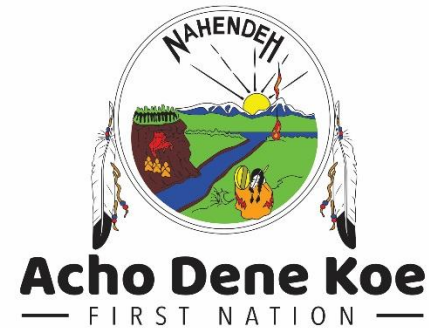


June 18, 2021

Mackenzie Valley Land and Water Board
4922 - 48th Street
7th Floor YK Centre Mall
P.O Box 2130, Yellowknife, NT. X1A 2P6



SENT ELECTRONICALLY ONLY

VIA: awheeler@mvlwb.com
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Re: CANZINC – PRAIRIE CREEK - MINING AND MILLING - NEW TYPE A LAND USE PERMIT AND WATER LICENCE RENEWAL APPLICATIONS (MV2021D0005 MV2021L2-0004) – PROPOSED WORK PLAN RESPONSE

Acho Dene Koe First Nation writes in response to the referral received via email on June 4, 2021.

Acho Dene Koe First Nation's traditional territory and waters span three jurisdictions: British Columbia, the Yukon Territory, and the Northwest Territories.

Our main community is currently settled in Fort Liard, north of the British Columbia-Northwest Territories border, but our members continue to use and occupy our Traditional Territory as a whole. As our ancestors did, we hunt, trap, fish and gather for food, social, cultural, and trading purposes throughout our Traditional Territory.

We adhered to Treaty 11, and as such, we have treaty-protected hunting rights. Additionally, we assert Aboriginal rights, including title, throughout our Traditional Territory.

Our rights, and our Traditional Territory, are affected by the proposed decision.

Acho Dene Koe First Nation's Treaty and Aboriginal Rights

In 1922, our ancestors adhered to Treaty 11, and these rights are constitutionally protected pursuant to s. 35(1) of the *Constitution Act, 1982*. Among other things, Treaty 11 protects our right to pursue our usual vocations of hunting, trapping, and fishing. When signing Treaty 11, our ancestors were assured that this liberty would not be taken away or curtailed. Any erosion of our ability to hunt, trap and fish would be a serious infringement of our Treaty rights.

The courts have cast serious doubt on whether Treaty 11 extinguished Aboriginal title to the land. In *Re: Paulette's Application*, the trial judge found that "notwithstanding the language of the two treaties there is sufficient doubt on the facts that aboriginal title was extinguished."¹

More recently, the Federal Court recognized that the Federal Government's failure to set aside reserves for Samba K'e First Nation was a fundamental breach of Treaty 11, and Samba K'e continued to have a strong *prima facie* case for Aboriginal title, which elevated the Crown's duty to consult with them.² Similarly, Canada failed to set aside reserves for Acho Dene Koe First

¹ *Re: Paulette's Application*, [1973] 6 W.W.R. 97 (N.W.T.) [*Re: Paulette's Application*].

² *Samba K'e Dene First Nation v. Duncan*, 2012 FC 204.

Nation. Accordingly, in our view, our Aboriginal rights, including Aboriginal title, have never been ceded, abandoned, or extinguished in any part of our Territory.

Aboriginal rights, which include title, are constitutionally protected legal rights, pursuant to s. 35(1) of the *Constitution Act, 1982*. Aboriginal rights include a priority use rights to resources (e.g., fish, wildlife, trees, traditional medicines, and foods). Aboriginal title confers on the rights-holding group the exclusive right to decide how the land is used and the right to benefit from those uses, subject to the restriction that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations.³

Acho Dene Koe First Nation holds constitutionally protected Treaty rights, and assert strong Aboriginal rights within our Traditional Territory, and take seriously any infringement of our rights.

Crown's Duty to Consult and Accommodate

Where the Crown has "knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it", the Crown has a duty to consult with the First Nation (*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para. 35).

