Sent via E-Mail

August 12, 2024

Hon. Josie Osborne
Minister of Energy, Mines and Low Carbon Innovation
E-Mail: EMLI.Minister@gov.bc.ca

Hon. George Heyman
Minister of Environment and Climate Change Strategy
E-Mail: ENV.minister@gov.bc.ca

Dear Ministers:

Re: Gibraltar Mine Expansion – Request to Designate as a Reviewable Project and Section 6-7 *DRIPA* Agreement(s)

I. Introduction and Overview

We write in connection with the proposed epxansion of the Gibraltar Mine.

Xatśūll understands that Taseko has recently filed requests to permit three pit expansions (Connector 2, Gibraltar 2 East, and Gibraltar 2 West) and one extension of the current M-40 permit boundary.

As you may be aware, the Gibraltar Mine has never undergone an environmental assessment process. It was initially constructed before the modern environmental assessment regime was implemented, and has carried on operations ever since without one.

However, the Mine operates in Xatśūll Territory, which is at a critical state of cumulative impacts from past and current mining and other resource extraction operations. Including, notably, the 2014 disaster at the Mount Polley Mine's tailings storage facility. The tailings breach resulted in the release of approximately 25 million cubic metres of material, causing widespread and long-lasting environmental damage and corresponding impacts to, and indeed infringements of, Xatśūll's Aboriginal title, rights, culture, and way of life.

It is within this context that I write to request that you:

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II. Discussion

A. Summary of impacts visited upon Xatśūll, our Aboriginal title, rights, culture, and way of life as a result of mining in the Territory

Xatśūll has experienced very significant cumulative effects loading from large-scale mining operations and natural resource extraction activities that the Province has unilaterally approved in our Territory without our consent.

These include: (i) the currently-scoped Gibraltar Mine; (ii) the Mount Polley Mine; (iii) the Bonanza Ledge/QR Mill Project; (iv) the proposed Cariboo Gold Mine; (v) the proposed Spanish Gold Mine; (vi) the highest concentration of placer mining activities in the Province; and (vii) extremely unsustainable industrial forestry operations in our Territory. In particular, the historical legacies of the Cariboo Gold Rush that started in the 1860s have left numerous reconciliation matters unresolved, including unknown fish habitat impacts from historic mining activities at high risk contaminated sites like the former Island Mountain and Cariboo Gold Quartz Mines. Forestry operations within our Territory have also resulted in severe impacts, indeed unjustified infringements, without any tangible benefits to Xatśūll. We are also experiencing other cumulative effects loading in relation to existing and proposed pipelines, rights-of-way, private land, parks, range activities, and other sites create a patchwork of land alienation across our Territory.

Most notoriously, on August 4, 2024, the tailings storage facility at the Mount Polley Mine failed, resulting in a release of approximately 25 million cubic metres of material (including tailings, interstitial water, supernatant water, and materials from the dam itself). The release caused widespread and long-lasting environmental damage and corresponding impacts to Xatśūll's Aboriginal title, rights, culture, and way of life.

The following is a high-level summary of the impacts that the tailing storage facility blow out visited upon Xatśūll and our Territory:

- copper-rich tailings destroyed Hazeltine Creek and its riparian zone, *extirpating Hazeltine Creek sockeye and coho*, and destroying wildlife and medicinal plant habitats, with recovery expected to take decades to centuries;

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- up-slope vegetation along Hazeltine Creek was completely destroyed, creating a wide corridor unsuitable for wildlife habitat or plant harvesting;

- Polley Lake Rainbow Trout had their spawning interrupted for three years from 2014-2017;

- the destruction of vegetation along Hazeltine Creek has led to reduced shade and higher summer water tempratures, contributing to stronger algae growth;

- Quesnel Lake experiences very high water turbidity due to the deposition of tailings and dam materials;

- the bottom of Polley Lake has been completely covered with 5-10 metres of tailings; and

- archaeological sites and cultural heritage resources were destroyed.

