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VIA EMAIL

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Janet Shaw
Impact Assessment Agency of Canada
Pacific and Yukon Region
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Dear Ms. Shaw,

Re: Designation of Castle Mountain Project under the IAA

We write on behalf of Kainai (Blood Tribe) and Siksika Nation in respect of Teck Resources Limited's ("Teck") application for expansion of its Fording River Operations ("FRO") at Castle Mountain (the "Castle Mountain Project" or the "Project").

We write to request that this Project undergo an impact assessment, as it is a designated project under the *Impact Assessment Act* ("IAA"). This Project falls within the threshold set out under s. 19(g) of the *Physical Activities Regulations* (the "*Regulations*") thus bringing it within the definition of a designated project under the IAA.

In the alternative, we request that the Minister designate the Castle Mountain Project for an impact assessment under section 9(1) of the IAA because carrying out these mining activities may cause adverse effects on multiple areas of federal jurisdiction, including fish and fish habitat, migratory birds, and environmentally sensitive lands. Many of these impacts will cross both provincial and international borders. In addition, this Project has the potential to significantly impact Kainai and Siksika's rights, particularly given the extent to which Kainai and Siksika's traditional territories have already been disturbed or taken up. Any remaining areas that support the exercise of the Nations' rights must be protected, and development of those areas carefully considered.

The Project

Teck's FRO is the largest mine in British Columbia. With a total permitted disturbance area of 6,993 ha, Teck is now seeking to expand its FRO to Castle Mountain to allow for continued coal production. Based on a conceptual project footprint provided in the Initial Project Description ("IPD"), the Castle Mountain Project will require approximately 2,550 ha of land outside Teck's existing *Mines Act* permit for FRO along with 1,550 ha within the FRO permit boundary for placement of waste rock. Therefore, it is estimated that Castle Mountain will result in 4,100 ha of new disturbance, significantly expanding the total footprint of the FRO. Should Castle Mountain proceed, it will extend the life of FRO mining activities by several decades.

1. The Project comes within the threshold set out in the Regulations

Where a physical activity is listed in the *Regulations*, it will be considered a designated project under the *IAA*. Section 19(a) of the *Regulations* lists the expansion of a coal mining operation where the expansion would result in a 50% increase in the "area of mining operations".¹ Teck has indicated that the Castle Mountain Project does not meet this threshold as it will only result in a 36.5% increase of "new" mining area.

While Teck's current *Mines Act* permit allows for a project footprint of up to 6,993 ha, there is currently 1,550 ha of land within the existing *Mines Act* permit area that is undisturbed and should therefore be excluded from Teck's calculation of its area of mining operations.² As stated above, the Castle Mountain Project will require 2,550 ha of land outside the existing *Mines Act* permit along with the unused 1,550 ha within the permit boundary for the placement of waste rock. Teck considers the 1,550 ha of undisturbed land within the permit boundary to be part of the existing coal mining operation because it is already permitted for disturbance and thus does not use it to calculate the increase in area of mining operations.

We submit that Teck has erred in its calculation of the "area of mining operations" by using an incorrect interpretation of the phrase. The *Regulations* define "area of mining operations" as "the area at ground level occupied by any open-pit or underground workings, mill complex or storage area for overburden, waste rock, tailings or ore", meaning actively used mining operations, not just the permitted area.³

There is nothing in the *Regulations* that indicates that an "area of mining operations" should be delineated by a permit boundary. Indeed, the definition of the term "area of mining operations" above indicates that the area must be actively used for mining operations for it to be considered part of the original project. To allow the "area of mining operations" to be interpreted incorrectly would allow project proponents to skirt the *Regulations* by applying for a

¹ *Physical Activities Regulations*, SOR/2019-285 at ss 1.1 and 19(a) [*Regulations*].

² Teck Coal Limited, *Initial Project Description: Castle Project* (March 2020) at Table 14 [IPD].

³ *Regulations*, *supra* note 1 at s 1.1.

larger project area at the outset, not developing the entire permitted area, and then use the entire area to calculate the original area of mining operations, as Teck has done in this case.

