

Outline of Stswécemc/Xgat'temc First Nation's Closing Submissions to the New Prosperity Mine Federal Review Panel, August 23, 2013

Dr. Bruce Stadfeld McIvor, Legal Counsel for the Stswécemc/Xgat'temc First Nation

Stswécemc/Xgat'temc's Position

- Stswécemc/Xgat'temc opposes the New Prosperity Project due to the significant effects of the Project, including the mine and the transmission line on the environment and on Stswécemc/Xgat'temc's Aboriginal title and rights, which either cannot or have not been accommodated.

The Panel's Jurisdiction

- Stswécemc/Xgat'temc's submissions are without prejudice to its position on the Panel's mandate as set out in our letter of February 18, 2013.
- The Panel can make further recommendations to mitigate the adverse environmental effects that could adversely impact or infringe on potential or established Aboriginal rights (Amended TOR, s. 3.11).
- The Panel can also (and we say must) make the findings regarding the significance of effects of the Project on established and asserted Aboriginal title and rights.
- There are important differences between whether the Project is likely to result in a significant adverse environmental effect under CEAA 2012 and whether the Project has the potential to infringe Aboriginal title and rights.
- First, only environmental effects defined in s. 5 of CEAA 2012 can be considered in determining significant adverse environmental effects—s. 5 does not include Aboriginal and treaty rights (current uses of lands and resources for traditional purposes are not synonymous with Aboriginal title and rights).
- Second, the Panel must determine whether a likely adverse environmental effect is significant.
- A conclusion by the Panel that the Project is not likely to result in a significant adverse environmental effect does not mean that the Project will not infringe Stswécemc/Xgat'temc's Aboriginal rights or that deep consultation and accommodation is not required.
- The Panel is precluded by s. 3.12 of its TOR from making determinations with respect to the validity of Aboriginal rights and title, the scope of the Crown's duty to consult and whether the duty to consult has been met.

- The Panel is not precluded from making findings regarding the effect of the Project on Aboriginal title and rights.
- The Panel must make these findings as part of discharging its role in the Crown's fulfillment of its legal obligation to respect First Nation's Aboriginal title and rights.

Summary of Select Testimony 2010 Prosperity Panel

- Mildred Kalelest talked how important it was for her to hunt and fish, pick berries, get their medicines, the deer, the moose, the endangered species, including the badger, the importance of the porcupine. She testified how important it is that their children learn from them on the land and if they cannot they will lose their culture.
- Phil Anderson talked about what the effects have been for all the increased access into their territory, and that there are fewer places that are isolated to teach youth.
- Kelyn Paul talked about the annual camping trip where adults and Elders take children out on to the land and show them the land and teach them their traditions, pass on their culture, and how for Kelyn that it was only from going out on the land that she began to learn about her people, who they are, how important the land is, and that it made her want to pass this on herself.
- Councilor Gerald Duncan talked about how important the Little Dog area is and that he himself had hunted there his entire life. He also testified about the west side of the Fraser River, its comparative remoteness and concerns about the transmission line opening it up: "Because that's where you learn, out there in the remote areas, that's where everything comes together for you."
- Larry Emile talked about how he had organized the yearly summer trips for the children for over 20 years. Some of those children now were adults. And he said how important it was for him, because this is what he could do, he could do this and he knew that it was important for his community.
- Phyllis Jack, a member of the Band and someone who is very involved in trying to develop tourism, talked about how the Churn Creek location is referred to as "the Grand Canyon of B.C." She made the point that Aboriginal tourism is not simply about economics. It's a vehicle for cultural learning. It's how they build their own identity and pride. She talked about how it's all tied up with their hopes to develop a tourism industry. And that they are actively doing this. They have a business plan. They are working towards it. It's not some pie-in-the-sky thing they just came up with.
- Rick Phillip emphasized how difficult for him to testify but one of the things that he wanted to emphasize was how fragile the soil is on the grasslands. When it's moved, when it gets wet, in his words, it just goes, it just washes all over. And that what he said

was, the idea that you could simply put in the poles from a helicopter was simply just unreasonable. You were going to have people on the land affecting the soil.

- Elder Dave Archie testified about being a child and the first time that he caught a fish. He testified about these concerns. He's worried about his grandson, a boy in the future won't be able to have that experience that he had. And that sums up the concerns about what the future might hold for Stswécemc/Xgat'temc. So much might be lost. Not just for the people that are there today, but for their children and their children's children.
- Clara Camille spoke about the use of plants. And importantly she spoke to you also about what their experience have been with the existing transmission line, about what the effects have been, and how they now have to travel so much farther to find a lot of the berries and plants that they used to be able to gather within their territory. She told you about wanting her grandson to come out and testify. But, like a lot of the people at Canoe, he was just too shy to come up there and talk to you. But she wanted to tell you what he said. And he wanted to tell you, just tell them that it's my favorite hunting ground. And he was talking to you about Little Dog and where the transmission line will go.
- Racelle Kooy testified regarding both the potential for Aboriginal tourism and the importance of it--that it's through it, Aboriginal People can preserve their voice, preserve their lands, and celebrate their culture.
- Louise Harry summed up what it means to her to be able to go out on to the land. It has sustained our family: "...without the land, we wouldn't have accomplished what we have. It's not only for food, but it's for our body, mind and spirit."
- Larry Harry emphasized the current effects of increased access to their territory and how with the ATVs, the 4x4s, hunters, it's dangerous at times to go out in the fall.
- Charlie Louis and his 7-year-old daughter, Charlize, talked about how important it is as a family for them to go out on the land. They go to Brigham Lake and they fish, they camp out, they hunt. That's where they learn about the land and who they are.
- Councilor Harold Harry emphasized how important it is to save the land, to save the people that they have buried there, to save the archaeological sites. He talked about the importance for himself and for his family about going out and having time alone. He said, "And that's where I find that peace is out there."
- Councilor Patrick Harry testified about the archaeological work and all the sites along the Fraser River, and how there were very few sites exactly where the line is going through or is intended to go through, and his testimony was that that's because Taseko simply haven't done the work to identify the sites.

