

Appendix B.11 – Lower Nicola Indian Band

I - Background Information

Lower Nicola Indian Band (Lower Nicola) is part of the Nlaka'pamux (pronounced "Ing-khla-kap-muh") Nation, whose asserted traditional territory encompasses part of south central British Columbia (BC) from the northern United States to north of Kamloops. Lower Nicola's asserted traditional territory is in the valley of the Lower Nicola River. Lower Nicola has 7,128 hectares of reserve land, spread out over 10 reserves. As of June 2016, Lower Nicola had a registered population of 1,253 (504 members are living on Lower Nicola's reserves, 52 are living on other reserves, and 694 are living off-reserve). Lower Nicola members historically spoke the Nlaka'pamux language. Today, there are a small and growing number of Nlaka'pamux speakers and the community is working to revitalize its language.

Lower Nicola is a party to the Nlaka'pamux Nation protective *Writ of Summons*, which was filed in the BC Supreme Court on December 10, 2003. The *Writ* also includes Ashcroft Indian Band, Boothroyd Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Kanaka Bar Indian Band, Lytton First Nation, Nicomen Indian Band, Nooaitch Indian Band, Oregon Jack Creek Indian Band, Shackan First Nation, Siska Indian Band, Skuppah Indian Band, and Spuzzum First Nation.

Lower Nicola's filings with the National Energy Board (NEB) state that their people have long relied on hunting and fishing for sustenance and for cultural fulfillment and that they have and continue to hunt moose, elk, and deer throughout their territory. Lower Nicola also states that they have traditionally used the Coquihalla and Fraser River to fish for salmon, whitefish, sucker, sturgeon, and Dolly Varden trout. The Coquihalla River is also an important site for the gathering of various bird species.

The proponent will be seeking Governor-in-Council authorization for *Indian Act* s.35 tenures if the proponent is granted rights to expropriate or alternatively *Indian Act* s.28(2) permits from Lower Nicola Indian Band to allow for the expansion of the pipeline. The *Indian Act* tenures will require a Band Council Resolution requesting the tenures be issued. Additionally, the form of agreements and fair market compensation will be considered before the approval of the tenures. The proponent will also be seeking permits from Indigenous and Northern Affairs Canada (INAC) for temporary stockpile sites proposed on reserves of the Lower Nicola.

II - Preliminary Strength of Claim Assessment

- Lower Nicola is one of the Nlaka'pamux Nation bands. Approximately 226 kilometres (km) of the proposed pipeline right-of-way (RoW) and four pipeline facilities (i.e. Kamloops Terminal, Stump Station, Kingsvale Station and Hope Station) would be located within Nlaka'pamux's asserted traditional territory. The existing RoW passes through three Lower Nicola reserves and is adjacent to others. The Project would cross the following Lower Nicola reserves: Joeyaska #2; Zoht #4; and Zoht #5.
- The Crown's preliminary assessment of the Nlaka'pamux Nation's claim for Aboriginal rights over the section of the project that spans Kamloops to southwest of Hope involves a range of a weak to strong *prima facie* claims. The areas assessed to have a strong *prima facie* claim are in the vicinity of the Nicola Valley south towards the Coquihalla Lakes, which most available ethnographers indicate to be within the Nlaka'pamux territory, and there are some indications of Nlaka'pamux hunting, fishing, gathering uses in the Nicola valley area around the time of contact, with connecting trails. The claims diminish in the area north of Stump Lake, as it is unclear whether this falls within Nlaka'pamux territory, and there is indication of an ancestral

connection between the Nlaka'pamux community who moved into the north end of Nicola Lake, intermarrying with the Stewix/Okanagan, which could support a moderate prima facie claim. The prima facie claim diminishes to weak in the vicinity of Hope as it is understood that area is outside the area ethnographers attribute to the Nlaka'pamux¹.

- The Crown's preliminary assessment of the Nlaka'pamux Nation's claim for Aboriginal title over the section of the project that spans Kamloops to southwest of Hope, involves a range of a weak to strong *prima facie* claim. The area assessed to have a strong *prima facie* claim is in the vicinity of Merritt, which is within the area considered by ethnographers to be within Nlaka'pamux territory, and there are indications of several historic villages in proximity in the Nicola Valley that were likely occupied by the Nlaka'pamux at 1846. The areas with weaker claims include those outside the area ethnographers attribute to the Nlaka'pamux (e.g. north of Stump Lake to Kamloops, and in the vicinity of Hope) and there is no/limited indication of historic Nlaka'pamux use at 1846².

III – Involvement in the NEB and Crown Consultation Process

Given the nature and location of the project, and the potential impacts of the project on Lower Nicola's Aboriginal Interests, the Crown is of the view that the legal duty to consult Lower Nicola lies at the deeper end of the *Haida* consultation spectrum. Lower Nicola was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which affords Lower Nicola opportunities to be consulted at a deeper level.

Lower Nicola was an intervenor in the NEB review of the project. They provided oral traditional evidence ([A4E9I3](#)), multiple rounds of information requests and written evidence and written final argument. Lower Nicola signed a contribution agreement with the NEB for \$80,500 in participant funding and travel for four to the hearing. The Major Projects Management Office (MPMO) provided Lower Nicola \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Lower Nicola an additional \$14,000 to support their participation in consultation following the release of the *NEB Recommendation Report*. Lower Nicola signed a contribution agreement with the MPMO for a total of \$12,000 in allocated funding. EAO provided \$5,000 in capacity funding to Lower Nicola to participate in consultation with the Crown.

Lower Nicola met with the Crown on June 12, 2014, May 17 and October 12, 2016 to discuss the project.

