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Via Email: vchristensen@reviewboard.ca

July 8, 2010

Mackenzie Valley Environmental Impact Review Board
200 Scotia Centre
Box 938, 5120 - 50th Ave
Yellowknife, NT X1A 2N7

Attention: Vern Christensen, Executive Director

Dear Sir:

**Re: Fortune Minerals Ltd. - NICO Project – EA0809-004
Submissions for Request for Ruling – May 28, 2010**

We are legal counsel for the Department of Indian Affairs and Northern Development ("DIAND") in this matter. We write to the Mackenzie Valley Environmental Impact Review Board ("Review Board") in response to the Tlicho Government's request for ruling as to whether the "Environmental Assessment is premature, and it will therefore be postponed and placed in abeyance until all essential components of the Proposal are included in applications accepted as completed by the [Wek'eezhii Land and Water Board]".

I. SUMMARY

The Tlicho Government submits that the environmental assessment should be placed in abeyance on the basis of two arguments. First, the Tlicho Government argues that the Terms of Reference set out a proposal for development that is inconsistent with the Tlicho Agreement and the provisions of the *Mackenzie Valley Resource Management Act* ("MVRMA"). Second, because the proposed access road to the proposed development is hypothetical and speculative, it cannot be scoped into the environmental assessment nor can it be properly assessed as required by the MVRMA.

We submit that although Fortune Minerals must reach an agreement with the Tlicho Government pursuant to the Tlicho Agreement with respect to the exercise of a right of access to their proposed development, the Tlicho Government cannot withhold this access until such time as they develop a land use plan. Consequently, we submit that

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the Review Board correctly scoped the proposed development for the purposes of s. 117 of the MVRMA. We further submit that the Review Board may either continue with the environmental assessment or, alternatively, suspend the environmental assessment until Fortune Minerals reaches an agreement with the Tlicho Government on access to its existing interests if this is deemed a more timely and expeditious process pursuant to s. 115 of the MVRMA.

II. SUBMISSION

1. Is the environmental assessment as proposed in the Terms of Reference inconsistent with the Tlicho Agreement and the provisions of the MVRMA and therefore outside of the Review Board's jurisdiction?

The Tlicho Government submits that until such time as its land use plan is completed, no development of any kind is permitted on Tlicho lands. This moratorium is to ensure the protection of the Tlicho's cultural, heritage and spiritual concerns and is given effect by the *Tlicho Lands Protection Law*, a copy of which is attached hereto.¹ As a result, the Tlicho Government submits that Fortune Minerals' proposal for development without an access road is not viable and the environmental assessment should be suspended.

a) Tlicho Lands

The Tlicho Government is vested with title to Tlicho lands as they are defined in Chapter 18 of the Tlicho Agreement. The Appendix to Chapter 18 sets out excluded parcels that do not form part of Tlicho lands as well as existing interests, which include mining claims and leases.

Holders of interests listed in the Appendix to Chapter 18 are granted an additional right of access over Tlicho lands to ensure that they can exercise their protected interest. Article 19.3.1 provides to the holder of one of these interests with "a right of access to Tlicho lands and waters overlying such lands to allow the exercise of [an] interest".

The right of access is not unlimited. Article 19.3.3 states:

Where the exercise of the right of access under 19.3.1 or 19.3.2 involves any activity of a type or in a location not authorized at the effective date, the exercise of that right of access is subject to the agreement of the Tlicho Government or, failing such agreement, to conditions established in accordance with chapter 6. Where the person with the right of access and the Tlicho Government do not reach agreement on conditions for the exercise of that right of access, the person with the right of access may refer the dispute for resolution in accordance with chapter 6, but may not exercise it until the dispute has been resolved.

Therefore, pursuant to Article 19.3.3, where the right of access differs or did not exist at the time the Tlicho Agreement was signed, an access right can only be exercised with the agreement of the Tlicho Government. If no agreement can be reached between the Tlicho Government and the holder of the right, the matter can be sent to dispute resolution pursuant to the terms of the Tlicho Agreement.

