

Motion to the Gwich'in Land and Water Board

Rule 22

NWT ENERGY CORPORATION (03) LTD - G18X005 G18L8-001

Filed by Nihtat Gwich'in Council

January 9, 2020

This motion is made pursuant to Rule 22 of the *Land and Water Board Rules of Procedure*. Nihtat Gwich'in Council ("NGC") is seeking a Ruling from the Board that NWT Energy Corporation (03) Ltd. ("NTEC") has failed to establish a lawful right to occupy land in order to be eligible to receive a permit in accordance with s 18(b) of the *Mackenzie Valley Land Use Regulations*.

Overview

1. NTEC has made applications for a Type "A" Land Use Permit and a Type "B" Water Licence for water use during project construction for the purpose of constructing, operating and maintaining a wind turbine, and all season access road, powerlines, and associated electricity infrastructure at Highpoint, near Inuvik. To be eligible for these permits, NTEC must have "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" in accordance with s. 18(b) of the *Mackenzie Valley Land Use Regulations*.
2. NTEC has conceded that the land in question is located within a larger Reindeer Grazing Reserve which was withdrawn from any disposition and set apart and appropriated for that purpose under *Land Withdrawal Order (Reindeer Grazing Reserve)*. The *Land Withdrawal Order* only exempts certain dispositions for specified purposes. Otherwise, any dispositions of lands are prohibited, and the lands are set apart and appropriated for reindeer grazing purposes.
3. NTEC purports to have a right to occupy the land in question because the land is within a Department of Infrastructure reserve.
4. NTEC's purported "right to occupy" the lands has not yet been established, as NTEC has not provided any documentation or instrument establishing NTEC's right to occupy the lands.
5. Further, even if such documentation is provided, the proposed Project does not fall into any of the exemptions in the *Land Withdrawal Order*, nor has the Reindeer Grazing Reserve been amended to exclude the area of the proposed Project.
6. Recognizing NTEC has having a "right to occupy" occupy land within the Reindeer Grazing Reserve in order to develop electrical generation facilities undermines the protective purpose of the Reserve. It also circumvents the Executive Council approval that amending the *Land Withdrawal Order* would require. Finally, it circumvents the comprehensive system of land management provided for in the *Gwich'in Land Claim Settlement Act*, S.C. 1992, c. 53 and *Gwich'in Comprehensive Land Claim Agreement*.
7. For these reasons, Nihtat Gwich'in Council submits that NTEC's purported "right to occupy" is not lawful, as it is either:
 - (a) a disposition contrary to the *Land Withdrawal Order*, or

(b) a use of lands which is contrary to the purposes for which the lands have been otherwise set apart and appropriated, and for which no exemption has been provided in the *Land Withdrawal Order*.

8. Accordingly, on the basis of the above reasons and as detailed more fully in the following submission, Nihtat Gwich'in Council requests the Board to find that NTEC has failed to establish a lawful right to occupy land in order to be eligible to receive a permit in accordance with s 18(b) of the *Mackenzie Valley Land Use Regulations*.

Facts

9. NTEC has made applications for a Type "A" Land Use Permit and a Type "B" Water Licence for water use during project construction for the purpose of constructing, operating and maintaining a wind turbine, and all season access road, powerlines, and associated electricity infrastructure at High Point, near Inuvik ("the Project").

10. The Commissioner in Executive Council, under paragraphs 19(a) and (e) of the *Northwest Territories Lands Act* and every enabling power, made NWT Reg 065-2014 effective as of 1 April 2014, withdrawing from disposal certain tracts of territorial lands for reindeer grazing purposes and setting apart and appropriating those tracts for use as a reindeer grazing reserve in the Northwest Territories.¹

11. Under s. 1 of the *Reindeer Grazing Reserve Order*, subject to very specific exemptions set out in ss. 2 and 3, the Reindeer Grazing Reserve lands (described in Schedule A to the *Order*) "are withdrawn from disposal for reindeer grazing purposes and are set apart and appropriated for use as a reindeer grazing reserve."²

12. The Project is located on Territorial Lands and Commissioner's Lands within the Reindeer Grazing Reserve.

13. To be eligible to obtain a Type "A" Land Use Permit and a Type "B" Water Licence, NTEC must show that it has a right to occupy land required for the Project in accordance with s 18(b) of the *Mackenzie Valley Land Use Regulations*.

14. On December 2, 2019, NTEC submitted a letter to the Board attempting to establish that it has the requisite right to occupy lands. NTEC acknowledged that while the Project is situated in the Reindeer Grazing Reserve:

"The proposed Project is on Commissioner's Land reserved for NTEC use, is not considered a disposition under the Land Withdrawal and so can proceed on the proposed site."

15. In light of the ambiguity around NTEC's purported right to occupy the lands, the Board requested further information from NTEC to support its claim.

16. On December 17, 2019, NTEC responded:

¹ *Land Withdrawal Order (Reindeer Grazing Reserve)* R-065-2014

² Section 1.

