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## **Closing Submissions of the Ktunaxa Nation Council**

### **Grassy Mountain Coal Project Joint Review Panel Hearing In the Matters of:**

*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, LOC970943 and the Impact Assessment Agency of Canada Reference No. 80101

**January 8, 2021**

*Takisqnuuk*

*Taqam*

*Lower Kootenay*

*Tobacco Plains*

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## A. Overview

1. The Ktunaxa Nation Council (the “KNC”) has participated in this Joint Review Panel (“JRP”) environmental assessment (“EA”) of the Grassy Mountain Coal Project (the “Project”) proposed by Benga Mining Limited (“Benga”), to ensure the JRP is informed of:

- a. the nature, scope and location of Ktunaxa aboriginal title and rights and traditional and cultural practices (collectively, “Ktunaxa Rights”) related to the Project and the Project area; and
- b. the environmental protection and management measures required to address and mitigate for potential adverse effects of the Project to Ktunaxa Rights and the environment generally.

2. The KNC does not, at this point in time, take any position on whether the Project is in the public interest or should be authorized to proceed by the Alberta Energy Regulator (the “AER”) or the Federal Minister of Environment. The KNC is engaging in ongoing, good-faith negotiations with Benga regarding the Project and the outcome of those negotiations, as well as the outcomes of the JRP process, will inform a decision by the KNC at a future date on the compatibility of the Project with Ktunaxa Rights and stewardship responsibilities over *ʔamakʔis Ktunaxa* (Ktunaxa territory). The KNC also respects and supports the Indigenous Nations who are signatories to Treaty No. 7 in making their respective determinations regarding the Project.

3. The central point the KNC emphasizes through these submissions is the need for the JRP to ensure that Project mitigation measures and management plans are *clear, timely, precautionary and adaptive*. The KNC has extensive experience with the

environmental legacy of coal mining in the Elk Valley in southeastern British Columbia. The KNC has learned from that experience that effective mitigation and management plans must be based on reliable data, and incorporate clear triggers and thresholds as well as concrete responsive measures and defined timelines. Benga’s application does not fully meet these criteria in several areas, and the KNC urges the JRP to ensure that these gaps are filled prior to the Project beginning construction, if approved.

## **B. Ktunaxa Rights and Project Impacts**

4. The KNC represents the Ktunaxa Nation, an “aboriginal peoples” within the meaning of section 35 of the *Constitution Act, 1982*. The KNC is the Nation-level governance body of the Ktunaxa people mandated with, among other things, protecting and asserting Ktunaxa title, rights and interests within *ʔamakʔis Ktunaxa*. It represents four Ktunaxa communities in Canada, *ʔakisq̓nuk* First Nation, *ʔaq̓am*, Lower Kootenay and Tobacco Plains, as well as Ktunaxa citizens who reside outside those communities.

5. The Ktunaxa traditionally occupied a territory extending in the west to the Arrow Lakes, in the north to Yellowhead Mountain, in the east to the foothills of western Alberta, and to the south into what are now the states of Montana, Idaho and Washington. The Ktunaxa understanding of *ʔamakʔis Ktunaxa* continues to evolve as research is done regarding Ktunaxa history and traditional knowledge. The Ktunaxa have never signed a treaty with the Crown or otherwise ceded or surrendered Ktunaxa title and rights to *ʔamakʔis Ktunaxa*, including that part of Ktunaxa territory located in what is now called Alberta.

6. The Project is located in a part of *ʔamakʔis Ktunaxa* known as *qukin ʔamakʔis* (Raven’s Land). A report prepared by Dr. Craig Candler entitled “Ktunaxa Nation Rights and Interests in Relation to Benga Mining Limited’s Proposed Grassy Mountain Coal

Project” (January 28, 2019 - the “Candler Report”; [CIAR#564](#) PDF p. 10 - 52) summarizes past and current Ktunaxa use and occupation of the Project area, which evidence was further confirmed by Ray Warden, Ktunaxa citizen and KNC Lands and Resources Director in oral evidence on November 9, 2020. Key points of this evidence include:

