor in considering the effects of the Pine Coulee Project, but it has no jurisdiction to determine the operating plan for Chain Lakes Reservoir. The Panel notes that the Application has given consideration to the operation of Chain Lakes Reservoir in addressing the flow requirements in Willow Creek and included some discussion of potential change in the operating regime of the

Chain Lakes Reservoir as it may affect the proposed operating regime of the proposed Pine Coulee Reservoir.

The Panel recognizes that the proposed diversion works on Willow Creek associated with the Pine Coulee Project may affect the aquatic environment of Willow Creek both upstream and downstream of the proposed works. Those effects are clearly within the scope of the review. The re-establishment of the cold water fishery upstream of the proposed Pine Coulee Project as a fisheries management project has not been included as a component of the mitigation plans of the current proposal. The Panel views any such fishery management/enhancement project as an important consideration in the design of the proposed project. Therefore, the Panel would be interested in receiving any information relevant to the feasibility of such a project and its relevance to the design of the proposed project.

Trout Unlimited indicated that its participation hinges on the scope of the review encompassing the determination of the operating regime of Chain Lakes Reservoir. The Panel notes that the proposed project, especially the design of the diversion works, may depend upon the effects of the project upstream of those works. The Panel believes it should consider any upstream effects in the context of the feasibility of re-establishing the cold water fishery upstream of the proposed project. To do so, the Panel would be required to take into account the current and potential future operating regimes of the Chain Lakes Reservoir. The Panel believes a submission from Trout Unlimited would be helpful to the Panel even though the Panel's primary interest in considering such matters would not be to determine the appropriate operating regime of the Chain Lakes Reservoir, but rather to examine the appropriate design of the proposed diversion works on Willow Creek, as such matters clearly are within the scope of the Panel's review.

The Fisheries Act

The federal *Fisheries Act* provides for the protection of fish and fish habitat. The Act is administered by the Department of Fisheries and Oceans. The Panel believes there may be potential impacts on fisheries resources of the proposed weir on Willow Creek. The Panel has no jurisdiction pursuant to the *Fisheries Act*. However, the Panel will have regard for those matters that are relevant to that jurisdiction and may provide recommendations for consideration by the federal Minister of Fisheries and Oceans.

The Constitution Act, Indian Act and Treaty #7

The Panel has been directed by the federal government's Terms of Reference to address in its review issues falling within federal jurisdiction, including the impacts of the project relating to the concerns and interests of aboriginal people. The Panel is mindful of the fiduciary obligations of the Crown and where specific evidence is provided that indicates that this reviewable project affects those obligations the Panel will have due regard for those obligations. The Panel is an independent body required to function in a quasi-judicial manner. The Panel recognizes that there are constitutional and other legal constraints on its jurisdiction. The Panel believes that it should ensure that aboriginal people have the opportunity to present their interests

and concerns as they relate to the effects of the project so that the Panel may have regard for those matters in fulfilling its responsibilities within its jurisdiction.

Other Issues Raised by Participants

The Panel has considered the relevance of the expansion of irrigation to the Panel's review. The Panel notes that irrigation expansion is a major purpose of the Application before the Panel. The proposed project would, through water management and flow regulation, create the opportunity for irrigation expansion within the basin as well as provide sufficient water for existing irrigation. The Panel views irrigation expansion as one of the effects of the project and the Panel will examine those effects as part of its review. The Panel notes, however, that while irrigation expansion could be possible should the proposed project proceed, the proposed project before the Panel is not the construction and operation of irrigation works. The decision to construct and operate irrigation works obviously would be dependent upon the completion and operation of the Pine Coulee Reservoir project, but the Panel views those decisions to develop irrigation works as being distinct from the decision to create the ability to manage flows in a manner that would enable irrigation expansion. Therefore, the Panel will have regard for the general effects that irrigation may have on the basin without attempting to consider the detailed effects since irrigation projects are not before the Panel.

The Willow Creek Irrigators Association raised the possible effects of the proposed project on the operating regime of the Chain Lakes Reservoir and potential benefits in the Highwood Basin. The Panel has already indicated that the operation of the Chain Lakes Reservoir is subject to the jurisdiction of the Controller of Water Resources and any benefits or costs in the Highwood Basin associated with any change in operations is not before the Panel.

The Pine Coulee Coalition requested that consideration of the proposed project be deferred pending the completion of revisions to the *Water Resources Act*. The Panel does not accept that specific suggestion as a basis for deferral of the consideration of the Application. The Panel does recognize the Coalition's concerns pertaining to the statutory protection of instream flow needs requires consideration by the Panel.

The Panel notes the Coalition's interest in any decision to invest public funds in the proposed project during current fiscal circumstances. The Panel is required to determine whether the proposed project is in the public interest. The actual decision to invest public funds in the proposed project can only be taken in the event that it receives an approval. The Panel, however, has no jurisdiction to determine whether or not public funding of the proposed project will occur. The Panel appreciates that the decision to invest public money in the proposed project is not its responsibility; however, it must have regard for this aspect of the proposal in order to determine the public interest in the matter.

The Panel notes the land use jurisdiction of the Municipal District of Willow Creek and the Oldman River Regional Planning Commission on private lands and Alberta Environmental Protection on Crown lands. The Panel believes that it should have regard for the potential effects

of the project on land use in the project area and more generally in the basin. The Panel would find helpful submissions on land use as it relates to the proposed project, and is particularly interested in views regarding the effects on Willow Creek Provincial Park and the need to control land uses in the vicinity of the proposed project.

The Waters raised the matter of compensation associated with the development of road allowances required as a result of the proposed project. The Panel has no jurisdiction to determine compensation and such matters are beyond the scope of the current review. The Panel will have regard for the need for ancillary road development associated with the project and the potential effects on the land owners.

