

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

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

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

Petitioners' Legal Representatives:



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



Eric Jorgensen  
Earthjustice  
325 Fourth Street  
Juneau, AK 99801  
Phone: +1.907.586.2751  
Email: [ejorgensen@earthjustice.org](mailto:ejorgensen@earthjustice.org)

14 July 2020



**CONTENTS**

I. SUMMARY OF THE PETITION ..... 1

II. JURISDICTION OF THE COMMISSION ..... 4

III. PETITIONERS WHOSE RIGHTS HAVE BEEN VIOLATED ..... 4

IV. HARD-ROCK MINING IN THE TRANSBOUNDARY WATERSHEDS OF THE TAKU, STIKINE, AND UNUK RIVERS THREATENS SOUTHEAST ALASKA NATIVE COMMUNITIES ..... 5

    A. CULTURE AND SUBSISTENCE PRACTICES RELATED TO FISHING IN SOUTHEAST ALASKA NATIVE COMMUNITIES LOCATED NEAR THE BRITISH COLUMBIA-ALASKA TRANSBOUNDARY WATERSHEDS ..... 6

        1. The Taku, Stikine, and Unuk River Watersheds ..... 6

        2. The importance of subsistence fishing for sustaining Petitioners’ livelihoods ..... 9

        3. Cultural and spiritual practices associated with subsistence fishing ..... 10

    B. THE SIX B.C. MINES THREATEN THE FISH STOCKS THAT ARE CENTRAL TO PETITIONERS’ CULTURE, SPIRITUALITY, AND MEANS OF SUBSISTENCE ..... 14

        1. Hard-rock mining pollutes the environment through chronic heavy metals pollution and the catastrophic failure of mine waste containment systems ..... 14

        2. The inadequate regulation and enforcement of mining in British Columbia ..... 19

        3. The B.C. Mines threaten the Taku, Stikine, and Unuk watersheds ..... 21

        4. Harm to salmon and eulachon from mining pollution ..... 29

        5. The B.C. Mines pose foreseeable, imminent, ongoing, and significant threats to Petitioners’ rights ..... 36

V. VIOLATIONS: CANADA’S AND BRITISH COLUMBIA’S APPROVALS OF THE B.C. MINES VIOLATE PETITIONERS’ HUMAN RIGHTS ..... 37

A.	THE AMERICAN DECLARATION SHOULD BE INTERPRETED AND APPLIED IN THE CONTEXT OF RELEVANT INTERNATIONAL NORMS AND PRINCIPLES .....	37
1.	The American Convention on Human Rights bears on interpretation of the American Declaration .....	38
2.	Developments in other international human rights systems and international environmental law should be taken into account when interpreting and applying the American Declaration.....	38
B.	HUMAN RIGHTS OBLIGATIONS RELATED TO THE ENVIRONMENT .....	39
1.	The American Declaration and the American Convention require states to guarantee that environmental harm does not violate human rights.....	39
2.	States are responsible for acts and omissions within their territories that cause environmental-related human rights violations outside their territories.....	41
3.	The human rights that are implicated by the environmental harm from the B.C. Mines are linked and interdependent .....	43
4.	Petitioners’ claims should be interpreted in the context of the unique relationship between Indigenous peoples and their land and environment .....	43
C.	CANADA’S AND BRITISH COLUMBIA’S FAILURE TO PREVENT FORESEEABLE HARMS FROM THE B.C. MINES VIOLATE PETITIONERS’ HUMAN RIGHTS .....	44
1.	Petitioners’ right to enjoy the benefits of their own culture .....	45
2.	Petitioners’ right to their own means of subsistence as a component of their rights to culture, life, health, and property .....	50
3.	Petitioners’ right to the preservation of health.....	52
4.	Petitioners’ right to use and enjoy the lands they have traditionally used and occupied.....	53
5.	Canada has not consulted with or obtained the free, prior, and informed consent of Petitioners with respect to the B.C. Mines .....	55
VI.	EXHAUSTION OF DOMESTIC REMEDIES .....	58

A.	CANADIAN LAW DOES NOT PROVIDE ADEQUATE OR EFFECTIVE REDRESS FOR PETITIONERS' CLAIMS .....	59
1.	Canada's environmental assessment laws do not adequately or effectively protect Petitioners' rights .....	59
2.	Canada's laws for the protection of Indigenous peoples do not adequately or effectively protect Petitioners' rights .....	63
3.	Canada's constitutional law does not adequately or effectively protect Petitioners' rights .....	65
B.	BECAUSE THE UNITED STATES DOES NOT HAVE JURISDICTION OR CONTROL OVER THE B.C. MINES, PETITIONERS HAVE NO OBLIGATION TO EXHAUST REMEDIES IN THE UNITED STATES .....	67
VII.	TIMELINESS .....	69
VIII.	ABSENCE OF PARALLEL INTERNATIONAL PROCEEDINGS .....	69
IX.	REQUEST FOR RELIEF .....	70

## I. SUMMARY OF THE PETITION

### Introduction

1. Southeast Alaska Native communities have depended for millennia upon the pristine transboundary watersheds of the Taku, Stikine, and Unuk rivers. These rivers flow through varied and wild landscapes from British Columbia through Alaska to the Pacific Ocean. These watersheds are teeming with biodiversity, including dozens of species of fish, many of which – particularly salmon and eulachon – have been historical staple commodities for Native communities, and remain centerpieces of their cultural practices and spiritual beliefs.



View of the Tulsequah River, looking east towards the confluence with Taku River. *Photo by Chris Miller - csmphotos.com*

2. In British Columbia, upstream of the Canada–US border and of where Southeast Alaska Native communities harvest fish, two hard-rock mining projects are operating and a third has received operating permits but is in receivership. Three other mines have been proposed and are in the permitting stage. These mines (collectively the B.C. Mines) are large-scale industrial projects that are generating and/or will generate huge quantities of acid-producing and toxic waste products. They thus 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.
3. In this petition, the Southeast Alaska Indigenous Transboundary Commission (SEITC), on behalf of itself and its constituent tribes (Petitioners), respectfully requests the assistance of the Inter-American Commission on Human Rights (Inter-American Commission or Commission) to obtain relief from the violations resulting from Canada’s failure to prevent the threats from the B.C. Mines.

### Petitioners

4. The Southeast Alaska Indigenous Transboundary Commission is a consortium of fifteen sovereign tribal nations in Southeast Alaska that live close to the Canadian border. The consortium consists of Chilkat Indian Village of Klukwan, Douglas Indian Association, Organized Village of Saxman, Craig Tribal Association, Ketchikan Indian Community, Organized Village of Kake, Metlakatla Indian Community, Wrangell Cooperative Association, Sitka Tribe of Alaska, Klawock Cooperative Association, Petersburg Indian

Association, Organized Village of Kasaan, Hydaburg Cooperative Association, Yakutat Tlingit Tribe, and Central Council of Tlingit and Haida Indian Tribes of Alaska.

5. These tribes' traditions, beliefs, food sources, and livelihoods are inextricably tied to the fish they catch in the Taku, Stikine, and Unuk watersheds, which are sacred to the communities that have depended on them for millennia. Subsistence fishing is a vital aspect of the tribes' cultural practices and provides a key opportunity for elders to pass on their tribes' traditions to younger generations. Sharing fish catches with elders, community members and others is also important for maintaining and strengthening tribal and communal culture and relationships. Salmon and eulachon harvests sustain Southeast Alaska Native communities throughout the year and are a critical source of food and economic livelihood.

### **Pollution from the B.C. Mines Is an Imminent and Significant Threat to the Human Rights of Southeast Alaskan Native Communities**

6. The B.C. Mines are generating and/or will generate large amounts of waste that can cause acid mine drainage, a toxic cocktail of acidic water and dissolved heavy metals. Although mine operators attempt to contain and treat acidic byproducts, treatment often does not perform as planned. The result is that acid mine drainage pollution is a common occurrence in British Columbia and elsewhere.
7. Most of the B.C. Mines also use a highly risky method of storing toxic byproducts – called “tailings” – in wet dam enclosures 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.
8. Compounding these threats, British Columbia has a history of poor enforcement and regulation of mines that has led to long-term and ongoing acid mine drainage from old mining sites and several catastrophic tailings-dam breaches. The August 2014 tailings-dam failure at Mount Polley mine, British Columbia, was one of the worst in Canadian history, releasing millions of cubic meters of toxic waste into nearby lakes and rivers. This record indicates that Canada and British Columbia cannot be counted on to prevent significant harm from the B.C. Mines to Petitioners and other Indigenous communities living downstream.
9. Pollution from the B.C. Mines could cause sustained and significant reductions in salmon and/or eulachon populations in the Taku, Stikine, and Unuk River watersheds. This would significantly harm Petitioners' generations-old subsistence practices that are a mainstay of their livelihoods, culture, and traditions. In that event, Petitioners would not be able to share their culture and traditions with future generations, including through teaching younger generations in subsistence practices, the culture of gift giving, and the ceremonial use of traditional foods. They would no longer be able to rely on fish from these watersheds for their subsistence and livelihoods. These impacts would violate their rights to enjoy the benefits of their culture, to an adequate means of subsistence, health, and to use and enjoy the lands and waters they have traditionally occupied.

## **Canada Has an International Human Rights Obligation to Take Steps to Prevent Transboundary Harm from the B.C. Mines**

10. Canada has a duty to prevent the B.C. Mines from degrading transboundary watersheds to an extent that infringes upon Petitioners' human rights to enjoy the benefits of their culture, means of subsistence, and other rights. Through its failure to prevent the foreseeable threats from these mines, Canada has failed to take necessary and precautionary measures to guarantee Petitioners' rights. 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 cannot shield itself from legal responsibility in this case just because Petitioners live outside its territory.
11. Moreover, neither Canada nor British Columbia has consulted with or sought the free, prior, and informed consent of Petitioners during the approval or permitting of any of the B.C. Mines, despite Petitioners having raised their concerns on multiple occasions with Canadian and British Columbian officials. The governments have not conducted or required any assessment of the mines' transboundary impacts in the watersheds, thus limiting Petitioners' ability to understand the potential threats to their rights to culture and means of subsistence. Likewise, they have not sought any information from Petitioners concerning how pollution from any of the operating and/or proposed mines might harm Petitioners' human rights. Without taking these steps, Canada and British Columbia are violating Petitioners' rights to be consulted, to free, prior, and informed consent, and to participate in decisions regarding any measures that affect their territory. These rights are critical to the protection of Petitioners' human rights because of the intrinsic relationship between Petitioners' territory and their culture, livelihoods, and well-being.

## **Canadian and US Laws Do Not Provide Adequate and Effective Domestic Remedies to Petitioners**

12. Although the Inter-American Commission's rules of procedure require exhaustion of domestic remedies, exhaustion is not required when domestic legislation in the state concerned does not afford due process of law or a domestic action would be inadequate or ineffective. Canada's Indigenous, environmental, and constitutional laws do not offer Petitioners adequate and effective redress for the harms and rights at issue in this petition because, among many other shortcomings, their protections do not extend to foreign Tribes.
13. The B.C. Mines are based in Canada and are under Canada's jurisdiction and control, as demonstrated by the fact that the operation of the mines requires permits from Canadian provincial and federal governments. The United States has no jurisdiction or control over the companies operating these mines. For these reasons, the United States cannot stop the violations, and Petitioners are not obligated to seek remedies in the United States. Moreover, even though they have no obligation to exhaust remedies in the United States, Petitioners have informed relevant United States government officials of their concerns, to no avail.

## **Request for Relief**

14. Because this petition raises violations of the American Declaration of the Rights and Duties of Man by Canada, the Commission has jurisdiction to receive and consider it. The petition is timely because the acts and omissions of Canada that form the basis for the petition are ongoing, and the human rights violations they are causing are continuing. Moreover, there are no domestic remedies suitable to address the violations.
15. In light of the violations described above, Petitioners respectfully request that the Commission:
  - 1) Hold a hearing to investigate the claims raised in the petition;
  - 2) Declare that Canada's failure to implement adequate measures to prevent the harms to Petitioners from the B.C. Mines violates rights affirmed in the American Declaration of the Rights and Duties of Man; and
  - 3) Recommend that Canada:
    - a. Suspend approval and/or operations of the B.C. Mines until it has thoroughly assessed and addressed the risks to Petitioners' human rights;
    - b. Consult with Petitioners and seek their free, prior, and informed consent with respect to each of the B.C. Mines as required by international law;
    - c. Establish and implement, in coordination with Petitioners, a plan to protect Petitioners, including the watersheds and fish species on which they depend, from the disastrous effects of pollution from the B.C. Mines; and
    - d. Provide any other relief that the Commission considers appropriate and just.

## **II. JURISDICTION OF THE COMMISSION**

16. The Commission has competence to receive and act on this petition in accordance with articles 1.2.b, 18, 20.b, and 24 of the Commission's Statute.

## **III. PETITIONERS WHOSE RIGHTS HAVE BEEN VIOLATED**

17. This petition is submitted by SEITC on behalf of its member tribal nations.

### **Southeast Alaska Indigenous Transboundary Commission**

715 Sawmill Creek Road, Sitka, AK 99835, United States, Phone: (907) 738-7319

18. SEITC is a consortium of fifteen sovereign tribal nations located in Southeast Alaska. It was established in March 2014 as the United Tribal Transboundary Mining Work Group, in order to protect the vital and sacred rivers that sustain its member tribes' communities and culture. Its members are Chilkat Indian Village of Klukwan, Douglas Indian

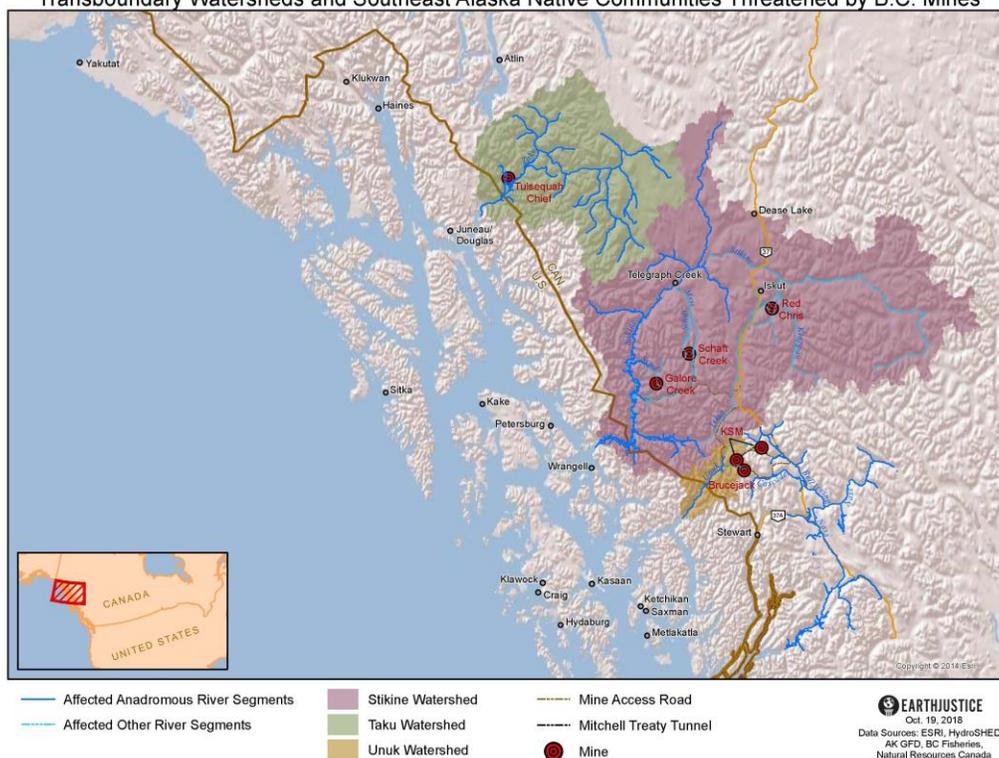
Association, Organized Village of Saxman, Craig Tribal Association, Ketchikan Indian Community, Organized Village of Kake, Metlakatla Indian Community, Wrangell Cooperative Association, Sitka Tribe of Alaska, Klawock Cooperative Association, Petersburg Indian Association, Organized Village of Kasaan, Hydaburg Cooperative Association, Yakutat Tlingit Tribe, and Central Council of Tlingit and Haida Indian Tribes of Alaska.<sup>1</sup>

19. SEITC derives its authority from its member tribal governments. Each member tribe has formally designated its representative by letter or resolution. The organization is run by executive director Frederick Olsen Jr. and a four-member board, with Rob Sanderson Jr. as Chairman, Jennifer Hanlon as Vice Chair, Sylvia Banie, as Secretary, and Lavina (Lovey) Brock as Treasurer.
20. In submitting this petition, SEITC represents the interests of its member tribal nations whose rights to culture, physical health and well-being, means of subsistence, and property are being violated by Canada's acts and omissions. Although SEITC member tribes' cultures and ways of life are a collective and shared interest, certain tribal nations are particularly harmed by the acts and omissions of Canada that are the subject of this petition: Douglas Indian Association, Ketchikan Indian Community, Metlakatla Indian Community, Organized Village of Saxman, and Wrangell Cooperative Association.

#### **IV. HARD-ROCK MINING IN THE TRANSBOUNDARY WATERSHEDS OF THE TAKU, STIKINE, AND UNUK RIVERS THREATENS SOUTHEAST ALASKA NATIVE COMMUNITIES**

21. For millennia, Southeast Alaska Native communities have depended on the transboundary watersheds of the Taku, Stikine, and Unuk rivers for their livelihoods and their spiritual and cultural practices.<sup>2</sup> Fish from these watersheds – particularly salmon and eulachon – have historically been, and continue to be, an important source of food and a centerpiece of cultural practices and spiritual beliefs.<sup>3</sup> Families in Petitioners' communities have passed these cultural and spiritual practices on to younger generations.
22. In the Taku, Stikine, and Unuk river watersheds in British Columbia, Canada, upstream of the Canada-US border, two hard-rock mining projects are operating, another has operating permits but is in receivership, and three more are in the permitting stages. These projects are located in or upstream of the waters in which salmon and/or eulachon spawn and rear, and upstream where the Southeast Alaska Native communities harvest fish. These mines are large-scale industrial projects that are generating and/or will generate huge quantities of acid-producing and toxic waste products. As described below, these projects threaten to pollute downstream waters with dissolved heavy metals, which are highly toxic to fish. Any substantial increase in the concentrations of these heavy metals could cause sustained and significant declines in salmon and eulachon populations in these watersheds, and curtail Petitioners' ability to continue to practice their subsistence way of life and culture. The locations of the six B.C. Mines, the three watersheds, and the Southeast Alaska Native communities are shown on the below map, a larger version of which is also appended to this petition as Appendix 4.

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



**A. CULTURE AND SUBSISTENCE PRACTICES RELATED TO FISHING IN SOUTHEAST ALASKA NATIVE COMMUNITIES LOCATED NEAR THE BRITISH COLUMBIA-ALASKA TRANSBOUNDARY WATERSHEDS**

**1. THE TAKU, STIKINE, AND UNUK RIVER WATERSHEDS**

- 23. Many families in Petitioners’ communities use the three watersheds downstream from the six B.C. Mines for subsistence fishing, which is integral to maintaining their livelihoods and the traditional cultural and spiritual practices passed down from their ancestors for generations.

*The Taku River Watershed*

- 24. For well over 750 years, Southeast Alaska Native peoples have inhabited the areas along the Taku River, where they maintained vibrant and sustainable fishing livelihoods.<sup>4</sup> Members of the Douglas Indian Association continue to fish for king, coho, and sockeye salmon at the inlet of the Taku River as well as around Douglas Island, southwest of Taku Inlet. The Taku River watershed is the largest unprotected wild river system on the northwest coast of North America.<sup>5</sup> It covers 11,500 square miles (29,800 square kilometers) of ice fields, tundra, and temperate forest landscapes.<sup>6</sup> The Taku River and its tributaries flow through three different biomes and terrestrial ecoregions as they weave from headwaters in northwestern British Columbia to the Pacific Ocean near Juneau, Alaska.<sup>7</sup> The Taku River watershed is inhabited by at least 32 fish species, including all five species of Pacific salmon, steelhead trout, Dolly Varden, cutthroat trout, eulachon,

longfin smelt, Pacific lamprey, round white fish, slimy sculpin, and threespine stickleback.<sup>8</sup>

### *The Stikine River Watershed*

25. Southeast Alaska Native peoples have fished the Stikine River for centuries, and “the mouth of the river is one of [Wrangell Cooperative Association’s] most important fishing areas.”<sup>9</sup> Britany *Kee’ ya aa*. Lindley, a member of the Wrangell Cooperative Association, says that her parents

*taught us that people have been fishing the Stikine for generations; we have always and will always do so. Historically, the Stikine Tlingits would disassemble their houses in the spring, all the way to the foundation, and transport them to upriver fish camps for the fishing season. Today, we continue the tradition of subsistence fishing.*<sup>10</sup>

26. The name “Stikine” means “great river” in the Tlingit language.<sup>11</sup> The Stikine River runs 335 miles (539 kilometers) from its headwaters in the Coast Range Mountains of British Columbia, across the Canada-US border to its mouth near Wrangell, Alaska.<sup>12</sup> The waters of the Stikine are inhabited by several species of fish, including all five species of Pacific salmon; steelhead, cutthroat, rainbow, bull, and lake trout; Dolly Varden; mountain whitefish; Arctic grayling; lake chub; longnose sucker; burbot, Pacific lamprey; slimy, prickly, and coast range sculpin; longfin smelt; eulachon; and threespine stickleback.<sup>13</sup> The Stikine River is one of the most important spawning rivers for Chinook salmon in Alaska.<sup>14</sup>



Stikine River near Wrangell, Southeast Alaska.  
*Photo used with permission.*

### *The Unuk River Watershed*

27. The Metlakatla and Ketchikan Indian Communities’ territories are in the watershed of the Unuk River, which runs from the coastal mountains of British Columbia into the marine waters of Alaska’s Inside Passage.<sup>15</sup> The Ketchikan Indian Community has a long history of using the area as a fish camp.<sup>16</sup> Members of the Metlakatla Indian Community have harvested eulachon for thousands of years on the Unuk River.<sup>17</sup> As Louis Wagner, an elder in the Metlakatla Indian Community and a descendant of the Tlingit people of Cape Fox Village, explains,

*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 [eulachon] on the Unuk River.*<sup>18</sup>

28. Around 80 miles (129 kilometers) long, the Unuk River drains a watershed of 1,500 square miles (3,885 square kilometers).<sup>19</sup> From its headwaters in a heavily glaciated area in British Columbia, south of the lower Iskut River, the Unuk flows west and south, crossing into Alaska and emptying into Burroughs Bay, an inlet of Behm Canal.<sup>20</sup> Despite its relatively small size, the watershed is a place of important biodiversity. The river teems with fish, including eulachon; steelhead, rainbow, bull and cutthroat trout; all five North American species of Pacific salmon; and mountain whitefish.<sup>21</sup>



Upper Unuk River, British Columbia, Canada.  
*Photo used with permission*

29. The US government has protected the American half of the Unuk watershed as part of the Misty Fjords National Monument.<sup>22</sup> The Canadian government has also protected some areas of the watershed within Border Lake Provincial Park.<sup>23</sup> Because of declines in eulachon stocks in the Unuk River, fisheries managers have closed the eulachon fishery there annually since 2005, including for subsistence fishing.<sup>24</sup> Some communities, including members of SEITC, attribute the decline of Eulachon to the former Eskay Mine that operated in a tributary of the Unuk River.<sup>25</sup> In recent years, members of the Metlakatla and Ketchikan Indian Communities have argued that returns have climbed to pre-2004 levels and are hopeful that the fishery will reopen so that they can continue their tradition of subsistence eulachon harvests.<sup>26</sup>

2. THE IMPORTANCE OF SUBSISTENCE FISHING FOR SUSTAINING PETITIONERS' LIVELIHOODS

30. Salmon and eulachon fishing are essential subsistence practices among Southeast Alaska Native communities in the Taku, Stikine, and Unuk watersheds. These communities typically harvest salmon using gillnets, set nets, or trolling lines from boats.<sup>27</sup> Salmon are then processed and preserved in many ways, including by smoking, canning, or freezing.<sup>28</sup> Eulachon are known colloquially as “hooligan” or “ooligan.”<sup>29</sup> They are harvested using float or seine nets, and are processed by smoking, frying, or baking.<sup>30</sup> The oil is rendered to produce eulachon grease.<sup>31</sup>



Hooligan from Stikine River are harvested with weighted nets. Photo by Jennifer Miller, courtesy of SEITC

31. Harvests of salmon and eulachon sustain Southeast Alaska Native communities throughout the year.<sup>32</sup> These harvests are central to Petitioners' livelihoods.<sup>33</sup> For example, James Stough, Sr., an elder in the Wrangell Cooperative Association, explains that his family eats salmon “five to six days a week.”<sup>34</sup> To sustain themselves through one winter and part of the next summer, his family

*put up 50 cases of one-pound tin cans [of salmon] with a 24-count per case. This was mostly smoked and canned. In addition to this, we put up dry salmon and halibut, smoked trout, and we froze an estimated 200 pounds of the different types of salmon for each winter.*<sup>35</sup>

32. The subsistence harvest is critical as a source of food and to the economic livelihood of Britany *Kee'ya aa*. Lindley and others in Wrangell's Indigenous community. Wild game and fish are her family's main food supply, and she shares these with her extended family and the elders in the community. She explains:

*We rely on the fish, game, and vegetation we harvest for food: our freezer is 90 per cent wild fish and game, and, beyond our own consumption, we share with our extended family and the elders in our community. As a couple with three daughters, my parents utilized subsistence harvests to provide plentiful healthy food for our family. Further, it helped my parents be able to put their earnings towards home ownership and supporting their children in all of our endeavors. Subsistence fishing has similarly supported many other, perhaps even most, families in Wrangell's Indigenous and nonindigenous community. The importance of this support has been evident in my lifetime, a time during which Wrangell has experienced dramatic economic changes, not least the transition*

*out of a reliance on the logging industry to commercial fishing and tourism, once the Wrangell pulp mill was shut down.<sup>36</sup>*

33. Subsistence fishing also provides a nutritious food source<sup>37</sup> that is difficult for some to replace in the cash economy because similarly nutritious store-bought foods are expensive or are unavailable in remote locations.<sup>38</sup> As Tammi Meissner, a member of the Wrangell Cooperative Association, explains,

*Our traditional harvesting practices are important to our livelihood, and to safeguarding our family's welfare, especially given Wrangell's location off of the continental road system. For example, I remember on September 11, 2001, when traffic was halted by plane and boat, no supplies could come into Wrangell through normal commercial networks.*



Wrangell, home of Wrangell Cooperative Association, sits near the mouth of Stikine River in Southeast Alaska.

*Photo used with permission*

*The grocery shelves emptied in hours, and our community was reminded of the importance of our relationship with the land.<sup>39</sup>*

34. The Alaskan government has estimated that “the cost of replacing the wild food harvested by rural Southeast residents with retail purchases of equivalent food run[s] from \$22 to \$35 million annually.”<sup>40</sup> In Petitioners’ communities, where the average per capita income was as low as \$20,315 according to 2015 census data, purchasing wild salmon and/or eulachon multiple times a week would be difficult.<sup>41</sup>

### 3. CULTURAL AND SPIRITUAL PRACTICES ASSOCIATED WITH SUBSISTENCE FISHING

35. Petitioners have long-standing and vital cultural practices associated with subsistence salmon and eulachon fishing in and around the Taku, Stikine, and Unuk watersheds. Continuing these practices is central to the maintenance of their culture identity – the

sense of attachment that comes from belonging to a social group. For example, John Morris, Sr., tribal elder and council member of the Douglas Indian Association, says,

*Traditional subsistence harvest on the Taku is a way of life. It is central to our culture. ... I was taught to respect the river because it provided so much for us. We were taught never to mistreat the river and its watershed, always to leave it the way we found it. We never took anything more than we could use – fish, game, berries – and never wasted anything. Once I was on the river with a member of the US Forest Service. He asked me to point out sacred sites on the Taku River. I told him that this whole place is sacred. I imagine that all twenty tribal governments in Southeast Alaska share that feeling.*<sup>42</sup>



Salmon harvested from the Taku River. Photo by Marina Anderson

36. Tammi Meissner says,

*Salmon is the staple harvest in our traditional culture. You could say it is the heartbeat of our culture. If the salmon heartbeat is gone then ours will be gone too.*<sup>43</sup>

37. According to Britany Kee 'ya aa. Lindley, “[A] feeling of connection with the land and its life” is

*[c]entral to my Tlingit culture.... Protection of the Stikine River is thus a part of my culture. According to legend, the Stikine Tlingits emerged from under the icefield at the headwaters of the Stikine. In our origin story, the people saw the green beyond the icefield, ventured out, and settled at the mouth of the River.... We harvest animals for both sustenance and art, and we always respect them and are grateful for what they provide.... We also work to preserve the fish habitat so that our people will be fed forever.*<sup>44</sup>

For this reason, the Stikine River “is culturally and spiritually central to our people.”<sup>45</sup>

38. Subsistence fishing is also essential to maintaining Petitioners’ culture and heritage because it is an important means by which elders educate younger members of the community in traditional ways of life, kinship, and bonding.

39. As Tammi Meissner explains,

*Subsistence harvests on the Stikine River, including salmon fishing, are not only about economics. It is a traditional way of living that has been passed down to my children through several generations. My 92-year-old grandmother for example, told me stories about hanging salmon upon wood stakes. Fishing provides a center for social life in our community as well. I can remember many times when, after a productive day on the river, we would invite families together to process our catch together. When I was young, I did not speak much during these meetings, but rather sat and listened to the elders. I heard so many stories during these get-togethers, so important to my knowledge and identification with my community and culture. ... I have taught both of my daughters to fish, to smoke and can our harvests, and to ration harvesting and consumption sustainably. One day, I hope my grandchildren will also carry on these traditions.*<sup>46</sup>



Hooligan from Stikine River are harvested with weighted nets.  
Photo by Jennifer Miller, courtesy of SEITC

40. Louis Wagner had a similar experience as a child, and now fishes with his son:

*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.*<sup>47</sup>

41. Petitioners educate the younger generations about cultural practices and the importance of fishing. For example, John Morris, Sr. explained that the Douglas Indian Association holds a cultural camp in the summer to teach traditional fishing and fish processing to the youth, in addition to teaching them about the land, the Tlingit language, and their history.<sup>48</sup> His granddaughter was educated in the program.<sup>49</sup> These programs are essential to maintaining the tribe's way of life and their cultural connection to the Taku River.<sup>50</sup>
42. The Douglas Indian Association has found a place on the Taku with old fishing nets, pottery, stoves, plates, and cups that indicate that it was once a Tlingit fishing community with a school. According to John Morris, Sr., the association plans to

*create a cultural center to educate the younger generation about who they are, their culture, respect of the land, respect of the river, a place where carvers could work, and where we could take our young people to learn about the Taku River, catching the salmon, showing them how to clean them, strip them, prepare them for the*

*smoke house and smoke them, and can them – everything from start to finish.*<sup>51</sup>

43. Similarly, Tammi Meissner has worked as a traditional foods educator for the Southeast Alaska Regional Health Consortium, a non-profit tribal health consortium of Native communities in Southeast Alaska.<sup>52</sup> She explains that in that role she has

*worked with elders in Southeast Alaska Native communities to gather and shared the knowledge learned with those in the community of Wrangell. ... I shared and continue to share our traditional methods of preparing foods, and eating healthy, but also about our Tribal values such as “Respect for self, Elders and Others, Respect for Nature and Property, and We are Stewards of the Air, Land and Sea.”*<sup>53</sup>

44. The sharing of the fish harvests with elders and others from within and outside of the community is also a key component of maintaining and strengthening tribal and communal cultural and social connections.<sup>54</sup> For Petitioners and other Alaskan Native communities, gifting subsistence foods within the community creates a “village-wide interdependency” and helps maintain larger networks.<sup>55</sup> This tradition values not letting any of the harvest go to waste,<sup>56</sup> sharing with the entire community,<sup>57</sup> and consequently allowing for households to stay intact and in the village community.<sup>58</sup> Gift-giving and bartering of fish products with other Native communities in Southeast Alaska renews ties and maintains relationships between villages that date back generations. As Einar Haaseth, an elder in the Wrangell Cooperative Association, explains,

*Harvests from the Stikine River and its surrounding lands are not only about filling the freezer for the winter. ... [W]e also give a lot of the food we catch or hunt away to friends and other members of the community, especially the elderly and the disabled. We have a tradition when you give someone cooked or smoked fish that they always take off a little piece of the fish and eat it right then and there to show thanks. My grandma instilled in me this tradition of bringing gifts with you wherever you go and always acknowledging and thanking others.*<sup>59</sup>

45. James Stough, Sr. was taught to do the same. For him,

*[s]haring knowledge of harvesting... is as important as the harvesting of fish and animals, because we share our stories, knowledge and customs. This helps us connect as a family and community.*<sup>60</sup>

46. For Louis Wagner, the social ties maintained through sharing the fish harvest extend beyond his local communities of Ketchikan and Metlakatla, also creating

*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>61</sup>

47. In addition to maintaining social connections, sharing fish harvest serves an important cultural purpose. As Britany *Kee'ya aa*. Lindley explains,

*Trade and gift-giving of subsistence fish not only tie our families and communities together, but also maintain our culture.*<sup>62</sup>

**B. THE SIX B.C. MINES THREATEN THE FISH STOCKS THAT ARE CENTRAL TO PETITIONERS' CULTURE, SPIRITUALITY, AND MEANS OF SUBSISTENCE**

48. Over the past years, six hard-rock mining projects have been proposed in the Taku, Stikine, and Unuk river watersheds, directly upstream of where Petitioners and their communities harvest fish for cultural and subsistence uses. These mines are at different stages: two are operating, one has its permits approved but is in receivership, and three are in the permitting stages.

49. These six mines are large-scale industrial projects that are generating and/or will generate huge quantities of waste that can cause acid mine drainage, a toxic cocktail of acidic water and dissolved heavy metals. Most of the mines also use or will use a highly risky method of storing toxic byproducts in wet dam enclosures that could catastrophically pollute the surrounding watersheds. These projects threaten to pollute downstream waters that Petitioners use, with potentially significant effects on the populations of salmon and eulachon that they harvest. Moreover, as discussed below, despite the threats these mines pose, British Columbia and Canada are unlikely to prevent the harm they are causing.



Taku River salmon.  
Photo by Chris Miller - csmphotos.com

**1. HARD-ROCK MINING POLLUTES THE ENVIRONMENT THROUGH CHRONIC HEAVY METALS POLLUTION AND THE CATASTROPHIC FAILURE OF MINE WASTE CONTAINMENT SYSTEMS**

50. The hard-rock mining process generates toxins that, if released to the environment, pose severe threats to downstream aquatic life. A primary threat originates in pollution generated by mining waste products. In the process of accessing and removing ore, mining operations displace and remove large quantities of waste rock,<sup>63</sup> which is often stored in a designated dump area or used to backfill an underground mine chamber once extraction is completed.<sup>64</sup> The processing of ore also produces a waste slurry of rock particles suspended in water, known as tailings.<sup>65</sup> Waste rock and tailings can both

generate toxic pollution, which can reach the environment through two primary pathways: chronic leaching and catastrophic failure of containment systems.<sup>66</sup>

51. As described in this section, processes for treating and containing these wastes have failed to prevent chronic and catastrophic toxic pollution from mines in British Columbia and elsewhere around the world.