If we apply the “area of mining operations” definition from the *Regulations*, then the permitted but undisturbed 1,500 ha should be added to the 2,500 ha of proposed new disturbance that is currently unpermitted, with a result of **4,100** ha of new disturbance – **not 2,550 ha** as stated in Teck’s IPD. Dividing the proposed new disturbance area (4,100 ha) by the current area of mining operations (5,443 ha, not 6,993 ha), Teck’s Project proposal increases the “area of mining operations” by 76%, well over the 50% threshold set out in the *Regulations*. It is Siksika and Kainai’s submission that Teck has erred in its approach to calculating its area of mining operations, and that this Project falls within s. 19(g) of the *Regulations* and is thus a designated project.

2. Minister should designate the Project under s. 9(1) of the IAA

Even where a project is not listed under the *Regulations*, the Minister retains discretion under s 9(1) of the *IAA* to designate a project for a federal impact assessment. Kainai and Siksika thus request that this Project be designated for an impact assessment pursuant to s 9(1) of the *IAA*.

Section 9(2) of the *IAA* explicitly lists adverse impacts on the rights of the Indigenous peoples as a factor that the Minister may consider when making a designation decision. The IAAC’s “Operational Guide: Designating a Project under the Impact Assessment Act” also lists other relevant factors the IAAC should consider when determining whether a project should be designated. This project should be designated for an impact assessment for the reasons set out below:

a. The project site is near or in an environmentally or otherwise sensitive location

As stated in Teck’s IPD, there are numerous environmentally sensitive habitats within the Project region. For instance, the Project footprint overlaps with bighorn sheep winter range and westslope cutthroat trout habitat. In addition, the project area includes listed endangered ecological communities, including that of whitebark pine, as well as mature and old growth forests, and wetlands, which are relatively uncommon in the Elk Valley and provide vital ecological functions that maintain terrestrial and freshwater biodiversity in the area. The project vicinity is home to multiple species and plants that are listed as Endangered, Threatened, or of Special Concern under the *Species at Risk Act*, such as grizzly bears and American badgers.⁴

These environmental impacts will also adversely affect Kainai and Siksika’s ability to exercise their Treaty rights and related cultural practices. For instance, bighorn sheep are a species of cultural importance to both Siksika and Kainai. Impacts to the bighorn sheep wintering range will likely have corresponding impacts on Siksika and Kainai’s ability to practice its treaty rights

⁴ IPD at 56-62.

in relation to bighorn sheep. It is critical that these impacts be adequately considered and assessed.

b. The project has the potential to cause adverse effects that fall within federal jurisdiction

Castle Mountain has the potential to cause adverse effects to a number of resources that fall within the jurisdiction of the federal government, including fish and fish habitat, migratory birds, changes to the environment outside of BC, and importantly, adverse impacts on Kainai and Siksika's aboriginal and Treaty rights.

The project will adversely affect fish and fish habitat

Castle Mountain will have adverse effects on fish and fish habitat. In particular, the project will have detrimental effects on the high-value habitat of the westslope cutthroat trout. Teck's Fording River Operations have already had adverse effects on this species, with recent surveys showing a 93 percent decline in the westslope cutthroat trout population just downstream of its Fording River mine.⁵ That this project is being proposed on the heels of this collapse with no federal impact assessment is simply unjustifiable.

The project has the potential to cause adverse effects on aquatic species

Castle Mountain will have effects on aquatic species as defined in subsection 2(1) of the *Species at Risk Act*, including the effects on the westslope cutthroat trout, listed above. In addition, recent monitoring of certain sensitive benthic invertebrate communities has shown that mine exposure results in adverse effects like reductions in the abundance of certain species (e.g. mayflies), and increased tissue selenium concentrations.⁶

The project will adversely affect migratory birds

Castle Mountain will have adverse effects on migratory birds protected under the *Migratory Birds Convention Act*, including the Spotted Sandpiper and the Harlequin Duck. These migratory species are known to use streams within the vicinity of the proposed project.⁷

The project will have impacts across provincial and international borders

Although the Castle Mountain Project is located within BC, its proximity to the Alberta border means that it has the potential to cause environmental changes in Alberta. For instance, Castle Mountain will impact the wildlife habitats of species such as bighorn sheep. Bighorn sheep habitat lies on both sides of the Rocky Mountains. Impacts to that habitat on the BC side of the

⁵ Paul Fischer, "Teck proposal to expand B.C.'s largest coal mine raises alarm about pollution on both sides of border", *The Narwhal* (17 June 2020) online: <thenarwhal.ca/teck-expand-castle-mountain-largest-coal-mine-selenium-pollution/>.

⁶ IPD at 60-61.

