

Tsilhqot'in National Government (TNG)

Final Submissions

For the Prosperity Mine Federal Review Panel

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And compensating for the destruction of Teztan Biny, which is a sacred lake to the Tsilhqot'in Nation, Taseko proposes to build a new man-made lake.

My question to Taseko is do you realize we cannot transfer our cultural and spiritual connection, which is in the thousands of years in the making, to a man-made lake? It's just not possible.

How much do you think in monetary terms would the compensation be for the loss of a sacred lake that would be lost forever. We believe there's no amount of money that can compensate that.

.... Our members want jobs like everyone else. They want a colour TV, a satellite dish, a nice vehicle in the driveway, have money to go on holidays.

But we will not create jobs at any cost to the environment.

We will not create economic development at the expense of a sacred lake.

Chief Percy Guichon, Chief of Tsi Del Del (Redstone), Transcript Vol. 1, pp. 164-166

I. OUTLINE OF TNG'S POSITION

As outlined in TNG's Initial Framing Submissions (dated March 19, 2010),¹ the federal Review Panel's primary role is to consider and provide conclusions about whether the proposed Prosperity Mine project (the "Mine Project") will have significant environmental effects.² The Panel is required to assess the significance of residual environmental effects after technically and economically feasible mitigation measures have been implemented.³

TNG's central position is as follows:

- the permanent destruction of Teztan Biny, Little Fish Lake (*Yanah Biny* or *Lhuy Nentsul*), Nabas⁴ and other areas in the Fish Creek drainage would be a significant cultural loss for the Tsilhqot'in;
- the permanent destruction of Teztan Biny, Little Fish Lake, Nabas and other areas would also be a significant ecological loss; and,
- neither the cultural nor the ecological loss can be adequately mitigated by replacing Teztan Biny (and other areas lost because of the Mine Project) with an artificial fish reservoir.

TNG will also present its concluding remarks about whether the Mine Project's significant cultural and ecological effects can be "justified in the circumstances".

Finally, TNG will present a summary of information about Tsilhqot'in Aboriginal rights and title, and possible impacts to those rights and title. The Tsilhqot'in Nation has a proven Aboriginal right to hunt and trap birds and animals throughout the area claimed in the *Tsilhqot'in Nation* case, including the area of the proposed Mine Project. Justice Vickers of the B.C. Supreme Court also expressed the opinion that the Tsilhqot'in Nation has Aboriginal title to the Brittany Triangle, which borders the Taseko River downstream of the proposed Mine Project. Further, the Tsilhqot'in Nation asserts Aboriginal rights to fish at Teztan Biny, to gather plants in the area, and to conduct spiritual and cultural ceremonies at the lake. These proven and asserted rights stand to be adversely impacted and infringed in myriad ways, including through:

¹ CEAR # 1851 ("Initial Framing Submissions").

² CEAR #48, *Terms of Reference; Panel Review of the Proposed Prosperity Gold-Copper Mine Project, Section 33 Canadian Environmental Assessment Act ("Review Panel Terms of Reference")* – see sections on "Mandate" and "Scope of the Assessment". The section on "Scope of the Assessment" explicitly adopts the definition of "environmental effects" set out in s. 2 of the CEAA (see below for full cite of the Act).

³ *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), s. 16(1)(a); see also Review Panel Terms of Reference, sections on "Mandate" and "Scope of the Assessment".

⁴ The area described as "Nabas" by Tsilhqot'in people is used with different degrees of specificity. Many use Nabas to mean the whole area between Teztan Biny and Anvil Mountain (Nabas Dzelh), including the Project Area: see *Tsilhqot'in Nation*, para. 901. However, Nabas is also used more specifically to refer to the meadows in this region where the Bulyan/William and Solomon families homesteaded – on the east shore of Little Fish Lake. Unless otherwise indicated, Nabas is used in this latter sense in these submissions.

- impacts on the populations and habitats of birds, wildlife, fish and plants that support the exercise of Tsilhqot'in rights;
- decades-long displacement of the Tsilhqot'in people from the area around Teztan Biny, Little Fish Lake, and Nabas (during mine construction, operation and decommissioning);
- permanent displacement from these same areas (due to permanent loss of lakes, streams and wetlands);
- Tsilhqot'in avoidance of areas potentially impacted by the Mine Project, including the Taseko River, due to serious concerns about ongoing contamination; and,
- the Proponent's general failure to identify feasible mitigation measures that would address impacts on Aboriginal rights and title, and on Tsilhqot'in current use and cultural heritage in the mine area.

The following submissions are by no means exhaustive of TNG's concerns. TNG's concerns extend beyond the immediate mine site area and include the potential impacts of the transmission corridor (including the potential for the transmission line to drive further development of these remote lands), downstream contamination from the site, Taseko's stated plans to expand the Mine Project, and numerous other issues. However, because of TNG's limited resources, and to assist the Panel in focusing on key issues, the following is intended as a summary of TNG's position on the most critical matters.

II. FEDERAL REVIEW PANEL'S MANDATE

TNG has already presented submissions about the Panel's mandate in its Initial Framing Submissions,⁵ and in legal counsel's presentation to the Panel at the Xeni Gwet'in community sessions.⁶ In these final submissions, TNG will provide further details and clarification on issues that have arisen during the hearing process.

1. Purposes and general principles of environmental assessment

Environmental assessment is a planning tool used to ensure that projects are considered in a careful and precautionary manner, in order to avoid or mitigate possible adverse environmental effects.⁷

The key purpose of environmental assessment is to “look before you leap” – to carefully consider a project's or an activity's long-term environmental consequences before deciding whether to proceed (and, if so, under what conditions). Environmental assessment is one of the few institutionalized processes we've developed to *prevent* environmental degradation.⁸ The economic benefits of proceeding with development projects are usually fairly obvious; each will at least offer some short-term employment, and will usually contribute to short-term government cash flows. Environmental assessment is meant to paint the other side of that picture – to tell us what environmental, cultural and socio-economic *costs* we're likely to pay in return for these short-term benefits.

The Newfoundland and Labrador Court of Appeal commented on some of these basic purposes of environmental assessment in a 1997 case⁹ that considered both CEAA and provincial environmental assessment legislation:

Both the Parliament of Canada and the Newfoundland Legislature have enacted environmental assessment legislation: *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (CEAA); *Environmental Assessment Act*, R.S.N. 1990, c. E-13 (NEAA). The regimes created by these statutes represent a public attempt to develop an appropriate response that takes account of the forces which threaten the existence of the environment. If the rights of future generations to the protection of the present integrity of the natural world are to be taken seriously, and not to be regarded as mere empty rhetoric, care must be taken in the interpretation and application of the

⁵ CEAR # 1851.

⁶ Transcripts Vol. 13 (March 31, 2010), at p. 1985 & following.

⁷ EIS Guidelines, p. v. See also CEAA, s. 4(1)(a), which states that one of the purposes of federal environmental assessment is to ensure “that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects” [emphasis added].

⁸ David R. Boyd, *Unnatural Law; Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at p. 149.

⁹ *Labrador Inuit Assn. v. Newfoundland (Minister of Environment and Labour)*, 1997 CanLII 14612 (NL C.A.), at paras. 11 & 12.

legislation. Environmental laws must be construed against their commitment to future generations and against a recognition that, in addressing environmental issues, we often have imperfect knowledge as to the potential impact of activities on the environment. One must also be alert to the fact that **governments themselves**, even strongly pro-environment ones, **are subject to many countervailing social and economic forces, sometimes legitimate and sometimes not. Their agendas are often influenced by non-environmental considerations.**

The legislation, if it is to do its job, must therefore be applied in a manner that will counteract the ability of immediate collective economic and social forces to set their own environmental agendas. It must be regarded as something more than a mere statement of lofty intent. It must be a blueprint for protective action [emphasis added].

2. Letter from federal fisheries Minister requesting a review panel

By letter dated February 19, 2007,¹⁰ the federal fisheries Minister formally requested that the federal environment Minister initiate a review panel for the Prosperity Mine Project. The fisheries Minister made the following comments at page 2 of his letter:

DFO [Fisheries and Oceans Canada] believes, based on information provided by the proponent, that the proposed Prosperity Gold-Copper Mine development has the potential to cause significant adverse environmental effects that cannot be readily mitigated. In addition, [DFO is] aware that there are important public and Aboriginal resource use issues that warrant a referral to a review panel.

From the outset, the key issues for this Review Panel (as identified in the Minister's letter) have included:

- whether Transport Canada and/or the federal Cabinet should give approvals or exemptions under the *Navigable Waters Protection Act*, for example to allow the deposition of mine tailings into Teztan Biny (Fish Lake);¹¹
- whether the federal government should allow the destruction of fish and/or the harmful alteration, disruption or destruction of fish habitat; and,
- whether the federal government should designate part of the Teztan Biny watershed as a "Tailings Impoundment Area" on Schedule 2 of the *Metal Mining Effluent Regulations*.

¹⁰ CEAR #69. As noted in the Minister's letter, Natural Resources Canada may also be required to issue a licence under the *Explosives Act*.

¹¹ As further explained during Transport Canada's presentation to the Panel during the technical sessions, the federal Cabinet may have to grant an exemption under s. 23 of the *Navigable Waters Protection Act*, for the placement of mine overburden in Fish Lake and Little Fish Lake – see CEAR #2291 at p. 7 [PDF].

A key part of the Review Panel’s mandate has always been to consider both the wisdom of allowing the permanent destruction of Teztan Biny and area, and the impacts that this destruction would have on the Tsilhqot’in people, their territory, and their culture.

3. “Current use”, “cultural heritage” and other key terms

TNG makes the following submissions about some of the key terms relevant to the federal Panel’s assessment.

a. “Current use”

The “environmental effects” of the Mine Project include the impacts of environmental change on the “current use” by the Tsilhqot’in people of these lands and waters for traditional purposes. There appears to be no settled definition of “current use”.¹² Defining this term falls to the discretion of the Panel in the circumstances of this review.

“Current use” can be defined to include the “living memory” of Aboriginal peoples using the land, as noted by the Panel for the Voisey’s Bay Mine and Mill Project:

The Panel is aware that "current use" can have a range of meanings. At a minimum, it means use during the last few years, because land use patterns vary and no single year can be considered fully representative. In its broadest sense, it means land use within "living memory" as recorded by the map biography method typically used to establish Aboriginal title or site-specific Aboriginal rights. This method produces a comprehensive record of the last 30 to 40 years and, for more limited purposes, a record as long as 60 to 70 years.¹³

The Panel in the Voisey’s Bay mine decision decided to focus on land and resource use patterns over “approximately the last 20 years, and also on possible future uses”.

TNG encourages the Panel in the circumstances of this review to include the “living memory” of Tsilhqot’in informants within the definition of “current use”. A number of reasons support this interpretation:

- i. Taseko’s own English-Ehrhart study documents the remarkable consistency of Tsilhqot’in land use patterns over time. Ms. Ehrhart-English notes that Tsilhqot’in patterns of land use centre on yearly rounds that are consistent from year to year.¹⁴ Her field work revealed consistent intergenerational patterns of hunting and

¹² Both the *Canadian Environmental Assessment Act* and the Guidelines for the EIS are silent on the matter.

¹³ The relevant portion of the Voisey’s Bay Mine and Mill Environmental Assessment Panel Report is available online at: http://www.ceaa.gc.ca/010/0001/0001/0011/0002/14_e.htm.

¹⁴ Ehrhart-English Report, p. 16.

trapping in the same territory.¹⁵ Her report emphasizes, for example, the continuity of Tsilhqot'in hunting¹⁶ and fishing¹⁷ patterns in the mine site area across generations.

- ii. Taseko submitted the Ehrhart-English report, prepared in 1996, as its information on “contemporary” Tsilhqot'in use of the area, without updating this information in the intervening thirteen or more years. Despite the Panel's encouragement, Taseko has refused to assist with obtaining more recent or detailed information to specifically address the requirements of this environmental assessment. Given Taseko's own study emphasizing the consistency of Tsilhqot'in land use patterns over time, Taseko should not now be permitted to narrow the definition of “current use” to the most recent few years, exclude a substantial body of available information, and complain that there is not enough information on present use.
- iii. “Current use” from the Tsilhqot'in perspective is inseparable from “living memory”. The Panel can only appreciate the significance of impacts on current use by understanding that such use is embedded in a continuous and unbroken pattern that extends across centuries. Tsilhqot'in people hunt, trap, fish and gather in the mine site area in the footsteps of their ancestors. This deep history lives and breathes in their current use of the area. The impacts of the Mine Project on Tsilhqot'in current use should not be minimized with an artificially restrictive time horizon that does not capture the depth of this connection.

TNG supports the view of the Voisey's Bay Panel that “current use” also extends to “possible future uses”, including the plans of the William family to re-occupy their homestead at Nabas. As Alice William noted in her presentation to the Panel at the Xeni Gwet'in community sessions, she is moving back to Nabas to re-establish the homestead formerly occupied by her father (Jimmy Bulyan / William) and others, with the intent of running an eco-tourism business in the

¹⁵ Ehrhart-English Report, p. 17 [“The tendency seems to have been for specific families to go to, but not be limited to a favourite hunting area where they may have had living structures and a history of habitation going back several generations”].

¹⁶ Ehrhart-English Report, p. 54, and Figures 57-59. She states:

The hunting ranges of Elders and middle-aged people differs from young people only to the extent that the older individuals seem to have spent more time searching the Fish Lake Study Area for game than younger individuals who have not had as much time in their lives to frequent or heavily use and area and for whom greater transportation options have presented themselves.

The referenced maps show extensive, overlapping hunting areas in the Fish Lake Study Area across generations.

¹⁷ Ehrhart-English Report, p. 52. She states:

There seems to be little difference in the patterns of fishing activity and location across age groups. Fish Creek, Fish Lake and Little Fish Lake are fished by individuals from all age groups. These fishing areas would be eliminated by the proposed development.

area.¹⁸ Future uses would also include more intensive use of the Eastern Trapline Area (including the mine site area) for trapping if fur prices recover.

b. Additional relevance of ancestral and “living memory” evidence of traditional use

It is important to note that regardless of how “current use” is defined, information provided by Elders and members about ancestral and lifetime use of the project area and surrounding lands and waters will generally be relevant to the Panel’s mandate in one or more additional ways, including:

- i. defining the “cultural heritage” significance of specific geographical areas and sites (Teztan Biny, Little Fish Lake, Nabas) as described below;
- ii. assessing the significance of project impacts on current use of these lands and waters for traditional activities (e.g. the loss of an area that has flourished as a cultural centre for traditional activities for generations is several orders of magnitude more significant in impact than interference with an area that has only been used for a few years);
- iii. information supporting Tsilhqot’in assertions of Aboriginal rights in the region (including evidence of continuous exercise since contact) and impacts on those Aboriginal rights, which the Panel is charged with collecting from First Nations; and
- iv. information relevant to determining whether the Mine Project is justified notwithstanding the significant residual environmental effects, which the Panel is also charged with compiling.

c. “Cultural Heritage”

Environmental effects include project-related environmental changes that affect “cultural heritage”. CEAA policy directs the following approach to defining “cultural heritage”:

The Canadian Environmental Assessment Agency acknowledges that there are two aspects of cultural heritage: tangible and intangible. This guide refers to tangible cultural heritage resources only.

