

January 8, 2021

Barbara D. Janusz

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Grassy Mountain Coal Project Joint Review Panel
Impact Assessment Agency of Canada
22nd floor, 160 Elgin Street
Ottawa, ON K1A 0H3

Attn: Alex Bolton, Chairperson

Dear Mr. Bolton

Re: Grassy Mountain Coal Project Final Argument - CEEA Reference No. 80101

Dear Mr. Bolton

I am pleased to enclose my Final Argument.

I thank you and the other Panel Members, once again, for the opportunity to participate in the hearing and remain,

Yours sincerely

Barbara D. Janusz

encl.

***Coal Conservation Act Application Nos. 1844520, 1902073
Environmental Protection and Enhancement Act Application No. 001-00403427, and
Water Act Application Nos. 001-00403428, 001-00403429, 001-00403430,
001-00403431,
Public Lands Act Application Nos. MSL160757, MSL160758, LOC160841,
LOC160842 and LOC970943***

**Joint Review Panel
Impact Assessment Agency of Canada Reference No. 80101
Grassy Mountain Coal Project
Final Argument**

of

**Barbara D. Janusz
Participant
Lawyer (Inactive) and Member of the Law Society of Alberta since 1983**

January 8, 2021

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A. Introduction

1. On March 26, 2015 the proponent, Riversdale Resources Limited (hereinafter referred to as Benga) submitted to the Canadian Environmental Assessment Agency, on behalf of its subsidiary Benga Mining Limited, a *Summary of a Project Description of a Designated Project* in application for approval of the development of an open pit metallurgical coal mine, a coal processing plant and associated infrastructure at Grassy Mountain, hereinafter referred to as the LSA (local study area).

2. The LSA is located in the Municipal District of Ranchlands, on the MD southern boundary, approximately 7 kilometers north of the community of Blairmore, in the Municipality of Crowsnest Pass (hereinafter referred to as the MCNP).

3. In order to facilitate transportation of the coal by rail to the Pacific coast, the proponent has also applied for approval of the construction and development of a rail load facility on the north side of Highway 3 in Blairmore, across from the hospital and on the site of decommissioned golf holes of the Crowsnest Pass Golf Club in the MCNP.

B. Water, Including Surface and Groundwater Management, Quantity and Quality, Selenium Management and Aquatic Resources, Including Fish and Fish Habitat and Fish Species at Risk

B.1 Degradation of Fish Habitat

4. Four months later, on July 23, 2015, Jim Rennie, a geologist and resident of Crowsnest Pass, was fly fishing for Westslope Cutthroat Trout on Gold Creek - one of two waterways that transects the LSA, (the other one being Blairmore Creek) - when he discovered that there were very few trout in the creek.

5. Testifying on his own behalf as a participant on November 24, 2020 at the Grassy Mountain Coal Project Hearing, (hereinafter referred to as the hearing) Mr. Rennie stated that he had been fly fishing at various locations along Gold Creek since 1993 and had been collecting data on fish populations in Gold Creek since that time. According to his records and a graph that Mr. Rennie produced at the hearing, ¹ the catch rates of Westslope Cutthroat Trout on Gold Creek, prior to July 23, 2015, consistently averaged 20 trout per hour. ¹ CIAR#527; ² CIAR# 903, pdf p. 237

6. On PDF page 237 of the transcript Mr. Rennie confirmed Wildlife Biologist, Mr. Lorne Fitch's expert opinion (when Mr. Fitch testified on behalf of the Coalition) that Gold Creek was at one time considered a gem for Westslope Cutthroat Trout. Mr. Rennie also stated that catch rates over 3 trout per hour is considered excellent. ³ CIAR# 903

7. Mr. Rennie testified that he subsequently learned from the Fish and Wildlife office in Blairmore that a coal spill on the legacy mine waste pile, on the east side of Grassy Mountain had been precipitated by Benga having drilled a core hole on July 17, 2015 into the waste pile and that the dislodged coal had deposited into Gold Creek.

⁴ CIAR# 903, pdf p. 239

8. The coal spill was confirmed by an Investigation Summary Report issued by the Alberta Energy Regulator. Rather than having attributed the spill to drilling by Benga, the report confirmed Benga's allegation that the spill was precipitated by a heavy rainfall on July 17, 2015. Accordingly, the Report concluded that Benga Mining had not violated any pollution prevention provisions under the Fisheries Act or AER regulatory directives.
⁵ CIAR# 897

9. Inasmuch as the coal spill occurred within the boundaries of the LSA, which at the relevant time was within the control of Benga, Benga could have been charged under section 35(1) of the *Fisheries Act* (2012 version) for "...carrying out any work, undertaking or activity, that results in serious harm to fish...". ⁶ RSC 1985, c F-14

10. The coal spoil piles, according to Mr. Rennie, are end-dumped, loose material that sit at an angle of repose and are susceptible to disturbance. He expressed the opinion that should Benga's application be approved, the blasting that Benga would be authorized to conduct thrice daily in order to mine the metallurgical coal out of the seams in Grassy Mountain would mobilize the many waste piles on the mountain's slopes.
⁷ CIAR# 903, pdf p. 242

11. Mr. Brinker, counsel for Benga, cross-examined Mr. Rennie and asked him whether he had read the Investigation Summary Report that they had forwarded to him prior to Mr. Rennie giving testimony. Mr. Rennie confirmed receipt of the report and that he had read it, but Mr. Brinker did not ask him about Benga having attributed the coal spill to a heavy rainfall. ⁸ CIAR# 903, pdf. p. 248

12. On page 108, para. 438 of Benga's Final Argument, Benga quotes Mr. Rennie as having stated "...it clears up a lot of misconceptions that people might have had, myself included, about how this all started out and where it came from..." ⁹ CIAR# 962

13. It is respectfully submitted that the above quote in Benga's Final Argument is taken out of context and does not establish that Mr. Rennie attributed the coal spill and subsequent plummeting of trout numbers in Gold Creek to a heavy rainfall. Prior to Mr. Rennie having stated that the Report "...clears up a lot of misconceptions..." he testified (line 7 of PDF page 248 of the transcript) as follows:

"Yes, I have reviewed it and it has been helpful because it documents the exact location of the origin of the spill and that location agrees exactly with the location on the satellite imagery."

