January 30, 2004

Via Facsimile (867) 669-2701
Indian and Northern Affairs Canada
Environment and Conservation
Renewable Resources and Environment
Attention: Fraser Fairman
Environmental Scientist
P.O. Box 1500
Yellowknife, NT
X1A 2R3

Dear Mr. Fairman,

RE: Paramount Environmental Assessment Information Requests - Round 2

The Review Board has enclosed an additional two Information Requests, as part of the Paramount EA process. These Information Requests directed at INAC were overlooked during our review process, and were therefore not issued earlier. We would ask that you please respond by February 6, 2004, in order to allow enough time for circulation of the responses to the parties.

If you require any clarification on this matter, please do not hesitate to contact me by telephone at (867) 766-7062.

Yours truly,

K. Cliffe-Phillips

Kimberley Cliffe-Phillips
Environmental Assessment Officer

IR Number: **1.2.136**

Source: **Fort Providence Metis Council**

To: **Indian and Northern Affairs Canada**

DAR Section: **n/a**

Terms of Reference Section: **n/a**

Preamble
Government agencies that issue authorizations must discharge the Crown's fiduciary duty in an effort to justify infringement of the FPMC's aboriginal rights in accordance with case law (e.g.*Powley*). The Supreme Court of Canada has established conditions that must be satisfied in this process such as ensuring that the FPMC receive economic benefits from the land and resources and that management decisions and processes about the land and resources must include significant FPMC involvement, with the bare minimum being deep and meaningful consultation.

The key principles of consultation are set out in the attached Deh CHo Consultation Principles.

Request:
Please explain how your organization has fulfilled its fiduciary duty to the FPMC in relation to this project. Specifically, please explain how the Deh Cho Consultation Principles have been satisfied.

IR Number: **1.2.137**

Source: **Ka'a'Gee Tu First Nation**

To: **Indian and Northern Affairs Canada**

DAR Section: **n/a**

Terms of Reference Section: **n/a**

Preamble
Government agencies that issue authorizations must discharge the Crown's fiduciary duty in an effort to justify infringement of the KTFN's aboriginal rights in accordance with case law (e.g.*Powley*). The Supreme Court of Canada has established conditions that must be satisfied in this process such as ensuring that the FPMC receive economic benefits from the land and resources and that management decisions and processes about the land and resources must include significant FPMC involvement, with the bare minimum being deep and meaningful consultation.

The key principles of consultation are set out in the attached Deh CHo Consultation Principles.

Request:
Please explain how your organization has fulfilled its fiduciary duty to the KTFN in relation to this project. Specifically, please explain how the Deh Cho Consultation Principles have been satisfied.

DEH CHO FIRST NATIONS

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Consultation Principles

1. **Government Agencies have a Duty to Consult.** Federal and territorial government agency activities routinely infringe, or have the potential to infringe, on Deh Cho communities' constitutionally protected treaty and aboriginal rights. These agencies have a fiduciary duty to consult the Deh Cho communities on their activities. The Crown cannot use consultations undertaken by a project proponent as a substitute for Crown consultations.

2. **Co-ordination by the Government Agencies is Critical.** A multiple agency approach to consultations could result in either significant subject gaps or unnecessary overlaps that will tax the communities' limited resources. The agencies must ensure that their activities are properly planned and co-ordinated to minimize subject gaps and the impacts on community resources.

3. **Project Proponents Have a Duty to Consult.** A proponent may have a duty to consult if it receives a benefit (eg. approval to use Deh Cho land) from the Crown and this benefit might infringe Deh Cho communities' aboriginal and treaty interests. The proponent cannot use consultations undertaken by Crown agencies as a substitute for proponent consultations: e.g., see *Haida* decision of British Columbia Court of Appeal.

4. **Negotiations Must Be Part of the Consultations.** The term "consultation", as noted by the Supreme Court of Canada, is just the minimum component in fulfilling the fiduciary duty when aboriginal and treaty rights are infringed. This duty is a very broad one encompassing not only meaningful and focussed dialogue on rights and title, but also negotiations in circumstances where there is a need to accommodate First Nation and Métis interests. (See *Delgamuukw.*)

5. **Deh Cho Leaders Must be Respected.** The Deh Cho leaders have the primary responsibility for participating in consultations and negotiations. While proponents and the Crown should inform local Deh Cho communities, the deep consultations required by the Courts must be conducted with Deh Cho leaders. The proponents and the Crown must acknowledge Deh Cho self-governing rights by respecting the Deh Cho leaders, the leaders' decisions and positions, Deh Cho protocols for dialogue and Deh Cho communities' internal decision-making processes.

