

# Mackenzie Valley Review Board



This is Exhibit "I" referred to in the  
affidavit of Dr. John B. Zoe  
sworn before me, this 21st  
day of September 2010.

**Terms of Reference  
for the  
Environmental Assessment  
of  
Fortune Minerals Ltd.  
NICO Cobalt-Gold-Bismuth-Copper Project  
EA 0809 - 004**

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A COMMISSIONER FOR TAKING AFFIDAVITS

November 30, 2009

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# 1. Introduction

## 1.1 Overview

This document outlines the information required for the environmental assessment of the NICO Cobalt-Gold-Bismuth-Copper Project (NICO Project), a mine proposed in the Wek'eezhii Settlement Area of the Northwest Territories by Fortune Minerals Ltd. ("Fortune" or "the developer"). It is divided into the following sections:

- Section 1 – Introduction, including the reasons for environmental assessment referral, the legal context, and the *Terms of Reference* development process;
- Section 2 – Description of the scope of the development and the scope of the assessment, including minimum geographic and temporal boundaries for consideration of impacts of the proposed development on valued components of the biophysical and human environments;
- Section 3 – The *Terms of Reference* that will direct the production of a *Developer's Assessment Report*; and
- Appendices.

The *Terms of Reference* will direct the developer to organize existing material, and conduct additional study and analysis as appropriate, in order to submit a "stand-alone" *Developer's Assessment Report*. That report will then be used to inform all interested parties about the proposed development during the analytical phase of the environmental assessment<sup>1</sup>.

## 1.2 Referral to environmental assessment

Fortune has applied to develop a primarily open pit with underground component mine and milling complex approximately 90km north of Behchoko, 50km northeast of Whati and approximately 10km northeast of Hislop Lake. Fortune proposes to ship concentrate from the proposed mine by truck/rail to a processing plant in southern Canada.

In January of 2009 the Wek'eezhii Land and Water Board received applications for a Type A Land Use Permit (W2008D0016) and Type A Water License (W2008L2-0004) for the NICO Project. A description of the proposed development was submitted by the developer as part of its application. The Wek'eezhii Land and Water Board initiated a preliminary screening of the NICO Project according to Section 124 of the *Mackenzie Valley Resource Management Act (MVRMA)*.

On February 27<sup>th</sup>, 2009, Indian and Northern Affairs Canada referred the NICO Project application to environmental assessment under paragraph 126(2)(a) of the *MVRMA*. Indian and Northern Affairs Canada stated that the project "may result in significant adverse environmental effects". Key areas identified where these impacts may occur included metal leaching/acid rock drainage, mine waste management, closure and general water quality issues.

The Review Board notified Fortune on March 2<sup>nd</sup>, 2009, that the development had been

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<sup>1</sup> The role of the *Developer's Assessment Report* and associated next steps in the environmental assessment are identified in the *Work Plan* issued by the Review Board as a companion document to the *Terms of Reference*.

referred to environmental assessment.

### **1.3 Legal context and the Terms of Reference development process**

This environmental assessment is subject to the requirements of Part 5 of the *Mackenzie Valley Resource Management Act*. Section Three of the Review Board's *Environmental Impact Assessment Guidelines* describes the environmental assessment process in detail. That document, as well as the Review Board's *Rules of Procedure*, other guidelines, reference bulletins and relevant policies applicable to this assessment are available online ([www.reviewboard.ca](http://www.reviewboard.ca)) or by contacting Review Board staff.

The Review Board must conduct an environmental assessment of the proposed development with regard for the protection of the environment from significant adverse impacts, and the protection of the social, cultural and economic well-being of Mackenzie Valley<sup>2</sup> residents and communities. The Review Board is also required to ensure public concerns are taken into account, and have regard for the importance of conservation to the well-being and way of life of Aboriginal peoples.

The Review Board has developed these *Terms of Reference* based on an examination of information from the following sources:

- The public record of the preliminary screening;
- All information on the public registry in relation to the NICO Project;
- Issues and information from participants at scoping sessions held in Tlicho communities in April, May and November of 2009 and a technical scoping session held in Yellowknife in April of 2009; and
- Review Board experience in the conduct of environmental assessment.

## **2. Scope considerations**

### **2.1 Scope of development**

Under subsection 117(1) of the *MVRMA*, the Review Board determines the scope of development for every environmental assessment it conducts. The scope of development consists of all the physical works and activities required for the project to proceed.

Within this document the term "NICO Project" means all the physical works and activities required to extract, concentrate, store, and transport concentrates out of the Mackenzie Valley. Where this document refers to the "NICO mine site", that means the area covered by Fortune's mineral claims and mining leases, generally located between Lou and Burke Lakes.

Fortune has stated that the NICO Project requires all-season road access from the NICO mine site to Highway 3. Fortune anticipates that the Government of the Northwest Territories will apply to build an all-land road from Highway 3 to Whati and Gameti in the near future (referred to in this document as the "potential realignment of the winter road through the Wek'eezhii Settlement Area"). This road would be used in part for the NICO

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<sup>2</sup> Throughout this document, the term "Mackenzie Valley" refers to the area as defined in section 2 of the *Mackenzie Valley Resource Management Act*.

Project. A short stretch of road (approximately 25km) from the NICO mine site to this anticipated road would be constructed and maintained by Fortune and is within the scope of this development.

The scope of development for this EA does not include the construction or general operation of the potential realignment of the winter road through the Wek'eezhii Settlement Area, which has not been proposed at this time, and which is not expected to be proposed, constructed or primarily operated by Fortune. The Review Board expects that the potential realignment of the winter road through the Wek'eezhii Settlement Area will undergo appropriate environmental scrutiny once applications for that road have been received. However, Fortune's use of the potential realignment of the winter road through the Wek'eezhii Settlement Area is required for the NICO Project, and is included in the scope of development.

With the above exception of the construction and maintenance of the potential realignment of the winter road through the Wek'eezhii Settlement Area, the scope of this environmental assessment includes all physical works and activities required to construct, operate, close and reclaim the NICO Project within the boundaries of the Mackenzie Valley. The Review Board has used information that Fortune provided and defined the scope of development to include the following physical works or activities during any phases of mine construction, operation and closure/ post-closure:

#### **Construction**

- Construction of the mine rock management area, tailings pond and tailings management area or alternatively a single co-disposal tailings/mine rock facility, including water management systems;
- Construction of a waste disposal facility;
- Construction of facilities for milling, initial separation and concentration of ore;
- Construction of power generation and heat recovery facilities;
- Construction of the Effluent Treatment Facility that will treat effluent from the tailings pond and other sources;
- Construction of drainage control structures, process pipelines and waste water pipelines from mine to surface, on surface at the NICO Project mine site, run-off collection trenches and sedimentation pond;
- Construction of any new roads at the mine site;
- Construction of water management facilities, including the pump house and water intake, water discharge system (including seasonal water storage areas, all drainage ditches and discharge points), potable water supplies for camp and a sewage treatment plant;
- Construction of fuel storage facilities on-site;
- Construction of the permanent camp west of Nico Lake;
- Construction of NICO access road to the mine site;
- Construction of the NICO access road bridge over the Marian River;
- Construction of the airstrip; and
- Development of borrow sources for aggregate production at the mine site or along the NICO access road.

#### **Mining and materials storage**

- Development of underground workings and open pit, including use of the existing decline and crosscut and drift development;

- Extraction and crushing of ore-bearing rock;
- Transport, storage and use of explosives;
- Mine dewatering;
- Transportation of materials, management of ore and tailings, the mine rock management area, tailings pond and tailings management area (or co-mingled deposition of rock and tailings), including waste management systems;
- Management of a waste disposal facility within the tailings management area;
- Management of initial separation and concentration reject materials, ore and tailings stockpiles on surface, including construction of any associated foundations, buildings, and water treatment and management systems; and
- Mining equipment operation, including vehicles and materials conveyance systems.

### **Milling**

- Use of facilities for milling, initial separation and concentration of ore including:
  - Conventional concentrator with ball mills;
  - Initial flotation, secondary flotation of bulk rougher concentrate, bulk cleaner flotation and any other processing;
  - Extraction, transportation, consumption, recycling, treatment and discharge to the environment of mine water and process water;
  - Storage, handling, use and disposal of milling process additives and chemicals; and
  - Thickening, filtration and packaging of concentrate for transportation.

### **Other on-site facilities and activities**

- Power generation and heat recovery facilities;
- Use of the Effluent Treatment Facility that will treat effluent from the tailings pond and other sources;
- Use of drainage control structures, process pipelines and waste water pipelines from mine to surface, on surface at the NICO Project mine site, run-off collection trenches and sedimentation pond;
- Use of roads at the mine site;
- Use of the water treatment plant;
- Use during mine operations of the pump house and water intake, water discharge system (including seasonal water storage areas, all drainage ditches and discharge points) and potable water supplies for camps;
- Use of fuel storage facilities on-site;
- Use of the pioneer camp at Lou Lake and permanent camp west of Nico Lake;
- Sewage treatment plant;
- Service complex and mine equipment management building;
- Use of vehicles and all other emissions sources at the NICO mine site; and
- Use of waste incinerator.

### **Support/ancillary facilities and activities**

- Transportation activities by air and road (including the NICO access road and the potential realignment of the winter road through the Wek'eezhii Settlement Area) that support the NICO Project's operation, including transportation of goods, fuel, contractors and employees in to and out of the mine;
- Removal and disposal of wastes or other materials;

- Use of the airstrip at the mine site; and
- Use of borrow sources for aggregate production at the mine site or along the access road.

### **Closure and reclamation**

- Removal or stabilization of all structures and equipment;
- Reclamation of tailings pond, tailings management area, and all other site water management facilities;
- Reclamation of the mine rock management area;
- Reclamation of the new access road proposed by Fortune, and all roads on the NICO Project mine site;
- Reclamation of infrastructure foundations, piping, and all built structures at the mine site;
- Reclamation of any stockpiles and materials storage locations;
- Re-vegetation of areas affected by mining, access road or support activities;
- Bulkhead installation and other capping of the underground works; and
- Long-term mine water outflow monitoring and water management around the mine site.

In the *Developer s Assessment Report* (see section 3.2.5) the developer is required to fully describe all required facilities and activities for the development, including any not listed above. The Review Board may amend the scope of development at any time during the environmental assessment if the proposed development changes.

## **2.2 Scope of assessment**

### **2.2.1 Overview**

The scope of assessment defines which issues will be examined in the environmental assessment. The scope of assessment includes all potential impacts on valued components of the biophysical and the human environment (e.g. wildlife species or heritage resources) from the development, by itself and in combination with other past, present and reasonably foreseeable future developments (see section 2.2.3 for details).

To determine the scope of assessment, the Review Board reviewed Fortune's Project Description Summary and the public registries of the preliminary screening and ongoing environmental assessment. The Review Board also hosted scoping sessions in Whati, Gameti, Behchoko, Wekweeti and Yellowknife.

### **2.2.1 Geographic scope**

The geographic scope will include all areas that may be affected by activities within the NICO Project scope of development. The geographic scope for each valued component must be appropriate for the characteristics of that component, or the impact and nature of the impact source. For example, consideration of impacts on air should reflect the airshed, wind patterns and mobility of airborne contaminants, while the habitat ranges of wildlife using the area may be relevant from a project specific and cumulative effects perspective. All of these areas together will be considered in the environmental assessment study area, which will be further defined by the developer in its *Developer s Assessment Report* (see section 3.2.3). The developer will provide rationale for the spatial boundaries it selects for the assessment of potential mine-related impacts on each valued component.

The minimum geographic scope will include the following areas:

- 1) Fortune's mineral and surface leases and mining claims in the area of the NICO Project mine site, sub-surface workings, and a reasonable impact footprint radius centered on the mine site;
- 2) The NICO access road connecting the NICO Project mine site to the potential realignment of the winter road through the Wek'eezhii Settlement Area and a reasonable impact footprint corridor, including any portions of watercourses that may be affected;
- 3) The watersheds from Peanut Lake and Lou Lake downstream of the NICO Project to Marian River, Marian Lake and to the confluence of the North Arm of Great Slave Lake to the point where reasonably foreseeable project-related impacts cease to occur; and
- 4) Hislop Lake related to any potential impacts on water quality, fisheries and the human environment.

The geographic scope for assessing impacts to the human environment includes the physical communities of Whati, Gameti, Wekweeti, Behchoko and Yellowknife and their residents, the Wek'eezhii Settlement Area as a whole and the Tlicho and Metis cultural communities resident in or making traditional use of any part of the environmental assessment study area. Together, these groups are described in this document as "potentially-affected communities".

In its response to section 3.2.3 (below) the developer is required to define and provide rationale for the specific spatial boundaries it used to examine the potential impacts on each of the valued components in its impact assessment.

### **2.2.2 Temporal scope**

The developer will use temporal boundaries for this environmental assessment according to potential long-term impacts on valued components, rather than on a single generic timeline. In all cases, the temporal boundary may not end with the duration of the operating phase of the NICO Project.

For project specific (that is, non-cumulative) impacts, the temporal scope will include all phases of the NICO Project lifespan including construction, operation, closure and reclamation, and extends until no potentially significant adverse impacts are predicted. For cumulative impacts, the temporal scope includes the period of the effects of past, present and reasonably foreseeable future projects that are predicted to combine with the impacts of the NICO Project.

The developer will place special focus on the consideration of times during the development when activities are particularly intense (such as during initial construction) or when valued components are particularly sensitive to potential impacts (such as during wildlife migration periods, or spawning and incubation periods for fish, key harvesting periods and annual cultural gatherings). The developer will also give special attention to appropriate temporal boundaries for considering any impacts that may require long-term monitoring and management after closure, such as mine water release into the environment (see section 3.3.3 for details on this subject).

In its response to section 3.2.3 (below) the developer is required to define and provide

rationales for the specific temporal boundaries it used to examine the potential impacts on each of the valued components considered in its impact assessment.

### **2.2.3 Other scope of assessment considerations**

The scope of assessment will include an examination of cumulative effects. This will involve considering impacts from other past, present and reasonably foreseeable future developments or human activities that combine with the impacts of the NICO Project to affect the same valued components. Such cumulative effects will be assessed at a spatial and temporal scale appropriate to the particular effect or valued component under consideration.

For example, contaminated sites in the area that are not part of the NICO Project are excluded from the scope of development. However, where the impacts and continuing effects of past activities may combine with the potential impacts of the NICO Project, they must be considered in the cumulative effects assessment (see Appendix L for more details).

The level of effort required in considering specific issues is discussed in section 3.1.

The scope of assessment set out in these *Terms of Reference* may be re-examined at any time by the Review Board if new information emerges.

### 3. Terms of Reference

#### 3.1 Considerations

The developer will consider the following when developing the specific material the Review Board requests in Section 3.2 – 3.4 and related Appendices.

##### 3.1.1 Issues prioritization

The purpose of scoping is not only to identify issues, but also to prioritize them and if possible, focus required additional work on the most important ones. Fortune will consider all the items described in Section 3.3 because every issue identified in this *Terms of Reference* requires a sufficient analysis to demonstrate whether the development is likely to be the cause of – or a contributor to – significant adverse impacts. However, three particular issues were identified during scoping as requiring increased attention, because of high impact potential and concerns raised during scoping. Fortune is required to give special consideration to the following **key lines of inquiry** in the *Developer's Assessment Report*:

- **Impacts of the NICO Project on water quality**, particularly in relation to the quality of mine water and effluent released to groundwater and surface waters, and related impacts to human health and aquatic life downstream.
- **Long-term impacts following mine closure and reclamation.**
- **Caribou and caribou habitat**, including effects from the NICO minesite and NICO access road on habitat, disturbance and displacement effects and direct mortality.

These key lines of inquiry are the topics of greatest concern that require the most attention during the environmental assessment and the most rigorous analyses in the *Developer's Assessment Report*. These are designated as key lines of inquiry to ensure a comprehensive analysis of the issues most likely to cause significant environmental impacts or significant public concern. Data collection and analyses for these key lines of inquiry in the *Developer's Assessment Report* should be at a level of detail appropriate for other interested parties to understand the technical material prior to any technical sessions on these topics.

These key lines will be presented in comprehensive stand-alone sections in the *Developer's Assessment Report*. This will facilitate close examination of the developer's response to these key lines of inquiry, and will require only minimal cross-referencing with other parts of the report and appendices.

All other valued components or issues identified in this document that require examination in the *Developer's Assessment Report* are treated as **subjects of note**. These issues do not have the same priority or expected level of detail as key lines of inquiry, but are nonetheless issues that require serious consideration and substantive analysis.

##### 3.1.2 Incorporation of traditional knowledge

The Review Board values and considers both traditional knowledge and scientific knowledge in its deliberations. Fortune will make all reasonable efforts to assist in the collection and consideration of traditional knowledge relevant to the NICO Project. Where it is applicable, Fortune will make all reasonable efforts to incorporate traditional knowledge from aboriginal culture holders as a tool to collect information on and evaluate the specific impacts required in this *Terms of Reference*. The developer should refer to the Review Board's *Guidelines for*

*Incorporating Traditional Knowledge into the Environmental Impact Assessment Process*.<sup>3</sup> and community/culture group-specific traditional knowledge protocols.

### **3.1.3 Assessing the impacts of the environment on the development**

Potential impacts of the physical environment on the development, such as changes in the permafrost regime, other climate change impacts, seasonal flooding and melt patterns, seismic events, geological instability, and extreme precipitation must be considered in each of the applicable items of this *Terms of Reference*. Any changes to the design or management of the NICO Project as a result of considering potential impacts of the environment should be noted in the relevant sections.

### **3.1.4 Use of appropriate media**

The Review Board encourages the developer to present information in user-friendly ways. The use of maps, aerial photos, development component/valued component interaction matrices, full explanation of figures and tables, and an overall commitment to plain language is encouraged. When it is necessary to present complex or lengthy documentation to satisfy the requirements of the *Terms of Reference*, the developer should make every effort to simplify its response in the main body of the text and place supporting materials in appendices.

The developer is strongly encouraged to visually represent the NICO Project and its surroundings using a diorama-type 3 dimensional landscape model to indicate scale, setting and direct footprint.<sup>4</sup> For digital mapping, all Geographic Information Systems (GIS) data must conform to the standards set by the Government of the Northwest Territories' spatial data warehouse.<sup>5</sup>

The *Developer s Assessment Report* will be submitted as a stand-alone document. Relevant information and analyses from previous project descriptions should be incorporated into the *Developer s Assessment Report* and combined with the supplementary material and analyses required by this *Terms of Reference*. Information referenced should be made accessible where possible.

## **3.2 General information requirements**

This *Terms of Reference* document describes the general information required on a subject-by-subject basis. For the sake of readability, detailed requirements are to be included in corresponding appendices for many of the following sections. The developer is encouraged to consider the information gaps identified and questions raised by interested parties on the public record in scoping submissions and comments on the *draft Terms of Reference* when determining the level of detail required in its *Developer s Assessment Report* for specific issues covered in this *Terms of Reference*.

### **3.2.1 Summary materials**

The following summary materials are required:

1. English and Tlicho plain language, non-technical summaries of the *Developer s Assessment Report*;
2. An audio (.mpeg) translation of the plain language summary in the Tlicho language;

3. Available at [http://www.reviewboard.ca/upload/ref\\_library/MVEIRB\\_TK\\_Guide.pdf](http://www.reviewboard.ca/upload/ref_library/MVEIRB_TK_Guide.pdf).

4 For an example, see *EA 0708-07- Taltson Hydroelectric Expansion Project*.

5. The GNWT's spatial data warehouse may be accessed at <http://maps.gnwtgeomatics.nt.ca/portal/index.jsp>.

3. A concordance table that cross references the items in the *Terms of Reference* with relevant sections of the *Developer's Assessment Report*; and
4. A commitments table listing all mitigation measures the developer will undertake, including but not limited to those described in the project application. These should be organized by subject (e.g. water quality, wildlife) for easy reference.

### **3.2.2 Developer**

The following information regarding the developer is required:

1. A summary of Fortune's corporate history and operational experience in Canada and the Northwest Territories;
2. How the developer will ensure that its contractors and subcontractors honour commitments made by Fortune;
3. Fortune's environmental performance record during prior exploration and development work in support of the NICO Project and any other projects in the NWT. This will include discussion of regulatory compliance (for example, regarding land use permits and water licenses). List any situations where compliance was breached, the issue and cause, and how and when it was mitigated to the regulator's satisfaction; and
4. A description of any corporate policies, codes of practice, programs or plans concerning Fortune's environmental, sustainable development, community engagement and workplace health and safety commitments or policies.

### **3.2.3 Developer's assessment boundaries**

The developer will provide a description, map and rationale for all of the chosen geographic and temporal boundaries used during its impact assessment. Certain minimum requirements and other instructions to assist in the determination of appropriate boundaries are discussed in Section 2.2 of the *Terms of Reference*. Separate boundaries may be required for cumulative effects assessment (see Section 3.6).

The developer will describe and provide rationales for:

1. An overall environmental assessment study area and the rationale for its boundaries;
2. Fortune's chosen spatial boundaries for the assessment of potential impacts for each of the valued components considered; and
3. The temporal boundaries chosen for the assessment of impacts on each valued component.

### **3.2.4 Description of the existing environment**

A detailed description of the existing environment is required, including current status and trends for all valued components. Wherever possible, the developer is responsible for providing a clear picture of what typical environmental conditions existed in the environmental assessment study area prior to any industrial activity occurring. This must consider the current state of the baseline conditions and the natural range of background conditions.

In addition, the developer is encouraged to provide a description of the methods used to acquire the information used to describe baseline conditions. This description should distinguish between techniques used to measure parameters in the field from information derived from the utilization of models.

Describe the biophysical environment, including:

- the geographic location
- air quality
- climate
- hydrology
- surface water quality and quantity
- aquatic organisms
- wildlife
- vegetation
- landscape
- terrain and geology
- soil characteristics
- groundwater quality and quantity

Describe the human environment, including:

- population demographics in surrounding communities
- existing infrastructure
- regional labour pool, skill levels and regional business capacity
- socio-economic conditions in potentially affected communities
- historic and present land use, including harvesting
- heritage resources
- other economic activities

Appendix A elaborates on the information required for the description of the existing environment.

### 3.2.5 Development description

Fortune will ensure that a description of all its planned facilities and activities is included in the *Developer s Assessment Report*, including any proposed or existing facilities and activities not listed in Section 2.1 of this *Terms of Reference*. In this section, Fortune is only asked to provide details on the NICO Project itself, not to comment on potential impacts from the development.

Where the developer feels it would be helpful to reviewers, the *Developer s Assessment Report* should describe alternative development components, management systems, or alternative locations for physical works and activities considered for the NICO Project. Where applicable, the developer will provide reference to research that identifies the successful use of the specific technologies being proposed, and their relevance for this environmental setting.

Describe the proposed NICO Project, providing details of all works and activities throughout construction, operation, closure and reclamation, and long-term monitoring phases, with a description of major activities by phase.

This description will include:

- mine components and facilities
- any on-site processing
- chemicals and explosives
- tailings
- mine rock management area
- stockpiling of material
- water usage, management and treatment
- waste management
- power generation
- transportation
- site infrastructure
- employment
- any other activities

Appendix B elaborates on the information required in the development description.

### 3.2.6 Public engagement

Engagement with communities, Aboriginal groups, the Tlicho Government, other governments, or other organizations with interests related to areas that might be affected by the NICO Project should be considered in this section. Aboriginal groups, government agencies and other interested parties may have information useful to the conduct of this impact assessment and all reasonable efforts should be made to engage with them. The Review Board encourages the developer to meet with interested groups outside the environmental assessment process, and to place any information from those discussions they consider may be relevant to the Review Board's decision on the public record.

The following items are required for consideration of public engagement:

- An engagement log, describing dates, individuals and organizations engaged with, the mode of communication, discussion topics and positions taken by participants, including:
  - All commitments and agreements made in response to issues raised by the public during these discussions, and how these commitments altered the planning of the proposed NICO Project
  - All issues that remain unresolved, documenting any further efforts envisioned by the parties to resolve them
- Description of all methods used to identify, inform and solicit input from potentially-interested parties, and any plans Fortune has to keep engagement moving forward;
- Discussion of the implications for environmental monitoring and management of any relevant agreement between the developer and other interested parties; and
- How Fortune has engaged, or intends to engage, traditional knowledge holders in order to collect relevant information for establishing baseline conditions and the effects assessment of potential impacts, as well as a summary table indicating where and how in which of the subsequent sections (3.3-3.6) traditional knowledge was incorporated (see Review Board's *Guidelines for Incorporating Traditional Knowledge in Environmental Impact Assessment*).

