



340 - 1122 Mainland Street  
Vancouver, BC V6B 5L1

T 604 687.0549  
F 604 687.2696  
www.jfklaw.ca

**Jeff Langlois**  
(He/Him/His)  
Principal  
E [janglois@jfklaw.ca](mailto:janglois@jfklaw.ca)

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**VIA EMAIL**

(ec.ministre-minister.ec@canada.ca)

**Minister of Environment and Climate  
Change**

Environment and Climate Change  
Canada: Pacific, Prairies and the North  
200-4999 98th Avenue  
Edmonton, Alberta  
T6B 2X3

Attention: The Honourable Jonathan Wilkinson

Dear Minister Wilkinson,

**Re: Regional Assessment Petition (No. 432-00681)**

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We are counsel for Blood Tribe/Kainai (“**Kainai**”). We write regarding the Petition to the Minister of Environment and Climate Change Canada initiated by Latasha Calf Robe and presented to the House of Commons on March 22, 2021 by Heather McPherson (Petition No. 432-00681) (the “**Petition**”).

Kainai supports the request that the Minister of Environment and Climate Change Canada:

conduct a Regional Assessment of the impacts of all proposed coal developments and exploratory activity in Southwest Alberta on Treaty and Aboriginal rights, water quality, species at risk and the environment.

Kainai has requested federal intervention in this issue on multiple occasions and specifically, Kainai has raised their desire for regional assessments of the activity in the eastern slopes of the Rocky Mountains (the “**Eastern Slopes**”) with the Impact Assessment Agency of Canada (the “**IAAC**”) on multiple occasions. In addition, Kainai requested federal reviews of two (2) proposed coalmines in the region: Teck’s Fording River Extension, and Montem Resource’s Tent Mountain.

In short, Kainai submits:

- selenium pollution caused by coalmines has devastated the lands and waters of the Elk Valley in BC;
- continued development in the Eastern Slopes will have the same effect, causing irreversible damage to the lands and waters of southwestern Alberta and beyond;
- the Eastern Slopes are integral to the continued practice of Kainai’s Aboriginal and Treaty rights;
- the protection of this area is vital;
- Alberta’s project-specific assessment is insufficient to appreciate and safeguard Kainai’s Aboriginal and Treaty rights; and
- deep consultation on this decision is required.

Due to these compounding issues, it is incumbent on the Crown to engage with Kainai regarding your decision as to whether to order a regional assessment. Kainai is available immediately for consultation on this critical decision.

### **Selenium pollution has devastated the lands and waters of the Elk Valley in BC**

Coalmines pollute rivers with selenium. According to a 2014 expert report prepared for Environment Canada by Dr. A. Dennis Lemly (the “**2014 Report**”), “selenium pollution in the Fording and Elk Rivers has been a growing environmental issue for many years”.<sup>1</sup> The 2014 Report concluded “[s]elenium concentrations in surface waters of the Elk River watershed have been increasing since the 1990’s as a result of open-pit coal mining activities in the area”.<sup>2</sup>

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<sup>1</sup> A. Dennis Lemly, Ph.D, “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” (September 25, 2014), [online](#), p 1 [2014 Report]; cited by Carol Linnitt, “For decades B.C. failed to address selenium pollution in the Elk Valley. Now no one knows how to stop it”, The Narwhal (December 4, 2018), [online](#), p 1.

<sup>2</sup> 2014 Report, p 1.

In waters tested throughout BC's Elk Valley, selenium levels have read as high as 150 parts per billion. BC's existing water quality guidelines recommend selenium levels be kept to two parts per billion in order to protect fish and other aquatic life.<sup>3</sup>

Selenium pollution affects water quality, fish and aquatic life, and other wildlife. In their 2014 Report, Dr. Lemly determined that the available information "strongly suggests that dissolved selenium emissions originating from coal mining waste rock are deleterious to resident fish populations, particularly the highly valued Westslope Cutthroat Trout".<sup>4</sup> Specifically, Dr. Lemly noted that "[e]xcess selenium in eggs causes reduced hatching success and a wide variety of morphological abnormalities and physiological changes in post-hatch survivors".<sup>5</sup> Noting gravely, that the "end result can be total population collapse and local extinction of species".<sup>6</sup>

According to a 2019 monitoring report from Teck, cited in an article in The Narwhal, the "adult population of genetically unique westslope cutthroat trout in a river in B.C.'s Kootenay region dropped by 93 per cent this past fall compared with 2017 levels".<sup>7</sup> Following Dr. Lemly's prediction, there have been reports of the "near-disappearance of rare cutthroat trout from a 60-kilometre stretch of the Fording River downstream from the company's four mines".<sup>8</sup>

Coalmines have wreaked havoc on the lands and waters of the Elk Valley. By polluting the rivers with selenium they have put at risk a highly-valued trout species and caused (likely) irreparable damage to the river system. Kainai does not wish to see this same result on the Eastern Slopes, throughout Treaty 7 lands, and beyond.

