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Reasons for Decision

Reference/File Number:	G18X005 (Type "A" Land Use Permit Application)
Applicant:	NWT Energy (03) Corporation Ltd.
Project:	Inuvik Wind Project
Subject:	Request for Ruling – Permit Eligibility
Meeting Date:	October 29, 2020

1.0 Decision

The Gwich'in Land and Water Board (GLWB or the Board) met on October 29, 2020 and considered the January 9, 2020 Request for Ruling (Request #2)¹ made by Nihtat Gwich'in Council (NGC) under Rule 22 of the Mackenzie Valley Land and Water Board Rules of Procedure (MVLWB Rules)² in respect of NWT Energy (03) Corporation Ltd. (NTEC)'s Application for a land use permit (Permit) for the Inuvik Wind Project (Project).

The Request asks the GLWB to rule that NTEC has failed to establish a lawful right to occupy land in order to be eligible to receive a Permit in accordance with paragraph 18(b) of the Mackenzie Valley Land Use Regulations (MVLUR).

The Board has decided that NTEC has a right to occupy the lands proposed for the Inuvik Wind Project and is thus eligible to receive a Permit in accordance with paragraph 18(b) of the Mackenzie Valley Land Use Regulations (MVLUR).

The Reasons for this decision are set out below.

2.0 Background

On October 30, 2018, NTEC applied to the GLWB for a type "A" Permit for the purpose of constructing, operating, and maintaining a wind turbine, an all-season access road, powerlines, and associated

¹ See [G18X005 G18L8-001 – NGC Request for Ruling #2 – Jan09_20](#)

² See www.glwb.com → Resources → Policies and Guidelines: [MVLWB Rules of Procedure](#)

electricity infrastructure³. It also applied for a type “B” Water Licence for water use during Project construction.⁴

NTEC proposes constructing the Project on lands approximately 12 km east of the town of Inuvik and 6.5 km north of the Mike Zubko Airport, at what is known locally as Highpoint. The turbine and northernmost portion of road and transmission line are to be located on Government of the Northwest Territories (GNWT) Territorial (formerly federal crown) land, while the southernmost portion of the road and lines are to be located on GNWT Commissioner’s land. The lands in question are all located within a Reindeer Reserve established by GNWT Land Withdrawal Order R-065-2014.

In order to be eligible for a permit, and as set out in paragraph 18(b) of the Mackenzie Valley Land Use Regulations (MVLUR), NTEC must demonstrate that it has a right to occupy the lands on which the Project will be carried out. The *MVLWB Guide to the Land Use Permitting Process*⁵ explains that Applicants must hold, or be in the process of obtaining, the appropriate interest (e.g., mineral exploration rights, quarry permits, timber permits, licences of occupation, leases, etc.) and/or right of access (e.g., access agreement or authorization) for the proposed operation and from the appropriate landowner prior to submitting an application to the Board.

Note that NTEC’s Water Licence Application is not at issue in the NGC Request for Ruling, as eligibility requirements in section 18 of the MVLUR apply only to permitting.

As evidence of eligibility, NTEC included in its Application a letter from the GNWT Deputy Minister of Lands confirming that a 50 metre by 50 metre parcel of land had been set aside by Reserve 107B07-172 (Wind Reserve) for the GNWT Department of Infrastructure (GNWT INF). The letter explained that further amendments to the Wind Reserve were being considered, to account for the proposed access road and transmission line.⁶

Board staff confirmed the application for the Project was complete, and then proceeded with the regulatory process, as outlined in Table 1. Steps pertaining to this Request for Ruling are highlighted in grey and discussed in detail below.

Table 1 – Regulatory Process Overview: G18X005 and G18L8-001

Date	Step in Proceeding
Oct 30, 2018	Water Licence and Land Use Permit Applications Received
Nov 09, 2018	Applications deemed complete
Nov 09, 2018	Applications circulated for public review Draft permit circulated for public review
Nov 19, 2018	Draft Licence circulated for public review
Nov 30, 2018	Deadline for Reviewer comments (Comments received, including several requests to extension to comment period)

³ See [G18X005 – Permit Application Form – Oct30 18](#)

⁴ See [G18L8-001 – Licence Application Form – Oct30 18](#)

⁵ See www.glwb.com → Resources → Policies and Guidelines: [MVLWB Guide to the Land use Permitting Process](#)

⁶ See [G18X005 G18L8-001 – Supporting Information – Oct30 18](#)

Dec 7, 2018	Deadline for proponent response deadline (Response received)
Dec 18, 2018	Board Meeting # 1: Decision made to pause Permit Application under paragraph 22(2)(b) of the MVLUR to allow additional time for reviewer comments - deadline extended to February 28, 2019.
Feb 28, 2019	Updated Reviewer Comment Deadline (Comments received by deadline)
Mar 14, 2019	Updated Proponent Deadline (Responses received by deadline)
Mar 20, 2019	Board Meeting # 2: Decision made to require additional study under paragraph 22(2)(b) of the MVLUR. Direction given to NTEC to conduct additional engagement and/or provide updated Engagement Record and Plan.
Oct 25, 2019	Engagement Plan and Record V 2.0 received
Oct 29, 2019	Engagement Plan and Record V 2.0 circulated for public review
Nov 12, 2020	Deadline for reviewer comments (Comments received by deadline)
Dec 2, 2019	Deadline for proponent response (Responses received by deadline)
Dec 4, 2019	NGC Request for Ruling (Request #1) received
Dec 10, 2019	Information Request (IR #1) issued to NTEC
Dec 17, 2019	NTEC Response to IR #1 received
Jan 7, 2020	Information Request (IR #2) issued to NTEC
Jan 9, 2020	NGC Request for Ruling (Request #2) received
Jan 15, 2020	NTEC Response to IR #2 received
Mar 04, 2020	Information Request (IR #3) issued to NTEC/GNWT
May 26, 2020	NTEC/GNWT Response to IR #3 Received
June 4, 2020	Notice of next step in request for ruling circulated to parties
June 18, 2020	Deadline for parties wishing to provide evidence in response to NGC's Request #2 (No parties submitted evidence)
July 2, 2020	Deadline for NGC to respond to evidence on record (No response received)
July 16, 2020	Deadline for NTEC/GNWT to file argument (Argument received)
July 30, 2020	Deadline for NGC to file Closing Argument: (Argument received)
[TBD]	Board Meeting #2: Decision on Requests # 1 and #2
[TBD]	Board Meeting #3: Decision on Preliminary Screening, Water Licence and Land Use Permit Applications

On December 4, 2019, the NGC Submitted to the GLWB a Request for Ruling (Request #1) made pursuant to Rule 22 and Rule 61 of the MVLWB Rules.⁷ Request #1 sought a directive from the Board to require NTEC to provide particulars in respect of its claim to have a right to occupy land and to be eligible to receive a permit in accordance with paragraph 18(b) of the MVLUR.