## 3.3 Impacts on the biophysical environment

### 3.3.1 Impact assessment steps and significance determination factors

In order to facilitate the consideration of the specific questions posed in this section, the developer is required to address the following impact assessment steps. In assessing impacts on the biophysical environment, the *Developer's Assessment Report* will for each subsection:

- Identify any valued components used and how they were determined;
- For each valued component, identify and provide a rationale for the criteria and indicators used;
- Identify the sources, timelines and methods used for data collection;
- Identify natural range of background conditions (where historic data are available), and current baseline conditions, and analyze for discernible trends over time in each valued component, where appropriate, in light of the natural variability for each;
- Identify any potential direct and indirect impacts on the valued components that may occur as a result of the proposed development, identifying all analytical assumptions;
  - Predict the likelihood of each impact occurring prior to mitigation measures being implemented, providing a rationale for the confidence held in the prediction;
  - Describe any plans, strategies or commitments to avoid, reduce or otherwise manage the identified potential adverse impacts, with consideration of best management

- practices in relation to the valued component or development component in question;
- Describe techniques, such as models utilized in impact prediction including techniques used where any uncertainty in impact prediction was identified;
- Assess and provide an opinion on the significance of any residual adverse impacts predicted to remain after mitigation measures; and
- Identify any monitoring, evaluation and adaptive management plans required to ensure that predictions are accurate and if not, to proactively manage against adverse impacts when they are encountered.

The developer will characterize each predicted impact<sup>6</sup>. These criteria will be used by the developer as a basis for its opinions on the significance of impacts on the biophysical environment. The Review Board will make ultimate determinations of significance after considering all the evidence on the public record later in the environmental assessment.

### **3.3.2 Key line of inquiry: water quality**

During the issues scoping process, potential impacts of the NICO Project on water quality was identified as a top priority by most interested parties, including the developer. The developer will consider all potential impacts on water quality in the watershed to the point where no mine-related changes can be measured and present this in a stand-alone section of the Developer's Assessment Report. The developer will:

- Describe the impacts of the proposed project on water quality around the NICO minesite and downstream. Include discussion of predicted physical or chemical changes. This will include predictions of any changes in levels of contaminants, pollutants or other harmful or deleterious substances caused entirely or partly by the NICO Project. Discuss these in terms of:
  - changes to water quality and impacts on aquatic resources and wildlife; and
  - changes to the quality of water for drinking in Behchoko and for people on the land.
- Describe any predicted changes from the NICO Project on:
  - surface waterbodies in the Fortune claim block;
  - surface waterbodies downstream of the project until no mine related changes can be measured; and
  - Marian River, Marian Lake and Hislop Lake.
- Predict potential impacts on groundwater flows from the project area.
- Describe mitigation measures to minimize impacts to water quality.

Appendix C elaborates on the information required on water quality.

### **3.3.3 Key line of inquiry: closure and reclamation**

During the issues scoping process, long-term impacts related to closure and reclamation of the NICO Project were identified as a high priority by most interested parties. Fortune will present its preliminary Closure and Reclamation Plan for the NICO Project in the *Developer's Assessment Report*. The developer should consider existing guidance, such as Indian and Northern Affairs Canada's mine closure and reclamation policy and guidelines for the NWT

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<sup>6</sup> in terms of magnitude, areal extent, timing, reversibility, likelihood and all other criteria required by section 3.11 of the Review Board's *EIA Guidelines*.

when developing its reclamation plan for the NICO Project (see <http://www.ainc-inac.gc.ca/ai/scr/nt/ntr/pubs/MSR-eng.asp>). The developer is also advised to work with communities and other parties to determine clear closure objectives and link them to measureable closure criteria and indicators. The formation of a Closure and Reclamation working group composed of regulators and other groups will assist in the development of closure objectives and reclamation standards for the Closure and Reclamation Plan.

The temporal scope of the Closure and Reclamation Plan should focus on impacts to water, fish, wildlife and people during the closure and post-closure phases of the project. Long-term project effects on caribou should specifically focus impact predictions in the context of the current serious decline in caribou populations, particularly the Bathurst herd. This discussion is not intended to duplicate the requirements of Section 3.3.4. The developer will:

- Describe to what overall standard Fortune plans to reclaim the site, and how that standard was selected, including any recommended closure criteria and/or a process for defining closure criteria.
- Describe how and when the mine site will be reclaimed, including how plans will ensure that the site does not contaminate water or pose an ongoing hazard to people or wildlife.
- Describe any alternative methods of waste management considered.
- Describe plans for reclaiming the NICO access road.
- Describe consultations with governments and communities regarding reclamation, and how plans have been adapted as a result.
- Consider the role of climactic change in development of a closure and reclamation plan.

Appendix D elaborates on the information required on closure and reclamation.

### **3.3.4 Key line of inquiry: caribou and caribou habitat**

The developer will:

- Describe impacts to caribou habitat, including degradation and fragmentation, with a focus on important wildlife habitat.
- Describe potential for increased mortality from all sources including vehicle collisions and changes to hunting access.
- Describe effects of increased sensory disturbance from all sources (e.g. noise, odours, activity, vibrations, overflights and dust) and effective habitat loss resulting from changed behavior.
- Describe any disruption of movement and migration patterns.
- Describe potential for increased contamination of food and water, including bio-accumulation from all sources.
- Discuss energetic costs to caribou from disturbance and displacement effects.
- Describe mitigation measures used to mitigate impacts on caribou and caribou habitat.

### **3.3.5 Water quantity**

The developer will:

- Describe the potential impacts of the NICO Project on upstream and downstream water quantity, with a particular emphasis on changes in:
  - Lou, Peanut, Nico and Burke Lakes;

- Connecting waterways (including any streams from Burke Lake feeding Marion River) and ephemeral springs that form during freshet; and
- groundwater flows.
- Provide a water balance for the project (with proposed water recycling).
- Discuss potential effect of pit dewatering on groundwater levels and water table drawdown.
- Discuss potential changes to groundwater-surface water interactions resulting from project activities.
- Discuss how potential changes to permafrost resulting from Project activities may affect groundwater quantity.
- Describe potential impacts of water withdrawals and the loss of littoral habitat.
- Describe potential effects of changes in water quantity on the Marian River and Marian Lake.
- Describe mitigation measures to minimize impacts to water quantity.

### 3.3.6 Fish and aquatic habitat

Describe the following potential impacts of the NICO Project on fish and aquatic habitat.

- Identify the fish bearing lakes and rivers that the project may affect.
- Describe the potential impacts on aquatic life, including changes to water quality and quantity, riparian areas and any introduction of contaminants to aquatic food chains.
- Describe in detail the mitigations Fortune will do to avoid or reduce impacts to fish and aquatic habitat, and predict the effects from the NICO Project after those mitigations.

Appendix E elaborates on the information required on fish and aquatic habitat.

### 3.3.7 Wildlife

The Review Board notes that Section 79 of the federal *Species at Risk Act* (SARA) requires that all SARA-listed species be identified and any adverse impacts of a development on them be thoroughly assessed and mitigated, regardless of whether the impacts are deemed “significant”. Cumulative effects on wildlife are examined in section 3.6. The developer will:

- Describe potential effects from the NICO Project on wildlife and its habitat. This will include impacts on hoofed mammals, large carnivores, furbearers (terrestrial and aquatic), and migratory birds. This description will consider:
  - direct and indirect habitat loss;
  - behavioural disturbance from NICO Project activities;
  - barriers to movements;
  - energetic costs from disturbance and barriers to movement;
  - impacts related to increased access; and
  - any other sources of direct or indirect mortality.
- Special consideration is required when looking at potential impacts on species that are harvested, and for species of wildlife at risk (SARA and Committee on the Status of Endangered Wildlife in Canada (COSEWIC) listed species).
- Describe any mitigation proposed to avoid or reduce impacts to wildlife, and predict any residual impacts.

Appendix F elaborates on the information required on wildlife.

### **3.3.8 Terrain**

The developer will:

- Describe the stability of the proposed mine rock management and tailings management areas and evaluate potential impacts.
- Describe how Fortune will ensure the stability of all engineered structures against a range of climate, seismic and precipitation scenarios.
- Describe plans to mitigate impacts on terrain, including plans for monitoring, evaluation and adaptive management of the mine rock management area, tailings management area the system of dykes and dams.

Appendix G elaborates on the information required on terrain.

### **3.3.9 Air quality**

The *Developer's Assessment Report* will evaluate the NICO Project's potential impacts on air quality due to project emissions. While considering impacts and mitigation on air quality, the developer is encouraged to enter dialogue with Environment Canada and the Government of the Northwest Territories about appropriate methods for modeling air quality and strategies for minimizing air quality impacts, and should consider the *Guideline for Ambient Air Quality Standards in the Northwest Territories* and Government of the Northwest Territories *Guideline for Dust Suppression*. The developer will:

- Describe and quantify existing conditions with respect to air quality and meteorological conditions.
- Predict the emissions and potential impacts using an established air quality model, during all phases of the NICO Project and the components of its operations. The model shall predict both dispersion and deposition potential.
- Describe proposed mitigations and any plans for air quality monitoring, evaluation and adaptive management.

Appendix H elaborates on the information required on air quality.

### **3.3.10 Vegetation**

The developer will:

- Describe the total amount of land cleared (relative to pre-fire conditions).
- Describe potential impacts on rare plants.
- Describe how Fortune will prevent the introduction of invasive plants.
- Describe mitigation measures related to vegetation.

Appendix I elaborates on the information required on vegetation.

### **3.3.11 Biophysical environment monitoring and management plans**

Monitoring in the environmental assessment is to focus only on monitoring activities required

for recognizing potentially significant impacts and ensuring that they are mitigated by adapting the management of the development. For clarity, this excludes monitoring details related to routine regulatory compliance monitoring and state of the environment monitoring, *unless these relate to potentially significant impacts.*

Describe conceptual plans for monitoring, evaluation and adaptive management for biophysical impacts. Specify which phase of the development each plan is for.

Show that monitoring plans have representative baseline information, consider the natural range of variability, and will detect any relevant impacts before they become significant. Describe how project management will be adapted if necessary to prevent significant impacts.

Appendix J elaborates on information required for environmental monitoring and management plans

### **3.4 Impacts on the human environment**

The *Mackenzie Valley Resource Management Act* lists social impacts, cultural impacts, impacts on heritage resources and impacts on wildlife harvesting in the definition of impacts on the environment. In addition, the Guiding Principles of Part 5 of the MVRMA require the consideration of the social, economic and cultural well being of residents and communities of the Mackenzie Valley during every environmental assessment. The Review Board's *Socio-economic Assessment Guidelines* provide a context for assessing impacts on the human environment. The developer is encouraged to work with communities and responsible government authorities to identify valued components of the human environment, appropriate indicators and sources of information to measure change, pathways by which change may likely occur, and mitigation and monitoring strategies that may be required to maximize benefits and minimize adverse impacts. Mitigation may not be entirely the responsibility of the developer, as governments and communities have social, economic and cultural protection mandates. However, it is primarily the responsibility of the proponent of the project to initially document these issues in its Developer's Assessment Report.

The developer will:

- Describe employment, training and business opportunities from the NICO Project, and any plans to maximize opportunities for Wek'eezhii Settlement Area residents, Aboriginal peoples and other Northerners.
- Estimate the total economic activity to be generated by the development (e.g. employment and income generation including multiplier effects and taxes) and associated socio-economic impacts, with a focus on the distribution of beneficial and adverse impacts. Include a description of any plans or strategies to mitigate adverse socio-economic impacts.
- Describe the social impacts of the NICO Project, focusing on community wellness and population health issues at regional, community, family and individual levels.
- Describe potential cultural impacts, including potential impacts on physical heritage resources, traditional land use (including hunting, fishing, gathering, use of the traditional Idaa Trail and any impacts on activities at Hislop Lake).
- Describe research methodology (see <http://www.pre.ethics.gc.ca/english/policystatement/introduction.cfm>).
- Describe commitments and plans to monitor, evaluate and manage impacts on the human environment.

Appendix K elaborates on the information required on the human environment.

### 3.5 Accidents and malfunctions

The developer will:

- Conduct a risk assessment using best practices for the NICO Project, including components, systems, hazards, and failure modes.
- Assess likelihood and severity of each risk identified.
- Provide rationale for criteria used for decisions on the various risks related to malfunctions/accidents during all project phases from construction through post-closure.
- Describe contingency plans for accidents, malfunctions or unforeseen impacts of the environment on the development.
- Describe on-site containment features, such as concrete pads and dykes and detection systems used for early warning of spills.
- Describe all accident and emergency response plans that will be in place during the construction phase and operations phase, including emergency communication plans.

### 3.6 Cumulative effects

Pursuant to paragraph 117(2)(a) of the *Mackenzie Valley Resource Management Act*, the Review Board considers cumulative effects in its determinations. Cumulative effects are the combined effects of the development in combination with other past, present or reasonably foreseeable future developments and human activities. In addressing cumulative effects, the developer is encouraged to refer to Appendix H of the Review Board's Environmental Impact Assessment Guidelines. The developer will:

- Describe and provide rationale for which past, present or reasonably foreseeable future developments and human activities are being considered in the cumulative effects assessment.
- Identify which of the valued components may be affected by other past, present or reasonably foreseeable future developments and human activities.
- Assess the likelihood, duration and magnitude of the combined effect of these human activities on the identified valued components.
- Describe any mitigation measures proposed to reduce or avoid the predicted effects, specifying if and how adaptive management will be used, and provide an assessment of any residual cumulative impacts.

Appendix L elaborates on the information required for the cumulative effects assessment.

## 4. Conclusion

The Review Board anticipates that the requirements described in this document will help Fortune produce a *Developer's Assessment Report* that clearly describes Fortune's predictions of the impacts of the NICO Project while providing sufficient basis for the Review Board and parties to analyze and evaluate those predictions.

The developer is encouraged to seek clarification from the Review Board in writing if specific requirements in the *Terms of Reference* are unclear.

## Appendix A: Existing environment

### *Biophysical environment*

Describe the biophysical environment within the relevant environmental assessment study areas. The following description should be at a level of detail sufficient to allow for a thorough assessment of project effects. Describe the following:

- 1) The physical location of the proposed development and identification of associated ecozones and ecoregions.
- 2) Ambient air quality.
- 3) Background noise levels with a description of all human-caused noise sources.
- 4) Climatic conditions, including temperature, precipitation and wind patterns.
- 5) Hydrology and hydrogeology, including surface water and groundwater amounts, direction of flow, likely surfacing points/discharge area (for groundwater and shallow subsurface water), and maps and descriptions of associated watersheds. Discussion should focus in particular on:
  - a. the NICO Project mine site with sufficient data to capture spatial and temporal variations in water quality;
  - b. seasonal and annual variation in groundwater and surface water quantity around the mine site; including trends over time related to climatic change and extreme events (e.g. high flows);
  - c. the relative contribution of water from the NICO Project mine site to the volume of Burke Lake and the Marián River;
  - d. surface water and groundwater flow regimes associated with the plateau on which the mine site is located including groundwater flow from the mine itself;
  - e. relationship between the groundwater regime and permafrost conditions and how permafrost influences on-site hydrogeology;
  - f. description of the methodology used to derive the components of the water balance and characterization of flow regimes including a discussion of any uncertainty;
  - g. provide a map indicating the location with rationale of all existing and planned wells, and seeps within the study area and other monitoring locations;
  - h. provide location of seepage meters, if any, and evaporation pans installed in the study area; and
  - i. provide a water table elevation map and a map detailing drainage patterns for surface and groundwater for the mine site and mine workings.
- 6) Current and historic data on surface water and groundwater quality for the NICO mine site area. This should include recent arsenic data and changes in baseline arsenic levels with reference to the recent forest fire, and should contrast baseline levels following the fire with the overall range of natural variability of background conditions.
- 7) Aquatic organisms and aquatic habitat in the environmental assessment study area. Include waterbodies on the mine site, water sources and downstream areas. Describe the following for key aquatic species:
  - a. seasonal and life cycle movements;
  - b. local and regional abundance and distribution;
  - c. known or suspected sensitive habitat areas for different development stages and times of year;
  - d. the food chain that supports the species; and

- e. any known issues currently affecting fish and other aquatic life forms in the area.
- 8) Wildlife (including resident and migratory bird species), wildlife habitat and migration corridors. Special emphasis will be placed on key harvested species including moose, caribou and furbearers. Where available, the following information is required for each species:
- a. population trends, including abundance, distribution and demographic structures;
  - b. habitat requirements, including identification of local areas of important habitat, attributes of the seasonal habitats that relate to how the species use them (e.g. travel routes, forage) and sensitive time periods;
  - c. migration routes, patterns and timings including typical patterns and the range of known variation;
  - d. factors known or suspected to be currently affecting the species in the environmental assessment study area (e.g. harvesting, disease);
  - e. known or suspected sensitivities to human activities; and
  - f. gaps in current knowledge of the species such as the impacts of disturbance on behaviour or abundance.
- 9) Wildlife at risk occurring in the environmental assessment study area. The developer will:
- a. identify any species present or potentially present in the environmental assessment study area that are listed under schedule 1 of the federal SARA;
  - b. identify any species present or potentially present in the project area assessed by the COSEWIC; and
  - c. describe each species in terms of the requirements of Item #8 above.
- 10) Vegetation and plant communities, including identification of any areas where rare plants are known or suspected to be present.
- 11) Terrain, surficial geology, structural geology, mineralogy, bedrock geology (type, depth, composition, and permeability), seismic activity records and risk factors, permafrost locations and types within the environmental assessment study area. In particular:
- a. describe the structure, permeability, stability, and other relevant characteristics of the plateau on which the mine site is located;
  - b. describe permafrost conditions at the site including thermal conditions and ground ice/moisture contents of underlying material, particularly if maintenance of frozen conditions is required;
  - c. identify the chemical composition of host rock and ore bodies at the mine site including potential for acid rock drainage;
  - d. describe and map the ground composition underlying the proposed mine site;
  - e. identify the location, amounts and type of granular material deposits including any information on ground ice;
  - f. describe the ground conditions under and around the mine site and road proposed by Fortune, with emphasis on identifying areas susceptible to erosion, and permafrost instability;
  - g. provide complete references for historical data and indicate when historical data is used to provide geological descriptions;
  - h. provide sources of information for geological descriptions and provide relevant information on sampling timing, frequency and duration; and

- i. include maps, cross-sections and figures to illustrate geological features, where appropriate.
- 12) Physical and chemical makeup of soils and water body sediments.

***Human environment***

Describe the following:

- 13) Any other physical infrastructure present in the environmental assessment study area, including habitations, roads, buildings, quarries, power lines and industrial works.
- 14) Available information pertaining to the project area from land use planning in the Wek'eezhii Settlement Area.
- 15) The availability and average training or skill levels of people in the local Wek'eezhii Settlement Area and the other Aboriginal and Northern resident regional labour pool.
- 16) The local and regional business capacity available to support the Project.
- 17) Current socio-economic conditions and relevant trends in the potentially-affected communities and the Wek'eezhii Settlement Area as a whole, using appropriate indicators of well-being and quality of life.
- 18) A summary of historic and present land use in the study area, including identification of traditional land use groups, areas used and traditional travel routes and timings.
- 19) Traditional harvesting activities, relevant species (wildlife, fish and plants), observed trends and any traditional values expressed about harvested species.
- 20) Known physical heritage resources locations, areas of high potential for unfound physical heritage resources and cultural values associated with the environmental assessment study area.
- 21) Other current economic activities in the environmental assessment study area.

## Appendix B: Development description

Provide a development description including descriptions of:

### *General items*

1. The estimated lifespan, illustrated by a Gantt chart, of the NICO Project broken down into construction, operation, closure and reclamation, and long-term monitoring phases, with a description of major activities by phase.
2. The direct physical footprint of the NICO mine site (outlining efforts made to reduce the footprint), with locations and descriptions of all structures and all aboveground and underground infrastructure.
3. A list of all regulatory permits, licenses and other authorizations required to carry out the development.
4. Land tenure and any existing or anticipated agreements related to access to facilitate the proposed development.
5. A list of any other required developments that need to be constructed or improved in order for the NICO Project to proceed.

### *Specific items*

6. All underground and open pit facilities, including ramps, portals, declines, location of infrastructure, machinery requirements, and water management facilities and methods.
7. Mine rock management area (whether separate or co-mingled with tailings) including location, underlying ground conditions and volume of waste rock.
8. Tailings management area including a description of dams and dykes with techniques utilized to ensure their stability and containment, a description of how closure considerations affected the weighing of alternative locations, and if frozen conditions are to be relied upon, describe techniques utilized to ensure maintenance of these conditions.
9. The volume and management of sludge produced at the Effluent Treatment Facility.
10. The types and estimated amounts of explosives to be used, their storage, handling and application, both aboveground and underground.
11. The mining, crushing, and ore transportation methods used in the open pit and underground works.
12. The location, contents and estimated amounts of mined materials, soil and overburden at all surface storage facilities, along with estimates of storage requirements, storage capacity limits, separation of materials, and maintenance of materials to facilitate reclamation.
13. A description of the milling process from initial separation to concentrate, including primary and secondary crushing and flotation and filtration processes.
14. Location(s) and proposed activities of aggregate production and storage, with an estimate of the amount of aggregate that will be produced per year over the life of the mine, by location.
15. The siting and design of the waste disposal facility and landfarm and management of all wastes generated including storage and disposal plans with contingencies, treatment and testing programs.
16. The type, volume, storage (location and method), handling, and disposal of all potentially hazardous materials used on site.
17. List the storage location of mill reagents including maximum volumes and concentrations of reagents to be stored on site.

18. The water collection, management and treatment system and all of its component parts, including drainage and other control structures, water and sewage treatment facilities, water storage facilities, and water transport components.
19. The total amount of water in cubic meters estimated to be collected from the mine and other mine site components and eventually be released into local watercourses, with consideration of changes during the life of the NICO Project and the range of seasonal fluctuations.
20. Water intake locations, withdrawal methods and estimated amounts of water required for all on-site activities.
21. Energy requirements and generation sources.
22. Fuel storage facilities including a justification for the fuel storage container type selected, on-site fuel transport and handling procedures.
23. Construction and operation of the airstrip, frequency of use, type of aircraft and estimated number of passengers and volume of materials.
24. The proposed NICO access road and any roads within the mine site, including construction (width of right-of-way, vegetation removal, road bed type) and maintenance.
25. Proposed NICO access road water crossings, construction schedule, amount of water and other materials required and a description of techniques to be utilized to minimize erosion and bank instability.
26. All other infrastructure and activities at the NICO mine site including intensity and type of on-site vehicle traffic.
27. The expected number of single, one-way trips per day to and from the NICO mine site by truck, type and weight of load, any related storage, transfer and handling, and estimated duration of the annual haul season..
28. The number of full-time job equivalents and person years of work associated with the NICO Project, broken down by life cycle phase.
29. Worker transportation and proposed work scheduling.

## Appendix C: Water quality

In predicting the impacts on water quality from NICO Project, the developer will:

1. Identify, describe, and estimate amounts of contaminants from all potential sources at the NICO mine site. Predict the likelihood and consequences for each of the following, alone or in combination, to leach metals, create acid rock drainage, or otherwise affect water quality:
  - a. mine water from the underground workings and open pit;
  - b. the mine rock management area, unless co-mingled with tailings;
  - c. the tailings management area, or co-mingled tailings management area;
  - d. reagent chemicals, hydrocarbons, explosives, and any other potentially hazardous products used at the mine site;
  - e. any other materials stored on surface at the NICO mine site, including aggregates; and,
  - f. other site runoff.

This discussion will include estimates of how much of the waste rock will likely be placed in the mine rock management area, delineation of all potential contaminant pathways and receptors, and post-closure locations, predicted amounts, and management systems for all surface materials storage systems.

2. Predict the water quality and quantity of final effluent discharged to the environment during all phases of the NICO Project life cycle, incorporating:
  - a. identification of the constituents of, and quantity likely to come out of, each on-site water source;
  - b. present discharge criteria for treated effluent;
  - c. predicted changes over time in the amount or quality of mine water outflows;
  - d. all relevant water quality parameters including pH, temperature, concentrations of metals, nutrients, total suspended solids, major ions, process chemicals and bacteria;
  - e. identification of all committed-to mitigation measures to minimize initial water contamination (e.g. mitigative measures to limit blasting residues) and to remove contaminants via the treatment process; and
  - f. identification of the uncertainties and confidence levels in the predictions, the assumptions used, and the likely range of variation for the parameters identified.
3. Describe naturally occurring arsenic, the range of natural variation, flows and ecological pathways in surface and groundwater, and how the NICO Project will affect this range of conditions. Describe how arsenic solubility under site conditions (both acidic and neutral) has been considered in long term mine planning and engineering designs.
4. Assess potential impacts of effluent discharge in Peanut Lake, Nico Lake, Burke Lake, Marian River and Marian Lake (to the point that no changes are measurable) including the predicted likelihood and severity of:
  - a. changes to pH in downstream watercourses;
  - b. increasing sediment levels and water turbidity;
  - c. increasing contaminant concentrations (including arsenic and mercury) in the sediments, fish and other aquatic organisms, including consideration of bio-accumulation effects;
  - d. discharge of ammonia and other nutrients, including possible changes in nutrients available in the food chain in downstream water bodies; and
  - e. any other impacts which may alter water quality or aquatic ecosystem integrity downstream of the

mine.

