



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

February 19, 2024

Honorable Executive Secretary,

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

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

Sincerely,

Ramin Pejan

Mae Manupipatpong

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

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

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19 February 2024

I. Introduction

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

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

Since filing the Petition in 2020, it has become increasingly clear that neither Canada’s nor B.C.’s regulatory frameworks are sufficient to protect the rights of Petitioners. Despite failing to fully assess environmental impacts from and obtain Petitioners’ free, prior, and informed consent for the B.C. Mines discussed in the Petition, Canada and B.C. continue to receive applications for additional mines and approve amendment applications that allow mining project proponents to increase their pollution of transboundary watersheds—all without adequate consultation with Petitioners in compliance with international human rights obligations. Worse yet, Canada and B.C. facilitate mining projects under the guise of critical mineral development for a clean economy¹ when most of the B.C. Mines primarily target gold, with critical minerals as by-products. This goldrush should not be prioritized over the rights of Petitioners.

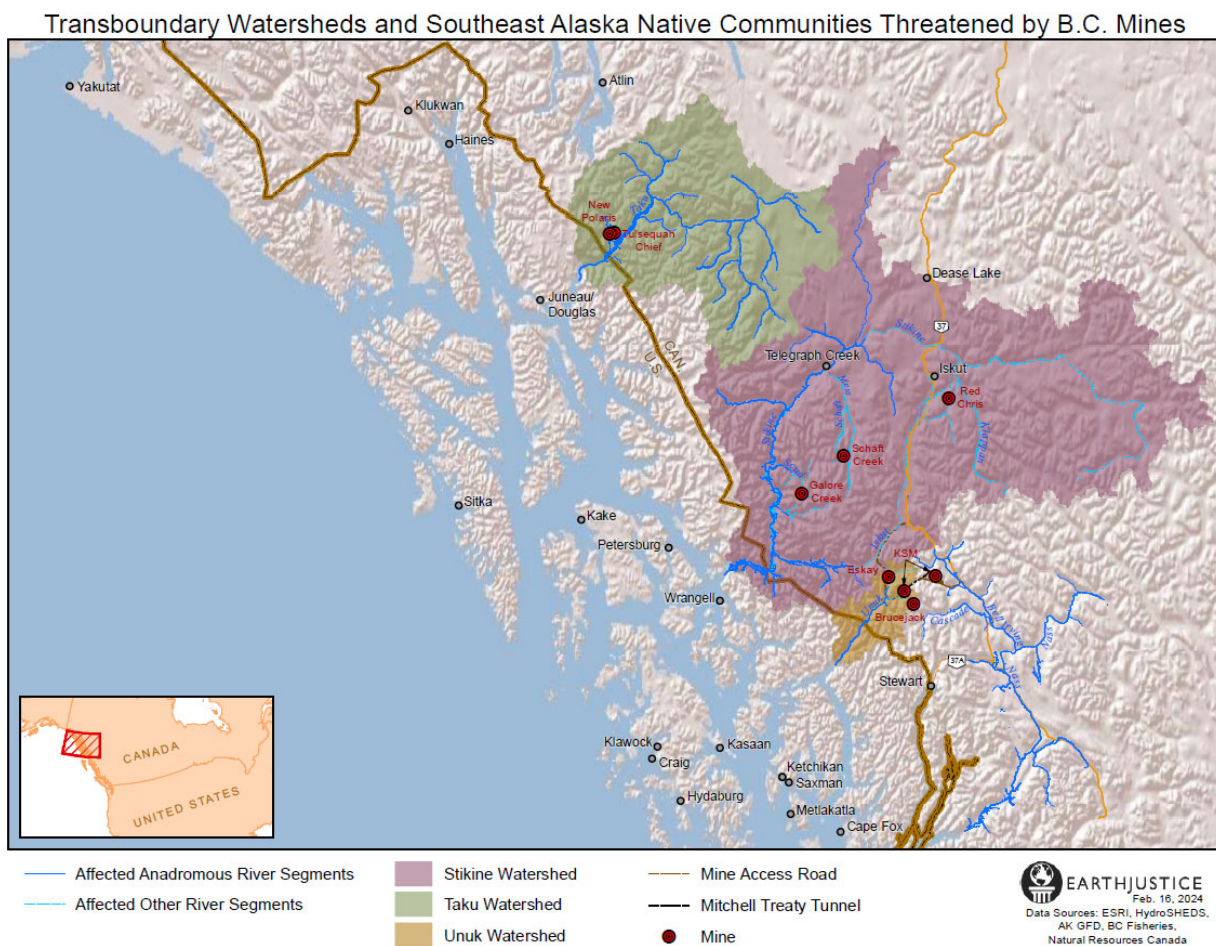
In this submission, Petitioners provide notable updates concerning the B.C. Mines; describe Petitioners’ continued unsuccessful efforts to have B.C. and Canada seek their free, prior, and informed consent with respect to the B.C. Mines; and review recent studies and other information documenting the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

