



**KTUNAXA
NATION**

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Jan. 16th, 2009

Mr. David "Archie" Riddell
Project Assessment Director
BC Environmental Assessment Office
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PO Box 9426 Stn Prov Govt
Victoria BC V8W 9V1

Dear Sir,

Subject: ***Request for EAC five year extension – Jumbo Glacier Resort Project***

We received your e-mail of Dec. 19th on the above-captioned subject. The purpose of this letter is to advise you, as requested, on our views on "...material and specific changes in circumstances since the original EA review that could impact the conclusions reached in the EA certificate". In our view, these changes require a reassessment of the seriousness of the potentially adverse impacts of the project on the Ktunaxa's Aboriginal interests and thus trigger the EAO's constitutional duty to consult us prior to making its decision on the five year extension.

The issue of whether these changes render the existing conditions and commitments of the EA Certificate inadequate cannot be prejudged. The adequacy of these conditions and commitments must be assessed in light of the impact of the significant changes that have occurred since 2004 on the Ktunaxa's Aboriginal interests, as well as environmental and other factors .

As you know, we were opposed to the issuance of an EAC for the project in 2004 and provided a substantial amount of documentation to your office regarding the reasons for our opposition. We have been engaged in consultation with the Ministry of Tourism, Culture and the Arts (MTCA, formerly MTSA) since 2006 in relation to the potential impacts of the project on Ktunaxa title, rights and interests and accommodation of these interests. This consultation process is focused on MTCA's future decision on the Master Development Agreement, a decision distinct from the extension decision.

It is our view that there have been 'material and specific changes in circumstances' with respect to:

- (i) the status of the Central Purcell Grizzly Bear Population Unit (GBPU);
- (ii) the feasibility and effectiveness of proposed grizzly bear impact mitigation measures; and
- (iii) the feasibility and costs of measures required to accommodate the Ktunaxa Nation's interests.

Takisqnuuk

Lower Kootenay

St. Mary's

Tobacco Plains

The following summary of potential project impacts on grizzly bears is taken from the Executive Summary of the 2004 ‘*Jumbo Glacier Resort Project Assessment Report*’ (prepared by Environmental Assessment Office, August 3, 2004):

“The Project is located in the Central Purcell Grizzly Bear Population Unit (GBPU), one of 49 such units in the Province designated as viable (stable and sufficiently productive to permit some hunting) under the Grizzly Bear Conservation Strategy.

A cumulative effects assessment concluded that in the absence of any measures to mitigate impacts on grizzly bears, the Project would increase the risk of grizzly bear mortality by 2.6% - 3.8% and reduce habitat effectiveness by 1.7% - 3.1% within the 3,977 km² study area.”

“Based on the information available, WLAP has determined that there is a low risk that the Project would result in a reduction of the grizzly bear population of such significance that the population in the Central Purcell GBPU would become threatened. This determination considers that: proposed mitigation for the area within and immediately adjacent to the CRA are fully applied; the Proponent will maintain its proposed monitoring program, and will adjust its mitigation programs to the fullest extent possible if resort-related impacts to Grizzly bear populations or habitat use are evident.”

The grizzly bear is of profound spiritual importance to the Ktunaxa Nation, based on traditional values and cultural practices. Moreover, the Jumbo valley has been identified by Ktunaxa Nation elders as an area of specific importance both for grizzly bears and the spiritual values they represent. It is for this reason that we have focussed much of our attention during consultation with MTCA on the protection of the grizzly bear values associated with the Jumbo area. We convened a facilitated two day workshop in late November, 2006 with grizzly bear experts and representatives from the KNC, MTSA, MoE and the proponent. I have attached a copy of the report from the workshop for your information.¹ It is important to note that: (i) the attached report was reviewed (in draft) by workshop participants and that this final report reflects the comments received from workshop participants; and (ii) the Ktunaxa Fish and Wildlife Management Committee² endorsed and supported the process and the workshop report. The following are some key conclusions from the workshop:

“During the workshop, new (not finalized)³ analysis estimating the number of grizzly bears was shared with participants. This data indicated that the population is much lower than previously thought and, if accurate, would suggest

¹ Preliminary Conceptual Framework for Mitigating Grizzly Bear Impacts – Jumbo Glacier Resort. Key Highlights from a 2-day Workshop held on 29-30 November 2006. Michael Harstone & Lee Failing, Compass Resource Management.