5. For Peanut Lake, describe:
  - a. method and location of effluent discharge; and
  - b. plume behaviour of effluent including an estimate of mixing behaviour and an estimate of where the plume will be sufficiently mixed so that there is no chronic toxicity.
6. For Peanut Lake, Burke Lake and water bodies in between, describe:
  - a. contaminant mobility in water under likely environmental conditions;
  - b. effects on dissolved oxygen and nutrient levels, especially during winter; and
  - c. potential increase in sedimentation and erosion (including lake bed and banks).
7. Identify any potential sources of contaminated groundwater not captured in the mine water management system. This discussion should identify:
  - a. where losses to the groundwater system could occur;
  - b. estimated quantities of contaminated groundwater loss; and
  - c. potential impacts of contaminated groundwater on the environment and their likely geographic distribution.
8. Describe potential effects on project effluent from *incoming* groundwater quality, and resulting impacts on the environment.
9. Describe:
  - a. site-specific characteristics of the receiving environment;
  - b. proposed site-specific water quality objectives for all stressors of potential concern, effluent quality levels, limits and proposed thresholds for water quality that the developer is committed to meeting in order to protect the downstream environment;
  - c. Fortune's proposed draft framework for aquatic effects monitoring and environmental effects monitoring programs, considering historical arsenic levels.
10. Describe Fortune's evaluation of water treatment alternatives. For the proposed water management and treatment facilities, provide an analysis of the adequacy of:
  - a. the effluent treatment facility, specifically to meet site specific water quality objectives for:
    - i. *Metal Mining Effluent Regulation* metals; and
    - ii. other applicable parameters such as selenium, iron, cobalt, bismuth, total suspended solids, ammonia, cyanide and radium-226.
  - b. all water collection systems, including that surrounding the mine rock and tailings management areas;
  - c. the sewage treatment system; and
  - d. any water storage facilities.

This discussion should emphasize the ability of these facilities and the system as a whole to handle expected increased mine water inflows and retention capacity timelines and contingency plans for greater than expected outflows, the ability to handle greater than predicted concentrations of contaminants in pre-discharge waters or other treatment upsets, and impacts of any identified failure mode. Include discussion of seasonal effects on the effectiveness of the effluent treatment facility.

11. Describe the likelihood and consequences of accidents, malfunctions, or impacts of the environment on the development influencing water quantity and quality and the ability of the water management system to function. This discussion should include the required circumstances for a failure to occur,

and what monitoring, evaluation and adaptive management systems will be in place to identify, proactively avoid and address them. The following scenarios, at a minimum should be considered:

- a. extreme short-term precipitation events, snowpack buildup or other factors leading to flooding events;
  - b. geologic instability or seismic activity causing slope failures at or near the NICO mine, impacts on the mine workings, or compromising of the mine rock management area;
  - c. failure of existing dams/containment structures;
  - d. freezing effects on water transportation systems;
  - e. how mine water will be managed if the water treatment system malfunctions, with a focus on retention capacity timelines for water storage facilities and contingency water treatment plans;
  - f. potential impacts to water from accidents in transport of processing chemicals and other dangerous goods; and
  - g. potential impacts to water from tailings spills or leaks.
12. Describe the effect of water recycling on water quality for different water recycling scenarios.
13. Describe water quality monitoring and management during operations including:
- a. contingency plans in case metals leaching or acid rock drainage occurs;
  - b. contingency plans for unacceptable effluent quality;
  - c. spill contingency plans on site and along transportation routes;
  - d. conceptual plans for surface water and ground water monitoring; and
  - e. whether and how Fortune will incorporate Wek'eezhii Settlement Area residents in environmental monitoring, and how it will report monitoring results to potentially-affected communities.

## Appendix D: Closure and reclamation

1. Describe policies, regulations and industry standards that Fortune considered in the development of its *Conceptual Closure and Reclamation Plan*.
2. Provide a preliminary *Conceptual Closure and Reclamation Plan*, which will include:
  - a. identification of the overall reclamation objectives, standards and criteria the Closure and Reclamation Plan is designed to achieve and over what time period;
  - b. a list of closure and reclamation components and activities including alternatives considered, a rationale for why Fortune chose a particular alternative and how it best meets the developer's reclamation objectives;
  - c. a description of how climatic change was considered in the development of the Closure and Reclamation Plan in order to ensure long-term physical integrity of permanent structures;
  - d. an outline for the methods and locations for re-use or disposal of materials during reclamation;
  - e. a conceptual program and schedule for any progressive reclamation envisioned; and
  - f. a conceptual post-closure monitoring plan that includes a reporting strategy and a rationale for an "end-date" for monitoring.
3. In the *Conceptual Closure and Reclamation Plan*, discuss management and monitoring programs for any materials/locations (including the underground works) that may cause acid rock drainage or metals leaching. Include:
  - a. creating a sufficient barrier for the prevention of tailings and waste rock oxidation at closure;
  - b. the likely rate of movement of water (including groundwater) through the tailings, mine rock management area and underground workings, associated uptake of acids, metals or any other contaminants into groundwater or surface waters, and monitoring location requirements and contingency plans for greater than expected rates of contaminant release;
  - c. the long-term physical integrity of permanent features including dams and open pit; and
  - d. monitoring coverage required to track any other reasonably foreseeable post-closure contamination pathways.
4. Visually show how the mine site is expected to look at one, ten and 25 years after closure and reclamation of the mine compared to its present and operating conditions. Include a plan view of the site and an illustration of visual impacts on the viewshed as seen from Marian River, Hislop Lake and other points along the Idaa Trail.
5. Describe Fortune's plans for establishing the viability of a self-sustaining vegetation community at the mine site after closure, including:
  - a. re-vegetation techniques, with a discussion on what species the developer will consider for this activity;
  - b. an outline for how soon the area will return to a natural state of vegetation, if ever; and
  - c. discussion of how revegetation objectives will ensure wildlife is not attracted to the site where they may be exposed to risks.
6. Describe how closure and reclamation activities and monitoring will ensure long-term suitability of all fish-bearing waters potentially affected by the project for fish and fish habitat (using pre-fire background conditions and a lake that has been impacted by the forest fire for reference).
7. Describe closure and reclamation plans associated with decommissioning of the NICO access road, including stabilization and re-vegetation of banks near water crossings.
8. Describe closure and reclamation plans associated with the airstrip.

9. Describe how reclamation will manage ongoing hazards to wildlife on the mine site, and how reclamation will affect wildlife movements.
10. Within the record of consultation that Fortune has had with potentially-affected communities, Aboriginal groups and responsible government agencies (see section 3.2.6), identify where there arose any concerns related to closure, reclamation, and long-term monitoring issues, and how the developer has adapted its plans to address the parties' concerns.

## Appendix E: Fish and aquatic habitat

When assessing impacts on fish and aquatic habitat:

1. Describe fish and aquatic habitat in Lou Lake, Peanut Lake, Nico Lake, and any other water bodies within the mine site on the Fortune claim block, Burke Lake, Hislop Lake and any water bodies the NICO access road crosses or that the development otherwise affects.
2. Describe the impacts of the NICO Project on aquatic organisms and habitat, including potential impacts from:
  - a. changes to flow or habitat, including alterations to banks, shores and riparian areas of waterbodies near road water crossings, and associated changes in habitat availability;
  - b. reduced oxygen concentration;
  - c. increased concentrations of metals, nutrients and other contaminations (including arsenic and mercury) in water, sediment and the aquatic food chain;
  - d. increased sedimentation in watercourses and Burke Lake, especially from the mine rock management area, the mine site, airstrip and road activities; and
  - e. alteration of pH.
3. Describe the developer's commitments to:
  - a. mitigate any habitat losses (such as habitat creation); and
  - b. specific management activities and plans, such as the adoption of relevant *Operational Statements* of the Department of Fisheries and Oceans.
4. Identify best management practices to minimize impacts on fish in this type of environment (including specific consideration of activity timing windows to avoid spawning and incubation periods and proper sedimentation and erosion control measures in close proximity to water bodies), a listing of all commitments to mitigate impacts on fish, fish habitat and other aspects of the aquatic ecosystem, and, where the two differ, a rationale for why certain management practices have not been adopted.
5. Describe the potential for the NICO Project to affect fish in Hislop Lake, or to affect fish downstream of the project which may migrate to Hislop Lake.
6. Describe all water crossings along the NICO access road and roads on the mine site, providing details on flow, fish passage, sediment and erosion control measures and any monitoring plans.
7. Describe potential impacts to fish and fish habitat, including riparian zones, arising from construction, operation, maintenance and decommissioning of the Marian River crossing.
8. Discuss how accidents, malfunctions or impacts of the environment on the development could create additional impacts on fish and aquatic species, and how the developer will minimize the potential for these scenarios to occur and manage them via contingency plans if they do occur.

## Appendix F: Wildlife

For potential impacts to wildlife, the developer will do the following:

1. Describe the impacts the NICO Project is likely to have on wildlife and wildlife habitat. For each species, and/or species group consider the following:
  - a. potential impacts to habitat, including degradation and fragmentation, with a focus on important wildlife habitat;
  - b. potential for increased mortality from all sources (including from vehicle collisions and changes to hunting access);
  - c. potential for increased attraction to the NICO mine site, risk of bear-human encounters, risk to people and associated carnivore mortality;
  - d. potential for increased sensory disturbance from all sources (e.g., noise, odours, activity, vibrations, overflights, dust). Predict effective habitat loss resulting from changed behaviour;
  - e. potential for disruption of movement and migration patterns;
  - f. potential for increased contamination of food and water, including bio-accumulation, from all sources; and
  - g. potential energetic costs to wildlife from points d through f above.
2. Describe the potential adverse impacts of the NICO mine on any “wildlife at risk” species known or suspected to reside in the environmental assessment study area or potential adverse impacts on their habitat including residences. Describe any management plans and specific mitigation commitments and monitoring proposed for any potentially affected species.
3. Considering that the NICO Project is on a regionally distinctive plateau landform, describe:
  - a. Fortune’s efforts to determine whether the plateau landform and surrounding cliffs supports regionally limited wildlife habitat;
  - b. how the NICO Project is expected to affect any specialized species using this distinctive habitat; and
  - c. how Fortune proposes to mitigate those impacts identified.
4. Describe how NICO Project planning has considered potential impacts on wildlife and wildlife habitat, best management practices to minimize impacts on wildlife, and what mitigation commitments have been made, with specific consideration of:
  - a. rules for road use by employees and contractors;
  - b. minimizing wildlife access to project components (e.g. by reducing attractants); and
  - c. spill avoidance techniques and spill response plans for the transportation routes.
5. Describe Fortune’s draft wildlife management plan, including discussion of:
  - a. which other interested parties have been involved in the development of the plan;
  - b. efforts to be undertaken to monitor wildlife in the area and report the presence of species to the appropriate authorities when necessary;
  - c. identification of measures to avoid or minimize potential impacts to wildlife;
  - d. wildlife monitoring, evaluation and adaptive management of the project activities;
  - e. how monitoring will be compatible with other current programs undertaken by responsible agencies; and
  - f. how monitoring results will be reported to regulators, responsible authorities and potentially-affected communities.

## Appendix G: Terrain

When assessing impacts and risks related to terrain:

1. Describe the existing geotechnical stability of the areas proposed for the mine rock management and tailings management areas, including:
  - a. soil and hydrological conditions;
  - b. permafrost, ground thermal conditions and ground ice conditions;
  - c. description of the physical and chemical characteristics of mine rock and tailings; and
  - d. topography and slope stability.
2. Describe potential impacts of NICO Project operations on terrain stability and vice versa, in light of Fortune's analyses of accidents and malfunctions (see section 3.5). Consider:
  - a. geotechnical instability, especially of the mine rock management area, the tailings management area and the system of dykes and dams on site;
  - b. changes to ground thermal conditions and permafrost failure at the mine site; and
  - c. impacts to permafrost and ground thermal conditions from vegetation removal.
3. Describe how the geotechnical stability of all engineered structures at the NICO mine site will be ensured against a range of climate, seismic and precipitation scenarios.
4. Identify any plans to mitigate and monitor against impacts on terrain, including:
  - a. erosion control measures;
  - b. prevention of permafrost degradation at all mine site locations where it is found to be present;
  - c. how the geotechnical stability of the mine rock management area, tailings management area and the system of dykes and dams will be monitored, and for what extent of time;
  - d. how monitoring results will be reported to regulators and potentially-affected communities;
  - e. how monitoring data will be used to determine if action is required including definitions of any methodologies used such as critical values, thresholds and decision trees; and
  - f. adaptive management measures and contingency plans that will be adopted if terrain stability is compromised.

## Appendix H: Air quality

While assessing impacts on air, describe:

1. Pre-development conditions including:
  - a. general climatology (typical temperatures, precipitation, air flows, etc.), terrain type and topography; and
  - b. baseline ambient concentrations of criteria air contaminants (total suspended particulates, particulate matter (PM<sub>10</sub>, PM<sub>2.5</sub>) nitrogen oxides, sulphur dioxide and carbon monoxide).
2. Potential impacts from project emissions during construction, operation and closure phases:
  - a. estimate criteria air contaminant emissions from all project sources including fugitive dust;
  - b. predict annual carbon emissions over the life of the mine and describe any offsets proposed to mitigate carbon emissions;
  - c. predict local and regional dispersion of the project emissions and resulting ambient concentrations and deposition of pollutants using an established air quality model;
  - d. compare predicted ambient concentrations and deposition rates to relevant ambient air quality guidelines and standards;
  - e. discuss potential sources and quantities of contaminants from the handling and transport of ore and concentrate, and their expected deposition range; and
  - f. discuss and quantify any potential links between predicted air quality impacts and other valued components such as water quality, fish, wildlife and human health.
3. Monitoring, mitigation and adaptive management strategies:
  - a. use predicted ambient air quality concentrations to design an appropriate monitoring program and to develop mitigation and adaptive management strategies to minimize emissions of criteria air contaminants;
  - b. describe specific mitigation, adaptive management strategies and monitoring methods, to minimize contamination by fugitive dust from the handling and transport of raw ore and concentrate and the processing operations; and
  - c. develop and describe an incineration management plan.

## Appendix I: Vegetation

While assessing impacts on vegetation, the developer will provide the following:

1. Estimate the total amount of land clearing required for the NICO Project, with estimates of losses of trees and other plants. Describe this relative to conditions before and after the recent fire. Include a description of how the soil materials will be removed, conserved or stored, and the likely impacts of loss of soil or compaction on long-term re-growth capacity.
2. Describe the potential for the NICO Project to impact on rare plants.
3. Describe the potential impacts of NICO Project operations on culturally or economically significant harvested plants.
4. Describe the potential impacts of vehicle, mine equipment and power plant emissions on vegetation around the mine site and roads.
5. Describe the potential impacts of dust generation on vegetation at the mine site, along roads, and downwind of the plateau.
6. Describe the likelihood that invasive species will be introduced, by what means, and potential impacts.
7. Describe best management practices for avoidance of impacts on vegetation, mitigation committed to, and where they differ, the rationale for not adopting best management practices.
8. Prepare a vegetation monitoring plan that will assist in achieving objectives described in a Closure and Reclamation Plan.

## **Appendix J: Biophysical environmental monitoring and management plans**

The developer is encouraged to provide a summary section with:

1. Reports of all discussions and agreements with communities, federal and territorial governments related to collaborative monitoring and adaptive management of impacts of the project on the environment.
2. A list all of its proposed monitoring and management plans, identifying:
  - a. where they are being adopted as commitments for the NICO Project;
  - b. addressing previous comments expressed by interested parties about the adequacy of the plans; and
  - c. where plans are being strengthened or otherwise altered in light of changing circumstances or advances in best practice of environmental management (the developer will cite any specific best management plan being adopted).
3. If adopting an existing plan, policy or other commitment, the developer will provide a rationale for why that commitment is adequate in light of proposed changes to the development required for full-scale mining.
4. All conceptual monitoring and management plans as identified in the appendices, including:
  - a. An overall Waste Management Plan, including commitments for management of solid, liquid, hazardous and airborne wastes, and associated monitoring programs; and
  - b. A conceptual framework for an integrated Aquatic Effects Monitoring Plan developed in discussions with Fisheries and Oceans and Environment Canada.
5. Plans for communicating results of mitigation, monitoring and adaptive management programs to regulators, responsible government authorities and the public.
6. A summary table listing all biophysical environmental monitoring and management systems, where they are described in the Developer's Assessment Report, the length of time the monitoring is proposed for, and a rationale for each timeline.

## **Appendix K: Human environment**

### **K1 Employment and business opportunities**

*The developer will assess the potential impacts of the NICO Project on the economy of the Mackenzie Valley, with a focus on the Wek'eezhii Settlement Area generally and each potentially-affected community.*

In assessing access to employment and business opportunities, the developer will provide the following.

#### ***Employment***

1. An estimate of human resource requirements for the development that includes a listing of all direct and contract employment requirements by skills category for each phase of the life of the NICO Project. The developer will identify the skill-levels that each position requires, and shall include employment in all aspects of the operation of the mine, including for example transportation and monitoring activities.
2. An assessment of the likely percentage of direct employment for northern and aboriginal residents at the NICO Project, in light of the current and likely future (extending for the expected 15 year life of the mine) labour pool context (i.e., likely available numbers of workers in light of total regional economic activity), and identification of any target goals for Northern and Aboriginal employment.
3. A qualitative description of any barriers to direct or contract employment, advancement and retention for Mackenzie Valley residents, with particular emphasis on Wek'eezhii Settlement Area residents, other Aboriginal and Northern people and women where possible. This description must include employee availability and employability in light of minimum skill requirements and an investigation of current training opportunities for community members. The developer will also discuss:
  - a. estimates of current skills gaps in the available labour pool that require additional training programs;
  - b. hiring and retention policies related to minimum education levels, criminal records and drug and alcohol use; and
  - c. any identified barriers to maximizing regional and Aboriginal employment.
4. The developer's plans, strategies and commitments for maximizing direct employment, advancement and retention of Wek'eezhii Settlement Area residents, other Aboriginal and Northern people.
5. Employment policies for Aboriginal and other Northern women including training initiatives, measures for security and safety at the mine site and anti-harassment policies.
6. A description of any plans, strategies or other commitments the developer has to support increasing the mine-ready workforce, support career paths in mining, and assist training programs in related support activities. The developer will outline how these strategies will create or contribute to training opportunities for Northern and Aboriginal persons in general, and its employees in particular, over the life of the mine. The developer will also identify when any committed-to mitigations will be enacted, keeping in mind the lead time required for job-ready training programs.
7. A discussion of whether and how the developer's strategies and commitments for maximizing employment of Aboriginal and Northern residents will extend to its contractors.

#### ***Business opportunities***

8. An estimate of all contractor and subcontractor goods and services that the NICO Project will require, by project phase, as well as an estimate of what percentage of required goods and services can feasibly be sourced from local and regional businesses.
9. The developer's policies, plans, and commitments associated with maximizing contracting to Aboriginal and Northern-owned and operated businesses, with emphasis on assisting business development initiatives and joint ventures with Wek'eezhii Settlement Area-based businesses.

10. An assessment of any barriers to maximizing the utilization of Northern businesses.
11. The developer's prediction for any training, education or other improvements necessary to maximize local and regional business capacity to benefit from the NICO Project.

### **K2 Distribution of beneficial and adverse socio-economic impacts**

The developer will provide the following information and analysis:

1. Qualitative and quantitative estimates of all beneficial and adverse economic impacts from the NICO Project, including at minimum:
  - a. capital costs associated with placing the NICO Project in operation, broken down by major components (estimates should be in 2009 dollars Cdn. and may be in a +/- 20% range);
  - b. annual operating costs during the life of the NICO Project (estimates should be in 2009 dollars Cdn. and may be in a +/- 20% range);
  - c. federal, territorial and municipal taxes that the developer may remit by year, as well as from linked economic development (a +/- 20% range is acceptable);
  - d. total employment impact on the Wek'eezhii Settlement Area and Mackenzie Valley, including a prediction of employment multipliers from the development; and
  - e. a prediction of any adverse impacts the development may have on public infrastructure maintenance and associated costs, depending upon availability (with emphasis on the potential realignment of the winter road through the Wek'eezhii Settlement area).
2. Discussion of any plans, strategies or other commitments the developer has to help potentially-affected communities avoid over-exposure to cyclical economic fluctuations, with a focus on:
  - a. potential social and economic effects of mine closure (including unforeseen early closure or project hiatus) on potentially-affected communities and the Wek'eezhii Settlement Area; and
  - b. any plans to assist post-closure transition for mine employees.
3. Discussion potential role of the NICO Project on the following:
  - a. socio-economic impacts potentially resulting from increased disposable income and larger reliance on the wage economy;
  - b. any impacts on social services provision, infrastructure and costs (e.g., emergency medical care or family social services); and
  - c. whether and how the project may create or contribute to impacts on other organizations and businesses servicing the region through mobilization of local skilled labour away from smaller NICO Project communities and associated impacts on maintenance of infrastructure and basic service provision.
4. The developer's policies, strategies, plans, and commitments, alone or in combination with other parties, for the mitigation of any adverse socio-economic impacts.

### **K3 Social impacts**

While conducting a social impact assessment, the developer will describe:

1. Potential impacts associated with the development on community wellness and population health issues such as:
  - a. population in- and out-migration;
  - b. alcohol and drug access and use;
  - c. sexually-transmitted infections rates;

- d. crime rates;
- e. access to child care;
- f. language retention and other key indicators of cultural maintenance;
- g. education completion rates by level; and
- h. community cohesiveness and pride in cultural identity.

The description of community wellness and population health issues may consist of a review of publicly available quantitative statistics and key informant interviews with community health providers and social service providers where possible.

2. How each identified potential impact may affect individual potentially-affected communities.
3. The physical, mental, and cultural health of mine workers and mine workers' families, considering potential impacts of long-distance commuting and greater engagement in the wage economy based on a review of select and pertinent peer-reviewed studies and through key informant interviews with Wek'eezhii Settlement Area residents currently working at mines in the NWT. This discussion should identify any alternative shift rotations considered by the developer, with the rationale for the chosen rotation.
4. Human resources management plans and programs the developer will offer at the mine site to identify and mitigate potential social problems associated with the NICO Project, that will include but not be limited to discussion of:
  - a. increased income and money management;
  - b. potential stressors associated with long-distance commuting and stress management programs;
  - c. substance abuse and treatment policies;
  - d. cross cultural training and avoidance of cross-cultural conflicts at the work site; and
  - e. "home" – community and family - support programs.
5. Potential impacts on public safety, especially in regards to the use of the NICO access road and the potential realignment of the winter road through the Wek'eezhii Settlement Area and identification of mitigation to minimize the potential for vehicle accidents.
6. Any lessons learned about short and long-term social and economic impacts of previous mine developments in the Mackenzie Valley and the Canadian North, and how the developer has incorporated such lessons into its impact assessment and mitigation commitments for the NICO Project.

#### **K4 Cultural impacts**

*The analysis of heritage resources is inclusive of both sites and objects of cultural significance, and cultural impacts include both tangible and intangible aspects of culture.*

##### ***K4a Physical heritage resources***

The developer will report on:

1. Consultation with traditional knowledge holders, archaeologists, anthropologists, and the Prince of Wales Northern Heritage Centre, that the developer conducted during its cultural impact assessment, indicating how such interactions influenced:
  - a. heritage resource survey locations;
  - b. the identification of locations of known or high potential for heritage resources; or
  - c. heritage resource management plans.

2. Identification of all known archaeological and heritage resources, sites or areas of cultural significance, and areas of high potential for unfound heritage resources in the environmental assessment study area.
3. All recommended mitigation measures that consultation produced for the protection of local known and high potential areas of physical heritage resources and other sites of cultural significance, and associated developer's commitments or reasons for not adopting recommendations.
4. Describe how the developer will involve the Wek'eezhii Settlement Area residents in heritage assessments and monitoring of impacts on culture.
5. Describe any potential impacts from the NICO Project on physical heritage on Hislop Lake and any other point on the Idaa Trail.

