July 23rd 2001

Nunavut Water Board
P.O. Box 119
Gjoa Haven, NU X0B 1J0

**Attention:** Mr. Philippe di Pizzo,
Executive Director

**By e-mail and FAX**

Dear Sir:

**KIA Reply HBJV Water License Renewal Application NWB1BOS9801**

This letter constitutes the Kitikmeot Inuit Association's (KIA) reply in the above captioned license renewal proceeding. KIA has reviewed all submissions forwarded by the Board in this proceeding.

KIA will reply below to the following issues:

1) General comments and recommendations for license terms and conditions; and
2) Terms and conditions related to security for abandonment and reclamation.

As we indicated in our July 17th, 2001 submission, KIA conducted its own on-site investigation with respect to acid rock drainage (ARD) and other environmental concerns, including pH neutral metal leaching from the ore and waste rock piles. Unfortunately, KIA did not have the final report from its engineering consultants on July 17th. Consequently, the final report received from Ferguson Simek Clark (FSC) and Lorax Environmental Services Ltd. (Lorax) is appended.

The comments provided below with respect to ARD and site conditions are in substitution of the preliminary report provided on July 17th. We regret any inconvenience caused to the Board and parties but our consultants' final report included some modest changes to the conclusions of the interim report which were provided in our earlier submissions.

1. **General Comments and Recommendations for License Terms and Conditions:**

    a) **The FSC – Lorax Report-**

FSC was instructed to perform sampling of both rock and water at the site to analyze whether or not the rock contained in the ore piles was acid producing. KIA was concerned about the results of previous sampling, literature and site visits. The field sampling program was to involve the collection of 3 ARD samples directly in the ore pile and another 10 in the runoff area to the east of the ore pile. Three water samples were also taken and analyzed for basic water chemistry and trace metals.

FSC and Lorax are still of the view that the report by Rescan appears to misinterpret data produced from that company's earlier sampling program. It appears that the acid generating potential of the property has been overestimated. Many parties to this proceeding have commented on, and KIA agrees, that pH neutral leaching of arsenic, nickel and possibly other heavy metals remains an important concern.

The acid base accounting data indicates that the three "rock, ore pile" samples collected on the surface by FSC contained somewhat lower neutralization potential (NP) values than the material sampled by BHP geologists and Rescan. The samples also contained a higher total sulfur content than the material sampled by BHP and Rescan. KIA's samples appear to be diluted with quartz vein material associated with the ore, which has lower NP than the majority of the material discussed in the Rescan Report. Although one (1) FSC sample is within the "uncertain" range of the DIAND criteria for

non acid generating material, all of the ore pile rock samples had paste pH > 7.5 which suggests the material is not currently acid generating. Soil samples from the area down slope of the waste rock/ore storage had low net neutralization ratios and low sulfur contents. All but one of the samples had a paste pH < 6.0 which suggests that this area has slightly acidic soils, however, this may also be a result of the test procedure. Paste pH values should be compared with other samples taken during baseline monitoring or samples from adjacent undisturbed slopes to establish whether the slightly acidic soil pH values are the direct result of exploration activities.

Arsenic leaching from waste rock is a concern as is shown by the results of the water samples collected for KIA. The presence of standing water appears to exacerbate the leaching of arsenic, and also the leaching of nickel, both of which, in the samples collected, exceed CCME Water Quality Guidelines for the Protection of Aquatic Life.

Ponded water near the stockpiles and camp contained elevated levels of arsenic and nickel concentrations despite neutral pH, confirming the potential for pH neutral metal release from the stockpiles. Arsenic concentrations in water samples collected on the slope below the ore pile and core racks, at the northern end of the camp were an order of magnitude lower than those collected from the ponded water in the ore pads. However, arsenic concentrations in these waters still exceeded the CCME Water Quality Guidelines for the Protection of Aquatic Life. Arsenic concentrations were not elevated in the water sample collected on the southern portion of the slope. This suggests that the material on the southern portion of the waste rock pad is either not releasing high concentrations of arsenic or that there is sufficient assimilative capacity in this drainage system to lower the concentrations of these two metals to within the CCME Guidelines prior to discharge into Spyder Lake.

The geochemical leaching characteristics of any new waste rock and eventually of mine tailings should be determined to facilitate the design of management facilities. Determining the presence, distribution and form of the arsenic in the critical geologic units that will be mined should be the primary focus of future characterization and

monitoring programs. An ongoing determination of ARD and metal leaching potential should be undertaken for new areas of the mine as they are developed. An inventory should be maintained of which materials are placed in which location on the surface. Monitoring stations should be established to assess the quality of water discharged from the stockpiles, tailings and other altered surfaces including the roads and campsites in addition to any sampling at Spyder Lake.

