



Deninu K'ue First Nation
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February 21, 2012

Mackenzie Valley Land
& Water Board

VIA FACSIMILE: 867-873-6610

File _____

FEB 22 2012

Application # MV2011L4-0002

Copied To KG 12/12

Willard Hagan, Chair
Mackenzie Valley Land and Water Board
7th Floor – 4910 50th Avenue
Yellowknife, BC

Dear Chairman Hagan:

Re: MV2011L4-0002 – Water License Renewal Application, Northwest Territories Power Corporation (“NTPC”), Talston River, Information Request for Claims of Compensation

We write in response to your letter dated December 20, 2011 on the matter referenced above.

Background

The Mackenzie Valley Land and Water Board (the “Board”) is considering NTPC’s application for a 25 year water license fundamental to the operation of the Talston Dam. The Talston Dam is in the traditional territory of the Deninu K’ue First Nation (“DKFN”). The building of the Talston Dam in 1965 caused the flooding of hunting, trapping, gathering and spiritual sites of the DKFN and the direct displacement of the DKFN members residing in the community of Rocher River.

The operation of the Dam has caused a demonstrable increase in mercury levels in Nanacho Lake and the diminishment of fish and wildlife (including game and waterfowl) in health and abundance. The alteration of the watershed and the continual fluctuation

of water levels in the Talston watershed system continually interfere with DKFN's access to the resource base of our traditional territory.

The DKFN views the licensing and building of the Talston Dam as an unjustified infringement of our Aboriginal and Treaty Rights; we have never been adequately consulted, accommodated, or compensated for the infringement of our Rights. The permitting of the operation of the Talston Dam for a further 25 years will extend and compound the infringement of DKFN's exercise of its Aboriginal and Treaty Rights. As stated by the DKFN Community Negotiator at the MVLWB hearing in Fort Resolution on September 20, 2011:

...members of our tribal area, Deninu K'ue, have suffered serious and irreversible damages from the Talston River Hydro Project for generations. ... we feel that hydro damages have impacted not only the livelihoods of individual First Nation members, but also have impacted the wellness and health of the community of Deninu Kue as a whole. Our position is there is no doubt that DKFN is owed full compensation for past and current damages to the livelihood of its members caused by the Talston hydro project. (MVLWB hearing transcript, pp. 53-53)

On November 29, 2011, the Board provided a draft water licence for the Talston Dam to the Minister for approval. The following conditions appeared in the draft licence under the heading "Conditions Applying to Compensation":

J.1 The Licensee is directed to determine the nature and extent of the adverse effects its operations shall have on the Deninu K'ue First Nation and the Carter Family.

J.2 The Licensee shall, on or before the expiration of one year subsequent to the issuance of this License, submit to the Board, for approval a report detailing the adverse effects upon Deninu K'ue First Nation and the Carter Family and file with the Board, for approval, its detailed plans to mitigate these effects.

J.3 If the Licensee fails to satisfy the Board that the Licensee has complied or shall comply with its obligations under s. 14(4)(b) of the NWTWA and the conditions of this licence, then the Board will take such measures as it considers necessary to assure the Licensee's compliance with s. 14(4)(b) of the NWTW A, and the conditions of this licence.

In a response letter dated December 12, 2011, the Minister acknowledged the Board's finding that the DKFN was entitled to compensation in respect of the license, and refused to approve the license on the basis that "the Board must determine the appropriate amount of compensation to be paid to each applicant deemed by the Board to be adversely affected by the licensed operation, prior to license issuance". The Minister further directed that the Board "hear evidence and prepare a ruling on the amount or type of compensation that is to be payable by the licensee to the Deninu K'ue First Nation...."

On December 20, 2011, the Board wrote to the DKFN posing a series of questions on the basis of which the Board would make a determination of the nature and amount of compensation to which the DKFN is entitled. The Board requested a written response from the DFKN prior to March 1, 2012. The Board emphasized that the onus was on the DKFN to "prove that they are indeed entitled to compensation and to quantify the amounts and form that compensation should take" for the term of the proposed water license, and indicated that "claims for past adverse effects will not be considered".

In order to properly respond to the Board's request, the DKFN seeks clarification from the Board, and/or the Minister, on several key questions. The legal framework of the *Northwest Territories Water Act (the "Water Act")*, the *Mackenzie Valley Resource Management Act*, previous Board decisions and Board policy and correspondence does not provide a clear picture of the Board's mandate to consider matters of foremost concern to the DKFN.

With respect, this ambiguity on issues of central concern is unacceptable at law. The DKFN is legally entitled to a clear, transparent and effective process for the assessment

of Constitutional questions, including compensation.¹ Further, it is to the benefit of the Board and all parties to clarify the Board's mandate in relation to these critical issues in order to focus the review and the parties' participation.

1. Ability to Consider Collective Rights

In a previous decision of the Board (Miramar Northern Mining Ltd., MV2007L8-0025, which the Board brought to our attention), the Board rejected an argument that communal water rights fall within the definition of water users within the context of s. 14(4)(b) of the *Water Act*. We recognize that the Board is not precedent bound, and that the claimant group in that case was a Metis Organization. We further note that the Board has asked us to inform it of "any asserted First Nation rights that will be affected and how". It is our position that the Aboriginal and Treaty Right affected by the Talston Dam are communal, and therefore require that compensation can be assessed on a communal basis. Please advise us as to whether or not the Board, under the authority of the *Water Act*, s. 14(4)(b), has the ability to assess compensation on a communal basis.