***K4b Traditional land use and wildlife harvesting***

The developer will:

1. Describe any potential impacts of the NICO Project on traditional harvesting activities for Aboriginal residents of Wek'eezhii Settlement Area communities, including changes from impacts to wildlife, changes in all-season access from Wek'eezhii Settlement Area communities due to the NICO access road, and any changes in access by non-resident hunters.
2. Provide a prediction of the total impact of the NICO Project on traditional activities, and on the potential for increased or reduced harvesting success.
3. Identify all mitigation commitments by the developer, alone or in combination with other parties, to minimize adverse impacts on traditional land use and resource harvesting, or to compensate for losses that the developer cannot prevent. This should include discussion of:
  - a. how access along the NICO access road will be monitored and, if feasible, managed; and,
  - b. any plans for any ongoing monitoring, adaptive management and harvester compensation.
4. For visual and audible changes perceptible from the Idaa Trail:
  - a. describe and illustrate any potential visual impacts to the viewshed as seen from Marian River and Hislop Lake;
  - b. describe any other points along remainder of the Idaa Trail where the NICO Project will be visible or audible, illustrate and describe how it will look and sound;
  - c. describe any measures taken to minimize these sensory disturbances; and
  - d. describe how any remaining sensory changes will affect the traditional authenticity of users' experiences along the Idaa Trail.
5. Describe potential impacts from the NICO Project on traditional activities at Hislop Lake.

**K5 Human environment monitoring and management plans**

1. Describe any commitments, plans and strategies to engage with responsible authorities and potentially-affected communities in monitoring impacts on the human environment such as:
  - a. success of local and regional residents and Aboriginal people in gaining employment at the NICO Project, and the success of training initiatives;
  - b. success of local and regional businesses in providing goods and services to the NICO Project, with identification of gaps to maximizing engagement;
  - c. employee retention;

- d. worker and family wellness;
  - e. the contribution of the NICO Project to beneficial and adverse social impacts at the regional and local levels across a spectrum of appropriate indicators to be determined in collaboration with Wek'eezhii Settlement Area communities and government authorities; and
  - f. impacts on wildlife harvesting and practice of traditional culture on the land.
2. Identify relevant existing initiatives monitoring community wellness and investigate how it will engage with, contribute to, and consider results from these programs in its ongoing monitoring and adaptive management programs.
  3. Describe how results from monitoring the human environment will be evaluated and reported to regulators, responsible authorities and potentially-affected communities.
  4. Describe the adaptive management systems will be in place to deal with issues identified during monitoring.
  5. Provide a summary table listing all human environment monitoring and management systems and where they are described in the *Developer s Assessment Report*.

## Appendix L: Cumulative effects

The following items are required for consideration of cumulative effects:

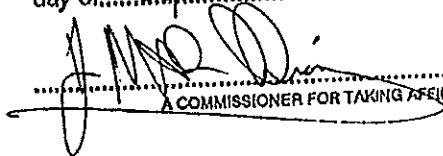
1. In terms of cumulative effects, predict:
  - a. potential impacts of the NICO Project on the Bathurst caribou herd in combination with impacts of other developments in the range of the Bathurst caribou herd;
  - b. potential socio-economic changes, cultural changes and changes to community well-being from the NICO Project in combination with the potential realignment of the winter road through the Wek'eezhii Settlement Area, using publicly available data;
  - c. potential socio-economic changes, cultural changes and changes to community well-being from the NICO Project in combination with other with other industrial developments using publicly available data including:
    - i. existing and proposed diamond mines;
    - ii. the proposed Yellowknife Gold Project; and
    - iii. the proposed Mackenzie Gas Project.
  - d. potential impacts on fish and wildlife due to increased access from the NICO access road in combination with the potential realignment of the winter road through the Wek'eezhii Settlement Area; and
  - e. potential impacts of the NICO Project on fish and wildlife in combination with impacts from past or present pollution from contaminated sites in the area, including Rayrock and Colomac.
2. Determine any other past, present and reasonably foreseeable human activities or developments that may affect the same valued components as the NICO Project.
3. Predict the combined impact of the NICO Project in combination with the impacts of the other developments identified above.
4. Identify means for Fortune, either on its own or cooperatively with others, to reduce or avoid the predicted cumulative effects.
5. Describe the residual cumulative effects following mitigation.
6. Provide the rationale for including the developments that are chosen for examination on specific valued components, as well as a description of and rationale behind the chosen geographic cumulative effects study area and temporal boundary.
7. Describe any plans for the monitoring and evaluation of cumulative effects and the adaptive management of the NICO Project's contribution to cumulative effects.
8. A description of how project-specific monitoring can contribute to and be compatible with regional monitoring programs such as the NWT Cumulative Impact Monitoring Program (see <http://www.nwtcimp.ca> for details).

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May 28, 2010

Mackenzie Valley Environmental Impact Review Board,  
200 Scotia Centre, P.O. Box 938,  
Yellowknife NT X1A 2N7  
Attention: Vern Christensen, Executive Director  
(by email: <vchristensen@reviewboard.ca>)

This is Exhibit 15 referred to in the  
affidavit of Dr. John B. Zoe  
sworn before me, this 21st  
day of September 2010

  
COMMISSIONER FOR TAKING AFFIDAVITS

Dear Sirs:

**Re Environmental Assessment EA 0809-004 – Respecting Fortune Minerals Limited’s proposed NICO Cobalt-Gold-Bismuth-Copper Project – Pursuant to Mackenzie Valley Resource Management Act**

**Request for Ruling by the Tłı̨ch̨ Government - that the Environmental Assessment is premature, and it will therefore be postponed and placed in abeyance until all essential components of the Proposal are included in applications accepted as complete by the WLWB.**

We are counsel for the Tłı̨ch̨ Government, and have been instructed to submit this Request for Ruling to the Mackenzie Valley Environmental Impact Review Board (the “Review Board”) respecting the above-referenced environmental assessment (the “EA”) of Fortune’s proposed NICO Cobalt-Gold-Bismuth-Copper Project (the “Proposal”).

The Proposal is the subject of two applications (W2008L2-0004 and W2008D0016) submitted by Fortune Minerals Ltd. (“Fortune”) to the Wek’eezhii Land and Water Board (the “WLWB”), on November 12, 2008.

This Request for Ruling is made with reference to the Final Terms of Reference (“TOR”) set by the Review Board for EA 0809-004, respecting Fortune’s two applications. The TOR were released on November 30, 2009.

The Tłı̨ch̨ Government requests that the Review Board schedule an oral hearing of this Request for Ruling, at a time and place to be determined by the Review Board, after written submissions have been received from interested parties.

**THE REQUESTED RULING:**

For the reasons explained below, the Tłı̨ch̨ Government requests a Ruling from the Review Board that the EA is premature, and that it will therefore be postponed and placed in abeyance until all essential components of the Proposal are included in

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applications that have been accepted as complete by the WLWB, in order that Part 5 of the *MVRMA* can be properly applied to the Proposal.

It is acknowledged that it would have been more convenient for the Review Board, Fortune and other interested parties if this Request could have been submitted sooner.

The Tłı̄ch̄o Government has expended very substantial resources considering Fortune's proposal, including its applications to the WLWB and the referral to the Review Board.

After that referral, the Tłı̄ch̄o Government initially suggested that all road-related issues be excluded from the EA. The final TOR took a different approach. A great deal of Tłı̄ch̄o Government time was then spent considering the TOR, and whether the proposed EA could be effective.

In the end the practical problems of such an EA appeared impossible to overcome, and the Tłı̄ch̄o Government also concluded that the proposed EA raises serious jurisdictional issues, in light of the inconsistencies of the TOR with the Tłı̄ch̄o Agreement and Part 5 of the *MVRMA*. Hence this Request for Ruling.

**THE RELEVANT FACTS:**

Fortune's initial applications to the WLWB respecting its Proposal were made in 2007. Separate applications were filed for land use permits and water licenses for each of **three components** that Fortune said **would be required for its Proposal to be feasible** – the mine proper (W2007L2-0004), all-weather industrial access roads between the mine site and Hwy 3, as well as airstrips (W2007F0006), and construction and maintenance of a hydro transmission line (W2007I0007).

Fortune's Proposal is based on a mining lease for its claims block, which is on and also completely surrounded by Tłı̄ch̄o Lands. Under that lease, which came into force before the effective date of the Tłı̄ch̄o Agreement, Fortune has an interest provided for in 18.1.1 of the Tłı̄ch̄o Agreement and listed in part 2B of the appendix to Chapter 18.

Fortune acknowledges that its Proposal could not be viable or successful without the construction and operation of all-weather industrial access roads outside the area of its lease and across Tłı̄ch̄o Lands. But such roads would require the consent of the Tłı̄ch̄o Government, pursuant to 19.3 of the Tłı̄ch̄o Agreement, and Fortune has no such consent.

In response to its original applications, the Chair of the WLWB informed Fortune, by a letter of April 24, 2008, (enclosed,) that it was not eligible to apply for land use permits

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for activities that are to take place wholly on or partially within Tłı̄chô owned lands, without providing proof of a right of access to those lands.

Fortune had no such access right, and did not dispute the WLWB's decision.

Fortune then withdrew its applications. It subsequently re-configured them and submitted new applications on November 5, 2008. In those replacement applications (for Type A Water License and Type A Land Use Permit), Fortune applied only for authorizations for components of its Proposal that it could conduct within its claim block.

Instead of the original proposal for hydro-electric power, it now proposed using a diesel power plant to be located within the claim block. The proposed air strip was also moved to a new location within its claim block. And the all-weather industrial access roads and bridges that had been proposed for construction - **outside** the claim block and across Tłı̄chô Lands - were excluded altogether from the applications.

The WLWB accepted the new applications (for water license W2008L2-0004 and land use permit W2008D0016) as eligible and complete, since no components of the re-configured Proposal required an access agreement respecting Tłı̄chô Lands. These applications were then referred to the Review Board by Indian and Northern Affairs, Canada, and are the basis for the above-referenced EA.

The industrial access roads that are essential for a viable project have thus been effectively removed from the Proposal. The newly filed applications contain no substitute plan for transporting industrial materials, including machinery, fuel and ore, to or from Fortune's claim block.

It is now almost 18 months since Fortune re-configured its application. In that time, no proposal for industrial access roads across Tłı̄chô Land has been put forward by Fortune or any other party. Neither the Proponent nor any other party has commenced discussions with the Tłı̄chô Government respecting possible access agreements respecting such industrial access roads.

During the entire period, a development moratorium has been in place on Tłı̄chô Lands, pursuant to the Tłı̄chô Lands Protection Law, enacted August 4, 2005, pending the conclusion of the Tłı̄chô Land Use Plan and the development of resulting protective mechanisms and development standards.

The Tłı̄chô Land Use Planning process is currently underway. In that work to date, it is already clear that parts of Tłı̄chô Lands that would need to be crossed by industrial

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access roads required for Fortune's Proposal would affect a number of areas of high environmental and cultural significance.

Therefore, although industrial access roads across Tłı̄ch̄o Lands continue to be essential components of Fortune's Proposal, and applications for the authority to construct and operate those would in turn first require access agreements from the Tłı̄ch̄o Government, for the reasons explained more fully below, it would be premature for the Tłı̄ch̄o Government to entertain discussions in that respect at this time, in light of the current moratorium and the ongoing Land Use Planning process.

**GROUNDINGS FOR THE REQUESTED RULING:**

- The planned EA is fundamentally flawed, because of the way Fortune has framed its replacement applications for authorizations required under the *Mackenzie Valley Resource Management Act* ("MVRMA").
- Fortune intentionally excluded two essential components of the Proposal from the revised Applications submitted to the Wek'eezhii Land and Water Board ("WLWB"), namely the industrial access roads without which the Proposal is not feasible. That was done in response to WLWB's decision that an application that included those aspects of the Proposal would not be accepted as complete until the proponent had secured the requisite access rights from Tłı̄ch̄o Government.
- As a result, the EA is premature, for two reasons.
- First, proceeding with the EA as proposed in the TOR would be inconsistent with the Tłı̄ch̄o Agreement and provisions of the *MVRMA*, and therefore outside the jurisdiction of the Review Board, for two reasons:
  - Because of the exclusion of the essential access roads from Fortune's applications, the Proposal as a whole is speculative or hypothetical. It is therefore not a "proposed development" within the contemplation of Part 5 of the *MVRMA*.
  - The TOR and the proposed EA ignore the fact that Fortune's Proposal could not be viable without industrial highway access across Tłı̄ch̄o Lands, and that authorizations to construct those could not even be applied for without an access agreement from Tłı̄ch̄o Government. Instead the TOR characterizes those roads as "anticipated" components of the Proposal, and "assumes" that they will be constructed and therefore can be considered in the EA. These assumptions are

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inconsistent with the Tłı̄ch̄o Agreement, because they ignore the Tłı̄ch̄o Government's authority under that Agreement, to decide what happens on Tłı̄ch̄o Lands.

- Second, the scope of the development, as defined in the TOR, is inconsistent with Part 5 of the *MVRMA*, and therefore the proposed EA would be outside the mandate and jurisdiction of the Review Board, for two reasons:
  - Because the industrial access roads required by Fortune are not existing projects, or authorized for future development, or the subject of applications to the WLWB, they are speculative and hypothetical. Therefore the Review Board has no jurisdiction to “scope” into the development either the construction and operation of the “spur road,” or Fortune’s “use” of an industrial highway to Highway 3.
  - Furthermore, because neither of those access roads has been already constructed, authorized or planned and included in an application, their location and related physical characteristics are unknown, with the result that their environmental and socio-economic impacts cannot be known or effectively assessed, as required by Part 5 of the *MVRMA*.
- Pursuant to the Review Board’s discretion to determine its own schedules and procedures, the EA should therefore be postponed and placed in abeyance until all essential components of the Proposal, including essential industrial access roads to and from the claim block, are the subject of plans and included in applications accepted as complete by the WLWB, in order that Part 5 of the *MVRMA* could be properly applied to the Proposal.

**Those grounds are more fully explained below.**

**A: IN THE CIRCUMSTANCES OF THIS CASE, THE EA AS PROPOSED IN THE TOR WOULD BE INCONSISTENT WITH THE Tłı́chô AGREEMENT AND THE MVRMA, AND THEREFORE OUTSIDE THE JURISDICTION OF THE REVIEW BOARD.**

**(1) The Unique Factual and Legal Circumstances of Fortune's Proposal:**

When Fortune submitted its original three applications to the WLWB in November, 2007, its covering letter said expressly that "all three elements (i.e., mine, road and power line) are necessary for the success of the project..." Fortune has since proposed to power the mine by a diesel plant within its claim block, rendering the power line unnecessary. But it has developed no substitute proposal for the road that it has always acknowledged is essential for the viability of the project.

An operating mine within the claim block would not be feasible without industrial access roads across Tłı́chô Lands. A land-locked mine would not be viable. It could not be financed or developed.

The essential nature of such road access is acknowledged in the TOR for the EA the Review Board intends to conduct:

Fortune has applied to develop a primarily open pit with underground component mine and milling complex approximately 90 km north of Behchoko, 50 km northeast of Whati and approximately 10 km northeast of Hislop Lake. **Fortune proposes to ship concentrate from the proposed mine by truck/rail to a processing plant in southern Canada.** (p. 1)

...

**Fortune has stated that the NICO Project requires all-season road access from the NICO mine site to Highway 3....** (p. 3)

It follows that Fortune's current applications are for a proposal that is not feasible. The proposed development is speculative or hypothetical at best.

But that is the proposal for which applications have been submitted to the WLWB, and which the Review Board plans to subject to environmental assessment.

It is now almost 18 months since Fortune submitted its applications, and there is no application for industrial access roads that are essential if this project is to be viable. There is no factual basis for an assumption that necessary financing and political support will be available to support such an application. There is no factual or legal

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basis for an assumption that access for such industrial access roads across Tłı̄chô Lands would be agreed to by the Tłı̄chô Government. And without such an access agreement, no application would be accepted by the WLWB.

The Proposal is therefore speculative or hypothetical.

In its efforts to apply Part 5 of the *MVRMA* to the Proposal, the Review Board is dealing with very particular circumstances, for the first time. These circumstances are unique, for two reasons.

First, Fortune's Proposal is based on a unique legal interest, since it involves the development of a mine on Tłı̄chô Land, based on a mining lease that pre-existed the Tłı̄chô Agreement. Fortune's rights and interests are termed "existing rights and interests". They are provided for in 18.1.1 of the Tłı̄chô Agreement, and listed in Part 2 of the appendix to Chapter 18. There are only a few such mining leases, and this is the only one that the Review Board has had occasion to deal with.

In Chapter 19 of the Tłı̄chô Agreement, 19.3 provides that rights of access (to or across Tłı̄chô Land) required to exercise such existing rights or interests are subject to the agreement of the Tłı̄chô Government.<sup>1</sup>

Second, Fortune's reconfigured applications have been made during the general moratorium on development on Tłı̄chô Lands that was put in place by the Tłı̄chô Assembly, pursuant to the Tłı̄chô Lands Protection Law, originally enacted in 2005 and later renewed in 2009.

Furthermore, the Tłı̄chô Government is still engaged in its Land Use Planning process. The moratorium will remain in effect at least until this process is complete.

In the result, Fortune has effectively applied for authorization to build a mine it could not build or operate in current circumstances. The required access roads are speculative or hypothetical. They are not reasonably foreseeable.

Those factual and legal circumstances underlie this Request for Ruling.

In the unique circumstances of this case, proceeding with the EA as proposed in the TOR would be inconsistent with the Tlı̄cho Agreement and provisions of the *MVRMA*, and therefore outside the Review Board's jurisdiction, for the following reasons.

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<sup>1</sup> That is the basis for the WLWB's decision of April 24, 2008, that Fortune is not eligible to apply for a land use permit for activities to take place on Tlı̄cho Land until it provides proof of a right of access to those Tlı̄cho Lands.

**(2) The Proposal is hypothetical, and therefore not a “proposed development”**

Fortune is seeking an environmental assessment of a speculative project that it could not build or operate in current circumstances. The Proposal reflected in the current applications to the WLWB is speculative, or at best, hypothetical.

The Tłı̄ch̄o Agreement and the *MVRMA* do not authorize the Review Board to conduct environmental assessments of speculative or hypothetical projects.

Co-management bodies under the *MVRMA*, including the Review Board, are not resourced to address hypothetical proposals. The Tłı̄ch̄o Government is concerned about the resulting drain on its own capacity and resources if it becomes necessary to respond to co-management bodies respecting applications for hypothetical proposals.

The efficacy of the *MVRMA* would be adversely affected if co-management boards exercised their jurisdiction to consider speculative or hypothetical projects. Such a practice could be perceived as providing assistance for developers to plan, promote or leverage prospective developments. In a case like this one, an approval by an *MVRMA* board for one component of a project could be perceived as creating momentum or pressure for other components. That is why the *MVRMA* does not authorize co-management Boards to consider speculative or hypothetical projects.

It follows that a speculative or hypothetical project – like this one in the present circumstances – is not a “proposed development” within the contemplation of sections 114-115 of the *MVRMA*, and therefore the Review Board has no mandate or jurisdiction to conduct the proposed EA.

**(3) The Proposed EA ignores and is inconsistent with the Tłı̄ch̄o Agreement**

Fortune’s proposed mine could not be a viable project without industrial road access to the claim block, and such access requires the agreement of the Tłı̄ch̄o Government. It is of great concern that the TOR for the proposed EA does not even mention this fundamental reality!

The TOR acknowledges the need for such access roads, but misrepresents the legal situation in the following passage:

Fortune has stated that the NICO Project requires all-season road access from the NICO mine site to Highway 3. Fortune **anticipates** that the Government of

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the Northwest Territories will apply to build an all-land road from Highway 3 to Whati and Gameti in the near future<sup>2</sup> (referred to in this document as the “potential realignment of the winter road through the Wek’eezhii Settlement Area”<sup>3</sup>). This road would be used in part for the NICO Project. A short stretch of road (approximately 25 km) from the NICO mine site to this anticipated road would be constructed and maintained by Fortune and is within the scope of this development.<sup>4</sup>

Proceeding with an EA based on the TOR would be inconsistent with, and disrespectful of, the jurisdiction of the Tlicho Government under the Tlicho Agreement, to exercise its self-government powers to decide what happens on Tlicho Lands. The WLWB correctly refused to allow Fortune to apply for authority to construct or operate roads across Tłı̄chô Land without proof of a right of access. The approach to the industrial access road issue in the TOR is inconsistent with, and profoundly disrespectful of, the authority of Tłı̄chô Government to decide what developments take place on Tłı̄chô Lands.

Pursuant to its self-government jurisdiction under the Agreement, the Tłı̄chô Government has imposed a moratorium on developments on Tłı̄chô Lands, and has undertaken a Land Use Planning process for those lands, which is currently still underway.

The access road issues that are raised indirectly by Fortune’s Proposal are of course important for Fortune. But those issues are far more important and complex for the Tłı̄chô. And it is ultimately for the Tłı̄chô to make decisions respecting these matters.

According to the TOR, the industrial highway proposed for Fortune’s purposes would connect both Gameti and Whati to Highway 3. Such a new road would change those communities profoundly and permanently. Do the residents of those communities want that?

There has not yet been a full discussion of the related socio-economic and cultural issues in either community, or a discussion of alternative ways to address access concerns of members of those communities. Nor have those communities or the Tłı̄chô

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<sup>2</sup> As explained above, no such application has been filed.

<sup>3</sup> This is a substantial misnomer for a year-round industrial access highway, across Tlicho Lands and capable of use by ore trucks, that Fortune needs if it is to have a viable proposal. Also, the term “Wek’eezhii Settlement Area” is not a term used in the Tlicho Agreement, and although such roads would be in Wek’eezhii, the most important fact is that they must cross Tlicho Lands.

<sup>4</sup> Fortune has intentionally excluded such a road from its application to the WLWB, as explained above. In those circumstances, the Review Board is wrong to characterize it as a road that “would be constructed and maintained by Fortune...”

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Government developed even a preliminary analysis of the costs and benefits of using an all-weather road, or an industrial highway, to improve access to those communities.

Access issues for the communities will ultimately need to be considered by the Tłı̄ch̄ô in the context of Tłı̄ch̄ô values and objectives. There is much more involved than just a consideration of short-term resource development possibilities.

Any such roads across Tłı̄ch̄ô Lands would necessarily affect areas of cultural, heritage and spiritual significance for the Tłı̄ch̄ô. It is already clear, from work done in the initial phases of the Land Use Planning process, that the Hislop Lake region is an area of very high significance, both culturally and ecologically.

Any such access roads would affect important Bathurst Caribou habitat. There has been no consideration of that factor to date, and this is particularly relevant in light of the commitment of the Tłı̄ch̄ô to the recovery of that herd, and to participation with GNWT in the joint adaptive management plan for the herd.

It can therefore be seen that access issues across Tłı̄ch̄ô Lands involve many factors and choices that must be made by the Tłı̄ch̄ô, in the context of their own self-government jurisdiction, values and interests. Many issues need to be considered. A great many options need to be developed and studied.

Those issues are crucial for the Tłı̄ch̄ô. The exploration of those issues must be done by the Tłı̄ch̄ô, in their own way and on their own timetable, taking account of all the factors they consider relevant. A consideration of these issues should not be driven by Fortune's short-term commercial interests or schedule.

The Review Board has no legal or factual basis for ignoring all those circumstances or making assumptions about the outcome of the Land Use Planning process and future decisions of the Tłı̄ch̄ô Assembly, as those may ultimately determine the Tłı̄ch̄ô Government's interest in concluding an agreement with Fortune or any other party respecting access to Tłı̄ch̄ô Lands for purposes of industrial access roads across the relevant portions of Tłı̄ch̄ô Lands, to service Fortune's Proposal.

Under 22.5.4 of the Tłı̄ch̄ô Agreement, when the Tłı̄ch̄ô eventually conclude and approve their Land Use Plan, it will ensure the implementation of Tłı̄ch̄ô decisions about future uses of Tłı̄ch̄ô Lands:

22.5.4 Upon approval of a land use plan applicable to any part of Wek'eezhii, government, the Tłı̄ch̄ô Government and the Tłı̄ch̄ô Community Governments and their departments and agencies, including the Wek'eezhii Land and Water

Board, shall exercise their powers in relation to Wek'eezhii in accordance with the plan.

At the present time, the outcomes of the Land Use Planning process cannot be known. Yet according to the TOR, the Review Board has agreed to consider the two fantasy roads that Fortune has **assumed would be constructed** across Tłı̄chô Lands, because its Proposal could not be viable without them.