- Chief Camille testified how important this project was for her community, both to be involved in and have real input on what the effects of the line would be. And that how they have lacked the capacity to date to meaningfully engage on that.

New Testimony from August 21, 2013 Community Hearing

Councilor Allan Adam:

- “trying to get a better future of our little ones”
- “we’re trying to preserve a future for our people with our culture on the land?”
- “I don’t want to tell my children where we used to hunt, fish, pick berries”

Councilor Patrick Harry:

- “it’s the same project for us—nothing new about it”
- “disheartened to be back here”
- “people should be judged on what they’ve done, not on what they say they will do. Taseko has done nothing to act on the recommendations.”
- “our door’s been open for three years”
- “action speaks louder than words. There’s been no action from Taseko”

Joyce Harry

- “thinking of my granddaughters”

Louise Harry

- “the peace and harmony when you are on the land”

Virginia Robins

- Residential school survivor
- Best times of her childhood was going out on the land with parents/grandparents

Stswécemc/Xgat'temc Rights/Interests

- Stswécemc/Xgat'temc holds the following constitutional rights:
 - a proven Aboriginal right to hunt;
 - an accepted Aboriginal right to fish;
 - an uncontested Aboriginal right to trap and gather plants; and
 - a strong claim to Aboriginal title.

Panel Report, p. 213-17

Serious Negative Effects Identified by First Panel

The first Panel identified the following issues and potential effects of the Project:

- inadequate baseline terrain and soil inventory carried out by Taseko (Panel Report, p. 99)
- in the area of the proposed transmission line, the Secwepemc identified areas for berrypicking (huckleberries, blueberries, soap berries) and for gathering medicinal plants (pitch). Soapberry and choke cherry picking areas were also reported just north of the transmission line corridor on the east side of the Fraser River. (Panel Report, p. 187);
- negative effect on medicinal plants (Panel Report, p. 188);
- negative effects on fragile grasslands ecosystems and rare or endangered plants or animals (Panel Report, p. 101);
- negative effect of the transmission line on mule deer and moose (Panel Report, p. 109);
- negative effect of a straight line transmission line corridor, including access for non-Aboriginal hunters and increased all-terrain traffic (Panel Report, p. 109);
- negative experience with the existing line and the collapse of hunting (Panel Report, p. 110);
- potential for increased fragmentation of ecosystems, increased all terrain vehicles, snowmobiles and poachers (Panel Report, p. 35);
- insufficient work done to date; no trust in IR Wilson; need for wider study than the 30-80 meter right-of-way (Panel Report, p. 125-26);
- Stswécemc/Xgat'temc burial grounds along the transmission line; importance of looking after ancestors and that they are not to be moved; part of their history that can never get back (Panel Report, p. 126-127);
- Stswécemc/Xgat'temc trying to develop wilderness tourism opportunities; great potential (Panel Report, p. 150-151);
- negative effect of the transmission line on the visual landscape (Panel Report, p. 197);
- First Nations were skeptical that line would be decommissioned (Panel Report, p. 110);
- Stswécemc/Xgat'temc trap lines west of the Fraser River (Panel Report, p. 47);
- delicate grassland ecosystem at the Fraser River crossing (Panel Report, p. 48)
- potential for cultural loss (Panel Report, p. 194);
- serious concerns about how it will interfere with their treaty negotiations, including treaty land selections (Panel Report, 214)
 - Mr. Gustafson—‘they can get other land’;
 - Councilor Allan Adam—‘Secwepemc means people of the land’

Key Conclusions from the First Panel Report

- “The proposed transmission line, which would cross the asserted territory of the Secwepemc Nation, would have a negative effect on Secwepemc Aboriginal rights to hunt and harvest plants and could potentially negatively affect areas of cultural importance to the Secwepemc.” (Panel Report, p. 219)
- “Given that the Secwepemc people have continued to exercise their Aboriginal rights in the area and that the development may affect their ability to continue exercising their Aboriginal rights due to increased access, loss of cultural connectivity with the land, and direct impacts to wildlife, the Panel finds that the effects of the transmission line on the Secwepemc may be long-term and potentially irreversible. The Panel also notes that, similar to the Tsilhqot’in, Taseko has not proposed any compensation to offset these losses.” (Panel Report, p. 219, emphasis added)
- “With respect to the Esketemc (Alkali Lake Band) and the Stswecem’c/Xgat’tem (Canoe Creek Band), the Project would have a direct effect on their Aboriginal title claim as the transmission line would reduce the availability of land for selection during the treaty process. Depending on the size of the land settlement through the treaty process, the Project may result in a significant adverse effect on Esketemc and the Stswecem’c/Xgat’tem title.” (Panel Report, p. 220, emphasis added)
- “...the Project would infringe on established Aboriginal rights, as per the *William* case and the *Alphonse* case; it is the Panel’s view that typical mitigation measures would be unable to provide accommodation for this infringement.” (Panel Report, p. 245, emphasis added)
- “It is the Panel’s conclusion that despite the proposed mitigation measures and commitments, the Project would result in significant adverse effects. The Panel also notes that while it has provided recommendations that should be implemented should the Project proceed, it does not believe that these recommendations would eliminate or accommodate the significant loss First Nations would experience as a result of the Project.” (Panel Report, p. 245, emphasis added)