Finally, several participants expressed the view that a public hearing was unnecessary. The Panel appreciates the long history associated with the development of the proposed project and the previous opportunities to incorporate public input into the development proposal. The Panel also appreciates the substantial public interest in the management of water resources in the project area. The Panel believes that its review of the project necessarily requires hearing of all views concerning the proposed project to determine the public interest in the matter and intends to proceed with a public hearing.

The Panel has the jurisdiction to review all aspects of the environmental, social and economic effects of the proposed project. The Board, having regard to the project effects, is required to determine whether the project is in the public interest. The Board is required to make a decision with respect to the Application in accordance with Section 9 of the *NRCB Act*. The Panel is required to make its report and recommendations on matters of federal jurisdiction to the federal Minister of the Environment and the Minister of Transport.

4. ELIGIBILITY FOR FUNDING OF THOSE MAKING REQUESTS

This section of the report summarizes the views of the participants in the Pre-Hearing Conference with respect to the eligibility of those requesting funds under Section 10 of the *NRCB Act* for the purpose of intervening in the review of the Pine Coulee Application. It also reports the Board's conclusions about the eligibility of each of those requesting funds and outlines the reasons for the Board's conclusions. The Panel reiterates that it has no responsibility for funding decisions under the Federal Participant Funding Program. However, the NRCB and FEARO will have regard for decisions made by each party to ensure duplication of funding to interveners does not occur.

4.1 Views of the Intervenors

The organizations or individuals participating in the conference have been identified in Appendix A. Not all of the participants applied to the Board for funding. Those that did apply are as follows:

- Willow Creek Irrigators Association
- Area Land Owners Group
- Pine Coulee Coalition
- Peigan Nation

Willow Creek Irrigators Association (the Association)

The Willow Creek Irrigators stated that they are a volunteer association whose members presently irrigate 8,000 acres on the Willow Creek. The Association was formed in 1985 and has promoted the construction of a further water reservoir in the Willow Creek Basin. It claimed that the Association's 65 members are directly affected by the project since it would create the potential for 21,000 acres of irrigation on Willow Creek. It noted the Applicant's contention that the benefits from an expansion of irrigated land is based on the assumption that the availability of water will lead the Association's members to make the capital investments in irrigation necessary to create benefits and economic spin-offs. In its view, only the Association's members can determine and provide information on whether these assumptions are accurate.

Area Land Owners Group

The Area Land Owners Group (the Land Owners) advised the Panel that it supported the project, but had a serious concern that if the project were to proceed as designed, they could face danger of salinization of soils, ponding and marshing due to excess groundwater, and seepage from direct leakage from the reservoir and from proposed irrigation activities. It stated that its members are residents of the area affected by the project and would be very negatively and directly affected by the project without inclusion of drainage works. The Land Owners stated that alternative drainage designs had been put forward in the past, but that there had not been a resolution of the issue. Their representative indicated that drainage of the area had been proposed to the Public Advisory Committee on June 20, 1992, and that this Committee had moved this issue forward on its agenda, but the current situation indicates that the Applicant had not acted upon this.

The Land Owners stated that the original Alberta Environment study suggested that seepage through the east side of the project is likely and that artesian pressure will cause seepage through onsite sand and gravel lenses. The Land Owners disputed certain results of other studies, such as the *Pine Coulee Soil Salinity Mapping Project* undertaken by the Applicant to define the project's effect on this group, on the basis of combined local knowledge comprising a cumulative total of some 350 years of experience with the land amongst its members. It stated that if half again as much acreage is put at risk as that which benefits from the project, it questions the cost-benefit of the project. The Land Owners question the merit of the Applicant's proposal to monitor and only install drainage or purchase the land subsequent to the determination of a problem. The Land Owners felt that allowing degradation of the land prior to taking remediation action, if this is in fact the option selected, is not responsible land management. Consequently, the Land Owners supported the construction of a prime drainage ditch, addressing drainage concerns six

miles to the north and also reducing risk to land owners to the east. It was stated that all of the land owners are located in the sub-basin and the concerns affect their livelihood as well as that of their offspring.

Pine Coulee Coalition

In its written submission, the Coalition stated its concern that strict adherence to and compliance with the "directly affected" clause in the *NRCB Act* could create divisiveness within the community and, consequently, was reluctant to be party to defining itself "in terms that might have the effect of pitting neighbour against neighbour". The Coalition submitted that in the public interest, all users of the Willow Creek area natural resources be considered "directly affected".

In subsequent correspondence to the Panel, the Coalition stated that one of its members represents retired individuals on fixed incomes who contribute taxes to a project from which they will derive no benefit and which will or may directly and adversely affect their income. Another member of the Coalition was identified as a representative of young Albertans residing in the area whose way of life will be adversely and directly affected by the potentially destructive effects of the project on the Chain Lakes Park. This member's parents, it was stated, live in the Longview area and use the Chain Lakes extensively for recreational/fishing opportunities. This member's family was considered to be representative of those families whose quality of life is or may be directly affected by the project. A third member of the Coalition was identified as a naturalist who together with other naturalists are directly affected by the decline of the ecosystem, including the disappearance of the leopard frog, Baird's sparrows and burrowing owls. Lastly, it was stated that the membership of the Coalition as a whole is comprised of groups of individuals who derive their recreational pleasure from the area, through hunting, fishing, hiking, bird-watching, camping, and viewing the natural flora and fauna.

