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May 28, 2010

Mackenzie Valley Environmental Impact Review Board,  
200 Scotia Centre, P.O. Box 938,  
Yellowknife NT X1A 2N7  
**Attention: Vern Christensen, Executive Director**  
(by email: <[vchristensen@reviewboard.ca](mailto:vchristensen@reviewboard.ca)>)

Dear Sirs:

**Re Environmental Assessment EA 0809-004 – Respecting Fortune Minerals Limited’s proposed NICO Cobalt-Gold-Bismuth-Copper Project – Pursuant to *Mackenzie Valley Resource Management Act***

**Request for Ruling by the Tłı̄chô Government - that 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 complete by the WLWB.**

We are counsel for the Tłı̄chô Government, and have been instructed to submit this Request for Ruling to the Mackenzie Valley Environmental Impact Review Board (the “Review Board”) respecting the above-referenced environmental assessment (the “EA”) of Fortune’s proposed NICO Cobalt-Gold-Bismuth-Copper Project (the “Proposal”).

The Proposal is the subject of two applications (W2008L2-0004 and W2008D0016) submitted by Fortune Minerals Ltd. (“Fortune”) to the Wek’eezhii Land and Water Board (the “WLWB”), on November 12, 2008.

This Request for Ruling is made with reference to the Final Terms of Reference (“TOR”) set by the Review Board for EA 0809-004, respecting Fortune’s two applications. The TOR were released on November 30, 2009.

The Tłı̄chô Government requests that the Review Board schedule an oral hearing of this Request for Ruling, at a time and place to be determined by the Review Board, after written submissions have been received from interested parties.

**THE REQUESTED RULING:**

For the reasons explained below, the Tłı̄chô Government requests a Ruling from the Review Board that the EA is premature, and that it will therefore be postponed and placed in abeyance until all essential components of the Proposal are included in

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applications that have been accepted as complete by the WLWB, in order that Part 5 of the *MVRMA* can be properly applied to the Proposal.

It is acknowledged that it would have been more convenient for the Review Board, Fortune and other interested parties if this Request could have been submitted sooner.

The Tłı́chô Government has expended very substantial resources considering Fortune's proposal, including its applications to the WLWB and the referral to the Review Board.

After that referral, the Tłı́chô Government initially suggested that all road-related issues be excluded from the EA. The final TOR took a different approach. A great deal of Tłı́chô Government time was then spent considering the TOR, and whether the proposed EA could be effective.

In the end the practical problems of such an EA appeared impossible to overcome, and the Tłı́chô Government also concluded that the proposed EA raises serious jurisdictional issues, in light of the inconsistencies of the TOR with the Tłı́chô Agreement and Part 5 of the *MVRMA*. Hence this Request for Ruling.

**THE RELEVANT FACTS:**

Fortune's initial applications to the WLWB respecting its Proposal were made in 2007. Separate applications were filed for land use permits and water licenses for each of **three components** that Fortune said **would be required for its Proposal to be feasible** – the mine proper (W2007L2-0004), all-weather industrial access roads between the mine site and Hwy 3, as well as airstrips (W2007F0006), and construction and maintenance of a hydro transmission line (W2007I0007).

Fortune's Proposal is based on a mining lease for its claims block, which is on and also completely surrounded by Tłı́chô Lands. Under that lease, which came into force before the effective date of the Tłı́chô Agreement, Fortune has an interest provided for in 18.1.1 of the Tłı́chô Agreement and listed in part 2B of the appendix to Chapter 18.

Fortune acknowledges that its Proposal could not be viable or successful without the construction and operation of all-weather industrial access roads outside the area of its lease and across Tłı́chô Lands. But such roads would require the consent of the Tłı́chô Government, pursuant to 19.3 of the Tłı́chô Agreement, and Fortune has no such consent.

In response to its original applications, the Chair of the WLWB informed Fortune, by a letter of April 24, 2008, (enclosed,) that it was not eligible to apply for land use permits

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for activities that are to take place wholly on or partially within Tłı̄chô owned lands, without providing proof of a right of access to those lands.

Fortune had no such access right, and did not dispute the WLWB's decision.

