

## Appendix B.12 – Nooaitch Indian Band

### I – Background Information

Nooaitch Indian Band (Nooaitch) 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. Nooaitch has two reserves: Nooaitch Reserve no. 10 (903.1 hectares [ha]) and Nooaitch Grass Reserve no. 9 (790.3 ha). Its total registered population as of June 2016 is 233 (105 are living on their Reserve, 20 are living on other Reserves and 108 are living off Reserve). Nooaitch members historically spoke the Nlaka’pamux language. Nooaitch is a member of the Nicola Tribal Association which also includes: Siska Indian Band, Nicomen Indian Band, Coldwater Indian Band, Shacken Indian Band, Cook’s Ferry Indian Band and Upper Nicola Band.

Nooaitch is a party to the Nlaka’pamux Nation protective *Writ of Summons*, which was filed in the BC Supreme Court on December 10, 2003, asserting Aboriginal title to a territory identified in the writ. The *Writ* also includes Lower Nicola Indian Band, 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, Oregon Jack Creek Band, Shackan First Nation, Siska Indian Band, Skuppah Indian Band, and Spuzzum First Nation.

Nooaitch’s filings with the National Energy Board (NEB) state that its people have long relied on hunting and fishing for sustenance and for cultural fulfillment and that they have and continue to practice traditional activities. Nooaitch states that they historically fished in Nicola Lake and used the fish for food and for trade with other communities. Nooaitch notes that there are burial grounds located just outside Nooaitch Reserve no. 10.

### II – Preliminary Strength of Claim Assessment

- Nooaitch 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 RoW is approximately 18 km east of Nooaitch’s main reserve.
- 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 strong *prima facie* claims 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 historic Nlaka’pamux use<sup>1</sup>.

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<sup>1</sup> 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

- 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* claims. 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 for 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 1846<sup>2</sup>.

### 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 Nooaitch's Aboriginal Interests, the Crown is of the view that the legal duty to consult Nooaitch lies at the middle to deeper end of the *Haida* consultation spectrum. Nooaitch was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which affords Nooaitch opportunities to be consulted at a deeper level.

Nooaitch was an intervenor in the NEB review of the Project, providing oral traditional evidence [A4E9W3], information requests [A3W8Q1], written evidence [A4Q0F4 and A4Q0F6] and written argument-in-chief [A4X5J5]. Nooaitch responded to Natural Resource Canada's Issue Tracking Table Information Request [A71245] by further elaborating their concerns. In letters sent to the EAO in May and June of 2016, Nooaitch identified additional issues and concerns regarding the Project and consultation by the Crown. The Crown is also in receipt of an open letter dated June 15, 2016, sent to Prime Minister Justin Trudeau, Alberta Premier Rachel Notley, and British Columbia Premier Christy Clark from a collective of Aboriginal groups, including Nooaitch. This letter identifies interests and concerns related to Crown consultation and Indigenous consent for the Project and proposes a role for Indigenous groups in overseeing and monitoring the Project over its lifecycle if approved.

Nooaitch has been active throughout the Crown consultation process, and have communicated their thoughts on the Project and consultation process via emails, letters, and phone calls. Nooaitch met with the Crown consultation team on June 12, 2014, and April 6, May 5, and October 21, 2016, to discuss the Project.

Nooaitch received \$15,400 in participant funding from the NEB plus travel for three to the hearing. The Major Projects Management Office (MPMO) offered Nooaitch \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Nooaitch an additional \$14,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Nooaitch signed a contribution agreement with the MPMO in response to the first offer, receiving a total of \$12,000 in allocated funding. During the October 21, 2016 meeting, Nooaitch was offered \$5,000 in capacity funding by EAO to participate in consultation with the Crown.

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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.

<sup>2</sup> Ibid.

The proponent stated that they entered into a confidential LOU with the Nicola Tribal Associated in July, 2013, that involved the participation of Nooaitch Indian Band and provided capacity funding to support Project engagement. The proponent further notes that in January, 2015, they signed a confidential capacity funding agreement (CFA) with Nooaitch that included funding to support Project engagement. In May, 2015, a confidential letter of understanding (LOU) which included Project engagement capacity funding, was signed with the proponent and Esh-kn-am Investments Joint Venture, a partnership of several Aboriginal groups, including Nooaitch.