For the purposes of this guide, cultural heritage resource is a human work or a place that gives evidence of human activity or has spiritual or cultural meaning, and that has historic value. Cultural heritage resources are distinguished from other resources by virtue of the historic value placed on them through their association with an aspect(s) of human history. This interpretation of cultural resources can be applied to a wide range

¹⁸ See CEAR # 2026 (Exhibit-52), at page 34 [PDF]. See also CEAR # 2312.

of resources, including, cultural landscapes and landscape features, archaeological sites, structures, engineering works, artifacts and associated records.¹⁹

“Cultural heritage” encompasses sites and places of historic value that hold spiritual or cultural meaning for the Tsilhqot’in people. Taseko’s own report describes the spiritual and cultural significance of numerous historic sites and landscape features, including the cabins at Nabas,²⁰ Little Fish Lake, and the mine site area generally.²¹ Cremation sites meet this definition, even if they have left no discernable physical traces. Burial sites, archaeological sites, and the island in Fish Lake also falls squarely within this definition; throughout the hearings, the Panel has heard ample evidence about the spiritual and cultural importance of various sites and locations in and around Fish Lake and Nabas. TNG submits that these sites and locations are of vital historical value to the Tsilhqot’in Nation, to Tsilhqot’in communities and to individual Tsilhqot’in people.

As described above, the loss of these and other sites and places that are imbued with cultural and spiritual meaning for the Tsilhqot’in people would represent a significant, irreversible and permanent environmental effect of the Mine Project.

d. “Significance” and “value”

The Panel is called upon in the course of its mandate to make numerous determinations about the “significance” or “value” of certain sites, activities, impacts, etc. The Panel will decide, for example, the archaeological or historical “value” of certain sites and the “significance” of impacts on Tsilhqot’in cultural heritage and current use for traditional purposes.

TNG respectfully submits that these determinations must take into account the Tsilhqot’in perspective, and give due weight to “significance” or “value” for the Tsilhqot’in people. For example, assessing archaeological sites for scientific value does not fully capture the value or significance of these sites for the Tsilhqot’in. Proposed measures to preserve the scientific value of archaeological sites, or to transport and preserve archaeological materials, do not address the significance of the impact this loss represents for the Tsilhqot’in people.

By way of analogy, the Supreme Court of Canada has directed that the just reconciliation of Aboriginal and non-Aboriginal peoples depends upon courts giving due regard to Aboriginal perspectives:

It is possible, of course, that the Court could be said to be "reconciling" the prior occupation of Canada by aboriginal peoples with Crown sovereignty through either a narrow or broad conception of aboriginal rights; the notion of "reconciliation" does not, in the abstract, mandate a particular content for aboriginal rights. However, the only

¹⁹ *The Canadian Environmental Assessment Act: Reference Guide on Physical and Cultural Heritage Resources*, p. 2, available on-line at: http://www.ceaa.gc.ca/3939C665-FB3D-43E3-9763-5C1E57840A25/CEA25_2E.pdf. See also pp. 17-18.

²⁰ Ehrhart-English Report, pp. 49-50.

²¹ Ehrhart-English Report, p. 54.

fair and just reconciliation is, as Walters suggests, one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.²²

We submit that the Panel can and should adopt a similar approach to defining “value”, “significance” and similar terms that arise in the course of its work.

e. Precaution

Section 4(2) of the *Canadian Environmental Assessment Act* reads as follows:

In the administration of this Act, the Government of Canada, the Minister, the Agency and all bodies subject to the provisions of this Act, including federal authorities and responsible authorities, shall exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.

Further, the Panel’s Terms of Reference set out that the Panel’s assessment will include a consideration of the “[e]xtent of the application of the precautionary principle to the Project”.²³ “Precautionary Principle” is defined in the Panel’s terms of reference to mean: “the application of prudent foresight, the recognition of uncertainty, and, when decisions must be taken, to err on the side of caution”.²⁴

The EIS Guidelines also establish the Precautionary Approach as a one of the guiding principles of the environmental assessment for the Mine Project,²⁵ noting as follows:

One of the purposes of EA is to ensure that projects are considered in a careful and precautionary manner before authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects. The **Precautionary Principle informs the decision-maker to take a cautionary approach, or to err on the side of caution, especially where there is a large degree of uncertainty or high risk** [emphasis added].

The EIS Guidelines specifically require the Proponent to indicate how the precautionary principle was considered in the design of the Project, including by “demonstrat[ing] that all aspects of the Project have been examined and planned in a careful and precautionary manner in order to ensure that they do not cause serious or irreversible damage to the environment and/or the human health of current or future generations”.²⁶

²² *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 50 [emphasis added].

²³ Review Panel Terms of Reference, Section on “Scope of Assessment”, item number 17.

²⁴ Review Panel Terms of Reference, Annex 1 Definition of Terms.

²⁵ EIS Guidelines at pp. v – vii.

²⁶ EIS Guidelines at p. vii. The proponent is also required to show how the precautionary principle was considered in its alternatives assessment: “alternative means of carrying out the project are evaluated and compared in light of risk avoidance, adaptive management capacity and preparation for surprise”.

As discussed in more detail below, TNG submits that the Panel should “err on the side of caution” particularly when making its key determinations about the *feasibility* of mitigation and the *significance* of relevant effects.

f. Mitigation, follow-up and adaptive management

The Panel’s Terms of Reference, in the section on “Scope of Assessment”, set out a total of 18 factors that the Panel must consider as part of its assessment of the Mine Project. The following factors are relevant to mitigation and follow-up:

1. The environmental effects of the Project pursuant to section 2 of the CEAA, including... any cumulative environmental effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out;
2. The significance of the effects referred to in paragraph 1; [...]
4. Measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project; [...]
7. The need for, and the requirements of, any follow-up program in respect of the Project; [... and,]
18. The significance of residual environmental effects after mitigation.

Note that the fourth factor (echoing s. 16(1) of the CEAA) requires the Panel to identify measures that **would** (not “could” or “might”) mitigate the Project’s effects.

Section 2 of CEAA includes the following definitions for follow-up and mitigation:

“follow-up program” means a program for

- (a) verifying the accuracy of the environmental assessment of a project, and
- (b) determining the effectiveness of any measures taken to mitigate the adverse environmental effects of the project;²⁷

“mitigation” means, in respect of a project, the elimination, reduction or control of the adverse environmental effects of the project, and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means;

Considering the need for, and requirements of, a follow-up program for a project (as required by s. 16(2)(c) of CEAA, and by the Panel’s Terms of Reference) is not a substitute for considering and identifying feasible mitigation measures. Rather, a follow-up program is meant to verify “the accuracy of an environmental assessment” and determine the “effectiveness of any [technically and economically feasible] measures taken to mitigate the [project’s] adverse

²⁷ And see CEAA s. 38(5): “The results of follow-up programs may be used for implementing adaptive management measures or for improving the quality of future environmental assessments.”

environmental effects”. Follow-up programs are not intended to design mitigation measures or to determine the feasibility of mitigation measures.

Discussion of relevant case-law

In the 1999 *Cheviot* case,²⁸ Justice Campbell of the Federal Court Trial Division held that, in determining the significance of environmental effects under CEAA, the first step is to identify or describe the effects, then determine the weight or “significance” to be given to each effect. In the process of ascribing weight, it is important to take mitigation of an effect into account (i.e. known, feasible mitigation measures can reduce or eliminate the weight or significance of an environmental effect). Justice Campbell described a review panel’s duty to consider “technically and economically feasible” mitigation measures in the following way:

... if a defined and described environmental effect is considered “adverse” and “significant”, that is substantial, then mitigation of this effect **by practical means** is important to consider. Once considered, the conclusion reached then becomes a feature of the environmental assessment about which a decision can be made respecting the weight to be placed on it in the government decision making process [emphasis added].²⁹

Similarly, in the 1996 *Express Pipelines* case in the Federal Court of Appeal, Justice Hugessen described the required certainty for relying on mitigation measures to address the “significance” of environmental effects:

... s. 37 [of CEAA]... strongly suggests that mitigation measures and environmental effects must be considered together. In our view, logic and common sense point the same way: there can be no purpose whatever in considering purely hypothetical environmental effects **when it is known and proposed that such effects can and will be mitigated by appropriate measures** [emphasis added].³⁰

In *Pembina Institute for Appropriate Development v. Canada*,³¹ decided in March of 2008, Justice Tremblay-Lamer of the Federal Court referred to some of the case-law dealing with EARPGO, the predecessor to CEAA, as being “instructive as to the content of the legal duty to consider mitigation measures [under CEAA].”³²

Justice Tremblay-Lamer referred first to *Tetzlaff v. Canada (Minister of the Environment)*, a decision of the Federal Court of Appeal.³³ In that case, Chief Justice Iacobucci described the initial assessment procedure under s. 12(c) of EARPGO as follows: “If the initial assessment procedure reveals that the potentially adverse environmental effects that may be caused by the

²⁸ *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425, [1999] F.C.J. No. 441 (QL) (F.C.T.D.) (“*Cheviot*”).

²⁹ *Cheviot*, at paras. 55-56.

³⁰ *Alberta Wilderness Assn. v. Express Pipelines Ltd* (1996), 137 D.L.R. (4th) 177 (F.C.A.) at p. 182d-f.

³¹ 2008 FC 302, [2008] F.C.J. No. 324 (QL).

³² *Pembina Institute* at para. 25. EARPGO is the Environmental Assessment and Review Process Guidelines Order.

³³ *Tetzlaff v. Canada (Minister of Environment)*, [1990] F.C.J. No. 1137 (F.C.A.).

proposal ‘are insignificant or **mitigable with known technologies**’ the proposal... may proceed or proceed with the mitigation, as the case may be [emphasis added].³⁴

Canadian Wildlife Federation Inc. v. Canada (Minister of Environment) is the case upheld by the Federal Court of Appeal in *Tetzlaff*, cited above. In *Canadian Wildlife Federation*, Justice Muldoon reviewed the decision the federal Minister of Environment to allow a project to proceed, apparently under the authority of EARPGO s. 12(c) (the section whose operation is described above by Chief Justice Iacobucci). Justice Muldoon held that “vague hopes for future technology” cannot constitute mitigation (Justice Tremblay-Lamer quoted this passage, with approval, in *Pembina*, *supra*):

... since the Minister did not identify any known technologies, but only vague hopes for future technology, it is not possible to consider that the recited adverse water quality effects are mitigable in contemplation of para. 12(c) of [EARPGO].³⁵

Justice Muldoon also held that monitoring plans for the future cannot constitute mitigation:

... those future prospects for the monitoring of water quality will do nothing in themselves to enhance water quality, or even to restore it. **Monitoring plans for the future are a far cry from known technology whereby the adverse water quality effects can be mitigated.**³⁶

As a matter of law, a significant adverse effect can only be rendered insignificant by technically and economically feasible measures – the Courts have described feasible mitigation measures as “practical means” (*Cheviot*), and as measures that are “known and proposed” and that “can and will” mitigate environmental effects (*Express Pipelines*). Neither “vague hopes for future technology” nor “monitoring plans for the future” constitute feasible mitigation measures (*Canadian Wildlife* and *Pembina*).

Federal Policy Statement on Adaptive Management

In 2009, the federal government published an Operational Policy Statement on Adaptive Management Measures under the *Canadian Environmental Assessment Act*.³⁷

The Adaptive Management Policy Statement is meant to provide “best practice guidance on the use of adaptive management measures” under CEAA.³⁸ The Policy Statement notes that adaptive management measures are referenced in the Act in s. 38, and specifically in relation to

³⁴ *Tetzlaff*, *supra*, at p. 8, quoted in *Pembina Institute* at para. 25.

³⁵ *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, 31 F.T.R. 1, [1989] F.C.J. No. 1144 (QL) (F.C.T.D.) at p. 14 [emphasis added], as quoted in *Pembina Institute* at para. 25.

³⁶ *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, 31 F.T.R. 1, [1989] F.C.J. No. 1144 (QL) (F.C.T.D.) at p. 15 [emphasis added].

³⁷ Operational Policy Statement on Adaptive Management Measures under the *Canadian Environmental Assessment Act* (“Adaptive Management Policy Statement”), Government of Canada 2009, available on the CEA Agency web-page listing “Guidance Materials” for federal environmental assessments under CEAA.

³⁸ Policy Statement, p. 1.

follow-up measures³⁹ (adaptive management is not specifically mentioned in relation to mitigation measures).

The Policy Statement has a helpful section that outlines when it might not be appropriate to incorporate adaptive management into an environmental assessment. TNG submits that the following factors are relevant to the present assessment:

Mitigation is not Identified

.... it is insufficient to assert that implementation of an unidentified future measure, developed as a result of adaptive management, constitutes mitigation of a predicted adverse environmental effect.

[....]

Commitment to adaptive management is not a substitute for committing to specific mitigation measures in the EA prior to the course of action decision. Adaptive management is an approach involving flexibility to modify mitigation measures or develop and implement additional measures in light of real-world experience.

Uncertainty about Significant Adverse Environmental Effects

If, taking into account the implementation of mitigation measures, there is uncertainty about whether the project is likely to cause significant adverse environmental effects, a commitment to monitor project effects and to manage adaptively is not sufficient.⁴⁰

The feasibility of proposed mitigation is a key issue before the Prosperity Mine federal Review Panel. TNG submits that there must be enough information before the Panel prior to the time that it closes its record for the Panel to consider and determine whether mitigation measures are technically and economically feasible, and whether residual Project effects are significant.

The Panel's duties in making these determinations must be informed by the precautionary principle, as set out above. Where mitigation is uncertain and where the probability and magnitude of cultural and ecological impacts is high, TNG submits that the Panel must "err on side of caution" by finding that the Mine Project has significant environmental effects. If the Proponent has failed to identify technically and economically feasible mitigation measures to address major Project-related effects, then the Panel has nothing to rely on to address those effects.

The Panel's determination that the Mine Project has significant environmental effects would not, by itself, keep the Project from going forward. Rather, it would ensure that future discussion about whether the Project is "justified in the circumstances" takes place in full awareness of the likely environmental effects of the Mine Project as currently proposed. If

³⁹ Ibid.

⁴⁰ Bold in original; underlining added. See Adaptive Management Policy Statement, Section on "When Might Adaptive Management not be Appropriate".

mitigation measures are not yet “feasible”, this is key information that must be brought to the attention of First Nations, of the public, and of the federal government.

After all, a key purpose of a review panel assessment under CEAA is for the Panel to provide its considered advice to the public and to the federal government about likely environmental effects of the Project, as proposed. This is accomplished through informed and open discussion before an independent (non-government) panel about the significance of environmental effects, and about whether proposed mitigation measures are “feasible”. If major elements of that discussion are deferred to the regulatory process then, with respect, there’s little purpose to holding a review panel assessment.

III. CULTURAL & ECOLOGICAL EFFECTS OF THE MINE PROJECT

Many of my Elders who are my connection to my culture and spiritual values are passing on. We as First Nations struggle every day to keep our identity and cultural values. In losing Elders, we lose important traditional knowledge about our culture and connection to the land. Once the last of our Elders has passed on, what do we have left to carry on our cultural beliefs? And more importantly, what do we have left to teach our children? What is left is the land itself, the water, the trees, the fish, the animals, and the stories that connect them. This is why we strongly oppose the destruction of important lakes such as Teztan Biny, as it represents our spiritual and cultural connection to our ancestors.

Chief Percy Guichon, Transcript Volume 1, page 164

1. Permanent destruction of Teztan Biny and area is a significant cultural loss

The permanent destruction of *Teztan Biny*, Little Fish Lake, Nabas and the surrounding area represents a significant “environmental effect” because of the profound cultural loss that it represents for the Tsilhqot’in people. In particular:

- a. Teztan Biny and the surrounding area is culturally and spiritually important to the Tsilhqot’in Nation, to Tsilhqot’in communities and to individual Tsilhqot’in people. The Panel has heard abundant evidence of the deep ancestral and continuous use of the Project Area as a significant cultural site for the Tsilhqot’in people.
- b. The B.C. Supreme Court in *Tsilhqot’in Nation* affirmed the constitutional Aboriginal rights of the Tsilhqot’in people to hunt and trap throughout a tract that includes Teztan Biny and the surrounding area.⁴¹ Such rights, as a matter of law, depend on proof that Tsilhqot’in people have hunted and trapped on these specific lands, as a central and defining feature of their distinctive culture, from pre-contact times to the present day.⁴²
- c. The B.C. Supreme Court in *Tsilhqot’in Nation* affirmed that “Tsilhqot’in people were present in the Eastern Trapline Territory at the time of first contact” and that “[t]he area has been used by Tsilhqot’in people since that time for hunting, trapping, fishing and gathering of roots and berries”.⁴³ The Court also specifically affirmed that Nabas and Little Fish Lake (referred to in the judgment as *Lhuy Nentsul*) were used for hunting, trapping and fishing and gathering prior to first contact with Europeans.⁴⁴

⁴¹ *Tsilhqot’in Nation v. British Columbia*, 2007 BCSC 1700, Executive Summary. See also para. 1268.