### **Coal development will cause irreversible damage to the lands and waters of southwestern Alberta and beyond**

Coal development in the Eastern Slopes will contribute to the cumulative impacts of industrial and recreational development in the area. The cumulative impact of various activities, including: agricultural development, the development and extension of municipalities, the transfer of lands to private landholders, the national and provincial park system, mining and other industrial activities have resulted in much of Blackfoot

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<sup>3</sup> Ainslie Cruikshank, "B.C. stalling on new rules for selenium pollution from coal mines, environmental groups say", The Narwhal (Oct 8, 2020), [online](#).

<sup>4</sup> 2014 Report, p 4.

<sup>5</sup> 2014 Report, p 4.

<sup>6</sup> 2014 Report, p 4.

<sup>7</sup> Carol Linnitt, "Unique B.C. trout population suffers 93 per cent crash downstream of Teck's Elk Valley coal mines" The Narwhal (April 16, 2020), [online](#).

<sup>8</sup> Bob Weber, "U.S. demands explanation from province over river pollution from B.C. mines", CBC News (May 11, 2020), [online](#).

traditional territory being taken up by activities inconsistent with the practice of Blackfoot Aboriginal and Treaty rights.

The proposed coal projects exacerbate the impacts of development on Kainai's use of the lands. The list of coal projects in this area is ever expanding. Today, it includes:

- four (4) *operating* coal mines in BC;
- four (4) *proposed* coalmines in BC: Fording River Extension, Crown Mountain, the Michel Coal Project, and the Bingay Main Coal Project;
- Two (2) proposed mines in Alberta: Benga's Grassy Mountain Project and Montem Resource's Tent Mountain Mine (which is adjacent to the Michel Project); and
- A number of Coal Exploration Programs in the Crowsnest Pass region of Alberta: Atrum's Elan South Project; Montem's Chinook Project; and the Cabin Ridge Project.

Of particular note are Tent Mountain and Michel Coal, which are back-to-back along the Alberta-BC border, respectively.

A map of the operating coalmines in BC shows a nearly continuous chain of coalmines from Fording River down to Coal Mountain south of Sparwood, BC. The proposed Alberta projects referenced in the paragraph above would mirror this development on the Alberta side of the border. This would have a devastating effect on the lands and waters of the Eastern Slopes, throughout Treaty 7 territory, and into the United States.

Beyond the ever-present concern about land uses inconsistent with Blackfoot use, the increasing number of proposed coalmines and coal exploration in the area is particularly alarming to Kainai. This is primarily because coalmines bring unique and devastating environmental effects.

Selenium pollution is already having adverse effects on Alberta's waterways. A recent release of previously unreported Government of Alberta data found that water samples taken from 1998 through 2016 averaged six (6) times higher selenium content downstream from the Cheviot mine than in upstream samples. For Gregg River and Luscar Creek, the pollution was even more alarming – samples averaged nine (9) and eleven (11) times higher downstream than upstream.<sup>9</sup> As noted above, high-selenium concentrations are cause for concern.<sup>10</sup>

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<sup>9</sup> Bob Weber, "Contaminant from coal mines already high in some Alberta rivers: unreported data", CBC News (January 25, 2021) [online](#).

<sup>10</sup> Recent reports have indicated that some herds of bighorn sheep may be heavily contaminated with selenium for old coal mines. See: Bob Weber, "Alberta government knew bighorn sheep contaminated with coal-mine selenium: scientist", CBC News (May 11, 2021), [online](#).

Kainai and Blackfoot throughout southern Alberta rely on the Oldman River Watershed for drinking water. Any pollution of this source water creates a significant adverse effect on the health and safety of Kainai's members. This is an impact on an area of federal jurisdiction that regulators cannot assess on a project-specific basis – it must be done regionally.