A first draft of this Consultation and Accommodation Report (the Report) was provided to Aboriginal groups for review and comment on August 17, 2016. Lower Nicola provided preliminary comments on the first draft of this Report on August 25, 2016. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016 and Lower Nicola provided comments on November 15, 2016. Lower Nicola noted that the comments on the first and second draft were submitted to the Crown under protest due to unrealistic timelines, lack of capacity, and lack of adequate funding. Comments received on the second draft included Lower Nicola's disagreement with the

¹ Ministry of Justice, Aboriginal Research Division, Nlakapamux: Review of Ethnographic and Historical Sources (Revised November 20, 2013; Teit, James, "The Thompson Indians of British Columbia" in *Memoirs of the American Museum of Natural History*, Volume II, 1900.; Dawson, George M., "Notes on the Shuswap People of British Columbia" in *Transactions of the Royal Society of Canada*, Section II, 1891; Wyatt, David, "Thompson" in *Handbook of North American Indians*, Vol. 12, Washington: Smithsonian Institution, 1998.

² Ibid

Crown's assessment of the degree of impacts of the project on Lower Nicola's Aboriginal Interests, specifically stating the Crown mischaracterizes the level, detail and intensity of the potential impact of the project, and the potential impacts of the project on Lower Nicola's Aboriginal title are significant and permanent. Lower Nicola also stated that they disagreed with the Crown's preliminary assessment of the Nlaka'pamux Nation's claim for Aboriginal title over the section of the project, maintaining the Nlaka'pamux Nation has a strong *prima facie* case for Aboriginal title in all areas asserted. Lower Nicola provided a separate Aboriginal group submission to the Crown on November 15, 2016.

IV - Summary of Key Lower Nicola Issues and Concerns Raised

Throughout the NEB review and Crown consultation process, Lower Nicola has raised the community's views of the consequences of the project proceeding to construction and operation. Lower Nicola's key concerns have focused on cultural and social impacts, environmental impacts, and food security. The Crown has gained its understanding of Lower Nicola's issues and concerns through the community's involvement in the NEB process, including submissions made during the NEB hearings^{3,4,5}, the responses Lower Nicola provided to the Crown on its Information Request (IR), and through consultation with the Crown, including correspondence and meetings held in June 2014, May 2016 and October 2016. In addition, the Crown has considered information regarding the proponent's engagement with Lower Nicola as described in the proponent's Aboriginal Engagement Report (July 2016). The Crown has considered all comments and information received from Lower Nicola throughout the environmental assessment process. The Crown's understanding of Lower Nicola's key Project-related issues and concerns is summarized below. This is a summary of the key issues raised by Lower Nicola, and does not present the views of the Crown as to whether it agrees or not with the issues.

Cultural and Social Impacts:

Lower Nicola is concerned that their access to traditional land use (TLU) sites will be impacted by the Project crossing their traditional territory. Lower Nicola has stated that its members gather various wild berries and other foods, including huckleberries, soapberries, blueberries, potatoes, garlic, and mosses and that they are concerned that these plant species will be harmed by the project, possibly rendering them inedible or unavailable. Lower Nicola also noted they are concerned with the alteration of culturally important native vegetation species, and that proper and effective reclamation of any construction phase effects would be required to ensure their continued ability to practice traditional gathering activities. Sustainability of local mule deer, elk and moose populations is also important for maintaining a traditional lifestyle and changes to ungulate habitat is a primary concern.

The TLU Study prepared by the Lower Nicola for the project demonstrated that moose occur in high densities near Lac le Jeune, particularly in the area designated as critical wintering range in the Kamloops Land and Resource Management Plan, which is to the west of the proposed pipeline RoW.

³ LGL Limited Environmental Research Associates. 2015. Information Request Route 2. Prepared for Lower Nicola Indian Band. January 2015. ([A4G6G7](#))

⁴ LGL Limited Environmental Research Associates. 2016. Trans Mountain Pipeline Expansion Project: Final Argument. Prepared for Lower Nicola Indian Band. (January 12, 2016) ([A4X5T8](#))

⁵ d'Entremont, M.V. and K. Froese. 2015. Trans Mountain Pipeline ULC Trans Mountain Expansion Project - Technical Review of ESA submitted to the National Energy Board as per Hearing Order OH-001-2014. Unpublished report by LGL Limited environmental research associates, Sidney, BC, and GatePost Risk Analysis, Calgary, AB for the Lower Nicola Indian Band, Merritt, BC. 36 pp ([A4Q7H4](#))

Another important Lower Nicola hunting area for moose is in the hills southeast of Zoht reserve no. 5, which also is in close proximity to the proposed project RoW. Lower Nicola stated that potential effects to moose will be of direct consequence to Aboriginal rights related to the ongoing practice of hunting moose. Lower Nicola noted that present disturbances on the landscape, including the existing Trans Mountain Pipeline, have had negative impacts on local fish and wildlife populations and on Lower Nicola's traditional seasonal round. Lower Nicola are concerned about project effects on trapping, and in particular notification and compensation in respect of any loss of use of Lower Nicola members' trap lines.

Cultural ceremonies, traditions and historic sites, as well as access to TLU sites, will be impacted by the project crossing Lower Nicola's traditional territory, including impacts on previously unrecorded pithouses located on the north end of Zoht Indian Reserve no.4. Lower Nicola are concerned about the loss of access or damage to culturally sensitive sites (e.g., sacred or ceremonial sites), and cultural impacts associated with the potential loss of culture and loss of ability to practice traditional resource use or ceremonial activities (e.g., as a result of operations, a spill, or increased traffic through traditional territory).