Specifically, NGC requested that the Board require NTEC to provide evidence or lawful authority that:

- the proposed Project is on Commissioner's Land;
- the proposed Project area is reserved for NTEC use;

⁷ See [G18X005 G18L8-001 – NGC Request for Ruling #1 – Dec04_19](#)

- that the reservation of the proposed Project Area is not considered a disposition under Land Withdrawal Order R065-2014; and
- that it has a right to occupy land and is therefore eligible to receive a permit in accordance with paragraph 18(b) of the MVLUR.

The GLWB issued Information Request # 1 (IR#1)⁸ on December 10, 2019, directing NTEC to provide the above information. NTEC responded on December 17, 2019 (NTEC IR#1 Response).⁹ The GLWB issued Information Request #2 (IR#2) on January 7, 2020, requesting NTEC provide additional information in support of its right to occupy, including evidence of a contractual relationship with the GNWT.¹⁰ NTEC submitted its response (NTEC IR#2 Response)¹¹ on January 20, 2020. The Responses to IR#1 and IR#2 effectively satisfied NGC Request #1.

On January 9, 2020 NGC submitted to the GLWB a second Request for Ruling (Request #2)¹² made pursuant to Rule 22 of the MVLWB Rules. Request #2 alleges that NTEC failed to establish a lawful right to occupy lands affected by the proposed Project, as required by paragraph 18(b) of the Mackenzie Valley Land Use Regulations

To ensure the necessary information was on the record prior to ruling on Request #2, on March 3, 2020, the GLWB issued a Information Request (IR #3)¹³ to NTEC and GNWT Lands, requesting further details pertaining to NTEC's right to occupy the lands in question; on May 26, 2020 NTEC/GNWT filed a response (GNWT/NTEC IR#3 - Response).¹⁴ The Board then provided an opportunity for Parties to submit their evidence in response to NGC's Request #2, in accordance with the MVLWB Rules; Parties wishing to provide evidence in response to NGC Request #2 were required to do so by June 18, 2020 (No submissions were received). NGC was given a July 2, 2020 deadline to respond to the NTEC's response to IR #3 and to any additional evidence submitted (NGC did not provide a submission). Parties wishing to file arguments were directed to do so by July 16, 2020; NTEC was the only party to file a submission.¹⁵ NGC responded by the closing date of July 30, 2020.¹⁶

3.0 EVIDENCE

3.1 NTEC and The Project

NTEC is a wholly owned subsidiary of the Northwest Territories Hydro Corporation (NT Hydro). NT Hydro is a public agency under Schedule B of the Northwest Territories *Financial Administration Act*. GNWT owns all of the shares of NT Hydro.¹⁷ NTEC is an agent of the GNWT.¹⁸

⁸ See [G18X005 – Information Request #1 – Dec10 19](#)

⁹ See [G18X005 – NTEC Response to IR #1 – Dec17 19](#)

¹⁰ See [G18X005 – Information Request #2 – Jan07 20](#)

¹¹ See [G18X005 – NTEC Response to IR #2 – Jan15 20](#)

¹² See [G18X005 – NGC Request for Ruling #2 – Jan09 20](#)

¹³ See [G18X005 – Information Request #3 – Mar03 20](#)

¹⁴ See [G18X005 – GNWT NTEC Response to IR #3 – May26 20](#)

¹⁵ See [G18X005 – NTEC Argument – July16 20](#)

¹⁶ See [G18X005 – NGC Closing Argument – Jul30 20](#)

¹⁷ NWT Hydro Corporation and NWT Power Corporation Annual Report 2017-2018 tabled on October 31, 2018, retrieved from: https://www.ntassembly.ca/sites/assembly/files/td_283-183.pdf.

¹⁸ See [G18X005 – NTEC Response to IR #1 – Dec17 19](#) at pg. 1

NTEC indicates that “NTEC will build the Project on behalf of the GNWT and transfer the completed Project to [NT Hydro], a GNWT owned utility, to own and operate the assets for public purposes. The Project will deliver renewable energy generation, significant fossil fuel displacement and improve rate stability for our 25 thermal zone communities.”¹⁹ NTEC will act as the operator at the site on behalf of GNWT pursuant to a Contribution Agreement dated January 15, 2020.²⁰

The Project is proposed to be located on Territorial Lands and Commissioner’s Land within Land Reserve No. 107 B/7-172-2, a reservation by notation currently in the name of the GNWT INF (Wind Reserve). The Wind Reserve was set aside in accordance with paragraph 19(b) of the NWT *Territorial Lands Act*.

The Wind Reserve was originally established on February 17, 2014 in the name of the Aurora Research Institute. The 50 metre by 50 metre reservation was established for government research purposes. A wind monitoring tower was installed on the reserve and feasibility work was conducted to confirm viability of the Project.²¹

On September 27, 2018, in preparation for building the Project, the Deputy Minister of Infrastructure requested an amendment to the Wind Reserve to include Territorial Lands and Commissioner’s Land required for the access road.²²

On November 2, 2018, the Deputy Minister of Lands responded to NTEC’s request for an amendment by letter and advised NTEC that:

*Lands has determined that it is not a requirement to amend your current reserve to include the access road you propose to build on the site. The road can be built under your Land Use Permit. Once the construction at this site is completed and the final boundaries are determined, an amendment to reserve can be done at that time.*²³

Similarly, on December 17, 2018, the Department of Lands wrote to NTEC stating that:

*The Department of Infrastructure is eligible for a Licence of Occupation for the road portion of the proposed Project on Territorial and Commissioner’s land. The Department of Lands, however, does not require tenure for government or government agents to build and operate small scale roads on GNWT administered and controlled land. For any current and future reservations by notation or licenses, the final boundaries can be amended by the Department of Lands if the proposed project is approved and a more defined project footprint is available.*²⁴

The 50 metre by 50 metre parcel reserved for the wind turbine is on Territorial Lands, while the proposed road and transmission line right of way crosses both Territorial and Commissioner’s Land. The entire Project is located within the Reindeer Reserve, which is withdrawn from disposition pursuant to R-065-2014.

