

# Fortress Mountain and the False Promise of Public Participation in Alberta

By Shaun Fluker



The AWA has closely monitored the application by Fortress Mountain Ski Hill for an amendment to its water license which – as of October 25, 2019 - now authorizes Fortress to remove up to 50 million litres of water annually from a tributary of Galatea Creek in Kananaskis Country and sell it as bottled water in the retail consumer market. Carolyn Campbell has reported on this proposal, setting out the numerous environmental concerns associated with it (see the September and December 2019 *Wild Lands Advocate*). Along with this water license amendment, Fortress has public lands authorization to construct and operate infrastructure to divert the water, store it in a reservoir, and fill water transport trucks. Fortress has stated that an average of nine truckloads per day of diverted water would be transported to a bottling facility in southern Alberta.

The manner in which public input was (dis)regarded in this approval process illustrates yet again the false promise of public participation found in Alberta's legal and policy framework for decisions concerning the development of natural resources and the assessment of that development's environmental impacts. Despite statements of purpose in legislation such as the *Environmental Protection and Enhancement Act* (Alberta) which speak to providing Albertans with an opportunity to give input on decisions affecting the environment, nothing could be further from the truth in this province. The department of Alberta Environment and Parks (AEP) typically authorizes projects with very little transparency and without any opportunity for public input. The Fortress decision is

case-in-point. I recently had an opportunity to review AEP records concerning the Fortress approvals, records which are publicly available on request but are not readily available online. These records paint a very clear picture of how little regard there was for public input in this process.

Fortress applied for the amendment to its water license under the *Water Act* (Alberta) on August 1, 2018. After what appears to be several months of back and forth, AEP wrote to Fortress on October 30, 2018 indicating that additional information was needed before the application would be considered. Among these requests, AEP sought information to support the water bottling proposal including whether diversion from the source tributary would be seasonal or year-round, where the diversion would occur, and how the water would be transported to the bottling facility. At some point thereafter, Fortress confirmed that diversion for bottling would be year-round. AEP then sought additional information by way of correspondence sent on January 25, 2019. In particular, AEP asked for details concerning:

- signed water bottling contracts to confirm the volume of water that would be diverted for this new commercial use;
- an assessment of all environmental impacts that will arise from year-round water diversion and how these impacts will be mitigated;
- confirmation that any other necessary consents or approvals have been obtained for the water bottling operation.

Fortress responded by confirming:

- there was a memorandum of understanding with a Calgary-based company for

water bottling in southern Alberta;

- impacts on downstream water users would be 'essentially non-existent' because: (1) the source tributary is non-fish bearing within the Fortress leasehold; (2) the proposed diversion for commercial use represents a small percentage of the total annual flow in the tributary (supported by a study of the hydrogeology of the region conducted by a University of Calgary graduate student); and (3) the proposed diversion represents just 0.0113% of the total average flow in the Kananaskis River.

On February 25, 2019, AEP informed Fortress of the additional public land use authorizations needed for the water bottling proposal and what information Fortress would have to submit in that regard. Much of this information related to the proposed transfer/fill station and truck transportation of the diverted water. Fortress requested that the water license amendment be processed concurrently with these additional consents and approvals needed under the *Public Lands Act* (Alberta). At some point between late February and early July 2019, AEP completed its 'technical review' of the application. Although, as noted below, it appears many technical details on the impacts of this proposal had yet to be fully considered in this 'technical review.'

On July 4, 2019, AEP directed Fortress to give public notice of its proposal. These directions included a requirement for a one-time notice in the *Rocky Mountain Outlook* newspaper, as well as a posting on the gated access road to Fortress and at the Barrier Lake Visitor Centre along highway 40 at the

# PUBLIC NOTICE

## Fortress Mountain Holdings Ltd.

### WATER ACT

### NOTICE OF APPLICATION

Fortress Mountain Holdings Ltd. are currently authorized by way of a Licence under the *Water Act* to divert 98,679m<sup>3</sup> of water from an unnamed tributary of the Galatea Creek at NE 32-021-09-W5 for Municipal (ski hill potable water supply) purposes. This Licence has a priority number of 1968-10-30-001.