- a. *Chronic heavy metals pollution*

52. One of the most damaging sources of water pollution from mining is a toxic mix of acidic water and dissolved heavy metals known as acid mine drainage.<sup>67</sup> Acid mine drainage is generated when water flowing from mine sites is acidified by contact with sulfide rock that has been exposed to oxygen.<sup>68</sup> Mining activities in sulfide rock include breaking the rock to access and extract ore, as well as milling it into fine particles during the ore-processing stage.<sup>69</sup> These activities increase the surface area of the sulfide rock, enabling more acid generation.<sup>70</sup> Acidic waters dissolve heavy metals in the rock, releasing them into the surrounding environment.<sup>71</sup> Where acid mine drainage flows into rivers, streams, or aquifers, it can cause significant harm to aquatic life.<sup>72</sup>
    53. To mitigate the generation and release of acid mine drainage to the surrounding environment, mine operators attempt to segregate acid-generating rock and acidic waters from the environment, using networks of liners, ditches, and ponds.<sup>73</sup> They can also use active and passive methods to treat polluted waters before releasing them into the environment.<sup>74</sup> A common active treatment method is to add lime to reduce acidity and allowing metals to precipitate out of solution in settling ponds.<sup>75</sup> Passive treatment involves a self-operating system that can treat acid mine drainage without constant human intervention.<sup>76</sup> For example, when acid mine drainage is passed through an artificial wetland, organic matter, bacteria, and algae can filter, absorb, and precipitate out the heavy metal ions and reduce the acidity.<sup>77</sup>
    54. Containment and treatment often does not perform as planned. For example, infrastructure often fails to contain polluted waters, and treatment processes often fail to reduce acidity or remove metals adequately.<sup>78</sup> Moreover, because the oxidization process that generates acid mine drainage persists over centuries, containment and treatment techniques must work for centuries, which is much longer than the operational life of a mine.<sup>79</sup> Given these issues, pollution from chronic acid mine drainage is a common problem where hard-rock mining occurs in sulfide deposits, as is the case with the six mines at issue in this petition.

55. The difficulty of containing acid mine drainage over decades is evident in the case of the old Tulsequah Chief Mine in British Columbia. Although the mine, located at the same site as one of the proposed B.C. Mines, ceased operations in 1957, toxic acid mine drainage from the mine has polluted the watershed since its closure.<sup>80</sup> A 2016 study commissioned by the government of British Columbia found that “multiple undiluted and untreated sources of historic mine waste are discharging into the Tulsequah mainstem and side channels from surface water and groundwater inputs,” posing “unacceptable risks to fish, fish eggs, and pelagic invertebrates.”<sup>81</sup> It is estimated that 12.8 litres of acidic, metals-laced water escape the mine site every second – over 400 million litres per year – into the Tulsequah River, the largest tributary of the Taku.<sup>82</sup>



Acid Mine Drainage from the old Tulsequah Mine collects in a retaining pond adjacent to the Tulsequah River. *Photo by Chris Miller - csmphotos.com*

56. Although the government issued a pollution abatement order in 1989, few steps were taken to stop the acid mine drainage.<sup>83</sup> In 2011, as part of an agreement to re-open the mine, Chieftain Metals agreed to build a water treatment plant to stop the acid mine drainage.<sup>84</sup> But the company shut the plant after less than a year because of high operating costs.<sup>85</sup> Another non-compliance order issued by the government in November 2015 also failed to achieve any action. Chieftain entered receivership in September 2016<sup>86</sup> and acid mine drainage continued to leach out of the mine site.<sup>87</sup> On October 27, 2017, the government issued another non-compliance order requiring Chieftain to develop a remediation plan “setting out remediation strategies and how they will be implemented to mitigate the discharge of acid waters into the receiving environment, and to address the exceedance of provincial water-quality standards by discharges into the environment.”<sup>88</sup> In November, after Chieftain and its receivers failed to submit an adequate remediation plan and almost twenty years after its initial pollution abatement order, the British Columbia Ministry of Energy, Mines and Petroleum Resources finally took matters into its own hand and issued a request for proposals for the mine’s remediation.<sup>89</sup> In 2019, the Ministry accepted proposals from two consulting firms that are in the process of developing detailed remediation plans for the mine.<sup>90</sup>
57. In another example, at the Buckhorn underground mine in Washington State, operators have been unable to control contaminated groundwater, which is reaching surface waters.<sup>91</sup>
58. Contributing to the problem of long-lasting pollution from mining sites is that British Columbia does not have adequate financial security provisions for mine operators. As a condition of Mines Act permits, the permittee must provide financial security in an amount and in a form acceptable to the Chief Inspector of Mines.<sup>92</sup> This discretion can lead to under-securitization and inconsistent application.<sup>93</sup> Thus, in situation like the pollution at the Tulsequah Chief Mine, British Columbia is flouting the polluter’s pay

principle by ultimately using tax payer funds to remediate the site. As a recent report by the Union of British Columbia Indian Chiefs found:

Had the Ministry required security to operate water treatment as a condition precedent to the [Tulsequah Chief Mine] permit, the Province would be in a position where it could order the water be treated, or liquidate the security and do it itself. Instead, the Province appears unwilling to ensure the requisite water treatment is undertaken. It is hoping Chieftain can raise enough capital to take the mine out of care and maintenance, and then hoping the company will use operating cash flow to undertake water quality treatment it should be undertaking today. Tulsequah is another example of the Ministry's failure to uphold the Polluter Pay Principle.<sup>94</sup>

59. As discussed below, there is no evidence that British Columbia or Canada are doing anything to prevent the same situations from occurring at any of the six mines at issue in this petition.

b. *Catastrophic pollution from wet tailings-dams*

60. In addition to leaching out as acid mine drainage, toxic pollution from hard-rock mines can reach the environment through catastrophic failures of tailings containment systems.<sup>95</sup>
61. Tailings are one of the main wastes produced by mining activities. In order to remove and process the metals present in rock, ore is crushed and ground into fine particles at a mill.<sup>96</sup> The rock particles are then suspended in water from which concentrated metals are separated using a combination of mechanical and chemical techniques.<sup>97</sup> The leftover waste slurry is referred to as tailings.<sup>98</sup>
62. Tailings are disposed of using either a dry or a wet technique.<sup>99</sup> Wet disposal or wet closure entails depositing the tailings underwater in a pond to slow the oxidation process.<sup>100</sup> The pond is often separated from the surrounding environment by a dam.<sup>101</sup> Given the timeframe of oxidation and acid generation from the tailings, these dams must stand for millennia.<sup>102</sup>
63. In a report attached as Appendix 1, Dr. David Chambers, an expert with 45 years of experience in mineral exploration and development, explains that these types of tailings-dams present risks of catastrophic failures that can release huge quantities of acid mine drainage into downstream surface waters.<sup>103</sup>
64. A number of factors make failure likely. First, because the dams are often raised incrementally over many years as tailings accumulate over the mine's operating life, quality control is difficult to ensure.<sup>104</sup> Also, the tailings themselves can be used for partial, or sometimes full, support of the dam.<sup>105</sup> These underlying tailings may be unstable, however, because they can remain saturated and liquefy under pressure or during an earthquake, compromising the integrity of the dam built on top of them.<sup>106</sup>

65. During the century or so of their use, over two hundred tailings-dam failures have been reported.<sup>107</sup> An increasing proportion are serious failures (ones large enough to cause significant harm to ecosystems and people), with 49 percent of serious failures occurring since 1990.<sup>108</sup> After 2000, five to six serious tailings-dam failures have taken place annually.<sup>109</sup> One particularly devastating example was the November 2015 collapse of the Fundão tailings-dam in Minas Gerais, Brazil.<sup>110</sup> The failure, which has been described as the world’s biggest environmental mining disaster, may have been caused by small seismic shocks<sup>111</sup> causing liquefied mud under the earthen dam to collapse under the mass of impounded tailings.<sup>112</sup> About 43 million cubic meters of tailings escaped through the breach, generating 10 meter-tall waves of toxic mud.<sup>113</sup> The resulting flood killed 19 people<sup>114</sup> and polluted 668 kilometers of waterways, from the Doce River to the Atlantic Ocean.<sup>115</sup> The released tailings “caused severe changes to the physico-chemical characteristics of the Doce River and estuarine region” and at places turbidity increased 6,000 fold.<sup>116</sup> Large numbers of fish were killed by toxic pollution in the water.<sup>117</sup>
66. The Fundão dam spill affected waters relied on by 40 downstream municipalities and left hundreds of thousands of people without access to clean water.<sup>118</sup> Among the communities affected were the Indigenous Krenak people who lived in seven villages along the Doce River.<sup>119</sup> Before the disaster, the Krenak “would hunt fish, capybaras, armadillos and other animals, and use the Rio Doce for drinking water and to irrigate their crops”; since the disaster they “eat beef, chicken and pork bought at nearby supermarkets.”<sup>120</sup> In the words of one village elder,
- We live to hunt and to fish and now we cannot.... [O]ur Native diet is fish. But for us, the river died.*<sup>121</sup>
67. The failure of the Fundão dam and the resulting damage occurred even though the dam was only seven years old and contained substantially less tailings (56.4 million cubic meters) than it had been designed to hold (111.6 million cubic meters).<sup>122</sup>
68. Canada is not immune to catastrophic tailings-dam failures. According to a United Nations Environment Programme assessment, Canada’s seven tailings spills were the second-most in the world between 2007 and 2017.<sup>123</sup> One of these – a 2014 spill at the Mount Polley Mine in British Columbia – was one of the worst tailings disasters in the world, and illustrates problems in tailings-dam regulation in British Columbia.
69. On August 4, 2014, a tailings-dam collapsed at Imperial Metal’s Mount Polley copper and gold mine in British Columbia.<sup>124</sup> The breach opened suddenly, giving the mine operator no warning<sup>125</sup> and releasing approximately 254 million cubic meters of toxic tailings slurry into salmon-bearing downstream waters.<sup>126</sup> The tailings and polluted water widened a downstream creek from five meters to a width of over 100 meters.<sup>127</sup> The toxic tailings rushed downstream, killing fish and destroying and contaminating Indigenous peoples’ lands and waters they had used for generations.<sup>128</sup> The full extent of the environmental, economic, and cultural damage from this disaster may remain unknown for decades.<sup>129</sup>

70. In response to the Mount Polley dam failure, the British Columbia government convened an expert panel to investigate the disaster and to recommend government actions that could ensure such failures would not occur again.<sup>130</sup> The panel concluded that the dominant cause of the dam failure was that its design did not account for stresses that the dam structure would have to bear because of its geological surroundings and the dam's slope.<sup>131</sup>
71. Alarmingly, the panel predicted that if mines in British Columbia continued to use the same wet tailings storage technology as the Mount Polley mine, there would be two tailings-dam failures every ten years.<sup>132</sup> The panel concluded:

Such high probabilities and numbers of future failures are incompatible with safety goals for either evaluation period. [British Columbia's] portfolio risk is clearly excessive for ensuring that similar failures do not occur at other mine sites in B.C.... The historic failure frequency provides clear evidence that past practices and technologies have failed to provide acceptable levels of tailings dam safety in the province from a portfolio risk point of view.<sup>133</sup>

72. The panel recommended that in the future mine projects avoid impounding saturated tailings under water behind dams.<sup>134</sup>
73. Despite claiming that it has “completed implementation of all recommendations resulting from the independent expert engineering panel’s investigation,”<sup>135</sup> British Columbia has failed to prevent construction of wet tailings-dams. The latest edition of the Health, Safety and Reclamation Code for Mines in British Columbia does not require the use of any specific technology or reflect any limitation on the use of wet tailings facilities, contrary to the recommendations of the independent panel.<sup>136</sup> As a report on the failures of British Columbia’s mining system by the University of Victoria’s Environmental Law Centre concluded, the Government of British Columbia

has failed to commit to the expert panel’s most significant recommendation – that the province systematically transition from building large tailings ponds to the safer technology of putting tailings underground, with dry/filtered tailings on the surface. Despite the panel’s warning that two tailings dams will likely fail every decade, [British Columbia] has failed to follow through. It is clear that [British Columbia] has failed to address the core systemic issues that led to the Mt. Polley disaster.<sup>137</sup>

74. As discussed below, five of the six B.C. Mines will use the same wet tailings-dam design against which the panel recommended. In some cases, British Columbia authorized the use of this flawed design after the panel’s recommendation.

## 2. THE INADEQUATE REGULATION AND ENFORCEMENT OF MINING IN BRITISH COLUMBIA

75. Recent reviews have found the government of British Columbia's regulation of mining inadequate.<sup>138</sup> Mining in the province is primarily overseen by the Ministry of Energy, Mines and Petroleum Resources, which regulates activities on the mine site, and the Ministry of Environment, which regulates a mine's potential impacts to the environment.<sup>139</sup> Unfortunately, these agencies are conflicted and unable to regulate mines adequately to avoid further spills and contamination.<sup>140</sup>
76. In 2016, prompted by the Mount Polley disaster, British Columbia's Auditor General audited the performance of these agencies. She found "a decade of neglect in compliance and enforcement activities within the Ministry of Energy and Mines, and significant deficiencies within the Ministry of Environment's activities."<sup>141</sup>
77. The Auditor General found that the Ministry of Environment compliance and enforcement activities do not adequately protect against "significant environmental risk."<sup>142</sup> The ministry has insufficient resources, including inadequately trained and qualified staff,<sup>143</sup> "declining staff morale"<sup>144</sup> that has led to an "exiting of staff with mining experience,"<sup>145</sup> and poor coordination with the Ministry of Energy, Mines, and Petroleum Resources,<sup>146</sup> all of which increase "the likelihood of environmental risks not being addressed."<sup>147</sup> As an example of poor enforcement, the Auditor General pointed to the ministry's inadequate oversight of a coal mining project in the Elk River watershed (a transboundary river flowing from British Columbia into Montana).<sup>148</sup> Despite knowing that the mine operator's discharges of selenium to an already polluted watershed in excess of its permit level would likely harm the environment, the ministry did not suspend the mine's operations, but instead authorized the mine's expansion.<sup>149</sup> Given the transboundary nature of the watershed, the Auditor General concluded that "[t]here is a risk that if [the Ministry of Environment] is unable to enforce [the mine permit] and the mine company exceeds its permit limit for selenium [in transboundary waters,] the outcome could be a violation of the 1909 [Boundary Waters] Treaty."<sup>150</sup>
78. The Auditor General also found that the Ministry of Energy and Mines' compliance and enforcement activities were inadequate to protect the environment, and its "expected regulatory activity" was "deficient."<sup>151</sup> For example, in connection with the Mount Polley disaster described above, the audit found that the ministry adopted generic dam-building standards that were "not specific to the conditions in B.C. or specific to tailings dams[,] ... result[ing] in a tailings dam that was built below generally accepted standards for tailings dams."<sup>152</sup> More specifically, the ministry "did not ensure that the [Mount Polley] tailings dam was being built or operated according to the approved design" and failed to "ensure that the mining company rectified design and operational deficiencies."<sup>153</sup>
79. The Auditor General also identified structural problems that undermine the ability of the Ministry of Energy and Mines to ensure that mining operations do not cause environmental harm.<sup>154</sup> Although the ministry has a dual mandate to both promote and regulate resource development in the province,<sup>155</sup> the Auditor General found that it devotes "[m]ost ... efforts ... to supporting the development of mining."<sup>156</sup> She concluded that "most of [the] signs [exist] which can give rise to a reasonable perception of, and increase the actual risk of, regulatory capture" in which the ministry "created to act in the

public interest, instead serves the interests of [the mining] industry.”<sup>157</sup> She recommended that the government create an “integrated and independent compliance and enforcement unit for mining activities, with a mandate to ensure the protection of the environment . . . [with] our expectation that this new unit would not reside within” the Ministry of Energy and Mining.<sup>158</sup> Citing “the absence of evidence by the Auditor General that [the British Columbia compliance and enforcement structure] has compromised the integrity of the [Ministry of Energy and Mines] or its staff,”<sup>159</sup> British Columbia instead opted to establish a Deputy Ministers Mining Compliance and Enforcement Board to oversee mineral exploration and development in British Columbia.<sup>160</sup> The Deputy Minister of Energy and Mines sits on the Board, together with the Deputy Minister of Environment and the Associate Deputy Minister of the Environmental Assessment Office.<sup>161</sup>

80. The University of Victoria Environmental Law Centre’s report affirmed the Auditor General’s findings. According to this report, there is “irrefutable evidence that the provincial mine regulatory system is in a state of profound dysfunction,” and a “series of major systemic failures demonstrate the need for wide-ranging reform.”<sup>162</sup> Some of these failures include:
- The Mount Polley Mine disaster;
  - Failures of provincial enforcement of mining laws;
  - Failure to inspect a closed mine for over 20 years, allowing the undetected destruction of a salmon river;
  - Failure of provincial rules for environmental assessment to meet global best practices;
  - Failures of provincial placer mining rules to protect rivers and streams; and
  - Failure of a 19<sup>th</sup>-century gold rush law to protect First Nations land and environmentally sensitive areas.<sup>163</sup>
81. Dr. Chambers assessed British Columbia’s mining regulatory and/or enforcement practices and agrees that British Columbia regulators do not make safety the primary consideration in the design, construction, operation, and closure of tailings-dams.<sup>164</sup> In reaching this conclusion, Dr. Chambers referred to the British Columbia government’s authorization of five of the B.C. Mines to use tailings-dams that have the same basic design as the Mount Polley dam – including authorizing some of these dams after having been informed of the expert panel’s recommendation against precisely this design.<sup>165</sup>
82. As discussed below, the failure of the governments of British Columbia and Canada to prevent environmental damage from the B.C. Mines, including from catastrophic tailings-dam failures, creates a significant and imminent risk of environmental damage to the Taku, Stikine, and Unuk watersheds.

### 3. THE B.C. MINES THREATEN THE TAKU, STIKINE, AND UNUK WATERSHEDS

83. The mines at issue in this petition pose the same risks associated with acid mine drainage and tailings-dam failures described above. All six mines are associated with sulfide deposits that are generating and/or will generate acid mine drainage, threatening downstream watersheds with chronic heavy metals pollution. In addition, as detailed below, five of these projects will use the same basic tailings-dam design as the ones that failed at Mount Polley, but at much larger scales.<sup>166</sup> Four of these mines have located or plan to locate their dams in either the Taku or Stikine watersheds and pose a significant risk of catastrophic pollution events.<sup>167</sup>
84. The risks of pollution from the B.C. Mines are discussed in detail in the report of Dr. David Chambers.<sup>168</sup>

a. *The Tulsequah Chief Mine*

85. Within the Taku River watershed, directly upstream of the Douglas Indian Association's traditional salmon fishing grounds and near the Canada-US border,<sup>169</sup> the Chieftain Metals Corporation,<sup>170</sup> which has now filed for bankruptcy, was the most recent company proposing to construct and operate the Tulsequah Chief Mine.
86. The proposed mine targeted gold, silver, copper, lead, and zinc from a 54 square-mile (139 square-kilometer) property on the east side of the Tulsequah Valley in British Columbia, near the confluence of the Tulsequah and Taku rivers.<sup>171</sup> The mine site would be 16 kilometers upstream of the international border, and 64 kilometers northeast of Juneau, Alaska.<sup>172</sup> The project encompasses two ore deposits, the Tulsequah Chief deposit and the Big Bull deposit, both of which Chieftain Metals plans to develop.<sup>173</sup> Cominco operated a mine at the same site from 1951 until 1957<sup>174</sup> that, as described above, has been polluting the Tulsequah River with acid mine drainage since its closure.<sup>175</sup>
87. Over its 11-year proposed operating life, the mine would produce 4.4 million metric tons of ore.<sup>176</sup> Ore would be mined and crushed underground, then fed into a mill for grinding on site.<sup>177</sup> Doré (a gold-silver alloy), copper, lead, and zinc concentrate would be extracted onsite.<sup>178</sup> For a few months a year, barges would transport ore concentrate and supplies down the Taku River from the mine to a transshipment site where material would be transferred to ocean-going barges for international shipment.<sup>179</sup>



The proposed Tulsequah Chief Mine sits along the Tulsequah River, a tributary to the Taku River, 10 miles upstream from the Canada-US border.

*Photo by Chris Miller - csmphotos.com*

88. The proposed project would produce over 2.16 million metric tons of tailings,<sup>180</sup> 1.76 million metric tons of which would be impounded in a 45-hectare wet impoundment

within the Taku drainage.<sup>181</sup> The proposed impoundment uses the same design as the dam that failed at the Mount Polley Mine.<sup>182</sup> The company plans to neutralize acidic wastewaters by treating them with limestone.<sup>183</sup> As Dr. Chambers explains, this kind of containment and treatment often does not perform as planned.<sup>184</sup>

89. The government of British Columbia approved the mine in 2002,<sup>185</sup> and all permits needed to start construction have been granted, subject to the condition that the current acid mine drainage be stopped and remediated.<sup>186</sup> Neither Canada nor British Columbia consulted with or sought the free, prior, and informed consent of Petitioners concerning the approval or operation of this mine during the approval process or at any other time, as required by international law, despite having had knowledge of the mine's threats to Petitioners' rights (see section V.C.5.).
90. In 2016, Chieftain Metals went into receivership.<sup>187</sup>

b. *The Red Chris Porphyry Copper-Gold Mine*

91. In the Stikine watershed, upstream of the traditional fishing grounds used by members of the Wrangell Cooperative Association, Ketchikan Indian Community, and Organized Village of Saxman, three hard-rock mines are in various stages of development.

92. The first of these mines, Red Chris Porphyry Copper-Gold Mine Project, a joint venture of Newcrest Red Chris Mining Limited and Imperial Metals Corporation,<sup>188</sup> began production in February 2015.<sup>189</sup> Neither Canada nor British Columbia consulted with or sought the free, prior, and informed consent of Petitioners concerning the approval or operation of this mine during the approval process at any other time.



Red Chris Mine. Photo by Dan Mesec

93. Over its projected 28-year operating life,<sup>190</sup> the Red Chris mine expects to process around 30,000 metric tons of ore per day.<sup>191</sup> In the fourth quarter of 2019, the mine produced “21.7 million pounds copper, 12,155 ounces gold, and 45,508 ounces silver.”<sup>192</sup> Mill throughput “averaged 27, 784 tons per calendar day.”<sup>193</sup>
94. The mine will generate 300 million metric tons of tailings,<sup>194</sup> which will be impounded in a Y-shaped valley that has been dammed at each of its three arms by earth-fill embankments.<sup>195</sup> The tailings impoundment drains into the Stikine River via two of its tributaries, the Iskut and Klappan rivers.<sup>196</sup>
95. The tailings-dam uses the same wet tailings method and design as the failed Mount Polley Mine dam, contrary to the expert panel's recommendations.<sup>197</sup> In fact, the government of British Columbia provided the Red Chris Mine, which is operated by the same company that owns Mount Polley, a permit to use a wet tailings facility just days

after the panel issued its report.<sup>198</sup> After the mine's first two years, the dams will be raised annually to contain additional tailings.<sup>199</sup>

96. The British Columbia Environmental Assessment Office predicts that seepage water with elevated concentrations of metals pollutants could potentially escape the impoundment and "enter the receiving environment."<sup>200</sup> The mine's environmental assessment certificate application enumerates "[p]otential impacts to aquatic habitat associated with the tailings impoundment" that include the direct loss of habitat within the tailings impoundment footprint and decreased water quality in downstream waters.<sup>201</sup> These impacts are expected to occur "during the lifetime of the project and into post-closure."<sup>202</sup>
97. Though environmental authorities concluded that the mine's precautionary measures would rule out significant environmental problems beyond the mine site,<sup>203</sup> by December 2015, less than a year after the mine became operational, there had already been a tailings spill from the mine "caused by wear and tear" to a pipe.<sup>204</sup> In 2017, the inspection record for Red Chris was referred for an Administrative Penalty based on failure to take required steps under its Environmental Trigger Response Plan when sampling showed that dissolved selenium, aluminum, and chromium concentrations exceeded allowable levels.<sup>205</sup> Red Chris has also failed to adequately monitor groundwater at certain wells from 2017 to 2018.<sup>206</sup>
98. In addition to tailings, the project is expected to generate 338 million metric tons of waste rock,<sup>207</sup> most of which will be deposited in a rock dump.<sup>208</sup> According to the environmental assessment report for the mine, "over time a significant proportion of the waste rock in the North waste dump and in the exposed pit wall rock is expected to become acid-generating[,] releasing increased concentrations of metal contaminants."<sup>209</sup>
99. During the mine's operation, drainage from the dump will flow directly into the tailings impoundment area.<sup>210</sup> Afterwards, however, the drainage "will require treatment to produce an acceptable quality of effluent for release to receiving waters."<sup>211</sup> For a period estimated to be "in excess of 200 years," drainage from the dump will be directed back into the open pit, via either a rock trench or tunnel, where a treatment plant will operate to reduce its acidity.<sup>212</sup> From there, the treated drainage will be directed to the tailings impoundment.<sup>213</sup> Although the mine's environmental assessment report notes that "[t]reatment will likely be required in perpetuity,"<sup>214</sup> there is currently no requirement or commitment that the mine proponent or any other party, including the British Columbia or Canadian governments, will provide the funding, personnel, access, or other resources to secure such treatment indefinitely.
100. Neither Canada nor British Columbia consulted with or sought the free, prior, and informed consent of Petitioners concerning the approval or operation of this mine during the approval process or at any other time, despite having had knowledge of its threats to Petitioners' rights.

c. *The Schaft Creek Mine*

101. Also in the Stikine watershed upstream of Petitioners' traditional fishing grounds, the Schaft Creek Joint Venture<sup>215</sup> between Copper Fox Metals Incorporated<sup>216</sup> and Teck Resources Limited<sup>217</sup> manages the Schaft Creek Mine, an open pit copper, gold, molybdenum, and silver mine.<sup>218</sup> Over the mine's 15-23 year proposed operating life, the project is expected to produce around 100,000 metric tons of ore per day.<sup>219</sup> The project involves "one of the largest undeveloped porphyry copper-gold-molybdenum-silver deposits in North America."<sup>220</sup>

102. It is estimated that the project would generate over 800 million metric tons of tailings.<sup>221</sup> These tailings would be impounded by rockfill embankments in Skeeter valley, which drains into the Stikine River via Skeeter and Schaft creeks.<sup>222</sup> Contrary to the Mount Polley expert panel's recommendations, this mine would also use a tailings-dam with the same basic design as the one that failed at the Mount Polley Mine.<sup>223</sup>



The proposed Schaft Creek Mine is located in the Stikine River watershed. *Photo used with permission*

103. The project is also expected to generate over a billion metric tons of waste rock,<sup>224</sup> which will be dumped at sites around the perimeter of the mine pit, "with the majority of the material placed on the east side of Schaft Creek."<sup>225</sup> Ten percent of the waste, over 100 million metric tons, is expected to be potentially acid-generating.<sup>226</sup>

104. In 2016, the proponents withdrew and began new environmental assessment studies for the Schaft Creek project.<sup>227</sup> The proponents approved \$900,000 in 2017 to complete environmental assessment and permitting, and committed to taking several other investigatory measures in 2019.<sup>228</sup> Neither Canada nor British Columbia has consulted with or sought the free, prior, and informed consent of Petitioners concerning the approval or operation of this mine during the approval process or at any other time, despite having knowledge of the mine's threats to Petitioners' rights.

d. *The Galore Creek Mine*

105. The third mine in the Stikine watershed is the Galore Creek Mine to be operated by Galore Creek Mining Corporation,<sup>229</sup> a joint venture between Newmont Mining Corporation<sup>230</sup> and Teck Resources Limited.<sup>231</sup> Over its 18.5-year operating life, the mine is expected to produce about 588 million metric tons of ore, with an annual yield of approximately 3.23 billion pounds of copper, 200,000 thousand ounces of gold, and three million ounces of silver.<sup>232</sup>

106. Most of the project's expected one billion metric tons of waste rock and tailings will be contained behind dams in a steep canyon.<sup>233</sup> Contrary to the Mount Polley expert panel's

recommendations, this mine would use wet tailings-dams with the same basic design as the one that failed at the Mount Polley Mine.<sup>234</sup> Waste rock is expected to leach aluminum, antimony, boron, cadmium, copper, fluoride, iron, lead, manganese, molybdenum, selenium, sulphate, and zinc into the impoundment water.<sup>235</sup> According to the environmental assessment prepared by the project proponents, “[e]ffluent from the mine site will be discharged from the tailings and waste rock impoundment into Galore Creek from mid-May to mid-October.”<sup>236</sup> The company maintains that this toxic “effluent will mix rapidly due to the highly turbulent nature of Galore Creek,”<sup>237</sup> diluting its content within the surface waters of the Stikine drainage. As described below, this would likely not prevent increases in metal concentrations downstream.<sup>238</sup>

107. Although the government of British Columbia issued an environmental assessment certificate for the Galore Creek Mine in 2007,<sup>239</sup> changes in the proposed project have necessitated a new environmental assessment process.<sup>240</sup> The project proponents plan to invest up to US\$30 million annually over three to four years to complete a new prefeasibility study.<sup>241</sup> Neither Canada nor British Columbia has consulted with or sought the free, prior, and informed consent of Petitioners concerning the approval or operation of this mine during the approval process or at any other time, despite having knowledge of the mine’s threats to Petitioners’ rights.

e. *The Brucejack Mine*

108. In the Unuk watershed, upstream of where the Metlakatla and Ketchikan Indian Communities have traditionally fished for eulachon and salmon, the Canadian government has approved one hard-rock mining project, and is evaluating another.
109. The first hard-rock mining project is the already-operational Brucejack Mine, a gold and silver mine operated by Pretium Resources Incorporated (Pretium).<sup>242</sup> The mine is located four kilometers from the KSM Mine near Brucejack Lake, which drains into the Unuk River via Brucejack and Sulphurets creeks, approximately 53 river-kilometers upstream from the Canada-US border.<sup>243</sup> This project consist of an underground mine, a mineral processing plant, a waste rock and tailings impoundment, an aerodrome, and an access road.<sup>244</sup> Doré and gold-silver concentrate is produced on-site and then trucked away.<sup>245</sup> According to Pretium’s environmental assessment, the fully operational mine will produce around 3,800 metric tons of ore per day, and will do so over the mine’s 13-year operating life,<sup>246</sup> for a total of over 18 million metric tons of ore.<sup>247</sup>



Brucejack Mine. Photo by Pretium Resources

110. The mine will generate around 3.48 million metric tons of waste rock over the remainder of its life, all of which is assumed to be potentially acid-generating material.<sup>248</sup> Pretium’s environmental assessment notes that the mine’s waste rock poses a risk of leaching

arsenic, antimony, silver and cadmium.<sup>249</sup> Although some portion of waste rock and tailings will be used to backfill the underground mine chamber at closure, the remainder will be piped to the bottom of Brucejack Lake.<sup>250</sup>

111. Brucejack mine received its final permits in September 2015 and began operations in June 2017.<sup>251</sup> Neither Canada nor British Columbia consulted with or sought the free, prior, and informed consent of Petitioners concerning the approval or operation of this mine during the approval process or at any other time, despite having had knowledge of the mine's threats to Petitioners' rights.

f. *The KSM Mine*

112. The second hard-rock mining project in the Unuk River watershed is the KSM Mine, located four kilometers downstream of the Brucejack Mine and approximately 22 miles (35 kilometers) from the Canada-US border. Proposed by Seabridge Gold Incorporated (Seabridge),<sup>252</sup> this gold, silver, copper, and molybdenum mine would be one of the largest undeveloped copper-gold projects in the world.<sup>253</sup> The project consists of two parts, one of which is a mine site within the Unuk River drainage.<sup>254</sup> Over the course of its anticipated 51.5-year operating life, the KSM Mine would extract about 130,000 metric tons of ore per day<sup>255</sup> from three open pits and two underground cave mines,<sup>256</sup> producing 2.16 billion metric tons of ore.<sup>257</sup> In December 2019, Seabridge announced its discovery of four additional porphyry targets that "could contribute to the multi-generational life of the KSM Mining District."<sup>258</sup>

113. According to Seabridge's environmental assessment, the mine will produce over three billion metric tons of waste rock and overburden over the course of its life.<sup>259</sup> Seventy-one percent of the waste rock by weight will be potentially acid-generating, and the acid-generating potential of another 15 percent is "uncertain."<sup>260</sup> Waste rock will be stored in dumps in rock storage facilities in the Unuk River drainage, and will also be used to backfill one of the mining pits once mining is completed there.<sup>261</sup>



The proposed KSM Mine is located in the upper Unuk River watershed. *Photo used with permission*

114. Seabridge plans to divert water that has contacted disturbed areas or materials to a 63-hectare water storage facility<sup>262</sup> in a dammed section of Mitchell Creek.<sup>263</sup> From there, it will be pumped to the water-treatment plant<sup>264</sup> to be treated with lime before being released into Sulphurets Creek, which flows into the Unuk River.<sup>265</sup> Seabridge claims that the water treatment and water storage facilities will continue to operate after closure of the mine "until discharge quality meets targets," a period expected to be around 250 years.<sup>266</sup> The company estimates post-closure treatment costs to be \$20,383,500 per year for basic treatment, and \$6,656,620 for the selenium treatment plant.<sup>267</sup> These costs do

not include replacement costs that would be expected to occur over the life of the water treatment plant, including replacement of moving parts (about every 10 years), stationary parts (about every 20 years) and plant itself (about every 50 years).<sup>268</sup>

115. As discussed in more detail below, the KSM Mine is the only one of the six B.C. Mines for which the proponents have assessed downstream water-quality impacts at the Canada-US border from “normal” operation of the mine. Although Seabridge’s environmental assessment predicts that its treatment of acidic wastewater will result in no increases in downstream concentrations of toxic metals other than selenium, Dr. Chambers concluded that the company’s predictions are flawed and likely understate the downstream water quality impacts, and that downstream concentrations of metals are likely to increase from existing levels and that the increase could be substantial.<sup>269</sup>
116. Earlier this year, an international group of 22 science and policy experts, including Dr. Chambers, published a letter in *Science* on the transboundary risks of Canada’s mines.<sup>270</sup> The authors described the KSM Mine as “one of the world’s largest copper and gold mines,” consisting of “one of the largest human-made holes on earth ... [and] one of the highest dams in North America.”<sup>271</sup> They highlighted that mines like KSM pose downstream threats due to key shortfalls in mine assessments, such as the underestimation of risks, under delivery of mitigation measures, and lack of “transparent, independent, and peer-reviewed science.”<sup>272</sup> The group “urge[d] the [Canadian and US] governments to honor their mutual obligations to protect [] shared transboundary waters ... and immediately collaborate on binational environmental reviews that are founded upon independent, transparent, and peer-reviewed science.”<sup>273</sup>
117. The project received provincial and federal environmental assessment certificates in 2014,<sup>274</sup> and Seabridge is still seeking various other permits.<sup>275</sup> Neither Canada nor British Columbia consulted with or sought the free, prior, and informed consent of Petitioners concerning the approval or operation of this mine during the approval process or at any other time, despite having had knowledge of the mine’s threats to Petitioners’ rights.