A first draft of this Consultation and Accommodation Report (CAR or the Report) was provided to Aboriginal groups for review and comment on August 17, 2016. No specific comments on the Report were provided by Nooaitch. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016 and Nooaitch provided comments on November 8, 2016.

#### **IV – Summary of Key Nooaitch Issues and Concerns Raised**

Nooaitch's key issues and concerns revolve around the NEB and Crown consultation for the Project, potential cultural and social impacts, environmental impacts to fish, wildlife, and water, spills and emergency response, and the cumulative environmental effects arising from this and other projects. The Crown has gained its understanding of Nooaitch's issues and concerns through Nooaitch's involvement in the NEB process, including the responses Nooaitch provided to Natural Resources Canada on its information request addressed to them, and through other engagement with the Crown.

This section offers a summary of the key issues raised by Nooaitch, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Nooaitch's key Project-related issues and concerns are summarized below:

##### *NEB Project Review Process and Crown Consultation Process*

- Nooaitch does not believe that the NEB review process has adequately considered the potential for Project impacts on their Aboriginal Rights and title, nor provided an accessible and appropriate process by which to undertake consultation. As such, Nooaitch believes that the Crown cannot rely on the NEB process to fulfill its duty to consult;
- Nooaitch has not been provided with adequate resources or time to effectively engage in the project review and that consultation thus far has been insufficient to meet legal requirements.
- Nooaitch evidence was not adequately considered in the NEB process, no oral cross examinations of the proponent were allowed, and they received inadequate responses from the proponent for Information Requests they submitted;
- Nooaitch noted the importance of the upstream greenhouse gas (GHG) emissions report for the Project and indicated a need for funding in order to review and comment on this Report;
- Disagree with the federal Crown's approach to determine strength of claim (SoC) based on proximity of reserve lands to the pipeline route, resulting in a 'medium' depth of consultation for Nooaitch while neighboring Aboriginal Groups (Coldwater Indian Band) were assigned a 'high' ranking;
- Omission of upstream and downstream effects of the Project and cumulative climate change effects in the NEB assessment of the Project;

- Nooaitch stated that the existing pipeline should have been included in the NEB assessment of the Project and it was not. As a result, Nooaitch expressed concern that impacts associated with the existing pipeline have not been addressed; and
- Nooaitch expressed concerns with the NEB Panel review process including, delegation of procedural aspects of consultation, perceived procedural issues and biases, lack of cross-examination to test the evidence, scoping of issues, as well as limited of definition of the “national interest” in the NEB filing manual.

#### Proponent Engagement, Assessment Methods and Planning

- Lack of meaningful engagement with the proponent and overrepresentation of the communications to date in the proponent’s engagement documentation;
- The proponent has failed to properly answer information requests, provide requested data or data analysis information, and answer Nooaitch’s questions;
- The Riparian Habitat Management Plan and Wetland Survey and Mitigation Plan are inadequate;
- The proponent’s proposed mitigation is general in nature and does not address broader environmental effects. As well, mitigation was developed without input from Nooaitch and does not take into account their specific concerns;
- Lack of Traditional Ecological Knowledge (TEK) incorporated into the proponent’s planning and assessments and improper TEK collection methods in the Black Pines to Hope segment of the Project. This included reference to a consultant’s report commissioned by the Lower Nicola that described deficiencies in the proponent’s TEK data collection methods and subsequent integration of TEK into the assessment of impacts;
- Methods and data used to assess the oil spill risk underestimate the risk and hazard from a spill. Reference to a consultant’s report outlining the deficiencies with the oil spill risk assessment that was conducted by the proponent;
- Deficiencies in the proponent’s hydrology studies, design criteria, and crossing designs, as described in their technical engineering report submitted as part of their written intervenor evidence; and
- Lack of capacity funding such that Nooaitch cannot carry out informed decision making.