Moving the Transmission Line Centre Line Does not Mitigate the Majority of the Adverse Effects

- Stswécemc/Xgat’temc disagrees with the first Panel that moving the centre line within the chosen 500 meter right-of-way will mitigate the adverse environmental effects:

The Panel concludes that, provided the planned mitigation to avoid construction in sensitive locations would be applied in cooperation with the Secwepemc, the Project would not result in a significant adverse effect on established or potential Secwepemc rights. (Panel Report, p. 219)

- Stswécemc/Xgat’temc’s position is that moving the centre line will not alleviate the majority of the identified adverse effects.

Alternative Route Option

- Taseko initially examined 9 corridor options; 2 were selected for further study; in 1997 the Dog Creek corridor option (option #6) was selected as the preferred alternative (Panel Report p. 35-36)
- TNG proposed a transmission line from Hanceville to the Soda Creek substation as part of proposal for Biomass fired generation plan; similar route to the option examined by Taseko in 1997 (Panel Report, p. 35-36)
- When the 1997 corridor selection was made the criteria did not include consideration of effects on First Nations' current use activities for traditional purposes and cultural heritage (Panel Report, p. 36)
- The 1997 corridor selection did consider comparative effects on Aboriginal title and rights; such a consideration is required as part of discharging the Crown's duty to consult (*Kwikwetlem First Nation v British Columbia (Utilities Commission)*, 2009 BCCA 68)
- The first Panel recommended a reconsideration of the choice of the preferred corridor option:
 - Panel's Recommendation #1: re-examine the choice of transmission line corridor based on Hanceville—Soda Creek alternative
 - Panel Recommendation #12: consider relocating the transmission line outside the Esketemc Community Forest
 - Relocating would assist in mitigating the effect of the project on current use of lands for traditional purposes (Panel Report, p. 202)

The Panel should recommend that should the Project proceed, a full review of corridor options take place at the earliest opportunity.

Nothing Has Been Done to Address the Issues Identified in the First Panel's Report

- British Columbia:
 - "The Panel notes that as a result of the two separate processes and their divergent timing, updated and new information was presented to the Panel that was not available to the British Columbia Environmental Assessment Office in completing its assessment." (Panel Report, p. 31)
 - Testimony of Patrick Harry, August 21, 2013--BC has done nothing to address the findings/recommendations from the first Panel's report.
- Taseko:
 - The first Panel found there had been no offer of compensation from Taseko or BC to offset the effect of the project--just references to provincial revenue sharing (Panel Report, p. iv)

- The so-called ‘new’ Proposal is the identical proposal for the transmission line; Taseko has done nothing to address concerns through changes to the proposal
- Taseko has done nothing to address concerns with the community despite Stswécemc/Xgat'temc being available and willing to discuss them
- Mr. Yelland’s testimony: “We have accommodated Aboriginal rights” (p. 17, line 7-8)—no basis for this statement.
- Mr. Yelland’s testimony “Many issues could have been cleared up if Taseko had been able to meet with the community”
- Councilor Patrick Harry testified that Stswécemc/Xgat'temc’s door was always open
- They did oppose the work on the locating the centre line in 2010 because there had been no decision on the project
- Testimony of Patrick Harry on August 21, 2013 re meeting with Taseko’s president:
 - He said "what do you want? If you want your culture to survive you need money”
 - “It was insulting to us.”

Recommendations

The Project Should be Rejected

- Nothing has changed in the last 3 years.
- It is the same project—neither BC or Taseko has done anything to address the conclusions and recommendations from the first Panel’s report.
- The Panel should draw a negative inference that Taseko will do nothing of consequence in the future.
- The ‘New’ Prosperity Project should not be approved because the possible economic and social benefits are outweighed by the significant adverse environmental, social, and cultural effects and the serious adverse effects on Aboriginal title and rights.

The Project Will Have Serious Effects on Stswécemc/Xgat'temc Aboriginal Title and Rights

- The Panel should make findings that the Project will have a serious effect on the Stswécemc/Xgat'temc’s:
 - proven Aboriginal right to hunt;
 - accepted Aboriginal right to fish;
 - uncontested Aboriginal rights to trap and gather plants; and
 - claim to Aboriginal title.

Nothing Has Been Done to Address the Findings/Recommendations of the First Panel

- The Panel should make a finding that there is no evidence that either the Province or Taseko had done anything to address the findings and recommendations from the first Panel on the effect of the Project on Canoe Creek Aboriginal title and rights.