¹ The *Tlicho Lands Protection Law* was signed on August 4, 2005. We understand that it was renewed in November 2009.

b) Fortune Minerals' Right of Access

In the present circumstances, there is no dispute that Fortune Minerals' proposed mining operation as described in its land use permit and water licence applications is located wholly on parcels excluded from Tlicho lands or within an existing mining interest that is captured by the Appendix to Chapter 18 of the Tlicho Agreement. However, Fortune Minerals has indicated that for the effective operation of its proposed development, it requires the construction of an all-season industrial access road over Tlicho lands from the mine site to a realigned all-weather access road through the Wek'eezhii to be constructed by the Government of the Northwest Territories.

Because the proposed right of access is of a nature and in a location not authorized at the Tlicho Agreement's effective date, we agree with the Tlicho Government that Fortune Minerals cannot exercise the proposed right of access without their prior agreement. However, we submit that the Tlicho Government cannot withhold its agreement to Fortune Minerals' access to Tlicho lands on the basis of the *Tlicho Lands Protection Law* and because it has not yet developed a final land use plan.

We acknowledge that pursuant to Article 7.4.2, the Tlicho Government has the power to "enact laws in relation to the use, management, administration and protection of Tlicho lands and the renewable and non-renewable resources found thereon". However, as stated by Article 7.5.10(c), the Tlicho Government's law making powers do not include the power to enact laws:

preventing any person from exercising a right of access under Chapter 19 or imposing any conditions on the exercise of such rights, except conditions agreed to by government in accordance with 19.1.9, conditions allowed by 19.2.3, or conditions established in accordance with chapter 6 where that process is expressly provided for in chapter 19;

The *Tlicho Lands Protection Law* must therefore be read in light of Article 7.5.10(c) and in a manner which does not infringe Fortune Minerals' right of access to exercise their existing interest.

Furthermore, we submit that the Wek'eezhii Land and Water Board ("WLWB") did not err by not considering a potential conflict between an all-season weather road and a future land use plan. It is only upon approval of the land use plan that the WLWB must consider a proposed development's conformity with that plan. As Article 22.5.4 states:

Upon the approval of a land use plan applicable to any part of the Wek'eezhii, government, the Tlicho Government and the Tlicho community governments and their departments and agencies, including the Wek'eezhii Land and Water Board, shall exercise their powers in relation to Wek'eezhii in accordance with the plan. [our emphasis]

Similarly, s. 62(1) of the MVRMA states that the WLWB "may not issue, amend or renew a licence, permit or authorization except in accordance with any land use plan, established under a federal, territorial or Tlicho law, that is applicable to any part of its management area." DIAND submits that there is no authority which prevents the WLWB from issuing, amending or renewing a licence, permit or authorization prior to the approval of a land use plan.

Only once a Tlicho land use plan is in effect will applications for water licences and land use permits be subject to conformity checks through a land use planning board and recommendations provided to the WLWB with respect to acceptance. Indeed, s. 46 of the MVRMA recognizes the requirement to operate in accordance with a land use plan but does not extend that requirement to the Wek'eezhii in the absence of such a plan.²

c) Summary

We submit that in the absence of an established land use plan, the *Tlicho Lands Protection Law* does not prevent Fortune Minerals from exercising its right of access to its proposed development as captured by the Appendix to Chapter 18 of the Tlicho Agreement. Nonetheless, Fortune Minerals and the Tlicho Government must come to an agreement on the form and location of this right of access.

If the Tlicho Government and Fortune Minerals cannot reach an agreement, Article 19.3.3 of the Tlicho Agreement allows Fortune Minerals, as holder of the right of access, to refer the dispute for resolution, including via binding arbitration, pursuant to Chapter 6 of the Tlicho Agreement.

2. Is the scope of the development, as defined in the Terms of Reference, inconsistent with Part 5 of the MVRMA and therefore outside the mandate and jurisdiction of the Review Board?

a) Regulatory Applications

We submit that the regulatory applications and the environmental assessment to this point have conformed to the requirements of Part V the MVRMA. In our opinion, the applications submitted by Fortune Minerals for an operating mine qualify as a "development" pursuant to Part 5 of the MVRMA. Section 111 of the MVRMA defines a "development" in part, as "any undertaking, or any part or extension of an undertaking, that is carried out on land or water".

