

December 9, 2013

Mr. Greg Fenton  
Superintendent  
Jasper National Park  
Box 10  
Jasper, Alberta T0E 1E0

*Via email, electronic submission and regular mail*

Dear Mr. Fenton:

**Re: Maligne Tours Ltd. Conceptual Proposal**

I am legal counsel to the Jasper Environmental Association (“JEA”) and the Canadian Parks and Wilderness Society – Northern Alberta (“CPAWS – Northern Alberta”) with respect to the above referenced matters.

JEA is a non-profit society registered under the Alberta *Societies Act*. JEA, formerly known as the Jasper Conservation Committee, has existed since 1987 and has been incorporated since 1990. Seventy-five percent of the members of JEA reside in the Town of Jasper within the boundaries of Jasper National Park (the “Park”). The primary purpose of JEA and its members is to ensure the preservation and protection of Jasper National Park through monitoring, information sharing and citizen advocacy.

JEA has a longstanding interest in developments and activities which threaten the ecological integrity of the Maligne Valley. In the late 1980’s, members of JEA were instrumental in alerting Parks Canada to the decline in harlequin duck populations on the Maligne River. JEA was subsequently granted intervenor status in a court action brought by a party challenging Parks Canada’s decision to close the Maligne River to commercial rafting operations. In 2003, JEA wrote to the Superintendent expressing their concerns with respect to renewal of the lease for Maligne Tours Ltd. (“Maligne Tours”) facilities at Maligne Lake. JEA subsequently filed a petition with the Commissioner for the Environment and Sustainable Development pursuant to the *Auditor General Act* with respect to the 2003 renewal of the Maligne Tours lease.<sup>1</sup>

The Canadian Parks and Wilderness Society (“CPAWS”) has been active in protecting Canada’s wild ecosystems in parks, wilderness areas and natural areas since 1963.

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<sup>1</sup> Office of the Auditor General of Canada, *Commercial tourist operation in Jasper National Park*, Petition No. 86, (15 July 2003), online at: [http://www.oag-bvg.gc.ca/internet/English/pet\\_086\\_2\\_28798.html](http://www.oag-bvg.gc.ca/internet/English/pet_086_2_28798.html).

CPAWS has 13 regional chapters and 60,000 supporters. CPAWS-Northern Alberta was established in 1968 and since that time, has informed the public and made several submissions with respect to development proposals within Jasper National Park.

JEA and CPAWS-Northern Alberta have reviewed the *Situation Analysis for the Maligne Valley* (“*Situation Analysis*”) and have previously provided comment on that document in letters dated November 19, 2013 and November 22, 2013 respectively. JEA and CPAWS-Northern Alberta have also reviewed the Maligne Tours’ *Conceptual Proposal for Responsible Experiential Enhancement at Maligne Lake* (“*Conceptual Proposal*”).

This letter is JEA and CPAWS-Northern Alberta’s joint submission with respect to the *Conceptual Proposal*. Specifically, JEA and CPAWS-Northern Alberta strongly oppose the development of overnight accommodation at Maligne Lake. The development of overnight accommodation at Maligne Lake could put important wildlife and ecological features at risk and is also contrary to existing Parks Canada policy and the law.

Specifically, it is JEA and CPAWS-Northern Alberta’s submission that the Minister should not and cannot approve this development for the following reasons:

1. the proposed development is contrary to the 2010 *Management Plan for Jasper National Park of Canada* (“*Management Plan*”);
2. the proposed development is contrary to the *Parks Canada Guiding Principles and Operational Policies* (“*Guiding Principles*”) and the *Outlying Commercial Accommodation Guidelines, 2007* (“*OCA Guidelines*”);
3. the proposed development is contrary to the conditions set on the 2003 renewal of the lease and licences of occupation for the Maligne Lake developments;
4. the proposed development could jeopardize the survival and recovery of the Maligne caribou herd;
5. the proposed development would interfere with the use by grizzly bears and harlequin ducks of habitat adjacent to the Maligne Lake Day Use Area; and
6. there is a lack of social science evidence to support the need for overnight accommodation at Maligne Lake.

These reasons are discussed in more detail below.

**Part 1: The proposed development is contrary to the 2010 Management Plan for Jasper National Park of Canada.**

**(a) Purpose and Application of the Management Plan**

The Minister is responsible for the administration, management and control of national parks.<sup>2</sup> Further, the Minister is required to prepare a Management Plan for the Park, including provisions for resource protection and restoration, zoning, visitor use and performance evaluation.<sup>3</sup> The Management Plan must be reviewed and revised as necessary at least every ten years.<sup>4</sup>

The Management Plan is the method through which the Minister is charged with directing the management of human activities in the Park in such a way as to preserve the Park's ecological integrity for future generations.<sup>5</sup> The priority of ecological integrity in the Minister's consideration of all aspects of Park management is discussed in more detail in Part 4 below with respect to the Maligne caribou herd.

Parks Canada has in the past relied on incompatibility with a management plan as the basis for denying certain developments. In *Peter G White Management Ltd v Canada (Minister of Canada Heritage)*, the appellant contended that the Banff National Park Management Plan was contrary to the provisions of a lease with respect to the summer operation of a gondola at Mount Norquay. The Superintendent denied a licence for summer use on the basis that such use was contrary to the Management Plan. While not deciding the issue, the Court stated:

...In my view, the promulgation of the MP [Management Plan] is material to the appellant's claim. First, the Mt. Norquay gondola provision in the MP is categorical in its terms: "prohibit the summer use of the lifts". The LRP [predecessor Long Range Plan], on the other hand, appears less mandatory, stating merely that the summer use of the gondola "will be discontinued by the operator by December 31, 1990". This difference in wording may explain why Mr. Fisher rejected the appellant's 2000 licence application without canvassing in his letter the range of factors that he considered in his 1996 decision.

Second, unlike the LRP, the MP was issued pursuant to statutory authority, another reason for the Superintendent to regard it as binding upon him, and as removing any discretion to grant the appellant's application for an operating licence in 2000. Moreover, the appellant argues, the gondola prohibition in the MP is legally binding on the Superintendent by virtue of the *Parks Canada Agency Act*, S.C. 1998, c. 31, sections 3, 4 [as am. By S.C. 2005, c. 2, s. 4] and 5 [as am. by

<sup>2</sup> *Canada National Parks Act*, SC 2000, c 32, s 8(1) [Act].