Based on these findings, the KIA respectfully submits that the SNP should be reviewed. We suggest that the SNP be modified as required to monitor the metal leaching from the ore and waste rock piles. The applicant should be required to submit a revised SNP plan for Board approval, taking these concerns into consideration, within a reasonable time after the issuance of the new license. The applicant should also be required to submit a plan for Board approval for managing and minimizing metal leaching problems, if they are occurring.

## 2. Terms and Conditions Related to Security for Abandonment and Reclamation:

The only party to these proceedings which addressed the terms and conditions related to security and abandonment and reclamation (the security conditions) in any detail was the Department of Indian Affairs and Northern Development (DIAND).

KIA notes that in his May 14th, 2001 submission to the Board, Mr. Brodie recommended that the security bond should reflect the costs of relocating stockpiled ore back into the underground development in the event that the exploration activity does not yield a producing mine. KIA agrees with this recommendation.

The balance of the KIA reply on the topic of security conditions is intended to rebut the argument advanced by DIAND.

It is, in the KIA's view, unfortunate that DIAND did not review, or else ignored, the evidence and argument presented in the February 22nd, 1999 hearing which led to the

current water license. DIAND's July 17th 2001 submission advances many of the same arguments considered at that hearing and rejected by the Nunavut Water Board. These arguments are narrow, jurisdictional and "turf" oriented. They ignore the innovative, practical results of NWB's April 21st, 1999 decision.[1]

That decision resulted from a proposal made by BHP itself. The company suggested, and KIA agreed, that joint security held by the Minister of DIAND would reflect the new land ownership arrangements resulting from the settlement of the Nunavut Land Claims Agreement (NLCA); would avoid "penalizing" companies involved in exploration which might otherwise be required to pay security to both the Crown and a landowner; would encourage a cooperative approach to water, land and environmental management among mining companies, the Crown and Inuit landowners; and would be an efficient way to solve problems related to abandonment and reclamation at the Boston site. The KIA submits that all of these objectives are relevant and deserve consideration as the Board reconsiders the terms and conditions for security in the new HBJV license.

KIA also wishes to draw the Board's attention to the fact that the HBJV voluntarily assumed the burden of these security conditions from the BHP license when it accepted the transfer of the license at the time it purchased the property. The HBJV did not raise any concerns with respect to the security conditions at that time. In its current license renewal application the HBJV questions only the quantum required, not the other security conditions.

When we examine the approach to security conditions argued by DIAND, it seems clear that they have nothing new to offer other than a *status quo* which has existed since the *Northern Inland Waters Act* was enacted in the early 1970s. Arrangements based on this *status quo* would be out of date. They would not reflect the unique arrangements made for Inuit land holding under the NLCA. They would have adverse implications for the licensee. Furthermore, DIAND has known of this "problem" since the Board's decision in 1999. Nonetheless, the Department has made no attempt to address this

[1] Re: Security Deposit for BHP Boston Gold Project, April 21, 1999.

issue constructively, either before the Board, or in the ongoing negotiations surrounding the development of the Nunavut Waters and Surface Rights Bill.

In any event, the argument advanced by DIAND is flawed, negative and unhelpful. It ignores evidence available on the public record from the previous hearing and provides little foundation for a challenge to the NWB's 1999 decision. KIA's basis for this analysis is outlined below in the same order as the DIAND July 17th submissions.

**a) The Facts –**

KIA takes no issue with the "facts" asserted by DIAND, however, some of them might better be characterized as expressions of the law. The Board should, in our submission, refresh itself on the evidence from the record of February 22, 1999. For example, the Board's own expert was not able to give any clear criteria for distinguishing "land related" security from "water related" security.[2] Mr. Cook who appeared for DIAND at that hearing was not able to help with this issue either. BHP tried to estimate land and water related security but then indicated to the Board that it preferred one security deposit for both.[3]

KIA does not hold any security for the Boston site other than its right to "share" in the current bond as a joint payee. The security held by KIA for the north Boston/Windy Lake land use operation has nothing to do with the Boston security and is not related to any water license.

**b) NWB Jurisdiction and Mandate –**

In the KIA's view, the DIAND submission attempts to restrict the jurisdiction of the NWB. It does so by narrowly construing Article 13 of the NLCA, particularly section 13.2.1. It ignores the NWB's role under Article 20 of the NLCA and the important relationships and responsibilities of the Board in the context of land use planning and environmental impact assessment under the NLCA. In the 1999 hearing, this issue of scope of jurisdiction was argued. At the time, KIA suggested, and the Board

[2] ***Supra,*** note 1 at page 11.
[3] ***Supra,*** note 1 at page 7.

agreed, that NWB jurisdiction should be interpreted remedially in a manner consistent with the federal *Interpretation Act* and with sections 2.9.1 and 2.9.4 of the NLCA. Considering this framework as a whole and consistent with the plain wording of section 13.2.1 of the NLCA, KIA submits that the NWB has authorities which extend beyond those originally granted the NWT Water Board by the *Northern Inland Waters Act.*