¹⁹ See [G18X005 G18L8-001 – NTEC Response to IR #1 – Dec17 19](#) at pg. 1

²⁰ See [G18X005 G18L8-001 – GNWT NTEC Response to IR #3 – May26 20](#)

²¹ See [G18X005 G18L8-001 – NTEC Response to IR #1 – Dec17 19](#) at pg. 1

²² See [G18X005 G18L8-001 – NTEC Response to IR #1 – Dec17 19](#) at pg. 2

²³ See [G18X005 G18L8-001 – NTEC Response to IR #1 – Dec17 19](#) attached Letter from Deputy Minister of Infrastructure to NTEC dated November 2, 2018

²⁴ See [G18X005 G18L8-001 – NTEC Response to IR #1 – Dec17 19](#) attached Letter from Department of Lands to NTEC

3.2 Reindeer Grazing Reserve Withdrawal Orders

The Reindeer Reserve was established on December 14, 1933 by a federal Order in Council. The Order set aside a 17,094 km² tract of land east of the Mackenzie Delta in which all types of hunting (except trapping) were prohibited. The land had been designated as pasture for a herd of 3,000 domestic reindeer that were brought from Alaska as part of an initiative to improve food security and establish sovereignty in Canada's Western Arctic. The federal legislation was amended a handful of times over the next decades, bringing changes to both the boundaries of the reserve, and the activities allowed within it.²⁵

On April 1, 2014, the date of devolution, the administration and control of the lands affected by the Order were transferred to the Commissioner of the Northwest Territories, and the GNWT Commissioner in Executive Council issued the *Land Withdrawal Order* made under the *Northwest Territories Lands Act* (R-065-2014).²⁶ R-065-2014 mirrored federal Order SI/2014-38 (*Withdrawal from Disposal, Setting Apart and Appropriation of Certain Tracts of Territorial Lands in the Northwest Territories (Reindeer Reserve)*) which had been made under the *Territorial Lands Act*.²⁷

R-065-2014 was amended in 2017 by R-052-2017 and remains in effect today.²⁸ The Order identifies tracts of land that are set apart and appropriated for use as a Reindeer Reserve and withdrawn from disposal, with the following exceptions, to which the order does not apply:

- 2(a)** the disposition of substances or materials under the Quarrying Regulations;
- 2(b)** interests in land to be used for public highways;
- 3(a)** the locating of a mineral claim by the holder of a prospecting permit;
- 3(b)** the recording of a mineral claim that is referred to in paragraph (a);
- 3(c)** the granting of a lease under the Mining Regulations to a holder of a recorded claim, if the lease covers an area in the recorded claim;
- 3(d)** the issuance of an interest under the Petroleum Resources Act;
- 3(e)** the issuance of a surface lease under the Northwest Territories Lands Act to a holder of a recorded claim under the Mining Regulations or of an interest under the Petroleum Resources Act, if the surface lease is required to allow the holder to exercise rights under the claim or interest; or withdrawn from disposal for reindeer grazing purposes and are set apart and appropriated for use as a reindeer grazing Reserve.
- 3(f)** the renewal, amendment and consolidation of an interest

²⁵ Treude, E. (1979). *Polar Geography. Forty years of reindeer herding in the Mackenzie delta, N.W.T.* retrieved from <https://doi.org/10.1080/10889377909377110>

²⁶ GNWT *Land Withdrawal Order (Reindeer Grazing Reserve)* dated April 1, 2014, retrieved from: <https://www.canlii.org/en/nt/laws/regu/nwt-reg-065-2014/110878/nwt-reg-065-2014.html> [R-065-2014].

²⁷ Federal *Withdrawal from Disposal, Setting Apart and Appropriation of Certain Tracts of Territorial Lands in the Northwest Territories (Reindeer Grazing Reserve) Order* (SI/2014-38) registered on April 9, 2014, retrieved from: <https://www.canlii.org/en/ca/laws/regu/si-2014-38/latest/si-2014-38.html> [SI/2014-38].

²⁸ GNWT *Land Withdrawal Order (Reindeer Grazing Reserve)* dated April 1, 2014, amended June 8, 2017. retrieved from: <https://www.canlii.org/en/nt/laws/regu/nwt-reg-065-2014/latest/nwt-reg-065-2014.html> [R-065-2014].

3.3 Eligibility

To obtain a permit, NTEC must meet the eligibility criteria set out in Section 18 of the MVLUR, which provides that:

A person is eligible for a permit who

(a) where the proposed land-use operation is in the exercise of a right to search for, win or exploit minerals or natural resources,

(i) holds the right,

(ii) is the manager of operations, where the right is held by two or more persons who have entered into an exploration or operating agreement designating one of them as the manager of operations, or

(iii) is the person who contracts to have the land-use operation carried out, where the right is held by two or more persons who have not entered into an exploration or operating agreement designating one of them as manager of operations; or

(b) in any other case, has a right to occupy the land and either contracts to have the land-use operation carried out or is the person who is to carry out the operation [emphasis added].²⁹

MVLUR, section 18 has not been judicially considered by the courts.

In this case, GNWT has contracted with NTEC to carry out the Project. At issue in this Request for Ruling is whether a wholly owned subsidiary of the GNWT has a “right to occupy the land” in the Reindeer Reserve pursuant to paragraph 18(b). If the Board finds that GNWT has a right to occupy the land, NTEC will be eligible for a permit for the Project.

3.4 Parties’ Positions

NGC Submissions

NGC’s position is that NTEC is not eligible for a permit pursuant to MVLUR paragraph 18(b), because NTEC has no right to occupy the land.³⁰ Specifically, NGC argues that (i) the “reservation by notation” does not establish NTEC’s right to occupy the land, and (ii) in the alternative, even if NTEC had evidence of a right to occupy, the Project is not permitted under R-065-2014 and NTEC’s right to occupy is therefore unlawful.³¹

NGC submits that NTEC’s occupation of the lands in question would be unlawful because it is inconsistent with the protective purpose of the Reindeer Grazing Reserve, circumvents the approval needed from the GNWT Executive Council to amend R-065-2014, and circumvents the system of land management under

²⁹ MVLUR, s. 1 defines a “land-use operation” as any use of land that requires a land use permit

³⁰ See [G18X005 – NGC Request for Ruling #2 – Jan09 20](#) at para 32.