<sup>3</sup> *Ibid*, s 11(1).

<sup>4</sup> *Ibid*, s 11(2).

<sup>5</sup> *Mountain Parks Watershed Assn v Chateau Lake Louise Corp*, 2004 FC 1222, at para 22.

S.C. 2002, c. 18, s. 35; 2005, c. 2, s. 5]. Whether or not any of this proves to be correct, it would appear from the Superintendent's letter of decision that he may well have thought that the MP's prohibition of the summer use of the gondola was a binding direction or, at least, enabled him to refuse the licence on the basis of the MP and the LRP, without considering other factors...

In addition, the exercise of the Superintendent's discretion may be affected by provisions in the MP, issued pursuant to the *National Parks Act*, subsection 5(1.1), and reviewable by the Minister every five years by virtue of the *Parks Canada Agency Act*, subsections 32(1) [as am. by S.C. 2002, c. 18, s. 40] and (2).<sup>6</sup>

In *Moresby Explorers Ltd v Canada (Attorney General)*, an agreement established the Archipelago Management Board ("AMB") whereby Canada and the Haida Nation would share in the management of the South Moresby National Park Reserve and National Marine Park Reserve.<sup>7</sup> The AMB was co-chaired by the Superintendent of the Park Reserve and a representative of the Haida Nation. In *Moresby Explorers*, the AMB ordered the removal of a float camp within the Park Reserve. The Superintendent of the Park Reserve stated:

The float camp comes under the definition of a "backcountry lodge", Parks Canada Management Directive 4.6.16. According to this directive, a backcountry lodge will be considered only when it is consistent with an approved park management plan. Further to that, the directive states that no new backcountry lodges will be permitted unless provided for in the park management plan. The AMB recognizes that your float camp may be incompatible with the final management plan, hence the notification of the potential incompatibility.<sup>8</sup>

In *698114 Alberta Ltd v Banff (Town of)*, in upholding a decision of the Town of Banff to deny a development permit for a proposed hotel, the Court noted, in support of the decision, that the Management Plan prohibited the Town from approving commercial developments which cumulatively exceeded a certain annual growth level.<sup>9</sup>

In *Bow Valley Naturalists Society v Canada (Minister of Canadian Heritage)*, the Court upheld the Minister's decision to approve a meeting facility at the Chateau Lake Louise on the basis, in part, that the park management plan specifically provided for consideration of a meeting facility at that location.<sup>10</sup>

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<sup>6</sup> *Peter G. White Management Ltd v Canada (Minister of Canadian Heritage)*, 2006 FCA 190, [2007] 2 FCR 475, at para 29-30, 70.

<sup>7</sup> *Moresby Explorers Ltd v Canada (Attorney General)*, 2001 FCT 780, [2001] 4 FC 591, at para 12.

<sup>8</sup> *Ibid*, at para 71.

<sup>9</sup> *698114 Alberta Ltd v Banff (Town of)*, 2000 ABCA 237, at para 37.

<sup>10</sup> *Bow Valley Naturalists Society v Canada (Minister of Canadian Heritage)*, [2001] 2 FC 461 (FCA) at para 70.

Therefore, the case law indicates that park management plans are to be given significant weight since they are issued under statutory authority and are intended to be the method through which the Minister directs and controls human activity within the Park in order to protect the Park's ecological integrity. Parks Canada has historically both approved and denied development applications on the basis of consistency with the management plan. Parks Canada's stated position is that proposed projects will be reviewed initially to ensure that they are compliant with existing plans.<sup>11</sup> The case law indicates that management plans are, as a minimum, directive and may in some cases be prohibitive of certain activities.

**(b) Management Plan for Jasper National Park of Canada**

The most recent *Management Plan* for Jasper National Park was released in June 2010. The *Management Plan* was prepared through broad consultation with the public, stakeholders, interest groups and Aboriginal groups.<sup>12</sup> The *Management Plan* was subject to public and expert review.<sup>13</sup> The *Management Plan* was approved by the federal Minister of the Environment.<sup>14</sup>

The *Management Plan* is intended to reflect the policies and legislation of the federal government and serve as a framework for planning and decision making within the Park.<sup>15</sup> The *Management Plan* is intended to guide the Park's overall direction for the next 10 to 15 years.<sup>16</sup> The foundation of the *Management Plan* is the 2008 *State of the Park Report* which identified deficiencies in current management approaches, emerging issues and information gaps.<sup>17</sup>

With respect to the potential development of overnight accommodation within the Park, the *Management Plan* states a clear direction for managing growth and development:

Apply the *Redevelopment Guidelines for Outlying Commercial Accommodations (OCAs) in the Rocky Mountain National Parks (2007)* to commercial accommodations outside the town. No new land will be released for overnight commercial accommodation outside the community.<sup>18</sup>

The application of the *OCA Guidelines* is discussed in more detail in Part 2 below. However, JEA and CPAWS-Northern Alberta are deeply concerned that this

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<sup>11</sup> Parks Canada, "Fact Sheet: What you should know about changes to Environmental Assessment requirements under CEAA 2012", (July 2012) at 2.

<sup>12</sup> Parks Canada, *Jasper National Park of Canada, Management Plan*, (Jasper; June 2010) at 91 [Management Plan].

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, at i.

<sup>15</sup> *Ibid.*, at 2.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, at 12-13.

<sup>18</sup> *Ibid.*, at 41.

prohibition, and similar prohibitions in the site lease as discussed below in Part 3, were not reflected in the *Situation Analysis*. The *Management Plan* does not permit the further development of overnight hotel or cabin style accommodation outside of the Jasper town site.

As a direction to welcome visitors to the Park, the *Management Plan* directs that development should be prioritized to infrastructure for first-time campers, recreational vehicle users and those seeking hassle-free camping.<sup>19</sup> This is in stark contrast to Maligne Tour's proposal to attract "more sophisticated and 'well-heeled'" visitors and "premium-paying customers" through the provision of overnight accommodation.<sup>20</sup>

Further, the *Management Plan* confirms that Parks Canada, in implementing its core mandate, gives first priority to the maintenance or restoration of ecological integrity to ensure that national parks will remain unimpaired for the benefit, education and enjoyment of future generations.<sup>21</sup>

The *Management Plan* identifies the conservation of threatened woodland caribou herds as a key concern.<sup>22</sup> The *Management Plan* sets the preparation of a conservation strategy for woodland caribou as a direction to ensure healthy ecosystems.<sup>23</sup> The threat posed to the Maligne caribou herd by the proposed development of overnight accommodation at Maligne Lake is discussed in more detail in Part 4 below.