Fortune then withdrew its applications. It subsequently re-configured them and submitted new applications on November 5, 2008. In those replacement applications (for Type A Water License and Type A Land Use Permit), Fortune applied only for authorizations for components of its Proposal that it could conduct within its claim block.

Instead of the original proposal for hydro-electric power, it now proposed using a diesel power plant to be located within the claim block. The proposed air strip was also moved to a new location within its claim block. And the all-weather industrial access roads and bridges that had been proposed for construction - **outside** the claim block and across Tłı̄chô Lands - were excluded altogether from the applications.

The WLWB accepted the new applications (for water license W2008L2-0004 and land use permit W2008D0016) as eligible and complete, since no components of the re-configured Proposal required an access agreement respecting Tłı̄chô Lands. These applications were then referred to the Review Board by Indian and Northern Affairs, Canada, and are the basis for the above-referenced EA.

The industrial access roads that are essential for a viable project have thus been effectively removed from the Proposal. The newly filed applications contain no substitute plan for transporting industrial materials, including machinery, fuel and ore, to or from Fortune's claim block.

It is now almost 18 months since Fortune re-configured its application. In that time, no proposal for industrial access roads across Tłı̄chô Land has been put forward by Fortune or any other party. Neither the Proponent nor any other party has commenced discussions with the Tłı̄chô Government respecting possible access agreements respecting such industrial access roads.

During the entire period, a development moratorium has been in place on Tłı̄chô Lands, pursuant to the Tłı̄chô Lands Protection Law, enacted August 4, 2005, pending the conclusion of the Tlı̄cho Land Use Plan and the development of resulting protective mechanisms and development standards.

The Tłı̄chô Land Use Planning process is currently underway. In that work to date, it is already clear that parts of Tłı̄chô Lands that would need to be crossed by industrial

access roads required for Fortune's Proposal would affect a number of areas of high environmental and cultural significance.

Therefore, although industrial access roads across Tłı̄ch̄o Lands continue to be essential components of Fortune's Proposal, and applications for the authority to construct and operate those would in turn first require access agreements from the Tłı̄ch̄o Government, for the reasons explained more fully below, it would be premature for the Tlı̄cho Government to entertain discussions in that respect at this time, in light of the current moratorium and the ongoing Land Use Planning process.

**GROUNDS FOR THE REQUESTED RULING:**

- The planned EA is fundamentally flawed, because of the way Fortune has framed its replacement applications for authorizations required under the *Mackenzie Valley Resource Management Act* (“MVRMA”).
- Fortune intentionally excluded two essential components of the Proposal from the revised Applications submitted to the Wek'eezhii Land and Water Board (“WLWB”), namely the industrial access roads without which the Proposal is not feasible. That was done in response to WLWB's decision that an application that included those aspects of the Proposal would not be accepted as complete until the proponent had secured the requisite access rights from Tłı̄ch̄o Government.
- As a result, the EA is premature, for two reasons.
- First, proceeding with the EA as proposed in the TOR would be inconsistent with the Tłı̄ch̄o Agreement and provisions of the *MVRMA*, and therefore outside the jurisdiction of the Review Board, for two reasons:
  - Because of the exclusion of the essential access roads from Fortune's applications, the Proposal as a whole is speculative or hypothetical. It is therefore not a “proposed development” within the contemplation of Part 5 of the *MVRMA*.
  - The TOR and the proposed EA ignore the fact that Fortune's Proposal could not be viable without industrial highway access across Tłı̄ch̄o Lands, and that authorizations to construct those could not even be applied for without an access agreement from Tłı̄ch̄o Government. Instead the TOR characterizes those roads as “anticipated” components of the Proposal, and “assumes” that they will be constructed and therefore can be considered in the EA. These assumptions are

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inconsistent with the Tłı̄ch̄o Agreement, because they ignore the Tłı̄ch̄o Government's authority under that Agreement, to decide what happens on Tłı̄ch̄o Lands.