Detailed legally binding conditions should be imposed

- The Provincial EAC does not include the type of concrete, prescriptive conditions that would be required to potentially mitigate the effects of the Project.
- The Provincial EAC conditions are vague, best-efforts-when-convenient types of conditions, e.g.:
 - Section 2.2: "Recognize and take into consideration the value and significance of First Nations places."
 - Section, 2.3: "Promote the development of mutually beneficial partnerships."
 - Section 2.5: "Provide opportunities."
 - Section 2.8, re the transmission line: "Taseko will make reasonable efforts to avoid or mitigate impacts."
- Mitigation measures must be concrete, specific, and technically and economically feasible; vague hopes that something can be done in the future do not equal mitigation under CEEA 2012. (*Pembina Institute*, 2008 FC 302, at para. 25)
- An environmental assessment is an ongoing and dynamic process; in certain projects may require ongoing mitigation measures with continuing dialogue between the proponent and affected parties. (*Pembina Institute* at par. 24; see also *Grand Riverkeeper, Labrador Inc. v. Canada (Attorney General)*, 2012 FC 1520 at para. 59 and *Canadian Transit Company v. Canada (Transport)*, 2011 FC 515 at para.180)
- If the Minister were to conclude that it might be possible for the project to proceed, the Panel should recommend detailed legally binding conditions in regards to:
 1. Assessment of Transmission Line Corridor Options
 2. Mitigation of Transmission Line Impacts
 3. Access & Resource Use Management
 4. Archaeological & Cultural Preservation Agreement
 5. Effectiveness Monitoring
 6. Decommission and Reclamation
 7. Monitoring & Compliance
- Attached are draft detailed conditions for each of the above.
- They all include two important features:
 - recognition of First Nation jurisdiction in decision-making; and

- necessity for First Nations to be reimbursed for the reasonable expenses associated with participating in the fulfillment of the conditions.

Conclusion

- The Panel has a role in addressing the great shame of Canadian history. For over 100 years, these First Nations' lands and resources have been taken without their consent--and it continues.
- The Panel has an important role in the ongoing promise of reconciliation.
- Reconciliation demands respect and recognition. The evidence before you is that for the entire history of this proposal, both the province and Taseko have failed to recognize or respect the Secwepemc and the Tsilhqot'in.
- Taseko and the Province's established track-record precludes any confidence that First Nations, the Panel or Canada should have in them treating the Secwepemc and the Tsilhqot'in with respect and seriously recognizing their constitutional rights in the future.
- Without confidence that the Secwepemc and the Tsilhqot'in will be treated with respect and their rights and interests recognized, there can be no reconciliation and there can be no Prosperity Mine.

Stswecem'c Xgat'tem Requested Conditions for the Prosperity Mine Federal Environmental Assessment

Should the Project be approved, Stswecem'c Xgat'tem requests that the Panel recommend that the approval be made conditional upon the completion or implementation the following matters prior to the Minister's final approval of the Project:

Assessment of Transmission Line Corridor Options

Taseko, in consultation with Stswecem'c Xgat'tem, undertake an assessment of the alternative corridors for the transmission line which includes consideration of comparative effects of the alternative corridors on Aboriginal title and rights and on environmental effects pursuant to s.5(c) of the *Canadian Environmental Assessment Act, 2012*.

Taseko reimburse the reasonable costs of Stswecem'c Xgat'tem for participation in the collaborative engagement process with Taseko with respect to the assessment of alternative transmission line corridors.

Mitigation of Transmission Line Impacts

Taseko engage in a collaborative engagement process with Stswecem'c Xgat'tem with respect to the selection of the transmission line centre line and the construction of the transmission line which requires that:

- Taseko determine the final alignment of the transmission line centre line in consultation with Stswecem'c Xgat'tem in order to minimize disturbance of Stswecem'c Xgat'tem's interests as a result of the placement of the transmission line;
- Stswecem'c Xgat'tem provide input to Taseko with respect to the identification of mitigation measures to address impacts of the transmission line right-of-way on Stswecem'c Xgat'tem's Aboriginal title and rights;
- Taseko commit to the implementation of those mitigation measures identified by Stswecem'c Xgat'tem;
- Taseko undertake further detailed terrain hazard and soils mapping in areas of the transmission line right-of-way that have been identified as having potentially hazardous terrain and sensitive soils to assist in finalizing the centerline; and
- Taseko construct the transmission corridor right-of-way in such a manner as to avoid long straight-line sight distances to reduce the negative effect of the right-of-way on predator-prey relationships;

Taseko reimburse the reasonable costs of Stswecem'c Xgat'tem for participation in the collaborative engagement process with Taseko with respect to the selection of the transmission

line centre line and the identification of mitigation measures to minimize disturbance on Stswecem'c Xgat'tem's interests as a result of the transmission line.

Access & Resource Use Management

Taseko, in conjunction with Stswecem'c Xgat'tem, Canada and the Province, develop and implement an access and resource use management framework which at minimum includes:

- Stswecem'c Xgat'tem co-management and administration of plans developed under the access and resource use management framework to minimize adverse impacts of the Project on Stswecem'c Xgat'tem's Aboriginal title and rights;
- the identification and development of plans to address impacts on Stswecem'c Xgat'tem's Aboriginal title and rights as a result of increased access to areas of importance to Stswecem'c Xgat'tem as a result of the construction and use of the transmission line; and
- the identification and development of plans for the protection of wildlife and wildlife habitat and in particular, areas used by Stswecem'c Xgat'tem for traditional activities including hunting and fishing

Taseko reimburse the reasonable costs of Stswecem'c Xgat'tem for participation in the development and ongoing co-management of the access and resource use management framework over the lifetime of the Project, with the framework being maintained and adapted over time to ensure the protection of Stswecem'c Xgat'tem's traditional land use in the Project area;

Archaeological & Cultural Preservation Agreement

Taseko, in conjunction with Stswecem'c Xgat'tem and the Province, develop an archaeological and cultural preservation agreement outlining mitigation measures to avoid or minimize damage to archaeological and cultural finds, which at minimum includes:

- mitigation measures, including mitigation measures identified by Stswecem'c Xgat'tem, to avoid or minimize damage to archaeological and cultural finds;
- incorporation of Stswecem'c Xgat'tem's traditional values with respect to archaeological and cultural finds,
- the development and implementation of a chance find procedure to address artifacts found during construction of the transmission line right-of-way; and
- the right of Stswecem'c Xgat'tem to select and retain an archaeologist to identify sites of archaeological and cultural significance and strategies for the preservation of such sites in relation to the construction of the transmission line.