This is an example of the tail wagging the dog! Such assumptions are inconsistent with the Tłı̄chô Agreement and the facts. The Review Board does not have jurisdiction to conduct an EA on that basis.

**B. THE SCOPE OF THE DEVELOPMENT PROPOSED IN THE TOR IS INCONSISTENT WITH PART 5 OF THE MVRMA AND OUTSIDE THE REVIEW BOARD'S JURISDICTION:**

**(1) The Review Board's Jurisdiction and Policy for scoping developments:**

Section 117(1) of the *MVRMA* provides the Board's jurisdiction to determine the scope of a development for environmental assessment purposes.

However that jurisdiction is not unlimited. The Board is constrained by the provisions of the *MVRMA*, properly interpreted.<sup>5</sup>

The Review Board's Environmental Impact Assessment Guidelines make it clear that project splitting undermines effective and efficient environmental assessments. In order to avoid that, the Board applies three criteria in order to decide whether a physical work or activity is an accessory development and therefore should be included in the scope of the development being assessed: dependence, linkage and proximity.<sup>6</sup>

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<sup>5</sup> *Mining Watch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 at paragraphs [39-40] -- although the scoping error found by the Supreme Court of Canada in *Mining Watch* does not arise in this case, it is clear from that decision that the discretion to scope a project for environmental assessment purposes must not be inconsistent with the authorizing statute.

<sup>6</sup> Environmental Impact Assessment Guidelines, pages 27-8

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The Review Board applied these principles in its decision on the Request for Ruling in the case of the *Prairie Creek Mine*,<sup>7</sup> and decided that the proposed undertaking had to be described for environmental assessment purposes in a way that included the transfer facilities as well as the winter road, because the proposed mine could not operate without them.

But this case is not like *Prairie Creek*, since the winter road in that case had been in operation for many years and its use for the proposed mining operation was included in the application. Thus the road was neither speculative nor hypothetical, and the Review Board had discretion to scope it into the development for purposes of that environmental assessment.

**(2) Because the industrial access roads required by Fortune are not existing projects, or authorized for future development, or the subject of applications to the WLWB, they are speculative and hypothetical. Therefore the Review Board has no jurisdiction to “scope” into the development either the construction and operation of the “spur road,” or Fortune’s “use” of an industrial highway to Highway 3**

It would appear that the scoping decisions in the TOR were designed to avoid project splitting, in order to ensure the achievement of the purposes in sections 114 and 115 of the *MVRMA*.

Although that intention is consistent with the Review Board’s mandate, the mechanism proposed in the TOR for achieving it was not. Section 117(1) of the *MVRMA* is not so broad that it authorizes the inclusion of speculative or hypothetical components in a development.

The problem is particularly serious in this case. Fortune initially included the two access roads in its Proposal. Then it intentionally excluded them. The proponent has taken steps to ensure that the access roads are **not** the subject of any proposal or application pursuant to the *MVRMA*.

It is the proponent’s “proposed development” that must be the subject of an EA pursuant to Part 5. The Review Board does not have jurisdiction to revive the concept of these roads and include them in the Proposal, for purposes of a proposed EA, when the proponent itself has withdrawn them from consideration by reconfiguring its applications to the WLWB.

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<sup>7</sup> Review Board Ruling on Scope of Development for EA0809-002, *Prairie Creek Mine*, March 5, 2009.

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This is not the same issue that is addressed in the *Prairie Creek* decision or the Guidelines, which consider whether existing or proposed activities or undertakings need to be “scoped” into a project for environmental assessment purposes, in order to ensure compliance with the objectives of Part 5. In this case the TOR has improperly assumed the future existence of speculative or hypothetical components of this Proposal. In effect the Review Board has decided to add to this Proposal a component that the proponent itself knows is not feasible at present and therefore chose to exclude. Such a “scoping” decision amounts to redefining the “proposed development,” and is therefore outside the Review Board’s jurisdiction.

In order to be included in the scope of a development pursuant to s. 117(1), an undertaking or activity must be more than a phantom – it must exist or be reasonably foreseeable. These roads are neither.<sup>8</sup>

The two access roads scoped into the development by the TOR were included because the Proposal would not be viable without them. They are therefore concepts for a development that have been included in order to fulfill a purpose – to make Fortune’s Proposal **conceptually** viable. But as the Court of Appeal for Newfoundland and Labrador has said, environmental assessments must be conducted on the basis of real, proposed activities, not conceptual ones:

One of the fundamental concepts of environmental assessment regimes is that they are concerned with the consequences of activities that involve physical incursions into an environment in a potentially harmful way... it is the effect or impact of actual physical activity that is the focus of an assessment... the scope of a required assessment is identified by the identified activities that are contemplated and is not to be defined along functional or purposive lines.<sup>9</sup>

The roads scoped into the development would not even be subject to consideration for cumulative impacts purposes, because they are not existing developments, nor would they be induced developments, nor are they reasonably foreseeable future developments, in the circumstances of this case.<sup>10</sup>

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<sup>8</sup> In *Bow Valley Naturalists Society of Canada (Minister of Canadian Heritage)* [2001] 2 FC 461 (F.C.A.) at paragraph [75], Linden J.A. wrote for the Court and advised against using environmental assessments to “consider fanciful projects by imagined parties producing purely hypothetical effects.”

<sup>9</sup> *Labrador Inuit Ass’n v Newfoundland (Minister of Environment and Labour)*, 1997 N.J. No 223 at paragraph [42]

<sup>10</sup> *Ur Energy Inc., Screech Lake Uranium Exploration Project*, MVEIRB Decision, May 7, 2007; see also *Bow Valley Naturalists Society of Canada (Minister of Canadian Heritage)*, supra, at paragraph [41]: “Only likely cumulative environmental effects must be considered. Projects or activities which

In the end, the TOR attempted to avoid project splitting by purporting to make decisions about the nature of the “proposed development” that had to be made by Fortune or another proponent. In doing so the TOR have exceeded the Review Board’s jurisdiction under s. 117(1).

**(3) Because neither of those access roads has been already constructed, authorized or included in an application, their location and related physical characteristics are unknown, with the result that their environmental and socio-economic impacts cannot be known or effectively assessed, as required by Part 5 of the MVRMA.**

The TOR scopes in the construction and operation of the “spur” road that Fortune asserts an intention to construct.

The proposed stretch of road, which crosses Tłı̄ch̄o Lands and the Review Board has identified in the TOR as approximately 25 km in length, could in reality be anywhere from 25 km to 35 km from the NICO mine site, since there is currently no agreement on, or a proposal for, the route or location of the industrial highway to connect to Highway 3 that Fortune requires. (See Attached Map<sup>11</sup>).

Instead of considering the environmental effects of the phantom industrial highway itself, the TOR proposes to consider only the effects of its “use” by Fortune. With respect, neither the Tłı̄ch̄o Government, any other responsible authorities, nor the Review Board itself could give “careful consideration” to the effects of Fortune “using” a road that is not planned or proposed.

The uncertainties about the nature or route of such an industrial highway are made clear by the fact that the TOR suggests a subsequent EA for the “proposed realignment of the winter road,” in order to capture all relevant environmental effects and design mitigations for them.

Thus the TOR itself has embraced project splitting, in light of the speculative or hypothetical nature of the industrial access roads required by Fortune.

It is clear that a proper environmental assessment cannot be conducted at this time of the entire undertaking that Fortune is promoting. The Review Board’s well intentioned

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have been or will be carried out must be considered. However, only approved projects must be taken into account; uncertain or hypothetical projects or activities need not be considered...

<sup>11</sup> The attached map was created by Tłı̄ch̄o Government staff, in an effort to illustrate information from Fortune Minerals Ltd. The map does not represent a Tłı̄ch̄o Government proposal.

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response to this problem – by scoping in some hypothetical aspects of the project and leaving others for a subsequent environmental assessment, has resulted in project splitting and scoping decisions in excess of the Review Board’s jurisdiction.

This is more than a legal problem about the Board’s jurisdiction. Proceeding in the ways proposed in the TOR would certainly result in confusion and regulatory overlap. More important it will not be a basis for orderly and informed participation in the EA by the Tłı̄ch̄o Government and affected communities.

The hypothetical road concepts that are included for some kind of consideration by the TOR are of great importance to the Tłı̄ch̄o.

Such access roads would cut through the heart of Tłı̄ch̄o territory, and as such may threaten caribou, the way of life in Whati and Gameti, cultural landscapes and spiritual sites. The portions of Tłı̄ch̄o Lands around Hislop Lake are very important winter habitat for the Bathurst Caribou herd. There are buildings, dogteam and canoe trails, burial sites, cabins, and fishing sites on Hislop Lake that would be threatened by such proposals, including by the potential year-round use of such a road by non-Tłı̄ch̄o people who could easily access the area. It could open up the heart of Tłı̄ch̄o territory to outside hunting, trapping and harvesting.

Furthermore, such roads could change forever the nature of the communities of Whati and Gameti.

Location, in this context, is very significant. All of this is far too important to be considered on the basis of phantom activities and undertakings, for a project that is in fact still speculative and hypothetical.

For all these reasons, the EA proposed by the TOR could not be effective and capable of fulfilling the purposes of Part 5 of the *MVRMA*, for the Tłı̄ch̄o or any other party.

For these reasons, the proposed EA is not the type of environmental assessment contemplated in Part 5, and is therefore outside the mandate and jurisdiction of the Review Board.

## CONCLUSION

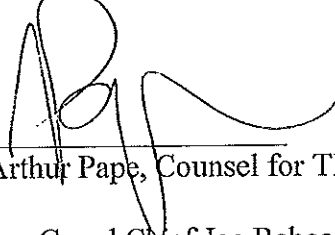
For all the above reasons, the Tłı̄ch̄o Government requests a Ruling from the Review Board that the EA proposed in the TOR is premature, and it will therefore be postponed

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and placed in abeyance until all essential components of the Proposal are included in applications that have been accepted as complete by the WLWB, in order that Part 5 of the *MVRMA* can be properly applied to the Proposal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

MAY 28, 2010.



Arthur Pape, Counsel for Tlicho Government

c.c. Grand Chief Joe Rabesca, Tlicho Government,  
c/o Laura Duncan, Tlicho Executive Officer  
(by email: <[lauraduncan@tlicho.com](mailto:lauraduncan@tlicho.com)>)

c.c. Robin Goad, P. Geo.  
President, CEO & Director, Fortune Minerals Limited,  
(by email: <[RGoad@fortuneminerals.com](mailto:RGoad@fortuneminerals.com)>)



**Wek'èezhì**  
Land and Water Board

Box 32, Wékweèti, NT X0E 1W0  
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April 24, 2008

Robin E. Goad, President  
Fortune Minerals Limited  
1902 – 140 Fullarton Street  
London, ON N6A 5P2

Dear Mr. Goad:

**Land Use Permit Eligibility Requirements on Tłıchǵ Lands**

After careful review and consideration the Wek'èezhli Land and Water Board has recently ruled that Fortune Minerals Ltd. is not eligible to apply for land use permits for activities that are to take place wholly or partially within Tłıchǵ owned lands without providing proof of a right of access to those Tłıchǵ lands. The Board in their decision considered all the information that was submitted to the WLWB from the Tłıchǵ Government, INAC, GNWT-ENR and Fortune Minerals in response to our request for clarification on eligibility requirements listed within the *Mackenzie Valley Land Use Regulations*. The Board's decision is consistent with positions put forward by the Tłıchǵ Government, and Indian and Northern Affairs Canada that a proof of right to access Tłıchǵ lands, through an existing access right provided for in the Tłıchǵ Agreement or granted by the Tłıchǵ Government, should be provided before a proponent be deemed eligible to apply for a land use permit.

Due to the current ineligibility of Fortune Minerals submissions for land use permits for the proposed development of the NICO mine and mill, all weather access road, airstrip, and hydro transmission line, the WLWB will not be processing the associated water licence applications that were submitted to the WLWB for the all weather access road and the NICO mine and mill.

While the Tłıchǵ Government has made its views known to the Board that a proof of a right to access Tłıchǵ lands should be required by the Board prior to deeming applications on Tłıchǵ lands complete, the Tłıchǵ Government has not provided direction to the Board on what kind of documentation should be submitted by an applicant, or other party, to prove a right of access to Tłıchǵ lands. We have proposed a meeting between the WLWB and the Tłıchǵ Government to discuss and provide clarity on what the expectations from each party may be in determining eligibility for land use

permits in the future. Fortune Minerals will be informed of any decisions that result from the proposed meeting.

If you have any further questions or concerns, please do not hesitate to contact Zabey Nevitt at (867) 669-9592 or by email at [zabey@wlwb.ca](mailto:zabey@wlwb.ca).

Sincerely,

A handwritten signature in black ink, appearing to read "V. C. Blondin". The signature is fluid and cursive, with a long horizontal stroke at the beginning.

Violet Camsell-Blondin  
Chair

Copied to: Trish Merrithew-Mercredi, Regional Director General, INAC  
Gary Bohnet, A/Deputy Minister, GNWT-Environment and Natural  
Resources  
Grand Chief George Mackenzie, Tłı̨chǫ Government



**FORTUNE MINERALS LIMITED**

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June 10, 2010

Vern Christensen  
Executive Director  
Mackenzie Valley Environmental Impact Review Board  
200 Scotia Centre  
Box 938, 5102-50th Ave  
Yellowknife, NT  
X1A 2N7

Dear Mr. Christensen

**Re: Response to Tłı̨cẖ Government Request for Ruling submitted to the Mackenzie Valley Environmental Impact Review Board Regarding the Environmental Assessment for the Fortune Minerals Limited Cobalt-Gold-Bismuth-Copper Project**

In its Request for Ruling of May 28<sup>th</sup>, 2010 (Request for Ruling), the Tłı̨cẖ Government asked that the Mackenzie Valley Environmental Impact Review Board ("Review Board") to make a ruling on the Fortune Mineral Limited ("Fortune") cobalt-gold-bismuth-copper project ("the NICO Project" or "the Project"). The Tłı̨cẖ Government has asked the Review Board to take the position, "that the Environmental Assessment is premature, and it will therefore be postponed and placed in abeyance until all essential components of the Proposal are included in applications accepted as complete by the WLWB". Fortune is of the view that the Review Board does not need to make a ruling on this matter at this point in time.

The rationale for the Request for Ruling is based primarily on the fact that an application has not yet been filed for construction and operation of an all-weather road between 19 kilometres north of Whatl and Highway 3 and an access road that would connect that road with the Project ("the NICO access road"). This issue was addressed extensively by the Review Board during the process leading up to its issuance of the Terms of Reference for the Environmental Assessment of the NICO Project ("TOR").

Fortune is of the view that the Review Board correctly interpreted its jurisdiction at that time and regards the scope of the TOR as settled. A request to the Review Board to re-

This is Exhibit <sup>"K"</sup> referred to in the  
affidavit of Dr. John G. Zoe  
sworn before me, this 21<sup>st</sup>  
day of September, 2010

J.M. D. [Signature]  
A COMMISSIONER FOR TAKING AFFIDAVITS

open its TOR process again, 7 months after its issuance of the final TOR and after Fortune has relied on the TOR to do extensive work to comply with its requirements, is neither fair to Fortune nor the appropriate forum or process for raising this concern. If the Review Board were to determine otherwise, Fortune would want to receive adequate notice of the issues to be addressed and the right to make further submissions on the points to be resolved.

Since the TOR was issued on November 30, 2009, nothing has changed with respect to the Project, its scope or potential impacts. Fortune understands that the Government of the Northwest Territories ("GNWT") has earmarked public moneys for construction of an all-land winter road, and since its 2008 consultations on route alignment, is continuing its efforts to work with the Tłı̨chǫ Government on matters related to access and alignment. Fortune is confident that these two governments can reach an amicable resolution to these matters in a practical and timely manner. The upgrade of the all-land winter road route to all-weather status will require further negotiations between all parties involved.

With respect to the NICO access road, Fortune, as requested in the TOR, fully intends to include detailed information on its proposed location, operation and impacts in the Developers Assessment Report ("DAR"). As you are aware, the NICO access road would be located on Tłı̨chǫ Lands. At this point in time, Fortune does not have a right of access to those Tłı̨chǫ Lands. This is so for a number of reasons. The Tłı̨chǫ have told us that a moratorium on development is in place until their land use plan is complete. They have also said that work related to land use planning is progressing, particularly as it relates to the Project and the NICO access road, but that a plan is not yet complete.

One of Fortune's objectives in submitting the DAR prior to completion of the land use plan is to provide the Tłı̨chǫ Government with the most extensive information available on the Project that could be considered during the development of the land use plan. The DAR would provide an assessment of the potential impacts and mitigation strategies associated with development of the Project, the NICO access road and the use of the road route corridor (both winter and all-weather). The DAR will address many of the issues raised in the Request for Ruling including socio-economic and cultural impacts associated with the Project and its use of the roads, impacts on the Bathurst Caribou herd and caribou habitat, and access to Tłı̨chǫ Lands.

Without the DAR, the Tłı̨chǫ Government may complete its land use plan without factual information on many issues raised in its May 28<sup>th</sup> Request for Ruling.

Fortune understands that the Tłı̨chǫ have been intensely busy with, among other things, establishing their new government and all of the processes and procedures associated with



implementing the Tłı̨chų Agreement. Over the approximately 15 years since Fortune has been in discussion with the Tłı̨chų about the Project we have tried to be sensitive to the pressures and stresses to which Tłı̨chų leaders and their people have been subject. We feel that we have enjoyed a spirit of cooperation and mutual respect. A further reason why Fortune has not applied for an "industrial access road" is our inability to meet with the Tłı̨chų Government. Since April 24<sup>th</sup>, 2008, when the Wek'eezhii Land and Water Board ("WLWB") ruled that "that Fortune Minerals Ltd. is not eligible to apply for land use permits for activities that are to take place wholly or partially within owned Tłı̨chų Lands without providing proof of a right of access to those Tłı̨chų Lands", Fortune has made numerous attempts to engage the Tłı̨chų Government in discussions concerning an access agreement, but, without success. Furthermore, Fortune has made numerous attempts to engage the Tłı̨chų Government concerning the road, to complete Traditional Knowledge studies, to commence negotiation of a Participation Agreement and the Project as a whole with little or no progress being achieved.

Fortune provided the Tłı̨chų Government with a draft Memorandum of Understanding ("MOU") for an access agreement for its consideration. On December 3<sup>rd</sup>, 2009, Grand Chief Joe Rabesca responded in a letter stating that the Tłı̨chų Assembly had authorized a team to enter into negotiations of a MOU with Fortune. This six member working group, subsequently named the K'iagoti working group, had been formed to negotiate this MOU with Fortune. Although we have not been successful in scheduling meetings with this working group to date, Fortune will continue in its efforts to meet with the K'iagoti working group so that a MOU can be successfully negotiated and signed.

It is our view that there are sufficient safeguards built into the Tłı̨chų Agreement and the *Mackenzie Valley Resource Management Act* to address the concerns expressed in the Request for Ruling. Neither submission of the DAR nor continuation of the EA process to its completion could amount to tacit approval for the NICO access road; neither could these events provide a regulatory mechanism that would enable the Review Board or the WLWB to authorize such a road. Therefore, the possibility that the NICO access road could go ahead without Tłı̨chų Government approval is highly improbable.

Having said that, Fortune acknowledges the importance of the land use planning process to the decisions facing the Tłı̨chų Government and the need to carry out discussions related to socio-economic, cultural, wildlife and other impacts on the environment that might arise from the Project. In order to address the concerns expressed by the Tłı̨chų Government, Fortune will voluntarily defer submission of the DAR until December 2010. During the next six months Fortune would like to engage the Tłı̨chų Government in discussions related to the issues it has raised in its Request for Ruling. By way of this letter I would

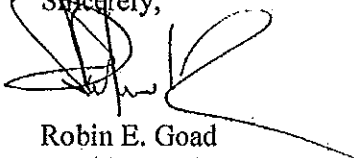


June 10, 2010

like to formally invite Grand Chief Rabesca and his Council to meet with me and my team in June to set out a timetable by which we can address matters related to socio-economic and cultural impacts associated with Fortune's use of the proposed road; impacts of the Project on the Bathurst Caribou herd and habitat; terms and conditions related to Fortune's access to the NICO Project; and any other issue of concern to the Tłı̨chǫ that is within the ability of the company to address. I am confident that together we can work on developing solutions that will allow the Tłı̨chǫ Government to progress with their land use planning process and Fortune to progress the Project through the Environmental Assessment and regulatory permitting process. It is Fortune's sincere hope that the concerns expressed by the Tłı̨chǫ Government can be addressed in a timely manner as we believe this Project and the road will provide significant benefits to the Tłı̨chǫ people.

In light of the above, and on behalf of Fortune, I respectfully request that the Board find that it does not have to make a ruling in response to the Request for Ruling at this time. Fortune will continue in its efforts to meet with the Tłı̨chǫ Government for the purpose of enabling the Tłı̨chǫ to make significant progress in their land use planning process, particularly as it affects the Project and enabling Fortune to share the information in its DAR and to progress in the Environmental Assessment process.

Sincerely,



Robin E. Goad  
President and CEO  
Fortune Minerals Limited

Cc Grand Chief Joe Rabesca  
Laura Duncan  
Art Pape





Department of Justice  
Canada

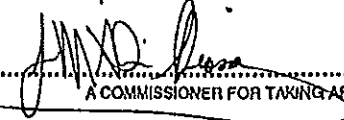
Northwest Territories Regional Office  
2<sup>nd</sup> Floor, Joe Tobie Building  
5020 - 46<sup>th</sup> Street  
PO Box 8  
Yellowknife NT X1A 2N1

Ministère de la Justice  
Canada

Bureau régional de Territoires du Nord-Ouest  
2<sup>ème</sup> étage, édifice Joe Tobie  
5020 - 46<sup>ème</sup> rue  
CP 8  
Yellowknife TN-O X1A 2N1

Phone/Téléphone: (867) 920-6008  
Fax/Télécopieur: (867) 920-6025

This is Exhibit "L" referred to in the  
affidavit of Dr. John B. Zoe  
sworn before me, this 21st  
day of September 2010.

  
A COMMISSIONER FOR TAKING AFFIDAVITS

Via Email: vchristensen@reviewboard.ca

July 8, 2010

Mackenzie Valley Environmental Impact Review Board  
200 Scottia Centre  
Box 938, 5120 - 50th Ave  
Yellowknife, NT X1A 2N7

Attention: Vern Christensen, Executive Director

Dear Sir:

Re: Fortune Minerals Ltd. - NICO Project - EA009-004  
Submissions for Request for Ruling - May 28, 2010

We are legal counsel for the Department of Indian Affairs and Northern Development ("DIAND") in this matter. We write to the Mackenzie Valley Environmental Impact Review Board ("Review Board") in response to the Tlicho Government's request for ruling as to whether the "Environmental Assessment is premature, and it will therefore be postponed and placed in abeyance until all essential components of the Proposal are included in applications accepted as completed by the [Wek'eezhil Land and Water Board]".

**I. SUMMARY**

The Tlicho Government submits that the environmental assessment should be placed in abeyance on the basis of two arguments. First, the Tlicho Government argues that the Terms of Reference set out a proposal for development that is inconsistent with the Tlicho Agreement and the provisions of the Mackenzie Valley Resource Management Act ("MVRMA"). Second, because the proposed access road to the proposed development is hypothetical and speculative, it cannot be scoped into the environmental assessment nor can it be properly assessed as required by the MVRMA.

We submit that although Fortune Minerals must reach an agreement with the Tlicho Government pursuant to the Tlicho Agreement with respect to the exercise of a right of access to their proposed development, the Tlicho Government cannot withhold this access until such time as they develop a land use plan. Consequently, we submit that

**Canada**

the Review Board correctly scoped the proposed development for the purposes of s. 117 of the MVRMA. We further submit that the Review Board may either continue with the environmental assessment or, alternatively, suspend the environmental assessment until Fortune Minerals reaches an agreement with the Tlicho Government on access to its existing interests if this is deemed a more timely and expeditious process pursuant to s. 115 of the MVRMA.

## **II. SUBMISSION**

### **1. Is the environmental assessment as proposed in the Terms of Reference inconsistent with the Tlicho Agreement and the provisions of the MVRMA and therefore outside of the Review Board's jurisdiction?**

The Tlicho Government submits that until such time as its land use plan is completed, no development of any kind is permitted on Tlicho lands. This moratorium is to ensure the protection of the Tlicho's cultural, heritage and spiritual concerns and is given effect by the *Tlicho Lands Protection Law*, a copy of which is attached hereto.<sup>1</sup> As a result, the Tlicho Government submits that Fortune Minerals' proposal for development without an access road is not viable and the environmental assessment should be suspended.

