NORTH SLAVE METIS ALLIANCE

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facsimile transmittal

To:	**Glenda Fratton**	**Fax:**	867 766 7074
From:	Kris Johnson	**Date:**	April 25, 2003
Re:	NSMA response to De Beers' Preliminary and Jurisdictional Issues	**Pages:**	8 (including cover)
CC:			

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COMMENTS:

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Mackenzie Valley Environmental Impact Review Board
Box 938, 5102-50th Ave.,
Yellowknife, NT
X1A 2N7

April 25, 2003

Attn: Glenda Fratton,

Re: NSMA response to DeBeers' submission on Preliminary and Jurisdictional Issues

Dear Glenda,

Please find attached the NSMA response to DeBeers' submission on Preliminary and Jurisdictional Issues.

Yours truly,

Kris Johnson
Land & Resource Coordinator
North Slave Métis Alliance

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April 25, 2003

THE NSMA's RESPONSE TO DEBEERS CANADA'S SUBMISSION ON PRELIMINARY AND JURISDICTIONAL ISSUES IN THE SNAP LAKE DIAMOND PROJECT ENVIRONMENTAL ASSESSMENT

1. The NSMA maintains all the submissions made in its original written submission of April 16, 2003.

2. The NSMA has established both breaches of procedural fairness and a failure to consult and accommodate by Government and DeBeers. This EA process must be adjourned until these matters are remedied or any decision by the MVERIB and the Minister will be void.

Procedural Fairness

3. DeBeers has responded selectively to the breaches of procedural fairness identified by the NSMA. The NSMA maintains all the concerns it originally raised.

4. Each of the examples noted by the NSMA would be enough to affect the validity of the EA process by itself. Taken together, they demonstrate procedural problems exist throughout the EA process.

5. The NSMA wishes to note that they are not an "intervener" as suggested by DeBeers. They are a "directly affected party" and a "first nation" as defined in the MVRMA. The North Slave Métis have constitutionally protected Aboriginal rights that are affected by this process. The NSMA's rights to procedural fairness must be viewed from that context, not from the context of the rights of an intervener.

6. The requirement of procedural fairness should also take into account:

    a. If the Minster continues to refuse to meet his duty to consult and accommodate, this EA is the only legislated process available to affected Aboriginal Peoples.
    b. The decision being made by the MVEIRB is extremely important and has wide ranging impact. The MVEIRB's recommendation could, potentially, lead to the approval of the entire project.
    c. The duty to consult and accommodate cannot be ignored when the Board assesses requirements of procedural fairness. Inadequate consultation may require greater procedural fairness or a unique Aboriginal process.
    d. The MVERIB's legislation and procedures create an expectation of a high level of fairness and consultation in the process.

e. The project, and therefore the EA, affects the Aboriginal rights, Treaty rights and title of the North Slave Métis people. It affects our people's use of the land and resources in the North Slave Region. It may affect the animals and fish we live on and the water we rely on. It potentially affects preservation of our heritage and certainly affects our children's futures in our traditional lands. It is difficult for us to think of a decision that could be more important to our people.

7. DeBeers states this is not an adversarial process. Regardless of the best intentions of DeBeers, the MVEIRB has a duty to ensure the requirements of procedural fairness are met. To date, the MVEIRB has not shown a willingness to conduct the process in a manner that meets minimum requirements of fairness. Further, there has not been a willingness to view the Snap Lake Project or the EA process from an Aboriginal perspective.

8. A minimum requirement of procedural fairness is that the NSMA have a fair chance to know the relevant information put before the MVERIB and a fair chance to respond.

9. This minimum requirement has not been met. Examples are set out in our April 16, 2003 submission. One example is the assurance given to the parties (one example being the September 5, 2002 meeting) that the MVEIRB would only base its decision on information filed in the Public Registry. However, the MVEIRB has and will receiving relevant reports and information from its staff and consultants that will not be filed in the Public Registry. All parties will be completely denied an opportunity to review and respond to information the MVEIRB is requesting to specifically assist it in reaching a decision.