In its appearance before the Panel, the Coalition re-emphasized the above points. It restated that it was a "public interest Coalition". It believed that the Board should consider public interest groups with meritorious arguments to be eligible for intervener funding. Additionally, it was stated that members of the Coalition are active in the region on a volunteer basis. The Coalition believed that it should be recognized as being eligible for funding on the basis of its ability to represent societal interest in major developments and its ability makes a unique contribution to the content of the public hearing. The Coalition referred by analogy to assistance provided by government for groups to participate in discussions regarding impacts associated with major policy changes.

The Coalition undertook to provide additional information regarding matters relating to its arguments as to why Coalition members were "directly affected" by the proposed project. This information was received by the Panel on June 20th and identified an additional six individual Coalition members who reside in Longview, High River and Calgary and have various

interests in the area. Additionally, it was stated that the High River Fish and Game Association holds annual and semi-annual "fisheramas" at Chain Lakes Park and re-emphasized that Association members provide services which support endangered, threatened and vulnerable species of wildlife in the general area of Chain Lakes Park.

Peigan Nation

The Peigan Nation view themselves to be "individuals or a group of individuals" rather than a corporation. In support of this position, it made reference to an earlier decision of the Board to award intervener funding to the Peigan Nation under the NRCB review of the Westcastle recreational development near Pincher Creek.

The Peigan Nation stated that the Oldman River would be affected by the project. It took the view that reductions in flow from Willow Creek into the Oldman River would be offset by additional releases from the Oldman River Dam. It observed that flows in Willow Creek would be reduced during storage and by the development of additional consumptive uses along the Creek. It also took the position that increased flow releases from Willow Creek during certain periods could result in additional water allocation from the Oldman River downstream of Willow Creek. In times when these additional flows are not available, the Peigan Nation contended that holders of current or future water licences would request releases from the Oldman River Dam to offset this shortfall. Since portions of the Oldman River are located on the Peigan Reserve it argued that they would be directly affected by the proposed project. The Peigan Nation made reference to the recently signed Memorandum of Understanding between the Peigan Band and the Minister of Indian Affairs concerning the impact of the Oldman River Dam to demonstrate the "closeness" between the Peigan Nation and the Oldman River.

The Peigan Nation stated that the project area falls within the area identified as their ancestral territory and that this territory has been defined under a water rights claim by the Peigan Nation currently before the courts. Within the project area they observe that they would be directly affected by the loss of archaeological resources and by the loss of wildlife and plants subject to traditional use. It made specific reference to statements in the EIA to support their claim that the aboriginal archaeological resources are related to Peigan culture and the impacts on natural resources such as plants and wildlife are unknown. The Peigan believed that impacts related to their treaty and constitutional rights to the use of these resources need to be assessed so that these impacts can be considered by the Panel.

In response to the Applicant's position that the Peigan Nation is not directly affected by the project, it pointed out that Alberta Environmental Protection had confirmed that the Pine Coulee Project would affect the operation of the Oldman River Dam, the LNID canal and facilities at Willow Creek. In the Peigan's view, the only outstanding issue is the magnitude of the impact. With regards to the connection between archaeological sites and the Peigan Nation, it noted that a representative from Alberta Community Development, Archaeological Services, a witness on behalf of the Applicant, stated that it would be difficult to link artifacts to any specific group. The Peigan Nation took the position that it is reasonable to assume a connection between the Peigan

Nation and the sites. Further, it stated that the onus should be on the Applicant to prove the sites are not connected to Peigan culture. In addition, it indicated that the proposed ethnographic study would provide information on any connection between the archaeological sites and the Peigan Nation.

4.2 Views of the Applicant

The Applicant stated that the Peigan Nation is not an eligible intervener as it is not an individual or group of individuals as required by Section 10 of the *NRCB Act* as the submission of the Peigan is on behalf of the Nation as a whole. In addition, the Applicant asked the Board to find that the Peigan Nation is not eligible to apply for funding as it has not established that it meets the "are or may be directly affected" statutory test. The Applicant based this submission on the past interpretation of those words by the NRCB and on decisions issued by the Court of Queen's Bench of Alberta in which the courts have considered the meaning of the phrase "directly affected" within the context of other statutes.

In response to the claimed effects, the Applicant stated that the claims of the Peigan Nation to territory and water rights beyond the boundaries of the Reserve have no legal meaning at this time such that it can be said that a land or property interest may be affected by the reviewable project. The claimed flow effects from the Oldman River Dam Reservoir are disputed by the Applicant. With respect to water allocation issues, the jurisdiction of the Panel to consider such matters was disputed, and it was suggested that the Panel's jurisdiction with respect to instream flow matters is limited to a consideration of the effects from the project as they impact on water management, flow regulation and conservation.

The Peigan Nation also claimed that there would be a direct effect as a result of the historical resources which would be disturbed. A witness from Alberta Community Development, Archeological Services, appeared, on behalf of the Applicant, to present evidence on the work contained within the Application and provide an expert opinion on attributing those identified sites to a particular cultural group. The Applicant's view was that there is no direct way that archaeologists can link the prehistoric sites and materials to the Peigan Nation.

With respect to the submission of the Pine Coulee Coalition, the Applicant's response was that there is no evidence indicating that the members of the Coalition may be directly affected by the reviewable project and therefore it is not eligible to apply for advance funding.

The Applicant did not take a position on whether the Willow Creek Irrigators Association or the Area Land Owners Group were eligible to apply for intervener funding.

4.3 Views of the Board

The Board has given consideration to what was presented in the Pre-Hearing Conference and to what requirements are on this Board with respect to interveners.