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

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

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

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



A. Mines discussed in the 2020 Petition.

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

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

for the Schaft Creek Mine, Copper Fox Metals Inc., has not reapplied for an environmental assessment certificate after withdrawing its application in 2016.² However, Copper Fox Metals is continuing to “advance key project activities including the collection of geotechnical, metallurgical, engineering, and environmental data and community engagement.”³

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

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

¹⁵ *Ibid.*, p. 7-5.

¹⁶ *Ibid.*

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

To take advantage of unmined ore reserves at the end of the Production Phase, Newcrest is also considering extending the currently permitted lifetime of the Red Chris Mine past 2038 (“LOM Extension Phase”), which would involve, among other things, “[a]dditional underground mining infrastructure development,” “[d]evelopment of additional tailings storage capacity,” and “[c]ontinued production mining at up to 15 [million tonnes per annum].”¹⁸ Newcrest will have to submit an LOM Extension Phase application if it decides to continue operating the mine post-2038.¹⁹

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

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

Seabridge published an updated joint Prefeasibility Study and Preliminary Economic Assessment (PEA) in August 2022 that proposed maximum mine production of 195,000 tons per day over a mine life of 33 years,²¹ which is a 65,000 tons per day increase from its plans in 2013.²² This increase is likely due in part to Seabridge’s integration of the Snowfield (now East Mitchell) deposit it purchased in 2020 into the greater KSM Project,²³ which Seabridge noted “is likely to enhance gold reserves.”²⁴ The location of the waste rock dumps have also been modified from that described in the 2013 Environmental Assessment.²⁵ The water quality impacts of these changes have not been evaluated, much less transboundary impacts.

¹⁷ *Ibid.*, pp. iv, 7-8.

¹⁸ *Ibid.*, p. 3-3, Tbl. 3.

¹⁹ *Ibid.*, p. 3-10.

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

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

²² 2020 Petition, para. 112.

²³ KSM Prefeasibility Study & PEA (2022), p. 13-17.

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

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

Seabridge's PEA explores potential expansion of the KSM Mine after the Prefeasibility Study mine plan has been completed.²⁶ The PEA is "planned to operate for 39 years with a peak mill feed production of 170,000 [tons per day]."²⁷ Although the 2014 certified project description mentions underground block cave mining with respect to the Mitchell and Iron Cap deposits,²⁸ the PEA proposes mining the Iron Cap and Kerr (instead of Mitchell) deposits using this method instead.²⁹ If realized, the PEA would also extend operation of the KSM Mine beyond the maximum 52-year mine life described in the certified project description from 2014.³⁰ Based on the PEA, Seabridge touts KSM as a "multigenerational long-life mining project potential with flexibility to vary metal output."³¹

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

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

To date, the B.C. EAO has issued seven amendments to the Environmental Assessment Certificate for the Brucejack Mine,³³ including several with potential impacts to water resources.³⁴ For example, a year after beginning operation, Pretium increased the maximum ore production from 16.5 million tons to 18.5 million tons, increased the annual ore production rate from 990,000 tons to 1,387,000 tons, and increased water withdrawal from Brucejack Lake from 45 m³/h December

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

²⁷ KSM Prefeasibility Study & PEA (2022), p. 24-1.

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

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

³⁰ KSM Certified Project Description, p. 4.

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

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

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

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

through April to 70 m³/h for every month of the year.³⁵ Since the increase in ore production would also result in a higher discharge rate of waste rock and tailings to Brucejack Lake, Pretium also requested to raise the effluent discharge limits for antimony, arsenic, and ammonia.³⁶ The new limits all exceeded—and in the case of arsenic and antimony, **doubled** and **tripled**, respectively—the recommended levels reflected in B.C.’s water quality guidelines for protection of freshwater aquatic life.³⁷

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

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

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

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

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

³⁷ Brucejack 2018 Water Quality Model Report, pp. 5-14, 5-17.

