



Yellowknives Dene First Nation

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April 29th, 2011

Richard Edjericon
Chair, Mackenzie Valley Environmental Impact Review Board
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Dear Mr. Edjericon:

Re: EA0506-005 Reconsideration (CGV Drybones Bay)

The Yellowknives Dene First Nation (YKDFN) has reviewed the Minister's letter of April 13th, 2010 and asks the Board to reject the Minister's additional considerations. It is clear that the cumulative impacts from the existing level of development, plus the impacts associated with this program, in combination with the likely induced impacts from following programs, will result in significant and irreversible cultural and environmental changes to the Drybones Bay area. There are only two ways to avoid this result – strong Measures with real mitigation strategies or to reject the proposal, pursuant to paragraph 128(1)d of the *Mackenzie Valley Resource Management Act*. Given the time and effort invested to date, YKDFN prefer the former.

With this in mind YKDFN ask the Board to reject any proposed changes. The Minister's letter allows the Board to reconsider the file – but INAC's suggestions are simply not tenable.

- Minister is asking the Board to contravene its own decision
- Minister is asking the Board to breach the MVRMA
- The reconsideration does not account for the recent impacts from development(s)
- The Crown has routinely ignored the Board's Suggestions in past EA's. Action on these would likely have prevented the current situation.
- Minister has not engaged in Consultation with regards to accommodations of the ongoing and future infringements, should the proposed Measures be diluted.

Indeed, if the Board is going to reconsider the Measures, it seems clear to the YKDFN that, contrary to the Ministers position, the measures as written are not strong enough. We have seen what happens with development in the most critical portions of our territory. Despite all the assurances and strict measures, a development company was responsible for starting a large fire

in the most critical area in the Chief Drygeese Territory, burning one of the graveyards in this area. Recall the *Report of Environmental Assessment and Reasons for Decision on the New Shoshoni Ventures Preliminary Diamond Exploration in Drybones Bay* in which the Review Board concluded (EA03-004, p52):

“Any activity conducted in the vicinity of burial grounds could have significant adverse impact on the social and cultural environment. The effect of the development is not physical but represents a diminished value of sacred sites because the burial sites are viewed as sacred.”

These impacts are in addition to the cultural changes and pressures being placed on the users of Drybones Bay – pressures that were well explained during the hearing and the submissions. The simple recommendations from the first EAs in this area were insufficient to prevent significant impacts - there is no reason to think that they will in this case either. Meaningful Measures such as concluded by the Board in this case are the only hope to avoid further impacts.

INAC has not respected the intent and totality of the Board’s decision(s):

Beyond the legalities, the likelihood of impacts, and any other aspect of this file, we must take a step back and review how it is that the YKDFN and the Board are faced with the current situation. In the Board’s decision (p79) they clearly and definitively state:

“The Review Board has prescribed several measures, directed at both the developer and to government. These measures are intended to be taken as a suite. Collectively, these measures will avoid or reduce the otherwise significant impacts that would have occurred.”

The language and intent is clear. The reconsideration that the Minister proposes contravenes the concept that the Review Board advanced in the decision – the principle that these measures should be considered as a whole and only as such will they work to avoid or reduce the significant impacts that will result from this and other programs. The changes proposed would result in a much weaker and haphazard suite of mitigations that will not address the impacts that the Review Board believes will result. If the Review Board accepts the Minister’s changes and dilutes the Measures, then there can be no doubt that significant adverse impacts would result, requiring the Board to order an Environmental Impact Review or reject the proposal.

The Minister has effectively rejected measures 3-6, with the resulting implication that measures 1 and 2 will be sufficient to address the direct impacts caused by this project as well as the cumulative impacts caused in conjunction with other developments. To review, these Measures relate to the archaeological inspection of drill sites prior to disturbance and the avoidance of known heritage sites. The YKDFN are unclear on how these two limited measures will succeed in effectively mitigating the significant impacts to the cultural and environmental landscape.

The Minister advocates a course of action that is contrary to the purpose and intent of the MVRMA

The Minister's letter suggests that the Board reconsider some of the measures as they are "considered excessive for a proposed small-scale exploration program" or that they consider the proposed development of a "scale that warrants" anything beyond "project-specific measures directed to the developer".