The *Management Plan* also identifies as an objective for the Maligne Valley that habitat needs and security requirements are met for harlequin ducks, caribou and grizzly bears.<sup>24</sup> The threat posed to grizzly bears and harlequin ducks by the proposed development is discussed in more detail in Part 5 below. The *Management Plan* states that habitat security for sensitive wildlife remains a challenge.<sup>25</sup> Key actions identified for the Maligne Valley include exploring ways to improve grizzly bear habitat security in the upper Maligne Valley and exploring ways to improve caribou habitat security as part of the caribou conservation strategy.<sup>26</sup> Further, the *Management Plan* identifies the Maligne Lake outlet as an environmentally sensitive site important for harlequin ducks, particularly during the pre-nesting period.<sup>27</sup>

The *Management Plan* states that the development of transportation networks and visitor infrastructure has fragmented the landscape and inadvertently created physical

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<sup>19</sup> *Ibid*, at 21.

<sup>20</sup> Maligne Tours Ltd., *Imagination, Innovation and Commitment: The Next Generation of Visitor Services and Operation at Maligne Lake, A Conceptual Proposal for Responsible Experiential Enhancement at Maligne Lake*, (November 2013) at 74 [*Conceptual Proposal*].

<sup>21</sup> *Management Plan*, *supra* note 12, at 3.

<sup>22</sup> *Ibid*, at 30.

<sup>23</sup> *Ibid*, at 32.

<sup>24</sup> *Ibid*, at 67.

<sup>25</sup> *Ibid*, at 68.

<sup>26</sup> *Ibid*.

<sup>27</sup> *Ibid*, at 88.

barriers to wildlife and aquatic circulation, predominantly in the valley bottoms of the Park.<sup>28</sup>

The *Management Plan* states that:

Each of the key strategies and area concepts contributes to ensuring that visitor use does not impair ecological integrity, by paying careful attention to protecting: grizzly bear and caribou populations, wildlife movement corridors, aesthetic values, wilderness attributes, and the experiences of other visitors.

Examples of strategies to manage the effects of visitor use on the park include:...

- implementing and maintaining limits to growth and development...
- continued consideration and incorporation of all ecological objectives during management deliberations, project-level environmental assessments and implementation of decisions...
- completing a caribou conservation strategy and managing visitor opportunities to support caribou recovery...<sup>29</sup>

These *Management Plan* requirements are discussed in more detail below.

### (c) Analysis

The *Management Plan*, while directive with respect to the regulation of development generally, contains a clear and explicit prohibition on the release of new land for overnight commercial accommodation outside of the Jasper town site. Similar to the case in *Moresby Explorers*, the Minister should not approve a development that is clearly contrary to the *Management Plan*.

Further, the *Management Plan* specifies limits to growth and development that the Superintendent must implement and maintain in order to protect the ecological integrity of the Park. Specifically, the *Management Plan* indicates that visitor infrastructure has already fragmented the landscape and created barriers to wildlife circulation, particularly in the valley bottoms. Therefore, the Superintendent must be directed by these concerns. The development of overnight accommodation at Maligne Lake would be contrary to these identified concerns and, in particular, contrary to the habitat needs of caribou, grizzly bears and harlequin ducks as discussed in Parts 4 and 5 below.

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<sup>28</sup> *Ibid*, at 94.

<sup>29</sup> *Ibid*, at 93.

In the *Conceptual Proposal*, Maligne Tours states that it fully recognizes the importance of Parks Canada legislation, policies and plans and that it is prepared to subject the review of its proposals to those documents in order to determine the relevance and suitability of the proposals to Maligne Lake and its environs.<sup>30</sup> It is therefore inconsistent that Maligne Tours proposes the development of overnight accommodation that is directly contrary to the provisions of the *Management Plan*, and as discussed in Part 2 below, directly contrary to the *OCA Guidelines*.

Given that the *Management Plan* is issued under statutory authority and is intended to be the method through which the Minister directs and controls human activity within the Park in order to protect the Park's ecological integrity, and given that the *Management Plan* contains a clear prohibition on the further development of overnight accommodation outside of the Jasper town site, the Minister must deny the Maligne Tours application.

**Part 2: The proposed development is contrary to the *Guiding Principles* and the *OCA Guidelines*.**

**(a) The *Guiding Principles***

Parks Canada contributes to sustaining cultural and natural heritage through a continuing commitment to the *Guiding Principles*.<sup>31</sup> The *Guiding Principles* provide specific direction with respect to the development of accommodations within the Park:

4.3.2 Parks Canada will cooperate with the tourism sector toward fulfilling public needs for a broad range of essential services and facilities **within the regions surrounding national parks**, particularly as they relate to the practice of environmentally sustainable tourism. **To avoid impacts on park ecosystems and to contribute to regional economic development, the location of commercial services and facilities should take place in adjacent communities.** Parks Canada will locate its own administrative facilities outside the parks wherever possible provided that the location would have the least impact on a shared ecosystem...

4.5.1 Within national parks, preference will be given to basic accommodation facilities such as campgrounds, hostels and shelters which enhance visitors' understanding, appreciation and enjoyment of the parks' special values and which provide access to additional, enjoyable park experiences including a range of appropriate recreational opportunities.<sup>32</sup>

<sup>30</sup> *Conceptual Proposal*, supra note 20 at 64, 79-80.

<sup>31</sup> Parks Canada, *Parks Canada Guiding Principles and Operational Policies*, online: <http://www.pc.gc.ca/eng/docs/pc/poli/princip/sec1/part1d.aspx> [*Guiding Principles*].

<sup>32</sup> *Ibid*, online: <http://www.pc.gc.ca/eng/docs/pc/poli/princip/sec2/part2a/part2a6.aspx>

(Emphasis added.)

The *Guiding Principles* direct that commercial services and facilities should be located in adjacent communities outside of the Park, or in the case of Jasper National Park, within the Jasper town site. Further, any accommodations developed within the Park should be limited to basic campgrounds, hostels and shelters.

