



2ND FLOOR, 736 BROUGHTON STREET
VICTORIA, BC, CANADA V8W 1E1

T: 250.361.9469
F: 250.361.9429

DGWLAW.CA

Our File: 2539

Via email: Jessie.Hannigan@gov.bc.ca

February 22, 2023

Environmental Assessment Office
2nd Floor 836 Yates St
PO Box 9426 Stn Prov Govt
Victoria BC V8W 9V1

Attention: Jessie Hannigan, Project Assessment Director

Dear Mr. Hannigan:

Re: Consultation with Lummi Nation on the Proposed GCT Deltaport Expansion Berth Four Project (DP4)

Thank you for providing a response to our August 30, 2022 letter, sent on behalf of Lummi Nation, and for offering to meet with Lummi to discuss Lummi's engagement in the DP4 coordinated environmental assessment process.

From our client's perspective, there is only one way to ensure that Lummi's engagement in the DP4 coordinated assessment process meets Lummi's interests and concerns: to initiate formal consultation with Lummi as an Aboriginal People(s) of Canada, and to afford Lummi, at the very least, the same rights and opportunities as other Indigenous Nations being consulted on this project.¹

¹ See Impact Assessment Agency of Canada and BC Environmental Assessment Office, "Joint Indigenous Engagement and Partnership Plan: GCT Deltaport Expansion – Berth Four Project (DP4)", dated 31 May 2022, p. 6, online: projects.eao.gov.bc.ca/api/public/document/62964d24182aa80022fdcc67/download/FINAL%20DP4%20Joint%20Indigenous%20Engagement%20and%20Partnership%20Plan_31May2022_for%20posting_EN.pdf.

In the preliminary information already provided to the EAO, Lummi establishes a strong *prima facie* claim to Aboriginal rights that would be adversely impacted by DP4, if approved. These rights are not dependent on kinship ties, nor are they dependent on sheltering under another Indigenous Nation's rights. Lummi is not statutory creation like many *Indian Act* bands, but rather is an independent, sovereign Indigenous Nation, and has been since before contact.

The questions posed in your December 15, 2022, letter are the types of questions that would be answered, with reference to supporting evidence, in a Traditional Use Study, which we understand are routinely funded by both proponents and the Crown for projects of this magnitude. While Lummi has recently received some federal funding to support Lummi's participation in the DP4 assessment, we understand that this funding can be used only for limited purposes and could not be used to fund a Traditional Use Study.

We understand that it is the EAO's (and the IAA's) position that environmental assessments and consultation processes are not rights determination processes. We agree. However, it is not a prerequisite for consultation that an Indigenous Nation have established rights. Rather, the vast majority of Indigenous Nations in British Columbia do not have established rights. Like Lummi, these Indigenous groups, from the Crown's perspective, have only "asserted" rights.

In *Haida*, the Supreme Court of Canada determined that British Columbia had a duty to consult and accommodate the Haida prior to making decisions that might adversely affect Haida's asserted but unproven claims.² The court explicitly rejected British Columbia's argument that there is no duty to consult and accommodate prior to final determination of the scope and content of claimed rights:

To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.³

While the process of proving Aboriginal claims is underway, the Crown is required to take certain steps, through consultation and accommodation, to preserve the Aboriginal interest pending resolution.⁴

Minister Rankin, by way of his February 8, 2022, letter, provided Lummi with contact information for an individual within the Ministry of Indigenous Relations and Reconciliation. Yet both the EAO and IAA continue to allude to some sort of formal

² *Haida Nation v. British Columbia*, 2004 SCC 73, para. 27 [*"Haida"*]

³ *Haida*, para. 33 [references omitted].

⁴ See *Haida*, para. 38.

process for “operationalizing” *Desautel* outside of the environmental assessment process, which Lummi has received no information about.

Haida makes clear that the EAO must consult with Lummi on the basis of Lummi’s asserted rights. It is both inadequate and contrary to the honour of the Crown for the EAO to wait until Lummi’s rights are proven through some forum that, to Lummi’s knowledge, does not yet exist.

Lummi looks forward to continuing this discussion with you and has advised that they are available to meet with you in the near future. Please contact Karlie Kinley <Contact Information Removed> and Gabriel Cantu <Contact Information Removed> to confirm a date and time for a meeting.

Yours truly,
DEVLIN GAILUS WATSON

<Signature Removed>

 John W. Gailus

<Contact Information Removed>

JWG/caj

cc: **Lummi Nation**
Chairman Anthony Hillaire <Contact Information Removed>
Gabriel D. Cantu <Contact Information Removed>
Merle Jefferson <Contact Information Removed>
Salena M. Phair-Gomez <Contact Information Removed>

EAO
Kim Walters <Contact Information Removed>
Cassana Kelly <Contact Information Removed>

IAA
Angeles Albornoz <Contact Information Removed>
Kate Witherly <Contact Information Removed>
Samantha Sabo <Contact Information Removed>
Jocelyn Harrington <Contact Information Removed>