Notice is given that Fortress Mountain Holdings Ltd. has filed an application to amend this Licence under the provisions of the *Water Act* to allow for the use of water for both Municipal and Commercial purposes. The applicant has requested that 50,000m<sup>3</sup> of the total 98,678m<sup>3</sup> be used for Commercial (truck fill station & water hauling) purposes. The Commercial operation will see the hauling of approximately 9 or more trucks per day annually from the site. The maximum volume allocated under the Licence will not increase.

Any person who is directly affected by this application may submit a written statement of concern to within 30 days of the date of this notice to:

Environment and Parks  
Regulatory Approvals Centre  
5th Floor, South Petroleum Plaza  
9915 108 Street  
Edmonton, Alberta T5K 2G8  
Phone: 780-427-6311  
Fax: 780-422-0154  
Email: aep.waapplications@gov.ab.ca

The written statement of concern should include the following:

- the application number: 003-00037369, Please quote file number: 12562
- describe concerns that are relevant to matters regulated by the *Water Act*
- explain how the filer of the concern will be directly affected by the activity and/or diversion of water proposed in the application
- provide the legal land location of the land owned or used by the filer where the concerns described are believed to be applicable
- state the distance between the land owned or used by the filer and the site in the application
- contact information including the full name and mailing address of the filer. Please provide the telephone number and/or email address for ease of contact.

Environment and Parks will review each written statement of concern, seek more information if needed, and notify each filer by letter of the decision to accept or reject their written submission as a valid statement of concern. The Public Notice of this application will also be posted on the Department's website at <https://avw.alberta.ca/PublicNoticesViewer.aspx>.

Statements of concern submitted regarding this application are public records which are accessible by the public and the applicant. Failure to file a statement of concern may affect the right to file a Notice of Appeal with the Environmental Appeals Board.

Copies of the application and additional information can be obtained from:

Thomas Heath  
Box 8173  
Canmore AB T1W 2T9  
Phone: 403-615-3433  
Email: Thomas.heath@skifortress.com

entrance to Kananaskis Country. AEP also suggested how the public notice should be worded, including text that indicated any person who is directly affected by the application may submit a statement of concern to AEP within 30 days of the notice.

Several observations are immediately apparent about the content of this public notice. Most obviously, the notice provides almost no details about the application and makes no reference whatsoever to the very purpose of this application: water bottling for the consumer market. This deficiency is remarkable given that AEP staff themselves had specifically raised concerns and sought more details about the bottling proposal from the outset.

