

Cassels

July 6, 2023

Via E-Mail: ministre-minister@ec.gc.ca

And To: information@iaac-aeic.gc.ca

Environment and Climate Change Canada:
1010 – 800 Boul de Maisonneuve E
Montréal, Quebec
H2L 4L8

<email address removed>

tel: +1 604 283 1481

fax: +1 604 691 6120

file # 50968-13

Attention: The Honourable Steven Guilbeault, P.C., M.P.
Minister of Environment and Climate Change (“**Minister**”)

Dear Minister:

Re: Federal Designation Request for Proposed McIlvenna Bay Project

I. Introduction

- I am writing on behalf of Métis Nation - Saskatchewan (“**MN-S**”) to request that the Minister:
 - consider whether the proposed McIlvenna Bay Project (“**Project**”) meets the criteria for a designated project pursuant to the *Impact Assessment Act*, SC 2019, c 28, s 1 (“**Act**”)¹ and the Schedule to the *Physical Activities Regulations* (SOR/2019-285) (“**Physical Activities Regulations**”); and
 - otherwise designate the Project for a federal impact assessment pursuant to Section 9(1) of the *Act* on the basis that the Project will cause adverse effects and will raise public concerns relating to adverse direct and incidental effects that warrant the designation.
- The Project is a proposed base and precious metals underground mine and surface mineral processing facility to be constructed by McIlvenna Bay Operating Ltd. (“**Proponent**”), a wholly owned subsidiary of Foran Mining Corporation (“**Foran**”), in east-central Saskatchewan. The Project is located on provincial Crown land at McIlvenna Bay on Hanson Lake, approximately 375km northeast of Saskatoon and 65km southwest of Creighton. The Project sits within MN-S Eastern Region I (“**ER1**”) in the Métis Homeland and also falls within the traditional territory of several First Nations. The Project is currently undergoing a provincial environmental impact assessment under the *Environmental Assessment Act*, SS 1979-80 c E-10.1.²
- ER1 sits within the heart of the Métis Homeland and holds significant historic and ongoing importance for the Métis Nation. Cumberland House is the oldest historic Métis community in Saskatchewan (founded 1774),³ pre-dating the Red River Colony (founded 1812).

¹ *Impact Assessment Act*, SC 2019, c 28, s 1, s 9 [Act].

² *Environmental Assessment Act*, SS 1979-80 c E-10.1.

³ <https://www.metismuseum.ca/media/document.php/01268.VM%20-%20Sask%20Metis%20Facts.pdf>

Cumberland House played a significant role as a hub of the historic Métis economy, having hosted one of the most important fur depots in Canada and also supported trade of pemmican.

4. Recognizing that capacity for MN-S to facilitate research and engagement has not been provided in respect of this Project, MN-S shares for context the following Wikipedia entry on the importance of Cumberland House to the Métis pemmican trade :

Trading people of mixed ancestry and becoming known as the Métis would go southwest onto the prairie in Red River carts, slaughter bison, convert it into pemmican, and carry it north to trade from settlements they would make adjacent to North West Company posts. For these people on the edge of the prairie, the pemmican trade was as important a source of trade goods as was the beaver trade for the Indigenous peoples farther north. This trade was a major factor in the emergence of the new and distinct Métis society. Packs of pemmican would be shipped north and stored at the major fur posts: Fort Alexander, Cumberland House, Île-à-la-Crosse, Fort Garry, Norway House, and Edmonton House.

