

Trans Mountain Expansion Project

Reconsideration Hearing

Hearing Order MH-052-2018; File No. OF-Fac-Gas-T260-2013-03-02

Opening Statement submitted by Blood Tribe (Káínai First Nation)

December 5, 2018

1. This is the Opening Statement of the Blood Tribe (Káínai First Nation) in regard to the Trans Mountain Expansion Project ("TMEP") Reconsideration Hearing (MH-052-2018). This submission is accompanied by a document entitled Direct Evidence Submission for the Trans Mountain Expansion Project Reconsideration Hearing ("Direct Evidence").
2. The Direct Evidence submission highlights the potential impacts of the Project on Blood Tribe's Aboriginal rights including Blood Tribe's traditional land and resource use (TLRU), and outlines deficiencies in the approach that Trans Mountain Corporation ("Trans Mountain") and Government of Canada have taken in consulting and accommodating Blood Tribe on the TMEP.
3. At this time, Blood Tribe's primary concern is that Trans Mountain and the Government of Canada have not formally consulted or accommodated Blood Tribe on the TMEP. There is no information gathered to adequately assess the potential impacts of the Project on Blood Tribe's traditional land and resource use TLRU, cultural heritage resources and Aboriginal rights. This failure hinders the NEB in carrying out both its statutory duty to assess the impacts of the Project, and its constitutional obligation to ensure that the duty to consult is fulfilled through its regulatory process.
4. This submission provides context for the issues and recommendations noted in the Direct Evidence, in particular in relation to gaps in the evidence submitted by Trans Mountain which are required for a meaningful assessment of potential impacts to TLRU, which Blood Tribe depends upon for the exercise of Aboriginal rights.
5. Blood Tribe Traditional Territory consists of the traditional homeland of the Blackfoot Confederacy (see Figure 3 in the Direct Evidence). Blood Tribe members assert their Aboriginal rights across the Blackfoot Confederacy Traditional Territory (and beyond) and have a duty as stewards to protect the environment and cultural heritage of these lands. The TMEP is located within Blood Tribe Traditional Territory and therefore requires meaningful consultation and accommodation to offset the impacts on Blood Tribe Traditional Territory.
6. The Blood Tribe, along with the other Blackfoot communities, continue to exercise their jurisdiction over all of their traditional territory, utilizing their traditional knowledge and their awareness of change to respect and protect the environment and maintain its balance. The Blood Tribe has not given up their land or use of the land, and therefore the spirit of partnership must be sought after and upheld by anyone wishing to share in the use of their traditional territory.

7. The Direct Evidence submission raises concerns in regard to the evidence gathered by Trans Mountain in preparing its evidence. In particular, the Direct Evidence demonstrates that Trans Mountain and the NEB has not adequately consulted or accommodated Blood Tribe during the hearing process for the TMEP. Trans Mountain has not collected primary data relating to Blood Tribe's traditional use of the Project area. Further Trans Mountain does not acknowledge the location of the TMEP in Blood Tribe Traditional Territory. This approach does not provide the NEB with reliable baseline information on the traditional use of this area by Blood Tribe members and deprives the NEB of the ability to consider the potential effects of the Project on Blood Tribe land users and cultural heritage resources.
8. On August 30, 2018, the Federal Court of Appeal released its decision in *Tsleil-Waututh Nation v Canada* ("Tsleil-Waututh"). In that decision the Court concluded that "that Canada did not fulfil its duty to consult with and, if necessary, accommodate the Indigenous applicants."¹ Regarding paragraph 767 of the Tsleil-Waututh decision, Blood Tribe sees an opportunity for the Government of Canada and Trans Mountain to fulfill its duty to consult with and, if necessary, accommodate Blood Tribe by engaging in meaningful consultation and dialogue with all interested Indigenous communities, including Blood Tribe.
9. Blood Tribe was not consulted during the original TMEP NEB hearing (OH-001-2014), however, a portion of the TMEP is located in Blood Tribe Traditional Territory. The failure to properly fulfill the Duty to Consult is affirmed by the FCA decision for the *Tsleil-Waututh Nation v Canada* in paragraph 767. The potential impacts associated with the TMEP, specifically, potential impacts to Blood Tribe archaeological resources during construction; potential impacts associated with spills, accidents or malfunctions; and potential impacts related to greenhouse gas emissions (GHG's). It is crucial that Blood Tribe's traditional land and resource use and cultural heritage resources are considered in the assessment of the TMEP and protected through mitigation and follow up monitoring.
10. Blood Tribe has members living and participating in traditional land and resource use activities across all regions of Alberta and British Columbia. The Aboriginal and harvesting rights of off-reserve Blood Tribe members must be protected and accommodated. Blood Tribe hunters travel throughout Alberta and British Columbia to hunt large game and fish. Blood Tribe also has members who collect

¹¹ *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153

traditional medicine and edible plants, these members travel extensively, including into the Project Development Area, to harvest unique and uncommon medicines and plants.

11. Without further meaningful consultation and engagement with Blood Tribe, the Crown cannot rely on the regulatory process to inform itself about potential impacts of the TMEP on Blood Tribe's Aboriginal rights and Traditional Territory.
12. Accordingly, Blood Tribe requests that Trans Mountain be required to address the issues and recommendations made in the Blood Tribe's Direct Evidence submission.



Source: www.bloodtribe.org

Direct Evidence Submission for the Trans Mountain Expansion Project Reconsideration Hearing

Submitted to: National Energy Board

Prepared by: Blood Tribe (Káínai First Nation)

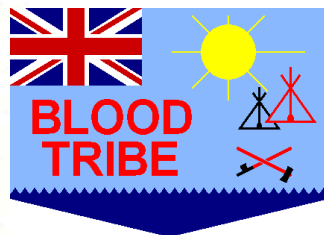


Table of Contents

Table of Contents	i
1.1 Introduction	2
1.2 Blood Tribe Rights and the Trans Mountain Expansion Project	2
1.2.1 Blood Tribe Context	3
2.0 Key Issues	5
2.1 Canada’s Failure to Fulfill to the Duty to Consult	5
2.1.1 Deficiencies in the Reconsideration Hearing Process	6
2.1.2 Section 35 and The Duty to Consult	7
2.1.3 The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) & Free, Prior, and Informed Consent (FPIC)	9
2.2 Impacts on Aboriginal Rights and Blackfoot Traditional Territory	10
2.2.1 Right to Self-Determination	11
2.3 Potential Impacts to Blood Tribe Archaeological Resources	12
2.3.1 Summary of Evidence and Data for Blackfoot People in and near the Trans Mountain Expansion Project route	12
2.4 Impacts on Traditional Land and Resource Use	14
2.5 Blood Tribe Involvement in Environmental Oversight of Follow-up Monitoring Programs	15
2.6 Potential Impacts Associated with Greenhouse Gas Emissions	18
3.0 Conclusion	19
4.0 References	21

1.1 Introduction

Blood Tribe (Káínai First Nation) provides this Direct Evidence Submission to the National Energy Board (NEB) as part of the Trans Mountain Expansion Project (TMEP) – Reconsideration Hearing. Blood Tribe is participating in the NEB hearing process as registered intervenor.

