



Ms. AlecSandra Macdonald
Regulatory Specialist
Gwich'in Land and Water Board
PO BOX 2018
INVUIK NT X0E 0T0

By Email

Dear Ms. Macdonald:

Response to Information Request 3

Please find attached a Government of the Northwest Territories (GNWT) response to Information Request #3 issued by the Gwich'in Land and Water Board (GLWB) on March 4th in relation to the proposed Inuvik Wind Project.

As the Board is aware, the proposed 3.5 MW Inuvik Wind project is a small scale renewable energy project that is anticipated to provide a number of regional benefits, including construction jobs, electricity rate stability and lower diesel emissions in the community of Inuvik. The Project has the potential to deliver savings of up to 3 million litres of displaced diesel fuel and offset 3,900 – 6,000 tonnes of GHG emissions or 30% of the community's annual energy requirements.

As outlined further in our attached response, NWT Energy Corporation (03) Ltd (NTEC) is the operator of the Inuvik Wind Project, on behalf of the GNWT. As such, NTEC holds the lawful right to occupy public lands on behalf of the GNWT for this project.

We trust that this response provides the information the GLWB requires to issue a timely ruling on the Nihtat Gwich'in Council's January 9th motion.

Sincerely,

Robert Jenkins
Assistant Deputy Minister
Energy and Strategic Initiative
Infrastructure

Blair Chapman
Assistant Deputy Minister
Operations
Lands

Attachment

c. Grand Chief Bobbie Jo Greenland-Morgan
Gwich'in Tribal Council

President Jozef Carnogursky
Nihtat Gwich'in Council
Nihtat Corporation

Mr. Joe Dragon, Ph.D.
Deputy Minister
Infrastructure

Ms. Sylvia Haener
Deputy Minister
Lands

Mr. Brad Patzer
Director, Legal Division
Justice

Mr. Andrew Stewart
Director, Energy
Infrastructure

Mr. Noel Voykin
President
NWT Energy Corporation (03) Ltd.

Mr. James Thorbourne
Interim Chief Operating Officer
Gwich'in Tribal Council

Ms. Lianne Nerysoo
Finance Officer
Nihtat Gwich'in Council

- 1. Please confirm that the Contribution Agreement referenced in Dr. Dragon’s letter of January 15, 2020 in response to IR #2 establishes binding contractual obligation between NTEC and the GNWT Department of Infrastructure within the meaning of paragraph 18(b) of the Mackenzie Valley Land Use Regulations (MVLUR). Provide a copy of the Contribution Agreement or else include all details in your answer necessary to prove that document’s contractual nature.**

The Inuvik Wind Project involves the construction and operation of one wind turbine to provide a source of renewable electricity for Inuvik. The turbine would be located at High Point, about 12 km east of Inuvik, north of the Dempster Highway and west of Campbell Creek. An all-season access road would extend about 5 km south from the High Point site to the Dempster Highway. A transmission line would follow the access road to the airport electrical substation.

All lands relating to the project fall under the administration and control of the Government of the Northwest Territories. The NT Energy Corporation is the operator of the site, and will be doing so on behalf of the GNWT through a binding contractual obligation, specifically, through the Contribution Agreement referenced in Dr. Dragon’s letter to the Board, dated January 15, 2020.

Rights to occupy public land 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.

This response confirms that NTEC will be occupying these lands under the GNWT’s general right to occupy lands that are under its administration and control.

- 2. A. Please explain in detail the origin in law, legal nature and effect of a “reservation by notation” as referenced in the December 17, 2019 letter found in the response to IR #1 from ADM of Lands Mr. Conrad Baetz to Mr. Noel Voykin President and CEO of NTEC.**

Origin in Law

The following provisions of the CLA and the NWTLA are the origin in law of “reservations” or “reservations by notation”:

Commissioner’s Land Act, R.S.N.W.T. 1988, c.C-11

4. The Commissioner may

...

(b) set apart and reserve Commissioner’s land for public or other purposes.

Northwest Territories Lands Act, S.N.W.T. 2014, c.13

19. The Commissioner in Executive Council may

...

