ADDENDUM to WRITTEN SUBMISSIONS of JAELA SHOCKEY

LEGAL COUNSEL FOR ESK'ETEMC NATION

INTRODUCTION

I make this written submission on behalf of Esk'etemc, and in their role as legal counsel, and in reply to the written submissions of Taseko mine dated August 22, 2013 (CEAR #1140) respecting Esk'etemc's treaty negotiations and the mandate of the Panel to assess impacts to title, and whether Taseko sufficiently mitigated or addressed in its EIS the potential significant adverse impacts to Esk'etemc's Aboriginal title, which were identified by the previous Panel as being losses for which there was no compensation or appropriate mitigation proposed.

Esk'etemc submits that the submission by Taseko on Esk'etemc's Aboriginal title and the status of treaty negotiations is evidence which, again, displays Taseko's lack of willingness to comply with section 2.7.5 of the EIS Guidelines for the New Prosperity review, which specifically requires the Proponent to identify "Any potential impacts that the Project may have on potential or established Aboriginal rights or title and the measures to prevent or mitigate these potential impacts" (EIS Guidelines at page 59).

In Taseko's submission, it states that "The Panel has a limited role concerning rights and title and it does not include a consideration of significant adverse effects on such rights and title". However, the Panel's Amended Terms of Reference specifically states in section 3.8 that the Panel shall accept and review information regarding the nature and "scope" of potential or established Aboriginal rights, "as well as information on the potential adverse impacts or potential infringements that the Project may cause on potential or established Aboriginal rights or title". Moreover, the Panel may recommend mitigation measures to address the Project's impacts on potential or established Aboriginal rights or title, in accordance with section 3.11.

In the Panel's ruling of September 13, 2013, which clarified the mandate of the panel to assess impacts on Aboriginal Rights, the Panel found that the word "review" in section 3.8 of the Terms of Reference had the meaning, to "examine or assess [something] formally with the possibility or intention of instituting change if necessary". The Panel found that this broad interpretation of the word "review" aligns with the context and purpose of CEAA 2012, "which is to consider and assess the potential impacts of a project and its related activities" (*ibid*.).

When the Panel made its determination to proceed to the hearing portion of the New Prosperity review, by letter dated June 20, 2013 (CEAR #566) it observed that there remained a wide divergence as between the parties views as to whether Taseko had complied with the requirements of the EIS Guidelines, as follows:

> The Panel recognizes that differences of views still remain between Taseko and other Interested Parties on a number of issues related to the environmental assessment of the Project and is of the opinion that the information generated as part of the Environmental Impact Statement review will be further developed and clarified through the hearing process.

In stating this, the Panel did not rule that Taseko had sufficiently complied with section 2.7.5 of the EIS Guidelines respecting the assessment of impacts to rights and title, and the requirement to propose measures to "prevent or mitigate these potential impacts". Note that there is no requirement for the impacts to be significant, in order for Taseko to be required to propose mitigation measures to address potential impacts to title. Nonetheless, the EIS does not contain

any proposed mitigation measures to address the potential impacts to Esk'etemc's Aboriginal title, which the previous Panel found could be potentially significant.

In Esk'etemc's submission, not only is the Panel required to examine or assess impacts to potential or established Aboriginal rights and title, but the Panel is also required to ensure compliance with the EIS Guidelines, which required Taseko to propose mitigations for all potential adverse impacts to rights and title, including impacts to Esk'etemc's Aboriginal title and the potential significant nature or scope of this impact as determined by the previous Panel. In the alternative, the Panel is required to consider the seriousness of adverse "environmental effects" which includes the effects of the Project on current use of the lands and resources for traditional purposes by Aboriginal persons.

ESK'ETEMC'S ABORIGINAL TITLE

In Taseko's submissions, the proponent attempts to minimize the potential impacts to Esk'etemc's Aboriginal title by stating that because of direction that the transmission line runs (East-West), and the direction that the culturally important and sacred sites identified by Esk'etemc run (North-South), and because "some" of the area is on private, fee simple lands, therefore, the potential impact of the transmission line on those lands "is relatively minor".

