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YUKON WATER BOARD

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To: Bruce Willis, Yukon Water Board
From: Ellesse, Executive Assistant
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Urgent For Review Comments Please Reply

Comments / Regards:

Re: First Nation of Na Cho Nyak Dun's
Suspension of Regulatory Dialogue
Relating to Keno Hill mines letter
dated August 15, 2007 from Chief
Simon Mervyn of NNDFN.

PRIVATE AND CONFIDENTIAL FOR THE PERSON NAMED ON THIS COVER SHEET ONLY

Please call the First Nation of Na Cho Nyak Dun at (867) 996-2265 if you have not received all the noted pages of this facsimile transmittal in full.

cc'd to applicant
07.08.22

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August 15, 2007

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Department of Environment, Government of Yukon
Randy Lamb, Manager of Environmental Affairs Section
Kevin McDonnell, Chief of Water Resources
Chuck Hubert, Environmental Assessment Analyst
Box 2703
Whitehorse, YT Y1A 2C6

Dear Sirs:

Re: First Nation of Na-Cho Nyak Dun:
Suspension of Regulatory Dialogue relating to Keno Hill Mines

I am writing to you in my capacity as Chief of the First Nation of the Na-Cho Nyak Dun. As Chief, I have an obligation to ensure that the constitutionally protected Aboriginal rights and title of our First Nation are honoured by the Crown. This includes my responsibility to ensure that all proposed activities on our lands, including our traditional territory, be sustainable and, take place with our full knowledge, involvement and consent.

Our Rights

As you are aware, our existing Aboriginal and treaty rights were reaffirmed under Section 35 of the *Constitution Act*, 1982. There have been a number of cases which have clearly established the

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importance of consultation and accommodation of First Nations rights, with the goal of substantially resolving our concerns before a decision is made which could impact those rights.

Further, as a First Nation with a modern land claims treaty with the Crown we have been recognized as a government that has taken on the obligations and benefits of a government. The Na-Cho Nyak Dun executed its Final Agreement and Self-Government Agreement with Canada and the Yukon in July 1995. The Final Agreement provides the Na-Cho Nyak Dun with extensive rights to carry on its traditional activities within its traditional territory.

Furthermore, the recent decision handed down by the Supreme Court of the Yukon Territory; *Little Salmon/Carmacks First Nation vs. Government of Yukon* clearly confirmed that, with respect to developments within our traditional territory, there must be a "government to government dialogue" about how potential transfers by the Crown will impact our Aboriginal rights and title. The court held that "courtesy consultations" are not sufficient. The *Little Salmon Carmacks* case makes it very clear that the Yukon and Federal government must consult with self-governing Yukon First Nations on a government-to-government basis before making decisions with respect to the transfer of lands, or interests in lands, which have the potential to impact First Nations lands and citizens.

The recent case of the *Dene Tha First Nation vs. Canada* makes certain that First Nations must be involved very early in designing processes for regulatory and environmental review for projects that take place on their lands. It is not sufficient to require First Nations to take part in a process which has not been designed by them and which does not afford the First Nation appropriate mechanisms to raise and resolve legitimate concerns. The decision in *Dene Tha* makes it clear that the longer the Crown delays in engaging meaningfully with First Nations, the more likely an Aboriginal group will be able to obtain declaratory relief, and perhaps even an injunction, to halt the project.

Our rights are also clearly established by our strong connection to the lands. For generations, our citizens have been hunting, trapping and fishing within our traditional territory and at the Keno Hill site. Our people have an historic and contemporary connection to these lands for our traditional pursuits for generations. Elders remember eagle nests around the big lakes, hawks, ptarmigans and different types of grouse were available as food. Caribou moss and wild rhubarb roots were gathered and made into medicines. Grizzly bear, thin horn sheep, caribou, rock rabbits and marmots were hunted to supplement our diets. We still hunt these areas where they aren't fenced in and berry harvesting still takes place in accessible areas. These are our lands.

Keno Hill Mines

As you are aware, in June 2005 both the Government of Canada and the Yukon Territorial Government approved the transfer of the Keno Hill assets to Alexco Resources Inc., through its subsidiary, Elsa Reclamation and Development Corporation. The interim closing took place in April 2006.

Our First Nation has not been, and continues not to be engaged in meaningful dialogue about:

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- a) the original decision to permit the development of Keno Hill in a manner which adversely impacted our Aboriginal and treaty rights and the natural environment of our traditional territory which has been inhabited by our ancestors since time immemorial;
- b) the decision to transfer Keno Hill to Elsa;
- c) decisions with respect to the process to evaluate the care & maintenance program, the exploration program and the closure and reclamation plans; and
- d) subsequent regulatory dialogue and decision making with respect to the care & maintenance program, the exploration program and the closure and reclamation plans.