These biophysical impacts have caused the following impacts to, and indeed unjustified infringements of, Xatśūll's Aboriginal title, rights, culture, and way of life:

- in many cases, Xatśūll members have stopped harvesting in areas impacted by the blow out as a result of perceptions those areas are highly contaminated, including in connection with decreased water quality and associated contamination of fishes;

- uncertainty as to the geographic extent and duration of impacts on the environment;

- reduced confidence in consuming fish resources due to contamination;

- reduced ability to harvest, process, and consume fish;

- reduced ability to hunt wildlife, and reduced confidence in consuming it due to contamination;

- increased dependence on non-traditional foods, leading to a decline in diet quality and increased costs; and

- inability to practice important cultural activities associated with the harvesting, processing, and consumption of wild game in the areas impacted.

In turn, this has caused very serious impacts to our culture, way of life, ability to transmit traditional knowledge vertically from elders to younger generations, as well as our Indigenous legal order and governance systems.

It is this background and context, together with the Province's commitment to implement the *United Nations Declaration on the Rights of Indigenous Peoples* and the legal requirements of the *Declaration on the Rights of Indigenous Peoples Act,* which gives rise to the urgent need for us to take a new, government-to-government approach to co-managing resource development within our Territory. Simply put, we must immediately put the days of the Province unilaterally approving resource development in our Territory without our consent behind us.

B. Request that you designate the proposed expansion as a reviewable project under the *Environmental Assessment Act*

We have very serious, ongoing, residual concerns about the current operation of the Gibraltar Mine Site and its proposed expansion as detailed below.

The ecosystems in our Territory have not yet recovered from the blow out of the tailings storage facility at Mount Polley. It will take many decades before that occurs, if it happens at all. Accordingly, Xatśūll is highly concerned with allowing further mining activity to proceed in its Territory without appropriately stringent levels of scrutiny to assess and address impacts.

This is particularly so in the case of a facility such as the Gibraltar Mine, which has operated in our Territory for many years without any environmental assessment. Furthermore, for the past 52 years since the Gibraltar Mine Site began operations, our membership has been excluded from exercising their section 35 rights to hunt, fish, and trap within the Mine's 2,966-hectare footprint, significantly impacting Xatśūll's Aboriginal title and rights. The Tailings Storage Facility (TSF) was constructed in a broad, steep

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valley that once formed a tributary of East Cuisson Creek, an area that supported vital aquatic and terrestrial ecosystems. Beyond the Mine's footprint, there are ongoing concerns from our membership regarding the impact on traditional sustenance practices, including the usability and quality of harvesting areas, particularly in family use areas adjacent to the TSF and wintering village sites near Cuisson Lake. Moreover, the Mine affected archaeological sites for at least 36 years before conducting its first archaeological assessment in 2008.

The proposed expansion is an "eligible project" within the meaning of section 11(1) of the *Environmental Assessment Act* (the "***Act***") as it has not been substantially started and it is not a reviewable project under a regulation made under section 9. As such, Minister Heyman has the power pursuant to section 11 of the *Act* to designate the proposed expansion as a "designated project". Indeed, pursuant to section 11(5) of the *Act* Minister Heyman must, within 30 days of receiving this application: (i) designate the expansion as a reviewable project or (ii) decline to make that designation.

In making that decision, under section 11(4) of the *Act* Minister Heyman "must consider the following":

a) **whether the applicant is an Indigenous nation**:

It is self-evident that Xatśūll is an Indigenous nation.

a) **whether the eligible project could have effects on an Indigenous nation and the rights recognized and affirmed by section 35 of the *Constitution Act, 1982*:**

Expanding the Gibraltar Mine could have very significant adverse impacts on Xatśūll's section 35 rights, culture, and way of life.

As described above, Xatśūll Territory is nowhere close to recovering from the catastrophic failure of the tailings storage facility in 2014. Xatśūll is now faced with the risk of increased mining activity in its Territory at a site that has never before undergone an environmental assessment, with the potential for additional impacts to, and infringements of, Xatśūll's Aboriginal title, rights, culture, and way of life.

