

May 4, 1992

**TO: Participants in Natural Resources
Conservation Board Meeting - April 29, 1992**

The Board held a public meeting in Calgary on April 29, 1992, to consider a number of matters related to intervener funding for the hearing of Application No. 9104 filed by Kan-Alta Golf Management Ltd. (Kan-Alta). This letter represents the Board's decision respecting that meeting.

1. Views of the Participants

Three interveners participated in the meeting; the Federation of Alberta Naturalists, Trout Unlimited Canada and the Sarcee Fish and Game Association. Only two interveners, Trout Unlimited Canada and the Sarcee Fish and Game Association, applied to the Board for an advance award of costs. The Federation of Alberta Naturalists made a submission asking the Board to make a determination as to whether they may be "directly affected" by the project but did not seek an advance award of costs at this time.

The Federation of Alberta Naturalists (the Federation) stated that because of the use of public lands, any development in the area would impact on all Albertans, some more than others. It noted that this area is very different from the land covered by the Three Sisters application to the NRCB as the area is not populated. However, the Federation has several hundred members living in the Bow Valley who use the area and would, it was claimed, be directly affected by any change to the use of these public lands. Specific reference was made to members who had recently used the area for recreational purposes.

Kan-Alta argued that actions that affect access to and frequency of use of public lands are not sufficient to qualify an intervener as directly affected.

Trout Unlimited Canada and a number of Trout Unlimited Chapters (Trout Unlimited) stated that they would be directly affected by the loss of angling opportunities that may result from the construction and maintenance of additional golf facilities within the Evan Thomas Creek watershed. Trout Unlimited submitted that any Albertan who requests recognition as a directly affected individual should be deemed eligible for funding in cases where the proposed project is on public lands.

Trout Unlimited expressed concern about the possible loss of public access to the Evan Thomas Creek fishery, the potential negative impact on fisheries habitat and water quality, increased pressure on sportfishing and possible changes to the existing angling regulations as a result of the development, as well as the deterioration of the angling experience as a result of alterations to the natural environment. Specific reference was made to members who had recently fished in the area. In addition, Trout Unlimited commented that while there is an abundance of land available in Alberta suitable for the development of golf courses, there are very few trout streams.

Trout Unlimited requested advance funding to hire two experts to present scientific and technical evidence on specific aspects of the proposed project and to hire legal counsel.

Kan-Alta responded that there are no fishing opportunities in the proposed development area and that it has already agreed to maintain full access to the upstream fishing area. It also stated that there would be no adverse effects on fisheries habitat and water quality as a result of the golf course development.

The Sarcee Fish and Game Association (Sarcee F&G Association) stated that its members are regular users of the area for a variety of purposes. Two letters were presented from members expressing concern about the potential disruption of wildlife habitat and the existing environment and the resulting loss of hunting opportunities in the area due to the proposed development. The planned restriction of hunting within and adjacent to the proposed development would affect member access and use of the area. The Sarcee F&G Association requested advance funding to study the value of the proposed site in its present state as compared to its value if it were to be developed as proposed.

Kan-Alta responded that both members of the Sarcee F&G Association who had written letters were residents of Calgary and not the proposed development area and that the Association has had no recent programs or projects within the proposed development area. The applicant stated that interference with hunting, hiking, cross country skiing and mountain biking should not qualify an intervener as being directly affected.

In Kan-Alta's opinion, none of the interveners would be "directly affected" by the proposed development. The applicant stated that an intervention should come from affected individuals rather than groups and that only individuals or groups of individuals could be "directly affected".

Kan-Alta argued that the development area has been zoned for facility development and the area is not a pristine or wilderness area because it already has considerable development, including horseback riding, mountain biking, hiking and cross-country skiing.

Kan-Alta made reference to both the Board's decision report on the Three Sisters Application and the Board's guidelines document. The excerpts referred to from the guidelines were:

- "directly" was intentionally used by the legislators to exclude from consideration for awards of costs the broad public in Alberta who may be affected by any Alberta project but in an indirect manner;
- directly affected individuals or groups of individuals would primarily include those persons who live or work in the vicinity of a proposed project; and
- they might also include individuals or groups who regularly use air, water, land, or living organisms which would be affected by the proposed project and, who as a result, might be exposed to an elevated risk of adverse effects on their bodies and health.

It was the opinion of Kan-Alta that none of the interveners present are or may be directly affected on the basis of these criteria.