In his presentation, Mr. Rennie discusses the satellite imagery (PDF page 244 of the transcript) and states that he believes that water entered into the drill hole, which precipitated slumping and the spill. ¹⁰ CIAR# 903

14. At the hearing, Benga did not produce any historical meteorological evidence confirming that a heavy rainfall event had occurred on July 17, 2015 nor that the AER had relied on any such records when investigating the coal spill.

15. Benga did not lead any evidence at any time during the hearing that contradicts Mr. Rennie’s testimony about the high fish counts that he had recorded prior to the spill occurring. Indeed the evidence of all other expert witnesses respecting the plummeting numbers of Westslope Cutthroat trout in Gold Creek from that time forward confirms that the species is in need of protection and is justifiably listed as a species at risk under the *Species at Risk Act*.

16. It is trite law that the purpose of cross-examination is to test and impeach the credibility of a witness. Benga failed to make a dent in Mr. Rennie’s evidence which he presented, I respectfully submit, in a direct and forthright manner. Mr. Rennie’s testimony should be accepted in its entirety and given considerable weight as he has nothing to gain from having testified in the proceedings. His longstanding professional training as a geologist, obvious passion for fly fishing and meticulous record keeping of fish counts on Gold Creek lend enormous weight to his evidence.

17. Benga has committed to working with the Department of Oceans and Fisheries to remediate the degraded aquatic habitat of Gold Creek, but regardless how the coal spill occurred in 2015 – whether due to drilling or to a heavy rainfall, or both – one is left to wonder why, in the meantime, Benga has not taken measures to restore the creek habitat. The MCNP has been a longstanding fly fishing destination and Benga’s failure to offset the damage precipitated by the coal spill of July 17, 2015 contradicts its characterization of itself as a responsible corporate citizen. 11 CIAR# 962, clause 377

18. Since the 2015 coal spill in Gold Creek and the filing of its *Summary of a Project Description of a Designated Project* with the Canadian Environmental Assessment Agency, Benga has focused instead on collecting and calibrating data and in designing models to bolster its case for regulatory approval of the Grassy Mountain Coal Project (hereinafter referred to as the Project).

B.2 Precautionary Principle, Monitoring and Morton v. Minister

19. Benga, in its Final Argument and through the testimony of Gary Houston during the hearing, has made many, many commitments respecting water management and conservation. In clauses 323, 326 and 327 of its Final Argument Mr. Houston’s testimony during his opening statement is reproduced as follows:

“Benga will use the natural steep topography of the north RDA...to facilitate capture of contact water that percolates through the rock dump. Once captured, contact water will be collected in one of the surge ponds.” “Benga has committed to maximize in pit storage of waste rock...”; “Benga has committed to monitoring groundwater down gradient from the RDA’s...to detect if there is significant seepage through the groundwater”. And at paragraph 348 the proponent states: “Benga recognizes that water concerns will continue after mine closure and has committed to ensure long term continued monitoring and appropriate treatment until the site is self-sustaining.”

12 CIAR# 962

20. In assessing Benga's evidence and its innumerable commitments respecting water management and conservation - and in particular, mitigation of selenium and other toxic substances - the Joint Review Panel, it is respectfully submitted, is required to apply the precautionary principle as it was enunciated by the Supreme Court of Canada in Castanguay Blasting Ltd. v. Ontario (Environment) ¹³

“This emerging international law principle recognizes that since there are inherent limits in being able to determine and predict environmental impacts with scientific certainty, environmental policies must anticipate and prevent environmental degradation.” ¹³ {2013} 3 SCR 323, clause 20

21. It is impossible to predict with scientific certainty how the South Saskatchewan River watershed - which sustains millions of hectares of land, wildlife habitat and tens of thousands of people downstream - will be impacted by the open pit mining proposed by Benga. Benga has no track record in metallurgical mining in the Canadian Rockies and its commitments are fraught with uncertainty such that it would be contrary to the precautionary principle to rely upon such commitments for the imposition of conditions to ensure compliance with environmental protection legislation.

22. As stated in my hearing submission ¹² and presentation ¹³, the risks of the Project outweigh its benefits. A more comprehensive discussion of the qualitative cost/benefit analysis as it pertains to the socioeconomic impacts upon the MCNP will follow. As far as water management and conservation is concerned, it is respectfully submitted that the Joint Review Panel must be mindful of the eventual burden that will be borne by taxpayers as a result of the imposition upon Benga of monitoring conditions pertaining to water management and aquatic habitat. The delegation of such monitoring by the Department of Fisheries and Oceans to Benga has been held by the Federal Court in its decision Morton et. al. v. Minister of Fisheries and Oceans to be unlawful. ¹² CIAR# 540; ¹³ CIAR# 793, pdf p. 37; ¹⁴ 2015 FC 575

23. The Federal Court in Morton reviewed the conditions that the Minister imposed upon Marine Hatchery - a fish farm located near Port Hardy, BC - when issuing the company a licence that permitted it to transfer fish or smolts from its fish hatchery to its fish farm. The court held that the Minister's delegation to Marine Hatchery of its duty under Fisheries regulations to monitor the fish for disease was tantamount to an abdication of the Minister's supervisory responsibilities in its oversight of the aquaculture industry. ¹⁵ 2015 FC 575

24. The court also found that the conditions imposed by the Minister upon the fish farm were unreasonable because the Minister failed to comply with the precautionary principle. To justify the transfer of infected smolts from the hatchery to the farm, the Minister unsuccessfully relied upon the argument that the scientific community had not yet determined with any degree of certainty that fish infected with viruses other than piscine reovirus (PRV) would develop an infectious disease known as heart and muscle skeletal inflammation (HMSI). The lack of scientific uncertainty, the court held, should not be relied upon to avoid or postpone environmental protective measures. ¹⁶, 2015 FC 575

25. Should Benga's Project application be approved, it would be only a matter of time before the conditions imposed respecting the monitoring by Benga of Westslope Cutthroat trout in Gold Creek would become the subject of judicial review. In the same vein as the Federal Court in the Morton case held that delegation of monitoring of smolts amounted to an abdication of DFO responsibilities, so too would the imposition of conditions to monitor numbers and health of Westslope Cutthroat trout in Gold Creek constitute an unlawful delegation of federal executive authority.

