

## **Appendix B.14 – Okanagan (Syilx) Nation**

### **I - Background Information**

The Okanagan, also known as Syilx, people identify their traditional territory as encompassing south-central British Columbia (BC). The northern area of this territory is close to the area of Mica Creek, just north of Revelstoke, and the eastern boundary is Kootenay Lake. The southern boundary extends to the vicinity of Wilbur, Washington and the western border extends into the Nicola Valley.

The Okanagan Nation filed a protective *Writ of Summons* in the BC Supreme Court on December 10, 2003 asserting Aboriginal title to a territory identified in the writ. The writ involves Penticton Indian Band (Penticton), Okanagan Indian Band, Osoyoos Indian Band, Lower Similkameen Indian Band (Lower Similkameen), Upper Similkameen Indian Band (Upper Similkameen), Upper Nicola Band (Upper Nicola), and Westbank First Nation (Westbank).

The Syilx people historically spoke the Nsyilxcen language. Nsyilxcen is a Salish language which is distinct from other Salish languages, like the Spokane, the Nlcamux, and the Secwepemc. Nsyilxcen is spoken in all the districts of the Syilx territory with varying dialects.

The Okanagan Nation Alliance (ONA) is the Tribal Council for the eight member communities of the Syilx Nation which includes Osoyoos, Upper Nicola, Lower Similkameen, Upper Similkameen, Penticton, Okanagan Indian Band, Westbank, and the Confederated Tribes of the Colville Reservation in the United States.

Osoyoos Indian Band's asserted traditional territory is almost 100 kilometers (km) from the Project right-of-way (RoW). Given the distance of their asserted traditional territory from the Project, their lack of participation in the NEB hearings, and as confirmed in a July 28, 2016 letter from the BC Environmental Assessment Office (EAO) to Osoyoos Indian Band, it is the Crown's understanding that Osoyoos Indian Band is not participating in the consultation process for the Project and will not be included in this Report. The Confederated Tribes of the Colville Reservation is located in the United States and was not engaged.

The Crown appreciates Syilx Nation's disagreement with the National Energy Board's (NEB's) individualization of the ONA bands, acknowledges Syilx peoples' assertion of collective title and rights, and recognizes that ONA bands have shared and individual responsibilities. Consistent with ONA internal protocols and practices, each of the ONA member bands is understood to be responsible for land and resources in their respective area of responsibility. These responsibilities are all carried out in a manner which respects Syilx Nation title and rights. Within Syilx traditional territory, the Project falls within the Upper Nicola's area of responsibility and as such, Upper Nicola has been authorized to take the lead in looking at the Project closely and deeply, having regard not only to the Upper Nicola community, but also with regard to Syilx Nation title and rights<sup>1</sup>.

### **Upper Nicola**

Upper Nicola has 12,535 hectares (ha) of reserve land, spread out over nine reserves. Upper Nicola's registered population is 965, which includes 374 living on their reserve, 52 living on other reserves, one living on no band Crown land, and 538 living off-reserve.

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<sup>1</sup> As stated by ONA in their letter to the Crown dated October 21, 2016.

### **Lower Similkameen**

Lower Similkameen holds 15,048 ha of reserve land, spread out over nine reserves. Lower Similkameen's registered population as of July 2016 is 502, of whom 230 live on reserve.

### **Upper Similkameen**

Upper Similkameen has 2,725 ha of reserve land, spread out over eight reserves. Upper Similkameen's registered population as of July 2016 is 92, which includes 69 on reserve and 23 off reserve.

Upper Similkameen filed an independent *Writ of Summons* in December 2003, asserting Aboriginal title to a territory identified in the writ.

### **Penticton**

Penticton holds 18,698 ha of reserve land, spread out across three reserves: Penticton 1, Penticton 2, and Penticton 3A. Penticton's registered population as of July 2016 was 1,058, of whom 634 live on reserve.