#### 4. HARM TO SALMON AND EULACHON FROM MINING POLLUTION

118. Canadian authorities have not required proponents of the six B.C. Mines to assess impacts from the mine projects on downstream water quality in areas populated by the salmon and eulachon upon which Petitioners' subsistence way of life and culture depends, despite having knowledge of the threats from these mines to Petitioners' rights. For five of the six mines, the proponents have not assessed potential changes to water quality in these downstream watersheds. Moreover, none of the proponents has assessed worst-case scenarios for downstream waters should their tailings-dams fail.



Subsistence sockeye salmon harvesting near Unuk River, Southeast Alaska.  
*Photo by Carrie Dodson, courtesy of SEITC*

119. Only the KSM Mine proponent, Seabridge, has assessed potential impacts of its mine on water quality downstream, including at the Canada-US border, from normal mine operations. Because all of the B.C. Mines propose to use largely similar pollution mitigation strategies as the KSM Mine – neutralizing and precipitating metals out of solution before releasing waters to the environment – the KSM Mine provides a general picture of threats that might be expected from the other B.C. Mines.<sup>276</sup> Thus, a critical evaluation of Seabridge's predictions and the potential harm to fish in downstream waters is relevant to a consideration of the likely impacts from each of the other B.C. Mines.

120. Seabridge does not deny that the KSM Mine will likely generate acid mine drainage. As part of its mine plan, Seabridge intends to capture waters that naturally contain metals, combine them with mine wastewater, and treat the combination before releasing it as effluent to the watershed.<sup>277</sup>

121. Seabridge acknowledges that these steps will not prevent an increase in concentrations of selenium in waters of the Unuk River downstream from the mine.<sup>278</sup> As described below, increased selenium concentrations has serious detrimental effects on fish and other aquatic life. For other metals, Seabridge predicts that its operations would not increase, and in some cases would actually reduce, mean concentrations in downstream waters.<sup>279</sup>

122. Dr. Kendra Zamzow and Dr. Chambers reviewed Seabridge's predictions and, for several reasons, concluded that they are misleading and may be overly optimistic.<sup>280</sup>

123. First, as described above, the containment and treatment methods planned by Seabridge and the proponents of the other B.C. Mines, and approved by the British Columbia government, are unlikely to prevent chronic or catastrophic contamination of waters downstream from the mines.<sup>281</sup> The kind of containment dams proposed or constructed

for these mines have failed in the past, and have been found by a panel of government experts to be unsafe. Moreover, as Drs. Chambers and Zamzow explain, no treatment process is adequate to prevent acid mine drainage pollution to surface waters.<sup>282</sup>

124. Second, Seabridge bases its conclusions on a predicted reduction in the total concentration of each metal in the water, including concentrations of both sediment-bound and dissolved forms of the metals.<sup>283</sup> However, because dissolved metals are more bioavailable to fish and most harmful to aquatic life,<sup>284</sup> concentrations of dissolved metals are more relevant to an assessment of potential harm.<sup>285</sup> Because treatment of mine effluent may reduce total metals concentrations without reducing – and possibly allowing an increase in – concentrations of dissolved metals, it is impossible to assess water quality impacts based on total concentrations.<sup>286</sup> In fact, for aluminum and iron, the only two metals for which Seabridge made both total- and dissolved-metals predictions, Seabridge’s analysis predicted 32% and 88% *increases*, respectively, in dissolved concentrations in the Unuk River despite a decrease in total metals concentrations.<sup>287</sup> Seabridge should have provided to the public similar analyses for other metals of concern, such as cadmium, copper, lead, molybdenum, and selenium.<sup>288</sup> Based on Seabridge’s own analysis, therefore, Dr. Zamzow concludes that Seabridge could be overstating the efficacy of its treatment plan, and understating risks the KSM Mine poses to the downstream aquatic life.<sup>289</sup>
125. Finally, Seabridge’s analysis is based on assumptions that cast its conclusions into doubt or that cannot be verified. For example, Seabridge relies on a predictive water quality model without providing monthly baseline flows and average metal concentrations by site, information key to assessment of the model’s accuracy.<sup>290</sup> Seabridge also tested its treatment techniques using simulated feed waters that were likely different from the water from the naturally metals-loaded stream, which would have led the company to underestimate the likely downstream metal concentrations.<sup>291</sup> Another questionable assumption was Seabridge’s exclusion of the possibility of acid mine drainage seepage from the mine site through underground chambers and tunnels.<sup>292</sup> Such seepage would result in higher concentrations of contaminants in the receiving waters.
126. One of the most problematic assumptions in Seabridge’s analysis was that its pollution capture and treatment process will work flawlessly over many decades.<sup>293</sup> In Dr. Zamzow’s experience, large industrial operations do not operate flawlessly, and the containment and treatment systems proposed at the KSM Mine will not operate seamlessly and consistently to reduce effluent concentrations to maintain baseline water quality.<sup>294</sup>
127. For all these reasons, Dr. Zamzow concludes that Seabridge has likely understated the threat the KSM Mine poses to the Unuk River system.<sup>295</sup>
128. Relying on Dr. Zamzow’s findings and his own extensive experience with containment and treatment systems in other mines, Dr. Chambers concluded that the actual ranges of downstream concentrations of metals are likely to increase due to discharge from the KSM Mine, and that these increases could be substantial.<sup>296</sup> As discussed below, increased concentrations of pollution in downstream waters could significantly

reduce fish populations in the downstream waters that Petitioners use.<sup>297</sup> For these reasons, Dr. Chambers concluded that, by granting KSM Mine’s environmental permit, the British Columbia government has demonstrated that “it is willing to authorize a mine project that will, as a matter of course, use downstream salmon waters – including waters in the United States – as mixing zones to dilute toxic mine wastes (presently for selenium).”<sup>298</sup>

*The KSM Mine significantly threatens fish populations in downstream waters*

129. Seabridge’s environmental assessment found that the levels of metals in the Unuk River system are naturally high even in the absence of a mine, because of metals leaching out of naturally occurring acid-generating rock.<sup>299</sup> Based on a review of that assessment and the reports of Drs. Chambers and Zamzow, Sarah O’Neal, a fish biologist and researcher at the University of Washington with 20 years of experience in freshwater ecology in salmon ecosystems,<sup>300</sup> concluded that water in the Unuk watershed is currently close to toxicity thresholds for fish survival, and that fish living in them have very little margin of safety.<sup>301</sup> As a result, an increase in concentrations of already naturally elevated selenium, aluminum, cadmium, copper, and zinc in waters downstream of an operational KSM Mine could cause population-level harms to Unuk River salmon, eulachon, and other fish, resulting in “significant and sustained population decreases.”<sup>302</sup>
130. Ms. O’Neal explains that, above certain concentrations, many heavy metals are toxic to fish and other aquatic life like salmon and eulachon.<sup>303</sup> Increased concentrations of several of the metals associated with the B.C. Mines could lead to population-level harms to fish in the Taku, Stikine, and Unuk watersheds.<sup>304</sup>

*Selenium*

131. Unlike other metals, the toxic effects of selenium occur primarily through dietary as opposed to waterborne pathways.<sup>305</sup> Unlike most trace elements, selenium bioaccumulates (accumulates in the body faster than the body can process or excrete it) and sometimes biomagnifies (becomes more highly concentrated in animal tissue at successively higher levels of the food chain).<sup>306</sup> Since diet is the primary source of selenium to fish, its efficient uptake by algae and macroinvertebrates contributes to selenium toxicity.<sup>307</sup> Thus, relatively low selenium concentrations can lead to fish toxicity via bioaccumulation.<sup>308</sup> Although adult fish are relatively tolerant of selenium, bioaccumulation allows it to be deposited into eggs during their formation, resulting in deformations, typically in the fishes’ skeleton, skull, or fins.<sup>309</sup>



Jarred Unuk River salmon eggs.  
Photo by Irene Dundas, courtesy of SEITC

132. As a result of all these factors, population-level effects of selenium exposure have been documented in multiple freshwater ecosystems, including multiple cases “where the majority of fish species have been extirpated as a result of selenium contamination.”<sup>310</sup>

In the same ways, “increased selenium concentrations downstream of the KSM Mine could ultimately lead to population-level impacts, meaning significant and sustained decreases of salmon, trout, and eulachon populations in the Unuk River.”<sup>311</sup>

### *Copper*

133. Copper is “one of the most pervasive and toxic elements to aquatic life, and has been documented at levels one to three orders of magnitude greater than background in mining areas.”<sup>312</sup> All aerobic organisms use copper for growth and metabolism.<sup>313</sup> Because it is essential to biological function, copper is readily incorporated into fish tissues.<sup>314</sup> Fish are “primarily exposed to copper through water in the gill, kidney, olfactory receptors, and lateral line cilia (waterborne exposure), or in the intestine (dietary exposure).”<sup>315</sup>
134. Olfactory inhibition resulting from copper exposure “occurs within minutes and lasts for weeks or longer, with the potential to affect all aspects of salmonid biology.”<sup>316</sup> Exposure can “reduce growth, immune response, reproduction, and survival.”<sup>317</sup> Specific examples of toxic effects “include disrupted migration; altered swimming; oxidative damage; impaired respiration; disrupted osmoregulation and pathology of kidneys, liver, gills, and other stem cells; impaired mechanoreception of lateral line canals; impaired function of olfactory organs and brain; and altered behavior, blood chemistry, enzyme activity, the endocrine system, and gene transcription and expression.”<sup>318</sup> These “effects have been demonstrated for juvenile and adult life stages primarily of coho and Chinook salmon and rainbow trout.”<sup>319</sup>
135. Many sublethal effects of copper are identical to those causing mortality, and include physiological effects such as “decreased growth, swimming speed or activity, and feeding rates.”<sup>320</sup> Coho salmon exhibit diminished immune response after exposure to copper.<sup>321</sup> Reproductive performance also decreases in adult salmonids exposed to copper.<sup>322</sup> Very slight increases in copper concentrations (5-25 parts per billion) inhibit olfaction in coho and Chinook salmon and rainbow trout, with potential to inhibit recognition of predators, prey, mates, kin, and natal streams.<sup>323</sup> Chinook salmon and rainbow trout avoid copper-contaminated waters altogether, except after long-term sublethal copper exposure, after which their avoidance response may be impaired.<sup>324</sup> Avoidance can lead to degradation of spawning patterns and resulting genetic diversity that are essential to maintaining overall population structure and sustainability.<sup>325</sup> Copper-contaminated streams can delay or interrupt adult spawning and downstream smolt migrations and can impair osmoregulation of smolt in seawater is impaired.<sup>326</sup>
136. Copper can also harm fish through indirect pathways. Numerous studies document adverse effects of copper on freshwater algae, zooplankton, mussels, and other invertebrates, which could result in reduced prey abundance and quality to support fish growth and reproduction.<sup>327</sup> Copper is one of the most toxic metals to algae, which form the base of the salmonid food chain. Algae production can decline with copper increases of only 1-2 parts per billion (ppb).<sup>328</sup> Zooplankton and lotic macroinvertebrates are also extremely sensitive to copper increases.<sup>329</sup>

137. Copper toxicity increases in acidic conditions, soft waters (low hardness), and in waters impoverished of dissolved organic matter, all of which occur in the waters draining the KSM deposit.<sup>330</sup>
138. For all these reasons, Ms. O’Neal concludes that increases in copper concentrations from existing levels downstream of the KSM Mine could ultimately lead to population-level impacts, meaning significant and sustained decreases of salmon, trout, and eulachon populations in the Unuk River.<sup>331</sup>

#### *Aluminum*

139. Aluminum can be lethally toxic to fish in two ways. First, aluminum can disrupt a fish’s ionoregulatory processes, meaning it would disrupt salt and water balances across the gill and other cellular membranes.<sup>332</sup> Second, aluminum can disrupt a fish’s respiratory system, leading, at high aluminum concentrations, to clogging of gills by mucus.<sup>333</sup> These effects lead to insufficient oxygen exchange, hyperventilation, and eventually suffocation.<sup>334</sup>
140. Even when these impacts occur below lethal levels, they can be harmful to fish. By accumulating on the gill surface, aluminum can cause mucous production to increase to up to four times above normal levels, inhibiting respiration.<sup>335</sup> Stress associated with impaired respiration can inhibit the ability of salmonids to deal with additional stressors, including natural stressors like smoltification, the series of physiological changes when juvenile salmonid fish adapt from living in fresh water to living in salt water.<sup>336</sup> For example, juvenile Atlantic salmon (*Salmo salar*, a species that share the *Salmonidae* family with Pacific salmon) exposed to aluminum exhibited a 20-30% reduction in survival and reduced seawater tolerance.<sup>337</sup> In addition, aluminum can reduce salmonid growth rates and swimming speeds.<sup>338</sup> Aluminum can also impair salmonid olfaction, which is critical to locating predators and prey, mates and kin, and homing to natal streams.<sup>339</sup> Interference with “any of these processes essential to survival and successful reproduction could ultimately lead to population-level impacts, meaning significant and sustained decreases of the population’s size.”<sup>340</sup>
141. The larval stage, when larvae emerge from gravels where their eggs incubate, may be the salmonid life stage most sensitive to aluminum.<sup>341</sup> This is “concerning given that all six salmonid species as well as Dolly Varden and cutthroat trout (*Oncorhynchus clarkii*) incubate in the gravels around and downstream of the KSM Mine site.”<sup>342</sup>
142. Aluminum can also indirectly harm fish. Aluminum has deleterious effects on freshwater zooplankton and insects known to be important food sources for salmonids.<sup>343</sup> Aluminum is also toxic to algal species that form the base of the aquatic food web and are a main diet item for many macroinvertebrate species. Consequently, deleterious effects of aluminum pollution can reverberate throughout the food web with ultimately negative impacts on salmonid growth and survival, particularly for those species that spend time rearing in freshwater, such as Chinook, coho, and sockeye salmon, rainbow and steelhead trout, and Dolly Varden.<sup>344</sup>

143. For all these reasons, Ms. O’Neal concludes that increased concentrations of aluminum downstream from the KSM Mine in the Unuk River could lead to population-level impacts for salmon, trout, and eulachon.<sup>345</sup>

#### *Cadmium*

144. Exposure to cadmium in fish occurs primarily through water in the gill and kidney (waterborne exposure) or in the intestine (dietary exposure).<sup>346</sup> Because cadmium inhibits the uptake of calcium, which is biologically essential to fish, excess cadmium concentrations can be lethal to fish.<sup>347</sup>
145. Sublethal physiological impacts of cadmium exposure include reduced growth and condition factor (unit weight per unit growth; an index of fish health).<sup>348</sup> Exposure also impairs egg development and causes premature hatching.<sup>349</sup> Exposure may also depress immune response, as evidenced by elevated stress chemicals in exposed salmonids.<sup>350</sup> Cadmium also induces neurotoxic effects in fish, including hyperactivity leading to decreased growth and increased detection by predators.<sup>351</sup> Emerging fry are most sensitive in Chinook salmon, while in rainbow and steelhead trout both fry and rearing parr (young fish between the stages of fry and smolt) are equally sensitive.<sup>352</sup>
146. Behavioral effects of cadmium on salmonids include a diminished ability to avoid predators, possibly due to olfactory inhibition; diminished foraging success; and altered social behavior including less aggressive competition.<sup>353</sup> At extremely elevated cadmium levels, salmonids have been documented avoiding waters altogether.<sup>354</sup>
147. Cadmium can also harm fish indirectly. For example, because “invertebrates (particularly amphipods) are more sensitive to chronic exposures of cadmium,”<sup>355</sup> chronic cadmium exposure will result in fewer invertebrates for fish to feed upon.<sup>356</sup> Its deleterious effects can reverberate throughout the food web, with ultimately negative impacts on salmonid growth and survival, particularly for those species that spend time rearing in freshwater such as Chinook, coho, and sockeye salmon, rainbow and steelhead trout, and Dolly Varden.<sup>357</sup>
148. For these reasons, Ms. O’Neal concludes that increases in concentrations of cadmium downstream of the KSM Mine could lead to population-level impacts on salmon, trout, and eulachon in the Unuk River.<sup>358</sup>

#### *Zinc*

149. Zinc is an essential element used by vertebrates in the synthesis of proteins, including hemoglobin. However, at high enough concentrations, zinc can be harmful to fish. Fish kills and/or the absence of fish (including salmonid) species are commonly associated with elevated zinc, copper, and cadmium concentrations downstream of mining activity.<sup>359</sup>
150. Like cadmium, zinc mimics calcium, inhibiting its uptake. Such inhibition can be lethal.<sup>360</sup> Waterborne exposure competitively inhibits calcium, binding to sites on fish gills and leading to impaired gas exchange, gill inflammation, and ultimately suffocation,

or decreased survival, growth, reproduction, and hatching.<sup>361</sup> Dietary uptake poses lower risk to fish than waterborne exposure, primarily through gills.<sup>362</sup>

151. Increased stress and decreased immune response has been attributed to zinc exposure in rainbow trout.<sup>363</sup> Juvenile rainbow trout and other salmonids have also been documented avoiding zinc-contaminated waters.<sup>364</sup> Other effects of zinc on behavior include increased ventilation and cough rates, altered swimming patterns, and decreased growth.<sup>365</sup>
152. Zinc can harm fish indirectly as well. Invertebrates are more sensitive to zinc than fish, so decreased feeding opportunities are a likely pathway for indirect effects of zinc.<sup>366</sup>
153. Although waters naturally high in cadmium (naturally hard) can ameliorate the toxic calcium-uptake inhibitive effects of zinc, the waters draining the KSM deposit are low in cadmium.<sup>367</sup> Dissolved organic matter can also decrease the bioavailability or overall toxicity of zinc, but levels of dissolved organic matter are also low in the waters draining the KSM Mine area.<sup>368</sup>
154. For these reasons, Ms. O’Neal concludes that increased zinc concentrations downstream of the KSM Mine could lead to population-level impacts on salmon, trout, and eulachon populations in the Unuk River.<sup>369</sup>

\*\*\*

155. In sum, the KSM Mine creates a significant risk of a substantial increase in concentrations of metals toxic to fish in downstream waters of the Unuk River in which salmon and eulachon spawn, rear, and migrate. An increase in the already naturally elevated concentrations of any one of the metals discussed here could cause population-level harms to Unuk River salmon, eulachon, and other fish species, meaning significant and sustained population decreases. Of most concern are elevated levels of copper and selenium. Copper can harm all life stages of salmonids even at relatively low concentrations.<sup>370</sup> Selenium has not successfully been treated at other mine sites, and its ultimate impact cannot be predicted because of its bioaccumulative properties.<sup>371</sup> Increased concentrations in many or all of these metals – which is likely, due to the kind of mining and waste-management processes used at the B.C. Mines – would have even more serious effects, as combinations of multiple metals can have synergistic effects, meaning effects can be greater than the sum of the effects of individual metals.<sup>372</sup>
156. Although Ms. O’Neal’s analysis focuses on the KSM Mine in the Unuk River watershed, her conclusions are relevant to the Taku and Stikine watersheds. While the proponents of the other B.C. Mines have not collected and modeled downstream baseline water-quality data for these rivers, these watersheds have “poor buffering capacity and little ability to assimilate metals or ameliorate their effects.”<sup>373</sup> It is also possible that the Taku and Stikine rivers, like the Unuk, already feature levels of natural occurring metals close to toxicity thresholds for fish like salmon and eulachon. For these reasons, Ms. O’Neal concludes that “[i]t is not unreasonable ... to expect that harm to aquatic life will be similar downstream of other mines [in the Taku and Stikine], at

magnitudes relative to the size of each mine. The combined impacts of multiple mines would no doubt increase the likelihood of population-level harm in the Unuk, Stikine, and Taku Rivers.”<sup>374</sup>

5. THE B.C. MINES POSE FORESEEABLE, IMMINENT, ONGOING, AND SIGNIFICANT THREATS TO PETITIONERS’ RIGHTS

157. Each of the B.C. Mines presents foreseeable, imminent, ongoing and significant threats to Petitioners.
158. Canada and British Columbia are not prioritizing environmental health or human safety when regulating mines. As mentioned above, the government of British Columbia has for decades failed to enforce regulations against mines.<sup>375</sup> Despite the recommendations of various experts to update its regulations and implement key reforms to improve compliance and enforcement, both governments continue to authorize mines to use mitigation practices that have failed to prevent the risks of operation. All six of the B.C. Mines feature infrastructure and pollution-mitigation strategies that could substantially increase metal concentrations downstream of the mines that could harm fish populations that Petitioners rely on for their cultural, spiritual, and subsistence practices. Even small increases in metal concentrations downstream of the mines could harm fish populations (see discussion in section IV.B.4. above).
159. For these reasons, the currently operating Red Chris and Brucejack mines pose foreseeable, imminent, ongoing, and significant threats to the Petitioners. The Tulsequah Chief Mine is also an imminent and significant threat because, although currently looking for a buyer, the mine has received all necessary permits and a new buyer would be able to commence operations very rapidly, with no time for Petitioners to seek the assistance of the Commission before the mine began discharging pollution into the watershed.<sup>376</sup>
160. The Galore Creek, Schaft Creek, and KSM mines also present foreseeable, imminent and significant threats to Petitioners, notwithstanding that each is still in the permitting stage. Like the Red Chris and Brucejack mines, each of these mines would use pollution treatment and containment processes that would be likely to substantially increase metal concentrations downstream of the mines.<sup>377</sup>
161. Several additional factors contribute to making the Galore Creek, Schaft Creek, and KSM mines foreseeable, imminent, and substantial threats to Petitioners. To begin with, the governments of Canada and British Columbia are likely to approve these mines without adequate safeguards to prevent the likely chronic or catastrophic contamination described above, as British Columbia did in authorizing the Red Chris Mine to use the same unsafe wet tailings-dam design that failed at the Mount Polley Mine only days after an expert panel recommended against using this practice. In the case of the KSM Mine, both governments approved environmental authorizations even though the proponent acknowledged that operations would increase downstream concentrations of selenium, which is known to be harmful to fish at low concentrations. The question is not if these dams will pollute the watersheds, but when.

162. Moreover, it is unlikely that the governments of Canada or British Columbia will consider threats to Petitioners as part of the permitting phase. The project proponents are not required to assess downstream water quality impacts and, with the exception of KSM Mine, have not done so. Nor, as explained in following section and section VI below, do Petitioners have adequate avenues to raise their concerns with the governments of British Columbia and Canada. In addition, these governments have not consulted with or sought Petitioners' free, prior, and informed consent about the B.C. Mines.
163. Once operational, it would also become difficult and costly to prevent the violations of Petitioners' human rights because these mining companies will have secured huge financial commitments, made costly capital expenditures, and committed to and constructed pollution control infrastructure that has been determined to be unsafe. It is also likely that these mines will begin polluting downstream waters immediately.

**V. VIOLATIONS: CANADA'S AND BRITISH COLUMBIA'S APPROVALS OF THE B.C. MINES VIOLATE PETITIONERS' HUMAN RIGHTS**

164. Pollution from the B.C. Mines could cause sustained and significant reductions in salmon and eulachon populations in the Taku, Stikine, and Unuk River watersheds, irreversibly harming Petitioners' subsistence and cultural practices, and endangering their health and property. This would threaten generations-old subsistence practices that form the backbone of Petitioners' livelihoods, culture, and traditions. Tribal members would not be able to share their culture and traditions with future generations, including through teaching younger generations traditional subsistence and gift-giving practices, and the ceremonial use of traditional foods, all of which are fundamental elements of Petitioners' culture. Petitioners' livelihoods and health would suffer from the loss of an important source of healthy traditional food. They would have to buy less-nutritious food in place of the fish they traditionally harvest and eat, and would not be able to afford, or perhaps even find, the wild salmon and eulachon that are central to their subsistence, as well as to their spiritual and cultural traditions. These foreseeable harms constitute violations of Petitioners' human rights to culture, means of subsistence, health, and right to use and enjoy the lands and waters they have traditionally used and occupied. In addition, Canada's and British Columbia's failures to consult with or seek the free, prior, and informed consent of Petitioners during the approval or permitting of any of the B.C. Mines, despite knowing of the foreseeable risks to them, violates Petitioners' rights to prior consultation, and to free, prior, and informed consent.

**A. THE AMERICAN DECLARATION SHOULD BE INTERPRETED AND APPLIED IN THE CONTEXT OF RELEVANT INTERNATIONAL NORMS AND PRINCIPLES**

165. The Inter-American Court of Human Rights (Inter-American Court or Court) and the Inter-American Commission have recognized that although originally adopted as a declaration and not as a legally binding treaty, "the American Declaration is a source of international obligations for the member states of the [Organization of American States]."<sup>378</sup> In interpreting the American Declaration, both the Court and the Commission have consistently recognized the relevance of broader developments in international law. These developments should inform the Commission's interpretation of the rights at issue

in this petition: the rights to the benefits of culture; property; preservation of health and well-being; and means of subsistence, as well as special protection for the rights of Indigenous peoples.

166. Additionally, these developments direct the Commission to give particular recognition to violations that result from threats to the environment upon which Petitioners' lives and culture depend.

1. THE AMERICAN CONVENTION ON HUMAN RIGHTS BEARS ON INTERPRETATION OF THE AMERICAN DECLARATION

167. The Commission has acknowledged that the American Convention on Human Rights (American Convention or Convention) "may be considered to represent an authoritative expression" of the rights contained in the American Declaration, and is therefore properly considered in interpreting the Declaration's provisions.<sup>379</sup> The jurisprudence of the Commission and the Court interpreting the Convention's provisions is thus also relevant in interpreting the Declaration. At the same time, the Convention should not restrict the Court's reading of the American Declaration or other sources of human rights. As the Convention itself states, the Convention must not be interpreted as "restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention ... or excluding or limiting the effect that the American Declaration ... and other international acts of the same nature may have."<sup>380</sup>

2. DEVELOPMENTS IN OTHER INTERNATIONAL HUMAN RIGHTS SYSTEMS AND INTERNATIONAL ENVIRONMENTAL LAW SHOULD BE TAKEN INTO ACCOUNT WHEN INTERPRETING AND APPLYING THE AMERICAN DECLARATION

168. The Commission has recognized that "the provisions of ... the American Declaration[] should be interpreted and applied in the context of developments in the field of international human rights law,"<sup>381</sup> and has often considered other international and regional human rights documents in interpreting the scope and meaning of the rights contained in the Declaration, as well as in the Charter of the Organization of American States. Other human rights instruments that are relevant to the understanding of the rights at issue in this case include, as noted above, the American Convention, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), other international and regional human rights conventions, and the official interpretations of these instruments by human rights bodies.

169. In addition to taking into account developments in human rights, the Inter-American Court has looked to the principles, rights, and obligations of international environmental law to inform the interpretation of the American Declaration and American Convention in cases related to environmental matters. The Court has stated that international environmental law "contribute[s] decisively" to the interpretation of the American Convention.<sup>382</sup> Therefore, when interpreting human rights obligations relevant to environmental protection, consideration should be given to jurisprudence and decisions

from other relevant treaty systems, “as well as the resolutions, pronouncements and statements referring to the topic that have been adopted at the international level.”<sup>383</sup> For example, in its recent advisory opinion considering states’ human rights obligations arising out of transboundary environmental harm, the Court relied on the widely recognized international law obligation requiring states to prevent transboundary environmental harm.<sup>384</sup>

## **B. HUMAN RIGHTS OBLIGATIONS RELATED TO THE ENVIRONMENT**

### **1. THE AMERICAN DECLARATION AND THE AMERICAN CONVENTION REQUIRE STATES TO GUARANTEE THAT ENVIRONMENTAL HARM DOES NOT VIOLATE HUMAN RIGHTS**

170. The Inter-American Court and Inter-American Commission have recognized in several cases brought by Indigenous peoples, and in the Court’s recent advisory opinion on human rights and the environment, that states have an obligation to guarantee that environmental harm does not violate the human rights of people, including Indigenous peoples, within their jurisdiction.
171. While some international law instruments, including the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador),<sup>385</sup> have established the right to a healthy environment, recognition of the relationship between environmental harm and human rights does not depend on the recognition of a “right to a healthy environment.” The Inter-American Court acknowledged this in its November 2017 advisory opinion on human rights and the environment, which was one of the Court’s first opportunities to elaborate, “in an extended manner,” on the relationship between human rights and the environment, including state obligations under the American Convention related to environmental protection.<sup>386</sup> Referring to many statements of international and regional human rights bodies and courts, the Court recognized the “irrefutable relationship” between the protection of the environment and the realization of human rights, and in particular the rights of Indigenous peoples.<sup>387</sup> Although the Court recognized that environmental damage can affect all human rights, it noted that some rights are more susceptible to environmental harm, including the rights to food and participation in cultural life.<sup>388</sup>
172. The Inter-American Commission has also noted that “several fundamental rights require, as a necessary precondition for their enjoyment, a minimum environmental quality, and are profoundly affected by the degradation of natural resources.”<sup>389</sup> For example, the Commission has stated that the rights to life and health are threatened “where environmental contamination and degradation pose a persistent threat to human life and health.”<sup>390</sup>
173. In its advisory opinion on human rights and the environment, the Inter-American Court identified two international environmental law principles that are particularly relevant to interpreting the American Convention (and, through it, the American Declaration) in situations related to environmental harm: the obligation of prevention and the precautionary principle.<sup>391</sup>

a. *The obligation to prevent environmental harm*

174. The obligation to guarantee the rights enshrined in the American Convention implies the duty to prevent the violation of those rights.<sup>392</sup> This is particularly true in the context of environmental harm. As 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>393</sup> For that reason, the interpretation of the obligation of prevention in international environmental law is relevant to understanding the scope of the obligation of prevention under the Convention.<sup>394</sup>
175. The Court has explained that the obligation of prevention under the Convention requires states to use “all means at their disposal in order to prevent the activities that are carried out under their jurisdiction from causing significant damage to the environment.”<sup>395</sup> This includes regulating activities that may cause significant environmental harm; supervising and inspecting activities that may cause significant environmental harm; and carrying out and approving environmental impact studies, which among other things, respect and take into account the traditions and culture of Indigenous peoples.<sup>396</sup> As discussed in section V.B.2 below, states must take these steps whether the damage takes place *inside or outside of their territories*.<sup>397</sup>
176. Most recently, in *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, the Inter-American Court found violations of the interrelated rights to culture, adequate food, water, and a healthy environment where the state government had failed to stop harmful activities taking place on Indigenous land.<sup>398</sup> The Indigenous communities in the Lhaka Honhat Association asserted that the Creole population’s illegal logging, installation of wire fencing, and use of livestock caused environmental damage and interfered with their cultural practices.<sup>399</sup> The Court noted that, despite awareness of such activities, Argentina has not been effective at preventing their reoccurrence.<sup>400</sup> Argentina’s failure to take adequate state actions to protect against cultural and environmental harms from these activities resulted in violations of the Indigenous communities rights under the American Convention.<sup>401</sup>
177. Like the Court, the Inter-American Commission has explained that “[s]evere environmental pollution may ... give rise to an obligation on the part of a state to take reasonable measures to prevent” the associated risks to human rights, including through effectively regulating potentially harmful activities and carrying out and approving environmental impacts studies that consider potential harms to the traditions and culture of Indigenous peoples.<sup>402</sup> Addressing development activities, the Commission underscored states’ obligation to require “appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including Indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.”<sup>403</sup>

b. *The obligation to apply the precautionary principle*

178. The precautionary principle is the legal expression of the common-sense approach that it is “better to be safe than sorry.” The Inter-American Court has interpreted this principle to mean that when there “are plausible indicators that an activity could cause serious and irreversible harms to the environment ... states must act with due caution to prevent possible harm.”<sup>404</sup> This is true “even in the absence of scientific certainty” concerning the nature or likelihood of the harm.<sup>405</sup>
179. Canada’s acceptance of this principle is reflected in its *Environmental Protection Act, 1999*, which affirms “the Government of Canada is committed to implementing the precautionary principle”<sup>406</sup> and requires the government to “exercise its powers in a manner that protects the environment and human health, [and] applies the precautionary principle.”<sup>407</sup> Canadian case law also affirms the principle,<sup>408</sup> as do several multilateral treaties to which Canada is party.<sup>409</sup>

2. STATES ARE RESPONSIBLE FOR ACTS AND OMISSIONS WITHIN THEIR TERRITORIES THAT CAUSE ENVIRONMENTAL-RELATED HUMAN RIGHTS VIOLATIONS OUTSIDE THEIR TERRITORIES

180. The American Declaration contains no territorial limitation that would insulate Canada from responsibility for its acts or omissions that violate the human rights of Alaska-based petitioners. To the contrary, in adopting the Declaration, the members of the Organization of American States (OAS) acknowledged that “the essential rights of [a person] are not derived from the fact that [they are] a national of a certain state, but are based upon attributes of [their] human personality” and that “[t]he *international protection* of the rights of [humans] should be the principal guide of an evolving American law.”<sup>410</sup> Where the Declaration does recognize limits on rights, it says nothing about territorial limits.<sup>411</sup>
181. The American Convention, like some other international human rights instruments,<sup>412</sup> contains language that limits a state’s human rights obligations to people subject to its “jurisdiction.” Article 1.1 of the American Convention places on states the obligation “to respect the rights and freedoms recognized [in the Convention] and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.”<sup>413</sup> However, in its November 2017 advisory opinion on human rights and the environment, the Inter-American Court makes clear that this provision does not shield states from responsibility for acts or omissions within their territories that cause environment-related human rights violations outside their territories:

The exercise of jurisdiction by the State of origin in cases of transboundary harm is based on the understanding that it is the State in whose territory or under whose jurisdiction these activities are carried out that has effective control over polluting activities and is in a position to prevent the cause of the transboundary harm which affects the enjoyment of human rights of individuals outside its territory.<sup>414</sup>

182. For this reason, “States are obliged to take all measures necessary to prevent activities carried out in their territory or under their control from affecting the rights of people inside or outside their territory.”<sup>415</sup> As explained in paragraph 175 above, this requires states to act with due diligence when assessing potentially harmful projects, including through reviewing environmental impact studies that, among other things, respect and take into account harm to the traditions and culture of Indigenous peoples.<sup>416</sup>
183. The Court’s understanding of jurisdiction is consistent with that of regional and international human rights bodies, including those that monitor compliance with human rights treaties that have similar “jurisdictional” language as the American Convention. These bodies clarify that extraterritorial obligations arise when a state controls activities in its territory that cause direct and foreseeable transboundary harm, be it through environmental damage, cross-border shootings, or pushbacks of asylum seekers.<sup>417</sup> For example, several United Nations human rights treaty bodies observed in a September 2019 Joint Statement that states that are party to their respective human rights treaties “have obligations, including *extraterritorial obligations*, to respect, protect and fulfil all human rights of all peoples.”<sup>418</sup> These obligations include taking “measures to prevent foreseeable human rights harms caused by climate change” and “to regulate activities that contribute to such harm.”<sup>419</sup>
184. Moreover, human rights treaty bodies have found extraterritorial obligations specifically in the context of claims arising out of the actions of Canadian companies, including Canadian mining companies.
185. For example, the United Nations Committee on the Elimination of Racial Discrimination (CERD) has interpreted “jurisdiction” broadly, recommending to multiple state parties that they regulate the extra-territorial activities of their corporations that interfere with the enjoyment of the rights of Indigenous peoples outside their territories.<sup>420</sup> In its Concluding Observations on Canada, for example, the Committee encouraged Canada
- to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the Committee recommends that [Canada] explore ways to hold transnational corporations registered in Canada accountable. The Committee requests [Canada] to include in its next periodic report information on the effects of activities of transnational corporations registered in Canada on indigenous peoples abroad and on any measures taken in this regard.<sup>421</sup>
186. The Committee also recently called upon the United Kingdom “to take appropriate legislative and administrative measures to ensure that acts of transnational corporations registered in the [United Kingdom] comply with the provisions of the Convention.”<sup>422</sup>
187. In this case, Canada and British Columbia have authorized, or are in the process of authorizing, mines that pose a substantial and foreseeable risk to Petitioners through the

pollution of the three transboundary watersheds they rely on for their means of subsistence, cultural practices, health, and property rights. Canada is thus exercising “effective control over polluting activities”<sup>423</sup> that originate in its territory, and is in a position to prevent the transboundary harm at issue in this case. As such, Canada cannot shield itself from legal responsibility in this case, even if Petitioners live outside its territory.