26. Expenditures at the federal and provincial levels of government for the administration of justice to uphold the Rule of Law in Canada (which yields us the distinction of being one of the most desirable nations on the planet in which to conduct business) must not be squandered, and in particular when government budgets are already strained by the impacts of climate change and the coronavirus pandemic.

27. Any argument advanced that it is also costly for the government to monitor the Crowsnest River and its tributaries, (rather than to delegate the task to Benga,) inexorably leads to the conclusion that Benga's application must be dismissed. Scarce resources of the DFO for monitoring must be channeled to comply with the Morton decision and to oversee the aquaculture industry which feeds millions of Canadians, and not for the monitoring of Westslope Cutthroat trout in Gold Creek that are likely to be further threatened by the Project.

B.3 Water Allocations, Licences and the *South Saskatchewan Regional Plan*

28. The mandate of the AER under section 2(b) of the *Responsible Energy Development Act* is to “[t]o regulate the disposition and management of public lands, the protection of the environment and the conservation and management of water, including the wise allocation and use of water.” (my emphasis). 17 S.A. 2012 c R-17.3

29. This authority respecting water conservation and management aligns with the purposes of the Water Act. Under section 4.1 of the Water Act the Minister “...must act in accordance with any applicable ALSA regional plan.” which in this instance is the *South Saskatchewan Regional Plan* or SSRP.

18 RSA 2000, c W-3

30. Benga in its Final Argument acknowledges the governance of the SSRP over its application for approval of the Project but has misinterpreted the prioritization of metallurgical mine development within the region. The SSRP - in the public interest - identifies the agricultural industry as “...the number one renewable and sustainable resource in the South Saskatchewan region...” 19 South Saskatchewan Regional Plan. p. 11

31. Metallurgical open pit mining in the headwaters of the South Saskatchewan River basin is inimical to the thriving agricultural industry downstream, the safeguarding of which the SSRP has identified as a priority in balancing, in the public interest, the

multiple competing land uses in the region. In summarizing the opening statements of participants in its Final Argument, Benga acknowledges that the Oldman Watershed Council expressed concerns about the “Project being located in a headwaters area that is already under multiple pressures and that the Project would add to those pressures”.²⁰ CIAR# 962 pdf. p. 30

32. When cross-examined about the amount of water that Benga foresees having to apply to roads to suppress dust, Mr. Houston concedes “...that is actually, you know, not an insignificant use of water.”²¹ CIAR# 876, pdf. p. 168

33. The source of water that would be used for dust suppression, was confirmed by Mr. Houston to be derived from the raw water pond.²² The raw water pond was also stated by Mr. Houston to be the source of water for cleaning the coal in the coal processing plant.²³ ²² CIAR# 928 pdf p. 99; ²³ CIAR# 876 pdf p. 168

34. When questioned by Hearing Commissioner Mr. O’Gorman about dust suppression and water demand, Mr. Houston stated that Benga foresees using 60 million liters of water for road dust watering.²⁴ Mr. Houston also confirmed that the raw water pond contains untreated water derived from excavating the mine pit.²⁵ Accordingly, the water from that source will contain selenium that may leach into the ground, potentially contaminating the groundwater and when pooling into gullies will pose a risk for wildlife.²⁴ CIAR# 931, pdf p. 202; ²⁵ CIAR# 931, pdf p. 203

35. Apart from maintaining sufficient snow cover on roads during the winter months, Benga has not proposed any other method for dust suppression other than applying copious amounts of untreated, contaminated water derived from the raw water pond onto the roadways within the LSA. While suppression of dust on the mine site is critical, particularly in an area with frequent high velocity winds, the application of water to roadways in a region that is already under multiple stresses, is not a wise allocation and use of water and is in contravention of the AER’s mandate to conserve and manage water.

Inasmuch as Benga is not able to suppress dust other than to apply copious amounts of water onto the roadways within the LSA, the Project, it is respectfully submitted, poses unsurmountable environmental challenges and is not in the public interest.

36. Benga has applied for approval of a transfer of the water licence to York Creek from the MCNP.²⁶ The application states that the quantity of water to be transferred will be 203 acre-feet annually. In its Application Form, under “Proposed Licence Information”, Benga provides the following details for the purpose of the application: “Coal Mine recontouring, coal washing and mine operations”.²⁷

When questioned about the need for this transfer of water allocation, Mr. Houston stated “So Ms. Janusz, we won’t be taking any water from York Creek. We are using that licence because we will be using water – or taking water from the watershed at the mine.”²⁶ CIAR# 42, Appendix 1E pdf. pp. 78-81; ²⁷ CIAR# 42, Appendix 1E, pdf p.81; ²⁸ CIAR# 928, pdf. p. 101

37. In its Application Form for Transfer of Water Allocation for York Creek, Benga has requested that “The 10% holdback not be taken in this transfer because the

entire allocation is being moved downstream a considerable distance and there will be no impacts on downstream users and no impacts to the environment.”²⁹

The request to waive the 10% holdback is contrary to the public interest as the Oldman River watershed is already over allocated and the purpose of the holdback provision under the Water Act is to enable the Minister to “...restore water to stressed water basins...”.³⁰

²⁹ CIAR# 42, Appendix 1E, pdf p.81; ³⁰ Seventy-five years of Alberta Water Law; Maturity, Demise and Rebirth, David R. Percy, Alberta Law Review, Vol. XXXV, No. 1, 1996, pp. 239, 241

38. The rationale given for waiver of the 10% holdback - that “there will be no impacts on downstream users and no impacts to the environment” - has not been established by Benga in either its EIA nor in any evidence lead during the hearing.