Trans Mountain Corporation (the Proponent) is proposing to twin the existing Trans Mountain crude oil pipeline from Edmonton, Alberta to Burnaby, British Columbia. The Proponent has provided Direct Evidence as well as other regulatory documents to Blood Tribe for review. This submission focuses on accommodation, resolution and protection of Blood Tribe's rights and interests as they relate to traditional land and resource use (TLRU), archaeological resources, cultural practices, and the consultation and accommodation process.

The purpose of this submission is to provide the NEB and Trans Mountain with context on Blood Tribe's rights and interests as they relate to the TMEP and to evaluate potential impacts of the TMEP on the Blood Tribe. The submission will identify issues and provide recommendations for mitigation and accommodation. The submission also provides recommendations to both the Proponent and the NEB on ways in which Blood Tribe's rights and interests may better be considered and accommodated within the NEB hearing process and through engagement with Trans Mountain.

1.2 Blood Tribe Rights and the Trans Mountain Expansion Project

The TMEP is located within Blood Tribe (Blackfoot) Traditional Territory. As the stewards and rights holders of this land, it is important for Blood Tribe to better understand the specific activities that may occur during the project, as well as the range of potential impacts that may result from these activities. The primary concern related to the TMEP are the protection of Blackfoot archaeological resources that may exist along the pipeline route. Our ancestors lived and traveled through the Project development areas.

The lands, waters and resources throughout Blood Tribe Traditional Territory are essential to the well-being and survival of our community. Members depend on the availability and health of the lands, waters and resources for harvesting and cultural purposes. Any degradation to an ecosystem, temporary or permanent, must be seriously considered for its impacts to Blood Tribe.

The Blood Tribe was never consulted on the Trans Mountain Expansion Project in the original hearing, nor was the Blood Tribe consulted on the original Trans Mountain pipeline project and the Crown's decision to establish the original pipeline right-of-way as a federally regulated land use. We wish to be consulted in the reconsideration hearing so that our views are on record and mitigations/accommodations measures can be put in place.

1.2.1 Blood Tribe Context

The Blood Tribe is based in Southern Alberta. The Nation has one of the largest parcels of reserve land in Canada, bordered by the Old Man River, the St. Mary River and the Belly River. The Blood Tribe is a part of the Blackfoot Confederacy, whose traditional Blackfoot territory extends from the Rocky Mountains to the West; to the Sand Hills to the East, to the North Saskatchewan River in the North, and the Yellowstone in the South (Blood Tribe, 2018). As such, Blood Tribe's Traditional Territory consists of the traditional homeland of the Blackfoot Confederacy (see Figure 1). Blood Tribe members assert their Aboriginal rights across the Blackfoot Confederacy Traditional Territory and have a duty as stewards to protect the environment and cultural heritage of these lands. The TMEP is located within Blood Tribe's Traditional Territory and therefore requires meaningful consultation and accommodation to offset the impacts on Blood Tribe Traditional Territory.

The Nation's population is spread out over its land base across seven (7) communities: Standoff, Moses Lake, Lavern, Old Agency, Fish Creek, Ft. Whoop Up and Bullhorn (Blood Tribe, 2018).

Traditionally, the Blackfoot people freely travelled large distances throughout their lands to practice subsistence harvesting, commercial harvesting, and spiritual and cultural ceremonies (O'Connor, 2018). In the context of pressures including the decline of bison populations, hunger, the arrival of newcomers and subsequent disease epidemics, a new alliance was necessary, leading Chief Red Crow to enter into Treaty No. 7 in 1877 on behalf of Blood Tribe, alongside Chief Crowfoot who entered Treaty No. 7 on behalf of the Blackfoot (Dempsey, 1997, 26). The elders of the Blackfoot people are clear about the intent and understanding of the Treaty: it was a means to make a partnership, to share their traditional territory, not to give up their land or cease using their land (Treaty 7 Elders, 1996).

Today, the commitment remains amongst the Blackfoot people to maintain traditional values, practices, principles and beliefs in the face of external pressure and change. Among the many practices that remain important to the Blackfoot people are the elk and beaver hunts and harvesting numerous wild game and plant species for subsistence, cultural and spiritual purposes (Blackfoot Gallery Committee, 2013).

One of the Blackfoot elders is well known for saying this about the importance of the lands and waters within Blackfoot traditional territory: *"the traditional territory of the Blackfoot Nation was given to our people by our Creator. We respected and protected this traditional territory with our minds and our hearts and we depended on it for what it encompasses for our survival. Everything that we ever needed for our way of life and survival existed in our traditional territory, such as herbs for medicine, roots, rivers, game animals, berries, vegetables"* (Treaty 7 Elders, 1996).

The Blood Tribe, along with the other Blackfoot communities, continue to exercise their jurisdiction over all of their traditional territory, utilizing their traditional knowledge and their awareness of change to respect and protect the environment and maintain its balance. The Blood Tribe has not

given up their land or use of the land, and therefore the spirit of partnership must be sought after and upheld by anyone wishing to share in the use of their traditional territory.

Blood Tribe has members living and participating in traditional land and resource use activities across all regions of Alberta and British Columbia. The Aboriginal and harvesting rights of off-reserve Blood Tribe members must be protected and accommodated. Blood Tribe hunters travel throughout Alberta and British Columbia to hunt large game and to fish. Blood Tribe also has members who collect traditional medicine and edible plants, these members travel extensively, including into the Project Development Area, to harvest unique and uncommon medicines and plants.