Fortune Minerals' applications describe the undertaking as the operation of a mine site with open pit and underground operations. The land use permit describes the mine as including "ore processing mill facilities, tailings and mine rock management areas, a camp, mine equipment maintenance building and site access roads and water intake facilities" located within the excluded claim boundary. It describes in essence, a fully operational mine. We submit that this clearly meets the definition of a "development" for the purposes of Part 5 of the MVRMA.

In addition, Fortune Minerals' application met the eligibility requirements for a land use permit. Pursuant to s. 18(a)(i) of the *Mackenzie Valley Land Use Regulations* ("MVLUR"), a person is eligible for a land use permit if they hold the right where "the proposed land-use operation is in the exercise of a right to search for, win or exploit minerals or natural resources".

² Section 46 of the MVRMA states: "The Gwich'in and Sahtu First Nations, departments and agencies of the federal and territorial governments, and every body having authority under any federal or territorial law to issue licences, permits or other authorizations relating to the use of land or waters or the deposit of waste, shall carry out their powers in accordance with the land use plan applicable in a settlement area."

The applications submitted by Fortune Minerals' describe a proposal for development that is located wholly within excluded parcels or existing interests described in Parts 1 and 2 to the Appendix to Chapter 18. Consequently, the application conformed to the MVLUR and the WLWB acted correctly in deeming Fortune Minerals' application for a land use permit as complete on January 30, 2009.

DIAND referred the applications to environmental assessment on February 27, 2009. DIAND did so because in their opinion, the project has the potential to have a significant adverse impact on the environment. Pursuant to s. 117(1) of the MVRMA, once a proposal for development is referred to environmental assessment, the Review Board is responsible for determining the scope of any proposed development undergoing an environmental assessment. The Review Board does not have to authority pursuant to the MVRMA to require a developer to reapply for new regulatory authorizations once the environmental process has commenced.

b) Scoping Decisions

We submit that the Review Board correctly scoped the development for EA0809-004 to include the use of the potential realignment of the winter road through the Wek'eezhii and all physical works and activities required to construct an access road to the mine site, including an access road bridge over the Marian River.

Section 117 of the MVRMA states that the Review Board shall determine the scope of the development "subject to any guidelines made pursuant to s. 120." Pursuant to this provision, the Review Board has issued its *Environmental Impact Assessment Guidelines*, March 2004. At p. 27 the Guidelines provide that "...the Review Board will consider what is the principal development, and what other physical works or activities are accessory to the development." On p. 28, the Guidelines state that:

Three criteria will be used to determine whether or not a physical work or activity is an accessory development, and therefore should be included in the development. The first test is dependence: that is, if the principal development could not proceed without the undertaking of another physical work or activity, then that work or activity is considered part of the scoped development. The second test is linkage: if a decision to undertake the principal development makes the decision to undertake another physical work inevitable, then the linked or interconnected physical work or activity will be considered part of the scoped development. The third test is proximity: if the same developer is undertaking two physical works or activities in the same area, then the two may be considered to form one development.

We submit, therefore, that the Review Board correctly identified Fortune Mineral's proposed mining operation as the principal development and that the proposed operation includes the access road and realigned winter road as an integral and necessary component of the proposed mining operation. Consequently, we submit that the Review Board properly scoped the proposed development, a decision which is accurately reflected in the Board's Terms of Reference and that the Review Board may continue with EA0809-004. We note that the Terms of Reference were issued on November 30, 2009 and that the Tlicho Government did not seek a review of the Review Board's decision at that time.

c) Current Environmental Assessment Process

We agree with the Tlicho Government that on the basis of the representations made by Fortune Minerals, an access agreement for an all-season road still needs to be reached with the Tlicho Government prior to the operation of the proposed development.