- a. Ktunaxa people regularly used and occupied the Crowsnest Pass area in the pre and post-contact era. The closest Ktunaxa community at that time was located at *kaqawakanmituk*, also known as Michel Prairie to the west of Crowsnest Pass near present day Sparwood. Ktunaxa people used the pass for travel to seasonal bison hunts in the eastern foothills of the Rockies, hunting (sheep, deer, elk, goat), fishing (cutthroat trout and other species), harvesting minerals (coal and stones) and plants, and cultural purposes.
- b. The Ktunaxa have names for geographically and culturally significant locations in the Project area, including *qukin ʔakitʔaʔis* (Raven’s House or Crowsnest Mountain) and *Kuʔwiaʔki* (Crowsnest Lake), indicating the time depth of Ktunaxa use and occupation of the area. The Ktunaxa hold the headwaters of Crowsnest River to be especially sensitive and sacred, as it is considered the home of the creation-being Raven.
- c. A map at Figure 1 of the Candler Report depicts extensive Ktunaxa traditional use of the Crowsnest Pass area. A cultural site is identified as within the Project Local Study Area (“LSA”), with significant density of habitation, subsistence harvesting, cultural and travel sites located within 5 - 10 km to the west of the LSA boundary. As noted by Dr. Candler in his oral evidence, this map only depicts spatially specific traditional use data from a limited number of Ktunaxa people, and Ktunaxa use of and connection to the area is further evidenced by Ktunaxa oral history and place names related to the

Crowsnest Pass area ([Hearing Transcript Vol. 11 - Nov. 9 2020](#) at p. 2478 l. 11- 26).

- d. While Ktunaxa use and occupation of Crowsnest Pass was temporarily attenuated by the effects of colonization, including the decimation of bison herds, smallpox epidemics, forcible displacement from territorial lands and residential schools, the Ktunaxa continue to travel to and through the Project area to maintain the Ktunaxa connection to their territory and exercise Ktunaxa Rights.
7. The evidence establishes a credible risk of significant adverse impacts to Ktunaxa Rights at multiple levels. The intrusion of a major open pit coal mine into the sacred landscape of *qukin ʔamakʔis* will impair the ongoing Ktunaxa cultural and spiritual relationship to the area. As noted in the Candler Report, “the potential for negative changes to the viewscape and sensory environment ... associated with direct ... and incidental Project activities are a primary concern for Ktunaxa current and future use, and stewardship of the values associated with *qukin ʔakitʔaʔis*, *Kuʔwiaʔki*, and nearby areas with place-based cultural-spiritual practices” ([CIAR#564](#), PDF p. 24).
  8. The Project’s footprint and associated disturbance corridors will also impair habitat for species the Ktunaxa rely on for the exercise of spiritual, cultural and harvesting practices, including grizzly bear, bighorn sheep, mountain goat, elk and moose, and reduce Ktunaxa access to the area for the exercise of Ktunaxa harvesting rights. The Ktunaxa are also concerned that the Project will further reduce the habitat available to support future reintroduction of bison, a species that the Ktunaxa are working to restore to its historic range in *qukin ʔamakʔis*.

9. The Project’s effects on water and aquatic habitat are a major concern to the KNC. The EA has identified the mobilization of contaminants, in particular selenium, into local waterways as a primary Project impact to water. Contamination of water reduces Ktunaxa confidence in the safety of harvesting fish, resulting in further displacement of Ktunaxa Rights and cultural practices from the landscape. The Ktunaxa experience in the Elk Valley demonstrates that these impacts are real and significant. As per the Candler Report, “past Ktunaxa studies have shown that contamination [to water] and health concerns associated with upstream mining often result in a direct impact on Ktunaxa citizen’s confidence in wild food, and on Ktunaxa ability to confidently rely on preferred places and species [for harvesting]” ([CIAR#564](#), PDF p. 26).

10. The above submissions provide only a brief synopsis of the evidence provided by the KNC to the JRP illustrating Ktunaxa historic and continuing use and occupation of the Project area, and the potential Project-related impacts to Ktunaxa Rights. This evidence was not contested or substantially contradicted by Benga or any other party to the EA (Benga’s comments in Final Argument regarding the KNC’s oral evidence are addressed below). The KNC submits that, based on that evidence, the JRP’s report should identify the Ktunaxa Nation, as represented by the KNC, as an aboriginal community with “asserted or established aboriginal rights” in the Project area that will be adversely affected by the Project, as per the JRP’s Terms of Reference ([Agreement to Establish a JRP for the Grassy Mountain Coal Project \(Including Terms of Reference\)](#) TOR Part A - Aboriginal Rights).