3. THE HUMAN RIGHTS THAT ARE IMPLICATED BY THE ENVIRONMENTAL HARM FROM THE B.C. MINES ARE LINKED AND INTERDEPENDENT

188. As mentioned above, the Inter-American Court and Commission have recognized that damage to the environment often violates multiple rights concurrently.<sup>424</sup> In particular, the Court has repeatedly recognized an interdependence of rights in cases brought by Indigenous peoples, including violations of the rights to culture, life, and means of subsistence.<sup>425</sup> In its 1997 report on the human rights situation in Ecuador, the Commission acknowledged that “indigenous peoples maintain special ties with their traditional lands, and a close dependence upon the natural resources provided therein – respect for which is essential to their physical and cultural survival.”<sup>426</sup> In its 2015 report on Indigenous peoples’ rights and extractive industries, the Commission observed that “damage to these lands ‘invariably leads to serious loss of life and health and damage to the cultural integrity of indigenous peoples,” and that “a range of human rights ... are frequently impacted by the implementation of extractive and development projects, including the rights to life, to physical integrity, to health, to nondiscrimination, to consultation, [to] consent and to cultural identity, information and participation, among others.”<sup>427</sup>

189. For Petitioners that live in and around the transboundary watersheds, the relationship among land, subsistence, and culture links multiple human rights. For instance, given that many individual tribal members in Southeast Alaska rely on the watersheds for their livelihood, environmental degradation of their rivers and land in many instances violate their right to their own means of subsistence. Because a large proportion of Petitioners’ diets depend on subsistence foods, including fish, impacts on their right to their own means of subsistence would affect their right to health. In addition, for Petitioners, the fish they depend on and the practices involved in the harvest and preparation of these fish hold cultural significance and are a means of continuing key cultural traditions. Damage to the watersheds from the B.C. Mines would affect multiple human rights of Petitioners.

4. PETITIONERS’ CLAIMS SHOULD BE INTERPRETED IN THE CONTEXT OF THE UNIQUE RELATIONSHIP BETWEEN INDIGENOUS PEOPLES AND THEIR LAND AND ENVIRONMENT

190. In applying the rights contained in the American Declaration to Indigenous peoples, both the Inter-American Court and Commission have repeatedly,<sup>428</sup> and for decades,<sup>429</sup> emphasized the need to take into account the unique context of Indigenous culture and history.<sup>430</sup> This is especially true with respect to the unique ties many Indigenous peoples have to their environment. The Inter-American system,<sup>431</sup> as well as customary international law, both recognize and protect these ties.<sup>432</sup>

191. As the Inter-American Court has recognized in numerous cases, Indigenous culture

directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of [Indigenous peoples'] close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity.<sup>433</sup>

As a result, “members of indigenous and tribal communities require special measures that guarantee the full exercise of their rights ... in order to safeguard their physical and cultural survival.”<sup>434</sup> Land has “special meaning ... for ... indigenous peoples, including [for] the preservation of their cultural identity and its transmission to future generations.”<sup>435</sup>

192. In addition, Article XIX(1) of the American Declaration on the Rights of Indigenous Peoples explicitly guarantees Indigenous peoples the right to environmental protection, linking it to their right to life, spirituality, and world-view: “Indigenous peoples have the right to live in harmony with nature and to a healthy, safe, and sustainable environment, essential conditions for the full enjoyment of the right to life, to their spirituality, worldview and to collective well-being.”<sup>436</sup> Article XIX(3) of the Declaration further provides: “Indigenous peoples are entitled to be protected against the introduction of, abandonment, dispersion, transit, indiscriminate use or deposit of any harmful substance that could negatively affect indigenous communities, lands, territories and resources.”<sup>437</sup>

**C. CANADA’S AND BRITISH COLUMBIA’S FAILURE TO PREVENT FORESEEABLE HARMS FROM THE B.C. MINES VIOLATE PETITIONERS’ HUMAN RIGHTS**

193. Exposing individuals to a risk of irreparable physical, cultural, or emotional harm by failing to take preventive measures is a cognizable human rights violation, even if that risk has not yet fully materialized. For example, the United Nations Human Rights Committee (Human Rights Committee) noted that states violate the right to life by exposing people to “reasonably foreseeable threats and life-threatening situations.”<sup>438</sup> The committee has recognized that environmental degradation, climate change, and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.<sup>439</sup> Similarly, the Committee on the Rights of the Child enshrines protection against environmental risks to guarantee the right to health.<sup>440</sup>

194. As the Human Rights Committee observed, a victim may bring a claim to prevent future harm when the “alleged victim’s risk of being affected is more than a theoretical possibility.”<sup>441</sup> Here, the evidence makes clear that the B.C. Mines have exposed and will continue to expose Petitioners to risks of foreseeable harm that are nearly certain without prevention.

195. Indeed, as the United Nations Special Rapporteur on the rights of Indigenous Peoples noted, the extraction of natural resources in Canada poses tremendous risks to Indigenous people's health, economy, and cultural identity:

One of the most dramatic contradictions indigenous peoples in Canada face is that so many live in abysmal conditions on traditional territories that are full of valuable and plentiful natural resources. These resources are in many cases targeted for extraction and development by non-indigenous interests. While indigenous peoples potentially have much to gain from resource development within their territories, they also face the highest risks to their health, economy, and cultural identity from any associated environmental degradation. Perhaps more importantly, indigenous nations' efforts to protect their long-term interests in lands and resources often fit uneasily into the efforts by private non-indigenous companies, with the backing of the federal and provincial governments, to move forward with natural resource projects.<sup>442</sup>

196. Risks like these are abundantly present in the context of the extraction of hard-rock minerals at the B.C. Mines. 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.

1. PETITIONERS' RIGHT TO ENJOY THE BENEFITS OF THEIR OWN CULTURE

197. The American Declaration and other sources of international law guarantee Petitioners' human right to enjoy the benefits of their culture. Given the close ties between Indigenous peoples' right to culture and the condition of their lands and environment, Canada has a duty not to authorize or allow activities that degrade the transboundary watersheds in a way that infringes upon Petitioners' human right to culture.

a. *The American Declaration guarantees Petitioners' right to enjoy the benefits of their culture*

198. The American Declaration guarantees all people the right to the enjoyment of their culture.<sup>443</sup>
199. A number of other international instruments are relevant to the interpretation of this right. The Additional Protocol to the American Convention recognizes "the right of everyone ... [t]o take part in the cultural and artistic life of the community."<sup>444</sup> Other international law instruments like the Universal Declaration of Human Rights,<sup>445</sup> ICCPR,<sup>446</sup> ICERD,<sup>447</sup> and ICESCR,<sup>448</sup> also provide for cultural rights.
200. The Inter-American system recognizes that the right to culture has particular importance for Indigenous peoples. Pursuant to the American Declaration on the Rights of Indigenous Peoples,

Indigenous peoples have the right to their own cultural identity and integrity and to their cultural heritage, both tangible and intangible, including historic and ancestral heritage; and to the protection, preservation, maintenance, and development of that cultural heritage for their collective continuity and that of their members and so as to transmit that heritage to future generations.<sup>449</sup>

201. For Indigenous communities like Petitioners and other Southeast Alaskan Native communities, the right to culture is inextricably linked to survival. In *Case of the Mayagna (Sumo) Awas Tingni Community*, the Inter-American Court has emphasized the importance of this connection:

[T]he close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.<sup>450</sup>

202. The Court has further recognized that interference with Indigenous lands necessarily implicates the right to culture.<sup>451</sup> In *Moiwana v. Suriname*, the Court recognized that the Moiwana community's "connection to its traditional land is of vital spiritual, cultural and material importance" and that "for the culture to preserve its very identity and integrity, the Moiwana community members must maintain a fluid and multidimensional relationship with their ancestral lands."<sup>452</sup>
203. More specifically, in *Yakye Axa v. Paraguay*, the Court explained that for Indigenous peoples, "the land is closely linked to their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and values."<sup>453</sup> In *Sawhoyamaya v. Paraguay*, the Court added that the special relationship between Indigenous or tribal peoples and their lands can be seen in "traditional spiritual or ceremonial use or presence; settlements or sporadic cultivation; seasonal or nomadic hunting, fishing or gathering; the use of natural resources connected to their customs; and any other factor characteristic of their culture."<sup>454</sup> In *Saramaka v. Suriname*,<sup>455</sup> the Court followed its growing number of decisions recognizing the "special relationship that members of indigenous and tribal peoples have with their territory," which "require[s] special measures under international human rights law in order to guarantee their physical and cultural survival."<sup>456</sup> In 2010, in *Chitay Nech v. Guatemala*, the Court stated that recognition of the "crucial" connection between Indigenous groups and their territory "for their cultural structures and their ethnic and material survival" is part of the Court's "constant jurisprudence on indigenous matters."<sup>457</sup>
204. Like the Court, the Commission has acknowledged that Indigenous peoples' lands are essential to their culture.<sup>458</sup> For instance, in *Maya Indigenous Communities of the Toledo District v. Belize (Belize Maya)*, the Commission recognized that the concept of family

and religion within the context of Indigenous communities, including the Maya people, is intimately connected with their traditional land, where ancestral burial grounds, places of religious significance and kinship patterns are linked with the occupation and use of their physical territories.<sup>459</sup> Recounting the Inter-American human rights system's jurisprudence on Indigenous peoples' land-related rights, the Commission stated that the "special relationship [between Indigenous and tribal peoples and their territories] is fundamental ... for the cultural integrity of indigenous and tribal peoples."<sup>460</sup> This "internationally protected special relationship ... [is] a cultural bond of collective memory and awareness of their rights of access or ownership, in accordance with their own cultural and spiritual rules."<sup>461</sup> Specifically, the Commission stated that "[t]he right to culture includes distinctive forms and modalities of using territories such as traditional fishing, hunting and gathering as essential elements of indigenous culture."<sup>462</sup> In its reports, the Commission has further recognized the close connection between the environment and the right to culture.<sup>463</sup>

205. The American Declaration on the Rights of Indigenous Peoples also recognizes that "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual, cultural, and material relationship to their lands, territories, and resources and to assume their responsibilities to preserve them for themselves and for future generations."<sup>464</sup> The declaration guarantees Indigenous peoples

the right to their own cultural identity and integrity and to their cultural heritage, both tangible and intangible, including historic and ancestral heritage; and to the protection, preservation, maintenance, and development of that cultural heritage for their collective continuity and that of their members and so as to transmit that heritage to future generations.<sup>465</sup>

206. Other international human rights bodies have recognized the special relationship that Indigenous peoples have with their land and its connection to their right to culture.<sup>466</sup> For instance, the Human Rights Committee acknowledged the importance of natural resources to the right to the benefits of culture in *Bernard Ominayak and the Lubicon Lake Band v. Canada*. In that case, which the Inter-American Commission cited with approval in the *Belize Maya* decision,<sup>467</sup> the petitioners alleged that the government of the province of Alberta had deprived the Band of their means of subsistence and their right to self-determination by selling oil and gas concessions on their lands.<sup>468</sup> The Human Rights Committee characterized the claim as being based on the right to enjoy culture under Article 27 of the ICCPR.<sup>469</sup> It found that oil and gas exploitation, in conjunction with historic inequities, threatened the way of life and culture of the Band and that Canada had thus violated Article 27.<sup>470</sup>

207. The Human Rights Committee has explained that degradation of natural resources may violate the ICCPR's right to enjoy culture:

[C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional

activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.... The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.<sup>471</sup>

208. In a subsequent case, *Länsman v. Finland*, which involved the effects of a stone quarry on an Arctic Indigenous group's reindeer-herding activities, the Human Rights Committee confirmed that the right to culture in Article 27 of the ICCPR encompasses modern-day adaptations:

The right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect *traditional* means of livelihood of national minorities, as indicated in the State party's submission. Therefore, that the [Indigenous petitioners] may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant.<sup>472</sup>

209. In addition, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) in 2009 recognized that "Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity."<sup>473</sup>

210. Finally, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) specifically guarantees the cultural rights of Indigenous groups and links them to the natural environment. UNDRIP states that

Indigenous peoples have the collective and individual right to ... prevention of and redress for ... [a]ny action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; ... [and a]ny action which has the aim or effect of dispossessing them of their lands, territories or resources.<sup>474</sup>

As part of the right to the benefits of culture, UNDRIP also includes the right to "revitalize, use, develop and transmit to future generations [Indigenous peoples'] histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons."<sup>475</sup> In November of 2019, British Columbia enacted the Declaration on the Rights of

Indigenous Peoples Act,<sup>476</sup> which requires the government to “take all measures necessary to ensure the laws of British Columbia are consistent with [UNDRIP].”<sup>477</sup>

b. *Pollution from the B.C. Mines would violate Petitioners’ right to enjoy the benefits of their culture*

211. Canada and British Columbia have fully permitted three of the six B.C. Mines, two of which are operating. They have granted environmental authorizations to a fourth (the KSM Mine), and will likely authorize the others. Each of these mines will likely release toxic acid mine drainage that could substantially harm fish populations in the watersheds used by Petitioners. In addition, a catastrophic tailings-dam breach, a serious risk due to Canada’s and British Columbia’s approvals of poor designs, could also significantly damage the downstream watersheds and their fish populations.

212. These risks could cause sustained and significant reductions in salmon and eulachon populations in the watersheds in which Petitioners harvest these fish. Such fish population declines would undermine Petitioners’ ability to engage in cultural and spiritual practices related to the harvest and sharing of these fish.

213. As discussed above,<sup>478</sup> salmon and eulachon harvests allow Petitioners to engage in communal gift-giving, sharing of stories, inter-tribal exchanges and bonding with their own tribes, practices they have passed on for generations, if not millennia. Fish products also feature prominently in sacred rituals, such as ceremonies commemorating ancestors or the death of community members. For example, the Taku River and its bountiful harvests are sacred to the Douglas Indian Association, and fishing from it has spiritual importance that reinforces bonds with past generations. Petitioners also use fishing to teach younger generations about their traditions, history, and language, and fishing is a key component of maintaining and protecting their cultural identities.

214. Damage to the environment from the B.C. Mines would permanently undermine Petitioners’ ability to engage in and pass along these practices. In the words of Lovey Brock, a Haida member of Wrangell’s Indigenous community,

*I think if we don’t save the parts of the Stikine River and those that flow down into the Stikine, I think we are going to ruin a whole way of life .... I don’t think the mines are worth it. I think our way of life is worth more than what we’re gonna get out of the mines.*<sup>479</sup>

215. Like the Indigenous petitioners in numerous cases before the Inter-American Court, Petitioners’ culture

directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity.<sup>480</sup>

By virtue of the “special relationship that members of Indigenous and tribal peoples have with their territory,” Petitioners merit “special measures under international human rights law in order to guarantee their physical and cultural survival.”<sup>481</sup>

216. Through its approvals of the mines and its failure to adequately regulate and prevent the threats they pose, Canada has thus failed to take necessary preventive and precautionary measures to guarantee Petitioners’ right to the benefits of their culture provided for in Article XIII of the American Declaration.

2. PETITIONERS’ RIGHT TO THEIR OWN MEANS OF SUBSISTENCE AS A COMPONENT OF THEIR RIGHTS TO CULTURE, LIFE, HEALTH, AND PROPERTY

217. Indigenous peoples’ right to their own means of subsistence is recognized in the Inter-American system’s jurisprudence and under international law. Canada thus has a duty not to allow or authorize activities that degrade the transboundary watersheds such that it violates Petitioners’ right to their own means of subsistence.

a. *The American Declaration guarantees Petitioners’ right to their own means of subsistence*

218. The ICESCR and ICCPR both provide that “[i]n no case may a people be deprived of its own means of subsistence.”<sup>482</sup> In the context of Indigenous peoples, the right to one’s own means of subsistence has become a recognized principle of international human rights law. Article XIX of the American Declaration on the Rights of Indigenous Peoples recognizes that Indigenous peoples have the “right to be guaranteed the enjoyment of their own means of subsistence,” and “have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.”<sup>483</sup> The UNDRIP provides that Indigenous peoples have the right “to be secure in the enjoyment of their own means of subsistence and development.”<sup>484</sup>

219. For people who depend on natural resources for their livelihood, the right to their own means of subsistence is inherent in, and a necessary component of, the American Declaration’s rights to property, health, life, and culture. The Inter-American Court has recognized that Indigenous peoples’ close relationship with their traditional lands and natural resources stems in part from the fact that “these are their main means of subsistence.”<sup>485</sup> In *Xákmok*, the Court recognized that the Xákmok community’s connection to its traditional lands is “indissoluble and fundamental for ... its food supply,” and that displacement from their traditional lands by private land owners made hunting, fishing, and gathering “constantly more difficult to the point that the indigenous people decid[ed] to leave the [traditional land] and relocate ... in other places, thus separating part of the Community.”<sup>486</sup> The Court found that this displacement had interfered with the Xákmok’s means of subsistence and thus had violated their right to life.<sup>487</sup>

220. The Commission has also recognized that Indigenous peoples’ “special relationship [to their territories] is fundamental ... for the[ir] material subsistence,”<sup>488</sup> and that such subsistence is related to the right to life. In *Yakye Axa*, the Court found that Paraguay’s

failure to legally recognize and protect traditional lands of Indigenous peoples “has had a negative effect on the right of the ... [Yakye Axa] Community to a decent life, because it has deprived them of the possibility of access to their traditional means of subsistence.”<sup>489</sup> The Court found that displacement of the Yakye Axa from their traditional lands “caused special and grave difficulties to obtain[ing] food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities, such as hunting, fishing, and gathering.”<sup>490</sup>

221. The American Declaration on the Rights of Indigenous Peoples recognizes the potential adverse impacts to Indigenous peoples’ means of subsistence from development projects, declaring that they have the right to restitution or compensation when their means of subsistence are deprived:

Indigenous peoples who have been deprived of their own means of subsistence and development have the right to restitution and, where this is not possible, to fair and equitable compensation. This includes the right to compensation for any damage caused to them by the implementation of state, international financial institutions or private business plans, programs, or projects.<sup>491</sup>

b. *Pollution from the B.C. Mines would violate Petitioners’ right to their own means of subsistence*

222. The B.C. Mines will likely release pollution that could substantially harm fish populations in the watersheds used by Petitioners. Such pollution could have dire consequences for salmon and eulachon populations that Petitioners rely on as an important food source.

223. As described above,<sup>492</sup> subsistence fishing is a primary source of food and livelihood among Southeast Alaska Native peoples, including Petitioners, and has been for generations. Like other Indigenous peoples, Petitioners’ “special relationship [to their territories] is fundamental ... for the[ir] material subsistence.”<sup>493</sup>

224. Smoked, frozen, or canned salmon and eulachon provide a year-round source of nutritious food for which substitutes are unavailable to or too expensive for Petitioners.

225. Through its approvals of the mines and its failures to adequately regulate and prevent the threats they pose, Canada has thus failed to take necessary preventive and precautionary measures to



Canned smoked salmon. Photo by Carrie Dodson, courtesy of SEITC

guarantee Petitioners' right to their own means of subsistence provided for in Articles I, XI, XIII, and XXIII of the American Declaration.

### 3. PETITIONERS' RIGHT TO THE PRESERVATION OF HEALTH

#### a. *The American Declaration guarantees Petitioners' right to the preservation of health*

226. The American Declaration provides that “[e]very person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.”<sup>494</sup> The meaning of this guarantee is informed by the Protocol of San Salvador, which ensures “the enjoyment of the highest level of physical, mental and social well-being.”<sup>495</sup> Other major international human rights instruments safeguard the right to health, including the Universal Declaration of Human Rights,<sup>496</sup> ICESCR,<sup>497</sup> and the African Charter on Human and Peoples' Rights.<sup>498</sup> Further supporting the universal and fundamental nature of this right, at least 115 national constitutions recognize the right to health or health care.<sup>499</sup>
227. The Inter-American system has long recognized the close relationship between environmental degradation and the right to health of Indigenous peoples. For example, the American Declaration on the Rights of Indigenous Peoples recognizes that “[i]ndigenous peoples have the collective and individual right to the enjoyment of the highest attainable standard of physical, mental, and spiritual health.”<sup>500</sup>
228. In *Yanomami v. Brazil*, the Commission held that the government of Brazil violated the Yanomami people's right to health by failing to prevent environmental degradation arising from road construction and the subsequent development of Yanomami Indigenous lands, which caused an influx of pollutants and resulted in widespread disease and death.<sup>501</sup> The Commission found that the government's failure to take timely and effective measures to prevent these developments had violated the Yanomami people's right to the preservation of health and well-being.<sup>502</sup>
229. In *Belize Maya*, the Commission recognized the particular impacts that environmental harm can have on Indigenous peoples' right to health and well-being, finding that the Maya people's rights were so dependent on the integrity and condition of Indigenous land that “broad violations” of Indigenous property rights necessarily infringed upon their health and well-being.<sup>503</sup> In its 1997 Report on the Situation of Human Rights in Ecuador, the Commission observed that “damage to [traditional] lands ‘invariably leads to serious loss of life and health ... of indigenous peoples.’”<sup>504</sup> In that report, the Commission became the first authoritative international institution to recognize that human rights are implicated “where environmental contamination and degradation pose a persistent threat to human life and health,” and that governments have a responsibility to protect human rights by preventing such degradation.<sup>505</sup>
230. Like the Commission, other international human rights bodies and experts have recognized the close relationship between environmental protection and health. For

instance, the CESCR has explained that the right to “the highest attainable standard of physical and mental health” in Article 12 of the ICESCR “extends to the underlying determinants of health, such as ... a healthy environment.”<sup>506</sup> The committee has further stated that victims of a violation of the right to health should have access to remedies at both national and international levels and should be entitled to adequate reparation.<sup>507</sup>

b. *Pollution from the B.C. Mines would violate Petitioners’ right to the preservation of health*

231. As discussed, pollution from the B.C. Mines could have dire consequences for salmon and eulachon populations that Petitioners rely on as an important food source.

232. As explained above,<sup>508</sup> when deprived of this food source, Petitioners will be forced to shift their diet to more expensive, less nutritious store-bought food. However, because Southeast Alaskan Native families generally have low incomes, often less than US \$20,000 per annum, they may not be able to afford fish and other healthy similarly nutritious food in the cash economy (see section IV.A.2), and for some Petitioners who live in remote locations, store-bought alternatives are often unavailable. This is likely to lead to adverse health effects.<sup>509</sup>

233. Through its approvals of the mines and its failures to adequately regulate and prevent the threats they pose, Canada has thus failed to take necessary preventive and precautionary measures to guarantee Petitioners’ right to the preservation of their health guaranteed in Article XI of the American Declaration.

4. PETITIONERS’ RIGHT TO USE AND ENJOY THE LANDS THEY HAVE TRADITIONALLY USED AND OCCUPIED

a. *The American Declaration guarantees Petitioners’ right to use and enjoy the lands they have traditionally occupied*

234. The American Declaration guarantees Petitioners’ right to “own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”<sup>510</sup> Similarly, the American Convention declares that “[e]veryone has the right to the use and enjoyment of his property.”<sup>511</sup> The Commission acknowledged the fundamental nature of the right to property when it stated that “[v]arious international human rights instruments, both universal and regional in nature, have recognized the right to property as featuring among the fundamental rights” of humans.<sup>512</sup> Such instruments include the Universal Declaration of Human Rights,<sup>513</sup> the European Convention on Human Rights,<sup>514</sup> and the African Charter on Human and Peoples’ Rights.<sup>515</sup>

235. The Inter-American system has long recognized that Indigenous peoples have a fundamental human right to use and enjoy the lands they have traditionally occupied, independent of domestic title. For example, the American Declaration on the Rights of Indigenous Peoples provides that Indigenous peoples have “the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”<sup>516</sup> The Declaration also guarantees Indigenous peoples’ right “to own, use,

develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.”<sup>517</sup>

236. In *Awas Tingni*, the Inter-American Court held that the government of Nicaragua had violated the Awas Tingni’s rights to property and judicial protection when it granted concessions to a foreign company to log on Awas Tingni’s traditional lands without consulting them or getting their consent. The Court explained that “the close relationship that the communities have with the land must be recognized and understood as a foundation for their cultures, spiritual life, cultural integrity, and economic survival.”<sup>518</sup> The Court further noted that, “[f]or indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.”<sup>519</sup>
237. In the *Saramaka* case, the Court recognized that the “inextricable connection members of indigenous and tribal peoples have with their territory” requires states to “ensure the security and permanence of their control and use of the natural resources, which in turn maintains their way of life.”<sup>520</sup> The Court held that “[t]his connectedness between the territory and the natural resources necessary for [Indigenous peoples’] physical and cultural survival is precisely what needs to be protected under Article 21 of the Convention in order to guarantee the members of indigenous and tribal communities’ right to the use and enjoyment of their property.”<sup>521</sup>
238. The Court has also recognized that environmental degradation – whether caused by a state’s actions or inactions – can violate the human right to property and give rise to an obligation on a state to take positive measures to ensure that third parties do not infringe upon property rights, especially those of Indigenous people.<sup>522</sup> For example, in *Saramaka*, the Court found that logging concessions issued by Suriname in traditional Saramaka lands “damaged the environment and the deterioration ... had a negative impact on lands and natural resources traditionally used by members of the Saramaka people.”<sup>523</sup> The Court held that Suriname violated the Saramaka people’s right to property by “fail[ing] to put in place adequate safeguards and mechanisms in order to ensure that [state-issued] logging concessions would not cause major damage to Saramaka territory and communities,” and “did not allow for the effective participation of the Saramakas in the decision-making process regarding these logging concessions, in conformity with their traditions and customs.”<sup>524</sup>
239. The Inter-American Commission has also recognized the right of Indigenous peoples to use and enjoy their traditional lands, regardless of whether these lands have been formally recognized by law. In *Belize Maya*, the Commission held that Belize violated the Maya people’s right to use and enjoy their property by granting concessions to third parties to exploit resources that degraded the environment within lands traditionally used and occupied by the Maya.<sup>525</sup> The Commission noted that Indigenous people’s international human right to property is based in international law and does not depend on domestic recognition of property interests.<sup>526</sup> Indigenous property rights are broad, and are not limited “exclusively by entitlements within a state’s formal legal regime, but also

include that indigenous communal property that arises from and is grounded in custom and tradition.”<sup>527</sup>

240. Other sources of international law also recognize the special significance of traditional lands to people who rely on their land for culture, well-being, or subsistence. For instance, the European Court of Human Rights (European Court), in *Dogan v. Turkey*, held that the petitioners had “unchallenged rights over the common [ancestral] lands in the village, such as the pasture, grazing and the forest land” from which their livelihood depended, adding that the resulting economic resources and revenue may qualify as part of the right to property under the European human rights system.<sup>528</sup> The European Court acknowledged that environmental harm to those lands could result in a breach of that right from either existing or future claims in which a petitioner “can argue that he has at least a reasonable and ‘legitimate expectation’ of obtaining effective enjoyment of a property right.”<sup>529</sup>
241. The UNDRIP specifically includes “the right to own, use, develop and control the lands, territories, and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired,”<sup>530</sup> along with “the right to maintain and strengthen their distinctive spiritual relationship with ... [those] lands ... and ... resources and to uphold their responsibilities to future generations in this regard.”<sup>531</sup> That declaration also recognizes Indigenous peoples’ “right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources” and requires that states “give legal recognition and protection to these lands, territories and resources.”<sup>532</sup>

b. *Pollution from the B.C. Mines would violate Petitioners’ right to use and enjoy the lands they have traditionally occupied*

242. Petitioners have fished in the three watersheds affected by the B.C. Mines for millennia. These watersheds and the fish they harvest from them are a vital “foundation for their culture, spiritual life, cultural integrity, and economic survival.”<sup>533</sup> Due to their connection to their traditional lands and the watersheds, Petitioners’ right to property includes the use and enjoyment of these lands and the fish they have traditionally harvested. As the Court noted in *Saramaka* case, “[t]his connectedness between the territory and the natural resources necessary for [Indigenous peoples] physical and cultural survival is precisely what needs to be protected under Article 21 of the Convention in order to guarantee the members of indigenous and tribal communities’ right to the use and enjoyment of their property.”<sup>534</sup>
243. Through its approvals of the B.C. Mines and its failures to adequately regulate and prevent the threats they pose to the transboundary watersheds, Canada has failed to take necessary preventive and precautionary measures to guarantee Petitioners’ right to property provided for in Article XXIII of the American Declaration.

5. CANADA HAS NOT CONSULTED WITH OR OBTAINED THE FREE, PRIOR, AND INFORMED CONSENT OF PETITIONERS WITH RESPECT TO THE B.C. MINES

244. States in the Inter-American system have a general obligation “to consult with indigenous peoples and guarantee their participation in decisions regarding any measure that affects their territory, taking into consideration the special relationship between indigenous and tribal peoples and land and natural resources.”<sup>535</sup> This obligation is directly related to the right to cultural identity because of the intrinsic relationship between Indigenous peoples’ way of life and their territory.<sup>536</sup>
245. The Inter-American Court and Commission have identified several requirements for adequate consultation. These include that consultation must be “prior,” meaning that it “must be carried out during the exploratory or planning phase” of a proposed project from the “very moment of evaluation of the grant of a concession.”<sup>537</sup> Consultation is not a single act, but a “process of dialogue and negotiation that involves both parties’ good faith and the aim of reaching mutual agreement” or consent.<sup>538</sup> Indigenous peoples “who lack formal titles of property over their territories must also be consulted in relation to the granting of extractive concessions.”<sup>539</sup> Consultation must happen through culturally adequate procedures taking into account the affected Indigenous people’s traditional decision-making methods.<sup>540</sup> In addition, consultation must be informed and states must make those affected “aware of possible risks, including environmental and health risks” from a proposed project.<sup>541</sup>
246. The Inter-American Court has also required Indigenous peoples’ free, prior, and informed consent when large-scale extraction projects like the B.C. Mines may affect their rights.<sup>542</sup> For example, in *Saramaka People v. Suriname*, the Court explained that “when large-scale development or extraction projects could affect the integrity of the Saramaka people’s lands and natural resources, the State has a duty not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent in accordance with their customs and traditions.”<sup>543</sup>
247. Applying the Commission’s and Court’s jurisprudence and other sources of international law, the United Nations Special Rapporteur on the rights of Indigenous peoples concluded that even if the extractive activities do not take place within Indigenous territory, the consent of Indigenous peoples otherwise affected by those activities may nevertheless be required “depending upon the nature of and potential impacts of the activities on the exercise of their rights.”<sup>544</sup> For example, the special rapporteur explained that where a large-scale resource extraction project may harm lands that support an Indigenous group’s physical well-being or cultural practices in a manner that substantially affects that group’s substantive rights, international law may require the group’s consent before the project may go forward.<sup>545</sup>
248. This is consistent with the Court’s November 2017 advisory opinion on human rights and the environment, which addressed the question of whether under article 1.1 of the American Convention “a person, even if not in the territory of a State party, could be subject to the jurisdiction of that State in the framework of fulfilling its obligations in environmental matters.”<sup>546</sup> The Court recognized that states have an obligation to prevent human rights violations that occur outside their territories when they exercise effective control over the activities that foreseeably cause the violations, including transboundary pollution or other environmental harm. Throughout its opinion the Court

clarified that this obligation extends to Indigenous peoples outside a state's territory, including engaging in "consultation and [] participation at all stages of the planning and implementation of a project . . . that could have an impact on [their] territory."<sup>547</sup> In essence, the state should obtain the free, prior, and informed consent of Indigenous peoples outside the state's territory whose rights could be affected by the environmental harm, and continue to allow for their participation throughout the project's lifetime.