#### Cultural and Social Impacts

- Potential adverse effects of the Project’s marine activities on the health of the fish stocks and species that pass through the marine terminal waters en route to spawning areas in Nooaitch territory. Nooaitch relies on fish for sustenance and for cultural purposes;
- A major focus on Nooaitch is food security and sustainability;
- Nooaitch noted that they have a higher level of risk exposure from the Project due to the location of their land in the floodplain of the Nicola River;
- Lack of benefits and appropriate compensation to the community from the Project given the potential impacts to community members, and uncertainty whether Nooaitch will receive any compensation or benefits from the proponent if they oppose the Project;
- Limited capacity for the community, including training and communications, to respond to a major spill and potential adverse social, cultural, and inter-generational effects should a major spill occur;
- Project’s potential impact on the ability of members to continue traditional practices, such as hunting and gathering berries, plants, tree bark and roots, on their reserves and in their traditional territory;
- Potential impacts to burial grounds located just outside of Nooaitch Reserve no. 10;

- Potential increased access into Nooaitch traditional territory as a result of the project and new access roads;
- Potential long-term cultural effects, including inter-generation effects, should a spill occur; and
- Potential impacts to Nooaitch lands from the pipeline that could affect their level of food security, self-sufficiency and sustainability.

#### Environmental Effects

- Potential environmental effects on the Nicola River, which Nooaitch considers an endangered watershed;
- Potential adverse effects of the Project on already low water levels in the Nicola River, specifically the effect this could have on salmon;
- Potential adverse effects on wildlife and wildlife habitat (e.g. deer, moose, rabbits, and grouse), including both direct and indirect effects;
- Potential adverse effects on fish and fish habitat, most especially for salmonids and the Interior Fraser Coho, in the Coldwater and Nicola watersheds;
- Potential adverse effects on underground aquifers and wells in their traditional territory;
- Potential adverse effects in the marine environment from Project activities and resulting impacts to fish stocks on which Nooaitch relies; and
- GHG emissions, including the enforceability of NEB conditions related to GHG emissions and the lack of conditions addressing GHG emissions during operation.

#### Cumulative Effects

- Historic and ongoing cumulative environmental effects in their asserted traditional territory, including impacts from pipelines, highways, agriculture, timber harvesting, utility corridors, and the transportation of dangerous goods, as well as the sustainability of the land-base;
- Inadequate assessment of cumulative effects by the proponent as it fails to consider existing development and Aboriginal Rights in Nooaitch traditional territory; and
- Cumulative effects on fish and fish habitat, including coho and SARA-listed species, as well as cumulative effects on wetlands.

#### Impacts on Aboriginal Rights and Title

- Impacts could impede or disrupt Nooaitch's use of its asserted traditional territory, including their level of food security, self-sufficiency and sustainability;
- Activities could affect Nooaitch's ability to manage and make decisions over the Project area, including land and resource management and the goal to maintain the longevity of food security for generations to come. In particular, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), including Free Prior and Informed Consent (FPIC) has not been implemented in Canada;
- Project-related activities that could affect Nooaitch's economic development aspirations for its asserted traditional territory;
- Lack of joint or shared decision making on projects within Nlaka'pamux title lands; and
- Potential Project-related and cumulative effects on Nlaka'pamux title as well as the weighing of the national interest against potential impacts on Nlaka'pamux rights and title.

#### Accidents and Malfunctions

- Significant concerns around spills, including the safety of the pipeline given other spills in the area and the proponent's ability to effectively respond to emergencies;

- Numerous potential adverse environmental, social, economic, and cultural impacts should a major spill occur; and
- Lack of testing and understanding of emergency spill response and fate and distribution of diluted bitumen as well as issues associated with spill modeling.

#### Access Management

- Concern about the potential for increased access as a result of construction activities and resulting impacts in their traditional territory. This includes concerns about how new access roads may increase traffic to previously inaccessible areas.

#### Additional Concerns

- Nooaitch expressed concerns related to the broader regulatory environment, including the federal government's review of environmental legislation, the timelines for these reviews, the timing of the TMX decision, and decision-making on major energy projects made by cabinet; and
- Nooaitch identified concerns related to the lack of a national energy strategy and climate change impacts associated with the energy sector.

