



# Yellowknives Dene First Nation

P.O. Box 2514, Yellowknife, NT X1A 2P8

January 19<sup>th</sup>, 2012

Brett Wheeler  
Wek'eezhii Land and Water Board  
Box 32  
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Dear Mr. Wheeler:

**Re: New Nadina – Further Studies Update**

Thank you for the opportunity to comment on this matter – it is critical that the Crown and the Boards verify that the 'engagement' in the 'engagement log' results in meaningful Consultation with the impacted community, ideally leading to accommodation of the communities concerns. In this case, there has been no consultation or accommodation with the Yellowknives Dene leading to this point. There have been discussions between staff and the company on establishing a mechanism to do this, but there has been no agreement as to the commitments and expectations of both the company and the First Nation.

Central themes that have been discussed thus far are simple and represent the initial concerns with every development proposal: protection of heritage resources, clear commitments to provide information, guarantees that the company is completing their work on the land as expected by way of monitoring or a site visit, and mechanisms to enforce the company's promises.

Staff have provided clear instruction to the company – there is no requirement that the company has to sign our exploration agreement – it is the Yellowknives preferred method and in our opinion, represents the most efficient tool. However, if they choose to another method, the Constitutional Duty to Consult remains. This was verified by *North Arrow*, where the Federal Court confirmed that the company is well within its rights to not undertake this responsibility, but the Duty must be met prior to the issuance of a permit. For clarity, at no point has AANDC undertaken any action to facilitate or achieve Consultation or Accommodation.

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As for the specific information that you request:

1) The Environment: The YKDFN will submit the sworn affidavits from several elders from the North Arrow case. The North Arrow project is near the Monument project, with similar environmental considerations.

2) Traditional Land Use: The affidavits also outline traditional use in this region. Furthermore, YKDFN's traditional knowledge mapping shows that these claim blocks are astride one of the three principal trails that people use to access Lac de Gras.

3) Cultural and heritage resources: Given the presence of the traditional trail, the historic use and as well as the numbers of very large numbers of archaeological sites found at Diavik and Ekati (two areas where archaeologists have *actually looked*) YKDFN strongly suspect that there is a high probability of heritage resources being found within these claim blocks.

4) Additions or revision to the Updated Engagement Log: See attached. We have chosen to provide additional context so that the Board can understand the content of the interaction between staff and the company. In reviewing this, the Board will clearly see that YKDFN have been forthright, responsive and done everything possible to try to move the discussion forward and arrive at a product that would meet the Parties and Boards need.

Beyond the issues raised in your letter of January 17<sup>th</sup>, 2012, for the purposes of this study, the fact of the matter is that objectives of the study remain outstanding. YKDFN refer to the September 20<sup>th</sup>, 2011 letter which state "The scope of this engagement, including an engagement plan and schedule, should be agreed upon between New Nadina and the engaged parties and this information must be provided to the WLWB by November 15, 2011" and "The full cooperation of New Nadina Explorations Limited, the Akaitcho Dene First Nations, and other affected parties is anticipated and appreciated."

- This evidence indicates there is no engagement plan or schedule. The YKDFN have advanced their mechanism to ensure the duty to consult is met, but there has been no commitment to this or any other scheme.
- It is the First Nations that have been driving this process, both in terms of initiating the conversation, and subsequently meeting requests for feedback/correspondence within rushed timelines.

The law is clear – there must be meaningful consultation, which has not occurred yet. We have been clear with the company – they're under no obligation to use our tool, but if not, they must go engage through Chief and Council. This is less certain, usually more time consuming, and does not produce clear commitments to accommodate the concerns of the First Nation. Secondly, the purpose of the study has not yet been achieved. The YKDFN's agreement dispenses with the need for an engagement plan, as it in effect, is the plan, but as there is no Exploration Agreement or heretofore unknown engagement plan, this objective has not been met and the study must continue.

Sincerely,



Chief Edward Sangris  
Yellowknives Dene First Nation (Dettah)

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Steve Ellis, Akaitcho IMA Implementation Office – Lutsel K'e NT, Fax: 1-888-714-3209  
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You will find below the YKDFN response to the engagement log.