#### **a) Tlicho Lands**

The Tlicho Government is vested with title to Tlicho lands as they are defined in Chapter 18 of the Tlicho Agreement. The Appendix to Chapter 18 sets out excluded parcels that do not form part of Tlicho lands as well as existing interests, which include mining claims and leases.

Holders of interests listed in the Appendix to Chapter 18 are granted an additional right of access over Tlicho lands to ensure that they can exercise their protected interest. Article 19.3.1 provides to the holder of one of these interests with "a right of access to Tlicho lands and waters overlying such lands to allow the exercise of [an] interest".

The right of access is not unlimited. Article 19.3.3 states:

Where the exercise of the right of access under 19.3.1 or 19.3.2 involves any activity of a type or in a location not authorized at the effective date, the exercise of that right of access is subject to the agreement of the Tlicho Government or, failing such agreement, to conditions established in accordance with chapter 6. Where the person with the right of access and the Tlicho Government do not reach agreement on conditions for the exercise of that right of access, the person with the right of access may refer the dispute for resolution in accordance with chapter 6, but may not exercise it until the dispute has been resolved.

Therefore, pursuant to Article 19.3.3, where the right of access differs or did not exist at the time the Tlicho Agreement was signed, an access right can only be exercised with the agreement of the Tlicho Government. If no agreement can be reached between the Tlicho Government and the holder of the right, the matter can be sent to dispute resolution pursuant to the terms of the Tlicho Agreement.

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<sup>1</sup> The *Tlicho Lands Protection Law* was signed on August 4, 2005. We understand that it was renewed in November 2009.

**b) Fortune Minerals' Right of Access**

In the present circumstances, there is no dispute that Fortune Minerals' proposed mining operation as described in its land use permit and water licence applications is located wholly on parcels excluded from Tlicho lands or within an existing mining interest that is captured by the Appendix to Chapter 18 of the Tlicho Agreement. However, Fortune Minerals has indicated that for the effective operation of its proposed development, it requires the construction of an all-season industrial access road over Tlicho lands from the mine site to a realigned all-weather access road through the Wek'eezhii to be constructed by the Government of the Northwest Territories.

Because the proposed right of access is of a nature and in a location not authorized at the Tlicho Agreement's effective date, we agree with the Tlicho Government that Fortune Minerals cannot exercise the proposed right of access without their prior agreement. However, we submit that the Tlicho Government cannot withhold its agreement to Fortune Minerals' access to Tlicho lands on the basis of the *Tlicho Lands Protection Law* and because it has not yet developed a final land use plan.

We acknowledge that pursuant to Article 7.4.2, the Tlicho Government has the power to "enact laws in relation to the use, management, administration and protection of Tlicho lands and the renewable and non-renewable resources found thereon". However, as stated by Article 7.5.10(c), the Tlicho Government's law making powers do not include the power to enact laws:

preventing any person from exercising a right of access under Chapter 19 or imposing any conditions on the exercise of such rights, except conditions agreed to by government in accordance with 19.1.9, conditions allowed by 19.2.3, or conditions established in accordance with chapter 6 where that process is expressly provided for in chapter 19;

The *Tlicho Lands Protection Law* must therefore be read in light of Article 7.5.10(c) and in a manner which does not infringe Fortune Minerals' right of access to exercise their existing interest.

Furthermore, we submit that the Wek'eezhii Land and Water Board ("WLWB") did not err by not considering a potential conflict between an all-season weather road and a future land use plan. It is only upon approval of the land use plan that the WLWB must consider a proposed development's conformity with that plan. As Article 22.5.4 states:

**Upon the approval of a land use plan applicable to any part of the Wek'eezhii, government, the Tlicho Government and the Tlicho community governments and their departments and agencies, including the Wek'eezhii Land and Water Board, shall exercise their powers in relation to Wek'eezhii in accordance with the plan. [our emphasis]**

Similarly, s. 62(1) of the MVRMA states that the WLWB "may not issue, amend or renew a licence, permit or authorization except in accordance with any land use plan, established under a federal, territorial or Tlicho law, that is applicable to any part of its management area." DIAND submits that there is no authority which prevents the WLWB from issuing, amending or renewing a licence, permit or authorization prior to the approval of a land use plan.

Only once a Tlicho land use plan is in effect will applications for water licences and land use permits be subject to conformity checks through a land use planning board and recommendations provided to the WLWB with respect to acceptance. Indeed, s. 46 of the MVRMA recognizes the requirement to operate in accordance with a land use plan but does not extend that requirement to the Wek'eezhii in the absence of such a plan.<sup>2</sup>

**c) Summary**

We submit that in the absence of an established land use plan, the *Tlicho Lands Protection Law* does not prevent Fortune Minerals from exercising its right of access to its proposed development as captured by the Appendix to Chapter 18 of the Tlicho Agreement. Nonetheless, Fortune Minerals and the Tlicho Government must come to an agreement on the form and location of this right of access.

If the Tlicho Government and Fortune Minerals cannot reach an agreement, Article 19.3.3 of the Tlicho Agreement allows Fortune Minerals, as holder of the right of access, to refer the dispute for resolution, including via binding arbitration, pursuant to Chapter 6 of the Tlicho Agreement.

- 2. Is the scope of the development, as defined in the Terms of Reference, inconsistent with Part 5 of the MVRMA and therefore outside the mandate and jurisdiction of the Review Board?**

**a) Regulatory Applications**

We submit that the regulatory applications and the environmental assessment to this point have conformed to the requirements of Part V the MVRMA. In our opinion, the applications submitted by Fortune Minerals for an operating mine qualify as a "development" pursuant to Part 5 of the MVRMA. Section 111 of the MVRMA defines a "development" in part, as "any undertaking, or any part or extension of an undertaking, that is carried out on land or water".

Fortune Minerals' applications describe the undertaking as the operation of a mine site with open pit and underground operations. The land use permit describes the mine as including "ore processing mill facilities, tailings and mine rock management areas, a camp, mine equipment maintenance building and site access roads and water intake facilities" located within the excluded claim boundary. It describes in essence, a fully operational mine. We submit that this clearly meets the definition of a "development" for the purposes of Part 5 of the MVRMA.

In addition, Fortune Minerals' application met the eligibility requirements for a land use permit. Pursuant to s. 18(a)(i) of the *Mackenzie Valley Land Use Regulations* ("MVLUR"), a person is eligible for a land use permit if they hold the right where "the proposed land-use operation is in the exercise of a right to search for, win or exploit minerals or natural resources".

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<sup>2</sup> Section 46 of the MVRMA states: "The Gwich'in and Sahtu First Nations, departments and agencies of the federal and territorial governments, and every body having authority under any federal or territorial law to issue licences, permits or other authorizations relating to the use of land or waters or the deposit of waste, shall carry out their powers in accordance with the land use plan applicable in a settlement area."

The applications submitted by Fortune Minerals' describe a proposal for development that is located wholly within excluded parcels or existing interests described in Parts 1 and 2 to the Appendix to Chapter 18. Consequently, the application conformed to the MVLUR and the WLWB acted correctly in deeming Fortune Minerals' application for a land use permit as complete on January 30, 2009.

DIAND referred the applications to environmental assessment on February 27, 2009. DIAND did so because in their opinion, the project has the potential to have a significant adverse impact on the environment. Pursuant to s. 117(1) of the MVRMA, once a proposal for development is referred to environmental assessment, the Review Board is responsible for determining the scope of any proposed development undergoing an environmental assessment. The Review Board does not have to authority pursuant to the MVRMA to require a developer to reapply for new regulatory authorizations once the environmental process has commenced.

**b) Scoping Decisions**

We submit that the Review Board correctly scoped the development for EA0809-004 to include the use of the potential realignment of the winter road through the Wek'eezhil and all physical works and activities required to construct an access road to the mine site, including an access road bridge over the Marian River.

Section 117 of the MVRMA states that the Review Board shall determine the scope of the development "subject to any guidelines made pursuant to s. 120." Pursuant to this provision, the Review Board has issued its *Environmental Impact Assessment Guidelines*, March 2004. At p. 27 the Guidelines provide that "...the Review Board will consider what is the principal development, and what other physical works or activities are accessory to the development." On p. 28, the Guidelines state that:

Three criteria will be used to determine whether or not a physical work or activity is an accessory development, and therefore should be included in the development. The first test is dependence: that is, if the principal development could not proceed without the undertaking of another physical work or activity, then that work or activity is considered part of the scoped development. The second test is linkage: if a decision to undertake the principal development makes the decision to undertake another physical work inevitable, then the linked or interconnected physical work or activity will be considered part of the scoped development. The third test is proximity: if the same developer is undertaking two physical works or activities in the same area, then the two may be considered to form one development.

We submit, therefore, that the Review Board correctly identified Fortune Mineral's proposed mining operation as the principal development and that the proposed operation includes the access road and realigned winter road as an integral and necessary component of the proposed mining operation. Consequently, we submit that the Review Board properly scoped the proposed development, a decision which is accurately reflected in the Board's Terms of Reference and that the Review Board may continue with EA0809-004. We note that the Terms of Reference were issued on November 30, 2009 and that the Tlicho Government did not seek a review of the Review Board's decision at that time.

**c) Current Environmental Assessment Process**

We agree with the Tlicho Government that on the basis of the representations made by Fortune Minerals, an access agreement for an all-season road still needs to be reached with the Tlicho Government prior to the operation of the proposed development.

We also note that pursuant to s. 115 of the MVRMA, environmental assessments must "be carried out in a timely and expeditious manner". In the present circumstances, even if the Review Board continues with EA0809-004 and provides its assessment of the proposed development pursuant to s. 128 of the MVRMA, Fortune Minerals will be unable to proceed with its mining operation. As stated by Fortune Minerals in its letter to the Review Board dated May 13, 2009, the proposed mine cannot be constructed, operated and closed without the realignment of the winter road through the Wek'eezhil. In addition, Fortune Minerals acknowledges that without an all-season access road, an alternate season road would present "detrimental impacts to both capital and operating costs".

At this time, the Government of the Northwest Territories has provided no indication to the Review Board that it intends to commence the construction of a realigned road through the Wek'eezhil. Moreover, although we submit that the absence of a land use plan and the *Tlicho Lands Protection Law* do not restrict Fortune Minerals' right of access established by Article 19.3.3 of the Tlicho Agreement, any access is still subject to the agreement of the Tlicho Government, or failing agreement, conditions established pursuant to dispute resolution under Chapter 6 of the Tlicho Agreement. In addition, once Fortune Minerals and the Tlicho Government agree on the nature and location of the right of access, Fortune Minerals will most likely be required to submit a land use permit application for the access road to the WLWB for approval depending on the nature of that access.

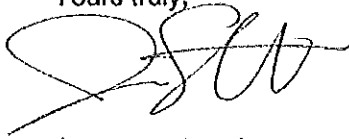
We note that if the environmental assessment process is undertaken prior to the determination of Fortune Minerals' right of access to the proposed development either via an agreement or dispute resolution, the Review Board may recommend mitigation measures that will no longer be applicable or relevant once the proposed mining operation is constructed and operational. Furthermore, as the Tlicho Government correctly note, the location and form of the access road remain unknown at this time, limiting the ability of the Review Board to conduct a complete analysis of the proposed development's impacts on the environment.

**d) Summary**

We submit that the WLWB properly accepted Fortune Minerals' land use permit and water licence applications and that the Review Board has appropriately scoped in the use of the potential realignment of the winter road as well as all physical works and activities required to construct an access road to the mine site, including an access road bridge over the Marian River. Consequently, it is our opinion that the Review Board may continue with the environmental assessment of Fortune Minerals' proposal for development. Alternatively, the Review Board may suspend the environmental assessment until such time as Fortune Minerals reaches an agreement with the Tlilcho Government on the nature and location of access roads.

We trust the foregoing submission is of assistance.

Yours truly,

A handwritten signature in black ink, appearing to read 'J. Steele', written over a horizontal line.

Jason Steele  
Legal Counsel

Encls.

TEJCHQ GOVERNMENT

TEJCHQ LANDS PROTECTION LAW

The Tjchq Assembly enacted this law as part of the Tjchq Omnibus Implementation Law on August 4, 2005 by unanimous consent.

Joe Rabesca, Grand Chief of the Tjchq Government, signed the Tjchq Omnibus Implementation Law on August 4, 2005.

Signature: Bertha Rabesca Zoe Date: Aug. 12/05  
Certified as a True Copy by Bertha Rabesca Zoe as of August 4, 2005.  
Laws Guardian, Tjchq Government

DISPOSITION

DATE OF INTRODUCTION	CONSIDERATION	CONSENSUS	EFFECTIVE DATE
August 4, 2005	August 4, 2005	August 4, 2005	August 4, 2005

# TEICHQ LANDS PROTECTION LAW

## Title

1. This law shall be cited as the *Tichq Lands Protection Law*.

## Definitions

2. In this Law,

“applicant” means a person applying for a disposition under this Law.

“Assembly” has the same meaning as in the Tichq Constitution.

“Chief’s Executive Council” has the same meaning as in the Tichq Constitution.

“director” means the Director of Lands Protection.

“disposition” means a disposing of an interest in the Tichq Land.

“Tichq” has the same meaning as in the Tichq Agreement.

“Tichq Government” means the Tichq Government and its institutions as defined in the Tichq Constitution.

“Tichq Lands” has the same meaning as in the Tichq Agreement and is shown for illustrative purposes in schedule A.

## Chief’s Executive Council

3. The Chief’s Executive Council is responsible for the management and protection of all Tichq Lands and the interest of the Tichq throughout Mqwhl Gogha Dè Ngt’èe.

*This law was signed by Grand Chief Joe Rabesca on August 4, 2005*

## Department of Lands Protection

4. There is hereby established a department to be known as the Tł̥chq Lands Protection Department.
5. A director of Lands Protection shall be appointed.

## Disposition

6. (1) No person may acquire an interest in Tł̥chq Lands except under this Law.  
  
(2) No disposition of an interest in Tł̥chq Lands is binding on the Tł̥chq Government until the instrument of disposition is executed by the Chief's Executive Council.

## Application

7. (1) Any person over the age of 19 or a corporation may apply in the prescribed form to the director for a disposition of Tł̥chq Lands.  
  
(2) The director shall maintain a register of applications made under this section.  
  
(3) No later than April 30, 2006, the Chief's Executive Council shall recommend to the Assembly regulations necessary to give effect to this law and provide for the management and protection of Tł̥chq Lands and the interests of the Tł̥chq throughout Mq̥whì Gogha Dè Nj̥t'èe.  
  
(4) Prior to the regulations referred to in (3) being enacted, no disposition of an interest in Tł̥chq Lands shall be permitted unless expressly approved as an exceptional case by the Assembly.

### Non-compliance

8. (1) If a person who holds a disposition under this law fails or neglects to comply with a term, covenant or stipulation set out in the instrument of disposition or imposed by the Chief's Executive Council pursuant to the disposition, the director may send a notice by registered mail, addressed to the person at their last known address, requiring the person to comply with the term, covenant or stipulation within 60 days after the date the notice is mailed.

(2) If the failure or neglect referred to in subsection (1) continues after the 60 day period, the Chief's Executive Council may, by order, cancel the disposition.

(3) If the Chief's Executive Council cancels a disposition under this section

- (a) the disposition holder's interest in the land and the interest of all persons claiming through that holder are terminated;
- (b) all improvements to the land become the property of the Tłchq Government; and
- (c) any money paid for or under the terms of the disposition is forfeited to the Tłchq Government.

### Abandonment or termination

9. (1) A person holding a disposition under this law may abandon and terminate the disposition by giving written notice to the director.

(2) On abandonment and termination of a disposition under subsection (1)

- (a) all improvements to the land become the property of the Tłchq Government; and
- (b) all money paid for or under the terms of the disposition is forfeited to the Tłchq Government.

(3) Unless the Chief's Executive Council otherwise directs, the holder of a disposition that is cancelled or abandoned and terminated must pay all money remaining due under the disposition and observe or perform all terms, covenants and stipulations of the disposition.

### Trespass on Tłıchǵ Lands

10. (1) If a person commits a trespass on Tłıchǵ Lands, the director may, on written notice to that person, do one or more of the following

- (a) require the person to cease the unauthorized trespass and restore the land to a condition satisfactory to the director;
- (b) require the person to pay to the Tłıchǵ Government a sum of money, considered by the Chief's Executive Council reasonable for the unauthorized occupation, possession or use for the restoration of the land;
- (c) seize, on behalf of the Tłıchǵ Government, any goods, chattels or other materials on Tłıchǵ Lands; or
- (d) require the person to remove any improvements made by or on behalf of the person on Tłıchǵ Lands and, if the person fails to comply within the required time, instruct the director to remove the improvements at the person's cost.

### Offences

11. (1) A person, commits an offence who without lawful authority

- (a) occupies or possesses Tłıchǵ Lands;
- (b) damages Tłıchǵ Lands or improvements on Tłıchǵ Lands;
- (c) harvests or damages forest resources, mineral resources, fish or wildlife on Tłıchǵ Lands;
- (d) construct a building, structure, enclosure or other works on Tłıchǵ Lands;
- (e) excavates Tłıchǵ Lands;
- (f) throws, deposits, dumps or in any way causes to be

placed on Tłchq Lands any glass, metal, garbage, soil or other material;

- (g) abandons on Tłchq Lands any vehicle or vessel; or
- (h) interferes with or removes a sign erected by, on behalf of or with the authority of the Tłchq Government on Tłchq Lands.

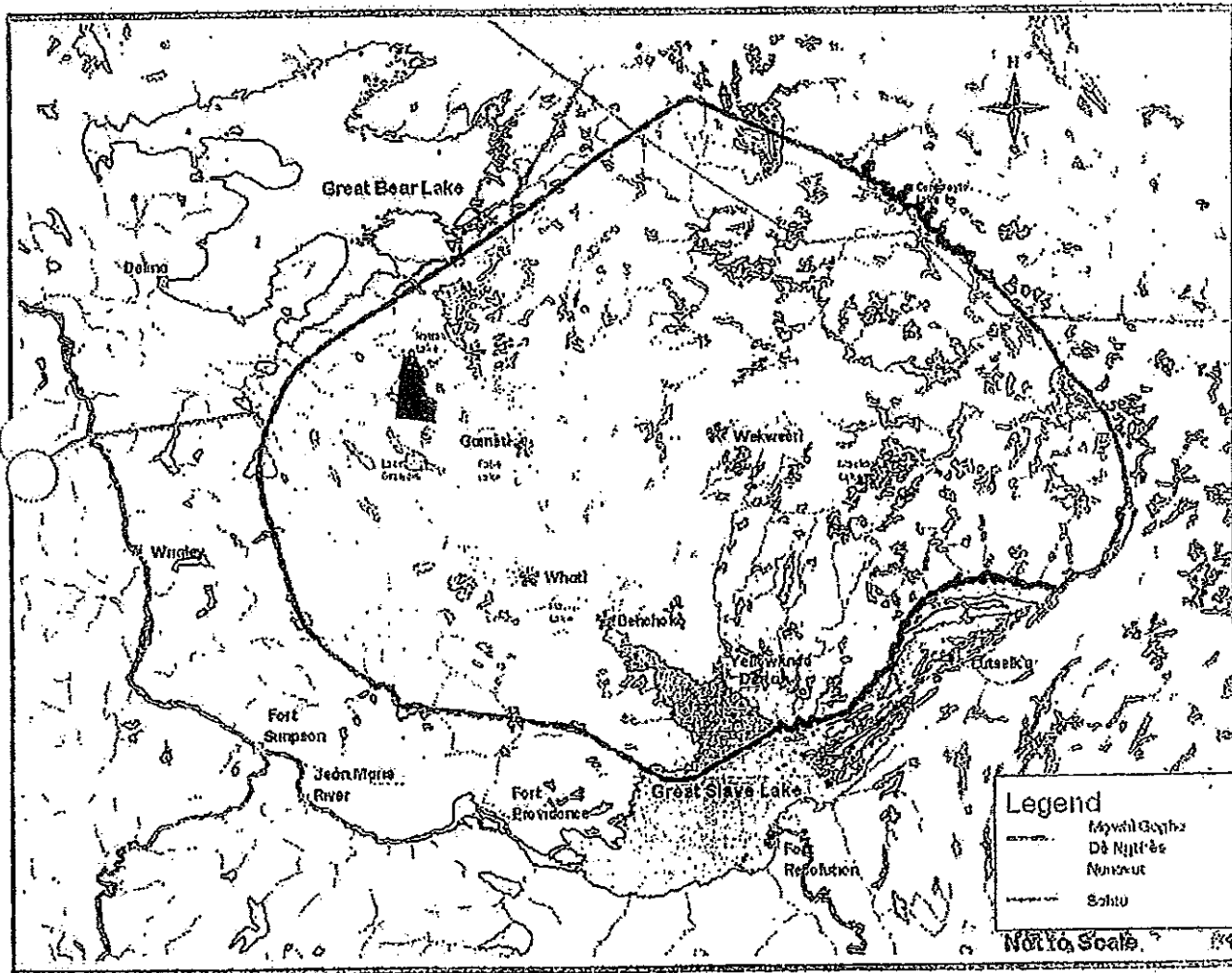
### **Right of Entry**

**12.** The director or his or her authorized representative may at any reasonable time enter any Tłchq Lands and premises to discharge any duty under this law.

### **Regulations**

**13.** The Assembly may enact regulations for the carrying out of the purposes and provisions of this Law.

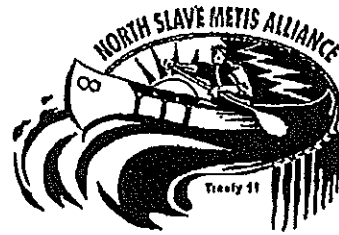
# SCHEDULE A MAP



Tłı̨chǫ Lands

# NORTH SLAVE MÉTIS ALLIANCE

PO Box 2301 Yellowknife, NT X1A 2P7



July 8<sup>th</sup>, 2010

Paul Mercredi,  
Environmental Impact Assessment Officer  
Mackenzie Valley Environmental Impact Review Board  
200 Scotia Centre.  
Box 938, 5102-50th Ave  
Yellowknife, NT X1A 2N7  
Email: [pmercredi@nveirb.ca](mailto:pmercredi@nveirb.ca)

This is Exhibit "M" referred to in the  
affidavit of Dr. John B. Zoe  
sworn before me, this 11<sup>th</sup>  
day of September 2010

A COMMISSIONER FOR TAKING AFFIDAVITS

Re: NSMA Comments on Tlicho Request for Ruling - EA 0809-004

The North Slave Métis Alliance (NSMA) provides the following comments in response to the Tlicho Request for Ruling.

It makes no difference to the NSMA whether or not Fortune has a lease from the Crown or a land access agreement with the Tlicho. The Aboriginal and Treaty Rights of the North Slave Métis community are constitutionally protected, and cannot be unilaterally affected by the Tlicho Agreement, by Crown issued leases, by land use plans, by development moratoriums, by mineral claims, or by project approvals. North Slave Métis Aboriginal Rights include the inherent right to determine and develop priorities and strategies for the development and use of our lands and other resources. Should the NSMA decide to pioneer and build roads or construct mines anywhere within our traditional territory, including across or on so-called Tlicho lands, we would be entitled to do so. Our Aboriginal Rights and Treaty Rights continue to exist as always, despite the Tlicho Settlement Agreement, and the North Slave Region continues to be an unsettled claims area for Métis, despite the Tlicho Agreement.

The Tlicho, in their Settlement Agreement, agreed to respect Fortune's lease as a pre-existing right, but the North Slave Métis have not agreed through any legal process to respect that lease as a pre-existing right. The boundaries of so-called "Tlicho Lands" are also of no relevance to our land and resource rights or to our inherent right of self-government since we were not involved in the negotiations that established them. The Tlicho Agreement recognizes, in section 2.7.1, that nothing in the Agreement can affect the Aboriginal or Treaty Rights of any other Aboriginal People.

It would be harmful to the NSMA to prevent a beneficial project, just as it would be harmful to the NSMA to allow a damaging project. We expect an impact benefit agreement with Tlicho and Canada if beneficial resource developments are prevented or put on hold as a result of

Ph: (867) 873-NSMA (6762)

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**the Tlicho Agreement, just as we expect impact benefit agreements with proponents and Canada if harmful projects are permitted.**

Disputed property rights are one of our significant concerns with regards to this proposed project, as mentioned in our October 22, 2009 comments on the TOR, during the scoping sessions, and in our February 28<sup>th</sup>, 2009 comments to the Wek'eezhii Land and Water Board.