The most fundamental objection that the YKDFN has with the Minister's direction is that it asks the Board to ignore the scope of impacts that must be considered during an environmental assessment. Paragraph 117(2)(a) of the MVRMA reads:

"the impact of the development on the environment, including the impact of malfunctions or accidents that may occur in connection with the development and any cumulative impact that is likely to result from the development in combination with other developments"

This project simply cannot be looked at in isolation, either procedurally or legally. Were the Board to follow the Minister's advice, they would be wilfully narrowing their scope and duties as mandated by the MVRMA. The Board's report clearly concludes that the cumulative nature of many small programs in a small but very important cultural and environmental area forms the foundation of the suggested Measures. This is not a single project being done on its own, rather this is just one of a series of projects that have been conducted (and continue to be) in the most significant area in the traditional territory of the Yellowknives Dene. The Review Board stated:

"Drybones Bay is a vitally important cultural and heritage site for YKDFN...It was the site of ongoing year round use by Aboriginal community, holds many burial sites and archaeological sites, and is used extensively today for hunting, trapping and providing youth with cultural exposure to traditional activities and the land."
(EA03-002)

The measures (3, 4) in the Board's report that seem to cause the most concern to the Minister(s) are not new issues. They have been mentioned in no less than three other environmental assessments in this same area. However, they have never been acted upon. The need for Land Use Planning was a suggestion in the EA03-002 (CGV Suggestion 5), EA03-003 (NAGR Suggestion 5), and EA03-006 (SDC Suggestion 4); while the heritage resource assessment discussed in measure 5 is found in EA03-002 (CGV Suggestion 6), EA03-003 (NAGR Suggestion 6), and EA03-006 (SDC Suggestion 5). It seems to the YKDFN that the real objection that the Minister has is that the Crown can't simply ignore the binding measures this EA decision contains as it has in previous cases.

If the regulatory process is going to meaningfully address the concerns of the resident of the Mackenzie valley, then it must have real results – the environmental assessment process must be more than just be an opportunity for Parties to blow off steam. *If* the Board changes these

measures to something less significant or less enforceable, then we should be clear on the result – they will be worth little more than the paper they are written on. If this process is not authentic, then it breaches the general provisions *Part 5* of the *MVRMA*, especially paragraph *115* where the processes shall have regard to the protection of the environment and the social, cultural and economic well-being of the residents of the NWT. The Review Board must serve the interests of the residents of the Mackenzie Valley and binding the responsible authorities to the actualization of measures addresses these interests. If the environmental assessment process cannot result in conclusions which can be implemented to address these matters, then it is effectively empty and if that is the case.

In its 2007 decision on this EA, the Board recognized the “high importance” of the Drybones Bay area to aboriginal communities, with “extensive” historical and current use of the area, and the “critical” level of impacts as result of mineral exploration in the area. Even if the Board were inclined to accept the flawed characterization of this project as ‘lacking scale’, all Parties must understand that ‘small’ projects in significant areas can result in unacceptable levels of impacts. The Board itself has *de facto* acknowledged this in the New Shoshoni EA (EA003-004) in an adjacent part of Drybones Bay as well as in the Thelon Uranium EAs.

Given the acknowledged importance of this area to the Yellowknives Dene, any and all impacts in the area are significant. Thus the only question is: can they be mitigated? The Board has spoken on the significance of the area, while the YKDFN and subsequent events have shed a great deal of light on the likelihood of these impacts occurring – this is no longer a question of risk. The YKDFN remain steadfast in their position that in vitally critical areas, the impacts cannot be adequately mitigated, especially with dilution and/or wholesale rejection of Measures such as the Minister suggests.

Recent Impacts

Not only does INAC ignore the historical impacts and the ongoing impacts, but they also ignore the impacts associated with future developments in this area. The file currently before the Board is only one of many projects in this area. During this and the other Environmental Assessments in this area (EA03-002, EA03-003, EA03-004, EA03-006, EA0506-005, EA0506-006) the Elders and membership of the YKDFN warned the Board and the Parties that there would be impacts associated with these developments – it would simply could not be avoided. As the late elder Helen Tobie stated in the 2003 hearings, “You assure us that nothing will happen, but we’re not sure that’s going to happen”.

The Boards and the regulatory authorities ignored these warnings, allowing the projects to proceed. Within three (3) years these developments had resulted in a large forest fire had torn through the area and a large fuel spill that is looming. In 2007 a forest fire started as a result of a mineral exploration program (Territorial Court case T-1-CR-2008-000814). This fire burned

over a thousand acres, a cemetery and unknown cultural and heritage resources. The year previous, a large truck crashed through the ice (NWT Spill Report 06-093) with at least a thousand litres of fuel, oil and other lubricants. YKDFN have petitioned the Crown to address this issue, but it remains outstanding, a disaster waiting to happen when the fuel tanks rupture. These are not just simple impacts to the land they are only the most visible. The hidden and unquantifiable impacts reach much deeper – an excerpt from Patrick Charlo’s testimony captures this:

“My concern is, is that we are being forced away from our hunting grounds, the way we were taught to live, to raise our children, and how to live on the land. And I strongly believe that's quite an important thing for us, for us Dene. I got three (3) boys, which they travel on their own now, and I got a camp what my dad had set up, and he passed away back in 1996.

