

**BRITISH COLUMBIA
MINISTRY OF FORESTS, LANDS
AND NATURAL RESOURCE OPERATIONS**

Rationale for Decision

March 20, 2012

**Jumbo Glacier Resort
Master Development Agreement**

**Honourable Steve Thomson
Minister of Forests, Lands and Natural Resource Operations**

Purpose of Document

The purpose of this document is to provide a record of the factors that I have considered, and the rationale I have employed, as the Minister of Forests, Lands and Natural Resource Operations for the Province of British Columbia, in making my decision regarding the Jumbo Glacier Resort Master Development Agreement (MDA), having regard to my statutory decision-making responsibilities under the *Land Act* and *Ministry of Lands, Parks and Housing Act*.

Background

The following is a summary of key approval milestones leading to the development and consideration of the Jumbo Glacier Resort MDA:

- Interim Agreement between the Province and proponent signed March 1993 and subsequently renewed to remain in effect to present
- Commission on Resources and the Environment (CORE) designation as a Special Management Area, with High Values for Wildlife and Ecology and Very High Values for Recreation and Tourism, which specifically did not preclude the development of a ski resort in the resulting East Kootenay Land Use Plan of October 1994
- Environmental Assessment commenced in July 1995
- Environmental Assessment Certificate granted to the project proponent in October 2004
- Master Plan review commenced in October 2005
- Master Plan approved July 2007
- Environmental Assessment Certificate extended in January 2009 (to October 2014)

Nature of the Decision

The Province's All Seasons Resort Policy establishes that the disposition of Crown land for the use, operation and development of an alpine ski resort may be authorized by an MDA. An MDA is an agreement between the Ministry of Forests, Lands and Natural Resource Operations and the Developer that is issued under the authority of the *Land Act* or the *Ministry of Lands, Parks and Housing Act* and sets out the terms and conditions governing the development and operation of an alpine ski resort.

The decision regarding the issuance of an MDA is the final stage of a proposal process that begins with a proponent submitting an Expression of Interest to the Ministry of Forests, Lands and Natural Resource Operations. The process includes a step in which an Interim Agreement may be issued to a proponent whose formal proposal has been accepted. An Interim Agreement was issued to the proponent of the Jumbo Glacier Resort project in March 1993 and sets out the terms and conditions for preparation and approval of an MDA.

Scope of the Decision

The Interim Agreement entered into with the proponent of the Jumbo Glacier Resort project requires the Province to “in good faith attempt to conclude an MDA” where:

1. the Minister is satisfied that the terms and conditions of the MDA are consistent with the approved Master Plan and with any specific terms that may be set out in the Interim Agreement; and
2. the MDA is in the form that is approved, or followed at the time of resort development.

This obligation exists within the broader powers, duties and functions of the minister and ministry under the *Land Act* and the *Ministry of Lands, Parks and Housing Act*. Under those acts, the ministry and minister are, among other things:

- responsible for the administration of Crown land,
- responsible to dispose of Crown land where the minister considers advisable in the public interest
- responsible for encouraging outdoor recreation

(*Ministry of Lands, Parks and Housing Act* s.6 and *Land Act* s. 11(1))

Further, the Province has a duty to consult (and accommodate if appropriate) in respect of decisions that could impact upon asserted aboriginal rights or title. In this case, the aboriginal groups consulted include the Shuswap Indian Band and the Ktunaxa Nation. (I use the term “Ktunaxa Nation” to refer to the Ktunaxa Nation Council and its representatives, and the Ktunaxa people and communities).

All of the foregoing that have been considered within the scope of this decision, for reasons set out below.

Information Sources Used in the Decision

I have considered a range of relevant materials and briefings from staff. The information sources considered include:

- Aboriginal Interest Consideration Report – Jumbo Glacier Resort – October 2011; an assessment of overall consultation prepared by staff which includes:
 - Ktunaxa Nation Consultation Correspondence
 - Consultation/Accommodation Summary
 - Review of Anthropological and Historical Sources Relating to the Use and Occupation of Land Revised July 2009
 - First Nations Socio-Economic Assessment: Jumbo Glacier Resort Project
 - Jan 22 2004 letter to Anielski

- Maps showing claimed traditional territories of Shuswap Indian Band and Ktunaxa Nation Council
- History of Shuswap Kinbasket People in Ktunaxa Traditional Territory
- Socio/Economic Study Shuswap Indian Band
- Ktunaxa Aboriginal Interests: Traditional Use and Archaeological Overview of the Proposed Jumbo Glacier Alpine Resort
- Jumbo Glacier Resort Environmental Assessment Report – August 2004, including Compendium of Proponent Commitments
- All Seasons Resort Policy – March 2011
- Land Use Report – October 2011, including consideration of:
 - Jumbo Glacier Resort Master Plan – November 2010
 - Jumbo Glacier Technical Review Committee – Response Summary Table
 - Ministry of Tourism, Culture and the Arts and the Grizzly Bear Consultation Flowchart
 - CORE Recommendations
- My meetings with representatives of the Ktunaxa Nation and the Shuswap Indian Band
- Correspondence received from Ktunaxa Nation regarding the Qat'muk Declaration
- Correspondence received from the Shuswap Indian Band regarding the Qat'muk Declaration

Consideration of Factors

Having regard to my responsibilities under the *Land Act* the *Ministry of Lands, Parks and Housing Act* and with respect to the All Seasons Resort Policy I consider the following to be relevant factors for the purposes of this decision

MDA:

I have considered the terms and conditions of the MDA and concluded that it is consistent with the Master Plan and Interim Agreement entered into between the Ministry of Forests, Lands and Natural Resource Operations and the proponent.