In its submissions at page 6, DIAND argues "… it is submitted that the NWB's mandate, responsibilities and powers clearly relate only to water, and not to land." The Board gave thorough and thoughtful consideration to this issue in its 1999 decision. This position, advanced anew by DIAND, was rejected. The Board's conclusion was as follows:

> "In conclusion, the Board finds that it must act to protect the Inuit and other users of water resources in the Boston region. Given that ecosystems operate on the principle that water supports all forms of life, and that fishing is linked to water quality, and that aquatic organisms are linked to water quality, and that public health is linked to water quality; that the local Inuit customs including harvesting is based in part on land use activities and this is also linked to water quality, we must therefore accept the several submissions in this hearing cautioning the Board not to separate water from land in the assessment of the security deposit required of BHP."[4]

DIAND has no new evidence to support their argument. The rationale advanced for their narrow construction of the Board's jurisdiction with respect to security is not new either. It was considered and rejected by the NWB in 1999 and should suffer the same fate in this proceeding.

On page 6 of its submissions, DIAND argues that security deposit required by the NWB should be available solely for water related matters. KIA does not suggest that NWB require security for matters unrelated to the applicant's activities pursuant to its water license. The issue seems to be determining just how broadly the "activities related to the water license" should be defined. We submit that the definition of

[4] ***Supra,*** note 1, at pages 18 and 19. The analysis of the issues runs from page 14 to page 19.

"waste" found in section 2 of the *Northwest Territories Waters Act*[5] does not require that the substance be actually deposited in to water. Consequently, the Board's waste control responsibilities extend on to the land. In any licensing proceeding, the NWB, of course, has authority to prescribe terms and conditions for the activities related to the "appurtenant undertaking". That term is defined to mean the "work described in the license". A “work” has been described in case law as referring to a "physical thing".[6] As was indicated by the Board in its 1999 decision, "the original License issued by the NWB authorizes BHP to use water and dispose of waste in conjunction with BHP's “Boston Gold” project".[7] Clearly, the scope of the Boston Gold project included more than purely water related activities, as does the scope of the activities applied for by the HBJV. It makes little sense to argue that the security deposit and conditions can only relate to "water related matters" when a whole variety of the applicant's activities on land have the potential to affect water quality and quantity at the site. The Board’s jurisdiction should be construed to include the control of all those activities which are necessarily incidental to the licensed operation.

In KIA submission, the NWB has all the authority necessary to require security which will cover the full range of the HBJV’s activities at the Boston site. The attempt made by DIAND to narrow the NWB's jurisdiction in this regard should be rejected.

DIAND's argument with respect to the NWB's mandate suffers from further difficulties. On page 7, it suggests that because KIA and the HBJV have a land tenure arrangement to which the Crown is not a party that this makes security available for "for non water related purposes, without any relationship to the water license that was issued by the NWB". As KIA has asserted on several occasions, it holds no security under its land tenure agreement, currently a land use license issued pursuant to the “Rules and Procedures for the Management of Inuit Owned Lands”. There are no provisions in this land use license for accessing security.

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[5] S.C. 1992, c.39.
[6] *Montreal v. Montreal Street Railway,*[1912] A.C. 333 at 342, (J.C.P.C.).
[7] ***Supra,*** note 1 page 2.

Consequently, KIA can only access security via the water license and subject to the terms established in that license for such access.

It appears to KIA that DIAND has misconstrued the terms established by the Board for access to water license security. Section 1 of those terms[8] indicates that the security deposit should be available "for reclamation or abandonment and restoration under the NWB water license **and** be accessed under the land tenure agreement that exists or will exist between KIA and BHP". KIA submits that this term must be interpreted to require that both these conditions are met. In other words, access would have to be for reclamation or abandonment and restoration as provided for the water license and KIA would have to have a land tenure arrangement with the licensee in order to do so. KIA has never interpreted this term to imply that it could draft special or unique abandonment and reclamation requirements under its land use license or lease and impose them notwithstanding the terms of the water license.

The final point made by DIAND on page 7 in support of its argument with respect to NWB mandate again suggests that land and water related security can be distinguished and suggests that the security held by KIA for the HBJV activities at north Boston/Windy Lake gives proof of this. This point is speculative. The land use license for this other site has never been filed with the Board and is not in evidence in this proceeding. The security deposit established for that site has nothing to do with water licensing. For the reasons included in the Board's 1999 decision and those argued above, this argument should also be rejected.

**c) Fettering of the Minister's Discretion –**

In KIA's submission, this argument advanced by DIAND is narrow and technical. The Board's original decision was that security should be provided in "amounts as may be required…. based on annual estimates of current mine restoration

[8] ***Supra,*** note 1 at page 24.

liability…". Furthermore, the Board provided for a schedule of payment in order to reduce the burden of providing security on BHP. The license terms were flexible and allowed for a reduction based on a proposed summer 2000 site visit as well as on the results of progressive reclamation.