#### **Accommodation Proposals**

Nooaitch has stated that a Certificate of Public Convenience and Necessity (CPCN) should not be issued for the Project until further conditions are met. Nooaitch desires to have an active role in managing Project related environmental effects to ensure mitigation is culturally appropriate and aligned with Nooaitch's Land Use Plan. As outlined in the *NEB Recommendation Report*, Nooaitch proposed a number of recommendations during the NEB review process related to the proponent's engagement, capacity funding, and potential impacts to Aboriginal rights and title. They also provided proposed revisions to the NEB proposed conditions related to fish, fish habitat, and wetlands to include specific reference to the Nicola and Coldwater watersheds. Other specific recommendations included:

- The proponent use the methods described in the *Technical Review of the ESA* (prepared by LGL Limited Environmental Research Associates for the Lower Nicola Band) to properly collect and consider TEK in the Black Pines to Hope segment of the Project;
- The proponent conduct further studies to determine potential Project effects on native plant species, including monitoring and data collection over five years to determine if re-planting is necessary;
- The proponent's Access Management Plan must specifically include all areas within Nlaka'pamux traditional territory and that access control measures are implemented in the Upper Coldwater watershed;
- The proponent conduct further assessments in the Nicola and Coldwater watersheds to determine the cumulative effects to date and examine what impacts a hydrocarbon spill could have on these watersheds;
- The offset measures plan that the proponent is required to prepare and file with the NEB should include Interior Fraser Coho and other salmonids;
- The proponent employ hydraulically isolated crossing methods at all crossings;
- The proponent provide a detailed spill Emergency Response Plan to Nooaitch that details how response times will be minimized, how Nooaitch will be notified and involved in the event of a spill, and that does not rely exclusively on automatic leak detection systems. Further, Nooaitch recommends that the proponent conduct a revised oil spill risk assessment based on a worst

case scenario and provide greater financial guarantees in its Financial Assurance Plan and compensation for losses experienced by Nooaitch in the event of a spill; and

- The proponent engage with Nooaitch in a meaningful way and provide financial capacity for Nooaitch to conduct a technical review and field investigations in order to better inform mitigation planning.

Additional recommendations that were brought up by Nooaitch in discussions and written submissions subsequent to the *NEB Recommendation Report* included:

- If the Project is approved, a fully equipped emergency response office must be located in Merritt, as travel times from Kamloops would be too great or not possible during the winter; and
- In terms of emergency response planning, Nooaitch requests that post-assessment reports are required to ensure continuous and constant improvements to planning, response and engagement with First Nations;

Nooaitch reiterated in its comments on the draft Crown Consultation and Accommodation Report submitted on November 8, 2016 that a CPCN should not be issued since more time is required to address the following outstanding issues:

- Meaningful consultation as defined and agreed to by all parties occurs with Nooaitch and the Nlaka'pamux Nation as defined in the June 15th and June 10th 2016 correspondence;
- FPIC by Nooaitch and Nlaka'pamux title holders is provided consistent with the UNDRIP and implementation without qualification;
- The Government of Canada makes best efforts to meet its Ministerial commitments as stated by Prime Minister Trudeau and as reiterated in Ministerial Mandate letters;
- Effective oversight of the CPCN and TMX have been established through development of an environmental and safety committee (referred to by Nooaitch as the Committee) with a defined agreed to Terms of Reference and long term revenue that has been allocated to support the operations of Committee;
- Effective oversight of the CPCN and TMX has been assessed through a follow up review of the Auditor General of Canada to assess the NEBs and the Committee track record;
- A more rigorous environmental assessment and regulatory regime has been developed through review of existing legislation;
- A full assessment of the cumulative impacts to the exercise of Aboriginal title and rights has been concluded;
- Compensation agreements have been developed (for impacts stemming from the existing line);
- Royalty Revenue sharing agreements are negotiated with all levels of government (for the life of the Project, TMX);
- The modernization of the NEB has been reviewed and social license of the NEB to operate has been re-established; and
- All conditions attached to the CPCN have been reviewed by the Committee.