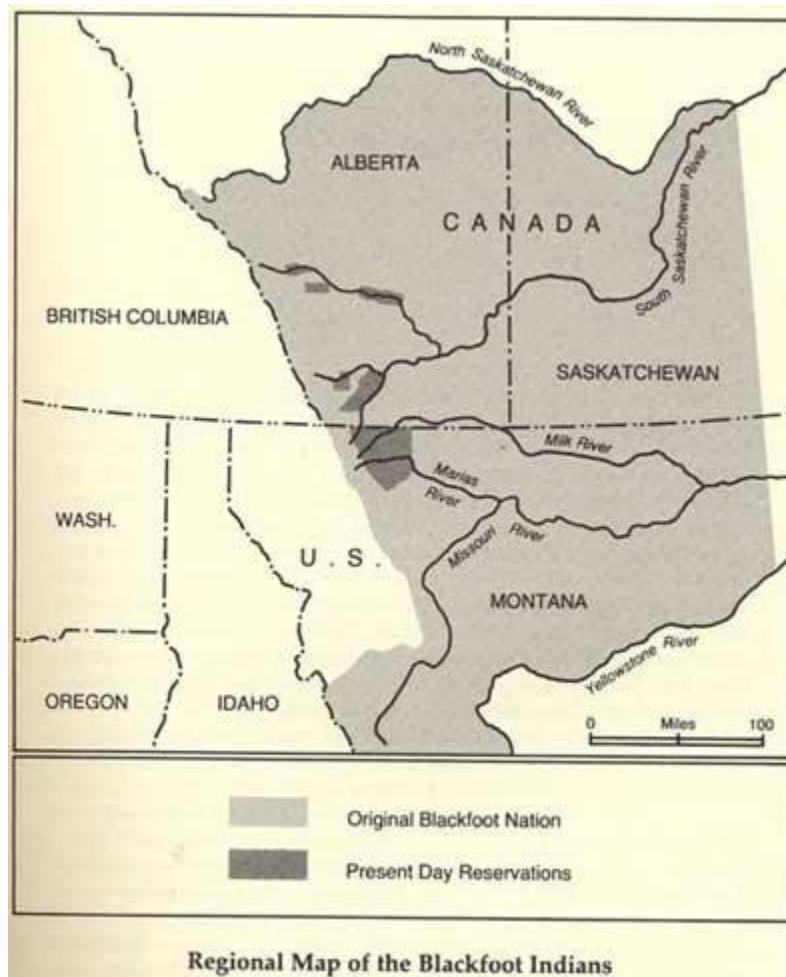


Figure 1 - Map of Blackfoot Confederacy (Blood Tribe) Traditional Territory (source: Blood Tribe)

2.0 Key Issues

The following sections provide a summary of Blood Tribe's key issues in relation the TMEP. A rationale is provided for each key issue as well as a recommendation on how the issue may be mitigated or accommodated by the NEB and/or Trans Mountain.

2.1 Canada's Failure to Fulfill to the Duty to Consult

The Federal Court of Appeal ("FCA") decision on *Tsleil-Waututh Nation v Canada* ("*Tsleil-Waututh*") made several important conclusions in relation to consultation with Indigenous people in the original hearing process for the TMEP. Of particular importance in the context of the Reconsideration Hearing and Blood Tribe's position are the following paragraphs from FCA's conclusion:

"[Paragraph 767 of Tsleil-Waututh] I have also concluded that Canada did not fulfil its duty to consult with and, if necessary, accommodate the Indigenous applicants.

[Paragraph 771 of Tsleil-Waututh] Further, Canada must re-do its Phase III consultation. Only after that consultation is completed and any accommodation made can the Project be put before the Governor in Council for approval."

Blood Tribe agrees with the FCA's decision and believes the Government of Canada did not fulfil its duty to consult the Blood Tribe during the original TMEP hearing.

Issue #1:

No meaningful consultation or accommodation has occurred, Blood Tribe was not consulted during the original TMEP NEB hearing (OH-001-2014), however, a portion of the TMEP is located in Blood Tribe Traditional Territory. The failure to properly fulfill the Duty to Consult is affirmed by the FCA decision for the *Tsleil-Waututh Nation v Canada* in paragraph 767. The potential impacts associated with the TMEP, specifically, potential impacts to Blood Tribe archaeological resources during construction; potential impacts associated with spills, accidents or malfunctions; and potential impacts related to greenhouse gas emissions (GHG's). Upon the commencement of the TMEP Reconsideration Hearing, Blood Tribe filed for intervenor status with the goal of being included in all future consultation and engagement activities with Trans Mountain Corporation and the Government of Canada related to the TMEP. It is crucial that Blood Tribe's traditional land and resource use and cultural heritage resources are considered in the assessment of the TMEP and protected through mitigation and follow up monitoring.

Recommendation #1:

- a) Blood Tribe requests meaningful consultation beyond the Reconsideration Hearing. Ongoing consultation and involvement in follow up monitoring during the construction and operations phase of the TMEP is required since accidents and malfunctions could impact Blood Tribe's ancestral lands which hold significant ecological, nutritional, economic and archaeological value to Blood Tribe members. **The Crown (through Natural Resources Canada/Major Projects**

Management Office) and Trans Mountain must engage with Blood Tribe to develop a community consultation plan for the TMEP.

- b) Regarding paragraph 767 of the *Tsleil-Waututh* decision, Blood Tribe sees an opportunity for the Government of Canada and Trans Mountain to fulfill its duty to consult with and, if necessary, accommodate Blood Tribe by engaging in meaningful consultation and dialogue with all interested Indigenous communities, including Blood Tribe.
- c) Regarding paragraph 771 of the *Tsleil-Waututh* decision, Blood Tribe requests that the Government of Canada include Blood Tribe in the TMEP Reconsideration Hearing during the re-do of Phase III Consultation. Since Blood Tribe only became an intervenor during the Reconsideration Hearing for TMEP, Blood Tribe was not provided with the same level of consultation and accommodation as intervenors in the original hearing for TMEP (OH-001-2014). As a new intervenor in the process Blood Tribe wishes to engage with the Government of Canada and Trans Mountain in order to better understand the project and to convey Blood Tribe TLRU and archaeological information that can be incorporated into mitigation planning. The Blood Tribe also wishes to gain a better understanding of the benefits related to for Indigenous communities and explore potential accommodation measures with Government of Canada and Trans Mountain.

2.1.1 Deficiencies in the Reconsideration Hearing Process

The Blood Tribe believes TMEP Reconsideration Hearing is a flawed process and does not represent meaningful consultation with Indigenous groups. By limiting the scope of the Reconsideration Hearing it does not allow for the Blood Tribe to express concerns related to the TMEP. Since the FCA's *Tsleil-Waututh* decision determined that "Canada did not fulfil its duty to consult with and, if necessary, accommodate the Indigenous applicants," the Blood Tribe's position is that the findings of the original hearing for TMEP (OH-001-2014) cannot be considered valid. The duty to consult is a fundamental component of the NEB hearing process and the Government of Canada's fiduciary responsibility to Indigenous people, as such the duty to consult must be adequately fulfilled before an approval for a project can be granted.

