

EA0809-002 submitted by INAC
DM Nov 19/08

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P.O. Box 1500
Yellowknife, NT, X1A 2N1

March 15, 2004

Your file - Votre référence

Our file - Notre référence

Melody McLeod
Chair
Mackenzie Valley Land and Water Board
7th Floor - 4910 50th Avenue, Box 2130
Yellowknife, NT X1A 2P6

Mackenzie Valley Land
& Water Board

File

APR - 2 2004

Application # M2003F0028

Copied To PUT/SM/SB/leg-

Dear Ms. McLeod

Canadian Zinc Corporation Winter Road Application M2003F0028

Further to your letter dated February 2, 2004, this will confirm that my Department does not have a position to put forth regarding the applicability of Section 157.1 of the MVRMA to this particular Land Use Application.

However, we have reviewed the package of information you forwarded to us, and we wish to correct the record regarding previous permits for the winter road.

Comments on Mr. Donihee's letter dated October 13, 2003

In the Chronology of ownership and permit events section starting on Page 4, Mr. Donihee indicates the mine was tied up in litigation until 1991, when San Andreas Resources Corporation acquired an interest in the mine, then states in 1999 San Andreas changed their name to Canadian Zinc Corporation. While these facts are correct, Mr. Donihee did not indicate that San Andreas held a land use permit on a portion of the Road in 1995 under Land Use Permit N95F346. Later in his letter, Mr Donihee indicates the road had not been permitted in over 20 years, which is incorrect based on the above.

Comments on the MVLWB's staff findings provided to John Donihee

As stated above, the chronology does not show the permit's that were issued in 1995 for mineral exploration and the road, although, later on in the staff findings, they do acknowledge that San Andreas Resource Corporation did have a completely new land use permit to access the minesite separate from the original land use permit issued to Cadillac Explorations.

...2

Comments on the Deh Cho First Nations letter dated December 12, 2003 to the MVLWB

Under the heading "New Undertaking" the DCFN indicates that 'DIAND took fiscal and legal responsibility for the clean-up of fuel along the road, there is further evidence that CZN had no ownership or legal responsibility of the roadside physical assets formerly owned by Cadillac Explorations Ltd.'. This statement is incorrect. CZN did in fact accept responsibility for the fuel at this location, as they applied for a land use permit in 2001 to clean up the site. The Land Use Application, made to the MVLWB was referred for an EA to the MVEIRB. Further, DIAND did not take legal responsibility for the clean up of the fuel. As the Land Manager, we were ordered to clean up the fuel by Environment Canada after they conducted an inspection at the site. DIAND complied with the order given to it. Had the order not been issued, CZN had an application before the Board to clean up the site.

Under the heading "Summary", the DCFN notes that: "... Deh Cho First Nations have also withdrawn the surface of the proposed winter road by an Order in Council..." We wish to point out that even though the lands are withdrawn from disposal, a Land Use Permit is not a disposal. It is a licence for temporary use of the land, and can be issued on lands that are withdrawn from disposal by Order in Council. DIAND cannot dispose of the land by way of lease, or other tenure that would give exclusive possession of the property to another party, however, your Board can issue land use permits on such lands.

Comments on Parks Canada's submission dated December 12, 2003

Parks in their submission states: "Also, Canada and Deh Cho First Nations have agreed to withdraw 18,800 sq. km. within the South Nahanni Watershed for five years. Within those lands and within the Greater Nahanni Ecosystem, Parks Canada and Deh Cho First Nations will conduct a three-year study to identify potential lands for addition to Nahanni National Park Reserve." We wish to point out that the withdrawal order in council was passed to facilitate land selections to settle the Deh Cho First Nation's Land Claim. The Order was not passed to withdraw lands for future Park consideration.

Parks Canada also implies that because the lands are withdrawn from disposal, a land use permit may not be issued on them. As indicated above, that is not the case.

In Parks Canada's Reasons for Position, they state facts, which includes a statement: "Consequently, there has been no land use permit for the road for over 20 years. This is further evidenced in the clean-up of the Cat Camp fuel cache recently ordered by the Department of Environment. The Department of Indian and Northern Affairs assumed responsibility for the clean-up of the fuel cache and paid for associated expenses.

This demonstrates that Canadian Zinc Corporation considers that it no longer has rights or obligations regarding the winter road, its assets and the associated environmental problems. In fact, all permits to date, including the permit and licence recently issued for the pilot plant, describe the undertaking as one without a road....” As stated earlier, there was a Land Use Permit on a portion of the Road in 1995, so the statement there have been no permits in 20 years on the road is incorrect.

As well, as stated previously, DIAND did not assume responsibility for the clean-up of the Cat Camp fuel cache. DIAND was ordered, as the Land Manager, to clean up the fuel cache, by Environment Canada, and did so in compliance with that order. The statement that Canadian Zinc Corporation considers that it no longer has rights or obligations regarding the winter road are also incorrect, based on their applying for a land use permit in 2001 to clean up the site. The fact that they applied for the permit, implies they may have felt, or did feel they had an obligation and responsibility to clean up the site.

In Item #5 of Parks Canada’s Reasons for Position, they indicate that San Andreas inquired into an environmental assessment process, however, did not pursue the project any further. Our research into this indicates that Land Use Permit N95F373 for a portion of the Winter Road was screened in early March 1995 as a Level 1 Screening pursuant to CEAA, and it was determined by that screening that the project could proceed as it was not likely to cause significant adverse effects pursuant to CEAA s. 20(1)(a).

Further, a letter was forwarded to San Andreas in April 1995 authorizing their diamond drilling in the Prairie Creek Mine area, which stated as a result of the environmental screening, it was determined any potential adverse effects were mitigable with known technologies and were not considered significant.