In addition to the issues identified above, Nooaitch identified the following recommendations for additional accommodations in its November 8, 2016 correspondence:

- Joint meetings between First Nations Chiefs and Ministers (including Ministers Carr and Bennett) to discuss proposed federal authorizations, NEB Panel review and recommendations, conditions attached to the recommended CPCN, scoping issues, procedural issues, issues

outside of the NEB Panel review, national energy strategy, track record on climate change, recent federal approvals on other major energy projects;

- Joint meetings between First Nations Chiefs and Ministers to discuss the June 15, 2016 correspondence and issues of Indigenous consent, Indigenous oversight and consultation.
- Joint meetings between First Nations Chiefs and Ministers to discuss the federal decision on TMX and debrief First Nations Leadership;
- Full Identification and disclosure of long term revenue streams flowing to all levels of government from the project, stemming from 1953 to present. Revenue Sharing Agreements with Federal, Provincial and Municipal government based on the principles outlined in the Laurier Memorial (50% of gross revenue sharing with First Nations);
- Full Identification and disclosure of long term revenue streams flowing to all levels of government from the project, stemming from the date of construction of TMX to the life of the pipeline. Revenue Sharing Agreements with Federal, Provincial and Municipal government based on the principles outlined in the Laurier Memorial (50% of gross revenue sharing with First Nations);
- Development of an Environment and Safety Committee that has a defined and agreed to terms of reference and mandate - including a Nation to Nation component - and long term funding and political commitment (for the life of the pipeline);
- Requirements to have an emergency preparedness, spill response office in Merritt and emergency preparedness and response located in Merritt;
- Time to fully scope out an effective terms of reference and planning for an Environment and Safety Independent Committee with specific focus on pipeline safety, monitoring and oversight, review of spill detection and other safety systems, review of emergency preparedness planning and capacity, review and assessment of any spill event, risk assessment and spill prevention preparedness;
- Recognition that timelines for a federal decision on TMX are a self-imposed deadline and that timelines can be changed by Cabinet. Recognition that the most likely course of action if Cabinet proceeds with a Dec 19th, 2016 decision and federal approval of TMEP is litigation;
- In addition to NEB Conditions 132 and 133, the proponent should be required to continual monitoring and offsetting any expected significant effects to marine mammals for the life of the pipeline;
- In addition to NEB Conditions 132 and 133, the proponent should be required to report any deaths of marine mammals related to marine shipping for the life of the pipeline; and
- Implementation of meaningful consultation and accommodation. Implementation of best efforts to seek the consent of Nlaka'pamux Nation and Nooaitch title holders consistent with full implementation of UNDRIP without qualification.

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 Nooaitch 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.

#### ***Nooaitch's Response to NEB Recommendation Report***

In a letter dated May 31, 2016, to the BC EAO, Nooaitch outlined their concerns regarding the province's acceptance and use of the *NEB Recommendation Report* to inform their decisions and consultation. Nooaitch expressed the view that the scientific information provided by the proponent was not rigorous

enough to properly assess risk from the Project. Additionally, Nooaitch noted the lack of 'social licence' for both the NEB and the EAO and the deficiency in consultation and engagement on the Project to date.

#### **V – Potential Impacts of the Project on Nooaitch'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) by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Nooaitch's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Nooaitch'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 Nooaitch's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Nooaitch, Nooaitch's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province.

Nicola Tribal Association led a joint third-party traditional land use/traditional ecological knowledge (TLRU) study with Shackan Indian Band, Nicomen Indian Band, and Nooaitch Indian Band. The study, titled *Final Report: Tmix<sup>W</sup> Research Traditional Land Use/Traditional Knowledge Study* was completed in September 2014 and submitted to the proponent. Prior to this, an Interim Report *Tmix<sup>W</sup> Research Traditional Land Use/Traditional Knowledge Study*, was summarized in a Supplemental Technical Report submitted to the NEB by the proponent on July 21, 2014 (Filing IDs A3Z4Z2 to A3Z4Z5). The study identifies traditional land uses in the segment of the Project from Black Pines to Hope. Traditional land uses identified by Nicola Tribal Association include hunting mammals and birds, gathering plants, information on fishing sites, sacred sites, trapping sites, habitation sites, gathering areas for community members and trails travelways. None of the Aboriginal Interests identified by Nicola Tribal Association in their TLRU study including fishing, hunting, trapping and gathering activities, habitation, trails and sacred sites, overlap with the proposed pipeline corridor. In its Supplemental Technical Report ([A4F5D1](#)), the proponent estimated approximate distances and directions from the pipeline corridor based on information in Nicola Tribal Association's report. Additional fishing locations are identified for Nooaitch in Volume 5B ([A3S1S0](#)) of the Project application. Nooaitch has expressed concerns that the proponent did not properly collect and consider Aboriginal traditional ecological knowledge in the Black Pines to Hope segment. In the oral traditional evidence Nooaitch Elders provided, they indicated that members exercise their Aboriginal rights throughout their traditional territory as well as in surrounding areas. Given this and Nooaitch's kinship ties to other Aboriginal groups in the area, they view their traditional territory as the entire Nlaka'pamux territory.