Acho Dene Koe First Nation currently uses, and has traditionally used, our Territory for fishing, hunting, trapping, and gathering. Development and resource exploitation have already significantly impacted and infringed our Treaty and Aboriginal rights, and any new developments will infringe our rights in a compounding manner. An infringement cannot be justified, without meaningful consultation and accommodation, which may include compensation.

Acho Dene Koe First Nation expects and intends to enter full meaningful consultation with government prior to any decision that has the potential to infringe our Treaty or Aboriginal rights. The importance of protection our Treaty and Aboriginal rights, and of preserving natural resources, cannot be overstated.

Regulatory Process Proposed Work Plan

Canadian Zinc Corporation (the Proponent) applied for a Type A Water Licence and a Type A Land Use Permit. The purpose of this application is to allow for an increase in production capacity at the mining and milling site at Prairie Creek Northwest Territories. Activities covered by this application include an increase in production capacity, as well as changes to the mine site (including temporary surface tailing storage and waste rock piles), to accommodate the changes in production.

The Mackenzie Valley Land and Water Board has requested comment from affected parties on a draft work plan which outlines the regulatory timeline for this application. On June 10, 2021, the Proponent circulated a proposed revised version of the work plan and noted the initial draft "*has a schedule eating into next summer, which is a problem for CZN to commence earthworks next summer as planned and stay on schedule.*"

Acho Dene Koe First Nation believes the process used by the Mackenzie Valley Land and Water Board to evaluate applications for Water Licence and Land Use Permits is an important method of collecting information about a project and allowing affected parties to participate in the regulatory process. Further, this process is an important step in the Crown's fulfillment of its Duty to Consult and Accommodate. We are very concerned about precedents and exceptions in the regulatory process that erode our ability to have meaningful involvement in the process. It is through that meaningful involvement that we identify and seek to avoid impacts to our Aboriginal and treaty rights or pursue their reasonable accommodation. We are also concerned that such

³ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 and *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.

timeline changes are being sought while we are still amid the COVID-19 pandemic, with the attendant challenges to our administration's capacity to respond. Furthermore, it is unreasonable to expect that we will accommodate risks to Can Zinc's project when to date Can Zinc has not fully committed to mitigations or accommodations which protect Acho Dene Koe First Nation's rights and interests.

In review of the initial draft work plan and proposed revised work plan put forward by the Proponent, Acho Dene Koe First Nation finds that the revised work plan fails to provide sufficient time for action and review on many of the activities outlined in the work plan. Further, if the Proponent's proposed work plan is accepted by the Mackenzie Valley Land and Water Board (the "Board"), Acho Dene Koe First Nation would view the Board's authorization as knowingly depriving Acho Dene Koe First Nation of a fair and meaningful consultation process. Given the Board's role in fulfilling the Crown's Duty to Consult, Acho Dene Koe First Nation has serious concerns that any approval of the proposed timelines will flaw the consultation process. Further, the revised work plan barely meets the minimum example timelines outlined in the *Guide to the Water Licensing Process*⁴. Our position is that this application represents a material change in scope of the Project, and as a result requires a more thorough review by Acho Dene Koe First Nation. In short, we believe there are compelling reasons not to grant an exception to the regulatory timelines in this case.

Specifically, we note concerns with the following proposed changes to the initial work plan:

1. *Technical Session Day 1,2, and 3.*

The Proponent has requested a reduction in the timeframe for scheduling the Technical Sessions from 33 to 21 calendar days. While we understand that the Technical Sessions are only three days, Acho Dene Koe First Nation requires sufficient time to review application materials, and prepare for sessions, which includes being provided the opportunity to consult with Elders, knowledge holders and other Acho Dene Koe First Nation members. We do not believe the timeline proposed by the Proponent would allow for meaningful participation by Acho Dene Koe First Nation. As a result, Acho Dene Koe First Nation requires a minimum of 33 days to prepare and participate in the Technical Sessions.