⁴² *Tsilhqot’in Nation v. British Columbia*, 2007 BCSC 1700, paras. 1154, 1212.

⁴³ *Tsilhqot’in Nation v. British Columbia*, 2007 BCSC 1700, para. 893.

⁴⁴ *Tsilhqot’in Nation v. British Columbia*, 2007 BCSC 1700, paras. 902-904.

- d. Taseko's own Environmental Impact Statement ("EIS") confirms the deep cultural connection of the Tsilhqot'in people to the proposed mine site area. TNG does not entirely support or agree with the report prepared for Taseko by Ms. English-Ehrhart. Nonetheless, this report confirms:
- i. Tsilhqot'in patterns of land use in the area have remained consistent across generations, dating back at least to the 1800s;
 - ii. "[h]unting, trapping, and ranching as well as habitation have great significance to the people who use the mine development area"⁴⁵, including a "great economic and cultural significance",⁴⁶ and there is a "strong Tsilhqot'in cultural interest, in general, in the Fish Lake Study Area";⁴⁷
 - iii. "trapping and fishing ... have a deep spiritual significance to individuals that use the mine development area".⁴⁸
 - iv. "[t]here remains those individuals who use the area despite the fact they don't live there. This type of usage pattern is being practised by the William family today because of their continued spiritual and emotional ties to Little Fish Lake and the entire study area".⁴⁹
- e. Among other significant cultural heritage sites in the mine site area, the island in Teztan Biny is a site of spiritual power where present-day and previous generations of Tsilhqot'in people have conducted ceremonies to receive their spiritual powers.⁵⁰

⁴⁵ C. English-Ehrhart, *The Heritage Significance of the Fish Lake Study Area* ("Ehrhart-English Report"), p. 31, available on-line at: http://www.ceaa.gc.ca/050/documents_staticpost/44811/32276/v8d002.pdf.

⁴⁶ Ehrhart-English Report, p. 48.

⁴⁷ Ehrhart-English Report, p. 46.

⁴⁸ Ehrhart-English Report, p. 49.

⁴⁹ Ehrhart-English Report, p. 54. Ms. Ehrhart-English repeatedly refers to the particular significance of the study area to the William and Solomon families. To avoid underestimating these statements, it is important to appreciate that the William and Solomon families comprise a significant portion of the Xení Gwet'in population. Moreover, the cultural significance of the area is not limited to the (large numbers) of Tsilhqot'in that actively resided at, or engage in traditional activities in, this area – these active users maintain and foster a cultural connection felt strongly by the Tsilhqot'in people generally.

⁵⁰ See, e.g., **Catherine Haller Statement**, included in CEAR #1397, pp. 38+ [PDF]. Catherine Haller states that Jimmy William [Bulyan] received his powers at the island in Teztan Biny. **Joanne William** describes one incident of her father using his powers as a healer in her written submissions: CEAR #1971, P. 4 [PDF]. See also: testimony of **Cecil Grínder**, a spiritual healer from Tl'etinqox (Anaham Band) married to the granddaughter of Jimmy Bulyan/Williams, at Transcript, March 25, 2010, p. 1035 ["My grandparents used to talk about the island on Teztan Biny. That's where the spiritual people get their powers to help their own people"]; **Kylan William**, CEAR #1985 ["I am in grade 6, 11 years old and I am from the beautiful Nemiah Valley B.C. My grandmother is Doris William ... Just imagine how my people would feel knowing the lake has been destroyed and the Island on Fish Lake with pit houses on it. There's even a grave yard on it. People gather medicine there and even find [their] spirit animal"]. **Alice William**, transcript, March 31, 2010, CEAR #1991, pp. 2266-67, 2287.

A number of additional factors further underscore the cultural and spiritual importance of Teztan Biny, Little Fish Lake and Nabas to the Tsilhqot'in people. Much of this information has already been presented by Patt Larcombe during the topic-specific hearing sessions; TNG adopts Ms. Larcombe's presentation as part of their final submissions, and asks the Panel to carefully review Ms. Larcombe's summary of Tsilhqot'in current use and Tsilhqot'in heritage values.⁵¹ The TNG gives the following additional summary:

- a. The importance of this region to the Tsilhqot'in is demonstrated by the explicit reference to the mouth of Taseko Lake (known to the Tsilhqot'in as Nadilin Yex) in the Tsilhqot'in legend of Lhin Desch'osh. Lhin Desch'osh is the Tsilhqot'in creation story. It describes their origins as a people and the formation of their homeland. It features a number of key geographical landmarks of Tsilhqot'in territory. In the story of Lhin Desch'osh, as recorded by the anthropologist Livingston Farrand in 1897, and confirmed by the evidence of Tsilhqot'in elders during the *Tsilhqot'in Nation* trial, key events in this legend occur at Nadilin Yex and along the Taseko River.⁵²
- b. Community Health Nurse Shari Hughson described the importance of lake fisheries, including Fish Lake, to maintaining a traditional diet in times of salmon shortages.⁵³ Fish Lake is integral to maintaining the Xenigwet'in's present consumption rates of 50-75% traditional foods. Most Elders eat a minimum of 75% traditional foods.⁵⁴
- c. The Department of Fisheries and Oceans has stated that they understand Fish Lake to be an important alternate source of fish for the Tsilhqot'in in times of shortage, noting: "In general, DFO has learned that the [TNG] view Fish Lake as a reserve food supply in the event of poor salmon runs. The TNG can net large numbers of fish from the lake on an annual basis, especially for two or three years, to support their food requirements, without impacting the longterm population success in the lake. [new paragraph] At this time, DFO is unable to determine if the proposed compensation plan would provide a similar fishery for the TNG."⁵⁵
- d. Even during recent times, when the Fish Lake and Nabas area has not been settled by Tsilhqot'in families year-round, it forms an important hub in seasonal Tsilhqot'in use of the land. Tsilhqot'in culture was, and to an extent remains, centred on a

⁵¹ CEAR # 2290 (Exhibit-133) and Transcripts for April 30, 2010 hearing session.

⁵² *Tsilhqot'in Nation*, paras. 654-57; 665-66.

⁵³ See testimony of Shari Hughson, Nemiah Community Health Nurse, Transcript, March 31, 2010, CEAR #1991, p. 2075-76 ["The salmon run was very low this year, so fishing in the fall and ice fishing in the winter became critical in all the local lakes, including Fish Lake, which became a critical food supply"].

⁵⁴ See testimony of Shari Hughson, Nemiah Community Health Nurse, Transcript, March 31, 2010, CEAR #1991, p. 2069.

⁵⁵ CEAR # 1769: DFO Submission to Prosperity Mine hearings (March 12, 2010) at page 24 [PDF]; see also Transcript, Vol. 31 (April 28, 2010) at pp. 6207-6208.

seasonally nomadic⁵⁶ lifestyle that makes key harvesting areas as critical to culture and survival as settled sites.

- e. The Court in *Tsilhqot'in Nation* described this region as a cultural hub embedded in an ancestral trail network, noting the “evidence of Tsilhqot'in people occupying the lands to the east of Dasiqox Biny [Taseko Lake], centred in the lowlands of Nabas and about Bisqox [Beece Creek], Teztan Biny, Jididzay Biny [Onion Lake] and Lhuy Nentsul [Little Fish Lake]. Tsilhqot'in people moved into the mountainous areas to the south and east of Dasiqox Biny in the summer and fall to harvest resources and prepare for the winter. They did so via the ancestral trail network, which is still used today”.⁵⁷
- f. Constructing and operating an open-pit mine would not only end the use of this cultural hub, but also the broader area that Tsilhqot'in people access from the Nabas region for hunting, trapping, fishing and gathering, including such critical areas as Anvil Mountain, Nadilin Yex, Red Mountain, Cheetah Meadows, Onion Lake, Beece Creek, etc. The clear evidence of Tsilhqot'in witnesses and others is that Tsilhqot'in people would avoid areas and wildlife that they perceived as potentially contaminated by the mine.⁵⁸
- g. Tsilhqot'in people describe the Teztan Biny area as particularly special because it provides “one stop shopping” – it is an area that abundantly supports hunting, trapping, fishing and gathering of plants and medicines, all in one small valley. It is close enough to Xeni Gwet'in for ready access, especially for elders, but still relatively intact and remote. It provides an accessible place to pass on traditions to younger generations. It is a cultural keystone place.
- h. Although Tsilhqot'in people are not presently residing year-round in the Teztan Biny area, it is important to appreciate that Tsilhqot'in families have settled in this area

⁵⁶ In this respect, the caution of the trial judge in *Tsilhqot'in Nation* merits reproduction:

While the term ‘nomadism’ generally implies a high degree of territorial mobility and little or no reliance on ‘cultivation’ in the Lockean sense, it does not mean ‘haphazard’ or ‘unorganized’. Rather, nomadism is properly conceived as a ‘way of living’ in which individual or groups are occasionally compelled to alter movements on short notice when conditions demand it, but beyond that inhabit recognizable spaces, know where they can and or cannot go, and whose daily or seasonal patterns of land use tend to follow the same cyclical trajectories over time. Put alternately, nomadism is a form of territoriality ... that accommodates the need of kinship based societies having a relatively low level of technological ‘development’ and operating in physiographic or climatic environments that often yield their resources grudgingly.

Tsilhqot'in Nation v. British Columbia, 2007 BCSC 1700, para. 646, quoting from the expert report of Dr. Brealey, historical geographer. See also paras. 381-87.

⁵⁷ *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, para. 897.

⁵⁸ See, e.g. Alex Lulua, Transcript, March 31, 2010, CEAR #1991, pp. 2155-56. See also Shari Hughson presentation, referenced above.

and lived year-round, raising their families, for several decades of the past century. As the Panel has heard during the hearings, members of the Williams family are planning to re-occupy their family homestead at Nabas in the near future.⁵⁹ TNG submits that these plans are relevant and compelling evidence of “current use”, in accordance with the definition of that term used in the Voisey’s Bay mine assessment.⁶⁰

- i. The Teztan Biny region has become all the more culturally important as other areas of Tsilhqot’in territory have been developed or alienated to third parties.⁶¹ Satellite imagery in the *Tsilhqot’in Nation* trial shows extensive development right up to the borders of the Claim Area in that case.⁶² Since then, two recent fires have decimated much of the Brittany Triangle. Aside from the profound and ancient cultural attachment to the Teztan Biny region, simply “going elsewhere” to hunt, trap and fish is becoming less and less of an option over time – this region has become “elsewhere” for many Tsilhqot’in people displaced by industry from other portions of Tsilhqot’in territory.⁶³

⁵⁹ See CEAR # 2026 (Exhibit-52), at page 34 [PDF]. See also CEAR # 2312.

⁶⁰ See the discussion of “current use” above. See testimony of Alice William, Transcript, March 31, 2010, CEAR #1991, pp. 2242, 2292-94.

⁶¹ As noted by Shawnee Palmatier at the Toosey community hearings, going elsewhere is no longer an option for the Tsilhqot’in people:

In my surveys of logging cut blocks for our community of Tl'esqox, we raised time and time again areas of traditional use, areas where we exercised our Aboriginal Rights. The reply from both MoF and licensees was, "You can practice elsewhere." We had a big site, traditional use site we called the Wild Tea Mountain. That and numerous other areas were logged. It sounds like that we have a large land base and that there are plenty of areas for us to practice Aboriginal Rights. There are not. The Fish Lake area in Xení Gwet'in territory is the last that's left of our Nation's territory that doesn't have quite the development footprint that the rest of us have. It can't be put to us that we can practice our Aboriginal Rights elsewhere. It cannot be put to us that there are protected areas and parks for us to practice Aboriginal Rights. We're not zoo animals to be contained, to be told where to go. It would be like the Reserves. And we certainly do not have to be told by external companies, the Provincial Government, or the Federal Government, as to where we can practice our Aboriginal Rights. We were born with those Rights and we have a territory to exercise them on. [Volume 18, April 10, page 3123, lines 13-24 and page 3124, lines 1-5, 10-19].

⁶² See satellite photo included in CEAR # 1998 (Exhibit-39).

⁶³ See, e.g. Alex Lulua, Transcript, March 31, 2010, CEAR #1991, pp. 2115-16 re disappearing moose habitat [“... there’s so much of the moose’s habitat is disappearing ... we got very few places to get our moose, and this is one of those places”] and 2154 [“... it’s almost one of the last areas where [moose] have that habitat left ... I’ve hunted everywhere and there ain’t too much of their habitat left where they hang around”]. See also Linda Smith Submissions, Exhibit-21, CEAR # 1939, p. 1:

Although Tsilhqot’in means ‘people of the river’, I prefer “people of the lakes” because I spent most of my childhood near lakes. In my lifetime, these places I learned to love have been permanently altered by clearcut logging. My mother and I wept for weeks after seeing this intentional slaughter of our forest; we saw this as a massacre. In fact, all the lands cherished by the Yunešit’in have been destroyed. The only pristine area left on the Yunešit’in side of the river is Nabaš, and Težtan Biny is part of that.

2. Permanent destruction of Teztan Biny and area is also a significant ecological loss

The permanent destruction of Teztan Biny and area must also be considered a significant environmental effect based purely on the scale of ecological disruption involved.

The destruction of Teztan Biny, Little Fish Lake, and the surrounding lands and waters means the irreversible loss of fisheries and ecological systems that are ancient and abundant. Ecologically, this represents the permanent loss of a complex, mature lake ecosystem that has been in place since the last ice age.⁶⁴ Standing alone, this is clearly a significant environmental effect.

The Mine Project also calls for the loss of large portions of Fish Creek and the associated wetlands (which are important for the exercise of Tsilhqot'in Aboriginal trapping rights), and the Nabas area of historic Tsilhqot'in settlement.

The above represents the environmental damage that even Taseko acknowledges is required for the Mine Project. However, there is every reason to conclude that Taseko's EIS drastically understates the potential magnitude and reach of the proposed mine's environmental impacts.

TNG gives the following summaries of key issues that came up during the last week of technical hearings:

Acid Rock Drainage and Metal Leaching

Acid rock drainage and neutral metal leaching (ML-ARD) will be a problem at the Prosperity mine site as explained by both Dr. Kevin Morin and Dr. Ann Maest. There are five major reasons for their finding:

- a. Potentially acid generating (PAG) was not correctly characterized and there will be a greater quantity of waste rock, low grade ore and overburden than Taseko predicted. More of these materials will generate acid and leach metals than predicted in the EIS.⁶⁵
- b. The mine waste and low grade ore will release ML/ARD much faster than predicted in the EIS. Test results showed mine waste material generated acid rapidly and lag times to onset of acid generation and metal leaching are under estimated.⁶⁶

⁶⁴ See DFO's March 12, 2010 Submission to the Public Hearings (CEAR #1769) regarding the complex ecological processes at work to maintain fish habitat in the region.

⁶⁵ Page 54-60 in Dr. Kevin Morin's power point presentation-CEAA document # 2235.

⁶⁶ Page 61-69 in Dr. Kevin Morin's power point presentation-CEAA document # 2235.

