



The Mining Association of Canada L'Association minière du Canada

September 11, 2007

The Honourable Chuck Strahl
Minister of Indian Affairs and Northern Development
Les Terrasses de la Chaudière
10 Wellington Street, Room 2101 NT
Gatineau, QC K1A 0H4

Dear Minister Strahl:

On behalf of The Mining Association of Canada, I am writing to provide further clarification and elaboration of our views with respect to the decision of the Mackenzie Valley Environmental Impact Review Board dated May 7, 2007 regarding the application by Ur Energy Inc. for a land use permit to conduct a mineral exploration program in the Northwest Territories.

MAC was one of the signatories to a letter dated May 25, 2007 that three industry associations submitted to your predecessor, the Honourable Jim Prentice, in response to the MVEIRB's decision. The letter was written to draw the attention of Minister Prentice to a number of important issues raised by the decision that greatly concerned the mining industry.

To put this matter into context, we note that while the *Mackenzie Valley Resource Management Act* is now almost ten years old, the legislation and its evolving mechanisms can still be described as a "work in progress". MAC has a strong interest in ensuring that this complex statutory scheme develops in a way that provides industry with clear, predictable and timely decision-making processes. MAC and others, including the Auditor General of Canada, have voiced concerns in the past regarding the regulatory system in the North, particularly in cases where the MVRMA Boards have made decisions that appear to exceed their intended mandates or where decisions result in uncertainty arising from unclear and inconsistent use of language or standards.

From an industry perspective, the MVEIRB's decision on Ur-Energy was one in which the potential consequences were sufficiently serious that to justify a request that the Minister refer the recommendation of the MVEIRB back to the Review Board for further consideration. Our letter therefore asked that the Minister do so.

In the interim, the letter has elicited a number of responses from other interested parties indicating that we may not have fully explained the issues raised in the May 25 letter and the underlying basis for industry's submission that request that the Minister refer the matter back to the board. This letter therefore seeks to provide a more detailed rationale for the position we have taken.



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The two principal issues for industry were as follows:

(a) **Scope and Impact of the Review Board's Determination**

Issue for industry: the decision places the Upper Thelon Basin off limits to all industrial activity. The "Upper Thelon Basin" is not clearly defined.

On page 4 of its report, the Review Board finds that:

"...it is reasonable to believe that other industrial developments will take place in the Upper Thelon. The Review Board agrees that the potential for industrial development of the area is incompatible with the aboriginal values of this spiritually significant cultural landscape. This would harm the "heart and soul" of the people of Lutsel K'e. The Review Board concludes that there will be an impact on the development as proposed in combination with the combined impacts of all other past, present and reasonably foreseeable human activities in the area. This is likely to be a significant cultural impact on the aboriginal peoples who value the Upper Thelon."

Noting that the term "impact on the environment" as defined under the MVRMA includes "...any effect on the social and cultural environment...", the Review Board concludes that the cultural impacts of the proposed development are so significant that the proposed development cannot be justified. However, as clearly indicated by the text quoted above, the Review Board's determination addressed not only the Ur-Energy project, but all other potential forms of "industrial development". The conclusion the Review Board evidently reached is that no activities of this kind should be allowed within the "Upper Thelon Basin."

The report contains additional information confirming the Review Board's intention that its decision should apply to the entire "Upper Thelon Basin". At page 38, the report states

"The Review Board notes that the people who presented at the hearing in Lutsel K'e spoke of their concerns about the cumulative impacts to the Upper Thelon as a whole. They did not specify particular points of potential disturbance within it. These concerns are directed at the entire landscape in the Upper Thelon Basin, and are not limited to a collection of individual points on a map. In the Review Board's view, the potential cultural impacts it heard about are cumulative because they relate to the combined effect of the proposed development in combination with all other human activities, including reasonably foreseeable future developments, that act in combination to change the cultural value of the landscape throughout the Upper Thelon."