³¹ See [G18X005 – NGC Request for Ruling #2 – Jan09 20](#) at para 4 and 5.

the *Gwich'in Comprehensive Land Claim Agreement (GCLCA)*.³²

NGC further argues that NGC should have been consulted on the making of the reservation by notation.

NTEC/GNWT Submission

NTEC's and GNWT Lands' position is primarily set out in their joint response to the Board's Information Request 3 dated May 26, 2020.³³ NTEC/GNWT's position is that GNWT has a right to occupy the lands by virtue of its powers of administration and control of public lands.³⁴ GNWT is one government entity, and therefore any of its departments or agencies has a right to occupy the lands. As the agent of the GNWT NTEC can apply for and hold a land use permit on behalf of the GNWT. The reservation by notation is an administrative tool, and not an instrument grounding NTEC/GNWT's right to occupy.³⁵

Furthermore, the reservation by notation is not a "disposition" of land contrary to R-065-2014 because the reservation by notation does not transfer land or other interests from GNWT to NTEC. GNWT cannot "dispose" of land it already owns to another GNWT department.³⁶

It is NTECs view, that because NTEC has a right to occupy the lands, NTEC is eligible for permit.

4.0 Analysis of Issues Raised by NGC

The issues raised by the parties in this Request for Ruling are as follows:

1. Does the GLWB have the authority to evaluate a permit applicant's right to occupy?
2. Does GNWT have a right to occupy the land proposed for the Project? (And relatedly, is NTEC eligible for a Land Use Permit?)
3. What is the effect of R-065-2014 and the Reindeer Reserve on GNWT's occupation of the lands, and on the proposed Project?
4. Has there been a failure to consult?

The Board sets out its responses to these issues in detail below.

4.1 The GLWB has Authority to Evaluate an Applicant's Right to Occupy

A preliminary issue related to this Request for Ruling is whether the GLWB has authority to question GNWT's representations that an applicant for a permit has a "right to occupy" for the purposes of MVLUR, paragraph 18(b).

GNWT/NTEC argues that:

³² See [G18X005 – NGC Request for Ruling #2 – Jan09_20](#) at para 6.

³³ See [G18X005 – NTEC Argument – July16_20](#) and [G18X005 – GNWT NTEC Response to IR #3 – May26_20](#)

³⁴ See [G18X005 – GNWT NTEC Response to IR #3 – May26_20](#) at pg. 1-2.

³⁵ See [G18X005 – GNWT NTEC Response to IR #3 – May26_20](#) at pg. 3.

³⁶ See [G18X005 – GNWT NTEC Response to IR #3 – May26_20](#) at pg. 3.

Rights to occupy public lands are decisions which fall outside of the MVRMA. For Territorial Lands, these decisions are vested with the GNWT pursuant to its general property rights and further reinforced in Territorial laws, namely the *Northwest Territories Lands Act* (NWTLA) and the *Commissioner's Land Act* (CLA). Any decisions under these authorities made by the GNWT are distinct from an eligibility decision under s. 18 of the federal MVLURs. Accordingly, representations by the GNWT that an applicant has a right to occupy lands under the GNWT's administration and control and that such right has been properly granted under GNWT-issued and administered laws are sufficient for the purposes of a s. 18 decision by an MVRMA LWB.³⁷

The GNWT, as land administrator and owner, has the authority to issue or confirm a right to occupy territorial or Commissioner's land in such situations and on such terms as it considers appropriate. The validity of a decision to issue a right to occupy is not subject to scrutiny under s. 18; only the question of existence of the right is relevant.³⁸

By contrast, NGC argues that the "GLWB cannot simply rely on the representations of GNWT (a) that there is a right to occupy, and (b) that it is valid. Those are both determinations that the GLWB must make with reference to lawful authority in determining whether to grant the permits under the [MVLUR]."³⁹

GNWT/NTEC has provided no legal analysis or rationale to support NTEC's assertion that assessing the nature or validity of an applicant's right to occupy is outside of the GLWB's jurisdiction. While the *Northwest Territories Lands Act* is one of the GNWT's "home-statutes," administrative tribunals have jurisdiction to interpret third party legislation, including legislation that is closely related to a tribunal's functions.

In the judicial review context, there is case law to support the proposition that deference is owed to a tribunal's interpretation of legislation that is "closely related to its function, with which it will have a particular familiarity."⁴⁰ Legislation that is closely related to an administrative tribunal's function includes legislation that the decision-maker "in the regular exercise of its mandate, is expressly or implicitly required to frequently work with"⁴¹ or will "necessarily have to interpret"⁴² to make a determination.

Pursuant to the MVRMA, section 59, the GLWB has jurisdiction in respect of all uses of land in its management area for which a permit is required, and may issue, amend, suspend, cancel, or approve the assignment of permits. The GCLCA similarly provides that the GLWB shall have the power to issue, amend, or renew permits and establishes the Board as a central component of the co-management system for land and water in the Gwich'in Settlement Area.⁴³

In exercising its authority to issue a permit to an applicant, the GLWB must necessarily consider whether the applicant is eligible for a permit pursuant to MVLUR, paragraph 18(b). To make a determination on eligibility, the GLWB is required to consider whether the applicant has a right to occupy the land. A bare assertion that a right to occupy exists by an applicant for a permit is not enough, particularly in a case like this where an affected third party challenges the existence of the right as part of a Board proceeding.

³⁷ See [G18X005 – GNWT NTEC Response to IR #3 – May26_20](#) at pg. 1.

³⁸ See [G18X005 – GNWT NTEC Response to IR #3 – May26_20](#) at pg. 4.

³⁹ See [G18X005 – NGC Closing Argument – Jul30_20](#) at para 10

⁴⁰ *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54.

⁴¹ External Review of Administrative Decisions: Petitions to Cabinet, Appeals to Court and Judicial Review by James Sprague and Robert Macaulay, Thomson Reuters Canada Limited (2016), pg. 28-286.

⁴² 2014 ABQB 189 at para 35 [*Calgary Board of Education*].

⁴³ GCLCA, art. 24.4.5.

The GNWT has the authority to decide who occupies public lands under GNWT's administration and control. But when eligibility for a permit is contested on the basis of whether an applicant has a right to occupy, the GLWB has the authority to determine whether a right to occupy exists by examining the tenure that provides a foundation for the right to occupy. Inherent in the GLWB's authority to issue permits is the authority to ensure that the applicant is actually eligible for a permit.

