



May 26, 2021

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Dear Ms. Boss,

**RE: Michel First Nation Comments on the Initial Project Description for the Phase I Vista Test Underground Mine and Vista Mine Phase II Expansion related to Participation in the Impact Assessment Planning Phase**

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I am writing this letter as the elected Chief, and on behalf of the Council and Membership, of the Michel First Nation ("MFN"). MFN has been governed since 1985 through democratic election every three years. MFN Chief and Council represent approximately 1007<sup>1</sup> people<sup>2</sup> currently registered as Indians, under the *Indian Act* Registry on the Alberta General List as well as many non-status descendants.

MFN has the following rights protected by Section 35 of the *Canadian Constitution*, 1982:

- a. MFN members are "Indians" within the meaning of Section 91(24) of the *Constitution Act*, 1867;
- b. MFN members are therefore "Aboriginal Peoples" within the meaning of Section 35;
- c. MFN is a signatory to Treaty 6; and,
- d. MFN has rights identified and set out in the *Natural Resources Transfer Agreement*, 1930.

Further, MFN members receive their Treaty 6 annuity payments, under Treaty 6, a payment of \$5.00 each year from the Government of Canada. According to Aboriginal Affairs and Northern Development Canada:

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<sup>1</sup> As of December 31, 2020

<sup>2</sup> This does not include members who have registered with other First Nations in error with no recourse for correction

*“Treaty annuity payments are paid annually on a national basis to registered Indians who are entitled to treaty annuities through membership to bands that have signed historic treaties with the Crown”.*

MFN’s Section 35 rights include hunting and fishing, as laid out in Treaty No. 6; as well as trapping and gathering, which is implied through the right to pursue avocations.<sup>3</sup> Further, MFN’s Section 35 rights include aspects not explicitly addressed in Treaty 6, including land and resource rights, as well as rights to self-govern, practice our culture, and speak our language.

We have reviewed the Initial Project Description for the Phase I Vista Test Underground Mine and Vista Mine Phase II Expansion Project (the “expansions” or the “Project”) and, based on our below detailed response, **MFN requests that this Project be designated as per Provision 9(1) of the *Impact Assessment Act* and 19(a) of *SOR/2019-285 Physical Activities Regulations*** as the expansions exceed the total coal production capacity threshold of 5,000 tonnes per day.

This designation will allow for the more robust requirements of the assessment of potential project impacts to areas of federal jurisdiction including Indigenous rights. This is of particular importance to MFN in relation to the combined impacts of this Project from legacy impacts from the existing Vista Coal Mine Phase I in conjunction with potential new impacts from the proposed expansions.

### **Comments on the Initial Project Description**

#### MFN Consultation and Engagement

Despite Coalspur Mines Ltd. (“Coalspur” or the “Proponent”) claim to have been actively engaging with First Nations and Métis communities since February 2019,<sup>4</sup> MFN, to-date, has not been involved in engagement for the original Vista Mine approval or in either expansion project. This is because MFN was not identified by the Alberta Aboriginal Consultation Office for the original Vista Mine, or the provincial approvals for expansions.

Based on the Ministerial decision on July 30, 2020, we reached out to Coalspur to request engagement. However, the Proponent indicated that “...it would be unsuitable for Coalspur to step away from the current Provincial process and embark on a Federal process prior to determination”.<sup>5</sup>

MFN has previously and repeatedly signaled to Coalspur that we are a rights-bearing Nation with rights and interests in proximity to the expansions.<sup>6</sup> Despite this, Coalspur has not included MFN in the Project Description in relation to Indigenous Consultation and Engagement. Further, in a letter dated September 4, 2020, Coalspur indicated that “...Coalspur has no information beyond what is stated in your letter that allows Coalspur to conclude MFN is potentially impacted by the existing Vista Coal Mine Project or Phase II. Therefore, we are unable to consider consultation funding at this time.”

We hope that through federal designation, MFN can undertake consultation with the Impact Assessment Agency of Canada (“IAAC”) and engage with the Proponent to understand potential

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<sup>3</sup> Treaty No. 6 (1876)

<sup>4</sup> Initial Project Description, Page 6 (PDF Page 15)

<sup>5</sup> Letter dated September 21, 2020

<sup>6</sup> Letters dated August 27, 2020 and September 18, 2020

impacts from the expansion on MFN rights recognized and affirmed by Section 35 of the *Constitution Act, 1982*.

We further hope that the Proponent will not rely on historical engagement completed for the original Vista Mine as a substitute for consultation on this Project, as is implied in the Project Description. Consultation completed for the original Vista Coal Mine Project cannot be used as a substitute for consultation on these new approvals. This was articulated in *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511, 2004 SCC 73 at para 78 the court found that "...past consultations with the Haida ... do not amount to and cannot substitute for consultation with respect to the decision" at hand. By basing their consultations on past processes, it was found that "...the Province ... failed to engage in any meaningful consultation at all" (para 79). Therefore, we hope that the IAAC and Proponent consult and engage with MFN should the expansions be designated.