This is contrary to the finding of the previous Panel, which indicated that "depending on the size of the land settlement through the treaty process, the Project may result in a significant adverse effect on the Aboriginal title that could be granted" to Esk'etemc (Panel Report, Executive Summary at v). Taseko's submission not only attempts to minimize potential impacts to title, consistent with their Final EIS at pages 1313 – 1314), but also completely disregards the EIS requirement to mitigate any potential impacts to title as part of the New Prosperity review. Taseko's submission confirms that the proponent has proposed nothing which would allow this Panel to confirm that the potential impacts to title identified in the previous process have been addressed by the New Prosperity project. Rather than complying with the EIS Guidelines and seeking to address or mitigate the impacts to rights and title found by the previous Panel, even at the stage of the hearing, Taseko refuses to acknowledge and address the impacts to Esk'et.

Taseko's submissions that the impacts are "relatively minor" due to the direction of the transmission line and it's place of crossing also disregards all of the information submitted by Esk'etemc in the previous Panel review process, and in the New Prosperity review. At the Community Hearing on August 20, 2013, the Panel heard from numerous community members who indicated that the impacts to their rights and title claims were long-term, potentially irreversible, and culturally significant. Taseko's submissions also ignore the views put forward by Esk'etemc on the previous Panel report, wherein Esk'etemc indicated that there would be significant and adverse impacts to title, regardless of the size of the land settlement through the treaty process (CEAR #953 Impacts Chart, and Esk'etemc Review of the Previous Panel Report at page 3, CEAR #428).

However, unlike Taseko, this Panel does not have the mandate to ignore or minimize the submissions from Esk'etemc from the previous Panel review process. Rather, this Panel has the specific mandate to "use the information, submissions and testimony generated as part of the 2009/2010 review" in accordance with section 3.2 of the Amended Terms of Reference. This includes the "submissions and testimony" from Esk'etemc Nation.

In attempting to minimize the potential impacts to Aboriginal title, Taseko relies heavily on the fact that "some" of the lands which overlap with Esk'etemc's sacred sites and the area of the transmission line crossing are private, fee simple lands. This is misguided for three reasons.

Firstly, as confirmed by the Supreme Court of Canada in the leading case on Aboriginal title, *R. v. Marshall; R. v. Bernard, 2005 SCC 43,* Aboriginal title underlies Crown sovereignty. More specifically, the court held that:

> Aboriginal title reflects this fact of prior use and occupation of the land together with the relationship of aboriginal peoples to the land and the customary laws of ownership. This aboriginal interest in the land is a burden on the Crown's underlying title.

The presence of private lands does not preclude the potential for adverse impacts to title, since Aboriginal title is a burden on the Crown's underlying title.

Secondly, Taseko argues that "Until such time as specific tracts of land are identified for inclusion in a treaty settlement, the business of government must continue and the government can and will continue to grant rights and interests in Crown lands. Any treaty settlements will be subject to those rights and interests".

This is precisely Esk'etemc's concern – if the transmission line is granted, the lands that the corridor crosses will be devalued since the settlement lands will be subject to those rights and interests. Granting the transmission line will effectively preclude Esk'etemc from making alternate land use decisions with respect to the use, planning and management of the title lands, and in particular, the lands where the east-west corridor of the transmission line cross the north-south areas of Esk'etemc's title claims. The ability to make land use decisions is an integral aspect of title, as noted in Delgamuukw, v. B.C., [1997] S.C.R. 1010 at para. 111, when it held that Aboriginal title "confers the right to use land for a variety of activities, not all of which need to be aspects of practices, customs and traditions which are integral to the distinctive cultures of Aboriginal societies."

This is also precisely this potential impact to title that was to be addressed by Taseko through mitigation in its Environmental Impact Statement. Taseko's lack of effort to address, in any way, the potential adverse impacts to Esk'etemc's title is further evidence that the previous Panel's finding that the despite the previously recommended mitigations, "such mitigations would not eliminate or accommodate the significant loss First Nations would experience as a result of the Project" (Federal Panel Report at 246).

Furthermore, Taseko's submission also flagrantly disregards the role of the honour of the Crown, which must be upheld in the Crown's decision-making processes while treaty negotiations and Aboriginal title claims are being negotiated. This was confirmed by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 20, when it stated that "It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate." The Supreme Court of Canada also held that the Crown is not entitled to continue to grant rights and interests in Crown lands, without taking into considering the adverse impacts to rights and title, at paras. 26 and 27 of *Haida Nation*, stating that:

> Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it

> chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?
>
> The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

Finally, please note that potential adverse impacts to Aboriginal title can occur, regardless of the whether Aboriginal title claims will be settled by way of a grant of treaty settlement land and a final agreement in the B.C. treaty process. The application of the duty to consult to potential impact to title was confirmed by the Supreme Court in *Haida Nation*, and the potential for adverse impacts from mining exploration within a First Nation's claimed Aboriginal title area arose recently in *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14. In Haida, the Supreme Court held that "the duty [to consult] arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (at para. 35). In Ross River, the appellate court held that in transferring mineral rights to quarts mining claim holders within the plaintiff's claimed traditional territory, "the Crown engages Crown engages in conduct that is inconsistent with the recognition of Aboriginal title" (at para. 32).

