

Appendix B.3 – Ashcroft Indian Band

I - Background Information

The Ashcroft Indian Band (Ashcroft) is a member of the Nlaka'pamux (pronounced "Ing-khla-kap-muh") people, whose asserted traditional territory encompasses part of south central British Columbia (BC) from the northern United States to north of Kamloops. Ashcroft holds four reserves (Cheetsum's Farm 1, 105 Mile Post 2, McLean's Lake 3, and Ashcroft 4) situated in the Thompson River watershed. As of July 2016, Ashcroft had a registered population of 269, with an on-reserve population of 70¹. Ashcroft members historically spoke Nlaka'pamux, the language of the Nlaka'pamux people.

Ashcroft is a party to the Nlaka'pamux Nation's *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 of Summons* also includes Lower Nicola 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 Band, Shackan First Nation, Siska Indian Band, Skuppah Indian Band, and Spuzzum First Nation.

II - Preliminary Strength of Claim Assessment

- Ashcroft is one of the Nlaka'pamux Nation bands. Approximately 226 kilometers (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, as identified in Nlaka'pamux Nation protective *Writ of Summons*. Approximately 151 km of the proposed pipeline RoW would be located within Ashcroft's asserted traditional territory. The distance from the RoW to the nearest Ashcroft reserve is 59 km.
- 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.

¹ Indigenous and Northern Affairs Canada: http://pse5-esd5.ainc-inac.gc.ca/FNP/Main/Search/FNRegPopulation.aspx?BAND_NUMBER=685&lang=eng

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 use².

- 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 1846³.

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

Ashcroft was an intervenor in the National Energy Board (NEB) process, provided correspondence and filed information requests. While Ashcroft filed intent to provide oral traditional evidence, Ashcroft did not attend the oral traditional evidence hearings. Ashcroft did not provide written evidence or oral summary arguments. In submissions to the NEB, Ashcroft stated that they "have lived on their traditional territory since time immemorial and assert un-extinguished Aboriginal rights, including title to the land, on their traditional territory. Ashcroft understands that some of the Project would be within the traditional territory the eastern boundary of Nlaka'pamux Traditional Territory, which is also Ashcroft Traditional Territory." ([A58701](#))

Ashcroft signed a 'Regulatory Support Letter' with the proponent, dated February 11, 2015, which was submitted to the NEB. In this letter, Ashcroft states that they withdraw any objection to the Project Application and consent to the issuance of a Certificate of Public Convenience and Necessity.

Ashcroft applied for participant funding from the NEB and was offered \$5,550 plus travel for one to the hearing; however, they did not sign a contribution agreement with the NEB. Ashcroft was offered \$1,500

² 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.

³ *Ibid.*

by the Major Projects Management Office (MPMO) towards participation in consultations after the close of the NEB hearing record. Ashcroft was offered an additional \$14,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Ashcroft signed a contribution agreement in response to both these offers, for a total of \$15,465.40 in allocated funding. EAO issued \$5,000 in capacity funding to Ashcroft on August 17, 2016 to assist with participation in consultation.

Ashcroft met with the Crown on August 8, 2016 to discuss the Project. The Crown provided a first draft of this Report to Ashcroft for review and comment on August 17, 2016. The Crown did not receive comments from Ashcroft on the draft Report. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016, and Ashcroft responded with an email on November 10, 2016, expressing concerns with tight deadlines. In a letter dated November 15, 2016, MPMO and EAO offered to accept comments until November 18, 2016, and explained that these timelines are constrained by the federal time limit for a Governor-in-Council (GIC) decision. Ashcroft provided a letter on November 18, 2016, stating that Ashcroft is unable to comment on the information and respond in an informed and meaningful manner given the time and capacity constraints. Ashcroft did not provide a separate Aboriginal group submission to the Crown.

IV - Summary of Key Ashcroft Issues and Concerns Raised

Ashcroft provided limited information to the NEB and the Crown. The Crown has gained its understanding of Ashcroft's issues and concerns through the community's involvement in the NEB process, and through consultation with the Crown, including the meeting held in August 2016. This section offers a summary of the key issues raised by Ashcroft, 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 Ashcroft's key Project-related issues and concerns is summarized below:

Methodology, Process and Consultation

Initially, Ashcroft raised a concern regarding whether the Crown has breached its legal duty to consult by relying on the NEB process, which they view as contrary to the Dene Tha' decision. Furthermore, Ashcroft expressed concerns with the Crown's reliance on the NEB process and discussions between Aboriginal groups and the proponent to support the legal duty to consult, stating these engagements do not substitute for, or meet the constitutional duty for government-to-government consultation.