10. The timelines in the process and volume of information received in recent months have made it impossible for the NSMA to have any meaningful opportunity to review, understand and respond to the information. The problem is compounded by the breaches of the duty to consult and accommodate.

11. A conservative list of the events and information received since the technical sessions includes:

a. Technical reports from parties;
b. At least 24 additional technical submissions since mid February 2003;
c. 4 technical report addendums (received approx. 6 weeks pre-hearing);
d. Minutes and transcripts of the technical sessions;
e. Minutes of at least 9 technical follow up meetings;
f. Preparation for and attendance at the Prehearing Conference;

g. An issue synopsis table (received approx. 1 mo. Pre-hearing);
h. A Board site visit on extremely short notice and provision of minutes of the visit (site visit approx. 2 weeks pre-hearing, notes 1 week pre-hearing);
i. Additional technical comments by DFO (received April 2/03);
j. An average of 2 or 3 communications from the MVERIB or the parties almost every day for the last few months;
k. Preparation and review of submissions on the preliminary / jurisdictional issues;
l. Dogrib Public Registry submission (13 days pre-hearing);
m. Hearing submissions from all parties (11 days pre-hearing);
n. NRCAN's diffusion report (11 days pre-hearing);
o. Responses from DeBeers and GNWT to MVERIB's additional questions (some less than 10 days pre-hearing);
p. Outstanding issues document by Ellis Consulting (6 days pre-hearing);
q. Hearing submissions from DeBeers (received 2 days before the hearing); and

r. Final posting of hearing materials this weekend (2 days pre-hearing).

12. The parties were told at the March 26, 2003 prehearing conference that MVERIB is not accepting major new technical filings. However, filing of substantial technical information has continued over the past month.

13. Examples of key evidence that are not to be available until after the hearing and that the parties will not have adequate or any time to comment on before the Public Registry closes:

a. Results of the elder's caribou meeting (May 12, 2003);
b. Results of the Esker visits (June 16, 2003);
c. Results of the NSMA TK study (undetermined – certainly late 2003);
d. Results of the IBA's and SEA negotiations (June 2003 or later);
e. Results of the Environmental Agreement negotiations (2004);

14. The MVEIRB commented on the Diavik process in "Views on the Diavik Diamond Project Comprehensive Study Report" in October 1999. The MVERIB called for a clear and consistent process that would allow for meaningful participation of Aboriginal groups. The MVERIB should now apply that standard to its own process.

15. In that same document, the Board criticized the Diavik process for not being realistic about the parties' capacity to respond and raised concerns about exhausting resources. The MVEIRB should now ensure their own process is not jeopardized by the same problems.

16. We cannot comment fully on the cases DeBeers has listed for the Board. We do not know if the facts of those cases are similar enough to be useful. The dates of many of the decisions suggest that they may have been decided before some of the most important cases on Aboriginal rights and the duty to consult.

17. We do not have the resources to provide the MVERIB will a comprehensive legal submission. We ask the MVEIRB to consider the points raised in these submissions and to inform itself fully on the law regarding procedural fairness before reaching a decision.

Duty to Consult

18. DeBeers' characterization of fiduciary duties to Aboriginal people and of the content of the duty to consult and accommodate seriously understates the vibrant rights the Courts have recognized in recent years.

19. The NSMA wishes to repeat that the inadequacies in the process noted in relation to procedural fairness and the concerns about inadequate consultation require that the MVERIB provide a process that adequately provides for the Aboriginal perspective and realities of Aboriginal communities. The standard public process that has been adopted is not adequate for Aboriginal communities.