Issue #2:

The Blood Tribe has found the TMEP Reconsideration Hearing to be deficient for the following reasons:

- a) The NEB did not consult with Indigenous groups on the scope of the Reconsideration Hearing including the development of the list of issues. Limiting the scope of the Reconsideration Hearing to marine shipping prevents Blood Tribe from providing important information related to the TMEP that must be considered in order to fulfill the duty to consult.

- b) The timeline for the Reconsideration Hearing is compressed to 155 days, as mandated by the Government of Canada. This compressed timeline does not allow for meaningful consultation. Further for Indigenous groups, such as Blood Tribe who did not participate in the original hearing for the TMEP, this compressed timeline does not provide adequate time to complete a fulsome review of hearing documents related to the TMEP
- c) The NEB did not adequately consider all the conclusions of the FCA's *Tsleil-Waututh* decision, instead the Reconsideration Hearing was focused entirely on Paragraph 770 of the *Tsleil-Waututh* decision.

Recommendation #2:

Based on the deficiencies of the Reconsideration Hearing noted above, the Blood Tribe makes the following recommendations:

- a) The NEB, the Government of Canada and Trans Mountain must consider the issues put forward by the Blood Tribe in this submission. Since Blood Tribe did not participate in the original TMEP hearing process, all the information and recommendations provided in this submission are new and must be adequately dispositioned in order to fulfill the duty to consult. Blood Tribe requests meaningful consultation and accommodation beyond the Reconsideration Hearing.
- b) The timeline for the Reconsideration Process should be extended to allow for meaningful consultation and accommodation with Indigenous groups. The timeline for the hearing should be developed in consultation with Indigenous groups.
- c) The scope of the Reconsideration Hearing should be modified to reflect all the conclusions of the *Tsleil-Waututh* decision, specifically the need for the Government of Canada to properly fulfill the duty to consult, and if necessary accommodate Indigenous nations, including the Blood Tribe.

Further context is provided below regarding the Crown's duty to consult and Blood Tribe rights under Section 35 of the *Constitution Act*.

2.1.2 Section 35 and The Duty to Consult

Under Section 35 of the *Constitution Act*, Aboriginal title is a protected aboriginal right: "The Canadian government did not initially plan to include Aboriginal rights so extensively within the constitution when the Act was being redrafted in the early 1980s. Early drafts and discussions during the patriation of the Canadian Constitution did not include any recognition of those existing rights and relationships, but through campaigns and demonstrations, Aboriginal groups in Canada successfully fought to have their rights enshrined and protected" (UBC Indigenous Foundations, 2009). The constitutionalization of Aboriginal rights by subsection 35(1) of the *Constitution Act* (1982) created a new legal framework for

addressing longstanding Aboriginal claims, including claims to Aboriginal title.

The Act specifically states that:

“(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, ‘aboriginal peoples of Canada’ includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) ‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.”

(Government of Canada, 2016)

As an agent of the Crown, the NEB has the authority, and is responsible for fulfilling the Crown’s obligation to consult First Nations for infringements to their rights are accommodated (OKT, 2018). This involves ensuring the requirements of consultation are being adequately met and that Blood Tribe’s rights and interests are protected or accommodated where necessary. “Because the NEB can hold hearings, elicit further information and order studies, order funding to support the participation of Indigenous groups in the hearing process, and order accommodation, the Supreme Court said the NEB has the right powers to enable it to fulfill the Crown’s duty to consult.” (OKT, 2018)

Through the duty to consult and accommodate, the Government of Canada, through the NEB regulatory process, has attempted to create a measure of interaction that is respectful of Blood Tribe’s rights of self-determination. This is a Crown duty. As such, the Crown must consult Indigenous peoples or groups when the Crown is contemplating taking action or making a decision (like issuing a permit or approving the proposed Project) that might have an adverse effect on a right of that group.

Consultation must always be carried out with the intent to substantially address the concerns of the affected Indigenous group. “Substantially address” means “to accommodate.” (Laidlaw and Passelac-Ross, 2014). Hence, in all cases, the Crown must intend to and make all good faith efforts to accommodate the Indigenous party. It does so by preventing negative impacts where possible, minimizing or mitigating those that cannot be prevented, and for all those that remain, it must provide a “trade” of benefits sufficient to offset the burdens and losses (Laidlaw and Passelac-Ross, 2014). The Crown can, and often does, delegate aspects of this duty to the proponent, such as Trans Mountain.

Consultations and development of accommodation measures must be done mutually and respectfully in order that the purpose of supporting rights, including the right of self-determination, and the purpose of furthering reconciliation between two self-determining societies, can be met. Proper consultation and accommodation allows all parties to share in the benefits of project and understand the risks.

As outlined above, the Aboriginal and Treaty rights of Indigenous peoples in Canada are protected and affirmed by Section 35 of Canada's Constitution, by international law, and by the laws of Indigenous peoples themselves. Any NEB hearing or environmental assessment process and outcome must recognize and avoid or minimize risks to infringement of these rights.

2.1.3 The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) & Free, Prior, and Informed Consent (FPIC)

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) affirms, among other things, the right of Blood Tribe to give their free, prior, and informed consent (FPIC) to any project or activity before it can proceed on their land. Blood Tribe has never consented to the construction, operation, maintenance, or decommissioning of the TMEP on Blood Tribe Traditional Territory.

Issue #3:

In addition to the Duty to Consult and Accommodate and Blood Tribe's Section 35 Constitutional rights there is also the matter of considering how Free, Prior, and Informed Consent (FPIC) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) interact with the TMEP and Blood Tribe rights and interests. When Canada adopted UNDRIP in 2016 it introduced the concept of the right to Free, Prior, and Informed Consent as a new consideration for the Crown and resource development proponents in Canada (Joseph, 2014). More specifically it is Article 32.1 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) that sets the direction that ought to be taken by the Crown and resource companies when taking FPIC-centric approach to the consultation and accommodation of Indigenous Peoples. UNDRIP recognizes certain rights of the Blood Tribe and other Indigenous Nations, and obligates Canada and other states to engage with Indigenous peoples in a manner that does not infringe these rights. Of importance are the following enshrined rights and obligations:

- a) Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
- b) Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
- c) States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Recommendation #3:

By properly obtaining free, prior, and informed consent from Blood Tribe and other impacted Indigenous Nations, the Crown via the NEB and Trans Mountain must ensure that appropriate project accommodations and mitigations are put in place and ultimately would exemplify both putting UNDRIP and FPIC into practice and conducting decision making that is rooted in reconciliation and repairing Canada's relationship with Indigenous Peoples.