Further, the *Guiding Principles* state:

4.3.3 Certain services and facilities are [sic] essential for public access to, as well as understanding, appreciation and enjoyment of, heritage areas. Provision of such services and facilities within national parks will be based upon the following considerations:

- impacts on the ecosystem as well as on specific natural and cultural resources;
- contribution to the interpretation of park themes and messages; heritage character and historical appropriateness;
- **types of opportunities and activities appropriate to the area, as set out in management plans;**
- a high degree of concern for site planning and choice of construction materials;
- environmentally appropriate design, aesthetics, architectural motif, and energy conservation; and
- the needs and expectations of visitors, consistent with park objectives...

4.5.3 In some national parks, the commercial sector may be invited to provide roofed accommodation due to severe climate conditions and the lack of existing or potential adjacent facilities. Any such facility must not impair the wilderness experience of others, **will be assessed within the management planning process**, and if authorized must stringently conform to the zoning plan.<sup>33</sup>

(Emphasis added).

Therefore, the *Guiding Principles* direct that the development of facilities will be as set out in approved management plans. As discussed in Part 1 above, the *Management Plan* for Jasper National Park contains a clear prohibition on the further development of commercial overnight accommodations outside of the Jasper town site. Therefore, approval of the Maligne Tours proposal would be contrary to both the *Guiding Principles* and the *Management Plan*.

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<sup>33</sup> *Ibid.*

Further, as stated in *Guiding Principle 4.5.3*, any commercial development must stringently conform to the zoning plan. The *Guiding Principles* describe the development intent for Zones IV and V:

#### 2.2.3.4 Zone IV - Outdoor Recreation

Limited areas which are capable of accommodating a broad range of opportunities for understanding, appreciation and enjoyment of the park's heritage values and related **essential** services and facilities, in ways that impact the ecological integrity of the park to the smallest extent possible, and whose defining feature is direct access by motorized vehicles. Park management plans may define provisions for limiting private motorized access and circulation.

#### 2.2.3.5 Zone V - Park Services

Communities in existing national parks which contain a concentration of visitor services and support facilities. Specific activities, services and facilities in this zone will be defined and directed by the community planning process. Major park operation and administrative functions may also be accommodated in this zone. Wherever possible, Parks Canada will locate these functions to maintain regional ecological integrity.<sup>34</sup>

(Emphasis added.)

The site of the proposed Maligne Tours development is Zone IV.<sup>35</sup> It is JEA and CPAWS-Northern Alberta's position that the provision of overnight accommodation is not an essential service required at Maligne Lake. Further, it is JEA and CPAWS-Northern Alberta's position that limiting the impact on the ecological integrity of the Park to the smallest extent possible is best achieved by limiting the development of commercial overnight accommodation to Zone V.

#### (b) The *OCA Guidelines*

In 2007, Parks Canada issued the *Redevelopment Guidelines for Outlying Commercial Accommodations and Hostels in the Rocky Mountains National Parks*.<sup>36</sup> The *OCA Guidelines* were issued in response to the need to limit the growth of commercial facilities in the Park and were intended to provide land use certainty for Outlying Commercial Accommodations ("OCAs").<sup>37</sup>

<sup>34</sup> *Ibid*, online: <http://www.pc.gc.ca/eng/docs/pc/poli/princip/sec2/part2a/part2a4.aspx>.

<sup>35</sup> *Situation Analysis*, *supra* note 1, at 52-54.

<sup>36</sup> Parks Canada, *Redevelopment Guidelines for Outlying Commercial Accommodations and Hostels in the Rocky Mountains National Parks*, (2007) [*OCA Guidelines*].

<sup>37</sup> Parks Canada, *State of the Park Report, Jasper National Park of Canada*, (Jasper: August 2008) at 46.

The *OCA Guidelines* acknowledge that limits need to be placed on the future development of OCA's in the national parks.<sup>38</sup> The *OCA Guidelines* state that all development at hostels and OCAs will be guided by the directions in the *Guidelines*.<sup>39</sup> The *OCA Guidelines* set out conditions, principles and policy that apply to all development proposals.<sup>40</sup> The *OCA Guidelines* state that park management plans provide the policy framework and overall direction for applying the *Guidelines*.<sup>41</sup>

With reference to the *OCA Guidelines*, the *Management Plan* states that:

The updated management plan incorporates important decisions regarding limits to growth and development in Jasper National Park, recognizing that the park has a finite capacity to support human use and enjoyment without impairing ecological integrity and wilderness values. The town of Jasper and major leaseholds have fixed boundaries and clear limits to development. The *Marmot Basin Site Guidelines for Development and Use* and the *Guidelines for Outlying Commercial Accommodations* set clear limits for development and use, and establish important management parameters to maintain and protect park wildlife, flora, terrain and water resources.<sup>42</sup>

The *OCA Guidelines* specifically state:

No new OCAs or hostels will be permitted, other than those permitted within the national park communities of Jasper and Field, as provided for in their community plans.<sup>43</sup>

As discussed in Part 1 above, this provision is confirmed in the *Management Plan*.<sup>44</sup>

The *OCA Guidelines* specifically note that no OCA development is proposed at Maligne Lake.<sup>45</sup> Given that OCA development is precluded at Maligne Lake, the *OCA Guidelines* acknowledge that other types of development at Maligne Lake will be planned in an exercise separate from the OCA process.<sup>46</sup>

**(c) Application of the *Guiding Principles* and *OCA Guidelines***

JEA and CPAWS-Northern Alberta acknowledge that the *Guiding Principles* and the *OCA Guidelines* are guidelines and do not carry the weight of law.<sup>47</sup> However,

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<sup>38</sup> *OCA Guidelines*, *supra* note 36, at 2.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, at 7.

<sup>41</sup> *Ibid.*, at 6.

<sup>42</sup> *Management Plan*, *supra* note 12, at 94.

<sup>43</sup> *OCA Guidelines*, *supra* note 36, at 8.

<sup>44</sup> *Management Plan*, *supra* note 12, at 41.

<sup>45</sup> *OCA Guidelines*, *supra* note 36 at 96.

<sup>46</sup> *Ibid.*, at 97.