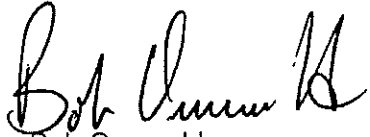
Parks Canada goes on later to state that Canadian Zinc does not have any 'existing rights' or a 'vested interest' in the 1980 winter road since it does not currently hold a permit for use of those lands as a winter road. We wish to clarify that there does not need to be a right along the winter road route to use it. The right must exist at the end of the road, which it does. Canadian Zinc holds the Mineral rights at Prairie Creek, which gives them the 'right' to apply for access to those minerals.

Comments on the Liddlii Kue First Nation letter dated December 15, 2003

The LKFN indicates there was non-compliance with the original land use permit N80F249. We do not feel this statement is correct, as the Company that held the permit went into bankruptcy, therefore, no party was left to comply with the conditions of that permit. If the Company had not filed for bankruptcy, they might well have complied with all conditions of the permit issued to them. Bankruptcy is not reason enough to determine whether or not the permit was complied with.

We trust the comments provided above will help the Board in reaching its determination on the matter before it.

Yours truly,

A handwritten signature in cursive script, appearing to read "Bob Overvold".

Bob Overvold
Director General,
Northwest Territories Region

Enclosures

Accessed
by RB
Nov 10 08



Mackenzie Valley Land and Water Board
7th Floor - 4910 50th Avenue • P.O. Box 2130
YELLOWKNIFE, NT X1A 2P6
Phone (867) 669-0506 • FAX (867) 873-6610

~~(S)~~ (d)

June 1, 2004

File: MV2003F0028

Mr. Alan Taylor
Vice President Exploration
Canadian Zinc Corporation
Suite 1202-700
West Pender Street
VANCOUVER, BC V6C 1G8

Fax: (604) 688-2043

Dear Mr. Taylor:

**Winter Road - Prairie Creek Mine to the Liard Highway
Section 157.1 Written Hearing, Reasons for Decision**

Please find the attached Reasons for Decision of the Mackenzie Valley Land and Water Board in the determination of whether a preliminary screening of Land Use Permit Application MV2003F0028 is required based on the legal application of Section 157.1 of the *Mackenzie Valley Resource Management Act*.

If you have any questions regarding this letter, contact me at (867) 669-0506 or email mvlwbpermit@mvlwb.com.

Yours sincerely,

A handwritten signature in black ink, appearing to read "S Mathyk", with a long horizontal flourish extending to the right.

Stephen Mathyk
Regulatory Officer

Attachment: Reasons for Decision – Legal Application of Sec. 157.1

Copied to: Parties to Section 24 Hearing
Robert Overvold, RDG – DIAND



Mackenzie Valley Land and Water Board
7th Floor - 4910 50th Avenue • P.O. Box 2130
YELLOWKNIFE, NT X1A 2P6
Phone (867) 669-0506 • FAX (867) 873-6610

IN THE MATTER OF: **An Application for Land Use Permit
MV2003F0028 for Operation, Maintenance and
Use of a Winter Road Alignment from the
Canadian Zinc Corporation Prairie Creek Mine
Site to the Liard Highway;**

AND IN THE MATTER OF: **A hearing pursuant to Section 24 of the
Mackenzie Valley Resource Management
Act.**

**REASONS FOR DECISION OF THE MACKENZIE VALLEY
LAND AND WATER BOARD**

Background:

On June 15, 2003, Canadian Zinc Corporation (the Applicant) applied to the Mackenzie Valley Land and Water Board (MVLWB or the Board) for a five year land use permit (MV2003F0028) pursuant to the *Mackenzie Valley Land Use Regulations* (MVLUR) for a winter road to connect its Prairie Creek Mine Site (the Mine) with the Liard Highway near Lindberg's Landing, just east of the Blackstone River in the Northwest Territories. The application indicated that repair of the all weather portion of the existing alignment would take place between August and September 2003 and that use of the winter road would thereafter take place between December 15 and March 31 of each year.

The letter of application indicated that in the Applicant's view, the application was exempt from environmental impact assessment under Part 5 of the *Mackenzie Valley Resource Management Act* (MVRMA) because of Section 157.1 of the MVRMA and the decision of the Northwest Territories Court of Appeal in *North American Tungsten v. Mackenzie Valley Land and Water Board*¹ (the Tungsten decision). The Applicant set out its views on the legal issues in a letter dated September 23, 2003.²

The MVLWB sought advice from counsel which was provided on October 13, 2003.³ The opinions from the Applicant's counsel and from Board counsel came to different conclusions. The Board decided to seek input from interested parties by way of a hearing called pursuant to Section 24 of the MVRMA. Submissions from interested parties were due December 12, 2003. The following parties participated:

¹ 2003, NWTCA 5.

² Letter from David H. Searle, C.M., Q.C. to Mr. John F. Kearney, of Canadian Zinc Corporation dated September 23, 2003.

³ Letter from Board Counsel John Donihee, October 13, 2003.

1. The Deh Cho First Nations;
2. The Parks Canada Agency;
3. The Lidlii Kue First Nation;
4. The Department of Fisheries and Oceans; and
5. The Canadian Parks and Wilderness Society (NWT Chapter).

No submission was received from the Department of Indian Affairs and Northern Development (DIAND). Consequently, in early February, the Board corresponded with that department seeking their assistance. On March 15, 2004, DIAND submitted a letter taking no position on the legal issues but which clarified certain of the facts relied upon by various parties.

Having considered all the submissions made by the parties, the MVLWB has decided that the winter road application is subject to Part 5 of the MVRMA and that the exemption provided by Section 157.1 of the MVRMA does not apply in the case of land use permit application MV2003F0028. The Board's reasons are set out below.