2.2 Impacts on Aboriginal Rights and Blackfoot Traditional Territory

An "Aboriginal right" is an "inherent right," meaning that it derives from Indigenous peoples' inherency in the land in which such peoples originate (it is "in here" in the place where the Creator put it at the beginning of time). Under Canadian law, an "Aboriginal right" is defined as an activity that is an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right. It needs to have been practiced at the time of first contact with Europeans and it must continue in some form today. The concept can be summarized as the right of independence through self-determination in respect of governance, land, resources and culture (UBC Indigenous Foundations, 2009).

Aboriginal rights refer to practices, traditions and customs that distinguish the unique culture of each First Nation and were practiced prior to European contact. The rights of certain peoples to hunt, trap and fish on ancestral lands are examples of Aboriginal rights. As Indigenous peoples, Blood Tribe have rights enshrined in Canada's Constitution. Blood Tribe's rights to hunt, fish, trap, and gather on their land cannot be unjustifiably infringed.

Blood Tribe's ancestors have occupied the lands of current day Alberta and beyond since time immemorial. Blood Tribe has always had a very close connection to and reliance on the lands and waters. Additionally, Blood Tribe has established Aboriginal rights and interests in the area under Section 35 of the Constitution Act, 1982. Together, these inherent and constitutional rights underscore the importance of appropriately and adequately consulting and accommodating Blood Tribe in the matter of the TMEP.

The TMEP will have significant adverse impacts on Blood Tribe's Aboriginal and Treaty rights. The Aboriginal and Treaty rights of Indigenous peoples in Canada are protected and affirmed by Section 35 of Canada's Constitution, by international law to which Canada must adhere, and by the laws of the Blood Tribe peoples themselves. Any NEB hearing process and outcome must adhere to such rights. These inherent and constitutional rights underscore the importance of appropriately and adequately consulting and accommodating Blood Tribe in the matter of the TMEP.

Issue #4:

Blood Tribe members assert their Aboriginal rights across the Blackfoot Confederacy Traditional Territory (and beyond) and have a duty as stewards to protect the environment and cultural heritage of

these lands. The TMEP is located within Blood Tribe Traditional Territory and therefore requires meaningful consultation and accommodation to offset the impacts on Blood Tribe's Aboriginal rights and the Blood Tribe Traditional Territory.

The NEB and Government of Canada has not adequately assessed the impacts of the TMEP on the Aboriginal rights of the Blood Tribe. Without further meaningful consultation and engagement with Blood Tribe, the Crown cannot rely on the regulatory process to inform itself about potential impacts of the TMEP on Blood Tribe's Aboriginal rights and Traditional Territory.

Recommendation #4:

The Crown must fulfill its duty to consult by meaningfully engaging with Blood Tribe to assess the potential impacts of the TMEP on Blood Tribe's Aboriginal rights and Traditional Territory. This could be achieved through the development of a community consultation plan (as referenced above in Recommendation #1). The Crown must work with Blood Tribe to ensure mitigation or accommodation measures are in place to minimize the impacts of the TMEP on Blood Tribe rights and interests.

Further context is provided below regarding the Blood Tribe's right to self determination:

2.2.1 Right to Self-Determination

Blood Tribe is a distinct society that have been governing themselves and their uses and occupancies (in an economic, social and cultural sense) of the lands they call home, since time immemorial. While both governance and cultures have changed since the settlers found purchase in what has become Canada, they have continued to exist as unique and distinct from Crown government and Euro-Canadian cultures. Through this, Blood Tribe has a right to self-determination, including the right to freely choose its governance and culture. This right is recognized in international law: In the International Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights, and more recently in the UN Declaration on the Rights of Indigenous Peoples. Canada has ratified all three.

Given the size, scope and longevity of the proposed Project and its incursion into the Ancestral Lands of Blood Tribe, it will have intrusive effects on the culture of Blood Tribe. This is an external force pushing in on the Blood Tribe's land base and society. There are no doubts that harvesting and other forms of cultural practices comprising rights will be potentially impacted by TMEP. In order to prevent infringement of Blood Tribe's rights, accommodation in respect to the TMEP will have to be equitable.

2.3 Potential Impacts to Blood Tribe Archaeological Resources

2.3.1 Summary of Evidence and Data for Blackfoot People in and near the Trans Mountain Expansion Project route

The purpose of this summary is to provide data and evidence that helps to demonstrate the historical, cultural and traditional importance of areas impacted by the Trans Mountain Expansion Project, (specifically Segments 1 and 2) to the Blackfoot people. This overview is not an exhaustive discussion or research project of the area in question, rather it seeks to demonstrate that the depth and breadth of evidence indicates Blackfoot people were present in this area prior the arrival of Europeans in what is now Alberta and the Blackfoot presence persisted well into the Settler Period despite their rapid depopulation from European diseases in the 18th and 19th centuries.

The Blackfoot people's own history, traditions and world view says unequivocally that they have been present on the Northern Plains, including the project area, since "time immemorial". The phrase "time immemorial" when heard by many Euro-Canadians and others brought up within a Eurocentric worldview seems to evoke the mythical, however in Blackfoot and many other world views, "time immemorial" is as accurate and as real and meaningful as a modern archaeologist saying 5,000 10,000 or 20,000 years ago. The point is that historical, archaeological and other evidence indicates that the Blackfoot people have been present on the Northern Plains for a stretch of time that recedes into the very distant past or "time immemorial". And over the millennia the Blackfoot have been living on the Plains they undoubtedly utilized much or all of the area occupied by this proposed project.