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

³⁹ *Ibid.*, p. 3.

⁴⁰ *Ibid.*, p. 2.

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

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

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

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

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

The B.C. EAO approved the Tulsequah Chief Mine in 2002, and all permits needed to start construction have been granted, subject to the condition that the current acid mine drainage be stopped and remediated.⁴⁵ In November 2018, after Chieftain failed to comply with several non-compliance orders, the Ministry of Energy, Mines and Petroleum Resources issued a Request for Proposals for the development of a remediation and closure plan for Tulsequah Chief.⁴⁶ The Tulsequah Chief Mine Conceptual Closure and Reclamation Plan was released in April 2020.⁴⁷ In September of 2022, Chieftain’s long-running receivership proceedings, a key hurdle to B.C. taking control of the mine site for remediation, concluded. According to the most recent correspondence from the B.C. government to Alaskan legislators dated January 24, 2024, the final plan for

⁴¹ 2020 Petition, paras. 87-88.

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

⁴³ SLR Consulting (Canada) Ltd., *Tulsequah Chief Mine Water Quality Monitoring Plan - 2021 (Year 2)* (May 7, 2021), p. 3, https://www2.gov.bc.ca/assets/gov/environment/air-land-water/site-permitting-and-compliance/tulsequah/slr_wq_monitoring_plan_yr_2.pdf.

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

⁴⁵ 2020 Petition, para. 89.

⁴⁶ British Columbia, *Tulsequah Mine Information*.

⁴⁷ *Ibid.*; SNC-Lavalin Inc. & SRK Consulting, Closure and Reclamation Plan for the Tulsequah Chief Mine Site, Near Atlin, British Columbia (Apr. 15, 2020), [remediation_plan_tulsequah_chief_mine_site_for_distribution.pdf](https://www2.gov.bc.ca/assets/gov/environment/air-land-water/site-permitting-and-compliance/tulsequah/snr_closure_reclamation_plan.pdf) ([gov.bc.ca](https://www2.gov.bc.ca)).

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

B. Mines proposed since the 2020 Petition.

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

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

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

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

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

⁴⁹ *Ibid.*, p. 3.

⁵⁰ *Ibid.*

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

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

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

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

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

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

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

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

The B.C. EAO invited public comment on the Draft Plan for the Environmental Assessment for Eskay Creek Project in January of 2023.⁵⁹ As part of the environmental assessment process, Skeena Resources developed a plan outlining engagement with the seven Alaska Tribes that the B.C. EAO determined may be adversely affected based on their proximity to the Unuk watershed.⁶⁰ The selection of these Tribes and criteria for inclusion were determined without any input from Petitioners. Moreover, the Engagement Plan restricts engagement to “information sharing,” “learning about the environmental assessment process and Eskay Creek,” support in the environmental assessment process, and “providing advice on the potential transboundary effects (both positive and negative).”⁶¹ To date, the documents examining the effects of the Eskay Creek Project all limit their analysis to the Canadian side of the border. This plan contains no legal obligations or enforcement mechanisms to protect Petitioners. Until they seek Petitioners’ free, prior, and informed consent, both the proponent and the B.C. EAO cannot fully understand the potential impacts to Petitioners. Even if Petitioners’ concerns are collected and placed into the record, there remains no mechanism to assure Petitioners that the impacts will be avoided or mitigated when, not if, they occur. Without engaging in a good-faith process of seeking Petitioners’ free, prior, and informed consent, SEITC Tribal governments are subservient to the whims of a mining company and a foreign colonial power. Conducting an environmental assessment is no

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

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

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

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

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

⁶¹ *Ibid.*

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

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

On January 30, 2024, SEITC submitted a formal request to B.C. EAO that it recognize seven SEITC Tribes⁶⁴ as Aboriginal people(s) of Canada, that B.C. seek the free, prior, and informed consent of SEITC Tribes concerning the Eskay Creek Project, including again a request that B.C. EAO recognize the Tribes as a “participating Indigenous nation” for the Project under the *Environmental Assessment Act, 2018*.⁶⁵ SEITC also requested that B.C. negotiate a consent-based agreement with SEITC Tribes, like that with the Tahltan Central Government, under the *Declaration on the Rights of Indigenous Peoples Act*.⁶⁶

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

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

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

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

⁶³ *Ibid.*

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

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

⁶⁶ SEITC Request for Rights.