### **Okanagan Indian Band**

Okanagan Indian Band holds 10,636 ha of reserve land, spread out over six reserves: Duck Lake 7, Harris 3, Okanagan 1, Otter Lake 2, Priest's Valley 6, and Swan Lake 4. Okanagan Indian Band's registered population as of May 2016 was 1,995, of whom 822 live on reserve.

The Crown understands that Okanagan Indian Band's area of responsibility or stewardship within the Nation is in the northern portion of the Okanagan Nation writ map, and is based on the 2008 Forest and Range Opportunities agreement boundary. Okanagan Indian Band members and their ancestors are known as *Inkumupulux* or Head of the Lake. *Inkumupulux* is both a name for the people and where they live.

### **Westbank**

Westbank has 2161 ha of reserve land, spread out over five reserves. Westbank's registered population as of May 2016 is 858, of whom 428 live on reserve. Westbank filed a Statement of Intent with a map identifying Westbank's asserted traditional territory in the BC Treaty Commission process. The Project RoW is located 15 km outside of that territory. It is in Stage 4 of the BC Treaty Commission process but had suspended its participation in the process in 2009.

Westbank was one of 14 signatories to the Framework Agreement on First Nation Land Management, which led to the passage of the *First Nations Land Management Act* in 1999. In addition to an approved Land Code, Westbank also has an approved Self-Government Agreement which was affirmed through the passage of Bill C-11 on May 6, 2004 of the *Westbank First Nation Self-Government Act*.

## **II - Preliminary Strength of Claim Assessment**

- The Project RoW crosses approximately 100 km of Syilx (Okanagan) Nation's asserted traditional territory, following closely the western limit of the boundary identified in the protective writ. The following Project facilities are located within Syilx Nation's asserted traditional territory: Stump Station, and Kingsvale Station.
- The Crown's preliminary assessment of the Syilx (Okanagan) Nation's claim for Aboriginal rights, over the section of the Project that spans an area north of Stump Lake to an area southwest of Coldwater, involves a range of a weak to strong *prima facie* claim. The area assessed to have a strong *prima facie* claim is at Nicola Lake's northeast portion, which was considered by most

ethnographers to be part of the historic Okanagan territory. There is some indication of Okanagan/Syilx use of this area. The *prima facie* claim is moderate at Stump Lake and diminishes to the north of Stump Lake. Areas with a weaker (i.e. weak) *prima facie* claim are those in the Nicola Valley and southwest of Coldwater, which most ethnographers considered to be outside Okanagan territory at the time of contact<sup>2</sup>.

- The Crown's preliminary assessment of the Syilx (Okanagan) Nation's claim for Aboriginal title over the section of the Project that spans an area north of Stump Lake to an area southwest of Coldwater, involves a range of a weak to strong *prima facie* claim. The area assessed to have a strong *prima facie* claim is Nicola Lake's northeast portion, in proximity to a historic Okanagan village to the east of Douglas Lake likely occupied at 1846. The areas with weaker (i.e. weak) *prima facie* claims include those considered by most ethnographers to be outside of Okanagan territory at 1846, and have no/limited indication of Okanagan use/presence (e.g. the vicinity of Stump Lake towards Kamloops, and southwest of Merritt)<sup>3</sup>.
- It is understood that there was an agreement in the late 1700s between the Chiefs of the T'kemlups Secwepemc and the Syilx to end wars between these two communities (known as the Fish Lake Accord), where the Syilx were granted the former Secwepemc territory in the vicinity of Douglas Lake. The present-day Syilx indicate this Accord also included the shared use of the territory in the vicinity of Stump Lake, describing the accord as a living agreement that is regularly commemorated by the Upper Nicola Band and T'kemlups communities. The historical description of the agreement indicates that in the late 1700s the Secwepemc of Kamloops would continue to camp at Chapperon Lake in the summer, and hold the territory north of Chapperon, while the Syilx held the territory east, west, and south of Chapperon. There are conflicting views among ethnographers regarding the location of the northern boundary at the time of contact (1811) and 1846, and its relation to Stump Lake.