“On September 27, 2018, in preparation for building the Project, The Deputy Minister of Infrastructure requested an amended land reserve 107B/7-172-2 that included Territorial and Commissioner’s Land (attached). The amended land area being requested would expand the reservation to include an access road, a transmission line and the wind turbine location for the Inuvik Wind Project. On November 2, 2018 The Deputy Minister of Lands responded in writing and concluded that it is not a requirement to amend the current reservation to include the access road to the site (attached). Once the construction at this site is completed and the final boundaries are determined, an amendment to the reservation can be submitted to the Department of Lands, at that time.

“On December 17, the GNWT Department of Lands clarified NTEC’s eligibility for a land use permit under section 18(b) of the Mackenzie Valley Land Use Regulations (attached). The letter also confirms that a reservation by notation is not considered a disposition under GNWT land withdrawals, including Land Withdrawal Order R065-2014 (Reindeer Grazing Reserve) made pursuant to the Northwest Territories Lands Act S.N.W.T. 2014, c.13.”

17. NTEC did not, however, provide documentation showing that it, rather than the Department of Infrastructure, is the beneficiary of the “reservation by notation”, and the Board requested further information from NTEC to establish that NTEC has been contracted to carry out the proposed Project by Information Request dated January 7, 2020.

Legislative Framework

18. The *Northwest Territories Lands Act* provides the Commissioner-in-Executive Council with the power to authorize the “sale, lease, licensing or other disposition” of territorial lands, and to make regulations enabling the Minister for same, subject to such limitations and conditions as the Commissioner in Executive Council may prescribe.³
19. “Disposition” is not defined in the *Northwest Territories Lands Act*, but is used broadly and inclusively to include sale, lease, and licensing, as well as *other dispositions*.

Withdrawals, Appropriations and Authorized Acquisitions

20. The *Northwest Territories Lands Act* also provides the Commissioner-in-Executive Council with a range of powers to order the withdrawal of any tract of lands from disposal under the act under s. 19(a), as well as powers to set apart and appropriate territorial lands for various public purposes under s. 19(b), and as game preserves and/or sanctuaries under s. 19(e). It also provides powers to authorize the acquisition of a right-of-way for a road bed, for transmission lines or for pipelines under s. 19(f).
21. As the terms are used in the *Northwest Territories Lands Act*, the power to order the “withdrawal of lands” from disposition under s. 19(a) requires the reasons for the withdrawal to be expressed in the order, and is clearly intended to prevent further disposition of such lands in order to achieve that purpose.
22. The powers to “set aside and appropriate” or to “authorize the acquisition” of territorial lands are to be exercised in relation to particular purposes described in s. 19.

³ *Northwest Territories Lands Act*, S.N.W.T. 2014, c.13, s 6.

23. Such powers can only be exercised by the Commissioner in Executive Council through orders and regulations.
24. There is no reference in the *Northwest Territories Lands Act* to a power of “reservation by notation” that can be exercised in relation to territorial lands.

Land Withdrawal Order (Reindeer Grazing Reserve)

25. The Commissioner in Executive Council issued the *Land Withdrawal Order (Reindeer Grazing Reserve)*, NWT Reg 065-2014 under s. 19(a) (the withdrawal power) and 19(e) (the power to appropriate lands for game preserves), and every enabling power of the *Northwest Territories Lands Act*.
26. According to *Land Withdrawal Order*, the lands “are withdrawn from disposal for reindeer grazing purposes and are set apart and appropriated for use as a reindeer grazing reserve.”⁴
27. The effect of the *Land Withdrawal Order* is that the lands are both withdrawn from any further disposition under 19(a), and set apart and appropriated for use for a specific purpose – reindeer grazing. Within the *Land Withdrawal Order*, there are specified exceptions to which the lands that have not only been withdrawn from disposal, but which have also been set apart and appropriated for use as a reindeer grazing reserve may be put. They include the following:
 - (a) the disposition of substances or materials under the Quarrying Regulations (s. 2(a));
 - (b) interests in land to be used for public highways (s. 2(b));
 - (c) mineral claims and interests under the *Petroleum Resources Act* and mining regulations (s. 3);
 - (d) or the renewal, amendment or consolidation of an interest (s. 3(f)).
28. Except as provided in section 2 and 3, there are no provisions in the *Land Withdrawal Order* which would authorize or enable further dispositions, or for the lands subject to the *Land Withdrawal Order* to be otherwise set apart, appropriated for use, or to permit interests to be acquired for electrical power generation or transmission.
29. This is notable, as other land withdrawal orders made by the Commissioner in Executive Council under the *Northwest Territories Lands Act* have expressly provided exemptions for electrical generation and transmission purposes. See for example the *Withdrawal from Disposal of Certain Tracts of Territorial Lands in the Northwest Territories (Central and Eastern Portions of the South Slave Region) Order* SI/2014-39, which expressly exempts disposition of “interests in land to be used for electrical transmission lines and ancillary facilities for power generated at any hydroelectric project on the Talston River or at the Bluefish hydro dam”.⁵ Other land withdrawal orders provide for similar provisions, when such exemptions have been intended.
30. It therefore follows that if the Commissioner-in-Executive Council had intended to exempt the types of activities that the NTEC is proposing on the lands subject to the *Land Withdrawal Order*,

⁴ Section 1.