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b) if the eligible project is in a category of projects described in a regulation under section 9, whether the potential effects of the eligible project will be equivalent to or greater than the potential effects of projects in that category that are reviewable projects; and

While the Gibraltar Expansion will not alter the amount of total ore output per-day (for purposes of this factor under section 11(4) of the *Act*), it will extend the life of the Mine all the way to 2036 (Phase 1) and 2044 (Phase 2). This will greatly prolong the current and existing impacts of the Mine on Xatśūll's Aboriginal title, rights, culture, and way of life. Additionally, Xatśūll's technicians have identified the following aspects of the proposed expansion which would best be addressed via environmental assessment conditions rather than in a permitting process:

- the suitability of the use of heap leach technology at the Mine, in light of the recent heap leach failure at the Victoria Gold Mine in Yukon, which has lead to a partial mining moratorium in that Territory, including a commitment not to licence further heap leach facilities for the time being;
- improved water management on site, including updating/developing a site-wide water quantity and quality management plan and the treatment of all effluent discharged from the site;
- use of available/achievable technologies in the treatment and management of water on site;
- better evaluation of cumulative effects as a result of ongoing and planned expansions of the operations at Gibraltar;
- the inclusion of Xatśūll monitors in carying out archaeological and cultural heritage field studies; and
- improved communications and transparency from the proponent on project operations, planned expansions, and ongoing operations at the site.

c) whether an assessment of the eligible project is consistent with the purposes set out in section 2.

Designating the expansion for assessment is consistent with the purposes set out in section 2:

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2 (1)The Environmental Assessment Office is continued as an office of the government.

(2)The purposes of the office are

(a) to carry out its responsibilities under this Act, and

(b) to do the following in carrying out the purpose referred to in paragraph (a):

(i) promote sustainability by protecting the environment and fostering a sound economy and the well-being of British Columbians and their communities by

(A) carrying out assessments in a thorough, timely, transparent and impartial way, considering the environmental, economic, social, cultural and health effects of assessed projects,

(B) facilitating meaningful public participation throughout assessments,

(C) using the best available science, Indigenous knowledge and local knowledge in decision making under the Act, and

(D) coordinating assessments with other governments, where appropriate, including Indigenous nations, and with other provincial ministries and agencies;

(ii) support reconciliation with Indigenous peoples in British Columbia by

(A) supporting the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*,

(B) recognizing the inherent jurisdiction of Indigenous nations and their right to participate in decision making in matters that would affect their rights, through representatives chosen by themselves,

(C) collaborating with Indigenous nations in relation to reviewable projects, consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*, and

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(D) acknowledging Indigenous peoples' rights recognized and affirmed by section 35 of the *Constitution Act, 1982* in the course of assessments and decision making under this Act.

As described above, in light of the already-critical state of cumulative impacts in Xatśūll Territory, the Gibraltar Mine has the potential to cause serious environmental effects and corresponding impacts to, and indeed unjustified infringements of, Xatśūll's title, rights, culture, and way of life.

Additionally, as noted, the Gibraltar Mine has never previously been subject to an environmental assessment.

Accordingly, designating the expansion for assessment would advance the purposes of the Act by "carrying out assessments in a thorough, timely, transparent and impartial way" (section 2(2)(b)(i)(A)) where, in the past, significant regulatory decisions about the Mine have all been made unilaterally by the Province despite the serious impacts it has caused, and without subjecting it to the scrutiny of an environmental assessment. Further, designation coupled with the section 6-8 *DRIPA* Agreement(s) (see next section) will advance the purposes in sections 2(b)(i)(C) and (D) to use the best available decision making, including Indigenous knowledge, and to coordinate assessments with Indigenous nations.

Relatedly, granting a higher level of attention to Gibraltar's operations via designation will reflect better collaboration with Xatśūll, go toward advancing the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*, and acknowledge potential impacts of the expansion to Xatśūll's constitutionally-protected rights under section 35 of the *Constitution Act, 1982* – all purposes of the Act under section 2(2)(b)(ii).