### 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 Syilx Nation's Aboriginal Interests, the Crown is of the view that the legal duty to consult Syilx Nation lies at the deeper end of the *Haida* consultation spectrum. The participating ONA member bands were placed on Schedule B of the Section 11 Order issued by the EAO, which afforded ONA opportunities to be consulted at a deeper level.

In December 2014 the ONA and Upper Nicola, who were both intervening in the NEB hearing process, agreed to work together to advance Syilx rights and interests and designated Chief Harvey McLeod of Upper Nicola as the Chiefs Executive Council Lead regarding the Project. By way of resolution signed by a quorum of ONA Chiefs, Upper Nicola was appointed a lead role to represent the ONA's rights and interests in the NEB hearing. On May 28, 2015 the ONA shared a copy of *ONA Tribal Council Resolution 2014/15 No. 294* through the NEB hearing process which stated that the ONA would adopt and support the evidence filed by Upper Nicola in the NEB hearing [\[A4Q2S8\]](#).

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<sup>2</sup> Ministry of Justice, Aboriginal Research Division, "Okanagan Nation: Review of Anthropological and Historical Sources" (revised November 20, 2013); and Teit, James, "The Salishan Tribes of the Western Plateau" in the Forty-Fifth Annual Report of the Bureau of American Ethnology, 1930; and Dawson, George M., "Notes on the Shuswap People of British Columbia" in Transactions of the Royal Society of Canada, Section II, 1891.

<sup>3</sup> Ibid

Upper Nicola was a very active participant in the NEB hearings. As an intervenor, Upper Nicola submitted written evidence which included technical studies, several rounds of information requests to the proponent, and provided Oral Traditional Evidence, as well as Oral Summary Argument and a Final Written Argument [\[A4X5V5\]](#). Upper Nicola also responded to Natural Resource Canada's Issues Tracking Table information request by further elaborating their concerns [\[A71240\]](#).

Upper Nicola has been, and remains, actively engaged with the Crown with respect to Project review and consultation process. Upper Nicola responded to the Major Projects Management Office's (MPMO) June 22, 2015 information request, which invited Upper Nicola to provide feedback on the Crown's Issues Tracking Table. Upper Nicola leadership met with the Crown consultation team as part of early engagement meetings in 2014 and again following the close of the NEB hearing record on March 31, 2016. Following the March 31 meeting, the Crown consultation team returned to Upper Nicola on May 3, 2016 for a special presentation where federal officials were invited into the Pithouse where seven current and former Upper Nicola Chiefs, going back to 1969, provided their views and perspectives on Upper Nicola's interests, their concerns with the consultation process, their fears of what would happen in the event of a major spill, and their vision for the future.

Upper Nicola was offered for \$40,000 plus travel for two to the NEB hearing by the NEB. An additional \$10,000 in special funding was offered by the NEB to support their participation in the hearing. A contribution agreement was reached, and \$39,508.66 was paid out through this agreement. The MPMO offered Upper Nicola \$11,977 and ONA \$24,000 in participant funding for consultations following the close of the NEB hearing record. Upper Nicola signed a contribution agreement with the MPMO in response to this offer, for a total of \$11,977 in allocated funding. ONA also signed a contribution agreement with the MPMO in response to this offer for a total of \$24,000 in allocated funding. The MPMO offered ONA an additional \$26,000 following the release of the *NEB Recommendation Report*. EAO provided Upper Nicola with \$5,000 in capacity funding on October 27, 2016.

EAO and MPMO met with Upper Nicola most recently on September 22, 2016, and November 16, 2016 regarding the Project.

As was stated in an October 21, 2016 letter to MPMO and EAO signed by ONA member band Chiefs, the Project falls within Upper Nicola's area of responsibility within Syilx traditional territory, and Upper Nicola has been authorized to take the lead in reviewing the Project. As such, the Crown's understanding is that Upper Nicola represents the views of the ONA in the consultation process for the Project.