(b) set apart and appropriate territorial lands for the sites of places of public worship, burial grounds, schools, market places, jails, court houses, town halls, public parks or gardens, hospitals, harbours, landings, bridge sites, airports, landing fields, railway stations, town-sites, historic sites or for other public purposes and, at any time before the issue of a grant, alter or revoke those appropriations;

Legal Nature

The NWT Devolution Agreement, which took effect on April 1, 2014, transferred “public lands” to the GNWT, with the exception of specific parcels of land listed in the Agreement. Except for those lands retained by the federal government in 2014, “administration and control” of public lands in the Northwest Territories was transferred to the GNWT. “Administration and control” in this sense includes the ability to sell lands in fee simple, giving the GNWT possession of the entire estate in these lands (*Northwest Territories Devolution Act*, SC 2014, c 2, at ss. 18(1)(q) and 51). As a result, the GNWT “owns” these lands as that word is generally understood. This response will generally use terms like “owns” and “ownership” because of this.

It is important to clearly identify for the Board that the Inuvik Wind Project is entirely within lands transferred to the GNWT at Devolution. As a landowner, the GNWT has the right to enter onto and to occupy this land. Publicly owned infrastructure projects, like the one subject to these proceedings, are a routine way in which this right is exercised.

As a general legal principle, a party cannot sell (“grant”) land it already owns to itself or otherwise dispose of it (by lease, etc.) by contract with itself; 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”. Accordingly, as detailed below, a “reservation” 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. In many ways it is similar to a “disposition”, which is why administrators often refer to it as one.

While the Department of Lands administers most GNWT-owned lands on behalf of all of the GNWT, many Departments utilize public lands in the course of their operations. GNWT Departments are not separate legal entities, but different administrative arms of the 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.

Effect of a Reservation by Notation

A “reservation” accounts for this practical and legal reality by providing the GNWT with an administrative tool that allows it to set aside specific public lands for a specific public purpose. The essential purpose of this tool is to identify and record lands that the government or government agents plan to occupy. This action serves both to notify administrators within the GNWT Land Titles Office and the Department of Lands’ Lands Administration Division of the intended governmental use and to ensure that the land subject to such reservation is not made available to other parties for incompatible purposes. A reservation of land does not prohibit the disposition of the land in question – any dispositions that do not interfere or conflict with the uses for which the land has been reserved may still be made. Regardless, it is still not itself a transfer of any quantum of land to another legal entity, and therefore it is not a disposition.

The system of “reservation by notation” under section 19(b) of the NWTLA was developed by directive of federal Cabinet well before the land was devolved to the GNWT. The GNWT relies on a similar process for reservations under section 4(b) of the CLA and largely continues to rely on the federal practice after the NWTLA was devolved. While the specific language varies somewhat between the two, in both pieces of legislation it is clear that the reservation can only be used to the extent that it gives effect to valid public purpose.

The reserve in question and the GNWT project being conducted on it reflect such a public purpose as required by the legislation. In *Black’s Law Dictionary*, 10th ed., 2014, “public purpose” is defined as “an action by or at the direction of a government for the benefit of the community as a whole”. The proposed project is not for individual or private benefit; it is a publicly-owned energy infrastructure project that entails building a wind turbine to supply power to Inuvik, reducing Northern reliance on fossil fuels, increasing energy security, reducing greenhouse gas emissions and stabilizing power costs for the 25 diesel communities of the NWT’s thermal rate zone. All of these anticipated outcomes are intended for the benefit of the community as a whole, and as such, are clearly a “public purpose” as defined. This makes the project in question a valid exercise by the GNWT of the reservation by notation tool, given the GNWT’s right to occupy the lands in question as their owner, as discussed above.

B. Explain in detail, by reference to your answer to question 2(a), why a reservation by notation is not a disposition under the *Northwest Territories Lands Act* of an interest in GNWT lands.

As indicated in our answer to Question 2.A. above, as a general principle of law, a person, including a government, cannot sell land it already owns to itself or otherwise contract with itself. Since the GNWT cannot transfer ownership or a lesser interest in its own land to itself, a “reservation” is legally incapable of being a “disposition”. Again, a reservation is simply an administrative tool that allows the GNWT both to communicate to relevant government actors and the public at large its intent to occupy certain lands, as it is entitled to do as their owner, and to *prevent* these lands’ disposition to any outside party whose use of the land would be contrary to the purpose of the reservation.

3. A. Explain the GNWT’s interpretation of the term “right to occupy” in paragraph 18(b) of the MVLUR.

Section 18 of the *Mackenzie Valley Land Use Regulations* SOR/98-429 states:

Eligibility for a Permit

18 A person is eligible for a permit who

...

(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.

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 section 18; only the question of existence of the right is relevant. However, in an effort to provide clarity on the territorial and Commissioner’s land administrators’ roles during regulatory processes, we can offer the following information.