After the arrival of European fur traders and explorers in what is now western Canada, data on various First Nation ethnic groups and their territories and presence started to be recorded by these European arrivals, however, that information is patchy at best and often unclear. There is however, some firm evidence and data regarding the Blackfoot. The Blackfoot and other First Nations had and continue to have traditional territories. These territories have, as should be expected, somewhat amorphous boundaries and those indistinct boundaries undoubtedly shifted over time. The modern conception of Blackfoot Traditional Territory is defined, more or less as shown in Figure 1. The northern boundary is shown as the North Saskatchewan River, however this boundary should be regarded as one of illustrative convenience, not a hard border. In fact there are many accounts of Blackfoot people north of the North Saskatchewan River Valley from at least the 1760s. For example, William Pink, a Hudson's Bay Company employee reported encountering Blackfoot in the vicinity of modern day St. Paul, located well north of the North Saskatchewan River (cited in Brink 1986; p. 14). Another famous explorer David Thompson, relates information from a Cree man named Saukamapee (Lewis 1942; p.10) that spent most of this life with the Blackfoot. Thompson states that Saukamapee told him that in the first half of the 18th century, many Blackfoot lived along the forest margins, presumably near or north of the North Saskatchewan River (Glover 1962; p241-247).

There is no question that southern Alberta south of the North Saskatchewan River, western and southern Saskatchewan and Montana are now and have been for a very long time, the Blackfoot heartland, however, and as noted above, smallpox epidemics in the 1700s devastated the Blackfoot (and other First Nations) and those epidemics including the well documented 1781 event (Schaeffer 1982) that may have wiped out half the Blackfoot people would have had to have resulted in the range of their traditional territory that they had utilized for centuries before becoming more compact.

The presence of the Blackfoot near Fort Edmonton, Fort Vermilion and other locations near and north of the North Saskatchewan River valley are well documented (Coues 1897, Grinnell 1892).

Another, line of inquiry and evidence is the archaeological record. The Blackfoot and all other Indigenous ethnic groups in what is now Alberta and Saskatchewan were members of a culture that practiced what was largely, if not exclusively, mobile economic system focussed on hunting of bison and other game animals and gathering plants for dietary and other living needs. Like other people who relied solely on available natural resources, as opposed to settled farming cultures, Blackfoot mobility was necessary. Until Europeans arrived, Blackfoot and other Plains groups used hunting, butchering and processing tools made mostly from stone. One group of stone tools that have proved useful in defining cultures temporally, spatially and at least partially ethnically are projectile points, that is, arrow points, dart points and spear points. It is beyond the scope of this overview to discuss this more generally, but a class of distinctive arrow points that are commonly found in Alberta are as strongly linked to the Blackfoot people as any Plains stone tool is linked to any specific ethnic group. This class of point is referred to as Old Women's Phase points named after a buffalo jump in southern Alberta where they were first recognized as a diagnostic and distinctive tool type. As the figure below indicates they were used between approximately 1100 and 250 BP (that is, years before present). These projectile points are closely associated with Blackfoot on a number of grounds including their spatial distribution and the fact that they are often found in association with other material cultural elements used by the Blackfoot people (Peck 2011, Peck and Hudecek-Cuffe, 2003).

Old Women's Phase projectile points are most common in southern Alberta, Saskatchewan and Montana, as noted previously, the Blackfoot Traditional heartland, but they have been found near the south shore of Wabamun Lake, in the Peace River country around Grand Prairie and elsewhere north of the North Saskatchewan River. The presence of these artifacts does not conclusively prove the presence of Blackfoot people in this area, but the presence of these materials does indicate the potential for the Blackfoot to have been there. It should also be noted that the relative sparseness of archaeological remains along and near the project route in Alberta is more a function of the lack of research and often difficult terrain rather than an absence of Old Women's Phase material and other archaeological remains.

The Blackfoot people's own history and the collected data and evidence from the ethnographical, historical and archaeological record should be more than enough to demonstrate the actual or the very strong possibility of long-time use and presence and use of the area that will be impacted by the TMEP.

Issue #5:

Blood Tribe archaeological sites, nor traditional knowledge pertaining to Blood Tribe archaeological sites was not considered in Trans Mountain's assessment of cultural heritage resources for the TMEP. The ancestors of Blood Tribe have occupied the lands of current-day Alberta, including the location of the proposed Project since time immemorial and most archaeological sites within the province are of Indigenous origin. As such Blood Tribe may have knowledge of archaeological sites within the proposed footprint of the Project that should be considered in any cultural heritage assessment.

Recommendation #5:

Blood Tribe archaeological and cultural heritage sites must be documented and assessed as part of the TMEP mitigation planning for construction. The completion of a Traditional Knowledge and Land Use Study, part of which would include the documentation of cultural heritage sites is required. This documentation should be considered in any follow-up cultural heritage considerations and mitigation planning. Documentation of this knowledge must occur prior to the beginning of any project-related construction and capacity funding should be provided to complete the study.

Issues #6:

Trans Mountain has not identified how chance finds of Blackfoot archaeological sites will be monitored during construction. It is unclear whether Trans Mountain or its contractors will have knowledge or expertise to identify Blackfoot archaeological sites.

Recommendation #6:

Archaeological assessments containing Indigenous Knowledge of Blackfoot archaeological sites is required. Given that most archaeological sites in present day Canada are Indigenous in origin, Indigenous communities must take a leading role in conducting this work. Identifying Blackfoot archaeological sites requires specialized knowledge and expertise. Blood Tribe's cultural heritage monitors (Guardians) should be engaged to participate in cultural heritage monitoring activities during construction to identify any potential chance finds.

2.4 Impacts on Traditional Land and Resource Use

The right for Blood Tribe members to practice TLRU activities is an essential component of Blood Tribe culture and is affirmed in the Section 35 of the Constitution through Aboriginal rights. Trans Mountain has not engaged with Blood Tribe to inquire about TLRU sites that may be potentially impacted by the TMEP. As such the Blood Tribe provide the following comments and recommendations.

Issue #7:

No formal Traditional Knowledge and Land Use (TKLU) study involving Blood Tribe has taken place as part of the TMEP. No primary data as it relates to Blood Tribe's TLRU was ever collected by Trans Mountain. This does not allow for Blood Tribe TLRU in the Project's study area to be properly assessed by Trans Mountain and the NEB. Further it neglects to recognize the unique and current knowledge of

Blood Tribe and the diversity of land use information possessed by members (who live throughout Alberta and British Columbia) that may have knowledge of TLRU or cultural sites that may be impacts by the TMEP.

Recommendation #7:

Trans Mountain and the Government of Canada must assess the potential impacts of the TMEP on Blood Tribe TLRU. Blood Tribe requires adequate capacity to undertake a formal and independent TKLU study to inform the TMEP mitigation and follow up monitoring programs. The TKLU study will help determine appropriate mitigations and accommodations, prior to construction. Trans Mountain must acknowledge the unique land use of Blood Tribe and incorporate the findings from the TKLU study into mitigation and follow up monitoring plans.