Methodology, Process, and Consultations

Lower Nicola has also expressed dissatisfaction with the NEB process and Crown consultation process, stating they are too restrictive in terms of the issues considered and the time allotted. Due to unrealistic timelines, lack of capacity to complete document review, a lack of expertise capacity for technical review and lack of funding overall, Lower Nicola has stated that the consultation process is fundamentally flawed and it is unrealistic to expect them to meaningfully participate in the information-sharing that forms the foundation of any consultation. Lower Nicola does not accept that the Crown can discharge its duty to consult through reliance on the NEB process. Lower Nicola is of the view that there has been a lack of discussion around financial benefits, and compensation and accommodation of Lower Nicola's rights and interests.

Lower Nicola found it very challenging to address the concept of holism from the Aboriginal definition of health in the context of the environmental assessment and the NEB project review process and approach. Lower Nicola is concerned that the information presented in the Application reflects an inadequate understanding of the Lower Nicola's Aboriginal rights, traditional land use practices and traditional knowledge. Specifically, Lower Nicola stated:

- The breadth of traditional ecological knowledge (TEK) provided in the Application was minimal and did not demonstrate full consideration of TEK;
- The proponent used and assessed TEK as an add-on to field survey work, which shows a lack of understanding of appropriate social science research design, methods and ethical standard for consent, as well as a lack of respect for TEK;
- The collection of TEK through the participation of Aboriginal communities in field studies likely represents only a very small portion of use and occupancy in the project area; and,
- The results and conclusions of the Application with regard to TEK are not scientifically credible and should not be used in the decision making process.

Lower Nicola also expressed their view that BC failed to engage in a meaningful and honest way with Lower Nicola and that a critical flaw in the consultation process is that the Crown is relying on information gathered by the proponent to come to conclusions on rights and impacts without appropriate third party verification. Lower Nicola does not feel that the Crown has consulted with them on a Nation-to-Nation basis.

Cumulative Effects

Lower Nicola is concerned that many of the components of the project application are evaluated in isolation of each other which is incompatible with Aboriginal perspectives on health and well-being that takes a more holistic approach. Lower Nicola is concerned about the level of cumulative impacts on wildlife and wildlife habitat within the Nlaka'pamux traditional territory. They stated that the environmental assessment approach excluded existing cumulative effects by failing to recognize historical conditions and environmental trends, and inadequately addressing effects on the status of wildlife populations. Lower Nicola is concerned that continued resource development in the region will further erode ecological integrity unless effective mitigation measures are implemented. Lower Nicola also stated that the NEB should consider the issue of climate change as they are concerned about the projects' contribution to greenhouse gas emissions and the federal governments' perceived lack of action.

Environmental Impacts

Lower Nicola members have long relied on hunting and fishing for sustenance and for cultural fulfillment. They have hunted, and continue to hunt moose, elk, and deer throughout their territory. The Coquihalla River is also an important site for the gathering of various bird species. Lower Nicola is concerned about the long-term impacts of the creation of a pipeline corridor or a pipeline rupture on these important species. Protection of wildlife corridors and mitigation measures (e.g., wildlife bridges) to enable unimpeded migration was also raised by Lower Nicola. Lower Nicola are concerned about impacts on wildlife (habitat, dens, and nests) and species at risk, and the pipeline corridor crossing parks and protected areas. Of particular concern are wildlife species that are hunted by community members for subsistence purposes. Lower Nicola noted concerns about the impacts of the Project to the land, water and plant and wildlife species, including moose, deer, grizzly bear, spotted owl habitat, Lac du Bois Grasslands Protected Area, Finn Creek Provincial Park, North Thompson River Provincial Park and Coquihalla Summit Recreational Area.

Lower Nicola emphasized that the Project runs parallel to waterways which are of central importance to the community. Concerns related to potential impacts to the Coquihalla, Fraser and Nicola River watersheds and Clapperton Creek region, including the issues of erosion, sediment control and water quality impacts related to the project were also raised. Lower Nicola requested that the proponent use a trenchless crossing, specifically horizontal directional drilling (HDD), for the Nicola River crossing. Any oil spills that impact the Fraser and Thompson River basins would also affect fish and fish habitat in the lower Nicola River. Lower Nicola is concerned that the Nicola River already has excessive bank erosion, lateral channel migration and poor pool-riffle development as a result of forestry, agriculture, irrigation and urban developments. Concerns related to the contamination of waterways due to use of herbicides to manage vegetation in the pipeline right-of-way were also raised.

Air quality concerns (as a result of construction, operation, and/or accident or malfunction) have also been expressed by Lower Nicola for both marine and terrestrial environments. Lower Nicola raised major concerns that the project will result in significant and negative contribution to climate change, and the project's impact on climate change should be evaluated.

Health and Human Safety Impacts

The project is proposed to cross the Zoht and Joeyaska reserves, near member residences, in addition to land at Coquihalla/Juliet Creek that Lower Nicola owns fee simple, and the group is concerned about human health risks, including negative impacts to human health caused by an oil spill in these areas. Contamination of country food is a concern, including all project-related activities that could have an

indirect effect on country food and physical health. Lower Nicola is also concerned that the assessment of community health in the Application generalized the project's effects on the indicators of community health across the entire length of the pipeline.

Accidents and Malfunctions (marine/terrestrial)

Lower Nicola is also concerned about the likelihood and prevention of spills. Key concerns arise particularly from the potential for low-level leakage from the pipeline and catastrophic pipeline failure leading to contamination of terrestrial and aquatic (freshwater) ecosystems. Additional concerns are about the potential for oil spills in the Salish Sea that could have a devastating impact on the salmon that serves as many band members' main food source. The group is concerned about the potential effects of a catastrophic oil spill on Aboriginal well-being, considering impacts on traditional and cultural activities (hunting, fishing, gathering), sacred places, food and water security, and indirect impacts due to risk perception, and mental and spiritual health. Risk perception is connected not only to contaminants, but also a sense of place, connection to the land, social relationships, and traditional cultural spiritual practices. Lower Nicola also expressed concern of the lack of clarity of the role Lower Nicola will have in developing spill response plans.