- c. The low-grade-ore stockpiles will be located outside the Tailing Storage Facility and will contain both PAG and non-PAG material. Until this material is processed quickly it represents a large risk for generating ARD. This material is open to the elements to weather and there has been no effort to minimize and collect rain water exposure and runoff from the site. Due to economics and to geochemical weathering that can render copper and gold less recoverable, the low-grade-ore stockpile may never be reprocessed at the end of operation.⁶⁷
- d. Water treatment of mine site waters is a very real possibility which will cost millions of dollars annually and will need to continue in perpetuity – i.e. forever. Will water treatment be enough to protect surface and groundwater? Who has the responsibility for and liability of maintaining the water treatment system after the life of the mine?⁶⁸
- e. Contaminants will travel off the mine site through surface and ground water and affect Big Onion Lake, Beece Creek, and the Taseko River.⁶⁹

Water quality concerns will require perpetual treatment, maintenance and funding

The TNG remains extremely concerned about off-site contaminant migration and the need for perpetual site monitoring, maintenance and water treatment. The Proponent has fundamentally failed to provide a technically and economically feasible process to ensure that the environment will not be contaminated. In particular:

- a. Dr. Ann Maest from Stratus Consulting presented compelling evidence illustrating that Taseko has underestimated the temporal onset and severity of water treatment requirements. Dr. Maest is an internationally renowned expert and is presently the main geochemist consultant to the US Environmental Protection Agency. Her expert opinions are based on the work that Stratus has done using the data that Taseko provided in the EIS. Stratus' work is credible, scientifically proven and informed.
- b. Dr. Maest is one of the principle authors of a report that compared predicted versus actual mine water quality impacts; the report found that 76% of the mines studied under-predicted impacts and that, of the mines studied with acid rock drainage issues, 89% had predicted there would be no such issues. This report is on the record and we strongly urge the Panel to review it.
- c. Dr. Maest's and Stratus' work concluded that there were fundamental issues with the modeling of environmental effects. In particular:

⁶⁷ Page 21-30 in Dr. Kevin Morin's power point presentation-CEAA document # 2235.

⁶⁸ Page 70-72, 90-95 and 100-102 in Dr. Kevin Morin's power point presentation-CEAA document # 2235.

⁶⁹ Page 70-72 and 90-95 in Dr. Kevin Morin's power point presentation-CEAA document # 2235.

- i. The geochemical testing done at the site, in particular the use of Humidity Cell Tests (HCT), failed to properly characterize site conditions. Dr. Maest concluded that the tests used underestimated concentrations and acidity. Methodological errors such as not running the HCT for long enough and dilution of tests have resulted in inaccurate water quality predications.⁷⁰
- ii. Dr. Maest also concluded that Taseko's models did not honour the real data; as such, acidic conditions (especially in the lower pit wall) were not properly predicted.
- iii. Errors in modeling by Taseko have lead to an overestimation of the lag time. In reality waste rock will become acidic during the life-of-mine, a time that Taseko has stated is the time until the mill ceases to operate.
- iv. Dr. Maest and Stratus have concluded that downstream and down-gradient contaminant concentrations will be up to ten times higher than predicted and **that water treatment will be necessary.**⁷¹
- v. Uncertainty remains about the site-water-balance and about Taseko's ability to ensure that submerged tailings in the TSF have a sufficient water cover.
- vi. Concerns remain about seepage from the TSF towards Big Onion; these concerns were also noted by federal agencies during the hearings. The TNG remains gravely concerned about the potential for off-site pollutant migration. During the hearings the Proponent continually relied upon their commitments as part of the BC process, but failed to provide the Panel with a technically and economically feasible plan to ensure that operations will not led to substantial water quality and environmental contamination concerns.
- vii. Overall, Stratus concluded that the pit water, TSF, and seepage has been improperly characterized and that there will be a need for perpetual treatment.
- viii. Currently, seepage mitigation measures proposed along the western tailings embankment remain site specifically unproven, and insufficient information has been presented about the technical and financial feasibility of such measures.
- ix. TNG remains extremely concerned that the Proponent has failed to properly assess the degree of water quality risk associated with the project. As the people that will likely bear the brunt of any detrimental impacts, the Tsilhqot'in are deeply concerned that the government of BC, an authority that has clearly failed

⁷⁰ Dr. Ann Maest, Presentation to the public hearings, April 27th, 2010, CEEA # 2233; & Transcript, Volume 30, April 27th, 2010, p. 5899.

⁷¹ Dr. Ann Maest, Presentation to the public hearings, April 27th, 2010, CEEA # 2233; and see Transcript, Volume 30, April 27th, 2010, p. 5899.

to fully assess the possible impacts of this project, may be the future agency that regulates off-site contamination concerns.

Project poses unacceptable risks to Taseko River salmon and compromises the right of the Tsilhqot'in people to fish in the Taseko River

The Prosperity Mine Project poses a permanent perpetual threat to the aquatic biodiversity of the Fraser Basin. In particular:

- a. Minesite seepage, equipment malfunction and TSF dam failure pose perpetual risks to the livelihood, health, and culture of the Tsilhqot'in. As illustrated by the recent oil spill in the Gulf of Mexico and accidents at other mine sites in British Columbia, including Taseko's Gibraltar Mine, "fail-safe" systems **can** fail.
- b. The Tsilhqot'in have the right to fish in the Taseko River; Justice Vickers of the B.C. Supreme Court expressed the opinion that the Tsilhqot'in have Aboriginal title to the Brittany Triangle along the western bank of the Taseko downstream of the proposed Mine Project. Aboriginal Title includes the right to use and occupy lands for a variety of purposes⁷² – in TNG's submission, it must include the right to fish in adjacent waterways.
- c. The 2009 Sockeye escapement into the Fraser River was approximately 10 percent of predicated levels. Both Richard Holmes (R.P. Bio. and TNG fisheries expert witness) and DFO testified during the technical hearings that 2009 Sockeye counts in the Taseko River only totalled 40 salmon. Historically runs have numbered up to 30,000. The survival of the Taseko Sockeye run is in question.
- d. The physical characteristics of the Taseko River make it a challenging waterway to study and TNG is concerned that insufficient background studies have been conducted on salmon to evaluate potential impacts and to establish baseline conditions to determine future impacts.
- e. A mine development in the Taseko watershed is not congruent with DFO's Wild Salmon Policy:

The policy places conservation of salmon and their habitats as the first priority for resource management. It gives tangible effect to this principle by committing to safeguard the genetic diversity of wild salmon, and maintain habitat and ecosystem integrity. The policy also considers the values that the harvesting of Pacific salmon provide to people. It reflects a management framework that will provide care and respect for the resource and its ecosystem, and for the people who rely on it for food

⁷² See *Delgamuukw* – discussed in more detail below.

and spiritual needs, for recreation, and for their livelihood. [emphasis added]⁷³

- f. TNG fish toxicologist Dr. Jeff Morris illustrated during the technical hearings that there is little margin for error and that thresholds for toxicological effects on aquatic organisms are close to being reached. TNG is particularly concerned about elevated levels of metals and metalloids leaching into downstream waterways. In particular, TNG notes that predicted May copper levels in the Taseko River and Fish Creek may reach levels that cause decreased growth in trout and only require minimal increases to reach acutely lethal concentrations. Similarly, concerns have been expressed by both Dr. Morris and federal government agencies about other potential contaminants such as selenium. TNG respectfully dismisses Taseko's assertion that new technologies may be developed in the future to treat selenium contamination. TNG submits that this exposes the Tsilhqot'in to an unacceptable risk. As discussed in more detail above, "vague hopes for future technology" are not feasible mitigation measures.

- g. In light of recent declines in the Fraser Basin salmon fishery, additional pressures will be placed on lake fisheries such as the one at Teztan Biny. DFO has identified the risk that the proposed fish compensation plan may not be able to viably assist in compensating for decreased sockeye fishing opportunities.⁷⁴

The above findings mean that the impacts of the Mine Project are uncertain, poorly understood, and could be on an order of magnitude far beyond what is presented in the EIS.

These risks are amplified by elevated site of the proposed Mine Project, with the Mine and the TSF proximate to and perched above key rivers and creeks. Beyond the certain significant environmental impacts of the Mine Project, there is a real risk of substantial contamination migration to see these water bodies with consequent environmental impacts.

All of the above risks are further amplified by Taseko's stated intention to proceed with an expanded Mine Project that would dig deeper, extract more ore, and operate for 13 additional years. In its response to the Panel, Taseko declined to assess the implications of this expanded project for hydrology and water balance issues at the mine site.⁷⁵

"Prosperity" is a low-grade ore mine that may collapse financially if confronted with significant unanticipated environmental management costs and/or a downward market or

⁷³ DFO, Wild Salmon Policy, 2009 Retrieved from: <http://www.pac.dfo-mpo.gc.ca/fm-gp/species-especies/salmon-saumon/wsp-pss/index-eng.htm>

⁷⁴ DFO, Submission to Public Hearings March 12th, 2010, CEAR #1769 & Transcript, Volume 31, April 28th, 2010, p. 6207-6208.

⁷⁵ See e.g. the concerns that DFO expressed in its March 12, 2010 Submission to the Public Hearings (CEAR #1769) about extending the mine life, in particular that this would "reset" any ecological gains from the fish compensation program.

serious project expenses. Because bonding does not cover the full costs of closure and remediation, an early end to “Prosperity” could leave behind a toxic legacy at public expense.

In sum, the environmental effects acknowledged by Taseko as required for the Mine Project to proceed are clearly significant. Reputed expert opinion on key technical issues indicates that there is no certainty that environmental impacts will be confined to those assessed by Taseko.

3. Significant Environmental Effects after Mitigation

Neither the cultural nor ecological impacts described above can be mitigated by “replacing” Fish Lake with a fish compensation reservoir, or through any of the other proposed mitigation measures. The residual environmental effects are significant and irreversible. In particular:

- a. As conceded by Taseko in its own report, described above, “trapping and fishing ... have a deep spiritual significance to individuals that use the mine development area”;⁷⁶ there is a “strong Tsilhqot’in cultural interest, in general, in the Fish Lake Study Area”;⁷⁷ and Tsilhqot’in members have “continued spiritual and emotional ties to Little Fish Lake and the entire study area”.⁷⁸ The loss of this connection to places of spiritual and historical significance cannot be fully mitigated. The residual impacts on the cultural heritage values⁷⁹ of the area would be significant and irreversible. These ties forged over centuries would be severed forever.
- b. The loss of the island in Teztan Biny would represent a loss of cultural heritage that is almost impossible to fathom. As discussed, it has been described as a site of great spiritual power for the Tsilhqot’in people where Tsilhqot’in people have received their spiritual powers.⁸⁰
- c. The loss of the cabins and areas of historical settlement near Little Fish Lake cannot be mitigated. As Ms. English-Ehrhart observes in her report for Taseko, the cabins at Little Fish Lake and the surrounding area are “symbols of their culture and they represent part of what native people speak about when they say the land is their

⁷⁶ Ehrhart-English Report, p. 49.

⁷⁷ Ehrhart-English Report, p. 46.

⁷⁸ Ehrhart-English Report, p. 54. Ms. Ehrhart-English repeatedly refers to the particular significance of the study area to the William and Solomon families. To avoid underestimating these statements, it is important to appreciate that the William and Solomon families comprise a significant portion of the Xenigwet’in population. Moreover, the cultural significance of the area is not limited to the (large numbers) of Tsilhqot’in that actively resided at, or engage in traditional activities in, this area – these active users maintain and foster a cultural connection felt strongly by the Tsilhqot’in people generally.

⁷⁹ See discussion of “cultural heritage”, below.

⁸⁰ See, e.g., Catherine Haller Statement, included in CEAR #1397, pp. 38+ [PDF].

culture. The range of emotion associated with these sites is very strong, complex and powerful to native people”.⁸¹

- d. Ms. Cindy English-Ehrhart, in the report attached as appendix 8-2-B to the Proponent’s own Environmental Impact Study, concluded that loss of the Little Fish Lake area (i.e. Nabas) will significantly impact the Xeni Gwet’in.⁸²
- e. The proposed mine site area is rich in archaeological sites, including pit houses, cultural depressions and burial and cremation sites. Taseko’s proposed mitigation measures focus on efforts to salvage some scientific or archaeological value from these sites from a non-Tsilhqot’in perspective, and assess their “significance” from this inappropriate cultural framework. The loss of these archaeological sites, notwithstanding these “mitigation” measures, would significantly impact the intangible but powerful connections of the Tsilhqot’in people to these cultural heritage sites.

TML’s Proposed Fish Habitat Compensation Plan – Not a Feasible Mitigation Measure

The proposed replacement reservoir (“Prosperity” Lake) is not a cultural or ecological substitute for the rich, complex and ancient lake ecosystems that will be destroyed, or for the enduring bond of the Tsilhqot’in people to these lands and waters. It is, in fact, an affront to the cultural values of the Tsilhqot’in people.

SUMMARY OF IMPACTS

- a. The record is well established that most of the 93 sq km of Fish Lake watershed that will be permanently destroyed by the Project has high biological, socio-economic and cultural value. This area is comprised essentially of an aquatic ecosystem having the following biophysical components:
 - 2 fish-bearing lakes of high productivity;
 - interconnecting streams and tributaries with high-value fish habitat; and,
 - riparian zones and wetlands connected with the lakes and streams that produce source waters and nutrients and seasonal habitat for fish, and well as important habitat for migrating birds.
- b. The special ecological values of this watershed were recognized in the early years of site development by DFO:⁸³

⁸¹ Ehrhart-English Report, pp. 49-50.

⁸² See *Heritage Significance of the Fish Lake Study Area: Ethnography*, EIS Vol. 8-2-B, for example at pages 49-50 (section on “Spiritual Significance”).

- The Fish Lake system, being isolated from other systems by a waterfall, necessarily supports all life stages of its trout stocks, including spawning, nursery, rearing and overwintering; all food supply for these stocks originates from within the system. Accordingly, the fish habitat of Fish Lake and Fish Creek is critical in supporting sensitive life stages of their fish stocks.
 - Additional factors contribute to the importance of the Fish Lake system from a fisheries management perspective. Contributing factors include: stocks of both inlet-and outlet-spawning rainbow trout exist, which is rare in the region; catch rates are exceptionally high; the system capacity can support extensive growth in fishing pressure; the system is monoculture (i.e. rainbow trout are the only fish in the system); which is rare in the region (~120 out of ~5000 lakes in the region), enabling the entire productive capacity of the system to be applied to the production of rainbow trout; the lake provides sufficient overwintering refuge habitat which is rare in the area; the combination of the above factors occur in one system, which is rare. The above factors individually and collectively rank Fish Lake system as particularly valuable from a fisheries management perspective.
- c. That is from DFO's perspective. The Tsilhqot'in perspective, however, is more important to this environmental assessment process. The Fish Lake area is an integral component of Tsilhqot'in land use and cultural identity, and has been for generations, as demonstrated by the archaeological surveys and oral tradition research, and supported by much testimony in the current community hearings. It is not simply a First Nation 'fishery' that is about to be destroyed—it is the permanent use (material and spiritual) of a richly productive part of the Tsilhqot'in land-based economy, situated historically and contemporaneously in the heart of their social and spiritual landscape. Its value to the Tsilhqot'in is not quantifiable, and its loss is neither mitigable nor compensable.
- d. Because the fish habitat impacts of the Project cannot be mitigated, the proponent has taken a habitat compensatory approach to offsetting the impact as allowed under the *Fisheries Act*. The most recent version of this was included in the EIS, and then modified in response to DFO's March 12, 2010 submission to this Panel. The question now before the Panel is, "is the proposed FHCP (Fish Habitat Compensation Plan) an economically and technically feasible means of offsetting the loss of the Fish Lake / Fish Creek aquatic ecosystem?"

TECHNICALLY AND ECONOMICALLY FEASIBLE MITIGATION

- e. The answer to the question above is clearly "no" – TML's proposed FHCP has been shown to be technically and economically unproven. It cannot be used as basis for determining that the loss of Fish Lake and associated aquatic/wetlands habitat can be mitigated in any meaningful sense.