### ***Impacts on Hunting, Trapping and Plant Gathering***

As stated in Volume 5B, Nooaitch community members continue to practice traditional hunting and gather berries, plants, tree bark and roots throughout their asserted traditional territory. In their TLRU study for the Project, Nicola Tribal Association identified hunted species such as white-tailed and mule deer, moose, elk, beaver, marmot, rabbit, otter, brown and spruce grouse, geese, and duck. Nicola Tribal Association members also snare grouse and collect eggs from some migrating birds. In their TLRU study for the Project, Nicola Tribal Association identified 67 plants that are gathered, including: asparagus, bitter root, bull rush, cactus, cow parsnip, dandelion, Devil's club, fern, false box, hawthorn, horse tail, Indian celery, Indian hemp, Indian tea, kinnikinick, mint, mullen, penstemon, pineapple weed, showy milk weed, stinging nettle, sunflower, tiger lily, tule/cat tail, watercress, wild onion, wild potato, yarrow, cotton wood mushroom, lightening, pine mushroom, puff ball mushroom, sand wood mushroom, shaggy mane mushroom, buffalo sage, juniper, rose, sage, sage brush, green willow bush, red willow, silver willow, water hemlock, wild weeping willow, wolf willow, alder, black moss from Jack pine, cedar and roots, Douglas fir, fir tree, pine needles, larch, lodge pole pine, pine and pine pitch, Ponderosa pine, tamarack, trembling aspen, western tamarack, yellow cedar, avalanche lilies, nodding onion, chocolate lilies, balsamroot, lichen and cactus. Historically, roots and bulbs were an important part of the diet, partly because the availability of root crops was reliable. Plants, roots and fibre were made into tools, bows and arrows, spears, and nets and harpoons.

Nooaitch identified many concerns related to environmental effects of the Project on hunting, trapping, and plant gathering activities, particularly the ability of members to continue traditional practices, such as hunting and gathering berries, plants, tree bark and roots, on their reserves and in their traditional territory, and impacts on wildlife and wildlife habitat. A major focus for Nooaitch is food security and sustainability. Concerns related to cumulative environmental effects in Nooaitch asserted traditional territory, including the existing Trans Mountain pipeline, timber harvesting, agriculture, highways and urban development were also raised. 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 Nooaitch, the proponent would implement several mitigation measures to reduce potential effects to species important for Nooaitch'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 Nooaitch to further discuss and address concerns, where possible, prior to the start of construction.

In their TLRU study for the Project, Nicola Tribal Association did not identify hunting or trapping sites. One plant gathering site was identified in the Coquihalla and Coldwater areas; however the approximate distance from the Project Area was not stated in the TLRU study. No hunting, trapping or plant gathering sites were identified in the proposed pipeline corridor.

Nooaitch raised concerns with the Project's potential impacts relating to specific locations and access on hunting, trapping, and plant gathering activities, particularly increased access as a result of Project, including concerns about how new access roads may increase traffic to previously inaccessible areas. Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Nooaitch's access to hunting, trapping and plant gathering activities, largely confined to the Project footprint for the pipeline and associated facilities. The Crown appreciates that with construction and reclamation activities disruptions to access may result in a loss of harvesting opportunities for Nooaitch. 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 Nooaitch, 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 Nooaitch'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 Nooaitch prior to construction, the sites will be assessed, and appropriate mitigation measures will be determined. The proponent committed to working with Nooaitch to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Nooaitch 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 impacts on the ability of Nooaitch community members to continue traditional practices on their reserves and in their traditional territory. Concerns related to adverse effects to Nooaitch lands that could seriously affect their level of food security, self-sufficiency and sustainability. The Crown appreciates that this short-term disruption could temporarily alter the behavior 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). 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 Nooaitch, Nooaitch'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 impact on Nooaitch's hunting, trapping, and plant gathering 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 Nooaitch;
- Project-related pipeline and facility construction and routine maintenance activities within Nooaitch's traditional territory are temporary and thus, likely to cause minor disruptions to Nooaitch'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 Nooaitch regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their hunting, trapping and plant gathering activities.

