



Lutsel K'e Dene First Nation

Post Office Box 28
Lutsel K'e, Northwest Territories
X0E 1A0

Toll-Free: 1-866-219-9033
Fax: (867) 370-3010

September 17, 2012

Mackenzie Valley Environmental Impact Review Board
Gahcho Kue Environmental Impact Review Panel
c/o Mr. Chuck Hubert – Gahcho Kue Panel Manager
via email @ chubert@reviewboard.ca

RE: EIR0607-001 Public Hearing Locations.

Good Afternoon,

The Lutsel K'e Dene First Nation has received correspondence dated September 11, 2012 from the Gahcho Kue Panel Manager in regards to our August 31, 2012 request to hold the technical portion of the public hearing, scheduled for December 5 – 7, in Lutsel K'e. The Lutsel K'e Dene First Nation is dismayed that the panel has decided to ignore the substance of our request and have instead offered us a one day community hearing on December 3, 2012. While I thank you for your consideration, I must insist that the technical hearing portion of the final public hearing be held in the community of Lutsel K'e.

I understand that the Panel has some concerns about the ability of Lutsel K'e to accommodate the proponent, Panel, and various interveners were the technical hearing to occur in the community. I can again assure you that Lutsel K'e will be able to accommodate all participants. We have accommodated a similar contingent during the UR-Energy public hearing in 2007, and have accommodated larger groups during the various Akaitcho and Dene Nation assemblies that we have hosted.

The more important issue is one of procedural fairness. The Lutsel K'e Dene First Nation stands to be the party most impacted by the Gahcho Kue Diamond Mine. The Supreme Court of Canada has been clear that a party to an administrative decision must be given the ability to "present their case fully and fairly, and have decisions affecting their rights, interests or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional, and social context of the decision."¹ We believe that a high degree of procedural fairness is required in this matter. One of the central legislative purposes of this Board is to ensure, "that the concerns of aboriginal people... are taken into account". Further, the legislated principles of this Board emphasize, "the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the Constitution Act, 1982 applies and who use an area of the Mackenzie Valley." Given the disproportionate effect that the Gahcho Kue Mine will have on our community relative to others, a community hearing, which the Board's own Rules of Procedure define as an "informal hearing", is insufficient to provide us with an adequate voice in this process. An informal hearing will not allow us to present our case fully and fairly and in a manner appropriate to the statutory and social context of the Board's decisions.

¹ *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, at para. 22.

Moreover, we have had throughout this process, a legitimate expectation that some portion of the hearing would be conducted in the Lutsel K'e community. As we have noted previously, in past circumstances where Lutsel K'e was disproportionately affected by a project, specifically the Ur Energy project, the entirety of the Board's environmental assessment hearing was held in the community. We do not see why the present assessment warrants less involvement and input from the community. As the Supreme Court of Canada stated in the *Baker* case, "If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness."² Our legitimate expectation that the formal technical portions of the hearing would be held in Lutsel K'e were strengthened by the Board's own Rules which call for the encouragement of traditional knowledge, including oral history in the proceeding (Rules 32 and 33). The Board's decision to hold one day of informal hearing in the community does not encourage or provide adequate opportunity for our Elders to share their traditional knowledge or oral history with the Panel. It was our legitimate expectation based on these objectives of the Board's Rules that formal hearings would be held in the community.

Finally, s. 123.1 of the *Mackenzie Valley Land Management Act* authorizes this Board to carry out any consultations required by any land claims agreements or where there are impacts on people who use the land.³ To the extent that this Board will be carrying out the Crown's constitutional duty to consult, it is our respectful submission that one day of "informal hearing" is insufficient to discharge this duty and that holding the a formal hearing in the community will allow the entire community to be a part of the process and will greatly assist in fulfilling the duty. While ultimately the duty to consult belongs to the Crown, any delays in adequately fulfilling the duty at the environmental impact review stage will require further consultation prior to the project approval, which will only slow the progress of the project.

We look forward to hearing from you soon with a positive reply regarding our request to hold the technical portion of the final public hearing for EIR0607-001 in the community of Lutsel K'e.

Marsi Cho,



Chief Dora Enzoe
Lutsel K'e Dene First Nation

cc. Akaitcho Dene First Nations
DeBeers Canada Inc.
AANDC
CanNor

² *Baker*, para 26

³ *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43.