Selenium pollution is not restricted to a single jurisdiction. The United States Environmental Protection Agency is currently calling for a review of Teck's contamination of the Kootenai watershed in the Elk Valley, which flows across Montana and Idaho. The Tribal Councils of the Confederated Salish and Kootenai Tribes and the Kootenai Tribe have expressed concerns about these proposed coalmines, requesting a federal review of both the Fording River Extension and Tent Mountain project.

Without federal intervention, we risk repeating the devastation in BC's Elk Valley. A regional assessment will go a long way to understanding the impacts of coalmines in the Eastern Slopes and will lead to fully-informed decisions at a project and regional level.

### **The protection of this sensitive ecological area is vital**

#### *Protected lands*

The area in which many of these coalmines are proposed is a sensitive and ecologically important ecosystem known as the Crown of the Continent Ecosystem. It comprises the headwaters of North America's three great watersheds (the Saskatchewan, Missouri, and Columbia). This area is bordered by several protected areas including the Beehive Natural Area, a provincially-recognized Environmentally Significant Area that contains important habitat for large mammals, such as grizzly and black bears, bighorn sheep, and provides a wintering range for one of Alberta's largest elk herds. Other notable protected areas in the Eastern Slopes include Bob Creek Wildland Park, Castle Wildland Park, and Waterton National Park.

#### *Species of importance*

The Eastern Slopes are home to many federally listed species at risk and federally protected species, including: the westslope cutthroat trout, bull trout, grizzly bear, wolverine, and migratory birds. In addition, the area includes critical habitat for species of cultural importance, including: bighorn sheep, elk, mountain goat, moose, and deer.

The Eastern Slopes are critical to the habitat and viability of these key species. By considering a series of coalmines in the area, the Government of Alberta is putting at risk all of the good conservation efforts taken on by the protection of these lands, and placing the viability of these key species at risk.

## **Environmental impacts to this area will have a devastating effect on Kainai's ability to practice Aboriginal and Treaty rights**

Impacts to the local environment, lands, and waters will have a significant adverse impact on the ability for Kainai to practice its Aboriginal and Treaty rights in the area. The Eastern Slopes have long been an area critical to the practice of Kainai's Aboriginal and Treaty rights, including hunting, fishing, harvesting plants and medicines, trade, and spiritual practices. The traditional practices conducted on the land and waters are integral to Kainai's physical and cultural well-being.

The Eastern Slopes are one of the last remaining intact areas in Blackfoot territory where Blackfoot can exercise these rights. It is incumbent on the Crown to monitor available land and determine whether our clients can continue to exercise their rights meaningfully. Kainai has raised this concern on multiple occasions.

During the regulatory proceedings for the Grassy Mountain project, Kainai filed a cumulative effects assessment report prepared by Integral Ecology Group and ALCES Group (the "**Kainai ALCES Report**"), which concluded:

The majority of the regional landscape surrounding the Kainai First Nation (*sic*) reserve has been converted to anthropogenic cover types, primarily farmland. The loss of natural land cover and high linear footprint densities have detrimentally affected fish and wildlife, resulting in moderate risk to the fish community and high risk to elk and mule deer. Accessibility of the land for traditional activities is also of concern, with only 20% of the land estimated to be accessible. These impacts have resulted in substantially reduced opportunities for Blood Tribe members to fish and to hunt in the region, which has made the comparatively intact landscapes to the west important for traditional land use.<sup>11</sup>

The Kainai ALCES Report found the Grassy Mountain project "would contribute to ongoing loss of habitat and associated opportunities for traditional land use, and impacts may be greater if consequences of water contamination (e.g. selenium, calcite) were to be considered".<sup>12</sup> Noting "[a]ny further decline in opportunities for traditional land use may be of concern given that risk to traditional land use is already assessed as high".<sup>13</sup>

In consultation on the development of the South Saskatchewan Regional Plan and the Livingstone-Porcupine Hills land footprint management plan (the "**LPH Plan**"), Kainai

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<sup>11</sup> Integral Ecology Group and ALCES Group, "Cumulative effects assessment for Kainai First Nation" (November 9, 2018), p 38 [ALCES Report]; Please find this report enclosed with this letter.

<sup>12</sup> ALCES Report, p 38.

<sup>13</sup> ALCES Report, p 38.

provided information to Alberta regarding the importance of the Eastern Slopes. The LPH Plan reflected this input by stating:

The Eastern Slopes include the hunting and gathering, and ceremonial places that lie within traditional territories of multiple First Nations. The Livingstone Porcupine Hills areas provide sustenance, materials, medicines, and sacred places for First Nations since time immemorial and is expected to continue to do so for generations yet to come. Indigenous communities are intimately connected to the land and are therefore their ancestral, traditional and continued use of public lands are at risk from the impacts of climate change, industrial development and unmanaged recreational use.<sup>14</sup>

Finally, these concerns were the centerpiece of a judicial review brought by Kainai, and several other nations, related to the Government of Alberta's abrupt decision to rescind the 1976 Coal Policy in May of 2020.