- Second, the scope of the development, as defined in the TOR, is inconsistent with Part 5 of the *MVRMA*, and therefore the proposed EA would be outside the mandate and jurisdiction of the Review Board, for two reasons:
  - Because the industrial access roads required by Fortune are not existing projects, or authorized for future development, or the subject of applications to the WLWB, they are speculative and hypothetical. Therefore the Review Board has no jurisdiction to “scope” into the development either the construction and operation of the “spur road,” or Fortune’s “use” of an industrial highway to Highway 3.
  - Furthermore, because neither of those access roads has been already constructed, authorized or planned and included in an application, their location and related physical characteristics are unknown, with the result that their environmental and socio-economic impacts cannot be known or effectively assessed, as required by Part 5 of the *MVRMA*.
- Pursuant to the Review Board’s discretion to determine its own schedules and procedures, the EA should therefore be postponed and placed in abeyance until all essential components of the Proposal, including essential industrial access roads to and from the claim block, are the subject of plans and included in applications accepted as complete by the WLWB, in order that Part 5 of the *MVRMA* could be properly applied to the Proposal.

**Those grounds are more fully explained below.**

**A: IN THE CIRCUMSTANCES OF THIS CASE, THE EA AS PROPOSED IN THE TOR WOULD BE INCONSISTENT WITH THE Tłı̄chô AGREEMENT AND THE MVRMA, AND THEREFORE OUTSIDE THE JURISDICTION OF THE REVIEW BOARD.**

**(1) The Unique Factual and Legal Circumstances of Fortune’s Proposal:**

When Fortune submitted its original three applications to the WLWB in November, 2007, its covering letter said expressly that “all three elements (i.e., mine, road and power line) are necessary for the success of the project...” Fortune has since proposed to power the mine by a diesel plant within its claim block, rendering the power line unnecessary. But it has developed no substitute proposal for the road that it has always acknowledged is essential for the viability of the project.

An operating mine within the claim block would not be feasible without industrial access roads across Tłı̄chô Lands. A land-locked mine would not be viable. It could not be financed or developed.

The essential nature of such road access is acknowledged in the TOR for the EA the Review Board intends to conduct:

Fortune has applied to develop a primarily open pit with underground component mine and milling complex approximately 90 km north of Behchoko, 50 km northeast of Whati and approximately 10 km northeast of Hislop Lake. **Fortune proposes to ship concentrate from the proposed mine by truck/rail to a processing plant in southern Canada.** (p. 1)

...

**Fortune has stated that the NICO Project requires all-season road access from the NICO mine site to Highway 3....** (p. 3)

It follows that Fortune’s current applications are for a proposal that is not feasible. The proposed development is speculative or hypothetical at best.

But that is the proposal for which applications have been submitted to the WLWB, and which the Review Board plans to subject to environmental assessment.

It is now almost 18 months since Fortune submitted its applications, and there is no application for industrial access roads that are essential if this project is to be viable. There is no factual basis for an assumption that necessary financing and political support will be available to support such an application. There is no factual or legal

basis for an assumption that access for such industrial access roads across Tlíchô Lands would be agreed to by the Tlíchô Government. And without such an access agreement, no application would be accepted by the WLWB.

The Proposal is therefore speculative or hypothetical.

In its efforts to apply Part 5 of the *MVRMA* to the Proposal, the Review Board is dealing with very particular circumstances, for the first time. These circumstances are unique, for two reasons.

First, Fortune's Proposal is based on a unique legal interest, since it involves the development of a mine on Tlíchô Land, based on a mining lease that pre-existed the Tlíchô Agreement. Fortune's rights and interests are termed "existing rights and interests". They are provided for in 18.1.1 of the Tlíchô Agreement, and listed in Part 2 of the appendix to Chapter 18. There are only a few such mining leases, and this is the only one that the Review Board has had occasion to deal with.

In Chapter 19 of the Tlíchô Agreement, 19.3 provides that rights of access (to or across Tlíchô Land) required to exercise such existing rights or interests are subject to the agreement of the Tlíchô Government.<sup>1</sup>

Second, Fortune's reconfigured applications have been made during the general moratorium on development on Tlíchô Lands that was put in place by the Tlíchô Assembly, pursuant to the Tlíchô Lands Protection Law, originally enacted in 2005 and later renewed in 2009.

Furthermore, the Tlíchô Government is still engaged in its Land Use Planning process. The moratorium will remain in effect at least until this process is complete.

In the result, Fortune has effectively applied for authorization to build a mine it could not build or operate in current circumstances. The required access roads are speculative or hypothetical. They are not reasonably foreseeable.