A first draft of this Consultation and Accommodation Report (the Report) was provided to Aboriginal groups, including ONA, for review and comment on August 17, 2016. The ONA Chiefs Executive Council provided general comments on the Report in the October 21, 2016 letter. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016. The Crown received comments from Upper Nicola on November 18, 2016. Upper Nicola also provided a separate Aboriginal group submission to the Crown on November 19, 2016.

#### **IV - Summary of Key Syilx Nation Issues and Concerns Raised**

This section offers a summary of the key issues raised by Upper Nicola 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 Upper Nicola's key Project-related issues and concerns is summarized below.

As previously stated, within Syilx Nation territory, the Project falls within the Upper Nicola's area of responsibility and as such, Upper Nicola has been authorized to take the lead in looking at the Project closely and deeply having regard not only to the Upper Nicola community but also with regard to Syilx Nation title and rights. The *ONA Tribal Council Resolution 2014/15 No. 294* and correspondence from the ONA of May 28, 2015 [[A4Q2S8](#)] confirmed that the Okanagan Nation joined its intervention with Upper Nicola and that the Okanagan Nation supports all of the evidence filed by Upper Nicola in the NEB hearings.

Upper Nicola identifies 11 potential impact areas in its May 2015 written evidence filing with the NEB, which is available on the NEB registry site at [A4Q1S8](#) and reprinted below:

1. Construction, and operations of the original Trans Mountain Pipeline;
2. Construction and operations of the Project, including twinning and reactivation of segments, seismic and other geo-hazard, erosion and hydrologic flow issues, acid rock drainage (ARD) and metal leaching;
3. Impacts on water, watersheds and water crossings, including wetlands, drainages, ground water, drinking water, and everything that relies upon those watersheds, such as fish, wildlife, birds, deer, moose, etc.;
4. Disturbance/Losses to Upper Nicola/Syilx way of life, including: ongoing cultural and spiritual losses; loss of access to land and resources; impacts to fishing, hunting, food gathering; impacts to Upper Nicola/Syilx management of lands and resources for present and future generations;
5. Disturbance and/or Loss of lands, food and medicinal plants from road building, introduction of non-native invasive weeds and use of herbicides on the pipeline RoW, roads and construction sites;
6. Increased opening of Upper Nicola/Syilx Territory to recreational use, including lack of respect and protocol shown for land, water, resources and cultural/spiritual sites;
7. Construction and operations of the proposed Kingsvale Pump Station 138 KV Hydroelectric Line;
8. Increased risk of oil spills and industrial accidents, including concerns regarding: inadequate knowledge and experience with the fate and behavior of diluted bitumen; the adequacy, readiness and capacity of oil spill response; appropriate mechanisms for avoidance, mitigation, and compensation for impacts; and liability and responsibility for damages and ecosystem recovery;
9. Long term effects of building and operating pipelines, including the production and shipment of crude oil and carbon emissions;
10. Cumulative impacts of on-going development in Upper Nicola/Syilx Territory, including such things as impacts to physical, emotional, mental and spiritual well-being and ecological impacts including from mountain pine beetle and climate change; and
11. Infringements to s.35 Rights, including Syilx Title and Rights.

Further details about these concerns were shared by Upper Nicola through the NEB hearing process, their response to the Crown's information requests, and in correspondences and meetings with the Crown consultation team. The Crown's understanding of these additional details is outlined below.