The Board therefore agrees with NGC that GLWB has the authority to consider any issues raised with respect to the nature and validity of an applicant's right to occupy generally, and NTEC's right to occupy in particular.

4.2 GNWT has a Right to Occupy the Land and NTEC is Eligible for a Permit

NGC's position is that a reservation by notation is insufficient to establish a right to occupy. NGC says that "it is not clear what, if any, authority the Department of Lands has to make a 'reservation by notation.' No such powers are expressly provided to the Department of Lands in the *Northwest Territories Lands Act*."⁴⁴

NGC asserts that even if the reservation by notation could establish a right to occupy, NTEC is not the beneficiary of the reservation by notation.⁴⁵ That the land is located within the Wind Reserve is insufficient to establish a right to occupy.⁴⁶ GNWT and NTEC have failed to provide any documentation of lawful authority to make a 'reservation by notation,' or of any contract in which the GNWT grants NTEC the rights to occupy.⁴⁷

NTEC/GNWT asserts that GNWT has authority to issue a 'reservation by notation' under the *Northwest Territories Lands Act*, s. 19(b).⁴⁸ Section 19(b) provides that the Commissioner in Executive Council may set apart and appropriate territorial lands for public purposes and, at any time before the issue of a grant, alter or revoke those appropriations. Similarly, the *Commissioner's Land Act*, paragraph 4(b) provides that the Commissioner may set apart and reserve Commissioner's land for public or other purposes. NTEC/GNWT argues that the Project is a public purpose, because it is an action by government for the benefit of the community as a whole.⁴⁹

It is the Board's opinion that NGC's focus on the reservation by notation misses the heart of NTEC/GNWT's submission. According to NTEC/GNWT, a reservation by notation "is simply an administrative classification that may be used to maintain accurate maps and records and prevent the allocation or disposal of the land for an inconsistent use."⁵⁰

NTEC/GNWT argues that it has administration and control of public lands in the NWT, and as a landowner, has the right to enter onto and occupy such land. The 'reservation by notation' is not what grounds NTEC/GNWT's right to occupy; however, "a reservation by the GNWT makes it clear to the public or any potential applicants for the land in question that the GNWT intends to exercise this right with regard to the land subject to such reservation. The exercise of this right to occupy the land as confirmed in a

⁴⁴ See [G18X005 – NGC Request for Ruling #2 – Jan09 20](#) at para 33 to 34.

⁴⁵ See [G18X005 – NGC Request for Ruling #2 – Jan09 20](#) at para 17; [G18X005 – NGC Closing Argument – Jul30 20](#) at para 23.

⁴⁶ See [G18X005 – NGC Request for Ruling #2 – Jan09 20](#) at para 3.

⁴⁷ See [G18X005 – NGC Closing Argument – Jul30 20](#) at para 10

⁴⁸ See [G18X005 – NWT NTEC Response to IR #3 – May26 20](#) pg. 1-2.

⁴⁹ See [G18X005 – GNWT NTEC Response to IR #3 – May26 20](#) at pg. 3.

⁵⁰ See [G18X005 – NWT NTEC Response to IR #3 – May26 20](#) at pg. 2.

reservation provides a clear, publicly communicated use of this right. However, the existence of a reservation by notation is not a legal requirement for the GNWT to publicly occupy land because of GNWT's inherent right to occupy GNWT-owned public land."⁵¹

GNWT asserts that it has a right to occupy public lands by virtue of having administration and control of public lands. Under the *Commissioner's Lands Act* and the *Northwest Territories Lands Act*, GNWT has the right to sell, lease, or dispose of public lands, and may require occupants to vacate public lands.⁵² GNWT has title in effect, and can give title away. The reservation by notation is simply an administrative arrangement. This system of tracking that identifies which GNWT department or agency has an interest in certain lands, does not change the fact that GNWT owns and has the right to occupy the land under reservation.

NTEC is GNWT's contractor. MVLUR paragraph 18(b) expressly recognizes that occupiers of land may contract to have a land-use operation carried out. In the NWT, contractors routinely apply for permits for projects they have been contracted to undertake.

In any event, NTEC is not a typical contractor. NTEC is a wholly owned subsidiary of NT Hydro. Pursuant to the *Northwest Territories Hydro Corporation Act*,⁵³ paragraph 4(2), NT Hydro is an agent of GNWT.

Therefore, GNWT, NT Hydro, and NTEC are related legal entities. Because NTEC is GNWT's contractor and agent, and GNWT has a right to occupy the land, the Board has determined that NTEC is eligible for a permit.

4.3 Effect of R-065-2014 and The Reindeer Grazing Reserve

NGC submits that the NWTLA defines GNWT's powers to dispose of interests in public lands. The NWTLA provides that the Commissioner in Executive Council may authorize disposition of territorial lands subject to such limitations as the Commissioner in Executive Council may describe.⁵⁴ Section 19 sets out the GNWT's authority to impose limitations on how public lands are used, including the authority to make withdrawal orders.⁵⁵

NGC argues that the effect of R-065-2014 is to withdraw lands from disposition, but also "makes it clear that the lands, even absent of any disposition, are appropriated for use as a reindeer grazing reserve."⁵⁶

NGC submits that, having enacted R-065-2014, GNWT is bound by it and

must not only refrain from granting dispositions – it must also conduct itself in accordance with the purposes of R-065-2014 which has set apart and appropriated those lands for use as a reindeer grazing reserve. It is therefore not open to GNWT to dispose of the lands contrary to R-065-2014], or to authorize uses of lands that are contrary to the purposes of the Reindeer Grazing Reserve. These are not discretionary guidelines – they are statutory prohibitions. GNWT is acting without lawful authority, and does not have the

⁵¹ See [G18X005 – GNWT NTEC Response to IR #3 – May26 20](#) at pg. 4.

⁵² CLA, ss. 3 and 5; NTLA, ss. 6 and 16.

⁵³ SNWT 2007, c 9.

⁵⁴ NWTLA, s. 6.

⁵⁵ [G18X005 – NGC Closing Argument – Jul30 20](#) at para 58.

⁵⁶ [G18X005 – NGC Closing Argument – Jul30 20](#) at para 60.

power to reserve for itself or to extend to NTEC a right to use and occupy lands to construct access roads to construct and service the Project, as such an action would be contrary to the purposes for which the Commissioner in Executive Council has set apart and appropriated those lands.⁵⁷

In the Board's view, there has as yet been no disposition of lands contrary to R-065-2014.