² The KFWMC was established by an MoU between BC MoE and the KNC (pursuant to a ‘Treaty Related Measure’) and includes representation from the KNC, MoE, Environment Canada and Fisheries and Oceans Canada.

³ Subsequently finalized – see attached report.

that the population is close to a threatened status (based on a conservation risk threshold of 50% of the habitat capability).

The implications of this new data (if confirmed)⁴ increased the importance of the anticipated residual grizzly bear impacts (i.e. primarily mortality & displacement associated with the Jumbo development), as the resiliency of the population may be at risk.

It was noted that if this new population estimate is accurate, it will trigger immediate changes in hunting regulations. Consequently, the potential range of viable mitigation options that were explored during the workshop were fewer than expected.”

With regard to confirmation of the new population assessment data, I have attached a report entitled ‘*Abundance and Diversity of Central Purcell, South Purcell, Yahk, and south Selkirk Grizzly Bear Population Units in southeast British Columbia*’⁵ Please note the following from the ‘Results’ and ‘Discussion’ section:

- New (2007) population estimate for the Central Purcell GBPU of 87 (95% CI of 67 – 124) compared to 150 estimate used during the project EA process
- The new population estimate corresponds to 54% of the habitat capacity of the area, vs. 93% for the earlier estimate;
- (pg. 19) “We suggest that due to the discrepancy between the Provincial estimates for the Yahk, South Purcell, and Central Purcell GBPUs (Table 8) and those reported here, our DNA survey-based estimates should be used (in fact our estimates have been incorporated as official Provincial estimates, G. Mowat, Nelson regional BC Provincial biologist, pers. comm..)”
- (pg. 22) “The Yahk and South Selkirk GBPUs are considered “threatened” by the BC Province by virtue of being estimated at below 50% of their habitat capability (Hamilton et al. 2004). Current Provincial estimates of the relationship between habitat effectiveness (current bear numbers) and habitat capability (potential bear numbers habitat could contain) for the south Purcell GBPU is 80% while the Central Purcell GBPU is 93%, the Yahk GBPU at 44% and the Selkirk GBPU is 44% (table 8). Our population estimates for the Purcell GBPUs suggest these values are considerably lower with the South Purcell GBPU at 46%, the Central Purcell GBPU at 54% and the Yahk GBPU at 20% (table 8). Our estimate and the Provincial estimate for the South Selkirks are identical. These numbers are relevant because they underpin the Provincial management approach applied to GBPUs. GBPUs with values considerably above 50% can typically sustain human-caused mortality and are less likely to be driven to threatened status (below 50% capability; Austin et al 2004). GBPUs with values approaching 50% should be managed more conservatively and may require management designed to increase population

⁴ Confirmed—see attached report.

⁵ Proctor, M., J. Boulager, S. Nielsen, C. Servheen, W. Kasworm, T. Radandt and D. Paetkau. Report submitted to BC Ministry of Environment. March 2007

size to maximize future hunting quotas. Provincial determination of the conservation status of the South and Central Purcell GBPU should be considered.”

- Also note (page 23) the regional importance of the Central Purcell grizzly bear population to the conservation and recovery of the fragmented southern Purcell population segments.
- The new estimates do not reflect a change in grizzly bear abundance between the time of the Jumbo EA assessment and 2007; rather they are an estimate of grizzly bear abundance during the 1998 – 2002 period bracketed by surveys in the Jumbo area.

Considering the above information, we conclude that the 2004 EA conclusion of “...low risk that the Project would result in a reduction of the grizzly bear population of such significance that the population in the Central Purcell GBPU would become threatened” *is no longer applicable*. At 54% of the habitat capacity of the area, the estimated population size is very close to the 50% threshold which triggers a provincial ‘threatened’ designation. Any reduction in the Central Purcell GBPU will result in the population becoming threatened thereby imperiling other population segments in the region.