The Facts:

The following chronology of the activity related to the Canadian Zinc winter road was prepared by Board staff, reviewed by the Board and amended based on the submissions of DIAND:

- The original application for land use was submitted to DIAND by Cadillac Explorations Ltd. (Cadillac) on March 8, 1980, under application number N80D249.
- Cadillac was granted a LUP on July 2, 1980, for a winter access route to the Prairie Creek mine site (Prairie Creek to Liard Highway NWT). The permit was approved for 1 year, commencing on July 2, 1980, and expiring July 1, 1981.
- On June 30, 1981, LUP N80D249 was extended to June 30, 1982.
- On June 1, 1982, the LUP was again extended to June 29, 1983.
- On May 31, 1983, Cadillac issued a Bankruptcy Notice. Cadillac had 60% interest in the Prairie Creek development at this time. The operation was taken over by Procan Explorations Company (They held the remaining interest in the mine).
- The original permit for the access road expired on June 29, 1983.

- On July 13, 1983, DIAND received a letter from Procan requesting the LUP be transferred to their name and the LUP be "renewed". There is no further correspondence in the file indicating that LUP N80D249 was ever transferred, renewed or extended past June 29, 1983.
- Some time in 1983 Nanisivik Mines bought the Prairie Creek Mine assets.
- Conwest acquired mine assets in 1990, with Strathcona Mineral Services Ltd. managing the site.
- The actual mine site was tied up in litigation until 1991.
- In 1991 San Andreas Resources Corporation acquired an interest in the mine site.
- In 1995, San Andreas held a land use permit N95F346 over a portion of the road and a separate permit N95C373 to conduct diamond drilling in the Prairie Creek mine site area of the NWT.
- In 1999, San Andreas changed its name to Canadian Zinc Corporation.
- On June 15, 2003, Canadian Zinc Corporation submitted an application to the Mackenzie Valley Land and Water Board for a Type "A" land use permit for a Winter Access Road Development in which they state that they have a legal opinion regarding Part 5 of the MVRMA.

The Application is for use of a winter road alignment that has not been used in entirety since the early 1980's. Portions of the road may have been used in support of the 1995 drilling operations but except for applications made by the Canadian Zinc, the Board finds that no use of the whole road has taken place.

The Authorities:

The MVRMA

157.1 Part 5 does not apply in respect of any licence, permit or other authorization related to an undertaking that is the subject of a licence or permit issued before June 22, 1984, except a licence, permit or other authorization for abandonment, decommissioning or other significant alteration of the project.

From section 111:

"development" means any undertaking, or any part of an undertaking, that is carried out on land or water and, except where the context otherwise indicates, wholly within the Mackenzie Valley, and includes measures carried out by a department or agency of government leading to the establishment of a park subject to the *Canada National Parks Act* and an acquisition of lands pursuant to the *Historic Sites and Monuments Act*.

The Tungsten Decision

The excerpts from the Court of Appeal's decision set out below and were referred to in the submission made by counsel for Canadian Zinc.⁴ Paragraph 37 from the Court's judgment is also included:⁵

[11] ... In essence, this comes down to whether Section 157.1 of the MVRMA grandfathers a licence issued prior to June 22, 1984 or an undertaking licensed prior to June 22, 1984

The Court of Appeal in paragraph 12 concluded:

"... that it is the latter", namely that it is the undertaking that is grandfathered, not a licence or a permit.

In coming to that conclusion, the Court of Appeal, in paragraphs 23 and 24 of the Tungsten decision reviewed the overall legislative scheme of the MVRMA and the comprehensive land claim agreements that resulted in the passage of the MVRMA and then it concluded in paragraph 27:

[27] These provisions (of the MVRMA) collectively reflect that Parliament did not intend to impose an entirely new environmental review process on every project in the Mackenzie Valley irrespective of the status of the project at the time the MVRMA came into effect. Instead, the MVRMA grandfathered certain projects and provided that others yet would be dealt with under prior applicable legislation. In interpreting Section 157.1, therefore, one must recognize that it is designed to grandfather certain undertakings which pre-date June 22, 1984. Accordingly, this section must be interpreted in a manner that best comports with its intended purpose".

Then in paragraphs 32 and 33 the Court of Appeal says that:

"The primary focus is on the undertaking itself". (emphasis added)

Those two paragraphs are particularly relevant here and are quoted in their entirety below:

[32] The specific wording of s.157.1 supports this interpretation. Under s.157.1, the primary focus is on the undertaking itself. To determine whether an application to renew a licence relating to that undertaking is exempt from the application of Part 5, one must first have regard to whether the undertaking meets the requirements of the section. To do so, the undertaking must be the subject of a licence or permit issued before June 22, 1984. These words modify the word "undertaking" and in this context, the key words are "the subject of". It is noteworthy that the MVRMA does not state that the undertaking must be subject to a licence issued prior to June 22, 1984, but merely that it be the subject of a licence issued prior to June 22, 1984. In other words, to fall within the scope of the exemption under s.157.1, one of the qualities or

⁴ Letter cited in foot note 2.

⁵ *North American Tungsten v. Mackenzie Valley Land and Water Board*, 2003 NTCA 5. Citations are to paragraph numbers in the case.

characteristics of the undertaking is that it must have had a licence issued as of June 22, 1984. Tungsten's undertaking did. (Underlining in the original decision)

[33] Further, under the grammatical and ordinary sense of the words used in s.157.1, there is no requirement that the undertaking be operating today under an original licence issued before June 22, 1984. Nor is there a need for the licence which is the subject matter of the renewal application to be the same licence issued before June 22, 1984. The French version of s.157.1 is consistent with this interpretation referring as it does to: "une activité par un permis délivré avant le 22 juin 1984". **To put it another way, the licence renewal application must relate to the same undertaking that was issued a licence before June 22, 1984.** (emphasis added)

In addition, the Court of Appeal decision commented on but did not decide the legal effect of the application of s.157.1 where the relationship or chain between the original licence and that being applied for in the instant case was broken:

[37] Accordingly, we have concluded that "an undertaking that is the subject of a licence or permit issued before June 22, 1984" means an undertaking in respect of which a licence or permit has been issued before June 22, 1984. **We do not find it necessary to determine whether the licence or permit issued before June 22, 1984 must have some relationship in terms of subject matter, substance and direct linkage to the licence in respect of which a renewal application has been filed. In this case, Tungsten's application for renewal of its water licence does and thus, we leave that issue for another day.** (emphasis added)

Analysis:

Counsel for the Applicant has pointed out that the circumstances associated with the transition from the Canada Tungsten Corporation to the North American Tungsten Corporation bear a similarity to those in this case and in the transition from Cadillac to Canadian Zinc Corporation. Paragraph 37 of the Court of Appeal's decision, however, indicates that the Court did not consider these matters in their North American Tungsten decision. Whether the circumstances are the same then is not helpful. The Board must consider the facts in this matter and apply them to s.157.1 and the Court of Appeal's decision to see if that case applies in the circumstances at hand. If there is no difference between these matters, the MVLWB is bound by the Court of Appeal decision.