39. When asked about whether the acquisition of water licences would render Riversdale Resources more attractive to investors, Mr. Houston dodged the question by stating, “...we have regulatory requirement to have water licences to match the water use that is expected at the project.”³¹ CIAR# 928, pdf. p. 102, l. 11

40. That Benga is governed by corporate social obligation and pays only lip service to corporate social responsibility³⁰ is borne out in its Final Argument when addressing the issue of the quality of the coal on Grassy Mountain and the financial viability of the Project. In paragraph 124,³² Benga acknowledges that it is accountable first and foremost to its shareholders whose paramount concern is the maximization of profits which are indeed contingent upon water licence acquisitions matching water use.

³² CIAR# 928, pdf p.120; ³³ CIAR# 962, pdf p. 37

41. When questioned by Panel Member O’Gorman about recycling water, Benga witness, Mr. McCoy confirmed that the water demand, after incorporation of the coarse reject centrifuge into the coal processing plant, would decrease from 110 metres of raw metric tonne to a value of 57. This projected decrease in water allocation for cleaning coal was an estimate only and there was no clear evidence lead as to how Benga arrived at this figure.³⁴ CIAR# 881, pdf p. 12

42. Given Benga’s assurances that it intends to recycle water in the coal processing plant, its motives for applying for diversion of 203 acre feet annually of water from York Creek remain highly suspect.;³⁵ CIAR# 928, pdf p. 102

43. Cross-examination of Mr. Houston about water licences held by Benga attracting investors proved to be prescient as within days the Dow Jones announced that it would be trading water futures as a commodity.³⁶ E360 Digest December 9, 2020, Yale School of Environment 360, “Wall Street begins Trading Water Futures as a Commodity”

44. Hearing Commissioner O’Gorman also asked about the method that would be employed “...to ensure that the release of water from [the] site is the correct volume or flow rate needed to satisfy that water return.” Mr. Houston answered as follows:

“I don’t think we’ve finalized how we’re going to monitor the flow rates...out of the various ponds.”

Mr. Houston then suggested two methods for measuring how much water is released into creeks and the Crowsnest River to restore flows to critical thresholds to sustain aquatic life; namely, by constructing a weir to gauge flow rates and secondly, through level metering on the pond from which the water is released. 37 CIAR# 881, Pdf p. 57

45. The fact that Benga has not finalized the method by which it will monitor flow rates to satisfy water returns speaks volumes about its cavalier attitude about water consumption. When questioned about the MCNP not having installed water meters, Mr. Houston admitted that he didn't know that the Municipality continues to charge residents a flat rate for water consumption. Mr. Houston also conceded that water metering is employed to conserve water and to determine the sources of usage 38, but when asked about the role that Benga could play in the MCNP adopting a water metering program, he stated that he didn't think that that was Benga's role. 38 CIAR #876, pdf pp. 178-179; 39 CIAR #876, pdf pp. 181-182

46. Despite the fact that Benga will be drawing water from the same watershed as the MCNP, has negotiated a transfer of the MCNP's water licence to York Creek, and is relying on the MCNP's endorsement of the Project, it is indifferent to the MCNP not having installed water meters as a measure to conserve water.

47. The application for transfer of water allocation to York Creek, accordingly should be denied and York Creek should remain unallocated. Under section 35(3) of the Water Act the Minister "...may by order reserve water that is not currently allocated under a certificate or registration. 40 RSA 2000, c W-3

C. Vegetation – Planting 60,000 plus Whitebark Pine seedlings

48. Benga has committed to planting over 60,000 Whitebark pine seedlings to compensate for the logging of over 21,000 Whitebark pine in the LSA. 41 CIAR# 360 Addendum 12, pdf p. 101

49. The feasibility of this recovery strategy was raised by Kirk Lambrecht, Joint Review Panel Secretariat Counsel. On pdf p. 45, at line 17, Mr. Lambrecht reads from Addendum 12 of Benga's EIA:

"The project will have a positive contribution for whitebark pine with the establishment of disease resistant trees on the reclaimed landscape...".

On line 22, Mr. Lambrecht then asked the proponent, "This appears to express a high degree of confidence...that disease-resistant trees can be planted at a 3:1 ratio... and I'd really like to ask what the level of your confidence in this prediction is. Are you confident that Benga can obtain sufficient seedlings that are disease resistant, and that those seedlings will take and will eventually mature into a forest of some 63,000 trees? And if so, what is the source of that confidence?" 42 CIAR# 842, pdf pp. 45-46

50. Benga witness, Mr. Bartlett responded by stating that Benga intends to rely upon provincial and federal recovery strategies for the planting of whitebark pine seedlings but he did not answer Mr. Lambrecht's question respecting the source of Benga's expressed level of confidence. 43 CIAR# 842, pdf pp. 46-47

51. Indeed, no evidence was lead by Benga to substantiate the likelihood that the provincial and federal recovery strategies for the planting of 60,000 whitebark pine seedlings would be successful. The strategies to mitigate Benga’s clearing and deforestation of Grassy Mountain, accordingly, are not “...environmental policies that anticipate and prevent environmental degradation...” and are contrary to the precautionary principle, as enunciated by the SCC in Castenguay Blasting Ltd. v. Ontario (Environment).⁴⁴

The planting of whitebark pine seedlings on the wind ravaged slopes of Grassy Mountain during progressive reclamation (which Benga has committed to initiating in year 2 of the Project)⁴⁵, and thereafter to reclaim the LSA to an ecosystem that will once again sustain flora and fauna would be, in my respectful submission, nothing more than a scientific experiment. ⁴⁴ {2013} 3 SCR 323, clause 20; 45 CIAR# 962, pdf pp.68-69

52. It is also respectfully submitted that, throughout the hearing, cross-examination of Benga’s witnesses proved to be difficult. Many of the witnesses were evasive in their answers, leading one to draw the conclusion that the witnesses had been coached beforehand to avoid answering questions in a forthright manner if it could damage Benga’s case. To acknowledge scientific uncertainties (or lack of confidence) when answering questions would, of course, trigger the application of the precautionary principle and cast doubt on Benga’s commitments and capacity to mitigate environmental degradation. It is also instructive that the precautionary principle was never once mentioned in Benga’s Final Argument.

