

Joe Acorn
Dehgh Alliance Society
Box 256
Fort Simpson, NT
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June 14, 2006

Dear Mr. Acorn,

Re: Motion for Ruling to file on the Joint Review Panel Public Registry draft documents relating to the Access and Benefits Agreement and an ancillary agreement on harvesting compensation, all of which are being negotiated between the Dehgh Alliance Society (DAS) and Imperial Oil Resources Ventures Ltd. (IORVL) on behalf of the Mackenzie Gas Project (MGP or Proponent)

The Joint Review Panel (Panel) has considered the Motion from the Dehgh Alliance Society (DAS) dated May 15, 2006 requesting that the Panel accept into evidence documents tabled during its presentation made at the Panel's hearing held in Fort Simpson Wednesday, May 10, 2006 (the "Motion"). The three documents, listed below as 1, 2 and 3, were prepared by Imperial Oil Resources and presented to DAS for the purpose of negotiation.

The Panel has also considered submissions on the Motion from:

Acho Dene Koe First Nation (May 23, 2006)
Alternatives North coalition (May 23, 2006)
Fort Providence Métis Council (May 23, 2006)
Imperial Oil Resources Ventures Limited (May 23, 2006)
North Slave Métis Alliance (May 23, 2006)

Finally, the Panel has considered the DAS rebuttal dated May 26, 2006.

The Motion from the DAS requested the Panel to issue a ruling that the following documents tabled by the DAS during its presentation to the Panel be accepted into evidence in the Panel's proceeding:

1. Draft Access Agreement;
2. Draft Benefits Agreement;
3. Draft Ancillary Agreement;
4. List of 18 issues critical to the DAS that are required to be satisfactorily addressed; and
5. Summary of administrative and other costs created by the agreements;

All documents were returned to the DAS pending resolution of this Motion. Two of the documents (listed as items 4 and 5 above) had been prepared by the DAS. In its May 15, 2006 letter to all Parties setting out the schedule for hearing the Motion, the Panel noted that, as the Proponent had not objected to the filing of items 4 and 5, the Panel would accept these

documents into the Public Registry and therefore the Parties need not address those items in their submissions. Items 4 and 5 will be posted to the Public Registry when submitted by the DAS.

The reasons set out by DAS in support of the Motion included:

1. Documents 1, 2 and 3 were provided freely to DAS by Imperial Oil at Inuvik in July 2005 as being the generic form of those documents being provided to each region in the Mackenzie Valley, which Imperial Oil intended to be the model for the agreements to be negotiated with each region. No conditions of secrecy were imposed by Imperial Oil in the distribution of these documents to the DAS.
2. The DAS was not asked by Imperial Oil, nor did the DAS volunteer or agree, to receive documents 1, 2 and 3 in confidence. Nor has DAS agreed in any negotiation sessions with Imperial Oil to keep the documents confidential. In fact, the DAS has consistently advised Imperial Oil that the DAS would not be keeping these documents confidential.

In addition the DAS pointed out that the status of the documents they sought to be placed on the Public Registry differed from those discussed with the K'ahsho Got'ine District Land Corporation in an earlier hearing and that it was important for the Panel to satisfy itself that the mitigation of impacts of the MGP on the people and lands of the Dehcho were being addressed in access, benefit and ancillary agreements.

The DAS also stated that in order to support its recommendation “that access, benefits and harvester compensation agreements are required with the Dehcho before the MGP may proceed” the Panel, in the DAS’ view, needs to understand “what is being discussed in the agreements and why they are necessary to mitigate impacts upon the Dehcho”. According to the DAS, two significant impediments standing in the way of the DAS achieving their desired terms are

- refusal by IORVL to concede that they have a legal requirement to enter into substantive agreements with the Dehcho. This, say DAS, is witnessed by a condition subsequent in the draft access agreement that “the Dehcho must demonstrate that they have “an aboriginal, treaty, or beneficial right” in and to their lands.”; and
- refusal by the Government of Canada “to concede that the Dehcho people have these rights.”