#### Review Process and Methodology

Concerns have been expressed that include dissatisfaction with the NEB process, short timelines, inadequate funding, and concern that the proponent failed to adequately respond to Information

Requests related to impacts on fish and fish habitat, pipeline crossings, and environmental emergency plans, impacting Upper Nicola Band's ability to assess potential impacts on their title and rights. Upper Nicola does not believe that the NEB process is an appropriate venue for the Crown to discharge its legal duty to consult. Upper Nicola also believes that they have a right to protect and make decisions regarding their rights, and the processes established by the Crown do not adequately defer to Upper Nicola decision making. In the early engagement meeting with MPMO officials, Upper Nicola expressed a desire to enter in to a consultation protocol with the Crown. In a meeting with the Crown on March 31, 2016, Upper Nicola noted that the ONA use an oral tradition and that consultation done by paper is not consistent with their history and their preference for how to work together, that Upper Nicola feels they should be consulted at a deeper level, and that more meetings between Upper Nicola and the Crown are needed to fulfil the Crown's duty to consult. Upper Nicola also raised concerns around the Crown's approach to strength of claim analysis. Upper Nicola stated that they are trying to "decolonize" themselves and envision taking the good from the current system and evolving towards a system of self-governance. Upper Nicola also expressed concerns with the methods used to assess Project impacts on Syilx Nation's Aboriginal Interests.

### *Cultural, Social, and Spiritual Impacts*

General concerns about disturbance or loss of Syilx way of life for current and future ONA members, including their deep connection to the land (łə\_kłtmxʷúlaʔxʷ), water (siwłkʷ), and everything living on and in it. It was noted that water is revered as sacred and is part of creation stories, teaching and laws in Upper Nicola/Syilx spirituality and religion, and must be treated with respect and dignity. Upper Nicola has stated that the cultural and social impacts of the Project are not limited to archaeological sites and sacred areas and that there are psychological impacts such as marginalization and disempowerment among Upper Nicola/Syilx members, especially amongst youth.

Upper Nicola expressed concern with the protection of cultural heritage resources in Syilx territory, including: traditional use areas; areas of historical significance, sacred and spiritual areas, archeological sites and cultural material, as defined in the Upper Nicola Band Cultural Heritage Policy, 2005. Among the 273 traditional use Values in the Local Study Area (LSA) currently utilized are highly valued hunting areas, fishing sites, important fish spawning areas, berry picking areas, medicinal plant gathering areas, sacred sites and sites important for traditional ceremonies. Sacred and culturally significant areas<sup>4</sup> in the region include (but are not limited to): cultural material, bone, basalt, fire-cracked rock, burial sites, habitation sites such as keekwilee ("pithouses") and cache pits, petroforms and pictographs ([A4Q1T0](#)).

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<sup>4</sup> As defined in Upper Nicola Band Cultural Heritage Policy, 2005: Archaeological Sites include: pithouse sites, mat lodge sites, caves, rock shelters, pictographs, petroglyphs, petroforms, cache pits, burial sites, roasting pits/ associated features, processing sites and associated features, quarry sites, surface lithic scatters, buried archaeological sites, and earthworks. Areas of Historical Significance (which may also be archaeological sites) include: place name locations, trap-lines, weirs and fish traps, village and camp sites, trails and trail markers, quarries, battle locations, hunting fences and blinds, ochre procurement places, and boundary markers. Cultural Materials include: materials and documents in libraries, archives, museum collections, universities, repositories include arch collections/provenance documentation, ethnographic collections, linguistic, archival documents, photographic, genealogical, archival maps, soil samples, radiocarbon samples, faunal remains, other arch materials, oral history recordings (audio/visual) anthropological field notes, archaeology reports. Sacred and Spiritual Sites include: places of mythological/legendary significance, including transformer sites, cultural landscape features e.g. waterfalls, burial sites and cemeteries, rock cairns and alignments, fasting/vision quest sites, training areas, sweathouse locations.

### Environmental Effects

Concern was expressed regarding potential impacts to lands and waters, including disturbance to fish, wildlife and birds. Upper Nicola is also concerned about the mountain pine beetle epidemic and the effect this is having on the environment (loss of trees leading to soil disturbance leading to erosion and instability) which could in turn impact the pipeline.

