



**KTUNAXA
NATION**

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The Honourable Jonathan Wilkinson
Minister of Environment and Climate Change
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And to:

Greg Bosse
Project Manager, Prairie and Northern Region
Impact Assessment Agency of Canada
Government of Canada
Greg.bosse@canada.ca

sent via email; April 1, 2021

Re: Request for Montem Resources Tent Mountain Project to undergo a Federal Impact Assessment

Ki?suk kyukyit,

The purpose of this letter is to request, on behalf of the Ktunaxa Nation Council (KNC), that the Minister of Environment and Climate Change (the Minister) designate the proposed Montem Resources (Montem) - Tent Mountain resuming activities project (the Project) as reviewable under section 9(1) of the *Impact Assessment Act* (the Act). The KNC is the governing body of the Ktunaxa Nation in Canada.

The KNC has reviewed the designation request made by the Siksika and Blood Tribe/Kainai Nations of Alberta on March 2, 2021, and supports that request.

In summary, the KNC is requesting that the proposed Project be designated because of the Project's potential to cause or contribute to significant adverse impacts on matters within federal jurisdiction, and its impact on Ktunaxa Aboriginal rights and traditional practices.

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ʔaq̓am

Lower Kootenay

Tobacco Plains

The location of the proposed Project is in an area that is of importance to the Ktunaxa Nation, where the Nation has Indigenous rights and interests that are recognized and affirmed by the *Constitution Act, 1982*, and where Ktunaxa Citizens are engaged in the ongoing practice of Ktunaxa rights through use of the lands and resources. Due to the location, size and lifespan of the proposed Project, the KNC considers that it will likely cause significant adverse impacts on the Ktunaxa Nation's Indigenous rights and interests.

The need for a Federal EA to address potential impacts to Ktunaxa rights and interests is underscored by the failure of the Alberta Aboriginal Consultation Office (ACO) to consult with the KNC regarding past major coal mine approvals. During the course of the joint panel review (JRP) of the Grassy Mountain Coal Mine, the ACO - which is responsible for all aspects of aboriginal consultation regarding energy and mining projects within Provincial jurisdiction - failed to engage in any consultation with the KNC, notwithstanding the KNC's full participation in the panel review. This omission indicates that the ACO cannot be relied upon to fulfill the Crown's constitutional duty to consult with and accommodate the Ktunaxa Nation regarding the Tent Mountain Project. A Federal EA is required to ensure the Crown's duties, and the purposes and intent of the *Impact Assessment Act*, are fulfilled.

In addition, the Project will likely have impacts to four additional areas of Federal jurisdiction: regional and transboundary cumulative effects, fisheries, migratory birds and endangered species. As such, the KNC considers it important that Canada become fully engaged in the review and assessment of the Project by designating it as reviewable under the Act.

A. The Proposed Project

As described in the proponent's Project summary document dated February 11, 2021, the Project is located within southwestern Alberta, just 26 km west of Coleman. The expected mine life is 14 years, it will be open pit mining with truck/shovel convention, and will cover 750 ha in size. This area was historically mined from 1948 – 1983 with reclamation occurring on parts of the property.

However, poorly described in the project summary document is that the Project also crosses over the southeastern BC border and into *Qukin ?amak?is* (Raven's Land), also known as the Elk Valley, and will have impacts within BC and downstream into Montana. The Project requires a BC *Mines Act* permit, and the Project loading area will be located in BC as well as the presence of potential waste rock dumps which stretch across the Alberta border and into BC. Of particular concern to the KNC, the Project includes a settling pond which discharges into Michel Creek, which is a fourth order tributary of the Elk River. The Project requires a BC *Environmental Management Act* permit for discharge of waste into BC waters, and contaminants from the Project will contribute to already excessive contaminant loading in the Elk River and downstream to the transboundary Kooconusa reservoir.

The Project area is bounded by Teck Coal's Coal Mountain Operations (which is entering the care and maintenance phase) to the southeast, the active Teck Coal Elkview Operations to the northwest, with two proposed mining operations - North Coal's Michel Coal Project directly adjacent to the Project, and NWP's Crown Mountain Project to the north. The potential for the Project to contribute to regional cumulative effects is therefore also a deep concern.