2. *Deadline to respond to Information Requests.*

The Proponent has requested a reduction in the Information Request response period from 14 to 10 calendar days. At this time, Acho Dene Koe First Nation cannot predict the volume or scope of Information Requests we will need to review and respond to following the Technical Session. As a result, Acho Dene Koe First Nation requires a minimum of 14 days to respond to Information Requests.

3. *Comments on Information Request Responses*

The Proponent has requested a reduction in the period to provide comments on Information Requests from 21 to 12 calendar days. This is a significant and unreasonable curtailment of the comment period. Like the point above, we cannot predict in advance the requirements for us to respond and whether this curtailed timeline will be sufficient. As a result, Acho Dene Koe First Nation requires a minimum of 21 days to review and provide a response to Information Request comments.

4. *Public Hearing Day 1,2, and 3*

Although we do not have a specific issue with either the window identified by the MVLWB or by the Proponent, we wish to draw the Board's attention to the need to avoid scheduling conflicts with winter holidays, when Acho Dene Koe First Nation's office anticipates being closed. As a result, we request that the Public Hearing not be scheduled between December 15, 2021 and January 7, 2022.

⁴ *Guide to the Water Licensing Process*. 2020. Appendix G – Example Work Plan for Type A and B Water Licences.

5. Public Hearing Undertakings Due

The Proponent has requested a reduction in the Hearing Undertakings response period from 25 to 10 calendar days. This is a significant curtailment of the normal regulatory timeline. At this time, Acho Dene Koe First Nation cannot predict the volume or extent of Hearing Undertakings we will receive following the Public Session. As a result, we require a minimum of 25 days to respond to Undertakings.

6. *Reviewer comments due on Draft Licence*

The Proponent has requested a reduction in the period to respond to the draft Licence from 14 to 7 calendar days. This is a significant curtailment of the normal regulatory timeline for an important final check in the process. Given the significance of the issuance of a Type A Water Licence, Acho Dene Koe First Nation believes a reduction in the timeline for this activity especially concerning. Acho Dene Koe First Nation requests that, if other requests outlined above are granted to Can Zinc - which we do not support as outlined above, that the time allotted to review the draft Licence be increased to 21 calendar days.

The Mackenzie Value Land and Water Board serves as an important regulatory forum to ensure matters can be properly and duly considered. The proposed curtailment of response time has a prejudicial effect on Acho Dene Koe First Nation's ability to review relevant information and prepare responses. This is particularly the case where Acho Dene Koe First Nation has limited resources and capacity, and, despite requests, has not received any financial support from the Proponent or the Board to participate in this regulatory process.

Acho Dene Koe First Nation acknowledges the need for sustainable economic development; however, we require the ability to effectively participate in the regulatory process to identify our Aboriginal and treaty rights as well as protect the environmental integrity of the lands and waters of our territory. Undermining Acho Dene Koe First Nation's ability to participate fully in this process deprives the Board of being able to consider our views and render appropriate decisions.

If you have any questions concerning our response, I will ask that you email our Lands Office at lands@adkfirstnation.ca

Thank you.

Yours truly,

ACHO DENE KOE FIRST NATION

Signed on behalf of Chief-Elect Eugene (Gene) Hope

Boyd Clark

Boyd Clark
Advisor/Acting Band Manager

Cc. Chief-Elect Eugene Hope
Andy Wheeler, Mackenzie Valley Land and Water Board
Jen Potten, Mackenzie Valley Land and Water Board
Kim Murray, Mackenzie Valley Land and Water Board
Sean Joseph, Mackenzie Valley Land and Water Board
Barney Dohm, Advisor, Nor Zinc Prairie Creek Mine
Hana Boye, Legal (Donovan & Co)
Scott Mackay, Lands Director (Consultant – Shared Value Solutions)
Directors, ADK Holdings Ltd.
Council