The Board notes that all of the parties, with the exception of the company, made submissions which argued that the Application was subject to Part 5 of the MVRMA. Some of these submissions suggested, among other things, that the winter road was abandoned. With respect, the question of abandonment is not important unless the application made is to abandon the project.

More important to the exemption in s.157.1 is the question of whether the new permit will result in a significant alteration of the project. The Applicant suggests that a winter road is never abandoned, something which common

sense does not support. For example, vegetation cut to establish the original alignment could regenerate and eventually would choke the right of way. There are no facts to support a suggestion that the right of way for this road has regenerated in the 20 years since it has been used and the Board is aware that regeneration times in mountainous areas like the project site and road alignment are long. It is clear though, from the June 15, 2003 letter of application that "repair of the all weather portion of the road" and "maintenance ... of the winter road" will be necessary. The Applicant's evidence is however, that no significant alteration of the project is intended and the MVLWB accepts that assertion.

The more difficult question is one of mixed fact and law. What is the relationship between the "undertaking" that was the subject of the permit issued in 1982 and the "undertaking" now proposed by Canadian Zinc?

The use of the term "undertaking" in Section 111's definition of development seems unhelpful in these circumstances. Resort to cases defining the term indicates the following:

The term undertaking has been held time and again to mean more than just physical things. Some examples of judicial interpretation are cited below.

In the *Capital Cities*⁶ case the Supreme Court of Canada held, following an earlier decision of the Privy Council, that:

"Undertaking" is not a physical thing but is an arrangement under which of course physical things are used. Their Lordships have therefore no doubt that the undertaking of broadcasting is an undertaking "connecting the Province with other Provinces and extending beyond the limits of the Province."⁷ (emphasis added)

In *Capital Cities*, the Supreme Court cited other Supreme Court of Canada cases that had interpreted the meaning of undertaking. One such case referred to was the 1955 case of *Reference re Industrial Relations and Disputes Investigation Act*⁸ in which Kellock J. had given a "large meaning to the word" undertaking. One of the questions in that case was whether the stevedoring employees were employed "upon or in connection with the operation of the work, undertaking or business of the Company".

The Supreme Court in *Capital Cities* also cited the case of [*Ontario Attorney General*] v. *Winner*⁹ in which the word "undertaking" was used interchangeably with

⁶ *Capital Cities Communications Inc. v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609, 18 N.R. 181 Laskin, C.J. (Martland, Judson, Ritchie and Spence JJ. concurring citing *Regulation and Control of Radio Communication in Canada, Re*, [1932] 2 D.L.R. 81. [hereinafter *Capital Cities*])

⁷ *Regulation and Control of Radio Communication in Canada, Re*, [1932] 2 D.L.R. 81 at 86 (S.C.C.).

⁸ [1955] 3 D.L.R. 721 at pp. 748-9

⁹ [1954] 4 D.L.R. 657 at 672

the word "enterprise". As well, the Court equated the word "undertaking" with "organization" in the *Empress Hotel* case.¹⁰

The quote from *Radio Communications* that was adopted by the Supreme Court in *Capital Cities* has been applied in several contexts. For example, it was applied in the railway context in 1945 by Chief Justice Rinfret of the Supreme Court of Canada to mean that "undertaking" in the particular railway statute "comprises the whole works of the company".¹¹

Professor Peter Hogg has also considered the meaning of the word "undertaking" in his work on the *Constitutional Law of Canada*. Hogg discussed the term "undertaking" and said that it 'seems to be equivalent to "organization" or "enterprise"'.¹²

Later in the book Hogg stated: 'We have already noticed that there are dicta which distinguish between a "work" and an "undertaking" on the basis that a "work" is a tangible thing while an "undertaking" is an intangible "arrangement" or "organization" or "enterprise"'.¹³ Hogg's characterization of a work as tangible and an undertaking as intangible may help to characterize what is an undertaking before the MVLWB.

Hogg also cited Viscount Dunedin's definition of undertaking from *Capital Cities* as "not a physical thing, but an arrangement under which...physical things are used."

In conclusion, then, the Board is of the view that the term "undertaking" used in Section 157.1 of the MVRMA should be interpreted in a manner consistent with these authorities. The meaning of the word is broad. For purposes of 157.1 then, the undertaking referred to is more than the physical work or the winter road or the right of way which the company proposes to use again. The undertaking is the whole arrangement under which the physical thing (winter road right of way) is proposed to be used. It includes the whole enterprise proposed by Canadian Zinc.

Here, the Board notes several important facts. The original land use permit expired and was not renewed. The only connection between Cadillac's original use of the road and Canadian Zinc's undertaking seems to be the plan to use the same right of way. Although portions of that road near the mine may have been used in 1995 to support diamond drilling, the large majority of the road alignment has not been used since about 1983. Moreover, the Board notes that although the Applicant terms itself the "successor in title" this relationship to Cadillac's undertaking seems tenuous since the corporate antecedents of Canadian Zinc secured their interest in the mine by way of assets purchase. Canadian Zinc is a different corporate entity from the bankrupt Cadillac.