249. In this case, despite Petitioners' many efforts to engage with Canadian government officials, neither British Columbia nor Canada has consulted with or sought Petitioners' free, prior, and informed consent during the permitting or approval of any of the B.C. Mines.
250. For example, on multiple occasions Petitioners raised their concerns directly with Canadian and British Columbian government officials. In September 2015, Petitioners wrote to British Columbia's minister of energy and mines, noting that neither British Columbia's nor Canada's permitting system "is truly meant to protect the land as much as it is designed to allow mining."<sup>548</sup> Petitioners stated that they hoped to be engaged "directly with the same level of information and effort as [British Columbia] engage Alaska and U.S. agencies."<sup>549</sup>
251. Petitioners also raised concerns at a January 17, 2018, meeting at which the Canadian consul and Alaska's lieutenant governor were present. Participants, including Petitioners, discussed issues concerning the transboundary watersheds, including salmon escapement, financial assurances for mining failures, climate change, scientific data needed to protect the five species of salmon, ongoing acid mine drainage from the Tulsequah Chief mining site, and elevated levels of selenium in the Stikine River.<sup>550</sup>
252. On June 1, 2018, Petitioners raised their concerns about the B.C. Mines with B.C. officials who were attending a Transboundary Workshop and Dialogue in Juneau, Alaska, hosted by Alaska's lieutenant governor and co-sponsored by Central Council Tlingit & Haida Indian Tribes of Alaska and Sealaska Corporation.<sup>551</sup>
253. On April 2, 2019, Canada's Office of the Prime Minister acknowledged receipt of SEITC's letter regarding Resolution 18-001 on transboundary mining,<sup>552</sup> which noted in the preamble that "the headwaters of the transboundary watersheds in Canada contain numerous large scale and other mines, including but not limited to hard rock," and "these active, expanding, and proposed Canadian mines collectively . . . directly and indirectly threaten water quality, and fish, wildlife, and human uses [] dependent on clean water."<sup>553</sup> Resolution 18-001 further noted that "contaminants from numerous mines in Canada . . . flow . . . into the U.S. and degrad[e] U.S. natural and cultural resources upon which U.S. Tribes rely."<sup>554</sup>
254. On August 12, 2019, SEITC sent a letter to British Columbia Premier John Horgan requesting a new environmental assessment process for the KSM Project and "detail[ing] concerns . . . relating to tailings storage facilities and the potential for contamination of nearby water sources used by [their] communities."<sup>555</sup>

255. Petitioners have also raised their concerns in various meetings organized by the Bilateral Working Group on the Protection of Transboundary Waters (BWG), established through a Statement of Cooperation between the governments of Alaska and British Columbia.<sup>556</sup> Although the BWG has no decision-making authority, its members include British Columbia government officials. BWG meeting notes from October 5, 2017, indicate that Alaska’s lieutenant governor “[would] be travelling to Ottawa to meet with federal representatives, and ... also discuss transboundary concerns” in November of that year.<sup>557</sup> The notes also reflect the BWG’s awareness that the SEITC had submitted a petition to the US Department of the Interior “to bring further federal attention and involvement to BC/AK transboundary concerns.”<sup>558</sup>
256. Petitioners have also raised concerns and sought information about the B.C. Mines with and from various Alaskan government officials, in the hope that those officials would convey their concerns to British Columbian and Canadian officials. Petitioners raised their concerns in testimony before the Alaska Legislature’s House Special Committee on Fisheries on October 12, 2016. Petitioners also met with Alaska’s lieutenant governor on May 25, 2017, October 25, 2017, and January 17, 2018. As mentioned, Canada’s consul general was present at the January 17, 2018, meeting.
257. None of these efforts resulted in consultation with Petitioners. As Anita McPhee, a member of the Tahltan and Tlingit First Nations living in Canada, noted, tribal leaders in Southeastern Alaska

*were really concerned about their way of life [because of the mines], but they weren’t being consulted because they were in Alaska.... [I]t also made me realize that because of the impacts of colonization—this border—it took away their voice. And so I really felt for them. And I still do. Because, you know, it’s still going on today. Those mines are still being proposed in that area.*<sup>559</sup>

258. In summary,<sup>560</sup> the governments of Canada and British Columbia have not consulted with or sought the free, prior, and informed consent of Petitioners during the approval or permitting of any of the B.C. Mines despite having knowledge of foreseeable harms to Petitioners from such mine development. They have not assessed, or required the mine proponents to assess, transboundary impacts in the watersheds, thus limiting Petitioners’ ability to understand the potential threats to their rights to culture, adequate means of subsistence, health, and the right to use and enjoy their traditionally-occupied territory. Likewise, they have not sought any information from Petitioners concerning how pollution from any of the mines might harm Petitioners’ human rights.

## VI. EXHAUSTION OF DOMESTIC REMEDIES

259. The Inter-American Commission’s rules of procedure require that the Commission “verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.”<sup>561</sup> Exhaustion is not required when “the domestic legislation of the state concerned does not afford due process of law for protection of the right or rights that have allegedly been

violated”<sup>562</sup> or “when it is evident from the case file that any action filed regarding that complaint had no reasonable chance of success based on the prevailing jurisprudence of the highest courts of the State.”<sup>563</sup> The Commission does not merely look to the formal existence of remedies, but rather, whether the legal remedy is “adequate” and “suitable and effective” in redressing the violations at issue.<sup>564</sup> Petitioners can invoke this exception without having to first pursue these remedies – a contrary rule would defeat the purpose of the exception.<sup>565</sup>

260. The Commission has also held that “judicially beneficial laws” aimed at protecting Indigenous rights “cannot by themselves guarantee the right of such peoples.”<sup>566</sup> Rather, “[s]tates must effectively implement and enforce the constitutional, legislative and regulatory provisions of their internal law that enshrine the rights of indigenous and tribal peoples and their members, so as to ensure the real and effective enjoyment of such rights.”<sup>567</sup>
261. As explained below, Canadian law offers Petitioners “no reasonable chance of success” due to the lack of adequate and effective redress for the harms and rights at issue in this petition.<sup>568</sup> Petitioners are not obligated to exhaust domestic remedies in the United States because their claims are against Canada. Thus, the petition is admissible under the Commission’s rules of procedure.

**A. CANADIAN LAW DOES NOT PROVIDE ADEQUATE OR EFFECTIVE REDRESS FOR PETITIONERS’ CLAIMS**

**1. CANADA’S ENVIRONMENTAL ASSESSMENT LAWS DO NOT ADEQUATELY OR EFFECTIVELY PROTECT PETITIONERS’ RIGHTS**

262. The Commission has noted that general environmental laws, which typically incorporate requirements of information and participation during social and environmental review processes for proposed projects, “are usually insufficient to accommodate the requirements of consultation with Indigenous peoples, visualized as a special mechanism to guarantee their rights and interest” as required by Inter-American human rights standards.<sup>569</sup>
263. These general concerns have been recognized in particular with respect to Canada’s environmental assessment laws. The B.C. Mines require approval under both the British Columbia Environmental Assessment Act (BC EAA) and the Canadian Environmental Assessment Act of 2012 (CEAA).<sup>570</sup> Both laws are inadequate and ineffective to protect the environment or Indigenous peoples’ rights.<sup>571</sup>

*British Columbia Environmental Assessment Act*

264. With the exception of Shaft Creek Mine, all of the B.C. Mines have received environmental assessment certificates under the previous version of the BC EAA (2002 BC EAA). The 2002 BC EAA was in effect until December 16, 2019, when the new BC EAA, enacted in 2018, came into force (2018 BC EAA).<sup>572</sup> The Shaft Creek Mine would need to seek authorization under the 2018 BC EAA, as would other mines that have not yet received environmental assessment certificates under the current law.<sup>573</sup> As explained

below, both the 2002 BC EAA and the 2018 BC EAA have significant shortcomings and would not provide effective remedy to Petitioners.

*2002 British Columbia Environmental Assessment Act*

265. The 2002 BC EAA lacks accountability and credibility.<sup>574</sup> For example, the act does set out an approval test or criteria for decision-making, including no criteria for considering the interests of potentially affected Indigenous peoples.<sup>575</sup> Without “decision-making criteria or rules governing how to deal with trade-offs, including which trade-offs are unacceptable (such as crossing an ecological limit), decisions often appear arbitrary, politicized and unjust.”<sup>576</sup> For example,

the environmental assessments of [the] proposed Prosperity Mine and BC Hydro’s proposed Site C dam both concluded that the projects would result in significant adverse environmental impacts, and recognized the opposition of the Indigenous peoples in whose territories the projects are located. In both cases, the provincial government approved the project anyway, accepting the significant adverse impacts with little or no “justification” provided for the decision.<sup>577</sup>

266. In addition, courts have made it difficult to successfully challenge environmental authorizations by according the government near-unlimited discretion under the 2002 BC EAA.<sup>578</sup> The law does not require

decision-makers to base decisions on the best available science or Indigenous knowledge, or to provide reasons for their decisions. It also d[id] not establish a right of appeal. As a result, courts have consistently held that decision-makers be accorded broad deference under the [2002 BC] EAA, making it more difficult to challenge decisions that ignore important information or community concerns.<sup>579</sup>

267. The 2002 BC EAA also does not require adequate assessment of the cumulative effects of projects, because the law made the power to consider cumulative effects “discretionary,” not legal.<sup>580</sup> British Columbia’s Auditor General found in 2015 that the province’s environmental assessment procedures “d[id] not effectively support the management of cumulative effects.”<sup>581</sup>

268. Importantly, the 2002 BC EAA does not meet the international law requirements for prior consultation with Indigenous peoples set out above in section V.C.5.<sup>582</sup> To begin with, restrictive timelines and vague requirements for the public and Indigenous peoples to comment on a project proponent’s application – which is typically highly technical and voluminous – make it challenging to meaningfully participate in the process.<sup>583</sup> The Public Consultation Policy Regulation to the BC EAA requires that an assessment include one public comment period of between 30 and 75 days, and a second one at the decision-maker’s discretion.<sup>584</sup> This is not enough time for most Indigenous peoples to

meaningfully review potentially thousands of pages of technical documents and submit comments.

269. In addition, the Public Consultation Policy Regulation directs project proponents to design the details of the public participation process subject to the approval of the government.<sup>585</sup> This is problematic because “the proponent clearly has a direct interest in the outcome of the assessment, thus members of the public are often rightly cautious that opportunities for their participation, and how their input is portrayed, will be limited or framed in a way that best serves the interests of the proponent.”<sup>586</sup>
270. The 2002 BC EAA also does not require assessment of a project’s potential impacts on Indigenous rights.<sup>587</sup> Although in practice such an assessment often took place, Indigenous peoples were not adequately consulted, and it was “a murky and ill-defined process, with the proponent being delegated the task of collecting the relevant information and the [government] doing the interpretation of it.”<sup>588</sup> The British Columbia First Nations Energy and Mining Council<sup>589</sup> commented that this “scheme [was] unilaterally designed and implemented, without consultation with the affected First Nation. Consequently, it incorporate[d] methods for assessing strength of claim that are not legally recognized, and reache[d] flawed determinations of impact magnitude and significance – all this without any engagement of the First Nation in the analysis.”<sup>590</sup>
271. In summary, the 2002 BC EAA does not provide an adequate or effective remedy for the violations of Petitioners’ rights set forth in this petition in relation to the Tulsequah Chief, Red Chris, Galore Creek, Brucejack, and KSM mines. As the BC First Nations Energy and Mining Council concluded,

Far from being the independent, neutrally administered, technically robust, transparent and accountable process it needs to be, the [2002 BC EAA] [was] constructed to achieve the opposite of these characteristics in its implementation.... A significant number of First Nations has lost the confidence in the process.<sup>591</sup>

*2018 British Columbia Environmental Assessment Act*

272. Although the 2018 BC EAA aims to enhance Indigenous participation through the newly restructured environmental assessment process<sup>592</sup> and now requires assessment of cumulative impacts, as demonstrated above, the British Columbia government has not effectively implemented the Environmental Assessment Act, particularly with respect to Indigenous peoples living in Alaska. Thus far, British Columbia has not consulted with SEITC for any mining or other projects that could impact them. Moreover, the 2018 BC EAA does not require consultation with tribes outside Canada. Section 25(1) of the 2018 BC EAA states that “[t]he effects of a project on Indigenous nations and rights recognized and affirmed by section 35 of the Constitution Act, 1982 must be assessed in every assessment.”<sup>593</sup> However, section 35 of the Constitution Act limits its protections only to “the aboriginal peoples of Canada,”<sup>594</sup> and does not protect Petitioners or other Indigenous peoples living in Alaska.

273. Key aspects of the 2018 BC EAA also do not sufficiently protect some of Petitioners' rights. For example, the act's requirements for free, prior, and informed consent are weaker than those under international human rights law. Under Section 29, in cases where Indigenous nations have provided notification of their lack of consent, the Minister of Environment and Climate Change Strategy and the minister responsible for a particular reviewable project must offer to meet and attempt to reach consensus with such nations, but may ultimately decide to issue a certificate without Indigenous consent if the ministers "provide reasons for why the decision to issue the certificate was made."<sup>595</sup> This does not guarantee that Indigenous peoples can withhold their consent to extractive projects that may harm their physical well-being or cultural practices in a manner that substantially affects that group's substantive rights.<sup>596</sup>
274. In addition, although Section 25(2) requires the Environmental Assessment Office to consider "in every assessment ... positive and negative direct and indirect effects of [a] reviewable project, including ... adverse cumulative effects,"<sup>597</sup> the 2018 BC EAA does not define "cumulative effects" or provide any guidance concerning whether and how to assess transboundary impacts. Cumulative impacts to Petitioners are potentially substantial because multiple mines would affect the transboundary watersheds. In addition to the Shaft Creek, Galore Creek, and Red Chris mines at issue in this petition, several other metals mines are proposed in the Stikine watershed.<sup>598</sup> The proposed Tulsequah Chief Mine could share the Taku River watershed with four other proposed mines: New Polaris, Big Bull, Thorne, and Hat.<sup>599</sup> KSM and Brucejack mines are both located in the Unuk watershed, which is also threatened by several other proposed mining projects, including the Eskay Creek mine.<sup>600</sup>
275. For these reasons, the 2018 BC EAA does not provide an adequate or effective remedy for the violations of Petitioners' rights set forth in this petition.

*Canadian Environmental Assessment Act*

276. All of the B.C. Mines – except for Shaft Creek – have undergone environmental assessments, screenings, or studies under either the 1992 CEAA or the 2012 CEAA. Although the 2012 CEAA was repealed in August 28, 2019 by the 2019 Impact Assessments Act (IAA), "[a]ny environmental assessment of a designated project by the former Agency commenced under the 2012 Act before the day on which [2019] Act comes into force . . . is continued under the 2012 Act as if that Act had not been repealed."<sup>601</sup> This also includes studies associated with such environmental assessments.<sup>602</sup> Thus, the 2019 IAA will only apply to the environmental assessment process for Shaft Creek.
277. Similar to the B.C. environmental assessment acts, neither the 2012 CEAA nor the 2019 IAA would provide Petitioners with an effective remedy.

*2012 Canadian Environmental Assessment Act*

278. The 2012 CEAA is ineffective and inadequate to protect Indigenous peoples in Canada, let alone Petitioners in Alaska.<sup>603</sup> The Act defines "environmental effects" "with respect

to aboriginal peoples, [as] an effect occurring *in Canada* of any change that may be caused to the environment.”<sup>604</sup> Thus there is no obligation to consider transboundary impacts on Indigenous peoples outside of Canada. The Act also gives the public a mere 20 days to comment on projects under consideration.<sup>605</sup> Moreover, Section 19 provides that environmental assessments must include “alternative means of carrying out the designated project,” but it does not require consideration of a no action alternative.<sup>606</sup> Before he became United Nations Special Rapporteur on human rights and the environment, Professor David Boyd noted that “First Nations, communities, and environmental groups argue that federal [environmental assessment] is too narrowly focused, happens too late, offers inadequate opportunities for Indigenous and public participation, and ultimately serves as a rubber stamp.”<sup>607</sup> Other experts have noted that the CEAA weakens “Aboriginal Peoples’ capacity to participate in the resource development review process of undertakings that affect their traditional lands. The result is the silencing of the people who are most affected by resource development.”<sup>608</sup>

### *2019 Impact Assessment Act*

279. The 2019 IAA also does not protect Petitioners’ rights.
280. Although the 2019 IAA explicitly requires consideration of impacts on Indigenous peoples, this requirement applies solely to Indigenous peoples of Canada. Under the Act, a federal authority must evaluate “adverse impacts . . . on the rights of Indigenous peoples *of Canada* recognized and affirmed by section 35 of the Constitution Act, 1982.”<sup>609</sup> The Act also defines “environmental effects” as “changes to the environment and the impact of these changes on the Indigenous peoples *of Canada* and on health, social or economic conditions.”<sup>610</sup> Thus, there is no obligation to consider transboundary impacts on Indigenous peoples outside of Canada.
281. For these reasons, the 2012 CEAA and 2019 IAA do not provide an adequate or effective remedy for the violations of Petitioners’ rights set forth in this petition.

### 2. CANADA’S LAWS FOR THE PROTECTION OF INDIGENOUS PEOPLES DO NOT ADEQUATELY OR EFFECTIVELY PROTECT PETITIONERS’ RIGHTS

282. Although Canada has developed a special legal framework and body of jurisprudence concerning Indigenous peoples’ rights, their application has been inadequate and ineffective to protect the rights of First Nations within Canada, and to the best of Petitioners’ knowledge Canadian Indigenous laws do not apply to foreign Tribes.<sup>611</sup>
283. The Inter-American Commission has held that shortcomings in the content and application of Canadian laws applicable to Indigenous peoples make those laws inadequate to protect Indigenous peoples’ rights, and therefore support the application of the exception to exhaustion of domestic remedies. In *Hul’Qumi’Num Treaty Group*, the petitioners alleged that Canada had violated the human rights of the Hul’Qumi’Num Treaty Group because of its failure to legally recognize the petitioners’ ancestral lands and to consult with the petitioners prior to granting concessions that destroyed the environmental and natural resources of the petitioners’ ancestral lands and sacred sites.<sup>612</sup>

284. Canada argued that the petitioners could have exhausted available domestic remedies, including through the treaty negotiation process under the British Columbia Treaty Commission (BCTC); legal actions to obtain recognition of aboriginal title and compensation for the violation of that right; filing petitions under the provisions of the Heritage Preservation Act to demand that the Crown fulfill its obligation to conduct prior consultation with Indigenous peoples; petitioning for interim or interlocutory measures against violations; and legal action under the provisions of the Canadian Charter of Rights and Freedoms.<sup>613</sup> Because Canada promoted the BCTC “as an ideal mechanism to address, in a comprehensive manner, the territorial claims of indigenous people,” the Commission’s analysis focused on the effectiveness of that process “as an important reference point to evaluate the exhaustion of remedies by the petitioners.”<sup>614</sup>
285. The Commission held that the petitioners did not have to exhaust domestic remedies because the central claims of the Hul’Qumi’Num Treaty Group had not been resolved under the BCTC after fifteen years.<sup>615</sup> In addition, the Commission noted the “difficulties faced by indigenous peoples when trying to avail themselves of the [BCTC process] due to the limited access to the justice system during and following treaty negotiations.”<sup>616</sup> The Commission concluded that “by failing to resolve the [Hul’Qumi’Num Treaty Group] claims with regard to their ancestral lands, the BCTC process has demonstrated that it is not an effective mechanism to protect” the rights claimed by the petitioners.<sup>617</sup>
286. The Commission also addressed possible remedies under the B.C. Heritage Conservation Act and the Canadian Charter of Rights and Freedoms. It held those remedies to be unsuitable “because they [could] not be used to comprehensively and permanently protect all [of the petitioners’] ancestral lands from the actions of third parties because their purpose is not to recognize [the petitioners’] property rights to those lands or the obligation of the State to provide restitution.”<sup>618</sup>
287. The United Nations Special Rapporteur on the rights of Indigenous peoples has also noted the ineffectiveness of Canadian Indigenous laws. During a 2013 visit to Canada, he explained:
- It is difficult to reconcile Canada’s well-developed legal framework and general prosperity with the human rights problems faced by indigenous peoples in Canada that have reached crisis proportions in many respects. Moreover, the relationship between the federal Government and indigenous peoples is strained, perhaps even more so than when the previous Special Rapporteur visited Canada in 2003, despite certain positive developments that have occurred since then and the shared goal of improving conditions for indigenous peoples.<sup>619</sup>
288. The special rapporteur found that in Canada, the “treaty and other claims processes have been mired in difficulties,” and that as a result “many First Nations have all but given up on them.”<sup>620</sup> Worse yet, in many cases it appears that these processes have contributed to

a deterioration rather than renewal of the relationship between indigenous peoples and the Canadian State.”<sup>621</sup> Further,

Many negotiations under these procedures have been ongoing for many years, in some cases decades, with no foreseeable end. An overarching concern is that the Government appears to view the overall interests of Canadians as adverse to aboriginal interests, rather than encompassing them. In the comprehensive land claims processes, the Government minimizes or refuses to recognize aboriginal rights, often insisting on the extinguishment or non-assertion of aboriginal rights and title, and favours monetary compensation over the right to, or return of, lands. In litigation, the adversarial approach leads to an abundance of pre-trial motions, which requires the indigenous claimants to prove nearly every fact, including their very existence as a people.<sup>622</sup>

289. The special rapporteur also noted the long delays First Nations face in pursuing claims using Canadian Indigenous laws. For example, he referred to the Tshilhqot’in Nation’s aboriginal title litigation, which at the time of his visit “had taken 14 years to pursue, including five years of trial, and the case is currently under appeal to the Supreme Court of Canada.”<sup>623</sup> The Nuu-chah-nulth Nation’s litigation over a commercial aboriginal right to fish has taken 12 years, including three years of trial and successive appeals.<sup>624</sup> The special rapporteur also referred to “four indigenous nations in the Treaty 8 territory in British Columbia [that] have been in Treaty Land Entitlement negotiations for a decade, for ‘so long that there are almost no available lands left for the First Nations to select.’”<sup>625</sup> He concluded that “[i]t is understandable that First Nations who see the lands and resources over which they are negotiating being turned into open pit mines or drowned by a dam would begin to question the utility of the process.”<sup>626</sup>
290. The Canadian domestic remedies referred to in *Hul’Qumi’Num Treaty Group* and other indigenous laws would not be effective at protecting Petitioners here because they live outside Canada and to the best of Petitioners’ knowledge the remedies do not apply or protect Indigenous people outside Canada. For example, the B.C. Treaty Commission describes the treaty negotiations process as reconciliatory “tripartite negotiations . . . among *First Nations*, Canada and BC” that are “open to *all First Nations* in BC.”<sup>627</sup> In addition, Canada’s guidelines for federal officials on their duty to consult define an “Aboriginal group” as “[a] community of First Nations, Inuit or Métis people that holds or may hold Aboriginal and Treaty rights under section 35 of the Constitution Act, 1982,” which as discussed above, does not protect Indigenous peoples outside Canada.<sup>628</sup> It therefore does cover consultation with Indigenous people outside of Canada.

### 3. CANADA’S CONSTITUTIONAL LAW DOES NOT ADEQUATELY OR EFFECTIVELY PROTECT PETITIONERS’ RIGHTS

- a. *The Canadian Constitution does not protect foreign Tribes and imposes no positive obligation on government to protect and preserve any Indigenous right*

291. Petitioners would have no reasonable chance of success in challenging the B.C. Mines under Canadian constitutional law, which is contained in Canada's Constitution Act of 1982 (Constitution Act).<sup>629</sup> This act contains the Canadian Charter of Rights and Freedoms, "which guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>630</sup> However, the protections under the Charter are limited to Canadians. For example, the Charter "protects every *Canadian's* right to be treated equally under the law."<sup>631</sup> Similarly, as mentioned, while the Constitution Act contains a section on aboriginal rights (Section 35), it limits those protections only to "the aboriginal peoples of Canada." Thus, Petitioners would not be protected that provision.
292. In addition, Canadian courts have held that Section 35 "imposes no positive obligation on government to protect and preserve any aboriginal right."<sup>632</sup> For instance, in *Davis v. Canada*, the plaintiffs argued that Canada had failed to recognize their identity as an aboriginal people and consequently had failed to establish programs and services as it had done for other peoples under the Indian Act.<sup>633</sup> As the Newfoundland and Labrador Supreme Court explained,

[e]ven assuming that aboriginal identity, as such, can represent an aboriginal right..., s. 35 as interpreted by the Supreme Court of Canada *provides absolutely no basis for the imposition on government of an obligation to take any steps to preserve that right.* If the right is proven to exist before European contact, and otherwise satisfies the analysis required for its acceptance, s. 35(1) operates to provide constitutional protection against its infringement by government action. That is the extent of the protection offered; *it does not go so far as to oblige government to take positive measures to ensure the continued existence of the right.* In my view, the claim that the plaintiffs are entitled to relief based on the assertion that government has failed to protect a s. 35(1) aboriginal right is certain to fail.<sup>634</sup>

293. In a November 2017 decision, the Supreme Court of Canada further demonstrated the ineffectiveness of Section 35 to ensure enjoyment of the rights of Indigenous and tribal peoples and their members.<sup>635</sup> The court held that the development of a large ski resort on Ktunaxa sacred land violated their right to freedom of religion by permanently damaging their ability to practice their spiritual traditions and beliefs.<sup>636</sup> The court held that "Section 35 guarantees a process, not a particular result," and that "there is no guarantee that, in the end, the specific accommodation sought will be warranted or possible."<sup>637</sup> Because the Minister of Forests, Lands and Natural Resource Operations had shown attempts at consultation, and because the minister's decision "is entitled to deference," the court dismissed the Ktunaxa Section 35 claims.<sup>638</sup>

294. Because Section 35 of the Constitution Act imposes no positive obligation on the government to protect and preserve any Indigenous right, but only creates a procedural obligation on the government, Petitioners would have no reasonable chance of success on a Section 35 claim seeking protection of their rights.

b. *The Canadian Constitution does not provide an adequate and effective remedy for the rights to culture, property, health, and own means of subsistence*

*Right to culture*

295. Canadian law does not provide an adequate, effective, or suitable remedy for protecting the right to culture and does not provide adequate redress for the violations alleged by the Petitioners. The only reference to culture in the Constitution Act is in Section 27, which states, “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”<sup>639</sup> However, the culture described in Section 27 is *Canada’s* multicultural heritage, preservation of which does not protect a particular people’s right to culture. It therefore is not applicable in this case.

*Right to property or the right to use and enjoy traditionally-occupied lands*

296. The Canadian Constitution does not recognize the right to property or the right to use and enjoy traditionally occupied lands. The Canadian government has negotiated agreements, known as “modern treaties,” with certain Indigenous groups, but, as mentioned above, the government is not obligated to negotiate treaties with foreign tribes. In any event, as also discussed above, the Commission held that the recourse available through a modern treaty process regarding a treaty group’s right to their ancestral lands was not effective.<sup>640</sup> In addition, to the extent that Canadian law protects Indigenous peoples’ right to property as part of their aboriginal rights, such a claim falls under Section 35 of the Constitution Act, and would have no reasonable chance of success, as discussed above.

*Right to health*

297. The Constitution Act does not recognize a right to health.

*Right to their own means of subsistence*

298. Neither the Constitution Act nor other Canadian legislation recognizes or provides any protection for a right to one’s own means of subsistence.

**B. BECAUSE THE UNITED STATES DOES NOT HAVE JURISDICTION OR CONTROL OVER THE B.C. MINES, PETITIONERS HAVE NO OBLIGATION TO EXHAUST REMEDIES IN THE UNITED STATES**

299. The B.C. Mines are in Canada and are under Canada’s jurisdiction and control, as demonstrated by the fact that the operation of the mines requires permits from Canadian provincial and federal governments. The United States has no jurisdiction or control over the companies operating these mines. For this reason, the United States cannot stop the violations, and Petitioners are not obligated to seek remedies in the United States.

300. Petitioners thus submit this petition against Canada because, as the Inter-American Court confirmed in its 2017 advisory opinion on human rights and the environment, a state with jurisdiction and control over activities resulting in transboundary harm has the obligation to prevent those violations.<sup>641</sup>
301. Moreover, the Commission’s rules of procedure focus on exhaustion of remedies in the state against which a petition is being filed. Article 31 of the Rules provides that “the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted.”<sup>642</sup> Exhaustion is not required when, among other circumstances, “the domestic legislation of the State concerned does not afford due process of law.”<sup>643</sup> Finally, “it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted.”<sup>644</sup> As this language from Article 31 indicates, the emphasis is on the state against whom the petition is being filed and the effectiveness of its domestic legal system. This is consistent with the Inter-American Court’s advisory opinion finding states responsible for human rights violations outside their territory where they have jurisdiction or control over the cause of the violation – in that case, the state with such control would be the “State concerned.”
302. Here, Petitioners have asserted that Canada – not the United States – has violated their human rights by failing to prevent transboundary harm from the B.C. Mines. As such, the exhaustion provisions in the Rules of Procedure pertain only to Canadian law.
303. Nonetheless, Petitioners have taken steps to protect their interests from threats posed by the B.C. Mines through various political and diplomatic processes in the United States, without success. For example, on June 27, 2016, Petitioners and other groups submitted a petition to the US Department of the Interior describing grounds for investigation of the B.C. Mines pursuant to a law called the “Pelly Amendment” that requires the Secretary of the Interior to undertake an investigation when foreign nationals may be engaging in a “taking” that diminishes the effectiveness of any international program for endangered or threatened species.<sup>645</sup> When the Secretary’s investigation finds that such taking is occurring, she must certify this finding to the President.<sup>646</sup> However, even if the Secretary certifies the harm from the mines, the only redress under this process is for the President, at his or her discretion, to issue trade sanctions.<sup>647</sup> On September 26, 2017, Petitioners and others submitted the same petition to the US Department of Commerce.<sup>648</sup>
304. These US government agencies are not required to take any action in response to these petitions; any action is fully within the discretion of the agencies. Moreover, the Pelly Amendment process affords no opportunity for a hearing or judicial review of the Government’s final decision. In such circumstances, the European Court of Human Rights has held that there is no domestic remedy that a petitioner must exhaust because it is “not open to the applicant to complain directly to the court” if the request is denied.<sup>649</sup>
305. On February 5, 2018, the US Department of Interior confirmed that Petitioners’ “petition [was] under review and a full response [was] forthcoming.”<sup>650</sup> As of the time of this petition – over two years later – Petitioners have received no final response. On January 29, 2020, the US Department of Commerce declined to issue the Pelly Amendment certification to the US president.<sup>651</sup> Instead, the department indicated that it had

concluded that “the actions of Canadian nationals associated with mine projects in British Columbia [were] unrelated to the primary activities regulated by” the treaties Petitioners asserted were being undermined by pollution from the B.C. Mines.<sup>652</sup>

306. As mentioned above, Petitioners have also raised concerns and sought information about the B.C. Mines with and from various Alaskan government officials. Petitioners raised their concerns before the Alaska Legislature’s House Special Committee on Fisheries on October 12, 2016. Petitioners also met with Alaska’s lieutenant governor on May 25, 2017, October 25, 2017, and January 17, 2018.
307. Apart from these political or diplomatic remedies, there are no other legal avenues in the United States for Petitioners to pursue their claims.

## **VII. TIMELINESS**

308. Under Article 32 of the Commission’s Rules of Procedure, a petition should be lodged within six months of notification of the final ruling that comprises the exhaustion of domestic remedies. For cases in which the exhaustion requirement does not apply, “the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred, and the circumstances of each case.”<sup>653</sup>
309. This petition is timely because, as described in section IV.B.5, the acts and omissions of Canada and British Columbia that form the basis for the petition are ongoing, and the individual and cumulative threat of serious pollution from the B.C. Mines present an imminent and significant risk to Petitioners’ human rights. British Columbia and Canada have failed to take effective action to prevent pollution and environmental damage from mines operating in the British Columbia-Alaska transboundary watersheds. It is also unlikely that these governments will adequately consider and address potential threats to Petitioners from the mines that are still in the permitting phase. These governments do not require proposed mines to assess transboundary water quality impacts and they continue to authorize mines that are using unsafe pollution containment and treatment processes. Particularly concerning, the governments also have not consulted with or sought the free, prior, and informed consent of Petitioners regarding any of the B.C. Mines. Thus, it is necessary for the Commission to take urgent measures now to prevent violation of Petitioners’ human rights from all of the B.C. Mines.
310. For the above reasons, this petition is timely.

## **VIII. ABSENCE OF PARALLEL INTERNATIONAL PROCEEDINGS**

311. The subject of this petition is not pending in any other international proceeding for settlement, nor does it duplicate any petition pending before or already examined by the Commission or any other international governmental organization.

## IX. REQUEST FOR RELIEF

312. States' responsibility to prevent breaches of international law and remedy them when they occur is a foundational principle of international law codified in the American Convention on Human Rights.<sup>654</sup>
313. The Inter-American Court has held reparations to include non-monetary measures, including environmental protection measures. For instance, in *Xákmok v. Paraguay*, the Court not only ordered Paraguay to return the petitioners' land, but also, until it did so, prevent deforestation or other exploitation that would cause irreparable damage to the land or the natural resources on it.<sup>655</sup> The Court recognized that monetary compensation for loss of or damage to the petitioners' land was not "capable of repairing the damage caused by the violations declared" in that judgment,<sup>656</sup> and accordingly identified environmental protection measures as a form of reparations.<sup>657</sup> In a similar vein, Canadian law acknowledges that "the Government of Canada must be able to fulfill its international obligations in respect of the environment"<sup>658</sup> and includes among the government's administrative duties the duty to "take preventive and remedial measures to protect, enhance and restore the environment."<sup>659</sup>
314. The United Nations Special Rapporteur on the rights of Indigenous people has also recognized states' obligations to take measures to address the effects of extractive industries on Indigenous peoples. In his 2014 report on Indigenous peoples' rights in Peru with regard to the extractive industries, the special rapporteur highlighted the need for states to develop "a regulatory framework that fully recognizes indigenous peoples' rights over lands and natural resources and other rights that may be affected by extractive operations . . . and that provides effective sanctions and remedies when those rights are infringed either by government or by corporate actors."<sup>660</sup>
315. By authorizing mines that would irreversibly pollute habitat for salmon, eulachon, and other fish populations and threaten these fish with significant and sustained population declines, Canada is allowing domestic actors under its jurisdiction to impose the environmental costs of their operations on Petitioners, thus violating their rights.
316. Canada therefore has a duty to provide appropriate remedy and redress, which may include environmental protection measures, to Petitioners.
317. In light of the violations described above, Petitioners respectfully request that the Commission:
- 1) Hold a hearing to investigate the claims raised in the petition;
  - 2) Declare that Canada's failure to implement adequate measures to prevent the harms to Petitioners from the B.C. Mines violates rights affirmed in the American Declaration of the Rights and Duties of Man, and
  - 3) Recommend that Canada:

- a. Suspend approval and/or operations of the B.C. Mines until it has thoroughly assessed and addressed the risk to Petitioners' human rights;
- b. Consult with Petitioners and seek their free, prior, and informed consent with respect to each of the B.C. Mines as required by international law;
- c. Establish and implement, in coordination with Petitioners, a plan to protect them and the resources they depend on from the disastrous effects of pollution from the B.C. Mines, including the watersheds and fish species used by the Southeast Alaska Native communities whose rights have been violated; and
- d. Provide any other relief that the Commission considers appropriate and just.

