NORTH SLAVE METIS ALLIANCE

PO Box 340 Yellowknife, NT X1A 2N3

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To:	**Glenda Fratton**	**Fax:**	867 766 7074
From:	Kris Johnson	**Date:**	April 16, 2003
Re:	Submission of Preliminary and Jurisdictional Issues	**Pages:**	15 (including cover)
CC:			

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Thank you.

Ph: (867) 873-9176 *Fax: (867) 669-7442* *EMail: general@nsma.net*

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NORTH SLAVE METIS ALLIANCE

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

April 16, 2003

Attn: Glenda Fratton,

Re: DeBeers Snap Lake Diamond Project Environmental Assessment- NSMA Preliminary and Jurisdictional Issues.

Dear Glenda,

Pursuant to the MVEIRB's letter dated April 8th, 2003, please find attached the Preliminary and Jurisdictional issues the NSMA was able to prepare in the short time provided.

The attached submission details the NSMA's concerns surrounding the duty to consult and procedural fairness and our subsequent request to adjourn the public hearing until these issues are resolved.

Thank you for your attention to this matter.

Yours truly,

Kris Johnson
Land & Resource Coordinator
North Slave Metis Alliance

Ph: (867) 873-9176 *Fax: (867) 669-7442* *EMail: general@nsma.net*

April 16, 2003

THE NSMA'S SUBMISSIONS TO THE MACKENZIE VALLEY ENVIRONMENTAL REVIEW BOARD DEBEERS SNAP LAKE DIAMOND PROJECT ENVIRONMENTAL ASSESSMENT: PRELIMINARY AND JURISDICTIONAL ISSUES

I) Request for Adjournment

The NSMA requests that the MacKenzie Valley Environmental Impact Review Board adjourn the scheduled public hearing. The NSMA requests the adjournment to allow adequate time to deal with the breaches of the duty to consult, to review all new technical information and adequately prepare submissions. If the hearing proceeds as proposed, breaches of procedural fairness and breaches of the duty to consult and accommodate will cause the MVEIRB's recommendations and the Minister's decision to be void.

Factors the NSMA would ask the Board to consider in relation to the adjournment request are:

1) There has been a total failure by the Federal Government and the Government of the Northwest Territories to consult with the NSMA regarding the Snap Lake project. The developer's consultations with the NSMA do not meet the standards for Aboriginal consultation. The Environmental Assessment process should not proceed any further until the breaches of the duty to consult and accommodate are remedied.

2) There has not been sufficient progress in the negotiations of the Impact Benefit Agreements, Socio-Economic Agreement and Environmental Agreement to know if these agreements will assist in mitigating significant adverse impacts identified by the parties. The agreements should be finalized before the MVEIRB or the Minister makes a decision. The Public Hearing

should be adjourned until, at minimum, the IBA's and Socio-Economic Agreements are negotiated.

3) The parties have received a massive volume of additional technical information since the December 2002 technical sessions. The NSMA estimates the information received since the technical sessions are at least double the volume of the original Environmental Assessment Report. The NSMA does not have adequate time, funding, or internal resources to fully review and understand this documentation or comment on how the new information affects the NSMA's Aboriginal rights and interests. The timelines in which this information has been provided, combined with the volume of information and lack of funding creates a situation where the NSMA will not have a reasonable amount of time to review the information or opportunity to present its views.

4) These circumstances also make the Board's deadline for written submissions unreasonable.

5) The Board must release all reports, documentation or other information it has received from its staff or consultants that are not filed on the Public Registry. Refusing to release this information breaches the requirements of procedural fairness. If the information is released, the parties will require a reasonable amount of time to review the information.

6) The Board is obligated to give equal weight to traditional knowledge as to western science. To date, the EA process has not included adequate provision for use of traditional knowledge. DeBeers has now expressed willingness to conduct a TK study with the NSMA. However, the study could not be completed before the Public Hearing. The MVEIRB needs adequate TK to fully assess and understand the issues in this EA. The Board should adjourn until the NSMA's and other Aboriginal groups' TK studies are completed.

II) Procedural Fairness

The MacKenzie Valley Environmental Impact Review Board must follow the requirements of procedural fairness. The NSMA objected to breaches of procedural fairness repeatedly in the process and has indicated on numerous occasions that its participation in the process was subject these objections. The Board has, nevertheless, continued to operate contrary to the requirements of procedural fairness.

Some examples of the breaches of procedural fairness in the Board's process to date include:

1) Many of the NSMA's procedural concerns were outlined at the technical sessions and summarized on Day 10. Please refer to the transcripts.