If KIA's right to access security is construed as suggested above, and is limited to activities related to reclamation or abandonment and restoration under the water license, the practical aspects of the fettering concern raised by DIAND evaporate. It should make little difference to the Board whether the licensee or the landowner undertakes activities which contribute to reclamation or abandonment and restoration. If KIA were to draw down the security, the NWB could simply reassess the overall requirement for the bond and adjust it accordingly.

DIAND suggests that because the Bank which issued the security instrument has indicated that it will require the consent of both payees before it will allow access to the security that KIA's consent is now required before the Minister can access security. Such a requirement for KIA consent was never intended nor is it provided for in the terms of the license. DIAND appears to argue that their Minister's discretion has been fettered not because of the Board's licensing decision but because of the terms of the security established by the funding institution. KIA fails to see how this problem can be laid at the Board's feet. The responsibility for determining the acceptability of security under the statutory scheme and under the license rests with the Minister and department. The NWB had no role in negotiating the terms of the security instrument. If the security instrument constrains the Minister's options in an unacceptable fashion, the Department should not have accepted it. It is the KIA's submission that no fettering of the Minister's discretion has occurred. DIAND should simply insist that a security instrument which conforms to the Board's decision be provided.

KIA has already indicated that the use of a pledge of assets as one form of security for the water license should be eliminated. In this we agree with the DIAND submissions.

**d) Delegation of Authority –**

The argument with respect to delegation advanced by DIAND again misconstrues the authority of the KIA land tenure arrangement with the HBJV and the security access terms included in the water license. DIAND suggests that by allowing KIA access to the security deposit under its land tenure agreement that the Board has delegated its authority to set security terms and conditions to the KIA. This argument implies that a contractual arrangement can somehow overrule the statutory authority of the water license. It also suggests that separate security terms and conditions can and have been established under the land use license between KIA and the HBJV. Again, the department speculates. KIA has asserted that there are no special security arrangements made in the land use license. The only security terms and conditions for the Boston site are those found in the water license. KIA accepted them as part of the compromise fashioned in the 1999 hearing and decision.

The DIAND argument on delegation goes on to suggest "besides fettering the discretion of the Minister, the authority of the Minister to compensate an affected person pursuant to section 17 of the NWTWA is also now delegated to the KIA". This is a ridiculous assertion. It is made without legal foundation, in the absence of any knowledge of the contents of the land use license and contrary to the terms of the 1999 license.

KIA suggests that the "fettering" and "delegation" arguments are two sides of the same coin. They suggest that somehow the water license has improperly given KIA a role which could affect the exercise of the Minister's responsibilities under section 17 of the Act. It seems to KIA that the source of this problem lies in the nature of the

security accepted by DIAND. Since the department was unhappy with the Board's decision in the first instance, it paid little attention to the terms imposed by the financial institution. The Board's original decision clearly required security which would be accessible to either the Minister or to KIA without a requirement for approval by the other party. Had such security been procured by the licensee subject to guidance by DIAND, many of the issues raised by DIAND in its July 17th 2001 submissions would disappear.

There is simply no legal basis for the conclusion that the Board delegated its authority to the KIA through the water license. The license doesn't say that and KIA has not established a compensation program for third parties allegedly affected by the licensed activities.

**e) Miscellaneous –**

The only new issue raised under this heading in the DIAND argument relates to the requirement established an appendix A to the 1999 decision that DIAND or the government of Nunavut assist the parties to dispute over water license security by appointing a mediator to resolve the dispute. This hardly seems an onerous obligation. Presumably if the dispute arose between DIAND and KIA the government of Nunavut would make the appointment. In other cases, DIAND could do so. If the Board is concerned about its authority to require DIAND assistance in this regard, KIA suggests that the terms for dispute resolution be amended so that the HBJV and KIA select a mediator by consensus, failing which the Unified Court of Nunavut shall make the appointment.

**f) Conclusion –**

KIA submits that the arguments presented by DIAND with respect to the scope of NWB jurisdiction to set security conditions should be rejected. The suggestions that the security conditions fetter the Minister's discretion or that they constitute a

delegation of the NWB's responsibilities arise from an interpretation of the terms of the water license which is not in accord with the plain language of the license and was never intended by the Board or the parties to the 1999 hearing. As long as the licensee maintains security in amounts fixed by the Board and which are reassessed annually, based on the concept of progressive reclamation, a draw down by KIA will not constrain the Minister's options.

KIA submits that terms for access to water license security included in the 1999 decision are acceptable and that they should not be disturbed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23RD DAY OF JULY, 2001:**

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John Donihee
Counsel for the
Kitikmeot Inuit Association