⁸³ DFO Backgrounder Note, dated 21 Sept 1998, 'Upcoming Meetings of MPs with Taseko Mines Ottawa.' CEAR 2117, TNG Submission for Topic-Specific Hearings. p.13 in DFO Correspondence File.

- f. All the expert reviewers (Hartman, DFO, Levy) agree on this. While the proponent has argued to the contrary in the hearings, it has not provided any substantive evidence to the contrary. The proponent presented no credible arguments to support their views during the hearing, instead relying on its submitted documents. These describe at a conceptual level what the components of the FHCP might look like, and a general plan for how they might be implemented. But there is no credible technical or economic analysis for any of it that can demonstrate the compensation project's viability.
- g. It is important to note that the values being proposed by the proponent for compensation include only the physical loss of lake and stream fish habitat. No compensation measures have been proposed by the proponent for any of the other values lost (i.e., wetland and migratory bird habitat, cultural landscape of Tsilhqot'in, pristine natural landscape with high aesthetic value, and wilderness recreation). These will be lost forever.
- h. The failure of meet DFO's policy of 'no net loss' is evident. DFO testified that the information provided in the proponent's April 13th submission 'narrowed the gap' in terms of the numeric calculations for no net loss, the plan was still significantly deficient in this respect.⁸⁴ We are not commenting on the specific metrics used in the compensation ratios presented in evidence. Clearly the proponent is wildly stretching the numbers when it includes nonsensical elements in its calculations such as the pit lake and TSF ponds. As Dr. Hartman eloquently summarized—how could they possibly replace the values to be destroyed in a natural aquatic ecosystem by purporting to create something eight times the value in the same watershed, as the proponent has calculated?
- i. The proponent has admitted that reconstructing the lost ecosystem is not possible. Its approach to compensation is therefore reduced to attempting to construct a few specific components of an engineered fish-support system that it believes are technically and economically achievable, and that will function as an enduring rainbow trout population. The components comprise a water collection, storage and delivery system, spawning channels, and Prosperity Lake as rearing and overwintering habitat.
- j. The proponent has not produced any evidence to show that the works will perform as intended. References were made to several precedents for each of spawning channels and constructed lakes. However, examination of these examples by both Levy and Hartman showed that none of them were reliably useful as analogs to the proposed components. The small scale and simplicity of the precedents cited rendered comparisons meaningless.

⁸⁴ Transcripts, Vol.31, p6161.

- k. The proposed FHCP is not only technically or economically infeasible, it is conceptually unsound. In reviewing the component parts individually, Dr. Hartman raised a number of concerns about the technical feasibility of each of them—the headwater collection system, the headwater retention pond, and the spawning channels, and Prosperity Lake.⁸⁵ Individually, these all had problems with respect to maintenance, water quality and flow control, and sustainable temperature regimes required for trout. Dr. Hartman was not convinced that any of these components, on their own, would function reliably for very long.
- l. For one example, the design of the spawning channel was unworkable. There were a number of structural complexities in the design, including curves and alcoves in the channel that would render required cleaning of gravel by heavy equipment impossible, and the guarantee of sustainable temperature and sediment conditions unreliable.
- m. Viewing the components as an integrated sustainable trout ecosystem was even more problematic. Dr. Hartman submitted that the likelihood of constructing a multi-component, integrated, and durable fish-sustaining aquatic system of this scale and complexity is extremely remote, if not impossible. His evidence, consistent with the expert reports submitted by DFO⁸⁶ and MiningWatch Canada⁸⁷ seriously erodes any defensible argument that the individual components can function effectively as described by the proponent.
- n. The proponent provided no ecological analysis to support the proposed works. For instance, there was no information provided on nutrient supply and cycling, energetics, food production, annual dispersal, etc., that would be required to sustain the trout population and its habitat. Serious questions were raised by several expert reviewers about the reliability of the sparse site hydrometeorological data and annual variability, such that water flow requirements for the engineered works would be reliably met in the long-term. There was no substantive analysis of the role of non-fish-bearing riparian and wetland habitat to provide support functions to fish such as water quality and quantity control, temperature, food and cover requirements, etc. The DFO paper mentioned the role of beavers in maintaining the existing aquatic habitat, and how the presence of beavers in the project area would pose a serious risk to its viability. Ecological assessment has been an explicit criterion for any fish habitat compensation plan set out by DFO as early as 1999⁸⁸, but has been clearly ignored by the proponent.

⁸⁵ TNG Submission for Topic-Specific Session, Gordon Hartman Paper, CEAR 2117. Also see Transcripts Vol.31, p.6246-6292.

⁸⁶ DFO Technical Submission March 12, 2010. CEAR 1769.

⁸⁷ MiningWatch Canada. April 13, 2010 Submission to Topic-specific Session. David Levy Report. CEAR 2116.

⁸⁸ Herb Klassen letter to Norm Ringstad, April 6, 1999. in TNG's Main Submission for Topic-specific Session. CEAR 2117. P.17 in DFO Correspondence Chronology.

- o. No risk analysis has been done for the proposed works. This, too, has been an express requirement of DFO's since at least 1999.⁸⁹ The only summary evaluation of the risks posed by the compensation project are outlined in DFO's March 12, 2010, technical submission. Risk analysis is critical in order to understand how the compensation project might fail, and what the consequences might be. It is a best management practice widely used in the mining industry for all phases of the mine plan, since such information can be used iteratively in the design phase to improve the project.
- p. The outlook for success is even more worrisome when the complexity of the compensation works is examined. There is simply no precedent that we have on record for a 4-component habitat compensation project of even being attempted, let alone constructed and operating with proven long-term success. DFO and the proponent were unable to identify any such parallel attempt when questioned on this.
- q. Evidence from both Dr Hartman and MiningWatch showed clearly that with increasing levels of complexity, uncertainty and risk are compounded from simpler systems. As Hartman and DFO have suggested in their testimony, the proponent's project is essentially conceptualized on the frontier of known ecological science, and likely beyond.
- r. Technology is the application of science, and if the science is unknown or only rudimentarily developed, then the technology by definition is 'unproven'. In this case, no scientific evidence for constructing a durable and effective fish ecosystem on this scale and complexity has been presented to support the proposed FHCP. The expert reviewers all raised serious concerns about the overall viability of the compensation project. If the science is not in front of us, the technological viability of the proposal cannot be either.
- s. There are well established standards and methodologies for conducting risk assessments in the mining industry. There is nothing in the proponent's information to suggest that a systematic assessment of risks has been conducted. While the proponent failed to undertake such an exercise, the record of correspondence between DFO, BC and the company⁹⁰ reveals that DFO has been very clear and consistent about what it expected to see in any compensation proposal coming from the proponent. In particular, the 1999 letter from DFO's Herb Klassen⁹¹ identifies in detail the kinds of information that the agency would want to see in a risk analysis conducted by the proponent for its compensation plan.

⁸⁹ Herb Klassen letter to Norm Ringstad, April 6, 1999. in TNG's Main Submission for Topic-specific Session. CEAR 2117. P.17 in DFO Correspondence Chronology.

⁹⁰ CEAR 2117. TNG's Submission for Topic-specific Session. DFO Correspondence Chronology.

⁹¹ Herb Klassen letter to Norm Ringstad, April 6, 1999. in TNG's Main Submission for Topic-specific Session. CEAR 2117. P.17 in DFO Correspondence Chronology.

- t. In its March 12, 2010, submission DFO provided a succinct analysis of a number of risks of failure that the department believed would characterize the compensation project. While DFO did not quantify the risks in its report, or rate them in terms of significance, it is clear that an array of failure modes exists, and that a failure in any one could compromise the entire compensation program.
- u. There is no information in front of the panel about the costs of the compensation project, or its overall economic feasibility. DFO testifies that it could be ‘many millions of dollars’ to construct.⁹² Perpetual maintenance and replacement costs would add significantly to this total. The proponent gave mixed messages about what cost figures were available and who had access to them. However, no meaningful capital or operations costs for the proposed FHCP are evident to date. TML’s 2009 NI43-101 report filed with SEDAR, which is certified precisely to provide accurate economic information to potential investors, is silent on this issue.
- v. There is no acceptable explanation or assessment of how the expanded 33-year mine plan would affect the FHCP, particularly Prosperity Lake. This information is critical to the assessment of the compensation project’s feasibility. Despite TML’s insistence in the hearing that the Panel should concern itself only with the applied-for 22-year mine plan, and that in any event details for the 33-year mine plan are hypothetical,⁹³ the 2009 NI43-101 report (Sec.18) clearly provides engineering details and costs for TML’s proposed upgraded mine plan. Despite TML’s insistence to the Panel that the expanded mine plan as outlined in the 2009 NI43-101 report is only an option,⁹⁴ the document is explicitly and consistently framed throughout in terms of what the proponent ‘will’ build if the project proceeds.
- w. The Panel has indicated that the extended mine life would be viewed as a ‘reasonably foreseeable’ new project, and would be included in the Panel’s assessment of the cumulative effects of the project. It is not clear that there would be a material difference in the outcome whether the expanded project was evaluated in the context of a cumulative effects assessment of a 20-year life with a new 13-year project, or from the start as a single 33-yr project. Given the status of the *2009 NI43-101 Report* as the certified expression of the company’s plans to its potential investors, we don’t think there should be any doubt that the 33-year project is the one that the proponent is contemplating from the start. However it is done, we agree with the Panel that the expanded 33-year project needs to be included in the assessment in some meaningful way, and that its technical and economic feasibility must be demonstrated.
- x. The proponent argued in its rebuttal to the technical sessions that its FHCP was an integral part of its mining project—this is patently untrue. The *2009 NI43-101*

⁹² Transcripts. Vol 31. p.6175.

⁹³ Transcripts Vol.30. p.6047.

⁹⁴ Brian Battison letter to Colette Spagnuolo dated January 18, 2010. CEAR 1577.

Report describes the updated mine plan as currently envisioned by TML—there is no mention of the FHCP in this document. Specific engineering and costs details are provided for the mining components—nothing is provided for the FHCP.

- y. Furthermore, the mine plan described in the 2009 NI43-101 Report is, on its face, incompatible with the development of the mine plan, and contradictory to what the proponent stated in the hearings as to how it would raise the TSF impoundment to accommodate the 30-year mine plan, while maintaining the original level of Prosperity Lake. Table 18-2 of the 2009 NI43-101 Report lays out in very specific terms the scheduled construction activity for raising the South Embankment in year 14, with annual increments every year following to end-of-mining. The accompanying text indicates that centerline construction will be used for this, and Mr. Smyth of Knight Piesold confirmed that this method of construction would result in rock being dumped into Prosperity Lake every year as the embankment was raised.⁹⁵ This is fundamentally incompatible with maintaining viable fish populations and habitat in Prosperity Lake, and shows that the FHCP has been fundamentally ignored by TML’s mine engineering department. The FHCP is demonstrably not integral to the project, but has been cobbled together in the last few months in response to fluctuating mine design.

- z. The proponent has attempted to argue in the hearings that it was not until DFO’s March 12, 2010, technical submission that it knew what DFO wanted to see. This is also not true. Questioning of both TML and DFO on the historical DFO correspondence, and in particular the very detailed 1999 letter from Herb Klassen to the BC EAO,⁹⁶ reveals that at least back to that date and earlier, DFO had consistently provided detailed guidance about what elements would need to characterize any habitat compensation plan that TML would develop. The large goal posts (technical feasibility, ecological feasibility, risk assessment, and economic feasibility) were clearly articulated, in substantive detail, in 1999 by Mr. Klassen. Mr. Sprout repeated these points in his letter to the Panel of May 22, 1999.⁹⁷ Mr. Silverstein in his oral presentation to the technical sessions confirmed that nothing had changed in this respect,⁹⁸ and his technical submission explains in detail how these critical elements are still lacking. In spite of having worked on this project for 17 years, and having clear guidance about DFO’s expectations for acceptability, the proponent cannot claim, as it did in the hearings, that it did not know what was expected until March 12th. The reality is that it put no real effort into attempting to meet DFO’s requirements. Rather, the company has taken the position at the hearings that the simplified approach to compensating for the sports fishery taken

⁹⁵ Transcripts Vol.30. p.6048.

⁹⁶ Herb Klassen letter to Norm Ringstad, April 6, 1999. in TNG’s Main Submission for Topic-specific Session. CEAR 2117. P.17 in DFO Correspondence Chronology.

⁹⁷ Paul Sprout letter to Robert Connolly dated May 22, 2009. CEAR 1078.

⁹⁸ Transcripts Vol.31. p.6179.

by BC is all it has to do, and that they can somehow pressure DFO into backing off its requirements for a workable compensation project consistent with federal policy.

- aa. As for the First Nations fishery identified as an objective in TML's *Performance Measures*, it is evident that, after all this time with abundant ethnographic, anthropological material and community testimony available, TML has no idea about the First Nations' fishery is, and how it could be mitigated or compensated in the current circumstances. The performance measure identified for this objective in the provincial document is 500 angler-days. This is a shameful response to the issue that is extremely important to the TNG, and is obviously challenging to address.
- bb. Finally, TML has presented no evidence pertaining to the sustainability of its FHCP. It could not or would not define what it meant by 'sustainability' in the hearing, and its technical documents do not address the notion of long-term viability. To the contrary, the proponent's stated view is that it will be responsible only for ensuring that the provincial objectives and the constructed compensation works are achieved and maintained for 'life of mine'. By the end of the hearings, 'life of mine' was confirmed by the company to represent the point at which commercial production stops. It does not include the following decades of pit flooding and other reclamation activities required for closure, or the post-closure future. For what is happen following the cessation of mine production, the proponent had no advice—it could not tell us who would assume responsibility for the works and bear the costs of doing so. Whatever adjective might be used to characterize the proposed FHCP, 'sustainable' is not one.
- cc. To sum the preceding arguments, the Panel does not have in front of it anything remotely representing a demonstrably viable and sustainable FHCP. Instead, it has, in Dr. Hartman's words, only a 'concoction of ideas'.⁹⁹ Dr. Hartman went on to characterize the company's presumption that it could do what it proposes in the plan as 'hubris'. TNG agrees. TNG urges the Panel to reject the proposal in its entirety, and for all the reasons set out above.
- dd. While the proponent is able to formulate a fish habitat compensation plan consistent with DFO policy for 'no net loss', the panel is not constrained to evaluating the proposal in this policy context. The real context for the panel is considerations of precaution and sustainability, and whether the use of no net loss is effective as a tool for preserving biodiversity. Therefore, the sustainability test that the Panel should adopt in evaluating the adequacy of the FHCP should also include considerations of implementation and likelihood of success.
- ee. Dr. Hartman's submission talked about the difficulties with developers successfully achieving compensation objectives for relatively straightforward, single component

⁹⁹ TNG Submission for Topic-Specific Session, Gordon Hartman Paper, CEAR 2117. Also see Transcripts Vol.31, p.6246-6292.

projects. The several reports tabled by MiningWatch Canada (i.e., Quigley *et al.*) about the results of audits conducted on habitat compensation projects corroborate the concern that even a majority of developers can achieve long-term success with these single component projects.¹⁰⁰ These failures reflect on the developers' abilities (for reasons that include poor ecological design, poor engineering, unanticipated costs of maintenance, monitoring and repair, etc.) to achieve the objectives.