## ENDNOTES

---

- <sup>1</sup> Southeast Alaska Indigenous Transboundary Commission's web page, <http://www.seitc.org/>.
- <sup>2</sup> *See*, section IV.A.
- <sup>3</sup> *See, id.*
- <sup>4</sup> Douglas Indian Association, *The A`akw Kwáan & T`aaku Kwáan Tribal History* at 1, 6 (June 2017), <https://diataku.com/wp-content/uploads/2018/12/DIA-Tribal-History-Brochure-Booklet-edited-7-21-17.pdf>.
- <sup>5</sup> Rivers Canada, *Imminent Threats to the Survival of a Wild Taku Watershed: Re: Tulsequah Chief Acid Generating Mine and 160 [kilometer] Access Road Proposed by Redfern Resources Ltd.* at PDF 3 (Nov. 12, 1996).
- <sup>6</sup> John. S. Richardson & Alexander M. Milner, *Pacific Coast Rivers of Canada and Alaska*, in *RIVERS OF NORTH AMERICA* 735, 772 (Arthur C. Benke & Colbert E. Cushing eds., 2005) (Richardson & Milner).
- <sup>7</sup> *Id.* at 760, 772.
- <sup>8</sup> *Id.* at 772.
- <sup>9</sup> *Id.* at 774.
- <sup>10</sup> SEITC Interview with Britany *Kee`ya aa*. Lindley (2017) on file with Earthjustice (Lindley Interview).
- <sup>11</sup> Richardson & Milner, *supra* note 6, at 751.
- <sup>12</sup> *Id.*; also Wrangell, *The Stikine River*, <http://www.wrangell.com/visitorservices/stikine-river>.
- <sup>13</sup> Red Chris Development Company Ltd., Application for an Environmental Assessment Certificate, Red Chris Project, British Columbia, Canada at 4-186, 4-188 (Oct. 2004) (Red Chris EA Application); Robert J. Behnke, *TROUT AND SALMON OF NORTH AMERICA* at 329 (2010); Richardson & Milner, *supra* note 6, at 754, 767.
- <sup>14</sup> Robert J. Behnke, *TROUT AND SALMON OF NORTH AMERICA* at 329 (2010); Richardson & Milner, *supra* note 6, at 754, 767.
- <sup>15</sup> Rivers Without Borders, *About the Region*, <https://riverswithoutborders.org/about-the-region/unuk>.
- <sup>16</sup> Ketchikan Indian Community, *About Us*, <http://www.kictribe.org/>; SEITC Interview with Louis Wagner (2017) on file with Earthjustice (Wagner Interview).
- <sup>17</sup> Wagner Interview, *supra* note 16.
- <sup>18</sup> *Id.*
- <sup>19</sup> Seabridge Gold, Application for an Environmental Assessment Certificate / Environmental Impact Statement: KSM Project at 15-45 (July 2013) (KSM EA Application); Transboundary Watershed Alliance, *The Unuk River Watershed of Southeast Alaska/Northwest British Columbia* at PDF 3 (March 2001) (Transboundary Watershed Alliance).
- <sup>20</sup> KSM EA Application, *supra* note 19, at 15-45; Transboundary Watershed Alliance, *supra* note 19, at PDF 2.

- <sup>21</sup> Transboundary Watershed Alliance, *supra* note 19, at PDF 3; KSM EA Application, *supra* note 19, at 15-42, Tbl. 15.1-4; *see also id.* at 15-20 (“The Unuk and Bell-Irving rivers are large river systems with diverse fish communities and cultural values. They provide spawning routes for Pacific salmon (*Oncorhynchus* spp.), anadromous steelhead (*O. mykiss*), and cutthroat trout (*O. clarkii clarkii*), and serve as habitat for resident rainbow and cutthroat trout, Dolly Varden (*Salvelinus malma*), bull trout (*S. confluentus*), and mountain whitefish (*Prosopium williamsoni*).”).
- <sup>22</sup> Transboundary Watershed Alliance, *supra* note 19, at PDF 1 (“U.S. conservationists early on recognized its importance and worked hard to have the entire lower portion of it protected within Misty Fjords National Monument.”).
- <sup>23</sup> *See, id.* at PDF 4.
- <sup>24</sup> Alaska Department of Fish and Game, Division of Commercial Fisheries, *2020 Southeast Alaska Eulachon Smelt Fishery Announcement* (Feb. 25, 2020), <http://www.adfg.alaska.gov/static/applications/dcfnewsrelease/1134839963.pdf>; Federal Subsistence Board, Press Release, *Federal subsistence fishery for Eulachon closed in Federal waters within District 1* (Feb. 25, 2020), <https://www.doi.gov/sites/doi.gov/files/uploads/20feb25eulachon-closure-nr.pdf>; *see also*, Maria Dudzak, *Eulachon Fishery Remains Closed*, KRBD (Feb. 27, 2020), <https://www.krbd.org/2020/02/27/eulachon-fishery-remains-closed/>.
- <sup>25</sup> *See, e.g.* Raven Radio, *Tribes to get voice in state transboundary mine work* (Aug. 6, 2015), <https://www.kcaw.org/2015/08/06/tribes-to-get-voice-in-state-transboundary-mine-work/>.
- <sup>26</sup> Wagner Interview, *supra* note 16.
- <sup>27</sup> SEITC Interview with Einar Haaseth (2017) on file with Earthjustice (Haaseth Interview); SEITC Interview with Tammi Meissner (2017) on file with Earthjustice (Meissner Interview); SEITC Interview with John Morris, Sr. (2017), on file with Earthjustice (Morris Interview); Wagner Interview, *supra* note 16.
- <sup>28</sup> *Id.*
- <sup>29</sup> Wagner Interview, *supra* note 16; Lindley Interview, *supra* note 10.
- <sup>30</sup> Wagner Interview, *supra* note 16; Lindley Interview, *supra* note 10; Meissner Interview, *supra* note 27; Haaseth Interview, *supra* note 27.
- <sup>31</sup> Megan Felicity Moody, *Eulachon Past and Present*, University of British Columbia at 5 (March 2008) (Moody). Despite its importance to Alaska Native communities, as well as to many First Nations in British Columbia, eulachon has been little studied, perhaps because it has never been commercially harvested. Scientists have documented a decline in returns over the past 20 years throughout their habitat along the Pacific coast, particularly in the 1990s, but do not understand the causes of these trends. Climate change and the destruction of eulachon spawning habitat have been hypothesized as potential causes. *See generally*, J. B. MacKinnon, ‘*Salvation Fish*’ That Sustained Native People Now Needs Saving, NATIONAL GEOGRAPHIC (July 7, 2015), <http://news.nationalgeographic.com/2015/07/150707-salvation-fish-canada-first-nations-animals-conservation-world/>.
- <sup>32</sup> Lindley Interview, *supra* note 10; Meissner Interview, *supra* note 27; Haaseth Interview, *supra* note 27.
- <sup>33</sup> *See, e.g.*, Wagner Interview, *supra* note 16.
- <sup>34</sup> SEITC Interview with James Stough, Sr. (2017) on file with Earthjustice (Stough Interview).
- <sup>35</sup> *Id.*
- <sup>36</sup> Lindley Interview, *supra* note 10.

- <sup>37</sup> For example, eulachon is a nutritious food high in unsaturated fats and vitamin A, E, and K. Moody, *supra* note 31, at ii.
- <sup>38</sup> See, e.g., Robert J. Wolfe, *Local traditions and subsistence: a synopsis from twenty-five years of research by the State of Alaska*, Technical Paper 284, at 14 (2005) (noting that “subsistence harvests in rural areas ... are a necessary part of economic survival in rural Alaskan communities where incomes are low, prices are high, and imported food unreliable.”); see also Lindley Interview, *supra* note 10; Meissner Interview, *supra* note 27.
- <sup>39</sup> Meissner Interview, *supra* note 27; see also Wolfe, *supra* note 38, at 13 (“It is not uncommon for [Alaskan] village stores to run out of many commercial products, particularly when weather interferes with shipments”).
- <sup>40</sup> John Sisk, Subsistence Use in Southeastern Alaska, [https://www.conservationgateway.org/ConservationByGeography/NorthAmerica/UnitedStates/alaska/seak/era/cfm/Documents/9.1\\_Subistence.pdf](https://www.conservationgateway.org/ConservationByGeography/NorthAmerica/UnitedStates/alaska/seak/era/cfm/Documents/9.1_Subistence.pdf) (citing Alaska Department of Fish and Game, Subsistence in Alaska: a year 2000 update, Division of Subsistence, Juneau, AK).
- <sup>41</sup> US Census Bureau estimates that the average per capita income for American Indians and Alaska Native people in Metlakatla is \$20,315, in Wrangell \$22,771, and in the Juneau Borough, where the Dougal Indian Association is located, \$24,843. US Census Bureau, *Per Capita Income in the Past 12 Months (in 2015 Inflation-Adjusted Dollars) (American Indian and Alaska Native Alone)*, 2011-2015 American Community Survey 5-Year Estimates (Oct. 27, 2017).
- <sup>42</sup> Morris Interview, *supra* note 27.
- <sup>43</sup> Meissner Interview, *supra* note 27.
- <sup>44</sup> Lindley Interview, *supra* note 10.
- <sup>45</sup> *Id.*
- <sup>46</sup> Meissner Interview, *supra* note 27.
- <sup>47</sup> Wagner Interview, *supra* note 16.
- <sup>48</sup> Morris Interview, *supra* note 27.
- <sup>49</sup> *Id.*
- <sup>50</sup> *Id.*
- <sup>51</sup> *Id.*
- <sup>52</sup> Meissner Interview, *supra* note 27.
- <sup>53</sup> *Id.*
- <sup>54</sup> Lindley Interview, *supra* note 10; Meissner Interview, *supra* note 27; Morris Interview, *supra* note 27; Wagner Interview, *supra* note 16. See also Matthew Brock & Philippa Coiley-Kenner, *A Compilation of Traditional Knowledge About the Fisheries of Southeast Alaska*, Alaska Dep’t of Fish and Game Division of Subsistence, Technical Paper No. 332 at 11 (Sept. 2009) (Brock & Coiley-Kenner).
- <sup>55</sup> Kirk Dombrowski, *Subsistence Livelihood, Native Identity and Internal Differentiation in Southeast Alaska*, 49 ANTHROPOLOGICA 211, 213, 216, 218 (2007).
- <sup>56</sup> Brock & Coiley-Kenner, *supra* note 54, at 4.
- <sup>57</sup> *Id.* at 3-4.
- <sup>58</sup> Dombrowski, *supra* note 55, at 216-17.

- 59 Haaseth Interview, *supra* note 27.
- 60 Stough Interview, *supra* note 34.
- 61 Wagner Interview, *supra* note 16.
- 62 Lindley Interview, *supra* note 10.
- 63 Report of David M. Chambers, Ph.D, P. Geop., ¶¶ 13-21 (July 6, 2020) (Chambers Report), attached here as Appendix 1.
- 64 *Id.*
- 65 *Id.*
- 66 *See, generally, id.*
- 67 Chambers Report, *supra* note 63, ¶ 23.
- 68 *Id.*
- 69 *Id.*, ¶ 24.
- 70 *Id.*
- 71 *Id.*, ¶¶ 23, 26.
- 72 *Id.*, ¶¶ 23, 28.
- 73 *Id.*, ¶ 31.
- 74 *Id.*, ¶ 32.
- 75 *Id.*
- 76 *Id.*
- 77 *Id.*
- 78 *Id.*, ¶ 33.
- 79 *Id.*, ¶ 29.
- 80 *See* Environmental Law Centre, University of Victoria, *Fixing Systemic Failures in BC's Mining Regulation: The Urgent Need for a Judicial Inquiry* at 37-9 (March 2017) (Environmental Law Centre Report), [http://www.elc.uvic.ca/wordpress/wp-content/uploads/2017/03/2016-03-02-MiningPublicInquiry\\_2017Mar8.pdf](http://www.elc.uvic.ca/wordpress/wp-content/uploads/2017/03/2016-03-02-MiningPublicInquiry_2017Mar8.pdf). *See also* Brian Lynch, *Clean up that damn mine*, JUNEAU EMPIRE (Aug. 17, 2018), <https://www.juneauempire.com/opinion/clean-up-that-damn-mine/>; Ed Schoenfeld, *British Columbia will clean up mine near Juneau*, KTOO PUBLIC MEDIA (Jan. 3, 2017), <http://www.ktoo.org/2017/01/03/british-columbia-will-clean-up-mine-upstream-of-juneau/>; Government of British Columbia, Tulsequah Mine Information, <https://www2.gov.bc.ca/gov/content/environment/air-land-water/site-permitting-compliance/tulsequah-mine>.
- 81 SLR, 2016 Aquatic Ecological Risk Assessment Tulsequah Chief Mine, Skeena Region at i (Apr. 2017), [https://www2.gov.bc.ca/assets/gov/environment/air-land-water/site-permitting-and-compliance/tulsequah/2017-04-17\\_tulsequah\\_mine\\_aera\\_slr\\_final\\_report.pdf](https://www2.gov.bc.ca/assets/gov/environment/air-land-water/site-permitting-and-compliance/tulsequah/2017-04-17_tulsequah_mine_aera_slr_final_report.pdf).
- 82 Sarah O'Neal, *A Review of the Tulsequah Chief Ecological Risk Assessment* at 2 (June 2016), <http://riverswithoutborders.org/wp-content/uploads/2017/03/Review-of-Tulsequah-Risk-Assessment.pdf>.
- 83 Environmental Law Centre Report, *supra* note 80, at 38.

- 84 *Id.*
- 85 *Id.*
- 86 *Id.*; Chambers Report, *supra* note 63, at ¶ 69.
- 87 Environmental Law Centre Report, *supra* note 80, at 38. On November 6, 2018, the B.C. Government issued a Request for Proposal for the development of a Remediation Plan that will enable the mitigation of the ongoing contamination from the old Tulsequah Chief Mine. *See* British Columbia, Ministry of Energy, Mines, and Petroleum Resources, Tulsequah Chief Mine Remediation and Closure Plan (Nov. 6, 2018), <https://www.bcbid.gov.bc.ca/open.dll/welcome?language=En> (search for “Tulsequah” under “Browse Using The Advanced Search.”).
- 88 Letter from Al Hoffman, Chief Inspector of Mines, to Bruce Brando, Chieftain Metals Inc., regarding Notice of Escalating Enforcement Action for Tulsequah Chief Mine at 2 (Dec. 13, 2018), <https://mines.empr.gov.bc.ca/api/document/5c1c05f25f9d470024338619/fetch>.
- 89 *See* British Columbia, Request for Proposals Tulsequah Chief Mine Remediation and Closure Plan (Nov. 6, 2018), <https://s3-us-west-2.amazonaws.com/ktoo/2018/11/RFP-Document-Tulsequah-Mine-Remediation-Closure.pdf>; BC First Nations Energy and Mining Council, *Using financial assurance to reduce the risk of mine non-remediation: Considerations for British Columbia and Indigenous governments* at 4 (Nov. 2019), <http://fnemc.ca/wp-content/uploads/2015/07/Using-FA-to-reduce-the-risk-of-mine-non-remediation.pdf>; Gordon Hoekstra, *B.C. issues request for proposal to clean up acidic Tulsequah Chief mine*, VANCOUVER SUN (Dec. 2, 2018), <https://vancouversun.com/business/local-business/b-c-issues-request-for-proposal-to-clean-up-acidic-tulsequah-chief-mine/>.
- 90 BC First Nations Energy and Mining Council, *supra* note 89 at 4.
- 91 Kendra Zamzow, PhD, Reliability of water quality predictions at the KSM mine relevant to aquatic life in the Unuk River at 10 (May 26, 2020) (Zamzow Assessment), attached here as Appendix 2.
- 92 Government of British Columbia, Reclamation and Closure: Securities, <https://www2.gov.bc.ca/gov/content/industry/mineral-exploration-mining/permitting/reclamation-closure/securities>.
- 93 *See e.g.*, Union of British Columbia Indian Chiefs, *Toward Financial Responsibility in British Columbia’s Mining Industry* (May 2016), pp. 75-78. [https://miningwatch.ca/sites/default/files/toward\\_financial\\_responsibility.pdf](https://miningwatch.ca/sites/default/files/toward_financial_responsibility.pdf); BC Ministry of Energy and Mines, *EY report & recommendations for BC’s mine reclamation financial security policy* February 2017, [https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/reclamation-and-closure/bc mem ey report on mine reclamation security final.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/reclamation-and-closure/bc_mem_ey_report_on_mine_reclamation_security_final.pdf).
- 94 Union of British Columbia Indian Chiefs, *Toward Financial Responsibility in British Columbia’s Mining Industry*, *supra* note 93, p. 77.
- 95 Chambers Report, *supra* note 63, ¶ 34.
- 96 *Id.*, ¶¶ 16, 17.
- 97 *Id.*, ¶ 16.
- 98 *Id.*, ¶¶ 17, 18.
- 99 *Id.*, ¶ 18.
- 100 *Id.*, ¶ 20.
- 101 *Id.*

- 102 *Id.*
- 103 *Id.*, ¶¶ 34-35.
- 104 *Id.*, ¶¶ 39-44.
- 105 *Id.*, ¶ 40.
- 106 *Id.*
- 107 *Id.*, ¶ 35.
- 108 *Id.*
- 109 J.R. Owen *et al.*, *Catastrophic tailings dam failures and disaster risk disclosure*, 42 INTERNATIONAL JOURNAL OF DISASTER RISK REDUCTION (2020), <https://www.sciencedirect.com/science/article/pii/S2212420919306648>.
- 110 Flávio Fonseca do Carmo *et al.*, *Fundão tailings dam failures: the environment tragedy of the largest technological disaster of Brazilian mining in global context*, 15 PERSPECTIVES IN ECOLOGY & CONSERVATION 145, 145 (2017) (Fonseca do Carmo *et al.*).
- 111 Dom Phillips, *Brazil dam disaster: firm knew of potential impact months in advance*, THE GUARDIAN (Mar. 1, 2018), <https://www.theguardian.com/world/2018/feb/28/brazil-dam-collapse-samarco-fundao-mining>.
- 112 Fonseca do Carmo *et al.*, *supra* note 110, at 146.
- 113 *Id.*
- 114 *Id.*
- 115 *Id.* at 145-46.
- 116 *Id.* at 148.
- 117 *Id.*
- 118 *Id.* at 146.
- 119 Luisa Torre & Patrik Camporez, *Life for Brazil's Krenak after Fundao dam collapse*, AL JAZEERA (July 3, 2017), <https://www.aljazeera.com/indepth/features/2017/05/life-brazil-krenak-fundao-dam-collapse-170518073228854.html>.
- 120 *Id.*
- 121 *Id.*
- 122 *Id.*
- 123 UNEP, *Mine Tailings Storage: Safety Is No Accident at 24-25* (2017), [https://gridarendal-website-live.s3.amazonaws.com/production/documents/:s\\_document/371/original/RRA\\_MineTailings\\_lores.pdf?1510660693](https://gridarendal-website-live.s3.amazonaws.com/production/documents/:s_document/371/original/RRA_MineTailings_lores.pdf?1510660693).
- 124 Ian Bailey, *Mount Polley mine still at risk for future tailings breach: analyst*, THE GLOBE AND MAIL (Aug. 14, 2016), <https://www.theglobeandmail.com/news/british-columbia/mount-polley-mine-still-at-risk-for-future-tailings-breach-analyst>.
- 125 Independent Expert Engineering Investigation and Review Panel, *Report on Mount Polley Tailings Storage Facility Breach*, at i, 6 (Jan. 30, 2015) (Expert Panel Report), <https://www.mountpolleyreviewpanel.ca/sites/default/files/report/ReportonMountPolleyTailingsStorageFacilityBreach.pdf>.

- <sup>126</sup> Environmental Law Centre Report, *supra* note 80, at 16.
- <sup>127</sup> *Id.*
- <sup>128</sup> *Id.* See also Jacinda Mack, *3 Years After The Mount Polley Disaster, Our Waters Are Still In Danger*, HUFFINGTON POST (July 28, 2017), [http://www.huffingtonpost.ca/jacinda-mack/3-years-after-the-mount-polley-disaster-our-waters-are-still-in\\_a\\_23049981/](http://www.huffingtonpost.ca/jacinda-mack/3-years-after-the-mount-polley-disaster-our-waters-are-still-in_a_23049981/).
- <sup>129</sup> Peter Moskowitz, *Mount Polley mine spill: A hazard of Canada's industry-friendly attitude?*, THE GUARDIAN (Aug. 13, 2014), <https://www.theguardian.com/environment/2014/aug/13/mount-polley-mine-spill-british-columbia-canada>.
- <sup>130</sup> Expert Panel Report, *supra* note 125, at i, 1.
- <sup>131</sup> *Id.* at iv.
- <sup>132</sup> *Id.* at 118; see also, *id.*, App. I, Tbl. I 5.2.1 at 10.
- <sup>133</sup> *Id.* at App. I at 10, 12.
- <sup>134</sup> *Id.* at 122-25, 139.
- <sup>135</sup> British Columbia, *Mining Compliance & Enforcement*, <https://www2.gov.bc.ca/gov/content/industry/mineral-exploration-mining/compliance-enforcement>.
- <sup>136</sup> British Columbia, Ministry of Energy and Mines, Health, Safety and Reclamation Code for Mines in British Columbia (revised June 2017), Section 10.1.3(f), [https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/health-and-safety/code-review/health\\_safety\\_and\\_reclamation\\_code\\_2017\\_rev.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/health-and-safety/code-review/health_safety_and_reclamation_code_2017_rev.pdf).
- <sup>137</sup> Environmental Law Centre Report, *supra* note 80, at 20.
- <sup>138</sup> Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector* at 5, 39 (May 2016), <http://www.bcauditor.com/sites/default/files/publications/reports/OAGBC%20Mining%20Report%20FINAL.pdf>. Dr. Chambers also explains that the substantial environmental risks posed by hard-rock mining operations can often be traced to government failures. Governments can fail to provide effective oversight of mining operations and tailings dam construction. Chambers Report, *supra* note 63, ¶ 43. High monitoring costs can reduce incentives to conduct adequate oversight. When governments pay attention to the environmental risks of mining, it is most often to the early stages of the mining process. They may promulgate regulations about initial design, but seldom make stipulations about ongoing stewardship. Governments may also often lack sufficient skilled staff to monitor conditions or address problems when they arise.
- <sup>139</sup> Auditor General's Report, *supra* note 138, at 39.
- <sup>140</sup> *Id.* at 4, 6.
- <sup>141</sup> *Id.* at 11.
- <sup>142</sup> *Id.* at 79.
- <sup>143</sup> *Id.* at 84.
- <sup>144</sup> *Id.* at 83.
- <sup>145</sup> *Id.* at 84.
- <sup>146</sup> *Id.* at 82.
- <sup>147</sup> *Id.*

- 148 *Id.* at 96.
- 149 *Id.* at 98-102.
- 150 *Id.* at 102.
- 151 *Id.* at 41.
- 152 *Id.* at 65-66.
- 153 *Id.* at 65.
- 154 *Id.* at 44-45.
- 155 *Id.* at 11.
- 156 *Id.* at 44.
- 157 *Id.* at 11, 45.
- 158 *Id.* at 45.
- 159 *Id.* at 22.
- 160 Judith Marshall, *Tailings Dam Spills at Mount Polley and Mariana: Chronicles of Disasters Foretold* at 37 (Aug. 2018), [https://www.wildernesscommittee.org/sites/default/files/2018-08/CCPA-BC\\_TailingsDamSpills.pdf](https://www.wildernesscommittee.org/sites/default/files/2018-08/CCPA-BC_TailingsDamSpills.pdf).
- 161 *Id.*
- 162 Environmental Law Centre Report, *supra* note 80, at 1.
- 163 *Id.* at 1-2, 11-14.
- 164 *Id.* App. C. at 69-70; Chambers Report, *supra* note 63, ¶ 82.
- 165 *Id.* App. C. at 71; Chambers Report, *supra* note 63, ¶ 82.
- 166 Chambers Report, *supra* note 63, ¶ 75.
- 167 *Id.*, ¶ 83.
- 168 *See, id.*
- 169 *See*, Office of the Alaska Lieutenant Governor, Status of Select British Columbia Mine Projects at 3 (June 2018) (Status of Select British Columbia Mine).
- 170 Chieftain Metals is a company incorporated in Ontario and based on Toronto. *Chieftain Metals Incorporated*, SYSTEM FOR ELECTRONIC DOCUMENT ANALYSIS AND RETRIEVAL, <https://www.sedar.com/DisplayProfile.do?lang=EN&issuerType=03&issuerNo=00034516>.
- 171 SRK Consulting, Big Bull Project, Tulsequah Chief Property, Technical Report Northern British Columbia at 6 (2010) (Big Bull 2010 Technical Report); JDS Energy & Mining Inc., Feasibility Study Technical Report, Tulsequah Chief Project, Northern British Columbia, Canada at 5-1 (Nov. 27, 2014) (Tulsequah Chief 2014 Technical Report).
- 172 Tulsequah Chief 2014 Technical Report, *supra* note 171, at 5-1.
- 173 *Id.* at 1-1; Big Bull 2010 Technical Report, *supra* note 171, at 6.
- 174 *Id.* at 11-12.
- 175 *See, supra* note 63, ¶ 53.
- 176 Tulsequah Chief 2014 Technical Report, *supra* note 171, at 1-20, Tbl. 1.10.

- <sup>177</sup> JDS Energy & Mining Inc., Technical Report for the Tulsequah Chief Project of Northern British Columbia, Canada at 1-8, 1-10 (Jan. 22, 2013).
- <sup>178</sup> *Id.* at 1-10.
- <sup>179</sup> Tulsequah Chief 2014 Technical Report, *supra* note 171, at 18-24 to 18-28.
- <sup>180</sup> *Id.* at 18-38, Tbl. 18.10.
- <sup>181</sup> *Id.*; *see, also id.* at 18-45 (describing the size of the tailings management facility); 18-38 (“The [tailings management facility] is located approximately 4 km upstream (north) of the main mine facilities on the east bank of the Shazah Creek.”); 5-2 (“Shazah Creek [is] close to its confluence with the Tulsequah River.”).
- <sup>182</sup> Chambers Report, *supra* note 63, ¶ 75.
- <sup>183</sup> Tulsequah Chief 2014 Technical Report, *supra* note 171, at 18-49. An acid treatment plant was also designed to treat discharges of acid mine drainage from the old mine works. *Id.* at 18-33.
- <sup>184</sup> Chambers Report, *supra* note 63, ¶¶ 33-34, 59.
- <sup>185</sup> *See* British Columbia Ministry of Sustainable Resource Management and British Columbia Ministry of Energy and Mines, Project Approval Certificate M02-01 (Dec. 12, 2002), <http://mines.nrs.gov.bc.ca/p/tulsequah-chief/authorizations>.
- <sup>186</sup> Project Approval Certificate M02-01 (Dec. 12, 2002), <https://mines.empr.gov.bc.ca/api/document/5ce875023e0b3d0025090b7b/fetch>; *see, e.g.*, *Tulsequah Chief Mine Project: Environmental Assessment Commitments Chart* (2012), <https://mines.empr.gov.bc.ca/api/document/5ce875028fc2cf00250e7877/fetch>.
- <sup>187</sup> Paul Tukker, *Owners of B.C.’s Tulsequah Chief mine site pushed into receivership*, CBC NEWS (Sept. 13, 2016), <http://www.cbc.ca/news/canada/north/tulsequah-chief-mine-bankrupt-receivership-1.3758668>; Status of Select British Columbia Mine Projects, *supra* note 169, at 3 (as of June 2018, “[t]he property remains in receivership, pending legal resolution.”).
- <sup>188</sup> *In the Matter of Environmental Assessment Certificate # M05-02*, Amendment #3 to Certificate #M05-02, <https://mines.empr.gov.bc.ca/api/document/5d8556caadfe470025458975/fetch>.
- <sup>189</sup> *See* Imperial Metals, Red Chris Mine, Overview (Oct. 2018), <https://www.imperialmetals.com/our-operations/red-chris-mine/overview> (indicating that commercial production started in July 2015, but the mine production dates back to February 17, 2015); Imperial Metals, Press Release, *Imperial Reports Red Chris Mine Receives Environmental Management Act (EMA) Permit* (June 15, 2015), [http://www.imperialmetals.com/assets/docs/2015-06-15\\_nr.pdf](http://www.imperialmetals.com/assets/docs/2015-06-15_nr.pdf) (showing that amended tailings discharge permit was issued on June 12, 2015).
- <sup>190</sup> British Columbia, BC Mine Information, *Red Chris Overview*, <https://mines.nrs.gov.bc.ca/p/red-chris/overview>.
- <sup>191</sup> Environmental Assessment Office, Red Chris Porphyry Copper-Gold Project Assessment Report at 5 (July 2005) (Red Chris EA Report).
- <sup>192</sup> Imperial Metals, *Imperial Provides Update on Red Chris 2019 Production and Exploration Programs* (Jan. 29, 2020), <https://www.globenewswire.com/news-release/2020/01/30/1977159/0/en/Imperial-Provides-Update-on-Red-Chris-2019-Production-and-Exploration-Programs.html?print=1>.
- <sup>193</sup> *Id.*

- <sup>194</sup> Klohn Crippen Berger Limited, *Tahltan Central Council: Red Chris Mine Site Review of Tailings Impoundment Design* at 4 (Oct. 2014), <https://thetyee.ca/Documents/2014/11/20/Klohn-Cripper-Berger-Tailings-Impoundment-Report.pdf>.
- <sup>195</sup> Red Chris EA Application, *supra* note 13, at 4-348.
- <sup>196</sup> *Id.*
- <sup>197</sup> Chambers Report, *supra* note 63, ¶ 75.
- <sup>198</sup> *Id.*, ¶ 49; Josh Massey, *Northwestern B.C. Mine Receives Discharge Permit*, TERRACE STANDARD (Feb. 5, 2015), <https://www.terracestandard.com/news/northwestern-b-c-mine-receives-discharge-permit/>.
- <sup>199</sup> Red Chris EA Application, *supra* note 13, at 4-348.
- <sup>200</sup> Red Chris EA Report, *supra* note 191, at 24.
- <sup>201</sup> Red Chris EA Application, *supra* note 13, at 4-349.
- <sup>202</sup> *Id.*
- <sup>203</sup> *See, e.g.*, Red Chris EA Report, *supra* note 191, at 27 (“E[nvironmental] A[ssessment] O[ffice] is satisfied that proposed mitigation measures and related commitments will prevent or reduce to acceptable levels any potential significant adverse water quality or [acid mine drainage/metals leaching] effects as they relate to the Project.”).
- <sup>204</sup> Red Chris Development Company, Environmental Memorandum, Re: Red Chris Monitoring Committee Environmental Report Dec 1, 2015 – Dec 22nd, 2015 (Dec. 2015), <http://dnr.alaska.gov/commis/opmp/Canadian-Mines/Attachments/Red%20Chris%20Monitoring%20Committee%20Environmental%20Report%20December%201-15%202015.pdf>.
- <sup>205</sup> Neil Bailey, British Columbia, Environmental Protection Officer, *An Administrative Penalty Referral, Red Chris Development Company Ltd., Permit 105017, 18 km southeast of Iskut BC, Effluent*, Report Number 071991 (Nov. 16, 2017), <https://mines.empr.gov.bc.ca/api/document/5b195640062a6100362b876e/fetch>.
- <sup>206</sup> Neil Bailey, British Columbia Environmental Protection Officer, *Non-compliance Advisory Letter, Permit 105017, 18 km southeast of Iskut, BC - Red Chris Mine, Effluent*, Report Number 100441 (Oct. 16, 2018), <https://mines.empr.gov.bc.ca/api/document/5c6c6f1927f4530024cf4370/fetch>.
- <sup>207</sup> Red Chris EA Report, *supra* note 191, at 81.
- <sup>208</sup> *Id.*
- <sup>209</sup> *Id.* at 23.
- <sup>210</sup> Red Chris EA Application, *supra* note 13, at 4-347 (“The North dump has been sited so that all contaminated toe drainage from the dump will gravity flow into the tailings impoundment area during the mine’s operational life.”).
- <sup>211</sup> Red Chris EA Report, *supra* note 191, at 23.
- <sup>212</sup> Red Chris EA Application, *supra* note 13, at 4-347.
- <sup>213</sup> *Id.*
- <sup>214</sup> Red Chris EA Report, *supra* note 191, at 23.

- <sup>215</sup> Copper Fox Metals, *Copper Fox Announces Corporate Update on Schaft Creek Joint Venture and Other Projects* (Oct. 31, 2019), <https://www.copperfoxmetals.com/news/copper-fox-announces-corporate-update-on-schaft-cr-49270/>.
- <sup>216</sup> Copper Fox Metals is incorporated in Alberta and based in Calgary. *Copper Fox Metals Inc.*, SYSTEM FOR ELECTRONIC DOCUMENT ANALYSIS AND RETRIEVAL, <https://www.sedar.com/DisplayProfile.do?lang=EN&issuerType=03&issuerNo=00020511>.
- <sup>217</sup> Teck Resources is incorporated in Canada and based in Vancouver. *Teck Resources Limited*, SYSTEM FOR ELECTRONIC DOCUMENT ANALYSIS AND RETRIEVAL, <https://www.sedar.com/DisplayProfile.do?lang=EN&issuerType=03&issuerNo=00001787>.
- <sup>218</sup> Phyllis W. Scannell, *Stikine River Mining Activity Risk Assessment*, Alaska Department of Fish and Game, Technical Report No. 10-06 at 74-75 (2012) (Scannell).
- <sup>219</sup> *Id.* at 75.
- <sup>220</sup> Copper Fox Metals, *Overview*, <https://www.copperfoxmetals.com/projects/schaft-creek-project/overview/>.
- <sup>221</sup> *Id.*
- <sup>222</sup> *Id.* at 75-76; Tetra Tech, *Feasibility Study on the Schaft Creek Project*, BC, Canada at 1-18; 18-19 to 18-21; 18-22, Fig. 18.6; 18-24 (Jan. 23, 2013) (Schaft Creek 2013 Feasibility Study).
- <sup>223</sup> Chambers Report, *supra* note 63, ¶ 75.
- <sup>224</sup> Scannell, *supra* note 218, at 76.
- <sup>225</sup> *Id.*
- <sup>226</sup> *Id.*
- <sup>227</sup> Letter from Warren Yau (Schaft Creek Project, Project Director) to Shelley Murphy (B.C. Environmental Assessment Office) (Mar. 22, 2016), <https://projects.eao.gov.bc.ca/api/public/document/5887d1fa3fa55712b70ab3e7/download/Letter%20from%20Warren%20Yau%20dated%20March%2022%2C%202016.pdf>; Government of Canada, Schaft Creek Mine Project, Canadian Impact Assessment Registry, <https://iaac-aeic.gc.ca/050/evaluations/proj/57852>.
- <sup>228</sup> *Id.* In April of 2019, Copper Fox announced that the Schaft Creek Joint Venture had “agreed to further evaluate the identified engineering improvements options to reduce capital and operating costs assuming a 130 ktpd [thousand tons per day]” and will conduct “a review of the site characteristics of potential revisions to key infrastructure elements, e.g., tailing storage, conveyance systems, ore and waste transport options, and mill location” in 2019. Copper Fox Metals, *Copper Fox Announces Schaft Creek* (Apr. 17, 2019), Update <https://copperfoxmetals.com/news/copper-fox-announces-schaft-creek-update-44131/>. The 2019 project goals also included “collection of baseline environmental data and ongoing work with the Tahltan Nation in British Columbia.” Copper Fox Metals, *Overview*, <https://www.copperfoxmetals.com/projects/schaft-creek-project/overview/>.
- <sup>229</sup> Galore Creek Mining Corporation, <https://www.gcmc.ca/>.
- <sup>230</sup> Newmont, Press Release, *Newmont Acquires 50 Percent Stake in Galore Creek Project in British Columbia* (July 26, 2018), <https://www.newmont.com/newsroom/newsroom-details/2018/Newmont-Acquires-50-Percent-Stake-in-Galore-Creek-Project-in-British-Columbia/default.aspx>. Newmont is headquartered in Greenwood Village, Colorado. Newmont, *About Us*, <https://www.newmont.com/about-us/default.aspx>.