¹⁰ *C.P.R. v. A.-G. B.C. et al.* [1950] 1 D.L.R. 721.

¹¹ *Quebec Railway, Light and Power Co. v. Beauport (Town)*, [1945] S.C.R. 16 at 24, [1945] 1 D.L.R. 145, 57 C.R.T.C. 245.

¹² Hogg, p. 22-4 The

¹³ Hogg, p. 22-16.

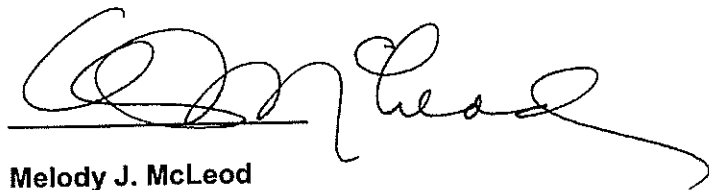
That the Applicant wants a permit to operate the same road is not compelling. The real issue is whether the application is for a permit related to the same undertaking that was in place before June 22, 1984. It seems to the MVLWB that there must be a positive connection between the two. If no such connection were required, any licence, permit or authorization issued before June 22, 1984, would be sufficient grounds for any subsequent unrelated activity at the same site to be exempted from the application of Part 5 of the MVRMA. The Board accepts Parliament's intention, as interpreted by the Court of Appeal, to ensure that activities permitted before June 22, 1984, for which there is sufficient continuity to continue without the need for preliminary screening, since such statutory requirements did not exist before 1984. The effect of this exemption can not be unbounded however. To qualify for the exemption in s.157.1, the undertaking must have a sufficient connection to the one that was there before 1984.

Having considered all the evidence, argument and the facts in this case, the Board is of the view that Canadian Zinc is involved in a different undertaking than that which was present before 1984. It is thus the Board's view that the Tungsten decision does not apply in this case and that Canadian Zinc is subject to Part 5 of the MVRMA.

Conclusion:

After considering all the submissions made, the MVLWB is of the view that Canadian Zinc's application for land use permit MV2003F0028 is not in respect of the undertaking originally permitted to Cadillac. Consequently, the Board has decided that Section 157.1 of the MVRMA does not provide an exemption from Part 5 of the Act and that the land use permit application is subject to preliminary screening.

SIGNED on behalf of the Mackenzie Valley Land and Water Board

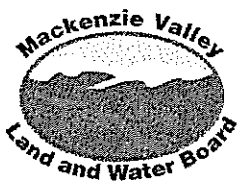


Melody J. McLeod
Chair

Copy to: Canadian Zinc Corporation
Parties to Section 24 Hearing
Bob Overvold, RDG DIAND

EA0809-002
DM

accessed by
Review Board
Nov 2008



Mackenzie Valley Land and Water Board
7th Floor - 4910 50th Avenue • P.O. Box 2130
YELLOWKNIFE, NT X1A 2P6
Phone (867) 669-0506 • FAX (867) 873-6610

REF

March 1, 2007

File: MV2003F0028

(F)
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Mr. Bob Bailey, Deputy Minister
Government of the Northwest Territories
Department of Environment and Natural Resources
P.O. BOX 1320
YELLOWKNIFE NT X1A 2L9

Fax: (867) 873-0638

Dear Mr. Bailey:

Land Use Permit MV2003F0028
Winter Road, Prairie Creek Mine to Liard Highway

The Mackenzie Valley Land and Water Board (MVLWB) met on February 28, 2007 to consider the Canadian Zinc Land Use Permit Application for the winter road. During the review of the information on the public record the Board noted that many concerns about wildlife have been expressed by reviewers in relation to this project. There has also been recent correspondence, notably the Indian and Northern Affairs report of consultation dated February 14, 2007 and a letter from Canadian Zinc dated February 22, 2007 that stress the importance of wildlife issues regarding this development. These documents are available on our website and have been forwarded to your staff.

The Board requests that the GNWT provide information on how these concerns regarding wildlife will be dealt with and has the following questions:

- Could a 'no-hunting' corridor be established for the winter road? If so, what would be the process and timeframe to establish such a corridor?
- What other strategies could the GNWT employ to mitigate potential impacts to wildlife along the winter road?
- Does the GNWT have any specific recommendations regarding protection of wildlife habitat that could be relevant in setting Land Use Permit Conditions?

The MVLWB has a Board meeting scheduled for March 15, 2007 and is hoping to re-consider this application at that time. If possible, please provide the requested information prior to the meeting or contact MVLWB staff if additional time is required.

If you have any questions please contact Peter Lennie-Misgeld, Senior Regulatory Officer at 669-0506 or email peter@mvlwb.com.

Yours sincerely

Willard Hagen
Interim Chair

Copied to: Distribution List - Attached
Alan Taylor, Canadian Zinc
Julie Jackson, INAC

EAO4609-003

DM

submitted originally
by CZN
Nov 3/08
as attached
to scoping
submission


Northwest Territories Environment and Natural Resources

MAR 21 2008

Mr. Williard Hagen
Interim Chair
Mackenzie Valley Land and Water Board
PO BOX 2130
YELLOWKNIFE NT X1A 2P6

(9)

Dear Mr. Hagen:

Land Use Permit MV2003F0028
Winter Road, Prairie Creek Mine to Liard Highway

The Department of Environment and Natural Resources (ENR) has reviewed your letter dated March 1, 2007, regarding questions on:

- 1) Could a "no-hunting" corridor be established for the winter road? If so, what would be the process and timeframe to establish such a corridor?
- 2) What other strategies could the Government of the Northwest Territories (GNWT) employ to mitigate potential impacts to wildlife along the winter road?
- 3) Does the GNWT have any specific recommendations regarding protection of wildlife habitat that could be relevant in setting Land Use Permit conditions?