2) Throughout the environmental assessment process the Board has maintained a schedule that did not allow reasonable time for the parties to review and respond to information. The Board has a mandate to fully assess significant adverse impacts and public concerns. The Board is obligated to protect the social, cultural and economic well being of residents and communities in the MacKenzie Valley. However, the Board's focus has been timelines that appear directed to meeting the developers' requirements rather than allowing for a full assessment of the project. The parties were advised more than once in this process by Board staff that it is unlikely the Board would change its timelines and the parties would have to work very hard to convince the Board to alter its timelines.

3) The MVRMA requires the Board to consider the concerns of Aboriginal People. This requirement applies to procedural issues as well as substantive issues. The courts recognize that a unique process may be required for proper Aboriginal consultation. The Board has an obligation to establish timelines and a process that reflect the realities of Aboriginal communities and their

resources. This environmental assessment process has consistently ignored those realties.

4) The timelines in this process have generally favored the developer. For instance, in the IR process the developer would be provided with copies of the parties' information requests at the time they were submitted to the Board for consideration. However, the developer's timelines to respond to those IRs would not begin to run until the Board had officially issued IRs. Overall, the delays in the IR process favored the developer. The developer also had almost three months to submit additional technical information after the technical sessions. More technical information was submitted by the developer recently. In relation to the information provided by the developer after the technical sessions, the parties had less than one month and in some cases only a few weeks to review the information and provide a formal reply. Overall, the schedule has not provided a reasonable timeline to review, understand and respond to the information.

5) The parties have had unequal access to the Board and the Board's staff. In some cases, there have been meetings involving only the expert advisors who are also parties. For example, in May 2002, there was a request for a meeting to discuss draft work plan amendments involving only Government representatives and expert advisors. Government departments are participating as expert advisors to the Board. The NSMA is asking the Board to deal with the issue of whether the Federal Government has met its obligations to consult. Also, non-expert advisor parties may have views that conflict with the expert advisors. The Board's relationship with these government departments as expert advisors make it impossible for the Aboriginal parties to receive a fair and objective hearing on the issues.

6) The parties must be able to review and have an opportunity to respond to any information the Board considers. This includes information from Board staff

and consultants. The NSMA requested all this information be released to the parties. The Board refused that request. The parties have been told the Board will receive explanations of technical evidence and comments on the materials in the Public Record from its staff and expert consultants. If the Board has considered or in the future considers any information relevant to the issues in the EA that is not available on the Public Registry, the parties will not be deprived of an opportunity to review and respond to the information the Board's decision is based on. The refusal to release the information breaches requirements of procedural fairness and the MVEIRB's own Rules of Procedure.

7) Technical meetings occurred after the technical sessions without notice to all the parties. The Board endorsed sidebar meetings during the technical sessions. The need for the meetings arose primarily because the ad hoc and disorganized process in the EA. Having endorsed these informal processes and accepting the information resulting from these processes for consideration, the Board was obligated to ensure all parties received notice of the meetings on timelines to provide a reasonable opportunity to participate.

8) Both pre-hearing conferences have been presented to the parties as being "without prejudice" processes. However, information from both pre-hearing conferences has been posted to the Public Registry and will be considered by the Board. It is not fair to advise parties that a process will be "without prejudice" and have no effect on their position and then provide the information to the Board.

9) The entire EA process has been developed in an ad hoc way and has caused confusion for the parties. The lack of organization has also made it impossible for the parties to anticipate timelines and plan use of limited resources. The parties should know what to expect from the process before it begins. Certainly, rules of procedure and process should not be developed on

an ad hoc basis throughout the proceeding. In this case, timelines were not even altered to allow the parties adequate time to adjust to changes in process in order to participate effectively.

10) In the January 29, 2003 teleconference the NSMA specifically requested clarification regarding the significance of the pre-hearing conference. In particular, the discussions regarding the pre-hearing conference process contradicted the Pre-hearing Conference Guide. Clarification on the NSMA's specific questions were never provided. The Board never explained whether its Pre-hearing Conference Guide continued to be in effect.

11) The concerns of the Aboriginal parties have been given less weight than those of Government parties and expert advisors. For example, this occurred in relation to the non-conformity items and the IR's that were issued.

12) The Board proceeded with a site visit contrary to the requirements of procedural fairness.

13) The Board has not met the requirements of Rule 51 and 52 in relation to all of its interim rulings and decisions. The Board has not complied with s. 121 of the MVRMA in its interim rulings and decisions.

14) The Board has continued to accept large volumes of new technical information without adjusting the timelines in the process to allow a reasonable time to review this information.