The Board is required to give persons who may be directly affected by a reviewable project standing to review information relevant to any application, to furnish evidence relevant to an application, to cross-examine, and to provide argument during a hearing. Individuals or groups of individuals who, in the opinion of the Board, are or may be directly affected by a reviewable project are eligible to apply for funding. The Board may make an award of costs to assist in the preparation and presentation of an intervention at a proceeding of the Board. If in the Board's opinion it is reasonable to do so, the Board may make an advance of costs to a person applying for funding.

The Board wishes to emphasize that in the Pre-Hearing Conference participants sought direction from the Board with respect to an advance award of costs. It is reasonable for the Board to consider a request for an advance award of costs when the person requesting the advance can clearly demonstrate their eligibility to apply for funding as individuals or groups of individuals who, in the opinion of the Board, are or may be directly affected by a reviewable project.

In previous applications, the Board concluded that two questions must be addressed in assessing eligibility. The first is whether those requesting funds are "individuals, or groups of individuals". The second question that must be addressed in assessing eligibility is whether those requesting funds "are or may be directly affected by the reviewable project".

In its decision respecting those seeking funds to intervene in the review of the Three Sisters Application, referred to by several participants in the Pre-Hearing Conference, the Board held that in order to directly affect an individual or group of individuals a project would have to cause a detectable effect on it or them. Such an effect could be beneficial or injurious. Direct effects might act upon an individual's or group of individuals'

- bodies or health;
- sustenance;
- livelihood;
- property; or
- statutory rights.

In considering effects that might occur, there must be evidence acceptable to a reasonable person that:

- a chain of causality exists;
- an effect would probably occur; and
- the effect would not be trivial,

before a potential effect can be considered to have been established. The Board went on in the Three Sisters review to define a "closeness test" which depends on the demonstration of an

uninterrupted chain of cause and effect between the reviewable project and the individuals requesting costs.

When an effect can be considered to have been established, the Board has given consideration to the kind and degree to which the effect is of a personal and individual nature and different, special or unique from effects that apply to the general public.

During the Pre-Hearing Conference, in the context of considering the eligibility of the participants, the Board questioned participants as to the nature of their interest in the reviewable project so that they might supplement their written and oral submissions. The Board believes that the participants had a reasonable opportunity to address their eligibility for funding.

The Board notes that each cost request must be decided on its own individual merits. The Board stresses the preliminary nature of the Pre-Hearing Conference and notes that further evidence brought forward at the hearing could cause the Board to come to different conclusions on some matters.

Willow Creek Irrigators Association

The Board finds that the members of the Willow Creek Irrigators Association may be directly affected should the Pine Coulee Project proceed and thus are eligible to be considered for funding pursuant to Section 10 of the *NRCB Act*. These individuals reside within the project area and would rely on the water from the proposed project, if approved, for agricultural and domestic use.

Area Land Owners Group (Land Owners)

The members of the Area Land Owners Group reside within the project area and the Board believes their lands may be directly affected by potential salinization from the proposed project and therefore this group of individuals are eligible to be considered for funding pursuant to Section 10 of the *NRCB Act*.

Peigan Nation

The Panel understands that the Peigan Nation is comprised of individuals who reside at the Peigan Indian Reserve #147 and that the Peigan Chief and Council are the legitimate representatives of the Peigan Nation. For the purposes of Section 10 of the *NRCB Act*, the Board concludes that the Peigan Nation is "a group of individuals" within the meaning of Section 10 of the *NRCB Act*.

In order to directly affect the Peigans, the Pine Coulee Project would have to cause a detectable effect on them. Such an effect could be beneficial or injurious. Direct effects might act upon the Peigan's bodies, or health, sustenance, livelihood, property or statutory rights.

In considering effects that might occur, there must be evidence to a reasonable person that: a chain of causality exists; an effect would probably occur; and the effect would not be trivial, before a potential effect can be considered to have been established. The Panel has also considered whether there is an uninterrupted chain of cause and effect between the reviewable project and the Peigan, and whether any effect on the Peigan is of a personal and individual nature and different, special or unique from effects that apply to the general public.

The Panel stresses that it has given only preliminary consideration to the potential effects of the proposed project on Willow Creek and the Oldman River. At this time, the Panel accepts that the proposed project will affect the flows of Willow Creek and will affect the Oldman River flows downstream of the Willow Creek confluence. The preliminary evidence at the Pre-Hearing Conference was that any changes in flows from Willow Creek as a result of the proposed project would be relatively small compared to the flows of the Oldman River. The timing, nature, and magnitude of these relatively small changes in the Oldman River are uncertain and may, or may not be, insignificant or trivial. The Panel heard that infrequent low flow conditions in the Oldman River could conceivably cause some change in the operation of the Oldman River Dam, and affect flows in the Oldman River along the Peigan Reserve. Flow releases from the LNID Headworks Canal into Willow Creek could also be affected. The Panel recognizes that the Peigan Nation have a long and well established connection to the Oldman River at the Peigan Indian Reserve and this connection may include uses that affect their bodies, or health, sustenance, livelihood, property or statutory rights. The Panel notes that with respect to the Peigan, the Applicant has already concluded that in the Applicant's opinion, it cannot be said that an effect would probably occur and there is no possibility that those decisions to change the operation of the Oldman River Dam could have the effect claimed or that the effect would not be trivial. No evidence is before the Panel at this time that would indicate that the Applicant's opinion about the effects on the Peigan Nation are based on the results of any communication between the Applicant and the Peigan Nation.

What effects, if any, the proposed Pine Coulee Project might have on the Oldman River, and the regulation of its flows by the Oldman River Dam, and thereby potentially affecting the use of the Oldman River by the Peigan Nation is unclear to the Panel at this time. However the Panel accepts that an effect on the Peigans may occur, and that it may not be trivial. In the Panel's opinion, the determination of the nature of the effects on the Peigan Nation is a matter that would require further evidence from the Peigan Nation.