### ***Impacts on Freshwater Fishing***

Nicola Tribal Association members fish for numerous species including coho and Chinook salmon, trout, whitefish, sucker, and minnow. In their Final Argument Nooaitch details the importance of the Nicola River and Coldwater River for fishing. They outline the historical and current impacts to these two rivers, including forestry, agriculture, irrigation, highway maintenance, warming waters, erosion, contamination, and urban development. Nooaitch members have observed a decline in both the quality and quantity of fish and fish habitat in these rivers, stating their belief that the Nicola River is contaminated and the fish there are smaller, fewer, and no longer safe to eat. Nooaitch asserts that any further adverse effects in these watersheds, such as from a spill, would devastate fish populations.

Nooaitch identified many concerns related to environmental effects of the Project on freshwater fishing activities, including impacts to fish and fish habitat, especially for salmonids and the Interior Fraser Coho, in the Coldwater and Nicola watersheds, watercourse crossings, and ongoing cumulative environmental effects in Nooaitch asserted traditional territory. A major focus for Nooaitch is food security and sustainability. Concerns were also raised related to underground aquifers, wells, and to the already low water levels in the Nicola River. 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 Nooaitch, the proponent would implement several mitigation measures to reduce potential effects to species important for Nooaitch's fishing activities. 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. The NEB also considered the evidence Nooaitch provided regarding hydrological risk assessment and planning and is of the view that Nooaitch's concerns regarding this topic would be adequately addressed by the proponent's current and proposed future planning and studies including updated flood frequency estimate information for hydrologically significant watercourse crossings, noting that the proponent committed to conducting further

hydrological analysis and geotechnical investigations<sup>3</sup>. The NEB also added Conditions 65, 66 and 67 that relate to Nooaitch's submitted hydrological evidence. The proponent is also committed to continued consultation and engagement with Aboriginal groups during construction.

In their TLRU study for the Project, Nicola Tribal Association identified three fishing sites located more than 2 km from the Project Area or the approximate distance from the Project Area was not stated in the study. In Volume 5B, five additional traditional fishing locations were identified, including fishing for salmon (coho and Chinook), bull trout, and Dolly Varden char at Coldwater River and the Fraser River, which cross the proposed pipeline corridor. The three other fishing sites at Nicola Lake, Anderson River, Spius Creek were identified more than 2 km from the proposed pipeline corridor.

Nooaitch raised concerns with the Project's potential impacts relating to specific locations and access to freshwater fishing activities, specifically impacts on the Nicola River and Coldwater River for fishing. Project-related construction and routine maintenance activities are expected to cause short-term, temporary disruptions to Nooaitch's access to fishing activities. The Crown appreciates that 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 Nooaitch 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 Nooaitch, the proponent would implement several mitigation measures to reduce potential effects to fishing sites important for Nooaitch's fishing activities. As previously discussed, the proponent is committed to minimize disturbance to access to Nooaitch's traditional lands, as described in the Access Management Plan. The proponent is committed to working with Nooaitch to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Nooaitch expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its freshwater fishing activities, including the health of the fish stocks and species on which Nooaitch relies for sustenance and culture, food security, self-sufficiency and sustainability. As described previously, the Project construction and routine maintenance is expected to cause short-term, temporary disruptions to Nooaitch's fishing activities. The Crown appreciates that 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 Nooaitch, Nooaitch'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 Nooaitch's freshwater fishing activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

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<sup>3</sup> National Energy Board Report: Trans Mountain Expansion Project. May 2016. pp.70-71.

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Nooaitch;
- Project-related pipeline and facility construction and routine maintenance activities within Nooaitch's traditional territory are temporary and thus, likely to cause minor disruptions to Nooaitch'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 Nooaitch regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their freshwater fishing activities.