D. GHG’s, Terms of Reference and the Paris Agreement

53. While the logging of tens of thousands of Whitebark pine and clearing the land of vegetation will release tons of sequestered carbon into the atmosphere, Benga has committed to persuading CP Rail and the marine terminal to adopt measures to reduce their GHG emissions. The feasibility of this commitment was raised by myself during cross-examination of Mr. Houston.

“For instance in your opening statement: (as read)
Benga will pursue additional greenhouse gas reductions associated with rail and marine transport by requesting Canadian Pacific Railway to dedicate its lowest emitting units to the project and encouraging the marine contractor to use large fuel-efficient vehicles. Are you serious? Are you really going to be doing that?”

Mr. Houston replied as follows: “So we don’t control Canadian Pacific Railway. We can’t...tell them what to do or how to run their operation but we can suggest to them, you know, ways that they can align with our aspirations for greenhouse gas emissions.”

⁴⁶ CIAR# 928, pdf. p. 122, line 5; line 20

54. Under Part II of the Terms of Reference, the Joint Review Panel is mandated to take into consideration “[a]ll incremental air pollutants and greenhouse gas emissions that are directly attributable to the Project, including rail to the west coast of BC and marine emissions within Canadian territorial waters...”. Benga has estimated its

contribution of GGH's to national and provincial 2013 totals to be negligible - .05% and .14% respectively. 47

It is virtually impossible to predict the Project's contribution to national and provincial totals over the life span of the mine, particularly when the clearing and deforestation of the LSA and the carbon footprint of the influx of workers and construction of the work camp and mine are taken into consideration. To its credit Benga has stated in its Final Argument that it has developed thus far only a draft GHG management plan. 47 CIAR# 962, pdf, p. 119; 48 CIAR# 962, pdf, p. 118

55. The clauses under the Terms of Reference mandating that the Joint Review Panel take into account the Project's air pollutants and GHG emissions are rooted in Canada's commitment under the Paris Agreement to substantially reduce its emissions by 2030. It is anticipated that the Paris Agreement will be a significant factor in the Supreme Court of Canada's pending consideration of the Alberta, Saskatchewan and Ontario reference cases relating to the constitutionality of Ottawa's imposition of a carbon tax on the said provinces.

56. The Honorable Jonathan Wilkinson, Minister of the Environment has been quoted in the mainstream media as harboring the belief that Canada and the world has passed a tipping point on climate change. To reach its GHG reduction goals by 2030, Ottawa will progressively increase the carbon tax over the next 9 years. Should the SCC rule in favour of the federal government in the upcoming reference case, the reinstatement of a carbon tax in Alberta will have serious ramifications for Benga's construction designs and mining operations. And the CPR and marine transport operator will have their own challenges aligning their operations to the new reality of incremental increases in a carbon tax. 49 National Observer, December 17, 2020

E. Socio-Economic Issues

E.1 The MCNP's Endorsement of The Project

57. "Should this project be approved an unseemly precedent may be set for other small rural communities struggling with debt to endorse industrial projects even while they may be violating their duties under the *Municipal Government Act* 50 to provide good government under s. 3(a), under s. 3(a.1) to foster the wellbeing of the environment and s. 3(c)... to develop and maintain safe and viable communities." 50 Municipal Government Act, RSA 2000, c. M-26; 51 CIAR# 793, pdf, p. 41

58. The MCNP has a statutory duty to its residents to address the numerous environmental impacts that the Project will precipitate – dust and air pollutants, noise and light pollution, and upon its water resource. Although residents from neighbouring communities in the MD's of Ranchland and Pincher Creek expressed concerns about the harmful environmental effects associated with mountaintop removal mining, the impacts will be borne predominantly by the MCNP.

59. No one from the MCNP testified to substantiate its endorsement of the Project or any of the conditions recommended in its Hearing Submission to mitigate the negative impacts of the Project. ⁵² The MCNP's failure to participate in the hearing gives the unseemly impression that it has abdicated its responsibility to its citizens and is relying upon Benga to chart the community's future.

60. It is also respectfully submitted, that the MCNP's absence from the hearing is in and of itself a violation of its duties under ss. 3(a), (a.1) and (c) of the *Municipal Government Act*. The MCNP's filing of a Hearing Submission, without more, ⁵² raises questions about Benga's reliance upon the MCNP's endorsement of the Project, ⁵³ and casts serious doubt about the Project being in the public interest.

⁵² CIAR# 545; ⁵³ CIAR# 756, pdf, p. 446.

61. In advocating for the ostensible socio-economic benefits of the Project, Benga, in its Final Argument, ⁵⁴ relies upon a survey conducted by the MCNP and produced as evidence by the Crowsnest Conservation Society. ⁵⁵ The survey has no evidentiary value and should be rejected altogether. The Crowsnest Conservation Society did not lead any evidence as to the methodology that was employed in conducting the survey. The MCNP did not testify as to the methodology employed in formulating the survey either, nor was the survey mentioned in their Hearing Submission.