- ff. The MiningWatch submission goes further than this, however. The 2009 audit conducted by the Commissioner of Environment and Sustainability adds another dimension to the problem, for it is a serious indictment of DFO's regulatory function to even document, track, inspect and enforce the compensation projects that it approves. The CESD audit suggests that even if we had a viable compensation project, properly implemented by the proponent, we would never know if the project performed effectively or achieved its objectives because DFO has no capacity or system for effective follow-up. This, despite a previous CESD audit several years earlier which identified the same structural deficiencies in DFO's habitat management branch.
- gg. Additionally, as MiningWatch testified at the hearings, DFO's spending estimates for the 2009-11 period show a substantial reduction in resources expected for the habitat management section. Putting all these pieces together suggests it is highly unlikely that there will be effective follow-up and enforcement by the regulator on any fish habitat compensation project.
- hh. The MiningWatch submission importantly includes an international survey of the problems with 'no net loss' specifically, and biodiversity bartering generally (i.e., paper by Walker *et al.*).¹⁰¹ Going beyond the basic reasons about deficiencies in ecological design, the paper examines institutional challenges to be surmounted in successfully implementing biodiversity trading programs against the pressures of development. The authors make the case that weak technical design and lax enforcement are observable and predictable features of regulatory biodiversity trading, even if sound ecological advice has been used in the design. In our view, this paper adds significant weight to the notion that 'no net loss', even at an enriched compensation ratio, simply will not be achieved in the outcome, and that even the theory of habitat compensation may be fundamentally flawed and unreliable as a sustainability criterion for land use decision making.

¹⁰⁰ MiningWatch Canada. April 13, 2010 Submission to Topic-specific Session.

¹⁰¹ MiningWatch Canada. April 13, 2010 Submission to Topic-specific Session.

Impacts on Navigation – No Proposed Mitigation

- a. Transport Canada has set out its conclusion for the Panel that the Mine Project, as proposed, will have a significant residual impact on navigation.¹⁰² Transport Canada agreed that one of these impacts would be the loss of Fish Lake as used by the Tsilhqot'in to move from the lakeshore by boat to the island which has high cultural and spiritual significance to them. "Navigation" implies that there exists in any system to be navigated a departure point and a destination, a useable pathway between them, and a user. In the case of the island, while it is conceivable that a new departure point might be identified (and, hence, mitigated), it is not conceivable that the destination point, if destroyed, could ever be mitigated. The loss would be both non-mitigable and non-compensable.
- b. As for the compensated navigation values to be established in Prosperity Lake, Transport Canada posited that it was conceivable an access point to the new lake could be created, although there were no plans in place at this time. While the provision of such access, and hence the continued "navigation" in Prosperity Lake, is theoretically possible, it is not realistic to believe that the Tsilhqot'in people will ever use this waterbody. The evidentiary record in front of the Panel is clear that TNG members, for a variety of reasons, will not use Prosperity Lake for any purpose. Re-establishing a navigation benefit here is completely meaningless to the Tsilhqot'in.
- c. The Proponent's failure to identify any mitigation at all (let alone feasible mitigation) for impacts to navigation means that it has failed to address impacts related to one of the key federal regulatory approval processes that first triggered this environmental assessment under CEAA. Transport Canada was visibly frustrated by the lack of cooperation and communication to date on the part of the Proponent to resolve the adverse effects identified by the Agency. The Proponent's failure to identify any mitigation measures in relation to *Navigable Waters Protection Act* approvals is symptomatic of a more general failure to identify feasible mitigation in relation to other CEAA "triggers", including contemplated approvals under the *Fisheries Act* and the *Metal Mining Effluent Regulations*.

In sum, the Proponent has failed to identify feasible mitigation measures for some of the primary environmental effects of the Mine Project. Further, the Mine Project would effectively obliterate an area that has served, according to Taseko's own report, as "a home base for the cultural and economic lifestyle that has flourished in the study area [*i.e.* the mine site area] for approximately 130 recorded years" or longer.¹⁰³ From the Tsilhqot'in perspective, this loss

¹⁰² As noted in the final slide of Transport Canada's PowerPoint presentation to the Panel during the technical sessions, Transport Canada's conclusion was: "Due to the complete elimination of navigation and lack of a proposal by Taseko Mines Limited to mitigate impacts on navigation, Transport Canada concludes that the project as proposed by Taseko Mines Limited will lead to significant adverse effects on mitigation." See CEAR # 2291 at p. 20 [PDF].

¹⁰³ See Ehrhart-English Report, p. 53:

would be immeasurable. It cannot be mitigated: significant impacts on cultural heritage and traditional use would be unavoidable and profound.

4. Taseko has conceded the significant residual environmental impacts of the Mine Project

As noted above, Ms. Cindy English-Ehrhart concluded that loss of the Little Fish Lake area (i.e. Nabas) will significantly impact the Xeni Gwet'in.¹⁰⁴

Further, Taseko admits in its EIS that the loss of Teztan Biny and area would be an irreversible cultural loss for the Tsilhqot'in and Xeni Gwet'in. Under the heading *Characterization of Residual Project Effects*, the Proponent states as follows:¹⁰⁵

The Project will have an adverse effect on cultural heritage values for the Tsilhqot'in people and more specifically members of the Xeni Gwet'in whose families have traditionally occupied the Little Fish Lake area. The magnitude of the effect is difficult to characterize. Although the Xeni Gwet'in asserted traditional territory has many other areas that support the types of traditional activities at Fish Lake, the one ethnographic study conducted on the mine site did document a consistent pattern of use since 1860 and permanent habitation by one family between 1930 and 1971. The effects will occur once construction activities begin, will continue indefinitely and are considered irreversible because the physical setting, though it may be capable of restoring baseline conditions for traditional activities like hunting and fishing post-closure, will be permanently altered.

This is an admission of “irreversible”, residual environmental effects on both the physical setting (“irreversible ... permanently altered”) and the cultural heritage of the Tsilhqot'in people.

Taseko states that the magnitude of the Tsilhqot'in and Xeni Gwet'in cultural loss is difficult to characterize. It is up to Panel to determine whether this loss is “significant”. TNG submits that, for the reasons described above, their loss can only be characterized as a substantial (high-magnitude) and long-lasting (permanent) loss.

... [t]he most significant area of spiritual attachment is the Little Fish Lake area where a series of cabins have provided a home base for the cultural and economic lifestyle that has flourished in the study area for approximately 130 recorded years. The pre-historic record will extend that time horizon ...

¹⁰⁴ See *Heritage Significance of the Fish Lake Study Area: Ethnography*, EIS Vol. 8-2-B, for example at pages 49-50 (section on “Spiritual Significance”).

¹⁰⁵ Vol. 8 of the EIS, s. 2.4.5.6, page 2-62 [underscore added].

IV. INSUFFICIENT JUSTIFICATION FOR SIGNIFICANT EFFECTS

The Xenigwet'in People can succeed as a healthy First Nation community. They are rebuilding their lives and working hard to find the lifestyle that fits their beliefs and goals of self-sufficiency and a connection to the land. So the fourth point I wanted to make is the Federal Government needs to understand that anything they do or allow into this community that does not fit with the Xenigwet'in plan for recovery will probably damage the one community that could be the model for traditional First Nation success. If the Federal Government truly wants a First Nation community to succeed in a way that retains their traditional lifestyle, versus other First Nation communities that have succeeded through Western economics, they need to stop any encroachment on the Xenigwet'in territory and support them in ways that meet their needs in becoming a model community.

... in mental health terms, the loss of land, loss of control, loss of self-determination, loss of identity, and all the emotional challenges represented by the mine proceeding would be classified by any health care provider as overwhelming. With a community of people who already have a fragile mental health state, it will be devastating. All their hard work to recover to this point may be lost and I'm not sure it could be turned around given the immensity of the losses they will perceive in their lives because of the mine.

Shari Hughson, Nemiah Community Health Nurse, Transcript, March 31, 2010, CEAR #1991, pp. 2054 & 2058-59

If the Panel agrees the Mine Project would result in significant residual environmental effects, its mandate is to collect information relevant to the justification test under s. 37 of CEAA.¹⁰⁶ The Proponent's main position is that such justification flows from the Mine Project's potential contribution to government revenues, jobs, and the local economy.

TNG submits that the following additional factors are relevant to justification:

- a. The TNG has made it clear since an early stage in the Proponent's engagement with the Tsilhqot'in about the Mine Project that the Tsilhqot'in people and communities are not necessarily opposed to mining activities – however, they are opposed to the Prosperity Project so long as it requires the destruction of Teztan Biny and the surrounding lands and waters.
- b. Jobs and revenues are clearly positive benefits of the mine, but it is important to critically assess Taseko's inflated claims about the "Prosperity" that will be generated by the Mine Project. By presenting *gross* rather than *net* anticipated gains to jobs and revenue throughout its EIS (and in the media) Taseko dramatically overstates the potential economic benefits of the Mine Project.¹⁰⁷

¹⁰⁶ See Review Panel Terms of Reference, section on "Mandate".

¹⁰⁷ As described in the Report prepared by Dr. Marvin Shaffer for Friends of the Nemiah Valley.

- c. The report submitted by Dr. Marvin Shaffer concludes that Taseko's EIS fails to address some of the most significant economic costs of the Mine Project to the public. In particular, the Mine Project is premised on a massive public subsidy for the electricity required to power the Mine: Taseko anticipates paying BC Hydro less than half the incremental cost of supplying this electricity. As a result, he projects this subsidy will cost rate-payers approximately \$35 million annually. When this and other hidden economic costs are factored into the assessment, he concludes that the Mine Project would run at a net cost to the public averaging \$20 million per year over the life of the mine.
- d. Equally important is a consideration of who will share in the benefits that would flow from the Mine Project and who will bear the costs. The people who work and reside closest to the Mine Project – both Native and non-Native – overwhelmingly oppose it.¹⁰⁸ The closest communities to the Mine Project (Xeni Gwet'in, Stone) will bear the most immediate and devastating cultural and environmental impacts of the Mine Project. There is no reason to conclude that the economic benefits of the Mine Project will reach them in any real way, and certainly not on a scale that could compensate for the loss, which to them is incalculable.
- e. The potential cultural impacts of approving the Mine Project will be profound. Tsilhqot'in culture and language is remarkably vibrant and intact in Xeni Gwet'in despite decades of adversity and external pressures, in large part because of a remoteness and ethic of stewardship that its leaders and membership have made tremendous sacrifices to preserve.¹⁰⁹ Dropping a massive open-pit mine into the backyard of the Xeni Gwet'in people, over their objections, will be a devastating blow to a culture that is struggling for survival.¹¹⁰
- f. Despite 17 years to develop policies and programs to enhance First Nations' share of the benefits of the proposed mine, Taseko has offered little more than vague assertions that First Nations will benefit economically. In response to direct questions, it could not point to any concrete programs or policies specific to the proposed Prosperity Mine that it would implement to monitor and enhance Aboriginal employment.¹¹¹ Although it provided an estimate that 8-13% of Gibraltar employees are Aboriginal, in response to direct information requests it has indicated

¹⁰⁸ See, e.g. CEAR #1764.

¹⁰⁹ See Former Chief Roger William's presentation during the general hearing session in William's Lake regarding the "sacrifices" the Xeni Gwet'in have made to retain their traditional lifestyle; see also testimony of Shari Hughson, Nemiah Community Health Nurse, Transcript, March 31, 2010, CEAR #1991, esp. pp. 2048-53.

¹¹⁰ See, e.g. CEAR #1764, CEAR #1723. See testimony of Shari Hughson, Nemiah Community Health Nurse, Transcript, March 31, 2010, CEAR #1991, esp. pp. 2054-59, 2096 ["Unfortunately, we believe the social impact of the Fish Lake Mine in the community will not only reverse the progress we have made, but it will impact the community in such a negative manner that it will not be able to recover"]. And see Shari Hughson presentation re impacts on a recovering culture: CEAR #1994.

¹¹¹ Transcript, March 22, 2010 [Daytime session], p. 387, 389-91.

that this estimate is purely anecdotal, that it doesn't keep track of these statistics and has no intention to do so at the proposed Prosperity Project.¹¹² As noted by the Proponent in response to questions during the Xení Gwet'in community sessions, despite years operating the Gibraltar mine, the Proponent has no agreements in place with neighbouring First Nations to share in its economic benefits.

- g. Further, provincial revenue sharing cannot be considered a mitigating factor because the Panel has absolutely no details before it. All that exists is a vague provincial policy that does not provide any detail or firm commitments. Nobody from BC spoke to this policy or provided any direction to the Panel. The slideshow of BC materials provided by Taseko shows that not a single agreement has been reached yet with a First Nation in BC, despite the fact the policy was announced in 2007. Taseko has made no commitment to enter an IBA. The notion that First Nations should abandon their core values and beliefs to benefit financially from the mine is, in TNG's submission, an offensive relic of colonialism.
- h. The Tsilhqot'in have their own vision for sustainable economic development that is consistent with their culture and core values. The Tsilhqot'in are not opposed to business. They have a business strategy and are actively pursuing business opportunities.¹¹³
- i. As Mr. Justice Vickers stated in his Preface to the *Tsilhqot'in Nation* decision, "Tsilhqot'in people have survived despite centuries of colonization ... [t]he central question is whether Canadians can meet the challenges of decolonization".¹¹⁴ He further urged that "the time to reach an honourable resolution and reconciliation is with us today".¹¹⁵ Displacing the Tsilhqot'in people from lands and waters of recognized spiritual and cultural importance, where they hold proven Aboriginal rights, to generate jobs and wealth for others – this is not reconciliation; it is the same process of colonization that Canada purports to have moved beyond.

The Mine Project would result in significant residual environmental effects with no certainty of a net economic benefit flowing to British Columbians and Canadians as a whole; in fact, the only full cost accounting of the Mine Project concludes that it would operate at a multi-million dollar net cost to the public each year of its life.

This cannot justify the significant environmental and cultural costs that would be borne by those communities closest to the Mine Project.

¹¹² CEAR #1176.

¹¹³ See presentations of Crystal Verhaeghe and Sam Zirnhelt, Transcript, March 25, 2010, pp. 1082-97.

¹¹⁴ *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, para. 20

¹¹⁵ *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, para. 1338.

V. POTENTIAL AND ESTABLISHED ABORIGINAL RIGHTS

The Panel has the mandate to fully consider and report on information obtained from First Nations about the nature and scope of potential or established Aboriginal rights or title in the area of the Project, and about the potential adverse impacts or potential infringement that the Project may have on potential or established Aboriginal rights or title.

1. Proven Aboriginal Hunting and Trapping Rights

The B.C. Supreme Court in the *Tsilhqot'in Nation* case held that the Tsilhqot'in Nation holds Aboriginal hunting and trapping rights throughout the Claim Area, including the proposed mine area, based on continuous use of these areas from a time before contact:

Tsilhqot'in people have an Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing animals for work and transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses. This right is inclusive of a right to capture and use horses for transportation and work. Tsilhqot'in people have an Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood. These rights have been continuous since pre-contact time which the Court determines was 1793.¹¹⁶

...

... the evidence leads to but one conclusion, namely that Tsilhqot'in people have continuously hunted, trapped and traded throughout the Claim Area and beyond from pre-contact times to the present day.¹¹⁷

The English-Ehrhart report and maps, and the Current Use Study submitted by TNG,¹¹⁸ both confirm the Court's finding of continuous Tsilhqot'in use of the mine site area for hunting and trapping. Both sources document the active use and cultural importance of the project area for hunting and trapping. Tsilhqot'in Elders and members provided additional information at the Community Hearings.

Displacing Tsilhqot'in people from lands and waters where they hold and actively exercise Aboriginal hunting and trapping rights would severely infringe¹¹⁹ these Aboriginal rights. Such infringement is aggravated by a number of factors including:

¹¹⁶ *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, Executive Summary.

¹¹⁷ *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, para. 1268 [emphasis added].

¹¹⁸ CEAR #1397.

¹¹⁹ See *R. v. Morris*, [2006] 2 S.C.R. 915, 2006 SCC 59, para. 53 ["Essentially, therefore, a *prima facie* infringement requires a 'meaningful diminution' of a treaty right. This includes anything but an insignificant interference with that right"]. This same test of *prima facie* infringement presumably applies with equal relevance to proven Aboriginal rights.