In addition to the direct effect noted above with respect to water, the Panel has also considered the relationship between the proposed project's effects on the land and the Peigan Nation. The project is located in and surrounded by a large area of settled, privately held and fenced lands that have been used for farming and ranching purposes for many years. No specific evidence was provided that the Peigans have in recent times used or not used these lands for hunting, fishing or gathering. No specific evidence was provided that individuals of the Peigan Nation have in recent times visited these lands in respect to their social, cultural, or spiritual interests. The Panel notes the evidence concerning the use of the project area by aboriginal people contained in the archaeological survey submitted by the Applicant. The Applicant indicated that,

pursuant to the *Historical Resources Act*, these historical resources are owned by the province. Pre-historical use appears to have been extensive and may have been significant with respect to spiritual and other features of aboriginal cultures. The Panel also notes the Applicant's evidence that the artifacts present in the project area cannot be attributed to the Peigan Nation or other Bands at this time since no attempt has been made by the Applicant, to date, to determine from the Peigan Nation or other Bands, whether or not they attach any specific importance to the use of the Pine Coulee area. Similarly, no evidence has been provided that shows the Peigans or other Bands have or have not used the Pine Coulee area for traditional purposes in recent times.

The Panel concludes that there may be a direct effect on the Peigan Nation's interests in the use of the project area that may not be trivial.

The Panel is also aware that if there are direct effects on the Peigan Nation as a result of the proposed project, then those effects may extend beyond the physical effects of water management or disturbances to the project area to include socio-economic effects on the Peigan Nation that may have a bearing on the Panel's considerations.

Overall, based on the information available at this time, the Board finds that the Peigan Nation is a group of individuals who may be directly affected by the proposed project and are eligible to be considered for funding within the meaning of Section 10 of the *NRCB Act*.

Pine Coulee Coalition

The Coalition stated that in the public interest, all users of the Willow Creek area natural resources should be considered "directly affected". The Panel recognizes and appreciates that the Coalition has a special interest in the reviewable project and the natural resources in the Willow Creek Basin generally.

In a sense their special interest is somewhat more focussed and specific than the general public, and to a degree this interest is of a kind which is of a personal or individual nature and is therefore different, special or unique from the interests of any other citizen living in Alberta. The Panel believes that this type of interest meets the test of an individual or group of individuals having an established interest in a review, and is relevant to determining whether standing should be given to participate fully as an intervener in this proceeding. The Panel makes a clear distinction, however, between having an established interest in this matter and where direct effects act upon these individual's or groups of individuals' bodies or health, sustenance, livelihood, property, or statutory rights. Having a special interest in this reviewable project does not necessarily mean that the Coalition will be subject to direct effects by the reviewable project. The Panel does not believe that the legislators intended funds to be provided to advocacy and special interest groups with broad geographic scope to assist them in advancing their ideas or achieving their goals. The Panel believes that the word "directly" affected was chosen deliberately to distinguish it from general effects on the public interest.

The Coalition made a straight-forward assertion that the Panel should adopt a broad interpretation of the legislation and that the Board should consider public interest groups with meritorious arguments to be eligible for intervener funding. The Coalition's ability to represent a broad range of interest in the proposed development and its ability to make a unique contribution to the content of the public hearing are, in the Panel's opinion, further reasons that are relevant to determining whether standing should be given to participate fully as an intervener in this proceedings.

On the basis of the information provided at this time, the Board finds that the Pine Coulee Coalition did not establish that they are or may be directly affected and therefore the Coalition is not eligible for funding. However, the Panel believes that the Coalition has evidence that may be of assistance to the Panel in its review.

The Panel notes that at the time of the Pre-Hearing Conference the Coalition included eight different groups. (The Claresholm Fish and Game Association advised the Panel during the Pre-Hearing Conference that their Association was in favor of the proposed project and was not part of the Pine Coulee Coalition as indicated in the Coalition's written submission.) The Panel believes the Coalition, through combining the separate submissions of these distinct groups, could make a substantial contribution to the Panel's review by reducing the need to hear individual submissions. The Panel would expect such a contribution to the efficiency of the hearing process could reduce the time and cost to other participants and the Board itself. Therefore, the Board is prepared to make a modest contribution to the direct out-of-pocket costs associated with disbursements of the Coalition submissions regarding terrestrial and aquatic effects (for telephone, typing, photocopying and like expenses) up to \$1,500.00 which the Panel anticipates would be offset by reduced hearing costs if separate submissions were to be avoided by the Coalition's efforts.

5. ADVANCE COST REQUESTS

In the preceding section, the Board concluded that three parties that participated in the Pre-Hearing Conference are eligible for funding in accordance with Section 10 of the *NRCB Act*. This section of the report summarizes the requests and supporting reasons by the parties and gives the Board's decisions respecting the requests. The Board notes that two groups, the Pine Coulee Coalition and the Peigan Nation, have also applied for funding under federal Participant Funding Program. As previously indicated, the Board will have regard for any funding received under the federal program when making its determination on final cost awards following the conclusion of the hearing.

5.1 Views of the Interveners

Willow Creek Irrigators Association (the Association)

The Association supports the proposed project and requested funding to confirm the economic benefits predicted by the Applicant; to review and report on the positive environmental impacts which will occur; to assess the benefits due to decreased water demands on the Chain Lakes; and the potential benefit to the Pekisko and Stimson Creek Basins.

The Association requested a total of \$20,000 which included: a farm economist to review the Applicant's economic studies and assist in the preparation of the submission (\$8,500); an environmental assessment of the habitat replacement and enhancement effects of irrigation (\$3,500); a hydrological assessment of improved stability for management of Chain Lakes Reservoir to benefit Highwood Basin (\$3,500); and legal assistance for organization and preparation of a formal submission (\$5,000).