Those factual and legal circumstances underlie this Request for Ruling.

In the unique circumstances of this case, proceeding with the EA as proposed in the TOR would be inconsistent with the Tlíchô Agreement and provisions of the *MVRMA*, and therefore outside the Review Board's jurisdiction, for the following reasons.

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<sup>1</sup> That is the basis for the WLWB's decision of April 24, 2008, that Fortune is not eligible to apply for a land use permit for activities to take place on Tlíchô Land until it provides proof of a right of access to those Tlíchô Lands.

**(2) The Proposal is hypothetical, and therefore not a “proposed development”**

Fortune is seeking an environmental assessment of a speculative project that it could not build or operate in current circumstances. The Proposal reflected in the current applications to the WLWB is speculative, or at best, hypothetical.

The Tłı̄ch̄o Agreement and the *MVRMA* do not authorize the Review Board to conduct environmental assessments of speculative or hypothetical projects.

Co-management bodies under the *MVRMA*, including the Review Board, are not resourced to address hypothetical proposals. The Tłı̄ch̄o Government is concerned about the resulting drain on its own capacity and resources if it becomes necessary to respond to co-management bodies respecting applications for hypothetical proposals.

The efficacy of the *MVRMA* would be adversely affected if co-management boards exercised their jurisdiction to consider speculative or hypothetical projects. Such a practice could be perceived as providing assistance for developers to plan, promote or leverage prospective developments. In a case like this one, an approval by an *MVRMA* board for one component of a project could be perceived as creating momentum or pressure for other components. That is why the *MVRMA* does not authorize co-management Boards to consider speculative or hypothetical projects.

It follows that a speculative or hypothetical project – like this one in the present circumstances – is not a “proposed development” within the contemplation of sections 114-115 of the *MVRMA*, and therefore the Review Board has no mandate or jurisdiction to conduct the proposed EA.

**(3) The Proposed EA ignores and is inconsistent with the Tłı̄ch̄o Agreement**

Fortune’s proposed mine could not be a viable project without industrial road access to the claim block, and such access requires the agreement of the Tłı̄ch̄o Government. It is of great concern that the TOR for the proposed EA does not even mention this fundamental reality!

The TOR acknowledges the need for such access roads, but misrepresents the legal situation in the following passage:

Fortune has stated that the NICO Project requires all-season road access from the NICO mine site to Highway 3. Fortune **anticipates** that the Government of



the Northwest Territories will apply to build an all-land road from Highway 3 to Whati and Gameti in the near future<sup>2</sup> (referred to in this document as the “potential realignment of the winter road through the Wek’eezhii Settlement Area”<sup>3</sup>). This road would be used in part for the NICO Project. A short stretch of road (approximately 25 km) from the NICO mine site to this anticipated road would be constructed and maintained by Fortune and is within the scope of this development.<sup>4</sup>

Proceeding with an EA based on the TOR would be inconsistent with, and disrespectful of, the jurisdiction of the Tlicho Government under the Tlicho Agreement, to exercise its self-government powers to decide what happens on Tlicho Lands. The WLWB correctly refused to allow Fortune to apply for authority to construct or operate roads across Tłı̄chô Land without proof of a right of access. The approach to the industrial access road issue in the TOR is inconsistent with, and profoundly disrespectful of, the authority of Tłı̄chô Government to decide what developments take place on Tłı̄chô Lands.

Pursuant to its self-government jurisdiction under the Agreement, the Tłı̄chô Government has imposed a moratorium on developments on Tłı̄chô Lands, and has undertaken a Land Use Planning process for those lands, which is currently still underway.

The access road issues that are raised indirectly by Fortune’s Proposal are of course important for Fortune. But those issues are far more important and complex for the Tłı̄chô. And it is ultimately for the Tłı̄chô to make decisions respecting these matters.

According to the TOR, the industrial highway proposed for Fortune’s purposes would connect both Gameti and Whati to Highway 3. Such a new road would change those communities profoundly and permanently. Do the residents of those communities want that?

There has not yet been a full discussion of the related socio-economic and cultural issues in either community, or a discussion of alternative ways to address access concerns of members of those communities. Nor have those communities or the Tłı̄chô

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<sup>2</sup> As explained above, no such application has been filed.