⁷ IPD at 59.

border may have impacts on the viability of the species more generally. Additional information in respect of the potential impacts from this Project on bighorn sheep is forthcoming.

In addition to interprovincial impacts, the Castle Mountain Project will also result in international impacts including the pollution of rivers that cross international borders. Selenium levels in the watershed below the FRO are much higher than they are above the mines⁸ and expanding the FRO will only increase contaminated effluent. The US Environmental Protection Agency is currently calling for a review of Teck's contamination of the Kootenai watershed, which flows across Montana and Idaho. Moreover, the Tribal Councils of the Confederated Salish and Kootenai Tribes ("CSKT") and the Kootenai Tribe of Idaho ("KTol") have also requested that the Castle Mountain Project be designated for a federal impact assessment due to potential cross-border impacts including contamination of transboundary waters.⁹

Environmental impacts beyond the jurisdiction where the project is taking place should be reviewed by the federal government.

c. The Project has the potential to cause adverse impacts to Kainai and Siksika's s 35 rights

Section 9(2) of the IAA explicitly lists adverse impacts on the rights of the Indigenous peoples as something that the Minister may consider when making a designation decision. The Castle Mountain Project has the potential to cause adverse impacts to Kainai and Siksika's ability to exercise their Aboriginal and Treaty rights.

Kainai and Siksika's Interests

Kainai and Siksika are members of the Blackfoot Confederacy and made treaty with the British Crown in 1877 under the Blackfoot Treaty, also referred to as Treaty 7. Castle Mountain is within the traditional territory of the Kainai and Siksika Nations.¹⁰ The area in and around Castle Mountain was used extensively by Kainai and Siksika for travel, trade, harvesting, and ceremonial purposes, and continues to be an area of importance for the exercise of Treaty rights and related cultural practices for both Nations.¹¹

The taking up of lands within Blackfoot traditional territory for coal mining, urban development, farming, and the loss of available crown land to oil and gas extraction and forestry has

⁸ United States Environmental Protection Agency, "EPA and partners release data and findings from Kootenai River sampling effort" (23 September 2019) online news release: <www.epa.gov/newsreleases/epa-and-partners-release-data-and-findings-kootenai-river-sampling-effort>.

⁹ Letter from the Tribal Councils of the Confederated Salish and Kootenai Tribes and the Kootenai Tribe of Idaho to the Honourable Jonathan Wilkinson (12 May 2020) online (pdf): <iaac-aeic.gc.ca/050/documents/p80702/134822E.pdf>.

¹⁰ Dermot O'Connor, *Review of the Literature on Blackfoot Use and Occupancy of the Crowsnest Pass & East Kootenays*, Oak Road Concepts, (May 2020), at 2 [Oak Road Report].

¹¹ *Ibid* at 3.

increased the importance of the foothills and front ranges of the Rocky Mountains for Kainai and Siksika. The few remaining landscapes within Blackfoot territory where the Kainai and Siksika can still hunt, gather, trap, fish and camp include the Crowsnest Pass and Elk River valleys, which are at risk of destruction from large-scale coal mine projects like Castle Mountain. Kainai and Siksika continue to hunt for elk, mule deer, bighorn sheep, moose and occasionally bear in the foothills and front slopes of the Rocky Mountains.¹²

The adverse effects to wildlife habitat, migratory birds, and fish and fish habitat outlined above will further impede Kainai and Siksika's ability to carry out their hunting and fishing rights.

In addition to hunting, the Crowsnest Pass and East Kootenays are currently used by Blackfoot people to harvest a variety of food and medicinal plants.¹³ Blackfoot people continue to travel through the Crowsnest Pass, Sparwood, and Fernie areas to pick a variety of plants for food and medicinal purposes including roots, stems, leaves, and berries. Gathering plants for food, for medicines, and to use as fuel or for building materials brings Blackfoot people in touch with sacred sites.¹⁴

Castle Mountain will also potentially interfere with Kainai and Siksika's ability to carry out important religious, legal, and cultural practices.¹⁵ Blackfoot spiritual leaders and harvesters continue to use Crowsnest Pass, Elk Valley and upper Old Man River valley to obtain materials for sacred materials such as ochre paint. Special locations for collection of these materials are still visited regularly by Blackfoot people, emphasizing the continued connection of these places to Blackfoot culture, spirituality, and material culture.¹⁶ Seasonal pilgrimages and gathering expeditions to sacred sites in these areas demonstrate the ongoing centrality of the Crowsnest Pass in Blackfoot culture, spirituality, and traditional knowledge. Cultural transmission is integral to the ability of Kainai and Siksika to pass down their ways of life.

