

DECISION NO. 2011-WIL-002(a)

In the matter of an appeal under section 101.1 of the *Wildlife Act*, R.S.B.C. 1996, c. 488.

BETWEEN:	Colonial Coal Corporation	APPELLANT
AND:	Regional Manager	RESPONDENT
AND:	West Moberly First Nations	APPLICANT
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on May 13, 2011	
APPEARING:	For the Appellant: Joan M. Young For the Applicant: Tim Thielman	

APPLICATION FOR PARTY STATUS

APPLICATION

[1] This is an application by West Moberly First Nations (“West Moberly”) to be added as a Third Party, with full party status, to an appeal by Colonial Coal Corporation (“Colonial Coal”).

[2] The application was conducted by way of written submissions.

BACKGROUND

[3] Colonial Coal’s appeal relates to its mineral exploration activities in and around the Huguenot area south-east of Tumbler Ridge, BC. In particular, its plans to build approximately 9.2 kilometres of new trails and to reopen and modify 0.3 kilometres of pre-existing trails to support its drilling program. Although unclear from its Notice of Appeal, at least some of the trails are located above the elevation of 1400 metres.

[4] Colonial Coal obtained mining permits and other mining-related authorizations to construct trails in the area of its coal exploration both above and below the 1400 metre elevation. However, its permit for the work also stated that Colonial Coal was “responsible for obtaining all required approvals or permits under

that [other] legislation including any authorizations to operate vehicles above 1400 metres.”

[5] In June of 2010, Colonial Coal applied to the then Ministry of Natural Resource Operations (now the Ministry of Forests, Lands and Natural Resource Operations) for a permit that would allow Colonial Coal to use motor vehicles to build access trails for mining exploration in an area closed to the use of motor vehicles under the *Motor Vehicle Prohibition Regulation*. Specifically, it applied for approval to use a motor vehicle in an area closed to the use of motor vehicles in or around the location of the Huguenot mineral exploration area above 1400 metres.

[6] In a decision dated February 11, 2011, Maurice Lirette, Regional Manager, Recreational Fisheries & Wildlife Programs, Peace Region (the “Regional Manager”), refused to issue the requested permit on the grounds that the motor vehicles would be going through sensitive caribou habitat. He states in part:

As you can appreciate, the proposal to use motor vehicles to build access trails for mining exploration in sensitive caribou habitat required me to gather additional information so that I could make an informed decision on the application. I had also hoped to meet with West Moberly First Nations to gather further information. I have come to the conclusion however, that I have sufficient information before me to consider the application.

... After reviewing the information before me I have concluded that issuing the permit would result in additional and unacceptable risk to woodland caribou. Specifically, allowing the use of a motor vehicle to create a linear corridor within the motor vehicle closed area would provide additional opportunity for predators to access an area identified as an important calving area for caribou. Calf survival rates for the Narraway caribou herd are extremely low (approximately 6 calves per 100 cows) and in my opinion adding any additional mortality risk from predators like wolves is contrary to proper wildlife management.

[7] On March 16, 2011, Colonial Coal appealed this decision to the Board on the grounds that the Regional Manager erred by:

- considering the purpose to which the motor vehicles would be used, rather than the effect of the use of motor vehicles in the permit area, as a ground for refusing the permit;
- failing to consider whether the operation of motor vehicles would be contrary to the proper management of wildlife resources in BC and specifically in the area of the Huguenot mineral exploration area;
- applying irrelevant criteria regarding caribou habitat to the question of whether motor vehicles should be allowed in the Huguenot mineral exploration area;
- refusing to authorize the permit based on inadequate and deficient technical information;

- failing to consider the biological and related information provided by Colonial Coal which indicated that the proposed exploration program was not expected to significantly affect the available caribou habitat; and
- making a decision as to whether the construction of trails in the Huguenot mineral exploration area was contrary to the proper management of wildlife resources in BC when Colonial Coal was already authorized to carry out such work in the area of the subject permit application.

[8] Colonial Coal asks the Board to reverse the Regional Manager's decision and to grant the requested permit.

[9] In a letter received by the Board on April 19, 2011, West Moberly asked to be added to the appeal as a Third Party, with full party status.

[10] No hearing has yet been scheduled for this appeal.

