



Executive Secretary  
Inter-American Commission on Human Rights  
Organization of American States  
889 F St NW  
Washington, D.C. 20006  
United States of America

February 19, 2024

Honorable Executive Secretary,

On behalf of the Southeast Alaska Indigenous Transboundary Commission (“Petitioners”), we are submitting observations with respect to the merits of Case N° 15.329.

Please do not hesitate to contact us should you require further information.

Sincerely,

Ramin Pejan

Mae Manupipatpong

**MERITS OBSERVATIONS TO THE INTER-AMERICAN COMMISSION ON  
HUMAN RIGHTS SEEKING RELIEF FROM VIOLATIONS OF THE RIGHTS OF  
THE MEMBERS OF THE SOUTHEAST ALASKA INDIGENOUS TRANSBOUNDARY  
COMMISSION RESULTING FROM HARD-ROCK MINING IN BRITISH  
COLUMBIA, CANADA**

SUBMITTED BY THE SOUTHEAST ALASKA INDIGENOUS TRANSBOUNDARY COMMISSION  
ON BEHALF OF ITS CONSTITUENT TRIBAL GOVERNMENTS AND THEIR TRIBAL MEMBERS

Petitioners' Legal Representatives:

Ramin Pejan  
Mae Manupipatpong  
Earthjustice  
50 California St., Suite 500  
San Francisco, CA 94111  
Phone: +1.415.217.2000  
Email: [rpejan@earthjustice.org](mailto:rpejan@earthjustice.org)  
[mmanupipatpong@earthjustice.org](mailto:mmanupipatpong@earthjustice.org)

19 February 2024

## **I. Introduction**

The Southeast Alaska Indigenous Transboundary Commission (SEITC), on behalf of itself and its constituent Tribes (“Petitioners”), submits these merits observations with regards to Case N° 15.329. Petitioners incorporate all the arguments in Petition 3004-18 (submitted in July 2020) (“2020 Petition”), reply letter addressing Canada and British Columbia’s responses (submitted on July 25, 2022), and supplemental response (submitted on November 4, 2022) by reference, some of which Petitioners have supplemented with additional evidence and analysis here.

On January 4, 2024, Petitioners requested that the deadline for submitting merits observations be extended by one month to February 19, 2024. Petitioners noted that there have been several new developments to the B.C. Mines identified in the 2020 Petition, and new mines are being proposed in one of the B.C.-Alaska transboundary watersheds at issue in the Petition. Recent analyses and research published since the 2020 Petition provide additional detail on the potential transboundary impacts of hard-rock mining in B.C. Drafting the merits submission to reflect these updates and their implications for Petitioners’ claims required more time than expected.

Since filing the Petition in 2020, it has become increasingly clear that neither Canada’s nor B.C.’s regulatory frameworks are sufficient to protect the rights of Petitioners. Despite failing to fully assess environmental impacts from and obtain Petitioners’ free, prior, and informed consent for the B.C. Mines discussed in the Petition, Canada and B.C. continue to receive applications for additional mines and approve amendment applications that allow mining project proponents to increase their pollution of transboundary watersheds—all without adequate consultation with Petitioners in compliance with international human rights obligations. Worse yet, Canada and B.C. facilitate mining projects under the guise of critical mineral development for a clean economy<sup>1</sup> when most of the B.C. Mines primarily target gold, with critical minerals as by-products. This goldrush should not be prioritized over the rights of Petitioners.

In this submission, Petitioners provide notable updates concerning the B.C. Mines; describe Petitioners’ continued unsuccessful efforts to have B.C. and Canada seek their free, prior, and informed consent with respect to the B.C. Mines; and review recent studies and other information documenting the potential harms associated with these mines. In addition, Petitioners raise a new claim related to the violation of Petitioners’ right to a healthy environment. Petitioners respectfully request the assistance of the Inter-American Commission on Human Rights (Commission) to obtain relief for the violations resulting from Canada’s failure to prevent the imminent and foreseeable threats from the B.C. Mines.

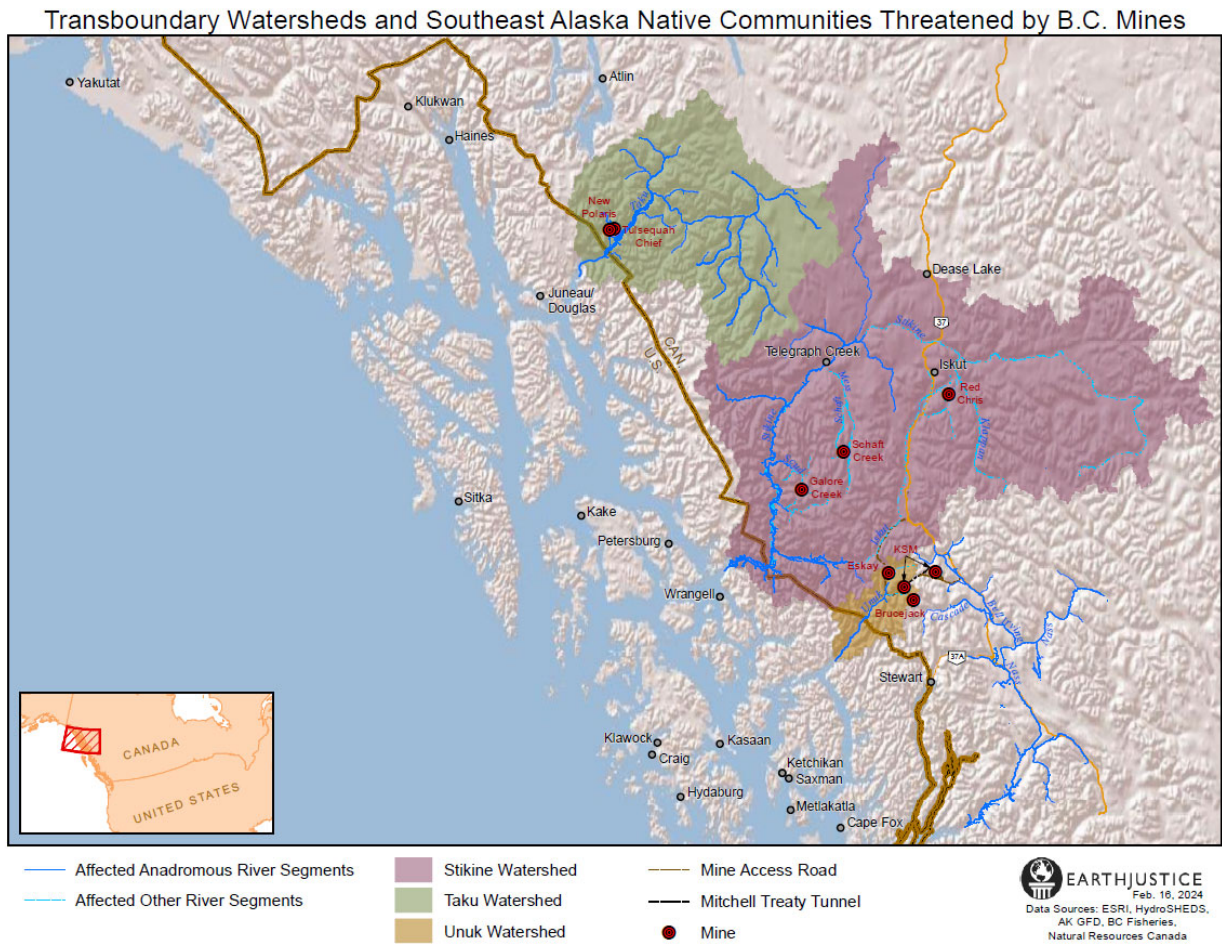
## **II. Updates on the B.C. Mines that threaten the transboundary Taku, Stikine, and Unuk watersheds.**

Petitioners’ 2020 Petition identified and described six hard-rock mining projects in the Taku, Stikine, and Unuk River watersheds. It described how these mines are an imminent and foreseeable threat of polluting downstream waters with highly toxic heavy metals that could cause sustained and significant declines in the populations of the fish that Southeast Alaska Native

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<sup>1</sup> British Columbia, Office of the Premier, *B.C. grows critical minerals sector; sustainable jobs* (Jan. 22, 2024), <https://news.gov.bc.ca/releases/2024PREM0003-000063>.

communities rely on for their subsistence and that are central to the maintenance of their culture. Since the filing of their Petition, there have been several developments with respect to some of the mines identified in the Petition, and two additional mines have been proposed and are in the early permitting stage. Petitioners refer to the mines discussed in the Petition and recently proposed mines collectively as “the B.C. Mines.” The locations of the B.C. Mines, the three watersheds, and the Southeast Alaska Native communities are shown in the below map, a larger version of which is also appended to this submission as **Appendix 1**.



**A. Mines discussed in the 2020 Petition.**

Petitioners described six hard-rock mining projects in the 2020 Petition: Schaft Creek (Stikine watershed), Galore Creek (Stikine watershed), Red Chris (Stikine watershed), KSM (Unuk watershed), Brucejack (Unuk watershed), and Tulsequah Chief (Taku watershed). Updates pertaining to these mines are discussed below.

**Schaft Creek Mine (Stikine River).** As mentioned in the 2020 Petition (paras. 101-104), Schaft Creek Mine, an open pit copper, gold, molybdenum, and silver mine, is expected to produce around 100,000 metric tons of ore per day and generate over 800 million metric tons of tailings over its 15-23 year proposed operating life. To the best of Petitioners’ knowledge, the project proponent



for the Schaft Creek Mine, Copper Fox Metals Inc., has not reapplied for an environmental assessment certificate after withdrawing its application in 2016.<sup>2</sup> However, Copper Fox Metals is continuing to “advance key project activities including the collection of geotechnical, metallurgical, engineering, and environmental data and community engagement.”<sup>3</sup>

***Galore Creek Mine (Stikine River).*** As mentioned in the 2020 Petition (paras. 105-107), over its 18.5-year operating life, the Galore Creek Mine is expected to produce about 588 million metric tons of ore, with an annual yield of approximately 322 million pounds of copper, 200,000 ounces of gold, and three million ounces of silver.<sup>4</sup> The Government of British Columbia had issued an environmental assessment certificate for the Galore Creek Mine in 2007.

Petitioners have raised concerns with the B.C. Environmental Assessment Office (“B.C. EAO”) regarding the approval process of the Galore Creek Mine, including that the original environmental assessment conducted over 15 years ago is outdated and invalid. Knowledge of the potential impacts of climate change on the transboundary watersheds has progressed substantially since then, and the understanding of the risks of wet tailing dams and chronic pollution has increased. As a result, the predictions made in the environmental review are no longer credible, including with respect to the performance of dam structures, site stability, and the need for active water treatment. Galore Creek Mine remains a substantial threat to the Stikine River and Petitioner’s rights. To date, B.C. EAO has not required an updated environmental impact assessment. Although the project proponent has applied for several amendments since 2007, the environmental assessments of these amendments are limited to assessing the impacts of the proposed changes, and not the entire project, so Petitioners’ concerns have been set aside.<sup>5</sup>

In November 2023, B.C. and the Tahltan Nation in B.C. signed a decision-making agreement outlining a collaborative process for reviewing proposed changes to the Galore Creek Mine.<sup>6</sup> Despite the potential transboundary impacts of the Galore Creek Mine as described in the 2020 Petition, B.C. has not offered the same opportunity for collaboration with Petitioners, or any other process for seeking their free, prior, and informed consent.

***Red Chris Mine (Stikine River).*** As noted in the 2020 Petition (paras. 91-100), the Red Chris Mine began operating in February 2015. Over its projected 28-year operating life, the Red Chris mine expects to process around 30,000 metric tons of ore per day, and it will generate 300 million metric tons of tailings and 338 million metric tons of waste rock.

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<sup>2</sup> Government of Canada, *Schaft Creek Mine Project*, Canadian Impact Assessment Registry, <https://iaac-aeic.gc.ca/050/evaluations/proj/57852>.

<sup>3</sup> Copper Fox Metals, *Copper Fox Provides Analytical Results for 2023 Geotechnical Drilling Program at Schaft Creek Project* (Jan. 23, 2024), <https://copperfoxmetals.com/news/copper-fox-provides-analytical-results-for-2023-ge-7566/>.

<sup>4</sup> AMEC Americas Limited, *Galore Creek Project, British Columbia, NI 43-101 Technical Report on Pre-Feasibility Study at 1-2 & 14-13, Tbl. 14-4* (Sept. 2011), [https://www.miningdataonline.com/reports/GaloreCreek\\_PFS\\_07272011.pdf](https://www.miningdataonline.com/reports/GaloreCreek_PFS_07272011.pdf) (“Galore Creek Technical Report”).

<sup>5</sup> B.C. EAO, *Galore Creek Copper-Gold-Silver*, EAO’s Project Information Center, <https://projects.eao.gov.bc.ca/p/588510c6aaecd9001b8157d0/amendments>.

<sup>6</sup> DCN-JOC News Services, *B.C. and Tahltan Nation enter agreement on Galore Creek review*, *Journal of Commerce* (Nov. 7, 2023), <https://canada.constructconnect.com/joc/news/government/2023/11/b-c-and-tahltan-nation-enter-agreement-on-galore-creek-review>.

In 2016, Red Chris Development Company Ltd. (RCDC) applied to amend its Environmental Assessment Certificate for the Red Chris Mine to reflect “design changes associated with the South Dam and water management of the tailings impoundment area.”<sup>7</sup> The B.C. EAO held a two-week public comment period, which it extended for an additional ten days.<sup>8</sup>

The B.C. EAO ultimately approved the amendment, dismissing concerns and recommendations by other regulatory agencies. With respect to the water management changes, the B.C. EAO concluded that the amendment was “unlikely to change the residual effects identified in [B.C.] EAO’s assessment of the original water management measures,” despite the Ministry of Environment (MoE) noting “considerable uncertainty in the hydrologic analysis as no measured data [was] [] available to characterize flow.”<sup>9</sup> RCDC stated that it would “finalize the specific design features of the east diversion during the [Environmental Management Act] permit amendment process and any residual concerns of MoE would be addressed at that time.”<sup>10</sup>

The B.C. EAO also concluded that the South Dam design changes were “unlikely to change the residual effects.”<sup>11</sup> The MoE recommended changes to the Environmental Assessment Certificate that would incorporate treatment of source water as a contingency to protect against water quality issues that may result from the tailings impoundment area.<sup>12</sup> RCDC did not support these changes, and the B.C. EAO ultimately did not require them. The B.C. EAO also approved the amendment even though RCDC was “still in the process of developing the closure layout,” based on RCDC’s commitment to update testing and modelling by mid-2017 and conduct further evaluations and surveys.<sup>13</sup> The B.C. EAO did not seek Petitioners free, prior, and informed consent regarding this amendment.

The current project proponent, Newcrest Red Chris Mining Ltd. (“Newcrest”), is seeking a new amendment to its Environmental Assessment Certificate and other permits to transition the mining method from open pit to underground block cave mining to reach the otherwise inaccessible ore beneath the open pit.<sup>14</sup> This is a major change in the operation of the mine. The changes can affect water quality because the ore mined through block caving has different geochemical properties, and the properties of the waste rock and tailings produced will also be different.<sup>15</sup> Block cave mining may also “change base flows of surface streams within Red Chris’ area of influence” and “affect the groundwater regime due to the need to dewater the underground mine in greater volumes than currently required for open pit mining.”<sup>16</sup> Newcrest acknowledges that block cave

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<sup>7</sup> B.C. EAO, *EAO’s Assessment of an Application for Amendment: Red Chris Porphyry Copper-Gold Mine Project, EA Certificate #M05-02, Amendment #2 (Water Management and South Dam Design Changes)* (Aug. 19, 2016), <https://projects.eao.gov.bc.ca/api/public/document/5886b3d5a4acd4014b81ff36/download/EAOs%20Assessment%20of%20an%20Application%20for%20Amendment%20dated%20August%2019%2C%202016..pdf>.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

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

<sup>14</sup> Newcrest Red Chris Mining Ltd., *Block Cave Project: Production Phase Project Description* (Feb. 17, 2023), pp. iii-iv, [https://projects.eao.gov.bc.ca/api/public/document/63f4fc7ef26a350022b7b7f8/download/401-8311-EN-REP-0016\\_Rev0.pdf](https://projects.eao.gov.bc.ca/api/public/document/63f4fc7ef26a350022b7b7f8/download/401-8311-EN-REP-0016_Rev0.pdf).

<sup>15</sup> *Ibid.*, p. 7-5.

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

mining has the potential to significantly impact surface water quantity and quality, groundwater quantity and quality, and Tahltan Nation culture,<sup>17</sup> yet it notably does not mention transboundary impacts.

To take advantage of unmined ore reserves at the end of the Production Phase, Newcrest is also considering extending the currently permitted lifetime of the Red Chris Mine past 2038 (“LOM Extension Phase”), which would involve, among other things, “[a]dditional underground mining infrastructure development,” “[d]evelopment of additional tailings storage capacity,” and “[c]ontinued production mining at up to 15 [million tonnes per annum].”<sup>18</sup> Newcrest will have to submit an LOM Extension Phase application if it decides to continue operating the mine post-2038.<sup>19</sup>

In November of 2023, B.C. and the Tahltan Nation in B.C. signed a decision-making agreement outlining a collaborative process for reviewing proposed changes to the Red Chris Mine.<sup>20</sup> Despite potential transboundary impacts of the mine as described in the 2020 Petition, and the potential for significant additional impacts from the proposed amendments to the mine’s operation, B.C. did not offer the same opportunity for collaboration with Petitioners, or any other process for seeking their free, prior, and informed consent.

***KSM Mine (Unuk River).*** As mentioned in the 2020 Petition (paras. 112-117), Seabridge Gold Incorporated (“Seabridge”), is proposing a gold, silver, copper, and molybdenum mine, which would be one of the largest undeveloped copper-gold projects in the world. The project received provincial and federal environmental assessment certificates in 2014, and Seabridge is still seeking various other permits.

Seabridge published an updated joint Prefeasibility Study and Preliminary Economic Assessment (PEA) in August 2022 that proposed maximum mine production of 195,000 tons per day over a mine life of 33 years,<sup>21</sup> which is a 65,000 tons per day increase from its plans in 2013.<sup>22</sup> This increase is likely due in part to Seabridge’s integration of the Snowfield (now East Mitchell) deposit it purchased in 2020 into the greater KSM Project,<sup>23</sup> which Seabridge noted “is likely to enhance gold reserves.”<sup>24</sup> The location of the waste rock dumps have also been modified from that described in the 2013 Environmental Assessment.<sup>25</sup> The water quality impacts of these changes have not been evaluated, much less transboundary impacts.

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<sup>17</sup> *Ibid.*, pp. iv, 7-8.

<sup>18</sup> *Ibid.*, p. 3-3, Tbl. 3.

<sup>19</sup> *Ibid.*, p. 3-10.

<sup>20</sup> Amanda Follett Hosgood, *BC and Tahltan Sign ‘Historic’ Mining Agreement*, The Tyee (Nov. 2, 2023), <https://thetyee.ca/News/2023/11/02/BC-Tahltan-Historic-Mining-Agreement-Industrial-Development/>.

<sup>21</sup> Hassan Ghaffari *et al.*, *KSM (Kerr-Sulphurets-Mitchell) Prefeasibility Study and Preliminary Economic Assessment, NI 43-101 Technical Report* (Aug. 8, 2022), p. 24-36, <https://minedocs.com/22/KSM-PEA-08082022.pdf> (“KSM Prefeasibility Study & PEA (2022)”).

<sup>22</sup> 2020 Petition, para. 112.

<sup>23</sup> KSM Prefeasibility Study & PEA (2022), p. 13-17.

<sup>24</sup> Seabridge Gold, *Seabridge Drilling Confirms Integrating KSM’s Mitchell and Snowfield Deposits, New PFS Combining Snowfield and Mitchell Expected Next Quarter* (Feb. 1, 2022), <https://www.seabridgegold.com/press-release/seabridge-drilling-confirms-integrating-ksm-s-mitchell-and-snowfield-deposits-new-pfs-combining-snowfield-and-mitchell-expected-next-quarter>.

<sup>25</sup> KSM Prefeasibility Study & PEA (2022), pp. 24-41 to 24-42.

Seabridge's PEA explores potential expansion of the KSM Mine after the Prefeasibility Study mine plan has been completed.<sup>26</sup> The PEA is "planned to operate for 39 years with a peak mill feed production of 170,000 [tons per day]."<sup>27</sup> Although the 2014 certified project description mentions underground block cave mining with respect to the Mitchell and Iron Cap deposits,<sup>28</sup> the PEA proposes mining the Iron Cap and Kerr (instead of Mitchell) deposits using this method instead.<sup>29</sup> If realized, the PEA would also extend operation of the KSM Mine beyond the maximum 52-year mine life described in the certified project description from 2014.<sup>30</sup> Based on the PEA, Seabridge touts KSM as a "multigenerational long-life mining project potential with flexibility to vary metal output."<sup>31</sup>

Neither Canada nor B.C. has consulted Petitioners or sought their free, prior, and informed consent about the modifications to the original KSM Mine plan in the Prefeasibility Study or concerns regarding potential expansion of the KSM Mine as proposed in the PEA.

***Brucejack Mine (Unuk River).*** As noted in the 2020 Petition (paras. 108-111), the Brucejack Mine began production in June 2017, absent consultation with and free, prior, and informed consent of Petitioners. On March 9, 2022, Newcrest Mining Ltd. acquired Pretium Resources Inc. ("Pretium"), including 100% of the Brucejack operation.<sup>32</sup>

To date, the B.C. EAO has issued seven amendments to the Environmental Assessment Certificate for the Brucejack Mine,<sup>33</sup> including several with potential impacts to water resources.<sup>34</sup> For example, a year after beginning operation, Pretium increased the maximum ore production from 16.5 million tons to 18.5 million tons, increased the annual ore production rate from 990,000 tons to 1,387,000 tons, and increased water withdrawal from Brucejack Lake from 45 m<sup>3</sup>/h December

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<sup>26</sup> *Ibid.*, p. 24-1; Seabridge Gold, *New KSM Preliminary Economic Assessment ("PEA") Sees Additional Copper-Rich Block Cave Opportunity* (Aug. 2, 2022), <https://www.seabridgegold.com/press-release/new-ksm-preliminary-economic-assessment-pea-sees-additional-copper-rich-block-cave-opportunity>.

<sup>27</sup> KSM Prefeasibility Study & PEA (2022), p. 24-1.

<sup>28</sup> Schedule A, KSM Project, Certified Project Description (undated), p. 4, <https://projects.eao.gov.bc.ca/api/public/document/5887dec89b566a12e7f69e6e/download/Schedule%20A%20-%20Certified%20Project%20Description.pdf> ("KSM Certified Project Description"); B.C. EAO, KSM, EAO's Project Information Center, <https://projects.eao.gov.bc.ca/p/58851156aaecd9001b81e652/documents>.

<sup>29</sup> KSM Prefeasibility Study & PEA (2022), pp. 1-19 to 1-20.

<sup>30</sup> KSM Certified Project Description, p. 4.

<sup>31</sup> Seabridge Gold, *New KSM Preliminary Economic Assessment ("PEA") Sees Additional Copper-Rich Block Cave Opportunity*.

<sup>32</sup> Newcrest Mining Ltd., *Our Assets: Brucejack*, <https://www.newcrest.com/our-assets/brucejack>.

<sup>33</sup> B.C. EAO, *The EAO's Assessment of an Application for Certificate Amendment: Amendment #8 – Request for Glacier Access Ramp and Road Alterations, Brucejack Mine* (June 27, 2022), p. 2, [https://projects.eao.gov.bc.ca/api/public/document/62ba394595902c0023901657/download/Brucejack%20-%20Amendment%208%20Report\\_FINAL.pdf](https://projects.eao.gov.bc.ca/api/public/document/62ba394595902c0023901657/download/Brucejack%20-%20Amendment%208%20Report_FINAL.pdf).

<sup>34</sup> Ben R. Collison *et al.*, *Undermining environmental assessment laws: post-assessment amendments for mines in British Columbia, Canada, and potential impacts on water resources*, FACETS 7: 611–638, p. 617, Tbl. 3 (Apr. 28, 2022), <https://www.facetsjournal.com/doi/10.1139/facets-2021-0106>.

through April to 70 m<sup>3</sup>/h for every month of the year.<sup>35</sup> Since the increase in ore production would also result in a higher discharge rate of waste rock and tailings to Brucejack Lake, Pretium also requested to raise the effluent discharge limits for antimony, arsenic, and ammonia.<sup>36</sup> The new limits all exceeded—and in the case of arsenic and antimony, **doubled** and **tripled**, respectively—the recommended levels reflected in B.C.’s water quality guidelines for protection of freshwater aquatic life.<sup>37</sup>

Petitioners have not been consulted for any of these amendments, despite their potential to harm the Unuk River watershed.

On May 24, 2023, the mine operator received a notice of non-compliance under Section 126 of the *Impact Assessment Act* for violating a condition of its authorization to operate Brucejack Mine.<sup>38</sup> This condition requires the operator to “protect fish and fish habitat during all phases of the Designated Project, which shall include the implementation of mitigation measures to avoid causing harm to fish and fish habitat when using explosives or conducting activities in or around water frequented by fish.”<sup>39</sup> The operator was directed to clean up sediment laden-discharge making its way towards Brucejack Creek, which laboratory analyses later revealed as “geochemically consistent with waste rock material that is actively deposited into the [Waste Rock Tailings Storage Facilities].”<sup>40</sup> This provides another example of how mining operations often do not conform to predictions in the environmental review stage.

***Tulsequah Chief Mine (Taku River).*** At the time of the 2020 Petition (paras. 85-90), Chieftain Metals’ plans to mine gold, silver, copper, lead, and zinc from a 54-square-mile (139-square-kilometer) property in Taku watershed, on the east side of the Tulsequah Valley, 10 miles (16

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<sup>35</sup> ERM, *Brucejack Gold Mine: Application for an Amendment to Environmental Assessment Certificate #M15-01* (Apr. 2018), p. 1-2 (Tbl. 1-1) & Appendix B, [https://projects.eao.gov.bc.ca/api/public/document/5ad8cfbbd666d0002485739b/download/Brucejack\\_Amendment%20Application\\_April%202018.pdf](https://projects.eao.gov.bc.ca/api/public/document/5ad8cfbbd666d0002485739b/download/Brucejack_Amendment%20Application_April%202018.pdf) (“Brucejack Application for Amendment No. 5”).

<sup>36</sup> *Ibid.*, Appendix C (Lorax Environmental Services Ltd., *Brucejack Gold Mine: 2018 Water Quality Model Report in Support of Amendment Applications for Ore Production Increase to 3800 tpd* (Mar. 12, 2018), pp. 5-9, 5-14, 5-17, [https://projects.eao.gov.bc.ca/api/public/document/5ad8cfbbd666d0002485739b/download/Brucejack\\_Amendment%20Application\\_April%202018.pdf](https://projects.eao.gov.bc.ca/api/public/document/5ad8cfbbd666d0002485739b/download/Brucejack_Amendment%20Application_April%202018.pdf) (“Brucejack 2018 Water Quality Model Report”).

<sup>37</sup> Brucejack 2018 Water Quality Model Report, pp. 5-14, 5-17.

<sup>38</sup> Impact Assessment Agency of Canada, *Alleged Non-Compliance by Pretium Resources Inc. with the Decision Statement issued for the Brucejack Gold Mine Project* (May 24, 2023), <https://iaac-aeic.gc.ca/050/documents/p80034/152508E.pdf>.

<sup>39</sup> *Ibid.*, p. 3.

<sup>40</sup> *Ibid.*, p. 2.



kilometers) upstream of the international border, were in doubt because the company had filed for bankruptcy.

Over its 11-year proposed operating life, the mine would produce 4.4 million metric tons of ore, and over 2.16 million metric tons of tailings, 1.76 million metric tons of which would be impounded in a 45-hectare wet impoundment.<sup>41</sup>

Cominco operated a mine at the same site from 1951 until 1957, that has been leaking untreated acid mine drainage into the Tulsequah River for at least 67 years.<sup>42</sup> The latest Baseline Water Quality Report from 2021 notes exceedances in levels of multiple contaminants of potential concern, including several heavy metals, below the mine site:

Downstream of the site in all exposure Zones (2, 3, 4) aluminum, chromium, copper, iron, mercury and zinc had a greater than 50% frequency of exceedances. The highest frequency of [contaminants of potential concern] exceedances (100%) was observed for aluminum (total & dissolved), cadmium, copper iron, lead, zinc (total & dissolved) and fluoride in the effluent zone with a greater than 75% frequency of exceedances observed for pH, arsenic, beryllium, chromium, cobalt, dissolved iron and mercury.<sup>43</sup>

Zone 3, located approximately one kilometer south of the mine, has “the potential for the largest number of receptors / highest quality habitat of the impacted zones,” and Zone 4, located approximately 2.5 kilometers south of the mine, is “characterized by high quality fish habitat for both resident and migratory fish.”<sup>44</sup>

The B.C. EAO approved the Tulsequah Chief Mine in 2002, and all permits needed to start construction have been granted, subject to the condition that the current acid mine drainage be stopped and remediated.<sup>45</sup> In November 2018, after Chieftain failed to comply with several non-compliance orders, the Ministry of Energy, Mines and Petroleum Resources issued a Request for Proposals for the development of a remediation and closure plan for Tulsequah Chief.<sup>46</sup> The Tulsequah Chief Mine Conceptual Closure and Reclamation Plan was released in April 2020.<sup>47</sup> In September of 2022, Chieftain’s long-running receivership proceedings, a key hurdle to B.C. taking control of the mine site for remediation, concluded. According to the most recent correspondence from the B.C. government to Alaskan legislators dated January 24, 2024, the final plan for

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<sup>41</sup> 2020 Petition, paras. 87-88.

<sup>42</sup> British Columbia, *Tulsequah Mine Information*, <https://www2.gov.bc.ca/gov/content/environment/air-land-water/site-permitting-compliance/tulsequah-mine> (last updated Apr. 18, 2023) (“British Columbia, *Tulsequah Mine Information*”).

<sup>43</sup> SLR Consulting (Canada) Ltd., *Tulsequah Chief Mine Water Quality Monitoring Plan - 2021 (Year 2)* (May 7, 2021), p. 3, [https://www2.gov.bc.ca/assets/gov/environment/air-land-water/site-permitting-and-compliance/tulsequah/slr\\_wq\\_monitoring\\_plan\\_yr\\_2.pdf](https://www2.gov.bc.ca/assets/gov/environment/air-land-water/site-permitting-and-compliance/tulsequah/slr_wq_monitoring_plan_yr_2.pdf).

<sup>44</sup> *Tulsequah Chief Mine Water Quality Monitoring Plan -2021 (Year 2)*, p. 4. The receptors refer to aquatic fish and benthos of concern. *Ibid.*, pp. 3, 6.

<sup>45</sup> 2020 Petition, para. 89.

<sup>46</sup> British Columbia, *Tulsequah Mine Information*.

<sup>47</sup> *Ibid.*; SNC-Lavalin Inc. & SRK Consulting, Closure and Reclamation Plan for the Tulsequah Chief Mine Site, Near Atlin, British Columbia (Apr. 15, 2020), [remediation\\_plan\\_tulsequah\\_chief\\_mine\\_site\\_for\\_distribution.pdf \(gov.bc.ca\)](https://www2.gov.bc.ca/assets/gov/environment/air-land-water/site-permitting-and-compliance/tulsequah/slr_wq_monitoring_plan_yr_2.pdf).



reclamation and closure appears to still be under development.<sup>48</sup> Although B.C. noted it is open to holding a public meeting on the mine in Juneau, Southeast Alaska, B.C. suggested waiting until an updated work plan is available.<sup>49</sup> It is unclear when this plan will be completed—B.C.’s letter mentioned only that “more progress will be made in 2024.”<sup>50</sup>

## B. Mines proposed since the 2020 Petition.

In addition to the six B.C. Mines identified in the 2020 Petition, new mines have been proposed in the transboundary watersheds over the past few years.

***Eskay Creek (Unuk River).*** Located within the headwater tributaries of the Unuk River watershed approximately 40 kilometers from the Alaska/B.C. border, the Eskay Creek Project is a proposed gold-silver open pit mine with an estimated total annual production of 3 to 3.7 million tons per year over a 14-year mine life.<sup>51</sup> The project proponent, Skeena Resources, applied for an environmental assessment certificate on or around July 2021. On August 3, 2021, Petitioners received notice from the B.C. EAO that Skeena Resources had released an Initial Project Description to the Impact Assessment Agency of Canada, the B.C. EAO, and Tahltan Central Government.<sup>52</sup> SEITC submitted comments to help inform Skeena Resources’ analysis on October 18, 2021, noting, among other things, the need for additional groundwater and hydrology studies and questioning the company’s conclusion that no transboundary effects will occur.<sup>53</sup>

SEITC has repeatedly requested that B.C. engage in formal consultation and seek Petitioners’ free, prior, and informed consent. B.C. received notice, at the very latest, on March 31, 2021, that the traditional territory of SEITC member Tribes is located on both sides of the US-Canada border.<sup>54</sup>

On September 23, 2022, SEITC, on behalf of its member Tribes, formally put B.C. on notice that it believes: 1) that SEITC member Tribes are “Aboriginal peoples of Canada” to whom the Crown owes a duty to consult and accommodate, and 2) that SEITC member Tribes intend to exercise their rights in B.C. SEITC also requested to be added as a “participating Indigenous nation” in the environmental assessment process for the Eskay Creek Project and sought capacity funding to facilitate SEITC’s meaningful participation.<sup>55</sup> Participating Indigenous nations are afforded

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<sup>48</sup> Letter from Shannon Baskerville, Deputy Minister, Ministry of Energy, Mines and Low Carbon Innovation, to Senator Jesse Kiehl *et al.* (Jan. 24, 2024) (**Appendix 2**).

<sup>49</sup> *Ibid.*, p. 3.

<sup>50</sup> *Ibid.*

<sup>51</sup> Skeena Resources, *Eskay Creek Revitalization Project: Detailed Project Description* (Aug. 10, 2022), p. viii, <https://projects.eao.gov.bc.ca/api/public/document/62f6b77d278bb60022579eac/download/2022.08.10%20Eskay%20Creek%20Revitalization%20Final%20DPD.pdf>.

<sup>52</sup> *See, e.g.*, Letter from David Grace, B.C. EAO, to Clinton E. Cook Sr., Craig Tribal Association, Reference: 381331 (Aug. 3, 2021) (**Appendix 3**).

<sup>53</sup> Letter from Frederick Olsen, Jr., Executive Director, SEITC, to David Grace, Project Assessment Director, EAO (Oct. 18, 2021), Re: Eskay Creek Revitalization Project Early Engagement Comments, <https://projects.eao.gov.bc.ca/api/public/document/617ad36c1fe4c00022fa7a85/download/seitcCommentsEskayCreekEarly.docx.pdf>.

<sup>54</sup> Letter from Robert Sanderson Jr., Chair, SEITC, to Honourable John Horgan, Premier, B.C., Canada, Re: Request for Consultation (Mar. 31, 2021) (**Appendix 4**).

<sup>55</sup> Letter from Robert Sanderson Jr., Chair, SEITC, to Honourable John Horgan, Premier, B.C., Canada, Re: SEITC’s Status in Canada and British Columbia (Sept. 23, 2022) (**Appendix 5**).

specific procedural rights within the *Environmental Assessment Act*, including consensus seeking processes, providing a notice of consent or lack of consent at specific decision points, and access to facilitated dispute resolution.<sup>56</sup> Typically, Canadian First Nations potentially impacted by projects are afforded such status by the B.C. EAO, but this has not been the case with Southeast Alaskan Tribes.

SEITC submitted notice to B.C. on November 18, 2022, that it intended to submit further evidence demonstrating that the member Tribes are “[A]boriginal peoples of Canada’ with constitutionally protected Aboriginal rights in Canada that will be adversely impacted by the Eskay Creek Project.”<sup>57</sup>

On December 12, 2022, the B.C. EAO made the determination “under Section 14(2) of the [Environmental Assessment] Act that there is no reasonable possibility that SEITC or its Section 35 rights will be adversely affected by the [Eskay Creek Project].”<sup>58</sup> The B.C. EAO requested further information about SEITC’s claims and confirmation that SEITC had been empowered to represent its member Tribes.

The B.C. EAO invited public comment on the Draft Plan for the Environmental Assessment for Eskay Creek Project in January of 2023.<sup>59</sup> As part of the environmental assessment process, Skeena Resources developed a plan outlining engagement with the seven Alaska Tribes that the B.C. EAO determined may be adversely affected based on their proximity to the Unuk watershed.<sup>60</sup> The selection of these Tribes and criteria for inclusion were determined without any input from Petitioners. Moreover, the Engagement Plan restricts engagement to “information sharing,” “learning about the environmental assessment process and Eskay Creek,” support in the environmental assessment process, and “providing advice on the potential transboundary effects (both positive and negative).”<sup>61</sup> To date, the documents examining the effects of the Eskay Creek Project all limit their analysis to the Canadian side of the border. This plan contains no legal obligations or enforcement mechanisms to protect Petitioners. Until they seek Petitioners’ free, prior, and informed consent, both the proponent and the B.C. EAO cannot fully understand the potential impacts to Petitioners. Even if Petitioners’ concerns are collected and placed into the record, there remains no mechanism to assure Petitioners that the impacts will be avoided or mitigated when, not if, they occur. Without engaging in a good-faith process of seeking Petitioners’ free, prior, and informed consent, SEITC Tribal governments are subservient to the whims of a mining company and a foreign colonial power. Conducting an environmental assessment is no

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<sup>56</sup> Environmental Assessment Act, S.B.C. 2018, §§ 5, 14, 16, 19, 27, 29, 31, 32, <https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/18051#part4>.

<sup>57</sup> Letter from Robert Sanderson Jr., Chair, SEITC, to Elenore Arend, Chief Exec. Assessment Officer, B.C. EAO, Re: Opportunity to be Heard; Participating Indigenous Nation Status (Nov. 18, 2022) (**Appendix 6**).

<sup>58</sup> Letter from Elenore Arend, Chief Exec. Assessment Officer, B.C. EAO, to Robert Sanderson Jr., Chair, SEITC, Reference: 393598, p. 5 (Dec. 12, 2022) (**Appendix 7**); Letter from Elenore Arend, Chief Exec. Assessment Officer, B.C. EAO, to Robert Sanderson Jr., Chair, SEITC, Reference: 393180, p. 4 (Nov. 7, 2022) (**Appendix 8**). Note that Skeena Resources has yet to submit a draft Environmental Assessment for the Eskay Creek Project.

<sup>59</sup> B.C. EAO, *Eskay Creek Revitalization* (Jan. 2023), EAO’s Project Information Center, <https://projects.eao.gov.bc.ca/p/60f078d3332ebd0022a39224/cp/63bca18d56fda30022ea9f96/details;currentPage=1;pageSize=10;sortBy=-datePosted;ms=1708041483838>.

<sup>60</sup> Skeena Resources, *Eskay Creek Revitalization Alaska Tribal Transboundary Advisory Committee Engagement Plan*, p. 9 (Jan. 3, 2024) (“Engagement Plan”) (**Appendix 9**).

<sup>61</sup> *Ibid.*

safety net and unlikely to predict the effects of mining on a complex ecosystem for hundreds of years into the future.

On June 6, 2022, B.C. and the Tahltan Nation in B.C. signed a consent decision-making agreement under the *Declaration on the Rights of Indigenous Peoples Act of 2019* outlining a collaborative approach to the environmental assessment process for the Eskay Creek Project.<sup>62</sup> Notably, the agreement provides for an independent “Tahltan Risk Assessment” of whether the mine will have significant effects on “Tahltan Values.”<sup>63</sup>

On January 30, 2024, SEITC submitted a formal request to B.C. EAO that it recognize seven SEITC Tribes<sup>64</sup> as Aboriginal people(s) of Canada, that B.C. seek the free, prior, and informed consent of SEITC Tribes concerning the Eskay Creek Project, including again a request that B.C. EAO recognize the Tribes as a “participating Indigenous nation” for the Project under the *Environmental Assessment Act, 2018*.<sup>65</sup> SEITC also requested that B.C. negotiate a consent-based agreement with SEITC Tribes, like that with the Tahltan Central Government, under the *Declaration on the Rights of Indigenous Peoples Act*.<sup>66</sup>

As of the time of this submission, B.C. has not decided on SEITC’s requests.

***New Polaris (Taku River)***. CanaGold Resources Ltd. (“CanaGold”) is seeking to develop the New Polaris Gold Mine Project, a proposed underground gold mine with an estimated production capacity of 1,000 tonnes per day, or 3.7 million tonnes of ore over its 10-year mine life.<sup>67</sup> The mine would be located around nine miles (15 kilometers) from the B.C.-Alaska border.<sup>68</sup>

In May of 2023, the B.C. EAO held a public comment period on CanaGold’s Initial Project Description and Engagement Plan. The Douglas Indian Association (DIA), one of Petitioners’ member Tribes, and the SEITC provided comments during this process.<sup>69</sup> To prevent significant cumulative impacts in the Taku River watershed, the DIA recommended that Tulsequah Chief “be successfully cleaned up and closed prior to permitting th[e] Project in order to demonstrate that

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<sup>62</sup> Maureen Killoran *et al.*, *British Columbia and Tahltan Nation enter into landmark consent-based decision-making agreement*, OSLER (June 15, 2023), <https://www.osler.com/en/resources/regulations/2022/british-columbia-and-tahltan-nation-enter-into-landmark-consent-based-decision-making-agreement>.

<sup>63</sup> *Ibid.*

<sup>64</sup> These tribes include the Federally recognized Tribal governments of Craig Tribal Association, Hydaburg Cooperative Association, Ketchikan Indian Community, Klawock Cooperative Association, Metlakatla Indian Community, Organized Village of Kasaan, and Organized Village of Saxman.

<sup>65</sup> Letter from Robert Sanderson Jr., Chair, SEITC, to Eleanore Arend, Chief Exec. Assessment Officer, B.C. EAO (Jan. 30, 2024) (“SEITC Request for Rights”) (**Appendix 10**); *Environmental Assessment Act*, S.B.C. 2018, c. 51, § 14.

<sup>66</sup> SEITC Request for Rights.

<sup>67</sup> B.C. EAO, *Summary of Engagement: New Polaris Gold Mine* (June 26, 2023), p. 3, [https://projects.eao.gov.bc.ca/api/public/document/6499b05ecd44a0022527d5d/download/New%20Polaris%20-%20Summary%20of%20Engagement\\_FINAL.pdf](https://projects.eao.gov.bc.ca/api/public/document/6499b05ecd44a0022527d5d/download/New%20Polaris%20-%20Summary%20of%20Engagement_FINAL.pdf).

<sup>68</sup> CanaGold, *New Polaris Mine: Initial Project Description* (Mar. 2023), p. v, <https://www.projects.eao.gov.bc.ca/api/document/6421ed5efb6e5700226f04fa/fetch/New%20Polaris%20Project%20Initial%20Project%20Description%20lr.pdf>.

<sup>69</sup> SEITC, *Early Engagement Comments on the New Polaris Project* (June 8, 2023), <https://www.projects.eao.gov.bc.ca/api/public/document/6482485d25083e0022adcad2/download/Comments%20on%20the%20New%20Polaris%206.8.23.pdf>.

decades of contamination from the New Polaris is not a likely outcome.”<sup>70</sup> The DIA also expressed concern around destruction of fish habitat from barge and tug groundings and interference with cultural gillnet fishing.<sup>71</sup> Although the DIA requested extending the comment period to allow for meaningful consultation between B.C. and the DIA government,<sup>72</sup> B.C. has yet to consult with the DIA as a participating Indigenous nation, or seek its free, prior, and informed consent regarding this mine.

### **Active mine exploration projects in the transboundary watersheds.**

In addition to the B.C. Mines, several other mine exploration projects are underway and may soon seek authorization. Maps showing the locations of these projects are included below. For example, Tudor Gold conducted a drilling program last year at the Treaty Creek gold-copper project, which was deemed one of the “top ten biggest gold projects in the world” in 2023 and is flanked by the KSM and Brucejack mines in the Unuk watershed.<sup>73</sup> Although the Snip Mine, located 35 kilometers west of Eskay Creek in the Unuk watershed,<sup>74</sup> has not been in active production since 1999, Skeena Resources continues to explore opportunities for redeveloping an underground mine and released an independent technical report last year estimating gold resources at 2.739 million tons.<sup>75</sup> Enduro Metals Corp. is similarly exploring its 688-square-kilometer Newmont Lake Project—“one of the largest contiguous land packages . . . in the heart of the Golden Triangle”—located in the Stikine watershed<sup>76</sup> between Eskay Creek, Snip, and Galore Creek.<sup>77</sup> Brixton Metals Corp. is actively drilling in its 2,880-square-kilometer Thorn Project area—the largest contiguous claim block in B.C.—in the Taku watershed.<sup>78</sup> New mines resulting from these exploratory activities will further threaten Petitioners’ rights.

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<sup>70</sup> *Ibid.*, p. 3.

<sup>71</sup> *Ibid.*, pp. 3-4.

<sup>72</sup> *Ibid.*, p. 2.

<sup>73</sup> Canadian Mining Journal, *JV Article: Tudor Gold moves closer to development at Treaty Creek project in British Columbia’s Golden Triangle* (May 11, 2023), <https://www.canadianminingjournal.com/news/jv-article-tudor-gold-moves-closer-to-development-at-treaty-creek-project-in-british-columbias-golden-triangle/>.

<sup>74</sup> Shane Lasley, *Significant Upgrade to Snip Gold Resource*, North of 60 Mining News (Sept. 6, 2023), <https://www.miningnewsnorth.com/story/2023/09/08/northern-neighbors/significant-upgrade-to-snip-gold-resource/8104.html>.

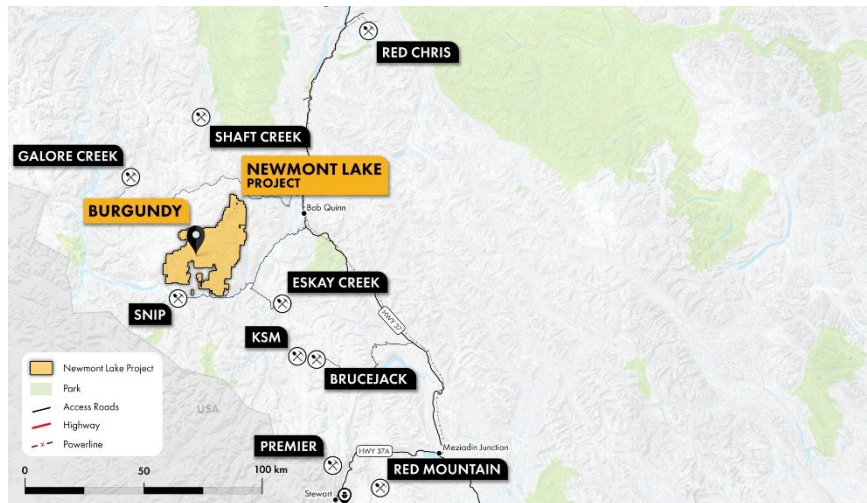
<sup>75</sup> SRK Consulting (Canada) Inc., *Independent Technical Report for the Snip Project, Canada* (Sept. 26, 2023), pp. ii, x, [https://skeenaresources.com/site/assets/files/6705/skeena\\_resources\\_snip\\_ni43-101\\_report\\_capr002721\\_20230926.pdf](https://skeenaresources.com/site/assets/files/6705/skeena_resources_snip_ni43-101_report_capr002721_20230926.pdf); see also Mining.com, *Skeena Boosts Snip Indicated Resource by 237% to 823,000 Oz* (Sept. 5, 2023), <https://www.mining.com/skeena-boosts-snip-indicated-resource-by-237-to-823000-oz/>.

<sup>76</sup> Cole Evans, *Enduro Metals Expands the Newmont Lake Project, Adjacent to Chachi Corridor in NW BC’s Golden Triangle*, Junior Mining Network (Sept. 16, 2020), <https://www.juniorminingnetwork.com/junior-miner-news/press-releases/2097-tsx-venture/endr/84190-enduro-metals-expands-the-newmont-lake-project-adjacent-to-chachi-corridor-in-nw-bc-s-golden-triangle.html>.

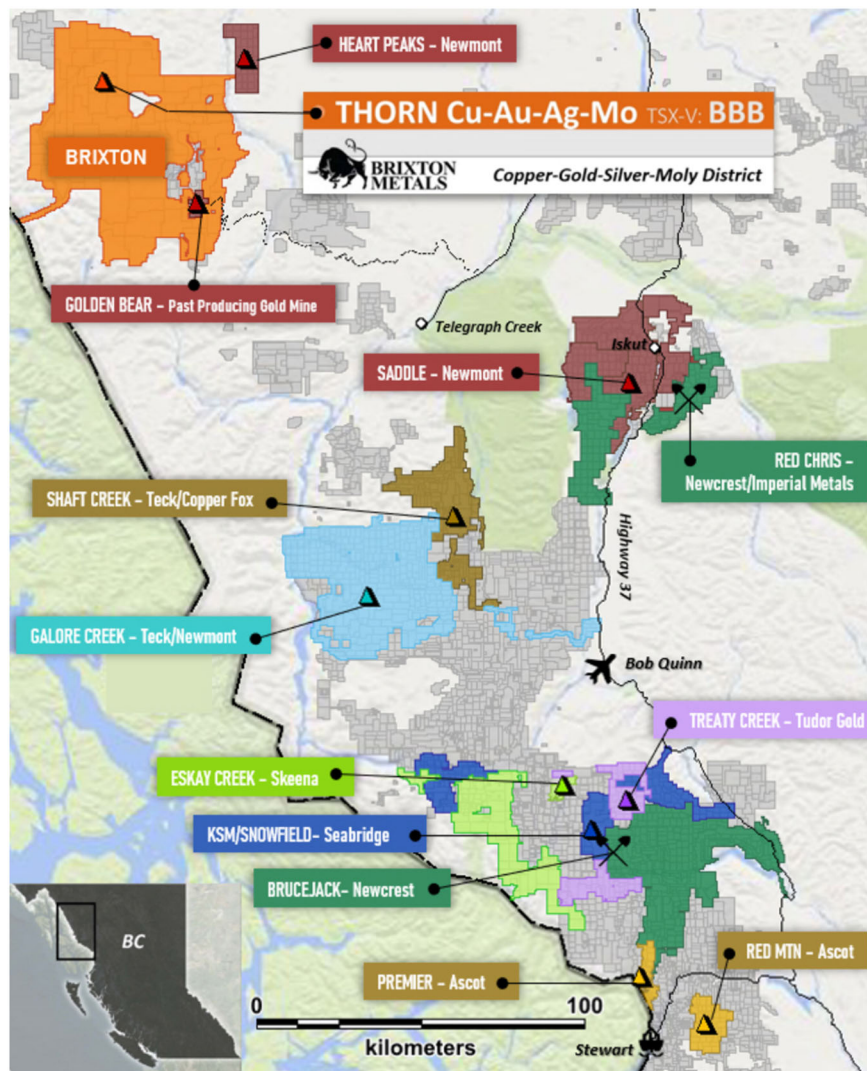
<sup>77</sup> Enduro Metals Corp., *Newmont Lake*, <https://endurometals.com/newmont-lake/>; see also Giles Gwinnett, *Enduro Metals unveils positive drill results from Newmont Lake project in Golden Triangle*, Proactive Investors (Jan. 16, 2023), <https://www.proactiveinvestors.com/companies/news/1003386/enduro-metals-unveils-positive-drill-results-from-newmont-lake-project-in-golden-triangle-1003386.html>;

<sup>78</sup> Brixton Metals, *Thorn Project*, <https://brixtonmetals.com/thorn-gold-copper-silver-project/>; see also Katie Gordon, *Brixton Kicks Off 2022 Exploration Program at Thorn Project*, The Assay (Feb. 16, 2022), <https://www.theassay.com/news/brixton-kicks-off-2022-exploration-program-at-thorn-project/>; see also Brixton Metals, *Thorn Project Cu-Au-Ag-Mo* (Jan. 15, 2024), [https://brixtonmetals.com/wp-content/uploads/2024/02/BBB\\_Thorn\\_Presentation\\_15Jan2024.pdf](https://brixtonmetals.com/wp-content/uploads/2024/02/BBB_Thorn_Presentation_15Jan2024.pdf).





Source: Enduro Metals Corp., *Newmont Lake*, <https://endurometals.com/newmont-lake/>.



Source: Katie Gordon, *Brixton Kicks Off 2022 Exploration Program at Thorn Project*, The Assay (Feb. 16, 2022), <https://www.theassay.com/news/brixton-kicks-off-2022-exploration-program-at-thorn-project/>.

### III. The B.C. Mines' foreseeable harm to Petitioners.

The 2020 Petition described the potential environmental impacts of the B.C. Mines, including that they could cause sustained and significant reductions in salmon and/or eulachon populations in the Taku, Stikine, and Unuk River watersheds from acid mine drainage and from catastrophic pollution due to wet tailings-dam failures.<sup>79</sup> Compounding these threats, B.C. has a history of poor enforcement and regulation of mines that indicates Canada and B.C. cannot be counted on to prevent significant harm from the B.C. Mines to Petitioners and other Indigenous communities living downstream.

The 2020 Petition describes in detail how the three transboundary rivers are intimately connected with the SEITC Tribes' cultural and subsistence practices dating back thousands of years. The Tribes' traditions, beliefs, food sources, and livelihoods are inextricably tied to the fish they catch in these rivers, which are sacred to the communities that have depended on them for millennia. Subsistence fishing is a vital aspect of the Tribes' cultural practices and provides a key opportunity for elders to pass on tribal traditions to younger generations. Sharing fish catches with elders, community members, and others is important for maintaining and strengthening Tribal and communal culture and relationships. Salmon and eulachon harvests sustain the Tribes throughout the year and are a critical source of food and economic livelihood.

The potential for fish population declines from the B.C. Mines would undermine Petitioners' ability to engage in cultural and spiritual practices related to the harvest and sharing of these fish and could have dire consequences for Petitioners' means of subsistence and health.

Recent studies that have been published since the filing of the 2020 Petition underscore these and other threats of mining on watershed health and Petitioners' rights.

For example, a July 2022 peer-reviewed analysis in the journal *Science Advances* assessed the cumulative mining impacts on salmon-bearing watersheds extending from Washington State to Alaska, including the transboundary rivers at issue here. The authors explained that mines in these areas have impacted salmonids through three main categories of stressors: "(i) altered hydrology and temperature, (ii) habitat modification and loss, and (iii) pollutants."<sup>80</sup>

First, the study documented how mining has modified streamflow patterns and thermal regimes of river valleys, both of which can disrupt "key life history events such as spawning and migration or alter growth and survival via direct (e.g., stream drying and exceedance of thermal tolerances) or indirect (e.g., alterations to food webs and reductions in available habitat) pathways."<sup>81</sup> Second, tailings dam failures like the Mount Polley Mine disaster which "scoured, deforested, and buried . . . salmonid spawning and rearing habitat" have and can devastate fish communities.<sup>82</sup> Other mining infrastructure, the study found, also has contributed to habitat modification and loss—

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<sup>79</sup> 2020 Petition, paras. 83-156.

<sup>80</sup> Christopher J. Sergeant *et al.*, *Risks of Mining to Salmonid-Bearing Watersheds*, *Science Advances* (July 1, 2022), p. 7, <https://www.science.org/doi/10.1126/sciadv.abn0929> ("Sergeant *et al.*").

<sup>81</sup> *Ibid.*, p. 7.

<sup>82</sup> *Ibid.*



access roads, for example, can “hinder fish passage via stream crossings, bridges, and culverts.”<sup>83</sup> Third, the authors noted that heavy metal pollution has reduced migration success and seawater adaptability of anadromous salmonids and even extirpated local populations, as was the case with Chinook salmon in Idaho, USA.<sup>84</sup>

The authors also noted major deficiencies in the environmental review process for approving mines in the study area. The authors note that current regulation of mining pollution in the U.S. and Canada is typically based on water quality standards that “overlook[] the indirect effects and multiple pathways of contaminant exposure” and fail to account for “additive and synergistic effects of multiple metals.”<sup>85</sup> Cumulative effects analyses are similarly too narrow in scope and underestimate impacts, especially where “mine assessment, permitting, and development occur within one jurisdiction but impacts extend far downstream and span multiple jurisdictions.”<sup>86</sup> To truly account for cumulative impacts on fish species like salmonids that migrate hundreds of kilometers and are exposed to multiple mines throughout their lifetime, “[t]he spatial and temporal extent of accounting for environmental risks should be aligned with the true scale of impact, which can often stretch from headwaters to estuary.”<sup>87</sup>

The authors noted even more deficiencies in how environmental reviews have assessed transboundary risks. They explained that assessing and managing transboundary impacts are complicated by conflicting and fragmented policies around water, fisheries, and resource extraction, including “calculating, monitoring, and regulating exceedances” of water quality standards or guidelines.<sup>88</sup> Notably, they found that assessments by an upstream jurisdiction may not adequately account for impacts to a downstream jurisdiction. Perhaps most pertinent to this Petition, the authors note that although downstream communities “*may be invited to provide public comments during the assessment process, they are often excluded from formal decision-making and have limited avenues for legal recourse.*”<sup>89</sup>

Open-pit coal mining operations in B.C.’s Elk River Watershed provide ample evidence of the types of transboundary harms caused by mines and the inadequacy of the B.C. regulatory framework in managing them. These mines are long-standing and known sources of contaminants to the Kootenai River Basin, including the Elk River, a transboundary river that flows from B.C. into Montana.<sup>90</sup> Measurements taken throughout the Elk River watershed downstream of the mines have found selenium levels more than twenty times B.C.’s water quality guidelines.<sup>91</sup> Water

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<sup>83</sup> *Ibid.*, p. 8.

<sup>84</sup> *Ibid.*, p. 8.

<sup>85</sup> *Ibid.*, p. 10.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*, p. 13.

<sup>89</sup> *Ibid.* (emphasis added).

<sup>90</sup> Meryl B. Storb *et al.*, *Growth of Coal Mining Operations in the Elk River Valley (Canada) Linked to Increasing Solute Transport of Se, NO<sub>3</sub><sup>-</sup>, and SO<sub>4</sub><sup>2-</sup> into the Transboundary Kootenai Reservoir (USA–Canada)*, *Environ. Sci. Technol.* (Nov. 3, 2023), pp. 17465–17480, 17466, <https://pubs.acs.org/doi/10.1021/acs.est.3c05090?ref=pdf> (“Meryl B. Storb *et al.*”).

<sup>91</sup> See A. Dennis Lemly, *Review of Environment Canada’s Teck Coal Environmental Assessment and Evaluation of Selenium Toxicology Tests on Westslope Cutthroat Trout in the Elk and Fording Rivers in Southeast British Columbia, Interim Report* (Sept. 25, 2014), [https://www.teck.com/media/2014-Water-review\\_environment\\_canada-T3.2.3.2.1.pdf](https://www.teck.com/media/2014-Water-review_environment_canada-T3.2.3.2.1.pdf).

selenium concentrations collected at the international border have also exceeded U.S. site-specific water quality criteria since July 2020.<sup>92</sup> Noting the “limited primary literature on the effects on the aquatic ecosystem” in the transboundary Koochanusa Reservoir, a recent study on the impacts of coal mining in the Elk River Valley recommended further research on the “surface water–groundwater interaction in the Elk Valley and its mine-affected tributaries, . . . the magnitude and extent of groundwater contamination, the long-range transport potential of [selenium], and . . . how treatment will affect downstream concentrations and loads.”<sup>93</sup>

Data show that there is no room for any additional contamination in the transboundary watersheds. Even with just Brucejack and Red Chris mines in operation, the 2021 B.C. and Alaska Joint Water Quality Program for Transboundary Waters Data Report already notes exceedances of the threshold effects NOAA Sediment Quality Guideline levels for arsenic, copper, and nickel at the Alaska/B.C. border.<sup>94</sup> Notably, the Unuk Watershed sediment element concentrations results show arsenic, copper, nickel, and zinc levels ten times, six times, almost four times, and two times higher than the threshold effects levels for these metals, respectively.<sup>95</sup> Despite these exceedances, only two samples were collected at the Unuk River site in Alaska, “which resulted in uncertainty related to the range of variability in fish element concentrations at this site compared to upstream sites and therefore limits the analysis of differences and trends.”<sup>96</sup> The nickel levels in the Taku and Stikine Watersheds also exceeded probable effects levels at certain sampling sites.<sup>97</sup> Sediment analysis can identify metals that are otherwise difficult to detect through water monitoring methods alone because they are quickly absorbed by particulate matter.<sup>98</sup> Heavy metals in sediment can also be “a secondary source of pollution when they are disturbed and become re-suspended within a water body.”<sup>99</sup> They may enter fish through dietary intake and incorporation of sediment particles.<sup>100</sup>

On the B.C. side of the border, the Data Report also shows exceedances of the long-term B.C. water quality guidelines for total zinc and dissolved copper at sampling sites in the Taku watershed,<sup>101</sup> total zinc and dissolved copper at sampling sites in the Stikine watershed,<sup>102</sup> and total zinc at sampling sites in the Unuk watershed.<sup>103</sup>

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<sup>92</sup> Meryl B. Storb *et al.*, p. 17467.

<sup>93</sup> *Ibid.*, p. 17476.

<sup>94</sup> Alaska Department of Environmental Conservation and BC Ministry of Environment and Climate Change Strategy (DEC and ENV), *British Columbia and Alaska Joint Water Quality Program for Transboundary Waters Data Report: 2021 Final Report* (2021), [https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/compliance-and-enforcement/6 - twg-m\\_ak\\_bc\\_2021\\_data\\_rpt\\_2021-01-08.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/compliance-and-enforcement/6_-_twg-m_ak_bc_2021_data_rpt_2021-01-08.pdf).

<sup>95</sup> *Ibid.*, p. 27.

<sup>96</sup> *Ibid.*, p. 28.

<sup>97</sup> *Ibid.*, pp. 15, 23-24.

<sup>98</sup> Aixin Hou *et al.*, *Toxic Elements in Aquatic Sediments: Distinguishing Natural Variability from Anthropogenic Effects*, *Water, Air, and Soil Pollution* 203 (2009), 179-191, p. 2, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4909263/pdf/nihms765665.pdf>.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> *British Columbia and Alaska Joint Water Quality Program for Transboundary Waters Data Report*, p. 14.

<sup>102</sup> *Ibid.*, p. 23.

<sup>103</sup> *Ibid.*, p. 27.

In summary, the risk of the B.C. Mines to Petitioners is substantial and foreseeable.

#### **IV. Canada has not adequately consulted with Petitioners regarding the B.C. Mines.**

As described in the 2020 Petition,<sup>104</sup> Petitioners have repeatedly attempted to engage with both the Canadian and B.C. governments through and beyond environmental assessment processes for the B.C. Mines. Petitioners continued their efforts to request that B.C. and Canada seek their free, prior, and informed consent and consult with them with respect to the B.C. Mines after filing the 2020 Petition.

Between 2020 and 2021, Petitioners requested several times to enter into an agreement with B.C. “regarding participation in ongoing permitting discussions and decisions throughout [B.C.]’s environmental process pursuant to the United Nations Declaration on the Rights of Indigenous Peoples.”<sup>105</sup> Petitioners also asked for a pause in new permits and approval of new mining projects in B.C. until the relevant B.C. ministries have made decisions on Petitioners’ ability to consult.<sup>106</sup>

The B.C. Minister of Energy, Mines, and Low Carbon Innovation responded to Petitioners’ request on June 11, 2021.<sup>107</sup> The Minister noted that B.C. “would like to understand” and “explore opportunities to address any gaps” in the environmental assessment processes for “existing or proposed mine development in B.C.”<sup>108</sup> In the following months, B.C. assisted Petitioners with arranging direct meetings with representatives of the Ministry of Energy and Ministry of the Environment and Climate Change Strategy. Petitioners also met with the B.C. EAO. On December 30, 2021, Petitioners again urged B.C., unsuccessfully, to pause its environmental permitting processes for the B.C. Mines while the dialogues between Petitioners and B.C. continue.<sup>109</sup>

As mentioned, Petitioners also formally requested that B.C. recognize SEITC Tribes as Aboriginal people(s) of Canada and seek their free, prior, and informed consent concerning the Eskay Creek Revitalization Project.<sup>110</sup>

To date, B.C. has not suspended environmental assessment processes or sought Petitioners free, prior, and informed consent with respect to any of the B.C. Mines, including for significant amendments to some of them discussed above and to any of the new proposed mines.

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<sup>104</sup> 2020 Petition, paras. 249-258.

<sup>105</sup> See, e.g., Appendix 4; see also Letter from Bruce Ralston, Minister, B.C. Ministry of Energy, Mines and Low Carbon Innovation, to Robert Sanderson Jr., SEITC, Ref: 113599 (June 11, 2021) (**Appendix 11**) (referencing SEITC’s letters from September 2020 and January 2021).

<sup>106</sup> Appendix 4.

<sup>107</sup> Appendix 11.

<sup>108</sup> *Ibid.*

<sup>109</sup> Letter from Rob Sanderson Jr., Chair, SEITC, to Honorable John Horgan, Premier, B.C., Canada (Dec. 30, 2021) (**Appendix 12**).

<sup>110</sup> Appendix 10.

**V. Canada’s and B.C.’s failure to prevent foreseeable harms from the B.C. mines violate Petitioners’ human rights.**

- A. Canada’s and B.C.’s approval of and failure to adequately regulate the B.C. Mines violate Petitioners’ rights to culture, subsistence, health, use and enjoyment of traditional lands, and free, prior, and informed consent.

Petitioners have alleged violations of their rights to culture, subsistence, health, use and enjoyment of traditional lands, and free, prior, and informed consent.<sup>111</sup> The facts and arguments detailing these violations are incorporated by reference to the 2020 Petition.

- B. Canada and B.C. are violating Petitioners’ right to a healthy environment.

Because of recent developments with respect to the right to a healthy environment in international and Canadian law, Petitioners now also allege that Canada and B.C. are violating their right to a healthy environment. Since filing the 2020 Petition, the United Nations General Assembly has adopted a resolution recognizing the human right to a clean, healthy, and sustainable environment.<sup>112</sup> Canada voted in favor of adopting this resolution, and its representative acknowledged when explaining Canada’s vote that environmental degradation can negatively impact human rights.<sup>113</sup> In June 2023, Canada also codified the right to a clean, healthy, and sustainable environment by amending the Canadian Environmental Protection Act, 1999.<sup>114</sup>

In Advisory Opinion OC-23/17, the Inter-American Court of Human Rights recognized the right to a healthy environment as a right protected by the American Declaration of the Rights and Duties of Man and by Article 26 of the American Convention.<sup>115</sup> The Court noted that a violation of “the right to a healthy environment ... may have a direct and an indirect impact on the individual owing to its connectivity to other rights, such as the rights to health, personal integrity, and life.”<sup>116</sup> In addition, it explained that “[e]nvironmental degradation may cause irreparable harm to human beings; thus, a healthy environment is a fundamental right for the existence of humankind.”<sup>117</sup> As an autonomous right, the right to healthy environment “protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence

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<sup>111</sup> 2020 Petition, paras. 193-258.

<sup>112</sup> United Nations General Assembly, *The human right to a clean, healthy and sustainable environment*, A/76/L.75 (July 26, 2022), [https://digitallibrary.un.org/record/3982508/files/A\\_76\\_L.75-EN.pdf?withWatermark=0&withMetadata=0&version=1&registerDownload=1](https://digitallibrary.un.org/record/3982508/files/A_76_L.75-EN.pdf?withWatermark=0&withMetadata=0&version=1&registerDownload=1).

<sup>113</sup> United Nations, Meetings Coverage and Press Releases, *With 161 Votes in Favor; 8 Abstentions, General Assembly Adopts Landmark Resolution Recognizing Clean, Healthy, Sustainable Environment as Human Right* (July 28, 2022), <https://press.un.org/en/2022/ga12437.doc.htm>.

<sup>114</sup> First Session, Forty-fourth Parliament, 70-71 Elizabeth II – 1 Charles III, 2021-2022-2023, *An Act to amend the Canadian Environmental Protection Act, 1999, to make related amendments to the Food and Drugs Act and to repeal the Perfluorooctane Sulfonate Virtual Elimination Act*, Bill S-5 (June 13, 2023), [https://www.parl.ca/Content/Bills/441/Government/S-5/S-5\\_4/S-5\\_4.PDF](https://www.parl.ca/Content/Bills/441/Government/S-5/S-5_4/S-5_4.PDF).

<sup>115</sup> Inter-Am. Ct. H.R., *Advisory Opinion OC-23/17, Human Rights and the Environment*, para. 57 (15 November 2017) (Inter-Am. Ct. H.R., *Human Rights and the Environment*), [https://www.corteidh.or.cr/docs/opiniones/seriea\\_23\\_ing.pdf](https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf).

<sup>116</sup> *Ibid.*, para. 59.

<sup>117</sup> *Ibid.*

of the certainty or evidence of a risk to individuals.”<sup>118</sup> States thus have an obligation of “guaranteeing everyone, without any discrimination, a healthy environment in which to live.”<sup>119</sup> This includes the obligation “to take reasonable measures to prevent pollution and ecological degradation.”<sup>120</sup>

A State’s failure to prevent significant transboundary environmental harm from mining operations can result in a violation of human rights, including the right to a healthy environment.<sup>121</sup> The former Special Rapporteur on human rights and hazardous substances has explained that hazardous substances and waste from extractive industries can “seep, leech and drain into water systems contaminating” water sources “of the communities living hundreds of kilometers downstream.”<sup>122</sup> This toxic pollution also wreaks havoc on aquatic ecosystems, regardless of its impacts on communities.

To protect the right to a healthy environment and other rights in the case of transboundary harm, States must “use all available means to avoid activities in their territory, or in any area under their jurisdiction, causing significant damage to the environment of another State” and, relatedly, “should not deprive another State of the ability to ensure that the persons within its jurisdiction may enjoy and exercise their rights under the Convention.”<sup>123</sup> As the Court explained, “[t]he potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage.”<sup>124</sup>

This Commission and the Court have also found violations of the right to a healthy environment. In November of 2020, the Commission found that Peru violated the Community of La Oroya’s rights to life with dignity, personal integrity, a healthy environment, health, access to environmental information and public participation. Peru had failed to adopt a clear regulatory framework that is protective of the environment and public health and to take immediate actions

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<sup>118</sup> *Ibid.*, para. 62.

<sup>119</sup> *Ibid.*, para. 60 (internal citation omitted).

<sup>120</sup> *Ibid.*, para. 61 (citing African Commission on Human and Peoples’ Rights, Case of the Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria. Communication 155/96. Decision of October 27, 2001, paras. 52 and 53).

<sup>121</sup> As Petitioners explained in the 2020 Petition, the human rights obligation to prevent significant environmental harm applies even to States that have not signed on to the American Convention, such as Canada. 2020 Petition, paras. 165-169.

<sup>122</sup> Human Rights Council, *Report of the Special Rapporteur on the Human Rights Obligations Related to Environmentally Sound Management and Disposal of Hazardous Substances and Waste*, Calin Georgescu, A/HRC/21/48 (July 2, 2012), para. 39, [https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-48\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-48_en.pdf).

<sup>123</sup> Inter-Am. Ct. H.R., *Human Rights and the Environment*, paras. 97, 101.

<sup>124</sup> *Ibid.*, para. 102.

to address the environmental contamination caused by a metallurgical complex, which Peru “not only tolerated but facilitated”<sup>125</sup> through its ineffective governance.<sup>126</sup>

The Inter-American Court also recently found a violation of the right to a healthy environment as described in the advisory opinion for the first time in *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*. The Court held that Argentina’s failure to effectively manage the harmful impacts of cattle-raising, fencing, and illegal logging on Indigenous land violated the Indigenous communities’ “interrelated rights to take part in cultural life in relation to cultural identity, and to a healthy environment, [and]adequate food.”<sup>127</sup> These impacts included, among others, the erosion impacts of cattle-raising around the headwaters of the Pilcomayo River on which the Lhaka Honhat indigenous communities relied.<sup>128</sup> The Court found Argentina responsible for such impacts because the State was aware of but “ha[d] not been effective to detain the harmful activities”—notably, “more than 28 years after the original indigenous territorial claim, the livestock and fences [were] still present.”<sup>129</sup> To rectify the human rights violations related to these activities, the Court ordered Argentina to draw up a report within a year describing measures to conserve surface and groundwater in the indigenous territory, avoid continued loss of forestry resources, and provide permanent access to culturally appropriate food.<sup>130</sup>

Other courts have also found environmental degradation can violate the right to a healthy environment. For example, in 2001, the African Commission on Human and People’s Rights (“African Commission”) issued a landmark decision that found that air pollution (as well as water and soil contamination) from Nigeria’s approval of oil development violated the Ogoni peoples’ right to a healthy environment.<sup>131</sup> The African Commission did not specify the levels of air pollution that resulted from oil development, but complainants alleged that air and other pollution resulted in “short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.”<sup>132</sup>

In 2022, the High Court Gauteng Division in Pretoria clarified the standard for when air pollution can violate Section 24(a) of the Constitution. In *The Trustees for the Time Being of Groundwork Trust et al. v. The Minister of Environmental Affairs et al.*, the High Court considered whether

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<sup>125</sup> This text was translated to English. The original text reads: “En el presente caso, la CIDH ya determinó que el Estado violó el derecho al medio ambiente sano y al derecho a la salud de las presuntas víctimas del presente caso, por la ausencia de sistemas adecuados de control, falta de supervisión efectiva y acciones inmediatas para atender la situación de contaminación ambiental en La Oroya, las cuales no solo toleró sino facilitó.” IACHR, *Comunidad de La Oroya Perú*, Informe de Fondo, Informe No. 330/20 (Nov. 19, 2020), para. 210.

[https://www.oas.org/es/cidh/decisiones/corte/2021/pe\\_12.718\\_es.pdf](https://www.oas.org/es/cidh/decisiones/corte/2021/pe_12.718_es.pdf)

<sup>126</sup> *Ibid.*, paras. 172, 181, 201, 210.

<sup>127</sup> Inter-Am. Ct. H.R., *The Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, Judgment of Feb. 6, 2020, paras. 287-89.

[https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_400\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf).

<sup>128</sup> *Ibid.*, para. 280.

<sup>129</sup> *Ibid.*, para. 287.

<sup>130</sup> *Ibid.*, para. 333.

<sup>131</sup> *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples’ Rights, Comm. No. 155/96, paras. 52-54 (27 Oct. 2001), <https://www.escr-net.org/sites/default/files/serac.pdf>.

<sup>132</sup> *Ibid.*, para. 2.



levels of air pollution exceeding ambient air standards in the Highveld Priority Area (“HPA”) were unconstitutional.<sup>133</sup> There, the court stated, “If air quality fails to meet the National Ambient Air Quality Standards (“National Standards”), it is a *prima facie* violation of the right” to a healthy environment under Section 24(a).<sup>134</sup> The High Court found a violation of the right to a healthy environment because the HPA had exceedances of air standards that continued over a four year period,<sup>135</sup> air pollution levels that “by far exceed[ed] the National Standards,” and posed “a threat to a safe environment and human life and their well[-]being.”<sup>136</sup>

Canada and B.C. are violating Petitioners’ right to a healthy environment. The B.C. Mines pose an unacceptable and foreseeable threat to the aquatic life in the transboundary watersheds, including to the salmon, trout, and eulachon populations on which Petitioners rely for subsistence and cultural practices. Mining can harm or even decimate fish communities through several pathways, including altered hydrology and temperature, habitat modification and loss, and pollution.<sup>137</sup> According to Dr. O’Neal’s report and the 2022 study on salmonid-bearing watersheds in northwestern North America, mining for metals creates a significant risk of a substantial increase in concentrations of metals toxic to fish in downstream waters, decreasing their survival rates, growth, reproduction, and hatching.<sup>138</sup> Heavy metal pollution from the B.C. Mines is particularly concerning because current levels of some heavy metals are in excess of B.C. water quality guidelines in all three watersheds.<sup>139</sup> As Dr. O’Neal explains with respect to KSM, “increases in concentrations of already naturally elevated aluminum, cadmium, copper, selenium, and zinc could cause population-level impacts to Unuk River salmon, eulachon, and other fishes, meaning significant and sustained population decreases.”<sup>140</sup>

In addition, given that Canada and B.C. have authorized and are authorizing mining projects in the transboundary watersheds without comprehensively evaluating downstream impacts, and have approved significant amendments to project design and/or operation without assessing transboundary impacts or consulting Petitioners, they have failed to “use all available means to avoid”<sup>141</sup> the B.C. Mines causing environmental damage to traditional lands across the border.

The 2020 Petition notes that the KSM Mine is the only one of the B.C. Mines for which project proponents have made some attempt to assess downstream water-quality impacts at the Canada-U.S. border from “normal” operation of the mine.<sup>142</sup> Petitioners submitted expert reports from Dr. David Chambers, Dr. Kendra Zamzow, and Dr. Sarah O’Neal to demonstrate how this analysis was flawed and likely understated downstream impacts, due in part to its reliance on inadequate

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<sup>133</sup> Case No. 39724/2019, Judgment High Court Gauteng Division Pretoria (Collis J.) (18 Mar. 2022) (“*The Trustees for the Time Being of Groundwork Trust et al. v. the Minister et al.*” or the “Deadly Air Litigation”), <https://www.saflii.org/za/cases/ZAGPPHC/2022/208.html>.

<sup>134</sup> *Ibid.*, para. 10.

<sup>135</sup> *Ibid.*, para. 64.

<sup>136</sup> *Ibid.*, paras. 178, 241.1 (“It is declared that the poor air quality in the Highveld Priority Area is in breach of residents’ section 24(a) constitutional right to an environment that is not harmful to their health and well-being”).

<sup>137</sup> Sergeant *et al.*, pp. 7-8.

<sup>138</sup> See 2020 Petition, paras. 129-156; see also Sergeant *et al.*

<sup>139</sup> See *British Columbia and Alaska Joint Water Quality Program for Transboundary Waters Data Report*, pp. 22, 23, 27.

<sup>140</sup> 2020 Petition, Appendix 3 (Report of Sarah O’Neal), para. 100.

<sup>141</sup> Inter-Am. Ct. H.R., *Human Rights and the Environment*, para. 97.

<sup>142</sup> 2020 Petition, para. 119.

containment and treatment methods and incorrect assumptions with regards to acid mine drainage.<sup>143</sup> To date, a comprehensive analysis of transboundary impacts on fish species in the Taku, Stikine, and Unuk watersheds has not been done for any of the B.C. Mines.

Although the B.C. EAO plans to engage with SEITC and the Alaska Transboundary Advisory Committee with respect to Eskay Creek,<sup>144</sup> unless B.C. EAO seeks SEITC's free, prior, and informed consent and gives SEITC Participating Indigenous status, as it has done for First Nations in Canada, it is improbable that the Canada or B.C. will adequately consider potential transboundary impacts or fully understand the potential to harms to Petitioners. Petitioners refer the Commission to the supplemental response dated November 4, 2022, in which Petitioners discussed why Canada and B.C.'s environmental and mining laws, policies, and regulations would be ineffective to protect Petitioners' rights. Among other shortcomings, as further detailed in Dr. David Chambers' report attached to the November 4<sup>th</sup> supplemental response, cumulative impacts are not or insufficiently assessed, environmental assessments are not updated to reflect changes to mine design or operation post-authorization, and mitigation measures proposed are inadequate.<sup>145</sup> Even the two policies and guidelines that require project proponents to mention potential transboundary impacts, such as B.C.'s Application Information Requirements Guidelines and the Effects Assessment Policy, are vague and general, offering no guarantee that B.C. will adequately assess downstream impacts on Petitioners' rights.<sup>146</sup> As such, this Commission concluded that Canada's "legal framework does not extend to the protection of the rights of the petitioners, particularly given that they are based outside of Canada."<sup>147</sup>

But even if B.C. decides to assess transboundary impacts of the B.C. Mines, it is still likely that its environmental impact studies will not be able to fully predict the effects of mining on water quality. A study of 25 mines that had gone through an extensive environmental assessment process in the United States showed that nine (36%) developed acid drainage on site. Nearly all the mines (8/9) that developed acid drainage either underestimated or ignored the acid drainage potential in their environmental impact statements. Of the 25 case study mines, 19 (76%) had mining-related exceedances in surface water or groundwater even though nearly half of the mines with exceedances (8/19 or 42%) predicted low contaminant leaching potential in their environmental impact statements. The constituents that most often exceeded standards or that had increasing concentrations in groundwater or surface water included toxic heavy metals such as copper, cadmium, lead, mercury, nickel, or zinc (12/19 or 63%), arsenic and sulfate (11/19 or 58% each), and cyanide (10/19 or 53%). Sixty percent of all the case study mines (15/25) had mining-related exceedances in surface water.<sup>148</sup>

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<sup>143</sup> *Ibid.*, paras. 119-156.

<sup>144</sup> Skeena Resources Limited, *Schedule B – Draft Assessment Plan* (Jan. 12, 2023), p. 6, <https://projects.eao.gov.bc.ca/p/60f078d3332ebd0022a39224/cp/63bca18d56fda30022ea9f96/details;currentPage=1;pageSize=10;sortBy=-datePosted;ms=1707515234991>.

<sup>145</sup> Petitioners' Supplemental Response, pp. 2-3.

<sup>146</sup> *Ibid.*, p. 4.

<sup>147</sup> Inter-Am. Commission H.R., *Southeast Alaska Indigenous Transboundary Commission v. Canada*, Report No. 179/23 (Aug. 25, 2023), para. 59.

<sup>148</sup> James R. Kuipers *et al.*, *Comparison of Predicted and Actual Water Quality at Hardrock Mines: The Reliability of Predictions in Environmental Impact Statements at ES-7 to ES-10* (2006), <https://earthworks.org/files/publications/ComparisonsReportFinal.pdf>.

Another major problem is that project proponents often abuse the amendment process to expand the scope or alter the designs of mines analyzed in their environmental impact assessments while skirting public scrutiny and environmental protections. Since filing the 2020 Petition, a group of Canadian researchers have completed the first-ever study on amendments to mining project certificates in B.C., highlighting serious issues with the amendment process and implications for water quality.<sup>149</sup> The authors noted that the B.C. Environmental Assessment Act does not mandate public consultation or offer detailed guidance for the B.C. EAO to follow during the amendment assessment process.<sup>150</sup> Moreover, “[i]t is unclear if amendments are subject to equivalent public, scientific, and legal scrutiny as the main [environmental authorization] process,” and “[t]here is no limit to the number of post-assessment amendments a proponent can apply for under either statute.”<sup>151</sup> The authors also noted “the inconsistency as to how amendment assessments were categorized as simple, typical, or complex” under the 2016 guidelines.<sup>152</sup> They observed that “[m]ost amendments potentially capable of harming public water resources were classified as ‘typical’ . . . , [for] which public consultation only may be required,” and B.C. EAO has “considerable flexibility” as to how it reviews them.<sup>153</sup> Out of the 23 mines approved by the B.C. EAO between 2002 and 2020, 15 proponents applied for amendments to alter their original certificates, for which 10 projects received approvals for amendments the authors deemed likely to directly or indirectly impact water resources.<sup>154</sup> The B.C. EAO approved all 49 amendment applications submitted, except one.<sup>155</sup> This lack of regulation and relaxed standard for amendments hardly protect Petitioners from potential violations of their rights, much less guarantee them the opportunity to be consulted and have British Columbia obtain their free, prior, and informed consent for major changes to the B.C. Mines.

As described above, through the amendment process, the B.C. EAO permitted Pretium to increase the maximum ore production at Brucejack Mine by **40%** above the originally authorized capacity and significantly increase heavy metal pollution from the mine beyond levels B.C. recommends for protection of freshwater aquatic life. The B.C. EAO also approved changes to dam design and water management at Red Chris Mine, prior to the project proponent completing key studies and plans. The project proponent for Red Chris is now seeking to use the amendment process to substantially change the mining method, which would affect the groundwater regime and potentially change base flows of surface streams, and produce ore—and associated waste rock and tailings—with different geochemical properties than the ore accessible through open pit mining. It is essential that these amendments be subject to a comprehensive and full environmental assessment and that B.C. seek Petitioners free, prior, and informed consent during the process.

Approving mining projects and substantial amendments to their design or operation based on superficial, if any, assessments of transboundary impacts is inconsistent with Canada’s obligation to protect the right to a healthy environment. Canada and B.C. cannot determine what measures

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<sup>149</sup> Ben R. Collison et al., *Undermining Environmental Assessment Laws: Post-Assessment Amendments for Mines in British Columbia, Canada, and Potential Impacts on Water Resources*, FACETS (Apr. 28, 2022), <https://www.facetsjournal.com/doi/pdf/10.1139/facets-2021-0106>.

<sup>150</sup> *Ibid.*, p. 614.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*, p. 627.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*, p. 619.

<sup>155</sup> *Ibid.*

are necessary to prevent environmental harm to Petitioners' traditional lands without first understanding the true extent of potential impacts from the B.C. Mines. Neither Canada's nor B.C.'s regulatory frameworks require that transboundary impacts be fully evaluated before mining projects are approved, let alone ensure these impacts are adequately mitigated. Project proponents can get approval for amendments to pollute the rivers even more after receiving authorization, essentially bypassing the requirement to conduct environmental impact assessments covering the full scope of mining projects. Amidst these concerns, Canada continues to incentivize exploration through attractive tax incentives, helping to finance potentially environmentally damaging projects like the B.C. Mines without fully investigating their impacts on Alaskan tribes.<sup>156</sup>

According to the B.C. EAO's most recent guidelines on amendments to environmental authorization certificates, "[c]omplex engagement requirements are expected with technical experts" and B.C. EAO "may require increased engagement . . . and/or EAO-led public comment period(s)" for complex amendments, whereas "public engagement" may be required by the B.C. EAO for typical amendments involving "[a] material but limited change to the project."<sup>157</sup> Although the language from the 2016 guidelines on "considerable flexibility" afforded to the B.C. EAO in determining "the structure and design of the application review process"<sup>158</sup> does not appear in the 2024 version, the B.C. EAO still has significant discretion under the new guidelines. For one, it is not clear what the difference is between "public engagement" and "increased engagement." Moreover, as in the 2016 guidelines, the 2024 guidelines categorize "material change[s]" to the location of project proponents, processes, or outputs, as complex amendments, but they do not explain when an amendment is "material" as opposed to "material but limited."<sup>159</sup> A "substantial expansion of a mine" is offered as an additional clarifying example of a complex amendment, similarly without any explanation of what "substantial" means. It seems the distinction between a "complex" and "typical" amendment is arbitrary and can be abused by the decision-maker to the detriment of affected parties.

In summary, through its approvals of the mine, including amendments, and its failure to adequately regulate and prevent the threats they pose, Canada and B.C. have thus failed to take necessary preventive and precautionary measures to guarantee Petitioners' right to a healthy environment.

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<sup>156</sup> Environmental Investigation Agency, *Bad Prospects: The Mining Exploration Financial Model that Rewards a Few While Creating Excessive Risks in the Shared Watersheds of British Columbia and Alaska* (2024), <https://us.eia.org/report/bad-prospects/>.

<sup>157</sup> British Columbia Environmental Assessment Office, *Amendments to Environmental Assessment Certificates and Exemption Orders – Guidance for Holders* (Jan. 11, 2024), p.7, [https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/acts-and-regulations/amendment\\_guidance\\_for\\_certificates\\_and\\_exemption\\_orders.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/acts-and-regulations/amendment_guidance_for_certificates_and_exemption_orders.pdf) ("B.C. EAO 2024 Guidance on Amendments").

<sup>158</sup> British Columbia Environmental Assessment Office, *Seeking an Amendment to an Environmental Assessment Certificate Guidance for Certificate Holders* (Dec. 2016), p. 8, <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/guidance-documents/eao-guidance-certificate-holder-amendments.pdf>.

<sup>159</sup> B.C. EAO 2024 Guidance on Amendments, p. 7.

- A. Canada's and B.C.'s continue to violate Petitioners' rights to free, prior, and informed consent.

It is well-established that States have a duty to consult with and obtain the free, prior, and informed consent of indigenous peoples with regards to actions that may impact their rights.<sup>160</sup> Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) requires that States “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”<sup>161</sup> The American Declaration on the Rights of Indigenous Peoples specifically requires consultation “in order to obtain [] free and informed consent prior to the approval of any project affecting [indigenous] lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water, or other resources.”<sup>162</sup> Canada recently amended its Environmental Protection Act to add to the preamble an explicit “commit[ment] to implementing [UNDRIP], including free, prior and informed consent.”<sup>163</sup>

Providing guidance on the content of the right to free, prior, and informed consent under UNDRIP, the United Nations Expert Mechanism on the Rights of Indigenous Peoples clarified that free, prior, and informed consent processes should be guided and directed by Indigenous peoples and “begin as early as possible,” the information made available about a project must cover “all the potential harm and impacts that could result,” and indigenous peoples should be given sufficient time to analyze the information and undertake their own decision-making processes.<sup>164</sup> Moreover, the obligation to consult cannot be satisfied in “a single moment”—a State must engage in “a process of dialogue and negotiation over the course of a project, from planning to implementation and follow-up.”<sup>165</sup>

The obligation to obtain free, prior, and informed consent may apply to communities living outside a State's borders. The former U.N. Special Rapporteur on Human Rights and the Environment, John Knox, noted that, “[i]n the case of transboundary environmental harm, States should provide for equal access to information, participation and remedies *without discriminating on the basis of nationality or domicile*.”<sup>166</sup>

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<sup>160</sup> See 2020 Petition, paras. 244-248.

<sup>161</sup> United Nations Declaration on the Rights of Indigenous Peoples, A/61/L.67 (Sept. 13, 2007), art. 19, [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf).

<sup>162</sup> Organization of American States, American Declaration on the Rights of Indigenous Peoples (2016), art. XXIX(4), <https://www.oas.org/en/sare/documents/DecAmIND.pdf>.

<sup>163</sup> Canadian Environmental Protection Act, 1999, preamble.

<sup>164</sup> Human Rights Council, *Free, Prior and Informed Consent: A Human Rights-Based Approach*, Study of the Expert Mechanism on the Rights of Indigenous Peoples (Aug. 10, 2018), paras. 20-22, <https://un-declaration.narf.org/wp-content/uploads/Free-prior-and-informed-consent-a-human-rights-based-approach-1.pdf>.

<sup>165</sup> *Ibid.*, para. 15.

<sup>166</sup> U.N. Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/37/59 (Jan. 24, 2018), Annex, para. 8, [https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/A\\_HRC\\_37\\_59\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/A_HRC_37_59_EN.pdf) (“Framework Principles on Human Rights and the Environment”) (emphasis added).

Satisfying consultation requirements under domestic law is not equivalent to fulfilling the right to free, prior, and informed consent when they do not conform with international human rights law. For example, in the recent case of *Indigenous Community Maya Q'eqchi Agua Caliente v. Guatemala*, the Commission found that the legislative and institutional frameworks for granting mining licenses in Guatemala do not fully ensure the right to consultation of indigenous peoples.<sup>167</sup> As such, even though Guatemala complied with its own environmental assessment process and other laws and regulations, the Commission nevertheless held that Guatemala violated the rights of the Maya Q'eqchi Agua Caliente Indigenous Community (“the Community”) because “the Community received insufficient, scarce and culturally inadequate information, and did not have the possibility of ensuring its right to prior consultation.”<sup>168</sup> The Commission found the environmental impact assessment process deficient by international standards because, among other factors, interested parties had only one month to submit observations.<sup>169</sup> Reviewing the case on referral from the Commission, the Court reiterated that “it is the duty of the State, and not of the indigenous peoples or communities involved, to demonstrate that in the specific case these dimensions of the right to prior consultation were effectively guaranteed.”<sup>170</sup> Noting that the State “avoided considering nearly half of the population of the Community” that “suffered impacts from the mining activity” and denied formal requests from 10 families of the Community to participate in the consultation process for the mine, the Court concluded that the State failed to prove that its process was adequate.<sup>171</sup>

Canada and B.C. have an obligation to obtain Petitioners’ free, prior, and informed consent with respect to the B.C. mines because these projects are looming threats to the Unuk, Taku, and Stikine watersheds. Petitioners’ limited participation in domestic environmental assessment processes do not qualify as providing free, prior, and informed consent. Indeed, B.C. never sought Petitioners’ free, prior, and informed consent about any of the B.C. Mines despite their many efforts to raise concerns and B.C. recently denied Petitioners’ formal request for Participating Indigenous status in the environmental impact assessment process for the Eskay Creek Mine.<sup>172</sup> This result is

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<sup>167</sup> Inter-Am. Commission. H.R., *Comunidad Indígena Maya Q'eqchi' Agua Caliente vs. Guatemala*, Report No. 11/20 (Mar. 3, 2020), para.111.

<sup>168</sup> The quoted text was translated to English. The original Spanish text reads: “la Comunidad recibió información insuficiente, escasa y culturalmente inadecuada, y no tuvo la posibilidad de asegurar su derecho a la consulta previa.” *Ibid.*, para. 113.

<sup>169</sup> *Ibid.*, para. 112.

<sup>170</sup> The quoted text was translated to English through DeepL. The original Spanish text reads: “Este Tribunal recuerda que es deber del Estado, y no de los pueblos o comunidades indígenas implicados, demostrar que en el caso concreto estas dimensiones del derecho a la consulta previa fueron efectivamente garantizadas.” Inter-Am. Ct. H.R., *Comunidad Indígena Maya Q'eqchi' Agua Caliente vs. Guatemala*, Judgment of May 16, 2023, para. 254.

<sup>171</sup> The quoted text was translated to English through DeepL. The original Spanish text reads: “Por otra parte, los representantes afirman que el Estado encausó el proceso de forma tal que evitó considerar a cerca de la mitad de la población de la Comunidad, que vive en un sector de su territorio que sufrió impactos por la actividad minera y que está afectado por el traslape. Surge de los hechos, asimismo, que cerca de 10 familias de la Comunidad solicitaron formalmente participación a las autoridades estatales, quienes la negaron.” *Ibid.*, para. 281.

<sup>172</sup> Petitioners note that their application for recognition as a participating Indigenous nation through the environmental assessment process for the Eskay Creek Mine, even if granted, would not provide an adequate remedy for the violations alleged in the Petition. Their request is limited in application to the Unuk River watershed and does not extend to the existing and proposed mines in the Taku or Stikine watersheds. As such, recognizing Petitioners as a participating Indigenous nation in the context of this process would not remedy violations of Petitioners’ rights to consultation and free, prior, and informed consent with regards to the other B.C. Mines, both operating and proposed.



unsurprising given that, as in *Maya Q'eqchi Agua Caliente v. Guatemala*, the legislative and regulatory frameworks in B.C. and Canada are insufficient to ensure Petitioners' right to adequate consultation. Neither the B.C. Environmental Assessment Act nor Canada's Impact Assessment Act requires consultation with, consent from, or assessment of transboundary impacts on indigenous tribes outside of Canada.<sup>173</sup> While B.C. has taken steps to integrate free, prior, and informed consent in its environmental assessment process for several mines with respect to Indigenous peoples in Canada, it has not done the same for Petitioners despite potentially significant downstream environmental and cultural impacts. Yet, Canada and B.C. "should provide for equal access to information, participation and remedies without discriminating on the basis of nationality or domicile."<sup>174</sup> Canada and B.C. thus cannot avoid considering impacts on Petitioners simply because they are on the other side of an arbitrarily drawn border and must provide them with equal opportunities to participate and consent as Canadian tribes.

Canada and B.C. should not only consult with and seek free, prior, and informed consent from Petitioners at the environmental authorization stage, but they should also continue this "dialogue and negotiation over the course of [each B.C. Mines] project,"<sup>175</sup> including with respect to amendment applications, mine plan changes through other processes, and subsequent environmental impact assessments. As Petitioners explained above, B.C. has approved significant changes to mine plans through the amendment process, from discharge limits to water management practices. Seabridge has gradually increased the proposed maximum ore production and is considering extending the original mine life of the KSM project—it is unclear what mechanism, if any, Seabridge will use to assess the impacts of these changes. Canada and B.C. must consult with Petitioners to ensure that potential transboundary impacts are properly considered when approving mine projects in the transboundary watersheds and evaluating applications for mine plan changes.

## **VI. Requests for Relief**

In light of the violations described above, Petitioners respectfully request that the Commission:

- 1) Hold a hearing to investigate the claims raised by Petitioners;
- 2) Declare that Canada's failure to implement adequate measures to prevent the harms to Petitioners from the B.C. Mines violates their rights affirmed in the American Declaration of the Rights and Duties of Man; and
- 3) Recommend that Canada:
  - a. Not authorize new mines or proposed amendments until it has thoroughly assessed and addressed the transboundary harms to Petitioners' human rights and sought their free, prior, and informed consent;

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<sup>173</sup> See 2020 Petition, paras. 262-281.

<sup>174</sup> Framework Principles on Human Rights and the Environment, para. 8.

<sup>175</sup> Human Rights Council, *Free, Prior and Informed Consent: A Human Rights-Based Approach*, para. 15.

- b. Suspend authorizations of operating mines until it has thoroughly assessed and addressed the transboundary harms to Petitioners' human rights and sought their free, prior, and informed consent;
- c. Establish and implement, in coordination with Petitioners, a plan to protect Petitioners, including the watersheds and fish species on which they depend, from the disastrous effects of pollution from the B.C. Mines; and
- d. Provide any other relief that the Commission considers appropriate and just.

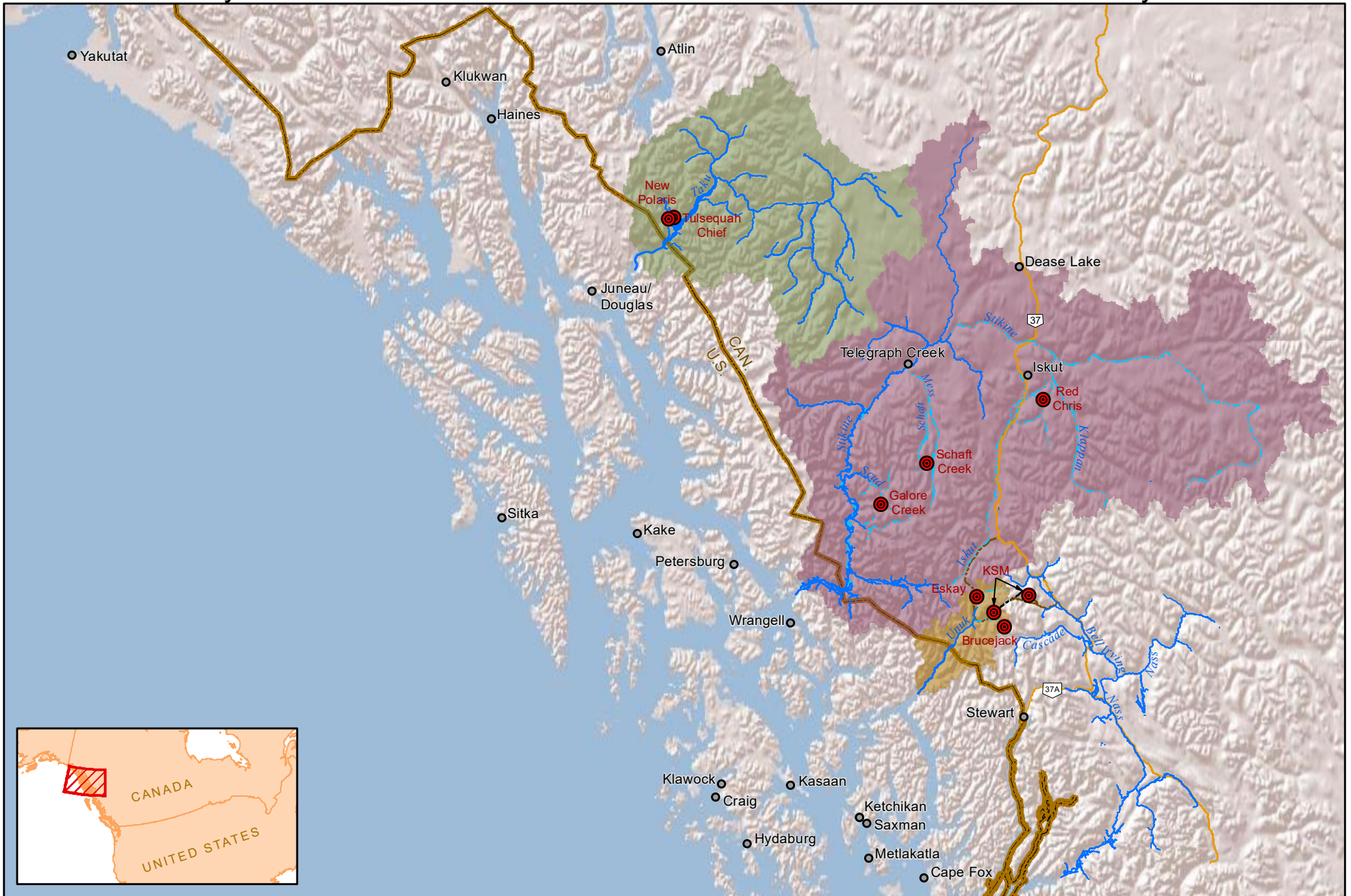
## **List of Appendices to the Brief of Observations on the Merits, 19 February 2024**

- 1 Map of Transboundary Watersheds and Southeast Alaska Native Communities Threatened by B.C. Mines (Feb. 16, 2024)
- 2 Letter from Shannon Baskerville, Deputy Minister, B.C. Ministry of Energy, Mines and Low Carbon Innovation, to Senator Jesse Kiehl *et al.* (Jan. 24, 2024)
- 3 Letter from David Grace, B.C. EAO, to Clinton E. Cook Sr., Craig Tribal Association, Reference: 381331 (Aug. 3, 2021)
- 4 Letter from Robert Sanderson Jr., Chair, SEITC, to Honourable John Horgan, Premier, B.C., Canada, Re: Request for Consultation (Mar. 31, 2021)
- 5 Letter from Robert Sanderson Jr., Chair, SEITC, to Honourable John Horgan, Premier, B.C., Canada, Re: SEITC's Status in Canada and British Columbia (Sept. 23, 2022)
- 6 Letter from Robert Sanderson Jr., Chair, SEITC, to Elenore Arend, Chief Exec. Assessment Officer, B.C. EAO, Re: Opportunity to be Heard; Participating Indigenous Nation Status (Nov. 18, 2022)
- 7 Letter from Elenore Arend, Chief Exec. Assessment Officer, B.C. EAO, to Robert Sanderson Jr., Chair, SEITC, Reference: 393598 (Dec. 12, 2022)
- 8 Letter from Elenore Arend, Chief Exec. Assessment Officer, B.C. EAO, to Robert Sanderson Jr., Chair, SEITC, Reference: 393180 (Nov. 7, 2022)
- 9 Skeena Resources, Eskay Creek Revitalization Alaska Tribal Transboundary Advisory Committee Engagement Plan (Jan. 3, 2024)
- 10 Letter from Robert Sanderson Jr., Chair, SEITC, to Eleanore Arend, Chief Exec. Assessment Officer, B.C. EAO (Jan. 30, 2024)
- 11 Letter from Bruce Ralston, Minister, B.C. Ministry of Energy, Mines and Low Carbon Innovation, to Robert Sanderson Jr., SEITC, Ref: 113599 (June 11, 2021)
- 12 Letter from Rob Sanderson Jr., Chair, SEITC, to Honorable John Horgan, Premier, B.C., Canada (Dec. 30, 2021)

# APPENDIX 1

Map of Transboundary Watersheds and Southeast Alaska Native  
Communities Threatened by B.C. Mines (Feb. 16, 2024)

# Transboundary Watersheds and Southeast Alaska Native Communities Threatened by B.C. Mines



- Affected Anadromous River Segments
- - - Affected Other River Segments
- Stikine Watershed
- Taku Watershed
- Unuk Watershed
- - - - Mine Access Road
- - - - Mitchell Treaty Tunnel
- Mine



# APPENDIX 2

Letter from Shannon Baskerville, Deputy Minister, B.C. Ministry of Energy, Mines and Low Carbon Innovation, to Senator Jesse Kiehl *et al.*  
(Jan. 24, 2024)



January 24, 2024

Ref: 120078

Senator Jesse Kiehl  
Senate District B  
State of Alaska, USA  
Email: [Senator.Jesse.Kiehl@akleg.gov](mailto:Senator.Jesse.Kiehl@akleg.gov)

Representative Dan Ortiz  
House District 1  
State of Alaska, USA  
Email: [Representative.Dan.Ortiz@akleg.gov](mailto:Representative.Dan.Ortiz@akleg.gov)

Representative Rebecca Himschoot  
House District 2  
State of Alaska, USA  
Email: [Representative.Rebecca.Himschoot@akleg.gov](mailto:Representative.Rebecca.Himschoot@akleg.gov)

Representative Andi Story  
House District 3  
State of Alaska, USA  
Email: [Representative.Andi.Story@akleg.gov](mailto:Representative.Andi.Story@akleg.gov)

Representative Sara Hannan  
House District 4  
State of Alaska, USA  
Email: [Representative.Sara.Hannan@akleg.gov](mailto:Representative.Sara.Hannan@akleg.gov)

Representative Louise Stutes  
House District 5  
State of Alaska, USA  
Email: [Representative.Louise.Stutes@akleg.gov](mailto:Representative.Louise.Stutes@akleg.gov)

Dear Legislators:

Thank you for your letter, dated January 4, 2024, regarding the development of a reclamation and closure plan for the Tulsequah Chief Mine (Tulsequah) in the Taku River watershed. I am pleased to provide responses to your questions and outline the progress that has been made over the past year.

... /2

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Ministry of  
Energy, Mines and  
Low Carbon Innovation

Office of the  
Deputy Minister

Mailing Address:  
PO Box 9319, Stn Prov Govt  
Victoria, BC V8W 9N3

Location:  
8<sup>th</sup> Floor, 1810 Blanshard Street  
Victoria

Telephone: 250 952-0120  
Facsimile: 250 952-0269

British Columbia remains committed to holding past and present owners of the Tulsequah Chief Mine accountable to address clean-up of the site. The ownership of this site has a complex history, starting in the 1950's when Consolidated Mining and Smelting (now Teck Metals) operated the mine until 1957. In 1992, Teck sold the site to Redfern who subsequently became insolvent in 2009, after obtaining an Environmental Assessment Certificate and a *Mines Act* Permit from BC. In 2010, Chieftain Metals acquired the property, and all authorizations were transferred to their name. In 2016, Chieftain's directors resigned, and no new directors have been appointed since. Chieftain, a corporation registered in the province of Ontario, has yet to be dissolved by the Ontario Registry.

BC has been working closely with the Taku River Tlingit First Nation (TRTFN) to ensure all work conducted in their territory includes full consideration of their interests and laws. BC has encouraged Teck to engage directly with the TRTFN, and it is our understanding that this engagement is ongoing.

From BC's ongoing discussions with Teck, and as stated by Laurel Nash, Assistant Deputy Minister of the Environmental Protection Division, and Andrew Rollo, Executive Director Tulsequah Reclamation during their March 2023 visit to Juneau, AK, BC understands that Teck remains committed to voluntarily lead and fund the closure planning at Tulsequah. As you may know, Laurel and Andrew were in Alaska to attend the Juneau Mining Forum and were able to meet with some of you as well as with several Alaskan Indigenous groups and environmental organizations during their visit.

In June 2023, Teck provided BC with a conceptual schedule for the development of the draft Tulsequah Reclamation Plan. This information was presented at the June 16, 2023, BC-Alaska Bilateral Working Group meeting. We understand that Teck prepared the conceptual schedule in June 2023 to support early engagement and that the schedule will be adapted and updated regularly to reflect new information gained from site work, engagement and other activities.

In August 2023, Teck staff and reclamation experts, along with TRTFN representatives visited Tulsequah to gain familiarity with the current site conditions and site logistics, to gain on-the-ground understanding of potential health and safety hazards, and to review the site with a view to understanding potential closure objectives. We understand that Teck is currently reconsidering their June 2023 workplan, based on information they gathered during their 2023 visit to the site. BC and Teck will continue to co-ordinate to engage directly with stakeholders from Alaska once the plan has been updated. In an email following their August 2023 site visit, Teck committed to "continuing to work with the Province and the TRTFN to identify and execute appropriate closure at the site."



Engagement with stakeholders and consultation with rights holders is key to ensuring that closure planning at Tulsequah is successful. BC staff meet frequently with representatives from the TRTFN, the State of Alaska (operationally and via the BC-Alaska Bilateral Working Meetings), the US Government, Alaska Tribes, and other interested parties to share updates on the progress being made on Tulsequah closure planning and to discuss concerns raised by these groups. BC remains committed to engagement with all interested parties as closure planning at Tulsequah continues. In addition, BC will continue to encourage Teck to engage directly with stakeholders and rights holders as reclamation planning progresses.

BC and Teck meet regularly, and we are jointly working through some of the critical elements that have been identified to ensure successful reclamation outcomes, one of which is the legal complexity surrounding Chieftain's interests at the site.

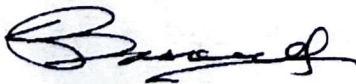
Be assured that BC is committed to ensuring that reclamation and closure at Tulsequah is properly planned to achieve the long-term protection of our shared waters. To underline our commitment, BC has appointed an Executive Director Tulsequah Reclamation, Andrew Rollo, to work with all parties and ensure the successful reclamation of Tulsequah in a timely manner. Development of a successful reclamation and closure plan requires the collection of quality data, careful planning and engineering, and robust engagement. Progress was made on these elements in 2023 and more progress will be made in 2024. We look forward to providing you with more information in the coming months.

With respect to your suggestion to hold a public meeting in Juneau in the near future, BC is open to doing so, and I suggest that this would be most productive after further progress is made on resolving critical success elements and after more detailed site investigation work is completed this coming summer. We will encourage Teck to join BC at a meeting of this kind once their updated work plan is available.

The Government of British Columbia appreciates your letter and on-going interest in this important transboundary issue. I share your sentiment that the cleanup of this site has been too long delayed, and we remain committed to seeing this work proceed as soon as possible.

Thank you again for writing.

Sincerely,



Shannon Baskerville  
Deputy Minister

cc:

Spokesperson Thom  
Taku River Tlingit First Nation  
[spokesperson@gov.trtfn.com](mailto:spokesperson@gov.trtfn.com)

Shantalle Schultz  
Taku River Tlingit First Nation, Senior Negotiator  
[Senior.negotiator@gov.trtfn.com](mailto:Senior.negotiator@gov.trtfn.com)

Chalyee Éesh Richard Peterson  
President, Central Council, Tlingit and Haida Indian Tribes of Alaska  
[otp@ccthita-nsn.gov](mailto:otp@ccthita-nsn.gov)

Guy Archibald  
Executive Director, Southeast Alaska Indigenous Transboundary Commission  
[garch570@gmail.com](mailto:garch570@gmail.com)

Andrea Cadiente-Laiti  
Tribal Administrator, Douglas Indian Association  
[saceveda@diataku.com](mailto:saceveda@diataku.com)

Lisa Murkowski  
U.S. Senator  
[sen.lisa.murkowski@akleg.gov](mailto:sen.lisa.murkowski@akleg.gov)

Dan Sullivan  
U.S. Senator  
[sen.dan.sullivan@akleg.gov](mailto:sen.dan.sullivan@akleg.gov)

Kevin Jardine  
Deputy Minister, Environment and Climate Change Strategy (ENV)  
[kevin.jardine@gov.bc.ca](mailto:kevin.jardine@gov.bc.ca)

Tania Demchuk  
Assistant Deputy Minister, Responsible Mining and Competitiveness Division (RMCD),  
EMLI  
[tania.demchuk@gov.bc.ca](mailto:tania.demchuk@gov.bc.ca)

Laurel Nash  
Assistant Deputy Minister, Environmental Protection Division (EPD), ENV  
[laurel.nash@gov.bc.ca](mailto:laurel.nash@gov.bc.ca)

Chris Trumpy  
Assistant Deputy Minister, Environmental Assessment Office (EAO)  
[chris.trumpy@gov.bc.ca](mailto:chris.trumpy@gov.bc.ca)

George Warnock  
Assistant Deputy Minister, Mines Health, Safety and Enforcement Division (MHSE),  
Energy, Mines and Low Carbon Innovation (EMLI)  
[george.warnock@gov.bc.ca](mailto:george.warnock@gov.bc.ca)



Amy Avila  
Executive Lead, Strategic Services Division (SSD), ENV  
[amy.avila@gov.bc.ca](mailto:amy.avila@gov.bc.ca)

Sonya Sundberg  
Executive Director, EPD, ENV  
[sonya.sundberg@gov.bc.ca](mailto:sonya.sundberg@gov.bc.ca)

Andrew Rollo  
Executive Director of Tulsequah Reclamation, MHSE, EMLI  
[Andrew.rollo@gov.bc.ca](mailto:Andrew.rollo@gov.bc.ca)

Lisa Paquin  
a/Executive Director, Intergovernmental Relations, SSD, ENV  
[lisa.paquin@gov.bc.ca](mailto:lisa.paquin@gov.bc.ca)

Gabrielle Barwin  
Director, Initiatives and Priorities Advancement, RMCD, EMLI  
[gabrielle.barwin@gov.bc.ca](mailto:gabrielle.barwin@gov.bc.ca)

Rebecca Westley  
a/Director, Intergovernmental Relations, SSD, ENV  
[Rebecca.westley@gov.bc.ca](mailto:Rebecca.westley@gov.bc.ca)

David Grace  
Project Assessment Director, EAO  
[david.grace@gov.bc.ca](mailto:david.grace@gov.bc.ca)

Haley Williams  
Senior Policy Advisor, Intergovernmental Relations, SSD, ENV  
[haley.williams@gov.bc.ca](mailto:haley.williams@gov.bc.ca)

Jonathan Price  
President and CEO, Teck Resources Ltd.  
[Jonathan.price@teck.com](mailto:Jonathan.price@teck.com)

Jeff Hanman  
Senior Vice President, Sustainability and External Affairs, Teck Resources Ltd.  
[Jeff.hanman@teck.com](mailto:Jeff.hanman@teck.com)

Amber Johnston-Billings  
Vice President, Communities, Government Affairs and HSEC Systems,  
Teck Resources Ltd  
[Amber.johnston-billings@teck.com](mailto:Amber.johnston-billings@teck.com)

Scott Maloney  
Vice President, Environment, Teck Resources Ltd.  
[Scott.maloney@teck.com](mailto:Scott.maloney@teck.com)

John Boyle

State of Alaska, Commissioner, Department of Natural Resources (DNR)

[john.boyle@alaska.gov](mailto:john.boyle@alaska.gov)

Doug Vincent-Lang

State of Alaska, Commissioner, Department of Fish and Game (ADF&G)

[doug.vincent-lang@alaska.gov](mailto:doug.vincent-lang@alaska.gov)

Emma Pokon

State of Alaska, Commissioner-designee, Department of Environmental Conservation (DEC)

[dec.commissioner@alaska.gov](mailto:dec.commissioner@alaska.gov)

Gary Mendivil

State of Alaska, Commissioner's Office, DEC

[gary.mendivil@alaska.gov](mailto:gary.mendivil@alaska.gov)

Kate Harper

State of Alaska, Associate Director, Office of Project Management and Permitting (OPMP) DNR

[kate.harper@alaska.gov](mailto:kate.harper@alaska.gov)

Terri Lomax

State of Alaska, Project Manager, DEC

[terri.lomax@alaska.gov](mailto:terri.lomax@alaska.gov)

Allan Nakanishi

State of Alaska, Wastewater Discharge Authorization Program, DEC

[allan.nakanishi@alaska.gov](mailto:allan.nakanishi@alaska.gov)

# APPENDIX 3

Letter from David Grace, B.C. EAO, to Clinton E. Cook Sr., Craig Tribal Association, Reference: 381331 (Aug. 3, 2021)



File: 30020-04/MINI 2021

Reference: 381331

August 3, 2021

**SENT VIA EMAIL**

Clinton E. Cook Sr., President  
Craig Tribal Association  
1330 Craig/Klawock Hwy  
Craig, AK 99921  
[tribal.admin@craigtribe.org](mailto:tribal.admin@craigtribe.org)

Dear Clinton E. Cook:

I am writing to notify the Craig Tribal Association that Skeena Resources Limited (Skeena) has submitted an Initial Project Description (IPD) and Engagement Plan for the Eskay Creek Revitalization Project (Eskay Creek). The Chief Executive Assessment Officer (CEAO) of the Environmental Assessment Office (EAO) has designated Eskay Creek as a reviewable project under Section 11 of the *Environmental Assessment Act* (2018) (the Act). The project is now in the Early Engagement phase of the review and subject to requirements under the Act. These documents and further information about the project can be found on the EAO's Project Information Centre website [here](#).

**Project Overview**

Skeena is proposing to restart mining as an open pit at the Eskay Creek underground mine, which operated from 1994 to 2008 and is currently considered to be in care and maintenance. The Project would be an open pit gold-silver mine, with an estimated total annual production of 2.5 to 3 million tonnes over a 13 to 16-year mine life (construction to post-closure). The Project would use facilities and infrastructure of the former underground mine and construct new infrastructure.

The project is located approximately 80 kilometres (km) northwest of Stewart and approximately 40 km from the British Columbia-Alaska border within the Unuk River watershed.

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The project's assessment will include a robust analysis of potential effects within a regional study area, including the tributaries to the upper portion of the Unuk River. The impact assessment will consider potential effects where there is potential for downstream effects on valued components such as water quality, fisheries, aquatic resources, and other valued components.

### **Environmental Assessment Act (2018)**

The Early Engagement phase of a review in British Columbia establishes an important preparatory stage during which meaningful conversations can begin about a proposed project with the project proponent, Indigenous nations, the public, local governments, provincial and federal government agencies, and other stakeholders to identify potential interests, issues and concerns early in the environmental assessment (EA) process. At the end of Early Engagement, the Chief Executive Assessment Officer will recommend, under Section 16 of the Act, whether or not a project should proceed to an EA that evaluates the effects of the project. This is referred to as the Readiness Decision, which takes place following the filing of a Detailed Project Description (DPD) by the proponent.

Following a Readiness Decision, the Process Planning phase begins which formalizes how the EA must be carried out, including: identifying the required information and methods for the assessment; defining roles and responsibilities for the assessment; and determining how participants work together for the rest of the EA and future engagement approaches (including public engagement). The EAO seeks input from the public and Indigenous nations on the draft Process Order and associated documents. Process planning ends with the issuance of the Process Order and if issued, the project may move on to Application Development and Review.

During Application Development, the proponent works with EA participants to develop their Application for an EA Certificate. Early feedback on data collection or analysis can help to identify and resolve key issues, reducing the potential for delays later in the process. During Application Review, the EAO, EA participants and the public review the Application, and direction is provided to the proponent on revisions that should be reflected in the revised Application. The EAO will provide direction on the adequacy of the revised Application.

Thereafter, the Effects Assessment of the project is conducted, resulting in the development of a draft Assessment Report and draft EA certificate (with conditions). These drafts reflect engagement with Indigenous nations, the Technical Advisory Committee, and the Community Advisory Committee (should one be established). The public has the opportunity to review the draft referral materials including the draft Assessment Report and draft EA Certificate. Recommendations to inform Provincial decision-makers are also prepared and reflect engagement on the draft materials.



Additional information on the EA process can be found on our website at: <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/environmental-assessments/guidance-documents/2018-act-guidance-materials>.

### **Coordination with the Impact Assessment Agency of Canada**

The Eskay Creek project is also subject to the requirements of the *Impact Assessment Act*. Should the federal government determine that an impact assessment is required, we will work closely with federal agencies on either a substituted or coordinated EA. Substitution means that the EAO will conduct a single assessment that the federal and provincial governments will rely upon to make separate decisions. Coordination means that the EAO and the Impact Assessment Agency of Canada (the Agency) will work together to align our separate processes and decisions. The EAO anticipates that it will seek approval from the federal government for a substituted EA.

The EAO will work with the Agency on the next steps for the process in accordance with the Impact Assessment Cooperation Agreement between Canada and B.C. (2019). The goal is for the EAO, the Agency and Indigenous nations to engage collaboratively as partners and governments, with their own governance frameworks, and establish appropriate collaborative approaches to evaluate a potential project.

### **Engagement with the Craig Tribal Association**

Based on the proximity of the project to Alaska, the EAO proposes the following activities with the Craig Tribal Association during the Eskay Creek review:

- Notification of the Craig Tribal Association of key milestones during the review; and
- Informing the Craig Tribal Association of opportunities to provide comments during public comment periods as follows:
  - During Early Engagement on the Initial Project Description;
  - During Process Planning on the draft Process Order including the draft Application Information Requirements;
  - During Application Development and Review, on the Application; and
  - During Effects Assessment, on the draft referral materials including the draft Assessment Report and draft EA Certificate.
- Meeting with the EAO, via phone, teleconference, or in-person, as possible, to discuss the project, as needed.

During the above-noted engagement, the Craig Tribal Association may choose to provide input on its views regarding Eskay Creek and its predicted effects.

## Next Steps

The Craig Tribal Association will have the opportunity to provide feedback on the Initial Project Description during the upcoming public comment period, currently planned for late-August through late September 2021. The EAO will follow up with the Craig Tribal Association to confirm timing of the public comment period in advance of its start date.

If you have any questions or require further information, please contact me at 778 698-9310 or [David.Grace@gov.bc.ca](mailto:David.Grace@gov.bc.ca).

Best regards,

A handwritten signature in black ink, appearing to read 'D. Grace', written in a cursive style.

David Grace  
Project Assessment Director  
Environmental Assessment Office

cc: Nathan Braun  
Executive Project Director, Environmental Assessment Office  
[Nathan.Braun@gov.bc.ca](mailto:Nathan.Braun@gov.bc.ca)

Jessica Harris  
Project Assessment Officer, Environmental Assessment Office  
[Jessica.Harris@gov.bc.ca](mailto:Jessica.Harris@gov.bc.ca)

Rob Sanderson, Jr.  
Chair, Southeast Alaska Indigenous Transboundary Commission  
c/o Frederick Olsen  
[otiliusconsulting@gmail.com](mailto:otiliusconsulting@gmail.com)

# APPENDIX 4

Letter from Robert Sanderson Jr., Chair, SEITC, to Honourable John Horgan, Premier, B.C., Canada, Re: Request for Consultation  
(Mar. 31, 2021)



March 31, 2021

Honourable John Horgan  
Premier  
British Columbia, Canada

Sent Via email - [premier@gov.bc.ca](mailto:premier@gov.bc.ca)

RE: Request for Consultation

Dear Premier Horgan,

The Southeast Alaska Indigenous Transboundary Commission (SEITC) would like to bring to your attention our request to enter into an agreement regarding participation in ongoing permitting discussions and decisions throughout British Columbia's environmental process pursuant the United Nations Declaration on the Rights of Indigenous Peoples.

Formed in 2014, SEITC is a consortium of fifteen federally-recognized southeast Alaska Tribal governments created to protect Tribal lands and waterways for future generations. Each member Tribe elects or appoints a representative to SEITC. Representing the Central Council of Tlingit & Haida Indian Tribes of Alaska, I am the SEITC Board Chair.

SEITC requested to enter into an agreement with the Ministry of Energy, Mines and Low Carbon Innovation. In reply, Minister Ralston conveyed that the subject matter raised in our request would involve several other ministries, including the Ministry of Environment and Climate Change Strategy, the Environmental Assessment Office, and the Ministry of Indigenous Relations and Reconciliation. Minister Ralson stated that the Ministries need time to conduct comprehensive internal reviews in order to fully respond to our request.

SEITC has an historical and inherent interest in the environmental review and approval process. We ask that during this review period posed by Minister Ralston there be a pause in new permits, amendments to existing permits, and approval of new mining projects in British Columbia until such time as the completion of internal reviews by the aforementioned Ministries and a decision on our ability to consult.

SEITC commends British Columbia for passing the Declaration on the Rights of Indigenous Peoples Act. We recognize that much work lies ahead on the implementation of the Declaration. Many mining projects are at all stages of exploration, development, operation, and closure in the British Columbia headwaters of our shared transboundary watersheds. Of course, BC cannot fully implement the Declaration without working with US Tribes affected by the decisions on these projects under several Ministries.

Our traditional lands and family/Clan ties occupy the region on both sides of the US/Canadian border. Implementing the Declaration would be incomplete without recognizing the right of self-determination by the downstream sovereign Tribes that share these critical watersheds. We believe that the benefits of these watersheds can be protected and shared by all. In order to assure equitable benefits, we must begin with dialogue. We have raised our concerns about the mines and described the obligations of British Columbia and Canada to consult with us in a petition submitted to the Inter-American Commission on Human Rights in July 2020.

Again, we ask for a pause in new permits and approval of new mining projects in British Columbia until such time as the completion of the above-mentioned comprehensive internal reviews. As a consortium of 15 Federally-recognized Tribal Nations tasked to represent member Tribes on issues surrounding transboundary mining, SEITC would like the opportunity to collaborate on the development and implementation of management plans concerning watersheds affecting Federally-recognized Tribal Nations in Alaska.

We look forward to the opportunity you have offered to move forward.  
We wish you good health.

Sincerely,

A handwritten signature in blue ink that reads "Rob Sanderson Jr". The signature is written in a cursive, flowing style.

Rob Sanderson, Jr  
Chair  
Southeast Alaska Indigenous Transboundary Commission  
[www.seitc.org](http://www.seitc.org)



# APPENDIX 5

Letter from Robert Sanderson Jr., Chair, SEITC, to Honourable John Horgan, Premier, B.C., Canada, Re: SEITC's Status in Canada and British Columbia (Sept. 23, 2022)



## Southeast Alaska Indigenous Transboundary Commission

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**Protecting Tribal Lands and Waterways for Future Generations**

September 23, 2022

Honorable Premier John Horgan  
British Columbia, Canada  
Sent Via email - [premier@gov.bc.ca](mailto:premier@gov.bc.ca)

**RE: SEITC's Status in Canada and British Columbia**

Dear Premier Horgan,

We write in regards to the Southeast Alaska Indigenous Transboundary Commission's (SEITC) participation in the Indigenous consultation process for the Skeena Resources Limited ("Skeena") Eskay Creek Mine Revitalization Project (the "Eskay Creek Project").

Formed in 2014, SEITC is a consortium of fifteen federally recognized Tlingit, Haida and Tsimshian sovereign Tribal governments based in southeast Alaska and sharing the rivers that originate in northwestern British Columbia and enter the ocean in Alaska. Each member Tribe elects or appoints a representative to SEITC. The transboundary rivers are vital to our citizens for food security, income and for the continuation of our cultural practices.

Many citizens of SEITC member Tribes have family and kinship ties with the Tlingit, Haida and Tsimshian nations in Canada. It is undeniable that our common territories span both sides of the border. We have a common history, language and culture. These lands, our lands, were undivided prior to the establishment of the U.S./Canadian border. As you are aware, the Supreme Court of Canada has confirmed that Tribal citizens currently residing in the United States can be "Aboriginal Peoples of Canada". It is clear that SEITC member Tribes are successors of Aboriginal peoples who occupied Canada at the time of European contact and are entitled to the protection of section 35 of the *Constitution Act, 1982*. Based on this shared history and connections to Canadian territory, your government must recognize SEITC member Tribes as "Aboriginal peoples of Canada" with constitutionally protected Aboriginal rights that will be adversely impacted by the Eskay Creek Project, if approved.

The Eskay Creek Project has the potential to adversely affect SEITC member Tribes' cultural and subsistence rights on both sides of the border that form the foundation of our culture. These rights, which include traditional and subsistence fishing, are intricately connected to maintaining the health of the transboundary watersheds. British Columbia is not only obligated to consult SEITC with respect to potential transboundary impacts on these rights in Alaska, but also must meet the duty to consult and accommodate SEITC given the potential impacts these rights on the Canadian side of the border.

We write to put the Crown on notice that SEITC member Tribes intend to exercise their rights in British Columbia. Given the adverse impacts that the Eskay Creek Project, if approved, would have on SEITC member tribes' ability to exercise these rights, SEITC demands a deeper level of consultation on the Eskay Creek Project that is compliant with the government's legal obligations under Canadian law, and beyond the purported "meaningful dialogue" currently offered by the Environmental Assessment Office.

As "Aboriginal peoples of Canada", under both the federal and provincial UNDRIP laws and the Canadian Constitution, the Crown has a duty to consult and obtain SEITC's free, prior and informed consent prior to any approvals for the Eskay Creek Project given the potential adverse effects to SEITC's member Tribes that depend on the health of the transboundary watersheds. As mentioned, these watersheds overlap with SEITC's member Tribes' traditional territories dating back prior to European contact. UNDRIP specifically requires your government to cooperate with SEITC and obtain our free, prior and informed consent (Art. 19), the continued productivity of our lands and resources (Art. 21), and the right to effective mechanisms for just and fair redress within the Eskay Creek project authorization process (Art. 32).

Finally, SEITC formally requests to be added as a "participating Indigenous Nation" under the Environmental Assessment Act, 2018. As such, SEITC will require adequate capacity funding from both the British Columbia EAO and Canada Impact Assessment Agency in order to sufficiently analyze the project, its environmental impacts and the potential impacts to the constitutionally-protected rights of our Tribal communities.

Thank you for your attention to these matters.

A handwritten signature in blue ink that reads "Rob Sanderson Jr." with a stylized flourish at the end.

Rob Sanderson Jr.  
Chair, SEITC

cc. George Heyman, Environment Minister  
Environment Assessment Office

# APPENDIX 6

Letter from Robert Sanderson Jr., Chair, SEITC, to Elenore Arend, Chief  
Exec. Assessment Officer, B.C. EAO, Re: Opportunity to be Heard;  
Participating Indigenous Nation Status (Nov. 18, 2022)



## Southeast Alaska Indigenous Transboundary Commission

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### Protecting Tribal Lands and Waterways for Future Generations

Elenore Arend  
Chief Executive Assessment Officer and Associate Deputy Minister  
Environmental Assessment Office  
Victoria, BC. V8W 9V1  
Sent via Email

November 18, 2022

#### **Re: Opportunity to be Heard; Participating Indigenous Nation Status**

Ms. Arend,

This letter is in response to the opportunity to be heard request in your November 7<sup>th</sup>, 2022 letter to Chair Sanderson Jr. of the Southeast Alaska Indigenous Transboundary Commission (SEITC).

SEITC had requested Participating Indigenous Nation status in regards to the Eskay Creek Revitalization Project (Project) based on the undisputed existence of common lands, language and relations of the Tlingit, Haida and Tsimshian people that exist on and are recognized by both the U.S. and Canada straddling the border. This territory includes lands under consideration in the effects analysis of the Project. As the United Nations Declaration on the rights of Indigenous Peoples (UN Declaration) states at Article 18; “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.” It is our procedures and therefore, our timeline that must be respected.

As you note in the November 7<sup>th</sup> letter, SEITC is in the process of submitting information concerning the recognized territories prior to European contact. This process is on going and we expect a submission by December 31<sup>st</sup>, 2022. In fulfilling this request however, the BC EAO cannot ignore information in the public record about the connections between the Alaska Tribes and BC First Nations that it already has access to and is aware of. The EAO has an obligation to consider these records as well as the information SEITC’s member Tribes submit. To ignore available evidence would be a violation of UN Declaration Article 19 where “[s]tates shall consult and cooperate *in good faith* with the indigenous peoples concerned” (emphasis added).

The process of submitting this information has been delayed due to the chief investigator for the traditional territory report falling ill. We expect a draft to be available to us in 2 weeks. SEITC will need to vet this report with the appropriate clan leaders prior to releasing to the contact you will provide.



## Ongoing Engagement not Consultation

SEITC acknowledges the ongoing engagement with the EAO on the Project, but SEITC emphasizes that active engagement falls short of consultation. Consultation is a right to a meaningful process, not an outcome. Consultation is not focused on environmental effects only, but rather is focused on the impact of the proposed government decision on Aboriginal rights. The Project authorization will not be complete, nor will it be able to accurately measure and mitigate effects without consultation-level dialogue. SEITC has been asked to do two separate things, engage in an authorization process and attempting to gain rights. We are approaching the environmental and rights as separate actions at this time.

Canada's obligations arising from the implementation of the UN Declaration apply regardless of whether SEITC's member Tribes gain formal rights Canada. Importantly, SEITC's members do not need to establish Aboriginal rights prior to seeking consultation. The duty to consult requires the Crown to respect potential, unproven Aboriginal interests, and to consult with and reasonably accommodate these interests pending final resolution of the claim. As of yet, this has not happened.

SEITC need only satisfy the threshold question set out in *Desautel* that they are the successors of Aboriginal peoples who occupied Canada at the time of European contact and do not need to claim rights in Canada to be considered "Indigenous peoples" under Canada and British Columbia's UN Declaration implementation law. SEITC represents Tlingit, Haida and Tsimshian Nations—nations already recognized in Canada whose traditional territories undeniably straddle the US-Canada border.

Regardless, the EAO also has an obligation to seek out consent based only on the existence of our lands within Alaska. Article 32(2) applies not to the State's lands, territories, and resources, but rather to those of the Indigenous peoples concerned—if a project affects the lands, territories or resources of Indigenous peoples, Article 32(2) requires that the Crown obtain their free, prior and informed consent, regardless of whether the lands, territories and resources affected are in Canada or the United States. To be consistent with the Crown's commitment to fully implement UNDRIP, the Crown must obtain the free, prior, and informed consent of SEITC's member Tribes on the Eskay Creek Project.

The current "active engagement" with the EAO in the environmental (as opposed to rights) analysis concerning the Project falls short of the duty to consult. The duty to consult is triggered when the Crown:

- (1) has real or constructive knowledge of the potential existence of Aboriginal rights, and
- (2) contemplates conduct that might adversely affect these rights.

Both of these triggers are met. The EAO is aware of potential rights and is in the process of authorizing an activity that potentially may affect SETIC member Tribes.

As to the assertion that potential changes to the environment are not expected outside of Canada, presently the level of evidence and data does not exist to make such an assumption. There has yet to be a cumulative effects analysis of the project in conjunction with the KSM and the BruceJack operating in the same watershed.

This is especially true given that some of the Project's structures will have to be maintained into perpetuity in order to protect our interests. The August 2014 Mt Polley disaster taught us two things, unexpected events happen and that BC did not change its mine authorization requirements as recommended by the Mt Polly Independent Expert Panel to prevent future unexpected failures.

The EAO and the proponent maintain that "potential changes to the environment resulting from the project is not anticipated." This is a much lower threshold than the language under 14 (2) "the chief executive assessment officer may provide notice to the Indigenous nation that the chief executive assessment officer has determined that there is no reasonable possibility the Indigenous nation or its rights recognized and affirmed by section 35 of the Constitution Act, 1982 will be adversely affected by the project."

Furthermore, BC still lacks any mechanism of compensation or rehabilitation in the event of catastrophic event. The B.C. mine permitting process assumes that project elements approved through the environmental assessments will function as designed, and that no serious accidents will happen. As a result, there is no discussion in the environmental assessments on how the Alaska Tribes' economic, environmental and cultural interests would be compensated or restored if a catastrophic accident like that at Mount Polley took place in the Unuk watershed.

BC also uses an improper permit-now, analysis-later approach to environmental approval. In the Unuk watershed, the KSM for example, regulators and the company have provided assurance that water quality guidelines at the U.S. border will be met, despite the proposed use of an unproven technology for water treatment.

In short, the EAO's indication that potential changes to the environment outside Canada will not occur is unfounded and the no reasonable possibility of harm unsubstantiated.

### EAO not Following Guidance

SEITC also notes that the EAO has not followed its own guidance under *Guide to Indigenous Knowledge in Environmental Assessments* (Version 1.0 April 2020 (Guidance) to collect Indigenous Knowledge from SEITC or its member Tribes.

If, at this time, SEITC is not afforded status and a Participating Indigenous Nations, then it

certainly qualifies under the definition of “Participant” in the Guidance that by definition includes “Indigenous nations, Proponents, Provincial Agencies, local communities, the public, the Technical Advisory Committee, the Community Advisory Committee and any other group participating in an environmental assessment process for a project”.

Even as just a Participant, the EAO is under an obligation to seek out Indigenous Knowledge from SEITC member Tribes. As defined at 1.1, Indigenous Knowledge is the “broad, holistic, place based, relational, intergenerational and can be embodied through tangible or less tangible forms”. Holistic, place based and intergenerational terms describe the entirety of the Unuk watershed including the Tribes in Alaska who depend on it.

Furthermore, the Guidance states that: “[f]or the purposes of the Act, Indigenous Knowledge is the subset of an Indigenous nation’s knowledge that the nation decides, through representatives chosen by themselves *in accordance with their own procedures*, is appropriate to be used in an EA” (emphasis added). The EAO has yet given no deference to our internal procedures and instead issues mandates for specific information and sets arbitrary deadlines.

In conclusion, SEITC’s member Tribes are “aboriginal peoples of Canada” with constitutionally protected Aboriginal rights in Canada that will be adversely impacted by the Eskay Creek Project, if approved. All of the Tribes can point to significant connections to a recognized “Aboriginal People of Canada”, eg. Haida, Tsimshian and Tlingit.

We look forward to your response.

A handwritten signature in blue ink that reads "Rob Sanderson Jr". The signature is written in a cursive, slightly slanted style.

Robert Sanderson Jr,  
Chair, SEITC

# APPENDIX 7

Letter from Elenore Arend, Chief Exec. Assessment Officer, B.C. EAO,  
to Robert Sanderson Jr., Chair, SEITC, Reference: 393598  
(Dec. 12, 2022)



File: 30200-20/ESKM-04-01

Reference: 393598

**SENT VIA EMAIL**

December 12, 2022

Rob Sanderson, Jr.  
Chair  
Southeast Alaska Indigenous Transboundary Commission  
715 Sawmill Creek Rd.  
Sitka, AK 99835  
c/o Guy Archibald  
garch570@gmail.com

Dear Chair Rob Sanderson, Jr:

Thank you for your letter of November 18, 2022, in response to my letter of November 7, 2022, and in relation to the Southeast Alaska Indigenous Transboundary Commission's (SEITC) request to be a participating Indigenous nation in the Eskay Creek Revitalization Project (Eskay) Environmental Assessment (EA).

Firstly, I would like to thank your representatives for taking the time to meet with Environmental Assessment Office (EAO) staff and myself on November 17, 2022, to provide SEITC with an opportunity to be heard prior to my determination under Section 14(2) of the *Environmental Assessment Act* (2018) (the Act). I found the meeting to be useful as it allowed for our respective views to be shared in a respectful and collaborative manner.

In this letter, I will set out the reasons for my determination under Section 14(2) of the Act. By separate letter, the EAO will provide responses to the remaining points in your letter dated November 18, 2022.

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Environmental  
Assessment  
Office

Mailing Address:  
PO Box 9426 Stn Prov Govt  
Victoria BC V8W 9V1

Location:  
1<sup>st</sup> & 2<sup>nd</sup> Fl – 836 Yates Street  
Victoria BC V8W 1L8



## CONTEXT

During the Eskay EA, the EAO has regularly communicated with SEITC regarding the EAO's engagement approach. The EAO's previous correspondence has responded to feedback from SEITC and described further opportunities for SEITC to provide its views at key EA milestones. The EAO has also directed the proponent, Skeena Resources Limited (Skeena), to respond to SEITC's technical comments. We appreciate the input SEITC has provided to date in the Eskay EA, including with respect to the initial project description, the detailed project description, the draft readiness decision report and recommendations, and the draft application information requirements.

In your letter dated September 23, 2022, SEITC requested to be added as a "participating Indigenous nation" in the Eskay EA as the representative of 15 Tribal governments in southeast Alaska recognized by the US federal government. SEITC asserts that the Eskay project, if approved, will have potential transboundary impacts on its member Tribes' rights in Alaska, as well as adverse effects on its member Tribes' rights on the Canadian side of the border that are recognized and affirmed by Section 35 of the *Constitution Act, 1982* (Section 35 rights).

## NATURE OF DECISION

Section 14(2) of the Act provides that, after giving an Indigenous nation that has provided notice under subsection 14(1) an opportunity to be heard, I may provide notice to the Indigenous nation that I have determined that there is no reasonable possibility the Indigenous nation or its Section 35 rights will be adversely affected by the project.

In making this determination, I have considered the Act in its entirety, relevant common law, the United Nations Declaration on the Rights of Indigenous Peoples, past EAO practice, all relevant information and submissions from participants in the EA, including submissions provided by SEITC, and the potential impacts of the decision on SEITC's asserted rights or interests.

## CONSIDERATIONS

In determining whether SEITC or its asserted Section 35 rights will be adversely affected, I will first identify whether SEITC has established Section 35 rights or a credible but unproven claim to Section 35 rights.<sup>1</sup> If I identify that SEITC has established Section 35 rights or a credible but unproven claim to Section 35 rights, I would then consider whether there is a reasonable possibility that SEITC or its Section 35 rights will be adversely affected by the project.

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<sup>1</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para 37.

### SEITC's Member Tribes

As noted, SEITC's membership consists of 15 Tribes based in southeast Alaska. Of those members, the EAO identified seven Tribes as potentially affected by transboundary impacts in Alaska from the Eskay project.<sup>2</sup> In September 2021, the EAO requested that SEITC provide confirmation from these seven member Tribes that SEITC is authorized to represent their interests in engagements with the EAO regarding Eskay. The EAO has yet to receive such confirmation from any of these seven Tribes but did receive confirmation from three other member Tribes in late 2021.

### Claims to Section 35 Rights

As SEITC has noted, the Supreme Court of Canada in *R v Desautel* found that the "Aboriginal peoples of Canada" who hold Section 35 rights are the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact, and this may include Aboriginal groups that are now outside Canada.<sup>3</sup>

In September 2021, SEITC's first letter to the EAO respecting the Eskay EA advised that SEITC would like to seek recognition of Section 35 rights. Since then, the EAO has engaged with SEITC regularly to seek to better understand SEITC's assertion of Section 35 rights on behalf of its member Tribes.

As a result of this engagement, I understand that SEITC is seeking status as a "participating Indigenous nation" in the Eskay EA on the basis that its member Tribes' are successors to Tlingit, Haida and Tsimshian Nations whose territories at the time of European contact included lands within British Columbia (B.C.), such as the Unuk River watershed, that are under consideration in the effects analysis of the Eskay project. SEITC asserts that its member Tribes' hold Section 35 rights as successors to these nations and that the Eskay project has the potential to adversely affect these rights, including impacts to traditional and subsistence fishing; legal, spiritual, and cultural practices; transmission of traditional culture, knowledge and law; and employment and economic opportunities.

In support of this assertion, SEITC has stated there is much evidence that Indigenous peoples now residing in southeast Alaska had territories extending into B.C., including oral history that the upper Unuk watershed was the location they took refuge in during the time of the last glacial advance. SEITC has also indicated that many citizens of SEITC member Tribes have family and kinship ties with the Tlingit, Haida and Tsimshian Nations in Canada and share a common history, language, and culture.

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<sup>2</sup> Craig Tribal Association, Hydaburg Cooperative Association, Ketchikan Indian Community, Klawock Cooperative Association, Metlakatla Indian Community, Organized Village of Kasaan, and the Organized Village of Saxman.

<sup>3</sup> *R v Desautel*, 2021 SCC 17, at para 31.

Despite repeated requests over the past year, the EAO has yet to receive the evidence that SEITC states would support its assertion of representing modern-day successors of an Aboriginal society that occupied Canada at the time of contact that gives rise to the asserted Section 35 rights. As a result, after considering the available information, my view is that SEITC has not provided sufficient information to support that they represent a modern-day successor of an Aboriginal society that occupied Canada at the time of contact and, as such, has not asserted a credible claim to Section 35 rights in relation to Eskay.

The EAO has consistently communicated that we are open to receiving further information that could support SEITC's assertion of Section 35 rights in B.C. In that regard, the EAO's previous correspondence requested further information from SEITC, including: confirmation of which of its member Tribes assert Section 35 rights; confirmation that those member Tribes have authorized SEITC to represent them for the purposes of any consultation on potential adverse impacts to those rights; the geographic extent of those asserted rights; the specific nature of those Section 35 rights that may be impacted by the proposed project; and which Indigenous groups present in B.C. pre-contact these claims are based on. The EAO suggested that examples of helpful information would include descriptions of connections between SEITC's member Tribes and the historic groups in B.C.; evidence of activities that took place before contact in the relevant areas of B.C.; and any available ethnohistoric information related to those areas.

## **DETERMINATION**

In light of the lack of confirmation from the seven member Tribes that SEITC represents them in relation to the Eskay EA and my finding that SEITC has not provided sufficient information to support that they represent a modern-day successor of an Aboriginal society that occupied Canada at the time of contact and, as such, has not asserted a credible claim to Section 35 rights in relation to Eskay, I have determined under Section 14(2) of the Act that there is no reasonable possibility that SEITC or its Section 35 rights will be adversely affected by the project.

In making this determination, I have considered that US-based Indigenous groups that have not made credible assertions of Section 35 rights are not owed obligations under the common law duty to consult and accommodate that would be fulfilled by the consensus-seeking opportunities provided to participating Indigenous nations under the Act, even if those US-based Indigenous groups may be subject to transboundary impacts in the US from the proposed project. Further, the purposes of the EAO, as set out on Section 2(2)(b) of the Act, include doing the following in carrying out its responsibilities under the Act: (i) promote sustainability by protecting the environment and fostering a sound economy and the well-being of British Columbians and their

communities; and (ii) support reconciliation with Indigenous peoples in B.C. including by acknowledging Indigenous peoples' Section 35 rights. Considering the scheme of the Act, I interpret the wording "Indigenous nation or its rights recognized and affirmed by Section 35 of the *Constitution Act, 1982*" within Section 14(2) as indicating that "Indigenous nation" in that section means an Indigenous nation with a credible claim to Section 35 rights in B.C.

From our meeting on November 17, 2022, we understand that SEITC expects to be able to provide additional information by December 31 that would support its assertion of Section 35 rights on behalf of its member Tribes. I would like to acknowledge the effort that SEITC is making to gather the requested information from its member Tribes and appreciate that these efforts take time. I may reconsider this determination under Section 14(2) and the EAO can adjust our engagement approach as needed should SEITC or its member Tribes provide additional supporting information.

As previously communicated, I would like to reiterate that the EA is not a rights-determining process as, in Canada, rights are established by the courts or by treaties between Indigenous nations and the Crown. However, information provided by SEITC will be considered appropriately and will inform B.C.'s assessment of whether the duty to consult and accommodate is triggered in relation to SEITC and its member Tribes. During our meeting SEITC indicated that it would like to initiate discussions with the appropriate provincial and federal agencies in relation establishment of Section 35 rights in B.C. and Canada. In support of this request, the EAO will follow up with SEITC and provide appropriate contacts.

## **FURTHER ENGAGEMENT**

While the result of my determination under Section 14(2) of the Act is that SEITC is not considered a "participating Indigenous nation", the EAO intends to continue its active engagement approach with SEITC that has included similar opportunities to provide input as other Indigenous nations. As was discussed during our recent meeting, I have instructed staff to explore the creation of an Alaska Tribal Transboundary Advisory Committee (ATTAC). I am of the view that this forum will assist SEITC and the seven member Tribes in your active and ongoing participation in the Eskay EA.

Once again, should SEITC or its member Tribes provide additional supporting information, we would consider any appropriate adjustments to our current engagement approach.

As communicated in previous correspondence, the EAO continues to strongly recommend that any information provided by SEITC about your interests in the project area also be shared with the Tahltan Central Government (TCG). In order to maintain transparency, the EAO will seek SEITC's views prior to sharing any SEITC information with the TCG in relation to the Eskay EA.

If you have any questions or require further information, please reach out to David Grace at 778-698-9310 or [David.Grace@gov.bc.ca](mailto:David.Grace@gov.bc.ca), or to Breanna Merrigan at 778 698-9474 or [Breanna.Merrigan@gov.bc.ca](mailto:Breanna.Merrigan@gov.bc.ca).

Yours truly,



Elenore Arend  
Chief Executive Assessment Officer  
Environmental Assessment Office

cc: Guy Archibald  
Executive Director  
SEITC  
[garch570@gmail.com](mailto:garch570@gmail.com)

Christie Jamieson  
Assistant Executive Director  
SEITC  
[christiejamieson@seitc.org](mailto:christiejamieson@seitc.org)

Breanna Merrigan  
Project Assessment Director  
Environmental Assessment Office  
[breanna.merrigan@gov.bc.ca](mailto:breanna.merrigan@gov.bc.ca)

David Grace  
Project Assessment Director  
Environmental Assessment Office  
[david.grace@gov.bc.ca](mailto:david.grace@gov.bc.ca)

Katherine Zmuda  
Project Manager  
Pacific and Yukon Region, Impact Assessment Agency of Canada  
[katherine.zmuda@iaac-aeic.gc.ca](mailto:katherine.zmuda@iaac-aeic.gc.ca)



# APPENDIX 8

Letter from Elenore Arend, Chief Exec. Assessment Officer, B.C. EAO,  
to Robert Sanderson Jr., Chair, SEITC, Reference: 393180  
(Nov. 7, 2022)



File: 30200-20/ESKM-04-01

Reference: 393180

November 7, 2022

**SENT VIA EMAIL**

Robert Sanderson Jr.  
Chair  
Southeast Alaska Indigenous Transboundary Commission  
PO Box 20841  
Juneau, Alaska 99802  
[haida2009@gmail.com](mailto:haida2009@gmail.com)

Dear Robert Sanderson Jr.:

Thank you for your letter of September 23, 2022, to the Honourable Premier John Horgan in relation to the Southeast Alaska Indigenous Transboundary Commission's (SEITC) participation in the Environmental Assessment (EA) process for the Eskay Creek Revitalization Project (Eskay). As the Chief Executive Assessment Officer (CEAO) under the British Columbia (B.C.) *Environmental Assessment Act, 2018* (the Act), I have been asked to respond on behalf of Premier Horgan. I would like to summarize my understanding of our engagement to date and to set out SEITC's opportunity to be heard under Section 14(2) of the Act.

**SEITC Engagement in the Eskay EA Process**

First, I would like to acknowledge SEITC's ongoing and active engagement with the Environmental Assessment Office (EAO) on the Eskay EA. I understand from my staff that SEITC and the EAO have established regular standing meetings to facilitate SEITC's continued direct engagement in the Eskay EA process on behalf of its member Tribes. I understand that SEITC has received all available information with respect to the assessment to date, and that any comments provided by SETIC have been responded to by the EAO and the proponent.

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The EAO intends to continue engaging with SEITC throughout the EA and will consider any adjustments to the EAO's engagement with SEITC that may be appropriate based upon additional information that SEITC provides.

Over the past several months, and in consideration of previous indications from SEITC that you may want to be a participating Indigenous nation for the Eskay Creek EA, the EAO's June 16, 2022, letter communicated the reasons that we do not envision engaging SEITC as a participating Indigenous nation at this time. The EAO has consistently communicated that we are open to receiving further information that clarifies any assertion of rights under Section 35 of the *Constitution Act*, 1982 and SEITC's interests in the project area and downstream transboundary watersheds and once this information is received, we would consider any appropriate adjustments to our current engagement approach.

The EAO's previous correspondence (October 1, 2021, letter; October 15, 25 and 29, 2021, emails; and June 16, 2022, letter) requested further information from SEITC related to the assertion of Section 35 rights in B.C. including: confirmation of which Tribes assert Section 35 rights; the geographic extent of those assertions; the specific nature of Section 35 rights that may be impacted by the proposed project; and which Indigenous group present in B.C. pre-contact these claims are based on (as per the 2021 Supreme Court of Canada decision *R. v. Desautel*). The EAO suggested that examples of helpful information would include a description of connections between the Tribes and ancestral groups in B.C., descriptions of activities that took place before contact in the areas of B.C. subject to the assertions of rights that may be potentially impacted by a proposed project, and any available ethnohistoric information related to those areas. The EAO has also requested and is awaiting receipt of confirmation from the member Tribes that SEITC is authorized to represent their interests in engagements with the EAO.

I am aware that several months ago, SEITC advised the EAO that it is in the "*process of submitting information concerning the recognized territories of the clans that existed in [the] region prior to European contact*<sup>1</sup>." While SEITC's September 23, 2022, letter does describe some of the requested information in general terms, in my view it has not provided sufficient information to support SEITC's assertion of Section 35 rights.

While the Eskay Creek EA is in the early stages of the process, the information provided by Skeena Resources Ltd (Skeena) to date indicates that potential changes to the environment resulting from the project are not anticipated outside of Canada.

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<sup>1</sup> April 20, 2022 letter from Guy Archibald to David Grace.

As the EA progresses, the EAO will continue to work with Skeena, EA participants and Indigenous nations to understand the nature and extent of potential effects, including transboundary effects.

### **Opportunity To Be Heard**

As your September 23, 2022, letter to Premier Horgan formally requested to be a participating Indigenous nation in respect of the Eskay EA process, I am writing to provide you an opportunity to be heard, which is a required step prior to making a determination under Section 14(2) of the Act that there is no reasonable possibility an Indigenous nation or its Section 35 rights will be adversely affected by a project.

I would like to highlight that the EAO's [Early Engagement Policy](#) (which I understand has previously been shared with SEITC) describes the following factors that the CEAO takes into consideration, but is not limited by, when reviewing an Indigenous nation's notice to be a participating Indigenous nation:

1. The entity represents an Indigenous nation with rights under Section 35 of the *Constitution Act, 1982*;
2. The Indigenous nation must have a governance role in relation to the area potentially affected by the proposed project; and
3. There is a reasonable possibility that the Indigenous nation or its Section 35 rights will be adversely affected by the proposed project.

To inform my consideration of this matter, I am requesting that SEITC provide its written response to this opportunity to be heard, including information to clarify your assertion of Section 35 rights and potential impacts to these rights, by November 18, 2022. Your response will be very helpful in informing my decision and if I decide to make a determination under Section 14(2) of the Act, I will set out my reasons for the determination in a written rationale to SEITC.

In the meantime, I would also propose that we schedule a meeting as soon as possible to provide you with the opportunity to discuss my letter and the next steps I have proposed. I have asked David Grace, Project Assessment Director to reach out to schedule this meeting.

...4

I look forward to hearing from you and welcome further discussions on the contents of my letter.

Yours truly,



Elenore Arend  
Chief Executive Assessment Officer &  
Associate Deputy Minister  
Environmental Assessment Office

cc: Guy Archibald  
Executive Director,  
SEITC  
[garch570@gmail.com](mailto:garch570@gmail.com)

Christie Jamieson  
Assistant Executive Director,  
SEITC  
[christiejamieson@seitc.org](mailto:christiejamieson@seitc.org)

Breanna Merrigan,  
Project Assessment Director,  
Environmental Assessment Office  
[breanna.merrigan@gov.bc.ca](mailto:breanna.merrigan@gov.bc.ca)

David Grace,  
Project Assessment Director,  
Environmental Assessment Office  
[david.grace@gov.bc.ca](mailto:david.grace@gov.bc.ca)

Katherine Zmuda,  
Project Manager,  
Pacific and Yukon Region, Impact Assessment Agency of Canada  
[katherine.zmuda@iaac-aeic.gc.ca](mailto:katherine.zmuda@iaac-aeic.gc.ca)

# APPENDIX 9

Skeena Resources, Eskay Creek Revitalization Alaska Tribal  
Transboundary Advisory Committee Engagement Plan (Jan. 3, 2024)





# **Eskay Creek Revitalization Alaska Tribal Transboundary Advisory Committee Engagement Plan**

January 3, 2024



# **Eskay Creek Revitalization Alaska Tribal Transboundary Advisory Committee Engagement Plan**

**Skeena Resources**  
Suite #2600, 1133 Melville Street  
Vancouver, BC V6E 4E5

January 3, 2024

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## ACRONYMS AND ABBREVIATIONS

Acronym / Abbreviation	Definition
ATTAC	Alaskan Tribal Transboundary Committee
ATTAC EP	Alaskan Tribal Transboundary Committee Engagement Plan
BC	British Columbia
BC EAO	BC Environmental Assessment Office
BC EAA	BC <i>Environmental Assessment Act</i> (2018)
GBA Plus	Gender Based Analysis Plus
Hybrid AIR	Hybrid Application Information Requirements
Project	Proposed Eskay Creek Revitalization Project
SEITC	Southeast Alaska Indigenous Transboundary Commission
Skeena Resources	Skeena Resources Ltd.
TCG	Tahltan Central Government

## COMPANY CONTACT INFORMATION

**Project Name:** Eskay Creek Revitalization Project

**Proponent:** Skeena Resources Limited  
Suite #2600, 1133 Melville Street  
Vancouver, BC V6E 4E5  
Phone: (604) 684-8725  
Fax: (604) 558-7695  
Website: [skeenaeskaycreek.com](http://skeenaeskaycreek.com)

**Chief Executive Officer:** Randy Reichert  
President & CEO  
Skeena Resources Limited  
Email: [info@skeenaresources.com](mailto:info@skeenaresources.com)  
Phone: (604) 684-8725

**Principal Contact for the  
Impact Assessment:** Nalaine Morin  
Vice President, Sustainability  
Skeena Resources Limited  
Email: [nmorin@skeenaresources.com](mailto:nmorin@skeenaresources.com)  
Phone: (778) 834-6292

## 1.0 INTRODUCTION

Skeena Resources Limited (Skeena Resources) is proposing the Eskay Creek Revitalization Project (the Project) to restart mining at the past-producing Eskay Creek Mine. The Project will be an open pit gold-silver mine in northwestern British Columbia (BC), within the territory<sup>1</sup> of the Tahltan Nation and the territory of the Tsetsaut Skii km Lax Ha (Figure 1). The southern portion of the concentrate haul route along Highway 37 near Meziadin Junction, and westward along Highway 37A to Stewart, passes through the Nass and Nass Wildlife Areas (as defined in the Nisga'a Final Agreement) of the Nisga'a Nation and the territory of the Gitanyow Nation. The closest local Métis chartered community, represented by the Métis Nation British Columbia, is in Terrace, BC (Figure 1).

The Project is subject to review under both the provincial *Environmental Assessment Act* (BC EAA; 2018) and the federal *Impact Assessment Act* (2019) and is undergoing an environmental assessment through a substituted process led by the BC Environmental Assessment Office (BC EAO) to meet both provincial and federal requirements. This document was prepared by Skeena Resources for the Eskay Creek Revitalization Project to support this process. The environmental assessment will include an assessment of Project effects, including proposed mitigations. Feedback from regulators, Indigenous Peoples, and public are considered throughout the assessment process.

Skeena Resources also requires consent from the Tahltan Central Government (TCG) as part of the assessment and decision-making process associated with the Tahltan Environmental Assessment Strategy Framework, as provided for in the agreement between TCG and the Province of BC under Section 7 of the *Declaration on the Rights of Indigenous Peoples Act* (2019; i.e., the Declaration Act Consent Decision-Making Agreement for Eskay Creek Project [Government of BC and TCG 2022]). In addition, Skeena Resources must satisfy the requirements under Chapter 10 of the Nisga'a Final Agreement between the Government of Canada, Nisga'a Lisims Government, and the Government of British Columbia (1999).

This document is the Project's Alaska Tribal Transboundary Advisory Committee Engagement Plan (ATTAC EP) as required by the Project's Assessment Plan issued by BC EAO (2023). The ATTAC EP summarizes Skeena Resources' plans to engage with ATTAC during the remaining phases of the assessment process. These engagements will inform the development of Skeena's Application for an Environmental Assessment Certificate (the Application), the Project design, and alternative means of carrying out the Project, mitigation, monitoring, and management plans.

Engagement with Indigenous Peoples may include activities that are typically delegated by the BC EAO to proponents in support of the government's duty to consult and accommodate Indigenous Nations whose interests may be adversely affected by the Project. The ATTAC EP does not include engagement activities that the BC EAO or federal Agency may undertake independently with ATTAC in relation to the Project.

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<sup>1</sup> As in the Hybrid Application Information Requirements, for the purposes of this document, "territory" is defined as the established or asserted traditional territories of Indigenous Nations, except in relation to the Nisga'a Nation, which refers to Nisga'a Lands, the Nass Area, and the Nass Wildlife Area as applicable.



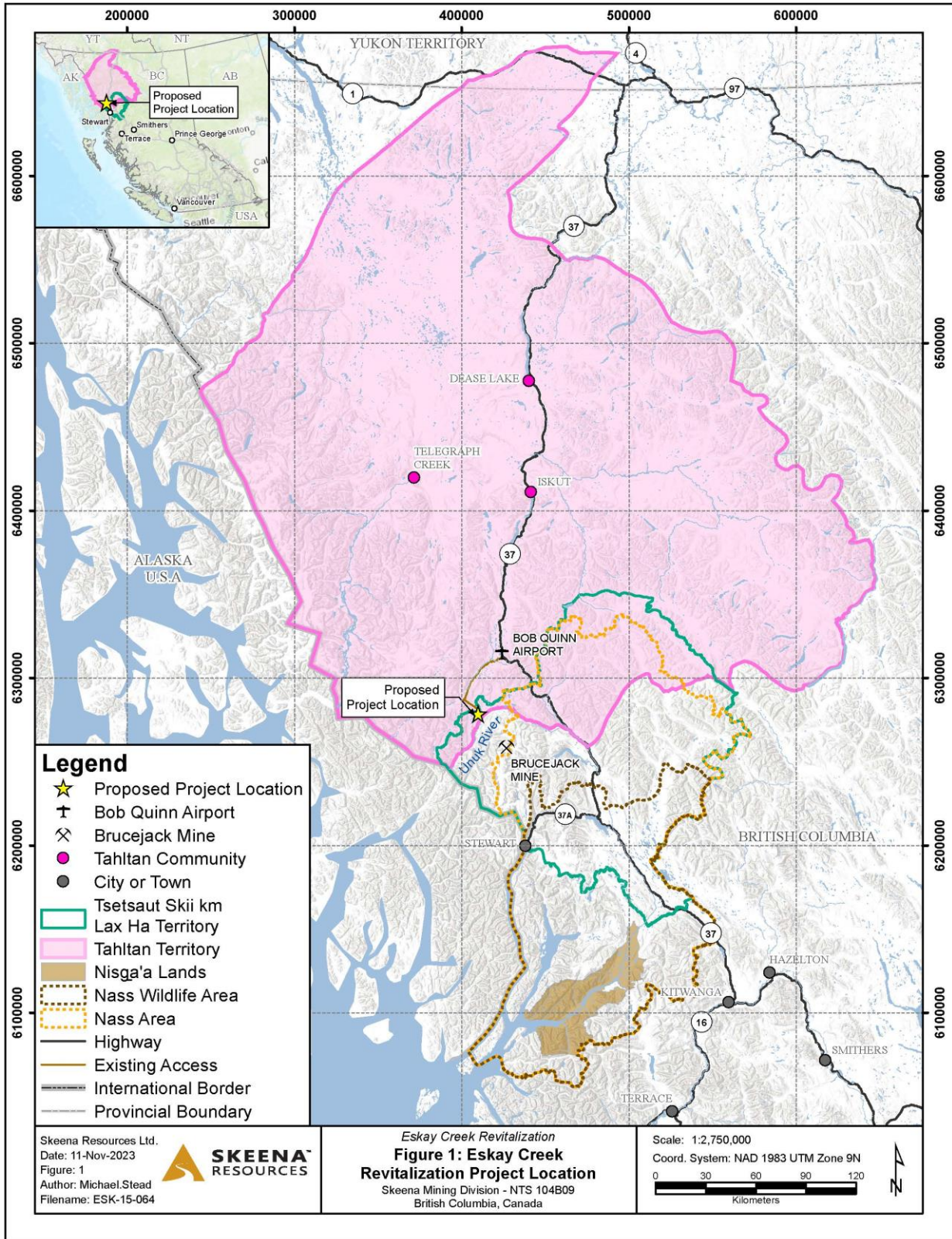


Figure 1 Eskay Creek Revitalization Project Location

## 2.0 PROJECT OVERVIEW

This section provides a brief description of the Project; a more detailed discussion can be found in the *Eskay Creek Revitalization – Detailed Project Description* (Skeena Resources 2022).

The Project will restart mining at the past-producing Eskay Creek Mine, which operated as an underground mine from 1994 to 2008. The Project will be an open pit gold-silver mine with an estimated total annual production of 3.0 Mt/year in Years 1-5 and up to 3.7 Mt/year in Years 6-9 (8,225 tpd to 10,140 tpd). Concentrate would be trucked along Highway 37 and Highway 37A to the Port of Stewart, 83 km south of the Project, for shipment to third -party smelters.

The Project will make use of existing facilities and infrastructure of the closed Eskay Creek Mine and will also require new infrastructure. The Project will involve construction, operation, decommissioning and closure of an open pit mine and mill operation, concentrate transport, and associated infrastructure. Once into the operations phase, the 2008 mine infrastructure will be decommissioned, as it will sit adjacent to the proposed open pit.

Project employment is anticipated to be approximately 5,088 person-years over the mine life of 14 years (2 years for construction, 9 years for operations, and 3 years for closure and reclamation).

Planning for the Project is anticipated to occur over a two- to three-year period, to be concurrent with the environmental assessment regulatory process preceding Project development, and to include completion of engineering studies, permitting, and engagement with communities, Indigenous Nations, and regulatory organizations.

Advanced exploration work, technical/bulk sample collection and additional land development at the mine site under existing permits and amendments over the next two years will also occur separately from the Project.

## 3.0 ENGAGEMENT PRINCIPLES, OBJECTIVES, AND METHODS

### 3.1 Principles and Objectives

Skeena Resources is committed to building and sustaining mutually beneficial and supportive relationships with the Indigenous Peoples, communities, and organizations that are being engaged on the Project. Throughout the engagement process, Skeena Resources will consider and adopt engagement approaches that will allow for meaningful and inclusive engagement on the Project.

Skeena Resources' overall approach to engagement will:

- Foster cooperation and understanding through transparent, honest, frequent, and timely plain language communication with the Indigenous Peoples, communities, and organizations that are being engaged on the Project to clearly communicate potential impacts, opportunities, and potential solutions associated with the proposed Project;
- Communicate proposed Project plans and activities openly and gather feedback; work to address any concerns including where possible, refining the proposed Project or developing mitigation measures;
- Meet the Indigenous consultation requirements under BC's environmental assessment process including public comment periods where feedback will be provided to the government and company; and
- Commit to incorporating principles of Gender Based Analysis Plus (GBA Plus) and work to mitigate barriers that limit participation and engagement from specific groups in the community.

Skeena Resources' overall objective for engagement with ATTAC is to build and maintain relationships through a transparent and responsive engagement process. Where Indigenous Knowledge is provided through engagement with ATTAC, it will be incorporated during the development of the Application, where appropriate. Other objectives include facilitating timely access to Project information; providing timely responses and relevant supporting information to address concerns and interests; and understanding and incorporating local knowledge.

### 3.2 Methods

To support the principles and objectives of engagement outlined in Section 3.1, Skeena Resources has and will continue to use a diversity of methods to engage with ATTAC. Depending on the preferences of ATTAC and direction provided by EAO, engagement methods may include those presented in Table 3.2-1.

*Table 3.2-1: Potential Engagement Methods with ATTAC*

Method	Description
Community Presentations	Skeena Resources will present updates on the Project, answer questions, and receive feedback in community presentations. These may be in-person or virtual and include BC EAO open houses.

Method	Description
Meetings with ATTAC	Skeena Resources will participate in ATTAC meetings, when invited, to support information sharing.
Letters, Notices, and Newsletters	Skeena Resources will issue notices, including letters, newsletters, advertisements, etc. (digital or printed) to provide timely Project updates and/or summaries of recent community engagements.
Social Media	Skeena Resources will use social media—such as Facebook, X (formerly Twitter), Instagram—to share Project updates and advertise for Project engagement events. Other Project and educational materials may also be disseminated through social media, such as brochures, information sheets, Q&A documents, maps, and figures, advertisements, videos, etc.
Project Website	Skeena Resources will maintain <a href="https://skeenaeskaycreek.com">https://skeenaeskaycreek.com</a> as a community engagement focused website with information about the Project and upcoming events. Other Project and educational materials may also be disseminated through social media, such as brochures, information sheets, Q&A documents, maps, and figures, advertisements, videos, etc.
Community Relations Offices	Skeena Resources will keep its community relations offices open for visits during regular business hours.
Phone and Email	Phone and email are used regularly by Skeena Resources to engage with key contacts including and beyond scheduled engagements. <a href="mailto:engage.eskay@skeenaresources.com">engage.eskay@skeenaresources.com</a> and the phone number 250-771-3074 have been established to receive questions and feedback at any time.
Application	Skeena Resources will share the Application. The level of engagement will be discussed jointly between Skeena Resources, ATTAC, and BC EAO.

## 4.0 ATTAC ENGAGEMENT

### 4.1 ATTAC

BC EAO has identified seven U.S. Tribes with the potential to be affected by the Eskay Creek Revitalization Project based on their proximity to the Unuk watershed, including Craig Tribal Association, Hydaburg Cooperative Association, Ketchikan Indian Community, Klawock Association, Metlakatla Indian Community, Organized Village of Kasaan, and Organized Village of Saxman. The Southeast Alaska Indigenous Transboundary Commission (SEITC) is a consortium of 15 sovereign Alaskan Tribes (member Tribes) and is representing its member Tribes in the Eskay Creek environmental assessment process, including the seven Alaskan Tribes identified by the BC EAO. BC EAO has acknowledged SEITC's role of representing the seven Alaskan Tribes in the Project's environmental assessment process.

SEITC and the seven member Tribes are represented in the assessment process through the Alaska Tribal Transboundary Advisory Committee (ATTAC), established under Section 22 of the BC EAA. A terms of reference document for ATTAC was issued by BC EAO on April 14, 2023 (BC EAO 2023).

The goals of the ATTAC are to:

- Support information sharing with SEITC and the seven member Tribes in relation to the environmental assessment process, and between SEITC and the seven member Tribes and environmental assessment participants as needed;
- Foster learning about the environmental assessment process and Eskay Creek; and
- Support SEITC and the seven member Tribes in engaging in the environmental assessment process and providing advice on the potential transboundary effects (both positive and negative) of Eskay Creek on the seven potentially affected member Tribes in Southeast Alaska and potential mitigation or enhancement measures, as applicable.

### 4.2 Engagement to Date with ATTAC

- **September 2021** – Beginning of engagement between BC EAO and SEITC on the Project;
- **May 2022** – Initial outreach to the seven Alaska Tribes to provide further information about the Project;
- **October 2022** - Outreach to the seven Alaska Tribes with offer to meet on the Project;
- **April and June 2022** - SEITC feedback on Skeena Resources' Detailed Project Description drafts;
- **July and August 2022** - SEITC comments on the draft Hybrid Application Information Requirements received and Skeena Resources' responses provided;
- **May 2023** - Skeena Resources' outreach to SEITC and the seven Alaskan Tribes with offer to meet and discuss the ATTAC EP;

- **July 2023** – SEITC request that ongoing communications include SEITC as well as individual Tribes, and request for in-person visits by Skeena Resources;
- **September 2023** – Skeena Resources’ response to SEITC’s July 2023 request that in-person visits would not be possible until January 2024, and request for guidance to establish virtual venues to introduce the Project in the interim;
- **October 2023** – Skeena Resources’ outreach to SEITC and the seven Alaskan Tribes seeking feedback on the draft ATTAC EP.
- **November 2023** – SEITC’s feedback on Skeena Resources’ draft ATTAC EP; and
- **December 2023** – Skeena Resources updates the ATTAC EP and responds to SEITC’s November 2023 feedback.

### 4.3 Topics of Interest Raised by ATTAC

Table 4.3-1 is a summary of interests and concerns that have been raised by ATTAC and its members to date. Skeena Resources is committed to working with ATTAC on addressing the interests and concerns related to the Project.

Skeena Resources acknowledges this is not a complete list of ATTAC’s interests and concerns and will continue to engage with ATTAC, including on potential Project effects, mitigations, and related supporting information.

Table 4.3-1: Summary of ATTAC Interests, Concerns and Topics Raised

Category	Summary of Interests, Concerns, and Topics
Indigenous Peoples’ Rights	<ul style="list-style-type: none"> <li>• Interest in SEITC being considered a Participating Indigenous Nation and member of the Technical Advisory Committee, and greater inclusion of Alaska Tribes’ interests in the environmental assessment.</li> <li>• Interest in Alaska Tribes contributing to data to inform baselines and assessments of potential impacts and cumulative effects.</li> <li>• Level of Indigenous involvement in Canadian mining and mine effects on transboundary waterways.</li> <li>• Interest in expanding the area of assessment into Alaska to include the Unuk River all the way to the marine waters of southeast Alaska.</li> </ul>
Benefits Sharing	<ul style="list-style-type: none"> <li>• Equitable benefits sharing.</li> </ul>
Accidents, Malfunctions and Public Safety	<ul style="list-style-type: none"> <li>• Tailings waste storage facility design and stability.</li> <li>• Active treatment of discharge water before release into the environment.</li> <li>• Adequate understanding of groundwater hydrology and connectivity to surface waters at the Project site.</li> </ul>
Climate Change and Greenhouse Gas Emissions	<ul style="list-style-type: none"> <li>• Request for an assessment of climate risks to water and implications to tailings and waste rock storage.</li> <li>• Request that climate change uncertainty be considered in planning and risk analyses.</li> </ul>
Air Quality	<ul style="list-style-type: none"> <li>• Potential transboundary effects on air.</li> </ul>
Water	<ul style="list-style-type: none"> <li>• Potential for contaminated water in tailings waste storage facilities.</li> <li>• Groundwater connectedness between waste facilities and nearby surface waters.</li> </ul>



	<ul style="list-style-type: none"> <li>• Potential transboundary effects on water, including water quality and flows (i.e., in the Unuk River and watershed).</li> <li>• Absence of discharge water quality data from mining activities at the Project site from 1998 to 2008.</li> <li>• Sufficiency of baseline data to reflect conditions prior to mining.</li> <li>• Final reclamation and closure conditions to reflect conditions prior to mining at the Project site.</li> </ul>
Species at Risk, Wildlife, and their habitat	<ul style="list-style-type: none"> <li>• Potential transboundary effects on wildlife.</li> </ul>
Fish and Fish Habitat	<ul style="list-style-type: none"> <li>• Potential effects to downstream salmon and hooligan (eulachon) fish populations, including changes over time.</li> </ul>
Assessment Approach	<ul style="list-style-type: none"> <li>• Interest in the assessment considering longer temporal scales because the mine life is likely to be extended.</li> <li>• Interest in the assessment's temporal scope to include the period after complete closure and reclamation and for as long as any structure may have to be maintained to prevent failure (e.g., tailings dams).</li> </ul>
Cumulative Effects	<ul style="list-style-type: none"> <li>• Project's potential contributions to cumulative transboundary effects on water, aquatic resources, and use by Alaska Tribes.</li> </ul>
Alternative Means of Carrying out the Project	<ul style="list-style-type: none"> <li>• Interest in an evaluation and use of dry-stack tailings disposal compared to wet tailings.</li> </ul>

#### 4.4 Planned Engagement Activities with ATTAC

In the remaining phases of the environmental assessment, Skeena Resources will continue to engage with ATTAC by providing information and opportunities for ATTAC members and representatives to give input and feedback on the Project. Skeena Resources is committed to attending and participate in ATTAC meetings as an observer or to provide information on the Project and the assessment where appropriate and as directed by the BC EAO per the ATTAC terms of reference (BC EAO 2023).

Skeena Resources' planned engagement with ATTAC is shown in Table 4.4-1. The engagement plan is tailored to Skeena Resources' understanding of ATTAC's preferences (i.e., timing and means of communication) and BC EAO guidance.

Table 4.4-1: Planned Engagement with ATTAC

Method	Description	Timing
Community Presentations	Skeena Resources will present updates on the Project, answer questions, and receive feedback in community presentations. These may be in-person or virtual and include BC EAO open houses.	<ul style="list-style-type: none"> <li>• Jointly determined by Skeena Resources and ATTAC</li> <li>• SEITC has indicated that it prefers initial in-person community presentations to gather pertinent information. Skeena Resources has offered to provide in-person community presentations whenever they can be scheduled.</li> </ul>
Meetings with ATTAC	Skeena Resources will participate in ATTAC meetings, when invited, to support information sharing.	<ul style="list-style-type: none"> <li>• Jointly determined by BC EAO and ATTAC</li> </ul>

Method	Description	Timing
Letters, Notices, and Newsletters	Skeena Resources will issue notices, including letters, newsletters, advertisements, etc. (digital or printed) to provide timely Project updates and/or summaries of recent community engagements.	<ul style="list-style-type: none"> <li>Quarterly</li> </ul>
Social Media	Skeena Resources will use social media—such as Facebook, X (formerly Twitter), Instagram—to share Project updates and advertise for Project engagement events. Other Project and educational materials may also be disseminated through social media, such as brochures, information sheets, Q&A documents, maps, and figures, advertisements, videos, etc.	<ul style="list-style-type: none"> <li>Ongoing and as updates become available</li> </ul>
Project Website	Skeena Resources will maintain <a href="https://skeenaeskaycreek.com">https://skeenaeskaycreek.com</a> as a community engagement focused website with information about the Project and upcoming events. Other Project and educational materials may also be disseminated through the website, such as brochures, information sheets, Q&A documents, maps, and figures, advertisements, videos, etc.	<ul style="list-style-type: none"> <li>Ongoing and as updates become available</li> </ul>
Community Relations Offices	Skeena Resources will keep its community relations offices open for visits during regular business hours.	<ul style="list-style-type: none"> <li>Ongoing</li> </ul>
Phone and Email	Skeena Resources will use phone and email to engage with key contacts including and beyond scheduled engagements. <a href="mailto:engage.eskay@skeenaresources.com">engage.eskay@skeenaresources.com</a> and the phone number 250-771-3074 have been established to receive questions and feedback at any time.	<ul style="list-style-type: none"> <li>Ongoing</li> </ul>
Application	The Application will be shared with ATTAC.	<ul style="list-style-type: none"> <li>Upon drafting of the Application and Revised Application</li> </ul>

## **5.0 DOCUMENTATION AND REPORTING**

Skeena Resources has established a system to track and record communications, engagement activities, and issues and comments raised by Indigenous Nations, government agencies, local governments, tenure holders and the public. Skeena Resources will use this system to maintain engagement records throughout the Application Development and Review phase of the environmental assessment process. Records will include engagement date and purpose, engagement methods, participants, issues raised and Skeena Resources' responses and actions, where relevant. Supporting materials such as agendas, presentations, and meeting minutes will be appended to the records. See Appendix A for a template of the tracking table which will be used for record keeping.

## 6.0 REFERENCES

2019. Canadian *Impact Assessment Act*, S.C. 2019, c. 28, s. 1.

2018. *Environmental Assessment Act*, SBC 2018, C. 51.

British Columbia Environmental Assessment Office. 2022. *Alaskan Tribal Transboundary Advisory Committee Terms of Reference*, at:  
<https://projects.eao.gov.bc.ca/api/public/document/6439b9719b42b6002224429/download/Eskay%20Creek%20-%20ATTAC%20Terms%20of%20Reference%20-%2020230414.pdf> (accessed August 15, 2023).

British Columbia Environmental Assessment Office. 2023. *Assessment Plan – Eskay Creek Revitalization Project*, at:  
<https://www.projects.eao.gov.bc.ca/api/public/document/6440149a41dd3c0022018a56/download/Eskay%20Creek%20-%20Assessment%20Plan%20-%2020230418.pdf> (accessed July 28, 2023).

Government of BC and Tahltan Central Government. 2022. Declaration Act Consent Decision-Making Agreement for Eskay Creek Project. Available at:  
[https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/declaration\\_act\\_consent\\_decision-making\\_agreement\\_for\\_eskay\\_creek\\_project.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/declaration_act_consent_decision-making_agreement_for_eskay_creek_project.pdf) (accessed July 2023).

Government of Canada, Nisga'a Nation, and Government of British Columbia. 1999. Nisga'a Final Agreement. Available at:  
<https://www.nisgaanation.ca/sites/default/files/Nisga%27a%20Final%20Agreement%20-%20Effective%20Date.PDF> (accessed July 2023).

Skeena Resources. 2022. *Eskay Creek Revitalization Project – Detailed Project Description*. Available at:  
<https://www.projects.eao.gov.bc.ca/api/public/document/62f6b77d278bb60022579eac/download/2022.08.10%20Eskay%20Creek%20Revitalization%20Final%20DPD.pdf> (accessed July 2023).

## Appendix A: Template for Engagement and Comment Tracking

ID #	Stage	Subject - Topic	Comment/Issue Date	Application/Document	Participant Issues, Description or Comment	Response Date	Proponent Response

# APPENDIX 10

Letter from Robert Sanderson Jr., Chair, SEITC, to Eleanore Arend,  
Chief Exec. Assessment Officer, B.C. EAO (Jan. 30, 2024)





SOUTHEAST ALASKA INDIGENOUS TRANSBOUNDARY COMMISSION

January 30, 2024

BY ELECTRONIC MAIL

Elenore Arend  
Chief Executive Assessment Officer  
Environmental Assessment Office  
Government of British Columbia and Canada  
E: Elenore.Arend@gov.bc.ca

Chief Executive Assessment Officer Arend,

The Southeast Alaska Indigenous Transboundary Commission (“SEITC”) and the Federally recognized Tribal governments of Craig Tribal Association, Hydaburg Cooperative Association, Ketchikan Indian Community, Klawock Cooperative Association, Metlakatla Indian Community, Organized Village of Kasaan, and Organized Village of Saxman formally request recognition as “Aboriginal Peoples of Canada” under s. 35(1) of the *Constitution Act 1982* with constitutionally protected Aboriginal rights in the Canadian section of the Unuk River watershed located in Northwestern British Columbia. As we are Aboriginal people(s) of Canada, the Crown has an obligation to engage in deep consultation and, if necessary, seek accommodation with us concerning the Eskay Creek Revitalization Project (“Eskay Creek Project” or the “Project”). As such, we request recognition as a “participating Indigenous nation” for the Project under the *Environmental Assessment Act, 2018*.<sup>1</sup> Finally, we request that you engage with us in good faith, to negotiate a consent-based agreement with us under the *Declaration on the Rights of Indigenous Peoples Act*.

As we outline below, and in the attached supporting evidence, the Unuk River watershed from the marine waters to the headwaters was the recognized property of the Tèikwèidi Tlingit Clan of the Sàanyàa K̄wáan in the 18<sup>th</sup> century at the time of the first European contact. The Federally recognized Tribal governments listed above are the modern-day successors to the Tèikwèidi Tlingit that occupied and exercised rights throughout the entirety of the watershed and continues to form the basis of our past

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<sup>1</sup> Environmental Assessment Act, S.B.C. 2018, c. 51, § 14.

and present cultural identity.

Ethnographically, SEITC member Tribes are Tlingit, Tsimshian, and Haida – Indigenous peoples whom both British Columbia and Canada recognize as Aboriginal peoples of Canada and to whom the Crown owes a duty to consult.<sup>2</sup>

The territory is now the subject of an action by the government of British Columbia (the Project) that will adversely affect our Tribal citizens' existing Aboriginal rights, including endangering our ability to practice our culture. Consultation at the deep end of the spectrum is required.

To support our requests, we attach the following documents:

- I. Chuck Smythe, Sealaska Heritage Institute, *The Traditional Ownership of Jòonax (Unuk River) by the Teikwèidi Tlingit Clan of the Sàanyàa Kwáan Since Ancient Time* (Jan. 11, 2024) (“SHI Report”) (Appendix I).

Sealaska Heritage Institute (“SHI”) is an Alaska Native non-profit organization that works to promote and perpetuate Tlingit, Haida, and Tsimshian cultures in Southeast Alaska and enhance cross-cultural understanding. At the request of SEITC, SHI undertook research to understand the extent of Tlingit territorial claims to and occupation and use of the Unuk River, which is now a part of British Columbia, up to the time of European contact. SHI’s analysis is based on extensive archival collections and other research materials that allow it to determine the temporal and spatial extent of traditional Tlingit ownership, occupancy, and use of the Unuk River since time immemorial. These archival collections and research materials contain audio recordings of interviews with Tlingit elders related to the history of clans along the Unuk River.

- II. Testimonies: Unuk River (Appendix II).

Willard Jackson, Sr., Teikweidi Brown Bear, Tongass Tribe, *Elder, Knowledge Holder*, Ketchikan Indian Community, AK (Mar. 15, 2023),

Louis Wagner, Jr., Ts’msyen and Lingít of the Wolf/Eagle moiety, Teikweidi (Brown bear clan), Xóots Koowu Hít (Brown bear’s den house) of Sanyaa Kwáan (Cape Fox), *Elder, Knowledge Holder, Fisherman*, Metlakatla Indian Community, Metlakatla, AK (Sept. 26, 2018 and May 15, 2023).

Cindy Wagner, Ts’msyen and Haida of the Niisk’iyaa Laxgibuu (wolf clan/phratry) of the Gitzaxlaaʔ, one of nine Allied Tribes of Lax Kw’alaams, within the Ecstall watershed near Port Simpson, B.C., *Elder, Knowledge Holder*, Metlakatla Indian Community, Metlakatla, AK (Nov. 24, 2023).

Tazia W’ally Sthaathi Ta Wagner, Ts’msyen, Lingít, Haida, and Athabaskan of the Niisk’iyaa Laxgibuu (wolf clan/phratry) of the Gitzaxlaaʔ, one of nine

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<sup>2</sup> See Union of BC Indian Chiefs, *Sovereign Indigenous Nations Territorial Boundaries* (June 1993) (Appendix VI.2).

Allied Tribes of Lax Kw'alaams, within the Ecstall watershed near Port Simpson, B.C., *Knowledge Holder*, Metlakatla Indian Community, Metlakatla, AK (May 15, 2023).

Lee Wagner, Ts'msyen, Lingít, and Haida of the Niisk'iyaa Laxgibuu (wolf clan/phratry) of the Gitzaxłaał, one of nine Allied Tribes of Lax Kw'alaams, within the Ecstall watershed near Port Simpson, B.C., *Knowledge Holder*, Metlakatla Indian Community, Metlakatla, AK (Nov. 21, 2023).

Sylvia Banie, Saanya Kwaan, *Elder, Knowledge Holder*, Organized Village of Saxman, Saxman, AK (July 31, 2023).

Marty Perez, Jr, Saanya Kwaan, *Knowledge Holder*, Metlakatla Indian Community, Metlakatla, AK (Jan. 9, 2024)

Tléix Tináa, Shaanax Hit Teikweidi Taant'a Kwáan, *Knowledge Holder*, Metlakatla Indian Community, Metlakatla, AK (Dec. 23, 2023).

Irene Dundas, *Cultural Resources Coordinator*, Ketchikan Indian Community (July 28, 2020).

Mrs. Annie Haldane, Saxman, AK (June 25, 1946).

Frank Howard Sr., Saxman/Klukwan, AK (June 26, 1946).

Charles Johnson, Saxman, AK (June 26, 1946).

Daniel Brown, *Clan Leader of the Teikweidi*, The Man Who Married a Bear (Feb. 17, 2023).

Joseph Johns (1946).

- III. Ishmael Hope, Khaagwáask' Unuk River History: Commentary on Oral History by Henry and Bessie Denny (Dec. 2023) ("Hope Commentary") (Appendix III).
- IV. Southeast Alaska Indigenous Transboundary Commission, Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of the Members of the Southeast Alaska Indigenous Transboundary Commission Resulting from Hard-Rock Mining in British Columbia, Canada (July 14, 2023) (excerpts) (Appendix IV).
- V. Resolutions or letters from Tribal governments (Appendix V):
  1. Craig Tribal Association, Letter (Nov. 3, 2021).
  2. Hydaburg Cooperative Association, Resolution No. 062-2022 (Aug. 26, 2022).
  3. Ketchikan Indian Community, Resolution KIC 22-90 (Dec. 19, 2022).
  4. Klawock Cooperative Association, Resolution No. 22-21 (Dec. 12, 2022).
  5. Metlakatla Indian Community, Resolution #22-50 (Jan. 14, 2020).

6. Organized Village of Kasaan, Resolution OVK 22-07-006 (July 7, 2022).
7. Organized Village of Saxman, Resolution #2023.01.259 (Jan. 23, 2023).

## VI. Maps (Appendix VI).

1. *Sàanyàa Kwáan* Traditional Territory in Unuk River Watershed (*Jòonax*) (Jan. 23, 2024).
2. Union of BC Indian Chiefs, Sovereign Indigenous Nations Territorial Boundaries (June 1993).

As the Project's environmental review has already begun, we consider our submission urgent and request that you make a decision respecting our requests within 30 days of receipt. We also request that you keep this letter and attached materials confidential. Please do not distribute them to anyone outside your agency without our consent.

## BACKGROUND

The Eskay Creek Project is located in the Unuk River watershed approximately 23 miles from the Alaska/British Columbia border. The project proponent, Skeena Resources, commenced the mine authorization through the British Columbia Environmental Assessment Office ("EAO"), as well as other agencies, on or around July 2021. On August 3, 2021, each Tribal government and SEITC received notice from the EAO that Skeena Resources had released an Initial Project Description to the Impact Assessment Agency of Canada, EAO, and Tahltan Central Government.<sup>3</sup>

Skeena Resources determined that the Eskay Creek Project may potentially affect seven Southeast Alaska Tribes downstream of the Project.<sup>4</sup>

SEITC has repeatedly requested that British Columbia engage in formal consultation. British Columbia received notice, at the very latest, on March 31, 2021, that the traditional territory of SEITC member Tribes is located on both sides of the US-Canada border.<sup>5</sup>

On September 23, 2022, SEITC, on behalf of its member Tribes formally put British Columbia on notice: 1) that SEITC member Tribes are "Aboriginal peoples of Canada" to whom the Crown owes a duty to consult and accommodate, and 2) that SEITC member Tribes intend to exercise their rights in British Columbia. SEITC also requested to be added as a "participating Indigenous nation" in the environmental assessment process for the Eskay Creek Project and sought capacity funding to facilitate SEITC's meaningful participation.<sup>6</sup>

SEITC, on behalf of its member Tribes, submitted notice to British Columbia on November 18, 2022, that we intend to submit further evidence demonstrating that we are "aboriginal peoples of Canada" with

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<sup>3</sup> See, e.g., Letter from David Grace, Project Assessment Dir., EAO, to Clinton E. Cook Sr., President, Craig Tribal Association, Reference: 381331 (Aug. 3, 2021) (on file with SEITC).

<sup>4</sup> Skeena Resources, Eskay Creek Revitalization Alaska Tribal Transboundary Advisory Committee Engagement Plan at p. 9 (Jan. 3, 2024) ("Engagement Plan").

<sup>5</sup> Letter from Robert Sanderson Jr., Chair, SEITC, to Honourable John Horgan, Premier, B.C., Canada, Re: Request for Consultation (Mar. 31, 2021) (on file with SEITC).

<sup>6</sup> Letter from Robert Sanderson Jr., Chair, SEITC, to Honourable John Horgan, Premier, B.C., Canada, Re: SEITC's Status in Canada and British Columbia (Sept. 23, 2022) (on file with SEITC).

constitutionally protected Aboriginal rights in Canada that will be adversely impacted by the Eskay Creek Project.<sup>7</sup>

On December 12, 2022, the EAO made the determination “under Section 14(2) of the Act that there is no reasonable possibility that SEITC or its Section 35 rights will be adversely affected by the [Eskay Creek Project].”<sup>8</sup> The EAO requested further information about our claims and confirmation that SEITC had been empowered to represent the Federally recognized Tribes on their behalf.

We are submitting the requested information and asking for reconsideration of the decision denying our claims.

### **SEITC MEMBER TRIBES MEET THE THRESHOLD REQUIREMENTS FOR ASSERTING RIGHTS IN CANADA.**

In *R. v. Desautel*, the Supreme Court of Canada described whether a group is an Aboriginal Peoples of Canada as a “threshold question” for asserting rights in Canada.<sup>9</sup> The Court noted that a fundamental purpose of section 35 was to recognize the prior occupation of Canada by organized, autonomous Aboriginal societies.<sup>10</sup> The majority of the Court said “[t]he Aboriginal peoples of Canada under s. 35(1) are *the modern successors of those Aboriginal societies that occupied Canadian territory at the time of European contact. This may include Aboriginal groups that are now outside Canada.*”<sup>11</sup> In other words, groups whose members are neither citizens nor residents of Canada can be “Aboriginal Peoples of Canada” and claim an Aboriginal right under section 35.

SEITC member Tribes meet what the court termed a threshold requirement because they are the modern successors of the Tlingit who occupied parts of British Columbia at the time of European contact in the 18<sup>th</sup> century. As the SHI Report concluded:

The main finding of this study concludes that substantial evidence exists of exclusive Tlingit occupancy along the entire Unuk River watershed since the earliest of ancient time. The People of the Unuk travelled and used the full length of the river to the headwaters beyond the current international border. The Unuk River people marked the area with clan crests signifying to all others that this was their territory. These claims exist to, and beyond,

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<sup>7</sup> Letter from Robert Sanderson Jr., Chair, SEITC to Elenore Arend, Chief Exec. Assessment Officer, EAO, Re: Opportunity to be Heard; Participating Indigenous Nation Status (Nov. 18, 2022) (on file with SEITC).

<sup>8</sup> Letter from Elenore Arend, Chief Exec. Assessment Officer, EAO, to Robert Sanderson Jr., Chair, SEITC, Reference: 393598 at 5 (Dec. 12, 2022) (on file with SEITC); Letter from Elenore Arend, Chief Exec. Assessment Officer, EAO, to Robert Sanderson Jr., Chair, SEITC, Reference: 393180 at 4 (Nov. 7, 2022) (on file with SEITC). Note that Skeena Resources has yet to submit a draft Environmental Assessment for this Project.

<sup>9</sup> *R. v. Desautel*, 2021 SCC 17 (“*Desautel*”).

<sup>10</sup> *Ibid.* at para. 22.

<sup>11</sup> *Ibid.* at para. 31 (emphasis added).

the time of first European contact and the establishment of the European sovereignty in 1931.<sup>12</sup>

## I. Background on Tlingit Tribal structures.

To better understand the history of the Tlingit and the historical relationship between the Tlingit Tribes currently living in Southeast Alaska with Tlingit living in British Columbia, we present a brief overview of Tlingit Tribal structures. As with all human societies, the method of governance and structure of Tlingit people evolved over time. Like many Native American groups, the Tlingit of Southeast Alaska were organized into family descent groups, known as clans. The clans were the recognized governing bodies before European contact and continue to be the source of individual identity.<sup>13</sup>

Segments of a single clan were typically dispersed in several, often nonadjacent, communities or *kwáans* especially during the winter months while people waited out the winter.<sup>14</sup> These established permanent villages were often comprised of several clans. The term *kwáan*, derived from the verb “to dwell,” simply served to identify Tlingit individuals as inhabitants of a certain geographic region. The extent to which they resembled the Western concept of a village was limited only to the close proximity of permanent structures typically located in a protected bay or area of resources abundant enough to allow clan members to get through the winter months.<sup>15</sup> The rest of the year was spent harvesting in each clan’s specific territory in seasonal subsistence camps.

*Kwáans* themselves originally did not act as political entities. Unlike western town and village governments, there were no *kwáan* councils or assemblies to issue ordinances, mete out punishments, or raise revenues. These activities were carried out at the clan level.<sup>16</sup>

This remained true until the purchase of Alaska by the Americans in 1867. Cut off from their traditional lands, decimated by disease, and forced into a money economy, the clan people began to permanently occupy the *kwáans*, which became more like the European concept of a village.<sup>17</sup>

Tribal governments were the sole creation of the United States federal government in 1932 to standardize federal treatment and policies dealing with Indigenous Peoples. Tribal governments were codified under the Indian Reorganization Act of 1932 (“IRA”) in 25 C.F.R. Part 83.<sup>18</sup>

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<sup>12</sup> SHI Report at p. 2 (Appendix I).

<sup>13</sup> See, generally, Thomas F. Thornton, *From Clan to Kwáan to Corporation: The Continuing Complex Evolution of Tlingit Political Organization*, 17 WICAZO SA REVIEW 167 (Fall 2002), <https://muse.jhu.edu/article/36334> (“Thornton”).

<sup>14</sup> *Ibid.* at p. 172.

<sup>15</sup> *Ibid.* at p. 171.

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

<sup>17</sup> *Ibid.* at p. 183.

<sup>18</sup> Federal Acknowledgment of American Indian Tribes, [80 Fed. Reg. 37,887 \(July 1, 2015\)](https://www.federalregister.gov/documents/2015/07/01/2015-13181).

To determine whether an Indigenous group (petitioner) was eligible for recognition as a Tribe for the programs and services provided by the United States to Indians, they had to fit the IRA definition of “community”<sup>19</sup> and have some level of “political authority.”<sup>20</sup>

A community was defined under the IRA as having “existed as a community from 1900 until the present.”<sup>21</sup> Political authority is defined as having “maintained political influence or authority over its members as an autonomous entity from 1900 until the present.”<sup>22</sup> Community and political authority are to “be understood flexibly in the context of the history, geography, culture, and social organization of the entity.”<sup>23</sup>

The most powerful and enduring result of the IRA was that it boosted the *kwáan* as a political entity. Just as Alaska Native Peoples had formed the Alaska Native Brotherhood and Alaska Native Sisterhood camps in 1912, all the major Tlingit *kwáans* quickly formed IRA governments. This was the only means available to access federal programs.<sup>24</sup> The Tlingit made the decision to keep politics centered at the *kwáan* or village level. These *kwáans* became Tribes.<sup>25</sup>

## **II. SEITC member Tribes are the modern successors of the Tlingit who occupied parts of British Columbia at the time of European contact in the 18<sup>th</sup> century.**

The attached supporting documents provide clear evidence that the SEITC member Tribes are the modern successors of the Tlingit who occupied parts of British Columbia at the time of European contact.<sup>26</sup> There is no dispute that the Tlingit are an Aboriginal People(s) of Canada.<sup>27</sup> The SHI Report recounts in detail that at the time of European contact, the entire Unuk River watershed, which covers parts of British Columbia, was the recognized territory of the Tèikwèidi Tlingit Clan of the *Sàanyàa K̄wáan*.<sup>28</sup> The *Sàanyàa K̄wáan* territory is shown on the below map.<sup>29</sup>

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<sup>19</sup> IRA at [§ 83.11\(b\)](#)

<sup>20</sup> *Ibid.* at § 83.5(b).

<sup>21</sup> *Ibid.* at [§ 83.11\(b\)](#).

<sup>22</sup> *Ibid.* at § 83.11(c).

<sup>23</sup> *Ibid.* at [§ 83.11\(b\)](#).

<sup>24</sup> *See, generally*, Thornton at pp. 183-87.

<sup>25</sup> *Ibid.* at pp. 189-90, Tbl. 2.

<sup>26</sup> *See* Appendices I-VI.

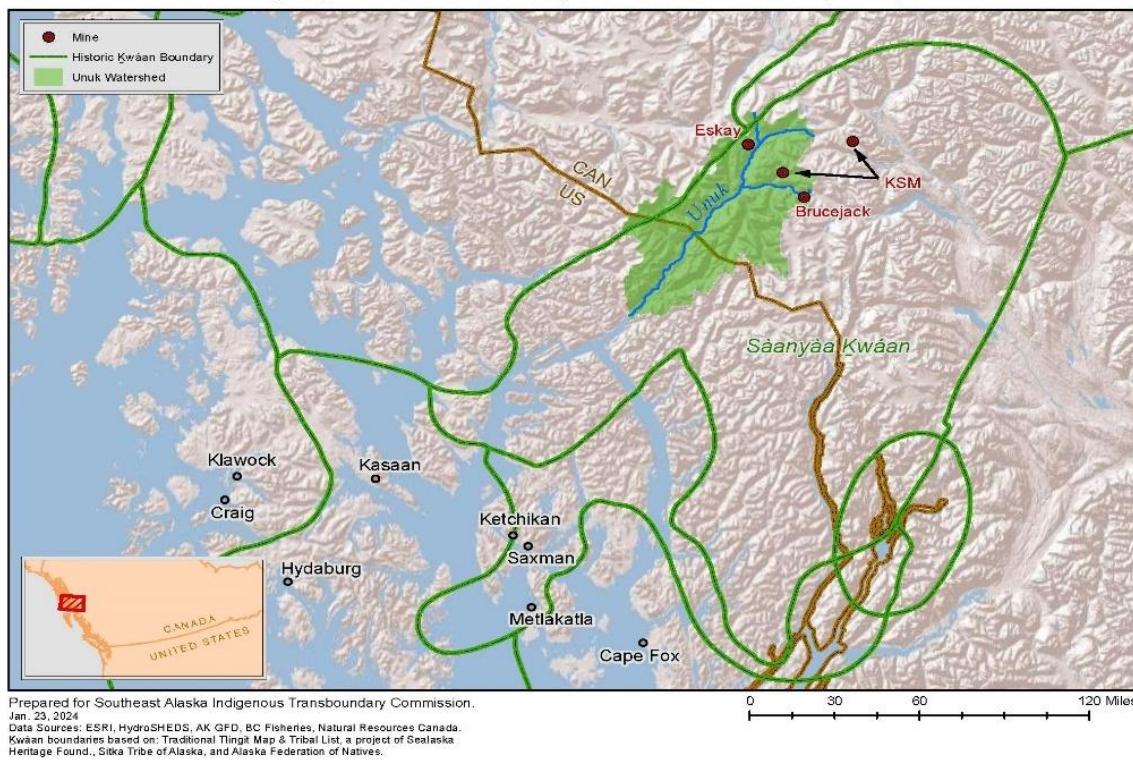
<sup>27</sup> *See Taku River Tlingit v. British Columbia*, [2004] 3 S.C.R. 550, 2004 SCC 74.

<sup>28</sup> SHI Report at pp. 2-4.

<sup>29</sup> *Sàanyàa K̄wáan* Traditional Territory in Unuk River Watershed (*Jòonax*) (Jan. 23, 2024) (Appendix VI.1).



Sàanyàa K̄wáan Traditional Territory in Unuk River Watershed (J̄onax)



The people who became the Sàanyàa K̄wáan travelled to the Unuk River watershed from down the coast, in what is now British Columbia.<sup>30</sup> As they moved into this area, they learned of places suitable for settlement from an old man who related his dreams of these places. The name of the Unuk River itself comes from the Tlingit name, *J̄onax* or *J̄onaxh*, translating as “revealed through a dream.” This is in reference to the dreams of a clan leader and head man of the Sàanyàa Tlingit K̄wáan who dreamed of several places in Behm Canal that he urged clan members to visit. By following his dreams, they eventually reached J̄onax (Unuk River). These people became known as the Unuk River people. According to oral history, this took place in an ancient time prior to the Flood, and they were the first human beings to come to the river.<sup>31</sup>

The SHI Report explains that the Unuk River people lived together as one people in five villages along the Unuk River at the time of the Flood, and it was later that they divided into Kiks.ádi, Tèikwèidi, and Nèix.adi clans.<sup>32</sup>

The Tèikwèidi Tlingit Clan of the Sàanyàa K̄wáan was the sole recognized owner of the Unuk River watershed at the time of European contact in the 18<sup>th</sup> century and prior to the IRA that defined “tribal” status and eligibility.<sup>33</sup> The seven Tribes identified in this submission are the modern-day successors to

<sup>30</sup> *Ibid.* at p. 5.

<sup>31</sup> *Ibid.* at p. 2.

<sup>32</sup> *Ibid.* at pp. 3-4.

<sup>33</sup> *Ibid.* at pp. 2-5.

the Tèikwèidi Tlingit Clan of the Sàanyàa K̄wáan.<sup>34</sup> This ownership was memorialized or validated in several ways, including through the clan crest and the placement of pictographs along the river, including in present-day Canada.

The Tèikwèidi acquired their brown bear clan crest while living on the Unuk River. Besides validating ownership, the acquisition of a crest along with the associated designs, personal and place names, and songs also signify ownership of the Unuk River as the place where these events took place.<sup>35</sup> Crests, songs, and place names, much like the territory itself, is the exclusive property of the clan. This tangible and intangible clan property is collectively referred to as *at.óow* (sacred clan property that depict the ancestral events and embody the spirits of clan ancestors involved in them), all of which symbolize the history and identity of the clan.<sup>36</sup> The clan crest, in the form of a pictograph, of the Tèikwèidi is prominently displayed near the mouth of the river and in other places along the river, including in Canada.<sup>37</sup> These pictographs were painted to mark clan territories.<sup>38</sup> Clan territories were recognized and enforced and transgressions of these customs governing land ownership and use could result in inter-clan conflict and even warfare.<sup>39</sup> To this day, individuals introduce themselves by stating their names and the physical objects that are *at.óow* of the Teikweidí clan.<sup>40</sup>

Importantly, the finalization of the Alaska border between the United States and Canada in 1903, a process that began with Russia and Britain in the 18<sup>th</sup> century, artificially split the Tlingit Nation.<sup>41</sup> As one researcher, Peter Stanton, explains, prior to this time, “[f]or the Tlingit, Haida, and other indigenous peoples, these borders between Euroamerican claims were largely ignorable into the late nineteenth century. By the 1870s and 1880s, however, the border began to have important ramifications for the Tlingit nation it divided. . . .”<sup>42</sup> Stanton explains: “[T]he diverse indigenous groups caught within the new, artificial region of Southeast Alaska began to recognize shared struggles and even adopt shared identities.”<sup>43</sup> Stanton further notes: “In addition to dividing [the Tlingit] itself, the Alaska-B.C. border also helped to break the centuries-old trade routes that Tlingit had sustained for so long with Dene groups like the Tutchone, Tagish, and Tahltan.”<sup>44</sup>

In summary, the evidence presented clearly demonstrates that SEITC member Tribes meet the threshold requirement set out in *Desautel* for asserting rights in Canada. To exclude SEITC member Tribes from

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<sup>34</sup> *Ibid.* at p. 1.

<sup>35</sup> *Ibid.* at p. 4.

<sup>36</sup> Sàanyàa K̄wáan Traditional Territory in Unuk River Watershed (*Jòonax*) at p. 4; SHI Report at pp. 21-22.

<sup>37</sup> *Ibid.*; Testimony of Louie Wagner, Jr. 2018 (Appendix II).

<sup>38</sup> Martin V. Stanford, *Shoreline Pictographs of extreme Southeast Alaska*, 9(1) ALASKA JOURNAL OF ANTHROPOLOGY at 40-42 (2011), [https://www.alaskaanthropology.org/wp-content/uploads/2017/08/akanth-articles\\_361\\_v9\\_n1\\_Stanford.pdf](https://www.alaskaanthropology.org/wp-content/uploads/2017/08/akanth-articles_361_v9_n1_Stanford.pdf).

<sup>39</sup> SHI Report at p. 24.

<sup>40</sup> *Ibid.* at p. 21.

<sup>41</sup> Peter Stanton, *Lingít ka Waashdan K̄wáan*, *The Tlingit and the Americans: Interactions and Transformations, 1856-1896* at p. 135 (May 10, 2023) (Senior Honors Thesis in History, Georgetown University).

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

consultation “would risk ‘perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers.’”<sup>45</sup>

### **SEITC MEMBER TRIBES HAVE ESTABLISHED A STRONG *PRIMA FACIE* CASE OF ABORIGINAL RIGHTS AND TITLE IN CANADA.**

The Supreme Court noted in *Desautel* that to establish Aboriginal rights, such rights “must be grounded in the existence of a historic and present-day community,”<sup>46</sup> and that “modern day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely.”<sup>47</sup> The Court has noted that the *Van der Peet* analysis requires that “courts must ... determine whether the claimant has proven that a relevant pre-contact practice, tradition or custom existed and was integral to the distinctive culture of the pre-contact society” and “determine whether the claimed modern right is demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice.”<sup>48</sup>

The Court has further noted that continuity plays a role both at the second and the third stages of the *Van der Peet* analysis.<sup>49</sup> The Court explained:

At the second stage, showing that a practice is integral to the claimant’s culture today, and that it has continuity with pre-contact times, can count as proof that the practice was integral to the claimant’s culture pre-contact. . . At the third stage, the question is whether the modern practice which is claimed to be an exercise of an Aboriginal right is connected to, and reasonably seen as a continuation of, the pre-contact practice.<sup>50</sup>

Although continuity with the pre-contact practice is required in order for the claimed activity to fall within the scope of the right, “[t]he right claimed ‘must be allowed to evolve’, because ‘[i]f aboriginal rights are not permitted to evolve and take modern forms, then they will become utterly useless.’”<sup>51</sup>

The Court has stated that the test for an Aboriginal right is the same whether the claimant is inside or outside Canada.<sup>52</sup>

The SEITC member Tribes meet these requirements.

The Tèikwèidi did not just claim ownership of the Unuk River, their identity was linked to the river and all that it had to offer. Clan identity is defined by their ownership and exclusive rights to physical property, including salmon streams, watersheds, hunting grounds, shellfish beds, canoe landing beaches, and other landmarks, as well as symbolic property, such as stories, songs, regalia, crests, and other

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<sup>45</sup> *Desautel* at para. 33.

<sup>46</sup> *Ibid.* at para. 59.

<sup>47</sup> *Ibid.* (citing *R. v. Marshall, 2005 SCC 43, [2005]* at para. 67).

<sup>48</sup> *Ibid.* at para. 51 (internal citations omitted).

<sup>49</sup> *Ibid.* at paras. 53-54.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.* at para. 54 (internal citation omitted).