ESK'ETEMC TREATY NEGOTIATIONS

With respect to the potential adverse impacts to title which may arise from the transmission line, recall that the area where the east-west transmission line crosses the north-south area of sacred sites outlined by Esk'etemc is one of the most important areas of land that Esk'etemc is seeking to obtain as Treaty Settlement Land within its territory. This displays the extreme importance and significance of this area of land, which is not only rich in burial sites and pit houses, but it is also the location of an important sacred village site, which is part of Esk'etemc's culture, distinctive society and identity. It is also an area where there is significant current use of the land for traditional purposes – a requirement that must be considered when the Panel assesses "environmental effects" under CEAA 2012.

With respect to Taseko's submission that private lands will not be expropriated in the treaty process, please note that part of the treaty negotiation process involves a negotiation of additional lands which will automatically become Treaty Settlement Lands, in the event fee simple lands are acquired by the First Nation after treaty. This is evidenced in the Maa-Nulth Final Agreement, which provides as follows:

> Acquisition and Addition of Fee Simple Lands
>
> 2.10.23 If, within 15 years after the Effective Date, a Maa-nulth First Nation referred to in Appendix F-3 or F-4, or a Maa-nulth First Nation Corporation, Maa-nulth First Nation Public Institution or Maa-nulth-aht of that Maa-nulth First Nation, becomes the registered owner of

the estate in fee simple of a parcel of land described as “Subject Lands” in Appendix F-3 or F-4, and:

1. where the owner of such parcel is a Maa-nulth First Nation Corporation, Maa-nulth First Nation Public Institution or Maa-nulth-aht of that Maa-nulth First Nation, such owner provides written consent; and
2. the registered holder of any financial charge or encumbrance provides written consent,

then that Maa-nulth First Nation may provide notice to British Columbia and Canada, that the parcel of land is to be added to the Maa-nulth First Nation Lands of that Maa-nulth First Nation.

2.10.24 As soon as practicable after receipt of a notice in accordance with 2.10.23, British Columbia and Canada will each, upon satisfactory review of the consents referred to in 2.10.23 a. and b., provide confirmation to the other Parties that such parcel of land is to be added to the Maa-nulth First Nation Lands of the applicable Maa-nulth First Nation.

2.10.25 If British Columbia and Canada provide confirmation in accordance with 2.10.24, that parcel of land will become Maa-nulth First Nation Lands of the applicable Maa-nulth First Nation upon receipt by that Maa-nulth First Nation of such confirmation and Appendix B is deemed to be amended to reflect such addition to Maa-nulth First Nation Lands.

In addition to the above-noted section, which will be the subject of treaty negotiations, there is also a section which provides that both British Columbia and Canada may consent to other parcels being added to Treaty Settlement Lands (see section 2.10.0), and certain factors will be considered including whether “the parcel of land is within the Maa-nulth First Nation Area of that Maa-nulth First Nation” (sections 22.10.2(b) and 22.10.3(b)).

Please see the Maa-Nulth Final Agreement, which is available at: http://www.bctreaty.net/nations/agreements/Maanulth_final_intial_Dec06.pdf.

In addition, please see my Written Submissions (filed August 21, 2013) respecting adverse impacts to title, with respect to the Heritage Conservation Act and the ability of Esk’etemc as a treaty first nation to make laws to protect its cultural and heritage resources.

ALTERNATIVES

In addition to the above reponses to Taseko’s submissions, please consider the following comments on behalf of Esk’etemc, respecting the failure of Taseko to consider alternatives to the Transmission Line Corridor in accordance with section 19 of the *Canadian Environmental Assessment Act 2012* (and section 16 of CEAA 1992). CEAA requires a consideration of “alternative means of carrying out the designated project that are technically and economically feasible and the environmental effects of any such alternative means”.