ISSUES

[11] Whether the Board should grant West Moberly participant status in this appeal.

SUBMISSIONS

West Moberly

[12] West Moberly submits that it has a direct interest in the outcome of the appeal and, therefore, should be granted full party status. West Moberly submits that the Regional Manager's decision was based on concerns regarding the risk to woodland caribou. West Moberly states:

... caribou and the habitat that the species relies upon for survival, are of vital cultural importance to the traditions, customs, and practices of the West Moberly community. Caribou are not only an important source of food, but the species is also significant in terms of its use in art, teachings of myths and norms, manufacturing of traditional items such as clothes, and medicinal purposes. In addition, the habitat is used for a variety of cultural purposes as well, an example of which are the use of terrestrial lichen in traditional medicines.

[13] West Moberly also notes that the use and importance of the caribou to West Moberly's culture and rights was recognized by the BC Supreme Court in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359. In that case, three decisions were made by separate government officials which allowed First Coal Corporation to perform exploration activities and tree cutting activities in territory that the West Moberly claimed to be subject to their Treaty No. 8 guaranteed traditional right to hunt caribou. West Moberly challenged the decisions on the grounds that the Crown failed to consult and accommodate them in relation to their treaty protected hunting rights.

[14] The Court in that case found that the diminished state of the Burnt Pine caribou herd was at the heart of West Moberly's concerns and ultimately found that

the Crown's efforts at consultation were not meaningful and that there was not reasonable accommodation. As part of its decision, the Court ordered at paragraph 83, "the Crown, in consultation with West Moberly, should proceed expeditiously to put in place ... a reasonable, active plan for the protection and augmentation of the Burnt Pine herd, a plan that takes into account the views of West Moberly, including the reports of the Crown's wildlife ecologists and biologists with the Ministry of Environment referred to by West Moberly."¹

[15] As a result of this decision, West Moberly states that it worked with the Province's caribou biologists to develop and plan to protect and augment the Burnt Pine caribou herd. Research for this plan also included the Narraway herd, which is the herd that stands to be impacted by Colonial Coal's permit application. West Moberly submits that this information, as well as its traditional knowledge, will be useful to the Board when considering the issues on appeal.

[16] Finally, it submits that the Regional Manager did not consult with it prior to making its decision and that the Board may need to consider the Crown's obligations to consult in the context of this permit application and appeal.

Colonial Coal

[17] Colonial Coal opposes West Moberly's application. It submits that its appeal is a narrow one regarding the appropriate considerations to be applied in granting or refusing a permit to operate a motor vehicle in certain limited areas above 1400 metres. It states that:

- its appeal relates to an application to operate motorized vehicles above 1400 metres in the location of its coal exploration works;
- it already holds a number of authorizations and/or permits which allow it to conduct coal exploration activities in the subject area;
- West Moberly's issues are not germane to the question of whether the Regional Manager considered the correct test or considered sufficient materials when refusing the permit;
- West Moberly's issues, such as the Crown's duty to consult, are wider and different than the narrow legal issue to be determined by the appeal;
- to the extent that consultation or aboriginal rights ought to be addressed in the appeal, Colonial Coal submits that they will be addressed by the Crown in its submissions;
- West Moberly's participation will significantly complicate and lengthen what ought to be a very straightforward appeal, and will cause delay and prejudice to Colonial Coal; and
- the permit in question relates to works expected to be carried out this year and next year. The addition of West Moberly will have the potential to result

¹ On appeal by the provincial Crown, a majority of the BC Court of Appeal upheld the BCSC's findings on consultation and accommodation, but disagreed on the appropriateness of the remedy granted (ordering the plan) [see *West Moberly First Nations v. BC (Chief Inspector of Mines)*, 2011 BCCA 247, released on May 25, 2011].

in significant delay in the ability to have the appeal heard in a timely manner, as well as increase the cost of the process to the Appellant.

[18] In the event that the Board decides that West Moberly ought to be given some opportunity to participate in the appeal, Colonial Coal submits that the scope of its participation should be limited.

Regional Manager

No submissions were received from the Regional Manager on this application.

RELEVANT LEGISLATION

[19] Under section 94(1)(a) of the *Environmental Management Act*, S.B.C. 2003, c. 53, the Board "may hear any person, including a person the board or a panel invites to appear before it"

[20] Under section 94(2) of that Act, a person or body that has full party status in an appeal may be represented by counsel, present evidence, ask questions if there is an oral hearing, and make submissions as to facts, law and jurisdiction.