B. Rationale for Designation

1. The Project is near a threshold in the Project List

As noted by Siksika and Kainai, the Project is stated to have a production design of 4,925 raw t/day. This production level is incredibly close to the 5,000 t/day production threshold for assessing both a new mine or a mine expansion. This raises the prospect that the Project description has been tailored specifically to avoid a Federal EA, as well as the risk that the production threshold will bump up above the 5,000 t/day threshold once the mine is operational.

The Project description also fails to properly differentiate between reclaimed and brownfield disturbance area. Montem measures the disturbance footprint against the previously permitted area of mining, including areas that have been reclaimed. To accurately assess the new disturbance footprint, the previously reclaimed areas should be subtracted from the existing disturbance area, since those reclaimed areas have had decades of regrowth since the mine ceased operations in 1983 and are somewhat functional habitat. If reclaimed areas are treated as new disturbance, the new disturbance area is likely closer to the 50% requirement provided in s. 19(a) of the Schedule to the *Physical Activities Regulation*, if not over.

2. The Project has the potential to impact the Ktunaxa Nation's section 35 rights (Sections 6(1)g and 7(1)(c) of the Act)

The KNC filed substantial evidence regarding Ktunaxa rights and traditional uses in the Crowsnest Pass area, including the Project area, as part of the Grassy Mountain JRP hearing. The IAAC is familiar with that evidence, and should review the same for details of Ktunaxa rights, traditional uses and interests, if required for purposes of this designation request.¹

¹ [Ktunaxa Nation Rights and Interests in Relation to Benga Mining Limited's proposed Grassy Mountain Coal Project](#)

Ktunaxa citizens rely on the Project area for the preferred practice of a range of rights and interests that rely on particular preferred or critical places, species, and practices. These include subsistence harvesting, cultural spiritual practices including teaching of oral histories and transmission of knowledge, and use of trails and roadways that allow access to important areas and resources. Based on historic treaties and agreements with neighboring First Nations, the Ktunaxa Nation recognizes that other First Nations from further east also have histories and rights in the Project area, alongside those of the Ktunaxa Nation. Practice of Ktunaxa rights in the Project area are ongoing and current, despite serious impacts from past coal mining, road development, extirpation of bison, and ongoing Canadian colonial policies, including those associated with National Parks and protected areas.

The Project has potential to result in:

- a. Loss of opportunity to carry out cultural practices, including teaching, traditional use and harvesting activities, including fishing, hunting and gathering, in both the Project area and the surrounding area where Project effects may occur, including impacts to water quality due to development of the Project.
- b. Loss of access to, and sensory disturbance impacting, preferred places, preferred species and resources, and preferred practices central to Ktunaxa use, language and identity.
- c. Loss of Ktunaxa cultural, historical and archaeological sites due to land disturbance associated with mine development.

These effects will be compounded by the cumulative disturbance to the regional landscape, addressed in more detail below. It is not possible to identify Project effects to Ktunaxa rights, traditional practices and interests in more detail at this time, due to the preliminary stage of the EA process.

The KNC's experience with the Grassy Mountain JRP process indicates that, without a Federal EA, the Alberta government will not conduct any, much less meaningful and legally sufficient, consultation with the KNC to address and accommodate for the Project's impacts to Ktunaxa's section 35 rights. Under Alberta's legal and policy regime, the ACO is responsible for conducting all consultation with Indigenous Nations regarding major mine and energy projects. The AER is statutorily precluded from conducting consultation or assessing the adequacy of consultation; it is the ACO that bears the responsibility for both issues. As the IAAC is aware, the KNC fully participated in the Grassy Mountain JRP, including filing evidence to establish Ktunaxa section 35 rights, providing technical and cultural evidence regarding impacts to those rights, and proposing meaningful mitigation and accommodation measures to address those impacts.