Area Land Owners Group (Land Owners)

Since the Applicant has not conceded to a request for drainage works during construction of the project, the Land Owners requested \$75,000 to prepare its intervention. This funding would be for a study of salinization and drainage and would involve the hiring of specialists in hydrology and soils as well as legal assistance. It was stated that the Land Owners were at a preliminary stage with respect to developing cost estimates. A representative stated they would undertake to exercise cost efficiency and return any funds not expended.

Peigan Nation

The Peigan Nation sought an advance award to evaluate the effects of the project on the quality and quantity of water in the Oldman River below Willow Creek. Further, it sought funds to determine the effects that releases of "replacement water" from the Oldman River Dam may have on the amount of water available for allocation to the Peigan Nation and the flow regime through the Peigan Reserve. In addition, it requested funding to examine the relationship between the Peigan Nation and the archaeological resources that would be lost as a result of the project and to study the wildlife and vegetation resources of the project area in relation to traditional and present use by the Peigan Nation.

The Peigan Nation requested a total of \$105,000. This included \$50,000 for experts including a hydrologist (\$30,000), an ethnographer (\$10,000) and a biologist (\$10,000); \$30,000 for legal fees; \$10,000 to coordinate instructions between the lawyer, the experts and Band members; \$10,000 for intervener disbursements and \$5,000 to cover costs associated with participation in the Pre-Hearing Conference.

Reference was made to the statement in the Panel's Terms of Reference that the review should address impacts of the project relating to concerns and interests of aboriginal people. Further, it was noted that the *EARP Guidelines Order* states that a public review shall include an examination of social effects directly related to the environmental effects of a proposal. The Peigan Nation were of the view that the social effects of the proposal on aboriginal people have not been addressed in the EIA. It proposed that the Panel could either direct the Applicant to supply this information or provide funding to the Peigan Nation to conduct the necessary study. It noted that their current request for funding does not include funds for a study of socio-economic effects. The Peigan Nation stated they may make additional submissions on these issues.

5.2 Views of the Applicant

The focus of the Applicant's comments concerning the specific funding requests of each of the groups was on the purpose and need for the work as opposed to specific dollar amounts.

The Applicant believed that the work proposed by the Willow Creek Irrigators Association and by the Area Land Owners Group would not be of assistance to the Panel and as such should not be funded. Specifically, the work proposed by the Willow Creek Irrigators Association would be just as relevant if prepared without funding. The Applicant took the position that adequate studies exist of the nature proposed by the Area Land Owners Group and that further work in this regard would not be helpful to the Panel.

In response to the Peigan Nation proposal, the Applicant stated that the issues identified are remote or the proposals so inadequately defined that there is no clear indication that the evidence that would come out of these studies would assist the Panel in the fulfillment of its mandate. Further, the Applicant submitted that the funding request for travel expenses and for legal services, in addition to a "coordinator", are costs that the NRCB has not considered appropriate in previous reviews.

In its written submission, the Applicant stated that neither the Peigan Nation nor the Pine Coulee Coalition complied with the regulations of the Board as they did not have controls in place for the expenditure of any advance funding directed by the Board. In addition, the Applicant requested that any decision to direct advance funds to the Peigan Nation should include conditions for repayment of the advance in the event that an advance exceeded the final costs award.

5.3 Views of the Board

The following are the Board's conclusions with respect to requests for advance funding by those parties found to be directly affected. The Board stresses the preliminary nature of the Pre-Hearing Conference and notes that further evidence brought forward at the hearing could cause the Board to come to different conclusions on some matters.

Willow Creek Irrigators Association

The Board agrees with the Willow Creek Irrigators Association submission that the experience and knowledge of the members of the Association and the views of potential irrigators on the financial implications of irrigation would be of value to the review. These include the on-farm financial effects (both negative and positive) of irrigation, as well as the extent and timing of changes from dryland farming to irrigated land, should the project be approved. It also includes an examination of the Applicant's information on economic matters.

The Board also agrees that an environmental assessment of the on-farm effects of present and future irrigation based on the views of the Association's membership would be of value to the review. The Board agrees that experts should be engaged to gather the information from the farmers and ranchers, and review, analyze and consolidate the information into a report for presentation at the hearing.

The Association requested \$20,000 with no specific advance funding requested. The Board is prepared to recognize \$10,000 for the agriculture (farm) economist to carry out the work on the on-farm economic impacts based on resident farmer/rancher input, and \$5,000 for a specialist to consolidate Association members' views regarding the on-farm environmental effects of irrigation, for a total cost award of \$15,000.

The Board is not of the view that legal assistance is required for this submission. However, should the Association wish, it could use a portion of the total costs recognized for legal assistance. The Board will direct the Applicant to provide an advance award of costs of \$7,500 upon the Association providing written information satisfactory to the Board on how the expenditure of funds will be controlled.

Area Land Owners Group

The Area Land Owners Group requested \$75,000 with no specific advance award noted.

The Board agrees that the issue of a primary drainage channel, described in the Land Owners presentation as necessary for mitigation of the potential impact of salinization on the 7,000 acres of land in the West Stavely Sub-Basin arising from the project, should be further investigated and reported on. The investigation should include a preliminary engineering design, construction cost estimates, and optimum construction timing estimates. Also, a breakdown and differentiation of the benefits and costs associated with the construction of a primary drainage channel should be provided as it relates to the existing status of salinization, and to the potential salinization which might arise, should the Pine Coulee Project proceed.