The applicant also presented a number of arguments respecting the allocation of intervener funding. Kan-Alta held the view that groups which receive public funds, from any sources including, for example, the Buck for Wildlife Program, should not qualify for intervener funding. It also felt that the groups represented were not in need of advance funding since they had sufficient operating budgets. With regard to the request for funding for legal counsel, Kan-Alta stated funding for legal assistance was not justified as the application is not complicated and the applicant intended to appear at the hearing without the benefit of legal counsel.

2. Eligibility of Interveners for Funding

Three interveners requested determination of their eligibility for funding under section 10(1) of the NRCB Act:

" Individuals or groups of individuals who, in the opinion of the Board, are or may be directly affected by a reviewable project are eligible for funding under this section."

In reaching its decision on the eligibility of interveners requesting funding to participate in the hearing on the Three Sisters Golf Resort Inc. (Three Sisters) Application, the Board concluded that two questions must be addressed in assessing eligibility. The first is whether those requesting funds are "individuals, or groups of individuals." The second is whether those individuals or groups of individuals "are or may be directly affected" by the proposed project.

In all three requests now before the Board, the Board accepts that the initiative for intervention originated with individuals who believe that they may be affected by the proposed Kan-Alta golf course development and who chose to be represented by the organizations making requests on their behalf. The Board therefore proceeded to assess whether or not these individuals are or may be directly affected by the proposed project.

In its decision respecting those seeking funds to intervene in the review of the Three Sisters application, the Board offered the following opinion of the meaning of "directly affected":

"... in order to directly affect an individual or group of individuals a project would have to cause a detectable effect on it or them. Such an effect could be beneficial or injurious. For illustration only, direct effects might act upon an individual's or group of individual's bodies or health, sustenance, livelihood, property, or statutory rights. Because the Board will normally be reviewing applications for projects that have been proposed but not constructed, it will not be considering effects that have occurred but effects that might occur. The Board has considered this, and concluded that there must be evidence acceptable to a reasonable person that: 1) a chain of causality exists, 2) an effect would probably occur and 3) the effect would not be trivial, before a potential effect can be considered to have been established."

The Board went on to define a "closeness test" which depends on the demonstration of an uninterrupted chain of cause and effect between the proposed project and the individuals requesting costs. The Board concluded that: "... in the case of individuals living within the vicinity of a proposed project, the demonstration of a chain of causality that could lead to direct effects on them would normally be easy to accomplish." In the case of the Kan-Alta application, members of those organizations requesting costs are not resident in the vicinity of the proposed project, and they cannot be eligible on application of the "closeness test".

The interveners requesting eligibility claimed that they would be directly affected because their use of the public lands on which the proposed project would be built would be affected by its construction, by resulting changes to the landscape, vegetation, and fish and wildlife habitat, and by restriction of access to the lands. This is a question that did not arise in the case of the Three Sisters application where the proposed development would, if approved, occur on private land.

In the Board's opinion, the interveners did provide evidence of a chain of causality and a significant probability that there would be an effect on their use of public land. All three interveners established the identity of individuals who make recreational use of the area proposed for the development of the golf course and that their recreation could be affected to some extent. The question remaining is whether or not the probable effect that might occur would be trivial.

The Board has identified two criteria for use in determining whether or not an effect on an individual's use of public lands should be considered trivial. One concerns the distinctiveness of the use of the lands and the other the extent to which the opportunity for use that the lands provide is particularly unusual. All Albertans have access to unoccupied public lands for recreation. Where a proposed project would restrict access to public lands, recreational opportunities available to all Albertans might be affected. The Board does not believe that the legislators intended to extend eligibility for costs to the general population where its members might be subject to effects of this kind. If the legislators had intended to do so, they might have simply used the word "affected" in section 10(1) of the Act instead of the more restrictive "directly affected". Therefore one requirement for the eligibility of an individual claiming that his or her use of public lands would be affected should be that the individual, or group of individuals, must demonstrate that its use of the land differs distinctly from that of the general public.

An individual might demonstrate a use that differs from that of the general public in kind or in degree. As an example of difference in kind: an individual whose livelihood depends in part on the gathering of fungi from a particular area of public lands might be affected in a way that the general population would not. As an example of difference in degree: a licensed outfitter might be able to demonstrate that he or she would be subject to a greater effect than a casual camper or hunter. Similarly, a resident of an area might make much greater use of an area than would the general population because of its proximity. Clearly there is a point at which the distinctiveness of the use of the land by a particular individual or group of individuals becomes sufficiently distinct from use by the general population that the potential effect on that individual or group of individuals would not be trivial.

Another situation in which the potential effect on interveners may not be trivial could arise when a project would affect public lands which have a highly unusual and important feature which would not be readily available to users elsewhere in the province. A hypothetical example might be an exposure of geological strata bearing unusual fossils.