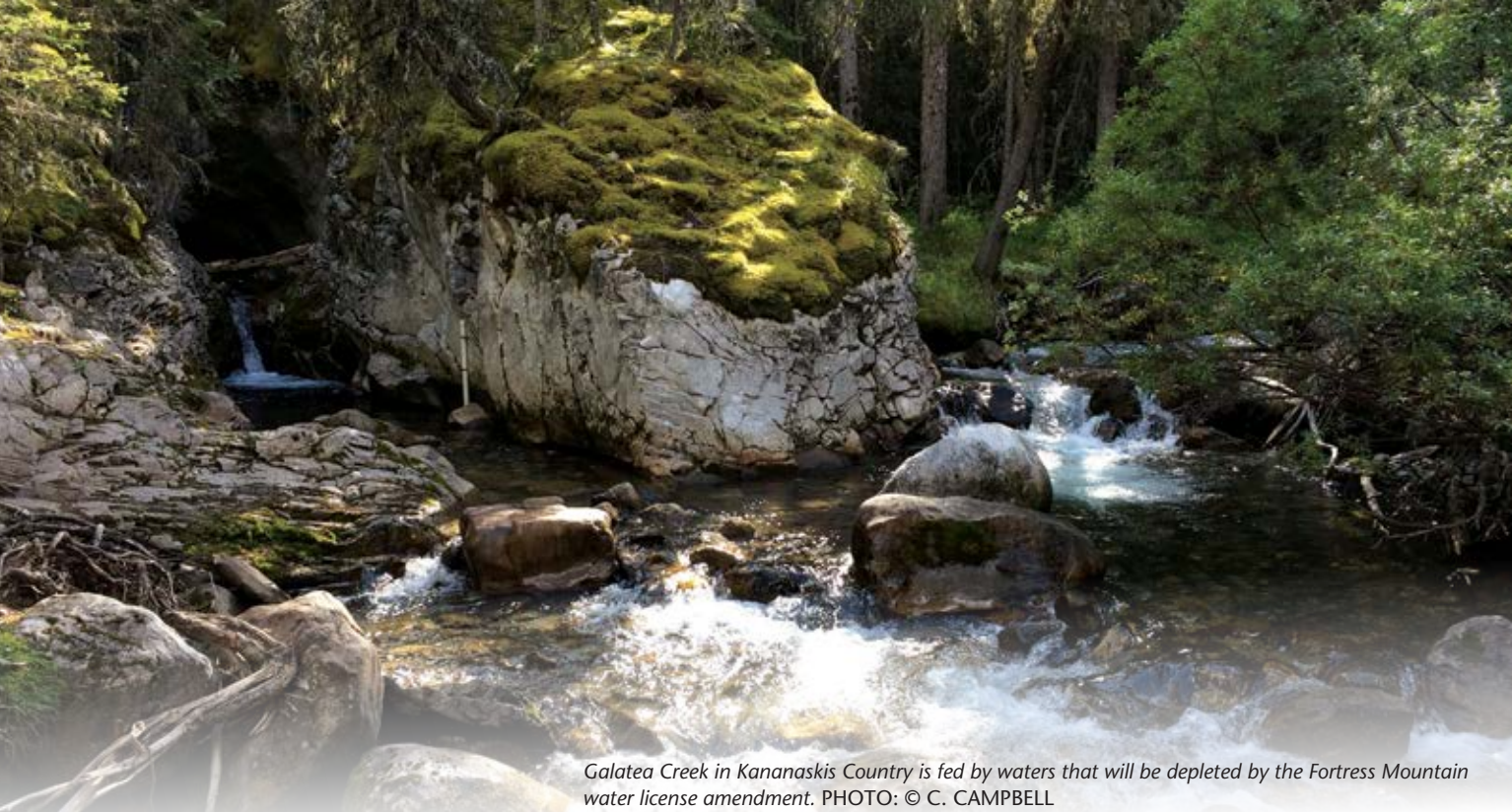
Similarly, there is no reference in the notice or even suggestions about the proposal's possible environmental impacts; this silence exists despite the fact that AEP staff had completed their 'technical review' of the application and, as internal records demonstrate, by this time AEP staff were aware of the possible environmental impacts. While the notice states further information can be obtained from Fortress or AEP, the public is left to guess what might be available. And the AEP record includes an internal AEP memo written on July 23, 2019 that suggests some reluctance on the part of Fortress to disclose additional information during the 30-day comment period.

The notice also references the 'directly affected' test for public participation in Alberta concerning environmental decision-making. As many readers will know from actual experience, this is the test used by AEP to **exclude**, rather than include, the public from decisions with possible environmental impacts. As is typical with AEP generally, none of the filers of statements of concern were found to be directly affected by the Fortress application. This is because AEP insists that in order to be 'directly affected' one must establish that they live or use a natural resource in close proximity to the approved activity. In short, AEP applies a test that nobody can meet for a project such as this one which is located on public lands in Kananaskis Country. In my view, this application of the 'directly affected' test by AEP must be unlawful in light of the statements of purpose in its governing legislation.