Taseko reimburse the reasonable costs of Stswecem'c Xgat'tem's participation in the development of the archaeological and cultural preservation agreement, including funding for Stswecem'c Xgat'tem to retain an archaeologist of Stswecem'c Xgat'tem's choosing.

Effectiveness Monitoring

Taseko, in conjunction with Stswecem'c Xgat'tem, develop an effectiveness monitoring program that at minimum includes:

- involvement of Stswecem'c Xgat'tem in the development of a program to monitor impacts on wildlife;
- incorporation of Stswecem'c Xgat'tem's recommendations with respect to the development and implementation of the effectiveness monitoring program to minimize impacts on Stswecem'c Xgat'tem's Aboriginal title and rights;
- incorporation of Stswecem'c Xgat'tem traditional knowledge in the development and implementation of the effectiveness monitoring program; and
- direct involvement of Stswecem'c Xgat'tem members in carrying out the effectiveness monitoring program in the area of the transmission line;

Taseko reimburse the reasonable costs of Stswecem'c Xgat'tem for participation in the development, implementation and ongoing activities associated with carrying out the effectiveness monitoring program.

Decommission and Reclamation

Taseko, in conjunction with affected First Nations including Stswecem'c Xgat'tem, develop a decommission and reclamation plan which at minimum includes:

- involvement of Stswecem'c Xgat'tem in decommission and reclamation planning;
- incorporation of Stswecem'c Xgat'tem's recommendations with respect to minimizing impacts on areas of traditional and cultural importance into the development and implementation of the plan; and
- Taseko posting a reclamation bond or other financial security of 100% of the total outstanding reclamation liability for land and water combined, calculated to cover the highest liability to ensure that project lands will be progressively and effectively reclaimed as required by the environmental assessment approval and all permits, and to a standard consistent with the current exercise of Stswecem'c Xgat'tem's Aboriginal rights. The bond will be held until reclamation and closure is completed to the satisfaction of the Environmental Assessment Office, the Minister of Natural Resources Canada and Stswecem'c Xgat'tem;

Taseko reimburse the reasonable costs of Stswecem'c Xgat'tem for participation in activities associated with the development and implementation of the decommission and reclamation plan.

Monitoring & Compliance

Canada, the Province and affected First Nations including Stswecem'c Xgat'tem establish an independent monitoring committee to ensure that Taseko is implementing its commitments and to address issues of concern to First Nations including Stswecem'c Xgat'tem throughout the lifetime of the Project. The responsibilities of the independent monitoring committee should include at minimum:

- reviewing the implementation and effectiveness of mitigation measures implemented to minimize impacts on Stswecem'c Xgat'tem's Aboriginal title and rights in the transmission line corridor;
- participating in the development of and reviewing the implementation of the access and resource use management framework and the archaeological and cultural preservation agreement plan to minimize impacts on Stswecem'c Xgat'tem's Aboriginal title and rights in the transmission line corridor,
- reviewing the implementation and effectiveness of mitigation measures incorporated into the effectiveness monitoring program and decommission and reclamation plan to minimize impacts on Stswecem'c Xgat'tem's Aboriginal title and rights in the transmission line corridor; and
- addressing other issues of concern to Stswecem'c Xgat'tem that may arise during the construction, operation, and closure of the Project

Taseko reimburse the reasonable costs of Stswecem'c Xgat'tem for the establishment and ongoing participation in the activities of the independent monitoring committee throughout the lifetime of the Project.

Outline of Stswécemc/Xgat'temc First Nation's Closing Submissions to the New Prosperity Mine Federal Review Panel, August 23, 2013

Dr. Bruce Stadfeld McIvor, Legal Counsel for the Stswécemc/Xgat'temc First Nation

Stswécemc/Xgat'temc's Position

- Stswécemc/Xgat'temc opposes the New Prosperity Project due to the significant effects of the Project, including the mine and the transmission line on the environment and on Stswécemc/Xgat'temc's Aboriginal title and rights, which either cannot or have not been accommodated.

The Panel's Jurisdiction

- Stswécemc/Xgat'temc's submissions are without prejudice to its position on the Panel's mandate as set out in our letter of February 18, 2013.
- The Panel can make further recommendations to mitigate the adverse environmental effects that could adversely impact or infringe on potential or established Aboriginal rights (Amended TOR, s. 3.11).
- The Panel can also (and we say must) make the findings regarding the significance of effects of the Project on established and asserted Aboriginal title and rights.
- There are important differences between whether the Project is likely to result in a significant adverse environmental effect under CEAA 2012 and whether the Project has the potential to infringe Aboriginal title and rights.
- First, only environmental effects defined in s. 5 of CEAA 2012 can be considered in determining significant adverse environmental effects—s. 5 does not include Aboriginal and treaty rights (current uses of lands and resources for traditional purposes are not synonymous with Aboriginal title and rights).
- Second, the Panel must determine is whether a likely adverse environmental effect is significant.
- A conclusion by the Panel that the Project is not likely to result in a significant adverse environmental effect does not mean that the Project will not infringe Stswécemc/Xgat'temc's Aboriginal rights or that deep consultation and accommodation is not required.
- The Panel is precluded by s. 3.12 of its TOR from making determinations with respect the validity of Aboriginal rights and title, the scope of the Crown's duty to consult and whether the duty to consult has been met.