<sup>47</sup> *Swartz v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 268 at para 22.

guidelines should be carefully considered and can provide an informed understanding of the purpose and context in decision making.<sup>48</sup>

The *Guiding Principles* are intended to contribute to sustaining cultural and natural heritage. The *Guiding Principles* provide explicit direction that the development of facilities within the Park are to be limited to campgrounds, hostels and shelters and must be consistent with the *Management Plan*.

Further, Parks Canada has specifically stated that the *OCA Guidelines* will apply to all development proposals in the Park and that the intent of the *Guidelines* is to provide land use certainty. The *OCA Guidelines* contain an explicit prohibition on the development of new commercial overnight accommodation outside of the Jasper Town Site.

As discussed in Part 1 above, Maligne Tours has stated that its proposed developments will be consistent with Parks Canada's legislation, policies and plans.<sup>49</sup> Yet, the proposed development of overnight accommodation at Maligne Lake would be inconsistent with the *Guiding Principles* and the *OCA Guidelines*.

JEA and CPAWS-Northern Alberta have a clear and reasonable expectation that the *Guiding Principles* and *OCA Guidelines* will be adhered to and that the proposal for overnight accommodation at Maligne Lake will be rejected on that basis.

**Part 3: The proposed development is contrary to the conditions set on the 2003 renewal of the lease for the Maligne Lake development.**

**(a) Terms of the Lease and Licences of Occupation**

The lease and licences of occupation for Maligne Tours operations at Maligne Lake were renewed or granted in 2003. Maligne Tours holds a lease for Parcels CR and CS as shown on a plan of record number 59248 in the Canada Lands Surveys Records at Ottawa (the "*Lease*").<sup>50</sup> The *Lease* is for a term of 42 years from 2002 until 2044.<sup>51</sup> The proposed overnight accommodations would lie within the boundaries of Parcel CS.<sup>52</sup>

The *Lease* specifies that the uses of Parcel CR are limited to certain listed storage, maintenance and staff accommodation uses and such other activities as may be permitted with the consent of the Superintendent from time to time.<sup>53</sup>

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<sup>48</sup> *Ibid*, at para 23, 26; *Environmental Defence Canada v Canada (Fisheries and Oceans)*, 2009 FC 878, at para 63.

<sup>49</sup> *Conceptual Proposal*, *supra* note 20, at 64, 79-80.

<sup>50</sup> *Lease between Her Majesty the Queen in Right of Canada and Maligne Tours Ltd*, for Parcels CR and CS as shown on a plan of record number 59248 in the Canada Land Surveys Records at Ottawa, (2002) [*Lease*].

<sup>51</sup> *Ibid*, at 1.

<sup>52</sup> *Conceptual Proposal*, *supra* note 20, at 52.

<sup>53</sup> *Lease*, *supra* note 50, at clause 2.01.

The *Lease* specifies that the uses of Parcel CS are limited to certain identified visitor services.<sup>54</sup>

Clause 2.03 of the *Lease*, which specifies the permitted uses on Parcel CS, does not contain the provision for “such other activities as may be permitted with the consent of the Superintendent, from time to time” that is found in Clause 2.01 with respect to Parcel CR. Therefore, the intent must be that the permitted activities on Parcel CS are fixed for the 42-year term of the *Lease*.

The *Lease* sets limits on the hours of operation for the restaurant, guided walk tour service and gift shop.<sup>55</sup> The *Lease* specifies that any future outdoor lighting plans must comply with the requirement that all outdoor lighting is turned off after daily closing except as required for safety and security and all outdoor lighting must be fully shielded to prevent light emissions above the horizontal plane of the light.<sup>56</sup>

Maligne Tours also holds Licences of Occupation for the Spirit Island View Point, Maligne Lake chalet and Maligne Lake boat tour support facilities.

#### **(b) Lease Replacement Environmental Assessment Screening**

The *Environmental Assessment Screening for the Lease Replacement and Issuance of Licences of Occupation for Maligne Tours Ltd.* (“*Lease EA*”) provides insight into many of the provisions and conditions of the *Lease*.

First, the *Lease* and Licences of Occupation were intended to set clear limits on commercial development at Maligne Lake. The *Lease EA* states:

There are currently no clear limits to commercial growth at Maligne Lake. The proposed replacement lease and licences of occupation do establish defined limits.

A key element of the replacement lease and licence agreements is the establishment of caps on future development and activities, which will prevent incremental expansion of facilities and services. This will reduce the potential for associated incremental contributions to adverse environmental effects.<sup>57</sup>

The *Conceptual Proposal* references the *Lease EA* in positive terms and states that Maligne Tours has adhered to the restrictions on capacity, hours of operation and

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<sup>54</sup> *Ibid.*, at clause 2.03.

<sup>55</sup> *Ibid.*, at clauses 4.01-4.03.

<sup>56</sup> *Ibid.*, at clauses 1.01(b) and 4.04.

<sup>57</sup> Golder Associates Ltd., *Environmental Assessment Screening for Lease Replacement and Issuance of Licences of Occupation for Maligne Tours Ltd.*, (14 April 2003) at 43, 83 [*Lease EA*].

geographical limits of activities as articulated in the *Lease EA*.<sup>58</sup> However, the *Conceptual Proposal* fails to mention that a key element of the lease renewal, as considered in the *Lease EA*, was the establishment of caps on future development and the prevention of incremental expansion of facilities at Maligne Lake.

A decision to allow expanded facilities and expanded hours of operation would negate this finding of the *Lease EA*. To approve the proposed Maligne Tours development, the Minister would have to ignore this finding of the *Lease EA* and permit incremental development and the increased potential of adverse environmental effects. It would be difficult to reconcile such a decision with the prime directive to maintain or restore ecological integrity as discussed in more detail in Part 4 below.