In order for Benga to rely upon the survey to support its case that the Project will benefit the MCNP socio-economically, Benga should have called evidence respecting its methodology and provided an opportunity for participants adverse in interest to cross-examine the individual who formulated the survey. ⁵⁴ CIAR# 962 at clause 116; ⁵⁵ CIAR# 765, pdf, p. 5

62. The question, "How would you like to see the municipality balance our resource extraction industry with the tourism industry?" ⁵⁶ is biased, as it presupposes that a resource extraction industry has already been developed and is operating in the MCNP. The question also presupposes that such a balance is even possible. The survey question doesn't permit respondents to consider whether no extractive resource development is an option. It would have been preferable if the question had been prefaced with the question, "Would you like to see the municipality develop an extractive resource industry?" ⁵⁶ CIAR# 765, pdf, p. 5

E.2 Spurious Property Tax Benefits

63. The projected \$490,000 property tax gain that will accrue to the MCNP in exchange for the rail loadout being located across from the local hospital will be outweighed by the increased budgetary expenses that the MCNP will be forced to bear in accommodating the shift in its economic base from tourism to mining. ⁵⁷ CIAR# 540, pdf, p. 5

64. A likely budgetary ramification of the MCNP having endorsed the Project is a spike in the costs of its public sector insurance. ⁵⁸ There is a reasonable prospect that residents will have a claim in nuisance against Benga for noise, dust and other pollutants that will substantially reduce Blairmore and Frank residents' enjoyment of their property. By virtue of its endorsement of the Project and failure to even present evidence at the

hearing, the MCNP has potential exposure in liability and would likely be named as a defendant in the Statement of Claim issued with respect to such a lawsuit.

In its Final Argument, Benga has acknowledged its own exposure to a lawsuit in nuisance owing to residents' diminished enjoyment of their property by the environmental impacts of dust, noise, air and light pollution.⁵⁹ 58 CIAR# 540, pdf. p. 6 ; 59 CIAR# 962, pdf. p. 46

65. Commencing a lawsuit in nuisance to address the deleterious environmental impacts of the Project is, of course, a drastic measure of last resort. There was much discussion about the formation of a Socio-Economic and Community Committee patterned after a similar organization founded in Sparwood to address citizens' concerns about coal dust and other negative impacts associated with the nearby Teck mines. ⁶⁰ Benga did not, however, lead any evidence about the effectiveness of such a committee in Sparwood to address citizens' concerns. The unbalanced power dynamics that exist between industry and citizens ⁶¹ can give rise to a dynamic known as group think and militate against such committees effectively addressing civic concerns over the negative impacts of mining operations.⁶²

⁶⁰ CIAR#793, pdf. pp. 33, 45-46; ⁶¹ CIAR# 540, pdf. pp. 25-26; ⁶² CIAR# 765, pdf. p. 45

66. A shift in focus to a resource extraction economy will place additional strain upon the MCNP's support services and infrastructure, such as water treatment facilities and roads. A spike in population will result in increased demand for municipal support services such as:

- a. issuance of permits for housing development and related inspections,
- b. snow removal
- c. garbage collection
- d. road maintenance
- e. weed control
- f. other by-law enforcement.

To ensure adequate delivery of these services the municipality will have little choice but to hire additional staff. ⁶³

As these additional expenses mount, the land upon which the offload facility will be situated will not yet be assessed or taxed for improvements, as the mine will still be under construction. Despite the MCNP's endorsement of the Project, it is clearly not in Crowsnest residents' public interest. ⁶³ CIAR# 793, pdf. p. 37

E.3 Challenges Inherent in Coexistence of Tourism with Mining

67. Apart from the increased taxes that the MCNP is projected to gain from the rail load out being located within the MCNP, Benga has lauded the potential of the Project to create good paying jobs and an influx of workers to the area. Contrary to the testimony of Fred Bradley which largely focused on the MCNP having an aging population, ⁶⁴ younger families have been choosing to relocate to the area to take advantage of its amenities – fresh air, clean water, ample recreational opportunities, scenery, the quiet, good schools and more. Some of these amenity migrants have started businesses geared toward the tourism sector that has been steadily growing in the MCNP in recent years. ⁶⁵

⁶⁴ CIAR# 756, pdf. p. 565; ⁶⁵ CIAR# 786 at 1485-1489

68. Benga has itself acknowledged that the MCNP is already a desirable community, but there is a serious risk that the tourism sector will be crowded out by the Project.

Also, “[a] key source of contention between the sectors is the degradation that the resource extraction can inflict upon sensitive cultural or environmental tourism products.”

66 CIAR# 962, pdf. p. 32; 67 CIAR# 793, pdf p. 22

69. The MCNP was once a fly fishing destination but after the coal spill on Grassy Mountain on July 17, 2015 and plummeting fish counts in Gold Creek, the area has lost its coveted reputation. Prior to the spill, Gold Creek was considered by fly fishermen to be a gem. The negative environmental impacts of dust, air, light and noise pollution that Benga has committed to mitigate will drive tourists elsewhere because the MCNP’s environmental tourism products will have become degraded. 68 CIAR# 903, pdf p. 237

70. A study⁶⁹ that examined the coexistence of mining and tourism in two communities in Australia – Roma and Gladstone - relied upon a survey of residents and community leaders to firstly assess respondents’ opinions respecting the impacts to their respective communities and secondly, to extrapolate synergies that might facilitate the overcoming of challenges experienced by the two sectors’ coexistence.

“The third objective of the study was to develop a strategic framework to overcome the obstacles for the two sectors to coexist.” The study’s authors’ key recommendation in overcoming the obstacles was to build trust between the two sectors, which can take a long time. “Many, many years. It takes hard work and patience.”⁷⁰

⁶⁹ “The co-existence of tourism and mining: a strategic framework for cross-sectoral interaction”, by Brent Boyle, Alexandra Bec and Char-Lee Boyle, 2017 *Current Issues in Tourism* at CIAR# 540 pdf. p. 10 ; ⁷⁰ CIAR# 793, pdf pp. 31-32

71. Good leadership, time and patience are prerequisites for overcoming the obstacles and challenges inherent in the coexistence of the two sectors of mining and tourism. The MCNP’s failure to even participate in the hearing does not bode well for the area’s tourism industry should the Project be approved.

E.4 Aesthetics

72. Benga, in its Final Argument, has acknowledged that aesthetically, the placement of the rail loadout across from the hospital will compromise the natural beauty of the MCNP that attracts tourists and is the foundation for its tourism industry. ⁷¹ In addressing the concerns of witnesses who testified about the aesthetical impacts of the Project, Benga argues that these concerns must be considered in the context of progressive reclamation beginning in year 2 after coal production commences. Progressive reclamation, however, is planned for the mine site which is located 7 kilometers from the highway and, accordingly, the rail loadout will remain an eyesore that will discourage tourists from recreating in the MCNP. ⁷¹ CIAR# 962, pdf. p. 52

E.5 Housing

73. Lack of affordable housing is another and often the most serious challenge that can arise from an existing tourism sector competing with a developing extractive resource sector. ⁷² Not only will Alberta families be excluded from vacationing in the MCNP which has traditionally been an affordable tourist destination, but residents employed in the tourism sector, such as restaurant servers, cooks, hotel housekeeping staff, and outfitting and tour guides will struggle to find affordable housing.