The Board supports the request for a supplementary report by appropriate experts to examine the experience and knowledge of the local land owners regarding salinization on their respective properties and provide conclusions arising from this analysis. This should include a

prediction of future salinity impacts and an assessment of the portion which might be directly attributed to the implementation of the proposed project. The submission should also include a review of the Applicant's information, and the rationale for a monitoring program which would provide the Applicant with a warning when mitigative action might be required.

The Board is prepared to recognize a total cost award of \$35,000 for the hiring of hydrology, soil and engineering expertise to address the above noted tasks. The Board would support \$25,000 to cover the cost of the engineering services to examine the proposed primary drainage channel and \$10,000 to examine salinity concerns. The Board is not of the view that legal assistance is required, however, should the Land Owners wish, a portion of the recognized funds could be utilized for that purpose. The Board will direct the Applicant to provide an advance of \$15,000 upon the Land Owners Group providing written information satisfactory to the Board on how the expenditure of funds will be controlled.

Peigan Nation

The Peigan Nation requested a total of \$105,000 and did not submit a specific request for advance costs. The Board is prepared to recognize a total of \$11,000 for a hydrologist (\$5,000) and ethnographer (\$4,000) and a socio-economic expert (\$2,000).

The hydrologist would be required to review the hydrology information provided by the Applicant and confirm the magnitude of the potential effect on water and the Peigan Nation. On a limited scope, the ethnographer would review Peigan Nation use of the area and identify what artifacts identified in the Application specifically in the immediate area of the project may be associated with the Peigan. In addition, the Board would request the submission provide information on the current knowledge and current use of the immediate project area and its importance to the Peigan Nation. The Board is prepared to recognize a cost of \$2,000 to provide the Peigan Nation with assistance in identifying the potential socio-economic impacts of the proposed project, related to any impacts identified during the ethnographic and hydrological reviews. The Board believes sufficient documentation exists for both experts to review and identify directly related socio-economic impacts, if required. The Board does not believe legal assistance is required for this submission, however, should the Peigan Nation wish, a portion of the recognized funds could be used for that purpose.

The Board is prepared to direct the Applicant to provide \$5,000 in an advance award of costs upon the Peigan Nation providing written information satisfactory to the Board on how the expenditure of funds will be controlled.

The Board's decision regarding advance cost awards is summarized in Appendix C.

6. FURTHER INFORMATION REQUESTS

The Panel notes that the Terms of Reference issued by the federal Minister of the Environment specifically refers to issues falling within federal jurisdiction including navigation,

fisheries, concerns and interests of aboriginal people, migratory birds, and vulnerable, threatened or endangered species. It would assist the Panel if the federal departments with responsibilities in these areas would present their views at the hearings. These departments would include Transport, Fisheries and Oceans, Indian and Northern Affairs and Environment.

With reference to the Panel's mandate in relation to aboriginal people, it notes that the proposed project may have impacts on archaeological resources. Further, it notes the view of Alberta Community Development (Archaeological Services) that, on the basis of archaeological evidence, it is difficult to link these resources to any particular aboriginal group. The Panel, therefore, specifically invites any Band within Treaty #7 to provide to the Panel evidence on how any effect on these resources may affect their cultural and spiritual heritage. The Panel would be interested in views of Alberta Community Development (Archaeological Services) on the significance of the archaeological resources, appropriate mitigation strategies, and opportunities for interpretation.

The Panel would benefit from the views of Alberta Environmental Protection on effects of the project on areas within their jurisdiction, such as hydrological changes on the Oldman River and any effects on the operation of the Oldman River Dam; operation of the Chain Lakes Reservoir; flow releases from the LNID Headworks Canal into Willow Creek; effects on Willow Creek Provincial Park; effects on fish and wildlife; and, further explanation of the role of the Controller of Water Rights.

In addition, the Panel would benefit from the views of the Municipal District of Willow Creek on local land use, regulation of land use around the proposed reservoir and its approval process.

7. THE LOCATION AND TIMING OF THE HEARING

7.1 Views of the Applicant and the Interveners

All of the participants agreed that the Panel should convene its hearing in Stavelly. On the issue of the timing for the hearing, the Applicant stated that it would be desirable to proceed as close as possible to the minimum thirty day notification period required by the *NRCB Act*. Further, the Applicant raised an issue as to whether or not a hearing would be required if the Board found that no participants were "directly affected" by its proposed project and in accordance with Section 8(3) of the *NRCB Act*. The Public Advisory Committee, Mr. Leeds, and the Willow Creek Irrigators Association all agreed that a hearing, if required, should be held as soon as possible. The Peigan Nation and the Area Land Owners Group each stated that it would require a minimum of sixty days to adequately prepare for a public hearing. In response to an enquiry as to the reasons for proceeding within a thirty day period, the Applicant advised the Panel that its concerns were budgetary in nature but that it would be possible, within the fiscal year, to proceed with some construction activity during the winter months if the Application were approved.

Trout Unlimited stated in its written submission that it would prefer a hearing date in October in order to adequately prepare for the hearing and also to accommodate the 9th International Trout Stream Habitat Improvement Workshop which it is hosting September 6th - 9th, 1994.

7.2 Views of the Panel

The Panel believes that there should be an opportunity for directly affected parties, parties with an established interest, and other parties with bona fide reasons to make submissions to the Panel in a location that is relatively convenient for them to do so that is in the region. Therefore, the Panel will schedule a hearing in Stavely. With respect to timing, the Panel agrees with most of the participants that the hearing should be scheduled as soon as it is reasonable to do so. The Panel has considered the needs of various participants to prepare, submit, and review submissions to the Panel, including the time required to engage experts where needed. The Panel will require that submissions to the Panel be received no later than 12:00 Noon on Thursday, September 8, 1994. The hearing will commence on September 26, 1994, at 10:00 a.m. in Stavely, Alberta, in the Stavely Community Hall.