The *Lease EA* also clearly articulates the reasons for limiting the hours of operation at Maligne Lake:

The replacement lease will place limits on operating hours of facilities. If tourism demands increase, it is likely that current use patterns to Maligne Tours will remain, where use is concentrated during the mid-day period. Early morning and evening visitors to Maligne Tours will likely continue to be primarily tour bus traffic. Early morning traffic is frequently associated with fishermen. How changing visitor demands will influence the volume or daily distribution of traffic along the Maligne Highway is unknown.<sup>59</sup>

Further, the *Lease EA* specifies, as a mitigation measure, that “dark skies” practices will be implemented as exterior lights are replaced.<sup>60</sup> While the *Conceptual Proposal* discusses the steps that Maligne Tours will take to mitigate adverse lighting, it is difficult to reconcile the development of overnight accommodation with the direction of the *Lease* that all outdoor lighting should be turned off after daily closing except as required for safety and security. The direction of both the *Lease* and the *Lease EA* is for less night-time light, not the greater night-time light that would be associated with overnight accommodation. Approval of overnight accommodation at Maligne Lake would result in increased light and increased disturbance in the evening, night and early morning periods.

The *Management Plan* states, as a direction for managing growth and development, that Parks Canada will work with Maligne Tours to ensure consistency with the development and use limits that are set out in their leasehold agreements.<sup>61</sup> This is further reflected in Clause 4.18 of the *Lease* requiring that Maligne Tours comply with the provisions of the *Management Plan*.<sup>62</sup> Given that the *Management Plan* specifies that no new land will be released for the development of overnight accommodation

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<sup>58</sup> *Conceptual Proposal*, *supra* note 20, at 75-76.

<sup>59</sup> *Lease EA*, *supra* note 57, at 76.

<sup>60</sup> *Ibid*, at 78.

<sup>61</sup> *Management Plan*, *supra* note 12, at 42.

<sup>62</sup> *Lease*, *supra* note 50, at clause 4.18.

outside of the Jasper town site, approval of the Maligne Tours proposal would violate Clause 4.18 of the *Lease*.

In summary, approval of overnight accommodation at Maligne Lake would be contrary to the provisions of the *Lease* and would negate the mitigation measures identified in the *Lease EA*.

**Part 4: The proposed development threatens the survival of the Maligne caribou herd.**

**(a) Status of the Maligne caribou herd**

As discussed in Part 1 above, the *Management Plan* identifies the conservation of threatened woodland caribou herds as a key concern and sets the preparation of a conservation strategy for woodland caribou as a direction to ensure healthy ecosystems.<sup>63</sup> The *Strategic Environmental Assessment of the Management Plan* identified the status of woodland caribou as a key ecological challenge in the Park.<sup>64</sup> The 2008 *State of the Park Report* identified that the South Jasper caribou herds (Maligne, Tonquin and Brazeau) are in decline and stated that recovery planning requires a *Species at Risk Act* compliant recovery strategy.<sup>65</sup> The South Jasper caribou herds are part of the Southern Mountain population of woodland caribou.

The *Situation Analysis* documents the precipitous decline in the Maligne caribou herd from 68 animals in 1998 to 6 animals in 2013.<sup>66</sup> Most of the Maligne Valley, including the area immediately adjacent to the Maligne Lake Day Use Area, is designated as important caribou habitat.<sup>67</sup> Caribou have been observed along the Maligne Road in all months except July and August.<sup>68</sup> The *Situation Analysis* identifies concern about road mortality and the impact on the sustainability of the herd if even one caribou is lost.<sup>69</sup>

**(b) Recovery planning for the Maligne caribou herd**

A federal recovery strategy for Southern Mountain Caribou was legally required under the federal *Species at Risk Act* by 2007. The recovery strategy is now more than 6 years overdue. Therefore, critical habitat, as defined in the *Species at Risk Act*, has yet to be identified. Further, important legal protections that are triggered under the federal *Species at Risk Act* once a species critical habitat has been identified are not available to the Maligne herd.<sup>70</sup>

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<sup>63</sup> *Management Plan*, *supra* note 12, at 30, 32.

<sup>64</sup> *Ibid*, at 93.

<sup>65</sup> *State of the Park Report*, *supra* note 37, at 9, 23.

<sup>66</sup> Parks Canada, *Situation Analysis for the Maligne Valley - Draft*, (October 2013) at 26 [*Situation Analysis*].

<sup>67</sup> *Ibid*, at 33.

<sup>68</sup> *Ibid*, at 35.

<sup>69</sup> *Ibid*, at 35-36.

<sup>70</sup> *Species at Risk Act*, SC 2002, c 29, s 58.

Despite the current lack of a recovery strategy, “important habitat” identified by Parks Canada in the *Conservation Strategy for Southern Mountain Caribou in Canada’s National Parks* (“*Conservation Strategy*”) should help define critical habitat and the future needs of the Maligne herd.<sup>71</sup> The *Conservation Strategy* states the intent to restrict recreation activities in important caribou habitat and to prohibit development within important caribou habitat except under exceptional circumstances.<sup>72</sup>

Given the absence of identified critical habitat in a federal recovery strategy as required by the *Species at Risk Act*, and the proximity of the Maligne Lake Day Use Area to identified important caribou habitat, the precautionary principle would dictate that a decision whether to allow overnight accommodation should not be made until the required recovery strategy for Southern Mountain Caribou has been completed and critical habitat has been identified.

**(c) The priority of the maintenance and restoration of ecological integrity**

The *Canada National Parks Act* (“*Act*”) states:

4. (1) The national parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, **subject to this Act** and the regulations, and the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.<sup>73</sup>

(Emphasis added).

Further, the *Act* states:

8. (2) Maintenance **or restoration** of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks.<sup>74</sup>

(Emphasis added.)

Ecological integrity is defined in the *Act* as:

2. (1) “ecological integrity” means, with respect to a park, a condition that is determined to be characteristic of its natural region and likely to persist, including abiotic components and the composition and

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<sup>71</sup> *Situation Analysis*, *supra* note 66, at 33; Parks Canada, *Conservation Strategy for Southern Mountain Caribou in Canada’s National Parks*, (November 2011), at 5 [*Conservation Strategy*].

<sup>72</sup> *Conservation Strategy*, *supra* note 71, at 14.

<sup>73</sup> *Act*, *supra* note 2, s 4(1).

<sup>74</sup> *Ibid*, s 8(2).

abundance of native species and biological communities, rates of change and supporting processes.<sup>75</sup>

In section 4(1) of the *Act*, the benefit, education and enjoyment that Canadians may acquire from the national parks is subject to other provisions of the *Act*. Therefore, the benefit, education and enjoyment of Canadians is subordinate to the explicit requirement of section 8(2) that the maintenance or restoration of ecological integrity shall be the first priority of the Minister when considering all aspects of the management of parks.