The report does not, however, clearly define the geographic limits or the total surface area of the "Upper Thelon Basin". Footnote number 1 on page 1 of the report defines the term "Upper Thelon" as the "...Upper Thelon River Basin meaning the hydrological basin or watershed, and not the geological basin, unless otherwise specified." The only additional guidance as to what constitutes the "Upper Thelon Basin" is provided by the map that appears on page 9 of the report where the "Upper Thelon basin" is shown as a shaded area. While not abundantly clear, the area outlined on the map together with the scale shown suggest that, estimated conservatively, the "Upper Thelon Basin" encompasses an area of approximately 30,000 square kilometres.

If implemented, this decision would seemingly render the entire "Upper Thelon Basin", an area approximately equal to the surface area of Great Slave Lake, or almost half the size of New Brunswick, entirely off limits to any form of "industrial development". While technically true that another mineral exploration project could be brought forward for review, the Board has signaled in the quotations set out above that it would also be rejected.

From the industry's perspective, this result is at odds with a number of well-established federal and territorial resource management policies, notably those that pertain to the establishment of new National Parks¹ and the designation of new protected areas under the NWT Protected Areas. The determination of the Review Board, if given effect, would effectively establish a protected area through a mechanism entirely independent of the existing processes that the responsible government authorities have agreed upon for precisely that purpose.

From a broader public policy perspective, endorsing the Review Board's determination in the Ur-Energy case would effectively grant it the discretion to withdraw large areas of Crown lands from mineral exploration or other forms of economic development – in this or any other region of the NWT where the MVRMA applies. MAC does not believe that the legislation was intended to grant the Review Board these kinds of powers especially given, as noted above, that a number of other processes for land withdrawals, including those related to aboriginal land claims, have already been established.

(b) Clarification of the Role of Spiritual Concerns

Issue for industry: The Review Board's reliance on and interpretation of "spiritual concerns" create uncertainty for industry and the need for clarification.

¹ The MERA or the "Mineral and Energy Resource Assessment of Proposed National Parks in Northern Canada" process draws upon the resources of Indian and Northern Affairs Canada, Parks Canada, Natural Resources Canada, the Government of Yukon and the Government of the NWT to ensure that an inventory of the non-renewable resource potential of areas of Yukon and the Northwest Territories is compiled before such areas are formally established as National Parks.

The May 25 letter questioned the weight that the Review Board gave to spiritual concerns in reaching its determination. The question raised by the industry letter reflected the following:

- (i) The obligation to identify specific sites that have cultural, archeological, spiritual or religious significance to aboriginal peoples, and to properly conserve and respect such sites, is well accepted within the exploration and mining community. While sometimes challenging, this is an obligation that can usually be met through archaeological surveys and by engaging local communities and knowledgeable individuals, notably community elders.

However, the implications of the Ur-Energy determination are much broader. As indicated above, the Review Board itself noted that it was not necessary to identify "particular points" of potential disturbance within the Upper Thelon Basin. Consequently, concerns could be directed to the "entire landscape" as a whole in determining whether or not a specific development would be approved or rejected.

Accordingly, if this determination were implemented, the approach previously applied to specific sites would be given effect, on a broad-brush basis, to an entire watershed encompassing tens of thousands of square kilometres.

The Review Board's decision thus has major policy implications that should be more fully considered.

- (ii) At page 36 of its report, the Review Board states that "...the importance of the Upper Thelon basin cannot be defined solely by its practical utility, because it is a spiritual area with an intrinsic and intangible cultural value to aboriginal peoples." At page 4 of the report, the Review Board states that it "...understands at the heart of this issue is the belief that the Upper Thelon is a spiritual place must be protected from any type of desecration."

The word "spiritual" or derivatives thereof appear in 33 places in the report, often in conjunction with the statement that the Upper Thelon Basin is "...the place where God began...". Unfortunately, the environmental assessment report does not adequately define the "spiritual values" that would have been adversely affected had the Ur-Energy project been allowed to proceed.