In particular, designating the expansions will advance the implementation of the following Articles of the *United Nations Declaration on the Rights of Indigenous Peoples*:

- Article 18 rights to participate in decision-making over matters affecting Indigenous rights (in particular when coupled with the section 6-7 *DRIPA* Agreement(s));
- Article 25 rights to maintain and strengthen the relationship with traditional territories;

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- Article 29 rights to the conservation and protection of the environment and productive capacity of Indigenous lands, territories, and resources; and
- Article 32 state obligations to consult to obtain free prior and informed consent prior to the approval of any project affecting Indigenous lands, territories, and resources.

C. Request that you seek the mandates necessary to negotiate, and subsequently enter into, section 6-7 *DRIPA* Agreement(s) with Xatśūll in relation to the environmental assessment and permitting processes for the proposed expansion

Xatśūll kindly requests that you immediately seek the mandates necessary to negotiate, and subsequently enter into, section 6/7 agreement(s) under the *Declaration on the Rights of Indigenous Peoples Act* ("**DRIPA**") in relation to the environmental assessment and permitting processes for the proposed expansion.

Section 7(1) of DRIPA provides that a section 6/7 agreement may be entered into "[f]or the purposes of reconciliation". The circumstances in connection with this proposed expansion raise a clear example of the need for reconciliation between Xatśūll and the Province: subjecting to an environmental assessment a facility that has operated for years on Xatśūll's Territory with neither our consent nor high-level environmental review.

In light of the above, plus the serious state of cumulative impacts in the Territory, Xatśūll's firm view is that any decisions made to expand the Gibraltar Mine must be made either jointly or with our consent to ensure that lessons learned during and after the 2014 disaster are implemented on a going-forward basis and that new impacts, indeed unjustified infringements of our title and rights, are not visited upon us.

This is a critically important opportunity to bring regulatory matters in relation to the Mine into compliance with *DRIPA*, as well as to enhance public confidence in the review process and, ultimately, the applicable decisions.

III. Closing and Next Steps

Xatśūll's intent in raising these two issues now is to get them on the radar of relevant Provincial authorities early on in the regulatory process before any major regulatory steps

are taken, to ensure that they are addressed in an orderly manner. In addition to the technical requirements for each of the project designation and DRIPA ss. 6/7 agreement requests, granting these requests would also be most consistent with:

- the requirement for statutory decision-makers to take into account whether and to what extent their decisions will advance or impair reconciliation with Indigenous peoples (see, i.e., *Redmond v. BC*, 2020 BCSC 561 at para. 38, aff'd 2022 BCCA 72; *Restoule v. Canada (Attorney General)*, 2018 ONSC 114 at para. 56; *Kainaiwa/Blood Tribe v. Alberta (Energy)*, 2017 ABQB 107 at para. 129; at paras. 117-144, *per* Feehan J.A., concurring);

- Minister Heyman's mandate letter directions to "continue working toward true and meaningful reconciliation by supporting opportunities for Indigenous peoples to be full partners in the inclusive and sustainable province we are building together"; and

- Minister Rankin's mandate letter directions to "mov[e] from short-term transactional arrangements to long-term agreements that recognize and support reconciliation [and] shared decision-making", and to "[s]upport ministries to implement [ss. 6-7 *DRIPA* agreements] that enable shared statutory decision-making authority, and advance the recognition of First Nations self-determination and Indigenous laws."

In relation to the Project designation request, under section 11(5), the Minister of the Environment is required to issue a designation decision within 30 days of receiving an application.

We look forward to meeting with your team to discuss these two matters.

Please have your staff contact me to discuss arranging a meeting in this regard.

Sincerely,

Kúkpi7 Rhonda Phillips

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Chylane Diablo-Sellars, Chief Administrative Officer
Emily Sonntag, Natural Resources Manager
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