Notwithstanding the KNC's good faith efforts, the ACO failed to engage in any consultation with the KNC regarding the Grassy Mountain project, and failed to provide the AER with a report assessing the adequacy of consultation with the KNC. The ACO has yet to provide a rationale for this omission.

The purposes of the *Impact Assessment Act* include promoting cooperation and communication with Indigenous peoples, and ensuring respect for the rights of Indigenous peoples (sections 6(1)(f) and (g)), and the Minister's mandate under the Act includes respecting "the Government's commitments with respect to the rights of Indigenous peoples" (section 6(2)). The KNC's experience with the Grassy Mountain JRP indicates that, without Federal involvement, the EA conducted by the AER will not achieve those purposes.

3. The Project will affect other areas of Federal jurisdiction

a) *Effects on Fish and Fish Habitat*

Federal triggers: Section 7(1)(a) of the Act; *Fisheries Act*, Section 35(2) and paragraphs 36(5)(a) to (e).

Within BC, Montem currently has a historic settling pond which will be reactivated for the Project. This pond currently discharges contaminants into Michel Creek, which is a tributary of the Elk River. It is KNC's understanding that Montem has a British Columbia *Environmental Management Act* Authorization for this current discharge. Michel Creek already has mining impacts from Teck Coal's Coal Mountain and Elkview Operations, and the proposed North Coal Michel Creek Project will also impact Michel Creek if accepted. Michel Creek has the provincially Blue Listed (BC) and SARA listed species of special concern Westslope Cutthroat Trout (WCT); *Oncorhynchus clarki lewisi*; that the Ktunaxa know *as qust'it* and the provincially Blue Listed (BC) Bull Trout (BT); *Salvelinus confluentus*; that the Ktunaxa know *as tuhut*, among other fish species. Within Alberta, the Project will impact the Crowsnest River which is also fish bearing water, and where both WCT and BT are federally listed under SARA. Potential impacts to fish and fish habitat include:

- d. Impacts to fish habitat and fish survival due to impacts on water quality through discharge and surface runoff from the open pit and rock storage area in Alberta, and Corbin settling pond discharge into Michel Creek in BC. Currently, in the Elk Valley active mining and other uses have been linked to increased levels of selenium, sulphate, and nitrate in the rivers and streams. Water quality issues have also been noted in the larger Elk River, downstream of the proposed mine site, which is already significantly impacted by contaminants from five large open pit coal mines operated by Teck Coal Ltd. The KNC is extremely concerned regarding the future of fish populations in Michel Creek and Elk Rivers.

Special attention is warranted to ensure that the Project does not make the existing selenium and water quality situation worse in the Elk Valley or on the Alberta side.

b) *Effects on Species at Risk*

Federal triggers: Section 7(1)(a) of the Act; *Species at Risk Act* (S.C 2002, c.29), Section 79(1).

Michel Creek and the Elk River are vital waterways with core habitat for the Westslope Cutthroat Trout and Bull Trout described above. Another tributary to the Elk River is the Fording River, which is influenced by mining and had a reduction in the WCT population by >90%.

Based on available information, other Schedule 1 listed species identified in the Project area include Badgers (Endangered), Olive-sided Flycatchers (Threatened), and Western Toads (Special concern). Potential Project impacts to these species and their habitat have not yet been fully assessed. These species and ecosystems are at risk and would benefit from Federal assessment and oversight, as would other species and ecosystems that are also at risk and likely to be impacted by the Project. There are also BC listed species like the Gillette's Checkerspot butterfly, Little Brown Myotis, Wolverine, Grizzly Bear, Big Horn Sheep, Bank and Barn Swallows, and a number of listed plant species (e.g. Whitebark Pine) that are or could be present in the area.

c) *Effects on Migratory Birds*

Federal triggers: Section 7(1)(a) of the Act; *Migratory Birds Convention Act, 1994*.

Based on information from adjacent areas, habitats and elevation range on and around Tent mountain, migratory birds would be present and would be protected under the *Migratory Birds Convention Act, 1994*. The KNC believes that a federal assessment would help focus attention on identifying and assessing potential effects on migratory bird species and their habitat, as well as methods for managing such effects.

d) *Effects that cross provincial and international boundaries*

Federal triggers: Section 7(1)(b) of the Act; *International Boundary Waters Treaty Act*.