Lower Nicola also noted concerns that the proposed Ajax Mine, whose footprint overlaps the proposed project, will have potential impacts to the safe operation of the pipeline.

Impacts on Aboriginal Rights and Title

Lower Nicola stated that the project has the potential to adversely impact Lower Nicola's Aboriginal rights and title. Lower Nicola is concerned with the proponent's Environmental and Socio-economic Assessment (ESA), and lack of clarity around how Aboriginal rights were assessed. The results and conclusions of the ESA with regard to TEK are not considered scientifically credible by Lower Nicola and should not be used in the decision-making process. Also, the information presented in the ESA is not considered an adequate understanding of Lower Nicola's Aboriginal rights, traditional land use practices and traditional knowledge to assess the potential effects of the project on Lower Nicola use of lands and resources. Lower Nicola noted that impacts on Aboriginal title have both governance and economic considerations. Alteration of native vegetation is of concern, in particular the direct impact on asserted and established Aboriginal rights to harvest plants species of cultural importance. A reduction of effective moose winter foraging habitat and effective winter security / thermal habitat in the southern and central interior ecoprovinces, which overlap Nlaka'pamux traditional territory, directly affects the ability of Aboriginal people to practice their rights. An important hunting area for moose is located in the hills southeast of Zoht IR no.5, in close proximity to the proposed pipeline corridor. Potential effects to moose will have a direct impact on Aboriginal rights related to the ongoing practice of hunting moose. It is not clear to Lower Nicola what environmental protection measures BC will take to protect their rights and title. Lower Nicola also notes that the infringements of the existing pipeline on their rights and title has not yet been addressed.

Economic Impacts

Lower Nicola notes the economic impacts of community members not being able to use the land and having to purchase food, and guides that rely on the land. Specifically, Lower Nicola is concerned about the project crossing the intersection of Highway 5 and Highway 5A (i.e., Exit 286), which is fee simple land. From the perspective of commercial development, this intersection is considered high value land. Lower Nicola considers this location an economic opportunity. Also, it is not clear to Lower Nicola the extent to which BC will share future tax revenues with Lower Nicola.

The Crown is in receipt of an open letter sent to Prime Minister Justin Trudeau, Alberta Premier Rachel Notley, and British Columbia Premier Christy Clark from a collective of Aboriginal groups, including Lower Nicola. This letter identifies concerns related to Indigenous consent for the Project and sets out the example of an Indigenous Committee as one means of potentially engaging Aboriginal groups directly in the regulatory oversight of the Project.

Accommodation Proposals

Lower Nicola provided the federal and provincial Crown with proposed accommodation measures to consider in relation to accommodating potential impacts of the Project on Lower Nicola's Aboriginal Interests, including, but not limited to:

- Lower Nicola is seeking financial benefits from the Crown, both in relation to the existing pipeline and the proposed expansion. Lower Nicola is interested in having financial benefits conversations with Canada, BC and the Province of Alberta;
- As stated in the Proponent's Aboriginal Engagement Report (July 2016), Lower Nicola request:
 - Mitigation and reclamation strategies similar to those outlined in the Rare Ecological Community and Rare Plant Population Management Plan be implemented for plant species of cultural importance and that Lower Nicola be involved in the implementation of these mitigation measures, including participating in supplemental surveys, in advance of construction, to identify the plant species of cultural importance;
 - A trenchless crossing, specifically HDD, be implemented for the Nicola River Crossing;
 - Quality assurance verification to include reporting of actions taken, or proposed, to correct non-conformances of NEB conditions;
 - The TLU and traditional marine resource use (TMRU) Investigation Report to include a description and justification for how Trans Mountain has incorporated the results of consultation with Aboriginal groups and government authorities;
 - Plans (e.g., Training and Education Monitoring Plan, Access Management Plan, Pipeline Environmental Protection Plan, Riparian Habitat Management Plan, Wildlife Species at Risk Mitigation Plan, Habitat Restoration Plan, and Grizzly Bear Mitigation Plan) be developed in collaboration with, and approved or validated by the affected Aboriginal groups;
 - Proposed measures to address business capacity gaps for Aboriginal groups include skills training and education;
 - Request that Trans Mountain must file with the NEB, at least 4 months prior to commencing construction, a Traditional and Culturally Significant Plant Species Mitigation and Replacement Plan;
 - The updated lists of infrastructure sites and watercourse crossings be provided to affected Aboriginal groups at the same time that they are filed with the NEB, and the HDD geotechnical and feasibility reports be provided to affected Aboriginal groups prior to being accepted;
 - The development of offsetting plans and measures be developed in collaboration with Aboriginal groups and should prioritize options to improve Aboriginal fisheries;
 - Apply the same level of reporting and protection to be used for municipal water sources for water wells;
 - Trans Mountain collaborate with Lower Nicola on a plan for Aboriginal group participation in construction monitoring, the Emergency Response Plan (ERP) for construction include a reporting component that meets the requirements outlined in NEB Condition 140, and Lower Nicola be included in the consultation on improvements to Environmental Management Plan (EMP); and

- The Emergency Preparedness and Response Exercise and Training Program to include the participation of affected Aboriginal groups and that, prior to commencing operations, an emergency response exercise be carried out with affected Aboriginal group. The full-scale emergency response exercises to be carried out during operations should include participation by Lower Nicola with training for Lower Nicola members in emergency response procedures.