Ashcroft expressed frustration with the consultation process and the assessment of potential impacts of the proposed Project on Ashcroft's Aboriginal title and rights by both MPMO and EAO. Ashcroft stated the Crown's assessment of potential impacts of the Project on Ashcroft's Aboriginal Interests is based on missed and incorrect information, and commitments by the proponent that do not fulfill the duty of the Crown to accommodate them for potential impacts on their Aboriginal title and rights. Ashcroft indicated that they were not provided the resources to conduct a traditional land and resources study. Other concerns raised include not being provided information in a timely manner, unreasonable timelines for responses, lack of clarity of the role of the Crown consultation team or who had jurisdiction

over consultation, and lack of resources from the Crown to support Ashcroft's informed and meaningful participation in the harmonized EA review.

Impacts on Aboriginal Rights

In their Application to Participate and Round 1 information request submitted to the NEB review, Ashcroft identified the Project as within their traditional territory. Ashcroft noted potential impacts to their Aboriginal rights and title, especially in the incident of a spill or other unauthorized release from the pipeline into the environment. Ashcroft stated they wanted to identify how their rights could be impacted, suggesting impacts could be cumulative, direct or indirect, and extend beyond the boundaries of the RoW. The band proposed it could provide mitigation recommendations in areas such as water quality, wildlife inventories, cultural heritage resources, pipeline spills and other accident risk assessments, emergency response readiness, skills or training readiness, and proposed accommodation or compensation. In the letter of support signed with the proponent, Ashcroft stated they were satisfied with the mitigation measures provided by the proponent, but continued to discuss accommodation measures with the Crown. Further, Ashcroft stated that although they have signed letter and have an agreement with the proponent, it does not fulfill the honor of the Crown or the goal of consultation. Ashcroft also noted issues with provincial revenue sharing models that are based on a per capita and the provincial assessment of strength of claim.

Ashcroft noted that if the Project protects cultural and environmental values important to them during construction and operations, and if the proponent fulfills its stated commitments, then Ashcroft has no opposition to the Project as long as they receive benefits, employment and training opportunities, and updates that the other commitments and requirements are being fulfilled. Ashcroft's main focus is to secure long-term benefits and opportunities for the community members to be involved in the Project. Although Ashcroft supports the Project, the following Project-related issues and concerns were identified during the meeting:

- Inadequate resources and funding provided by the Crown;
- Potential impacts in the event of a pipeline spill on Ashcroft's future water supply from the Thompson River; and
- The excessive length of the regulatory process reviewing the Project.

Environmental Impacts

Ashcroft expressed concerns about potential impacts on wildlife.

Accidents and Malfunctions

Ashcroft noted a specific concern, regarding potential impacts on the Thompson River from a spill. The water supply for the Ashcroft will be the Thompson River, and this water supply could be negatively impacted in the event of a spill.

Ashcroft's Response to NEB Recommendation Report

Ashcroft does not agree with the NEB assessment or view the NEB process as fulfilling the duty to consult with them.

V - Potential Impacts of the Project on Ashcroft'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 or established 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.

It is the Crown's understanding that Ashcroft did not complete a traditional land and resource use study for the Project. As a result, the Crown has limited information on the specific sites and resources used by Ashcroft for traditional purposes that could be impacted by the Project. Ashcroft identified concerns during the Crown consultation process, which the Crown has taken into consideration in its assessment of potential impacts on Ashcroft's Aboriginal Interests.

The general direct and indirect effects of the Project on Aboriginal rights, along with key mitigation measures, are described in Section 4.3 of the main body of this Report. As described in that section, routine Project-related activities are likely to result in low to moderate impacts on the lands, waters and resources that Aboriginal groups use to exercise their hunting, trapping, plant gathering, fishing, and other traditional activities. Short-term, temporary access disruptions to traditional activities are expected, although these impacts would be localized within the Project footprint for the pipeline and associated facilities. In consideration of the information available to the Crown from the NEB process, Crown consultation with Ashcroft, Ashcroft's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province, the Project is expected to result in a minor impact on Ashcroft's Aboriginal rights.

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 notes that Ashcroft executed a Mutual Benefits Agreement with the proponent in October 2014. Although these agreements are confidential, the Crown understands they may contain provisions for financial, environmental and training benefits that could further reduce or accommodate impacts to Aboriginal title claims if the Project proceeds. 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 negligible impacts on Ashcroft's asserted Aboriginal title to the proposed Project area.

The Crown also appreciates Ashcroft's concerns regarding spills, and the potential for a spill to impact Ashcroft's future water supply from the Thompson River. 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 Ashcroft's Aboriginal Interests, and concerns raised by Ashcroft during the Crown consultation process, a pipeline spill associated with the Project could result in minor to serious impacts on Ashcroft's exercise of Aboriginal Interests, depending on the characteristics and severity of the spill. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline 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.

VI - Conclusions

The Crown understands that 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 ongoing burdens and risks associated with the Project. Under the typical conditions for construction and operations, the Crown expects impacts of the Project on the exercise of Ashcroft's Aboriginal Interests would be up to minor.

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

In addition, the Crown is aware that the proponent has entered into a Mutual Benefits Agreement with Ashcroft in an attempt to offset potential impacts, should the Project proceed.