6. **Deh Cho Consultations are more than mere "Public" Consultations.** The consultations with Deh Cho leaders are not limited to stakeholder consultations and public reviews, which the proponent and the Crown must conduct to fulfill regulatory and legislative requirements. The proponent's and the Crown's duty to consult is a constitutional obligation, over and above any regulatory and legislative requirements. The Deh Cho consultations must consist of something beyond the notification and information exchange process conducted with other stakeholders, eg. *Mikisew Cree* decision of Federal Court. Information sessions organized by the proponents and the Crown are not sufficient consultations as required by the Courts, eg. *Taku Tlingit*, *Delgamukw*, *Haida*.

7. **Proponents and the Crown Must Involve the Deh Cho Leaders at the Early Planning Stage.** Both the Crown and the proponent must consult at the project's early planning stage. The Crown and proponents often seek discussions and consultations too late in the planning process, resulting in inordinate and urgent demands on community resources.

8. **Consultations Must Analyze the Impact on Deh Cho Rights.** The consultations with Deh Cho leaders must, at an early stage, do the following:

    a. provide Deh Cho leaders with all relevant information about a project, including the complete regulatory basis of a project;

    b. identify the full nature of Deh Cho rights that may be infringed; and

    c. conduct a specific analysis of which project impacts will infringe which Deh Cho rights. (See, for example, *Delgamuukw*, *Sparrow* and *Marshall* decisions of the Supreme Court of Canada.)

    This process is not straightforward and takes time, resources and a serious commitment on behalf of all parties.

9. **The Crown and the Proponent Must Accommodate Deh Cho Rights.** On the basis of Principle 8, the Crown and the proponent must consult and negotiate with Deh Cho leaders in good faith to seek a workable accommodation on the Deh Cho treaty and aboriginal rights, including aboriginal title, that will be infringed. This means that the Crown and the proponent must propose a process in which it will listen to what Deh Cho leaders identify as Deh Cho rights and provide a response that fully and expressly recognizes, addresses and accommodates those rights. (See *Delgamuukw* and B.C. Court of Appeal decision in *Haida*).

10. **Project Approval Depends on Accommodation.** Project approval depends on Deh Cho leaders providing consent where Deh Cho rights are substantially infringed. The Deh Cho leaders will carefully scrutinize consultation efforts with the view to taking whatever action is necessary if a project proceeds without proper consultation. Some infringed rights may be so integral to the Deh Cho communities that the Deh Cho leaders have a legal right to veto the project.

11. **Communities Must Have the Capacity to Consult**. Meaningful consultation can only be achieved if the Deh Cho communities have the resources to meet the heavy demand for consultations. The Deh Cho communities have very limited resources. There is a real danger that core programs would have to be sacrificed to meet proponent and Crown requests for comments and meetings without financial assistance.

12. **Community Representatives May Participate in Discussions on a Without Prejudice Basis**. The Crown and the proponents typically plan many information meetings. To the extent that the Deh Cho communities have available resources, leaders and staff will attend such information sessions to become more familiar with a project. Participation by Deh Cho representatives (leaders or staff) at these information sessions should not be deemed to be consultation. Any comments, opinions and ideas expressed at these sessions are without prejudice to any future position of the Deh Cho leaders.

    Any formal position of the Deh Cho leaders can only be provided to the Crown or a proponent either in writing or in person at a Deh Cho consultation meeting and only after we have received full information disclosure, have had adequate time to review the material and have been provided with adequate financial and human resources to conduct our own analysis and develop our positions.

13. **"Consultation" as Defined in the Interim Measures Agreement ("IMA") is not Adequate**. The narrow definition of "consultation" in the IMA is not adequate consultation for many projects. The current law on consultation and the fiduciary duty is much broader than the IMA definition of "consultation". As well, the IMA is not legally enforceable (Section 70) and is without prejudice to any legal position the Deh Cho First Nations take on fulfillment of the fiduciary duty and consultation (Section 73). Section 72 also provides that the document will not create or deny rights with respect to consultation or fiduciary duties when our rights are at stake.