...

But back onto what -- onto yesterday – I mean, sorry, over the weekend, I'm teaching my grand-kids how to live on the land, the wife and I. And we travel those trails and when you guys say you guys are going to put in winter roads, it's almost like water splashing on my back. That -- the same thing happened in Drybones Bay. Cat trails all over the place. What does that create? That creates open roads for recreational riders. Those trails which have been opened up to everybody that's our traditional trails which has been taught to the younger generation, to generations, where we are here today”

In case there was some uncertainty, Mary Rose Sundberg:

“I feel like I've been closed in, pushed out of my traditional lands. Just the thought of someone out there digging into the land that you have respect for and take care of makes me really angry. What will our grand -- great grandchildren have to enjoy or to live on if developers keep tearing up the land that we survived on for many years.”

The presence of developments causes ripples through the cultural landscape that cannot be quantified. For example, the prospect of a looming fuel spill is a constant source of concern, routinely raised as meetings with Elders, leading to concerns with the health of the fish. The presence of a large burn has changed the land, meaning that Treaty activities cannot be practiced with any prospect of success. Empty rights provide no value.

Hunters and trappers have faced economic impacts as this once very productive area has been degraded, forcing trappers to travel further, into less suitable areas. Since 2003 there can be no doubt that the exercise and pursuit of cultural practices have become more difficult and that the YKDFN are slowly being pushed from their key lands. Family, educational and traditional activities are more difficult and the intense connection to the land is in peril because of a lack of action on the Crown and an open door policy for developers.

There is no prospect of these impacts subsiding as time moves forward. In the north, environmental impacts take generations before Nature reclaims them – and even were this so, industry continues to advance proposals in this area. Just this month, on April 19th, 2011, the Review Board issued letter of notification commencing EA1112-001 for another project in the Drybones Bay area. This will be the seventh (7) Environmental Assessment to take place in this critical area. Additionally, during November 2010 New Shoshoni (see EA03-004) once again contacted the YKDFN to “discuss the potential for exploration at Drybones Bay”.

Measures (Recommendations) vs. Suggestions

The YKDFN asserts that the Board’s Suggestions are not acted upon and have shown to be effectively meaningless. In the four previous EAs completed for the Drybones Area, the Board has made 20 Suggestions. Of those, not one has been fully and/or effectively implemented. While the YKDFN have not commenced a formal or exhaustive review of the recommendations issued by the Board over the years, it seems that the Recommendations (or Measures) are better implemented in terms of appearing in Permit Terms and Conditions from the Land and Water Board, but still have not been universally implemented. At this point YKDFN can only confirm that 14 of the 18 recommendations were fully addressed at the regulatory stage.

The Minister’s letter suggests that there will be some outside process to facilitate the development of land use planning in the area. While YKDFN accepts that eventually some sort of land use planning effort will be forthcoming, in the seven years since the Review Board first advanced this as a Recommendation in other Environmental Assessments in the area, there has been no mention of such an initiative by the federal government. When considering other land use planning initiatives and land withdrawals in the territory, it seems to YKDFN that the Federal Government currently has the land use it prefers – wide open for development, despite the sensitivity of the land, thus there is little reason for them to commence such an initiative.

Had the Responsible Ministers followed through on these recommendations and suggestions, many of the most contentious issues facing the regulatory process in the NWT, especially in the Yellowknives Dene’s traditional territory, would have much more clarity or have been resolved at this point. The inaction provides all the evidence that Parties should need – if the Crown truly sought a balanced and clear development scheme, they would have made moves towards achieving such an end.

The Review Board has stated its position, based on the clear conclusions and impacts that are mentioned in the Environmental Assessment report. Before considering any alteration to the measures, we hope the Board will once again review the significant impacts that they foresaw (Chapter 6). There will likely be some consideration from the Board to modify these measures and change them to suggestions. YKDFN just want to be clear in our opinion that if this is done, if these measures are watered down in such a way, then all Parties should be clear that they will never come into being and the significant impacts that they were originally designed to address

will not be effectively mitigated.