Acho Dene Koe First Nation, Alternatives North coalition, Fort Providence Métis Council and the North Slave Métis Alliance were in support of the Motion. Alternatives North coalition and the Ft. Providence Métis Council were of the view that

- the Panel has a responsibility to identify and recommend ‘measures that are technically and economically feasible and that would mitigate any significant adverse impact of the project’;
- the Panel has a responsibility to consider all relevant information that contributes to identifying and recommending mitigating measures – whether inside or outside these agreements;
- the MGP has the same duty and obligation to enter into access and benefits agreements with the Deh cho as with all other Aboriginal groups within project area; and

- If the project is approved, these agreements must be negotiated and signed before the project proceeds.

The Acho Dene Koe First Nation, the Ft. Providence Métis Council and the North Slave Métis Alliance were of the view that the Proponents have not shown that there is any proprietary information in the offers it has made or that any party will suffer prejudice as a result of the docs being filed on the Public Registry.

The North Slave Métis Alliance addressed the notion of confidentiality in the context of their own experiences with Impact Benefit Agreements and observed that secrecy “creates a potential for inequality, competition and jealousy between and within Aboriginal groups”; prevents “Canada from fulfilling the Crown’s fiduciary duties, including the Duty to Consult and Accommodate or Compensate”; and prevents regulatory bodies from fulfilling “their section 14 (4) Waters Act responsibilities”. The NSMA claims that “confidentiality limits the options for pursuing a remedy” if there are defaults in an agreement and, “if a project is allowed to proceed before the agreements are signed, Aboriginal organizations may have significant difficulty ensuring a satisfactory agreement is in fact signed.”

IORVL opposed the Motion. In its submission on the Motion, IORVL stated that it had provided the Draft Access Agreement and Draft Benefits Agreement and the Ancillary Agreement to the DAS, with a cover letter addressed to Chief Keyna Norwegian dated July 19, 2005 and August 17, 2005 respectively, that had been clearly marked "Without Prejudice". IORVL also stated that

Imperial's intent to keep the Draft Agreements confidential is evidenced by the "without prejudice" notation placed on the July and August 2005 cover letters. Moreover, it has been clear since the outset of discussions between Imperial and DAS that Imperial intended the Draft Agreements, and any subsequent negotiation of terms of the Draft Agreements, be kept confidential.

... Imperial acknowledges that the DAS expressed concerns regarding the confidentiality restriction but Imperial understood the DAS's concerns to stem from the fact that the DAS wished to communicate the contents of the Draft Agreements and subsequent negotiations to its community. In response to this concern, Imperial clarified that it did not, in any way, intend to prevent the DAS negotiators from communicating the contents of the Draft Agreements with Dehcho community members. This position was outlined by Mr. Ottenbreit at Fort Good Hope on April 12, 2006 in relation to the Sahtu region and agreements. See: transcript volume 23, page 2149, line 4 to 2150, line 13. At no time prior to the Fort Simpson General Hearing held on May 10, 2006 was Imperial advised that the DAS wished to file the Draft Agreements with the JRP.

Imperial understands that the DAS want, and need, to share the contents of the Draft Agreements and subsequent negotiations with community members, but Imperial has always required that the Draft Agreements remain confidential in relation to all other parties. In the present situation, Imperial submits that the DAS effectively agreed to respect the confidentiality of the Draft Agreements when they were initially provided to the DAS under cover of "without prejudice" communications, when Imperial made it clear that negotiation of the access and benefits agreements should remain confidential and when negotiations subsequently ensued between Imperial and DAS. The DAS should

not be permitted to now argue that it never accepted Imperial's imposition of confidentiality.

IORVL goes on to argue that the Draft Agreements would not provide any assistance to the JRP, that they

...are not required by the JRP to complete its environmental assessment of the Project and that “the volumes of material filed in the MGP’s Environmental Impact Statement, additional Information Report, Responses to Information Requests and testimony at hearings is sufficient for the JRP to assess the potential impacts of the MGP and available mitigation measures. Detailed information regarding potential socio-economic impacts of MGP and commitments made to mitigate such impacts has already been provided in the EIS and in, for example, the Revised Socio-Economic Commitments Table and Preliminary Socio-Economic Management Plan Framework submitted to the JRP in August 2005. See: Exhibit J-IORVL-00321 and J-IORVL-00323.