Further, the preamble to the *Parks Canada Agency Act* states that it is in the national interest:

- ...(g) to maintain or restore the ecological integrity of national parks,...
- (l) to maintain ecological and commemorative integrity as a prerequisite to the use of national parks and national historic sites, and
- (m) to manage visitor use and tourism to ensure both the maintenance of ecological and commemorative integrity and a quality experience in such heritage and natural areas for this and future generations.<sup>76</sup>

In *ZooCheck Canada v Parks Canada Agency*, the Federal Court confirmed that the loss of an ecosystem would be contrary to the Minister's obligations under section 8(2) of the *Act*.<sup>77</sup> Similarly, permitting a development that would contribute to the loss of a species within the Maligne Valley would be contrary to the Minister's obligation under section 8(2) of the *Act*. In *Burley v Canada (Attorney General)*, the Federal Court has also confirmed that interference with existing commercial activities within a park is permissible in order to meet the Minister's obligations under section 8(2).<sup>78</sup>

Similar to the *Act*, the *Guiding Principles* dictate that the Minister must give the first priority to the protection of ecological integrity, which in this case is manifested in the protection and recovery of the Maligne caribou herd:

***Protecting ecological integrity and ensuring commemorative integrity take precedence in acquiring, managing, and administering heritage places and programs. In every application of policy, this guiding principle is paramount. The integrity of natural and cultural heritage is maintained by striving to ensure that management decisions***

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<sup>75</sup> *Ibid*, s 2(1).

<sup>76</sup> *Parks Canada Agency Act*, SC 1998, c 31, preamble.

<sup>77</sup> *ZooCheck Canada v Parks Canada Agency*, 2008 FC 540 at para 22.

<sup>78</sup> *Burley v Canada (Attorney General)*, 2008 FC 588 at para 56, 59.

*affecting these special places are made on sound cultural resource management and ecosystem-based management practices.*

*It is recognized that these places are not islands, but are part of larger ecosystems and cultural landscapes. Therefore, decision-making must be based on an understanding of surrounding environments and their management.*

Rigorous adherence to this principle is fundamental to ensuring a continuing contribution to heritage and environmental stewardship.

Heritage areas are designated and managed for their intrinsic and symbolic values, and for the benefit of the public. Fostering appreciation and understanding of commemorative and ecological integrity is the foundation for public use and enjoyment.

The various internal and external factors that contribute to the deterioration of heritage places and ecosystems are carefully analyzed. Protection and presentation are afforded in ways appropriate to the type, significance and sensitivity of the ecosystems and heritage resources involved.<sup>79</sup>

(Emphasis in original.)

It is JEA and CPAWS-Northern Alberta's submission that the proposed Maligne Tours development of overnight accommodation will pose additional risk to the already decimated Maligne caribou herd. It is JEA and CPAWS-Northern Alberta's submission that the maintenance and recovery of this herd may in fact require the removal of existing development rather the addition of new development within the Maligne Valley. The Minister has an obligation to consider the maintenance or restoration of the Maligne caribou herd as the first priority in considering the Maligne Tours application. It is unlikely that additional development within the Maligne Valley is compatible with the recovery of the Maligne herd.

In the *Conceptual Proposal*, Maligne Tours states that it has become "the de facto caretaker of Maligne Lake".<sup>80</sup> Maligne Tours attributes this to changes in Parks Canada's priorities or budget cuts at Parks Canada.<sup>81</sup> Maligne Tours states:

If MTL [Maligne Tours] is going to continue in its role as Parks Canada's partner and the caretaker of Maligne Lake – together with all of the responsibilities the company has assumed or inherited over the years due to changes in Parks Canada priorities or budget cutbacks at

<sup>79</sup> *Guiding Principles*, *supra* note 31, online: <http://www.pc.gc.ca/eng/docs/pc/poli/princip/sec1/part1d.aspx#a1>.

<sup>80</sup> *Conceptual Proposal*, *supra* note 20, at 32.

<sup>81</sup> *Ibid.*

Parks Canada – then there will need to be incremental sources of revenue by way of more customers purchasing more products or fewer customers spending more for higher quality experiences (see Higher-Yield Customers in proposal section 6).<sup>82</sup>

Maligne Tours also states, with respect to dropping visitation at Maligne Lake:

This is not a sustainable situation in terms of jobs, in terms of continuing investment and in terms of the quantity of provincial and federal tax receipts earned through tourism revenues. Such a dramatic shift in visitation patterns calls for a response linked, on balance of all environmental and wildlife considerations, to what customers really want in a place such as Maligne Lake.<sup>83</sup>

If Parks Canada has, as alleged by Maligne Tours, delegated authority for managing Maligne Lake to Maligne Tours, whether purposefully or by default, it does not change the priority to protect ecological integrity. Parks Canada's prime responsibility remains the protection of the sustainability of the ecosystems, species and ecological integrity of the Maligne Valley, not the protection of the economic sustainability of Maligne Tours commercial operations. Maligne Tours' veiled threat to discontinue services at Maligne Lake is not supported by any evidence from Maligne Tours that the current operations are not profitable or that the addition of overnight accommodation is essential to the profitability of the company and the continuation of services at Maligne Lake. Parks Canada must reassert its authority as the manager of all areas of the Park, guided by the priority of ecological integrity, and not succumb to such threats.

**(d) Approval of the proposed development would be premature and disrespectful of the Court pending a decision in *Western Canada Wilderness Committee v Canada (Minister of Fisheries and Oceans)*.**

The Western Canada Wilderness Committee and other organizations currently have a matter before the Federal Court to rectify the Minister's failure to post the proposed and final recovery strategies for Woodland Caribou, Southern Mountain population (Southern Mountain Caribou) and three other species at risk, contrary to section 42, 43 and 132 of the *Species at Risk Act*.<sup>84</sup> The action alleges that the Minister has failed to prepare a recovery strategy for Southern Mountain Caribou within the timelines required by the *Species at Risk Act*. As discussed above, the recovery strategy for the Southern Mountain Caribou, including the Maligne herd, is more than 6 years overdue.

The *Management Plan* acknowledges the absence and importance of a recovery plan as required by the *Species at Risk Act*:

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<sup>82</sup> *Ibid*, at 32.

<sup>83</sup> *Ibid*, at 31.