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

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

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

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

Active mine exploration projects in the transboundary watersheds.

In addition to the B.C. Mines, several other mine exploration projects are underway and may soon seek authorization. Maps showing the locations of these projects are included below. For example, Tudor Gold conducted a drilling program last year at the Treaty Creek gold-copper project, which was deemed one of the “top ten biggest gold projects in the world” in 2023 and is flanked by the KSM and Brucejack mines in the Unuk watershed.⁷³ Although the Snip Mine, located 35 kilometers west of Eskay Creek in the Unuk watershed,⁷⁴ has not been in active production since 1999, Skeena Resources continues to explore opportunities for redeveloping an underground mine and released an independent technical report last year estimating gold resources at 2.739 million tons.⁷⁵ Enduro Metals Corp. is similarly exploring its 688-square-kilometer Newmont Lake Project—“one of the largest contiguous land packages . . . in the heart of the Golden Triangle”—located in the Stikine watershed⁷⁶ between Eskay Creek, Snip, and Galore Creek.⁷⁷ Brixton Metals Corp. is actively drilling in its 2,880-square-kilometer Thorn Project area—the largest contiguous claim block in B.C.—in the Taku watershed.⁷⁸ New mines resulting from these exploratory activities will further threaten Petitioners’ rights.

⁷⁰ *Ibid.*, p. 3.

⁷¹ *Ibid.*, pp. 3-4.

⁷² *Ibid.*, p. 2.

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

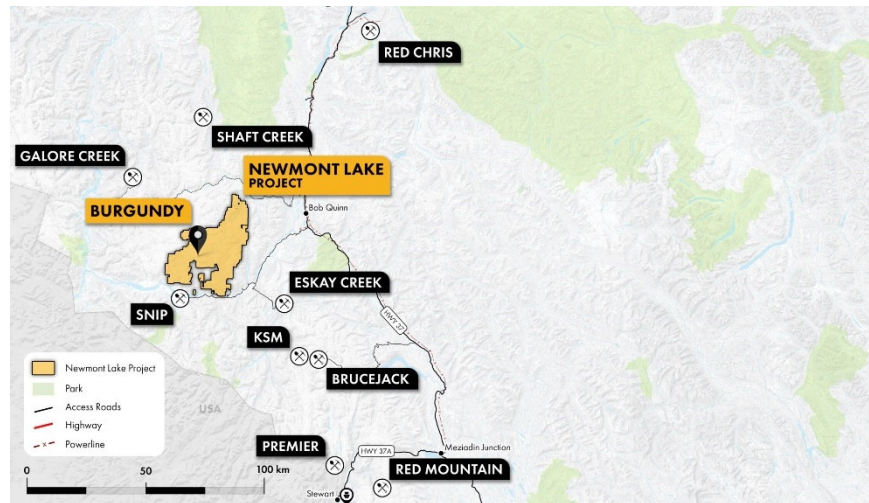
⁷⁴ Shane Lasley, *Significant Upgrade to Snip Gold Resource*, North of 60 Mining News (Sept. 6, 2023), <https://www.miningnewsnorth.com/story/2023/09/08/northern-neighbors/significant-upgrade-to-snip-gold-resource/8104.html>.