To attempt to address this concern, you will note the proposal summarized in the workshop report to establish a ‘Conservancy Area’ to ensure the resilience of the Central Purcell grizzly bear population in the broader area, with resiliency defined by abundance, population stability, distribution, demography, and connectivity (movement rate). We have been pursuing this option *as a key measure to accommodate the Ktunaxa Nation interests related to grizzly bears* in preliminary discussions with MTCA and MoE. We have been unable to achieve any certainty regarding the establishment of the proposed conservancy area; indeed, we have been told on numerous occasions that neither a ‘Conservancy’ nor a ‘Wildlife Management Area’ (WMA) is feasible. We do know that the establishment of a Conservancy or WMA to attempt to secure a robust Central Purcell grizzly bear population which would be resilient to the potential direct mortality and habitat displacement impacts of the Jumbo Glacier Resort project would entail very substantial costs to the BC government and possibly to the resource and tourism industries.

We have identified, and are negotiating with MTCA, a wide range of other measures including revenue sharing, socio-economic impact mitigation and a comprehensive ‘Ecosystem Stewardship Framework.’ These measures also entail significant costs to the provincial government.

The foregoing changes in circumstances are sufficiently material and specific to call for a process of meaningful consultation prior to the EAO’s decision on the extension. Although it will require further discussion, the information we are providing in and with this letter, together with the information that the Crown already has about the Ktunaxa’s Aboriginal interests, constitutes knowledge sufficient to trigger the EAO’s duty to consult prior to making its decision on the extension. The Supreme Court of Canada has “set a low threshold” for triggering the duty to consult (*Mikisew Cree* at paragraph 34). Having triggered this duty, the EAO cannot excuse itself from its duty by appeal to statute,

regulation, or policy. We remind you that, “the constitutional duty to consult and accommodate is upstream of the statutes” under which you and your colleagues exercise your powers. In other words, the EAO “is not able to follow a statute, regulation or policy in such a way as to offend the Constitution” (*Klahoose First Nation* at paragraph 131).

In order to meet your obligation to consult meaningfully, your request for our views on the proposed extension of the EA Certificate and this initial response must be viewed as simply a first step. From here on, we believe it is critical that we jointly engage in reviewing the changes in circumstances, including the new information referred to above, that puts into question fundamental assumptions that were made and important conclusions that were drawn in 2004. To that end, we are seeking:

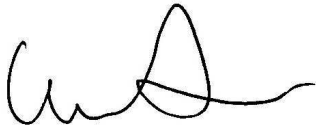
- a commitment to find agreement between the provincial government and the KNC on the population size and status of the Central Purcell GBPU;
- a review of the potential grizzly bear impact mitigation measures identified in the ‘Project Assessment Report’ to re-evaluate the potential feasibility and effectiveness of these measures under current circumstances;
- a commitment to finding the means, whether by a ‘Conservancy’ or WMA or some other arrangement for an area of sufficient size, to support the rebuilding of a robust and resilient central Purcell GBPU;
- a re-assessment of the financial and economic costs and benefits of the project (and required mitigation and accommodation measures) to the BC government and BC economy; and
- if you require, a process to share with EAO, MTCA and MoE representatives, Ktunaxa Nation knowledge and values with respect to grizzly bears and the Jumbo area.

When these steps are complete, we must then determine what amendments, if any, may be required to the conditions and commitments in the original EA Certificate to address these significant changes in circumstances and their impact on Ktunaxa interests. All of this *must* be completed prior to a recommendation to the responsible ministers on the certificate deadline application request.

In addition to the above, we ask, as a way of starting the consultation on the right foot, for a copy of the preliminary assessment of the strength of Ktunaxa’s Aboriginal claims in the project area on which your office relied in the original EA review, plus supporting documents (e.g. reports). We would appreciate receiving these documents as soon as possible, and by no later than February 13th, 2009. The Supreme Court of Canada has said that First Nations are entitled to know and discuss the Crown’s position on such matters (*Haida Nation* at paragraph 37).

Thank you for your consideration of this information and our requirements.

Yours truly,



William Green
Director

Cc: Chief Mary Mahseelah, TPIB
Chief Wilfred Teneese, ?akisq'nuk First Nation
Chief Cheryl Casimer, SMIB
Chief Chris Luke Sr., LKIB
Sophie Pierre, KNC Tribal chair
Kathryn Teneese, Chief Negotiator, Ktunaxa-Kinbasket Treaty Council
Peter Walters, MTCA
Norman Lee, MTCA
Psyche Brown, MTCA
Dave Dunbar, MoE
Garth Mowat, MoE
Grant Costello, GRL

Encl: (2)