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Fortress Mountain and the Sale of Water from Kananaskis Country

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Matter commented on: Fortress Mountain Holdings Ltd. Application No. 003-00037369 under the *Water Act*, [RSA 2000 c W-3](#)

This is a short comment to raise awareness about a systemic problem in how Alberta Environment and Parks (AEP) administers its decision-making powers concerning the development of natural resources and assesses the environmental impacts associated with this development. It is a problem of transparency and more particularly, the absence of transparency and lack of any meaningful opportunity for public participation in the AEP decision-making process. This is not a new problem, and it is one which I canvassed more thoroughly in [The Right to Public Participation in Resources and Environmental Decision-Making in Alberta](#) published by the Alberta Law Review in 2015. In short, decisions made by AEP under the *Environmental Protection and Enhancement Act*, [RSA 2000 c E-12](#) (*EPEA*) or the *Water Act* concerning the use or development of natural resources are generally made behind closed doors with no opportunity for public input and minimal disclosure. This makes a mockery of the statements of purpose set out in section 2 of *EPEA* and section 2 of the *Water Act*, which state that a purpose of each Act is to provide opportunities for citizens to give advice on decisions affecting the environment.

The matter at hand is an AEP decision to approve an amendment to the water license held by Fortress Mountain Ski Resort, allowing Fortress to take up to 50 million cubic metres of water annually from a tributary of Galatea Creek in Kananaskis Country for the purpose of transporting it to a bottling facility in Calgary. This amounts to approximately one-half of the total water entitlement under the Fortress license which was originally issued to Fortress many decades ago.

Apart from the environmental concerns with this approval, which are summarized by the Alberta Wilderness Association [here](#), a more basic question to ask is: Why is a ski resort getting into the business of selling bottled water possibly [infused with cannabis](#)? We can't say for sure because of the closed-door approach administered by AEP in making this decision, but one can speculate from [media reports](#) that Fortress needs to generate cash to resume operations. The chairlifts at the ski resort have been idle for years, and during this time the downhill ski industry has evolved towards a business model whereby resorts use high-speed lifts, develop extensive on and off-piste skiable terrain, build luxurious on-hill facilities, and sell real estate. Simply put, Fortress likely needs a significant capital investment to compete in today's ski industry.

Moreover, the Fortress resort has the misfortune of being located one valley too far to the east in Kananaskis Country. As someone who visits the region in the winter, my observation is that the real snow in Kananaskis Country is usually squeezed out of the clouds by the continental divide

further to the west. And it is increasingly apparent to me that one of the impacts of climate change in the mountains west of Calgary is that the front ranges get relatively smaller amounts of snow than they received in past decades. Less snow makes for difficult skiing, and it also means less water to recharge those front range mountain streams – which also happens to be one of the environmental concerns raised by the Alberta Wilderness Association with respect to the removal of water for sale by Fortress.

Now all of this is just speculation on my part, but speculation is one of the products of non-transparency. The public isn't given an opportunity to consider all the facts or ask questions about them. Moreover, the closed-door approach by AEP allows Fortress to make claims about [confidentiality](#) when pressed to disclose its intentions here. What the legislative framework should really deliver in this case is an open and transparent environmental impact assessment on the proposal by Fortress to resume its operations – along the lines of what the Natural Resources Conservation Board would administer under the *Natural Resources Conservation Board Act*, [RSA 2000, c N-3](#).

Transparency is a real problem in this case. AEP has approved the taking of water from a tributary stream in Kananaskis Country for commercial bottling. Why aren't the record of this application, the documents considered by AEP department staff, and the back-and-forth between AEP and Fortress readily available on the AEP website? Why does section 16 of the *Water (Ministerial) Regulation*, [Alta Reg 205/1998](#) still only contemplate disclosure by written request or inspection at the department offices? This is, after all, the internet age. Do we still have to pretend there is any real difficulty in establishing an online registry for these records? I know the materials are already digitized because you can obtain an e-copy of the record by requesting it in person from the information record-keeping folks at AEP – or at least that has been my experience on other matters in the past. Just think of all the efficiencies and cost-savings to be gained if AEP simply published this information on an open database!

If someone was fortunate to come across the public notice of this Fortress application when it was issued this past summer as required by section 108 of the *Water Act* and section 13 of the *Water (Ministerial) Regulation*, that person would have seen the invitation to file a statement of concern under section 109 of the *Water Act*, which provides that a person who feels they may be directly affected by the Fortress application may provide their concerns to AEP. An example of a statement of concern is what the Alberta Wilderness Association filed [here](#). Apparently, AEP received [246 statements of concern \(and 13 letters of support\)](#) in relation to this application. However, as is typical with AEP, none of the filers of statements of concern were found to be directly affected by the Fortress application. This is because AEP maintains the view that in order to be 'directly affected' one must establish that they live in close proximity to the approved activity and that the activity will adversely affect a resource they use or their use of the resource. I would cite a source for this reading by AEP, but AEP doesn't publish guidance on how it interprets and applies the phrase 'directly affected'. Rather, one develops an understanding of what the term 'directly affected' means in the legislation by challenging AEP in judicial review applications and reading the legal arguments submitted by Alberta Justice in defence of the AEP position. Obviously, where the AEP decision involves authorizing an activity taking place in an alpine mountain stream in Kananaskis Country, no one will be able to establish they are directly affected on these terms. AEP has thus relied on its own interpretation of the legislation to dismiss

all statements of concern filed in this case and to disregard all advice from the public contained therein without any apparent consideration.

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