Consultation and Accommodation:

It seems clear that the only party who does not accept the critical nature of this land is INAC, who are charged with upholding the Treaty which ensures that First Nations can continue to lead their lives unaffected. The YKDFN has repeatedly tried to protect this critical area, efforts which the Crown has all but ignored. In reviewing the transcripts for the Drybones EAs, it becomes painfully clear how important this area is, but at no point has INAC moved to limit development or protect the First Nation's treaty rights.

The Crown and the courts have made it clear that the environmental assessment process is one of the mechanisms that First Nations can utilize to secure consultation. Consultation is more than just an opportunity to raise concerns – it must be meaningful. The actions involved in consultation are often referred to as a 'spectrum' with the level and consultative burden associated with serious concerns being more involved. In a situation such as this, with a First Nation's most important area being infringed upon, consultation involves accommodation. However, the Crown's lack of response and failure to accept even minimal accommodations to address the obvious needs that have been stated over and over again means that consultation is inadequate. It is somewhat ironic that the authority charged with ensuring that the obligations associated with the Constitutional duty is the one who is acting to undermine the processes that have occurred to date.

The courts have been clear that the Board is charged with assessing if consultation has been adequate. YKDFN are asking the Board to find that Crown consultation and accommodation to date has been inadequate relative to the level of infringement that is occurring. In its decision the Board has indicated that the impacts associated with this application extend beyond just the activities which will be covered under this land use permit. This is not a project being done in isolation. The Crown has made its position clear – that each program should be evaluated as though it is divorced from the surrounding environment. This is simplistic, intellectually bankrupt and fundamentally wrong. If the Board finds that consultative process has been insufficient, YKDFN suggests that it must create a situation where the failures can be remedied.

As Justice Phelan noted in *YKDFN vs Canada (North Arrow)*

"It is only the guidelines which give specifics on consultation and even those were not followed. It is not sufficient, even if it occurred in this case, to have a process, framework or some other system to facilitate negotiation. It is still necessary to evaluate the actual implementation and processes specific to the case. It is not sufficient to set up some form of elaborate system and then put it on auto-pilot and hope for success." [Bold Added]

YKDFN have participated in good faith with these permitting processes only to see their concerns effectively ignored by the Federal Government. Until such time that the failure to

dispense with these obligations is remedied, be it by implementing accommodation measures as a result of consultations to date or some other mechanism, to even consider the issuance of a decision or permit would be in clear contravention of case law, the *Constitution Act*, and the *MVRMA*.

Evidence

For the purposes of the 'desktop review' that the Board wishes to have for the new members of the Review Board to overcome their quorum issues, YKDFN wish to highlight some of the more important portions of evidence submitted to the registry for their immediate consideration.

- 1) EA0506-005 CGV Report of Environmental Assessment and Reasons for Decision – Especially Chapters 5-9. The many quotes from the YKDFN and the Board's conclusions are critical to understanding the issues of concern. As an example:

"What I really learned from it was that there was no possible way that I could convey to the Board, nor to anyone else, what the importance of the area was to the Yellowknives Dene First Nation... It was the most major area and the most important area to the Yellowknives Dene First Nation, from a spiritual standpoint, from a cultural standpoint and certainly from an archeological standpoint." (Greg Empson)

A great deal of the Review Board's decision making rationale is also explained:

"The Review Board finds that cultural impacts are being caused by the increasing number of developments, including the proposed project, in this important area, and that these cultural impacts are at a critical threshold. Unless certain actions are taken, this would result in a diminished cultural value of this particular area, which would be an unacceptable cumulative impact on Aboriginal land users."

"In the Review Board's process, the onus is on the developer to convince the Review Board that it will not cause significant adverse impacts."

"This proposed development in combination with all other past, present and reasonably foreseeable future activities in the Shoreline Zone would also cause cumulative impacts on the culture of Aboriginal land users. These potential impacts are caused mainly due to the location of the development in a culturally important setting, not due to the scale of activity proposed."

The Review Board has prescribed several measures, directed at both the developer and to government. These measures are intended to be taken as a suite. Collectively, these measures will avoid or reduce the otherwise significant impacts that would have occurred."

- 2) CGV 2007 hearing transcript

- a. In particular, but not limited to, we point to the testimony of the YKDFN Elders on Day 1, along with Dean Cluff's and Mr. Steve Ellis' testimony on Day 2. This will allow the Board to once again have an understanding of the nature of this

area, why this development is even being contemplated, and the critical fauna habitat that exist[ed] within Drybones Bay.