The law regarding the requirements for procedural fairness is established and can be accessed by the Board. The NSMA does not have the resources or adequate time to provide the Board with legal submissions outlining the law on procedural fairness.

III) Breach of the Duty to Consult and Accommodate

The duty to consult and accommodate arises from the fiduciary duty owed to Aboriginal Peoples. While this duty always remains the responsibility of the Crown, the Courts have now recognized that other parties, particularly developers, may share this fiduciary duty and the duty to consult and accommodate. The MVEIRB itself may have a common law of duty to consult. However, it certainly it cannot continue its process when it is aware that Aboriginal People's constitutional rights are being violated in the EA process.

The Federal Government and Government of the Northwest Territories have made absolutely no effort to consult with and accommodate the concerns of the North Slave Metis Alliance. Although DeBeers has had some meetings with the NSMA, the meetings have not been consultation meetings. Other than a few confidential IBA meetings, all meetings have been general in nature. To date, both in and out of the negotiations, there have not been any concrete steps to accommodate the NSMA's concerns. Several concerns have been ignored. For instance, concerns regarding the inadequacy of the historical sites survey were raised in January 2002. The NSMA requested a survey of sites with potential significance for the Metis. This has never been done. The NSMA presented Can't Live Without Work to DeBeers more than once, most recently in June 2002. DeBeers was asked to respond to the 80 recommendations in the publication. DeBeers has never responded. There has not been any work done to date to collect TK from the NSMA community. Although DeBeers expressed a willingness to do a study in late 2002, discussions have occurred too late in the process to allow time to actually complete a study before the public hearing.

The NSMA asks the MVEIRB to send a clear message to the Federal and Territorial government and the developer by refusing to proceed further with the process until they have fulfilled their obligations to consult and accommodate. The Board should render an interim recommendation that the Minister, the GNWT, and the developer fulfill their fiduciary and constitutional duties by entering into a proper Aboriginal consultation process with all affected Aboriginal Peoples, including the NSMA. Any substantive

recommendation the Board makes in the EA process will be invalid until these obligations to consult and accommodate are fulfilled.

Without proper Aboriginal consultation, the NSMA will not have adequate information to determine the impact the development will have on their rights and interests. Without that information, the MVEIRB will not have sufficient information to determine the significance of the impact on the NSMA's social and cultural environment, wildlife harvesting or heritage resources. The inadequate information to the NSMA and the MVEIRB would both cause any recommendation by the Board and subsequent approval by the Minister to be invalid.

Briefly, the NSMA understands the duty to consult to include a requirement to accommodate Aboriginal interests and concerns. Also, any consultation that occurs must be meaningful. Meetings, letters and discussions are not consultation if they are merely general in nature. Also, they must include real efforts and concrete proposals regarding how to accommodate Aboriginal concerns. The Government and DeBeers should be able to show how Aboriginal concerns have been accommodated.

Effective Aboriginal consultation should also recognize the realties of the Aboriginal communities affected by the project. Effective Aboriginal consultation and accommodation must also occur early in the process. There must be sufficient time and resources to review the information on the project, understand it, and, if necessary, obtain outside assistance to review and evaluate technical information. The community must also have time to discuss the issues and develop a formal response. In this Environmental Assessment, the volumes of information combined with extremely short timelines and inadequate funding have made that impossible.

The NSMA does not consider the MVRMA's consultation provisions to provide for adequate Aboriginal consultation. To date, the NSMA has received the same information available in the standard public consultation process. However, this has clearly not been

adequate to meet the requirements of proper Aboriginal consultation. There must be a separate process for affected Aboriginal Peoples in this EA process.

Section 3 of the MVRMA defines consultation. Although this definition cannot limit the common law requirements of the duty to consult and accommodate, the MVERIB must meet the minimum standards of its own legislation. Section 3 requires a minimum of a reasonable period to prepare views and an opportunity to present those views. Given that the purpose of the MVEIRB also includes ensuring the concerns of Aboriginal People are considered, the reasonable period and opportunity to present should be assessed based on the Aboriginal community's circumstances. Even these minimum standards have not been met.

This EA process has not included adequate Aboriginal consultation and accommodation. Current timelines make effective Aboriginal consultation and accommodation before April 28, 2003 impossible. Short timeframes cannot be used to justify inadequate consultation. The only solution is to postpone the hearing. If the hearing proceeds as proposed, the MVEIRB will lose jurisdiction in this EA. The MVEIRB cannot allow time pressures to approve another diamond mine to take priority over Aboriginal interests.