- <sup>231</sup> Teck Resources, *About Galore Creek*, <https://www.teck.com/operations/canada/projects/galore-creek-project/>. Teck Resources is incorporated in Canada and headquartered in Vancouver. *Teck Resources Limited*, SYSTEM FOR ELECTRONIC DOCUMENT ANALYSIS AND RETRIEVAL, <https://www.sedar.com/DisplayProfile.do?lang=EN&issuerType=03&issuerNo=00001787>.
- <sup>232</sup> AMEC Americas Limited, Galore Creek Project, British Columbia, NI 43-101 Technical Report on Pre-Feasibility Study at 1-2 & 14-13, Tbl. 14-4 (Sept. 2011) (Galore Creek Technical Report).
- <sup>233</sup> Scannell, *supra* note 218, at 28; Transport Canada *et al.*, Galore Creek Comprehensive Study Report at 36, 38-39 (Jan. 19, 20017) (Galore Creek Comprehensive Study Report) (“The effects of [potentially acid generating] waste rock will be controlled by submergence in the tailings and waste rock impoundment, adjacent to but separate from the tailings disposal area.”).
- <sup>234</sup> Chambers Report, *supra* note 63, ¶ 75.
- <sup>235</sup> Galore Creek Comprehensive Study Report, *supra* note 233, at 76 (“Other variables indicated elevated concentrations of several elements known to be associated with specific minerals in the deposit. These included copper (chalcopyrite), zinc (sphalerite), lead (galena) and fluorine (fluorite). Initial results from kinetic tests demonstrated that most elements leach at low rates. However, copper, cadmium, fluoride, manganese, selenium, sulphate and zinc were leached at concentrations greater than typical water quality criteria. The water quality model determined that other variables, including calcium, barium, [aluminum], iron, boron, molybdenum, lead and antimony, would have significant loadings from waste rock to the tailings facility.”).
- <sup>236</sup> Rescan Environmental Services Ltd., Galore Creek Project Application for Environmental Assessment Certificate at 7-231 (June 2006).
- <sup>237</sup> *Id.*
- <sup>238</sup> *See*, section IV.B.4.
- <sup>239</sup> British Columbia Ministry of Environment and Ministry of Energy, Mines and Petroleum Resources, Environmental Assessment Certificate #M06-03 (Feb. 16, 2007), <https://projects.eao.gov.bc.ca/p/galore-creek-copper-gold-silver/docs>.
- <sup>240</sup> Galore Creek Technical Report, *supra* note 233, at 20-1.
- <sup>241</sup> *See*, Shane Lasley, *Novagold gets US\$275M for Galore Creek*, NORTH OF 60 MINING NEWS (Aug. 10, 2018), <https://www.miningnewsnorth.com/story/2018/08/03/news/novagold-gets-us275m-for-galore-creek/5290.html>; Galore Creek Mining Corporation, *The Project: Current Status*, <https://www.gcmc.ca/the-project/current-status/>.
- <sup>242</sup> Pretium Resources, *Brucejack Mine*, <https://www.pretivm.com/projects/brucejack-overview/default.aspx>; Pretium Resources is a company incorporated in British Columbia, and based in Vancouver. *Pretium Resources Incorporated*, SYSTEM FOR ELECTRONIC DOCUMENT ANALYSIS AND RETRIEVAL, <https://www.sedar.com/DisplayProfile.do?lang=EN&issuerType=03&issuerNo=00030613>; Pretium Resources Inc., Brucejack Gold Mine Project: Application for an Environmental Assessment Certificate / Environmental Impact Statement at 1-23 (June 2014) (Brucejack EA Application). The mine site will sit on the Brucejack Property, a 3,199-hectare area comprised of eleven mineral claims. *Id.* at 1-13. However, Pretium owns claims covering a larger area including the Snowfield and Bowser properties. *See, id.* at 1-13, Fig. 5.3-1.
- <sup>243</sup> Canadian Environmental Assessment Agency, Brucejack Gold Mine Project, Environmental Assessment Report at 23 & 24, Fig. 5 (July 2015) (Brucejack EA Report). The mine site will sit on the Brucejack Property, a 3,199-hectare area comprised of eleven mineral claims. Brucejack EA

- Application, *supra* note 242, at 1-13. However, Pretium Resources owns claims covering a much larger area including the Snowfield and Bowser properties. *See id.* at 1-13 & 1-14, Fig. 1.5-1.
- <sup>244</sup> Brucejack EA Application, *supra* note 242, at 1-29.
- <sup>245</sup> Brucejack EA Report, *supra* note 243, at 7.
- <sup>246</sup> *Id.* at 7, 11; Brucejack EA Application, *supra* note 242, at 1-30.
- <sup>247</sup> *In the Matter of Environmental Assessment Certificate #M15-01*, Amendment #5 to Certificate #M15-01 (Nov. 15, 2018), [https://projects.eao.gov.bc.ca/api/public/document/5bedec668c05f70024016779/download/brucejack\\_amendment%205%20order\\_final.pdf](https://projects.eao.gov.bc.ca/api/public/document/5bedec668c05f70024016779/download/brucejack_amendment%205%20order_final.pdf); Pretium, *Brucejack Mine*, <https://www.pretium.com/brucejack/overview/default.aspx>.
- <sup>248</sup> Tetra Tech and Pretium, *Technical Report on the Brucejack Gold Mine, Northwest British Columbia* at 16-15 (Mar. 9, 2020), [https://s23.q4cdn.com/277467366/files/doc\\_downloads/technical\\_reports/PVG-Technical-Report-\(2020\)-\(Final\).pdf](https://s23.q4cdn.com/277467366/files/doc_downloads/technical_reports/PVG-Technical-Report-(2020)-(Final).pdf); *see also id.* at 20-30 (“all waste rock is assumed to be [Potentially Acid Generating]”).
- <sup>249</sup> Brucejack EA Application, *supra* note 242, at 13-73 to 13-74.
- <sup>250</sup> *Id.* at 5-115 (“Over time, as appropriate voids become available underground, much of this rock will be used as backfill. About 37%, or 1.58 Mt, of waste rock generated from mining activities will be disposed of in the lake.”); *id.* at 5-118 (“Approximately 7.1 Mt of the flotation tailings will be used in paste backfill in the underground workings, while the rest will be deposited in Brucejack Lake.”).
- <sup>251</sup> Pretium Resources Inc., *Project History*, <https://www.pretium.com/projects/History/default.aspx>.
- <sup>252</sup> Seabridge is a company incorporated under the Canada Business Corporations Act and based in Toronto. *Seabridge Gold Incorporated*, SYSTEM FOR ELECTRONIC DOCUMENT ANALYSIS AND RETRIEVAL, <https://www.sedar.com/DisplayProfile.do?lang=EN&issuerType=03&issuerNo=00007531>.
- <sup>253</sup> Seabridge, Featured Projects: KSM, <http://seabridgegold.net/projects.php>; Seabridge Gold, Backgrounder, [http://seabridgegold.net/pdf/KSM\\_fact\\_sheet.pdf](http://seabridgegold.net/pdf/KSM_fact_sheet.pdf).
- <sup>254</sup> Seabridge, KSM EA Application, *supra* note 19; *see also id.* Fig. 4.1-1 (showing the Mine Site and other parts of the KSM project relative to the Unuk River).
- <sup>255</sup> *Id.* at 4-5.
- <sup>256</sup> *Id.* at 4-21.
- <sup>257</sup> *Id.* at 4-5.
- <sup>258</sup> Shane Lashley, *Looking Below 53 yrs of KSM Gold Reserves*, NORTH OF 60 MINING NEWS (Dec. 20, 2019), <https://www.miningnewsnorth.com/story/2019/12/20/northern-neighbors/looking-below-53-yrs-of-ksm-gold-reserves/6107.html>.
- <sup>259</sup> Seabridge, KSM EA Application, *supra* note 19 at 4-5.
- <sup>260</sup> *Id.* at 4-22 (“[T]he majority of the KSM Project rock is potentially acid-generating (PAG), particularly in the vicinity of the ore deposits. Substantial volumes of non-ore (waste) PAG rock must be mined in order to access the ore.”).
- <sup>261</sup> Seabridge, KSM Mine Project Environmental Effects Summary at 1 (July 2013) (KSM Environmental Effects Summary) (“Mined waste rock will be stored in rock storage facilities (RFSs) in the Mitchell and McTagg creek valleys and placed as backfill in the mined-out Sulphurets Pit.”).

- 262 KSM EA Application, *supra* note 19, at 4-137. The water storage facility will also receive effluent from a selenium treatment plant that will treat the selenium contaminated water that has been exposed to the waste rock from the Kerr Pit. *Id.* at 4-158.
- 263 *Id.* at 4-137.
- 264 *Id.* at 4-149.
- 265 *Id.*
- 266 Canadian Environmental Assessment Agency, KSM (Kerr-Sulphurets-Mitchell) Project: Comprehensive Study Report at 8 (July 2014), [http://ksmproject.com/wp-content/uploads/2014/07/34-081-CEAA\\_KSM\\_EN\\_R4\\_X4.pdf](http://ksmproject.com/wp-content/uploads/2014/07/34-081-CEAA_KSM_EN_R4_X4.pdf).
- 267 Chambers Report, *supra* note 63, ¶ 59.
- 268 *Id.*
- 269 *Id.*, ¶¶ 65-66.
- 270 Erin K. Sexton *et al.*, *Canada's Mines Pose Transboundary Risks*, 368 SCIENCE 376 (Apr. 24, 2020), <https://science.sciencemag.org/content/368/6489/376.2>.
- 271 *Id.*
- 272 *Id.*
- 273 *Id.*
- 274 *See*, British Columbia Ministry of Environment and Ministry of Energy and Mines, Environmental Assessment Certificate #M14-01 (July 29, 2014), <https://projects.eao.gov.bc.ca/p/ksm/docs>.
- 275 KSM Mining ULC, KSM Project, *KSM: Working with Alaska*, <https://ksmproject.com/>.
- 276 Chambers Report, *supra* note 63, ¶ 68.
- 277 *Id.*, ¶ 59; Zamzow Assessment, *supra* note 91, at 1. Baseline mean concentrations for metals analyzed in this petition were as follows: aluminum: 24.3 ug/L in November-April, 57 ug/L in May-October; cadmium 0.1924.3 ug/L in November-April, 191 ug/L in May-October; copper: 1.95 ug/L in November-April, 2.64 ug/L in May-October; selenium: 0.88 ug/L in November-April, 12.5 ug/L in May-October; zinc: 8.4 ug/L in November-April, 4.9 ug/L in May-October. KSM EA Application, *supra* note 19, Tbl. 14.1-1.
- 278 Seabridge Gold Inc., KSM Mine Project Environmental Effects Summary, *supra* note 261, at 13.
- 279 *Id.*
- 280 Zamzow Assessment, *supra* note 91, at 2.
- 281 *See*, section IV.B.1.
- 282 Chambers Report, *supra* note 63, ¶¶ 31-33; Zamzow Assessment, *supra* note 91, at 10-11.
- 283 Zamzow Assessment, *supra* note 91, at 7.
- 284 *Id.*
- 285 *Id.*
- 286 *Id.*
- 287 *Id.* at 8. This was based on the 85th percentile concentration, which is what the State of Alaska looks at when evaluating water quality discharge permits. *Id.*

288 *Id.* at 7.  
289 *Id.* at 8.  
290 *Id.* at 6.  
291 *Id.* at 2, 8-9.  
292 *Id.* at 9-10.  
293 *Id.* at 10.  
294 *Id.*  
295 *Id.* at 11.  
296 Chambers Report, *supra* note 63, ¶¶ 61-66.  
297 *See, infra* section IV.B.5.  
298 Chambers Report, *supra* note 63, ¶ 67.  
299 *Id.*, ¶ 59; Zamzow Assessment, *supra* note 91, at 1.  
300 Report of Sarah O’Neal, ¶¶ 1-2 (May 29, 2020) (O’Neal Report), attached here as Appendix 3.  
301 *Id.*, ¶¶ 54, 100.  
302 *Id.*, ¶ 100.  
303 *Id.*, ¶ 51. Toxicological studies have established these concentrations in laboratories, but in the field, variability in factors that contribute to toxic effects, such as alkalinity, dissolved organic carbon, and temperature make the effects of particular concentrations difficult to predict with precision. *Id.*, ¶ 53. In the absence of comprehensive knowledge about each of these variables at a given location, it is not possible to predict exactly what toxicological effects would result from a given concentration of a metal. *Id.*  
304 *Id.*, ¶¶ 54, 103.  
305 *Id.*, ¶ 87.  
306 *Id.*  
307 *Id.*  
308 *Id.*  
309 *Id.*, ¶¶ 87-88.  
310 *Id.*, ¶ 90.  
311 *Id.*, ¶ 91.  
312 *Id.*, ¶ 76.  
313 *Id.*  
314 *Id.*  
315 *Id.*, ¶ 77.  
316 *Id.*, ¶ 78.  
317 *Id.*  
318 *Id.*

- 319 *Id.*
- 320 *Id.*, ¶ 79.
- 321 *Id.*
- 322 *Id.*
- 323 *Id.* ¶ 80.
- 324 *Id.*
- 325 *Id.*
- 326 *Id.*
- 327 *Id.*, ¶ 81.
- 328 *Id.*
- 329 *Id.*
- 330 *Id.*, ¶ 82.
- 331 *Id.*, ¶ 83.
- 332 *Id.*, ¶ 57.
- 333 *Id.*
- 334 *Id.*
- 335 *Id.*, ¶ 58.
- 336 *Id.*, ¶¶ 9, 58.
- 337 *Id.*, ¶ 58.
- 338 *Id.*
- 339 *Id.*
- 340 *Id.*
- 341 *Id.*, ¶ 59.
- 342 *Id.*
- 343 *Id.*
- 344 *Id.*, ¶ 60.
- 345 *Id.*, ¶ 62.
- 346 *Id.*, ¶ 65.
- 347 *Id.*
- 348 *Id.*, ¶ 66.
- 349 *Id.*, ¶ 67.
- 350 *Id.*, ¶ 68.
- 351 *Id.*, ¶ 69.
- 352 *Id.*
- 353 *Id.*, ¶ 70.

- 354 *Id.*
- 355 *Id.*, ¶ 71.
- 356 *Id.*
- 357 *Id.*
- 358 *Id.*, ¶ 74.
- 359 *Id.*, ¶ 93.
- 360 *Id.*, ¶ 94.
- 361 *Id.*
- 362 *Id.*
- 363 *Id.*, ¶ 95.
- 364 *Id.*
- 365 *Id.*
- 366 *Id.*, ¶ 96.
- 367 *Id.*, ¶ 97.
- 368 *Id.*, ¶ 98.
- 369 *Id.*, ¶ 99.
- 370 *Id.*, ¶ 101.
- 371 *Id.*
- 372 *Id.*
- 373 *Id.*, ¶ 103.
- 374 *Id.*
- 375 *See*, section IV.B.2.
- 376 *See*, section IV.B.3.
- 377 *Id.*
- 378 Inter-Am. Ct. H.R., *Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, 1989 Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 42 (July 14, 1989) (Inter-Am. Ct. H.R., *Interpretation of the American Declaration*).
- 379 *Grand Chief Michael Mitchell v. Canada*, Case 12.435, Inter-Am. C.H.R., Report No. 61/08, OEA/Ser.L/V/II.118, doc. 70 rev. 2, ¶ 64 (Jul. 25, 2008) (*Grand Chief Michael Mitchell v. Canada*); *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, ¶ 97 (2002) (*Dann*); *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Inter-Am. C.H.R. Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1, ¶ 87 (2004) (*Belize Maya*).
- 380 Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (American Convention), art. 29; *see, also* Inter-Am. Ct. H.R., *Interpretation of the American Declaration*, *supra* note 378, ¶ 42.
- 381 *Grand Chief Michael Mitchell v. Canada*, *supra* note 379, ¶ 63 (citing Inter-Am. Ct. H.R., *Interpretation of the American Declaration*, *supra* note 378, ¶ 37).

- <sup>382</sup> Inter-Am. Ct. H.R., *Advisory Opinion OC-23/17, Human Rights and the Environment*, ¶ 44 (15 November 2017) (Inter-Am. Ct. H.R., *Human Rights and the Environment*). (“[L]a Corte desea subrayar que, aunque no le corresponde emitir una interpretación directa de los distintos instrumentos de derecho ambiental, indudablemente los principios, derechos y obligaciones allí contenidos contribuyen en forma decisiva a fijar el alcance de la Convención Americana.” (“[T]he Court wishes to emphasize that, although it is not issuing a direct interpretation of the various instruments of environmental law, undoubtedly the principles, rights and obligations contained therein contribute decisively to establishing the scope of the American Convention”)) (*translation by the authors*).
- <sup>383</sup> *Id.* (“En virtud de la materia sometida a consulta, la Corte tendrá en consideración, como fuentes de derecho internacional adicionales, otras convenciones relevantes a fin de efectuar una interpretación armónica de las obligaciones internacionales en los términos de la disposición citada. En adición, la Corte considerará las obligaciones aplicables y la jurisprudencia y decisiones al respecto, así como las resoluciones, pronunciamientos y declaraciones referentes al tema que hubieren sido adoptados a nivel internacional.” (“By virtue of the matter submitted for consultation, the Court will take into consideration, as sources of additional international law, other relevant conventions in order to have a harmonious interpretation of international obligations in the terms of the aforementioned provision. In addition, the Court will consider the applicable obligations and the jurisprudence and decisions in this regard, as well as the resolutions, pronouncements and statements referring to the topic that have been adopted at the international level.”)) (*translation by the authors*).
- <sup>384</sup> *Id.*, ¶ 130.
- <sup>385</sup> *See, e.g.*, Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights (Protocol of San Salvador), art. 11, Nov. 14, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156; Organization of African Unity, African Charter on Human and Peoples’ Rights, art. 24, June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force Oct. 21, 1986) (African Charter).
- <sup>386</sup> Inter-Am. Ct. H.R., *Human Rights and the Environment*, *supra* note 382, ¶ 46.
- <sup>387</sup> *Id.*, ¶ 47, citing *Cfr. Case of Kawas Fernández Vs. Honduras*, 2009 Inter-Am. Ct. H.R. (ser C) No. 196 (Apr. 3, 2009), ¶ 148. The Court also referred to other regional human rights bodies and courts, United Nations treaty bodies, and United Nations Special Rapporteurs, among other sources. *See generally id.*, ¶¶ 46-70.
- <sup>388</sup> *Id.*, ¶¶ 64, 66.
- <sup>389</sup> Inter-Am. C.H.R., *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System* (Inter-Am. C.H.R., *Indigenous and Tribal Peoples’ Rights*) (Dec. 30, 2009), ¶ 190. The Commission has referred to numerous international instruments’ recognition of the duty to protect the environment. *See, e.g.*, International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 1(2), Dec. 16, 1966, 6 I.L.M. 360, 365, 993 U.N.T.S. 3 (signed by Canada on May 19, 1976); Convention on the Rights of the Child, arts. 24, 27, and 30, Nov. 20, 1989, 28 I.L.M. 1448, 1577 U.N.T.S. 3 (ratified by Canada on Dec. 13, 1991); Protocol of San Salvador, *supra* note 385, art. 11; African Charter, *supra* note 385, art. 23 (“[a]ll peoples shall have the right to a generally satisfactory environment favorable to their development.”); Organization of African Unity, African Charter on the Rights and Welfare of the Child, July 1990, art. 14, OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999) (“to ensure the provision of...safe drinking water.”); Final Draft Charter of Fundamental Rights of the European Union, Sept. 28, 2000, art. 37, 2000 O.J. (C 364) 1, 17 (“A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”); Convention on Biological Diversity, pmbl. (June 5, 1992), 31 I.L.M. 818, 1760 U.N.T.S. 79 (entered into force

Dec. 29, 1993); G.A. Res. 45/94, ¶ 1, U.N. GAOR, 45<sup>th</sup> Sess., U.N. Doc. A/45/749 (1990) (“all individuals are entitled to live in an environment adequate for their health and well-being”); G.A. Res. 55/107, ¶ 3(k), U.N. GAOR, 55<sup>th</sup> Sess., U.N. Doc. A/RES/55/107 (2000) (“affirm[ing] that a democratic and equitable international order requires, inter alia, the realization of ... the entitlement of every person and all peoples to a healthy environment”); United Nations Office of the High Commissioner for Human Rights, ¶ 3(k), CHR Res. 2000/62, U.N. ESCOR, 56<sup>th</sup> Sess., U.N. Doc. E/CN.4/RES/2000/62 (2000) (“a democratic and equitable international order requires, inter alia, the realization of ... [t]he right to a healthy environment for everyone.”).

<sup>390</sup> Inter-Am. C.H.R., *Report on the Human Rights Situation in Ecuador* (Inter-Am. C.H.R., *Ecuador Report*), OEA/Ser.L/V/II.96, Doc. 10 rev. 1 (24 April 1997), ch. IX.

<sup>391</sup> Inter-Am. Ct. H.R., *Human Rights and the Environment*, *supra* note 382, ¶ 125. Other obligations that the Court specified related to environmental protection include the obligation of cooperation and procedural obligations.

<sup>392</sup> *Id.*, ¶ 127.

<sup>393</sup> *Id.*, ¶ 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>394</sup> *See, generally id.*, ¶¶ 127-140.

<sup>395</sup> *Id.*, ¶ 142.

<sup>396</sup> *Id.*, ¶¶ 142, 145-169.

<sup>397</sup> *Id.*, ¶¶ 133, 140.

<sup>398</sup> Inter-Am. C.H.R., *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) vs. Argentina* (Feb. 6, 2020).

<sup>399</sup> *Id.* at ¶¶ 186-190.

<sup>400</sup> *Id.* at ¶ 287.

<sup>401</sup> *Id.* at ¶ 289.

<sup>402</sup> Inter-Am. C.H.R., *Ecuador Report*, *supra* note 390, ch. VIII. The Commission further noted, “the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention [on Human Rights].” *Id.*, ch. VIII.

<sup>403</sup> *Belize Maya*, *supra* note 379, ¶ 150.

<sup>404</sup> Inter-Am. Ct. H.R., *Human Rights and the Environment*, *supra* note 382, ¶ 180 (“Por tanto, esta Corte entiende que, los Estados deben actuar conforme al principio de precaución, a efectos de la protección del derecho a la vida y a la integridad personal, en casos donde haya indicadores plausibles que una actividad podría acarrear daños graves e irreversibles al medio ambiente, aún en ausencia de certeza científica. Por tanto, los Estados deben actuar con la debida cautela para prevenir el posible daño.” (“Therefore, this Court understands that States must act in accordance with the precautionary principle, for the purposes of protecting the right to life and personal integrity, in cases where there are plausible indicators that an activity could cause serious and irreversible harms to the environment, even in the absence of scientific certainty. Therefore, States must act with due caution to prevent possible harm.”)) (*translation by the authors*).

- 405 *Id.*
- 406 Canadian Environmental Protection Act, 1999 SC, ch. 33 (Can.), pmbl.
- 407 *Id.*, ¶ 2(1)(a).
- 408 *See, 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 SCR 241.
- 409 *See, e.g.*, United Nations Framework Convention on Climate Change, art. 3.3, May 9, 1992, 31 I.L.M. 849 (ratified by Canada on Dec. 4, 1992) (“The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects;” “lack of full scientific certainty should not be used as a reason for postponing [cost-effective] measures” in the face of “threats of serious or irreversible damage”); Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals, pmbl., ¶¶ 2-3, June 24, 1998, U.N. Doc. E/ECE/EB.AIR/66/1999, U.N. Sales No. E.99.II.E.21 (1999); Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, arts. 5-6, Annex II, U.N. Doc. A/CONF.164/37 (Aug. 4, 1995) (ratified by Canada on Aug. 3, 1999).
- 410 OAS General Assembly, American Declaration on the Rights of Indigenous Peoples, AG/RES.2888 (XLVI-O/16) (June 15, 2016) (American Declaration on the Rights of Indigenous Peoples) (emphasis added).
- 411 *See, id.*, art. XXVIII (“The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.”).
- 412 *See, e.g.*, International Covenant on Civil and Political Rights, art. 2.1, Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171 (acceded to by Canada on May 19, 1976) (ICCPR).
- 413 American Convention, *supra* note 380, art. 11.
- 414 Inter-Am. Ct. H.R., *Human Rights and the Environment*, *supra* note 382, ¶ 102 (*translation by the authors*) (“El ejercicio de la jurisdicción por parte del Estado de origen frente a daños transfronterizos se basa en el entendimiento de que es el Estado, en cuyo territorio o bajo cuya jurisdicción se realizan estas actividades, quien tiene el control efectivo sobre las mismas y está en posición de impedir que se cause un daño transfronterizo que afecte el disfrute de los derechos humanos de individuos fuera de su territorio.”). The Court defines “State of origin” as the State under whose jurisdiction or control an incident occurs or could occur which causes environmental harm. *Id.*, n.195.
- 415 *Id.*, ¶ 104.g. (*translation by the authors*) (“Los Estados están obligados a adoptar todas las medidas necesarias para evitar que las actividades desarrolladas en su territorio o bajo su control afecten los derechos de las personas dentro o fuera de su territorio.”).
- 416 *Id.*, ¶¶ 142, 145-169.
- 417 *See, e.g.*, *Andreou v. Turkey*, Application No. 45653/99, Eur. Ct. H.R. (June 3, 2008), <http://hudoc.echr.coe.int/eng-press?i=001-88068> (admissibility decision); *Bastidas Meneses v. Ecuador*, Petition 189-03, Report No. 153/11, ¶ 18, Inter-Am. Comm’n H.R. (2011), <http://www.oas.org/en/iachr/decisions/admissibilities.asp>.
- 418 Joint Statement on “Human Rights and Climate Change” (Sept. 16, 2019), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E>.
- 419 *Id.*
- 420 Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) provides: “States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against

any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.” ICERD, Dec. 1, 1965, 660 U.N.T.S. 195 (ratified by Canada on Oct. 14, 1970). *See, also*, Human Rights Committee, Concluding observations on the sixth periodic report of Canada, CCPR/C/CAN/CO/6 (13 August 2015) (The Committee stated its concern: “about allegations of human rights abuses by Canadian companies operating abroad, in particular mining corporations, and about the inaccessibility to remedies by victims of such violations. The Committee regrets the absence of an effective independent mechanism with powers to investigate complaints alleging abuses by such corporations that adversely affect the enjoyment of the human rights of victims, and of a legal framework that would facilitate such complaints (art. 2).”). The Human Rights Committee has addressed the extra-territorial obligations of other states as well in the context of their surveillance of communications outside of their territories. *See* Human Rights Committee, Concluding observations on the fourth report of the United States of America, CCPR/C/USA/CO/4, para. 22 (23 April 2014); Human Rights Committee, Concluding observations on the fifth periodic report of France, CCPR/C/FRA/CO/5, para. 12 (16 August 2015); Human Rights Committee, Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/7 (16 August 2015).

- <sup>421</sup> CERD, Concluding Observations on Canada, CERD/C/CAN/CO/18, ¶ 17 (25 May 2007); *see also* CERD, Concluding observations on Australia, CERD/C/AUS/CO/15-17, ¶ 13 (27 August 2010), (encouraging Australia to “take appropriate legislative or administrative measures to prevent acts of Australian corporations which negatively impact on the enjoyment of rights of indigenous peoples domestically and overseas and to regulate the extra-territorial activities of Australian corporations abroad. The Committee also encourages the State party to fulfil its commitments under the different international initiatives it supports to advance responsible corporate citizenship.”).
- <sup>422</sup> CERD, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, CERD/C/GBR/CO/18–20, ¶ 29 (14 September 2011); *see also* CERD, Concluding Observations: United States, CERD/C/USA/CO/6, ¶ 30 (8 May 2008) (“the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in the State party which negatively impact on the enjoyment of rights of indigenous peoples in territories outside the United States. In CERD/C/USA/CO/6 page 11 particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in the United States accountable.”).
- <sup>423</sup> Inter-Am. Ct. H.R., *Human Rights and the Environment*, *supra* note 382, ¶ 102.
- <sup>424</sup> *See, e.g., id.*, ¶ 47.
- <sup>425</sup> *See, e.g., Xákmok Kásek Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 291 (Aug. 24, 2010) (*Xákmok*); *Case of the Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007) (*Saramaka*); *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006) (*Sawhoyamaya*); *Case of the Yakyé Axa Indigenous Community v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005) (*Yakyé Axa*); *Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001) (*Awas Tingni*). *See also* Inter-Am. Ct. H.R., *Human Rights and the Environment*, *supra* note 382, ¶ 48.
- <sup>426</sup> Inter-Am. C.H.R., *Ecuador Report*, *supra* note 390, ch. IX (internal citation omitted).
- <sup>427</sup> Inter-Am. C.H.R., *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, OEA/Ser.L/V/II. Doc.47/15 (*Extractive Industries and Indigenous Peoples’ Rights Report*), at 10.

- <sup>428</sup> See, e.g., *Awás Tingni*, *supra* note 425; *Yakye Axa*, *supra* note 425; *Xákmok*, *supra* note 425 (Inter-American Court cases); *Dann*, *supra* note 379, ¶ 125; *Belize Maya*, *supra* note 379, ¶ 95; *Case of Yanomami Indians v. Brazil*, Case 7615, Inter-Am. C.H.R., OEA/Ser.L/V/II.66, doc. 10 rev. 1, ¶¶ 7-8 (1985) (*Yanomami*).
- <sup>429</sup> See, e.g., *Dann*, *supra* note 379, ¶ 126 (“[T]he Commission has since its establishment in 1959 recognized and promoted respect for the rights of indigenous peoples of this Hemisphere.”).
- <sup>430</sup> See, e.g., *Awás Tingni*, *supra* note 425, ¶ 151 (American Convention’s protection of “property” means protection of property rights as understood by the indigenous community involved); *Case of Aloeboetoe v. Suriname, Reparations*, 1993 Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 58 (Sept. 10, 1993) (disregarding the State’s domestic family law for purposes of determining which persons were the next-of-kin of the victims and awarding reparations based on the matrilineal and polygamist customs of the Saramaka people to which the victims belonged).
- <sup>431</sup> See, e.g., *Yanomami*, *supra* note 428, ¶ (“[I]nternational law in its present state ... recognizes the right of ethnic groups to special protection ... for all those characteristics necessary for the preservation of their cultural identity.”).
- <sup>432</sup> See, *Dann*, *supra* note 379, ¶ 125 (citing Inter-Am. C.H.R., *The Human Rights Situation of the Indigenous People in the Americas*, OEA/Ser.L/V/II.108, Doc. 62 (2000), at 21-25); see also *Belize Maya*, *supra* note 379, ¶ 95 (citing same).
- <sup>433</sup> *Xákmok*, *supra* note 425, ¶ 174; see also *Sawhoyamaxa*, *supra* note 425, ¶ 118; *Yakye Axa*, *supra* note 425, ¶ 135.
- <sup>434</sup> *Saramaka*, *supra* note 425, ¶ 85; see also *Case of the Moiwana Community v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005) (*Moiwana*), ¶ 133.
- <sup>435</sup> *Yakye Axa*, *supra* note 425, ¶ 124; see also *Xákmok*, *supra* note 425, ¶ 321 (special meaning of land for indigenous peoples “means that all denial of the enjoyment or exercise of land rights does damage to values that are very important for those peoples, as they experience the risk of losing their identities and cultural heritage that they would pass on to future generations, or of experiencing damage that would be irreparable within their lifetimes”); *Saramaka*, *supra* note 425, ¶ 86.
- <sup>436</sup> American Declaration on the Rights of Indigenous Peoples, *supra* note 410, art. XIX(1).
- <sup>437</sup> *Id.*, art. XIX(3).
- <sup>438</sup> UNHRC, General Comment No. 36, CCPR/C/GC/36, ¶ 7.
- <sup>439</sup> *Id.*, ¶ 62.
- <sup>440</sup> Convention on the Rights of the Child, art. 24(2)(c) (State parties should take all appropriate measures to combat “disease and malnutrition” by “taking into consideration the dangers and risks of environmental pollution.”).
- <sup>441</sup> *G. v. Australia*, Communication No. 2172/2012 (CCPR/C/119/D/2172/2012) HRC, ¶ 6.4 (June 15, 2017), [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/AUS/CCPR\\_C\\_119\\_D\\_2172\\_2012\\_25976\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/AUS/CCPR_C_119_D_2172_2012_25976_E.pdf). See also *Decision as to the Admissibility of Senator Lines GmbH*, Application No. 56672/00, Eur. Ct. H.R., Grand Chamber (2004), <http://hudoc.echr.coe.int/fre?i=001-23765>.
- <sup>442</sup> James Anaya, *The Situation of Indigenous Peoples in Canada*, U.N. Doc. A/HRC/27/52/Add.2 (4 July 2014) (*Anaya Canada Report*), ¶ 69.
- <sup>443</sup> Organization of American States, *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OAS/Ser.L/V/I.4 Rev. 9 (2003) (American Declaration), art. XIII (“Every person has the

right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.”).

- <sup>444</sup> Protocol of San Salvador, *supra* note 385, art. 14, Nov. 14, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156.
- <sup>445</sup> Universal Declaration of Human Rights, G.A. Res. 217A, at 72, U.N. GAOR, 3rd Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), art. 27.1. (“Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”).
- <sup>446</sup> ICCPR, *supra* note 412, art. 27 (Members of minority groups “shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice[sic] their own religion, or to use their own language.”).
- <sup>447</sup> ICERD, *supra* note 420, art.7; *see also* CERD, *General Recommendation No. 23, Annex V: Rights of indigenous peoples*, at 122, ¶ 4(e), U.N. Doc. A/52/18 (Aug. 18, 1997).
- <sup>448</sup> ICESCR, *supra* note 389, art. 15(1) (“The States Parties to the present Covenant recognize the right of everyone[] [t]o take part in cultural life.”).
- <sup>449</sup> American Declaration on the Rights of Indigenous Peoples, *supra* note 410, art. XIII(1).
- <sup>450</sup> *Awas Tingni*, *supra* note 425, ¶ 149.
- <sup>451</sup> *See, generally* Inter-Am. Ct. H.R., *Human Rights and the Environment*, *supra* note 382, ¶ 48.
- <sup>452</sup> *Moiwana*, *supra* note 434, ¶ 101.
- <sup>453</sup> *Yakye Axa*, *supra* note 425, ¶ 154.
- <sup>454</sup> *Sawhoyamaxa*, *supra* note 425, ¶ 131; *see also* *Xákmok*, *supra* note 425, ¶113.
- <sup>455</sup> *Saramaka* is a separate case from *Aloeboetoe*, cited *supra*, which also involved the Saramaka people.
- <sup>456</sup> *Saramaka*, *supra* note 425, ¶¶ 90, 86.
- <sup>457</sup> *Chitay Nech v. Guatemala Case*, Inter-Am. Ct. H.R. (ser. C) No. 212, ¶147 (May 25, 2010).
- <sup>458</sup> *See Belize Maya*, *supra* note 379, ¶¶ 154-155.
- <sup>459</sup> *Id.*, ¶ 154.
- <sup>460</sup> Inter-Am. C.H.R., *Indigenous and Tribal Peoples’ Rights*, *supra* note 389, ¶ 56.
- <sup>461</sup> *Id.*, ¶ 78.
- <sup>462</sup> *Id.*, ¶ 74 (citing United Nations Office of the High Commissioner for Human Rights, General Comment No. 23: The Rights of Minorities (art. 27), ¶ 6.2, CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994) (OHCHR, Gen. Comment No. 23), ¶ 7); *see also* *Dann*, *supra* note 379, ¶ 130, n.97 (same).
- <sup>463</sup> *See, e.g.*, Inter-Am. C.H.R., *Ecuador Report*, *supra* note 390, ch. IX (“Certain indigenous peoples maintain special ties with their traditional lands, and a close dependence upon the natural resources provided therein – respect for which is essential to their physical and cultural survival.”) (citation omitted); Inter-Am. C.H.R., *Extractive Industries and indigenous peoples’ rights report*, *supra* note 427; Inter-Am. C.H.R., *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, Doc. 10 rev. 3 81 Part II (1983), ¶ II.B.15 (“[S]pecial legal protection is recognized for the use of their language, the observance of their religion, and in general, all those aspects related to the preservation of their cultural identity. To this should be added the aspects linked to productive organization, which includes, among other things, the issue of the ancestral and communal lands. Non-observance of those rights and cultural values leads to a forced assimilation with results that can be disastrous.”).