Located along the AB/BC border the Project Summary states the loading facility will be located primarily within BC. Michel Creek and the Elk River are subject to significant cumulative impacts from other mines and developments in the watershed. The Elk River flows directly into the Kootenay River and downstream through Kocanusa Reservoir, thereby influencing transboundary waters between British Columbia and Montana.

The Kootenai Tribe of Idaho, the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, the State of Montana and the US EPA have all expressed concerns regarding water quality impairment caused by the accumulation of mine related contaminants in the waters and fish of the Kooconusa Reservoir. Additional information regarding transboundary environmental concerns by Ktunaxa governments were provided through letters and memos sent to both the Canadian and US governments in April 2017. The reservoir is a transboundary waterbody between BC and Montana, with the northernmost point just downstream of the confluence of the Kootenay River and the Elk River (and its mine impacted tributaries, including Michel Creek and the Fording River). An increasing selenium trend can be detected further downstream via the Kootenay River through Montana, and Idaho and all the way back up to the Yaqan Nukiy area (Creston, British Columbia). Other proposed coal mines have also triggered important transboundary issues related to water quality.

Concerns around transboundary mine contaminants, specifically selenium, led the Montana Department of Environmental Quality (MT DEQ) to identify Kooconusa as threatened by selenium (Se) and listed the water body under Section 303 (d) of the US Clean Water Act. In 2020 further research and concern led to Montana setting a criteria using the EPA 2016 recommended mechanistic model method for translating the recommended fish tissue criterion elements into a site-specific water column criterion element for Kooconusa. The recent selenium criteria includes a monthly average exposure of 0.8 µg/L with a duration of 30 days and a frequency that shall not be exceeded more than once in three years, on average. The U.S. Environmental Protection Agency (EPA) completed its review of Montana's revised water quality standards (WQS) and approved the Administrative Rules of Montana (ARM) 17.30.632 and 17.30.602(32) on February 25, 2021. Current selenium concentrations range from approximately 1-2 µg/L downstream of the Elk River, leading to water quality exceeding this criteria. Under the Clean Water Act, the US EPA is responsible for evaluating water quality standards. The potential for the Project to affect a transboundary water body, and the implications of the discharge of selenium contaminated waters from the Project for US state and EPA approved WQS for Kooconusa, is an important issue that falls squarely within Federal jurisdiction and that will have legal implications through the 1909 Boundary Waters Treaty regarding transboundary contamination. Alberta, in contrast, is unlikely to adequately consider or address this issue in the absence of a Federal EA.

e) *Cumulative Effects*

Federal triggers: Sections 6(1)m and 22(1)(a)(ii) of the Act.

The proposed Project will contribute further to the accumulation of effects in the Elk Valley, and on areas of shared federal and KNC concern.

The Elk Valley, Elk River, and Michel Creek are subject to intense accumulation of effects due to the large number of coal mines in the watersheds, with impacts already at or beyond sustainable and significant thresholds. For example, five of BC's 20 major "operating" mines are located in the Elk Valley (see <https://mines.nrs.gov.bc.ca/projects>). The KNC is also deeply concerned about additional habitat fragmentation and high road and stream crossing density located adjacent to a valley that has so much historic and ongoing industrial development. The cumulative impact of the discharge of selenium and other contaminants from these mines on the Elk River watershed and downstream waterways is of particular concern to the KNC.

As well, looking at the Elk Valley from the perspective of greenhouse gas emissions, these five mines stood at #7 (Fording River), #9 (Greenhills), #10 (Elkview), #17 (Line Creek) and #35 (Coal Mountain) out of 191 top greenhouse gas emitters in BC in 2017 (see <https://climate-change.canada.ca/facility-emissions/>).

We trust that this is sufficient information to support our request that the Project be designated as reviewable. Should you have any questions or require additional information, please do not hesitate to contact us.

Sincerely,

<Original signed by>

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