IORVL questioned the probative value of filling the Draft agreements because they are almost a year old and “are not reflective of the current position of Imperial or the DAS due to subsequent negotiations.” IORVL suggests that if the JRP were to receive the Draft agreements they might “risk becoming an arbitrator of commercial negotiations between Imperial and the DAS” and states that “the JRP has not been constituted to act as an arbitrator of a dispute as to what terms ought to be included in commercial agreements which may be entered into by Imperial and the DAS.”

In its rebuttal, the DAS alleges that “Imperial tries to confuse matters by falsely implying that “Without Prejudice” means “Confidential.” DAS clarifies its own understanding of the difference between the two concepts of “Without Prejudice” and “Confidential” when marked on a document.

“Without Prejudice” and “Confidential” are two separate and distinct concepts. “Without Prejudice” simply means that if an offer is extended and negotiations subsequently break down, any would-be commitments cannot be used against the party having made the offer which was subsequently withdrawn or lost through a breakdown in negotiations.

The DAS continues to stress that its cooperation in negotiations is without prejudice to the Dehcho Process. While we agree that the draft agreements were provided to the DAS on a “without prejudice” basis, that has no bearing or relevance to this question of confidentiality and there is nothing in that position that would impose confidentiality on anyone. In fact, Imperial’s July 19th, 2005 letter (attached) makes absolutely no mention of confidentiality as a condition of the DAS’ receipt of these documents.

The DAS contrast the desire of Imperial to have negotiation of Access and Benefits Agreements held in confidence with the “open, non-confidential process for the far more important Dehcho Process”. It questions the benefit of filing a mere Table of Contents for an Access Agreement and a Benefits Agreement as has been undertaken by IORVL and contests

Imperial’s suggestion that it is not within the JRP’s terms of reference to address access, benefits and harvesters issues and that its responsibility is to satisfy itself as to the matters raised based on the information in the EIS and other specific documents, but not these agreements, is an affront to the JRP. ...The JRP cannot allow them to rely upon access and benefits agreements as part of the mitigation of project impacts in the EIS and yet fail

to provide the details of that mitigation that allows Imperial to conclude “no significant impact”.

DAS goes on to state

If these agreements are not placed on the public registry for the use of the JRP and other parties in assessing the impacts of this project, then the JRP has no choice but to give zero weight to each and every instance in the EIS and other documents where these agreements are being touted as impact mitigation and all of Imperial’s “no significant impact” conclusions in these instances must be considered by the JRP as unproven.

On this point DAS also states

Imperial does not seem to appreciate that if Imperial continues to take the position that they need not negotiate in good faith with the DAS, it leaves no alternative but for the DAS to seek a recommendation from the JRP that access, benefit and traditional harvesters issues be addressed in the decision process. Either we start with what would be on the table if it were not without prejudice, or we go through everything that needs to be addressed in the access and benefits agreements (if there were any), and ask the JRP to recommend acceptance of those commitments as a condition of approval.

The DAS state that they have been told by the Imperial negotiator that IORVL “is meeting with the DAS even though their position is that they do not have to” and that the belief of the DAS is that

...what Imperial really means in their claim that negotiations be without prejudice, is that they’ll negotiate with the DAS, but if it turns out they do not have to because Canada will give them access to the Dehcho Territory without regard for the Dehcho, then they may renege on any commitments they might otherwise have been prepared to make toward the Dehcho.

The DAS disagree that the Access, Benefit and Harvesting agreements are “commercial agreements” and assert that they are

...public agreements between the Dehcho aboriginal governments and a company wanting to work on lands within the political jurisdictions of these aboriginal governments. The Dehcho aboriginal governments have the right and obligation to ensure that companies that want to work on their lands do so in a safe manner that not just protects the environment but also provides benefits to the people. This can best be achieved through the negotiation of project agreements.

As for the notion of adjudication of rights, the DAS states that it has not required and is not requesting that the JRP or anyone else adjudicate the terms of access to the Dehcho Territory.” They state that

...access, benefit and harvester compensation agreements must be in place in the Dehcho before the project is allowed to proceed and, in the absence of a commitment by the proponent to put binding agreements in place before the project proceeds, the DAS seeks a condition to that effect in the JRP’s recommendations. Filing these documents is essential for the DAS to fairly explain and justify our position on this matter to the JRP.