- 464 American Declaration on the Rights of Indigenous Peoples, *supra* note 410, art. XXV(1).
- 465 *Id.*, art. XIII(1).
- 466 *See, e.g., Centre for Minority Rights Development v. Kenya*, Case 276/2003, Afr. Comm'n on Human and Peoples' Rights, ¶ 156 (2009) (citing extensively the Inter-American Court's jurisprudence in *Awás Tingni*, *Moiwana*, and *Saramaka* in observing that indigenous peoples' "culture, religion, and traditional way of life are intimately intertwined with their ancestral lands [ ] and the surrounding area" and that "without access to their ancestral land, [they] are unable to fully exercise their cultural and religious rights, and feel disconnected from their land and ancestors.").
- 467 *Belize Maya*, *supra* note 379, ¶ 141.
- 468 United Nations Human Rights Committee, *Bernard Ominayak and the Lubicon Lake Band v. Canada*, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (Mar. 26, 1990) (*Lubicon Lake Band*).
- 469 *Id.*; *see, also* United Nations Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, ¶ 9.5, U.N. Doc. CCPR/C/70/D/547/1993 (Nov. 16, 2000) (noting that, according to general comment to Article 27, "especially in the case of indigenous peoples, the enjoyment of the right to one's own culture may require positive legal measures of protection by a State party and measures to ensure the effective participation of members of minority communities in decisions which affect them.").
- 470 *Lubicon Lake Band*, *supra* note 468, ¶ 33.
- 471 OHCHR, Gen. Comment No. 23, *supra* note 462, ¶¶ 7, 9.
- 472 United Nations Human Rights Committee, *Ilmari Länsman v. Finland*, Communication No. 511/1992, ¶ 9.3, U.N. Doc. CCPR/C/52/D/511/1992 (Nov. 8, 1994).
- 473 United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 21, *Right of everyone to take part in cultural life, (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 36, E/C.12/GC/21 (Dec. 21, 2009) (CESCR, Gen. Comment No. 21) (citing International Labour Organization, Convention concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, arts. 13-16). *See also* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, pmb., U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (UNDRIP), arts. 20 and 33. The Committee added that "States parties must take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources." CESCR, Gen. Comment No. 21, ¶ 36.
- 474 UNDRIP, *supra* note 473, art. 8.
- 475 *Id.*, art. 13.
- 476 British Columbia, *B.C. Declaration on the Rights of Indigenous Peoples Act*, <https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples>.
- 477 Declaration on the Rights of Indigenous Peoples Act § 3 (2019).
- 478 *See*, section IV.A.
- 479 Aan Yátx'u Sáani: Noble People of the Land, *Lovey Brock*, <https://www.aanyatxu.org/lovey-brock> (audio clips titled "No Steak" and "Just like it is").
- 480 *See, Yakye Axa*, *supra* note 425, ¶ 135; *Xákmok*, *supra* note 425, ¶ 174; *see also, Sawhoyamaxa*, *supra* note 388, ¶ 118; OHCHR, Gen. Comment No. 23, *supra* note 462, ¶ 7.
- 481 *Saramaka*, *supra* note 425, ¶¶ 90, 86.

- 482 ICESCR, *supra* note 389, art. 1(2); ICCPR, *supra* note 412, art. 1(2).
- 483 American Declaration on the Rights of Indigenous Peoples, *supra* note 410, arts. XXIX(1) and XIX(4).
- 484 UNDRIP, *supra* note 473, art. 20.
- 485 *Xákmok*, *supra* note 425, ¶ 174; *see also*, *Yakye Axa*, *supra* note 425, ¶ 135.
- 486 *Xákmok*, *supra* note 425, ¶¶ 180, 282.
- 487 *Id.*
- 488 Inter-Am. C.H.R., *Indigenous and Tribal Peoples' Rights*, *supra* note 389, ¶ 56 (citing *Dann*, *supra* note 379, ¶ 128 (noting connection between subsistence and the right to property, stating that the American Convention's right to property "refers ... [to] its capacity for providing the resources which sustain life"))).
- 489 *Yakye Axa*, *supra* note 425, ¶ 168.
- 490 *Id.*, ¶ 164.
- 491 American Declaration on the Rights of Indigenous Peoples, *supra* note 410, art. XXIX(5).
- 492 *See* section IV.A.
- 493 Inter-Am. C.H.R., *Indigenous and Tribal Peoples' Rights*, *supra* note 389, ¶ 56 (citing *Dann*, *supra* note 379, ¶ 128 (noting connection between subsistence and the right to property, stating that the American Convention's right to property "refers ... [to] its capacity for providing the resources which sustain life"))).
- 494 American Declaration, *supra* note 443, art. XI.
- 495 Protocol of San Salvador, *supra* note 385, art. 10.
- 496 Article 25(1) of the Universal Declaration of Human Rights, *supra* note 445, assures the right to "a standard of living adequate for the health and well-being of himself and his family, including...medical care and necessary social services."
- 497 Pursuant to Article 12 of the ICESCR, *supra*, note 389: "1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: ... (b) the improvement of all aspects of environmental and industrial hygiene; (c) the prevention, treatment and control of epidemic ... and other diseases."
- 498 African Charter, *supra* note 385, art. 16 ("Every individual shall have the right to enjoy the best attainable state of physical and mental health.").
- 499 United Nations Office of the High Commissioner for Human Rights, World Health Organization, *The Right to Health: Fact Sheet No. 31* at 10 (June 2008).
- 500 American Declaration on the Rights of Indigenous Peoples, *supra* note 410, art. XVIII(1).
- 501 *Yanomami*, *supra* note 428, ¶ 10(b).
- 502 *Id.* "Resolves" ¶ 1. Though the facts in that case demonstrated an extreme circumstance, the case affirmed the principle of state responsibility for violations of indigenous peoples' human rights under the Inter-American system.
- 503 *Belize Maya*, *supra* note 379, ¶¶ 154-156.

- 504 Inter-Am. C.H.R., *Ecuador Report*, *supra* note 390, ch. IX (internal citation omitted).
- 505 *Id.*, ch. VIII.
- 506 CESCR, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, General Comment No. 14, ¶ 4, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).
- 507 *Id.*, ¶ 59.
- 508 Section IV.A.2.
- 509 ICESCR, *General Comment 14*, *supra* note 506, ¶ 57.
- 510 American Declaration, *supra* note 443, art. XXIII.
- 511 American Convention, *supra* note 380, art. 21.
- 512 *Annual Report of the Inter-American Commission on Human Rights*, Inter-Am. C.H.R., OEA/Ser.L/V/II.85, doc. 9 rev. ch. IV, ¶ VII(A) (1994) (Nicaragua, Right to Property).
- 513 Universal Declaration of Human Rights, *supra* note 445, art. 17.
- 514 Council of Europe, Protocol [1] to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 4, 1950, 213 U.N.T.S. 221 (“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principle of international law.”).
- 515 African Charter, *supra* note 385, art. 14 (“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”).
- 516 American Declaration on the Rights of Indigenous Peoples, *supra* note 410, art. XXV(2). *See also*, e.g., *Xákmok*, *supra* note 425, ¶¶ 108-09; *Moiwana*, *supra* note 434, ¶ 133; *Yakye Axa*, *supra* note 425, ¶¶ 131, 135, 137; *Sawhoyamaxa*, *supra* note 425, ¶¶ 127, 131; *Awás Tingni*, *supra* note 425, ¶ 149. This right “extend[s] in principle over all of those lands and resources that indigenous peoples currently use, and over those lands and resources that they possessed and of which they were deprived, with which they preserve their internationally protected special relationship – i.e. a cultural bond of collective memory and awareness of their rights of access or ownership, in accordance with their own cultural and spiritual rules.” Inter-Am. C.H.R., *Indigenous and Tribal Peoples’ Rights*, *supra* note 389, ¶ 78.
- 517 American Declaration on the Rights of Indigenous Peoples, *supra* note 410, art. XXV(3).
- 518 *Awás Tingni*, *supra* note 425, ¶ 149; *see also Xákmok*, *supra* note 425, ¶ 86; *Yakye Axa*, *supra* note 425, ¶ 131; *Saramaka*, *supra* note 425, ¶¶ 90, 96; *Sawhoyamaxa*, *supra* note 425, ¶ 118.
- 519 *Awás Tingni*, *supra* note 425, ¶ 149.
- 520 *Saramaka*, *supra* note 425, ¶ 122.
- 521 *Id.*
- 522 *Id.*, ¶ 154; *Belize Maya*, *supra* note 379, ¶¶ 149-150 (citing with approval Afr. Comm’n on Human and Peoples’ Rights, *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96 (Oct. 27, 2001)).
- 523 *Saramaka*, *supra* note 425, ¶ 154.
- 524 *Id.*

- 525 *Id.*, ¶¶ 148, 153, 194.
- 526 *Id.*, ¶ 117.
- 527 *Id.*
- 528 *See Dogan and Others v. Turkey*, App. Nos. 8803-8811/02, 8813/02 and 8815-8819/02, Eur. Ct. H.R., ¶ 138-39 (June 29, 2004) (Dogan); *see also* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, Protocol 1, art. 1; *Oneryildiz v. Turkey*, App. No. 48939/99, Eur. Ct. H.R., ¶ 129 (June 18, 2002) (“applicant’s proprietary interest in his dwelling was of a sufficient nature and sufficiently recognised to constitute a substantive interest and hence a ‘possession’ within the meaning of the rule laid down in the first sentence of Article 1 of Protocol No. 1”).
- 529 *See, e.g., Dogan, supra* note 528, ¶ 138; *Oneryildiz, supra* note 528, ¶¶ 124, 129.
- 530 UNDRIP, *supra* note 473, art. 26.
- 531 *Id.*, art. 25.
- 532 *Id.*, arts. 29(1), 26(3).
- 533 *Awat Tingni, supra* note 425, ¶ 149; *see also Xákmok, supra* note 425, ¶ 86; *Yakye Axa, supra* note 425, ¶ 131; *Saramaka, supra* note 425, ¶¶ 90, 96; *Sawhoyamaya, supra* note 425, ¶ 118.
- 534 *Saramaka, supra* note 425, ¶ 122.
- 535 Inter-Am. C.H.R., *Indigenous and Tribal Peoples’ Rights, supra* note 389, ¶ 273 (citations omitted).
- 536 *Id.*, ¶ 276 (“Indigenous peoples’ right to be consulted about decisions that may affect them is directly related to the right to cultural identity, insofar as culture may be affected by such decisions.”).
- 537 *Id.*, ¶¶ 302, 304.
- 538 *Id.*, ¶¶ 292, 315, citing *Special Rapporteur James Anaya, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, A/HRC/12/34 (July 15, 2009), ¶¶ 48-9; *see also* Inter-Am. C.H.R., *Extractive Industries and indigenous peoples’ rights report, supra* note 427, ¶ 183.
- 539 Inter-Am. C.H.R., *Indigenous and Tribal Peoples’ Rights, supra* note 389, ¶ 293.
- 540 *Id.*, ¶ 305; Inter-Am. C.H.R., *Extractive Industries and indigenous peoples’ rights report, supra* note 427, ¶ 207.
- 541 Inter-Am. C.H.R., *Indigenous and Tribal Peoples’ Rights, supra* note 389, ¶ 308, citing *Saramaka, supra* note 425, ¶ 133; Inter-Am. C.H.R., *Extractive Industries and indigenous peoples’ rights report, supra* note 427, ¶ 198.
- 542 Inter-Am. C.H.R., *Extractive Industries and indigenous peoples’ rights report, supra* note 427, ¶ 183; *Saramaka, supra* note 425, ¶¶ 133-37.
- 543 *Saramaka, supra* note 425, ¶ 134.
- 544 United Nations Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, *Extractive Industries*, U.N. Doc. A/HRC/24/41, July 1, 2013, ¶ 27.
- 545 *Id.*, ¶ 27. Even if the impacts are not significant or direct enough to require indigenous consent, “[i]n all instances of proposed extractive projects that might affect indigenous peoples, consultations with them should take place and consent should at least be sought.” *Id.* (emphasis added).

- <sup>546</sup> Inter-Am. Ct. H.R., *Human Rights and the Environment*, *supra* note 382, ¶ 36 (*translation by the authors*) (“¿De acuerdo con lo estipulado en el artículo 1.1 del Pacto de San José, debería considerarse que una persona, aunque no se encuentre en el territorio de un Estado parte, podría estar sujeta a la jurisdicción de dicho Estado en el marco del cumplimiento de obligaciones en materia ambiental?”).
- <sup>547</sup> *Id.*, ¶ 227 (*translation by the authors*) (“En el contexto de las comunidades indígenas, este Tribunal ha determinado que el Estado debe garantizar los derechos de consulta y participación en todas las fases de planeación e implementación de un proyecto o medida que pueda afectar el territorio de una comunidad indígena o tribal, u otros derechos esenciales para su supervivencia como pueblo, de conformidad con sus costumbres y tradiciones.”).
- <sup>548</sup> Letter from Carrie James and Robert Sanderson Jr. (UTTMWG) to Honorable Bill Bennett, British Columbia Minister of Energy and Mines (Sept. 2015).
- <sup>549</sup> *Id.*
- <sup>550</sup> Notes on file with Petitioners.
- <sup>551</sup> British Columbia, *Transboundary Waters 2018* at 5 (2018), [https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/compliance-and-enforcement/transboundary\\_waters\\_-\\_2018.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/compliance-and-enforcement/transboundary_waters_-_2018.pdf); *see also* State of Alaska, *Transboundary Partner Dialogue* (2018), <https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=112618>.
- <sup>552</sup> Letter from K. Black, Executive, Correspondence Officer, Office of the Prime Minister to Tis Peterman, SEITC Coordinator (Apr. 2, 2019).
- <sup>553</sup> Resolution SEITC 18-001, *Protecting Transboundary Communities and Environment from Adverse Impacts of Transboundary Mining Activities* (adopted on Oct. 14, 2018).
- <sup>554</sup> *Id.*
- <sup>555</sup> Letter from Rob Sanderson, SEITC Chair, to John Horgan, British Columbia Premier (Aug. 12, 2019); George Heyman, British Columbia Minister, Reply to Rob Sanderson, SEITC, Re: request for a new KSM Environmental Assessment Study (undated).
- <sup>556</sup> Statement of Cooperation on Protection of Transboundary Waters Between the State of Alaska Departments of Environmental Conservation, Fish and Game and Natural Resources and The Province of British Columbia Ministries of Environment, and Energy and Mines (Oct. 6, 2016) (Statement of Cooperation), <http://www.sitnews.us/1016News/100616/100616-Statement-of-Cooperation-Final.pdf>; Summary: BC/AK Bilateral Working Group (Oct. 5, 2017), [https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/compliance-and-enforcement/bc-ak\\_bwg\\_-\\_meeting\\_summary\\_-\\_october\\_5\\_2017.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/compliance-and-enforcement/bc-ak_bwg_-_meeting_summary_-_october_5_2017.pdf).
- <sup>557</sup> Summary: BC/AK Bilateral Working Group, *supra* note 556.
- <sup>558</sup> *Id.*
- <sup>559</sup> SEITC & Ping Chong + Company, *When the Salmon Spoke* (2020), <https://www.aanyatxu.org/when-the-salmon-spoke-home>.
- <sup>560</sup> Section IV.B. 3.
- <sup>561</sup> Organization of American States, Rules of Procedure of the Inter-American Commission on Human Rights, art. 31(1) (Inter-Am. C.H.R. Rules).
- <sup>562</sup> *Id.*, art. 31(2)(a).

- <sup>563</sup> Inter-Am. C.H.R., Admissibility Report No. 48/15, Petition 79-06, *Yaqui People (Mexico)*, July 28, 2015, ¶ 51. *See also* Inter-Am. C.H.R., Admissibility Report No. 105/09, Petition 592-07, *Hul'Qumi'Num Treaty Group (Canada)*, October 30, 2009, ¶ 41 (*Hul'Qumi'Num Treaty Group*) (citing Inter-Am. C.H.R., Admissibility Report No. 16/04, Petition 129-02, *Tracy Lee Housel (United States)*, February 27, 2004, ¶ 36).
- <sup>564</sup> Inter-Am. Ct. H.R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, (Ser. C) No. 4, ¶ 64 (*Velásquez-Rodríguez v. Honduras*). *See also* *Hul'Qumi'Num Treaty Group*, *supra* note 563, ¶ 31 (“The jurisprudence of the inter-American system clearly indicates that only those remedies that are suitable and effective, if pertinent, in resolving the matter in question, must be exhausted.”); Inter-Am. C.H.R., Admissibility Report No 69/04, P504/03, *Community of San Mateo de Huancho and its members (Peru)*, October 15, 2004, ¶ 56 (“In all domestic law systems, there are many remedies, but they are not all applicable to all circumstances.”); Inter-Am. Ct. H.R., *Gilson Nogueira Carvalho Case*, Judgment of October 3, 2000, (Ser. C) No. 12,058, ¶ 60 (“[T]he merely theoretical existence of legal remedies is not sufficient for this objection to be invoked: they have to be effective.”).
- <sup>565</sup> In *D.R. v. Australia*, for example, CERD found that the Petitioner had exhausted all effective remedies even though he had not sought relief through the Australian court and administrative justice system because Australia’s Racial Discrimination Act does not recognize a person’s citizenship as a ground for discrimination, precluding the very basis for the Petitioner’s complaint. *D.R. v. Australia*, Comm. No. 42/2008, Opinion, CERD/C/75/D/42/2008, ¶ 6.5 (Aug. 14, 2009). The ECtHR similarly does not require the filing of domestic proceedings before the futility exception can be invoked. *See, e.g., Open Door and Dublin Well Woman v. Ireland*, 64/1991/316/387-388, ¶ 48 Eur. Ct. H.R. (Sept. 23, 1992), (claimants did not have to initiate any proceedings in Irish domestic courts because their claims would have no prospect of success).
- <sup>566</sup> Inter-Am. C.H.R., *Indigenous and Tribal Peoples’ Rights*, *supra* note 389, ¶ 44.
- <sup>567</sup> *Id.*
- <sup>568</sup> *Id.*, ¶ 58, holding that “the State’s obligation to provide judicial recourse is not simply met by the mere existence of courts or formal procedures, or even by the possibility of resorting to the courts. Rather, the State has to adopt affirmative measures to guarantee that the recourses it provides through the justice system are really effective for determining the existence of a human rights violation and providing the corresponding compensation” (quotations omitted); and Inter-Am. C.H.R., Admissibility Report No. 87/12, Petition 140-08, *Maya Kaqchikel Communities of Los Hornos and El Pericón I and Their Members (Guatemala)*, November 8, 2012, ¶ 36, holding that the State remedy mechanism did not work to address the petitioners’ claim to “secure recognition and protection of the property rights” over ancestral land for the “the use and enjoyment of their land and its natural resources, free of interference.”
- <sup>569</sup> Inter-Am. C.H.R., *Indigenous and Tribal Peoples’ Rights*, *supra* note 389, ¶ 299, citing Constitutional Court of Colombia, Judgment on Tutela action T-652, of November 10, 1998 (“the participation [of the indigenous peoples] is not reduced merely to an intervention in the administrative procedure aimed at ensuring the right of defense for those who have been affected by the authorization of the environmental license ... but has a larger meaning given the lofty interests it seeks to protect, such as those that go to the definition of the destiny and security of the subsistence of said communities.”).
- <sup>570</sup> Any mining project that produces more than 3,000 tons of ore per day or a gold mine that produces 600 tons per day is subject to a decision under CEAA 2012 as a designated project. *See* Canadian Environmental Assessment Act, 2012, Regulations Designating Physical Activities, SOR/2012-147 (July 6, 2012); *see also* BC Ministry of Environment, Fact Sheet Mining Operations (June 2016),

[https://www2.gov.bc.ca/assets/gov/environment/waste-management/industrial-waste/industrial-waste/mining-smelt-energy/mining\\_operations\\_fs.pdf](https://www2.gov.bc.ca/assets/gov/environment/waste-management/industrial-waste/industrial-waste/mining-smelt-energy/mining_operations_fs.pdf).

- 571 See, e.g., David Boyd, *From Environmental Assessment to Sustainability Assessment: A Way Forward for Canada*, Submission to the Expert Panel Reviewing Canada's Federal Environmental Assessment Processes (Dec. 15, 2016) (Boyd, *From Environmental Assessment to Sustainability Assessment*); See, e.g., West Coast Environmental Law, *Why It's Time To Reform Environmental Assessment In British Columbia* at 9, 17-19 (Jan. 2018) (West Coast Environmental Law), <https://www.wcel.org/sites/default/files/publications/2018-01-bc-eareform-backgrounder-web-final.pdf>; BC First Nations Energy and Mining Council, *Environmental Assessment and First Nations in BC: Proposals for Reform* at 2-3 (20 August 2009) (BC First Nations Energy and Mining Council), <http://fnemc.ca/?portfolio=ea-proposals-for-reform>.
- 572 British Columbia, *The Environmental Assessment Process*, <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/environmental-assessments/the-environmental-assessment-process>.
- 573 British Columbia, *Frequently Asked Questions about Environmental Assessments*, <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/environmental-assessments/frequently-asked-questions#transition-FAQs>.
- 574 West Coast Environmental Law, *supra* note 571, at 8; BC First Nations Energy and Mining Council, *supra* note 571, at 2-3.
- 575 West Coast Environmental Law, *supra* note 571, at 8; BC First Nations Energy and Mining Council, *supra* note 571, at 26-27.
- 576 West Coast Environmental Law, *supra* note 571, at 8.
- 577 *Id.* (citing Environmental Assessment Office, *Recommendations of the Executive Director* at 8 and 22 (17 December 2009); Environmental Assessment Office, *Environmental Assessment Certificate #14-02* (14 October 2014)).
- 578 See *id.* (citing *Do Rav Right Coalition v. Hagen*, 2005 BCSC 991, para 34 (aff'd 2006 BCCA 571); *Peace Valley Landowner Association v. British Columbia* (Environment), 2015 BCSC 1129, para 94 (aff'd 2016 BCCA 377)).
- 579 *Id.*
- 580 West Coast Environmental Law, *supra* note 571, at 4.
- 581 BC Auditor General, *Managing the Cumulative Effects of Natural Resource Development in BC* at 5 (May 2015).
- 582 West Coast Environmental Law, *supra* note 571, at 9, 17-19; BC First Nations Energy and Mining Council, *supra* note 571, at 2-3.
- 583 West Coast Environmental Law, *supra* note 571, at 9, 17-19.
- 584 Public Consultation Policy Regulation, BC Reg 373/2002, s 7, [http://www.bclaws.ca/Recon/document/ID/freeside/12\\_373\\_2002](http://www.bclaws.ca/Recon/document/ID/freeside/12_373_2002).
- 585 *Id.*, s 4.
- 586 West Coast Environmental Law, *supra* note 571, at 18-19.
- 587 BC First Nations Energy and Mining Council, *supra* note 571, at 24-25.
- 588 *Id.*

- 589 “The BC First Nations Energy & Mining Council (FNEMC) is a provincial First Nations non-profit organization. FNEMC’s mandate is to support and facilitate First Nation efforts to manage and develop energy and mineral resources in ways that protect and sustain the environment forever while enhancing the social, cultural, economic and political well-being of First Nations in British Columbia. The mandate was established by the BC First Nations Leadership Council – the political executives of the BC Assembly of First Nations, the First Nations Summit and the Union of BC Indian Chiefs – and the Chiefs of British Columbia.” BC First Nations Energy and Mining Council, *About Us*, <http://fnemc.ca/about-us/>.
- 590 BC First Nations Energy and Mining Council, Environmental Assessment and First Nations in BC: Proposals for Reform, *supra* note 571, at 24-25.
- 591 *Id.* at 2-3.
- 592 Environmental Assessment Office, *Free, Prior and Informed Consent within the Context of UNDRIP and Environmental Assessments*, [https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/free\\_prior\\_informed\\_consent\\_in\\_an\\_ea\\_context.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/free_prior_informed_consent_in_an_ea_context.pdf).
- 593 Environmental Assessment Act (2018), <https://www.bclaws.ca/civix/document/id/complete/statreg/18051>.
- 594 *Rights of the Aboriginal Peoples of Canada*, Part II of *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. *Id.*, ¶ 35 (Constitution Act of 1982).
- 595 Environmental Assessment Act (2018), *supra* note 593, Section 29.
- 596 Anaya, *Extractive Industries*, *supra* note 544, ¶ 27.
- 597 Environmental Assessment Act (2018), *supra* note 593, Section 25(2).
- 598 *See, e.g.*, British Columbia Geological Survey, *Mines, mine development, selected proposed mines, and selected exploration projects in British Columbia, 2018*, Open File 2019-01 (2019), [http://cmscontent.nrs.gov.bc.ca/geoscience/PublicationCatalogue/OpenFile/BCGS\\_OF2019-01.pdf](http://cmscontent.nrs.gov.bc.ca/geoscience/PublicationCatalogue/OpenFile/BCGS_OF2019-01.pdf) (British Columbia Geological Survey) (showing select proposed metals mines in the Stikine watershed); Salmon Beyond Borders, *Learn more about the B.C. Mines upstream from Southeast Alaska*, <https://www.salmonbeyondborders.org/map.html> (Salmon Beyond Borders, *Learn more about the B.C. Mines*) (showing proposed North ROK mine); Colorado Resources Ltd., *North ROK Property*, <https://www.coloradoresources.com/projects/north-rok-property/>.
- 599 British Columbia Geological Survey, *supra* note 598; Salmon Beyond Borders, *Learn more about the B.C. Mines*, *supra* note 598.
- 600 British Columbia Geological Survey, *supra* note 598; Skeena Resources, *Eskay Creek*, <https://www.skeenaresources.com/projects/eskay-creek>.
- 601 Impact Assessment Act (2019), <https://laws.justice.gc.ca/eng/acts/I-2.75/FullText.html>, Section 181(1).
- 602 *Id.*, Section 179(2)-(3).
- 603 *See, e.g.*, Boyd, *From Environmental Assessment to Sustainability Assessment*, *supra* note 571, at 2; Denis Kirchhof *et al.*, *The Canadian Environmental Assessment Act, 2012 and Associated Policy: Implications for Aboriginal Peoples*, THE INTERNATIONAL INDIGENOUS POLICY JOURNAL, 4(3), Art. 1 (2013) (Kirchhof *et al.*); Meinhard Doelle, *CEAA 2012: The End Of Federal EA As We Know It?*, 24 JOURNAL OF ENVIRONMENTAL LAW AND PRACTICE 1 (2012).
- 604 Canadian Environmental Assessment Act (2012), Section 5(1)(c).

- 605 Canadian Environmental Assessment Act, Section 9(c).
- 606 *Id.*, Section 19(1)(g).
- 607 *See, e.g.*, Boyd, *From Environmental Assessment to Sustainability Assessment*, *supra* note 571, at 2.
- 608 *See*, Kirchhof *et al.*, *supra* note 603, at 10. The Canadian government’s current proposed amendments to the CEAA has also been criticized as “applying a fresh coat of paint to the same old EA model. It exempts the vast majority of projects and activities from review, provides no certainty that Indigenous jurisdiction and decision-making rights will be upheld, and gives the government broad discretion to trade environmental health for short-term economic and political gains.” Anna Johnston, West Coast Lawyers, *Canada’s proposed new Impact Assessment Act: Good from afar but far from good?* (Feb. 21, 2018), <https://www.wcel.org/blog/canadas-proposed-new-impact-assessment-act-good-afar-far-good>.
- 609 Impact Assessment Act, *supra* note 601, Section 84(1)(a).
- 610 *Id.*, Section 81.
- 611 For example, the central piece of legislation is the Indian Act, the general statute under which indigenous peoples’ status is defined and lands are governed and managed. Canada has also developed legislation to address the historical grievances regarding treaty and aboriginal rights called “comprehensive land claim agreements,” which address treaty claims to land that have been historically denied. At the federal level, twenty-four claims from indigenous communities have concluded. At the provincial level, the British Columbia Treaty Process, an independent Commission, exists to facilitate treaty negotiations between First Nations and the governments of Canada, has thus far produced two final agreements between indigenous tribes and Provincial governments. Furthermore, indigenous peoples can go through the Special Claims Tribunal to attempt to settle land debt owed from historic treaties in which indigenous groups lost land entitled to them. *See, generally*, *Anaya Canada Report*, *supra* note 442, ¶¶ 6 and 7.
- 612 *Hul’Qumi’Num Treaty Group*, *supra* note 563, ¶ 1.
- 613 *Id.*, ¶ 35.
- 614 *Id.*
- 615 *Id.*, ¶ 37.
- 616 *Id.*, ¶ 38.
- 617 *Id.*, ¶ 37. The court also found the other remedies suggested by Canada to be ineffective because “they cannot be used to comprehensively and permanently protect all HTG ancestral lands from the actions of third parties because their purpose is not to recognize the HTG’s property rights to those lands or the obligation of the State to provide restitution.” *Id.*, ¶ 43.
- 618 *Hul’Qumi’Num Treaty Group*, *supra* note 563, ¶ 43.
- 619 *Anaya Canada Report*, *supra* note 442, ¶ 14.
- 620 *Id.*, ¶ 61.
- 621 *Id.*
- 622 *Id.*, ¶ 62.
- 623 *Id.*, ¶ 64.
- 624 *Id.*
- 625 *Id.*, ¶ 65.

- 626 *Id.*
- 627 BC Treaty Commission, Frequently Asked Questions, *What is the BC Treaty Negotiations Process?*, <http://www.bctreaty.ca/faq> (emphasis added).
- 628 Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (2011) at 61, [https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui\\_1100100014665\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf).
- 629 Constitution Act of 1982, *supra* note 594, Part I, *Charter of Rights and Freedoms*.
- 630 *Id.*, § 1.
- 631 Canadian Human Rights Commission, *Human Rights in Canada*, <https://www.chrc-ccdp.gc.ca/eng/content/human-rights-in-canada>.
- 632 *Davis v. Canada (Attorney General)*, 004 NLSCTD 153 (2004), 240 Nfld. & P.E.I.R. 21 (NFTD), ¶ 92, *aff'd* [2008] N.J. No. 280 (C.A.); *see also Brown v. Canada (Attorney General)* [2010] O.J. No. 2253 (S.C.J.), ¶ 118 (citing *id.*).
- 633 *Davis v. Canada*, *supra* note 632, ¶ 2.
- 634 *Id.*, ¶ 94 (emphasis added); *see also Brown v. Canada (Attorney General)*, *supra* note 632, ¶ 118 (emphasis added) (citing *id.*).
- 635 *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16816/index.do>.
- 636 *Id.*
- 637 *Id.*
- 638 *Id.*
- 639 Constitution Act of 1982, *supra* note 594, § 27.
- 640 *Hul-Qumi'Num Treaty Group*, *supra* note 563, ¶ 37.
- 641 Inter-Am. C.H.R., *Human Rights and the Environment*, *supra* note 382, ¶ 102.
- 642 Inter-Am. C.H.R. Rules, *supra* note 561, art. 31.
- 643 *Id.*
- 644 *Id.*
- 645 Petition for certification pursuant to 22 U.S.C. § 1978 of actions undertaken by Canadian nationals diminishing the effectiveness of the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere and the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean (June 27, 2016).
- 646 22 U.S.C. § 1978(a)(2)-(3)(B).
- 647 *Id.*
- 648 Petition for certification pursuant to 22 U.S.C. § 1978 of actions undertaken by Canadian nationals diminishing the effectiveness of the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere and the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean (Sept. 26, 2017).
- 649 Case of Tănase v. Moldova, Application No. 7/08, Judgment (Merits and Just Satisfaction), ¶ 112 (April 27, 2010).

- <sup>650</sup> Email from Laura S. Noguchi, Chief, Wildlife Trade and Conservation Branch, Division of Management Authority, US Fish and Wildlife to Kenta Tsuda, Associate Attorney, Earthjustice (Feb. 5, 2018).
- <sup>651</sup> Letter from Chris Oliver, Assistant Administrator for NOAA Fisheries, to Kenta Tsuda, Associate Attorney, Earthjustice (Jan. 29, 2020).
- <sup>652</sup> *Id.*
- <sup>653</sup> Inter-Am. C.H.R. Rules, *supra* note 561, art. 32(1).
- <sup>654</sup> *See* American Convention, *supra* note 380, art. 63(1) (“If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule ... that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”); *see also Velásquez-Rodríguez v. Honduras*, *supra* note 564, ¶ 54 (ordering compensation for human rights violations: “the obligation to indemnify is not derived from internal law [of the violating nation], but from violation of the American Convention. It is the result of an international obligation.”).
- <sup>655</sup> *Xákmok*, *supra* note 425, ¶ 291.
- <sup>656</sup> *Id.*, ¶ 277.
- <sup>657</sup> *See id.*, ¶ 291.
- <sup>658</sup> Canadian Environmental Protection Act, *supra* note 406, pmbl.
- <sup>659</sup> *Id.*, art. 2(1)(a.1) (“Administrative Duties”); *see also id.*, art. 2.(1)(l) (“endeavour to act with regard to the intent of intergovernmental agreements and arrangements entered into for the purpose of achieving the highest level of environmental quality throughout Canada”).
- <sup>660</sup> United Nations Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, *The Situation of Indigenous Peoples’ Rights in Peru with Regard to the Extractive Industries*, A/HRC/27/52/Add.3, ¶ 10, July 3, 2014.