We also note that pursuant to s. 115 of the MVRMA, environmental assessments must "be carried out in a timely and expeditious manner". In the present circumstances, even if the Review Board continues with EA0809-004 and provides its assessment of the proposed development pursuant to s. 128 of the MVRMA, Fortune Minerals will be unable to proceed with its mining operation. As stated by Fortune Minerals in its letter to the Review Board dated May 13, 2009, the proposed mine cannot be constructed, operated and closed without the realignment of the winter road through the Wek'eezhii. In addition, Fortune Minerals acknowledges that without an all-season access road, an alternate season road would present "detrimental impacts to both capital and operating costs".

At this time, the Government of the Northwest Territories has provided no indication to the Review Board that it intends to commence the construction of a realigned road through the Wek'eezhii. Moreover, although we submit that the absence of a land use plan and the *Tlicho Lands Protection Law* do not restrict Fortune Minerals' right of access established by Article 19.3.3 of the Tlicho Agreement, any access is still subject to the agreement of the Tlicho Government, or failing agreement, conditions established pursuant to dispute resolution under Chapter 6 of the Tlicho Agreement. In addition, once Fortune Minerals and the Tlicho Government agree on the nature and location of the right of access, Fortune Minerals will most likely be required to submit a land use permit application for the access road to the WLWB for approval depending on the nature of that access.

We note that if the environmental assessment process is undertaken prior to the determination of Fortune Minerals' right of access to the proposed development either via an agreement or dispute resolution, the Review Board may recommend mitigation measures that will no longer be applicable or relevant once the proposed mining operation is constructed and operational. Furthermore, as the Tlicho Government correctly note, the location and form of the access road remain unknown at this time, limiting the ability of the Review Board to conduct a complete analysis of the proposed development's impacts on the environment.

d) Summary

We submit that the WLWB properly accepted Fortune Minerals' land use permit and water licence applications and that the Review Board has appropriately scoped in the use of the potential realignment of the winter road as well as all physical works and activities required to construct an access road to the mine site, including an access road bridge over the Marian River. Consequently, it is our opinion that the Review Board may continue with the environmental assessment of Fortune Minerals' proposal for development. Alternatively, the Review Board may suspend the environmental assessment until such time as Fortune Minerals reaches an agreement with the Tlicho Government on the nature and location of access roads.

We trust the foregoing submission is of assistance.

Yours truly,



Jason Steele
Legal Counsel

Encls.

TLĪCHQ GOVERNMENT

TLĪCHQ LANDS PROTECTION LAW

The Tłıchq Assembly enacted this law as part of the Tłıchq Omnibus Implementation Law on August 4, 2005 by unanimous consent.

Joe Rabesca, Grand Chief of the Tłıchq Government, signed the Tłıchq Omnibus Implementation Law on August 4, 2005.

Signature: Bertha Rabesca Zoe Date: Aug. 12/05
Certified as a True Copy by Bertha Rabesca Zoe as of August 4, 2005.
Laws Guardian, Tłıchq Government

DISPOSITION

DATE OF INTRODUCTION	CONSIDERATION	CONSENSUS	EFFECTIVE DATE
August 4, 2005	August 4, 2005	August 4, 2005	August 4, 2005

TEICHQ LANDS PROTECTION LAW

Title

1. This law shall be cited as the *Tetchq Lands Protection Law*.

Definitions

2. In this Law,

“applicant” means a person applying for a disposition under this Law.

“Assembly” has the same meaning as in the Tetchq Constitution.

“Chief’s Executive Council” has the same meaning as in the Tetchq Constitution.

“director” means the Director of Lands Protection.

“disposition” means a disposing of an interest in the Tetchq Land.

“Tetchq” has the same meaning as in the Tetchq Agreement.

“Tetchq Government” means the Tetchq Government and its institutions as defined in the Tetchq Constitution.

“Tetchq Lands” has the same meaning as in the Tetchq Agreement and is shown for illustrative purposes in schedule A.

Chief’s Executive Council

3. The Chief’s Executive Council is responsible for the management and protection of all Tetchq Lands and the interest of the Tetchq throughout Mqwhì Gogha Dè Ngà’èe.