<sup>3</sup> This is a substantial misnomer for a year-round industrial access highway, across Tlicho Lands and capable of use by ore trucks, that Fortune needs if it is to have a viable proposal. Also, the term “Wek’eezhii Settlement Area” is not a term used in the Tlicho Agreement, and although such roads would be in Wek’eezhii, the most important fact is that they must cross Tlicho Lands.

<sup>4</sup> Fortune has intentionally excluded such a road from its application to the WLWB, as explained above. In those circumstances, the Review Board is wrong to characterize it as a road that “**would be constructed and maintained by Fortune...**”

Government developed even a preliminary analysis of the costs and benefits of using an all-weather road, or an industrial highway, to improve access to those communities.

Access issues for the communities will ultimately need to be considered by the Tłı̄ch̄o in the context of Tłı̄ch̄o values and objectives. There is much more involved than just a consideration of short-term resource development possibilities.

Any such roads across Tłı̄ch̄o Lands would necessarily affect areas of cultural, heritage and spiritual significance for the Tłı̄ch̄o. It is already clear, from work done in the initial phases of the Land Use Planning process, that the Hislop Lake region is an area of very high significance, both culturally and ecologically.

Any such access roads would affect important Bathurst Caribou habitat. There has been no consideration of that factor to date, and this is particularly relevant in light of the commitment of the Tłı̄ch̄o to the recovery of that herd, and to participation with GNWT in the joint adaptive management plan for the herd.

It can therefore be seen that access issues across Tłı̄ch̄o Lands involve many factors and choices that must be made by the Tłı̄ch̄o, in the context of their own self-government jurisdiction, values and interests. Many issues need to be considered. A great many options need to be developed and studied.

Those issues are crucial for the Tłı̄ch̄o. The exploration of those issues must be done by the Tłı̄ch̄o, in their own way and on their own timetable, taking account of all the factors they consider relevant. A consideration of these issues should not be driven by Fortune's short-term commercial interests or schedule.

The Review Board has no legal or factual basis for ignoring all those circumstances or making assumptions about the outcome of the Land Use Planning process and future decisions of the Tłı̄ch̄o Assembly, as those may ultimately determine the Tłı̄ch̄o Government's interest in concluding an agreement with Fortune or any other party respecting access to Tłı̄ch̄o Lands for purposes of industrial access roads across the relevant portions of Tłı̄ch̄o Lands, to service Fortune's Proposal.

Under 22.5.4 of the Tłı̄ch̄o Agreement, when the Tłı̄ch̄o eventually conclude and approve their Land Use Plan, it will ensure the implementation of Tłı̄ch̄o decisions about future uses of Tłı̄ch̄o Lands:

22.5.4 Upon approval of a land use plan applicable to any part of Wek'eezhii, government, the Tłı̄ch̄o Government and the Tłı̄ch̄o 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.

At the present time, the outcomes of the Land Use Planning process cannot be known. Yet according to the TOR, the Review Board has agreed to consider the two fantasy roads that Fortune has **assumed would be constructed** across Tl'ichô Lands, because its Proposal could not be viable without them.

This is an example of the tail wagging the dog! Such assumptions are inconsistent with the Tl'ichô Agreement and the facts. The Review Board does not have jurisdiction to conduct an EA on that basis.

**B. THE SCOPE OF THE DEVELOPMENT PROPOSED IN THE TOR IS INCONSISTENT WITH PART 5 OF THE MVRMA AND OUTSIDE THE REVIEW BOARD'S JURISDICTION:**

**(1) The Review Board's Jurisdiction and Policy for scoping developments:**

Section 117(1) of the *MVRMA* provides the Board's jurisdiction to determine the scope of a development for environmental assessment purposes.

However that jurisdiction is not unlimited. The Board is constrained by the provisions of the *MVRMA*, properly interpreted.<sup>5</sup>

The Review Board's Environmental Impact Assessment Guidelines make it clear that project splitting undermines effective and efficient environmental assessments. In order to avoid that, the Board applies three criteria in order to decide whether a physical work or activity is an accessory development and therefore should be included in the scope of the development being assessed: dependence, linkage and proximity.<sup>6</sup>

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<sup>5</sup> *Mining Watch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 at paragraphs [39-40] – although the scoping error found by the Supreme Court of Canada in *Mining Watch* does not arise in this case, it is clear from that decision that the discretion to scope a project for environmental assessment purposes must not be inconsistent with the authorizing statute.