ENR understands that Canadian Zinc Corporation (CZN) is reopening a previously permitted and used winter road corridor that underwent an environmental assessment in the early 1980s. After only two years of use, the road was closed but remains today, after 25 years, visible on the landscape predominantly covered with early successional species. Construction, use and restoration of the winter road will occur from December to March for the period of the license. A 37 kilometre segment of all-weather road will also be upgraded for use, predominantly in conjunction with the winter road season but possibly for other project related activities year-round, with rehabilitation occurring August to September.

Question 1

The GNWT has the ability to limit hunting along roads for two separate reasons. The first reason would arise from concerns over public safety. For example the no hunting corridor along the Ingraham Trail, which is established by GNWT's Department of Municipal and Community Affairs under the *Area Development Act*. As there is no human habitation along the proposed winter road, human safety is not believed to be the primary concern in this case.

.../2



The second reason is for wildlife management through section 18(2) of the *Northwest Territories Wildlife Act*, which provides for the designation of a portion of one or more wildlife management units as (f) a special management area. As such the GNWT through the *Wildlife Act* does have the legal authority to restrict hunting along roads for the purpose of wildlife management.

Special management areas are designated by regulation under the *Wildlife Act*. The creation of regulations for the *Wildlife Act* is a complex process and ENR would only begin this process, if a wildlife management concern was clearly identified. This concern could either come from technical staff within ENR or as a request from local communities. Due to the Interim Measures Agreement the process would require extensive consultation with the Dehcho First Nation and local communities.

Consultation on new regulations would require a minimum of three to four months, and possibly longer depending on the outcome of the discussions. The timeframe for writing the new regulations would be an additional three to four months. Thus the entire process would take six months to several years. It needs to be noted that depending on the issues raised in consultation the recommendation at the end of the consultation process could be to not create a special management zone.

Question 2 and 3

The winter road corridor is known to traverse habitats utilized by a number of wildlife species including caribou, moose, grizzly bear, black bear, wolverine, bison and Dall's sheep. The corridor also encompasses the transition from boreal woodland caribou habitat to mountain caribou habitat.

Wood bison, boreal and mountain caribou are listed under the federal *Species at Risk Act* whereas grizzly bear and wolverine are species listed by Committee On the Status Of Endangered Species In Canada, as requiring special management attention due to their vulnerability to disturbance and sensitivity to landscape change.

Roads, both all-weather and winter, have the potential to affect wildlife and wildlife habitat in the following ways:

- Direct mortality through vehicle collisions;
- Increased hunting pressure through facilitated access into the project area;
- Reduced habitat use in the zone of influence around the road because of vehicular traffic;
- Habitat fragmentation from the creation a linear corridor through previously contiguous habitat.

CZN, for the most part, recognizes these potential impacts and provides a number of mitigation strategies to address and reduce them to acceptable levels. These include:

- Implementing a Controlled Road Use Plan including appropriate speed limits and coordination of vehicle traffic on the road;
- Controlling access to the road (although it was not clear to whom access would be denied);
- Maintaining a record of all wildlife sightings on the road.

Along with the proposed “No Hunting Zone” addressed in question 1, these mitigations are a first step towards addressing the potential impacts to wildlife and wildlife habitat concerns that often result from road corridors. ENR would suggest that these measures be augmented in the ways outlined below to ensure that they are adequate for all wildlife species but also species at risk in particular and that these be developed in conjunction with our Dehcho Regional Biologist:

- CZN should include in their Controlled Road Use Plan:
 - A mechanism for truck and other vehicle operators to report to each other wildlife sightings so that vehicle speed can be sufficiently reduced and proper attention given to passing wildlife;
 - A protocol for operators to follow when wildlife is encountered that emphasizes that wildlife have the right-of-way and should be allowed free passage with minimal disturbance;
 - Management of the volume of traffic by considering the pulsing of traffic (i.e. having convoys) rather than a continuous disturbance from a stream of traffic.
- Along with a record of all wildlife sightings along the road, observations should be noted on wildlife response to the traffic and Global Positioning System location should be included where possible.
- As upgrading of the all-weather road will occur in late summer/early fall, disturbance of wildlife, mountain caribou and Dall’s sheep are perhaps of most concern. A reconnaissance of the area should be undertaken prior to activities commencing. In the event that animals move into the area, activities should stop temporarily to allow free passage and minimal disturbance of wildlife.

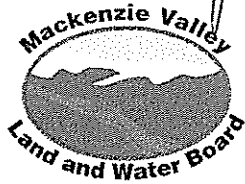
Lastly, ENR strongly urges CZN to commence baseline wildlife studies along the road corridor and other project areas to support future development activities at this site. This type of work would greatly enhance the understanding of wildlife activities in the area and how it has changed from when initial studies were undertaken in the early 1980s.

-4-

Should you have any questions regarding the above, please contact Mr. Jason McNeill at 920-8071.

Sincerely,


R.P. Bailey
Deputy Minister



Mackenzie Valley Land and Water Board
7th Floor - 4910 50th Avenue • P.O. Box 2130
YELLOWKNIFE, NT X1A 2P6
Phone (867) 669-0506 • FAX (867) 873-6610

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April 24, 2007

File: MV2003F0028

(i)

Mr. Alan Taylor
COO and VP Exploration
Canadian Zinc Corporation
Suite 1760-650 West Georgia Street
VANCOUVER BC V6B 4N9

Fax (604) 688-2001

Dear Mr. Taylor:

RE: Reasons for Decision

The Mackenzie Valley Land and Water Board (the Board) issued Land Use Permit MV2003F0028 on April 11, 2007. The Board indicated at that time that separate Reasons for Decision would be issued and they are enclosed with this letter.

If you have any questions please contact Peter Lennie-Misgeld, Senior Regulatory Officer at 669-0506 or email peter@mvlwb.com.

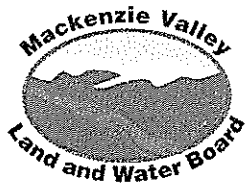
Yours sincerely,

A handwritten signature in cursive script that reads "Wanda Anderson".