This Law was signed by Grand Chief Joe Rabesca on August 4, 2005

Department of Lands Protection

4. There is hereby established a department to be known as the Tłchq Lands Protection Department.
5. A director of Lands Protection shall be appointed.

Disposition

6. (1) No person may acquire an interest in Tłchq Lands except under this Law.
- (2) No disposition of an interest in Tłchq Lands is binding on the Tłchq Government until the instrument of disposition is executed by the Chief's Executive Council.

Application

7. (1) Any person over the age of 19 or a corporation may apply in the prescribed form to the director for a disposition of Tłchq Lands.
- (2) The director shall maintain a register of applications made under this section.
- (3) No later than April 30, 2006, the Chief's Executive Council shall recommend to the Assembly regulations necessary to give effect to this law and provide for the management and protection of Tłchq Lands and the interests of the Tłchq throughout Mqwhì Gogha Dè Ntł'èe.
- (4) Prior to the regulations referred to in (3) being enacted, no disposition of an interest in Tłchq Lands shall be permitted unless expressly approved as an exceptional case by the Assembly.

Non-compliance

8. (1) If a person who holds a disposition under this law fails or neglects to comply with a term, covenant or stipulation set out in the instrument of disposition or imposed by the Chief's Executive Council pursuant to the disposition, the director may send a notice by registered mail, addressed to the person at their last known address, requiring the person to comply with the term, covenant or stipulation within 60 days after the date the notice is mailed.

(2) If the failure or neglect referred to in subsection (1) continues after the 60 day period, the Chief's Executive Council may, by order, cancel the disposition.

(3) If the Chief's Executive Council cancels a disposition under this section

- (a) the disposition holder's interest in the land and the interest of all persons claiming through that holder are terminated;
- (b) all improvements to the land become the property of the Tł̓ch̓q Government; and
- (c) any money paid for or under the terms of the disposition is forfeited to the Tł̓ch̓q Government.

Abandonment or termination

9. (1) A person holding a disposition under this law may abandon and terminate the disposition by giving written notice to the director.

(2) On abandonment and termination of a disposition under subsection (1)

- (a) all improvements to the land become the property of the Tł̓ch̓q Government; and
- (b) all money paid for or under the terms of the disposition is forfeited to the Tł̓ch̓q Government.

(3) Unless the Chief's Executive Council otherwise directs, the holder of a disposition that is cancelled or abandoned and terminated must pay all money remaining due under the disposition and observe or perform all terms, covenants and stipulations of the disposition.

Trespass on Tłchq Lands

10. (1) If a person commits a trespass on Tłchq Lands, the director may, on written notice to that person, do one or more of the following

- (a) require the person to cease the unauthorized trespass and restore the land to a condition satisfactory to the director;
- (b) require the person to pay to the Tłchq Government a sum of money, considered by the Chief's Executive Council reasonable for the unauthorized occupation, possession or use for the restoration of the land;
- (c) seize, on behalf of the Tłchq Government, any goods, chattels or other materials on Tłchq Lands; or
- (d) require the person to remove any improvements made by or on behalf of the person on Tłchq Lands and, if the person fails to comply within the required time, instruct the director to remove the improvements at the person's cost.

Offences

11. (1) A person, commits an offence who without lawful authority

- (a) occupies or possesses Tłchq Lands;
- (b) damages Tłchq Lands or improvements on Tłchq Lands;
- (c) harvests or damages forest resources, mineral resources, fish or wildlife on Tłchq Lands;
- (d) construct a building, structure, enclosure or other works on Tłchq Lands;
- (e) excavates Tłchq Lands;
- (f) throws, deposits, dumps or in any way causes to be

placed on Tłchq Lands any glass, metal, garbage, soil or other material;

- (g) abandons on Tłchq Lands any vehicle or vessel; or
- (h) interferes with or removes a sign erected by, on behalf of or with the authority of the Tłchq Government on Tłchq Lands.