⁵ Section 3.

the Commissioner-in-Executive Council would have provided for such exemptions in the *Land Withdrawal Order*.

31. Accordingly, Nihtat Gwich'in Council submits that:
- (a) A “disposition” under the *Northwest Territories Lands Act* should be interpreted to include the sale, lease, license, or “other disposition” of interests. NTEC’s purported “right to occupy” the Project area must therefore be considered to be a disposition of a right or interest to use and occupy territorial land under the *Northwest Territories Lands Act* that is contrary to the *Land Withdrawal Order*.
 - (b) In the alternative, even if NTEC’s purported “right to occupy” the Project area is not a disposition within the meaning of the *Land Withdrawal Order*, the Commissioner-in-Executive Council not only exercised its powers under s. 19(a) to withdraw the lands from disposition, but additionally exercised its powers under 19(e) (the power to appropriate lands for game preserves) and every enabling power in making the *Land Withdrawal Order*. This has the effect of not only withdrawing the lands from disposition, but it further appropriated such lands and set them apart for as a reindeer grazing reserve. The withdrawal under 19(a) and the appropriation and setting apart of those lands under 19(e) and every enabling power not only prohibits dispositions, but establishes a specific statutory purpose for the land. Subject to the exceptions set out in the *Land Withdrawal Order*, there can be no disposition, appropriation or acquisition of those lands for other purposes while the *Land Withdrawal Order* remains in effect.
 - (c) The Commissioner-in-Executive Council can only exercise powers under s. 19 of the *Northwest Territories Lands Act* by order or regulation.
 - (d) The Commissioner-in-Executive Council has not amended or repealed the *Land Withdrawal Order*.
 - (e) A “reservation by notation” is not provided for in the *Northwest Territories Lands Act*.
 - (f) There is no authority for the proposition that a “reservation by notation” takes precedence over the *Land Withdrawal Order* made by the Commissioner-in-Executive Council.

NTEC is not eligible for a permit under the *Mackenzie Valley Land Use Regulations*

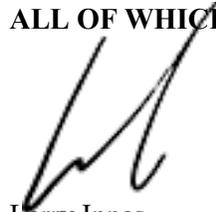
32. Under s 18(b) of the *Mackenzie Valley Land Use Regulations* an applicant is only eligible for a permit if they have a right to occupy the land or are contracted by a person holding such a right.⁶
33. NTEC purports to have a right to occupy the lands on the basis of a “reservation by notation” issued to the Department of Infrastructure. NTEC also relies on the opinion of the Department of Lands that a “reservation by notation” is not a disposition under the *Northwest Territories Lands Act*.
34. This is a matter of statutory interpretation. 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 the *Northwest Territories Lands Act*. Any similar powers in the statute require a regulation or order of the Commissioner-in-Executive Council. It is open to the Board to

⁶ *Mackenzie Valley Land Use Regulations* (SOR/98-429), s 18(b).

determine whether or not a “reservation by notation” is an instrument that is sufficient to establish a right to occupy for the purposes of s. 18(b) of the *Mackenzie Valley Land Use Regulations*

35. Further, it is also open to the Board to determine whether the particular “reservation by notation” (Reservation 107B/7-172-2) that is being relied on by NTEC in this application provides rights that are valid as a matter of law, as it was made on lands that are subject to the *Land Withdrawal Order*.
36. Nihtat Gwich’in Council finds no authority for the proposition that a “reservation by notation” takes precedence over the *Land Withdrawal Order* made by the Commissioner-in-Executive Council. Accordingly, we submit that the reservation by notation is either:
 - (a) a disposition contrary to the *Land Withdrawal Order*, or
 - (b) a use of lands which is contrary to the purposes for which the lands subject to the *Land Withdrawal Order* have been otherwise set apart and appropriated, and for which no exemption that has been provided in the *Land Withdrawal Order*; and
 - (c) is therefore unlawful and void.
37. Nihtat Gwich’in Council further notes that the “reservation by notation” was made without any consultation, and has not even been provided to the Board. The reliance on a “reservation by notation” appears to be a thin and colourable attempt by the GWNT and NTEC to ignore the application of the *Land Withdrawal Order* to the lands sought for the Project.
38. This course of conduct by NTEC cannot be condoned. The integrated system of land and water management developed pursuant to the *Gwich’in Comprehensive Land Claim Agreement* was intended to ensure that Gwich’in social, cultural and economic wellbeing, as well as their harvesting and other rights would be respected,⁷ and that Gwich’in would be consulted on land use matters.⁸ Indeed, when it comes to protected areas – which includes the Reindeer Grazing Reserve – the Gwich’in are to be consulted about any changes to such areas.⁹
39. Nihtat Gwich’in Council therefore requests the Board to make a determination that NTEC does not have a valid right to occupy the land required for the Project, and is accordingly not eligible for the permits that it seeks from the Board in this Proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



Larry Innes
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⁷ Article 24.2.4.

⁸ Article 24.2.6.

⁹ Article 16.2.1.