### ***Impacts on Other Traditional and Cultural Practices***

Nicola Tribal Association reported that the Coquihalla is a spiritually and culturally important region. Nooaitch also stated in their Final Argument that the water and land in their traditional territory is of central importance to their cultural and spiritual identity. In the Crown consultation meeting on October 21, 2016, Nooaitch noted that there are six to eight historical sites close to the Project, of which two are within the proposed pipeline corridor.

Nooaitch identified many concerns related to environmental effects of the Project on other traditional and cultural practices, including ongoing cumulative environmental effects in Nooaitch asserted traditional territory, and health of the fish stocks and species on which Nooaitch relies for sustenance and culture. 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 Nooaitch's traditional and cultural practices (section 4.3.4). With regards to specific concerns raised by Nooaitch, 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.

Nicola Tribal Association identified a total of four trails and travelways in their TLRU study for the Project, none of which are within the proposed pipeline corridor. One trail/travelway from Coquihalla Lake to Boston Bar Creek is located within 2 km of the Project Area, while the remaining three sites identified by Nicola Tribal Association are located more than 2 km from the Project Area or the approximate distance from the Project Area was not stated in the TLRU study. Nicola Tribal Association also identified one sacred area in their TLRU study for the Project although the distance from the Project was not provided. From the Coldwater Valley to Hope, 45 ceremonial and spiritual sites were identified; however, the specific locations of these sites were not provided.

Nooaitch raised concerns with the Project's potential impacts relating to specific locations and access to other cultural and traditional practices, including impacts to burial grounds and waterways within their asserted traditional territory, specifically the Nicola and Coldwater Rivers which are culturally significant. Concerns related to increased access into Nooaitch traditional territory as a result of the Project were also raised. 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 Nooaitch'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 Nooaitch'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.

Nooaitch expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its other traditional and cultural practices, particularly long-term cultural effects, including inter-generation effects. As described previously, the Crown appreciates that this may result in temporary interruptions to Nooaitch'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 Nooaitch, Nooaitch'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 impact on Nooaitch'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 Nooaitch's traditional and cultural practices;
- Project-related construction and routine maintenance activities within Nooaitch's traditional territory are temporary and thus, likely to cause minor disruptions to Nooaitch'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 Nooaitch 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 Nooaitch's traditional territory assessed as having strong *prima facie* claim to Aboriginal title, in the vicinity of Merritt, 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 Crown has actively consulted with Nooaitch 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 Nooaitch throughout the NEB and Crown consultation process include:

- Impacts could impede or disrupt Nooaitch's use of its asserted traditional territory, including their level of food security, self-sufficiency and sustainability;
- Activities could affect Nooaitch's ability to manage and make decisions over the Project area, including land and resource management and the goal to maintain the longevity of food security for generations to come; and

- Project-related activities that could affect Nooaitch's economic development aspirations for its asserted traditional territory.

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 or 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. It is noted that Nooaitch 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, the Project is expected to have minor impacts on Nooaitch's asserted Aboriginal title to the proposed Project area.

#### ***Impacts Associated with Accidental Spills***

Nooaitch expressed several concerns with direct and indirect effects of Project-related pipeline spills on their Aboriginal Interests, particularly potential adverse environmental, social, economic, and cultural impacts should a major spill occur, impacts on underground aquifers and wells in their traditional territory, and the proponent's ability to respond to emergencies in freshwater and marine environments.

The Crown also appreciates Nooaitch's concerns regarding spills, and the potential for a spill to impact Nooaitch'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 Nooaitch 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. In consideration of this information and analysis, as well as information available to the Crown on Nooaitch's Aboriginal Interests and concerns raised by Nooaitch during the NEB process and Crown consultation process, a pipeline spill associated with the Project could result in minor to serious impacts on Nooaitch'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 spill<sup>4</sup>.

#### **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,

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<sup>4</sup> Trans Mountain Final Argument, p. 85 and 207

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 Nooaitch's Aboriginal Interests would be up to minor-to-moderate.

The Crown is also supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Nooaitch'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 Nooaitch 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 Nooaitch, as discussed in sections 4 and 5 of the main body of this Report.