### **C. Requested Mitigation Measures**

11. The KNC retained qualified professionals in water quality (Jesse Sinclair, senior aquatic biologist, LGL Limited), aquatic biology and fisheries management (Chris Burns, senior fisheries biologist, LGL Limited) and ecosystem and biodiversity management and

restoration (Marlene Machmer, Pandion Ecological Research) to review the Project environmental impact statement (“EIS”). The outcomes of their review were provided to the JRP through the following documents:

- a. Proposed Information Requests on the Sufficiency and Technical Merit of the Grassy Mountain Project’s Environmental Assessment, January 21, 2019 ([CIAR #178](#));
  - b. KNC Comments to the Grassy Mountain Coal Project - Eleventh Addendum, May 4, 2020 ([CIAR #345](#)); and
  - c. Grassy Mountain Coal Project Joint Review Panel - Written Submissions of the Ktunaxa Nation Council, September 25, 2020 ([CIAR#564](#)).
12. The KNC’s written evidence was supplemented by direct evidence given by the KNC witness panel on November 9, 2020.
13. The KNC review team identified several shortcomings in aspects of the Benga EIS, including:

*Water quality:*

The EIS relies on saturated backfill zones (“SBZs”) for treating selenium and nitrates. However, the EIS lacks the site-specific field trial data to establish a level of confidence in the SBZs capacity to manage those contaminants. Further details regarding water residence times, carbon dosing and other technical features are required. As noted by Mr. Sinclair at PDF p. 2419, l. 20 - 25 of the November 9 transcript, Benga is relying on the SBZs to achieve “highly effective selenium attenuation ... to prevent water quality effects”. Given the centrality of the SBZs to



the Project's mitigation plans, further technical validation is required before the Project is operational.

Benga's water quality contingency plan relies on active water treatment ("AWT"). While the KNC's experience in the Elk Valley indicates that AWT may assist in reducing water contamination from coal mining, the time required to build and operationalize AWT is longer than assumed by the EIS. This highlights the need for a proactive water quality management plan that defines clear triggers and adequate timelines for implementing AWT in a timely manner, if required.

A related concern is the need for defined water quality triggers, based on sound field data, to ensure proactive protection of aquatic resources. Mr. Sinclair highlighted sulphate contamination as a particular concern, noting that while the EIS projects sulphate concentrations will exceed water quality guidelines, it defers the preparation of a detailed sulphate water quality plan to a later date. The EIS takes a similar approach to calcite management, deferring the preparation of a detailed plan to a later date. Based on experience in the Elk Valley, Mr. Sinclair advised that preventing calcite deposition in the first place is more cost efficient and environmentally sensible than working to remove calcite once it has been deposited in the water.

#### *Fish and aquatic habitat*

The KNC evidence is that there is not sufficient baseline data to support the aquatic effects monitoring program ("AMP"). The fish and aquatic tissue baseline study does not identify the near-field, mid-field and far-field exposure sites essential to achieving the study objectives, and the sampling program did not include adequate locations and time periods. Mr. Burns expresses the concern that, without this data,

the AMP will lack a reliable baseline against which to measure future changes in the aquatic environment.

There is also still uncertainty regarding the efficacy of proposed fisheries offset measures, which include the creation of overwintering pool habitat. Mr. Burns noted overwintering pools are known to be dynamic, and fish recruitment to the pools is affected by many factors. In the absence of a more developed plan, there is the risk that the overwintering pools created under the offset program could “act as a sink and actually could result in increased overwintering mortality by trapping certain fish in the wrong type of environment” ([Hearing Transcript Vol. 11 - Nov. 9 2020](#) at p. 2431 l. 12- 17)

#### *Terrestrial habitat*

Ms. Machmer highlighted several concerns with the EIS regarding impacts to terrestrial habitat and species. The valued components (“VCs”) selected for the EIS do not adequately represent the full range of wildlife guilds in the LSA and omitted some species, such as small fur bearers, that were identified as valued by Indigenous Peoples. The assessment of impacts to rare plants relied on broad, landscape level eco-system classification, which overlooks the unique micro-site features relied on by many rare plant species. Rare plants were also pooled together for purposes of a significance assessment, which means that impacts to specific species - which may be more significant - may be overlooked. The EIS also failed to assess the value of the Project site as a key raptor migration corridor.