Section 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Lower Nicola that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

Lower Nicola's Response to NEB Recommendation Report

Lower Nicola communicated to the Crown that the *NEB Recommendation Report* failed to account for significant and unique impacts on Lower Nicola interested, referring to Aboriginal groups, and treating Aboriginal groups as a single collective. Lower Nicola stated that the *NEB Recommendation Report* mischaracterized the level of detail and seriousness of impacts of the project on Lower Nicola, in that the project's impacts can be reversed. However, Lower Nicola disagree with this considering the proponent is not required to remove the project at the end of its useful life and many impacts of the project, if they occur, will not be reversible. The *NEB Recommendation Report* notes temporary impacts during construction; however Lower Nicola considers the land to be already converted to a point where it does not allow Lower Nicola to use their territory as desired.

Lower Nicola noted the *NEB Recommendation Report* did not consider spills that have occurred on or near existing infrastructure. Lower Nicola expressed concerns that the potential impacts of project are more intense and significant, and less reversible, than characterized in the *NEB Recommendation Report*. Modifications to the draft conditions set out by the NEB to address gaps and Lower Nicola's concerns are listed above.

V - Potential Impacts of the Project on Lower Nicola's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the project on Aboriginal Interests are provided in Sections 2.4.3 and Section 4.3 of this report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal Group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), including by individual members or families.

The discussion in this section focuses on potential impacts of the project on Lower Nicola's Aboriginal Interests. These potential impacts are characterized by considering how the project could affect several factors important to Lower Nicola's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of project impacts on Lower Nicola's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Lower Nicola, Lower Nicola's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued.

Lower Nicola completed a traditional land and resource use (TLRU) study in 2014 titled "*Traditional Land Use Report*". The report included identification of traditional land uses in the segment of the proposed pipeline from Black Pines to Hope. Traditional land uses identified by Lower Nicola include hunting moose and deer, gathering plants, information on fishing sites, sacred sites, trapping sites, habitation sites, gathering areas for community members and trails travelways. The interim results of the TLRU were summarized in *Volume 5B* ([A3S1S0](#)) and *Volume 5D* ([A3S2H1](#)) of the Project Application. In its Supplemental Technical Report ([A4F5D1](#)), the proponent estimated approximate distances and directions from the pipeline corridor based on information in Lower Nicola's final TLRU report.

Impacts on Hunting, Trapping and Plant Gathering

As summarized in the TLRU, Lower Nicola community members historically hunted moose, deer, elk, mountain goat, bighorn sheep, beaver, bear, ducks, geese, and grouse. Lower Nicola gathered a variety of roots, berries, seeds, nuts, tree bark, lichen, mushrooms, tobacco, cedar, and other wild plants. Lower Nicola community members used controlled burning to clear brush in order to grow berries and roots for harvesting. Plants gathered were used for food, medicine, dye, cleansing agents, adhesives, fuel, building material, baskets caches, and trade. Community members also noted that Saskatoon berries are an important resource that were used to trade with other First Nations along the Pacific Coast. In terms of trapping activities, Lower Nicola community members trapped beaver, coyote, marten, mink, muskrat, rabbit, fox, grouse, ermine, lynx and mink. Currently, community members hunt moose and deer, trap muskrat, beaver, bobcat, lynx, mink and weasel, and harvest berries and mushrooms. As stated in Lower Nicola's Final Argument submitted to the NEB, the Nlaka'pamux people used more than 120 species of native vegetation as foods and at least 200 species for medicinal purposes

Lower Nicola identified many concerns related to environmental effects of the project on hunting, trapping, and plant gathering activities, including protection of wildlife corridors and migration, sustainability of local mule deer and moose populations, changes to ungulate habitat, and long-term impacts of the creation of a pipeline corridor on moose, elk, deer and various bird species throughout their territory. Other concerns include the alteration of native vegetation, in particular the direct impact on asserted and established Aboriginal rights to harvest plants species of cultural importance, and plant species that may be harmed by the project, possibly rendering them inedible or unavailable. As described in the *NEB Recommendation Report*, project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, old growth forests, wetlands, and wildlife and wildlife habitat (including species at risk) listed species. NEB conditions, if the project is approved, would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping, and gathering (section 4.3.1 of this Report). With regards to specific concerns raised by Lower Nicola, the proponent would implement several mitigation measures to reduce potential effects to species important for Lower Nicola's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the

immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP), and the vegetation and wildlife management plans. The proponent is also committed to meeting with Lower Nicola to further discuss and address concerns, where possible, prior to the start of construction.

As described in the Final Argument submitted to the NEB, Lower Nicola traditionally followed a seasonal round of traditional land and resource use and moved throughout their territory according to the season. Traditional hunting grounds of the Nlaka'pamux people encompass three major rivers: Fraser, Thompson, and Nicola; and the valleys of these rivers. During the TLRU study, Lower Nicola identified a total of 55 hunting, trapping, and plant gathering sites. Twelve of these sites are located within the proposed pipeline corridor: six hunting sites, including sites along the Coldwater and Nicola Rivers and Clapperton and Godey Creeks; four plant gathering sites including sites along the Coldwater and Nicola Rivers; and two trapping sites including sites in the Coldwater and Nicola regions. An additional five hunting, trapping, and plant gathering sites are located within 2 km of the proposed pipeline corridor, while the remaining 38 hunting sites are 2 km outside of the project area or the approximate distance from the project area was not stated in the TLRU study.