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

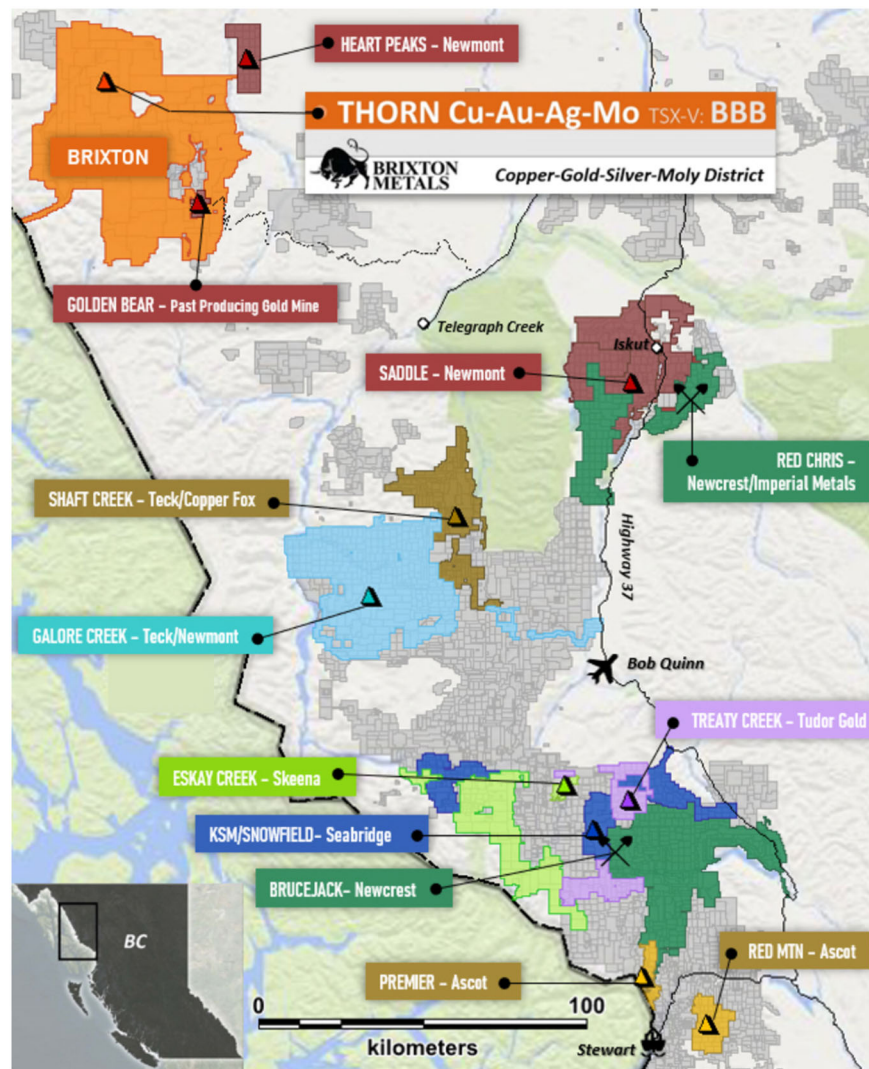
⁷⁶ Cole Evans, *Enduro Metals Expands the Newmont Lake Project, Adjacent to Chachi Corridor in NW BC’s Golden Triangle*, Junior Mining Network (Sept. 16, 2020), <https://www.juniorminingnetwork.com/junior-miner-news/press-releases/2097-tsx-venture/endr/84190-enduro-metals-expands-the-newmont-lake-project-adjacent-to-chachi-corridor-in-nw-bc-s-golden-triangle.htm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

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

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



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



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

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

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

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

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

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

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

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

⁷⁹ 2020 Petition, paras. 83-156.

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

⁸¹ *Ibid.*, p. 7.

⁸² *Ibid.*

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

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

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

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

⁸³ *Ibid.*, p. 8.

⁸⁴ *Ibid.*, p. 8.

⁸⁵ *Ibid.*, p. 10.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, p. 13.

⁸⁹ *Ibid.* (emphasis added).

⁹⁰ Meryl B. Storb *et al.*, *Growth of Coal Mining Operations in the Elk River Valley (Canada) Linked to Increasing Solute Transport of Se, NO₃⁻, and SO₄²⁻ into the Transboundary Kootenai Reservoir (USA–Canada)*, *Environ. Sci. Technol.* (Nov. 3, 2023), pp. 17465–17480, 17466, <https://pubs.acs.org/doi/10.1021/acs.est.3c05090?ref=pdf> (“Meryl B. Storb *et al.*”).

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

selenium concentrations collected at the international border have also exceeded U.S. site-specific water quality criteria since July 2020.⁹² Noting the “limited primary literature on the effects on the aquatic ecosystem” in the transboundary Koochanusa Reservoir, a recent study on the impacts of coal mining in the Elk River Valley recommended further research on the “surface water–groundwater interaction in the Elk Valley and its mine-affected tributaries, . . . the magnitude and extent of groundwater contamination, the long-range transport potential of [selenium], and . . . how treatment will affect downstream concentrations and loads.”⁹³

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

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

⁹² Meryl B. Storb *et al.*, p. 17467.

⁹³ *Ibid.*, p. 17476.

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

⁹⁵ *Ibid.*, p. 27.