There has Been No disposition of Lands Contrary to R-065-2014

NGC argues that GNWT's right to occupy and/or the reservation by notation is a disposition prohibited by R-065-2014. As noted by NGC, the word "disposition" is "not defined in the *Northwest Territories Lands Act*."⁵⁸

Black's Law Dictionary defines "disposition" as "the act of transferring something to another's care of possession."⁵⁹ In *W.W. (1978) Ltd. v U.A., Local 740*,⁶⁰ the Supreme Court of Canada accepted that in the context of a disposition under Newfoundland's *Labour Relations Act*, a "disposition" means "alienate or direct the ownership of property as disposition by will; to exercise finally, in any manner, ones power of control over; to pass into control of someone else; to alienate, relinquish, part with, or get rid of; to put out of the way; to finish with; to bargain away; to transfer into new hands or to the control of someone else (as by selling or bargaining away); relinquish the whole."

Similarly, in *Plant National Ltd. v Minister of National Revenue*, 1988 CarswellNat 528, at para 4, the Tax Court of Canada explained that "The definitions of the word "disposition" in Black's Law Dictionary fifth edition include "the parting with, alienation of, or giving up property". In the same dictionary "dispose of" is defined in part as follows: "to alienate, relinquish, part with, or get rid of; to put out of the way; to finish with; to bargain away."

A right to occupy is not a disposition. Neither is a reservation by notation.

As explained by NTEC/GNWT, the reservation by notation is not a disposition because:

- "As a general legal principle, a party cannot sell ("grant") land it already owns to itself or otherwise dispose of it (by lease, etc.); that is no different for government. Since government cannot transfer any interest in its own land to itself, a "reservation" is legally incapable of being a "disposition."⁶¹
- "GNWT Departments are not separate legal entities, but different administrative arms of a single legal entity of the GNWT. As a result, a decision by the Department of Lands to set aside land for another Department's use is not a disposition because no transfer of any interest in land between two distinct legal entities occurs."⁶²

⁵⁷ [G18X005 – NGC Closing Argument – Jul30_20](#) at para 61 and 66.

⁵⁸ See [G18X005 – NGC Request for Ruling #2 – Jan09_20](#) at para 19.

⁵⁹ Black's Law Dictionary, 9th Edition, West, Edited by Bryan Garner (definition of "disposition").

⁶⁰ 1990 CarswellNfld 139, at para 51 [*UA Local 740*].

⁶¹ See [G18X005 – GNWT NTEC Response to IR #3 – May26_20](#) at pg. 2.

⁶² See [G18X005 – GNWT NTEC Response to IR #3 – May26_20](#) at pg. 2.

- A reservation by notation is “not itself a transfer of any quantum of land to another legal entity, and therefore it is not a disposition.”⁶³

NGC argues that the GLWB should interpret “disposition” of a right or interest to include the sale, lease, license or other disposition of interests.”⁶⁴ NGC argues that “GNWT appears to be claiming that because it has not alienated an interest in land to NTEC there is no disposition. But that is not correct. A licence does not confer an interest in land to the license holder, only a contractual right in relation to land. Yet the *Territorial Land Act* makes it plain that granting a licence is a disposition.”⁶⁵

The reservation by notation is a simple administrative arrangement that allows one department of the GNWT to communicate its plans for a piece of public land to other GNWT departments. The creation of a reservation by notation does not change the ownership of the lands or grant rights in the land. GNWT has not granted NTEC a license to or an interest in the land for the Project. NTEC is GNWT’s contractor and agent. The lands remain under the administration and control of the GNWT. As discussed above, GNWT and NTEC are related legal entities. Therefore, a legal contract between NTEC and a department of GNWT cannot constitute a disposition of GNWT interests.

Permitted use of the Reindeer Grazing Reserve

Order R-065-2014 withdraws the Reindeer Reserve from disposal for reindeer grazing purposes and appropriates the area for use as a grazing reserve. R-065-2014 only authorizes specific uses of land in the Reindeer Reserve, including quarrying, other forms of resource extraction (i.e., the issuance of a lease or interest under the Mining Regulations or *Petroleum Resources Act*), and the construction of public highways. However, as noted by NGC, R-065-2014 does not authorize the construction or operation of an electrical power generation or transmission projects in the Reindeer Grazing Reserve.

Despite the linkage drawn by NGC between the GLWB’s responsibility to determine whether a right to occupy exists before issuing a permit, and the effect of the Reindeer Reserve Order on the Project’s activities, the Board’s role does not extend to ruling on whether the Project is a lawful use of the Reserve. The purpose of the Board’s IRs and Request process was to secure the evidence and explanation needed about whether NTEC has a right to occupy. This is a core mandate for the GLWB under MVLUR section 18. NGC, however, invited the Board to rule that the Project is not lawful under R-065-2014. This is a GNWT Order and the Board is of the opinion that determining whether a proposed activity in the Reindeer Reserve is lawful is a decision that should be made by the GNWT.

4.5 There Has Been No Failure to Consult

In NGC’s view, GNWT was obligated to consult about the reservation by notation pursuant to the Devolution Agreement, the GCLCA, and the common law duty to consult. NGC argues that GNWT “stepped outside of its powers of administration and control” as set out in the Devolution Agreement by failing to notify and consult with the Gwich’in when GNWT transferred its right to occupy to NTEC through the reservation by notation process.⁶⁶

⁶³ See [G18X005 – GNWT NTEC Response to IR #3 – May26 20](#) at pg. 3.

⁶⁴ See [G18X005 – NGC Request for Ruling #2 – Jan09 20](#) at para 31(a).

⁶⁵ See [G18X005 – NGC Closing Argument – Jul30 20](#) at para 81.

⁶⁶ See [G18X005 – NGC Closing Argument – Jul30 20](#) at para 40.

NGC further argues that “as the GNWT’s action was clearly made in contemplation of further actions that were likely to affect Gwich’in rights through the construction of a wind turbine, support infrastructure and an access road through a sensitive game reserve where NGC members exercise harvesting rights” a reservation by notation triggers the duty to consult.⁶⁷ Because GNWT failed to discharge its duty to consult with respect to the reservation by notation, any extension of the right to NTEC is invalid, as is any right to occupy created by the reservation by notation.⁶⁸

Although the Board’s authority does not extend to ruling on whether the Project is a lawful use of the Reserve, it does have a duty to address questions about the adequacy of consultation when they are raised in relation to Board decisions on permits.