Upper Nicola outlined specific concerns around anticipated impacts to wildlife, which include habitat loss, including land clearing, habitat degradation, introduction of invasive species, sensory disturbance such as noise and visual disturbance during construction, operations and maintenance, as well as direct mortality to wildlife from construction machinery and/or increased vehicular access, and negative effects of linear disturbances on the behaviour and fitness of birds and wildlife. Concerns were also identified related to both direct and indirect impacts of the Project on wildlife, birds, plants and seeds, water, or fish that move throughout Syilx territory

Other environmental concerns raised by Upper Nicola include the potential for serious harm to fish, wildlife, groundwater and surface water related to construction activities including: clearing, blasting, grading, trenching, drilling, boring, seismic surveys, road construction, stream crossings and water extraction and decommissioning of the pipeline, as well as impacts on the Nicola River and Stump Lake watersheds.

During construction, Upper Nicola has concerns about the destruction of land during road building and use of herbicides on the Project RoW, as well as the spread of invasive species. Upper Nicola is also concerned that construction and operation activities will increase the number of outsiders in their community.

ARD and metal leaching was raised as a concern by Upper Nicola during construction and operation of the Project. The concern relates to potential impacts on the land and waters of Upper Nicola/Syilx Territory and the exercise of traditional activities.

### Cumulative Effects

Concern was expressed related to cumulative impacts of development, including impacts from climate change, and impacts to physical, emotional, mental and spiritual well-being and ecological impacts including from mountain pine beetle and climate change. Upper Nicola also raised concerns about the indirect impacts of the Project on the environment outside of the Project RoW, such as invasive species spreading across Syilx territory or deer migrating across the territory.

### Impacts on Aboriginal Rights and Title

Upper Nicola expressed concern for potential effects to hunting, trapping, fishing, harvesting, and governance rights. Upper Nicola argues that Syilx people have a responsibility to care for and ensure the protection and sustainability, and health and wellbeing of the land and are concerned that these rights of stewardship are being impacted. Upper Nicola is also concerned that the Project will prevent ONA members from accessing the land to exercise their Aboriginal rights and that accessing their land is already limited by the existing Trans Mountain Pipeline. In their comments submitted on November 18, 2016 regarding the Consultation and Accommodation Report, Upper Nicola expressed disagreement with the Crown's assessment of Project impacts on Syilx Nation's Aboriginal Interests. Upper Nicola expressed in their November 18, 2016 letter that the Project introduces significant impacts and risks to Upper Nicola/Syilx Peoples and their territory.

### Human Health and Safety

Concerns were raised about living with the ongoing uncertainty of a potential spill. Upper Nicola expressed concern for potential negative health effects from consuming contaminated fish and wildlife. Upper Nicola is also concerned about potential effects from ARD and metal leaching to groundwater, fish and other freshwater dependent organisms which also relate to human health concerns.

### Pipeline Accidents and Malfunctions

Concerns were raised about potential oil spills and industrial accidents and the effectiveness of current technologies to contain and recover oil that is spilled in Upper Nicola/Syilx territory. Upper Nicola are concerned that the weather conditions, flow, topography at the time of any spill, together with adequate monitoring to detect the spill, could affect the ability to deploy equipment and personnel, as well as the effectiveness of oil containment and recovery after a spill. In addition, Upper Nicola feels that there are gaps in planning, emergency preparedness and equipment capability in Nicola Lake and Stump Lake watersheds, specifically, that no control point planning has been or will be done for the entire Project pipeline route. Upper Nicola also expressed concerns related to regulatory oversight for the design, construction, and monitoring of pipeline integrity. Upper Nicola is concerned that the quantity and type of spill response equipment available in Kamloops and Hope, the two nearest caches, is limited. Upper Nicola have also stated that they bear most of the risks from the Project, given a spill would happen on their traditional territory, and that currently no benefits flow to the community. Concerns were also raised regarding the age and stability of the original pipeline.

### Economic Impacts

Upper Nicola believes the Crown should establish royalty and revenue sharing with Upper Nicola/Syilx Nation on a long term basis.