<sup>84</sup> *Western Canada Wilderness Committee v Canada (Minister of Fisheries and Oceans)*, Federal Court File No. T-1777-12.

Species at risk recovery strategies for woodland caribou and Haller's apple moss are a priority in the plan. The plan does not contain detailed actions for caribou recovery, which drew some public concern during the review of the draft plan; however, the plan commits to the next steps of developing that direction. A Parks Canada caribou conservation strategy will be completed with public involvement for Banff, Jasper, Mt. Revelstoke and Glacier national parks. The conservation strategy will support and contribute to the broader Environment Canada-led recovery plan under the *Species at Risk Act*.<sup>85</sup>

The *Operational Policy Statement: Projects on Federal Lands and Outside Canada under the Canadian Environmental Assessment Act, 2012* states that proposed projects must be in compliance with other applicable legislation including the *Species at Risk Act*.<sup>86</sup> However, this is impossible to achieve when the Minister herself is not in compliance with the requirement under the *Species at Risk Act* to produce a recovery strategy for Southern Mountain Caribou that would provide direction for assessing the impacts of proposed development in the Maligne Valley.

Given the existing legal challenge to the Minister's failure to produce a recovery strategy for Southern Mountain Caribou, it would seem prudent to delay any decision with respect to the Maligne Tours proposal until the Court has rendered a decision in that matter.

**Part 5: The proposed development would interfere with the use by grizzly bears and harlequin ducks of habitat adjacent to the Maligne Lake Day Use Area.**

The *Situation Analysis* indicates that grizzly bears have been seen in the Maligne valley, including in areas adjacent to the Maligne Lake Day Use Area, in spring, summer and fall.<sup>87</sup> Grizzly bears have a relatively high probability of occurrence and of movement in the habitat immediately adjacent to the Maligne Lake Day Use Area.<sup>88</sup> The north end of Maligne Lake is identified as a "pinch point" where grizzly movement is restricted by topography, human facilities and human activities.<sup>89</sup>

The *Situation Analysis* indicates that human activity can cause the displacement of grizzly bears from preferred habitats.<sup>90</sup> The *Situation Analysis* also states that some studies have shown that grizzly bears may adapt more nocturnal activity where human activity is high during the daytime.<sup>91</sup>

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<sup>85</sup> *Management Plan*, *supra* note 12, at 94.

<sup>86</sup> Canadian Environmental Assessment Agency, *Operational Policy Statement: Projects on Federal Lands and Outside Canada under the Canadian Environmental Assessment Act, 2012*, (13 June 2013) at 7.

<sup>87</sup> *Situation Analysis*, *supra* note 66, at 37.

<sup>88</sup> *Ibid*, at 39-40.

<sup>89</sup> *Ibid*, at 40.

<sup>90</sup> *Ibid*, at 41.

<sup>91</sup> *Ibid*, at 43.

Allowing overnight accommodation at the north end of Maligne Lake, and in particular the provision of tent cabins, will increase the likelihood of human disturbance and human-bear encounters during the late evening and night time hours, resulting in risks for both the bears and the visitors. Given the already documented conflicts between grizzly bears' use of their habitat and human activity at this location, it would be unwise to exacerbate the potential conflicts by extending the hours of human activity at this site.

The *Situation Analysis* also identifies harlequin ducks as sensitive to disturbance and in particular identifies the importance of undisturbed feeding before and during the breeding season.<sup>92</sup> The *Situation Analysis* further confirms Parks Canada's approach to minimizing disturbance of the harlequin population before and during the breeding season.<sup>93</sup> Adding more development near the Maligne Lake outlet is contrary to the objective of minimizing disturbance in this area.

The *Situation Analysis* identifies that evening events at the Maligne Lake Day Use Area and generators are the main sources of noise pollution in the Maligne Valley.<sup>94</sup> Approval of overnight accommodation at Maligne Lake would increase the potential sources of evening noise pollution at Maligne Lake. In particular, Maligne Tours' proposal for special events such as weddings and meetings in combination with the provision of overnight accommodation at Maligne Lake has the potential to greatly extend both the time period and intensity of noise and disturbance into the late evening hours.

**Part 6: There is a lack of social science evidence to support the need for overnight accommodation at Maligne Lake.**

The *Situation Analysis* indicates that visitors to the Maligne Valley are generally very satisfied with their experience. Almost all visitors would recommend the valley to others and 99 percent agreed that the visit had met or exceeded their expectations.<sup>95</sup> Of the gaps and opportunities for enhanced visitor experience identified in the *Situation Analysis*, none require the construction of overnight accommodation to enhance those experiences.<sup>96</sup>

The *Conceptual Proposal* does not provide any quantitative social science evidence or market analysis of the need for overnight accommodation. The *Conceptual Proposal* also does not provide any quantitative analysis of how the presence of overnight accommodation would impact the perceptions of other users and how that might impact their use of Maligne Lake area. Given that 99 percent of visitors to the Maligne Valley find that their visit to the valley met or exceeded their expectations, there would appear

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<sup>92</sup> *Ibid*, at 46.

<sup>93</sup> *Ibid*, at 47.

<sup>94</sup> *Ibid*, at 57.

<sup>95</sup> *Ibid*, at 10.

<sup>96</sup> *Ibid*, 61-63.

to be no need to add infrastructure that is not necessary to enhance the visitor experience and that may, in fact, have a negative impact on ecological integrity.

### **Conclusions**

In conclusion, the Maligne Tours proposal to develop overnight accommodation at Maligne Lake is contrary to the *Management Plan*, the *Guiding Principles*, the *OCA Guidelines* and the existing site *Lease*. A decision to permit the development of overnight accommodation at Maligne Lake contrary to each of these documents would undermine the reasonable expectation that these documents guide the administration, management and control of the Park.

Further, approval of overnight accommodation at Maligne Lake, in the absence of a recovery strategy and identified critical habitat for the Maligne caribou herd, would be contrary to the prime directive to maintain and restore ecological integrity. Further, such approval would further aggravate the impacts of the Minister's failure to provide the recovery strategy and identify critical habitat as required by the *Species at Risk Act*.

Therefore, JEA and CPAWS-Northern Alberta must challenge in the strongest terms the approval of the proposed development of overnight accommodation by Maligne Tours at Maligne Lake.

Sincerely,



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