Lower Nicola raised concerns with the project's potential impacts relating to specific locations and access to hunting, trapping, and plant gathering activities, particularly that their access to TLU sites will be impacted by the project crossing their traditional territory, and moose hunting sites near Lac le Jeune and in the hills southeast of Zoht reserve no. 5. Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Lower Nicola's access to hunting, trapping and plant gathering activities, largely confined to the project footprint for the pipeline and associated facilities. Construction and reclamation activities may result in disruptions to access and a loss of harvesting opportunities for Lower Nicola. NEB conditions, if the project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access to hunting, trapping, and gathering sites (section 4.3.1 of this Report). With regards to specific concerns raised by Lower Nicola, the proponent would implement several mitigation measures to reduce potential effects on TLRU sites, such as management plans that include access management, scheduling and notification of Project activities, and environmental monitoring programs that monitor access control measures. The Access Management Plan is intended to reduce disturbances caused by access, construction equipment and vehicle traffic, during and following construction in order to minimize disturbance to access to Lower Nicola's traditional lands. The proponent is committed to minimizing the development of access routes, controlling public access along the construction right-of-way, selecting appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent will work with applicable resource managers, traditional land and resource users to define locations where access control is necessary, and what type(s) of access control will be implemented. In the event that hunting, trapping, and plant gathering sites are identified during ongoing engagement with Lower Nicola prior to construction, the sites will be assessed, and appropriate mitigation measures will be determined. The proponent committed to working with Lower Nicola to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Lower Nicola expressed concern with direct and indirect effects of the project on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities, including cultural impacts associated with the potential loss of culture and loss of ability to practice traditional

resource use. Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Lower Nicola's hunting, trapping, and plant gathering activities. This short-term disruption could temporarily alter the behaviour of community members' hunting, trapping or plant gathering activities during construction, and that reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the project, could have spiritual and cultural impacts on community members. NEB conditions, if the project is approved, would either directly or indirectly avoid or reduce potential impacts on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities (section 4.3.1 of this Report). The proponent has also committed to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the project.

In consideration of the information available to the Crown from the NEB process, consultation with Lower Nicola, Lower Nicola's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, project construction and routine maintenance during operation are expected to range from minor-to-moderate to moderate impacts on Lower Nicola's hunting, trapping, and plant gathering activities. The moderate impacts on Lower Nicola's trapping activities would arise from project construction and routine maintenance, and would occur within the project footprint. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Lower Nicola;
- Project-related pipeline and facility construction and routine maintenance activities within Lower Nicola's traditional territory are temporary and thus, likely to cause minor disruptions to Lower Nicola's community members accessing traditional hunting, trapping and plant gathering sites within the project footprint, and negligible disruptions for sites that are not within the project footprint; and
- Concerns identified by Lower Nicola regarding project-related effects on social, cultural, spiritual, and experiential aspects of their hunting, trapping and plant gathering activities.

Impacts on Freshwater Fishing

As described in the Final Argument submitted to the NEB, fishing has been key to the Nlaka'pamux economic, cultural, and social lifestyles and the Nlaka'pamux have a rich history with respect to fish harvesting, particularly salmon. As summarized in the TLRU, fishing was historically a communal activity for Lower Nicola as each community had a fishery that was typically designated by a fishing rock. Community members used various methods, including fish traps, spears, gill nets, bag nets and corralling fish with stones, in order to catch trout, salmon, Dolly Varden, suckers, kokanee and whitefish. The Nicola and Fraser Rivers are of particular importance to the Lower Nicola and fish such as burbot, kokanee, whitefish and other species continue to be an important resource for the community. Community members fish for salmon in the Nicola, Coldwater, Fraser and Thompson Rivers using traditional dip and gill nets, and ice fish for rainbow trout on Mammot Lake, Fish Lake and Nicola Lake. Burbot, kokanee and whitefish are also harvested and community members preserve fish by drying, canning or smoking.

Lower Nicola identified many concerns related to environmental effects of the project on freshwater fishing activities, including potential impacts to the Coquihalla, Fraser and Nicola River watersheds and Clapperton Creek region, in particular fish and fish habitat and riparian habitats and issues of erosion, sediment control and water quality. Lower Nicola specifically requested that the proponent use a

trenchless crossing, horizontal directional drilling (HDD), for the Nicola River crossing. As described in the *NEB Recommendation Report*, Project-related construction and operation could result in low to moderate environmental effects on fish and fish habitat and surface water. Moderate effects to fish and fish habitat would be localized to individual watercourse crossings where any potential serious harm would be compensated by offset measures. NEB conditions, if the project is approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (section 4.3.2 of this Report). A number of recommended NEB conditions require the proponent to file reports that will monitor project-related impacts to fish, fish habitat and riparian habitats. With regards to specific concerns raised by Lower Nicola, the proponent would implement several mitigation measures to reduce potential effects to species important for Lower Nicola's fishing activities. The proponent submitted a feasibility report to the NEB for the Nicola River crossing. Further, the proponent has committed to time watercourse crossing construction activities to occur within the least risk biological windows in an attempt to avoid causing serious harm to fish, has committed to working with Aboriginal groups to identify the most appropriate means of offsetting serious harm to marine fish and fish habitat, and has proposed the implementation of channel and bank reclamation measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat.

In their TLRU study, Lower Nicola identified a total of 15 fishing sites, five of which are within the proposed pipeline corridor including sites along Clapperton and Moore Creeks as well as the Coldwater and Nicola Rivers. Lower Nicola identified an additional two fishing sites within 2 km of the proposed pipeline corridor, while the remaining eight sites are outside 2 km of the project area or the approximate distance from the was not stated in the TLRU study. In *Volume 5B*, an additional fishing location was identified on the Nicola River located more than 2 km from the proposed pipeline corridor.