- The Panel is not precluded from making findings regarding the effect of the Project on Aboriginal title and rights.
- The Panel must make these findings as part of discharging its role in the Crown's fulfillment of its legal obligation to respect First Nation's Aboriginal title and rights.

Summary of Select Testimony 2010 Prosperity Panel

- Mildred Kalelest talked how important it was for her to hunt and fish, pick berries, get their medicines, the deer, the moose, the endangered species, including the badger, the importance of the porcupine. She testified how important it is that their children learn from them on the land and if they cannot they will lose their culture.
- Phil Anderson talked about what the effects have been for all the increased access into their territory, and that there are fewer places that are isolated to teach youth.
- Kelyn Paul talked about the annual camping trip where adults and Elders take children out on to the land and show them the land and teach them their traditions, pass on their culture, and how for Kelyn that it was only from going out on the land that she began to learn about her people, who they are, how important the land is, and that it made her want to pass this on herself.
- Councilor Gerald Duncan talked about how important the Little Dog area is and that he himself had hunted there his entire life. He also testified about the west side of the Fraser River, its comparative remoteness and concerns about the transmission line opening it up: "Because that's where you learn, out there in the remote areas, that's where everything comes together for you."
- Larry Emile talked about how he had organized the yearly summer trips for the children for over 20 years. Some of those children now were adults. And he said how important it was for him, because this is what he could do, he could do this and he knew that it was important for his community.
- Phyllis Jack, a member of the Band and someone who is very involved in trying to develop tourism, talked about how the Churn Creek location is referred to as "the Grand Canyon of B.C." She made the point that Aboriginal tourism is not simply about economics. It's a vehicle for cultural learning. It's how they build their own identity and pride. She talked about how it's all tied up with their hopes to develop a tourism industry. And that they are actively doing this. They have a business plan. They are working towards it. It's not some pie-in-the-sky thing they just came up with.
- Rick Phillip emphasized how difficult for him to testify but one of the things that he wanted to emphasize was how fragile the soil is on the grasslands. When it's moved, when it gets wet, in his words, it just goes, it just washes all over. And that what he said

was, the idea that you could simply put in the poles from a helicopter was simply just unreasonable. You were going to have people on the land affecting the soil.

- Elder Dave Archie testified about being a child and the first time that he caught a fish. He testified about these concerns. He's worried about his grandson, a boy in the future won't be able to have that experience that he had. And that sums up the concerns about what the future might hold for Stswécemc/Xgat'temc. So much might be lost. Not just for the people that are there today, but for their children and their children's children.
- Clara Camille spoke about the use of plants. And importantly she spoke to you also about what their experience have been with the existing transmission line, about what the effects have been, and how they now have to travel so much farther to find a lot of the berries and plants that they used to be able to gather within their territory. She told you about wanting her grandson to come out and testify. But, like a lot of the people at Canoe, he was just too shy to come up there and talk to you. But she wanted to tell you what he said. And he wanted to tell you, just tell them that it's my favorite hunting ground. And he was talking to you about Little Dog and where the transmission line will go.
- Racelle Kooy testified regarding both the potential for Aboriginal tourism and the importance of it--that it's through it, Aboriginal People can preserve their voice, preserve their lands, and celebrate their culture.
- Louise Harry summed up what it means to her to be able to go out on to the land. It has sustained our family: "...without the land, we wouldn't have accomplished what we have. It's not only for food, but it's for our body, mind and spirit."
- Larry Harry emphasized the current effects of increased access to their territory and how with the ATVs, the 4x4s, hunters, it's dangerous at times to go out in the fall.
- Charlie Louis and his 7-year-old daughter, Charlize, talked about how important it is as a family for them to go out on the land. They go to Brigham Lake and they fish, they camp out, they hunt. That's where they learn about the land and who they are.
- Councilor Harold Harry emphasized how important it is to save the land, to save the people that they have buried there, to save the archaeological sites. He talked about the importance for himself and for his family about going out and having time alone. He said, "And that's where I find that peace is out there."
- Councilor Patrick Harry testified about the archaeological work and all the sites along the Fraser River, and how there were very few sites exactly where the line is going through or is intended to go through, and his testimony was that that's because Taseko simply haven't done the work to identify the sites.

- Chief Camille testified how important this project was for her community, both to be involved in and have real input on what the effects of the line would be. And that how they have lacked the capacity to date to meaningfully engage on that.

New Testimony from August 21, 2013 Community Hearing

Councilor Allan Adam:

- “trying to get a better future of our little ones”
- “we’re trying to preserve a future for our people with our culture on the land?”
- “I don’t want to tell my children where we used to hunt, fish, pick berries”

Councilor Patrick Harry:

- “it’s the same project for us—nothing new about it”
- “disheartened to be back here”
- “people should be judged on what they’ve done, not on what they say they will do. Taseko has done nothing to act on the recommendations.”
- “our door’s been open for three years”
- “action speaks louder than words. There’s been no action from Taseko”

Joyce Harry

- “thinking of my granddaughters”

Louise Harry

- “the peace and harmony when you are on the land”

Virginia Robins

- Residential school survivor
- Best times of her childhood was going out on the land with parents/grandparents

Stswécemc/Xgat'temc Rights/Interests

- Stswécemc/Xgat'temc holds the following constitutional rights:
 - a proven Aboriginal right to hunt;
 - an accepted Aboriginal right to fish;
 - an uncontested Aboriginal right to trap and gather plants; and
 - a strong claim to Aboriginal title.