Right of Entry

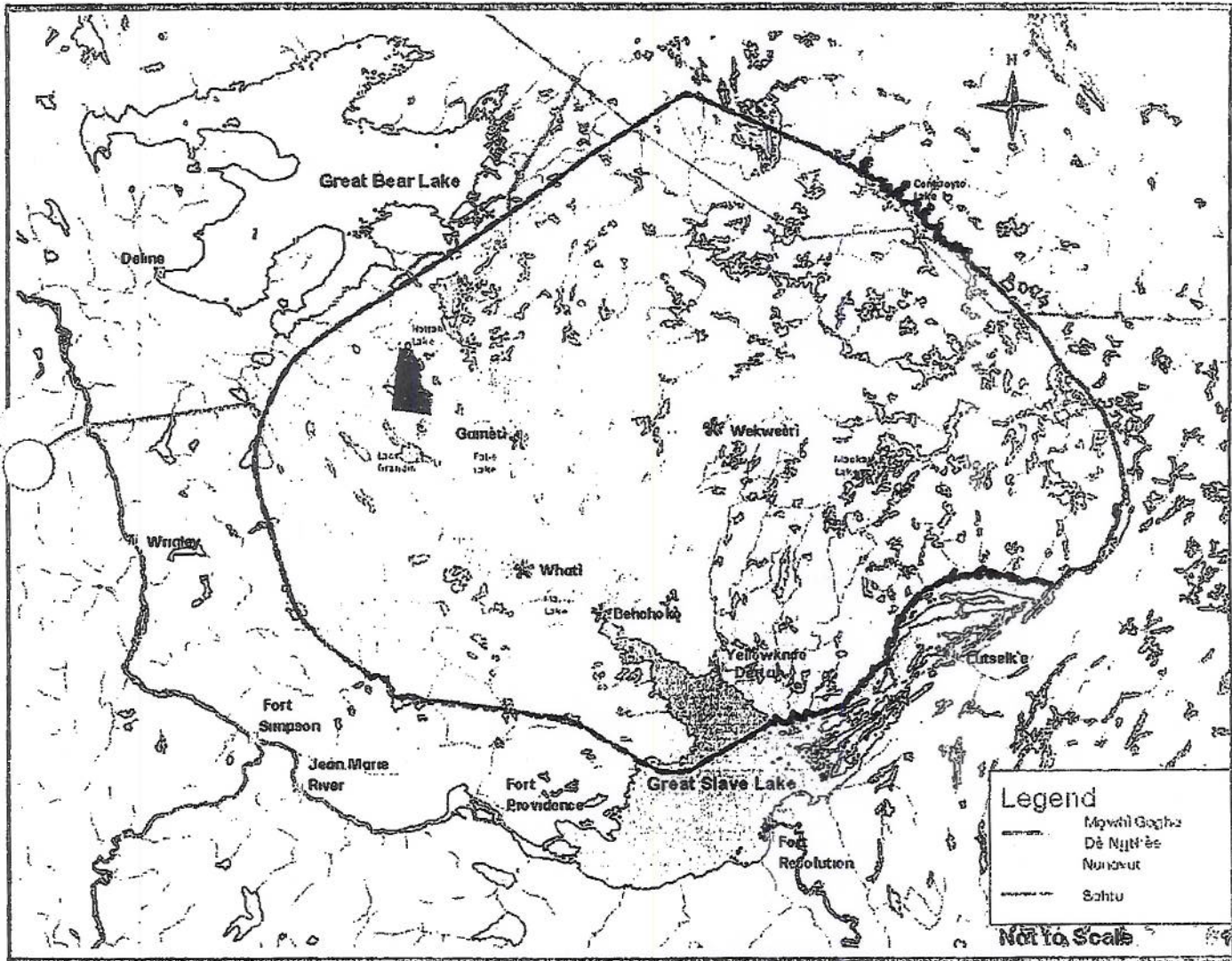
12. The director or his or her authorized representative may at any reasonable time enter any Tłchq Lands and premises to discharge any duty under this law.

Regulations

13. The Assembly may enact regulations for the carrying out of the purposes and provisions of this Law.

SCHEDULE A

MAP



Tłıchǫ Lands