Lower Nicola raised concerns with the Project's potential impacts relating to specific locations and access to freshwater fishing activities, specifically that Lower Nicola's access to TLU sites will be impacted by the project crossing their traditional territory. Project-related construction and routine maintenance activities are expected to cause short-term, temporary disruptions to Lower Nicola's access to fishing activities. If construction and reclamation occur during the fishing season, there could be a potential reduction in access to waterways, staging areas, and fishing sites for Lower Nicola community members. However, disruptions to access would largely be confined to the project footprint for the pipeline and associated facilities during construction and reclamation. NEB conditions, if the project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access to fishing sites (section 4.3.2 of this Report). With regards to specific concerns raised by Lower Nicola, the proponent would implement several mitigation measures to reduce potential effects to fishing sites important for Lower Nicola's fishing activities. As previously discussed, the proponent is committed to minimize disturbance to access to Lower Nicola's traditional lands, as described in the Access Management Plan. The proponent is committed to working with Lower Nicola to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Lower Nicola expressed concern with direct and indirect effects of the project on social, cultural, spiritual, and experiential aspects of its freshwater fishing activities, including cultural impacts associated with the potential loss of culture and loss of ability to practice traditional resource use. As described previously, the project construction and routine maintenance is expected to cause short-term, temporary disruptions to Lower Nicola's fishing activities. This temporary interruption could mean that community members alter their fishing activities during construction, which could affect their participation in the traditional activity. NEB conditions, if the project is approved, would either directly

or indirectly avoid or reduce potential impacts on social, cultural, spiritual or experiential aspects of fishing activities (section 4.3.2 of this Report).

In consideration of the information available to the Crown from the NEB process, consultation with Lower Nicola, Lower Nicola's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, project construction and routine maintenance during operation are expected to result in a minor-to-moderate impact on Lower Nicola's freshwater fishing activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Lower Nicola;
- Project-related pipeline and facility construction and routine maintenance activities within Lower Nicola's traditional territory are temporary and thus, likely to cause minor disruptions to Lower Nicola's community members accessing traditional fishing sites within the project footprint, and negligible disruptions for sites that are not within the project footprint; and
- Concerns identified by Lower Nicola regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their freshwater fishing activities.

Impacts on Other Traditional and Cultural Practices

In the Final Argument submitted to the NEB, Lower Nicola described how the cultural well-being of Aboriginal communities depends in large part on members' continued ability to access and use traditionally important places and resources on the land. The knowledge and practices of traditional land and resource use are often family-specific, meaning that certain families have specialized knowledge about, or near-exclusive use of, some areas on the territory.

As described in the TLRU, Lower Nicola community members lived in villages containing domed pithouses that consisted of a few families to several hundred individuals prior to European colonization. Community members dispersed during the summer and stayed at seasonal summer camps. Lower Nicola community members used trails and travelways throughout the Nicola Valley and beyond to practice traditional and other cultural activities. The use of trails and travelways was also important for trading with other First Nation communities along the Pacific Coast. Historically, locations where Lower Nicola community members created pictographs became important community gathering places.

Lower Nicola identified many concerns related to environmental effects of the project on other traditional and cultural practices, including the loss of access or damage to culturally sensitive sites. As described in section 4.3.4 of the Report, project-related activities are not likely to result in significant adverse effects on the ability of Aboriginal groups to use land, waters or resources for traditional purposes. NEB conditions, if the project is approved, would either directly or indirectly avoid or reduce potential environmental impacts on physical and cultural heritage resources important for Lower Nicola's traditional and cultural practices (section 4.3.4). With regards to specific concerns raised by Lower Nicola, the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources. The proponent has committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during right-of-way finalization, narrowing the right-of-way in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments.

During the TLRU study, Lower Nicola identified a total of 90 cultural sites, including trails/travelways, campsites, pithouses, village sites, burial sites, graveyards, pictograph sites, a cemetery and a mythological place. Sixteen of the cultural sites are within the proposed pipeline corridor: four trails/travelways including those along the Coldwater and Nicola Rivers; eight habitation sites including historic pithouses in Joeyaska IR No. 2; one community gathering place, and three burial sites or potential burial sites in Joeyaska IR No. 2 and Coldwater. Lower Nicola requested that the locations of the unrecorded historic pithouse sites located at the north end of Zoht IR No. 4 be left undisturbed. Lower Nicola also requested that a community Elder be consulted about the locations of the unrecorded pithouses. In *Volume 5B*, historical village locations in valley bottoms and beside lakes were identified near the Fraser River Canyon and Nicola Lake. Semi-subterranean pit houses in Nicola Village sites were also identified. The locations of these village and pit house sites are more than 2 km from the proposed pipeline corridor.

Lower Nicola raised concerns with the Project's potential impacts relating to specific locations and access to other cultural and traditional practices, including cultural ceremonial, traditional and historical sites will be impacted by the project crossing their traditional territory, in particular the impact to previously unrecorded pithouses located on the north end of Zoht IR #4. As described in section 4.3.4 of the Report, project-related activities are expected to cause short-term disruptions that temporarily affect the ability of Aboriginal groups to access land, waters or resources for traditional purposes. The Crown appreciates that Lower Nicola's opportunities for certain traditional and cultural activities will be temporarily interrupted during construction and routine operation, and there could be reduced access to travelways, habitation sites, gathering sites, and sacred areas. However, temporary disruptions to Lower Nicola's traditional and cultural practices would be largely confined to sites within the project footprint for the pipeline and associated facilities. NEB conditions, if the project is approved, would either directly or indirectly avoid or reduce potential impacts on specific sites and access to physical and cultural heritage resources (section 4.3.4 of this Report). The Crown notes the proponent's commitment to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the project.