Panel Report, p. 213-17

Serious Negative Effects Identified by First Panel

The first Panel identified the following issues and potential effects of the Project:

- inadequate baseline terrain and soil inventory carried out by Taseko (Panel Report, p. 99)
- in the area of the proposed transmission line, the Secwepemc identified areas for berrypicking (huckleberries, blueberries, soap berries) and for gathering medicinal plants (pitch). Soapberry and choke cherry picking areas were also reported just north of the transmission line corridor on the east side of the Fraser River. (Panel Report, p. 187);
- negative effect on medicinal plants (Panel Report, p. 188);
- negative effects on fragile grasslands ecosystems and rare or endangered plants or animals (Panel Report, p. 101);
- negative effect of the transmission line on mule deer and moose (Panel Report, p. 109);
- negative effect of a straight line transmission line corridor, including access for non-Aboriginal hunters and increased all-terrain traffic (Panel Report, p. 109);
- negative experience with the existing line and the collapse of hunting (Panel Report, p. 110);
- potential for increased fragmentation of ecosystems, increased all terrain vehicles, snowmobiles and poachers (Panel Report, p. 35);
- insufficient work done to date; no trust in IR Wilson; need for wider study than the 30-80 meter right-of-way (Panel Report, p. 125-26);
- Stswécemc/Xgat'temc burial grounds along the transmission line; importance of looking after ancestors and that they are not to be moved; part of their history that can never get back (Panel Report, p. 126-127);
- Stswécemc/Xgat'temc trying to develop wilderness tourism opportunities; great potential (Panel Report, p. 150-151);
- negative effect of the transmission line on the visual landscape (Panel Report, p. 197);
- First Nations were skeptical that line would be decommissioned (Panel Report, p. 110);
- Stswécemc/Xgat'temc trap lines west of the Fraser River (Panel Report, p. 47);
- delicate grassland ecosystem at the Fraser River crossing (Panel Report, p. 48)
- potential for cultural loss (Panel Report, p. 194);
- serious concerns about how it will interfere with their treaty negotiations, including treaty land selections (Panel Report, 214)
 - Mr. Gustafson—‘they can get other land’;
 - Councilor Allan Adam—‘Secwepemc means people of the land’

Key Conclusions from the First Panel Report

- “The proposed transmission line, which would cross the asserted territory of the Secwepemc Nation, would have a negative effect on Secwepemc Aboriginal rights to hunt and harvest plants and could potentially negatively affect areas of cultural importance to the Secwepemc.” (Panel Report, p. 219)
- “Given that the Secwepemc people have continued to exercise their Aboriginal rights in the area and that the development may affect their ability to continue exercising their Aboriginal rights due to increased access, loss of cultural connectivity with the land, and direct impacts to wildlife, the Panel finds that the effects of the transmission line on the Secwepemc may be long-term and potentially irreversible. The Panel also notes that, similar to the Tsilhqot’in, Taseko has not proposed any compensation to offset these losses.” (Panel Report, p. 219, emphasis added)
- “With respect to the Esketemc (Alkali Lake Band) and the Stswecem’c/Xgat’tem (Canoe Creek Band), the Project would have a direct effect on their Aboriginal title claim as the transmission line would reduce the availability of land for selection during the treaty process. Depending on the size of the land settlement through the treaty process, the Project may result in a significant adverse effect on Esketemc and the Stswecem’c/Xgat’tem title.” (Panel Report, p. 220, emphasis added)
- “...the Project would infringe on established Aboriginal rights, as per the *William* case and the *Alphonse* case; it is the Panel’s view that typical mitigation measures would be unable to provide accommodation for this infringement.” (Panel Report, p. 245, emphasis added)
- “It is the Panel’s conclusion that despite the proposed mitigation measures and commitments, the Project would result in significant adverse effects. The Panel also notes that while it has provided recommendations that should be implemented should the Project proceed, it does not believe that these recommendations would eliminate or accommodate the significant loss First Nations would experience as a result of the Project.” (Panel Report, p. 245, emphasis added)

Moving the Transmission Line Centre Line Does not Mitigate the Majority of the Adverse Effects

- Stswécemc/Xgat’temc disagrees with the first Panel that moving the centre line within the chosen 500 meter right-of-way will mitigate the adverse environmental effects:

The Panel concludes that, provided the planned mitigation to avoid construction in sensitive locations would be applied in cooperation with the Secwepemc, the Project would not result in a significant adverse effect on established or potential Secwepemc rights. (Panel Report, p. 219)

- Stswécemc/Xgat’temc’s position is that moving the centre line will not alleviate the majority of the identified adverse effects.

Alternative Route Option

- Taseko initially examined 9 corridor options; 2 were selected for further study; in 1997 the Dog Creek corridor option (option #6) was selected as the preferred alternative (Panel Report p. 35-36)
- TNG proposed a transmission line from Hanceville to the Soda Creek substation as part of proposal for Biomass fired generation plan; similar route to the option examined by Taseko in 1997 (Panel Report, p. 35-36)
- When the 1997 corridor selection was made the criteria did not include consideration of effects on First Nations' current use activities for traditional purposes and cultural heritage (Panel Report, p. 36)
- The 1997 corridor selection did consider comparative effects on Aboriginal title and rights; such a consideration is required as part of discharging the Crown's duty to consult (*Kwikwetlem First Nation v British Columbia (Utilities Commission)*, 2009 BCCA 68)
- The first Panel recommended a reconsideration of the choice of the preferred corridor option:
 - Panel's Recommendation #1: re-examine the choice of transmission line corridor based on Hanceville—Soda Creek alternative
 - Panel Recommendation #12: consider relocating the transmission line outside the Esketemc Community Forest
 - Relocating would assist in mitigating the effect of the project on current use of lands for traditional purposes (Panel Report, p. 202)

The Panel should recommend that should the Project proceed, a full review of corridor options take place at the earliest opportunity.