DISCUSSION AND ANALYSIS

[21] Based on the above noted statutory provisions, the Board has been granted broad discretion to determine whether a person should be allowed to participate in a hearing, and to determine the extent of that participation.

[22] In the Board's Procedure Manual, the Board states:

When deciding whether to invite a person to participate, the Board will consider whether the person is impacted or affected by the appeal, has relevant evidence to provide to the Board and any other factors, which are relevant in the circumstances.

[23] In considering whether to grant West Moberly full party status, the Board has first considered whether it has a valid interest in participating. The Board notes that the Regional Manager referred to the West Moberly in his decision. He states, "I had also hoped to meet with West Moberly First Nations to gather further information. I have come to the conclusion however, that I have sufficient information before me to consider the application."

[24] Based on West Moberly's submissions it is clear that, from its participation in the BC Supreme Court case and the follow-up research with the Provincial biologists, West Moberly has an interest in the subject matter of this appeal and may be impacted by the Board's decision on the appeal; in particular, it has an interest in the health and population of the caribou herd at issue and may be impacted by an activity that negatively affects the herd.

[25] In addition, from its involvement in the research, it appears that West Moberly has information as well as its traditional knowledge regarding the caribou herd at issue in the Regional Manager's decision and, therefore, at issue in this appeal.

[26] The Board has also considered whether West Moberly can be of assistance in this appeal, including whether it has relevant evidence to present, its expertise, whether there is any potential for delay or duplication as a result of its participation, and whether it has a unique perspective.

[27] As stated above, the Board finds that the West Moberly has (or “appears to have”) relevant information to provide the Board on the caribou herd and on any impacts that allowing the appeal may have on its hunting and/or cultural rights. However, the Board has two concerns with West Moberly’s application. First, the information that it has in relation to the caribou herd may be a duplication of the evidence that will be presented by the Regional Manager; the information to be provided overlaps with that of the Regional Manager. The Board notes that the main reason for the Regional Manager’s refusal of the permit was risk to the caribou herd. Thus, it is reasonable to assume that the Regional Manager will be presenting this evidence to the Board. If the Regional Manager is of the view that West Moberly’s evidence would be helpful to his case, he may call members of the West Moberly First Nations as witnesses for his case or, if the hearing is conducted in writing, he may include affidavit evidence from members of West Moberly.

[28] The Board’s second concern is in relation to West Moberly’s observation that the Crown did not consult in the context of this permit application and that it “may be necessary for the EAB to consider the Crown’s constitutional obligations towards West Moberly in the context of this permit application and Appeal.”

[29] It is unclear what the West Moberly’s intention is in relation to addressing this matter, but if West Moberly intends to introduce evidence and arguments regarding its right to hunt and the Crown’s duty to consult and accommodate, that would significantly expand the scope and nature of the appeal. Specifically, the Board notes that these proceedings are limited by the grounds of appeal that have been set out by Colonial Coal. Accordingly, the Board is not prepared to hear extensive evidence and submissions respecting the Crown’s duty to consult and the level of accommodation that should be owed to the West Moberly if this permit is granted. Nor is the Board prepared to hear full evidence and argument on those issues or make any final determination or findings respecting the Crown’s obligations in this case.

[30] However, the Crown may have a constitutional obligation to consult and accommodate West Moberly prior to a permit being issued. Since this is the remedy sought by Colonial Coal, the Board will grant limited participant status to West Moberly to make submissions respecting their rights and the constitutional obligations that may be owed to West Moberly in the event that Colonial Coal is successful on the appeal. These submissions shall not include the opportunity to present evidence or ask questions (cross-examination).

[31] Accordingly, the Board is prepared to allow the West Moberly to participate in the appeal on the limited basis described above. The Board will set out the specifics of this participation (how it will present this information) once the Board determines whether the appeal will be conducted in writing or via an oral hearing.

DECISION

[32] In making this decision, the Panel of the Environmental Appeal Board has carefully considered all of the evidence before it, whether or not specifically reiterated here.

[33] For the reasons provided above, the application for third party status is allowed in part.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

May 31, 2011