Wanda Anderson
Acting Executive Director

Attachments

Copied to: Distribution List



Mackenzie Valley Land and Water Board
7th Floor - 4910 50th Avenue • P.O. Box 2130
YELLOWKNIFE, NT X1A 2P6
Phone (867) 669-0506 • FAX (867) 873-6610

IN THE MATTER OF: **An Application by Canadian Zinc Corporation
for Land Use Permit MV2003F0028 for the
Operation, Maintenance and Use of a Winter
Road from the Canadian Zinc Corporation
Prairie Creek Mine Site to the Liard Highway.**

**REASONS FOR DECISION OF THE MACKENZIE VALLEY
LAND AND WATER BOARD**

Background:

On June 15, 2003, Canadian Zinc Corporation ('the Applicant') applied to the Mackenzie Valley Land and Water Board (MVLWB or the Board) for a five year land use permit (MV2003F0028) pursuant to the *Mackenzie Valley Land Use Regulations* (MVLUR) for a winter road to connect its Prairie Creek Mine Site (the Mine) with the Liard Highway near Lindberg's Landing, just east of the Blackstone River in the Northwest Territories. The application indicated that repair of the all weather portion of the existing alignment would take place between August and September 2003 and that use of the winter road would thereafter take place between December 15th and March 31st of each year.

The letter of application indicated that in the Applicant's view, the application was exempt from environmental impact assessment under Part 5 of the *Mackenzie Valley Resource Management Act* (MVRMA) because of Section 157.1 of the MVRMA and the decision of the Northwest Territories Court of Appeal in *North American Tungsten v. Mackenzie Valley Land and Water Board*.¹ The Applicant set out its views on the legal issues in a letter dated September 23, 2003.²

The Board decided to seek input on the environmental assessment exemption question from interested parties by way of a hearing called pursuant to Section 24 of the MVRMA.

¹ 2003, NWTCA 5.

² Letter from David H. Searle, C.M., Q.C. to Mr. John F. Kearney, of Canadian Zinc Corporation dated September 23, 2003.

Submissions from interested parties were received December 12, 2003. The following parties participated:

- Dehcho First Nations;
- Parks Canada Agency;
- Liidlii Kue First Nation;
- Department of Fisheries and Oceans; and
- Canadian Parks and Wilderness Society (NWT Chapter).

No submission was received from the Department of Indian Affairs and Northern Development (DIAND). Consequently, in early February, the Board corresponded with that department seeking their assistance. On March 15, 2004, DIAND submitted a letter which took no position on the legal issues but which clarified some of the facts relied upon by various parties.

On April 15, 2004 the Board met to consider the submissions from the written hearing as well as DIAND's clarification. The Board determined that the winter road application was subject to Part 5 of the MVRMA and that the exemption provided by Section 157.1 of the MVRMA did not apply to land use permit application MV2003F0028. Reasons for that decision were issued at the time.

On June 30, 2004 the Applicant filed an application for judicial review challenging the Board's decision that Land Use Permit MV2003F0028 was subject to Part 5 of the MVRMA and not exempt from preliminary screening. The judicial review was heard in Northwest Territories Supreme Court on December 6, 2004. Reasons for Judgement were released by the Honorable Justice V. A. Schuler on May 6, 2005. The application for judicial review was granted and the Court quashed the Board's decision to apply Part 5 of the MVRMA to the land use application.

On June 3, 2005 Chief Eric Betsaka of the Nahanni Butte Dene Band (NBDB) advised the Board that the issuance of a Land Use Permit based upon application MV2003F0028 would result in a serious infringement of the aboriginal and treaty rights of the NBDB which are protected by section 35 of the *Constitution Act, 1982*.

The Board made DIAND aware of these issues in a letter dated June 23, 2005. In response, DIAND stated they would begin an investigation of the alleged infringements and that this would take some time to complete. The Board then halted the permitting process so that DIAND could provide advice on the outcome of their consultation efforts.

The Board determined that it could not proceed with the application until DIAND had completed its consultation investigations. However, based on the comments the Board had received at that time, draft Land Use Permit terms and conditions were prepared and sent out to interested parties on June 27, 2005 for review with an extension granted to August 5, 2005.

The Board received comments on the draft permit from the following parties;

- Dehcho First Nations;
- Parks Canada Agency;
- Liidlii Kue First Nation;
- Department of Fisheries and Oceans;
- Canadian Parks and Wilderness Society (NWT Chapter);
- Department of Indian and Northern Affairs (DIAND);
- Government of the Northwest Territories (GNWT);
- Dene Nation;
- Environment Canada; and
- Nahanni Butte Dene Band (NBDB).

On August 3, 2005 Chief Eric Betsaka submitted further comments which reinforced his assertion that the issuance of Land Use Permit MV2003F0028 would result in a serious infringement of NBDB's aboriginal and treaty rights. The NBDB also requested that the Board stop the process for solicitation of Land Use Permit terms and conditions until the NBDB had been consulted by the Crown and their interests accommodated.

On February 14, 2007 the Board received DIAND's consultation report regarding the application for the winter road. The letter of transmittal states that DIAND is of the view that the Crown consultation conducted is adequate in the circumstances and that the process of consultation and accommodation with the NBDB will be an ongoing process. The Board reviewed DIAND's consultation report and determined that in combination with the other information on the public registry it had the necessary information to make a decision on the Land Use Permit application.

The DIAND report highlighted the following concerns expressed by NBDB:

- Increased access into the area and increased hunting pressure;
- Area is ecologically sensitive and important for wildlife and community traditional land use;
- Construction and rehabilitation required to use the road will result in detrimental impacts to wildlife, land, waters and traditional land use and occupancy;
- Compensation for trappers;
- Cyanide removal; and
- Development of terms and conditions should be through a process of consultation and accommodation.

