From: Brittnee Russell <email address removed>
Sent: August 29, 2013 9:12 PM
To: Michaud,Livain [CEAA]
Cc: Newprosperityreview [CEAA]; Karl Gustafson
Subject: Taseko's response to Exk'etemc submission

Hello Livain,

Please find attached Taseko's response to the Esk'etemc submission filed August 23.

Thanks very much,

Brittnee

mcmillan

Brittnee P. Russell
Associate
<contact information removed>

TASEKO'S RESPONSE TO ESK'ETEMC SUBMISSION

Legal counsel for Esk'etemc filed a written submission titled "Addendum to Written Submissions of Jaela Shockey, Legal Counsel for Esk'etemc Nation" (the "**Esk'etemc Submission**"), a copy of which was provided to Taseko on August 23rd. The Esk'etemc Submission is stated to have been made in reply to a previous submission from Taseko regarding treaty negotiations and the mandate of the Panel. The following is Taseko's response to the Esk'etemc Submission.

The Esk'etemc Submission suggests that the Panel is required to assess impacts to potential or established aboriginal rights and title and that the Panel must ensure compliance with the EIS Guidelines which, they claim, require that Taseko propose mitigations for all potential adverse impacts to Esk'etemc's asserted aboriginal title. In the alternative, the Esk'etemc Submission states that the Panel is required to consider the seriousness of adverse "environmental effects" which, they claim, include the effects of the project on current use of the lands and resources for traditional purposes by aboriginal persons.

Taseko submits that the suggestion that its EIS "completely disregards" any requirement to mitigate potential impacts to Esk'etemc title claims, is false. To the contrary, despite the fact that the potential impacts of the transmission line on Esk'etemc asserted claims for aboriginal title are relatively minor, Taseko has contemplated efforts to mitigate those effects in the EIS. The proposed location for the transmission line is itself the product of previous consultation and represents an accommodation of concerns raised by the Esk'etemc and the Tsilhqot'in. The EIS sets out mitigation measures and Taseko confirmed during the hearings that it remains willing to work in cooperation with the Esk'etemc to locate the transmission line to avoid or minimize any impact on culturally significant sites. However, some impact is inevitable given the way in which the Esk'etemc have configured their claims regarding culturally significant areas so as to effectively create a north-south wall through their traditional territory.

The Esk'etemc Submission states that the "problem with accepting the 500 meter corridor approved by B.C. as the starting point is that the Province approved this corridor before the previous Federal Panel Report was released" and that there had been no consultation with Esk'etemc on alternate corridors. Taseko submits that this assertion is both false and irrelevant. To begin, it ignores that fact that there were previous discussions regarding alternative corridors. It ignores that fact that the previous Panel hearing is part of the consultation process. It ignores the fact that this Panel was directed to follow, where possible, the findings of the previous Panel with respect to the transmission line.

In any case, the assertions regarding the duty to consult are irrelevant to this Panel's mandate.

In *Haida,* the Supreme Court of Canada stated that the duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal

right or title and contemplates conduct that might adversely affect it. In *Rio Tinto*, the Court elaborated on this test as follows:

> [31] … "This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right."

In a recent decision of the Federal Court, in *Hupacasath First Nation vs. The Minister of Foreign Affairs Canada and the Attorney General of Canada*, the Chief Justice said as follows:

> [51] "I will address each of these three elements of the test separately below. Although HFN also briefly stated in its Application that Canada's duty to consult also arises from the Crown's fiduciary obligations towards First Nations Peoples and the *United Nations Declaration on the Rights of Indigenous Peoples*, Resolution 61/295, 13 September 2007, I agree with the Respondents that the question of whether the alleged duty to consult is owed to HFN must be determined solely by application of the test set forth immediately above. I would add in passing that HFN did not pursue these assertions in either written or oral argument, and that, in a press release issued by Aboriginal Affairs and Northern Development Canada, entitled *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples*, that Declaration is described as "an aspirational document" and as "a non-legally binding document that does not reflect customary international law nor change Canadian laws." HFN did not make submissions or lead evidence to the contrary."

The Chief Justice went on to say:

> [140] " It is important to distinguish between potential adverse effects on asserted Aboriginal rights and potential adverse effects on a First Nation's future negotiating position. The duty to consult applies solely to the former, where they are demonstrated to be non-speculative, appreciable and causally linked to particular conduct contemplated by the Crown. Stated alternatively, that duty <u>does not apply</u> to contemplated conduct that may simply have potential adverse effects on HFN's future negotiating position (*Rio Tinto*, above, at paras 46 and 50). It also <u>does not apply</u> to other interests of HFN that do not specifically concern HFN's asserted Aboriginal rights, as listed at paragraph 53 above." *[emphasis added]*
>
> [141] "Accordingly, to the extent that any of the potential adverse impacts identified by HFN concern matters that may, as a result of the CCFIPPA, be more or less likely to be addressed in any future treaty that HFN may negotiate with Canada, and that do not directly concern HFN's asserted Aboriginal rights themselves, those potential impacts cannot give rise to a duty to consult…."

Taseko submits that the position advocated in the Esk'etemc Submission is not supported by the decision in *Hupacasath First Nation*. Taseko also submits that the decision in *Hupacasath First Nation* is entirely consistent with the previous submissions made by Taseko to the effect that the *United Nations Declaration on the Rights of Indigenous Peoples* is not the law in Canada and that, in circumstances where the Crown's duty to consult arises, the question is to be determined solely by the test in *Haida*. The law simply does not go as far as counsel for the Esk'etemc suggests regarding a duty to consider impacts on treaty negotiations.