Socio-economic Viability:

I have considered the Socio-economic and Market analyses included in the Master Plan and the Environmental Assessment processes, as well as the Economic Benefits review of the project, commissioned by the Ktunaxa Nation, written by Marvin Shaffer and Associates Ltd.

I also note that the relevant resort policies and guidelines and the MDA have been drafted to protect the interests of the Province. In particular, the MDA requires completion of recreational infrastructure (access, lifts, runs, day lodge, etc.) as a precondition of any associated land sales for residential construction in each phase of the Resort Master Plan, ensuring that the overall development is balanced and controlled. I also recognize that economic conditions will appropriately dictate the pace of development, which could stop or pause at the completion of any given phase.

Further, I note that the proponent team is knowledgeable and experienced in the development of ski resorts in BC. In reviewing the proponent's assumptions with regard to the economic viability of the project, I found them to be reasonable, conservative, and consistent with other resorts in the region, in aspects including but not exclusive to market analysis, development feasibility, economic benefits and First Nation business opportunities. The assumptions are in my opinion reasonable.

For the above reasons, I have concluded that, on balance, the business plan and analysis are reasonable and that the project can be economically viable.

First Nations Consultation:

Relevant legal principles

An aboriginal right is a custom, practice or tradition integral to the distinctive culture of an aboriginal group at the time of contact with European settlers (generally regarded as 1793 in British Columbia). Aboriginal rights may be exercised on and associated with land, but they are not an interest in the land itself.

Aboriginal title is an aboriginal interest in land, based on exclusive use and occupancy of an area of land by aboriginal groups, at the time of assertion of sovereignty (1846).

Where (as is the case here) aboriginal rights and title are asserted but not yet proven, the Crown has a duty to consult, and potentially accommodate, those interests where a Crown decision or authorization may have an adverse impact on such asserted rights or title. The Supreme Court of Canada has made clear that the depth of consultation in such circumstances ranges from "mere notice" to "deep consultation", depending on the strength of claim and the potential impact of the activity on the asserted right.

The courts have also made clear that aboriginal consultation can occur through existing processes, including the environmental assessment process.

Shuswap Indian Band

The Shuswap Indian Band considers that their aboriginal interests were duly addressed through consultation undertaken during the Environmental Assessment and have indicated, in writing, their support of the project.

Ktunaxa Nation

With respect to the Ktunaxa Nation, I have considered the consultation process as outlined in the materials referred to above, and in particular the "Consultation/Accommodation Summary, Ktunaxa Nation – Jumbo Glacier Resort" and conclude that it has been sufficient to discharge the Crown's duties. I reach this conclusion for all of the reasons set out in Consultation/Accommodation Summary (which is over 70 pages long and includes a number of attachments) and other relevant documents referred to above, in particular would highlight the following:

- The province has determined that the Ktunaxa Nation's *prima facie* claim:
 - to gather berries and plants in the proposed project area is moderate to strong
 - to hunt and fish in the proposed project area is strong
 - to aboriginal title in the proposed project area is weak
- With respect to the Ktunaxa Nation's asserted spiritual interests in the area (referred to as Qat'muk), the Consultation/Accommodation Summary notes how the Crown has endeavored to honourably give consideration to those interests, while at the same time applying the tests for determination of aboriginal rights as set out in relevant case law. In this regard, the Consultation/Accommodation Summary states at pages 49-51:

It is... not clear whether any of these values can take the shape of a constitutionally protected aboriginal right or whether such a claimed right can be reconciled with other claimed aboriginal rights and Ktunaxa access to the valley for a variety of traditional and modern uses, including hunting, gathering and fishing. The Ministry's challenge is to give due respect and recognition to this sensitive spiritual information, which has been provided by the Knowledge Keepers in a trusting way, and at the same time, assess it in the context of the Crown's consultation and accommodation obligations in respect of aboriginal rights recognized by section 35 of the *Constitution Act*, 1982....

The Ministry sincerely recognizes the genuinely sacred values at stake for Ktunaxa leadership and the Knowledge Keepers in particular, however it has determined on a preliminary basis that a *prima facie* claim to an aboriginal right of this nature is weak. In particular, there is no indication that valley would have been under threat from permanent forms of development at the time of contact such that the right claimed would have been one that was exercised or an aboriginal tradition, practice or activity integral to the culture of Ktunaxa. In addition, in the Ministry's view the claim to such a right is weakened where the details of the spiritual interest in the valley have not been shared with or known by the general Ktunaxa population. The Ministry makes these preliminary statements because the nature of the consultation obligation requires it be done, and hopes that no personal or cultural disrespect is perceived. The Ministry believes that there is difference in respecting certain personal and spiritual beliefs or values, which the ministry hopes it has done, and then weighing this information in the context of a legal aboriginal rights claim, which the Ministry believes it has done in as respectful a way as possible.