<sup>6</sup> Environmental Impact Assessment Guidelines, pages 27-8

The Review Board applied these principles in its decision on the Request for Ruling in the case of the *Prairie Creek Mine*,<sup>7</sup> and decided that the proposed undertaking had to be described for environmental assessment purposes in a way that included the transfer facilities as well as the winter road, because the proposed mine could not operate without them.

But this case is not like *Prairie Creek*, since the winter road in that case had been in operation for many years and its use for the proposed mining operation was included in the application. Thus the road was neither speculative nor hypothetical, and the Review Board had discretion to scope it into the development for purposes of that environmental assessment.

**(2) Because the industrial access roads required by Fortune are not existing projects, or authorized for future development, or the subject of applications to the WLWB, they are speculative and hypothetical. Therefore the Review Board has no jurisdiction to “scope” into the development either the construction and operation of the “spur road,” or Fortune’s “use” of an industrial highway to Highway 3**

It would appear that the scoping decisions in the TOR were designed to avoid project splitting, in order to ensure the achievement of the purposes in sections 114 and 115 of the *MVRMA*.

Although that intention is consistent with the Review Board’s mandate, the mechanism proposed in the TOR for achieving it was not. Section 117(1) of the *MVRMA* is not so broad that it authorizes the inclusion of speculative or hypothetical components in a development.

The problem is particularly serious in this case. Fortune initially included the two access roads in its Proposal. Then it intentionally excluded them. The proponent has taken steps to ensure that the access roads are **not** the subject of any proposal or application pursuant to the *MVRMA*.

It is the proponent’s “proposed development” that must be the subject of an EA pursuant to Part 5. The Review Board does not have jurisdiction to revive the concept of these roads and include them in the Proposal, for purposes of a proposed EA, when the proponent itself has withdrawn them from consideration by reconfiguring its applications to the WLWB.

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<sup>7</sup> *Review Board Ruling on Scope of Development for EA0809-002, Prairie Creek Mine*, March 5, 2009.

This is not the same issue that is addressed in the *Prairie Creek* decision or the Guidelines, which consider whether existing or proposed activities or undertakings need to be “scoped” into a project for environmental assessment purposes, in order to ensure compliance with the objectives of Part 5. In this case the TOR has improperly assumed the future existence of speculative or hypothetical components of this Proposal. In effect the Review Board has decided to add to this Proposal a component that the proponent itself knows is not feasible at present and therefore chose to exclude. Such a “scoping” decision amounts to redefining the “proposed development,” and is therefore outside the Review Board’s jurisdiction.

In order to be included in the scope of a development pursuant to s. 117(1), an undertaking or activity must be more than a phantom – it must exist or be reasonably foreseeable. These roads are neither.<sup>8</sup>

The two access roads scoped into the development by the TOR were included because the Proposal would not be viable without them. They are therefore concepts for a development that have been included in order to fulfill a purpose – to make Fortune’s Proposal **conceptually** viable. But as the Court of Appeal for Newfoundland and Labrador has said, environmental assessments must be conducted on the basis of real, proposed activities, not conceptual ones:

One of the fundamental concepts of environmental assessment regimes is that they are concerned with the consequences of activities that involve physical incursions into an environment in a potentially harmful way... it is the effect or impact of actual physical activity that is the focus of an assessment... the scope of a required assessment is identified by the identified activities that are contemplated and is not to be defined along functional or purposive lines.<sup>9</sup>

The roads scoped into the development would not even be subject to consideration for cumulative impacts purposes, because they are not existing developments, nor would they be induced developments, nor are they reasonably foreseeable future developments, in the circumstances of this case.<sup>10</sup>

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<sup>8</sup> In *Bow Valley Naturalists Society of Canada (Minister of Canadian Heritage)* [2001] 2 FC 461 (F.C.A.) at paragraph [75], Linden J.A. wrote for the Court and advised against using environmental assessments to “consider fanciful projects by imagined parties producing purely hypothetical effects.”