It is the Board’s view that GNWT is not required by either the Devolution Agreement, the GCLCA, or the common law, to consult about the making of a reservation by notation.

Devolution Agreement and GCLCA

NGC submits that in signing the Devolution Agreement, “GNWT undertook to administer public lands in accordance with the terms of the Devolution Agreement and any agreement with any Aboriginal party.”⁶⁹ NGC relies on Schedule 5 of the Devolution Agreement which sets out the terms of an intergovernmental agreement with Aboriginal parties including the Gwich’in.⁷⁰ The Agreement provides, among other things, that:

- Public Lands, Waters, and resources in the NWT should be managed in accordance with Settlement Agreements, and in keeping with the honour of the Crown including any requirement for consultation and if appropriate, accommodation, and
- The Parties, in carrying out their responsibilities for Management of Lands and Resources, should (i) respect Aboriginal and treaty rights, (ii) allow for mutual consultation in respect of the Management of Lands and Resources, and (iii) provide for meaningful participation in decision-making in the Management of Lands and Resources.⁷¹

As discussed below, there is no evidence that GNWT has failed to allow for consultation in respect of land and resource management. The GLWB process set up under the GCLCA is designed to ensure that consultation on land use proposals occurs. The Board’s Consultation and Engagement Policy requires that the GNWT consult with NGC about the Project throughout the Board’s application process. As part of the Board’s proceeding NGC challenged the adequacy of consultation in relation to the Permit application, and additional engagement was undertaken.

NGC now asserts that GNWT should have consulted NGC not just about the Permit Application, but also about its intention to make the reservation by notation. As set out in GNWT submissions, this is an administrative system used to reserve GNWT owned lands for specific GNWT departments and projects with no direct effects on outside parties. A reservation by notation is not a disposition. Indeed NGC’s argument suggests that the reservation by notation process is an internal administrative system without

⁶⁷ See [G18X005 – NGC Closing Argument – Jul30 20](#) at para 52.

⁶⁸ See [G18X005 – NGC Closing Argument – Jul30 20](#) at para 53.

⁶⁹ See [G18X005 – NGC Closing Argument – Jul30 20](#) at para 33.

⁷⁰ See [G18X005 – NGC Closing Argument – Jul30 20](#) at para 37-38.

⁷¹ Northwest Territories Land and Resources Devolution Agreement. Dated June 25, 2013. Retrieved from https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-NTH/STAGING/texte-text/nwt_1385670345276_eng.pdf

legal foundation, and the Board agrees. Such an administrative system has no effects on the exercise of Gwich'in land claim or other Aboriginal rights.

The GCLCA and MVRMA both require consultation in relation to the issuance of a permit. The Board applies a comprehensive Consultation and Engagement Policy which requires applicants to begin engagement even before a permit application is filed. NGC has been consulted on the proposed Project itself and was involved in pre-application engagement as well. All of this engagement and consultation is undertaken before any permit decision is made.

NGC states that under the GCLCA, GNWT is required to⁷²:

- consult with Gwich'in about changes to protected areas generally (s. 16.2.1). The Board notes that s. 16.2.1 specifically requires GNWT to consult with Gwich'in Tribal Council and affected local communities prior to changes in the boundaries of an established protected area.⁷³ In this case, GNWT is not proposing to change the boundaries of the Reindeer Grazing Reserve.
- consult with Gwich'in about land use decisions generally (ss. 24.2.6, and 24.2.2). Section 24.2.6 requires GNWT to consult with the relevant Gwich'in community in the development of a community plan. Section 24.2.2 deals with membership of the Planning Board. GNWT is not developing a community plan in this case.
- give special attention to Gwich'in harvesting and rights (24.2.4(b)). Section 24.2.4(b) provides that in conducting land use planning in the settlement area, special attention shall be devoted to land used by the Gwich'in for harvesting and other uses of resources, and the rights of Gwich'in under the GCLCA. The making of the reservation by notation is not a land use planning exercise and does not affect the land use planning designation of the lands.

NGC also submits that the GCLCA requires any authority granting licenses or leases to do so only in accordance with GCLCA (s. 24.2.10).⁷⁴ This submission is not accurate. Section 24.2.10 requires authorities with jurisdiction to grant licenses, permits, leases, or interests relating to the use of land and water in the settlement area to conduct their activities and operations in accordance with the approved land use plan. NGC has made no submissions related to the Project's consistency with the applicable land use plan. There is no evidence that any action of the GLWB in this matter violates the applicable plan nor that the granting of a Permit to NTEC would violate the plan.

All of NGC's arguments relate to consultation on specific land use planning decisions. There is a land use plan in the Gwich'in Settlement Area and the GLWB process in this case is consistent with that Plan and the MVRMA. In the Board's view, these arguments about the planning process do not support the proposition that GNWT was required to consult before making a reservation by notation.

⁷² See [G18X005 – NGC Closing Argument – Jul30_20](#) at para 39.

⁷³ GCLCA, s. 2.1.1 defines "protected area" as "all areas and locations of land set apart and protected by government in the settlement area including historic parks and sites, national wildlife areas, migratory bird sanctuaries, territorial parks, conservation areas and archaeological sites but does not include national parks."

⁷⁴ See [G18X005 – NGC Closing Argument – Jul30_20](#) at para 39.

Common Law Duty to Consult

NGC also submits that GNWT has failed to discharge its common law duty to consult. As set out by the Supreme Court in *Haida Nation v British Columbia (Minister of Forests)*,⁷⁵ the duty to consult arises where the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it.

In *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, the Supreme Court explained that:

high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on the lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a direct adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions.⁷⁶

The reservation by notation is not a high-level management decision, and it does not structurally change management of the Reindeer Reserve. The making of a reservation by notation is an administrative tool that reserves land for infrastructure as between GNWT departments. The reservation by notation did not transfer power over a resource from the Crown to another entity. As explained above, NTEC is an agent of GNWT and NTEC and GNWT are related legal entities. In the Board's view, this sort of administration decision does not trigger the duty to consult.

Furthermore, several courts have concluded that the Indigenous group must adduce some evidence that the contemplated Crown conduct might adversely affect rights.⁷⁷ In *Fond du Lac Denesuline First Nation v Canada (Attorney General)*, the Federal Court explained that "there must be evidence to establish an adverse impact on Aboriginal rights. Moreover, such evidence must: a) support the finding of an interference with an interest; b) be linked to the project or decision under consideration; and c) be more than simply submissions or generalities: see *Brokenhead*, above, at paragraphs 30, 33-34."⁷⁸

In *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands & Natural Resource Operations)*,⁷⁹ the British Columbia Court of Appeal held that the Minister's approval of an annual management plan, specifically applicable to Nisga'a hunters, would not adversely affect the rights of Gitanyow. The Court held at para 90 that "A marginal potential adverse impact is not an appreciable adverse effect on the Gitanyow's ability to exercise their Aboriginal right."