One of the more interesting documents on the AEP record is a decision statement dated October 8, 2019. This decision statement lists each of the 224 statements of concern received by the department within the prescribed comment period. With only a few exceptions, the AEP decision statement concludes each statement of concern is invalid because the filer did not provide information to support how they are directly affected by the project. In letters sent to statement of concern filers, AEP provided the following basis for rejecting statements of concern:

- the information submitted did not demonstrate how the filer is directly affected by the project;
- the filer's place of residence is outside the area of potential environmental impact associated with the transfer/fill station;
- concerns raised were outside the mandate of the *Water Act*;
- there was not sufficient information provided in response to the public notice of application;
- the statement of concern was filed after the 30 day comment period expired.

How is a member of the public even to know about these thresholds for participation when AEP requires the Fortress public notice to contain so little information? There is absolutely no reference to a 'residency' or 'use' re-



*Galatea Creek in Kananaskis Country is fed by waters that will be depleted by the Fortress Mountain water license amendment. PHOTO: © C. CAMPBELL*

quirement in the governing legislation for this process. In any event, such requirements are clearly impossible to meet for just about anybody concerned about a project in Kananaskis Country. Many public concerns focused on the removal of water for consumer bottling and, while this concern may not fall clearly within the mandate of the *Water Act*, it is surely within the mandate of the *Environmental Protection and Enhancement Act*. Given how little is disclosed in the public notice, it really seems like a ‘slap in the face’ to public participation for AEP to dismiss concerns for failing to give sufficient information!

On a related note, the record demonstrates that AEP held these statements of concern for most of August and all of September, before summarily dismissing them in early October 2019 just weeks before AEP approved the application on October 25, 2019. Given the basis upon which statements of concern were rejected in this case, the length of time AEP held these statements of concern is somewhat curious. And what transpired internally within AEP during the months of August and September is also interesting. Issues with the proposal raised by the public in statements of concern were, in fact, similar to the issues being raised internally within AEP in August and September. At the very least, all of this raises some doubt over the decision

by AEP that every single statement of concern filed on this project was ‘invalid.’

For example, statements of concern filed by the public identified the potential for adverse impacts to wildlife from truck traffic associated with this proposal, and within AEP similar concerns were being discussed and communicated to Fortress. AEP records indicate that on July 16, 2019 – during the public comment period – Fortress was informed that AEP was considering a seasonal closure on truck traffic between May 1 and June 15 each year because the subject lands are located within core grizzly bear habitat. On August 29, 2019, a senior wildlife biologist with AEP was asked to opine on the potential impacts to wildlife arising from the transfer/fill station and truck traffic on the Fortress access road. In correspondence sent September 10, 2019, the wildlife biologist answered that the impact of the transfer/fill station will be low because it is located on a previously disturbed site. However, the biologist stated truck traffic on the access road during the summer was a concern and that this will have impacts on wildlife. The public lands authorization issued to Fortress for the transfer/fill station on October 25 did include a condition of no activity between May 1 and June 15, but there does not appear to be any explanation on the record for why this is suf-

ficient to mitigate adverse impacts to wildlife.

In my view, the Fortress application should have been subjected to an open and transparent environmental impact assessment process right from the start. The application was destined to be controversial because of its potential adverse environmental impacts located in the highly valued lands of Kananaskis Country, and these impacts are clearly of significant concern to many Albertans. Not only would an open and transparent environmental impact assessment process have given the public a meaningful forum to raise concerns with the proposal, it would also have provided Fortress with more predictability over the issues it would need to address and the overall timeframe for doing so. As a further benefit, such a process would also have provided some legitimacy to the ultimate decision here. As it stands now, Fortress has the legal authorizations it needs to bottle Kananaskis water but its social license to do so remains in doubt.

*Shaun Fluker is an Associate Professor in the Faculty of Law at the University of Calgary. He also is the Executive Director of the Faculty's Public Interest Law Clinic. His research focuses, in part, on public participation and community engagement with natural resources/environmental decision-making. 🐾*