So important was pemmican that, in 1814, governor Miles Macdonell started the Pemmican War with the Métis when he passed the short-lived Pemmican Proclamation, which forbade the export of pemmican from the Red River Colony.⁴

5. To-date, MN-S has not had an opportunity to gather the types of modern traditional knowledge data that can be shared with proponents to help understand project effects. MN-S submits that such information is essential for reasonably assessing any significant project within the Homeland. Likewise, MN-S has not been provided with capacity to review the Proponent's submissions from a technical perspective and to use this information to understand potential rights-based concerns.
6. MN-S submits that the Minister should determine whether the Project qualifies as a "designated project" under the *Act*, or otherwise exercise his discretion to designate the Project for a federal impact assessment under Section 9 of the *Act* on the basis that the Project:
 - (a) appears to have a "capacity" in excess of 5,000 t/day based on materials the Proponent has disclosed to investors, which would satisfy sections 18(c) and 18(d) of the *Physical Activities Regulations*.
 - (b) is anticipated to adversely impact areas within federal jurisdiction, including Indigenous peoples and lands, species at risk, migratory birds, fish and fish habitats, and also has the potential to raise interprovincial concerns given its proximity to the Saskatchewan-Manitoba border;
 - (c) will adversely affect the rights of the Métis and contribute to the cumulative impacts of other developments in and around Hanson Lake and the broader region around Flin

⁴ Site: <https://en.wikipedia.org/wiki/Pemmican> retrieved July 6, 2023.

Flon, which is an area of cultural significance to MN-S that has already faced significant pressure from past development; and

- (d) will otherwise be assessed through a processes that does not adequately consult with MN-S or address Métis rights and interests, and which expressly refuses to consider Métis claims to commercial harvesting rights and Aboriginal title or to recognize the role of MN-S as the appropriate representative of Métis rights.

II. The Project Qualifies For, or Should be Designated For, a Federal Impact Assessment

A. The Project May Exceed Capacity of 5000 t/day

7. MN-S submits that the Project appears to exceed the 5,000 t/day “capacity” as contemplated in sections 18(c) and 18(d) of the *Physical Activities Regulations* which would automatically make the Project a “designated project” under the *Act*, and that if the Proponent can establish that the Project does not reach the thresholds under the *Physical Activities Regulations*, the Minister should exercise his discretion to designate the Project for a federal impact assessment under Section 9 of the *Act*.

Average production is different from “capacity”

8. The Project, as modeled in the Proponent’s Environmental Impact Statement (“EIS”), as well as in the Foran’s National Instrument 43-101 investor disclosures,⁵ contemplates annual mining and processing throughput equating to an average of 4,200 tonnes per day. MN-S submits that this average daily production rate does not correspond with the per-day “capacity” set out in section 18(d) of the *Physical Activities Regulations*.

Definition of “capacity” can be understood by looking at other designated projects

9. The “capacity” triggers under the *Physical Activities Regulations* are best understood as maximum production rates. “Capacity” in this context measures what can be achieved in a single day assuming optimal normal operating conditions. This interpretation of “capacity” can be supported by looking at how “capacity” is used when considering other operations listed within the *Physical Activities Regulations*.
10. For example, reference to “capacity” in respect of power generation (such as those contemplated in Section 30 of the *Physical Activities Regulations*) is generally understood to reflect “the amount of electricity a generator can produce when it’s running at full blast” – generation capacity is not the same as electricity produced.⁶

Disclosures suggest mine and processing capacity exceeds 4,200 t/day

⁵ Technical Report on the Feasibility Study for McIlvenna Bay Project, Saskatchewan Canada, Report Date April 14, 2022, Effective Date February 28, 2022. (“43-101”) Retrieved from SEDAR.com posted April 14, 2022.

⁶ U.S. Department of Energy, Office of Nuclear Energy at site: <https://www.energy.gov/ne/articles/what-generation-capacity#:~:text=Capacity%20%3D%20Maximum%20Power%20Output&text=Capacity%20is%20the%20amount%20of,load%20a%20generator%20can%20handle>. Retrieved June 27, 2023.