8. SUMMARY OF CONCLUSIONS

The Panel has scheduled a hearing to begin on Monday, September 26, 1994, at 10:00 a.m. The date for the filing of intervener submissions is Thursday, September 8, 1994, at 12 Noon.

The Board is directing Alberta Public Works, Supply and Services to make the advances set out in Appendix C.

DATED at Edmonton, Alberta, this 4th day of July, 1994.
PINE COULEE NRCB/EARP JOINT REVIEW PANEL

Ken Smith
Chairman
Member/

Charlie Weir
Acting Vice-Chairman/

Panel Member

George Kupfer
Acting Board

Panel Member

APPENDIX A

PRE-HEARING CONFERENCE PARTICIPANTS
 APPLICATION # 9401, June 15, 1994

Participants (Abbreviations Used in Report)	Witnesses
Alberta Public Works Supply and Services (PWSS or The Applicant) Stan Rutwind	Jack Brink Alberta Community Development, Archaeological Services
Willow Creek Irrigators Association (The Association) George Gaschler Doug Leeds	
Area Land Owners Group (Land Owners) Brent Carey Kris Snethun	
C.K. Waters/W.C. Waters/S.B. Waters Cody Waters	
Peigan Nation David Patterson	
Pine Coulee Coalition (The Coalition) Jim Harvie Bob Scace	
Trout Unlimited Canada (Trout Unlimited) Garry Szabo	
Oldman River Regional Planning Commission	

(ORRPC)

Mike Burla

Department of Fisheries & Oceans
Government of Canada

Glen Hopkey

Alberta Environmental Protection
Government of Alberta
(AEP)

Everett Bunnell

Dick Hart

Water Resources Services, Sr. River Basin Planner - Southern Region

Claresholm Fish & Game Association

Walt Lane

Public Advisory Committee - Pine Coulee Project

Duane Southgate

Doug Leeds

Pine Coulee NRCB/EARP Joint Review Panel Secretariat

W. Kennedy
J. Ingram
P. Cleary
R. Powell
A. van Roodselaar
J. Mathers

APPENDIX B

PANEL TERMS OF REFERENCE

JOINT REVIEW PANEL - PINE COULEE WATER MANAGEMENT PROJECT SOUTHWESTERN ALBERTA

INTRODUCTION

The federal Minister of Transport referred the Pine Coulee Project to the federal Minister of the Environment for a public review in accordance with the *Environmental Assessment and Review Process (EARP) Guidelines Order*. In doing so, he asked that negotiations be entered into with the Government of Alberta for the establishment of a joint review panel as provided for in the *Canada-Alberta Agreement for Environmental Assessment Cooperation*. He also asked that the review address the environmental effects of the proposal and the socio-economic effects directly related to these environmental effects, especially those effects which would have an impact on aboriginal interests.

As a result of this referral, officials from the Federal Environmental Assessment Review Office (FEARO) and the Alberta Natural Resources Conservation Board (NRCB) have entered into an agreement outlining the basis for the establishment and operation of a joint review panel.

These terms of reference are being issued in accordance with the requirements of the *EARP Guidelines Order* and to identify, from a federal perspective, the issues to be addressed in the joint review and how the review will proceed.

MANDATE

The proposal to be reviewed consists of the construction and operation of water management facilities on Willow Creek including a diversion of a portion of the Creek and the construction and operation of an off-stream dam in Pine Coulee. The project is located southwest of Stavely in southwestern Alberta.

The panel will address in its review issues falling within federal jurisdiction, including the impacts of the project:

- on navigation and the safety of vessels on the waterway, both upstream and downstream of the works;
- on fisheries and fish habitat;
- relating to the concerns and interests of aboriginal people;
- on migratory birds; and

-on vulnerable, threatened or endangered species.

The panel's final report, including recommendations relating to the above issues and any other issues that may arise during the review that relate to matters of federal jurisdiction, will be conveyed to the federal Ministers of the Environment and Transport at the same time as it is conveyed to the Government of Alberta.

The panel will be managed in accordance with the agreement signed by FEARO and the NRCB, having regard for the general terms and conditions set out in the Subsidiary Agreement on Joint Review Panels that forms part of the *Canada-Alberta Agreement for Environmental Assessment Cooperation* signed on August 6, 1993. It will also meet the duties and responsibilities of a federal EARP panel.

REVIEW PROCESS

The Joint Review Panel is authorized pursuant to the *EARP Guidelines Order* and the *NRCB Act*. The main steps in the review process will be as follows:

- Public hearing conducted in accordance with the procedural requirements of the *NRCB Act*.
- Preparation by the panel of its final report and submission of this report to the Government of Alberta and to the federal Ministers of the Environment and Transport. The report will incorporate the panel's decisions on matters that fall within provincial jurisdiction in accordance with the provisions of the *NRCB Act* and will include recommendations on matters that fall within federal jurisdiction in accordance with the requirements of the *EARP Guidelines Order*.

APPENDIX C

SUMMARY OF COST AWARDS

INTERVENER	TOTAL REQUEST	BOARD RECOGNIZED	ADVANCE APPROVED
Willow Creek Irrigators Association	\$20,000	\$15,000	\$7,500
Area Land Owners Group	\$75,000	\$35,000	\$15,000
Pine Coulee Coalition**	\$38,600	\$1,500*	\$1,500*
Peigan Nation**	\$105,000	\$11,000	\$5,000
TOTALS	\$238,600	\$62,500	\$29,000

* Note: To be provided from Board funds.

**Have also applied to the Federal Participant Funding Program.