Lower Nicola expressed concern with direct and indirect effects of the project on social, cultural, spiritual, and experiential aspects of its other traditional and cultural practices, including cultural impacts associated with the potential loss of culture and loss of ability to practice traditional resource use or ceremonial activities. As described previously, project-related activities may result in temporary interruptions to Lower Nicola's cultural and spiritual practices, or that their participation in the traditional activity is curtailed, during project construction and routine maintenance activities.

In consideration of the information available to the Crown from the NEB process, consultation with Lower Nicola, Lower Nicola's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued, project construction and routine maintenance during operation are expected to result in a minor-to-moderate impact on Lower Nicola's other traditional and cultural practices. In reaching this conclusion, the Crown has considered several factors that have been discussed about, which are summarized as follows:

- Project-related construction and operation activities are likely to have minor to moderate environmental effects on Lower Nicola's traditional and cultural practices;
- Project-related construction and routine maintenance activities within Lower Nicola's traditional territory are temporary and thus, likely to cause minor disruptions to Lower Nicola's community

members accessing traditional and cultural practice sites within the project footprint, and negligible disruptions for sites that are not within the project footprint; and

- Concerns identified by Lower Nicola regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their other cultural and traditional practices.

Impacts on Aboriginal Title

The Crown notes that the project would be located within an area of Lower Nicola's traditional territory assessed as having a strong *prima facie* claim to Aboriginal title, in the vicinity of Merritt Valley, which is within the area considered by ethnographers to be within Nlaka'pamux territory, and there are indications for several historic villages in proximity in the Nicola Valley that were likely occupied by the Nlaka'pamux at 1846. The Project would cross three Lower Nicola reserves: Joeyaska #2; Zoht #4; and Zoht #5.

The Crown has actively consulted with Lower Nicola throughout the NEB process and Crown consultation process at a deeper level in an attempt to better identify, understand, and resolve concerns relating to Aboriginal title. Concerns related to Aboriginal title raised by Lower Nicola throughout the NEB and Crown consultation process include:

- Impacts could impede or disrupt Lower Nicola's use of its asserted traditional territory;
- Activities could affect Lower Nicola's ability to manage and make decisions over the project area;
- Project could affect Lower Nicola's economic development aspirations for its asserted traditional territory, in particular, the Project crossing the intersection of Highway 5 and Highway 5A (i.e., Exit 286), which is fee simple land; and
- Lack of discussion around financial benefits, and compensation and accommodation of Lower Nicola's rights and interests.

The Crown provides a description of the potential impacts of the project on Aboriginal title in section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid/reduce project impacts associated with the degree of disturbance to terrestrial and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the project, as well as NEB conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the project is approved. The Crown understands that, in addition to NEB conditions that would require the proponent to report on heritage resources and traditional use investigations (NEB Conditions 97 and 100), the proponent has committed to meeting with Lower Nicola prior to the start of construction to discuss and address concerns, where possible. It is noted that Lower Nicola has not executed a Mutual Benefits Agreement with the proponent.

Given the potential impacts of the project on Aboriginal title and various measures to address those impacts, as described in section 4.3.5, it is the Crown's opinion that the project is expected to have minor-to-moderate impacts on Lower Nicola's asserted Aboriginal title to the proposed project area.

Impacts Associated with Accidental Spills

Lower Nicola expressed several concerns with direct and indirect effects of project-related pipeline spills on their Aboriginal Interests, particularly related to potential impacts related to low-level leakage from

the pipeline, as well as catastrophic pipeline failure leading to contamination of terrestrial and aquatic ecosystems and impacts on Aboriginal well-being (considering direct impacts on traditional and cultural activities, sacred places, food and water security, and indirect impacts due to risk perception, and mental and spiritual health). Concerns related to potential effects of an inland oil spill to community health and wellbeing, fish and fish habitat, particularly in the Coquihalla, Fraser and Thompson River Basins, and future land use plans for Lower Nicola Indian Band reserves and fee simple land were raised.

Lower Nicola is concerned regarding spills, and the potential for a spill to impact Lower Nicola's use and occupation of its asserted traditional territory, ability to make decisions over the area impacted, and the potential for a spill to adversely impact any economic development aspirations Lower Nicola has for its territory.

A discussion of the potential impacts of a pipeline spill on Aboriginal Interests is provided in Section 4.3.6 of this Report. The pipeline RoW is proposed to cross three Lower Nicola reserves: Zoht Reserve #4, Zoht Reserve #5, and Joeyaska Reserve #2. In consideration of this information and analysis, the proposed crossing of three Lower Nicola reserves, as well as information available to the Crown on Lower Nicola's Aboriginal Interests and concerns raised by Lower Nicola during the NEB process and Crown consultation process, a pipeline spill associated with the project could result in minor to serious impacts on Lower Nicola's Aboriginal Interests. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who live nearby and rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill⁶.

VI - Conclusions

The Crown understands the project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions, and the existing pipeline safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations, the Crown expects impacts of the project on the exercise of Lower Nicola's Aboriginal Interests would be up to moderate.

The Crown is also supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Lower Nicola's ongoing involvement and participation the proponent's detailed project planning, including the development of site-specific measures to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Lower Nicola in emergency response planning activities. The federal Crown is also considering incremental measures that would further accommodate the potential adverse impacts of the project on Lower Nicola, as discussed in Sections 4 and 5 of the main body of this Report.

⁶ Trans Mountain Final Argument, p. 85 and 207