<sup>9</sup> *Labrador Inuit Ass’n v Newfoundland (Minister of Environment and Labour)*, 1997 N.J. No 223 at paragraph [42]

<sup>10</sup> *Ur Energy Inc., Screech Lake Uranium Exploration Project*, MVEIRB Decision, May 7, 2007; see also *Bow Valley Naturalists Society of Canada (Minister of Canadian Heritage)*, supra, at paragraph [41]: “Only likely cumulative environmental effects must be considered. Projects or activities which

In the end, the TOR attempted to avoid project splitting by purporting to make decisions about the nature of the “proposed development” that had to be made by Fortune or another proponent. In doing so the TOR have exceeded the Review Board’s jurisdiction under s. 117(1).

**(3) Because neither of those access roads has been already constructed, authorized or included in an application, their location and related physical characteristics are unknown, with the result that their environmental and socio-economic impacts cannot be known or effectively assessed, as required by Part 5 of the MVRMA.**

The TOR scopes in the construction and operation of the “spur” road that Fortune asserts an intention to construct.

The proposed stretch of road, which crosses Tl̓ch̓ Lands and the Review Board has identified in the TOR as approximately 25 km in length, could in reality be anywhere from 25 km to 35 km from the NICO mine site, since there is currently no agreement on, or a proposal for, the route or location of the industrial highway to connect to Highway 3 that Fortune requires. (See Attached Map<sup>11</sup>).

Instead of considering the environmental effects of the phantom industrial highway itself, the TOR proposes to consider only the effects of its “use” by Fortune. With respect, neither the Tl̓ch̓ Government, any other responsible authorities, nor the Review Board itself could give “careful consideration” to the effects of Fortune “using” a road that is not planned or proposed.

The uncertainties about the nature or route of such an industrial highway are made clear by the fact that the TOR suggests a subsequent EA for the “proposed realignment of the winter road,” in order to capture all relevant environmental effects and design mitigations for them.

Thus the TOR itself has embraced project splitting, in light of the speculative or hypothetical nature of the industrial access roads required by Fortune.

It is clear that a proper environmental assessment cannot be conducted at this time of the entire undertaking that Fortune is promoting. The Review Board’s well intentioned

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have been or will be carried out must be considered. However, only approved projects must be taken into account; uncertain or hypothetical projects or activities need not be considered...

<sup>11</sup> The attached map was created by Tl̓ch̓ Government staff, in an effort to illustrate information from Fortune Minerals Ltd. The map does not represent a Tl̓ch̓ Government proposal.

response to this problem – by scoping in some hypothetical aspects of the project and leaving others for a subsequent environmental assessment, has resulted in project splitting and scoping decisions in excess of the Review Board’s jurisdiction.

This is more than a legal problem about the Board’s jurisdiction. Proceeding in the ways proposed in the TOR would certainly result in confusion and regulatory overlap. More important it will not be a basis for orderly and informed participation in the EA by the Tłı̄ch̄o Government and affected communities.

The hypothetical road concepts that are included for some kind of consideration by the TOR are of great importance to the Tłı̄ch̄o.

Such access roads would cut through the heart of Tłı̄ch̄o territory, and as such may threaten caribou, the way of life in Whati and Gameti, cultural landscapes and spiritual sites. The portions of Tłı̄ch̄o Lands around Hislop Lake are very important winter habitat for the Bathurst Caribou herd. There are buildings, dogteam and canoe trails, burial sites, cabins, and fishing sites on Hislop Lake that would be threatened by such proposals, including by the potential year-round use of such a road by non-Tłı̄ch̄o people who could easily access the area. It could open up the heart of Tłı̄ch̄o territory to outside hunting, trapping and harvesting.

Furthermore, such roads could change forever the nature of the communities of Whati and Gameti.

Location, in this context, is very significant. All of this is far too important to be considered on the basis of phantom activities and undertakings, for a project that is in fact still speculative and hypothetical.

For all these reasons, the EA proposed by the TOR could not be effective and capable of fulfilling the purposes of Part 5 of the *MVRMA*, for the Tłı̄ch̄o or any other party.