11. Foran's disclosures suggest that the estimated daily average production of 4,200 t/day is not reflective of the "capacity" of the Project:
- i. Foran projects that both the mine and the processing plant for the Project will average 4,200 t/day when measured across an entire year.⁷ Elsewhere 4,200 t/day is described as a "target"⁸ or "at an initial processing rate of 4,200 tpd (1.512 Mtpa), based on the current mine plan [*emphasis added*]" . 4,200 t/day is not described as the maximum daily capacity – but instead as the ore production target to be achieved across the entire year.
 - ii. Foran's disclosure expressly includes reference to a 20% contingency in its ore handling infrastructure.⁹ The fact that the ore hoisting design capacity is 5,040 t/day would suggest that consideration has been given to ensure that the ore hoist does not bottleneck mine production below 5,040 t/day.
 - iii. Foran's disclosures note that run of mine ore will be delivered from the mine at an average rate of 247 dmtph,¹⁰ implying that daily ore deliveries could amount to 5,928 dry metric tonnes.
 - iv. The Proponent's estimates are built from the estimate that underground workforce will be productive for only 73.3% of shift time, while also noting that automation can address unproductive time. Without even factoring in additional automation enhancements, this effective shift time is only an estimate, and could materially differ from the actual throughput achieved. For example, a Saskatchewan uranium project estimates a 78.3% effective shift time¹¹ despite it being for what is, presumably, a more complicated uranium mine. Once the Project is in operations, the Proponent will be incentivised to increase workforce effectiveness and to adopt additional automation opportunities to increase ore output.

Minister should designate if there is any uncertainty as to the capacity

12. Foran and the Proponent have suggested that the Project will achieve average ore throughput volumes which amount to 84% of the "capacity" triggers found under sections 18(c) and 18(d), without disclosing the actual "capacity" of the Project. MN-S submits that unless the Proponent can reasonably establish that the Project will not be capable of

⁷ 43-101, *supra* at 1.1, 1.9, 15.3.1.

⁸ 43-101, *supra* at 16.1

⁹ 43-101, *supra* at Table 16-19

¹⁰ 43-101, *supra* at 17.3.1

¹¹ NexGen Energy Ltd. Arrow Deposit, Rook 1 Project, Saskatchewan 43-101 Technical Report on Feasibility Study. Report date March 5, 2021, Effective date February 22, 2021. Table 16-16

achieving 5,000 t/day in either of its mining or processing operations, the Minister should direct that the Project be assessed as a designated project under the *Act*.

Effects Indistinguishable From 5,000 t/day

13. MN-S submits that even if the Proponent is able to establish that the Project will not have the capacity of extracting 5,000 tonnes of ore in a day, or of processing 5,000 tonnes of ore in a day, the effects of the Project are indistinguishable from the anticipated effects of a project that exceeds 5,000 t/day of ore and as a consequence, the Minister should exercise his discretion to designate the Project for a federal impact assessment under Section 9 of the *Act*.
14. First, even the average daily rate, measured over a full year, of 4,200 t/day amounts to 83.3% of the regulated threshold, and will presumably require substantially the same operations and infrastructure as a facility with a 5,000 t/day capacity.
15. Second, under the *Physical Activities Regulations*, the Proponent is undertaking 2 separate projects on the same footprint: a new metal mine and a new metal mill, each of which can potentially trigger a federal impact assessment based on its effects alone. MN-S submits that even if the Proponent is able to establish that the mine and the mill each have a capacity marginally below 5,000 t/day, the effect of developing both operations within the same footprint will necessarily result in impacts beyond what are intended to be caught with the 5,000 t/day trigger in the *Physical Activities Regulations*.
16. MN-S submits that even if the Proponent is able to establish that both the processing plant and mine have capacities under 5,000 t/day, the Minister should nevertheless exercise his discretion to designate the Project for a federal impact assessment under section 9 of the *Act* given the likelihood that the Project's effects will meet and exceed those which are reasonably anticipated for projects which would trigger either sections 18(c) or 18(d) of the *Physical Activities Regulations*.