- i. loss of access to key cultural hunting and trapping areas;
- ii. the severing of a centuries-old connection to these lands and waters;
- iii. the acknowledged fact that “[h]unting [and] trapping ... have great significance to the people who use the mine development area”,¹²⁰ including a “great economic and cultural significance”¹²¹ and that “trapping [has] ... a deep spiritual significance to individuals that use the mine development area”;¹²²
- iv. the scale of cultural and environmental destruction involved, which is a direct affront to Tsilhqot’in values;¹²³
- v. the broader adverse impacts on the wildlife populations that support Tsilhqot’in hunting and trapping, including impacts on wild horses, deer, moose, grizzly bears, and migratory birds;
 - a. With respect to grizzly bears, Dr. Wayne McCrory concluded: “The combined consequences from the mine of increased movement disruptions, loss of habitat effectiveness, habitat loss is a cumulative reduction of the ability of the West Chilcotin to support a viable grizzly bear population. These factors combined with an escalation of human caused mortality predicted from the mine will push the Chilcotin grizzly bears over the threshold of extinction.”¹²⁴
 - b. With respect to wild horses, mule deer and moose Dr. McCrory concluded:

Other impacts will include increased mortality to wild horses, mule deer, moose and other wildlife along the proposed mine transportation corridor. Loss of moose and deer as an important traditional food source for First Nations will have be serious. Additionally, the impacts of the mine will reduce the ability of adjacent large protection areas to support viable populations of wide-ranging species. Collectively these aboriginal and provincial protection areas exceed 2 million acres in size and represent a significant investment by society to leave a natural and heritage legacy for future generations.

¹²⁰ Ehrhart-English Report, p. 31.

¹²¹ Ehrhart-English Report, p. 48.

¹²² Ehrhart-English Report, p. 49.

¹²³ See *Tsilhqot’in Nation v. British Columbia*, 2007 BCSC 1700, paras. 418 [“The spirituality of Tsilhqot’in people is rooted in a deep respect for the land, the plants and animals ... That spirituality remains today for many Tsilhqot’in people ...”], 436 [“Reverence for the land that supported and nourished them continues to the present generation”].

¹²⁴ Wayne McCrory, Submission for the Public Hearings, April 30th, 2010, CEAA # 2344, p.2.

[...]

I predict that development of the mine road will lead to relatively high mortality to mule deer, especially during spring and fall migration periods. Moose will also be affected. This has serious implications to the First Nations' reliance on this important meat source.¹²⁵

- c. With respect to migratory birds, Andrew Robinson of EC-CWS (Canadian Wildlife Service) stated that he remains concerned that the Proponent has not submitted a clear habitat compensation plan for migratory birds. CWS is concerned about the interpretation of "adaptive management" and the level of information that the Proponent has submitted at this stage.¹²⁶
- vi. potential impacts on critical deer migration routes across the Taseko into and around the Teztan Biny area;¹²⁷
- vii. the failure, to date, to identify feasible mitigation measures to address impacts on wildlife and wildlife habitat. The Proponent has merely referenced its vague BC EAO commitment to "... **develop** and implement a plan for achieving compensation for adverse effects to wetlands habitat, recreation values, wildlife, wildlife habitat and the critical habitat of species at risk taking into account the effectiveness of mitigation measures";¹²⁸ as already noted, this is not a feasible mitigation measure – this is a "plan to come up with a plan";
- viii. the recognized fact that Tsilhqot'in people are likely to avoid areas that they perceive as potentially contaminated by the Mine Project, including downstream areas;¹²⁹
- ix. the broader adverse impacts on ancient and enduring hunting and trapping patterns of the Tsilhqot'in people for which the Teztan Biny area serves as a hub. Constructing and operating an open-pit mine would not only end the use of this cultural hub, but also the broader area that Tsilhqot'in people access from the Nabas region for hunting, trapping, fishing and gathering, including such critical areas as Anvil Mountain, Nadilin Yex, Red Mountain, Cheetah Meadows, Onion Lake, Beece

¹²⁵ Wayne McCrory, Submission for the Public Hearings, April 30th, 2010, CEAA # 2344, pp. 3 & 19.

¹²⁶ Transcript, Volume 29, April 29th, 2010 p.6425-6439; see also Environment Canada, Presentation at the April 29th, 2010 topic specific session, CEAR #2270.

¹²⁷ See references in to this deer migration route in the *Tsilhqot'in Nation* trial decision, paras. 895-96, 907-8. See, e.g. Alex Lulua, Transcript, March 31, 2010, CEAR #1991, pp. 2114-15. Mr. Lulua (at pp. 2146-47) explicitly confirmed, from his direct observation over years, that "twenties, hundreds" of deer cross at the mouth of Taseko Lake "[a]nd they are going straight right by Fish Lake" (see also p. 2153).

¹²⁸ March 17, 2010 letter from Proponent to Prosperity Mine Panel, CEAR # 1821 at page 5 [PDF] (under "IR 6.1. Wildlife Compensation Plan") – emphasis added.

¹²⁹ See presentations by Health Canada and P. Larcombe.

Creek, etc. The clear evidence of Tsilhqot'in witnesses and others was that Tsilhqot'in people would avoid areas and wildlife that they perceived as potentially contaminated by the mine.¹³⁰

As explained above, it is no answer to this infringement to direct the Tsilhqot'in to "go elsewhere" on their rapidly diminishing traditional lands. Further, location *matters*. It is not simply hunting and trapping that defines Tsilhqot'in culture – it is, in part, the manner in which these activities bind them to specific lands and waters and connect them to Tsilhqot'in ancestors and to future generations of Tsilhqot'in that have used, or will use, these same lands and waters. There is an extremely strong sense for many Tsilhqot'in people that the lands around Fish Lake and Nabas are "home".¹³¹

As set out in the written statement of Tasheena William (age 16), from Nemiah Valley:

What they, we, have out there is something you just can't find anywhere. It's something in all of our memories. Either we've been there to experience what life is really like to live in such wilderness or either our elders have told us stories about their memories there. When I listen to my Grandma talk to me about her childhood out at Nabis, it melts my heart because I see now that you are trying to take that away from her. Not just for a couple months or years, but forever. Would you want to have your "home" ruined? When you have that feeling when something is taken away from you that you will never ever be able to retrieve. Just the memories you have to cherish, but who wants to cherish a memory of having something so special taken away from you? Let us make more memories to cherish. Fish Lake is love to us, it's what puts a smile on all our elders faces because it's a place where they call home. I don't understand how heartless a human being can be to another and take something away like that, can you? Is taking away such wonderful water and breaking hearts that motivates you? I sure hope not, because that is just not humanity. If it does follow through, you will not be remembered in a good way, but in a way that people will have no respect for someone who could do such thing. Our land and water is probably nothing to you, but to us...it's our home. Please, don't take it away. No one should have to plead for such a thing.¹³²

For the reasons set out in the preceding sections, the severe infringement of Tsilhqot'in Aboriginal hunting and trapping rights is not justified.

2. Asserted Aboriginal Fishing Rights

The Aboriginal fishing rights asserted by the Tsilhqot'in Nation have sufficiently strong support that they should be treated as tantamount to proven Aboriginal rights.

¹³⁰ See, e.g. Alex Lulua, Transcript, March 31, 2010, CEAR #1991, pp. 2155-56. See also testimony of Shari Hughson, Nemiah Community Health Nurse, Transcript, March 31, 2010, CEAR #1991, p. 2060 ["I want to state unequivocally ... that the mine going ahead will represent a contaminated site in the minds of the Xeni Gwet'in people whether anything happens or not"].

¹³¹ See, e.g. Ehrhart-English Report, p. 26.

¹³² <http://www.ceaa.gc.ca/050/documents/42077/42077E.pdf>.

In the *Baptiste v. British Columbia* action in B.C. Supreme Court, the Tsilhqot'in Nation asserts the site-specific Aboriginal right to fish for food, social and ceremonial purposes in Teztan Biny and portions of its connecting streams and water bodies, including portions of Fish Creek that would be affected by the Mine Project. In that action, the Tsilhqot'in Nation asserts that the destruction of these waters for the Mine Project would effectively extinguish, or alternatively severely and unjustifiably infringe, this Aboriginal fishing right, contrary to ss. 35 and 52 of the *Constitution Act, 1982*.

As stated in paragraphs 26 and 27 of the Statement of Claim for this court action:

The members of the Xeni Gwet'in and the Tsilhqot'in Nation have a deep and abiding connection to *Teztan Biny*. From a time prior to and at the Date of Contact, and continuously to the present day, members of the Tsilhqot'in Nation have fished at *Teztan Biny* for sustenance, social and ceremonial purposes, as an integral and defining element of their distinctive culture. Accordingly, the Xeni Gwet'in and Tsilhqot'in Nation hold a site-specific Aboriginal right to fish in *Teztan Biny* for food, social and ceremonial purposes, protected under s. 35(1) of the *Constitution Act, 1982*....

The Tsilhqot'in Aboriginal Fishing Right at *Teztan Biny* depends intimately on the lands, water and resources of *Teztan Biny* for its continued exercise. The Aboriginal Fishing Right includes the right, of the Tsilhqot'in Nation, to the protection and conservation of the cultural, ecological and spiritual integrity of the lands, waters and resources in and around *Teztan Biny*, as required to sustain the meaningful exercise of the Aboriginal Fishing Right.

The Statement of Claim asserts that proceeding with the Prosperity Project would necessarily entail the complete and permanent loss of *Teztan Biny* and its resources. The Tsilhqot'in Nation seeks a declaration from the Court that the Tsilhqot'in have an existing Aboriginal right to fish at *Teztan Biny* for food, social and ceremonial purposes. They also seek a declaration that the destruction of *Teztan Biny* would extinguish or unjustifiably infringe the Tsilhqot'in Nation's Aboriginal right to fish in the lake.

The Statement of Claim also asserts that the destruction of *Teztan Biny* and approval of the mine project would unjustifiably infringe the Tsilhqot'in Nation's right to hunt and trap in the area surrounding *Teztan Biny* (i.e. the right established in the judgment of the BC Supreme Court in *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700).

As one example of the potential impact of the Mine Project on the Tsilhqot'in Aboriginal right to fish, future generations of Tsilhqot'in people would more likely maintain their ability "to pursue traditional activities or lifestyle" if they were allowed to continue exercising their (asserted) constitutionally-protected Aboriginal right to fish at *Teztan Biny* than if they were required instead to fish in an artificial reservoir that did not exist at the time of first contact with Europeans. This is a key point that speaks to the adequacy of the Proponent's proposed mitigation measures.

The test for proving an Aboriginal right comprises the following criteria:

Van der Peet set out the test for establishing an aboriginal right protected under s. 35(1) [of the *Constitution Act, 1982*]. Briefly stated, the claimant is required to prove: (1) the existence of the ancestral practice, custom or tradition advanced as supporting the claimed right; (2) that this practice, custom or tradition was “integral” to his or her pre-contact society in the sense it marked it as distinctive; and (3) reasonable continuity between the pre-contact practice and the contemporary claim ...¹³³

This test focuses on pre-contact practices exercised with reasonable continuity to the present day. With respect to the remaining element (“integral” to pre-contact culture), the Court has clarified that practices undertaken in pre-contact times for survival purposes meet this threshold.¹³⁴

The available record amply satisfies the test for establishing Tsilhqot’in Aboriginal fishing rights at Teztan Biny, Little Fish Lake and in the lakes, streams and rivers throughout the region. In particular:

- a. Although Aboriginal fishing rights were not at issue in the *Tsilhqot’in Nation* case, the Court made findings that meet the criteria for proving an Aboriginal fishing right. As mentioned, the Court held that “Tsilhqot’in people were present in the Eastern Trapline Territory at the time of first contact” and that “[t]he area has been used by Tsilhqot’in people since that time for hunting, trapping, fishing and gathering of roots and berries”.¹³⁵ The Court also specifically affirmed that Nabas and Little Fish Lake were used for hunting, trapping and fishing and gathering prior to first contact with Europeans.¹³⁶
- b. The Court’s findings of continuous fishing by Tsilhqot’in people in the region from pre-contact times to the present day suffice to establish the asserted Aboriginal fishing rights. There is no question that fishing was for survival purposes and thus integral to Tsilhqot’in culture. These findings are amply supported by the evidence provided at trial.
- c. With respect to cultural significance, the importance to the Tsilhqot’in of lake fisheries as an essential survival strategy in the face of periodic salmon shortages is well documented.¹³⁷ Lake fishing for Tsilhqot’in people is integral to cultural security.

¹³³ *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, para. 26, referencing *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

¹³⁴ *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54, paras. 35 *et seq.*

¹³⁵ *Tsilhqot’in Nation v. British Columbia*, 2007 BCSC 1700, para. 893 [underscore added].

¹³⁶ *Tsilhqot’in Nation v. British Columbia*, 2007 BCSC 1700, paras. 902-904.

¹³⁷ For example, see the excerpts from the Robert Tyhurst dissertation included in the supporting materials.

- d. The Proponent's own English-Ehrhart report accords with the above. She records use of the mine site area by Tsilhqot'in people "as far back as 1860 and quite possibly before then" and documents consistent patterns of fishing across generations.¹³⁸

Tsilhqot'in land use and occupation has been tested in one the most extensive trials in Canadian history and the resulting findings satisfy the criteria for proving Aboriginal fishing rights. Accordingly, Tsilhqot'in asserted fishing rights should be characterized as tantamount to proven Aboriginal rights for determining whether infringements of these rights are justified.

The complete obliteration of lakes and streams where Tsilhqot'in actively exercise their Aboriginal fishing rights (and the risk of further downstream contamination) is an infringement of Aboriginal rights on an almost unprecedented scale. These impacts are briefly surveyed above.

For the reasons set out in the preceding sections, including those addressing the proposed replacement reservoir, the Crown's duty to provide justification commensurate to the magnitude of this infringement has not been satisfied.

3. Asserted Aboriginal Gathering Rights

The Aboriginal rights to gather plants and medicines asserted by the Tsilhqot'in Nation have sufficiently strong support that they should be treated as tantamount to proven Aboriginal rights.

The available record clearly satisfies the test for establishing Tsilhqot'in gathering rights at Teztan Biny, Little Fish Lake and the lands and waters throughout the region. In particular:

- a. Although Aboriginal gathering rights were not at issue in the *Tsilhqot'in Nation* case, the Court made findings that satisfy the criteria for proving an Aboriginal gathering right. As mentioned, the Court held that "Tsilhqot'in people were present in the Eastern Trapline Territory at the time of first contact" and that "[t]he area has been used by Tsilhqot'in people since that time for hunting, trapping, fishing and gathering of roots and berries".¹³⁹ The Court also specifically affirmed that Nabas and Little Fish Lake were used for hunting, trapping and fishing and gathering prior to first contact with Europeans.¹⁴⁰
- b. The Court's findings of continuous gathering by Tsilhqot'in people in the region from pre-contact times to the present day suffice to establish the asserted Aboriginal gathering rights. There is no question that gathering of plants and roots was for

¹³⁸ Ehrhart-English Report, pp. 47, 52.

¹³⁹ *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, para. 893 [underscore added].

¹⁴⁰ *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, paras. 902-904.

survival or cultural purposes and thus integral to Tsilhqot'in culture. These findings are amply supported by the evidence provided at trial.

- c. With respect to cultural significance, the importance of gathering to the Tsilhqot'in people was well documented at trial through expert evidence that was explicitly approved by the trial judge.¹⁴¹
- d. The Proponent's own English-Ehrhart report accords with the above. She records use of the mine site area by Tsilhqot'in people "as far back as 1860 and quite possibly before then".¹⁴²
- e. The Proponent has stated that plant gathering is the activity least likely to be affected by the Mine Project, as "most species still collected exist outside the mine buffer area, or there are equally suitable sites for collection";¹⁴³ however, as noted in P. Larcombe's report attached to the TNG's EIS Sufficiency Submissions (May 25, 2009), the Proponent has presented no analysis about how accessible other locations are or what additional costs may be incurred in accessing those other locations (p. 18 of Larcombe report).