⁹⁶ *Ibid.*, p. 28.

⁹⁷ *Ibid.*, pp. 15, 23-24.

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

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

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

¹⁰² *Ibid.*, p. 23.

¹⁰³ *Ibid.*, p. 27.

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

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

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

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

The B.C. Minister of Energy, Mines, and Low Carbon Innovation responded to Petitioners’ request on June 11, 2021.¹⁰⁷ The Minister noted that B.C. “would like to understand” and “explore opportunities to address any gaps” in the environmental assessment processes for “existing or proposed mine development in B.C.”¹⁰⁸ In the following months, B.C. assisted Petitioners with arranging direct meetings with representatives of the Ministry of Energy and Ministry of the Environment and Climate Change Strategy. Petitioners also met with the B.C. EAO. On December 30, 2021, Petitioners again urged B.C., unsuccessfully, to pause its environmental permitting processes for the B.C. Mines while the dialogues between Petitioners and B.C. continue.¹⁰⁹

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

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

¹⁰⁴ 2020 Petition, paras. 249-258.

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

¹⁰⁶ Appendix 4.

¹⁰⁷ Appendix 11.

¹⁰⁸ *Ibid.*

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

¹¹⁰ Appendix 10.

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

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

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

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

Because of recent developments with respect to the right to a healthy environment in international and Canadian law, Petitioners now also allege that Canada and B.C. are violating their right to a healthy environment. Since filing the 2020 Petition, the United Nations General Assembly has adopted a resolution recognizing the human right to a clean, healthy, and sustainable environment.¹¹² Canada voted in favor of adopting this resolution, and its representative acknowledged when explaining Canada's vote that environmental degradation can negatively impact human rights.¹¹³ In June 2023, Canada also codified the right to a clean, healthy, and sustainable environment by amending the Canadian Environmental Protection Act, 1999.¹¹⁴

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

¹¹¹ 2020 Petition, paras. 193-258.

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

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

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

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

¹¹⁶ *Ibid.*, para. 59.

¹¹⁷ *Ibid.*

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

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

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

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

¹¹⁸ *Ibid.*, para. 62.

¹¹⁹ *Ibid.*, para. 60 (internal citation omitted).

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

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

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

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

¹²⁴ *Ibid.*, para. 102.

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

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

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

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

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

https://www.oas.org/es/cidh/decisiones/corte/2021/pe_12.718_es.pdf

¹²⁶ *Ibid.*, paras. 172, 181, 201, 210.

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

https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf.

¹²⁸ *Ibid.*, para. 280.

¹²⁹ *Ibid.*, para. 287.

¹³⁰ *Ibid.*, para. 333.

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

¹³² *Ibid.*, para. 2.

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

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

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

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

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

¹³⁴ *Ibid.*, para. 10.

¹³⁵ *Ibid.*, para. 64.

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

¹³⁷ Sergeant *et al.*, pp. 7-8.

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

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

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

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

¹⁴² 2020 Petition, para. 119.

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

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

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

¹⁴³ *Ibid.*, paras. 119-156.

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

¹⁴⁵ Petitioners' Supplemental Response, pp. 2-3.

¹⁴⁶ *Ibid.*, p. 4.

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

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

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

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

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

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

¹⁵⁰ *Ibid.*, p. 614.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*, p. 627.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*, p. 619.

¹⁵⁵ *Ibid.*

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

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

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

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

¹⁵⁷ British Columbia Environmental Assessment Office, *Amendments to Environmental Assessment Certificates and Exemption Orders – Guidance for Holders* (Jan. 11, 2024), p.7, https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/acts-and-regulations/amendment_guidance_for_certificates_and_exemption_orders.pdf ("B.C. EAO 2024 Guidance on Amendments").

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

¹⁵⁹ B.C. EAO 2024 Guidance on Amendments, p. 7.

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

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

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

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

¹⁶⁰ See 2020 Petition, paras. 244-248.

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

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

¹⁶³ Canadian Environmental Protection Act, 1999, preamble.

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

¹⁶⁵ *Ibid.*, para. 15.

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

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

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

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

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

¹⁶⁹ *Ibid.*, para. 112.

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

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

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

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

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

VI. Requests for Relief

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

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

¹⁷³ See 2020 Petition, paras. 262-281.

¹⁷⁴ Framework Principles on Human Rights and the Environment, para. 8.

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

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