B. The Project Presents Material Risk to Areas within Federal Jurisdiction

17. The Project is proposed to be located within areas identified as environmentally sensitive and of significant importance to the Métis. The McIlvenna Bay Project Environmental Impact Statement dated May 2023 ("**EIS**") notes that the Project is anticipated to cause adverse effects to various environmental matters within federal jurisdiction, including species at risk, migratory birds, fish and fish habitats. The Project, by virtue of its location close to the Saskatchewan-Manitoba border, may also raise interprovincial environmental and regulatory concerns.
18. MN-S is particularly concerned regarding the potential release of tailings and other materials into the natural environment, and the effects of development and mining operations on fish and protected species in and around Hanson Lake, as well as the ability for Métis Citizens to safely harvest these species without interruption or disruption.

19. The Project facilities, including tailings storage, will be located near the shores of Hanson Lake and present risks to water, fish and fish habitats.
20. The Project is located within the territory of the Boreal Shield Woodland Caribou, which are designated as a threatened species, and the potential impact of the Project on woodland caribou in the area has been identified by the Proponent.¹² The Project Description also identifies other species of concern which have been observed, including species of birds protected under the *Migratory Bird Convention Act* (GC 1994).¹³
21. MN-S has not been provided capacity funding by the Proponent to undertake a technical review of the EIS, including the matters described above. Notwithstanding the proposed mitigation measures identified in the EIS, even a high-level non-technical review of the issues raised suggest that there is potential for significant impacts on the environment and Métis rights and interests that may persist over a long period of time (e.g., 46-120 years in the case of loss or alteration to wildlife and habitat¹⁴).
22. As the Proponent is completing the early stages of project design, and provincial environmental assessment has yet to be completed to determine the specific impact of the Project on the environment, MN-S requests that the Minister consider the precautionary principle noted as Principle 4 in the Sustainability Guide and mandated in Section 6(2) of the *Act*.¹⁵

C. The Project Adds Cumulative Risks and Pressures on Métis People, Métis Rights and Métis Lands

23. In accordance with section 9(2) of the *Act*, before making a decision on whether to designate a given project, the Minister may consider adverse impacts that a physical activity may have on the rights of the Indigenous peoples of Canada - including Indigenous women - recognized and affirmed by Section 35 of the *Constitution Act, 1982*.¹⁶
24. The Project is located in in the heart of the Métis Homeland in an area rich in current and historic Métis use. The area around Hanson Lake hosts moose, caribou, and fish, the harvesting of which is important to Métis people, the Métis economy, and Métis culture. Rivers and lakes throughout Saskatchewan have played, and continue to play a key role in supporting extensive trade (including in furs and pemmican) and cultural networks, while also facilitating the harvesting of animals and fish.
25. MN-S has not been provided with resources to undertake a traditional land use study – something that is typical for major project assessment processes. However, even a cursory search identifies that the Project area, including the Sturgeon Weir River which is downstream from the Project, were significant to the Métis fur trade, and was a preferred route for travel

¹² McIlvenna Bay Project Environmental Impact Statement, May 2023, at page 1-11. Link at paragraph 29, below.

¹³ *Ibid* at section 4.5.5.

¹⁴ *Ibid* at table 7-2.

¹⁵ Impact Assessment Agency of Canada, *Guidance for Considering the Extent to which a Project Contributes to Sustainability under the Impact Assessment Act*, available online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance.html>.

¹⁶ *Constitution Act, 1982*, RSC 1985, App II, No 44, Sched B, Pt II, s 35.

within the Homeland.¹⁷ Likewise, as noted above, region was host to a significant hub of Métis economy, including in the trade of furs and pemmican.