As Chief of the Na-cho Nyak Dun, I am disappointed with what appears to be a Crown pattern of indifference to us as First Nations peoples. We are not just third party stakeholders who are required to take part in processes designed by other governments with respect to the transfer, reclamation, exploration and proposed redevelopment of Keno Hill. The Keno Hill clean up and redevelopment involves our lands and our rights and should only take place once concerns about impacts to our rights and title have been jointly identified and subsequently appropriately assessed, addressed and accommodated.

To date your actions demonstrate departure from the honour of the Crown and your fiduciary obligation to consult with us and accommodate our concerns. In fact, I feel we have been dealt with as minimally as possible as Elsa and Alexco move forward towards the path of redevelopment at Keno Hill. Courtesy consultations or expectations that we have the capacity to meaningful engage can no longer be accepted by the Na-Cho Nyak Dun.

We have the following specific concerns about how the Crown has proceeded with important aspects of the Keno Hill redevelopment, without including us.

Transfer of Keno Hill to Elsa

Contrary to your fiduciary obligations to us, the Yukon and Federal government did not appropriately consult with us prior to approving the decision to transfer Keno Hill to Elsa.

We were not able to fully engage in dialog about potential impacts of the transfer to Elsa upon our continued right to harvest resources within our traditional territory. While we were afforded an opportunity to address concerns with respect to the transfer of the care and maintenance program to a third party and the proposed redevelopment of Keno Hill in court we did not have the capacity to intervene at the time. Our First Nation has legitimate concerns that approval of an inadequate care and maintenance program or further the redevelopment Keno Hill will result in significant adverse impact upon our rights and title. This could alienate us from our preferred use of our traditional territory and adjacent settlement lands. To some degree this has already happened as several of our traditional hunting areas were fenced off from access to our people under the previous Care and Maintenance contract.

The original decision to approve the transfer of Keno Hill to Elsa without meaningfully consulting, accommodating and reconciling our concerns was incorrect, unreasonable and inconsistent with

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your fiduciary obligations to us as self governing First Nation as set out in the *Little Salmon/Carmack* case.

Yukon Environmental and Socio-economic Assessment Board

We have strong concerns about the adequacy of our involvement in the Yukon Environmental Assessment Board processes related to the Project. Although the *Yukon Environmental and Socio-economic Assessment Act* guarantees that the views of Yukon First Nations and their citizens will be sought and accepted during the assessment process, this guarantee of accepting 'views' is inadequate as it ignores the unique position of those Yukon First Nations with self government agreements. The requirement of the Yukon Environmental and Socio-economic Assessment Board to seek First Nation input along with all other interested parties treats First Nations as merely another stakeholder. We must put in place a process for government to government consultation.

Under the Board's assessment process, we were not wholly included in the entire assessment and decision making process. Instead we were only given a small window within the prescribed process to voice our concerns. We have demonstrated that we have legitimate concerns and interests in the Keno Hill project by following the Board's requirements and submitting comments within the specified timeframe, to the best of our ability. Our submitted letter to the Board dated January 29, 2007 establishes this. It also makes it clear how the regulatory process was inadequate for our First Nation. Included in the letter are a number of questions regarding the Keno Hill project as well as an expression of our concerns about the lack of time and resources we had to review and provide sufficient comments and any potential alternatives. Is this what the Crown sees as a "government to government" dialogue? Under the YESAB process, we lacked sufficient time, capacity and resources to sufficiently review and evaluate the entire application, its potential impacts and any alternatives that may have been appropriate. This remains the case.

Water Licence

We are also very concerned that all regulatory processes that have followed the interim closing of Keno Hill have been designed to exclude our meaningful participation and the consideration of our legitimate concerns.

We understand that Elsa is in the process of submitting Type B Water License application to support the care and maintenance program.

Again, we were put in the unfortunate position of not being afforded the time, capacity and resources to meaningfully engage with respect to this intended application by Elsa. We believe that before any application for a water license can be completed, the First Nation needs to be provided with the capacity and resources to review and evaluate all parameters of the application and its potential impacts to us. Therefore the August 27, 2007 deadline for submissions regarding this license is not reasonable.

Should an application be accepted without our input, which as we have noted is contingent of the development of a process to do so, it is our position that the nature of the Keno Hill project and its potential impacts to our rights and title would require that the Water Board exercise its discretion to hold a public hearing with respect to the proposed issuance of the Type B Water License. We

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would anticipate that that public hearing not take place until the process and funding for our participation in meaningful dialog and accommodation of our concerns has taken place.

Reclamation and Closure Plan

Na-Cho Nyak Dun has very significant concerns with respect to the regulatory dialogue which has taken place on the "Existing State of Mine Reclamation Plan Scoping Document", the closure plan and the reclamation plan for Keno Hill Mines. We believe that in the interest of promoting Elsa's development objectives, the Crown and the proponent have sought to substitute an inadequate process of "courtesy consultation" for the required process of meaningful consultation and accommodation.

In order for any process with respect to the closure and reclamation of the Keno Hill Mines to be legitimate, it must appropriately and meaningfully involve Na-Cho Nyak Dun and this dialogue must take place pursuant to a process which has been developed with Na-Cho Nyak Dun and which appropriately facilitates its participation.