**The NSMA relies on the MVEIRB, as the Crown Agency responsible for assessing the adequacy of Crown Consultation and Accommodation, to ensure that NSMA's Aboriginal and Treaty Rights are respected and protected in a manner consistent with the Honour of the Crown before rejecting or recommending approval of any proposed project within NSMA's traditional territory.**

All that being said, the NSMA questions whether Fortune would or would not be able to go ahead with its proposed project if a new on-land winter road is not built. Whether using the existing winter road or a new one on land, road transport would still only occur in the winter, while air transportation, or some other better alternative, would have to be used during other times. The difference in feasibility is not apparent at first glance. Fortune should be required to state categorically whether or not their proposal is feasible without any additional public road built. If it is feasible with the currently existing road, the environmental assessment should go ahead, and if not, the assessment should be cancelled.

**We firmly believe the scope of the currently proposed project should include use of the existing winter road as well as construction, operation and use of the access road needed to connect Fortune's property to the existing road. Alternative access roads to meet possible future public roads could be assessed now, or at a later date when the new public road gets closer to becoming a reality, if that ever happens.**

**The NSMA is strongly opposed to the assessment of Fortune's project without consideration of access. To do an environmental assessment of a portion of a project that cannot be completed without other projects being completed first is contrary to Federal policy, and harmful to the NSMA's interests.**

The Canadian Environmental Assessment Agency has issued an Operational Policy Statement, just recently (<http://www.ceaa.gc.ca/Content/D/A/C/DACB19EE-468E-422F-8EF6-29A6D84695FC/scope-eng.pdf>), which is attached for your review. Of note, the policy states that the project scope should generally be expanded to include any additional components that can be considered "connected actions", such as if one is automatically triggered by the other, whether one cannot proceed without the other, or whether both are part of a larger whole which if considered separately have no independent utility (pg 3).

We expect projects to be constructed promptly after approval. Legislation, regulatory procedures, economic conditions, technological practices and even environmental conditions may all change significantly if there are significant delays in construction. In particular, socioeconomic impact assessments can become rapidly outdated. For this reason, and not because of anything required by the Tlicho Agreement, the NSMA objects to any environmental

assessment until there is certainty with regards to the proposed project description, particularly the method of access.

Given the importance of road access to economic development and harvesting in general, as well as the current particularly sensitive status of endangered species (such as caribou and bison) and their road moderated interactions, we believe it would be exceptionally irresponsible to assess the environmental impacts of this project without considering its roads and access routes.

We hope that you find these comments useful in your deliberations. Please keep in mind that the NSMA has severe and chronic capacity issues, and has prepared these comments without the benefit of legal advice.

Sincerely,



Sheryl Grieve  
Environment and Resource Manager  
North Slave Metis Alliance  
Box 2301, Yellowknife. X1A 2P7  
Email: [enviromgr@nsma.net](mailto:enviromgr@nsma.net)

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[jason.steele@inac-ainc.gc.ca](mailto:jason.steele@inac-ainc.gc.ca)



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## Operational Policy Statement

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# Establishing the Project Scope and Assessment Type under the *Canadian Environmental Assessment Act*

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### Purpose

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The purpose of this Operational Policy Statement is to provide best practice guidance in the consistent application of section 15 of the Act for the establishment of the scope of project in relation to which an environmental assessment is to be conducted.

The Operational Policy Statement also clarifies when the requirements of the Act with respect to comprehensive studies are to be followed.

The Operational Policy Statement will be supplemented shortly by guidance on how the environmental assessment of a project scoped in accordance with the direction of the Supreme Court of Canada is to be conducted, and on how course of action decisions under section 20 or 37 of the Act with respect to such a project should be made.

### Background

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On January 21, 2010 the Supreme Court of Canada released its decision in *MiningWatch Canada v. Canada*. The issue addressed in the decision was whether the environmental assessment track (screening or comprehensive study) is determined by the project as proposed by the proponent or by the discretionary scoping decision of the responsible authority.

The decision also addressed the issue of how this discretionary authority to establish the scope of the project is to be exercised.

The Court concluded that the project as proposed by the proponent determines the assessment type, and that the scope of project is at a minimum, the project as proposed by the proponent.

The Court also underscored the value of the cooperative assessment provisions set out in the *Canadian Environmental Assessment Act* (the Act), as the appropriate means to minimize duplication with provincial processes.

The Supreme Court of Canada decision provides clarity and will contribute to a more timely overall environmental assessment and regulatory process.

This Operational Policy Statement is structured to guide the reader through the process related to establishing scope of project for the purposes of environmental assessment, and sets out key roles and responsibilities. This statement sets a foundation for the conduct of both screenings and comprehensive studies, and will be supplemented by additional guidance on an as needed basis.

## Application

This Operational Policy Statement replaces and supersedes all previous guidance documents released by the Canadian Environmental Assessment Agency on:

- how to establish the scope of the project to be assessed; and
- how to determine if the project is subject to the comprehensive study requirements of the Act.

The Operational Policy Statement applies to determining the scope of project for any project that may require an environmental assessment under the Act, and its regulations.

The Operational Policy Statement is primarily intended for responsible authorities<sup>1</sup>. It also provides useful guidance for all other federal authorities, proponents, provinces and other interested parties involved in the environmental assessment process.

## Principles

Decisions on the scope of project advance the purposes of the Act, i.e. the careful and precautionary identification of potential adverse environmental effects and means of mitigating them prior to final decision making, by a responsible authority that would enable a project to proceed in whole or in part. (See Annex 1)

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<sup>1</sup> For the purpose of this Operational Policy Statement, the reference to responsible authorities is meant to also include any other authorities referred to in sections 8 to 10.1 of the Act, as well as the Minister of the Environment in the context of an assessment by a review panel.

Project scoping decisions are made in a manner that allows for the consideration of the adverse environmental effects that may be associated with a development proposal as described by the proponent.

Given the concurrent federal and provincial constitutional responsibilities towards the environment, including with respect to environmental assessment, inter-jurisdictional cooperation is essential to ensure that high-quality environmental assessments are conducted in a non-duplicative manner. In this regard, wherever possible, federal-provincial cooperative mechanisms must be used to conduct the required environmental assessment (see: *Operational Policy Statement — Use of Federal-Provincial Cooperation Mechanisms in Environmental Assessments pursuant to the Canadian Environmental Assessment Act*).

## Approach

### **a) How to establish the scope of the project to be assessed**

At the earliest opportunity after a proposal comes to the attention of a federal authority, the authority must determine based on the proponent's proposal and any other available information whether an environmental assessment is required. (See: *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*)

Federal authorities, individually or collectively, are encouraged to develop project description guidance to assist proponents in identifying the information they should submit in order to allow for a timely determination as to whether the Act applies. Where such guidance has already been developed (for example through the

major projects regulatory improvements initiative — *Guide to Preparing a Project Description for a Major Resource Project: Dec 2008*), federal authorities and proponents should rely on it.

To take maximum advantage of the opportunities provided in the legislation for inter-jurisdictional cooperation, all federal authorities with a strong possibility of a trigger are expected to adopt an “automatically in” approach with respect to their environmental assessment obligations, rather than delaying engagement until they have certainty that an environmental assessment will be required. [“In until out” or “automatically in” approach]

The scope of project to be assessed, to be established pursuant to section 15 of the Act, must include at a minimum, and will generally coincide with, the project as proposed by the proponent. However, in some cases, the responsible authority might have to, in accordance with subsections 15(2) and 15(3) of the Act, enlarge the scope based on the particular facts and circumstances of the project.

Subsection 15(2) grants discretion to the responsible authority to combine related proposed projects into a single project for the purposes of assessment. Subsection 15(3) provides that an environmental assessment of a physical work shall be conducted in respect to every “construction, operation, modification, decommissioning, abandonment or other undertaking” in relation to the project.

Subsections 15(2) and 15(3) constitute an exception to the proposition that the project to be assessed will generally be the project as proposed by the proponent.

The Act assumes that the project will be represented in its entirety. However, and as noted by the Supreme Court of Canada, were a proponent to engage in “project splitting” by representing part of the project as the whole, or proposing several parts of a project as independent projects, the responsible authority might have to include all parts of the project in the scope of the project to be assessed.

In determining whether a project scope should be expanded beyond the project as proposed by the proponent, responsible authorities should consider how the additional components are linked to the project as proposed by the proponent. Where these components are connected actions, for instance:

- where one is automatically triggered by another;
- where one cannot proceed without the other; or
- where both are part of a larger whole and have, if considered separately, no independent utility.

The project scope should generally be expanded to include any such additional component(s). In making a final determination in that regard, it will be important to work in cooperation with any other jurisdiction involved in the assessment (e.g., a province) to ensure that all the components that may have to be included in the scope of the project have been identified and considered.

Project phasing is a common phenomenon in sectors such as infrastructure. In phased projects, details and timing of future phases may not be available and some phases may never be built as originally conceived. In the assessment of these types of projects, future phases, unless these are connected actions,

should be scoped as separate projects, but considered as much as possible as part of the cumulative effects assessment, taking into account the information that is available with respect to the final project as a whole (i.e., all the phases).

Based on the approach recommended in the preceding paragraphs, responsible authorities are expected to agree upon a single scope of project to provide the basis for a single scope of assessment and a single federal assessment process. (See: *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*)

#### **b) How to determine if the project is subject to the comprehensive study requirements of the Act**

A project will be subject to the comprehensive study requirements of the Act in either of the two following circumstances:

- I. the project, as proposed by the proponent (or any part of it), is described in the comprehensive study list; or
- II. the project as proposed by the proponent is NOT described in the comprehensive study list but the project as scoped (or any part of it), taking into account additional elements added to the scope of the project pursuant to subsections 15(2) and 15(3), is described in the list.

(See: *Comprehensive Study List Regulations*)

#### **c) Environmental Assessment Phase**

Following the scope of project determination, subsequent decisions are

required on the factors to be considered and the scope of those factors (the scope of the assessment). The scope of assessment is established in accordance with requirements set out in section 16 of the Act. (See:

*Operational Policy Statement — Establishing the Scope of the Environmental Assessment [currently under development]*)

#### **d) Roles and Responsibilities**

The following list focuses on certain roles and responsibilities and is not intended to be exhaustive.

##### *Responsible Authority*

- Apply the principle of “automatically in”
- Apply this Operational Policy Statement in determining the environmental assessment type under sections 18 and 21 of the Act
- Exercise responsibilities of Federal Environmental Assessment Coordinator as determined by the Act

##### *Expert Federal Authority*

- Provide advice, on request, to the responsible authority and provincial jurisdiction in conducting the assessment.

##### *Canadian Environmental Assessment Agency*

- Act as Federal Environmental Assessment Coordinator as determined by the Act
- Support the development of effective cooperative processes with other jurisdictions that advance the concept of one project-one environmental assessment
- Manage the environmental assessment process on behalf of the

responsible authorities for projects under the major projects regulatory improvements initiative.

The role of the Federal Environmental Assessment Coordinator is to coordinate the participation of responsible and federal authorities in the environmental assessment process, and to facilitate cooperation among them, and with provinces and other participants.

## Annex

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### Role of Scoping

Reaching a scoping decision pursuant to section 15 of the Act has historically been difficult and time consuming, particularly with respect to certain regulatory triggers. Scoping is a critical phase in the environmental assessment process. It serves to directly focus the environmental assessment and supports the subsequent analysis of environmental effects and the preparation of the environmental assessment report. Establishing the scope of the project is the first step in the scoping exercise.

Effective scoping early in the project planning stage significantly enhances the ability of the federal government to cooperate with provinces and minimize duplication. It can improve the efficiency, predictability and timeliness of the assessment and promote sound decision making by:

- ensuring the assessment focuses on the relevant issues and concerns;
- helping identify federal authorities and other jurisdictions that may need to be involved in the environmental assessment;
- enabling and supporting federal-provincial cooperation in the delivery

of the environmental assessment, in order to achieve the objective of “one project-one assessment”;

- helping to identify whether there are likely to be public concerns that need to be addressed in the environmental assessment;
- establishing, for all participants in the process, clear boundaries for the environmental assessment; and
- helping determine the appropriate level of effort for the environmental assessment.

### Related Guidance

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- *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements* (<http://laws.justice.gc.ca/en/c-15.2/sor-97-181/index.html>)
- *Federal Coordination: An Overview* ([http://www.ceaa-acee.gc.ca/Content/D/A/C/DACB19EE-468E-422F-8EF6-29A6D84695FC/Federal-Coord-Overview\\_e.pdf](http://www.ceaa-acee.gc.ca/Content/D/A/C/DACB19EE-468E-422F-8EF6-29A6D84695FC/Federal-Coord-Overview_e.pdf))
- *Federal Coordination: Identifying Who's Involved* ([http://www.ceaa-acee.gc.ca/Content/D/A/C/DACB19EE-468E-422F-8EF6-29A6D84695FC/Federal-Coord-Identifying\\_e.pdf](http://www.ceaa-acee.gc.ca/Content/D/A/C/DACB19EE-468E-422F-8EF6-29A6D84695FC/Federal-Coord-Identifying_e.pdf))

### Additional Information

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For more information on this OPS or on the requirements of the Act, please contact the Agency office in your region.

#### Head Office:

<http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=16C9C18C-1>

**Regional Offices:**

<http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=12D96EC7-1>

Additional Agency policies and guidance can be found on the Agency's Web site at: <http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=D75FB358-1>

**Disclaimer**

This guide is for information purposes only. It is not a substitute for the Act or any of its regulations. In the event of any inconsistency between this guide and the Act or regulations, the Act or regulations, as the case may be, would prevail.

To ensure that you have the most up-to-date versions of the Act and regulations, please consult the Department of Justice Web site at <http://laws.justice.gc.ca>.

**Updates**

This document may be reviewed and updated periodically by the Canadian Environmental Assessment Agency (the Agency). To ensure that you have the most up-to-date version, please consult the Guidance Materials page of the Agency's Web site at <http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=DACB19EE-1>.

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Alternative formats may be requested by contacting: [publications@ceaa-acee.gc.ca](mailto:publications@ceaa-acee.gc.ca).

**Comments and Feedback**

The Agency would appreciate receiving comments on the content of this guide and feedback regarding whether the guidance effectively meets your needs. Comments received will be considered for future updates.

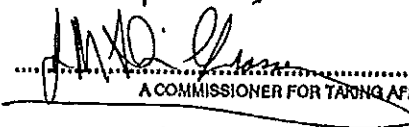
Please submit your comments to [training.formation@ceaa-acee.gc.ca](mailto:training.formation@ceaa-acee.gc.ca).

**PAPE SALTER TELLET**  
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T 416.916.2989 F 416.916.3726 www.pstlaw.ca

This is Exhibit <sup>"N"</sup> referred to in the  
affidavit of Dr. John B. Zoe  
sworn before me, this 21st  
day of September, 2010

July 15, 2010

Mackenzie Valley Environmental Impact Review Board,  
200 Scotia Centre, P.O. Box 938,  
Yellowknife NT X1A 2N7  
Attention: Vern Christensen, Executive Director  
(by email: <vchristensen@reviewboard.ca>)

  
A COMMISSIONER FOR TAKING AFFIDAVITS

Dear Sirs:

**Re EA 0809-004 of Fortune Minerals Ltd. proposed NICO Project -  
Tłı̨ch̨ Government Request for Ruling, filed May 28, 2010.**

This is the Tłı̨ch̨ Government's reply to the three submissions filed in response to the Tłı̨ch̨ Government's Request for Ruling ("Tłı̨ch̨ Request") - by Fortune Minerals Ltd. ("Fortune") on June 10, 2010, by the Department of Indian Affairs and Northern Development ("DIAND") on July 8, 2010 and by the North Slave Metis Alliance ("NSMA") on July 8, 2010.

**Fortune's Submission:**

Fortune's submission did not address the legal arguments on which the Tłı̨ch̨ Request is based.

But it does confirm four important facts: (1) that two industrial access roads across Tłı̨ch̨ Lands would be required before its proposed project could be feasible, (2) that it is counting on those being constructed by two different proponents - Fortune and the Government of the Northwest Territories - (3) that both those roads would require an access agreement with Tłı̨ch̨ Government, and (4) that no discussions are underway or planned regarding such an agreement for either road.

In every sense, therefore, those two roads are hypothetical.

Fortune's submission proposes to defer filing its Development Assessment Report ("DAR") for the EA until December, 2010, and to conduct access and road-related discussions in the interim with the Tłı̨ch̨ Government. It suggests that the Review Board therefore need not decide the Request for Ruling at this time.

With respect, the Request for Ruling needs to be decided because, as made clear in the Request for Ruling, from the Tłı̨ch̨ Government's perspective, it is premature at this time to try to resolve and negotiate all the issues and concerns raised by proposals for two new industrial access roads across Tłı̨ch̨ Lands.

Arthur Pape  
O.C., B.C., N.Y.T. & Ont. Bar

Richard B. Salter  
O.C., B.C., N.Y.T. & Ont. Bar

Jean Tillet  
O.C., B.C., N.Y.T. & Ont. Bar

Bertha Rabesca Zoe  
O.C. & N.Y.T. Bar



## FORTUNE MINERALS LIMITED

140 Fullarton Street, Suite 1902, London, Ontario, Canada N6A 6P2  
Tel. 519-858-8188 ~ Fax 519-858-8155

July 19, 2010

Vern Christensen  
Executive Director  
Mackenzie Valley Environmental Impact Review Board  
200 Scotia Centre  
Box 938, 5102-50th Ave  
Yellowknife, NT  
X1A 2N7

Dear Mr. Christensen

**Re: Information Concerning the Proposed Roads for the  
Environmental Assessment for the Fortune Minerals Limited  
Cobalt-Gold-Bismuth-Copper Project**

Fortune Minerals Limited (Fortune) is requesting that this letter be added to the public registry as information that can be utilized by all parties for the NICO gold-cobalt-bismuth-copper project (NICO Project) Environmental Assessment (EA) process.

It is our understanding that the Government of the Northwest Territories (GNWT) Department of Transport (DOT) is currently proposing, and has funding for, the realignment of the current winter road between Highway 3 and Gamètì so that it would be an all-land seasonal (extended winter) road route. The purpose of this road is to provide the communities of Whatì and Gamètì with a safer and more reliable winter transportation route for goods and services, and reduce the cost of living.

The access road required for the NICO Project would start 19 kilometres (km) north of the Whatì road junction and is not part of the road proposed by the GNWT DOT. This mine access road would be 27 km in length and would be built by Fortune after an access agreement has been signed with the Tłı̨chǫ Government.

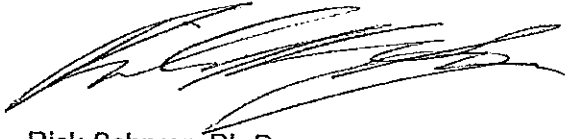
Fortune is proposing to upgrade the DOT all-land winter road route to an all-weather road from Highway 3 to the start of the NICO Project access road. This upgrade is subject to negotiations with the Tłı̨chǫ Government and the GNWT.

We hope this information will be of use to all parties participating in the EA process for the NICO Project.

This is Exhibit <sup>"0"</sup> referred to in the  
affidavit of Dr. John B. Zoe  
sworn before me, this 21st  
day of September 2010

JMR. Anson  
A COMMISSIONER FOR TAKING AFFIDAVITS

Sincerely,

A handwritten signature in black ink, appearing to read 'Rick Schryer', with several horizontal strokes extending to the right.

Rick Schryer, Ph.D.  
Director of Regulatory and Environmental Affairs  
Fortune Minerals Limited

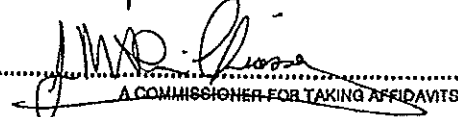
Cc Grand Chief Joe Rabesca

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546 Euclid Avenue, Toronto, Ontario M6G 2T2  
T 416.916.2989 F 416.916.3726 www.pstflaw.ca

This is Exhibit "P" referred to in the  
affidavit of Dr. John B. Zoe  
sworn before me, this 11<sup>th</sup>  
day of September 2010

July 23, 2010

Mackenzie Valley Environmental Impact Review Board,  
200 Scotia Centre, P.O. Box 938,  
Yellowknife NT X1A 2N7  
Attention: Vern Christensen, Executive Director  
(by email: <vchristensen@reviewboard.ca>)

  
A COMMISSIONER FOR TAKING AFFIDAVITS

Dear Sirs:

**Re EA 0809-004 of Fortune Minerals Ltd. proposed NICO Project -  
Tłı̨ch̨ Government Request for Ruling, filed May 28, 2010.**

Fortune made a further submission to the Review Board on July 19, after the deadline for such submissions and without permission of the Board. Tłı̨ch̨ Government could not have responded to that submission in its reply, which had to be filed on July 15.

The Review Board is therefore asked to consider this Tłı̨ch̨ Government reply to Fortune's latest submission, when considering the materials on file and rendering its decision.

It is respectfully submitted that Fortune's latest submission confirms the substantial uncertainties about the project, and in particular, the hypothetical nature of the roads required for the project. This is shown by the following:

First and most fundamentally, Fortune has consistently said that it is GNWT that would build the all season industrial highway required between Fortune's proposed mine spur road and Highway 3. The GNWT has been silent and never filed a submission in this proceeding. Fortune is not the proper party to make representations to the Review Board about that industrial highway, and the Board should not make decisions in reliance on this submission by Fortune.

Second, this latest letter talks about a proposal for a "realigned winter road," or an "all-land seasonal (extended winter) road route". Whether or not such a "realigned" winter road may be consented to by Tłı̨ch̨ Government and developed on some basis in the near or distant future, it would not meet Fortune's requirements, which are for an all-weather industrial highway.

Third, in letters of June 9 and 14, Mr. Rinaldi wrote on behalf of Fortune that the Tłı̨ch̨ Government's map showing Fortune's road proposals was inaccurate, and should not have included any reference to a proposed road to Gameti. Yet in this latest submission

Arthur Pape  
EC, NWT, NT & OBI Bar

Richard B. Salter  
Ost. EC, NWT & Yukon Bar

Jean Teillet  
Ost. EC, NWT & Yukon Bar

Bertha Rabesca Zoe  
Ost & NWT Bar

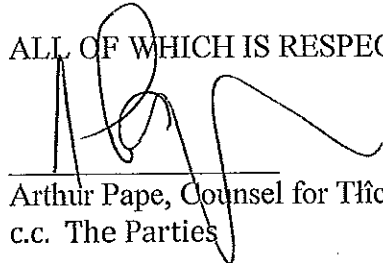
**PAPE SALTER TEILLET**  
BARRISTERS & SOLICITORS

by Mr. Shryer, Fortune now says the proposed “realigned” winter road would go to Gameti, and would be for the purpose of providing benefits for both Gameti and Whati.

Fourth, at the end of his letter, Mr. Shryer confirms that the GNWT road proposal on which it relies would be developed in **two** phases, starting with an all-land winter road, which would later be “upgraded” to an all-weather road. The letter further confirms that such a road would be subject to negotiations between Tłı̄ch̄ô Government and GNWT. Furthermore there is no discussion of the engineering or financial challenges for such road projects, or the resulting feasibility or likelihood of these road proposals.

Therefore Fortune’s latest submission fully confirms and supports the view in the submissions by DIAND and Tłı̄ch̄ô Government, that an effective EA could not be conducted in the present circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Arthur Pape, Counsel for Tłı̄ch̄ô Government  
c.c. The Parties

reviewboard.ca

This is Exhibit "0" referred to in the  
affidavit of Dr. John B. Ze  
sworn before me, this 21st  
day of September 2010.

Mackenzie Valley  
Review Board



  
A COMMISSIONER FOR TAKING AFFIDAVITS

Our File: EA0809-004

Aug 27, 2010

To: Distribution List  
EA0809-004  
Fortune Minerals NICO Project

Re: **Tlicho Government Request for Ruling:  
Review Board Ruling with Reasons for Decision**

Please find attached the Review Board's Ruling with Reasons for Decision on the Request for Ruling submitted by the Tlicho Government on May 28, 2010 regarding environmental assessment EA0809-004, Fortune Minerals Limited, NICO Project.