- The documentation sets out a very extensive record of consultation with the Ktunaxa Nation under various provincial initiatives over the last two decades including the Commercial Alpine Ski Policy, the Commission on Resources and the Environment, the Kootenay-Boundary Land and Resources Management Plan, the Environmental Assessment Process, and the Commercial Alpine Ski Policy under the All Seasons Resort Policy.
- The Consultation/Accommodation Summary contains detailed information on many substantive issues raised by the Ktunaxa, and it contains extensive information about

accommodation measures that have been taken (through the commitments contained in the environmental assessment certificate or otherwise) to mitigate the impact of the project in respect of those issues. By way of example, these include:

- The overall area of the controlled recreation area has been reduced by approximately 60% and the total resort development area has been reduced to approximately 104 hectares at build out (p. 40)
- there are requirements for on-site independent environmental monitors during all construction to address, among other things, water quality fish and wildlife (p. 22)
- as a condition of the MDA, the developer will be required to provide for continuing use by the Ktunaxa of portions of the controlled recreation area for the practice of traditional activities including berry picking and plant gathering (p. 36)
- the approved Master Plan shows the removal from the controlled recreation area of the lower Jumbo Creek area that has been perceived as having greater visitation potential from Grizzly bears. It has also been amended to remove ski lifts on the West side of the valley, where impact to Grizzly bear habitat was expected to be greatest. (p. 44)
- to address potential impacts in relation to Grizzly bears and aboriginal claims relating to spiritual value of the valley the Province will pursue the establishment of a Wildlife Management Area (WMA). Further, the Ktunaxa are invited to engage with the province in the development and implementation of the WMA objectives. (p. 52)
- Overall, the consultation applied in this case is at the deep end of the consultation spectrum and having regard to the accommodation measures, is adequate in respect of those rights for which the strength of claim is strong, and for which potential impacts of the project could be significant.
- Given the extensive mitigation and accommodation measures, and having regard to the continued ability of the Ktunana Nation to continue exercising its asserted aboriginal rights, the potential impact of the master development agreement and the proposed project itself is considered to be reasonable when balanced against the other societal benefits of the project.

Environmental Considerations:

I have considered the environmental concerns regarding the Jumbo Glacier Resort Project which were raised during the Environmental Assessment and Master Plan review processes. The primary concerns appear to be related to impacts to wildlife, particularly to Grizzly bears which, due to their large territory, serve as an “umbrella species” for other wildlife. Studies, including a cumulative impact assessment, were completed and reviewed, and the proponent undertook DNA analysis to identify bears using the project area.

Ten of the 195 commitments of the proponent in the Environmental Assessment Certificate are specifically related to Grizzly bear management and minimizing impacts to the Grizzly bear population and additional conditions of the MDA are intended to mitigate impacts to wildlife and habitat. Meetings which focused on residual impacts to Grizzly bears outside of the Controlled Recreation Area included provincial government agencies, and the Ktunaxa Nation as well as government and non-government

biologists. As a result of those meetings, Ministry officials committed to pursue the designation and implementation of a Wildlife Management Area in watersheds adjacent to the resort (outside of the Controlled Recreation Area), if the MDA is approved. The Province will continue to pro-actively manage the Purcell Mountain Grizzly bear population and other wildlife through existing legislation and policies.

All aspects of the environment, including water, air, noise, glacial ablation, plants and animals, fish and wildfire, were considered during the public, agency and First Nations reviews of the Project. The Environmental Assessment Office concluded that “practical means have been identified to prevent or reduce to an acceptable level all potential significant adverse effects arising from the Project”, and further conditions intended to minimize impacts to the environment have been included in the MDA. Environmental impacts will be effectively minimized through the development and monitoring of Environmental Management Plans which include proactive mitigation measures, monitoring and adaptive management mechanisms.

For these reasons I have concluded that, on balance, the commitments and strategies in place are reasonable and minimize the potential impact to the environment and specifically, to Grizzly bear habitat.

Other factors:

I have also considered the following additional factors which are relevant to determining the public interest in respect of this matter:

- The proponent has estimated that the total capital investment of the resort could total \$900 million in capital investment, and that 750 to 800 permanent, direct jobs could result once the project achieves full build out.
- While there is not unanimous support for the project, all interested parties have had extensive opportunities to make their views known and have them considered as part of the environmental assessment process and other government engagement processes.

Conclusion and Decision

For the reasons noted above and having regard to my responsibilities under the *Land Act* and the *Ministry of Lands Parks & Housing Act*, I have decided to approve the Master Development Agreement for the Jumbo Glacier Resort, effective March 20, 2012.



Honourable Steve Thomson
Minister of Forests, Lands and Natural Resource Operations