26. The environment around the Project has been significantly impacted over the past century as Flin Flon's development brought mines, roads, the railway, and electrical transmission and generation. The Project will put further pressure on the environment and on species which support Métis culture and economies.
27. The Project presents material risk to Métis Citizens and their section 35 *Constitution Act, 1982* Aboriginal rights. The Project will alter Métis lands, put Métis wildlife resources at risk, permanently store mine waste within Métis lands, and further erode the natural wealth of the Métis Homeland. The Project also risks further alienating Métis Citizens from their lands while the Project is operating. Concerns regarding mine waste storage and the safety of eating local species may lead to permanent fear and stigma regarding the Hanson Lake area. Métis concerns may be further compounded should the Project proceed.
28. The Proponent has not meaningfully engaged with MN-S in order to share project information, provide capacity for MN-S to meaningfully engage with the Proponent in respect of the Project, or to facilitate the collection of Métis knowledge and information necessary for understanding how the Project will impact Métis Citizens and their rights. The Proponent has also not given consideration to how the Project will add and amplify existing stresses and pressures that have been placed on the environment and on the exercise of Métis rights that have been growing since the initial development of Flin Flon. This cumulative effects assessment is necessary to ensure that Métis rights and interests can be meaningfully protected and appropriately accommodated by further development.
29. As noted below in Section D, there is no reason to believe that the Proponent's failure to meaningfully involve MN-S and consider and appropriately accommodate Métis rights, including through the assessment of cumulative effects, will be addressed through the existing Saskatchewan environmental assessment process. For this reason, MN-S submits that the Minister should exercise his discretion to designate the Project for a federal impact assessment under Section 9 of the *Act*.

D. Saskatchewan's Assessment Approach is Flawed and Will Not Satisfy the Commitments Canada has made to MN-S

30. MN-S is concerned that the Government of Saskatchewan's approach to consultation is deficient and expressly limits the ability of the provincial Crown to consider and discharge the Crown's duty to consult.

Saskatchewan's Consultation Is Flawed and Differs from Canada's Commitments

31. The Government of Saskatchewan, by policy, will not consider or engage with respect to claims of Aboriginal title by any First Nation or Métis peoples.¹⁸ The Saskatchewan Court of

¹⁷ <http://www.kayas.ca/tradetravel/travelroutes/sturgeonweirriver.html> ; see also <https://www.thecanadianencyclopedia.ca/en/article/fur-trade-routes>

¹⁸ Government of Saskatchewan, First Nation and Metis Consultation Policy Framework, June 2010, at page 6.

Appeal noted in March of 2023 that Saskatchewan “refused to consult with [MNS] about their asserted Aboriginal title and commercial rights because it is the Province’s position that those claims do not have sufficient credibility to trigger the Duty to Consult.”¹⁹

32. In addition, the Government of Saskatchewan does not recognize MN-S as a representative of Métis rights.²⁰ As a result, Saskatchewan directs engagement to Métis locals and regions (small collectives of Métis operated by elected volunteers) who lack the capacity, context, and resources to meaningfully engage. The effect of this policy across Saskatchewan has been that duty to consult notifications go unanswered, the role of engagement and consultation are not explained, and Métis voices and rights go unrepresented. MN-S has submitted in court that this policy is designed to discourage and marginalize Métis voices.
33. MN-S submits that these policies are not only inappropriate and inconsistent with Canadian law, but are also in conflict with the express commitments and recognitions that Canada has provided to MN-S.
34. On February 23, 2023, Canada and MN-S signed the *Métis Nation within Saskatchewan Self-Government Recognition and Implementation Agreement* which provided, *inter alia*, that:
 - (a) MN-S is exclusively mandated to represent Métis Citizens in respect of their Rights, interests and claims, including to engage in consultation with Canada where Canada’s conduct has the potential to adversely impact Métis rights [s. 5.02(e)(ii)];
 - (b) MN-S is exclusively mandated to represent Métis claims, including claims to Aboriginal title [s. 5.02(e)(ii)]
 - (c) the honour of the Crown applies to all aspects of the relationship between MN-S and Canada, including in interpreting the agreement, and that the agreement is not contingent on the participation of the Government of Saskatchewan [s. 11.03]
35. The commitments made on February 23, 2023 are not new. Canada made similar commitments recognizing MN-S as the representative of Métis rights and agreeing to negotiate Métis claims, including to Aboriginal title, previously, including in the July 20, 2018 *Framework Agreement for Advancing Reconciliation* and the June 27, 2019 *Métis Government Recognition and Self-Government Agreement*.