The Crown must ensure that the Blackfoot have the ability to practice their Aboriginal and Treaty rights. Uncontained industrial, agricultural, residential, and other development has pushed the Blackfoot to the western portion of Blackfoot territory – the Eastern Slopes. Consequently, this has dramatically increased the importance of this area for the practice of Blackfoot Aboriginal and Treaty rights. It is both the federal and provincial Crowns' obligation, under the honour of the Crown, to ensure that the decisions they make do not leave Kainai unable to practice their Aboriginal and Treaty rights. To ensure this does not happen requires understanding the historical and regional context of the area.

Accounting for historical and regional impacts is required for a thorough assessment of impacts to Aboriginal and Treaty rights. In *West Moberly First Nations v British Columbia (Chief Inspector of Mines)* the BC Court of Appeal was asked to assess the scope of the duty to consult related to a proposal for coal mine exploration in an area with an extremely fragile caribou population. The coal proponent argued that to consider these impacts (which they viewed as unrelated to the coal exploration proposal) would be an attempt to redress past wrongs through the duty to consult. The court disagreed, finding that “the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners’ treaty right to hunt”.<sup>15</sup> The court continued that a historical assessment is conducted to “recognize an existing state of affairs, and to address the consequences of what may result from pursuit of the

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<sup>14</sup> Government of Alberta, “Livingstone-Porcupine Hills land footprint management plan” (May 17, 2018), [online](#), p 25.

<sup>15</sup> *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, [2011 BCCA 247](#), paras 117-118 [*West Moberly*].

exploration programs”.<sup>16</sup> The regional assessment is one of the limited tools available to the federal government to account for these historical and regional impacts and should be ordered in this instance.

Failing to account for these impacts properly may leave Kainai without anywhere to practice their Aboriginal and Treaty rights. Following, *Grassy Narrows First Nation v Ontario (Natural Resources)*, if Crown action (in that case, the taking up of lands) leaves a nation “with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise”.<sup>17</sup>

### **Alberta’s provincial assessment regime is insufficient**

A project-specific assessment is insufficient to assess the total cumulative effects of a project on a watershed, and a region. The cumulative effects component of a project-specific assessment only looks at the impact of the project within the context of all the other future and proposed activity – it does not look at the impacts on a region.

Further, we note that the Alberta Energy Regulator (“**AER**”) is legislatively barred from determining the adequacy of consultation. The Alberta government assesses the adequacy of Crown consultation on AER regulated projects through the Aboriginal Consultation Office (“**ACO**”). This structure is problematic as the ACO has a very narrow view of the duty to consult and impacts to Aboriginal and Treaty rights. To order consultation, the ACO requires evidence of “site-specific” impacts to Aboriginal and Treaty rights. In practice, this means that nations are not consulted early in the process and their funding and ability to impact the project is significantly hampered.

### **Considerable public interest regarding coal development in Alberta**

Coal activity in this area has generated considerable public interest. For example, Alberta revoking their decades-old Coal Policy and opening up formerly protected lands to development lead to multiple judicial reviews from ranchers and First Nations, and created a flurry of activity on social media, which included input from celebrities and the Premier of Alberta.

For example, please see selected news stories generated in relation to the Coal Policy alone:

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<sup>16</sup> *West Moberly*, para 118.

<sup>17</sup> *Grassy Narrows First Nation v Ontario (Natural Resources)*, [2014 SCC 48](#), para 52, citing *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005 SCC 69](#), para 48.

