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November 22, 2021

Honourable Minister Nils Clarke
Minister of Environment,
Government of Yukon
Box 2703 Whitehorse,
Yukon Y1A 2C6

Attention Minister Clarke;

Re: ATAC Road Agreement

In anticipation of the development of the all-season Tote Road by ATAC Resources Ltd. in the Beaver River watershed, the First Nation of Na-Cho Nyäk Dun (FNNND) and the Government of Yukon (YG) entered into an agreement in January of 2018 to create a Regional Land Use Plan for the area. Within this Agreement, the Yukon Fish and Wildlife Management Board (Board) was assigned in clause 1. (h) to develop an "adaptive, proactive fish and wildlife harvest regime that will address actual or anticipated harvest associated with the Tote Road."

We reiterate our concern to the Minister that the parties did not consult the Board before writing us into this Agreement.

The Board was notified of this Agreement in December 2018, a full ten months after the parties signed it. As a result, the Board received some misplaced negative feedback for its involvement in this Agreement from the Mayo District Renewable Resources Council and the Yukon Land Use Planning Council. As required, we willingly participated in a Planning Committee to determine the next steps for developing a fish and wildlife harvest regime for the Planning Area within the Beaver River watershed. However, we want to share some critical issues regarding this process, which raises some significant concerns.

Firstly, the Board would like to address the concern expressed by the Mayo District Renewable Resources Council regarding the Board's involvement in this process. Particularly that in developing the fish and wildlife harvest regime for the Planning Area as outlined in clause 1. (h) of the Agreement, the Board is overstepping the RRC mandate as the "a primary instrument for local renewable resources management in that Traditional Territory" (UFA 16.6.1).

The Board's mandate is to act as "the primary instrument of Fish and Wildlife management in the Yukon" (UFA 16.7.1). While the management of the Beaver River watershed is of interest to Yukoners across the territory, the Board concurs with the Mayo District RRC that the development of a harvest regime for the planning area falls squarely within the mandate of the Mayo District RRC. The authority rests with the RRC because this is a specific localized fish and wildlife management issue within FNNND Traditional Territory. The Board was not notified [at any point] during the development of the Agreement that we would be assigned the responsibility of developing the fish and wildlife harvest regime within the Planning Area. As such, we did not overstep the RRC mandate. However, the drafters and signers created an Agreement that produced numerous conflicts for our Board. And as such, this is a matter of significance to us.

The Board participated in the planning process to deliver on the requirements of the Agreement. The Agreement recognized the local jurisdiction of the RRC within Section 5, where it states that "the Parties would work with the Mayo District Renewable Resources Council to address management measures that support the conservation, including sustainable use, of wildlife populations and the protection of their habitat."

1.1 The Board formally recommends that the parties include the Mayo District RRC in any discussions and decision-making for developing the fish and wildlife harvest regime outlined in clause 1. (h). The Mayo District RRC strongly supports this recommendation.

The Board wishes to reiterate and support the position expressed by the Yukon Land Use Planning Council, expressing concern for their involvement. The YLUPC also desires to clarify and understand Chapter 11 of the Na-Cho Nyäk Dun Final Agreement. We assert that the Agreement would have been better addressed through the established elements of the Final Agreement, and a sub-regional plan should have been proposed. This would have helped define the nature of sub-regional plans in greater detail and the process by which they are created, explicitly concerning clause 11.8.4 of the Na-Cho Nyäk Dun Final Agreement as expressed by the Land Use Planning Council. This is a matter of grave concern for the Board. As an instrument of the Umbrella Final Agreement, we are disturbed to see elements of the modern-day treaties and signed Final Agreements not being fully realized.

Below are two excerpts from a legal review we conducted on the Agreement. Our lawyer identified this Agreement as being "fraught with legal challenges. "One of those legal challenges was the attempt by the Parties to avoid the Supreme Court of Canada's judgement in NND vs. Yukon (2017), in which the Supreme Court held that:

The provisions of Chapter 11 of the Final Agreements, which set out the land use planning process, must be interpreted in light of the modern treaty interpretation principles. Compared to their historic counterparts, modern treaties are detailed documents and deference to their text is warranted. Paying close attention to the terms of a modern treaty means interpreting the provision at issue in light of the treaty text as a whole and the treaty's objectives. While courts must show deference to the terms of a modern treaty, this is always subject to such constitutional limitations as the honour of the Crown.

and;

In this case, the treaty makes clear that Section 11.8.4 of the NND Final Agreement, which the parties had intended to use to give effect to the contractual intent to create a "development of a Plan," did not meet the terms of 11.8.4. This section allows the creation of "sub-regional or district land use plan" and did not meet the terms of the Supreme Court's direction.

We believe that this process, in particular the Agreement between the First Nation of Na-Cho Nyäk Dun and the Government of Yukon, will set the stage for future agreements of this kind. Especially when considering the announcement of the Yukon Resource Gateway Project in 2017, which we expect will lead to future proposals to develop roads in other areas of the Yukon.

As the primary instrument of fish and wildlife management in the territory, the Board feels that our responsibility is to provide recommendations and guidance on effectively drafting and implementing such agreements. The government must hold these considerations in high regard to conserve fish, wildlife, and their habitats for our future generations.

I appreciate your consideration, and we look forward to continuing our work with First Nations governments and the Government of Yukon on these matters in a respectful, transparent matter that honours the spirit and intent of the Final Agreements.

Sincerely,

A handwritten signature in blue ink, appearing to be 'CS', with a small arrow pointing to the right.

Carl Sidney, Chair

cc: All Yukon Renewable Resources Council
First Nation of Na-Cho Nyäk Dun
Yukon Land Use Planning Council