In *Mi'kmaq of P.E.I v Province of P.E.I. et al.*, the PEI Court of Appeal held that the Crown transferring lands

⁷⁵ 2004 SCC 73 at para 35 [*Haida Nation*].

⁷⁶ *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council* (2010), 2010 SCC 43 at para 47.

⁷⁷ *Fond du Lac Denesuline First Nation v Canada (Attorney General)* (2010), 2010 FC 948; affirmed (2012), 2012 FCA 73; *Conseil des Innus de Ekuanitshit c. Canada (Ministre des Pêches et des Océans)* (2015), 2015 FC 1298; *Mi'kmaq of P.E.I. v Province of P.E.I. et al.* (2018), 2018 PESC 20; affirmed (2019), 2019 PECA 26.

⁷⁸ 2010 FC 948 at para 105 [*Fond du Lac*].

⁷⁹ 2020 BCCA 215 [*Gamlaxyeltxw*].

subject to Aboriginal title claims does not necessarily result in an adverse impact.⁸⁰ The Court of Appeal specifically noted that “no substantial evidence was provided to show a causal connection between the transfer of ownership and control of the Mill River property by itself and potentially adverse effect upon the title claim.”⁸¹ In this case, no transfer is occurring.

NGC has provided no evidence to suggest that the making of the reservation by notation has the potential to appreciably affect the exercise of Gwich’in harvesting rights. The making of a reservation does not affect the ownership of the land and has no consequence on harvesting rights. Even if the reservation by notation did result in a transfer of ownership and control, as noted in *Mi’kmaq of P.E.I.*, the transfer of ownership and control does not necessarily result in an adverse impact. The Project itself has the potential to adversely affect harvesting right, but Gwich’in consultation about the Project takes place through the GLWB permitting and licensing process.

NGC relies on *Beckman v Little Salmon/Carmacks First Nation*⁸² in support of its argument that GNWT had a duty to consult on the making of the reservation by notation. NGC notes that in *Beckman*, the Yukon Government’s discretionary issuing of agricultural grants triggered the duty to consult.⁸³ In *Beckman*, the Yukon Government approved a grant of land for agricultural purposes to a third party. Because the land was granted to a third party, the Supreme Court concluded that the grant could alter Little Salmon/Carmacks First Nation’s access to the land for harvesting, a potential adverse impact. In this case, there is no disposition or transfer of land away from government. The making of the reservation by notation does not impact Gwich’in access to the lands in the Reindeer Reserve for harvesting.

NGC also relies on *Ross River Dena v Yukon* for the proposition that “statutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist.”⁸⁴ NGC argues that the reservation by notation process is defective because it does not allow for consultation. *Ross River* is a case about the disposition of proprietary interests (mining claims) permitting free entry prospecting to a third party without consultation. The holder of a mining claim has an obligation to do further work once a claim has been issued to maintain the claim. A mining claim is not comparable to a reservation by notation. A reservation by notation is entirely administrative and does not result in a disposition of land or affect harvesting rights. As noted above, the Project has the potential to affect harvesting rights, but GNWT has consulted Gwich’in about the Project through the GLWB’s permitting process.

In conclusion, NGC has provided no compelling evidence or arguments to support the proposition that the making of the reservation by notation triggers a duty to consult, or that GNWT acted improperly in making the reservation by notation.

⁸⁰ 2019 PECA 26 [*Mi’kmaq of P.E.I.*].

⁸¹ *Mi’kmaq of P.E.I.* at para 14.

⁸² 2010 SCC 53 [*Beckman*].

⁸³ See [G18X005 – NGC Closing Argument – Jul30_20](#) at para 45; 2012 YKCA 14 at para 37 [*Ross River*].

⁸⁴ See [G18X005 – NGC Closing Argument – Jul30_20](#) at para 51.

5.0 Conclusion

The GNWT has a right to occupy the lands proposed for use by the Project by virtue of having the authority to administer and control the lands (which is much like an ownership interest). NTEC is GNWT's contractor. MVLUR paragraph 18(b) expressly recognizes that parties with the right to occupy the land may contract to have a land-use operation carried out. In the Mackenzie Valley, contractors routinely apply for permits for projects they have been contracted to undertake.

In any event, NTEC is not a typical contractor. NTEC is a wholly owned subsidiary of NT Hydro, which is a statutory agent of GNWT. GNWT and NTEC are thus closely related legal entities. Because NTEC is GNWT's contractor and agent, and GNWT has a right to occupy the lands proposed for the Project, NTEC is eligible for a permit.

Notwithstanding the question of NTEC eligibility for a permit, NGC has argued that the proposed Project is prohibited by GNWT legislation (i.e., R-065-2014). The Reindeer Grazing Reserve is a protected area and uses of the Reindeer Grazing Reserve are limited by R-065-2014.

In the Board's view, whether the Project is an authorized use of land in the Reindeer Grazing Reserve is a question that should be decided by the GNWT. The enforcement of R-065-2014, if such action is warranted, is a matter for the GNWT to consider. The GLWB's role in this matter is to determine whether a right to occupy exists under section 18 of the MVLUR, and if so to manage its proceeding in a way that satisfies the requirements of Parts 3 and 5 of the MVRMA and consultation and engagement obligations.

Review of the Request also indicates that NGC has alleged that Crown consultation obligations should apply to a Reservation by Notation decision by the GNWT and that such consultation did not occur. In the Board's view a Reservation by Notation does not trigger Crown consultation because it is merely an administrative process and does not transfer or otherwise dispose of land or interests in land in a way that could adversely affect the exercise of land claim or other Aboriginal rights.⁸⁵

The Reindeer Grazing Reserve Order is GNWT law. The GLWB suggests that the GNWT is best placed to enforce its own legislation.

SIGNATURE



October 29, 2020.

Elizabeth Wright
Chair, Gwich'in Land and Water Board

Date

⁸⁵ Note that the scope of the Crown consultation analysis in this decision only addresses NGC arguments about consultation in relation to the GNWT's Reservation by Notation process, not the broader Board permit and licensing process.