Given the novel nature of the Review Board's determination as well as the broader implications for mineral exploration generally, MAC believes that the Review Board should have provided a much clearer and more

comprehensive explanation of the spiritual values in question and the adverse impact that the proposed project would potentially have had on those values.

- (iii) In s. 111 of the MVRMA, "impact on the environment" is defined as "...any effect on land, water, air or other component of the environment, as well as harvesting, and includes any effect on the social or cultural environment or on heritage resources."

In its determination, the Review Board appears to adopt the view that the term "cultural" necessarily includes the term "spiritual". It therefore concluded that any adverse impact on spiritual values inevitably constitutes an adverse impact on cultural values. It should be noted that this view is shared by the Akaithcho Dene First Nations, as evidenced in the NWT #8 Tribal Corporation's letter of June 6, 2007 to Minister Prentice.

We understand that, in a broader sense, the terms "cultural" and "spiritual" may be intimately related if not synonymous. However, in the context of the Ur-Energy decision, effect must be given to the legal interpretation of the term "cultural" as determined by reference to the principles of statutory interpretation. One such principle is the presumption of consistent expression.

In that regard, it is important to note that the word "spiritual" appears elsewhere in the MVRMA, namely in section 73, where certain allowances are made for the use of water and the deposit of waste for "...traditional heritage, cultural and spiritual purposes." It follows that if the legislature had intended that the term "cultural" when used in the legislation should also encompass the term "spiritual", it would not have been necessary to include both words in this section.

Indirect evidence for distinguishing "cultural" from "spiritual" is also found in the definition of "heritage resources" ("...archaeological or historic sites, burial sites, artifacts and other objects of historical, cultural or **religious** significance, and historical or cultural records.") As the term "spiritual" is often used synonymously with the term "religious", the legislation once again suggests that the "cultural" and "religious" realms (and hence the "spiritual" realm) are considered to be separate and distinct.

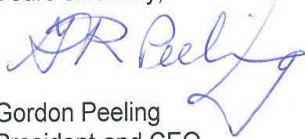
A preliminary survey of the case law indicates that both terms have been frequently used in a number of decisions pertaining to aboriginal law matters. Once again, this suggests that, in a legal context, it is proper to make a distinction between the cultural and the spiritual realms.

In reviewing the Review Board's decision, industry concluded that it was critical to seek further clarification as to the proper meaning to be given to the term "spiritual" in the context of the phrase "cultural and social environment" that forms part of the key definition of "impact on the environment" in the MVRMA. As a result, this became another reason to ask that the Review Board's recommendation be referred back for further consideration.

The Mining Association of Canada is in no way challenging or questioning the validity of rejecting a development proposal due to adverse cultural impacts. As also noted above, it is good industry practice to identify culturally significant lands or sites at early stages of a project in order to avoid or mitigate impacts upon them. The approach taken by the Review Board in response to concerns rooted in spirituality, however, raises significant legal and policy issues. In MAC's view, these issues warrant further examination and clarification, with due regard for the consequences of the various interpretations that can potentially be made.

We conclude by noting that some of the responses to our May 25 letter suggest that MAC and the mining industry are opposing the resolution of unsettled land claims in the Upper Thelon Basin by questioning the decision of the MVEIRB in the Ur-Energy application. This perception is unfortunate and does not reflect MAC's position or that of the industry. On the contrary, the Ur-Energy case emphasizes, once again, the need for the federal government to settle land claims expeditiously so that aboriginal and treaty rights can be properly recognized and affirmed, land use conflicts can be avoided, and industry can be provided with the clarity and certainty that are required to make sound investment decisions.

Yours sincerely,



Gordon Peeling
President and CEO
The Mining Association of Canada

cc: Ms. Gabrielle Mackenzie Scott, Chair, Mackenzie Valley Environmental Impact Review Board
Mr. Mike Vaydik, NWT and Nunavut Chamber of Mines
Mr. Tony Andrews, Prospectors and Developers Association of Canada