- Robson Fletcher and Jordan Omstead, “Alberta rescinds decades-old policy that banned open-pit coal mines in Rockies and Foothills” (May 22, 2020) CBC News, [online](#).
- Jill Croteau, “Southern Alberta ranchers weigh in on coal mining after Corb Lund, Paul Brandt speak out” (January 14, 2021) Global News, [online](#).
- Bob Weber, “Court to hear challenge to Alberta coal policy removal” (January 17, 2021) The Globe and Mail, [online](#).
- Sharon J. Riley, “Alberta’s ‘back door’ plan to free up billions of litres of water for coal mines raises alarm” (February 1, 2021) The Narwhal, [online](#).
- Bob Weber, “More Alberta towns ask for coal consultations, pause on exploration” (February 2, 2021) The Globe and Mail, [online](#).
- Bob Weber, “Kenney defends Alberta government’s coal mining decision, says old policy was obsolete” (February 3, 2021) The Globe and Mail, [online](#).
- Sharon J. Riley, “How a public uprising caused a province built on fossil fuels to reverse course on coal mining” (February 10, 2021) The Narwhal, [online](#).
- Bob Weber, “Alberta coal consultation terms of reference rule out land use, water concerns” (April 15, 2021) The Globe and Mail, [online](#).

In addition, several prominent environmental groups and academics have weighed in on the matter:

- Alberta Wilderness Association, “Alberta Strips Away Significant Mountain-Foothills Protection To Encourage Coal Mines” (May 20, 2020), [online](#).
- Nigel Bankes, “OPINION | Reinstating the Alberta coal policy does not mean the end of coal mining” (February 9, 2021), [online](#).
- Ecojustice, “Tent Mountain coal mine: Niitsitapi Water Protectors, landowners group, environmental orgs urge Canada to designate project for assessment” (April 6, 2021), [online](#).
- Bob Weber, “Alberta scientists urge adoption of bill that would protect against coal mining” (April 19, 2021), [online](#).

### **Additional value in ordering regional assessment**

As more and more projects are proposed in this area, a regional assessment will provide provincial and federal regulators, as well as proponents with the data, studies, and true cumulative effects analysis to make informed decisions about the future of the Eastern Slopes. This will be particularly useful in assessing whether federal impact assessments are required for future projects.

### **Deep consultation is required on this decision**

It is integral that the Ministry understands Kainai's perspective on this decision and hears directly why a regional assessment, and federal engagement, is required here.

Deep consultation is required on this decision because:

1. Both the federal and provincial Crowns have knowledge of the Aboriginal and Treaty rights practiced by Kainai in the area.
2. The Eastern Slopes are one of the last remaining intact areas in Blackfoot territory where Blackfoot people can exercise their Aboriginal and Treaty rights. Any development here will have an outsized impact on Kainai's Aboriginal and Treaty rights. Following *West Moberly*, accounting for historical and regional impacts is necessary to address the consequences of proposed development.
3. The federal government cannot uphold the honour of the Crown by ignoring the area and relying on inadequate environmental reviews conducted by Alberta. Failing to exercise federal oversight in this regard will resign the Eastern Slopes to the same fate as northeastern Alberta – where the Crown is embroiled in infringement litigation.

The decision to conduct a regional assessment has far-reaching effects, as it will form a baseline of knowledge and information from which every future project is assessed. This baseline must be developed in consultation with our clients and other Indigenous nations. Our client suggests that an extension be granted to enable the Ministry to develop a more robust approach aligned with the duty to consult that can effectively illicit our client's input.

### **A regional assessment is required**

Our client requests that you order the IAAC to conduct a regional assessment of the Eastern Slopes related to coal activity.

Kainai takes the position that:

- continued development in the Eastern Slopes will cause irreversible damage to the lands and waters of southwestern Alberta and beyond;
- the Eastern Slopes are integral to the continued practice of Kainai's Aboriginal and Treaty rights;
- the protection of this area is vital as it is a sensitive ecological zone that houses several species of importance; and
- Alberta's project-specific assessment is insufficient to appreciate and safeguard Kainai's Aboriginal and Treaty rights.

A regional assessment would be a significant practical step the Crown can take to respect and renew its Treaty obligations and uphold the honour of the Crown. Kainai representatives and legal counsel are available immediately to meet with you to discuss this matter further.

Yours truly,

**JFK Law Corporation**

Blair Laurence <Original signed by>

**Jeff Langlois**

JLL

cc: Impact Assessment Agency of Canada (IAAC.AlbertaCoal-CharbonAlberta.AEIC@canada.ca)  
Annabel Crop Eared Wolf, Blood Tribe/Kainai (annabelcew@bloodtribe.org)  
Mike Oka, Blood Tribe/Kainai (mike.oka@bloodtribe.org)  
Clayton Leonard, JFK Law Corporation (cleonard@jfklaw.ca)  
Blair Feltmate, JFK Law Corporation (bfeltmate@jfklaw.ca)

Encl. Integral Ecology Group and ALCES Group, "Cumulative effects assessment for Kainai First Nation" (November 9, 2018)

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