



March 12, 2025

Kathy Racher, Executive Director
Mackenzie Valley Land and Water Board
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BY EMAIL

Dear Kathy,

Monster Lake - Winter Road – Land Use Permit - Sambaa K'e First Nation - Information Request #3

Thank you for the February 27, 2025, Information Request #3 (IR3) regarding Sambaa K'e First Nation (SKFN)'s eligibility for a land use permit for the Monster Lake Winter Road Project (MV2024F0034).

The GNWT is of the opinion that provision of a land disposition associated with the project is necessary to provide SKFN with eligibility under 18(b) of the *Mackenzie Valley Land Use Regulations*. Legal considerations specific to the questions provided by the MVLWB can be found in Appendix A.

The Department would like to clearly identify to all parties that it is supportive of SKFN exercising its Treaty rights, while acknowledging the need to respect current legal requirements. It is important to note that the area of the project is currently subject to Land Withdrawal Order R-048-2014, established to support ongoing land claim negotiations. An amendment to the Land Withdrawal Order, requested by Dehcho First Nations, would be necessary to process an application for a disposition for this project.

The GNWT is committed to working with all parties involved to undertake this work in as timely a manner as possible.

Sincerely,

Robert Jenkins
Deputy Minister
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 Dehcho Land Claim Main Table. Without the issuance of a disposition, the MVLWB would need to make a determination whether SKFN otherwise has a right to occupy the land under s. 18(b) of the MVLUR for the Monster Lake Winter Road Project through: (i) a right to occupy under Treaty 11; or (ii) a court declaration that SKFN or Dehcho First Nations holds Aboriginal title to the lands at issue.

(i) A right to occupy under Treaty 11

SKFN is a signatory to Treaty 11. Treaty 11 does not create any Indigenous-owned lands.

Treaty 11 does not provide signatory First Nations a right to construct lengthy 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 11, no court decision has indicated that construction of a lengthy 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 a snowmobile trail, may well be reasonably incidental to the right to harvest under Treaty 11. 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.

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

No court declaration that SKFN holds Aboriginal title to the lands at issue has been issued nor has SKFN 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 Monster Lake Winter Road Project, without a disposition issued by ECC, also presents broader legal implications:

1. ECC's ability to require that SKFN 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

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:

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Dehcho First Nation

Chief Dolphus Jumbo
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