20. DeBeers' statement that the North Slave Métis have not made a claim to Aboriginal title in this area is simply incorrect. The basis on which the IBA negotiations were entered into was NSMA's assertion of Aboriginal rights, Treaty rights and Aboriginal title to the lands affected the Snap Lake Diamond project. The NSMA's claims to Aboriginal rights, Treaty rights and Aboriginal title have been well publicized. More importantly, they have been explained directly to DeBeers.

21. Also, the duty to consult and accommodate is not triggered solely by claims to Aboriginal title. It is a duty triggered by claims to Aboriginal rights as protected by s.35 of the *Constitution Act*. Aboriginal title is only one of the rights that triggers the duty to consult.

22. The NSMA objects to the suggestion that DIAND has been in consultation with their people for decades. There has been absolutely no government consultation with the North Slave Métis people regarding the Snap Lake Diamond project and its impact on the North Slave Métis' Aboriginal rights, Treaty rights or Aboriginal title.

23. To reply to paragraph 24, the NSMA has explained why the IBA's, SEA and Environmental Agreement should be finalized before the MVERIB or the Minister makes a decision. To reiterate, until those agreements are finalized neither the Board nor the affected Aboriginal Peoples will be in a position to determine which, if any, of their concerns will be addressed by the agreements. Also, the MVERIB cannot draw any conclusions on adequacy of mitigation until the parties know if agreements will be concluded and how they mitigate impacts. While the NSMA hopes an IBA will be concluded, that has not occurred at this time. The NSMA cannot say any of its concerns will be accommodated by an IBA when it does not know what the content of the agreement will be.

24. Without final agreements, the MVEIRB also lacks sufficient evidence to determine mitigation. The MVEIRB commented on the Diavik process in "Views on the Diavik Diamond Project Comprehensive Study Report" in October 1999. In that document that MVERIB acknowledged that without knowing the content of the IBA's neither the Board nor the Minister could determine the effectiveness of the treatment of socio-economic effects. The Board acknowledged that information was needed to assess mitigating effects.

25. In response to paragraph 23, the NSMA is not aware of any bad faith IBA negotiations on the part of the DeBeers to date and did not intend its submissions to be interpreted to suggest bad faith.

26. The NSMA did wish the MVEIRB to be aware of the concerns raised outside the parameters of the IBA and SEA negotiations have not been addressed. The meetings that have occurred outside the IBA process have been very general in nature. They have been preliminary in nature and have not dealt with concrete or specific discussions to address the NSMA's concerns about the projects' effect on its Aboriginal rights. While the NSMA appreciates the meetings with DeBeers to date, the NSMA does not agree that there has been extensive and ongoing consultation with the NSMA. The IBA negotiations are confidential and are not evidence of consultation.

27. The NSMA's understanding of the principles the Courts have developed regarding fiduciary duties owed to Aboriginal peoples, s.35 Aboriginal rights and the duty to consult with Aboriginal Peoples is very different from the one explained in DeBeers' submissions. The 2002 Supreme Court of Canada case DeBeers listed for the MVEIRB did not deal with s. 35 Aboriginal rights. Any limitations that case could have on the Crown's fiduciary duty cannot limit the NSMA's Aboriginal rights and the associated duty to consult and accommodate.

28. The MVEIRB has a duty to fully inform itself on all relevant authorities. The NSMA is confident that review will not support the limited and one-sided view that the developer's submission offers on this issue.

Summary

29. The MVERIB has lost jurisdiction over this EA process due to breaches of procedural fairness and of the duty to consult and accommodate in relation to the Snap Lake project.

30. The NSMA requests that the MVEIRB adjourn the hearing and issue an interim recommendation that the Minister, the GNWT and the developer enter into a proper Aboriginal consultation process. In addition, the MVERIB process and timelines should be adjusted to reflect the Aboriginal perspective, allow adequate time to review, understand and respond to the volumes of information provided and to deal with the outstanding funding issues.

Submitted by:

Kris Johnson

Land and Resource Co-ordinator
North Slave Métis Alliance