- According to the “engagement log”, the Yellowknives Dene had no contact from the applicant until November 1<sup>st</sup>, 2011 when the YKDFN contacted them by email. Until that point, the company had not taken action to respond to the Sept. 20<sup>th</sup> engagement order from the Board (i.e. a month and half had transpired).
  - Two days later the company responded with some preliminary information and a request for a face to face meeting to develop an “Engagement Plan and Schedule”. The next eight entries in the engagement log are scheduling and shouldn’t be construed as anything important. YKDFN object to this type of information being included as ‘engagement’ as it allows companies to ‘bulk up’ consultation logs without undertaking meaningful actions.
- The face to face meeting took place on November 15<sup>th</sup> at the Geoscience trade show.
  - After introductions, staff explained that the Exploration Agreement is the YKDFN’s preferred mechanism for consultation with Exploration Companies. Staff explained the pros and cons honestly and as straight forward as possible. The template is flexible – YKDFN are open to working with the company to find terms that satisfy both parties.
  - Ms. Clements was not pleased with the way that events had transpired, suggesting that the YKDFN had blocked her application at the last hour. Staff tried to explain that the Yellowknives Dene were not the Wekeezhii Land and Water Board and we do not have the ability to make decisions such as what she was suggesting. Despite explaining honestly and directly as to what Land and Environment think happened, Ms. Clements feels that staff “gave [her] the various and multiple excuses how this happened”.
    - \* For the record, YKDFN did not communicate with this proponent until November 1<sup>st</sup>, which was on our initiative after Stephanie Poole’s email of October 17<sup>th</sup> to the company which had not resulted in any action.
  - Eventually, the discussion returned to the Exploration Agreement. Staff outlined the principle issues that it addresses – the need for archaeology, information exchange and monitoring/site visit. This was met with a considerable amount of resistance.
  - YKDFN staff tried to be clear with Ms. Clements – she was under no obligation to utilize the Exploration Agreement model. This was the mechanism that the Akaitcho Dene First Nations had created to fill the void between the regulatory process and the extra-regulatory.
  - We disagree with the statement in the log regarding hiring of FN people. This was not a focus of the discussion – it was brought up by the company and we supported their effort. What we discussed are several clauses in the Exploration Agreement which would require the company to allow the YKDFN’s business arm the opportunity to bid on contracts for work in their traditional territory. Where the company could demonstrate capacity and cost effectiveness, they would be selected. In other words, it only requires the proponent to give them a chance – it did not require direct contracting or anything along those lines.
  - Archaeology was discussed as part of the Exploration Agreement. YKDFN are steadfast that any further disturbance (drillholes, new camp) would need to be inspected prior to the disturbance occurring.

- During the meeting, Ms. Clements principal concerns seemed to revolve around costs and timeliness.

\* To this end it was explained that the YKDFN would attempt to minimize costs, working with the company wherever possible, repeatedly explaining that there was no profit in this for the band.

\* In terms of timeliness, it was explained that if she chooses to use our tool, then it's generally the company that drives the timeline. Specifically, it was explained that more changes introduced the longer the delay from the First Nation side – additional review (possibly requiring legal review) is required.

- My commitment was to discuss the case with the Chiefs to ensure that it was in an area where the impacts could be mitigated with the measures contained in the Exploration Agreement and the Terms and Conditions. In the meantime the YKDFN Exploration Agreement Template would be provided for her review – to see the language of the clauses that had been described to her.

- There seemed to be confusion as to the relationship between the YKDFN agreement and the WLWB permit.

- The next day (as promised), the draft ExA was provided to Arlene Ashton at New Nadina, with information that YKDFN would confirm with leadership that this was an appropriate manner to proceed so as to address YKDFN concerns.

- November 23<sup>rd</sup>, 2011: After a short meeting with the Chief, confirming that the ExA was an appropriate mechanism, staff emailed the company indicating this. Again it was noted that if she did not want to use our method, then consultation would have to occur directly with leadership.
- December 12<sup>th</sup>, 2011: the company responded with a draft agreement that was entirely different. They had chosen to discard the template that we sent and written up a completely new one. Furthermore, they did not seem to recognize that the Yellowknives Dene First Nation is a single First Nation.
- December 13<sup>th</sup>, 2011: YKDFN responded asking – a) For a track changes version version so that it could seen what had been removed/changed versus just rearranged and; b) why the company chose to re-write the whole agreement rather than just making changes within the template.
  - Later this day the company responded that they didn't have a track changes available, meaning that staff would have to a) complete a clause by clause review of the agreement and; b) likely need involve a lawyer to review any agreement text (because of the significance/number of changes). This would increase our cost and introduce another time requirement.
  - The second question went unanswered.
- December 16<sup>th</sup>, 2011: Staff completed the initial clause by clause review, changing very little – the primary changes involved improving the clarity of the archaeological clauses. The version sent to us, in my opinion, could certainly have been interpreted in a way that would see drilling

prior to archaeological inspection. From the email:

*"I've gone over this and tried to bring it back in conformity with our template, while leaving in most of the changes. There are only two items where I think I've changed the content - the Good Neighbour clause, where we left your definition but removed the 6 month time period and I've added details surrounding the archaeology so that there's additional clarity."*

- December 22<sup>nd</sup>, 2011: Company responds, indicating no progress and that our changes have been "quite severe" and asks us to reconsider on some of the costly items, suggesting that the process is "too onerous". Furthermore, they asked us to "stage" these items "down the road", which was already part of the agreement – other than the obligation for the Chief and Council meeting, the requirements of the agreement are tied to the activities being planned. For example, the archaeological work only need to be done prior to the disturbance (a common sense approach), thus drilling work planned in the future does not require this to be done now.
  - Ms. Clements commits "continue to work on this best that I can"
  - For clarity, YKDFN had made numerous concessions already, significantly altering the content and cost of implementation. However, as had been stated from the beginning of our conversation with the company, there are costs associated with this process.
  - The HR requirement that the company objects to at the end of this email – "The HR requirements you request are more geared to a larger company" is the only clear concern that is illustrated.

\* This is confusing as there are HR costs other than the Archaeological study, there are no HR costs. The company would have been required to let YKDFN know what employment opportunities are available and *"where feasible, the company will seek to train on-the-job those members of the First Nation that demonstrate the ability to succeed"*. These are hardly onerous conditions.

- December 29<sup>th</sup>, 2011 (1:00pm): YKDFN response to the companies mail of the 22<sup>nd</sup> below:
 

*Hi - I'm going to slice this message into numbered comments to try and allow us to break the discussion up into manageable chunks.*

  - 1) *"The changes have been quite severe" - I'm open to this discussion, but as you re-wrote the entire draft template that we sent to you, bringing this back into line with our expectations isn't out of line in my opinion. I added words and passages that were important for clarity - for instance, your draft included reference to multiple First Nations - a confusing insertion that I didn't understand. Rejigging this was the single most numerous [repeated] change in the document - so in terms of the severity of changes, the largest degree was a correction.*
  - 2) *"reconsider on some of the costly items and stage the agreement down the road" - What do you see as excessively costly - what would you like to see - but still addresses the FN concerns? The costs associated with meeting with the First Nation? The Archaeology? I think that we've shown flexibility on both of these themes.*
  - 3) *What HR requirements are you referring to - there are two. The first is a site visit (ie. one day) and the second is associated with the Archaeology (scaled to the size of the proposed program).*

*Again, if you can explain how you see this as onerous, then we can potentially consider options here - but at this point, I do not see this as geared to a larger company.*

*Overall - It is clear that you are rejecting the version that I sent to you, but I'm not sure if there is common ground to continue negotiations towards an acceptable text - I could use additional clarity in what the issues are and if you are rejecting particular changes, would like rewording, or some are acceptable? I'm just not sure.*

*In terms of your closing - it is not clear to me if you wish continue to pursue an Exploration Agreement with the Yellowknives Dene - there's the suggestion that it is just too costly and too onerous. Again, I remind you, that you are not required to do so, but if you choose to reject this tool, the duty to consult remains and must be completed. If I am correct in this interpretation, I suggest that you contact AANDC and solicit their assistance in completing their duty.*

*For your information, if you're not going to utilize the ExA, this file becomes a matter for Chief and Council - I have CC'd Shannon Gault on this email - she will be your contact henceforth to develop an engagement plan with clear steps and expectations from the parties. Ellen, you must be explicit on what option New Nadina wishes to pursue at this point - if you want to continue discussion on the ExA, then I am the contact. If it is not your preferred option, then it's outside my office - Consultation with the YKDFN occurs directly with leadership - I'm just staff trying to help the process.*

*Hope you have a happy new year,*

- In reviewing this file, the highlighted passage is in error as this section had been removed when the company re-wrote the Exploration Agreement. The site monitoring visit is in the YKDFN draft template, but not in the version sent to the company on December 16<sup>th</sup>.
- December 29<sup>th</sup>, 2011 (1:06pm): Company submits the consultation log.
- January 10<sup>th</sup>, 2012: The company responds to the YKDFN email of December 29<sup>th</sup>:
 

*Hello Todd,*

*I feel confident we will work out an agreement that is acceptable. I'll be getting back to you shortly with discussions and clarification,*

*Regards,*

*Ellen*

The company has not provided any clarification as to what their concerns were.
- This was the last communication received.