On GNWT administered and controlled land, the right to occupy refers to a right granted by the GNWT to occupy the land. This may be done via many instruments, including sale, lease, licence, easement or other instruments granted under GNWT legislation. This can also include a decision by the GNWT that such instrument is not necessary in a given situation for a party to enter onto and occupy public land.

As stated above in response to Question 2.A., the GNWT has the right to occupy public lands as their “owner” in the ordinary sense of that word. 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 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 occupy public land because of the GNWT’s inherent right to occupy GNWT-owned public land.

A contractor hired by the GNWT is acting as its agent, meaning that for the purposes for which NTEC, or any such party, has entered into a legally binding agreement, they are acting on behalf of the GNWT. Any party that occupies land pursuant to a contract between itself and the GNWT, as NTEC would do here, is occupying that land as the GNWT under the GNWT’s right to occupy land. Contractors are in no way appropriating any interest in the public land they occupy as GNWT agents. In the present case, NTEC is applying for MVRMA authorizations on the basis that it is exercising the GNWT’s right to occupy its own land. NTEC is the party that will actually be conducting the public work under the contract discussed in response to Question 1, but it is doing it on the GNWT’s behalf.

B. Explain in detail how a reservation by notation can be a right to occupy if it is not a disposition of a legal interest in GNWT lands or real property.

As stated above in our response to Question 2.A., a reservation is not a disposition because it is legally incapable of being such. A reservation is only an administrative classification that does two things: first, it signals to other government agencies and the public the GNWT's intent to exercise its rights to enter onto and occupy lands that it owns; and, second, it prevents the disposition of the land to which it applies for purposes that are incompatible with the public purpose of the reservation. The GNWT is not relying on the reservation by notation to create eligibility under s. 18 of the MVLURs; instead, it is relying on the inherent right of an owner of land, and any contractor operating on the owner's behalf, to occupy its own land as the basis for eligibility.

4. Explain what entities, persons or organizations to be the beneficiary of, or be granted, a reservation by notation. Must the recipient be a part of the GNWT? (e.g., like a department) Can a third party such as a separate corporation owned by GNWT be the beneficiary of a or granted a reservation by notation?

A reservation is an administrative classification that demonstrates the GNWT's intent to occupy land, which is a right that it already has as landowner. It transfers no interest, and as such, cannot have a beneficiary, and as such, cannot impact eligibility under section 18 of the MVLURs. When the GNWT hires a contractor, the contractor is acting as an agent of the GNWT and so is a part of the GNWT for the purposes for which it was contracted. A contractor gains no interest in any lands it enters or occupies on behalf of the GNWT; it is merely exercising the GNWT's right to occupy these lands for the benefit of the GNWT and the public it represents. Land subject to a reservation may be sold ("granted") or leased ("disposed of") to an independent third party, but that would require a second, subsequent decision and instrument, and would not form a part of the reservation. Such a subsequent grant or disposition can only be done if it is in conformity with the purpose of the reservation.

5. A. Explain in detail how the Inuvik Wind Project can take place on the lands in question in light of the withdrawal of and appropriation of lands for the Reindeer Preserve under the *Land Withdrawal Order (Reindeer Grazing Reserve)*.

The GNWT's decision to reserve land within the area of the land withdrawal order in question is not contrary to the terms of the land withdrawal order because, as detailed in our answers above, a reservation is not a disposition.

B. Explain whether the *Land Withdrawal Order (Reindeer Grazing Reserve)* binds or affects the GNWT in the use or development of the territorial lands subject to the land withdrawal order.

Yes, the *Land Withdrawal Order (Reindeer Grazing Reserve)* R-065-2014 does bind the GNWT. However, a land withdrawal order withdraws land from disposition. As detailed in our answers above, a reservation is not a disposition. Therefore, the GNWT's decision to reserve

land within the lands subject to the land withdrawal order in question is not contrary to the terms of this land withdrawal order, and thus the withdrawal and the reserve can co-exist.

6. Explain how a reservation by notation granted in favour of GNWT-Infrastructure can satisfy the need for NTEC to prove that it has a right to occupy the lands upon which it proposes to carry out contractual activities.

As stated in the January 15, 2020 response to Information Request #2, from GNWT Department of Infrastructure's Deputy Minister, NTEC is acting as a contractor on behalf of the GNWT, the owner of the land in question. As discussed above in our previous answers, a contractor or agent of the landowner is exercising the owner's right to enter and occupy its lands on its behalf. Again, this right is the owner's right to occupy its own land and does not derive from the reservation – this remains simply an administrative classification that prevents certain dispositions and ensures that public and private actors are aware of the GNWT's intent to exercise its right to occupy its own lands in the manner described in the reservation.