2. Scope of Damages and Compensation

While the Board explicitly states that it will not consider past adverse impacts of the Talston Dam on the DKFN, the Board also asks DKFN to indicate what costs or damages DKFN or its members have suffered to date. The Board asks additional 'backward looking' questions such as how long the DKFN has had interests in the affected area, and what steps the DKFN has taken to avoid or mitigate the effects of the Talston Dam in respect of the exercise of our Rights. We also note the general difficulty in separating an assessment of damages arising from the original construction and past licensing, from the current effects of the ongoing operation in the Dam. We therefore request clarification from the Board as to the use of information pertaining to pre and post license periods in respect of the Board's assessment of the nature and amount of compensation the DKFN may be entitled to under the *Water Act*.

¹ See, e.g., *Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1505, para. 147.

There appears to be no precedent for the Board requiring payment of compensation to a water user, property owner/occupier, or license holder under s. 14(4)(b) of the *Water Act*. However, in its reasons for decision in the matter of Bluefish Hydro Facility (MV2005L4-0008), the Board indicated that “the question of Crown consultation is not *directly* related to compensation for damages arising because of a water licence” (emphasis added). We respectfully request that the Board explain whether, and to what extent, Crown consultation (or lack thereof) plays a role in the assessment of compensation in the matter at issue. Further, we request that the Board advise us of what heads of loss or damage it views to be compensable under the *Water Act*.

3. Relationship to Other Compensation Processes

The DKFN has repeatedly made it clear to the Board that we expect that our participation in the processes mandated by the *Water Act* is without prejudice to our right to pursue compensation for infringement of our Aboriginal and Treaty Rights through other mechanisms. As we believe the Board and the Crown are aware, the DKFN has initiated, and intends to pursue, a legal claim for damages arising from the past, current and ongoing infringements caused by the development and operation of the Talston Dam.

The DKFN acknowledges s. 30 of the *Water Act* which appears to clearly express the intention of the legislature that compensation under s. 14(4)(b) does not preclude exercising any common law or other statutory rights for compensation in any court of competent jurisdiction.

30. (1) Except as otherwise provided by a compensation agreement referred to in subparagraph 14(4)(a)(ii), a person who is adversely affected as a result of

(a) the issuance of a licence, or

(b) a use of water or deposit of waste authorized by regulations made under paragraph 33(1)(m) or (n)

is entitled to be compensated by the licensee, authorized user or authorized waste depositor in respect of that adverse effect, and may sue for and recover any such compensation in any court of competent jurisdiction.

Rights protected

(2) A person is not barred from exercising any rights conferred by subsection (1) merely because of having been paid compensation referred to in subsection 14(4), or because of having been paid compensation pursuant to paragraph 17(2)(a) or pursuant to a compensation agreement referred to in subparagraph 14(4)(a)(ii).

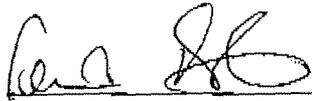
Prior to providing a response to the Board, the DKFN requires clarification on the scope of the compensation contemplated under the *Water Act*, and agreement from the Minister, as a representative of the Crown, that any compensation which may be pursued under the *Water Act* is without prejudice to any legal proceedings in respect of past impacts of the Talston Dam. The DKFN acknowledges that if compensation is awarded under the *Water Act* in respect of the adverse effects of the water licence in the future, it may impact that amount of compensation it is entitled to through other processes; therefore, it is equally important that all parties have clarity at the outset as to the scope of compensation contemplated in the *Water Act*, as discussed above.

4. Methodology for Damage Assessment

The Board has asked the DKFN to estimate damages to our interests from the proposed water license and explain "how DKFN has come to any estimates of damages". There can be no doubt that this is a factually and legally complex matter for which expert evidence would be required. Further, as noted above, the DKFN is not in a position to identify methodologies until it knows the mandate of the Board and the scope of damages and compensation that the Board is empowered and prepared to assess. This poses both a timing and capacity challenge. It is clearly impossible by March 1, 2012 for the DKFN to secure funds to establish an appropriate methodology and the expert evidence that would certainly be required for the Board to make a determination on the nature and amount of compensation the DKFN may be entitled to due to the future operation of the Talston Dam.

In closing, the DKFN requires, and is entitled to, much greater certainty with respect to the scope of the Board's assessment of compensation entitlement under the *Water Act*. We respectfully request a response to the matters we have raised in this letter; to enable us to provide a complete and proper response to the Board's request for information (including a determination as to whether it is appropriate for the DKFN to seek compensation under the *Water Act*). Further, we ask the Board to recognize, should DKFN determine that it would be appropriate to seek compensation under the *Water Act*, that longer timelines would be required for the DKFN to provide a proper evidentiary record to the Board. Finally, we request that the Board advise us of its intentions in carrying out the Minister's direction to extend the term of the water license that expired on December 30, 2011. We are not aware if the license has in fact been extended and for how long a period.

Marsi Cho,



Chief Louis Balsillie, Deninu Kue First Nation

cc. Minister of Indian Affairs
Northwest Territories Power Corporation
Lutsul K'e Dene First Nation
Akaitcho Territory Government



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FACSIMILE TRANSMITTAL SHEET

TO: Wilard Hagan, Chair	FROM: Chief Louis Balsillie, DKFN
COMPANY: Mackenzie Valley Land and Water Board	DATE: FEBRUARY 22, 2012
FAX NUMBER: 867 873- 6610	TOTAL NO. OF PAGES, 7 including cover
PHONE NUMBER:	SENDER'S REFERENCE NUMBER:
RE: MV2011L4-0002 NTPC	YOUR REFERENCE NUMBER:

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

NOTES/COMMENTS:

ATTENTION: