



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

August 1, 2024

***Re: Request for Precautionary Measures Pursuant to Article 25 of the Inter-American Commission on Human Rights Rules of Procedure Concerning Serious and Urgent Risks of Irreparable Harm Arising Out of the Eskay Creek Revitalization Project in British Columbia, Canada (Case N° 15.329)***

Honorable Executive Secretary,

On behalf of the Southeast Alaska Indigenous Transboundary Commission and seven of its member Tribes, 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, we are submitting this request for precautionary measures with respect to the Eskay Creek Project, one of the proposed mines at issue in Case N° 15.329.

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

Sincerely,

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## I. Introduction

The Southeast Alaska Indigenous Transboundary Commission (“SEITC”), on behalf of itself and seven of its member Tribes, respectfully requests that the Inter-American Commission on Human Rights (“Commission” or “IACHR”) call on Canada and B.C. to adopt and implement precautionary measures to prevent irreparable harms to SEITC resulting from the impending approval and construction of the Eskay Creek Revitalization Project (“Eskay Creek Project” or “Project”), a large gold and silver mine in the transboundary Unuk River in British Columbia (“B.C.”).

The Eskay Creek Project is one of eight mines in B.C. that are at issue in a case filed in July 2020 by SEITC and all of its member Tribes against Canada before the Commission.<sup>1</sup> The 2020 Petition alleges that the approvals of these mines violate Petitioners’ rights to the benefits of their culture, their own means of subsistence, preservation of health and well-being, and right to use and enjoy the lands they have traditionally occupied. Because so many of the facts and much of the evidence SEITC presented in the Petition and subsequent submissions (collectively “2020 Petition” or “Petition”) are relevant to this request, SEITC requests that the Commission consider the facts alleged in the Petition as part of this request for precautionary measures.

The 2020 Petition describes how the SEITC member Tribes’ traditions, beliefs, food sources, and livelihoods are inextricably tied to the fish they catch in the Taku, Stikine, and Unuk River watersheds, which are sacred to the communities that have depended on them for millennia. The Petition identifies and describes hard-rock mining projects at various stages of development in the Taku, Stikine, and Unuk watersheds. It describes how these mines pose 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 communities rely on for their subsistence and that are central to the maintenance of their culture. The Petition further explains how B.C. does not have a protective regulatory system for preventing pollution from mines.

Although in B.C., the Eskay Creek Project sits on the traditional and historical territory of seven SEITC member Tribes, and it is only 40 km from the B.C.-Alaska border and upstream from the Tribes’ communities in Southeast Alaska. The Project has reached the final stages of the environmental review process, and its approval is looming. Despite the foreseeable and imminent risks to SEITC member Tribes’ rights from the operation of the Project, neither national nor B.C. provincial authorities have sought SEITC’s free, prior, and informed consent. Instead, B.C. has unilaterally imposed an entirely deficient process to “consult” with SEITC that falls far short of meeting its international obligations. With little time left before the Project will be authorized, after it has attempted unsuccessfully for three years to seek adequate consultation from B.C., and with no effective domestic remedies at its disposal, SEITC is now seeking urgent intervention from the Commission.

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<sup>1</sup> Although it was not yet proposed when the initial Petition was filed in 2020, SEITC identified the Project in its Merits Observations. SEITC, *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 to Inter-American Commission on Human Rights, pp. 9-11 (Feb. 19, 2024) (“SEITC Merits Observations”).

The repercussions of approving the Eskay Creek Project without seeking SEITC's free, prior, and informed consent are serious because these heightened procedural protections are inextricably linked to ensuring and preventing the Project from violating the member Tribes' rights. Free, prior, and informed consent is an essential safeguard for the rights to self-determination of Indigenous Peoples. It allows Indigenous Peoples to engage in negotiations consistent with their own traditions and practices and allows communities to shape the design, implementation, monitoring, and evaluation of projects, and, if necessary, to develop adequate mitigation and conditions for the safe operation of a project. By doing so, free, prior, and informed consent allows projects to appropriately assess and consider potential impacts on Indigenous Peoples' traditions and ways of life and fosters better dialogue and mutual understanding of risks between project proponents and Indigenous Peoples.

Through denying SEITC the opportunity to provide its free, prior, and informed consent during the approval process of the Eskay Creek Project, Canada and B.C. have substantially increased the likelihood that the Project will violate SEITC member Tribes' rights to culture, healthy environment, their own means of subsistence, physical health and well-being, and right to use and enjoy the lands they have traditionally occupied. As such, the Project presents a serious and urgent risk of irreparable harm under Article 25 of the IACHR Rules of Procedure.

## II. Beneficiaries

The beneficiaries of this request are 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, the seven SEITC member Tribes whose traditional territories are in the Unuk River watershed. These Tribes are also Petitioners in *Case N° 15.329*. They have consented to Earthjustice submitting this request on their behalf.

These SEITC member Tribes are the modern-day successors to the Tèikwèidi Tlingit Clan of the *Sàanyàa K̄wáan* to which the Unuk River watershed belonged at the time of first European contact.<sup>2</sup> “The term *kwáan*, derived from the verb ‘to dwell,’ simply served to identify Tlingit individuals as inhabitants of a certain geographic region.”<sup>3</sup> As SEITC has explained to B.C. EAO with regards to the *Sàanyàa K̄wáan*:

The people who became the *Sàanyàa K̄wáan* travelled to the Unuk River watershed from down the coast, in what is now British Columbia. 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, *Jòonax̄* or *Jòonax̄h*, 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 *Jòonax̄* (Unuk River). These people became known as the Unuk River people. According to oral

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<sup>2</sup> SEITC Merits Observations, App. 10, pp. 7-8.

<sup>3</sup> *Ibid.*, p. 6.

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>4</sup>

The Tèikwèidi's cultural practices and traditions are historically interconnected with the Unuk River, and these traditions and practices continue today. 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 from terminus to the headwaters.<sup>5</sup> They harvested and preserved fish, berries, and big game.<sup>6</sup> Fish from the Unuk River—particularly salmon and eulachon (hooligan)—continue to be an important source of food and a centerpiece of Tèikwèidi cultural practices and spiritual beliefs.<sup>7</sup> These connections to the river have been outlined in detail in the 2020 Petition.

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, has described her ancestors' dependence on the Unuk River for subsistence:

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>8</sup>

And further, “[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>9</sup>

Sylvia also elaborated on how the Unuk River held an important role in her learning from her father how to hunt and fish:

[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>10</sup>

Louis Wagner, Jr., from the Metlakatla Indian Community and a member of the Tlingit people, has explained the importance of eulachon for subsistence purposes, but also the role the fish plays in building and maintaining ties between local communities:

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<sup>4</sup> *Ibid.*, p. 8.

<sup>5</sup> *Ibid.*, p. 11.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, p. 12.

<sup>8</sup> *Ibid.*, p. 11.

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

<sup>10</sup> *Ibid.*, p. 13.

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>11</sup>

Tazia W’ally Sthaathi Ta Wagner—granddaughter of Louis—from the Metlakatla Indian Community described the significance of the Unuk River to the sharing and preserving of generational knowledge:

I grew up with my grandparents from whom I learned our way of life and how to harvest... [I] want to be able to steward the Unuk River for future generations, so they can take part in harvesting and processing the hooligan, the moose and the king salmon that come from the Unuk River... They closed the fishery due to low runs of hooligan in 2002. Because of that closure, my chance to harvest hooligan for our communities was taken away from me and from my cousins. With that 15 year plus pause, we lost a generation that knows how to put up hooligan, how to make the grease, how to smoke it or even how to eat or care for it. That’s cultural genocide. I would love to see us do another community harvest on the Unuk River again and see those bright smiles on everyone's faces one more time. And to bring hooligan again to our elders, that is what I would really love to happen in the future, for generations to come.<sup>12</sup>

Given its location on the Unuk River, the Eskay Creek Project presents a foreseeable and imminent threat to the SEITC member Tribes’ environment and culture.

### III. Facts

Skeena Resources Limited (“Skeena”) proposed the Eskay Creek Project—an open pit gold and silver mine—in 2021.<sup>13</sup> Skeena estimates that the Project will have an annual production of 3.0 million tons per year (Mt/a) in Years 1-5 of operation and 3.5 Mt/a during Years 6-9.<sup>14</sup> From construction to closure, it is expected to have a 14-year mine life.<sup>15</sup> The mine will be in the same area of a previous mine that operated from 1994-2008.

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<sup>11</sup> *Ibid.*, p. 12.

<sup>12</sup> SEITC, *Unuk River Testimonies [Tazia Wagner]* (May 15, 2023), <https://www.seitc.org/unuk-river-community-interviews>.

<sup>13</sup> Skeena, *Eskay Creek Revitalization Project, Detailed Project Description*, p. 3 (Aug. 10, 2022), [https://skeenaeskaycreek.com/site/assets/files/5815/2022\\_08\\_10\\_eskay\\_creek\\_revitalization\\_final\\_dpd.pdf](https://skeenaeskaycreek.com/site/assets/files/5815/2022_08_10_eskay_creek_revitalization_final_dpd.pdf) (“*Eskay Creek Revitalization Project, Detailed Project Description*”).

<sup>14</sup> Ben Adaszynski *et al.*, *Eskay Creek Project British Columbia NI 43-101 Technical Report on Updated Feasibility*, p. 1-18 (Nov. 14, 2023),

[https://skeenaresources.com/site/assets/files/6750/eskay\\_ck\\_technical\\_report\\_2023\\_final\\_22dec2023\\_-\\_sedar.pdf](https://skeenaresources.com/site/assets/files/6750/eskay_ck_technical_report_2023_final_22dec2023_-_sedar.pdf).

<sup>15</sup> *Eskay Creek Revitalization Project, Detailed Project Description*, p. viii.

As described in more detail below, since 2021, SEITC has repeatedly requested from provincial authorities that it be consulted to the full extent allowed for First Nations under the B.C. *Environmental Assessment Act* and B.C.’s *Declaration on the Rights of Indigenous Peoples Act*. The *Environmental Assessment Act* requires that a reviewable project not proceed without the consent of an Indigenous Nation where such consent is required.<sup>16</sup> Under this Act, an Indigenous Nation may request to act as a “Participating Indigenous Nation” (“PIN”) in the assessment of a project. If approved, PIN status requires that the chief executive assessment officer “seek to achieve consensus with” the Indigenous Nation as part of the environmental assessment process.<sup>17</sup> The *Environmental Assessment Act* also establishes a process for B.C. to enter into an agreement with “one or more Indigenous Nation” regarding an environmental assessment process.<sup>18</sup> Additionally, B.C.’s *Declaration on the Rights of Indigenous Peoples Act* sets out a process through which a member of the Executive Council—on behalf of B.C.—may enter into an agreement with an Indigenous Nation aimed at seeking “the consent of the Indigenous governing body before the exercise of a statutory power of decision.”<sup>19</sup> Although discretionary, B.C. has used this provision to enter into a consent-based decision-making agreement regarding the Eskay Creek Project with the Tahltan Government.<sup>20</sup> If B.C. were to apply these provisions to SEITC during the approval of the Eskay Creek Project, it would be a substantial step towards meeting its international obligations related to seeking SEITC’s free, prior, and informed consent. Unfortunately, after three years of requests by SEITC, B.C. refuses to apply them to SEITC.

On August 3, 2021, David Grace, Project Assessment Director of B.C. Environmental Assessment Office (“B.C. EAO”), copied SEITC on an email notifying Craig Tribal Association, one of SEITC’s member Tribes, that Skeena had submitted an Initial Project Description for the Eskay Creek Project, a step that marks the beginning of the environmental review process.<sup>21</sup> In this email, Grace informed Craig Tribal Association that it could “provide feedback” on the description during a month-long public comment period starting in late August and ending in late September 2021.<sup>22</sup> SEITC submitted comments to help inform Skeena’s 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>23</sup>

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<sup>16</sup> Environmental Assessment Act, S.B.C. 2018, § 7, <https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/18051> (“Environmental Assessment Act”).

<sup>17</sup> *Ibid.*, § 16(1).

<sup>18</sup> *Ibid.*, § 41(1)(c).

<sup>19</sup> Declaration on the Rights of Indigenous Peoples Act, S.B.C. 2019, §7, <https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19044#section7>.

<sup>20</sup> Tahltan Nation and Province of British Columbia, Declaration Act Consent Decision-Making Agreement for Eskay Creek Project (Jun. 6, 2022), [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).

<sup>21</sup> SEITC Merits Observations, App. 3.

<sup>22</sup> *Ibid.*, p. 4.

<sup>23</sup> Letter from Frederick Olsen, Jr., Executive Director, SEITC, to David Grace, Project Assessment Director, B.C. EAO, Re: Eskay Creek Revitalization Project Early Engagement Comments (Oct. 18, 2021), <https://projects.eao.gov.bc.ca/api/public/document/617ad36c1fe4c00022fa7a85/download/seitcCommentsEskayCreek>.

SEITC, on September 23, 2022, submitted a letter to B.C. Premier Horgan, informing him that his “government must recognize SEITC member Tribes as ‘Aboriginal peoples of Canada’ [under section 35 of the *Constitution Act*, 1982] with constitutionally protected Aboriginal rights that will be adversely impacted by the Eskay Creek Project.”<sup>24</sup> Additionally, SEITC requested that B.C. formally recognize it as a PIN under Section 14 of the *Environmental Assessment Act*, 2018.<sup>25</sup> As described above, PIN status would grant SEITC member Tribes procedural rights related to free, prior, and informed consent such as “consensus seeking processes, providing a notice of consent or lack of consent at specific decision points, and access to facilitated dispute resolution.”<sup>26</sup> B.C. EAO denied SEITC’s PIN request on December 12, 2022, asserting that “there was no reasonable possibility that the Indigenous Nation [SEITC] or its Section 35 rights will be adversely affected by the [Eskay Creek Project].”<sup>27</sup> It did not make a determination regarding SEITC’s Aboriginal Peoples of Canada assertion, but suggested SEITC submit additional information to support its claim.<sup>28</sup> B.C. EAO was very specific about what kind of information complied with their decision and outlined a process,<sup>29</sup> and SEITC complied fully with their evidentiary request.

On January 30, 2024, SEITC and the 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 once again requested that the B.C. EAO (1) formally recognize them as “Aboriginal Peoples of Canada” under section 35 of the *Constitution Act 1982*; (2) formally recognize them as PINs for the Eskay Creek Project; and (3) engage in good faith to negotiate a consent-based agreement under the *Declaration on the Rights of Indigenous Peoples Act*.<sup>30</sup> As per B.C.’s request for further information, SEITC and the Tribal governments submitted substantial archival collections and research materials, testimonies, traditional maps, and other literature supporting their request.<sup>31</sup> This formal request is attached as Appendix 10 to SEITC’s Merits Observations.

Without addressing SEITC’s PIN request, Elenor Arend, B.C. Chief Executive Assessment Officer, notified SEITC on April 24, 2024 that B.C. intended to develop a policy for engaging and consulting with Indigenous groups outside of the Canadian border.<sup>32</sup> On May 10, 2024, Colin Ward, B.C. Assistant Deputy Minister of Water, Land and Resource Stewardship, wrote to inform SEITC of a proposed order under section 7(1) of the *Environment and Land Use Act* (“ELUA”) “to support an interim approach to engagement with certain Alaskan nations on the

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<sup>24</sup> SEITC Merits Observations, App. 5, p. 1.

<sup>25</sup> *Ibid.*, p. 2.

<sup>26</sup> SEITC Merits Observations, pp. 8-9 (citing 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> (“Environmental Assessment Act”).

<sup>27</sup> SEITC Merits Observations, App. 7, p. 2.

<sup>28</sup> *Ibid.*, p. 4.

<sup>29</sup> SEITC Merits Observations, App. 8.

<sup>30</sup> SEITC Merits Observations, App. 10.

<sup>31</sup> *Ibid.*

<sup>32</sup> Letter from Esther Reese, President, SEITC, to Honourable George Heyman, Minister of Environment and Climate Change Strategy; the Honourable Nathan Cullen, Minister of Water, Land and Resource Stewardship; and the Honourable Murray Rankin, Minister of Indigenous Relations and Reconciliation, Re: Policy for Engaging and Consulting Aboriginal Groups Outside of Canada (May 21, 2024) (**Appendix A**).

environmental assessments (EAs) of certain projects.”<sup>33</sup> The notification explained that, pursuant to the proposed ELUA order, SEITC member Tribes would be consulted “outside of the participating indigenous nation framework” to allow B.C. EAO “to differentiate the approach to any engagement or consultation with these Alaskan nations from the approach taken with First Nations based in British Columbia.”<sup>34</sup> It set no timelines for consultation or for issuing the order. In a response dated May 31, 2024, SEITC expressed deep disappointment with B.C.’s intention to issue the ELUA order, which “falls far short of meeting Canada and BC’s obligations to seek [SEITC’s] free, prior, and informed consent,” explaining that “Canada and BC cannot shield themselves from [] international obligations just because SEITC member Tribes live outside their territory.”<sup>35</sup>

On June 27, 2024, B.C. issued the Environmental Assessment Order under ELUA (“ELUA Order” or “Order”), as proposed.<sup>36</sup> The Order listed SEITC’s member Tribes by name, determining that they “may not be a participating Indigenous nation” and that “section 14 of the [*Environmental Assessment Act*] does not apply to” them.<sup>37</sup> Beyond noting an expiration date of September 15, 2027,<sup>38</sup> the Order does not provide any detail regarding B.C.’s proposed approach to consultation with SEITC member Tribes or timeline for developing an approach.

On July 3, 2024, Arend further clarified that “to meet any constitutional obligations owed” to SEITC, the B.C. EAO will “[n]otify the Seven Member Tribes of five key milestones during the remainder of the [environmental assessment (EA)] process,” “[s]hare documents and provide the opportunity for the Seven Member Tribes and SEITC to comment on interests,” and “[m]eet as required to discuss issues and concerns arising in the EA.”<sup>39</sup> Arend also explained that

[i]f and when other mining projects that enter an EA process are identified as having potential for effects in the Alaska transboundary region or potential impacts to Alaskan Tribes asserted Section 35 Rights, [Arend] will consider the scope and nature of those projects, any consultation obligations to Alaskan Tribes, and the ELUA Order, and . . . communicate further on these projects on a case-by-case basis.<sup>40</sup>

Arend reiterated that, pursuant to the ELUA Order, “there is no ability for SEITC to be a PIN on behalf of any of the Seven Member Tribes,” and “there can be no reconsideration of the

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<sup>33</sup> Letter from Colin Ward, Assistant Deputy Minister, B.C. Ministry of Water, Land and Resource Stewardship, to Guy Archibald, Christie Jamieson, and Rob Sanderson, SEITC, p. 1 (May 10, 2024) (**Appendix B**).

<sup>34</sup> *Ibid.*, p. 2.

<sup>35</sup> Letter from Esther Reese, President, SEITC, to Colin Ward, Assistant Deputy Minister, B.C. Ministry of Water, Land and Resource Stewardship, Re: Proposed Order under section 7(1) of the Environment and Land Use Act (May 31, 2024), pp. 4-5 (**Appendix C**).

<sup>36</sup> Province of British Columbia, *Environmental Assessment (Participating Indigenous Nations – Alaska) Order, Order of the Lieutenant Governor in Council No. 364* (Jun. 27, 2024), [https://www.bclaws.gov.bc.ca/civix/document/id/oic/oic\\_cur/0364\\_2024](https://www.bclaws.gov.bc.ca/civix/document/id/oic/oic_cur/0364_2024).

<sup>37</sup> *Ibid.*, p. 2.

<sup>38</sup> *Ibid.*, p. 3.

<sup>39</sup> Letter from Elenore Arend, Chief Executive Assessment Officer and Associate Deputy Minister, B.C. EAO, to Esther Reese, President, and Guy Archibald, Executive Director, SEITC, *et al.*, p. 3 (Jul. 3, 2024) (**Appendix D**).

<sup>40</sup> *Ibid.*, p. 4.



determination [Arend] made in December 2022, under Section 14(2) of the [Environmental Assessment] Act.”<sup>41</sup>

#### **IV. This Situation Merits the Granting of Precautionary Measures.**

The Commission can request Canada to adopt precautionary measures concerning “serious and urgent situations presenting a risk of irreparable harm to persons . . . of a pending petition [].”<sup>42</sup>

##### **A. Seriousness**

The Commission may grant precautionary measures in a serious situation, which “refers to a grave impact that an action or omission can have on a protected right.”<sup>43</sup> Because free, prior, and informed consent is so closely connected to understanding and preventing harms to Indigenous Peoples from proposed extractive projects, the failure to ensure this protective process exponentially increases the risks of violations once a project begins operations. B.C.’s failure to obtain SEITC’s free, prior, and informed consent before authorizing the Eskay Creek Project would thus subject them to foreseeable, imminent, and significant environmental, cultural, and health harms against which they have actively sought to protect.

- 1. The Eskay Creek Project presents a foreseeable, imminent, and significant threat to SEITC member Tribes who have relied on the Unuk River for millennia.*

The potential threats to the SEITC member Tribes from the Eskay Creek Project are serious. The Project presents a foreseeable, imminent, and significant threat to the Unuk River watershed and particularly the fisheries which are intimately connected with SEITC Tribes’ cultural and subsistence practices.<sup>44</sup> As outlined in SEITC’s 2020 Petition, the Eskay Creek Project would also use a highly risky method of storing toxic byproducts—called “tailings”—in wet dam enclosures<sup>45</sup> that have a history of failure. When these dams fail, they release huge amounts of toxic sludge into surrounding rivers and streams, catastrophically polluting downstream waters and habitats.<sup>46</sup> This was the case with the August 2014 tailings dam failure at Mount Polley mine, B.C., which was one of the worst in Canadian history, releasing millions of cubic meters of toxic waste into nearby lakes and rivers.<sup>47</sup> Because these dams would need to permanently contain the toxic materials behind them, they must function for thousands of years.

At the end of the Project’s mine life, in 14 years, the tailings pond would store 26.4 million tons (Mt) of tailings and 84 Mt of potentially acid generating rock.<sup>48</sup> Documents show that potential

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<sup>41</sup> *Ibid.*, p. 3.

<sup>42</sup> IACHR, *Rules of Procedure of the Inter-American Commission on Human Rights* (effective Aug. 1, 2013), art. 25(1), <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp> (“*Rules of Procedure of the Inter-American Commission on Human Rights*”).

<sup>43</sup> *Ibid.*, art. 25(2)(a).

<sup>44</sup> 2020 Petition, ¶¶ 83-156; SEITC Merits Observations, pp. 14-16.

<sup>45</sup> *Eskay Creek Revitalization Project Detailed Project Description*, pp. viii-ix.

<sup>46</sup> 2020 Petition, ¶¶ 65-68.

<sup>47</sup> 2020 Petition, ¶ 69.

<sup>48</sup> See *Eskay Creek Revitalization Project, Detailed Project Description*, p. 31.

reduction in water quality downstream of the Project site within the Unuk River could be an issue.<sup>49</sup> The Project is located about four miles upstream of salmon habitat.<sup>50</sup> The tailings dam will have to be maintained and remain intact in perpetuity to avoid harm to SEITC member Tribes. It is not a matter of if it 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>51</sup> The Project, like the other B.C. Mines, will generate large amounts of waste that can cause acid mine drainage, a toxic cocktail of acidic water and dissolved heavy metals.<sup>52</sup> Although mine operators attempt to contain and treat acidic byproducts, treatment often does not perform as planned.<sup>53</sup> The result is that acid mine drainage pollution is a common occurrence in B.C. and elsewhere.<sup>54</sup>

Pollution from the Eskay Creek Project could cause sustained and significant reductions in fish populations in the Unuk River watershed, which would significantly harm SEITC member Tribes’ generations-old subsistence practices that are a mainstay of their livelihoods, culture, and traditions. As explained in previous submissions to the Commission,<sup>55</sup> 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 Eskay Creek Project would undermine SEITC member Tribes’ ability to engage in cultural and spiritual practices related to the harvest and sharing of these fish and could have dire consequences for SEITC member Tribes’ means of subsistence and health.

Citizens of the Alaska Tribes who have used the Unuk River for generations documented changes to the river and reduction in anadromous fish when the past producing Eskay Creek Mine was in operation. As Lee Wagner of the *Sàanyàa Kwáan* and Metlakatla Indian Community observed:

In the late 1990s and early 2000s, we began to notice changes on the river. My mother started finding 50-gallon drums and debris washing up on the riverbanks. There was more silt in the water, and its color was no longer glacier-blue. As time went on, less and less ooligan came in. Eventually, they nearly disappeared from the Unuk. Salmon, too, began diminishing at an alarming rate, along with other wildlife.<sup>56</sup>

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

<sup>50</sup> *Ibid.*, p. xvii.

<sup>51</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>52</sup> 2020 Petition, ¶¶ 83-156.

<sup>53</sup> *Ibid.*, ¶¶ 54-57.

<sup>54</sup> *Ibid.*, ¶¶ 65-68.

<sup>55</sup> See, e.g., SEITC Merits Observations, p. 14.

<sup>56</sup> Statement from Lee Wagner, Saanya Kwaan, Metlakatla, AK (Nov. 21, 2023) (**Appendix E**).

The Eskay Creek Project is a much larger open pit mine plan at the same site. Since mining ceased in 2015, fish populations are only now beginning to recover. SEITC member Tribes are concerned that restarting operations at a larger scale will be detrimental to the eulachon and salmon. Cindy Wagner of the *Sàanyàa Kwáan* and Metlakatla Indian Community explained:

[A]fter over a decade of no mining, ooligan have returned to the Unuk River with good runs. . . . And now, the mines are getting close to opening again. Before these devastating mines begin again, I want to fish the Unuk River this spring as we always did with my children, grandchildren, and great grandchildren, so they can see what we had.<sup>57</sup>

Louis Wagner of the *Sàanyàa Kwáan* and Metlakatla Indian Community also noted that:

King salmon returns have been lower and the salmon smaller. Now there are only sixteen to eighteen-pound king salmon. I am severely concerned that while we continue advocating the reopening of the subsistence ooligan fishery, any additional stresses—no matter how minor—could ruin our efforts and derail our goals to open this fishery back up to the community.<sup>58</sup>

Given significant and lasting damage from existing B.C. Mines, the risks associated with the Project are far from theoretical. For example,

- Teck’s Elk Valley coal mines have released selenium into the transboundary Elk-Kootenay River watershed “hundreds of times over the healthy limit for fish . . . for decades.”<sup>59</sup> A 2024 study on selenium contamination from the Elk Valley mines found that, despite installing three additional water treatment facilities, “the recently measured concentrations of selenium have regularly exceeded the water quality targets . . . and the frequency and degree of exceedance appears to be worsening.”<sup>60</sup> This result is unsurprising, given that these facilities were only able to remove approximately “5% of the total mine-related loading to the Elk River watershed in 2020, approximately 13% in 2021, and 19% in 2022.”<sup>61</sup> The U.S. Geological Survey similarly found that “[t]he physiographic setting of the [Elk River Mines] and their operational practices have resulted in tons of [selenium] and thousands of tons of other mine wastes ( $\text{NO}_3^-$ ,  $\text{SO}_4^{2-}$ ) entering U.S. waters . . . that are now resulting in exceedances of U.S. and CA water-quality regulations in [the Koochanusa Reservoir].”<sup>62</sup> Elevated selenium concentrations pose health harms for Indigenous Tribes who rely on the watershed in both Canada and

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<sup>57</sup> Statement from Cindy Wagner, Saanya Kwaan Teikweidi, Metlakatla, AK (Nov. 24, 2023) (**Appendix F**).

<sup>58</sup> Statement from Louis Wagner (Sept. 26, 2018) (**Appendix G**).

<sup>59</sup> B.C. Mining Law Reform, *Dirty Dozen 2023: B.C.’s Top Polluting and Risky Mines*, p. 6 (2023), <https://reformbcmining.ca/wp-content/uploads/2023/05/BCMLR-Dirty-Dozen-report-2023-web.pdf> (“*Dirty Dozen 2023*”).

<sup>60</sup> Burgess Environmental Ltd., *Review of Reclamation Security Addressing Selenium Contamination Teck Coal’s Elk Valley Mines*, p. 7-7 (Mar. 18, 2024), [https://d1tfm8vclpljj.cloudfront.net/wp-content/uploads/2024/03/2024-03-18-Teck-Coal-Final-Report\\_Reduced\\_Cover-Letter.pdf?x98553](https://d1tfm8vclpljj.cloudfront.net/wp-content/uploads/2024/03/2024-03-18-Teck-Coal-Final-Report_Reduced_Cover-Letter.pdf?x98553).

<sup>61</sup> *Ibid.*, p. 5-22.

<sup>62</sup> Meryl B. Storb *et al.*, *Growth of Coal Mining Operations in the Elk River Valley (Canada) Linked to Increasing Solute Transport of Se,  $\text{NO}_3^-$ , and  $\text{SO}_4^{2-}$  into the Transboundary Koochanusa Reservoir (USA–Canada)*, 57 *Env’t. Sci. Tech.*, 17465, 17475 (Nov. 3, 2023), <https://pubs.acs.org/doi/10.1021/acs.est.3c05090?ref=pdf>.

the U.S. Teck’s 2023 Human Health Risk Assessment found that “[p]eople who eat fish and other traditional foods at the Ktunaxa preferred rate” from across locations along the Elk River “have risks that are 2.8 times higher than those for eating fish from reference locations.”<sup>63</sup>

- For over six decades, the abandoned Tulsequah Chief mine in B.C. has leaked acid mine drainage, including heavy metals, into the Tulsequah River, which itself “provides important salmon habitat and is only 10 km away from the top salmon-producing transboundary Taku River.”<sup>64</sup> A final reclamation plan is still in development.<sup>65</sup>
- According to a 2022 study, the mine tailings discharged during the 2014 Mount Polley disaster remained potentially toxic to benthic invertebrates of the freshwater ecosystems in Polley and Quesnel Lakes four years after the breach.<sup>66</sup> The authors explained that this toxicity could reduce macroinvertebrate populations on which fish rely for food and “serve as a significant source of metals to fish populations,” noting the need for “[m]uch more research” to “understand the full extent of the ecological ramifications” of the Mount Polley tailings breach.<sup>67</sup>
- In the transboundary Columbia River watershed, Copper Mountain Mine is responsible for “unauthorized wastewater discharges directly [into] the Similkameen (where local Indigenous communities now feel unsafe accessing traditional foods), and repeated copper and nitrate contamination of local creeks.”<sup>68</sup>
- A recent mine failure at the Eagle Gold Mine in Yukon, Canada, released up to 300,000 cubic meters of cyanide solution into nearby waterways that drain into the transboundary Yukon River.<sup>69</sup> Water samples taken by the Yukon government after the incident from locations around the mine indicated the presence of cyanide, including at levels in a nearby free-flowing creek that “could affect fish.”<sup>70</sup>

2. *In failing to respect SEITC’s right to free, prior, and informed consent, B.C. has created a serious and imminent threat from the Project to SEITC member Tribes’ rights.*

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<sup>63</sup> Ramboll Americas Engineering Solutions, Inc., Second Revised Final Human Health Risk Assessment Supporting the Elk Valley Water Quality Plan, p. ES-20 (Oct. 2023) <https://nrs.objectstore.gov.bc.ca/xedyjn/Projects/ElkValley/Elk%20Valley%20Human%20Health%20Risk%20Assessment.pdf>.

<sup>64</sup> *Dirty Dozen 2023*, p. 12.

<sup>65</sup> SEITC Merits Observations, App. 2.

<sup>66</sup> Gregory G. Pyle *et al.*, *Invertebrate Metal Accumulation and Toxicity from Sediments Affected by the Mount Polley Mine Disaster*, 29 *Env’t. Sci. Pollution Rsch.* 70380 (May 19, 2022), [https://link.springer.com/epdf/10.1007/s11356-022-20677-1?sharing\\_token=ue\\_Z5vjT3VrbCMbclSGIMPe4RwlQNchNBvi7wbcMAY6kUJWPE0YZZb8gqEQ4rd\\_91yEdnWneDmIHfOXqC4iJX-jiYMIb-BMp-ckmEDEX4-B3YTO8\\_HWbUAXqwDxIyGjn\\_-5sbFSBIKDXajrALoFO2JvRXOTdPpCDjKWQVvKLn4%3D](https://link.springer.com/epdf/10.1007/s11356-022-20677-1?sharing_token=ue_Z5vjT3VrbCMbclSGIMPe4RwlQNchNBvi7wbcMAY6kUJWPE0YZZb8gqEQ4rd_91yEdnWneDmIHfOXqC4iJX-jiYMIb-BMp-ckmEDEX4-B3YTO8_HWbUAXqwDxIyGjn_-5sbFSBIKDXajrALoFO2JvRXOTdPpCDjKWQVvKLn4%3D).

<sup>67</sup> *Ibid.*, p. 70394.

<sup>68</sup> *Dirty Dozen 2023*, p. 8.

<sup>69</sup> Julien Greene, ‘Every Minute Matters’: Experts with First-Hand Accounts at Victoria Gold Mine Disclose Gravity of Problems, CBC News (Jul. 17, 2024), <https://www.cbc.ca/news/canada/north/victoria-gold-mine-experts-1.7264503>.

<sup>70</sup> *Ibid.*

B.C.'s refusal or failure to seek SEITC's free, prior, and informed consent with respect to the Eskay Creek Project is a serious threat to their member Tribes' rights. B.C. EAO's decision to adopt a completely insufficient consultation policy not only violates its obligation to seek SEITC's free, prior, and informed consent, but exponentially increases the abovementioned risks of the Project to SEITC member Tribes' substantive rights.

Indigenous Peoples' right to free, prior, and informed consent both stems from and safeguards their fundamental right to self-determination. This Commission has recognized that for "large-scale development or investment projects that would have a major impact within [Indigenous] territory, the State has a duty, not only to consult with the [Indigenous Peoples], but also to obtain their free, prior, and informed consent, according to their customs and traditions."<sup>71</sup> This is, in part, because of the "negative environmental, social, cultural, and human impacts generated by these activities."<sup>72</sup> With respect to extractive projects, ensuring free, prior, and informed consent is intimately connected to ensuring and preventing violations of Tribes' substantive rights. Without seeking SEITC's free, prior and informed consent, B.C. EAO and Skeena cannot understand the full extent to which the Project could interfere with SEITC member Tribes' rights. Conducting appropriate consultation with SEITC is integral to adequately assessing the Project's cultural and environmental impacts and ensuring measures are in place to deal with potential risks. Once a project is approved without free, prior, and informed consent of those potentially impacted, it is simply too late.

After three years of back and forth, B.C. has at the eleventh hour imposed a process on SEITC that utterly falls short of ensuring SEITC is adequately consulted. Even more troubling, B.C. EAO made this decision without consulting with SEITC, much less considering their traditional decision-making methods. It has also failed to explain or offer any analysis of the information SEITC submitted under B.C. EAO's request to inform the PIN decision under the *Environmental Assessment Act*. SEITC is concerned that this new policy is merely an excuse to further deny free, prior, an informed consent to SEITC member Tribes.<sup>73</sup> B.C. has admitted as much. In its response to SEITC's 2020 Petition, B.C. acknowledged its misconceived and insulting belief that consultation with First Nations in B.C. would be adequate to understand the potential impacts to Tribes in Alaska.<sup>74</sup> It stated:

Aspects of the new *Environmental Assessment Act* apply specifically to "Indigenous peoples in British Columbia".... It is the Province's experience that the Indigenous peoples of British Columbia, however, share similar interests with the Petitioners in the transboundary waters and fisheries that move through British Columbia and Alaska. The project mitigations developed collaboratively with Indigenous nations in British Columbia ... to address potential project effects on these nations and their rights, are expected to similarly mitigate any potential project effects to the interests of Indigenous peoples in Alaska, whose cultures and

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<sup>71</sup> *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 134 (Nov. 28, 2007).

<sup>72</sup> IACHR, *Indigenous Peoples Communities of African Descent Extractive Industries*, ¶ 15 (Dec. 31, 2015), <https://www.oas.org/en/iachr/reports/pdfs/extractiveindustries2016.pdf>.

<sup>73</sup> Appendix A.

<sup>74</sup> Submission of British Columbia in response to a petition by the Southeast Alaska Indigenous Transboundary Commission before the Inter-American Commission on Human Rights, ¶ 12 (May 10, 2022).

subsistence practices similarly rely on the environment of watersheds such as of the Taku, Stikine and Unuk Rivers.<sup>75</sup>

Although the full details of the B.C.-imposed process have yet to be determined, given B.C. EAO's consistent disregard for SEITC's right to free, prior, and consent thus far, including, as described in the 2020 Petition, authorizing two other mines in the Unuk River watershed without adequately consulting with SEITC member Tribes,<sup>76</sup> it is unlikely that the process will protect SEITC member Tribes' rights. In stark contrast to "a dialogue and negotiation towards consent," which is a fundamental tenet of achieving free, prior, and informed consent, B.C.'s imposition of an ill-defined process that it has developed without any input from SEITC gives SEITC no "freedom to guide and direct the process of consultation" or any "power to determine how to consult and the course of the consultation process."<sup>77</sup>

The B.C. EAO's consultation and engagement with B.C. First Nations about the Project demonstrates how much more robust the process has been for Canadian Tribes. B.C. has recognized the rights of First Nations in Canada that are further from the project and who might be impacted even less than SEITC member Tribes. For example, B.C. EAO has entered into a consent-based decision-making agreement with the Tahltan Nation with respect to the Eskay Creek Project, which, among other things, requires that B.C. ensure Tahltan indigenous knowledge and values are "appropriately, respectfully, and meaningfully reflected and considered."<sup>78</sup> It has allowed the Tahltan Nation to help determine the design, implementation, monitoring, and evaluation of the Project. But protecting the interests of a First Nations Tribe in B.C. is not enough to protect SEITC, as B.C. suggested in its submission to this Commission,<sup>79</sup> because SEITC member Tribes have their own unique concerns and interests.

If B.C. approves the Project without adequately consulting SEITC, it would violate SEITC member Tribes' "human rights as a people"<sup>80</sup> and subject them to "the whims of a mining company and a foreign colonial power."<sup>81</sup> The Eskay Creek Project is only the first of many, potentially harmful mining projects for which B.C. plans to authorize in accordance with the ELUA Order—allowing barebones consultation to proceed for this project also risks legitimizing B.C.'s approach with respect to other mines and U.S. Tribes.

In summary, SEITC cannot count on B.C. and Skeena to protect and guarantee its member Tribes' rights without seeking SEITC's free, prior, and informed consent during the

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<sup>75</sup> *Ibid.*

<sup>76</sup> SEITC Merits Observations, pp. 5-7.

<sup>77</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*, ¶ 20(d) (Aug. 10, 2018), <https://un-declaration.narf.org/wp-content/uploads/Free-prior-and-informed-consent-a-human-rights-based-approach-1.pdf>. ("Human Rights Council").

<sup>78</sup> Tahltan Nation and Province of British Columbia, Declaration Act Consent Decision-Making Agreement for Eskay Creek Project, ¶ 6.4(i) (Jun. 6, 2022), [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).

<sup>79</sup> Submissions of British Columbia in response to a petition by the Southeast Alaska Indigenous Transboundary Commission before the Inter-American Commission on Human Rights, ¶ 12 (May 10, 2022).

<sup>80</sup> SEITC Merits Observations, App. 10, p. 15.

<sup>81</sup> SEITC Merits Observations, p. 10.

environmental review process. This omission presents a grave and serious threat to SEITC member Tribes' rights.

## B. Urgency

An urgent situation refers to a “risk or threat that is imminent and can materialize, thus requiring immediate preventive or protective action.”<sup>82</sup>

Precautionary measures are warranted here because after three years the Project is in the end stages of the environmental review process where public input is limited, and there is a real risk that, without the Commission's intervention, B.C. will approve the mine absent SEITC's free, prior, and informed consent<sup>83</sup> B.C. EAO has indicated that it may release the Project's environmental impact assessment (“EIA”) as early as the beginning of August. Without PIN status or a consent agreement with B.C., SEITC, like the general public, will then only have 30 days to give input,<sup>84</sup> which B.C. EAO need only “consider.”<sup>85</sup> Adjustments to the assessment report and environmental assessment certificate are made as B.C. EAO “considers appropriate.”<sup>86</sup> In other words, any changes are at its sole discretion. After Skeena submits a revised application for an environmental assessment certificate in response to public comments, B.C. EAO has 150 days to refer the application to the ministers who must then decide whether to issue the certificate within 30 days.<sup>87</sup> As such, after the 30-day public comments period ends, B.C. EAO is not required to consider any input from SEITC. Participating in a public EIA process with limited opportunity for intervention is a far cry from ensuring free, prior, and informed consent.<sup>88</sup>

If the ministers decide to grant the environmental assessment certificate, SEITC's only recourse in Canada is to seek judicial review, a domestic remedy that this Commission has already decided is ineffective to protect SEITC. In the admissibility decision on SEITC's petition (*Case N° 15.329*), the Commission found that the domestic legal framework would not be “adequate and effective” because it “does not extend to the protection of the rights of the [SEITC member Tribes], particularly given that they are based outside of Canada.”<sup>89</sup>

B.C.'s imposition of a diluted consultation process for SEITC member Tribes underscores the need for this Commission's immediate intervention. As described above, authorizing the Eskay Creek Project without SEITC's free, prior, and informed consent, would exponentially increase

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<sup>82</sup> *Rules of Procedure of the Inter-American Commission on Human Rights*, art. 25(2)(b).

<sup>83</sup> Province of British Columbia, Eskay Creek Revitalization, <https://projects.eao.gov.bc.ca/p/60f078d3332ebd0022a39224/project-details>.

<sup>84</sup> Environmental Assessment Act, § 28(2)(b). This Commission has found legislative and institutional frameworks for mining inconsistent with international human rights law in part because interested parties only had one month to submit observations. Inter-Am. Commission. H.R., *Comunidad Indígena Maya Q'eqchi' Agua Caliente vs. Guatemala*, Report No. 11/20 (Mar. 3, 2020), ¶ 112.

<sup>85</sup> Environmental Assessment Act, § 28(2)(c).

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

<sup>87</sup> Environmental Assessment Act, § 29.

<sup>88</sup> *Comunidad Indígena Maya Q'eqchi' Agua Caliente vs. Guatemala*, Report No. 11/20 (Mar. 3, 2020), ¶ 111 (finding that the legislative and institutional frameworks for granting mining licenses in Guatemala do not fully ensure the right to consultation of Indigenous Peoples).

<sup>89</sup> IACHR, Report No. 179/23, Petition 3004-18, Report on Admissibility, ¶ 59 (Aug. 25, 2023).

the threat of harm to SEITC member Tribes once the Project is operational. Obtaining SEITC’s free, prior, and informed consent *prior* to authorizing the project is critical to prevent imminent and foreseeable harm. As the Commission itself has noted, the principle of prevention “entails the obligation of States to carry out the necessary measures *ex ante* the production of environmental damage, taking into consideration that, due to its particularities, it will often not be possible, after such damage has occurred, to restore the previously existing situation.”<sup>90</sup>

In summary, there is very limited time left for SEITC to exercise its rights to free, prior, and informed consent. Once the EIA is issued, which is imminent, it will be too late. Immediate protective action is required to prevent the violation of SEITC member Tribes’ rights.

### C. Irreparable harm

Irreparable harm refers to “injury to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.”<sup>91</sup> Particularly relevant here, the Inter-American Court has noted, because “it is often impossible to restore the status quo that existed before the environmental damage has occurred, prevention must be the main policy regarding the protection of the environment.”<sup>92</sup>

As described, the threat of pollution from the Eskay Creek Project is foreseeable and substantial. B.C. has a history of long-lasting chronic pollution from mines in its watersheds and a poor track record for preventing pollution from mines. Eulachon populations in the Unuk River were likely devastated due to the operation of the first Eskay Creek mine, and there are many more examples of B.C. and Canadian mines causing pollution and harm.

For the reasons provided above, without SEITC’s free, prior, and informed consent, Canada and B.C. significantly increase the risk of causing irreparable damage to the Unuk River watershed, which would permanently alter SEITC member Tribes’ thousands of years old cultural and spiritual relationship to the watershed. Further, should B.C. EAO approve the Eskay Creek Project under the current process, it will be too late for it to seek or receive SEITC’s free, prior, and informed consent. This, alone, constitutes irreparable harm because it deprives SEITC of its “right to self-determine [its] political, social, economic, and cultural priorities”<sup>93</sup> regarding the Project. There would be no reparation, restoration, or adequate compensation that would rectify these violations.

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<sup>90</sup> Inter-Am. C.H.R., *Caso Habitantes de La Oroya v. Peru*, Judgement of Nov. 27, 2023, ¶ 126 (En relación con lo anterior, la Corte ha destacado que el principio de prevención de daños ambientales forma parte del derecho internacional consuetudinario. Este principio entraña la obligación de los Estados de llevar adelante las medidas que sean necesarias *ex ante* la producción del daño ambiental, teniendo en consideración que, debido a sus particularidades, frecuentemente no será posible, luego de producido tal daño, restaurar la situación antes existente) (*translation by the authors*).

<sup>91</sup> *Rules of Procedure of the Inter-American Commission on Human Rights*, art. 25(2)(c).

<sup>92</sup> Inter-Am. Ct. H.R., *Advisory Opinion OC-23/17, Human Rights and the Environment* (Nov. 15, 2017), ¶ 130 (“Tomando en cuenta que frecuentemente no es posible restaurar la situación existente antes de la ocurrencia de un daño ambiental, la prevención debe ser la política principal respecto a la protección del medio ambiente.” (“Taking into account that it is often not possible to restore the existing situation before the occurrence of environmental damage, prevention must be the main policy regarding the protection of the environment”)) (*translation by the authors*).

<sup>93</sup> Human Rights Council, ¶ 14.



## **V. Precautionary Measures Requested**

Given the serious and urgent situation posing a risk of irreparable harm, we request that this Commission call on Canada and B.C. to:

1. Seek and obtain SEITC's free, prior, and informed consent in compliance with international law for the Eskay Creek Project before the environmental authorization is issued; and
2. Provide any other relief that the Commission considers appropriate and just.

**List of Appendices to the Request for Precautionary Measures Pursuant to Article 25 of the Inter-American Commission on Human Rights Rules of Procedure Concerning Serious and Urgent Risks of Irreparable Harm Arising Out of the Eskay Creek Revitalization Project in British Columbia, Canada, 1 August 2024**

- A Letter from Esther Reese, President, SEITC, to Honourable George Heyman, Minister of Environment and Climate Change Strategy; the Honourable Nathan Cullen, Minister of Water, Land and Resource Stewardship; and the Honourable Murray Rankin, Minister of Indigenous Relations and Reconciliation, Re: Policy for Engaging and Consulting Aboriginal Groups Outside of Canada (May 21, 2024)
- B Letter from Colin Ward, Assistant Deputy Minister, B.C. Ministry of Water, Land and Resource Stewardship, to Guy Archibald, Christie Jamieson, and Rob Sanderson, SEITC (May 10, 2024)
- C Letter from Esther Reese, President, SEITC, to Colin Ward, Assistant Deputy Minister, B.C. Ministry of Water, Land and Resource Stewardship, Re: Proposed Order under section 7(1) of the Environment and Land Use Act (May 31, 2024)
- D Letter from Elenore Arend, Chief Executive Assessment Officer and Associate Deputy Minister, B.C. EAO, to Esther Reese, President, and Guy Archibald, Executive Director, SEITC, *et al.* (Jul. 3, 2024)
- E Statement from Lee Wagner, Saanya Kwaan, Metlakatla, AK (Nov. 21, 2023)
- F Statement from Cindy Wagner, Saanya Kwaan Teikweidi, Metlakatla, AK (Nov. 24, 2023)
- G Statement from Louis Wagner (Sept. 26, 2018)

# APPENDIX A

Letter from Esther Reese, President, SEITC, to Honourable George Heyman, Minister of Environment and Climate Change Strategy; the Honourable Nathan Cullen, Minister of Water, Land and Resource Stewardship; and the Honourable Murray Rankin, Minister of Indigenous Relations and Reconciliation, Re: Policy for Engaging and Consulting Aboriginal Groups Outside of Canada (May 21, 2024)



Via email: IRR.Minister@gov.bc.ca  
WLRs.minister@gov.bc.ca  
ENV.Minister@gov.bc.ca

May 21, 2024

Parliament Buildings  
Victoria BC  
V8V 1X4

**Attention: The Honourable George Heyman, Minister of Environment and Climate Change Strategy, the Honourable Nathan Cullen, Minister of Water, Land and Resource Stewardship, and the Honourable Murray Rankin, Minister of Indigenous Relations and Reconciliation**

**Re: Policy for Engaging and Consulting Aboriginal Groups Outside of Canada**

Dear Ministers,

On April 24, 2024, the Southeast Alaska Indigenous Transboundary Commission (“SEITC”) received a letter from the provincial Chief Executive Assessment Officer (“CEAO”), Elenore Arend, informing us of your letter dated the day prior. We understand that the Province intends to develop a policy that will "create an approach on engaging and consulting with Aboriginal groups outside of Canada that have credible assertions of rights under Section 35 of the *Constitution Act*, 1982 (“Section 35 rights”) in British Columbia (“B.C.”). We are concerned with the Province’s approach, finding it to be contrary to SEITC’s Section 35 rights held as “Aboriginal peoples of Canada” and our requested recognition as a “participating Indigenous nation” under the *Environmental Assessment Act*, 2018 (“EAA”).

The Province does not need a separate policy for consultation with "Aboriginal groups outside of Canada" that is different from the approach taken with B.C. First Nations. Your letter references two Indigenous groups that are seeking consultation – we understand there are 200+ First Nations in B.C. - hardly the threshold for a completely separate policy. The Province is making a distinction that was rejected by the Supreme Court of Canada (“SCC”) in *R v Desautel*, 2021 SCC 17 (“*Desautel*”).

Suggesting that the residence of Indigenous Groups requires a different process is directly contrary to *Desautel*, which recognized that the international boundaries established by the Crown and the United States are not a relevant consideration if an Indigenous group can answer the “threshold question” as to whether they are Aboriginal Peoples of Canada. The SEITC member tribes, like B.C. First Nations, are "Aboriginal peoples of Canada" with Section 35 rights in B.C., and are entitled to the same processes under the EAA as opposed to some ‘watered-down’ process.

Where there may be some uncertainty regarding the modern successor(s) of Indigenous nations who occupied Canadian territory at the time of European contact, perhaps a policy could guide the process of

determining the proper rights holder(s).

However, that is not the case with SEITC. As demonstrated through the abundant evidence we have provided to the Province to date, our member tribes who have claimed Section 35 rights are the modern-day successors to the Tèikwèidi Tlingit Clan. The Unuk River watershed was the recognized property of the Tèikwèidi Tlingit of the Sàanyàa Kwáan at the time of the first European contact in the 18<sup>th</sup> century. The Tèikwèidi Tlingit Clan occupied and exercised rights throughout the entirety of the watershed and is foundational to the member Tribes of SEITC and their past and present cultural identity. As we stated in our submissions to the EAO, SEITC member tribes are ethnographically Tlingit, Tsimshian, and Haida, whom B.C. and Canada and the Supreme Court of Canada have all formally recognized as Aboriginal peoples of Canada.

Your letter suggests that B.C. First Nations will have a role in determining the scope and content of the duty to consult owed to "Aboriginal groups located outside of Canada". This does not align with *Desautel*. The Supreme Court cautioned against placing a higher burden on Aboriginal communities who were forced to move or were divided by the international border. By allowing B.C. First Nations to decide when and how Indigenous groups based in the United States are consulted, the Province creates two distinct classes of Aboriginal rights — an approach that the SCC explicitly rejected. It is not appropriate for the Province to seek permission from, or provide a veto to B.C. First Nations. Such an approach clearly runs afoul of your government's commitments to implement the *United Nations Declaration on the Rights of Indigenous Peoples*.

Finally, the Province's decision to develop a policy seems more like an excuse to further delay consultation rather than address the potential impact that projects in British Columbia have on SEITC's Section 35 rights. The Eskay Creek Revitalization Project — which SEITC has requested to participate in the Environmental Assessment of as a participating Indigenous nation — will adversely affect our Tribal citizens' Aboriginal and inherent rights on both sides of the border. This project will be submitting an Environmental Analysis application in about 30 days.

We have demonstrated a requirement for consultation on the deep end of the spectrum, as articulated in *Desautel* and *Haida*. Further delay is unacceptable. The Province cannot continue to approve projects or delay decisions under section 14(2) of the EAA until such a time that a policy is developed.

We look forward to a timely acknowledgement of our rights.



Esther Reese  
President  
Southeast Alaska Indigenous Transboundary Commission

# APPENDIX B

Letter from Colin Ward, Assistant Deputy Minister, B.C. Ministry of Water, Land and Resource Stewardship, to Guy Archibald, Christie Jamieson, and Rob Sanderson, SEITC (May 10, 2024)

From: **Ward, Colin WLRS:EX** <[Colin.Ward@gov.bc.ca](mailto:Colin.Ward@gov.bc.ca)>

Date: Fri, May 10, 2024 at 12:00 PM

Subject: Proposed order under section 7(1) of the Environment and Land Use Act (ELUA) to support an interim approach to engagement with certain US Tribes on the environmental assessments (EAs) of certain projects

To: [garch570@gmail.com](mailto:garch570@gmail.com) <[garch570@gmail.com](mailto:garch570@gmail.com)>, [christiejamieson@seitc.org](mailto:christiejamieson@seitc.org) <[christiejamieson@seitc.org](mailto:christiejamieson@seitc.org)>, [haida2009@gmail.com](mailto:haida2009@gmail.com) <[haida2009@gmail.com](mailto:haida2009@gmail.com)>

To Guy Archibald, Christie Jamieson and Rob Sanderson,

Please find attached a notification letter on behalf of Assistant Deputy Minister Colin Ward regarding a proposed order under section 7(1) of the Environment and Land Use Act (ELUA).

Input can be submitted by replying to this email prior to May 23rd.

Kind regards,

**Colin Ward (he/him)**

*Assistant Deputy Minister, Reconciliation, Lands and Natural Resource Sector Policy  
Ministry of Water, Land and Resource Stewardship  
Phone: 778-974-2150*

I respectfully live, work and play on the beautiful, traditional, unceded territory of the Ləkʷəŋən speaking peoples as represented today by the Esquimalt and Songhees nations.

SEITC  
Guy Archibald  
Christie Jamieson  
Rob Sanderson

Dear Guy Archibald , Christie Jamieson, and Rob Sanderson,

We are writing to inform you that the Province of British Columbia is initiating engagement on the following proposal:

**PROPOSAL:** An order under section 7(1) of the *Environment and Land Use Act* (ELUA) to support an interim approach to engagement with certain Alaskan nations on the environmental assessments (EAs) of certain projects.

**APPLICANT:** Ministry of Water, Lands and Resource Stewardship – “the Ministry.”

**NOTIFICATION:** The intention of the proposed ELUA order is to support the ability of the Environmental Assessment Office (EAO) to engage with certain Alaskan nations with respect to certain projects in a manner that differs from how the EAO consults with First Nations based in British Columbia. We are sending this notification to make you aware of changes in decision-making processes in relation to matters that may affect your Nation’s interests and want to ensure transparency in any changes to provincial policies and practices.

**ISSUE SUMMARY:**

The Southeast Indigenous Transboundary Commission (SEITC), on behalf of seven of its member Tribes, provided notice under Section 14(1) of the *Environmental Assessment Act* (2018) (the Act) of their intention to participate as a participating Indigenous nation (PIN) in the EA of the Eskay Creek Revitalization Project. SEITC also identified interest in consultation for the following projects that are currently undergoing or are anticipated to commence an environmental assessment (EA) process in northwest B.C.:

- Galore Creek Copper-Gold-Silver Project
- Red Chris Porphyry Copper-Gold Mine Project
- Kerr-Sulphurets-Mitchell (KSM) Project
- Brucejack Gold Mine Project
- New Polaris Gold Mine Project

On April 23, 2024, Ministers Murray Rankin, Nathan Cullen and George Heyman [sent a letter to the Chief Executive Assessment Officer](#) regarding the Province's approach to engaging with Aboriginal groups outside of Canada. The Ministers’ letter states that “there are several important legal and policy matters that must be considered in relation to how the Province consults with Aboriginal groups located outside Canada. The Province intends to develop a Consultation Policy to support engagement with such groups.”



In addition, the Ministers' letter stated an intention to advance regulatory tools to provide certainty on how the Province will meet constitutional obligations and differentiate the approach to consultation in the EA process with Aboriginal groups outside of Canada from the approach taken with Aboriginal groups located in Canada. These tools include the proposed order under Section 7 of the ELUA, which sets out that the Lieutenant Governor in Council may make orders they consider necessary or advisable respecting the environment or land use.

The ELUA order proposed by the Ministry would exclude the Alaska nations listed below from being a "participating Indigenous nation" in the EA processes for the projects listed above. The EAO will meet any obligations to consult with these Alaskan nations in respect of these projects outside of the participating Indigenous nation framework. Consistent with *R v Desautel*, this ELUA order would support the EAO's ability to differentiate the approach to any engagement or consultation with these Alaskan nations from the approach taken with First Nations based in British Columbia.

- Central Council of Tlingit and Haida
- Chilkat Indian Village
- Craig Tribal Association
- Douglas Indian Association
- Hydaburg Cooperative Association
- Ketchikan Indian Community
- Klawock Cooperative Association
- Metlakatla Indian Community
- Organized Village of Kasaan
- Organized Village of Kake
- Organized Village of Saxman
- Petersburg Indian Association
- Sitka Tribe of Alaska
- Wrangell Cooperative Association
- Yakutat Tlingit Tribe

Please reply prior to May 23<sup>rd</sup> if you have any further questions or concerns.



**Colin Ward**

*Assistant Deputy Minister, Reconciliation, Lands & Natural Resource Policy  
Ministry of Water, Land and Resource Stewardship*

# APPENDIX C

Letter from Esther Reese, President, SEITC, to Colin Ward, Assistant  
Deputy Minister, B.C. Ministry of Water, Land and Resource  
Stewardship, Re: Proposed Order under section 7(1) of the Environment  
and Land Use Act (May 31, 2024)



Via email: [colin.ward@gov.bc.ca](mailto:colin.ward@gov.bc.ca)

May 31, 2024

Reconciliation, Lands and Natural Resource Policy Division  
Ministry of Water, Land and Resource Stewardship  
PO Box 9012 Stn Prov. Govt.  
Victoria, BC V8W 9L6

**Attention: Colin Ward, Assistant Deputy Minister**

**Re: Proposed Order under section 7(1) of the Environment and Land Use Act**

Dear Mr. Ward,

The proposed order under section 7(1) of the *Environment and Land Use Act* (“ELUA”) raises several legal and procedural concerns. Southeast Alaska Indigenous Transboundary Commission (“SEITC”), on behalf of its member Tribes, has formally engaged with the process of requesting to be a participating Indigenous nation (“PIN”) for the Eskay Creek Revitalization Project (“Eskay Creek Project”) since 2022. We have engaged with the Crown in good faith with an expectation that the process that you have designed would be carried out to completion. We are therefore deeply disappointed by this proposed order, which would prohibit us from engaging in a process that we have already invested considerable time, effort, and costs only to have it substituted for an ill-advised, ill-conceived, and ill-defined process. A process that will only be determined at some time in the future.

The duty to consult has been triggered. We continue to assert that SEITC and seven of its member Tribes are “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 BC. We have submitted comprehensive evidence that SEITC member Tribes meet the *Desautel* court’s threshold requirement for Aboriginal rights because they are the modern successors of the Tlingit who occupied parts of British Columbia at the time of European contact in the 18th century. To the extent that the proposed order serves to deny our request for meaningful consultation, we object and disagree, and reserve our rights.

**Record of Engagement**

SEITC has attempted to engage with the *Environmental Assessment Act* (“EAA”) since 2020, including repeated requests for British Columbia (“BC”) to conduct formal consultation and seek free, prior, and informed consent for projects which may have adverse impacts on SEITC member Tribes’ traditional territories and rights. SEITC provided notice to BC on March 31, 2021, at the latest, that these traditional territories span the US-Canada border. Please see Attachment 1: Table of Correspondence between BC and SEITC.

On September 23, 2022, SEITC, on behalf of our member Tribes, formally notified BC of our assertion that we are “Aboriginal peoples of Canada” under section 35 of the *Constitution Act, 1982*, and of our request to be added as a PIN for the Eskay Creek Project. The PIN request was denied by the Environmental Assessment Office (“EAO”) on December 12, 2022, citing that “there was no reasonable possibility that SEITC or its Section 35 rights will be adversely affected by the [Eskay Creek Project],” although we were advised that we could submit further information to EAO in support of our Aboriginal peoples of Canada assertion.

We took EAO up on this request. On January 30, 2024, SEITC again submitted a formal request to BC, this time requesting that seven SEITC member Tribes be recognized as Aboriginal peoples of Canada and be added as a PIN for the Eskay Creek Project. This request contained extensive evidence supporting SEITC member Tribe’s claims to section 35 rights in British Columbia as specifically requested.

SEITC received a response on April 24, 2024, from Chief Executive Assessment Officer Elenore Arend, notifying us that BC intends to create a separate consultation policy for US Tribes asserting section 35 rights in BC, and that the EAO’s decision on SEITC’s January 30<sup>th</sup> request was pending subject to further information on that policy.

### Summary of Issues

The proposed order raises several legal and procedural concerns for SEITC.

First, the proposed order is inconsistent with the *Desautel* decision because the proposed order would create a separate, undefined, and different consultation process for SEITC Tribes than for First Nations in BC.<sup>1</sup> While the court noted that the scope and manner of the duty to consult with Aboriginal groups outside of Canada may differ from those inside Canada, and may be more challenging, they cautioned against placing a higher burden on those groups. The court noted that for groups outside of Canada, “consultation is part of a ‘process of fair dealing and reconciliation’ which ‘arises . . . from the Crown’s assertion of sovereignty.’”<sup>2</sup> The court also cautioned against “perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers.”<sup>3</sup>

It is important to put the court’s comments in context as well. The court affirmed that the *Haida* consultation framework continues to apply and the onus is on groups outside of Canada to put the Crown on notice – to provide a strength of claim – that is exactly what SEITC has done. The suggestion that BC First Nations may have a role in determining the consultation to be afforded to SEITC member Tribes is contrary to *Desautel*. Importantly, the court’s comments were directed at situations like in *Desautel*, where there was a live issue regarding the “proper rights holder.” Such a situation does not exist in this situation – SEITC is not claiming membership in Tahltan Nation or any of the other entities that the Crown is engaged in consultations with and to our knowledge none of those groups claim to represent SEITC members’ interests. Such a practice runs the risk of creating two distinct classes of Aboriginal rights; an argument that BC put forward in *Desautel* which was soundly rejected by the SCC.

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<sup>1</sup> *R v Desautel*, 2021 SCC 17 [*Desautel*].

<sup>2</sup> *Desautel* at para 76, citing *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 32

<sup>3</sup> *Desautel* at para 33, citing *R v Côté*, [1996] 3 SCR 139 at para 53.

Second, the proposed order is inconsistent with the honour of the Crown. As you are aware, the duty to consult stems from the honour of the Crown and is a constitutional right owed to all Aboriginal peoples of Canada, as affirmed in *Haida*.<sup>4</sup> All Aboriginal rights holders are owed a “process of fair dealing and reconciliation” by the Crown.<sup>5</sup> The attempt to prohibit Aboriginal peoples of Canada that reside outside of Canada – but *prima facie* have section 35 rights in Canada – from equal participation in the consultation process of environmental assessments is contrary to the honour of the Crown and the duties that stem from it. Further, the introduction of an order that will interfere with the outcome of the PIN request that SEITC is currently immersed in is sharp dealing and smacks of bad faith by the Crown. Without and regardless of this proposed order under the ELUA, SEITC meets the current threshold under the EAA to be granted PIN status. The courts have been clear that consultation must be initiated at the earliest opportunity. Further delays consulting with SEITC’s members are prejudicial to our procedural rights and may lead to delays in the EAA process.

Third, the proposed order interferes with the legitimate expectations SEITC has for a fair process under the PIN framework of the EAA. As we stated above, SEITC entered into the process designed by BC to become a PIN; a process which is available to SEITC member Tribes as Aboriginal peoples of Canada. The proposed order was introduced as we await a decision from the EAO. That process cannot and should not be thwarted by politicians – for reasons unknown to us – putting their “thumb on the scale.”

Fourth, creating unequal distinctions between different Aboriginal peoples of Canada is contrary to BC’s commitment to the *United Nations Declaration on the Rights of Indigenous Peoples*. The Ministers’ letter states that some other process is necessary based on your “distinction-based approach.” However, we note that in the context of the Eskay Creek Project, consultations under the PIN framework are taking place with:

1. A modern Treaty Nation – the Nisga’a;
2. A First Nation with a section 7 DRIPA Consent Agreement – the Tahltan;
3. A First Nation that is asserting and pursuing an Aboriginal title claim – the Gitanyow;
4. Metis Nation British Columbia, who we understand BC does not recognize as having land-based rights; and
5. A non-recognized Aboriginal Group - Tsetsaut Skii km Lax Ha, resident in Hazelton – 235km from the project.

Despite these various distinctions, BC has not developed separate processes for each of these groups. A separate engagement process is unnecessary when the PIN framework already exists. The only distinction that BC can point to for SEITC and Lummi is residence, and that distinction was rejected by the SCC in *Desautel* as a basis for denying procedural and substantive rights.

The SEITC member Tribes identified in our January 30<sup>th</sup> request are Aboriginal peoples of Canada and meet the qualifying threshold of a PIN under the EAA. Under the circumstances, they are owed consultation at the deep end of the spectrum. The duty of consultation has been triggered and BC should get on with upholding its consultation obligations. Further delays in engaging with us in good faith consultation will not reflect well on this government.

Fifth, the proposed order under the ELUA is unprecedented, inconsistent with the purpose of the

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<sup>4</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*].

<sup>5</sup> *Haida* at para 32.

legislation and *ultra vires* its powers. The text of the legislation describes objectives of “foster[ing] increased public concern and awareness of the environment” and “ensuring that all the aspects of preservation and maintenance of the natural environment are fully considered.” The Hansard emphasizes the objective of protecting the environment through management of development, and the need for public involvement.<sup>6</sup> The Minister of Lands and Forests at the time, who brought forward the ELUA, stated “the main feature of this act is that before lands are alienated and before projects are developed, they shall be subject to public scrutiny to see if, in fact, they can be established without basic detriment to the environment.”<sup>7</sup> We note that the Act has been in place long before the courts recognized a Crown duty of consultation.

We understand that ELUA has not yet been used to limit consultation in a manner comparable to that in the proposed order. ELUA orders generally operate to limit development and place higher burdens on prospective development projects – through the creation of protected areas, for example – whereas the proposed order has the potential to do the opposite. Prohibiting certain Aboriginal peoples of Canada from participating in the consultation process of projects that will impact them appears to be directly contrary to the ELUA’s emphasis on public involvement in environmental protection, and its “main feature” as described by the former Minister.

Finally, the proposed order violates Canada’s international human rights obligations. As we assert in our current petition against Canada in the Inter-American Commission on Human Rights, Canada and BC have an obligation to obtain the free, prior, and informed consent of Indigenous peoples outside its territory whose rights could be affected by activities that foreseeably could cause transboundary pollution or other environmental harm. 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>8</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>9</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>10</sup>

Because, as the Inter-American Court on Human Rights has held, a nation may be responsible for transboundary human rights violations caused by actors within its control, Canada and BC cannot shield themselves from these international obligations just because SEITC member Tribes live outside their territory. Here, Canada and B.C. have an obligation to obtain SEITC and its member Tribe’s free, prior, and informed consent because the Eskay Creek project is a looming threat to the Unuk watershed. The proposed order falls far short of meeting Canada and BC’s obligations to seek our free, prior, and

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<sup>6</sup> Official Report of Debates of the Legislative Assembly, 1971 Legislative Session: 2nd Session, 29th Parliament, March 23, 1971 [Hansard].

<sup>7</sup> Hansard.

<sup>8</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>9</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>10</sup> Canadian Environmental Protection Act, 1999, preamble.

informed consent.

Moving Forward

We understand that you may have written to other First Nations requesting their views on the SEITC member Tribes' requests for consultation, without the courtesy of copying us on those letters. If that is the case, we request copies of those letters and any responses that you received to be provided to SEITC.

Should the government move forward with the proposed order, we request the opportunity to make further submissions in response to any recommendations from the Environment and Land Use Committee prior to the passage of the proposed order.

We look forward to your timely response and the documents we have requested.

A handwritten signature in black ink that reads "Esther Reese". The signature is written in a cursive style with a long, sweeping underline.

Esther Reese  
President  
Southeast Alaska Indigenous Transboundary Commission

# APPENDIX D

Letter from Elenore Arend, Chief Executive Assessment Officer and Associate Deputy Minister, B.C. EAO, to Esther Reese, President, and Guy Archibald, Executive Director, SEITC, *et al.* (Jul. 3, 2024)





File: ARCS-00146-45/USTRIB

Reference: 411217

July 3, 2024

**SENT VIA EMAIL**

Esther Reese  
President  
Southeast Alaska Indigenous Transboundary Commission  
C/O Guy Archibald  
Executive Director  
Southeast Alaska Indigenous Transboundary Commission  
[Garch570@gmail.com](mailto:Garch570@gmail.com)

Clinton E. Cook Sr.  
Tribal President  
Craig Tribal Association  
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Sidney Edenshaw  
Tribal President  
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Norman Skan  
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Dennis Demmert  
President  
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...2

Al Smith  
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Judith Eaton  
Secretary of Metlakatla  
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Mike Jones  
Tribal President  
Organized Village of Kasaan  
[MikeJ@kasaan.org](mailto:MikeJ@kasaan.org)

Joe Williams Jr.  
President  
C/O Lee Wallace  
Tribal Transportation & Housing Liaison  
Organized Village of Saxman  
[iragovt@kpunet.net](mailto:iragovt@kpunet.net)

Dear All:

I understand that you were notified by the Minister of Water, Land and Resource Stewardship (WLRs) on June 27, 2024 that an order pursuant to the *Environment and Land Use Act* (ELUA Order) was issued setting out that, for certain projects, the specified Alaskan entities (Alaskan Tribes) may not be participating Indigenous nations (PIN) and Section 14 of the *Environmental Assessment Act* (the Act) does not apply to them.

The specified Alaskan entities include your seven member Tribes that assert they are the modern-day successors to the Tèìkwèidi Tlingit Clan of the Sàanyàa K̄wáan (Seven Member Tribes) and that the Southeast Alaska Indigenous Transboundary Commission (SEITC) is representing the Seven Member Tribes in relation to the Eskay Creek Revitalization Project. The Environmental Assessment Office (EAO) understands SEITC to be an organization that acts on behalf of its member Tribes and is not itself an Aboriginal rights-holding collective.

The ELUA order in no way restricts the province's ability to meet any constitutional obligations to consult the Alaskan Tribes on proposed decisions that may affect Alaskan Tribes' asserted rights under Section 35 of the *Constitution Act, 1982* (Section 35 Rights) or to engage on potential transboundary effects in accordance with the EAO's longstanding practice. The ELUA order provides that Section 14 of the Act does not apply to the Seven Member Tribes in relation to the Eskay Creek Revitalization Project, whether or not notice has previously been provided under Section 14(1) or (2) of the Act. Accordingly, there is no ability for SEITC to be a PIN on behalf of any of the Seven Member Tribes and there can be no reconsideration of the determination I made in December 2022, under Section 14(2) of the Act.

As previously communicated, in the interim and until an applicable provincial consultation policy is in place, the EAO will discharge any constitutional obligations owed to the Alaskan Tribes on the specified Environmental Assessment (EA) projects outside of the PIN framework under the Act and in a manner consistent with *Haida Nation v. British Columbia* and *R v. Desautel*.

In accordance with the *Haida* framework, and to meet any constitutional obligations owed to the Seven Member Tribes, the EAO proposes to carry out the following activities in relation to the Eskay Creek Revitalization Project:

Similar to how the EAO has consulted the Seven Member Tribes, directly and via SEITC as their representative, since Early Engagement, the EAO will continue to consult as follows:

- Notify the Seven Member Tribes of five key milestones during the remainder of the EA process:
  - Receipt of an Application for an Environmental Assessment Certificate under Section 27 of the Act;
  - Public comment periods required by Sections 27(2)(a) and 28(2)(b) of the Act;
  - Acceptance of a revised Application under Section 27(4) of the Act; and,
  - Referral to Ministers for decision on an Environmental Assessment Certificate under Section 29 of the Act; and
  - Issuance of any legal orders issued under the Act in relation to the above-noted projects.
- Share documents and provide the opportunity for the Seven Member Tribes and SEITC to comment on interests, including the Seven Member Tribes' asserted Section 35 Rights, that may be impacted by these projects, within established legislated timelines under the Act; and
- Meet as required to discuss issues and concerns arising in the EA.

The EAO and SEITC, on behalf of the Seven Member Tribes, have been engaging regularly since 2021. In 2022, the EAO established the Alaskan Tribes Transboundary Advisory Committee to discuss the potential effects on the Seven Member Tribes related to the Eskay Creek Revitalization project including within the Unuk River watershed.

The engagement that has occurred to date through this committee has resulted in an understanding of the Seven Member Tribes' project concerns and has informed the development of application information requirements issued to Skeena Resources. Continuation of this committee will serve as a means for consultation between ourselves regarding the Seven Member Tribes' asserted Section 35 Rights in relation to the Eskay Creek Revitalization Project and how impacts to those rights can be mitigated through the EA process.

It is the EAO's view that the proposed approach to consultation outlined earlier in this letter will meet any constitutional duties owed to the Seven Member Tribes, based on the information provided by SEITC and the Seven Member Tribes and on the anticipated impacts of the Eskay Creek Revitalization Project.

If and when other mining projects that enter an EA process are identified as having potential for effects in the Alaska transboundary region or potential impacts to Alaskan Tribes asserted Section 35 Rights, I will consider the scope and nature of those projects, any consultation obligations to Alaskan Tribes, and the ELUA Order, and I will communicate further on these projects on a case-by-case basis.

As stated in previous correspondence, the Supreme Court of Canada in *R v. Desautel* also contemplates a role for Canada-based First Nations in discussions of how to integrate groups outside of Canada in consultations. In recognition of this acknowledgement from the Supreme Court of Canada, the EAO intends to notify the BC-based First Nations whose territories overlap the relevant project areas of the consultation approach it plans to undertake with SEITC and the Seven Member Tribes, as set out in this letter. The EAO will also notify potentially affected proponents.

We look forward to building on the engagement undertaken to date. If you have any immediate questions or require further information, please reach out to Tracy James at 778 698-9293 or [Tracy.James@gov.bc.ca](mailto:Tracy.James@gov.bc.ca).

Best Regards,



Elenore Arend  
Chief Executive Assessment Officer and Associate Deputy Minister

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

Tracy James, Executive Project Director  
Environmental Assessment Office  
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Danielle Smyth, Executive  
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Jessica Warner, Project Assessment Director  
Environmental Assessment Office  
[Jessica.Warner@gov.bc.ca](mailto:Jessica.Warner@gov.bc.ca)

# APPENDIX E

Statement from Lee Wagner, Saanya Kwaan, Metlakatla, AK  
(Nov. 21, 2023)

**Lee Wagner**

Saanya Kwaan

Metlakatla, AK

November 21, 2023

My family has been the customary caretakers of the Unuk River for over 10,000 years. Our crests of the rising sun are seen throughout the river. These pictographs declare we were there then, we are here now, and we will be there as long as the river flows.

My mother and father, Cindy Wagner and Louie Wagner, Jr have fished ooligan on the Unuk for over six decades. My father is the *ooligan man* who provided the fish for Metlakatla, Prince of Wales, and Ketchikan each spring. My mother is known as the *grease lady* for having mastered the art of making highly sought-after ooligan grease. With my uncles, Bert May and Walter Wagner, they were the sole providers of ooligan for those who were unable to get the treasured fish for themselves.

Until I was old enough to fish alongside my family around the age of 10, my mother and brother would fly or ferry to Ketchikan, weather permitting, to meet the boat coming into Ryus Float or Thomas Basin. We helped distribute bags, buckets and even garbage cans (clean of course) to the people excitedly waiting in line for the prized fish.

My first year fishing the ooligan was unforgettable. As the ooligan came in, their fluid, silvery forms filled the glacier-blue river. I had never seen anything like it — it looked as though you could have walked up and across the water on their backs. The absolute beauty of the Unuk River is breathtaking. It's wild and unruly, and I was in love. After we had caught what we needed and started heading for Ketchikan, we left a living river in our wake.

That night, as the tide was going out and it was getting dark, we got stuck on a slough. My

parents were on a separate boat than me, my brother and cousin and they had left to get the main boat ready for Ketchikan. My brother and nine-year old cousin got in the water, and pushed the boat as hard as they could. I don't know how, but we got free. The boat was going as fast as it could, turning on its sides here and there, and we got home just as the sun had set. My mother was so happy to see us, I think she almost broke out in hives stressing about us coming home that night.

Pulling into Ketchikan for the first time with a load of ooligan was surreal. Lines and lines of people were singing and cheering for us as we docked. I vividly remember the joy and bright smiles on everyone's faces. Ooligan brought us together and marked the arrival of spring.

In the late 1990s and early 2000s, we began to notice changes on the river. My mother started finding 50-gallon drums and debris washing up on the riverbanks. There was more silt in the water, and its color was no longer glacier-blue.

As time went on, less and less ooligan came in. Eventually, they nearly disappeared from the Unuk. Salmon, too, began diminishing at an alarming rate, along with other wildlife. The law officials told my family that we were no longer allowed to fish. It was a devastating blow to my family and the entire community.

In the fall, my family would hunt for moose upriver. My father and brother always brought back one or two that was shared with family and elders. My family loved to share our gatherings; fish, venison, tea and berries, but it has been seven years now.

The last time we fished on the Unuk was 21 years ago. I was granted a small window into our traditional way of life. We lived with and cared for the land and water. We respected and cherished the countless forms of life that it sustains. I don't understand my native languages, stories or songs. Our culture is being taken away from us. My children have never fished the Joonax, and if the mining continues, they never will.



Despite our deep ties with the Unuk River, our traditions and traditional lands straddling the US-Canada border, we've been left out of decision-making processes. The mines will not only take our culture from us, but also our clean water, air, and our forests.

In my heart, I see our river running clear and glacier blue, our Savior fish saturating its currents, and my family fishing on the Unuk again.

# APPENDIX F

Statement from Cindy Wagner, Saanya Kwaan Teikweidi,  
Metlakatla, AK (Nov. 24, 2023)

**Cindy Wagner**

Saanya Kwaan Teikweidi

Metlakatla, AK

November 24, 2023

In the '90s, I started finding 50-gallon drums and plastic debris washing up along the banks of the Unuk River. There was talk of a single mine along the Canadian side, whose new owners had blown up a glacier in search of gold. Before this, the Unuk River used to be glacier blue, almost white above the lake. There was less water than usual and areas that used to be easily passable were completely blocked with sand, silt, and logs.

Each year, less and less ooligan came in. We were told this was happening because we overfished, which we denied — the river was black with ooligan when we left. For six decades of catching ooligan, which is our inherent right, we only take what we need. We know how much we need for the People, for the smokehouses, and for our precious ooligan grease.

Ooligan have scouts; the actual first run that we have learned to leave alone. If they don't find clean and clear water, they will go to a different river. They are not like the salmon, tied to their rivers of birth. They didn't become endangered — they left the Unuk River in search of clean water. We know this for a fact.

Louie was known as the *ooligan man*, and I was known as the *grease lady*. When standing in the Unuk River with my hip boots inches from being flooded in early spring with ice and snow still on the banks, sometimes an hour against the current and holding the end of the net until the skiff got back — what kept me going was the People waiting for the ooligan. I had to hold the net full of ooligan for them. I couldn't let it go.

I miss the smoking of ooligan. Outside in the rain or sleet, stringing it on sticks until the smokehouse was full. People who couldn't smoke their own would wait to get ours. I miss the making of ooligan grease — quite the art depending on how cold the weather is; how wet the

weather is. Keeping a fire going under the tank; not too high, not too low. The results were always amazing, and our grease was highly sought after. My heart saddens when I think of who will learn from me the art of making ooligan grease. My children were there, but now I have grandchildren and great grandchildren.

Above all, I miss the People. I would love to again see the days when the docks were underwater with People waiting for their year's supply of ooligan. I miss the pride my family felt in traditionally catching the ooligan and bringing them home for our People. Such great happiness and pride that we fulfilled our inherent right given by grandmothers from generations and generations ago.

By Tlingit law, the Unuk River is ours. Our crest on the wall at the river mouth states so. The crest says this river is exclusively Teikweidi Sanyaa Kwa'an. X'oots Koowu Brown Bear Clan Cape Fox. We never gave it up in ANILCA, as we never accepted land claims. We never gave up the use of the river. We were caretakers of the Unuk River for over 10,000 years and we never harmed the land or the water.

What the Alaska Fish and Game have done to this family tradition of springtime by closing the fishery has been disheartening. We were told we couldn't even pick up the dead ones. It's a tradition that the People need. We have pages and pages of signed petitions from the villages demanding that the traditional ooligan fishery remains, as it always has. Many of our Elders passed away while we were prevented from harvesting our Savior Fish, and my heart cries for all the names that never got their last meal of ooligan. This is cultural genocide.

Now, after over a decade of no mining, ooligan have returned to the Unuk River with good runs. We don't sit at home and wait for the Fish & Game to tell us. We go to witness it for ourselves. And now, the mines are getting close to opening again. Before these devastating mines begin again, I want to fish the Unuk River this spring as we always did with my children, grandchildren, and great grandchildren, so they can see what we had. Maybe have it documented as a lost way of life.

# APPENDIX G

Statement from Louis Wagner (Sept. 26, 2018)

FINAL, September 26, 2018

**Mr. Louis Wagner**

I was born in Ketchikan 69 years ago, and have lived in Metlakatla, Alaska my whole life. Today, I serve as the acting mayor of Metlakatla, when the Mayor is out of town; since 2000 I have been a member of the 12-person Metlakatla Tribal Council.

History and connection to place are important in my family. On my mother's side, I descend from the original Tsimshian community that moved to Annette Island in the late 19<sup>th</sup> Century with the Reverend William Duncan. My grandfather and great-grandfather, John and Rod Davis, were on the first canoes with William Duncan, and helped to settle Metlakatla. They were boat builders. They built fishing boats, trawlers, seiners, and row boats, and sold them throughout Southeast Alaska. Two of their boats are in museums in Juneau today.

From the maternal side of the family, I am a member of the Tlingit people, from the Bear Clan at Cape Fox Village, near Ketchikan, Alaska. Our people go back thousands of years fishing on the Unuk River. My family has been the hereditary caretaker of the River going back thousands of years. As caretakers, our family's crest can be seen marked on painted pictographs at the mouth of the Unuk River, as well as at points upstream. The crest has been tested and is thousands of years old. It depicts a sun with rays; the bottom edge was rubbed off by ice, with the grooves still evident. Since my childhood, my family has exercised our traditional rights to fish ooligan 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. Today the federal government has recognized our rights to subsistence harvests here, though the fishery is co-managed by the State of Alaska under the subsistence fishery permits.

It is in my role as caretaker of the Unuk that I harvested ooligan and brought them back to share with the community. The voyage from Metlakatla to the River is a dangerous one. The waters are choppy, and weather can change dramatically on a dime. Once we have made it to the River, timing is everything. The ooligan run does not last very long, and so it is important to understand when the fish will arrive. After years of sitting out on the River, watching for the ooligan, I have the experience and the knowledge to sense when the ooligan are coming up the River. When we know they are arriving, we use seine nets and float nets to harvest them. I especially like the float nets, because they allow us to fish without interfering with the spawning. We never take more ooligan than we need, always thinking about providing for the community while leaving a healthy population in a healthy River.

Returning home with thousands of pounds of ooligan in the hold, we would stop in Ketchikan. The radio would announce our arrival, bringing folks to the docks to pick up their ooligan and deliver it to their families. A line would stretch from the dock past the Salvation Army blocks away. Once we finished in Ketchikan, we returned home to Metlakatla. When the ooligan were delivered in Metlakatla the whole town would look like it was on fire, because every smokehouses would be fired up smoking ooligan.

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

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exchange gifts of smoked ooligan for their regional foods. These are ties that allow us to stay in touch and to support each other.

The federal U.S. Forest Service and the Department of the Interior's Federal Subsistence Board have recognized the Unuk ooligan as a subsistence fishery, but our access to it has been interrupted recently. In 2004, the Alaska Department of Fish & Game decided to close the Unuk to subsistence ooligan fishing after they determined low returns to the drainage. Until the mines above the Canadian border the ooligan returned every year. Clear and cold water is what they need to spawn. If they don't find their needs in the Unuk River they travel to another stream river creek. They are not tied to their river beds as the salmon are. That's what's been happening. They are no way gone for good. In recent years, we have seen the ooligan come back in greater numbers, and I believe that whatever was hurting the Unuk ooligan has subsided and that the returns are back. Together with members of the community, I have been in discussions with the Department to have the fishery re-opened, though it has been a struggle—and one in which I do not believe Native interests have been given due respect. This has hurt our community.

While we work to make the reopening of the Unuk ooligan fishery, and even after it is reopened, we remain highly protective of the River. When I first fished the Unuk in 1962, there were no other people or planes there. The flats were full of geese, mallards, swans, and other birds. Today, the birds and wildlife in general are not as common as they once were. King salmon returns have been lower and the salmon smaller. Now there are only sixteen to eighteen-pound king salmon. I am severely concerned that while we continue advocating the reopening of the subsistence ooligan fishery, any additional stresses—no matter how minor—could ruin our efforts and derail our goals to open this fishery back up to the community.

Our community is already engaged in a struggle to preserve our traditions and our way of life. The last thing we need is two more threats in the form of the Kerr-Sulpheretts-Mitchell and Brucejack Mines. I fear, and my community fears, that these mines could poison the River and prevent us from ever returning to fish on the Unuk.