⁷² CIAR# 793, pdf. p. 27

74. When cross-examining Mr. Houston about the challenges confronting mine workers in Gladstone, Australia where the lack of affordable housing resulted in a shortage of daycare workers and childcare for employees of Rio Tinto, ⁷³ Mr. Houston responded that perhaps some of the wives of Benga employees would choose to work in daycares.; ⁷³ CIAR# 540, pdf. p. ⁷⁴ CIAR# 771, pdf pp. 192-193

E.6 Labour and Occupational Health and Safety

75. “At a macro-economic level, research indicates that a resources sector boom can often result in Dutch Disease, a term coined to describe the adverse impacts a boom sector can have on other industries. Previous studies suggest that a resources sector boom can result in a high exchange rate and strong competition for labour which, in turn, crowds out other industries such as tourism.”⁷⁵

In clause 118 of Benga’s Final Argument, Benga asserts that it “...has policies in place to hire locally and to use regionally based contractors...”. ⁷⁶ The boom that Benga is forecasting for the region could give rise to Dutch Disease, which, in turn would precipitate strong competition for labour and crowd out the MCNP’s tourism industry.

⁷⁵ CIAR# 793, pdf. p. 24 ; ⁷⁶ CIAR# 962

76. In clause 118 Benga also commits to “...offer[ing] increased contracting opportunities for local Indigenous businesses and employment opportunities for local Indigenous workers.” ⁷⁷ Despite assurances on the part of Benga to provide employment opportunities for indigenous workers and contractors, Benga has not finalized a strategy to fulfill this commitment. Kirk Lambrecht posed questions respecting a follow-up plan by Benga tracking the numbers of First Nations workers and contractors that are projected to become a component of the Benga workforce. Unfortunately, Mr. Houston did not directly answer his question. ⁷⁸ ⁷⁷ CIAR# 962; ⁷⁸ CIAR# 771, pdf. pp. 230-239

77. When cross-examining Benga regarding the lack of diversity in the MCNP’s population, Benga conceded that it hadn’t considered the need for the development of an anti-bullying policy. ⁷⁹ CIAR# 771, pdf. pp. 186-188

78. Under section 35 of *The Occupational Health and Safety Act*, ⁸⁰ employers are required to ensure that workers are not subjected to discriminatory treatment. Under s. 36 of the Act an employee that has been subjected to discrimination in the workplace has the right to make a complaint to an Occupational Health and Safety officer.

At common law, employers are bound to provide a safe work environment and with recent awareness of how psychological harassment can negatively affect an employee's mental health, the concept of a safe work environment has expanded beyond physical safety to include workers feeling psychologically in their workplace. 79 SA 2017, c. O-2.1;

79. It is laudable that Benga intends to hire indigenous workers and to retain the services of indigenous contractors but in a slack labour market, and in a region that lacks the diversity of larger urban centres, it is shortsighted to not have contemplated the need to develop a workplace anti-bullying policy.

E.7 Justifiability under the Terms of Reference

80. Under the Terms of Reference, for purposes of the review under the CEAA, the Joint Review Panel is precluded from making any conclusions with respect to the justifiability of any significant environmental impacts. Historically, socio-economic impacts were considered to be benefits in extractive resource applications and as justification for the negative environmental impacts of projects such as the one herein under consideration. With the luxury of hindsight respecting the human toll, particularly upon First Nations, that boom bust extractive industries can precipitate upon communities, it may be wise and prudent to expand the application of the precautionary principle beyond environmental impacts to encompass socio-economic impacts.

81 Terms of Reference, Part II

81. When Kirk Lambrecht asked whether the socio-economic effects of the Project would be positive or negative, Mr. Houston conceded that the projected effects are mixed; that the Project might provide economic opportunities for First Nations, but that their traditional way of life will be negatively impacted inasmuch as the region is of spiritual significance for many First Nations and degradation of the landscape is not consistent with indigenous traditional values. 82 CIAR# 771, pdf. pp. 231-232

F. Mine Closure & Risk, BYG and Redwater Decisions

82. Despite Benga's assurances that the visual impacts of the Project will be temporary, 82 the best case scenario following mine closure is that Benga will have fulfilled its reclamation commitments and that Grassy Mountain will become a manufactured landscape. All the photos of reclaimed mine sites in Alberta that Benga witness, Mr. McCoy beamed onto the screen cannot detract from the fact that should the Project be approved, Grassy Mountain will no longer be a natural environment. Indeed, Benga's footprint on the landscape has already coincidentally resulted in Gold Creek no longer sustaining the number of fish that Mr. Rennie so painstakingly recorded prior to the coal spill of July 17, 2015. 83 82 CIAR# 962, pdf. p. 52; 83 CIAR# 903, pdf p. 237

83. The worst case scenario is that Grassy Mountain will be cleared of vegetation and deforested, the mine will be constructed, but after a few years of production, operations will cease to be profitable and the Project will be abandoned.

84. In Yukon v. BYG Natural Resources Inc.⁸⁴, the Yukon Supreme Court considered, and granted an application brought by the receivers, Price Waterhouse Coopers Inc. for an Order approving its Proposal Solicitation Procedure for the solicitation of proposals from qualified parties for the acquisition of the remaining assets of BYG and remediation of the mining property that BYG abandoned in the Mount Nansen area of the Yukon territory. The Proposal Solicitation Procedure was developed in consultation with the Government of Canada and Little Salmon Carmacks First Nation.