- 3) YKDFN Traditional Use Maps – YKDFN will confidentially submit maps showing the limited amount of TK/Land Use data that has been currently captured. As a warning, the available data is limited, there has been little opportunity or resources available to capture this information in a systematic and coherent manner. This is similar to a comment that was made during the hearing(s), in which the Prince of Wales noted that less than 1% of the heritage sites in the NWT were likely known.
- 4) 2004 Reports of Environmental Assessment for North American General Resources, Consolidated Goldwin Resources, New Shoshoni Ventures, and Snowfield Development Corp – In particular, we point out the impacts to the landscape and the recommendations and suggestions issued by the Board. It is worth considering which of these were ever carried out and if not, what lasting impacts have resulted.
- 5) 2004 Hearing Transcripts from the North American General Resources, Consolidated Goldwin Resources, New Shoshoni Ventures, and Snowfield Development Corp. hearings – the YKDFN elders and members raise many of the same issues in these hearings, but there is little mitigation that addresses their concerns.
- 6) YKDFN Review and Comments on the New Shoshoni Ventures, Consolidated Goldwin Resources, North American General Resources Developers Assessment Reports, September 2003 – A thorough consideration of the YKDFN view with respect to these early developments as well as an assessment of the proponents documents. Three examples, all directly applicable to this project:
 - a. The Yellowknives have consistently said the areas are part of a living history that contains a rich story of the historical and contemporary lives of the North and of Yellowknives Dene.
 - b. These initial findings are merely a preliminary quantification of the areas' [heritage] resources. There is still much work to do to ensure the lives and the stories of those that came before us are not lost. Development has already impacted these sites.
- 7) The Proponent does not understand that the entire Wool and Drybones Bay areas, and the island and land in between are vitally important to the identity of Yellowknives Dene. Any impact however small without the consent of Yellowknives Dene is a significant impact on the YKDFN as a uniquely identifiable culture, with defined cultural representation demonstrated at the Wool and Drybones Bay areas.
- 8) April 2003 Dettah Public Meeting – this outline contains a great deal of discussion on

how the people view the Drybones area and the significant concerns that exist and the lack of respect and understanding about the Dene's connection and reliance on the land. The unknown cumulative effects from all of the operations in the area are also a principal concern.

- 9) YKDFN's Request for Ruling, April 26th – If the Review Board intends to entertain changes to Measures, YKDFN wish to have a hearing so that new Board members can hear directly from the Elders.
- 10) This list should not be regarded as complete – it just includes some of the materials that YKDFN feel are the most important for anyone looking to understand the history of this assessment.

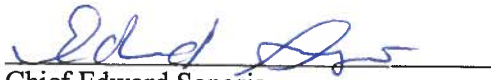
This list is obviously not the whole of the evidence YKDFN would like members to review. It is, in our opinion, functionally impossible for new members to understand the passion and importance of the elders and landusers without hearing them speak. This list should be the tip of the iceberg for those members who wish to understand just how the YKDFN use this area and how it is fundamental to the people and their culture.

Conclusion:

YKDFN have fully participated with these regulatory proceedings over the years, relaying the critical nature of Drybones Bay over and over. Yet we continue to face the same issues we faced at the beginning. This environmental assessment report was the first to implement anything beyond non-binding suggestions to the full scope of concerns raised by the First Nations. If these Measures are not in place, then clearly this project will be responsible for significant adverse environmental impacts. If the Review Board accepts the Ministers position, then this area, the most important area in the Chief Drygeese Territory, will be continuously degraded, both culturally and environmentally, because of the industrial pressures intruding and changing the land and the people's relationship with it, effectively alienating the land from the people who have depended on it for generations.

YKDFN ask the Review Board to hold to their original Measures. The conclusions are in the Board report and the mitigations that the Board imposed to address them are at risk. Add to these conclusions a very large fire and the potential of a medium sized fuel spill and anyone can see that this land has already been impacted too much. Complicating the healing of the land by allowing further additional developments puts the long term health of the land at risk, which is directly tied to the Yellowknives Dene. This area is too important and needs protection – and the YKDFN could not achieve this through their interim land withdrawal and INAC shows no inclination to do this through land use planning which means that the only way it can be done is through the Review Board. To put it plainly, there are some areas in the NWT that are not compatible with exploration and this is one of them. We hope that you agree.

Sincerely,



Chief Edward Sangris
Yellowknives Dene First Nation (Dettah)

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