For these reasons, the proposed EA is not the type of environmental assessment contemplated in Part 5, and is therefore outside the mandate and jurisdiction of the Review Board.

## **CONCLUSION**

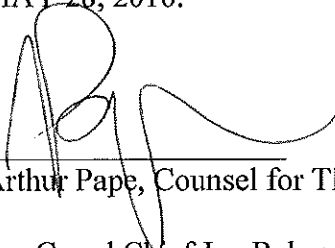
For all the above reasons, the Tłı̄ch̄o Government requests a Ruling from the Review Board that the EA proposed in the TOR is premature, and it will therefore be postponed

**PAPE SALTER TEILLET**  
**BARRISTERS & SOLICITORS**

and placed in abeyance until all essential components of the Proposal are included in applications that have been accepted as complete by the WLWB, in order that Part 5 of the *MVRMA* can be properly applied to the Proposal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

MAY 28, 2010.



Arthur Pape, Counsel for Tlicho Government

c.c. Grand Chief Joe Rabesca, Tlicho Government,  
c/o Laura Duncan, Tlicho Executive Officer  
(by email: <lauraduncan@tlicho.com>)

c.c. Robin Goad, P. Geo.  
President, CEO & Director, Fortune Minerals Limited,  
(by email: <[RGoad@fortuneminerals.com](mailto:RGoad@fortuneminerals.com)>)





**Wek'èezhì**  
Land and Water Board

Box 32, Wekweètì, NT X0E 1W0  
Tel: 867-713-2500 • Fax: 867-713-2502 • [www.wlwb.ca](http://www.wlwb.ca)

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April 24, 2008

Robin E. Goad, President  
Fortune Minerals Limited  
1902 – 140 Fullarton Street  
London, ON N6A 5P2

Dear Mr. Goad:

**Land Use Permit Eligibility Requirements on Tłıchǵ Lands**

After careful review and consideration the Wek'èezhì Land and Water Board has recently ruled that Fortune Minerals Ltd. is not eligible to apply for land use permits for activities that are to take place wholly or partially within Tłıchǵ owned lands without providing proof of a right of access to those Tłıchǵ lands. The Board in their decision considered all the information that was submitted to the WLWB from the Tłıchǵ Government, INAC, GNWT-ENR and Fortune Minerals in response to our request for clarification on eligibility requirements listed within the *Mackenzie Valley Land Use Regulations*. The Board's decision is consistent with positions put forward by the Tłıchǵ Government, and Indian and Northern Affairs Canada that a proof of right to access Tłıchǵ lands, through an existing access right provided for in the Tłıchǵ Agreement or granted by the Tłıchǵ Government, should be provided before a proponent be deemed eligible to apply for a land use permit.

Due to the current ineligibility of Fortune Minerals submissions for land use permits for the proposed development of the NICO mine and mill, all weather access road, airstrip, and hydro transmission line, the WLWB will not be processing the associated water licence applications that were submitted to the WLWB for the all weather access road and the NICO mine and mill.

While the Tłıchǵ Government has made its views known to the Board that a proof of a right to access Tłıchǵ lands should be required by the Board prior to deeming applications on Tłıchǵ lands complete, the Tłıchǵ Government has not provided direction to the Board on what kind of documentation should be submitted by an applicant, or other party, to prove a right of access to Tłıchǵ lands. We have proposed a meeting between the WLWB and the Tłıchǵ Government to discuss and provide clarity on what the expectations from each party may be in determining eligibility for land use

permits in the future. Fortune Minerals will be informed of any decisions that result from the proposed meeting.

If you have any further questions or concerns, please do not hesitate to contact Zabey Nevitt at (867) 669-9592 or by email at [zabey@wfwb.ca](mailto:zabey@wfwb.ca).

Sincerely,

A handwritten signature in black ink, appearing to read "V. Camsell-Blondin". The signature is fluid and cursive, with a long horizontal stroke at the beginning.

Violet Camsell-Blondin  
Chair

Copied to: Trish Merrithew-Mercredi, Regional Director General, INAC  
Gary Bohnet, A/Deputy Minister, GNWT-Environment and Natural  
Resources  
Grand Chief George Mackenzie, Tłı̨chǫ Government