Nothing Has Been Done to Address the Issues Identified in the First Panel's Report

- British Columbia:
 - "The Panel notes that as a result of the two separate processes and their divergent timing, updated and new information was presented to the Panel that was not available to the British Columbia Environmental Assessment Office in completing its assessment." (Panel Report, p. 31)
 - Testimony of Patrick Harry, August 21, 2013--BC has done nothing to address the findings/recommendations from the first Panel's report.
- Taseko:
 - The first Panel found there had been no offer of compensation from Taseko or BC to offset the effect of the project--just references to provincial revenue sharing (Panel Report, p. iv)

- The so-called ‘new’ Proposal is the identical proposal for the transmission line; Taseko has done nothing to address concerns through changes to the proposal
- Taseko has done nothing to address concerns with the community despite Stswécemc/Xgat'temc being available and willing to discuss them
- Mr. Yelland’s testimony: “We have accommodated Aboriginal rights” (p. 17, line 7-8)—no basis for this statement.
- Mr. Yelland’s testimony “Many issues could have been cleared up if Taseko had been able to meet with the community”
- Councilor Patrick Harry testified that Stswécemc/Xgat'temc’s door was always open
- They did oppose the work on the locating the centre line in 2010 because there had been no decision on the project
- Testimony of Patrick Harry on August 21, 2013 re meeting with Taseko’s president:
 - He said "what do you want? If you want your culture to survive you need money”
 - “It was insulting to us.”

Recommendations

The Project Should be Rejected

- Nothing has changed in the last 3 years.
- It is the same project—neither BC or Taseko has done anything to address the conclusions and recommendations from the first Panel’s report.
- The Panel should draw a negative inference that Taseko will do nothing of consequence in the future.
- The ‘New’ Prosperity Project should not be approved because the possible economic and social benefits are outweighed by the significant adverse environmental, social, and cultural effects and the serious adverse effects on Aboriginal title and rights.

The Project Will Have Serious Effects on Stswécemc/Xgat'temc Aboriginal Title and Rights

- The Panel should make findings that the Project will have a serious effect on the Stswécemc/Xgat'temc’s:
 - proven Aboriginal right to hunt;
 - accepted Aboriginal right to fish;
 - uncontested Aboriginal rights to trap and gather plants; and
 - claim to Aboriginal title.

Nothing Has Been Done to Address the Findings/Recommendations of the First Panel

- The Panel should make a finding that there is no evidence that either the Province or Taseko had done anything to address the findings and recommendations from the first Panel on the effect of the Project on Canoe Creek Aboriginal title and rights.

Detailed legally binding conditions should be imposed

- The Provincial EAC does not include the type of concrete, prescriptive conditions that would be required to potentially mitigate the effects of the Project.
- The Provincial EAC conditions are vague, best-efforts-when-convenient types of conditions, e.g.:
 - Section 2.2: "Recognize and take into consideration the value and significance of First Nations places."
 - Section, 2.3: "Promote the development of mutually beneficial partnerships."
 - Section 2.5: "Provide opportunities."
 - Section 2.8, re the transmission line: "Taseko will make reasonable efforts to avoid or mitigate impacts."
- Mitigation measures must be concrete, specific, and technically and economically feasible; vague hopes that something can be done in the future do not equal mitigation under CEEA 2012. (*Pembina Institute*, 2008 FC 302, at para. 25)
- An environmental assessment is an ongoing and dynamic process; in certain projects may require ongoing mitigation measures with continuing dialogue between the proponent and affected parties. (*Pembina Institute* at par. 24; see also *Grand Riverkeeper, Labrador Inc. v. Canada (Attorney General)*, 2012 FC 1520 at para. 59 and *Canadian Transit Company v. Canada (Transport)*, 2011 FC 515 at para.180)
- If the Minister were to conclude that it might be possible for the project to proceed, the Panel should recommend detailed legally binding conditions in regards to:
 1. Assessment of Transmission Line Corridor Options
 2. Mitigation of Transmission Line Impacts
 3. Access & Resource Use Management
 4. Archaeological & Cultural Preservation Agreement
 5. Effectiveness Monitoring
 6. Decommission and Reclamation
 7. Monitoring & Compliance
- Attached are draft detailed conditions for each of the above.
- They all include two important features:
 - recognition of First Nation jurisdiction in decision-making; and

- necessity for First Nations to be reimbursed for the reasonable expenses associated with participating in the fulfillment of the conditions.

Conclusion

- The Panel has a role in addressing the great shame of Canadian history. For over 100 years, these First Nations' lands and resources have been taken without their consent--and it continues.
- The Panel has an important role in the ongoing promise of reconciliation.
- Reconciliation demands respect and recognition. The evidence before you is that for the entire history of this proposal, both the province and Taseko have failed to recognize or respect the Secwepemc and the Tsilhqot'in.
- Taseko and the Province's established track-record precludes any confidence that First Nations, the Panel or Canada should have in them treating the Secwepemc and the Tsilhqot'in with respect and seriously recognizing their constitutional rights in the future.
- Without confidence that the Secwepemc and the Tsilhqot'in will be treated with respect and their rights and interests recognized, there can be no reconciliation and there can be no Prosperity Mine.