A significant concern is what Ms. Machmer characterized as the “overly optimistic” assessment of the likely timing and success of the proposed site reclamation plans ([Hearing Transcript Vol. 11 - Nov. 9 2020](#) at p. 2436 - 2439). The EIS under estimates

residual landscape and habitat effects by over estimating post-project habitat quality, quantity and distribution without adequate supporting evidence. The KNC's experience in the Elk Valley shows that post-mining restoration efforts are not fully succeeding, with limited success in a range of habitat areas including wetlands, montane grasslands, bushland or mature or old-growth forest. There is, in particular, no evidence to date of successful reclamation to fescue grasslands in any project, yet the EIS predicts full reclamation to equivalent or greater land capacity for this vegetation subgroup.

### *Cumulative effects*

Nicole Kapell, MA and KNC team lead for the Project and Dr. Candler both addressed cumulative effects. The KNC use the Ktunaxa cultural concept of *ʔa·kxamʔis qapi q̓apsin* (all living things) to guide their assessment of activities in *ʔamakʔis Ktunaxa*. This value has guided the KNC in its work with BC and other parties in developing a cumulative effects management plan for the Elk Valley. Given the proximity of the Project to the already ecologically compromised landscape of the Elk Valley and the eastern foothills, the KNC recommend the preparation of an Indigenous lead cumulative effects management strategy that could, in collaboration with governments and proponents, set the parameters for assessing and managing environmental effects on a regional level. In his evidence on November 9, Mr. Houston for Benga indicated that, while the company would like to know more about this concept, it is in principle open to supporting the initiative ([Hearing Transcript Vol. 11 - Nov. 9 2020](#) at p. 2396 l. 16 - 2397 l. 7).

The KNC also propose that the Project mitigation plans include the acquisition and/or protection of lands as an offset to the mine's disturbance footprint. These lands would serve both an environmental and cultural function by ensuring the

ongoing protection of, and Indigenous access to, intact lands that can, in part, mitigate for the long-term loss of the mine site. The KNC has experience with terrestrial offsetting programs in the Elk Valley, and is working collaboratively with industry and governments to manage protected lands in that area for both cultural and environmental values.

14. The KNC recognizes that the evidentiary phase of the JRP hearing process is concluded, and the JRP cannot now require further evidence to address the EIS deficiencies identified above. However, the JRP can still play the critically important role of ensuring (in the case of the AER) or recommending (in the case of the Minister of Environment) that any Project approvals include conditions that require Benga to prepare environmental management and mitigation plans for the Project that address the above deficiencies, *before* the Project begins construction and operation. The KNC's evidence identified several key elements and principles needed to achieve that objective:

- a. *Full Indigenous participation is required.* A common element running through the KNC's evidence is the need for the Project's plans to be further developed, finalized and implemented with the involvement and input of the KNC and other affected Indigenous Nations. The KNC understands from Mr. Houston's evidence of November 9 that Benga recognizes the importance of ongoing Indigenous participation, and the KNC asks the JRP to require full Indigenous participation in the further development of all Project management and mitigation plans.
- b. *Complete further baseline data collection.* The ability of a monitoring plan to detect changes in the environment depends, in part, on the baseline data it relies on. Benga should be required to fill the gaps in baseline data for the

aquatic effect, rare plant, wildlife diversity and regional habitat, aerial raptor, nocturnal owl and climate change studies before the Project begins construction, with the updated data incorporated into finalized management plans.

c. *Require clear, measurable thresholds for responsive management measures.*

One significant concern for the KNC is the current reliance on qualitative, rather than quantitative, descriptions of what future conditions will trigger Benga to take adaptive management measures. As noted by both Mr. Sinclair and Mr. Burns, the AMP should include clear, measurable exceedance thresholds that will trigger defined management responses. Similarly, the reclamation plan must identify clear timelines, restoration targets and thresholds that will trigger further measures if the ambitious reclamation objectives are not being achieved.