More information about the Blackfoot's historic and continued use of this area can be found in the *Review of the Literature on Blackfoot Use and Occupancy of the Crowsnest Pass & East Kootenays* by Dermot O'Connor, to be considered in support of this request.

If approved, Castle Mountain would result in the direct disturbance of 4,100 hectares of land in Kainai and Siksika's traditional territory. In addition to the impacts from the disturbance of a significant amount of land such as reduced harvesting areas and the removal of wildlife and plants, Castle Mountain may also result in other indirect impacts, including adverse effects on water and air quality, decreased confidence in the resources around the area, and cumulative effects.

¹² *Ibid* at 22.

¹³ *Ibid* at 23.

¹⁴ *Ibid*.

¹⁵ *Ibid* at 23-24.

¹⁶ *Ibid*.

d. The Project will contribute to the already significant level of cumulative development in the area

Given the significant level of historical, ongoing and future planned development, it is critical that the cumulative impacts of this development on both sides of the Alberta-British Columbia Border be adequately assessed.

Coal has been mined in the Elk Valley since the late 1890s, with the Elk Valley coalfield being one of the major coal-producing areas in Canada.

Other projects planned in the vicinity of Castle Mountain include an expansion of Atrum's Isolation South Lease, Montem's Tent Mountain Mine, North Coal's Michel Coal Project, NWP's Crown Mountain Mine, and Riversdale Resource Limited's Grassy Mountain Coal Mine. This is in addition to the already existing projects including Teck's Line Creek Mine, Greenhills Mine, Elkview Mine, and Coal Mountain Mine.

The cumulative impact of this activity has the potential to significantly and adversely impact the ecological integrity of the area, and Kainai and Siksika's ability to use this area for the practice of their rights now and well into the future. The combination of cumulative effects from existing and potential projects and the international effects of these mining activities requires assessment by the federal government.

e. Failure to designate project will undermine confidence in assessment process

Finally, failure to designate this Project for an impact assessment will undermine public confidence in the impact assessment process. Teck's FRO is already the biggest mine in BC. If left undesignated, the proposed Castle Mountain project would be the second expansion of the FRO to occur in five years without a federal impact assessment. The adjacent Swift Expansion of the FRO was originally required to have a federal environmental assessment because of concerns about destruction of fish habitat under the *Fisheries Act*. Less than three months later, however, the new *Canadian Environmental Assessment Act 2012* came into force, replacing the former Act and eliminating the need to complete a federal environmental assessment of the project. Therefore, when the Swift Expansion project received approval in 2015, the mining operations area was increased without a federal assessment. As stated above, the proposed Castle Mountain expansion will add 4,100 ha of total disturbance area and bring the overall expansion of Teck's FRO operations well over the 50% threshold.

Allowing Teck to proceed with two separate expansions that together would have certainly triggered a federal assessment (and individually, may still trigger a federal assessment), undermines the purposes of impact assessments and weakens public confidence in assessment processes. It gives the impression that Teck is engaging in project splitting, and that the Projects are being intentionally phased to avoid a federal assessment. It is for this very

reason that the Minister holds the discretion to designate a project for a federal assessment even when a project does not fall within the *Regulations*; however, this discretion is worthless unless it is exercised in appropriate circumstances, such as this.

Conclusion

As set out above, this Project falls within the thresholds set out under s. 19(g) of the *Regulation* and should thus be considered a designated project under the IAA. However, if the IAAC disagrees, there are strong indicators that the Castle Mountain Project will have significant adverse effects that the Minister should consider in exercising his discretion to designate the Project under s. 9(1). As outlined above, the current mining activities at FRO already have significant adverse impacts, and the Castle Mountain Project will only compound these effects. Some of these effects include impacts on Kainai and Siksika's Treaty rights, environmental impacts that cross international borders, harmful cumulative effects from multiple projects in the area, and adverse effects on fish and fish habitat, migratory birds, and environmentally sensitive lands. Given the potential impacts of this project on multiple areas of federal jurisdiction, Kainai and Siksika request that Castle Mountain be designated by the Minister under the discretion provided in s 9(1) of the *IAA*.

Yours Truly,

JFK Law Corporation

<Original signed by>

Mae Price

MAP/hs

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