Sincerely,

Chuck Hubert  
Environmental Assessment Officer

Attachment



## REASONS FOR DECISION

**IN THE MATTER OF:** Environmental Assessment EA0809-004, NICO  
Project, Fortune Minerals Limited;  
**AND IN THE MATTER OF:** A Request for Ruling by the Tlicho Government  
dated 28 May 2010

### **INTRODUCTION:**

On May 28, 2010 the Tlicho Government (TCG) filed a Request for Ruling (Request) with the Mackenzie Valley Environmental Impact Review Board (the Review Board) in relation to the scope of development determined by the Board and set out in the Terms of Reference<sup>1</sup> (ToR) for the Environmental Assessment of the Fortune Minerals Limited's (Fortune) NICO project EA0809-004 (the "EA"). The Request asks the Board to rule: "that the Environmental Assessment is premature, and it will therefore be postponed and placed in abeyance until all essential components of the Proposal are included in applications accepted as complete by the Wek'eezhii Land and Water Board (WLWB)<sup>2</sup> in order that Part 5 of the *Mackenzie Valley Resource Management Act*<sup>3</sup> (MVRMA) can be properly applied to the Proposal."<sup>4</sup> The Request also asked that an oral hearing be scheduled to hear argument in relation to this matter.

The Review Board gave notice of the Request to the parties to the EA and indicated that any party wishing to respond should notify the Review Board accordingly. The parties were also asked to indicate whether they considered an oral hearing into the Request to be necessary. Fortune, the Department of Indian and Northern Affairs Canada (INAC) and the North Slave Metis Alliance (NSMA) advised the Review Board of their intention to participate and indicated that they did not consider an oral hearing necessary.

<sup>1</sup> Issued November 30<sup>th</sup>, 2009.

<sup>2</sup> The "current applications" for a Type A water licence W2008L2-004 and a Type A land use permit W2008D0016 do not include all of the components necessary for a complete project.

<sup>3</sup> S.C. 1998, c.25 as amended.

<sup>4</sup> May 28, 2010 TCG Request, p. 2

Fortune filed its written response June 10<sup>th</sup>, 2010 and INAC and NSMA were allowed to respond in writing by July 8<sup>th</sup>, 2010. A reply argument was received from counsel for TCG on July 15<sup>th</sup>, 2010. This matter then proceeded by consent of the TCG and parties without an oral hearing.

#### **THE FACTS:**

The facts set out by the TCG in its Request were not contested by the other parties. They are included among the relevant facts that follow:

The Request relates to two roads that are not part of the current applications which have been referred to the Review Board:

After careful consultation with interested parties and Tlicho communities, the Review Board made a decision on the scope of development, and set that out in a Terms of Reference (ToR) document issued November 30<sup>th</sup>, 2009. The ToR state that the scope of development for the EA includes the use by Fortune of the "all-land winter road" from Highway 3 to Whati and Gameti. Fortune has stated that this road will be built by the GNWT in the near future. The scope of development in the ToR does not include the construction of this road as it will not be constructed or operated by Fortune and serves a larger purpose than just the proposed mine.

Fortune also proposes to build a 27 km (approximate length) all season road from the mine site to the all-land winter road. This "anticipated" access road would be constructed and maintained by Fortune and therefore the Review Board included its construction and use by Fortune within the scope of development. There is as yet no application for construction of this road before the WLWB.

Fortune's initial applications to the WLWB respecting its project were made in 2007. Separate applications were filed for land use permits and water licenses for each of the three components that Fortune said would be required for its project to be feasible — the mine proper (W2007L2-0004), all-weather industrial access roads between the mine site and Highway 3, as well as an airstrip (W2007F0006), and construction and maintenance of a hydro transmission line (W200710007).

Fortune's Proposal is based on a mining lease for its claims block, which is on, and completely surrounded by, Tlicho Lands. Under that lease, which came into force before the effective date of the Tlicho Agreement, Fortune has an interest provided for in 18.1.1 of the Tlicho Agreement and listed in part 2B of the appendix to Chapter 18.

Fortune acknowledges that its project would not be viable without the construction and operation of all-land and anticipated all-weather access roads outside the area of its lease and across Tlicho Lands. The construction of such roads would require the consent of the Tlicho Government, pursuant to 19.3 of the Tlicho Agreement, and Fortune has received no such consent.

In response to its 2007 applications, the Chair of the WLWB informed Fortune, by a letter of April 24, 2008, that it was not eligible to apply for land use permits for activities that are to take place wholly or partially on Tlicho owned lands, without providing proof of an access agreement to exercise their right to cross those lands.

Fortune had no such access agreement, and did not dispute the WLWB's decision. Fortune then withdrew its applications. It subsequently re-configured them and submitted new applications to the WLWB on November 5, 2008. In those replacement applications<sup>5</sup> Fortune applied only for authorizations for components of its project that it could conduct within its claim block.

Instead of the original proposal for hydro-electric power, it now proposed using a diesel power plant to be located within the claim block. The proposed air strip was also moved to a new location within its claim block. And the all-weather industrial access roads and bridges that had been proposed for construction - outside the claim block and across Tlicho Lands - were excluded from the current applications.

The WLWB determined that Fortune was eligible to make the current applications and accepted them as complete, since no components of the reconfigured project required an access agreement respecting Tlicho Lands. The project was then referred to the Review Board by INAC and forms the basis for the EA.

The industrial access roads that are essential for a viable project were thus effectively removed from the project which was referred to the Review Board. The 2008 applications and project contain no substitute plan for transporting industrial materials, including machinery, fuel and ore, to or from Fortune's claim block.

It is now almost 18 months since Fortune re-configured its application. In that time, no proposal for industrial access roads across Tlicho Land has been put forward by Fortune or any other party. The Request states that neither the Proponent nor any other party has commenced discussions with the Tlicho Government respecting possible access agreements for industrial access roads.<sup>6</sup> In their June 10, 2010 response to the Request, Fortune states that they have made attempts to engage the Tlicho Government in discussions concerning an access agreement, but without success<sup>7</sup>.

During the entire period since 2007, a development moratorium has been in place on Tlicho Lands, pursuant to the *Tlicho Lands Protection Law*, enacted August 4, 2005, pending the conclusion of the Tlicho Land Use Plan and the development of resulting protective mechanisms and development standards. That land use planning process is currently underway, but not complete.

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<sup>5</sup> *Supra*, note 2.

<sup>6</sup> May 28, 2010 TCG Request, p. 3.

<sup>7</sup> June 10, 2010 Fortune Response, p. 3

## **THE ISSUES AND PARTIES' POSITIONS:**

The TCG submits that the EA is premature and that it should be postponed and placed in abeyance until Fortune can amend its project description to include all necessary components, in other words, until access arrangements are negotiated and the applications include the necessary access roads.

The problem in the TCG's view is that Fortune excluded two essential components of the project in its 2008 applications and the result is that the EA and the ToR set out for the development of a Developer's Assessment Report (DAR) are inconsistent with both the Ticho Agreement and the MVRMA.

The TCG also argues that the scope of development set out in the ToR is inconsistent with Part 5 of the MVRMA and that the ToR represent a jurisdictional error.

The TCG suggests a postponement of the EA which, in the Review Board's view, would be tantamount to an indefinite adjournment. Otherwise it submits that the Review Board must address the jurisdictional problems created by the ToR.

Fortune argues that no postponement is required and suggests that the Review Board properly interpreted its jurisdiction. INAC also argues that the Review Board properly scoped the use of the potential realignment of the winter road, as well as the physical works and activities required to construct an access road to the mine site, into the EA. The NSMA submits that the EA should include assessment of access to the Fortune mine site.

## **MATTERS TO BE DECIDED:**

In the Review Board's view, the TCG suggestion for a postponement cannot and should not be approved without also addressing the jurisdictional issues raised in its argument. To simply delay the proceeding as a means of avoiding a jurisdictional problem is not an acceptable outcome for any of the parties. Moreover, it is clear to the Review Board that an indefinite adjournment would be highly prejudicial to Fortune.

The company is in the process of preparing a DAR. It has already expended significant resources in this effort. The project was referred to EA in February 2009. The MVEIRB notes from the TCG's argument<sup>8</sup> that it too has expended significant resources considering Fortune's project. It is only fair to note, however, that the TCG has had more than ample opportunity to raise any concerns it might have had about this project earlier in the course of the EA.

The Review Board notes the following history of Ticho community and Government involvement in the scoping of the development and preparation of the ToR and work plan for the EA:

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<sup>8</sup> See page 2 TCG Request May 28, 2010.

- April 2, 2009: the Review Board requested that the parties provide written scoping comments. The TCG scoping comments were received June 1, 2009 with the TCG scoping comments further clarifying road issue received July 23, 2009.
- April 27, 2009: the Review Board holds a scoping session in the community of Whati.
- May 4, 2009: the Review Board holds a scoping session in the community of Behchoko.
- May 7, 2009: the Review Board holds a scoping session in the community of Gameti.
- Sept 15, 2009: the Review Board releases draft ToR and Work Plan and requests comments from parties. TCG provides comments on draft ToR Oct 22, 2009 and TCG provides comments on draft Work Plan Nov 6, 2009.
- November 2-3, 2009: the Review Board holds a scoping session in the community of Wekweeti.

On none of these occasions did the TCG raise the kinds of jurisdictional issues outlined in the Request.

- November 30, 2009: the Review Board issues its final Fortune ToR and Work Plan to the parties.

Now, six months after Fortune began work on the DAR in response to the ToR and Work Plan, the TCG has filed its Request (May 28<sup>th</sup>, 2010).

Considering this procedural history, the Review Board is of the view that an indefinite postponement of the EA would be unfair to Fortune. The Review Board is of the view that the TCG had over a year to raise the concerns set out in the Request. In fact, the TCG previously commented on the draft ToR and Work Plan without raising these concerns. It is the Review Board's opinion that an adjournment is not an appropriate remedy in these circumstances. Consequently, the Review Board has decided that it must also review the jurisdictional issues raised by the TCG and make a ruling on those issues.

#### **THE JURISDICTIONAL ISSUES:**

The TCG expresses its jurisdictional arguments as follows:<sup>9</sup>

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<sup>9</sup> See page 5 of the Request.

First, proceeding with the EA as proposed in the ToR would be inconsistent with the Tlicho Agreement and provisions of the MVRMA, and therefore outside the jurisdiction of the Review Board, for two reasons:

Because of the exclusion of the essential access roads from Fortune's applications, the Proposal as a whole is speculative or hypothetical. It is therefore not a "proposed development" within the contemplation of Part 5 of the MVRMA.

The ToR and the proposed EA ignore the fact that Fortune's Proposal could not be viable without industrial highway access across Tlicho Lands, and that authorizations to construct those could not even be applied for without an access agreement from the Tlicho Government. Instead the ToR characterizes those roads as "anticipated" components of the Proposal, and "assumes" that they will be constructed and therefore can be considered in the EA. These assumptions are inconsistent with the Tlicho Agreement, because they ignore the Tlicho Government's authority under that Agreement, to decide what happens on Tlicho Lands.

Second, the scope of the development, as defined in the ToR, is inconsistent with part 5 of the MVRMA, and therefore the proposed EA would be outside the mandate and jurisdiction of the Review Board, for two reasons:

Because the industrial access roads required by Fortune are not existing projects, or authorized for future development, or the subject of applications to the WLWB, they are speculative and hypothetical. Therefore the Review Board has no jurisdiction to "scope" into the development either the construction or the operation of the "spur road," or Fortune's "use" of an industrial highway to be connected to Highway 3.

Furthermore, because neither of those access roads has been already constructed, authorized or planned and included in an application, their location and related physical characteristics are unknown, with the result that their environmental and socio-economic impacts cannot be known or effectively assessed, as required by Part 5 of the MVRMA.

#### **THE REVIEW BOARD'S ANALYSIS OF THE JURISDICTIONAL ISSUES:**

##### **The First Jurisdictional Ground-**

The TCG argues that the Fortune project is not feasible as a result of the lack of an access agreement to the claim block and submits that this fact makes the NICO project as a whole "hypothetical or speculative". The TCG says that the Tlicho Agreement and the MVRMA do not authorize the Review Board to engage in EAs of such hypothetical projects.

The Review Board notes, however, that the definition of "development" in section 111 of the MVRMA reads as follows:

"development" means any undertaking, or any part or extension of an undertaking, that is carried out on land or water and includes an acquisition of lands pursuant to the *Historic Sites and Monuments Act* and measures carried out by a department or agency of government leading to the establishment of a park subject to the Canada National Parks Act or the establishment of a park under a territorial law. (emphasis added)

It would seem from this definition that a part of an undertaking, such as the elements of the NICO project included in the current applications, is indeed a development within the contemplation of the MVRMA.

Moreover, the WLWB reviewed Fortune's eligibility for a licence and permit at the time it received the current applications and decided that the applicant was eligible. Thereafter, INAC referred these applications to the Review Board for an EA. Section 126 of the Act is clear. It is mandatory for the Review Board to conduct an EA of a development referred to it by a regulatory authority. There was no issue raised by the TCG about the actions of INAC, which is clearly a regulatory authority under the MVRMA, and its decision to refer the development.

In the Review Board's view, proceeding to conduct an EA on an eligible project for which a valid referral has been received should not be perceived to be "disrespectful of the jurisdiction of the Tlicho Government under the Tlicho Agreement". The Review Board is required by law to proceed with this EA.

Further, it is the Review Board's opinion that the EA in no way affects or limits the TCG's jurisdiction or authorities.

As for the issue of access to Tlicho Lands, the Review Board is of the view that the INAC argument is more compelling. Section 19.3.1 of the Tlicho Agreement grants Fortune, as the holder of an existing right in an excluded parcel, a right of access to Tlicho Lands in order to exercise that right. Section 19.3.3 limits that right in certain circumstances, subject to the provisions of chapter 6 of the Tlicho Agreement. That chapter does not, however, provide the arbitrator or surface rights tribunal with the authority to deny access, rather it provides for an order setting the terms of access in the case of a dispute.

The Review Board agrees with INAC that section 7.5.10(c) of the Tlicho Agreement limits the authority of the *Tlicho Lands Protection Law* so that it cannot prevent a person with a chapter 19 access right from exercising that right. Likewise, while the Board accepts and understands the importance of the TCG land use planning process, it is clear that the plan cannot limit the decisions of the WLWB until such time as it is approved.<sup>10</sup>

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<sup>10</sup> See section 22.5.4 Tlicho Agreement which makes it clear that the plan only has effect upon approval.

Thus, on the first ground of the TCG argument the Review Board holds that proceeding with the EA is neither inconsistent with nor disrespectful of the Tlicho Agreement. The Review Board also finds that proceeding with the EA is both consistent with and mandatory under the MVRMA. In the Review Board's opinion the *Tlicho Land Protection Law* and land use planning process do not affect these conclusions.

### **The Second Jurisdictional Ground-**

The second basis for the TCG challenge of the ToR and the EA is that the Review Board does not have the jurisdiction to include hypothetical projects in the scope of a development under section 117(1) of the MVRMA.

Section 117(1) of the MVRMA makes it mandatory for the Review Board to determine the scope of the development in an EA, subject to guidelines made under s. 120 of the MVRMA. After making considerable effort to consult the TCG and the communities, the Review Board made the scoping decision set out in the ToR. The Review Board's *Environmental Impact Assessment Guidelines*, March 2004 (Guidelines) set out on page 28 the criteria which will be used to decide whether physical works or activities are accessory developments and should be included in an EA.

First, the construction of the access road, a road which is essential to the operation of the NICO development, can be characterized as a "part or extension" of the NICO undertaking. This is based on the definition of "development". Therefore, the access road construction falls under the definition of "development" for the NICO project. The "use" of the roads could also fall under the "development" definition as an undertaking or extension of an undertaking.

The Review Board's Guidelines also show how it determines what to include in the scope of a development:

In scoping the development, the Review Board will consider what is the principal development, and what other physical works or activities are accessory to the principal development.

Three criteria will be used to determine whether or not a physical work or activity is an accessory development, and therefore should be included in the development.

The first test is dependence: that is, if the principal development could not proceed without the undertaking of another physical work or activity, then that work or activity is considered part of the scoped development.

The second test is linkage: if a decision to undertake the principal development makes the decision to undertake another physical work inevitable, then the linked or interconnected physical work or activity will be considered part of the scoped development.

The third test is proximity: if the same developer is undertaking two physical works or activities in the same area, then the two may be considered to form one development. (p. 27-28) [underlining added]

The Board applied the Guidelines to help it determine the scope of development for the NICO development. The Review Board found that since the NICO development cannot function without the access road for transportation in and out of the site, that the access road should be part of the scope of development. The NICO development "depends" on the access road. Further, the access road is "linked" to the NICO development because the road has no purpose if it cannot connect to and allow Fortune to use the winter road. The road and the NICO development are also "proximate" because they are to be constructed in the same area. Therefore, the access road construction should be included in the scope of development.

The Board also has the authority to include the "use" of both roads in the scope of development for the NICO project. First, the "use" of the two roads can each be characterized as an "activity" that is "accessory" to the principal NICO development, as described in the Guidelines.

Thus the winter road's use should be part of the NICO scope of development based on the application of the same three criteria.

Finally, both roads were included in the scope of development because they are linked, both to each other, and to the NICO development. There is no reason to construct and use the access road if there is no winter road to connect to. The access road has no purpose for existence if it cannot link to the winter road. The winter road will likely have other purposes on its own, including providing transportation to Gameti and Whati.

Therefore in this case the Review Board decided to include both the construction and use of Fortune's anticipated all weather access road and the use by Fortune of the all land winter road from Highway 3 in the scope of the NICO development.

The TCG says that these roads are both hypothetical. That characterization is, however, mainly based on the fact that the TCG's agreement to permit access across Tliche Lands has not yet been granted. As was indicated in relation to the analysis of the TCG's first line of jurisdictional argument above, the TCG cannot refuse that approval.

As far as the anticipated access road goes, Fortune can and must provide all the necessary information about the location, design, construction, use and eventual abandonment of this road in its DAR. This analysis will provide a firm foundation for prediction of the impacts of that road as required by part 5 of the MVRMA.

The TCG argues that because neither of the access roads are built that their locations and related physical characteristics are unknown and their environmental and socio-economic impacts cannot be assessed. With respect, if this argument were accepted as presented, many

environmental impact assessments could never be conducted. It is not at all uncommon for EAs to include and assess activities which will not be specifically located and built until later. For example, in EA003-05 the Review Board assessed future oil and gas developments in the Cameron Hills without knowing the specific location of each well, pipeline or access road. Likewise with the Mackenzie Gas Project, an environmental impact review was conducted of a large proposed development for which hundreds of regulatory applications will follow if the review is favourable and approvals are given.

When the time comes for Fortune to make applications for the anticipated access road it will be constrained by the scope of the EA. If the road applications expand the scope of the development or significantly modify the development, those applications will be subject to screening and a second possible EA. This arrangement is set out in the *Exemption List Regulations*<sup>11</sup> (see Schedule 1 Part 1 s.2.1).

#### **CEAA Case Law on the Scoping of Developments-**

There is no MVRMA case law addressing the authority and discretion of the Review Board during the scoping process. The case law on the issue of scope of development and project splitting has largely arisen under the *Canadian Environmental Assessment Act*<sup>12</sup> (CEAA). It is important to consider s. 15(1) of the CEAA:

15. (1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by
- (a) the responsible authority; or
  - (b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority.

The section gives the RA and/or the Minister the discretion to determine the scope of the project. This is similar to the Review Board's discretion under s. 117(1) of the MVRMA. However, the CEAA case law is relevant to the interpretation of the Review Board's scoping discretion in the MVRMA context. The two most helpful cases are briefly reviewed below.

#### **A) *Bow Valley Naturalists Society v. Canada (Minister of Heritage)***

In the case of *Bow Valley Naturalists Society v. Canada (Minister of Heritage)*<sup>13</sup> the Federal Court of Appeal followed its decision in the Sunpine case. In relation to scoping under the CEAA, the Court referred to the Responsible Authority's Guide (now no longer used).

<sup>11</sup> SOR/99-13 as amended.

<sup>12</sup> S.C. 1992, c. 32

<sup>13</sup> [2001] F.C.J. No. 18, 2 F.C. 461 (2001) 266 N.R. 169, 27 Admin. L.R. (3d) 229, 37 C.E.L.R. (N.S.) 1 (FCA)[hereinafter *Bow Valley*]

The Court stated that the scope of a project under s. 15 of the CEAA "is normally limited to undertakings directly related to the proposed physical work, such as its construction and operation, and ancillary or subsidiary undertakings".<sup>14</sup> However, in relation to the judicial review of a decision taken on receipt of an EA, Justice Linden stated:

The Court must ensure that the steps in the Act are followed, but it must defer to the responsible authorities in their substantive determinations as to scope of the project, the extent of the screening and the assessment of the cumulative effects in the light of the mitigating factors proposed. It is not for the Judges to decide what projects are to be authorized, but, as long as they follow the statutory process, it is for the responsible authorities.<sup>15</sup> [underlining added]

This case stresses the importance of courts deferring to the RAs in their determination of the scope of a project.

#### **B) *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)***<sup>16</sup>

The applicants in this case, including the Coalition, applied for judicial review of DFO's decision on the scope of the EA of TrueNorth Energy's oil sands extraction mine. The project required a DFO authorization to destroy a fish-bearing creek in the area of the proposed mine. DFO determined that the scope of the project was the destruction of the bed and channel and the construction of diversions.

The applicants argued that DFO's scoping decision was too narrow because it "only covered the destruction of a fish habitat, and not the entire oil sands undertaking..." The Federal Court dismissed the application and found that DFO's decision to limit the scope of the EA to the destruction of the creek was reasonable and was legally appropriate. The Court stated that the destruction of the creek was a project in its own right.

On appeal, the Federal Court of Appeal affirmed the Trial Court's decision. The Court of Appeal stated at para 34:

If, as the appellants seem to argue, the subsection 35(2) trigger requires that the project's scope be the entire oil sands undertaking, a responsible authority would have no discretion under subsection 15(1) of the CEAA as to the scoping of a project for

<sup>14</sup> *Ibid.*, para 34 Q.L.

<sup>15</sup> *Ibid.*, para 78 Q.L.

<sup>16</sup> [2004] F.C.J. No. 1518; 2004 FC 1265;; 257 F.T.R. 212; 10 C.E.L.R. (3d) 55; 133 A.C.W.S. (3d) 1000. Affirmed. [2006] F.C.J. No. 129; [2006]; 2006 FCA 31; [2006] 3 F.C.R. 610; [2006] 3 R.C.F. 610; 265 D.L.R. (4th) 154; 345 N.R. 374; 55 Admin. L.R. (4th) 191; 21 C.E.L.R. (3d) 175; 145 A.C.W.S. (3d) 844; 2006 CarswellNat 170; Leave to Appeal Refused [2006] S.C.C.A. No. 197. (also called the *TrueNorth* case)

federal environmental assessment purposes. Any trigger would automatically require an overall federal environmental assessment of the entire proposed physical work. Nothing in the CEAA supports the view that project scoping under subsection 15(1) must always include the entire proposed physical work. [underlining added]

This suggests that when scoping a project that an RA could scope part of the physical work or indeed scope the project in phases and conduct the EA in phases too. However, it is also equally possible that the RA could decide to enlarge the scope of a project.

The Court discussed the discretion conferred on DFO by s. 15 of the CEAA as follows in paragraph 18:

The appellants' argument that the DFO was obliged to scope the project for environmental assessment purposes as the entire oil sands undertaking ignores the words of subsection 15(1), which empower the responsible authority, the DFO in this case, to determine the scope of the project. In *Friends of the West Country* at paragraph 12, this Court described the powers of a responsible authority under subsection 15(1) in the following words:

Subsection 15(1) is straightforward. It confers on the responsible authority ... the power to determine the scope of the project in relation to which an environmental assessment is to be conducted.

The appellants' approach would deprive the DFO of any discretion in respect of the scoping of a project contrary to the words of subsection 15(1). (underlining added)

The Review Board has a similar authority under s. 117(1) and its Guidelines to exercise its discretion when deciding what to include in the scope of development.

## Conclusion

Thus on review of the MVRMA, the Review Board's Guidelines and the CEAA case law on scoping it appears to the Review Board that the anticipated access road and the all land winter road were properly scoped into the NICO development and that the Review Board did so in a proper exercise of its s. 117(1) discretion under the MVRMA.

The Review Board therefore concludes that it had the jurisdiction to scope the roads into the NICO development pursuant to the MVRMA.

**DECISION:**

For the reasons set out herein, the Review Board finds that it would be unfair to Fortune Minerals Limited to postpone the completion of the NICO Environmental Assessment. The Review Board also finds that its scoping decision in this EA is not inconsistent with the Tlicho Agreement or the MVRMA and that it had the requisite jurisdiction to make its scoping decision.

The Tlicho Government's Request is therefore denied.

**MACKENZIE VALLEY ENVIRONMENTAL IMPACT REVIEW BOARD:**



Richard Edjericon  
Chairperson

August 25, 2010