DECISION

IORVL's letter to the DAS dated July 19, 2005 referred to "benefits agreements (sic) and an access agreements (sic)" as being enclosed and is stated to be "Without Prejudice".

The Panel is not persuaded that the words "Without Prejudice" alone are sufficient to attach confidentiality to the relevant documents. The Panel does, however, accept that IORVL intended that the Draft Access Agreement and the Draft Benefits Agreement would be kept confidential. Indeed, the DAS acknowledged in its evidence before the Panel in Fort Simpson (Tr. p. 2389, at lines 10-16) that IORVL had sought to impose confidentiality restrictions "from the very start" of negotiations. (The IORVL letter of July 19, 2005 states: "We are currently drafting an ancillary agreement... We will forward this agreement to you when it is available." It is not clear when, or the circumstances in which, the Draft Ancillary Agreement was provided by IORVL to DAS. The Panel will assume for present purposes that the same intention on the part of IORVL with respect to confidentiality also extended to the Draft Ancillary Agreement.)

On the other hand, there is no conclusive evidence before the Panel that the DAS accepted any confidentiality restrictions. Indeed, DAS testified to the Panel (Tr. p. 2389, at lines 15-16) that "we've never accepted any of the confidentiality restrictions they've tried to place on our negotiations." At the same time, the DAS testified (Tr. p. 2383, at line 38) that "the negotiations between ourselves and Imperial at this stage are confidential." This suggests that the DAS has accepted at least some degree of confidentiality with respect to its negotiations with IORVL.

In the circumstances, the Panel is unable to determine whether the documents were received by the DAS on condition that they would be held in confidence.

The key question for the Panel, however, in determining whether the documents should be admitted in evidence is: "Would the documents have probative value in addressing matters within the Panel's mandate?" Would they, in other words, assist the Panel?

At the heart of this question is the role that access and benefits (and related ancillary) agreements may play as mitigation measures with respect to the MGP. Obviously, such agreements are relevant to the Panel's assessment of some mitigation measures. Indeed, the Proponent has itself relied on the agreements for this purpose. The Panel does need to have sufficient details on the contents of these agreements to support any conclusions with respect to the significance of impacts, but reviewing the agreements themselves is not the only means by which the Panel may be able to satisfy itself in this regard. The Panel accepts the DAS argument that IORVL cannot "rely upon access and benefits agreements as part of the mitigation of project impacts and yet fail to provide the details of that mitigation that allows Imperial to conclude 'no significant impact'." That proposition, however, begs the questions of how much detail and whether reviewing the agreements themselves is necessary in order to obtain such detail. The Panel will continue to address these questions throughout the remaining hearings and in its final report.

The issue before the Panel in ruling on the present DAS motion, however, is not whether concluded access and benefits agreements should be admitted into the Panel's record, but whether draft "agreements", prepared and offered unilaterally by one party to a negotiation, should be so admitted. In its submission, the DAS states that "the JRP needs to know more than that an item was addressed –

it needs to know how it was addressed or, more to the point, how it will be addressed in the Dehcho Territory” (*emphasis added*). In the Panel’s view, unilateral drafts that, in IORVL’s submission, “are not reflective of the current position of Imperial...” (and to which there is no evidence the DAS would agree) would be of no assistance in addressing this question.

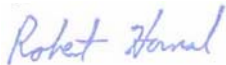
The DAS also submitted that it has

...no choice but to press the JRP to include in its recommendations that access, benefits and harvester compensation agreements are required with the Dehcho before the MGP may proceed. The DAS cannot fairly or reasonably make this case without putting these draft agreements before the JRP such that you may understand what is being discussed in the agreements and why they are necessary to mitigate impacts upon the Dehcho.

The Panel accepts that the Dehcho must be able to fairly and reasonably make its case that certain agreements are required with the Dehcho before the MGP may proceed. Again, however, the Panel fails to see how a draft, unilateral “agreement”, which is not accepted by one party as reflecting the current state of negotiations, would be of any assistance in this regard.

The Panel has concluded that the Draft Access Agreement, the Draft Benefits Agreement and the Draft Ancillary Agreement would have no probative value in addressing the issues within the Panel’s mandate that the DAS wishes to pursue. The Motion is denied with respect to these three draft agreements.

Sincerely,



Robert Hornal
Joint Review Panel Chair