<sup>52</sup> *Ibid.* at paras 60-61.

cultural icons, including clan ancestors.<sup>53</sup> This *at.óow* can be translated as a sacred possession to the Tèikwèidi.<sup>54</sup> All *at.óow* specific to the Unuk, the Tèikwèidi, and their descendants remain critical to their personal identity.<sup>55</sup>

Some of the most detailed history of the *Saanyá Khwáan* and Teikweidí was told by Henry Denny Jr. (Nèix.adi clan leader) and his mother Betsy. Much of this is presented in the SHI Report and is referred to in many other sources. Denny Jr. explains the importance of the Unuk River to the core identity of the Teikweidí, conveying that Joonáxh is so important and central to the Teikweidí clan that “Joonáxh Khwáan,” “People of Joonáxh,” is their second name. Denny Jr. says, “Joonáxh Khwáan tsú has duwasáakw, Teikhweidí. The Teikhweidí are also called the People of Joonáxh.”<sup>56</sup>

As the historian Ishmael Hope explains,

Henry Denny Jr. effectively demonstrates that the Teikhweidí own, occupy, use, and steward the Unuk River, Joonáxh. Their clan history of the river goes back to the founding and naming of the river, to the move from the river, to its continued use by the clan as a hunting and fishing territory.<sup>57</sup>

The Tèikwèidi’s cultural practices and traditions are thus historically interconnected with the Unuk River, and these traditions and practices continue today. As mentioned, prior to the US-Canada border, the Tlingit people who settled in the Unuk River watershed travelled and utilized the entire length of the river to the headwaters. They harvested and preserved fish, berries, and big game. For example, Sylvia Banie, an Elder and Knowledge Bearer of the Organized Village of Saxman and whose father was a member of the Tèikwèidi bear clan, explained that her ancestors, who lived all along the Unuk River, relied on the watershed for a variety of food and medicine. She explains:

Once the men found an area that could be used for hunting, fishing and making homes, the women, children and elders followed. The women went out to get berries and devil’s club for medicine. Hudson Bay tea was widely used as tea and medicine, and was found across the Unuk River all the way down to Cape Fox. The warriors went out to get the deer and the bear and brought them back to their people to share with each of them. Sometimes there would be a big potlatch.<sup>58</sup>

Banie further elaborates: “[Our people] would go out to catch fish, which is still very important for us. We would get hooligans, salmon, halibut, bear, moose, deer, plants, herbs, and more to smoke and preserve for the winter months. The Unuk River has always sustained us.”<sup>59</sup>

Denny Jr. recounts the Teikweidí were the strongest of the three clans of the *Saanyá Khwáan* and would

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<sup>53</sup> SHI Report at p. 20; Ishmael Hope, Khaagwáask’, Unuk River History: Commentary on Oral History by Henry and Bessie Denny at p. 9 (Dec. 2023) (“Hope Commentary”) (Appendix III).

<sup>54</sup> SHI Report at p. 20; Hope Commentary at p. 9.

<sup>55</sup> SHI Report at pp. 20-21.

<sup>56</sup> Hope Commentary at pp.7-8.

<sup>57</sup> *Ibid.* at p. 8.

<sup>58</sup> Testimony of Sylvia Banie (Appendix II).

<sup>59</sup> *Ibid.*

paddle their canoes to the head of the Unuk River where they would hunt, fish, and gather things.<sup>60</sup>

Louie Wagner, Jr. of the Metlakatla Indian Community, who is a member of the Tlingit people from the maternal side, explains that his people have been fishing on the Unuk River for thousands of years and that his family's crest can be seen marked on painted pictographs at the mouth of the Unuk River, as well as at points upstream. He explains: "Since my childhood, my family has exercised our traditional rights to fish ooligan [eulachon] on the Unuk River. I first joined the trip to the river on a trawler when I was nine; I fished with my brother Walter Wagner and later, from when he was four years old, my son."<sup>61</sup>

Fish from the Unuk River – particularly salmon and eulachon – have historically been, and continue to be, an important source of food and a centerpiece of Tèikwèidi cultural practices and spiritual beliefs and communities have passed these cultural and spiritual practices on to younger generations.<sup>62</sup> Louie Wagner, Jr. explains:

It is in my role as caretaker of the Unuk that I harvested ooligan and brought them back to share with the community....Our return from the River with ooligan marked the start of Spring, and was a special time for the community. The ooligan we brought to Ketchikan and Metlakatla would be smoked, and then would help sustain our livelihoods. It also tied communities together—not only those of Ketchikan and Metlakatla, but also our ties with other Native communities in Southeast, with whom we could exchange gifts of smoked ooligan for their regional foods. These are ties that allow us to stay in touch and to support each other.<sup>63</sup>

Louie Wagner, Jr.'s granddaughter, Tazia W'ally Sthaathi Ta Wagner from Metlakatla Indian Community, explains the importance of ooligan to the Tribes' cultural identity: "Hooligan is a sacred fish. The first run, *sm'algyax*, translates from *halimotkw*, the fish that saves. And it's true, it brings so many together. Laughter and love are on that table where we have our grease and hooligan, gathering after a long winter and sharing all our favorite foods."<sup>64</sup>

In 1946, Annie Haldane, who was 70 years old at the time and from the village of Saxman, provided oral testimony about how her people came up from the Unuk River in old times and how she, her family, and her ancestors fished and picked berries from the Unuk River. She explains:

I am about seventy years old, and I have been a resident of Saxman a good part of my life. There were, or have been two smoke houses at the Unuk River. These smokehouses were owned by two brothers who belonged to the Xoots Hit of Unuk (Joonax) Teikweidi'. From Unuk Bay we got king salmon, dog salmon, cohos and other fish. Also, high-brush cranberries, blackberries, wild currents, and crab apples. There was quite a number of

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<sup>60</sup> Hope Commentary at p. 8.

<sup>61</sup> Testimony of Louie Wagner, Jr. 2018 (Appendix II).

<sup>62</sup> SEITC, Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of the Members of the Southeast Alaska Indigenous Transboundary Commission Resulting from Hard-Rock Mining in British Columbia, Canada at p. 9 (July 14, 2023) (Appendix IV).

<sup>63</sup> Testimony of Louie Wagner, Jr. (2018).

<sup>64</sup> Testimony of Tazia W'ally Sthaathi Ta Wagner (Appendix II).

creeks where we got fish from in the Unuk River. From Spring until late fall, we camped at the Unuk River, and returned to winter village before freeze-up.<sup>65</sup>

Sylvia Banie also talked about how her father taught her to hunt and fish on the Unuk river:

[M]y father taught me to hunt and fish. I would go up the Unuk with him to hunt and get hooligans. We would bring everything back to share with the village. He taught me how to take a boat up the river, how to swim and how to gather hooligans with small netting. In the days of my great-grandmother and grandmother, fish was caught with weaved baskets.<sup>66</sup>

The testimonies in Appendix II have many more examples of the connections between the Tèikwèidi and the Unuk River, and how they have used the Unuk River watershed for millennia to hunt, fish, and gather food. The identity of the Tèikwèidi people is inextricably connected to the river. This relationship to the river has been passed on through each generation and continues today.

### **BRITISH COLUMBIA HAS A DUTY TO UNDERTAKE DEEP CONSULTATION AND SEEK ACCOMMODATION WITH SEITC TRIBES CONCERNING ITS REVIEW OF THE PROJECT.**

In the landmark *Haida* case, the Supreme Court of Canada confirmed that the Crown (the federal and provincial governments in Canada) has a duty to consult Indigenous Peoples when the Crown (1) has real or constructive knowledge of the *potential* existence of Aboriginal rights (including Aboriginal title), and (2) contemplates conduct that might adversely affect these rights.<sup>67</sup>

The duty of consultation requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances.<sup>68</sup> Deep consultation, aimed at finding a satisfactory interim solution, may be required, “where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high.”<sup>69</sup> Meaningful consultation may lead to the duty to accommodate. The Court explained that “[w]here a strong *prima facie* case exists for the claim, and the consequences of the government’s proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.”<sup>70</sup>

*Desautel* further discussed the application of the duty to consult with Tribes living outside of Canada

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<sup>65</sup> Testimony of Annie Haldane (Appendix II).

<sup>66</sup> Testimony of Sylvia Banie.

<sup>67</sup> See *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 (“*Haida*”).

<sup>68</sup> *Ibid.* at para. 41.

<sup>69</sup> *Ibid.* at para. 44.

<sup>70</sup> *Ibid.* at para. 47.

who meet the threshold requirement for asserting rights in Canada. The majority explained:

Once the Crown is put on notice, however, it has to determine whether a duty to consult arises and, if so, what the scope of the duty is. As [] mentioned earlier, consultation is part of a ‘process of fair dealing and reconciliation’ which ‘arises . . . from the Crown’s assertion of sovereignty’ (*Haida*, at para. 32). . . . While the consultation process may be more challenging when it involves groups outside Canada, as this Court said in *Powley*, at para. 49, ‘the difficulty of identifying members of the [Aboriginal] community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada.’<sup>71</sup>

On November 28, 2019, British Columbia also promulgated the *Declaration on the Rights of Indigenous Peoples Act* (“DRIPA”), which seeks to implement the *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”). DRIPA sets out additional provisions related to decision-making agreements. Section 7 specifically outlines a process of decision-making agreements, including relating to the consent of the Indigenous governing body before the exercise of a statutory power of decision.<sup>72</sup> Both the federal and provincial laws implementing UNDRIP make clear that (1) UNDRIP applies to the laws of Canada [and British Columbia], and (2) that nothing in the laws is to be construed as delaying UNDRIP’s application.<sup>73</sup>

Here, the evidence establishes that British Columbia should engage in deep consultation with SEITC Tribes and seek accommodation because the Project could significantly impact their rights.

#### **I. British Columbia has real knowledge of the potential existence of SEITC Tribes’ Aboriginal rights.**

Above, we have outlined the historical facts that clarify that the SEITC Tribes have rights under Section 35, and the EAO has real knowledge of our potential rights. As mentioned, the entire Unuk River watershed is intimately connected with the Tribe’s cultural practices dating back thousands of years. The Tribes’ traditions, beliefs, food sources, and livelihoods are inextricably tied to the fish they catch in the Unuk River watershed, which are sacred to the communities that have depended on them for millennia. Subsistence fishing is a vital aspect of the Tribes’ cultural practices and provides a key opportunity for elders to pass on their tribes’ traditions to younger generations. Sharing fish catches with elders, community members, and others is important for maintaining and strengthening tribal and communal culture and relationships. Salmon and eulachon harvests sustain the Tribes throughout the year and are a critical source of food and economic livelihood. All Southeast Alaska Tribes benefit from the salmon spawned in the Unuk and rejoice in the coming of spring when Unuk River ooligan is delivered to our communities.

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<sup>71</sup> *Desautel* at para. 76.

<sup>72</sup> Declaration on the Rights of Indigenous Peoples Act, S.B.C. 2019, c 44, s 7(1)(b), <https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19044>.

<sup>73</sup> *Ibid.* at ss 1(4) and 2(a); G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples, ss 2(3) and 4(a) (Sept. 13, 2007), [https://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).



The Unuk River, along with the other major rivers of the region served as a trade route to the interior and connected the coastal Tlingit and the Tlingit who occupied the interior in what is now British Columbia.<sup>74</sup>

## II. The Project will adversely affect our rights.

The river does not conform to the political boundaries imposed by Europeans. Harm to the water quality from the Project and other mines in the river can have long-term and devastating consequences on the entire ecosystem that depends on the Unuk. Any potential threat to the water quality of the Unuk River threatens to irreparably harm these long-established cultural and subsistence rights.

Some harm is already occurring, while other harms are likely given the history of mining in salmon habitats exasperated by British Columbia's poor track record of keeping mine projects in compliance. Without deep consultation with our Tribes, the understanding of the potential impacts on our communities will remain limited and the vast amount of traditional ecological knowledge accumulated over centuries will be unavailable to help prevent harm.

The risks associated with mining on watersheds and salmon are well documented. Mining contributes to contamination in water and sediment. It impacts water cycling, physical habitat, and the health of organisms ranging from microbes to mammals, including humans.<sup>75</sup> Mining impacts span vast scales of time and space.<sup>76</sup> Pollution can extend tens to hundreds of kilometers downstream from mining operations.<sup>77</sup> Studies also indicate that the impacts of mining on watersheds is likely underestimated.<sup>78</sup>

That which impacts the Unuk watershed, impacts the rights of Southeast Alaska Tribes and their citizens.

The failure to provide adequate consultation on mining projects, including the Project, in the Unuk River watershed vital to Southeast Alaska Tribes violates our human rights as a people. This failure has been recognized by the Inter-American Commission on Human Rights, which recently deemed admissible our complaint against Canada, for, among other things, failing to engage in the free, prior, and informed consent of the SEITC Tribal members concerning the approval of various mines in British Columbia, including Seabridge Gold's Kerr-Sulphurets-Mitchell ("KSM") mine in the Unuk River watershed. The Commission's initial decision finding for SEITC affirmed that Canada has an obligation under

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<sup>74</sup> SHI Report at p. 1.

<sup>75</sup> Johnnie N. Moore & Samuel N. Luoma, *Hazardous wastes from large-scale metal extraction. A case study*, 24(9) ENVIRON. SCI. TECHNOL. 1278 (1990), <https://pubs.acs.org/doi/10.1021/es00079a001>; A. M. Farag *et al.*, *Concentrations of Metals Associated with Mining Waste in Sediments, Biofilm, Benthic Macroinvertebrates, and Fish from the Coeur d'Alene River Basin, Idaho*, 34 ARCH. ENVIRON. CONTAM. TOXICOL. 119 (1998), <https://link.springer.com/article/10.1007/s002449900295>.

<sup>76</sup> Manuel Olías & José Miguel Nieto, *Background Conditions and Mining Pollution throughout History in the Río Tinto (SW Spain)*, 2(3) ENVIRONMENTS 295 (2015), <https://www.mdpi.com/2076-3298/2/3/295>.

<sup>77</sup> C. A. Mebane & C. G. Schmidt, *Selenium and mercury in the Kootenai River, Montana and Idaho, 2018–2019 (Sept. 20, 2019)*, <https://doi.org/10.5066/P9YYVV7R>.

<sup>78</sup> Christopher J. Sargent *et al.*, *Risks of mining to salmonid-bearing watersheds*, 8(26) SCI. ADV. (2022), <https://www.science.org/doi/10.1126/sciadv.abn0929>.

international law to prevent activities by companies within its jurisdiction from violating human rights and causing transboundary environmental harm and concluded that “[t]he risk of pollution from the B.C. mines, if proven, could threaten the petitioners’ means of subsistence, health, culture, and well-being.”<sup>79</sup>

While our complaint against Canada focused on the impacts to our rights in Alaska, the Project will have similar impacts on our rights in Canada.

This very ask itself, to prove our connections to lands that bear our names, display our crests, and holds the remains of our ancestors and to justify our concerns related to a massive mining project upstream of our communities violates our right to self-determination and right to our own processes and identity. British Columbia has identified at least seven Tribes in Canada for consultation that meets the requirements of *Haida* because it has recognized that the Project could adversely affect their rights. Our rights are similarly impacted, regardless of the existence of a post-colonial border dividing the Unuk River watershed.

British Columbia’s track record for assuring mine safety is spotty at best. Studies show that the numerous tailings dam facilities in British Columbia in proximity to salmon habitat have created a considerable threat to both communities and wildlife<sup>80</sup>—“[o]ut of the 86 sites containing tailings storage facilities (including proposed sites), 54 are located within salmon habitat.”<sup>81</sup>

Salmon are not only the lifeblood of our cultural identity, but they feed the forest that is our home. Salmon are the mechanism by which nutrients are returned to the rainforest.

In 2014, the tailings dam at the Mount Polley Mine breached and spilled an estimated [25 million cubic liters](#) of water and contaminated materials into Polley Lake, Hazeltine Creek, and Quesnel Lake — a source of drinking water and major spawning grounds for sockeye. The dam was less than 20 years old when it failed.<sup>82</sup>

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<sup>79</sup> Inter-American Commission on Human Rights, Report on Admissibility, Report No. 179/23, Petition 3004-18 at para. 66 (Aug. 25, 2023) (emphasis added).

<sup>80</sup> Steven H. Emerman, Malach Consulting, LLC, *The Risk of Tailings Dam Failure in British Columbia: An Analysis of the British Columbia Existing and Future Tailings Storage Database*, at 3 (Rev. July 3, 2022), [https://reformbcmining.ca/wp-content/uploads/2022/06/BC\\_TSF\\_Database\\_Analysis\\_Emerman\\_Revised2.pdf](https://reformbcmining.ca/wp-content/uploads/2022/06/BC_TSF_Database_Analysis_Emerman_Revised2.pdf).

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

<sup>82</sup> *See, generally*, Independent Expert Engineering Investigation and Review Panel, Report on Mount Polley Tailings Storage Facility Breach (Jan. 30, 2015) (“Expert Panel Report”), <https://www.mountpolleyreviewpanel.ca/sites/default/files/report/ReportonMountPolleyTailingsStorageFacilityBreach.pdf>.

Despite the recommendation in the Mount Polly Expert Panel Report to move away from watered tailings facilities,<sup>83</sup> this is the exact type of tailings impoundment specified for the Project.<sup>84</sup>

At the end of the Project's mine life, in 14 years, the tailings pond will store 26.4 Mt of tailings and 84 Mt of PAG rock.<sup>85</sup> Documents show that potential changes in water quality downstream of the mine site within the Unuk River could be an issue.<sup>86</sup> The mine is located about four miles upstream of salmon habitat.<sup>87</sup> This dam will have to be maintained and remain intact in perpetuity to avoid harm to our people. It is not a matter of if they will fail at some point, only a matter of when.

As bad as tailings dam failures are, studies show “[t]he number of people exposed to contamination sourced from long-term discharge of mining wastewater into rivers is almost 50 times greater than the number directly affected by tailings dam failures.”<sup>88</sup>

There is currently severe ongoing selenium pollution of the Elk River originating from Teck Resources' coal mines in B.C.'s Elk River valley. The Elk River is a transboundary river that flows from B.C. into Montana. Measurements taken throughout the Elk River watershed downstream of the mines have found selenium levels in excess of twenty times B.C.'s water quality guidelines, while selenium levels found upstream of the mines are within those guidelines.<sup>89</sup> British Columbia is either unable or unwilling to remedy this harm to our Upper Columbia Tribal relatives.

Despite all the science that goes into an environmental impact study, such studies cannot fully predict the effects of mining on water quality. A 2006 study of 25 mines that had gone through an extensive environmental assessment process in the United States showed that nine (36%) developed acid drainage on site. Nearly all the mines (8/9) that developed acid drainage either underestimated or ignored the acid drainage potential in their environmental impact statements. Of the 25 case study mines, 19 (76%) had mining-related exceedances in surface water or groundwater even though nearly half of the mines with exceedances (8/19 or 42%) predicted low contaminant leaching potential in their environmental impact statements. The constituents that most often exceeded standards or that had increasing concentrations in groundwater or surface water included toxic heavy metals such as copper, cadmium, lead, mercury, nickel, or zinc (12/19 or 63%), arsenic and sulfate (11/19 or 58% each), and cyanide

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<sup>83</sup> *Ibid.* at pp. iv, 112, 125.

<sup>84</sup> See Skeena Resources, Eskay Creek Revitalization Project: Detailed Project Description, at pp. 48-53 (Aug. 10, 2022), <https://projects.eao.gov.bc.ca/api/public/document/62f6b77d278bb60022579eac/download/2022.08.10%20Eskay%20Creek%20Revitalization%20Final%20DPD.pdf>.

<sup>85</sup> *Ibid.* at p. 31.

<sup>86</sup> *Ibid.* at p. xxi.

<sup>87</sup> *Ibid.* at p. xvii.

<sup>88</sup> See M. G. Macklin *et al.*, Abstract, *Impacts of metal mining on river systems: a global assessment*, 381(6664) *SCIENCE* 1345 (Sept. 22, 2023), <https://www.science.org/doi/10.1126/science.adg6704>.

<sup>89</sup> See A. Dennis Lemly, Review of Environment Canada's Teck Coal Environmental Assessment and Evaluation of Selenium Toxicology Tests on Westslope Cutthroat Trout in the Elk and Fording Rivers in Southeast British Columbia, Interim Report (Sept. 25, 2014), [https://www.teck.com/media/2014-Water-review\\_environment\\_canada-T3.2.3.2.1.pdf](https://www.teck.com/media/2014-Water-review_environment_canada-T3.2.3.2.1.pdf).

(10/19 or 53%). Sixty percent of all the case study mines (15/25) had mining-related exceedances in surface water.<sup>90</sup>

In summary, the Project has the potential to significantly infringe our Aboriginal rights, and British Columbia is obligated to engage in deep consultation with us in compliance with the requirements of *Haida*, and, if necessary, work in good faith towards accommodation.

Indeed, with respect to potentially affected Canadian First Nations, B.C. and Skeena Resources recognized the need to go beyond even the requirements of *Haida* and entered into the first ever consent-based decision-making agreement with the Tahltan Nation in June 2022 under the *Declaration on the Rights of Indigenous Peoples Act* (Declaration Act).<sup>91</sup> In particular, the agreement outlines consent-based decision-making related to the environmental assessment of the Eskay Creek Project. Justin Himmelright, Senior Vice-President of external affairs and sustainability at Skeena Resources, acknowledged after the agreement was made that “Indigenous consent is an essential step in an efficient approval process for Eskay Creek.”<sup>92</sup> We also request that British Columbia establish a similar agreement with the SEITC Tribes listed in this submission.

### **III. British Columbia’s current plan to engage with Alaska Tribes is woefully inadequate.**

As mentioned above, Skeena Resources has identified the seven U.S. Tribes as being potentially affected by the Eskay Creek Project.<sup>93</sup> Even the selection of these Tribes and the criteria for inclusion was done without any input from us. In truth, all Southeast Alaska Tribes are affected when a foreign government ignores their status and contemplates actions that could adversely affect them without consent.

The plan produced by the proponent (not British Columbia) outlines the engagement with the Alaska Tribes to be restricted to information sharing, learning about the environmental assessment, support in the Environmental Assessment process, and providing advice on the potential transboundary effects (both positive and negative). The documents examining the effects of the Eskay Creek Project all limit their analysis to the Canadian side of the border. This plan contains no legal obligations or enforcement mechanisms to protect our Tribes.

Until consultation occurs, both the proponent and the EAO cannot fully understand the potential impacts to our Tribes. Even if our concerns are collected and placed into the record, there remains no mechanism to assure our Tribes that the impacts will be avoided or mitigated when, not if, they occur. Without accommodation or some mechanism to negotiate direct government-to-government agreements, our Tribal governments are subservient to the whims of a mining company and a foreign colonial power.

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<sup>90</sup> James R. Kuipers *et al.*, Comparison of Predicted and Actual Water Quality at Hardrock Mines: The Reliability of Predictions in Environmental Impact Statements at ES-7 to ES-10 (2006), <http://pebblescience.org/pdfs/ComparisonsReportFinal.pdf>.

<sup>91</sup> British Columbia Office of the Premier, News Release, *Tahltan Central Government, B.C. make history under Declaration Act* (June 6, 2022), <https://news.gov.bc.ca/releases/2022PREM0034-000899>.

<sup>92</sup> *Ibid.*

<sup>93</sup> Engagement Plan at 9.

Conducting an environmental assessment that seeks to predict the effects of mining on a complex ecosystem for hundreds of years into the future is no safety net.

We have many specific concerns, but there is nothing in the general history or performance of the mining industry or in the mechanisms that authorize mines that gives us any comfort. We are asked to describe our concerns, yet we fail to see where the industry or governments who authorize these projects are required to describe their failures.

## CONCLUSION

We ask that our Aboriginal rights in our traditional territory now within Canada be recognized under Section 35 of the *Constitution Act*, consistent with the principles of the *United Nations Declaration on the Rights of Indigenous Peoples*, the *Declaration on the Rights of Indigenous Peoples Act*, and the on-going process of reconciliation between the first people of this land and the Crown.

We request that the inherent rights of SEITC and the seven Tribes be respected and acknowledged and that the Crown obtain SEITC's free, prior, and informed consent prior to any approvals for the Eskay Creek Project.

In keeping with its commitment to implement UNDRIP, the Province enacted the Declaration Act on November 28, 2019. We request that you negotiate an agreement under subsections 7(b) and 41(1) of the *Environmental Assessment Act*, which provides that the Minister may enter into an agreement with an Indigenous nation with respect to any aspect of a Provincial environmental assessment. We further request that you negotiate a consent agreement for the Eskay Creek Project under subsection 7(1)(b) of DRIPA.

We await your decision.

A handwritten signature in black ink that reads "Esther Ashton". The signature is written in a cursive style and is positioned above a horizontal line.

Eshter Ashton, Chair  
Southeast Indigenous Transboundary Commission

Cc:

EAO:

- David Grace ([David.Grace@gov.bc.ca](mailto:David.Grace@gov.bc.ca))
- Breanna Merrigan ([Breanna.Merrigan@gov.bc.ca](mailto:Breanna.Merrigan@gov.bc.ca))
- Tracy James ([Tracy.James@gov.bc.ca](mailto:Tracy.James@gov.bc.ca))

# APPENDIX 11

Letter from Bruce Ralston, Minister, B.C. Ministry of Energy, Mines and  
Low Carbon Innovation, to Robert Sanderson Jr., SEITC, Ref: 113599  
(June 11, 2021)



June 11, 2021

Ref: 113599

Robert Sanderson, Jr.  
Chair  
Southeast Alaska Indigenous Transboundary Commission

Email: [otiliusconsulting@gmail.com](mailto:otiliusconsulting@gmail.com)

cc: [Premier@gov.bc.ca](mailto:Premier@gov.bc.ca)  
[ENV.Minister@gov.bc.ca](mailto:ENV.Minister@gov.bc.ca)  
[Simon.Coley@gov.bc.ca](mailto:Simon.Coley@gov.bc.ca)  
[Peter.Robb@gov.bc.ca](mailto:Peter.Robb@gov.bc.ca)  
[Scott.Bailey@gov.bc.ca](mailto:Scott.Bailey@gov.bc.ca)  
[Jennifer.Melles@gov.bc.ca](mailto:Jennifer.Melles@gov.bc.ca)  
[Gerry.Hamblin@gov.bc.ca](mailto:Gerry.Hamblin@gov.bc.ca)

Dear Robert Sanderson, Jr.,

Thank you for your March 31, 2021 letter to Premier John Horgan and for your continued commitment to working with British Columbia. The Premier asked me to respond on his behalf. This letter also responds to your September 21, 2020 and January 15, 2021 letters raising similar concerns. We acknowledge your requests in the March 31, 2021 letter to pause new permits, amendments to existing permits, and approval of new mining projects in BC.

As you are aware, BC and Alaska signed a Memorandum of Understanding (MOU) in 2015 based on a recognition of a mutual commitment to sustaining our environment for the benefit of all, including our valuable transboundary rivers, watershed, and fisheries. Both parties agreed that our respective engagement with BC First Nations and Alaska Tribes was important. In 2016, Alaska and BC signed a Statement of Cooperation on Protection of Transboundary Waters (SOC), setting out in greater detail how the parties would strive to enhance their engagements with BC Indigenous Nations and Alaska Tribes.

The Province is committed to implementing the *Declaration on the Rights of Indigenous Peoples Act* and ensuring that Indigenous Nations, when potentially affected by projects within BC, are appropriately engaged in the review processes. The Province is also committed to ensuring that the effects of projects proposed within BC are appropriately assessed in environmental assessment and permitting processes, including appropriate consideration of downstream and cumulative effects.

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Ministry of  
Energy, Mines and  
Low Carbon Innovation

Office of the Minister

Mailing Address:  
PO Box 9060, Stn Prov Govt  
Victoria, BC V8W 9E2

Telephone: 250 953-0900  
Facsimile: 250 356-2965



If there are gaps in the engagement currently being undertaken with Indigenous Nations, or the assessments being undertaken in the area of the transboundary waters with respect to existing or proposed mine development in BC, we would like to understand that and explore opportunities to address any gaps. We would then raise this with Alaska, consistent with the MOU and SOC, to explore how best to address these issues.

Ministry staff will be reaching out to you shortly to schedule a meeting to understand gaps in the engagement you seek to address and how our approach to engagement in partnership with Alaska could be improved.

In the meantime, should you have any questions or concerns, please contact Gerry Hamblin, Director, Indigenous Affairs Branch, at [Gerry.Hamblin@gov.bc.ca](mailto:Gerry.Hamblin@gov.bc.ca) or 778-698-9312.

Thank you, again, for writing.

Sincerely,



Bruce Ralston  
Minister

# APPENDIX 12

Letter from Rob Sanderson Jr., Chair, SEITC, to Honorable John Horgan, Premier, B.C., Canada (Dec. 30, 2021)



December 30, 2021

Honourable John Horgan  
Premier  
British Columbia, Canada

Sent Via email - [premier@gov.bc.ca](mailto:premier@gov.bc.ca)

RE: Request for Alignment

Dear Premier Horgan,

The Southeast Alaska Indigenous Transboundary Commission (SEITC) would like to thank you and Ministers Bruce Ralston of the Ministry of Energy, Mines and Low Carbon Innovation and George Heyman of the Ministry of the Environment and Climate Change Strategy for helping us arrange direct meetings with Ministry representatives. Over the last few months, we have held 3 direct meetings with their staff and the Environmental Assessment Office. SEITC seeks to help the Province of British Columbia and its Ministries implement the United Nations Declaration on the Rights of Indigenous Peoples.

We again commend British Columbia for passing the Declaration on the Rights of Indigenous Peoples Act (DRIPA). Implementing DRIPA would be incomplete without recognizing the right of self-determination by the downstream sovereign indigenous peoples sharing critical transboundary watersheds. We believe that the benefits of our watersheds can be protected and shared by all.

To refresh your memory, formed in 2014, we were authorized to engage on behalf of member Tribes to protect Tribal lands and waterways for future generations. In March 2021, SEITC requested a pause in new permits, amendments to existing permits, and approval of new mining projects in British Columbia until such time as the completion of internal reviews within your Ministries and the establishment of the framework of working with all relevant indigenous governments regarding shared transboundary watersheds is established.

Since DRIPA's Royal Assent in 2019, no framework exists, no process has been established for working with Alaska Tribes who have traditional territories and vital interests in several major

transboundary watersheds affected by the decisions of British Columbia Ministries. Our connection to these lands and waterways on both sides of the US/Canadian border goes back to ancient times.

We look forward to continuing the dialogue beginning the path to a framework for international watershed governance. While the dialogue continues, we again ask for a pause in your environmental permitting process until the establishment of a formal process or mechanism for aligning your environmental laws and regulations with the letter and spirit of DRIPA.

We wish you good health. Happy New Year!

Sincerely,

A handwritten signature in blue ink that reads "Rob Sanderson Jr". The signature is written in a cursive, flowing style.

Rob Sanderson, Jr  
Chair  
Southeast Alaska Indigenous Transboundary Commission  
[www.seitc.org](http://www.seitc.org)

CC - Honourable Jonathan Wilkinson, Minister of Environment and Climate Change, Canada