⁸⁴ 2017 YKSC 2

85. From November 1997, when BYG mine production commenced, until abandonment in 1999, operations were suspended on several occasions because of “blatant breaches of the terms of the company’s water licence”.⁸⁵

On May 19, 1999 BYG was convicted on three counts of violations under the *Waters Act* and fined the maximum penalty of \$100,000 for each count. The blatant breaches of the terms of the water licences and particulars of the offences were as follows: zinc concentrations in the tailings pond four times the permitted limit; failure to file with Water Resources a chemical analysis report relating to tailings and tailings effluent; excessive concentrations of cyanide in the tailings ponds.⁸⁶ ^{85 & 86} *Ibid* at p. 7

86. In her Reasons for Judgement, Madam Justice R.S. Veale “...address[es] the environmental disaster following BYG’s abandonment of the BYG mine property and the financial consequences for the taxpayers of Canada”.⁸⁷ According to an environmental assessment conducted by an independent party following BYG’s abandonment of the mine, the site contains “...55,000 cubic meters of contaminated soil, 300,000 cubic meters of tailings and 500,000 cubic meters of waste rock...” that require attention. At the date of the application, the Government of Canada had already, at taxpayers’ expense, spent over \$25,000,000 on “site control and environmental protection measures”.⁸⁸ ⁸⁷ *Ibid* at p. 1 ⁸⁸ *Ibid* at p. 6

87. Madam Justice Veale concludes her judgement with a warning. “Although it is fair to say that there have been substantial changes to the mining approval and monitoring regime since BYG was granted the right to operate in the Territory in the late 1990’s, this case stands as a painful reminder of the lasting and egregious damage that unscrupulous and unchecked profiteering can bring about in the mining sector.” “It is the hope of this court that this case will provide a valuable lesson to future governments of Yukon and Canada and the taxpayers who will pay the millions of dollars required to remediate the BYG mine property.”⁸⁹ *Ibid* pp. 9-10

88. Even though the BYG decision is not binding on the Joint Review Panel, nor upon any court in the Province of Alberta, it is persuasive and instructive on the risks that taxpayers at both the provincial and federal levels would be assuming should Benga’s application be approved.

89. The recent SCC Redwater decision,⁹⁰ however, which **is** binding on the Joint Review Panel, aligns with the warning issued by Madam Justice Veale in the BYG case. In Redwater, the SCC held that prior to any distribution by a trustee or receiver of the assets of an insolvent party to creditors, reclamation and abandonment liabilities must

first be settled. By ruling that the trustees of an insolvent extractive resource company must prioritize environmental liabilities ahead of creditors, the SCC enforced the supremacy of the “polluter-pay-principle”.

From a practical point of view, the Redwater decision has been a wakeup call for industry and regulatory authorities that have consistently marginalized the environmental costs and concomitantly underestimated the reclamation liabilities associated with extractive resource projects to the detriment of the public and more importantly, future generations. 90 Orphan Well Association, et. al. v. Grant Thornton Limited, et. al. 2019 SCC 5

G. Conclusion – Not in the Public Interest

90. The innumerable commitments that Benga made during the hearing respecting monitoring - and in particular of air quality and water - would translate, if the Project is approved, into the imposition of many onerous conditions that ultimately increases the risk for failure and precipitation of the worst case scenario.

91. It is telling that Benga throughout the hearing and in its Final Argument has vigorously defended its position that the environmental impacts - revealed through the testimony of so many witnesses - are not significant. When a legislative body, such as Parliament enacts legislation such as the *Canadian Environmental Assessment Act* 91, the judiciary, tasked with interpreting statutory provisions, will refer to the subtitle and preamble of a statute for guidance. The subtitle of the *Canadian Environmental Assessment Act* reads as follows: An Act respecting the environmental assessment and the prevention of **significant** adverse environmental effects (my emphasis). 91 SC 2012, c. 19

92. There is a strong likelihood that the Project will precipitate significant environmental degradation upon the region’s water resources and natural habitat, and therefore, Benga’s application does not conform with the provisions and environmental protective objectives of the *Canadian Environmental Assessment Act*, and the *Environmental Protection and Enhancement Act*. 92

The aquatic life in Gold Creek has already been subjected to habitat degradation and is in serious decline. The Whitebark pine forest on Grassy Mountain that sustains insects, birds, bats and other wildlife will be eradicated.

The challenges inherent in the coexistence of tourism and an emerging mining industry in the MCNP are insurmountable given the lack of leadership and accountability of the MCNP’s council. And while the MCNP’s lack of participation in the hearing casts doubt on its endorsement of the Project, and the soundness of Benga’s reliance on such endorsement, the projected expenses associated with the MCNP’s accommodation of Benga’s vision for the community will likely outweigh the benefits. 92 RSA 2000, c. E-12

93. Benga’s assertion in its Final Argument, at clause 5, that the Project is in the public interest 91 has not been supported by the evidence lead at the hearing.

93 CIAR# 962, pdf. p. 8

94. Accordingly , I urge the Joint Review Panel to **dismiss** Benga’s applications, but in the event that the applications are granted, I request that the Joint Review Panel issue orders for reclamation security and the imposition of conditions as it deems necessary, and the inclusion of the following:

- a. Posting of a contingency bond to cover the costs of securing and remediating surface mine pits, waste rock disposal site(s) etc. by Alberta Emergency Management in the event of impairment of the same owing to an extreme weather event;
- b. Issuance of an order that Benga Mining Limited and its agents negotiate and enter into a Community Impact and Benefit Agreement with the Municipality of Crowsnest Pass governing the workforce influx associated with construction of the Project and establishment of a work camp as authorized by the Municipality of Crowsnest Pass amendment *Bylaw no. 1040, 2019, Land Use Bylaw Amendment, Work Camp Use and Regulation, Addition of use to Industrial (I-1) and Sentinel Industrial Park (SIP-1) Districts*.

The Community Impact and Benefit Agreement shall include a reclamation security clause requiring the posting of a bond by the proponent for decommissioning of the work camp and a clause stipulating that construction of the mine shall not commence until the work camp(s) is constructed and approved for occupancy.