Designation is Necessary to Address Métis Rights

36. The record submitted by the Proponent indicates that MN-S has not been identified as a representative of Métis rights and that MN-S has not been provided with appropriate resources for conducting a technical review or for the collection and sharing of Métis knowledge regarding rights and land use potentially impacted by the Project. Instead, most of the limited record evidences that the Proponent was unable to meaningfully engage with Métis local presidents

¹⁹ *Métis Nation – Saskatchewan v Saskatchewan (Environment)*, 2023 SKCA 35 at para 13.

²⁰ Government of Saskatchewan, First Nation and Metis Consultation Policy Framework, June 2010, at page 11.

- (a volunteer role) and the elected regional director of Eastern Region 1 over a fairly limited period.
37. The record further evidences that consultation by the Proponent was limited to those items which the Province will consult with under its consultation framework, and there is no indication that any effort was made to consult in respect of Métis claims to Aboriginal title or commercial harvesting rights (which are fundamentally tied to the history of the Métis).
 38. MN-S submits that without the Minister exercising his discretion to designate the Project for a federal impact assessment under Section 9 of the *Act*, Métis rights and interests will be adversely impacted including in ways which have not been appropriately reflected in the Project's EIS being assessed by Saskatchewan. As a result, MN-S submits that it is both appropriate under the *Act*, and in consideration of the express obligations that Canada has made to MN-S, for the Minister to designate the Project.
 39. The circumstances around this Project are different from those considered by the Minister in his letter of November 14, 2022 addressing the request of MN-S to designate the Patterson Lake South Mine Project (the "**Fission Project**"). In that case, the Canadian Nuclear Safety Commission ("**CNSC**") was to undertake its own assessment of the Project following the provincial environmental assessment, and would develop Indigenous community-specific consultation plans and arrangements and community-specific rights-impact assessments through its distinct assessment process. The scope of the CNSC's assessment would include considering impacts to Indigenous people and lands, species at risk, fish and fish habitats and the risk to human health of Métis and other Indigenous communities.
 40. Unlike in the case of the Fission Project, the federal government does not have a clear role in the permitting process for the Project that will enable a comprehensive review of Métis interests and concerns with the ability to accommodate those concerns wherever appropriate once the provincial environmental assessment process is complete.

III. Project and Other Materials

41. MN-S provides the following Government of Saskatchewan web links with respect to key documentation:
 - (a) Key Project Documents, including the Environmental Impact Statement:
<https://publications.saskatchewan.ca/#/categories/5737>
 - (b) Foran Mining Corporation public documents filed to SEDAR:
<https://www.sedar.com/DisplayCompanyDocuments.do?lang=EN&issuerNo=00008811>
 - (c) Government of Saskatchewan, First Nation and Métis Consultation Policy Framework, June 2010:
<https://www.saskatchewan.ca/-/media/news-archive/2010/june/15/province-releases-consultation-policy-framework/cpf-final.pdf>

- (d) Métis Nation within Saskatchewan Self-Government Recognition and Implementation Agreement between MN-S and Canada, February 24 2023:
https://metisnationsk.com/wp-content/uploads/2023/02/MNS_FED-SGRIA_02-24-2023.pdf

IV. Conclusion

42. On the basis of the foregoing, MN-S respectfully requests that the Minister review the Project to determine if it qualifies as a “designated project” pursuant to section 18(c) and section 18(d) of the *Physical Activities Regulations*, and if the Project does not automatically qualify as a designated project, MN-S respectfully requests that the Minister exercise his discretion under Section 9 of the *Act* and designate the Project for a federal impact assessment.

Your office is invited to direct any questions or communication to my attention.

Yours sincerely,

Cassels Brock & Blackwell LLP

<original signed by>

Arend J.A. Hoekstra

cc: President Glen McCallum, Métis Nation - Saskatchewan
Matt Vermette, Chief Operating Officer, Métis Nation - Saskatchewan
Christopher Gall, Senior General Counsel, Métis Nation – Saskatchewan