Turning to the requests for eligibility before the Board, all three interveners provided information useful in applying the criterion of distinctive use. The Sarcee F&G Association identified three members who use the area at issue for recreation more frequently than does the general population. Mr. Everett said he spends five to six days per year hunting in the immediate development area and an additional amount of time skiing and bicycling there. Although the nature of its use of the area does not differ from recreational activities of Albertans in general, the Sarcee F&G Association argued its use is much more frequent than the average Albertan. The other two interveners established use of the area by individual members, but did not argue that their intensity of use was exceptional. Although their uses of the area are of specific types, i.e., primarily fishing and naturalists' field excursions respectively, they did not contend that these are different from recreational pursuits of the public at large. The Board did not find evidence to conclude that the activities of the interveners in the area are sufficiently distinct in type or frequency of use from those of Albertans in general to qualify them as eligible for intervenor costs.

With respect to highly unusual features of the area, the Sarcee F&G Association identified the ease of access to opportunities to view and hunt wildlife. Trout Unlimited said that the sport fishery for trout in the upstream reaches of Evan Thomas Creek is one of a limited number in Alberta. The Federation said that the area is one of a few affording opportunities for naturalists who are not able to walk longer distances over difficult ground.

Although the Board accepts that the area offers attractive recreational opportunities and ease of access it does not believe that the opportunities or the access to them are unique or extremely unusual in Alberta. In addition the golf course, if approved, would occupy a relatively small area and similar opportunities for recreation would probably remain available within the vicinity of the proposed development. Furthermore, the Board notes that access to the fishery in the upper reaches of Evan Thomas Creek would not be restricted by the proposed development and the existing trails for bicycling and horseback riding would be retained. The Board, therefore, concludes that none of the interveners demonstrated that the area has features that are sufficiently unusual that restriction of

access to them, or their alteration or removal, would cause an effect on the interveners that would not be trivial.

Having examined the evidence and argument provided by the interveners, the Board is not satisfied that any of them are or may be directly affected by the proposed project as intended in section 10(1) of the NRCB Act. The Board does note that final determinations with respect to eligibility and costs would normally be made on request after the completion of a hearing.

The Board wishes to emphasize that its decision reported here deals only with eligibility for awards of costs to interveners. This is distinct from the consideration of the merits of the application or the matter of standing. The Board believes that anyone with an interest in a proposed project is entitled to intervene at a hearing on an application before it. However, standing to appear does not automatically entitle an intervener to receive an award of costs. Also, in assessing the requests for awards of costs, the Board has not assessed the question of whether or not the proposed project is in the public interest.

Having concluded that none of those requesting eligibility for intervener funding are directly affected, the Board does not consider that it has jurisdiction to make an award of an advance of costs and direct that Kan-Alta pay those costs. This situation is illustrative of the circumstances the Board may face when projects come before it where the combination of a remote location and the nature of the proposed project is such that no parties are considered directly affected. Potential interveners would not be eligible for funding from the applicant and this could limit the detailed technical analyses they place before the Board. This would put additional onus on the Board and its staff to ensure an appropriately detailed review of the proposal. In such circumstances, the Board would be prepared to provide some of its own funds to interveners to help ensure that such a review occurred.

For this reason, and notwithstanding that the Board has concluded that none of those making requests are directly affected, it has carefully reviewed the intended use of funds by the two parties that requested an advance, Trout Unlimited and the Sarcee F&G Association.

Trout Unlimited indicated that it has additional data respecting fish in the area. Also, certain work is now being done for it regarding possible effects of golf courses on water and fisheries. The Board believes such information should be considered in its assessment of the Kan-Alta application, and is prepared to provide some funding to assist in that regard. The funding would be less than requested by Trout Unlimited and, for example, would not include the cost of legal representation at the hearing.

The Sarcee F&G Association proposed a study of the economic rationale for the project, describing it as an assessment of the socio-economic value of the proposed site in its present state compared to the value if the proposal proceeds. The Board believes a general assessment of the nature suggested by the Sarcee F&G Association might be useful. It is prepared to assist in the funding of such a study, including its presentation at the hearing, if an appropriate expert can be located and terms of reference agreed upon.

The Board has requested its staff to immediately contact representatives of Trout Unlimited and the Sarcee F&G Association to discuss and arrange some degree of financial support for the above mentioned matters.

3. Summary of Decision

The Board has concluded that none of the interveners making requests are directly affected in accordance with section 10(1) of the NRCB Act and therefore eligible for intervener funding. The Board is prepared to provide some of its own funds to the two parties seeking advances to assist them in bringing relevant information before the Board.

Yours truly,

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G.J. DeSorcy
Chairman