d. *Require adaptive management responses tied to clear management actions.*

Effective management plans need to be able to respond and adapt to new information as it develops. Of equal importance, to avoid undue delay in developing responses to new information, management plans should include specific future mitigation and management measures that will be implemented if triggering events occur. This will avoid environmental conditions worsening as time is spent figuring out how to respond to higher than anticipated contamination levels or other conditions.

e. *Recommend Alberta and Canada establish an Indigenous lead cumulative effects management and offsetting program.* Ideally, a valid regional cumulative effects assessment would occur before the Project is approved. However, given the existing and proposed development pressures in the

Project area, it is important that an Indigenous-lead cumulative effects process at least proceed in tandem with the development of the Project (if it is approved). This program could include further exploration of the option of terrestrial offsets, as discussed by the KNC witness panel.

15. In conclusion on this point, the KNC will briefly respond to Benga’s submissions at pages 64 - 65 of its Final Argument. Benga notes that the KNC did not file technical reports, and submits that the KNC should have presented its evidence regarding specific issues during the topic blocks for that issue, and not during the Indigenous land use session. With respect, Benga had notice that the KNC intended to present its evidence during the Indigenous land use session, as per the JRP’s procedural directive, and was provided through KNC submissions [CIAR #178](#), [CIAR #345](#) and [CIAR#564](#) with notice of the nature and content of the KNC’s concerns and evidence regarding the EIS. Benga was provided the opportunity to contest that evidence through cross-examination and, with the exception of one question asked by Mr. Brinker regarding terrestrial offsets, declined to do so. There has been no prejudice to Benga that would warrant the JRP failing to give the KNC’s evidence and submissions due consideration.

16. Benga notes at paragraph 241 that the KNC “cannot expect the same mitigations specifically crafted to KNC’s preferences, as it can with respect to Teck coal mines located in much closer proximity to KNC members and regular land use activities”. In response, the KNC is recommending technically sound, common sense and practical steps to improve the evaluation, mitigation and control of the environmental impacts of Benga’s major open pit coal mine, which are informed by the KNC’s experience with coal mining in the Elk Valley. This is not a question of designing programs to suit the KNC’s preferences, but rather of applying the lessons learned from decades of experience in dealing with similar projects so that Benga’s mine will avoid, not repeat, the problems encountered elsewhere in *ʔamakʔis Ktunaxa*.

## D. The ACO Reports

17. The KNC will briefly address the implications for the JRP of the consultation reports filed by the Alberta Aboriginal Consultation Office (“ACO”) on December 3, 2020. Those reports provide the ACO’s advice to the AER, sitting as the JRP, regarding the sufficiency of Crown consultation with the Tsuu’tina, Blood, Stoney Nakoda, Siksika and Piikani Nations, all of which are signatories to Treaty No. 7. The ACO reports do not include the Ktunaxa Nation, and the ACO has not, to the knowledge of the KNC, provided the AER with any advice regarding the sufficiency of Crown consultation with the Ktunaxa.

18. This omission puts the AER in a difficult position. Under Alberta’s legislative and policy scheme, the AER “has the responsibility to consider potential adverse impacts of energy applications on existing rights of aboriginal peoples” within its statutory authority ([Energy Ministerial Order 105/2014](#), Appendix p. 1). Notably, this obligation is not restricted to rights defined by Treaty; it encompasses all “existing rights of aboriginal peoples” as recognized and affirmed by section 35 of the *Constitution Act, 1982*.

19. Since the Supreme Court of Canada’s seminal decision in [Haida Nation v. British Columbia, 2004 SCC 73](#), the law has been clear that the phrase “existing rights”, as used in section 35, includes both proven and asserted aboriginal rights, and the Crown has a duty to consult with and, where appropriate, accommodate Indigenous peoples before making decisions that have the potential to affect those rights. The evidentiary threshold for triggering the duty is low; all that is required is sufficient evidence to show a *prima facie* case for an asserted right (*Haida Nation, supra* at paras. 36 - 37).