In the “New Prosperity Project” Taseko has not described any alternatives to the currently proposed transmission line, despite the fact that the Last Panel clearly found that there would be adverse impacts to our title claims. However, Taseko has come to this Federal Panel and is asking for a second chance at a federal review process without addressing all of the significant impacts to Esk’etemc. There have been **no** changes to the transmission line corridor. Essentially, Taseko has proposed a “New” Prosperity mine project with an “Old” transmission

line corridor. It is this "Old Corridor" that will cause irreversible loss to Esk'etemc's culture, rights and ability to protect and make decisions about its Aboriginal title lands.

The original Panel was concerned that the adverse impacts to Esk'etemc's cultural areas, hunting rights and gathering could become "significant", and would be long-term and potentially irreversible, if there was no progress made with respect to re-routing the Transmission Line to avoid areas of importance to Esk'etemc. However, Taseko has made no progress in this regard to date.

Taseko has not proposed any Alternative Corridor that would avoid impacting Esk'etemc, our sacred areas, fishing sites and the areas of critical habitat for the animals we harvest. The question for this Panel now is – can you accept the "Old Corridor" when Taseko has clearly failed to meet the basic requirements of the *Canadian Environmental Assessment Act* to examine alternatives to the project? Can you accept the "Old Corridor" when Taseko has not made any attempt to address the significant impacts to our rights and title identified by the last Federal Panel?

At the Community Hearing three days ago, Taseko said that it understands that there is a "Lands" Issue with the Esk'etemc. Taseko knew this from the first Panel hearing. Taseko could have avoided the "Lands" Issue if it had chosen to study and propose an Alternate Transmission Line Corridor that avoided Esk'etemc completely.

Instead, Taseko's Environmental Impact Statement says that it has considered "No new alternatives" for the transmission line, beyond alternatives previously assessed (EIS at 160). There was no consultation with Esk'etemc on any Alternative Corridors for the Transmission Line, despite the previous Panel's conclusion that the location of the Transmission Line within Old Corridor proposed has the potential to cause significant adverse impacts to title, and potential long-term and irreversible impacts to our cultural sites, hunting rights and access rights.

It remains unclear to Esk'etemc why there was no re-assessment of Alternative Corridors for the Transmission Line, given the Previous Panel's findings. In Taseko's Project Description, it says that Alternative Corridors were considered in the 1990s by Taseko, and while 9 routes were studied, 7 were eliminated because they were "impossible or difficult". The Old Corridor that Taseko seeks to have approved in the New Prosperity proposal is – without question – impossible or difficult in terms of impacts to Esk'etemc's rights.

In the New Prosperity Project Description, Taseko notes that the Province has approved a 500 metre wide transmission line corridor selected from the original 3 km corridor Taseko proposed in the first Federal Panel review. This 500 metre wide corridor would not avoid any of the areas we have identified as sacred and critical to our title claim and our ability to exercise our rights.

The problem with accepting the 500 meter corridor approved by B.C. as the starting point is that the Province approved this corridor before the previous Federal Panel Report was released. There has been no consultation with Esk'etemc on Alternate Corridors to assess whether they would have a greater or lesser adverse impact on Esk'etemc's rights and title.

When the Province approved the 500 meter Corridor, it did not take into account or consider the impacts to Esk'etemc's rights and title which were identified in the previous Federal Panel Report. It did not take into account the potential significant impacts to Esk'etemc's title, the potential long-term and irreversible impacts to our rights, and interference with our cultural and sacred sites. In addition, there was no consultation with Esk'etemc about the Corridor approved by B.C.. The Province was only examining those elements of the projects that had changed – which did NOT include the transmission line – the Province did not consider the impacts of the transmission line when it issued its amended Environmental Assessment Certificate for New

Prosperity. As such, this Panel should not rely on the Province's decision that the 500 meter corridor is acceptable.

The reality is that there is nothing "new" about Taseko's proposed transmission line and since no "new" alternative corridors have been considered since the Last Federal Panel found significant impacts to our title, this panel cannot responsibly determine that the Old Corridor is the best option. Taseko chose to ignore what the last panel said about the impacts to our title, and had failed to provide information about alternative corridors. This is a failure to meet the requirements of the *Canadian Environmental Assessment Act.*

This Panel has no option but to decide exactly as the previous Panel did: that the transmission line corridor will have significant adverse impacts on Esk'etemc's aboriginal title claims and that those impacts cannot be mitigate or accommodate the significant loss that will result to Esk'etemc.