Again, it is important to appreciate that location is important to the Tsilhqot'in people;¹⁴⁴ the Proponent's bald assertion that Tsilhqot'in people can go elsewhere in their territory to harvest plants does not comprehend or respect the depth of connection Tsilhqot'in people feel to gathering areas where their families and ancestors harvested berries, medicines, roots and other plants. The Mine Project would severely and unjustifiably infringe Aboriginal gathering rights in the area around Fish Lake and Nabas.

4. Asserted Aboriginal Ceremonial Rights

The Tsilhqot'in assert Aboriginal rights to conduct spiritual and cultural ceremonies at Teztan Biny, and in particular at the island in Teztan Biny where pre-contact pit-house depressions are documented and present-day and previous generations of Tsilhqot'in people have conducted rituals to receive their spiritual powers.¹⁴⁵

¹⁴¹ *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, paras. 675-77. The expert report of Dr. Nancy Turner is included with the supporting materials.

¹⁴² Ehrhart-English Report, p. 47.

¹⁴³ EIS Vol. 6, pages 3-52 and 3-53.

¹⁴⁴ Numerous Tsilhqot'in presenters described traditional gathering and harvesting activities in the Teztan Biny/Nabas region. See, e.g. Alex Lulua, Transcript, March 31, 2010, CEAR #1991, pp. 2125-27, where he describes the richness of this region for traditional berries, plants and medicines, and how it is one of the few areas that provides some of these products, such as pine mushrooms and exceptional pine pitch.

¹⁴⁵ See, e.g., Catherine Haller Statement, included in CEAR #1397, pp. 38+ [PDF]. See also: testimony of Cecil Grinder, a spiritual healer from Tl'etinqox (Anaham Band) married to the granddaughter of Jimmy Bulyan/Williams, Transcript, March 25, 2010, pp. 1035 ["My grandparents used to talk about the island on Teztan Biny. That's where the spiritual people get their powers to help their own people"] and 1036 ["I still conduct ceremonies around Fish Lake, do fastings, do my own healing of who I am and what's going to happen to our people"]; 1047.

The complete destruction of this ancestral spiritual site cannot be accommodated if the Mine Project Proceeds.

5. Aboriginal Title

The Mine Project is outside the areas identified by the Court in *Tsilhqot'in Nation* as supporting findings of Aboriginal title. The Plaintiff has appealed the decision in this respect.

If the Plaintiff succeeds on that appeal, approval for the Mine Project by the Province would be unconstitutional, in the same manner as the Court held that the *Forest Act* could not constitutionally dispose of rights to third parties in lands held subject to Aboriginal title.¹⁴⁶ The possibility that the Tsilhqot'in Nation could succeed on the appeal only to find that these lands have been unlawfully exploited and their connection to these lands destroyed has not been accommodated.

Taseko has on several occasions suggested that the Court's refusal to extend Aboriginal title to this area indicates that it is of minimal cultural significance to the Tsilhqot'in people. This is an unfair and inaccurate characterization.

Although the Court found that the evidence of use and occupation did not meet the stringent test for proving Aboriginal title, it did find Aboriginal hunting and trapping rights throughout this area. This is an explicit affirmation that Tsilhqot'in people have hunted and trapped on these lands continuously from pre-contact times to the present day as a defining and integral element of Tsilhqot'in culture. As stated in the Nemiah Declaration, the Mine Project falls within the area identified by the Xenigwet'in "the spiritual and economic homeland" of their people.¹⁴⁷

6. Comments on the need for Tsilhqot'in "approval" of the Mine Project

Taseko has repeatedly asserted throughout these proceedings that the Tsilhqot'in people do not have a "veto" in respect of this proposed Project. It has made these assertions in a manner suggesting that the lack of such a veto means that First Nations' rights and interests should not or cannot stand in the way of its proposed Project.

It is not the Panel's mandate to determine the scope of the Crown's to consult First Nations, or whether Canada has met its duty to consult with and accommodate First Nations. However, in the interests of setting the record straight, TNG wishes to clarify the following points:

¹⁴⁶ *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, paras. 1001+.

¹⁴⁷ *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, para. 59. A copy of the Nemiah Declaration is included in CEAR # 1998 (Exhibit-39).

Full consent of First Nations required for provincial infringements of Aboriginal title

- a. First, the law is clear that, in some circumstances, the consent of affected First Nations is required before development can proceed. Taseko is wrong to advise the Panel that “approval of the Tsilhqot’in is not necessary in any case, regardless of whether they have asserted or established Aboriginal Rights or Title”.¹⁴⁸
- b. Taseko relies on *Delgamuukw* to argue that mining falls within the list of activities that justify infringements of Aboriginal title.¹⁴⁹ But the Supreme Court of Canada in *Delgamuukw* was clear in stating that such activities might justify infringements “in principle”¹⁵⁰ – the Crown must still justify such infringements in fact, including satisfying its duty to consult. In this respect, the Court said:

Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.¹⁵¹

- c. If the Tsilhqot’in Nation succeeds on appeal of the *Tsilhqot’in Nation* decision in establishing Aboriginal title to lands including the proposed mine site area, the monumental infringement of Aboriginal title contemplated here will, in our respectful view, “require the full consent of [the] aboriginal nation”.¹⁵²
- d. Further, the *Tsilhqot’in Nation* decision is clear that, as a result of Canada’s constitutional division of powers, provincial legislation cannot interfere with the use, management and possession of Aboriginal title lands.¹⁵³ If the Tsilhqot’in Nation succeeds on appeal in establishing Aboriginal title to lands including the proposed mine site area, British Columbia will have no legal authority to grant authorizations for the development of the mine under the *Mines Act* or any other legislation.
- e. Moreover, the Tsilhqot’in Nation has proven Aboriginal title to the lands along portions of the Taseko River downstream from the mine. This raises a serious question as to whether British Columbia has the constitutional authority to approve the mine if there is a serious risk (and/or a serious perceived risk) of contamination

¹⁴⁸ Transcript, March 25, 2010, CEAR Doc #1943, p. 1203.

¹⁴⁹ See above, pp. 1203-1204.

¹⁵⁰ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 165.

¹⁵¹ See above, para. 168.

¹⁵² See above.

¹⁵³ *Tsilhqot’in Nation v. British Columbia*, 2007 BCSC 1700 1045, 1048-49.

to the Taseko River, such that the mine would interfere with the use and enjoyment of Tsilhqot'in Aboriginal title lands.

- f. In sum, contrary to Taseko's submissions, consent of the Tsilhqot'in Nation will almost certainly be required if Aboriginal title is established on appeal. Consent may already be required given the serious risks and perceived risks to fisheries along the Taseko River.

Full consent of First Nations may be required "on very serious issues"

- g. Taseko relies heavily on the statement in *Haida Nation* to the effect that First Nations do not have a "veto" over development. It is important to understand, however, that this statement is a reference to asserted Aboriginal rights, not proven rights:

This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.¹⁵⁴

- h. In this case, the proposed project would have significant impacts on established Aboriginal hunting and trapping rights. Further, Tsilhqot'in Aboriginal fishing rights are tantamount to proven and should be treated as established Aboriginal rights. The complete destruction of water bodies that have supported these Aboriginal fishing rights for generations, and are integral to passing down these practices, is an exceptionally severe infringement of Aboriginal rights that, in our submission, may well require consent of the Tsilhqot'in Nation. In fact, it can be characterized as an extinguishment of Aboriginal fishing rights to the impacted fisheries, which lies beyond the constitutional authority of both levels of government,¹⁵⁵ and thus requires Tsilhqot'in consent.
- i. The Supreme Court of Canada in *Haida Nation* confirmed that "on very serious issues" the consent of a First Nation may be required in light of the impacts on asserted or established Aboriginal rights:

The Court's seminal decision in *Delgamuukw, supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum "duty to discuss important decisions" where

¹⁵⁴ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, para. 48 [underscore added].

¹⁵⁵ *Constitution Act, 1982*, s. 35. See also the Supreme Court of Canada's decision in *Sparrow, supra*.

the “breach is less serious or relatively minor”; through the “significantly deeper than mere consultation” that is required in “most cases”; to “full consent of [the] aboriginal nation” on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.¹⁵⁶

Duty to attempt to “substantially address” First Nations’ concerns

- j. Given Taseko’s submissions, it is important to emphasize an obvious point: even if a First Nation does not have a “veto” in a particular case, this does not mean the proponent or the Crown have *carte blanche* or that approvals must be granted notwithstanding severe impacts on First Nations’ rights and interests.
- k. In all cases (even where there is not a strong case for Aboriginal rights or where potential impacts on rights are minimal), the duty to consult imposes a requirement on the Crown to consult in good faith “with the intention of substantially addressing” First Nations’ concerns.¹⁵⁷ The key to Crown consultation is “responsiveness”.¹⁵⁸ The duty to consult and accommodate First Nations’ concerns becomes more demanding as the magnitude of potential impacts increases.¹⁵⁹
- l. Accordingly, even if a First Nation does not have a “veto” in a particular case, the Crown cannot lawfully authorize proposed development where it does not properly accommodate Aboriginal rights and interests. The *Tsilhqot’in Nation* case provides a clear example. In that decision, the Court held that provincial forestry planning and authorizations unjustifiably infringed Tsilhqot’in Aboriginal hunting and trapping rights, in part because the provincial legislative scheme did not manage wildlife and habitat to ensure the continuation of those Aboriginal rights;¹⁶⁰ the Court found that there was insufficient information about individual species of wildlife and their numbers in the claim area, and that the province had not conducted a “needs analysis which would inform decision makers on the needs of the Tsilhqot’in people related to their hunting, trapping and trading rights.”¹⁶¹ To justify provincial forestry activities in the claim area, the Court held that the province must have “sufficient credible information to allow an assessment of the impact on wildlife in the area.”¹⁶²

“Consultation” on one unacceptable option

- m. In the present case, the Tsilhqot’in people have been presented by Taseko with a single, non-negotiable proposal for a mining project that is wholly unacceptable to

¹⁵⁶ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, para. 24.

¹⁵⁷ *Delgamuukw*, *supra*.

¹⁵⁸ *Haida Nation*, *supra*, at para. 44.

¹⁵⁹ *Haida Nation*, *supra*.

¹⁶⁰ *Tsilhqot’in Nation* at paras. 1290-1291.

¹⁶¹ *Tsilhqot’in Nation*, *supra*, at para. 1293.

¹⁶² *Tsilhqot’in Nation*, at para. 1294.

the Tsilhqot'in. The Tsilhqot'in people have been clear from the outset that they cannot agree to the destruction of an area that carries such profound cultural and spiritual importance for their people and culture.

- n. It is the proponent, and not the Tsilhqot'in, that have created a situation with no room for compromise, accommodation, or give and take. The proponent has said on many occasions that you can have the mine, or Teztan Biny, but not both. This was the "range" of options presented to the Tsilhqot'in people.

VI. CONCLUSION

My mother and her siblings were all raised at Nabis and the Fish Lake area. My mother would trap and fish with her father and siblings. They would fish at Fish Lake every summer and every fall of every year. They would catch so much fish and take it home to Nabis where the females of the family would dry all the fish. They would eat that fish and also eat it through the winter. My mother said the fish were all good eating. Fish Lake is a big part of the family and it will always be. It fed the family greatly and the family will always be forever thankful and that's something we will not ever want to be taken away from us. The family still goes to the lake and fishes and the catching is great. My mother and uncle Norman were there last year and my mom said it was just wonderful! They each caught ten fish to bring home to Nemiah. They walked around fish lake looking for grave sites and they found one. It sure was a great time....

This year is another year and I am going to take the kids and my mother up there and we will all feel the goodness together. My mom will again share everything with the children and they will know that this is their future. My son who is eleven said "mom this is where I want to live!" The land is so important to the future generation it means everything. All the history the medicine's the wild life and all the waters. My whole family lived off the land. Eating wild meat, fish, berries and drinking water. The family also gathered wild medicine and Indian tea. This is something that needs to be saved and never be destroyed.

Nabis and Fish Lake is my family's home land. If destroyed there is going to be so much pain that cannot be cured. It is going to be like one huge poison.¹⁶³

Geraldine William (grand-daughter of Jimmy and Anne, daughter of Doris)

For all the complexities in this Review Panel process, the TNG submits that the Panel's primary duty is relatively simple; the Panel has to determine whether the Mine Project will have significant residual environmental effects.

The permanent destruction of Fish Lake is a significant cultural effect that cannot be adequately mitigated. That alone (without even considering any technical or ecological issues) means that this Mine Project has significant environmental effects under the CEAA. In TNG's respectful submission, this immediately moves the Panel on to its role in collecting information about whether the Project's significant environmental effects can be "justified in the circumstances" (under s. 37 of CEAA).

In addition, TNG submits that there are strong technical and ecological reasons for finding that the proposed Mine Project has significant residual effects, including:

- the permanent loss of mature aquatic and wetland ecosystems in and around Teztan Biny and Little Fish Lake;

¹⁶³ <http://www.ceaa.gc.ca/050/documents/42080/42080E.pdf>.

- acid rock drainage and metal leaching, and the strong likelihood that treatment will be needed for mine site water in perpetuity (at unknown cost);
- potential seepage from the Tailings Storage Facility into the Onion Lake drainage, with no technically and economically feasible measures currently proposed to address this risk;
- risks to the salmon fishery in the Taseko River;
- poorly identified impacts and risks from a likely 13-year mine expansion;
- significant and unmitigated impacts on navigation; and,
- a fish habitat compensation plan (the primary proposed mitigation for the primary environmental effect of the Mine Project) that is not technically and economically feasible after 17 years of mine planning.

The TNG also submits that this Project cannot be “justified in the circumstances”. The Mine Project comes at the wrong time (while the land question in the Eastern Trapline Territory remains unresolved), uses the wrong technique (by permanently destroying two lakes with important ecological, cultural and spiritual values), and is proposed by a company that has nothing but a steadily deteriorating relationship with the Tsilhqot’in Nation to show after 17 years of mine planning. Further, the vague possibility of provincial revenue sharing cannot “fix” the impacts the Mine Project would have on the Tsilhqot’in people – no amount of money can compensate for the loss of the culturally and spiritually important areas around Teztan Biny and Nabas.

Tsilhqot’in proven and asserted Aboriginal rights stand to be adversely impacted and infringed by the Mine Project in several ways. There will be impacts on the populations and habitats of birds, wildlife, fish and plants that support the exercise of Tsilhqot’in rights. Tsilhqot’in people will be displaced from the Mine Area, and will likely abandon areas around and downstream of the mine site because of the perceived or actual risk of contamination.

The situation here is unique. The Tsilhqot’in Nation has proven Aboriginal rights to hunt and trap in the area of the proposed Mine Project, and has Aboriginal title (in the BC Supreme Court’s opinion) to lands and waters downstream, along the Taseko River. The Tsilhqot’in claim a right to fish in the very lake (Teztan Biny) that will be permanently destroyed by the Mine Project. Teztan Biny is of deep cultural and spiritual importance to the Tsilhqot’in people, as is the settlement at Nabas that stands to be inundated by the tailings storage facility.

In this unique situation, if the Prosperity Mine Project can be “justified in the circumstances” because of its purported short-term economic benefits, then it would seem that the impacts of virtually any project of any kind anywhere in Canada on any land important to any Aboriginal group can also be “justified in the circumstances”. If that is the case then, in TNG’s submission,

there is no possibility of long-term reconciliation between Canada's First Nations and the settler culture.

The Tsilhqot'in Nation needs to see respect for the hopes and dreams they have for their culture and for their traditional lands. They respectfully ask this Panel to help effect an honourable reconciliation for the Tsilhqot'in people.