DIAND recommended that the MVLWB impose strict LUP conditions on this project and highlighted the fact that the lower portion of the road is an area of intensive traditional use and occupancy. DIAND also recommended that conditions be included for the protection of wildlife habitat in the area, especially moose and fur-bearers.

DIAND stated that the NBDB is very concerned about increased access into the area via the winter road corridor. Restriction of road access could be an effective measure to minimize impacts to wildlife and to the NBDB that might result from increased access to the area. However, the Board does not have the authority to restrict road access under Land Use Permit terms and conditions as outlined under the MVLUR and consequently has not included such conditions in the Land Use Permit. The Board notes that the Applicant has committed to implementing a manned check-point on the road at a location satisfactory to both the NBDB and the Applicant to monitor winter road access. The Board expects the Applicant to implement this commitment.

The GNWT submitted comments regarding Land Use Permit terms and conditions but provided no specific information to assist the Board in setting conditions for the protection of wildlife habitat. On February 28, 2007 the Board met to review the application, the DIAND consultation report as well as reviewer comments and recommendations for Land Use Permit conditions. At that time, the Board requested additional information from both the Applicant and the Government of the Northwest Territories. More specifically, the Board requested that the GNWT provide the following information:

- Could a 'no-hunting' corridor be established for the winter road? If so, what would be the process and timeframe to establish such a corridor?
- What other strategies could the GNWT employ to mitigate potential impacts to wildlife along the winter road?
- Does the GNWT have any specific recommendations regarding protection of wildlife habitat that could be relevant in setting Land Use Permit Conditions?

The GNWT responded to the Board's request on March 21, 2007. The letter submitted by the GNWT stated that the process for establishment of a 'no-hunting' zone is a complex and intensive process that could take months or years and that depending on the issues raised during consultations, still might not result in the creation of a 'no-hunting' corridor or special management area. While the Board believes that the creation of a special management area would address some of the concerns expressed by the NBDB, the timeline proposed to work through a process to establish a special management area along the road is too lengthy. Further delay in the issuance of this Land Use Permit to complete this work is not in the Board's view warranted. The Board strongly encourages the GNWT to work with the Applicant, DIAND and the NBDB to investigate options on how a special management area or 'no-hunting' corridor could be established along the winter road. Such a corridor could be implemented independent of the land use permitting process at a later date.

The GNWT provided further recommendations regarding implementation of a controlled road use plan, controlling access to the road and maintaining a record of all wildlife sightings along the road. The Land Use Permit conditions include a requirement for a Controlled Road Use Plan.

The GNWT highlights that winter road activities could disturb wildlife, specifically Dall sheep and Mountain caribou and that a reconnaissance of the area should be conducted before commencement of road operations. The GNWT also requests that the Applicant conduct wildlife baseline studies in the winter road corridor. These requests fall outside the scope of conditions that can be included in a Land Use Permit, but the Board encourages the Applicant and the GNWT to work together to ensure that wildlife issues are adequately addressed.

The Board notes the lack of specific wildlife habitat information that is currently available and due to this lack of information is unable to set specific terms and conditions for protection of specific wildlife habitats. However, the Board understands the importance of wildlife habitat protection in relation to this development and has required that the Applicant provide a Controlled Road Use Plan which will outline the methods and techniques to be used during operation of the road to minimize impacts to wildlife and wildlife habitat.

To further address potential impacts to wildlife, the Board has also included conditions in the Land Use Permit specifying that damage to wildlife and fisheries habitat should be minimized, water intakes should be screened to prevent entrainment of fish, activities should be minimized when Species and Risk are encountered and wildlife should not be harassed.

As a regulatory authority that is responsible for issuing Land Use Permits and Water Licenses, the Board does not have a role in determining compensation for trappers. The Board hopes that the Applicant and NBDB can work together to ensure that impacts to trappers are minimal and that any compensation claims are addressed in good faith. The Board has required the Applicant to give notice to the NBDB before it initiates construction or operation of the road so that the Band can notify trappers in the community of the activity.

The Board understands that the NBDB and other reviewers are concerned about Cyanide removal from the Prairie Creek mine site. To ensure that any Cyanide removal is conducted in a manner that is protective of the environment, the Board has included a Land Use Permit condition that requires the Applicant to submit an emergency and spill response plan to the Board for the removal of any hazardous materials from the Prairie Creek mine site. No removal of hazardous materials shall occur until the plan is approved by the Board.

On March 1, 2007 the Board also requested the Applicant to submit the following information:

- A detailed description of all work required to rehabilitate and construct the winter road in order to make the road operational, including but not limited to:
 - Methods to be utilized for construction and rehabilitation of the road, including specific areas where wash-outs or erosion has occurred and associated engineering design documents;

- Methods to be utilized for culvert upgrades and construction; including associated engineering design documents;
- Locations and aerial extent of all staging and lay-down areas to be used;
- Descriptions and locations of any quarry sites or other associated land use activities that may be required to assist in road rehabilitation.

The Applicant submitted the requested information to the Board on March 8, 2007. In the Board's view, the information submitted by the Applicant was helpful to clarify the scope of operations for the rehabilitation, construction and operation of the winter road. To ensure that Developer commitments are implemented, the Board has included a Land Use Permit condition stating that the Applicant shall adhere to all Developer and engineering commitments for rehabilitation, construction and operation of the winter road. Inclusion of this Land Use Permit condition gives assurance to the Board that winter road operations will adhere to applicable environmental and engineering standards.

It is the Board's expectation that appropriate Crown authorities will continue their efforts to address those recommendations in the DIAND report of consultation that fall outside of the Board's authority under the MVLURs. This ongoing effort should be of assistance in order to accommodate the NBDB's concerns.

Conclusion:

After considering all the information and submissions made, the Board has decided to issue a Land Use Permit to Canadian Zinc Corporation for a period of five (5) years.

SIGNED on behalf of the Mackenzie Valley Land and Water Board



April 20, 2007

**Willard Hagen
Interim Chair**