2.5 Blood Tribe Involvement in Environmental Oversight of Follow-up Monitoring Programs

For any project on Blood Tribe's Traditional Territory, the Nation requires a role for Blood Tribe members in participating in the environmental oversight and monitoring throughout the lifecycle of the project. Blood Tribe requires the direct involvement of Blood Tribe environmental and cultural heritage experts in Project mitigation and Environmental Protection Planning, emergency response planning and environmental/archaeological field work in order to mitigate concerns pertaining to impacts on Blood Tribe's archaeological sites, harvesting sites, spiritual and cultural sites.

Blood Tribe is in the process of establishing a Guardian Program to monitor environmental and cultural heritage resources within Blackfoot Traditional Territory. Blood Tribe sees a role for itself in the environmental and cultural heritage monitoring of the TMEP through training and employment of Blood Tribe Guardians or "monitors" to assist TMEP and the NEB in fulfilling follow up monitoring requirements.

In Trans Mountain's Direct Evidence (*NEB Filing ID: A95280*), Section 5.0 Topic 2: Mitigation and Monitoring Measures, Trans Mountain describes the approach to the implementation of mitigation and monitoring programs as described below.

Issue #8:

Trans Mountain refers to government and multi-party Initiatives in an attempt to mitigate adverse effects on marine species and in support of the requirements of Trans Mountain's Condition 132 (p.21). Additionally, Trans Mountain refers to information regarding Western Canada Marine Response Corporation's emergency response plans being shared with Indigenous groups, along with an "...initiative to build relationships with Indigenous groups in advance so that if a spill were to occur, the parties would already have a relationship in place and tailored plans to map and protect specific areas of sensitivity". (pp. 33) There is no mention however, of the IMAC or an Indigenous led Guardian style long term environmental and cultural monitoring program for the duration of the Project's activities (on land and marine). Blood Tribe was never engaged nor consulted regarding this Project, so have not had any

opportunity to be involved in the IAMC. Blood Tribe (specifically Mike Oka) has extensive experience on Enbridge's IAMC for Line 3 Replacement Project. Given Blood Tribe's history and knowledge of the Blackfoot Territory, Blood Tribe could provide valuable expertise to the IAMC to ensure that Indigenous knowledge is applied to the mitigation and monitoring of the Project over its lifecycle.

Recommendation: #8

- a) Trans Mountain must provide information regarding Indigenous Advisory and Monitoring Committee (IAMC) or other Indigenous led environmental monitoring advisory committees and programs that will be implemented as part of the TMEP follow up programs. Confirmation is required that these commitments are in place for both marine related and land based related impacts to Blood Tribe and their rights bound harvesting activities.
- b) Trans Mountain must involve Blood Tribe in the IAMC and Indigenous Guardianship and stewardship oversight activities over the life of the Project.

Issue #9:

Although there is indication within the Direct Evidence of Indigenous involvement regarding emergency response planning there is not reference to the scope of the monitoring or response plans. Additionally, it is unknown, what capacity funding provisions for training regarding the various aspects of monitoring and emergency response preparedness. It is critical that Blood Tribe be involved in environmental oversight of the project and follow-up monitoring programs

Recommendation #9:

Indigenous Guardianship and stewardship oversight and operational on the water and land programs are critical as conditions for approval of TMEP. Blood Tribe requests the direct involvement of Blood Tribe Guardians (environmental and cultural heritage experts) in Project mitigation and environmental protection planning, emergency response planning and environmental/archaeological field work in order to mitigate concerns pertaining to impacts on Blood Tribe's archaeological sites, harvesting sites, spiritual and cultural sites. Clarification is requested regarding capacity funding and programs have been made available to the interested Indigenous groups and whether it is the Proponent is making available, the funding needed for capacity building to this effect.

Issue #10:

It is unclear how emergency response planning programs will be developed and operationalized for onshore and inland Indigenous communities including Blood Tribe to address accidents, malfunctions and spills from the shores of Burrard Inlet east into BC and Alberta.

Recommendation #10:

Blood tribe request information as to what Indigenous led environmental monitoring and specifically, what emergency response planning and preparedness programs for Indigenous communities will be

implemented on land in BC and Alberta. Having an Indigenous advisory committee and equal Indigenous representation for ongoing environmental monitoring is critical for both marine and inland Indigenous communities, which includes the capacity required to engage in this specific area of environmental protection

Issue #11:

Trans Mountain has provided very little detail on their proposed post-construction monitoring plan for wildlife, and the information that is available is focused exclusively on monitoring the impacts of the Project on changes to wildlife habitat. There is no mention of measures to monitor potential changes in wildlife movement or changes in mortality risk.

Trans Mountain does not provide any indication that there will be opportunities for Blood Tribe Guardians to undertake the mitigation measures for wildlife and wildlife habitat outlined, or the management (e.g. breeding bird and nest management plan) and contingency plans (e.g. wildlife species of concern discovery contingency plan, TLU sites discovery contingency plan) outlined in the Environmental Protection Plan.

Recommendation #11:

Trans Mountain should commit to providing capacity funding and industry-standard job training for Blood Tribe Guardians to undertake, or at a minimum participate in, the pre-construction wildlife surveying and mitigation measures outlined in the follow up monitoring program and should ensure that there are opportunities to provide input when wildlife species of concern and TLU discovery contingency plans are triggered.

Issue #12:

Given the current ownership situation with the Trans Mountain Pipeline and TMEP, it is not clear who will administer the follow up monitoring programs prescribed by the NEB in the Conditions of Approval. It is also unclear the level of involvement Indigenous groups including the Blood Tribe will have in the oversight and monitoring of the TMEP, or involvement in overseeing follow up programs.

Recommendation #12:

Trans Mountain and the Government of Canada must provide clarity on the scope of monitoring and follow up monitoring plans including roles and responsibilities of each party. Trans Mountain and the Government of Canada must also outline opportunities for Blood Tribe and other Indigenous groups to participate in, and have oversight for, follow up and monitoring activities

2.6 Potential Impacts Associated with Greenhouse Gas Emissions

Blood Tribe have an interest in project related greenhouse gas (GHG) emissions due to the well documented scientific connection between GHGs and climate change. The effects of climate change are already being experienced across Blackfoot Traditional Territory and the world in the form of changing weather patterns, changing animal migration routes, biodiversity loss and increases in natural disasters (e.g. drought, wildfires) to name some examples.