Examples of specific instances of inadequate consultation include:

1) The complete absence of any consultation by Government. The Federal Government, through Indian and Northern Affairs Canada has gone so far as to take the position that Government does not even have a legal obligation to consult with First Nations whose rights may be infringed by approvals related to development (IR # 1.1.69). This position flies in the face of existing decisions from the courts.

2) DeBeers indicated in May 2001 that they would contact communities regarding traditional knowledge studies. This assurance was not followed up with the NSMA until the end of 2002 and still has not been resolved.

3) DeBeer's position that they have conducted many community consultations regarding socio-economic issues is disputed by the NSMA. The EAR and follow up information failed to consider or even attempt to accommodate the NSMA's unique socio-economic concerns.

4) The government departments involved in the EA have not attempted to meet with the NSMA to determine what their concerns may be or to assist them in understanding the technical issues. Rather, these departments have communicated primarily with the developer or Board staff. There have been numerous meetings in the course of this process between Federal and territorial government representatives and the developer to discuss impacts on the environment. Government representatives made no effort to notify and include Aboriginal parties in these meetings. They made no effort to report the results of these meetings to Aboriginal parties or advise them as to how the project would affect their rights and interests in the North Slave region. Recent examples are the meetings that occurred in late January and early February 2003. DeBeers met with DFO regarding fish habitat, INAC and Environment Canada regarding hydrogeology, INAC regarding geo-chemistry, RWED regarding wild life issues, and Environment Canada regarding migratory birds. These government departments were aware of the NSMA's concerns on these issues but made no effort to include the NSMA, consult with them about their concerns or get information back to them regarding how their interests would be affected.

5) In January 2002, the NSMA notified DeBeers that their heritage resource inventory was not adequate and did not deal with Metis heritage resources. The NSMA requested a survey of Metis heritage resources. Neither government nor DeBeers has attempted to deal with this concern. No survey of historical sites and heritage resources that have Metis significance has been conducted.

6) As early as June 2002, the NSMA indicated that an environmental agreement should be finalized before an approval. No substantial efforts have been made to conclude this agreement before the approval. It may not be negotiated until 2004.

7) The NSMA provided DeBeers with a copy of "Can't Live Without Work" and asked them to respond to the 80 recommendations in that document. The NSMA never received a response.

8) On November 23, 2002, legal counsel for the NSMA emailed DeBeers with concerns about having adequate time to deal with the traditional knowledge study and other issues. DeBeers was asked for a concrete proposal prior to Christmas on how the concerns in the NSMA's rationale document and as raised at the technical sessions would be addressed. The proposal was never received.

9) The NSMA has raised issues of capacity and resources in discussions with DeBeers and Indian and Northern Affairs Canada. The NSMA submitted an application for additional funding to INAC in order to fully participate in the final steps of the environmental assessment process. Funding was denied. No other steps have been taken to address the NSMA's capacity and funding issues. As a result, the NSMA had to dramatically reduce its level of participation after March 14, 2003.

The NSMA wishes to refer the MVEIRB to the court decisions on duty to consult. The courts have explained many of the principles on consultation and accommodation in the following decisions:

Delgamuukw v. *B.C.* [1997] 3 S.C.R. 1010

Haida Nation v. *British Columbia (Minister of Forests)* [2002] B.C.J. No. 1882 (B.C.C.A.) (Haida II)

Haida Nation v. *British Columbia (Minister of Forests)* [2002] B.C.J. No. 378 (B.C.C.A.) (Haida I)

Taku River Tlingit First Nation v. *Tulsequah Chief Mine Project* [2002] B.C.J. No. 155 (B.C.C.A.)

Mikisew Cree First Nation v. *Canada (Minister of Canadian Heritage)* [2001] F.C.J. No. 1877 (T.D.)

Halfway River First Nation v. *British Columbia (Minister of Forests)* [1999] B.C.J. No. 1880 (B.C.C.A.)

Cheslatta Carrier Nation v. *British Columbia (Environmental Assessment Act, Project Assessment Director*) [1998] B.C.J. No. 178 (B.C.S.C.)

The NSMA submits there are clear breaches of the duty to consult and accommodate. Also, the MVEIRB must consider that, despite attempting to assist the Board with these submissions, the onus always falls on the Government and developer to prove adequate consultation. There is not an onus on Aboriginal People to prove inadequate consultation.

Conclusion

These breaches of procedural fairness and duty to consult and accommodate have caused this Board to lose jurisdiction. A hearing cannot proceed until these issues are addressed.

April 16, 2003

Submitted by:

Kris Johnson,

Land and Resources Co-Ordinator
North Slave Métis Alliance