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Harlequin Ducks Dismissed by Federal Court in Cheviot Case

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Harlequin ducks have effectively been served with their eviction notice for their residence on the McLeod River. The Federal Court, on August 17, 2005, dismissed a challenge to the approval of the Cheviot coal mine, which had been filed by a coalition of environmental groups representing wildlife and concerned members of the Alberta public.

The legal issues with which the coalition was most recently concerned surrounded what the coalition believed to be ill-founded approval for the Cheviot mine, the enormous coal mining project located within three kilometres of the eastern border of Jasper National Park. The coalition had applied for a judicial review of the failure of the Minister of the Department of Fisheries and Oceans (DFO) to comply with duties under the *Canadian Environmental Assessment Act*.

It is not just harlequin ducks that are affected by this decision. "What they promised wouldn't happen and what is happening on the ground are two different things," said Jill Seaton of the Jasper Environmental Association in a recent press release. "For example, there's been no replacement habitat found and protected for the grizzly bears, which are, in effect, a threatened species in Alberta."

A key ruling by the federal court was that a new environmental assessment (EA) was not required, even though Elk Valley Coal and its parent companies, Teck Cominco and Fording Canadian Coal Trust, had not included a haul road in the original submission and subsequent EA. Additionally, the court deemed it irrelevant that a haul road was later added to now pass over a causeway/dam, as the dam itself had been assessed previously.

The court also ruled that no new mitigation measures were required despite the potential impacts of the major change in which the mined coal was now going to be transported down the McLeod River valley. Furthermore, in disregard of an acknowledgement of precautionary principles, the court deemed that rejection of mitigation measures for harlequin ducks was acceptable, given that Environment Canada had not identified specific mitigations required.

AWA remains opposed to the existence of the mine. "The federal environmental process has failed us in this instance, forcing AWA to give up its legal opposition, but we can pursue other options," says AWA Past-President Cliff Wallis. He also pointed out that even though the mine has started operating, not everywhere has been wrecked, yet.

"With this constant disturbance, will animals like grizzly bears and harlequin ducks be able to adapt to this non-stop disturbance?" he asks. "Will public access beyond the mining area be closed down?" And of course there remains the significant unanswered question of what the eventual impact will be on Jasper National Park.

Lastly, and with respect to the challenge under the *Migratory Birds Convention Act* (MBCA), the court also held that, as the DFO was not in control of the project, it was not responsible for ensuring compliance with the MBCA; however, they could be free to prosecute for any harm that occurred later.

The current status of the haul road in question is that legal opposition to it has become effectively moot. The mine has started operations and trucks loaded with coal have already started moving down the valley.





This latest round of court action was initiated in August 2004 and was presented by Sierra Legal Defense Fund on behalf of a coalition comprising Alberta Wilderness Association, Jasper Environmental Association, Nature Canada, the Pembina Institute, and Sierra Club of Canada. The coalition has decided not to appeal these current legal issues unless more compelling legal issues arise. AWA has now ended its role in the coalition.

