



April 3, 2025

Chris Hotson, Regulatory Manager
Mackenzie Valley Land and Water Board
7TH FLOOR – 4922 48TH STREET
YELLOWKNIFE NT X1A 2P6

Dear Chris,

Response to Information Request
Rebecca Broderick – New Land Use Permit for Cabin Access Road

Thank you for the March 11, 2025, Information Request regarding Rebecca Broderick's eligibility for a land use permit for the proposed Cabin Access Road Project (MV2024F0030).

The GNWT's opinion is that provision of a land disposition associated with the proposed project (i.e., access road) is necessary to provide Rebecca Broderick with eligibility under s. 18(b) of the *Mackenzie Valley Land Use Regulations* (MVLUR). For clarity, a cabin/recreational lease does not provide or convey any rights of access; therefore, that type of disposition is not a basis for eligibility for a land use permit to construct an all-season access road. A non-exclusive license of occupation would be required and would provide the right to occupy the land where a proposed all-season access road is constructed. This disposition type would provide an applicant with eligibility under s. 18(b) of the MVLUR. Further legal considerations can be found in Appendix A.

While a highway access permit from the GNWT's Department of Infrastructure is not required to apply for a license of occupation, it is recommended the applicant first seek the advice from Infrastructure to ensure the proposed access point from the public highway is suitable and safe. Without receiving input from Infrastructure first, the applicant could go through the entire license of occupation process only to find out that an amendment is required because the access point is not suitable (e.g. needs to be in a different location or requires additional land). As the duty to consult applies to amendments, which has the potential to delay an applicant's construction plan.

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We hope this letter clarifies the GNWT's position on this topic. If you have any further questions, please do not hesitate to reach out.

Sincerely,

A handwritten signature in black ink, appearing to read 'V Stretch'.

Vanessa Stretch
Director, Land Management and Administration
Environment and Climate Change

A handwritten signature in blue ink, appearing to read 'Scott Stewart'.

Scott Stewart
Regional Superintendent, North Slave Region
Environment and Climate Change

Attachment

c. Distribution List

APPENDIX A: LEGAL CONSIDERATIONS

The GNWT notes that rights are actively being negotiated with First Nations in the region as part of the Akaitcho Land Claim Main Table. Without the issuance of a disposition, the MVLWB would need to make a determination whether Rebecca Broderick, through family member(s) being a member of Łutselk'e Dene First Nation (LKDFN), one of the Akaitcho Dene First Nations (ADFN), otherwise has a right to occupy the land under s. 18(b) of the MVLUR for the Cabin Access Road Project through: (i) a right to occupy under Treaty 8; or (ii) a court declaration that ADFN or LKDFN holds Aboriginal title to the lands at issue.

(i) A right to occupy under Treaty 8

LKDFN is a signatory to Treaty 8. Treaty 8 does not create any Indigenous-owned lands.

Treaty 8 does not provide signatory First Nations a right to construct access roads for vehicles to facilitate harvesting or for any other purpose. The Supreme Court of Canada concluded in *R. v. Sundown*, 1999 673 (SCC), [1999] 1 SCR 393, that historical numbered Treaties allow cabins that are consistent with certain criteria to be constructed as an activity reasonably incidental to the right to harvest thereunder. While the GNWT acknowledges that an appropriate modern means of access may also be incidental to the right to harvest under Treaty 8, no court decision has indicated that construction of an access road for vehicles, which provides a high degree of access, is reasonably incidental to the right to harvest under any numbered historical Treaty.

A lesser means of modern access, such as an all-terrain vehicle trail, may well be reasonably incidental to the right to harvest under Treaty 8. Even if a signatory First Nation applied for such access, it would still be important to ensure the access route avoids any conflicting land status, uses and occupancies. Issuance of a disposition to prevent such conflicts may still be necessary.

There is a further reason why the applicant, through family member(s) who are members of LKDFN, does not have a right to occupy without a disposition for an access road that is reasonably incidental to Treaty 8 harvesting rights. Without a disposition, for a right to occupy to construct an access road associated with a cabin to exist, the cabin would need to be consistent with the criteria set out in paragraphs 33 to 36 of *R. v. Sundown*. The most noteworthy criterion is that the cabin belongs to a First Nation as a whole and is available for any member to use. This cabin is a private cabin from which Rebecca Broderick and her family can exclude any LKDFN members. The cabin therefore does not meet this criterion and is not a cabin that is reasonably incidental to the exercise of LKDFN's collective right to harvest under Treaty 8.

(ii) A court declaration that ADFN or LKDFN holds Aboriginal title to the lands at issue

No court declaration that ADFN or LKDFN holds Aboriginal title to the lands at issue has been issued nor has ADFN or LKDFN sought a declaration. MVLWB does not have the authority to issue such a declaration.

A decision by the MVLWB concluding that eligibility exists for a land use permit under s. 18(b) of the MVLUR for the Cabin Access Road Project, without a disposition issued by GNWT-ECC, also presents broader legal implications:

1. GNWT-ECC's ability to require that Rebecca Broderick obtain a disposition from ECC will be pre-empted.
2. It will create a precedent in terms of what level of access is reasonably incidental to the right to harvest across the NWT.
3. Subsequently, as a result of the first two considerations, the GNWT will be unable to ensure that the routing of access roads does not result in conflicting land status, uses and occupancies. The following are examples of conflicting land status, uses and occupancies that could result:
 - the road goes through an important site for another Indigenous government or Indigenous organization;
 - the road goes through a leased site, preventing the lessee from having exclusive occupancy provided for under their lease;
 - the road goes through a contaminated site; or
 - the road goes through land that is reserved for a public purpose.
4. It will create a precedent that assesses whether a cabin is reasonably incidental to the right to harvest inconsistently with the criteria in *R. v. Sundown*, and is inconsistent with current law.

Further, the GNWT notes that as the MVLWB acts on behalf of the Crown, if the MVLWB broadly determines what access is reasonably incidental to the right to harvest, it will likely prejudice the GNWT's and Canada's negotiation of access clauses related to harvesting in lands, resources and self-government agreements or via any other means.

Distribution List:

Nathen Richea

Assistant Deputy Minister, Regulatory, Assessment and Authorizations
Environment and Climate Change

Janice Ziemann

Assistant Deputy Minister, Regional Operations
Environment and Climate Change