At present, it seems that the proponent and government would like to give the appearance that Na-Cho Nyak Dun is being fully involved and engaged in all dialogue with respect to plans for the scoping of reclamation and closure at Keno Hill. Indeed, on the latest draft of the "Existing State of Mine Reclamation Plan and Scoping Document", the proponent has included reference to "NND-DC" as a partner in developing the scoping document. The First Nation of Na-Cho Nyak Dun has not been engaged by government or the proponent as a full partner in this process. We will be advising Elsa that all uses of the Na-Cho Nyak Dun logo or that of its Development Corporation must be removed. We must first establish and implement a process, as well as funding to evaluate the scoping documents and provide input on how the closure and reclamation plan can be scoped to accommodate our interest.

The draft "Existing State of Mine Reclamation Plan and Consultation Plan" also only recognizes us as a "community" or "stakeholder". Any actual plan must first provide for a process and funding for our participation in scoping the closure and reclamation plans before there are any communications with our community.

To date, we have only obtained selective information derived from some meetings which have taken place between government and Elsa with respect to the reclamation and closure matters. Additionally, we have been treated as peripheral participants and have not been equipped with the technical resources or capacity to engage in a consultation process which ensures that plans for reclamation and closure adequately incorporates our concerns. In order for this to take place, we must have the time and capacity to independently assess, evaluate and participate in the scoping and development of the reclamation and closure plans.

Immediate Suspension of all Regulatory Dialogue

It is my opinion that, to date, Na-Cho Nyak Dun has been excluded from key regulatory decisions surrounding Keno Hills which affect our Aboriginal rights and title in our traditional territory.

Despite this, we have engaged to the best of our ability in other regulatory processes. However, we do not have the financial resources or capacity to meaningfully engage in all the regulatory

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processes surrounding Keno Hill Mines. We have devoted much of our staff, time and resources to cooperate with the process and time frames which have been dictated to us by the Crown and Elsa. This can no longer happen, we are overwhelmed by the amount of activity in our Traditional Territory and we do not have the capacity to engage in a manner consistent with our obligations to our people. This has become increasingly obvious the more we have tried to engage with our limited resources and the subsequent assumptions by others that we have been meaningfully engaged in the process.

Until such time that there is a process and funding for Na-Cho Nyak Dun to independently evaluate, assess and contribute towards all ongoing regulatory processes with respect to the proposed redevelopment Keno Hill, we have no other option but to withdraw from these processes.

Our withdrawal from all regulatory dialogue at this time is not to suggest that we oppose all development on our traditional lands. Rather, as a First Nation whose ancestors and citizens have strong connections to the lands at Keno Hill, we must be satisfied that any care and maintenance, reclamation and closure and redevelopment of the Keno Hill site takes place in a manner which fully involves us and accommodates all of our legitimate concerns.

I would suggest that a decision by the Crown to move forward in the regulatory processes, in a manner which continues to make us peripheral participants would be counter-productive and inconsistent with the honour of the Crown

Na-Cho Nyak Dun is willing to consider and discuss with the Crown proposals for involving us in all ongoing regulatory processes with respect to the proposed redevelopment of Keno Hill. We are very interested in a government to government dialogue with all regulatory agencies involved in evaluating the Keno Hill project with the objective of designing a process, confirming funding and establishing time frames which properly take into account the interests of my community and my citizens.

We look forward to your commitment to resolving each of the concerns that we have raised in this letter and not irrevocably moving forward with the process which excludes our First Nation. As such we ask that you:

- a) provide your commitment that you will not make any regulatory decision with respect to the Keno Hill exploration, care and maintenance program, water license, closure and reclamation plans, or redevelopment until we have been engaged in a meaningful process of consultation with you;
- b) adhere to the consultation protocol signed between NND and Government of Yukon signed in October 2003
- c) provide us with your plan for developing a meaningful government to government process which involves the Na-Cho Nyak Dun with respect to all regulatory aspects of the proposed Keno Hill redevelopment.

We look forward to your written response to the very significant concerns we have raised in this letter.

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Also, we understand that Elsa is coordinating a meeting in connection to the water use licence application for the care and maintenance program at the Keno Hill property on August 15th 2007. Due to the substantial issues to be raised at this meeting, the short time frame for the notice and our lack of capacity to engage, we have notified both government and the company that we will not be able to take part in this meeting, or subsequent meetings, until there is a government to government designed process to include us. Any decision to move forward with the scheduled meeting without the presence of Na-Cho Nyak Dun and our meaningful participation will promote a questionable and flawed process.

In summary, we would like to engage with you about the water licence and other regulatory matters and we must have the time, capacity and resources to do this. We are hopeful that it will be possible to work collaboratively with all agencies of government to devise a process which legitimately includes us and seeks to address our concerns.

Yours truly,



Chief Simon Mervyn