

July 5, 2011

REGULAR MAIL AND E-MAIL

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Dear Sirs:

**Re: Authorization from the Grand Council of Treaty #3 Required for the Continued
Operation of ACH Hydroelectric Dams in Treaty #3 Territory**

Introduction and Summary

We are lawyers for the Grand Council of Treaty #3 (“Grand Council”) in this matter. The Grand Council is the traditional government of the Anishnaabe Nation in Treaty #3 with communities located in northwestern Ontario (and Manitoba). Treaty #3 territory subject to the jurisdiction of the Grand Council is set out in the map attached to this letter. The Grand Council is responsible for

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carrying out consultation on behalf of the Anishnaabe Nation and granting authorizations for developments within Treaty #3 territory.¹

As you know, ACH Limited Partnership (“ACH”) owns and operates the Calm Lake, Sturgeon Falls, Fort Frances, Kenora and Norman Generating Stations (“Generating Stations”) pursuant to Electricity Licence EG-2006-0124 in Treaty #3 territory.

ACH is currently operating the Generating Stations without authorization from the Grand Council or any of the individual Treaty #3 First Nations. ACH has never consulted with the Grand Council or any of the individual Treaty #3 First Nations about the construction or past, current or future operations of the Generating Stations. ACH’s failure to consult and to seek the Grand Council’s authorization regarding the Generating Stations in Treaty #3 territory has given rise to an inequitable and unconstitutional state of affairs: ACH is reaping all of the financial benefits from operating the Generating Stations in Treaty #3 territory while the Treaty #3 First Nations are suffering all of the adverse impacts arising from such operations.

The operation of the Generating Stations has caused and continues to cause significant adverse impacts on Treaty #3 territory, reserve lands, as well as on the Aboriginal and treaty rights of Treaty #3 First Nations. These impacts arise, for example, where water levels higher than under natural conditions are maintained by dams in the Lake of the Woods and Rainy Lake watersheds. Maintaining water levels at unnaturally high levels has caused the historical and ongoing flooding of Treaty #3 territory and reserve lands. This flooding in turn causes impacts such as erosion of Treaty #3 territory and reserve lands, interference with hunting and fishing rights, the growing of wild rice, impacts on sturgeon, and reduced or impaired access to Treaty #3 territory and reserve lands.

It is clear that the economic and physical damages caused to Treaty #3 territory, reserve lands, as well as the historic and ongoing infringement of the Aboriginal and treaty rights of Treaty #3 First Nations caused by the continued flooding of reserve lands and traditional territories associated with the operation of ACH’s hydroelectric dams and Generating Stations must be addressed.

The Grand Council is very concerned with ACH’s continued unauthorized operation of the Generating Stations in Treaty #3 territory, refusal to negotiate appropriate and required economic compensation for the historic and ongoing impacts caused by the operation of the Generating Stations in Treaty #3 territory, and failure to consult with the Grand Council about recent and important decisions involving the Generating Stations. On June 2, 2011 the Grand Council passed Resolution #CA-11-01, which empowers the Grand Council to take immediate actions to assert, protect, and seek meaningful accommodation of the rights and claims of Treaty #3 First Nations from the Crown and *the past and present owners of hydroelectric generating stations in Treaty #3 territory.*

¹ “Development” includes the construction, operation, alteration, and decommissioning of any building, structure or work within Treaty #3 territory, which may affect the environment within Treaty #3 territory or the exercise of rights of the Anishnaabe.

We are writing at this time on behalf of the Grand Council to notify ACH that it must immediately consult with and seek an authorization from the Grand Council for the continued operation of the Generating Stations in Treaty #3 territory.

We request that you respond to this letter by July 12, 2011 indicating dates later in July that are available for you and your senior officials to meet with the Grand Council to begin this consultation process.

It is our view, on a without prejudice basis, that the recent change in control in ACH provides an opportunity for ACH to develop a new relationship with the Grand Council based on mutual respect, transparency, and acknowledgement that ACH's dams and Generating Stations are adversely impacting Treaty #3 territory, reserve lands, and the Aboriginal and treaty rights of Treaty #3 First Nations.

The request for consultation with and authorization from the Grand Council is without prejudice to the Grand Council and Treaty #3 First Nations pursuing any judicial or appeal remedies arising from recent events involving these dams and generating facilities by the Ontario Energy Board and the Ontario Power Authority.

Proposed framework for engagement

The parameters for ACH initiating consultation with the Grand Council are set out in the *Manito Aki Inakonigaawin*, which is a resource law that sets out the consultation requirements for proponents engaging in developments and activities on Treaty #3 territory. The *Manito Aki Inakonigaawin* is attached to this letter.

The purpose of the consultation process is to determine, on a without prejudice basis, whether the Grand Council will authorize the continued operation of the Generating Stations in Treaty #3 territory, and if so, the conditions of authorization. As a starting point for discussion, the Grand Council would like to negotiate a Resource Revenue Sharing Agreement with ACH, as a condition of a possible authorization, that will address, *inter alia*, the following issues:

1. economic compensation for historical impacts caused by the operation of the Generation Stations;
2. operation of the Generating Stations in a way that decreases or eliminates impacts on Treaty #3 territory, reserve lands, wild rice, hunting and fishing rights, sturgeon and access to Treaty #3 territory and reserve lands;
3. equitable compensation for the operation of the Generating Stations in Treaty #3 territory on a go-forward basis; and
4. an undertaking to consult the Grand Council and to obtain the Grand Council's authorization for any future changes in the control of ACH, as well as any proposed modifications, upgrades or decommissioning of the Generating Stations in the manner prescribed by the *Manito Aki Inakonigaawin*.

Executing a Resource Revenue Sharing Agreement with the Grand Council will go some way in ensuring that Treaty #3 First Nations are appropriately compensated for past and ongoing impacts, and it will provide the basis for a new, mutually beneficial relationship between ACH and the Anishinaabe Nation in Treaty #3.

Closing

ACH's continued unauthorized operation of the Generating Stations in Treaty #3 territory and the corresponding adverse impacts caused by such operations must be addressed immediately. ACH must take steps now to request the Grand Council's authorization for the continued operation of the Generating Stations in Treaty #3 territory.

We ask that you contact us to make arrangements for a without prejudice meeting to be held with the Grand Council at its offices in Kenora on a date to be agreed in July to begin discussions of and commitments to resolving the important issues raised in this letter.

Yours sincerely,

GOWLING LAFLEUR HENDERSON LLP



David Estrin
Certified Environmental Law Specialist



Scott A. Smith

Attachment
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