20. The duty to consult is constitutional in origin and cannot be altered or avoided through legislative or regulatory means ([R. v. Kapp, 2008 SCC 41](#) at para. 6). Where an independent regulatory tribunal such as the AER exercises delegated statutory powers that have the potential to affect Aboriginal rights, the tribunal’s actions themselves trigger the duty. While it is the Crown that ultimately holds the responsibility to ensure the duty is fulfilled in such cases, the Crown may rely on the tribunal’s processes for that purpose, so long as the Crown clearly communicates this to affected Indigenous communities ([Clyde River \(Hamlet\) v. Petroleum Geo-Services Inc., 2017 SCC 40](#) at paras. 19 - 29).

21. Regardless of the means chosen by the Crown to fulfill the duty, “any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative” (*Clyde River (Hamlet)*, *supra* at para. 24).

22. In this instance, the elements required to trigger the duty to consult on the part of the Province of Alberta, including the AER, are present. The KNC has provided uncontested evidence to establish a *prima facie* case for Ktunaxa Rights to the Project area, and there is strong evidence of potential adverse impacts to those rights if the Project is approved by the AER. Any decision by the AER to approve the Project and issue approvals under the *Coal Conservation Act* and related legislation, which will occur in part through the JRP report, must therefore be preceded by adequate consultation with the KNC. This is a distinct task from the AER’s consideration of the overall environmental effects and public interest benefits of the Project.

23. Under the system designed by Alberta, it is the ACO’s job to ensure that adequate consultation with the KNC occurs. Energy Ministerial Order 105/2014 directs the AER to liaise with the ACO regarding consultation, and to seek the advice of the ACO



on whether consultation has been adequate before the AER makes its decision. These requirements are further particularized in the [Joint Operating Procedures for First Nations on Energy Resource Activities \(Oct. 31, 2018\)](#), which tasks the ACO with managing “all aspects of aboriginal consultation”, including on applications before the AER (JOP, p. 1). It is the ACO’s task to “assess the adequacy of consultation” and to provide advice to the AER on the sufficiency of consultation and whether measures are required to address potential adverse impacts to Aboriginal or Treaty rights (JOP, p. 2).

24. The difficulty is that the ACO has in this case chosen to act as if the Ktunaxa do not exist. It has not contacted the KNC to undertake any direct consultation, it has not filed any report assessing the adequacy of consultation with the Ktunaxa, and it has not provided the AER with its advice on whether the Provincial Crown’s constitutional duty has been fulfilled. The ACO has not provided any rationale for this failure to fulfill its statutory and constitutional duties with respect to the KNC.

25. The result of the ACO’s omission is that the AER does not have the information it requires to determine whether consultation with Ktunaxa is adequate. Pursuant to Alberta’s policy regime, it is required to depend on the ACO for that information, and the ACO has failed to deliver. This is no mere procedural misstep; the duty to consult is constitutional in origin, and fulfilment of the duty is a legal prerequisite to the exercise of the AER’s powers. Yet Alberta has deprived the AER of both the power to do the consultation itself, and the power to make an independent assessment of the adequacy of consultation ([Responsible Energy Development Act, SA 2012](#), section 21).

26. The simplest solution to this problem would be for the JRP to request the ACO to correct this omission and provide its advice on the adequacy of consultation with the KNC, before the AER makes any decision on the Project. If this step is taken, it would include the related obligation on the JRP to allow the KNC a reasonable opportunity to

review and respond to the ACO's report. To be clear, the KNC is not waiving any rights it may have, nor is it consenting to its constitutionally protected rights being reduced to a procedural afterthought by the ACO and the AER. The KNC is instead seeking a solution that aligns with the good-faith relationship it is building with Benga, which bears no responsibility for the ACO's omission.

## **E. Conclusion**

27. In conclusion, the KNC appreciates the opportunity to participate in this process to inform the JRP of Ktunaxa Rights, and the mitigation measures required to reduce Project-related impacts to those rights and the environment generally. While the KNC remains committed to negotiating a Project agreement with Benga, such an agreement does not fulfill or obviate the Federal and Provincial Crowns' duties to the KNC, nor does it substitute for meaningful government regulation of the Project through well-developed permit and approval conditions. The KNC accordingly respectfully asks the JRP to give these submissions careful consideration in developing its recommendations and approval conditions for the Project.



T. HOWARD LAW