Blood Tribe's position is that the TMEP will have a major contribution to Canada's (and global) GHG emissions based on the predicted upstream and downstream emissions associated with the extraction, transportation and eventual use of crude oil products across global markets. The TMEP will lead to increased extraction and potentially expansion of Alberta's oil sands. Blood Tribe believes that the TMEP will further exacerbate climate change impacts through significant GHG emissions, and the TMEP is not in line Government of Canada commitments to reduce GHG emissions and combat climate change.

In regard to Trans Mountain's Direct Evidence - Attachment 5.4.2: Greenhouse Gas (GHG) Emissions, the Blood Tribe has identified the following issue and recommendation.

Issue #13:

Trans Mountain's GHG inventory for marine tankers is inadequate. Trans Mountain is only accounting for GHG emissions from tankers within the Marine Air Quality RSA. This RSA includes the Westridge Marine Terminal (WMT) and extends out to the 12-mile nautical limit of Canada's territorial zone. The choice of limiting calculations to within 12-nautical miles is arbitrary and captures only a fraction of the true tanker miles required for transporting oil products associated with the Project. The marine tankers calling at the WMT will obtain oil products for transport internationally, which may include ports in the US, Asia, South America and Europe. If the project were not approved (i.e. the base case) then these tanker miles would not be completed. Therefore, the full distance, from WMT to the destination must be accounted for.

Accounting for the full distance of travel is complicated because the destination for all tankers that call at WMT is not known and the destinations will change based on market conditions, international agreements, and contracts with the Proponent. As a result, any calculation for the full distance of tanker travel must be an estimation based on assumptions for distance travelled. This could be done based on an average value for all potential destinations or as scenario analysis for a variety of potential shipping routes. Regardless of the method chosen for these calculations, it is critical that it is done to provide a complete picture of GHG emissions, especially true given the comparisons being made by the Proponent with "total global shipping emissions" for determining significance.

Recommendation #13:

Blood Tribe request that Trans Mountain re-evaluate the GHG production associated with marine-shipping to account for complete one-way journeys to destination ports for predicted shipping.

Issue #14:

The effects of climate change on northern Indigenous communities is likely to be more pronounced than other places across Canada and the world (Furgal & Seguin, 2006). The Blood Tribe are already experiencing such effects. Changes to weather patterns and increases in natural disasters (e.g. wildfires and drought) impact the ability for Blood Tribe members to exercise Aboriginal and Treaty rights. Despite the impacts of climate change (and their contribution to it) Trans Mountain has not put forward any mitigation or accommodation measures which are relevant to Blood Tribe's ability to exercise Aboriginal and Treaty rights.

Recommendation #14:

It is requested that Trans Mountain and the Government of Canada engage in a dialogue with Blood Tribe for evaluating mechanisms to mitigate and accommodate the impacts of the Project and its contributions to climate change on Aboriginal and Treaty rights.

3.0 Conclusion

This submission demonstrates that should the Project be approved, Blood Tribe's Aboriginal and Treaty Rights may be impacted.

The Blood Tribe is concerned that the TMEP could put the Nations' rights and interests at direct and indirect risk through potential impacts on water bodies, TLRU, wildlife, fish, vegetation, socio-economic and community wellbeing, and cultural heritage resources. The Project will interact with Blood Tribe's values, interests and pose risks to rights through land and water disturbances within and surrounding the right of way (ROW) and construction site components. During operations, activities with land disturbance interactions with Blood Tribes rights related land-based activities and interests include integrity digs and other ongoing maintenance activities. The risks are of concern under 'normal' project conditions, but they are of greater concern in the event of pipeline accidents and malfunctions throughout construction and operations. Emergency response and remediation plans are currently too generalized to reflect the specific geography, values and concerns held by Blood Tribe.

Accidents and malfunctions related to the Project including spills in the marine environment will have far-reaching cumulative impacts that would affect Blood Tribe's ability to carry out Aboriginal and Treaty Rights.

Blood Tribe's involvement in the lifecycle regulation of the TMEP (or any development project on Blood Tribe Traditional Territory) is a crucial component of proper consultation and accommodation. Blood Tribe's role as stewards of their Traditional Territory requires the First Nation to have meaningful involvement in monitoring and oversight throughout the Project lifecycle. This includes involvement in Project planning and environmental monitoring, as well as a decision-making role for Blood Tribe in adaptive management. It is essential that Blood Tribe be meaningfully involved through formal roles on monitoring boards and committees, oversight of follow up programs, and through "boots on the ground" employment of Blood Tribe cultural and environmental monitors. This will allow Blood Tribe to be confident their rights and interests are accommodated and ensure the highest standard of environmental protection and oversight.

Blood Tribe asserts their right to a healthy, interconnected ecosystem as well as their interests in economic benefits associated with the TMEP. Blood Tribe leadership calls for the incorporation of local Indigenous knowledge into the assessment and mitigation planning, including follow up monitoring over the TMEP's lifecycle.

As a nation committed to UNDRIP, FPIC and Reconciliation, Canada must uphold its responsibilities and obligations to consult with and accommodate First Nations, including Blood Tribe. Blood Tribe would like to emphasize these responsibilities also in solidarity with other Indigenous communities that may be impacted by the Project.

The Federal Court of Appeal stated that Canada did not fulfil its Duty to Consult with Indigenous rights-holders, and if necessary, accommodate those communities; Blood Tribe can confirm that the Crown has not adequately consulted with Blood Tribe, nor has there been any specific and focused discussion.

Based on this direct evidence submission, we conclude that the Crown has not yet met its Duty to Consult. As a result, the following additional accommodation measures are recommended as a means of potentially addressing the outstanding issues and comments raised in the review:

- The issues raised in this direct evidence submission must be responded to in full
- Trans Mountain must meet directly with Blood Tribe to discuss mitigation and accommodation measures related to the TMEP
 - This meeting should include a discussion of the possibility of developing a mutual benefit agreement
 - Blood Tribe sent a letter to this effect to Trans Mountain on November 9th, 2018

Blood Tribe requests meaningful consultation beyond the Reconsideration Hearing. Meaningful consultation is necessary in Canada's efforts to participate in the Reconciliation process. Ongoing consultation and involvement in follow up monitoring during the construction and operations phase of the TMEP is required based on the potential impacts to Blood Tribe's rights and interests. The Crown (through Natural Resources Canada/Major Projects Management Office) and Trans Mountain must engage with Blood Tribe to develop a community consultation plan for the TMEP.

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