#### Legislative Requirements

One of our main concerns with the Initial Project Description, and the Project proceeding with a provincial Environmental Impact Assessment ("EIA"), is the disconnect between the provincial and federal approaches to Indigenous consultation. The new *Impact Assessment Act, 2018* ("IAA") includes requirements for the assessment of impacts from physical activity on the rights held by Indigenous peoples of Canada. This varies from provincial legislation, including the *Responsible Energy Development Act, 2013* referenced in the Project Description, which still heavily relies on current use of land as a metric of impact. Current use of land is too narrow of a metric to understand the full scope of impacts from a proposed project on Section 35 rights. Further assessment areas are required as identified under the IAA and by the IAAC.

We have reviewed a variety of new federal planning phase documents available on the registry including the *Practitioner's Guide to the Impact Assessment Act* as well as *Tailored Impact Statement Guidelines* produced for other projects regulated under the IAAC. This review has allowed us to conclude that the best way for Indigenous rights to be considered is through a federal process. Most importantly for MFN, the initiation of a federal process would allow for consultation and engagement with MFN, which to date, and based on direction of the Alberta government, has not been undertaken by the Proponent.

#### Issues and Concerns

While the previously identified impacts from formerly completed work is valuable, there must be an assessment, as part of the current process, of potential impacts to Indigenous rights through the assessment phase for the expansions. This should include an evaluation of issues and concerns raised by Indigenous Nations to inform the selection of Valued Environmental Components for further assessment. For example, where Nations have raised concerns regarding noise and air,<sup>7</sup> these should be used to inform (1) types and locations for noise and air modelling receptors to align with areas of importance to Indigenous Nations including MFN; (2) expand consideration of noise and air assessment to include key parameters to Indigenous Nations such as perception and subsequent avoidance behaviors; and, (3) allow for the collaborative development of any required mitigation plans to ensure the initial concerns are addressed.

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<sup>7</sup> Initial Project Description Page 5 (PDF Page 14)

### Benefits from the Project

The Initial Project Description outlines the benefits and employment opportunities for Indigenous Groups. In relation to Project benefits, this is premature for Phase II in particular as benefits are identified without a consideration of the impacts to rights. Typically, in an environmental assessment process, mitigation of impacts is applied, should additional impact remain following mitigation, compensation or 'benefit' is identified to address any outstanding effect. While we understand Coalspur is proactive, and has long-standing positive relationships with some Indigenous Nations, this lack of consideration of the Project 'trade offs' minimizes the constitutional imperative to consider Indigenous rights.

### Physical and Biological Environment

In addition to concerns related to our rights, MFN also has concerns with impacts to the physical and biological environment which relate to specific Valued Environmental Components developed for various discipline and environmental aspects for consideration within the assessment. The outcomes and objectives listed in relation to the technical and environmental assessments do not appear to include consideration of aspects of importance to Indigenous Nations or MFN, specifically. For example, perceptions of Indigenous Nations in relation to fisheries resources (e.g., perception of acute health effects) is not considered and how this could lead to avoidance behavior of those Nations in relation to fish resources in proximity to the expansions. This lack of consideration of potential linkages is present in a variety of technical and environmental assessments including air quality, human health, surface hydrology and water quality, and wildlife.

In relation to potential effects of the Project, there are gaps in consideration of aspects of the Physical and Biophysical environment in relation to Indigenous Nations. For example, the Valued Environmental Components include arctic grayling, bull trout, rainbow trout, and benthic invertebrates. However, there is no discussion of whether these species are representative of species of importance to Indigenous Nations, including MFN; or whether additional species of importance may be considered pending additional consultation or engagement. Further, there is no discussion of wildlife within the Potential Effects section of the Initial Project Description.

Based on our above listed concerns, we ask that this Project be designated to ensure a full consideration of MFN's rights and interests and a robust consultation and engagement process and look forward to future engagement with the Proponent on the expansions.

### **Information Related to Participation in Impact Assessment Planning Phase**

In addition to our comments on the Initial Project Description your letter indicated that you would like to initiate a dialogue on the consultation process should the Project require a federal impact assessment. To this end, MFN would like to indicate our interest in participating in all phases, starting with the Planning Phase. MFN would like the opportunity to review and provide comment into the Summary of Issues, the Indigenous Engagement Partnership Plan as well as the Tailored Impact Statement Guidelines. MFN is also receptive to ensuring this process is collaborative with the Crown, as represented by the IAAC, as well as the proponent. However, due to COVID-19, we prefer this be completed virtually until such time that in-person meetings are deemed safe.

Thank you in advance for your support and consideration of our designation request for this Project. We look forward to consultation and engagement from the IAAC and Proponent on the expansions to ensure impacts to MFN's rights are considered, assessed, and mitigated.

Yours Truly,

<Original signed by>

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Michel First Nation

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