Nine additional concerns were raised by Upper Nicola in their traditional use and occupancy study (TUOS) completed for the Kingsvale Transmission Line:

1. Destruction of land due to road construction;
2. Increased access to non-Aboriginal recreationalists and increased resource exploitation;
3. Ongoing contamination of the water and land and impacts to Traditional Use resulting from the original Trans Mountain Pipeline;
4. Invasive plant species along Kingsvale Transmission Line RoW;
5. Culture loss/difficulty sustaining way of life;
6. Infringement of Upper Nicola's right to decision making power over ancestral lands;
7. Cumulative impacts of development, including impacts from climate change;
8. Impacts of a pipeline spill or accident; and
9. Proper notification, prompt response time, and responsibility for clean-up following a pipeline spill or accident.

The Crown is in receipt of an open letter sent to Prime Minister Justin Trudeau, Alberta Premier Rachel Notley, and BC Premier Christy Clark from a collective of Aboriginal groups, including the ONA. This letter identifies interests and concerns related to Indigenous consent of the Project and the Project's consultation process.

### Accommodation Proposals

During the November 16, 2016 meeting Upper Nicola requested that an honourable table be established outside of the Project consultation process to begin addressing grievances associated with the original Trans Mountain Pipeline within Syilx Nation territory. This process could eventually include



compensation, but the first step is to establish a table to discuss recognition for the use of the territory and coming to a common understanding. The Crown consultation team has committed to advise senior officials on Upper Nicola's request.

Another action item to come out of the November 16, 2016 meeting was to plan and hold a half day meeting between Upper Nicola and relevant Crown experts regarding emergency spill response and pipeline safety. This meeting will help to ensure that Upper Nicola understand how preparedness and response will be regulated in Syilx Nation's traditional territory.

In their responses to Natural Resources Canada's Issues Tracking Table information request [[A71240](#)], Upper Nicola elaborated on their concerns with the Project, and recommended measures to reduce or avoid potential impacts associated with the Project. Additional accommodation and mitigation measures listed below are included in the proponent's Issues Summary and Resolutions Table in the Aboriginal Engagement Report.

General environmental mitigation measures proposed by Upper Nicola include:

- Involving Upper Nicola in carrying out and monitoring any construction, clean up, re-seeding, and emergency preparedness and response in Upper Nicola/Syilx Territory; and
- Developing a communications plan to keep Upper Nicola up to date on the Project's environmental management record. As part of the communications plan, Upper Nicola should be immediately notified of any of the following issues:
  - reportable spill events;
  - applications for variance under the *BC Wildlife Act*, *Migratory Birds Act*, or other Acts;
  - any activities resulting in the Harmful Alteration Disruption or Destruction (HADD) of fish habitat;
  - implementation of any archaeological protocols identified in the plan; or
  - any other environmental non-compliance issues and subsequent measures.

Mitigation measures proposed by Upper Nicola related to wildlife include:

- Limiting habitat loss by avoiding important habitats in the planning and design of the Project;
- Consulting with Upper Nicola on the development of a protocol to avoid impacting wildlife during critical seasonal activities, develop appropriate site specific environmental protection plans including buffers and Best Management Practices for the protection of key habitat features, and develop habitat restoration or enhancement planning if there is a potential loss of sensitive or valued habitats; and
- Ensuring sensitive breeding and migration windows for wildlife are observed.

Mitigation measures proposed by Upper Nicola related to ungulates include:

- Avoiding unnecessary road development that may result in an alteration of natural movement patterns, or changes in natural movement patterns of ungulates which may result in increased hunting pressures;
- Implementing a monitoring and adaptive management plan to address negative changes in movement patterns and habitat use; and
- Limiting construction vehicles, ensuring due care when travelling at safe road speeds, and displaying road signs in high risk areas of vehicle collisions.

Mitigation measures proposed by Upper Nicola related to birds include:

- Ensuring the active nests are not disturbed during breeding season;
- Consulting with Upper Nicola cultural advisors, resource technicians and naturalists to determine bird activity and local weather patterns;
- Ensuring ongoing monitoring of migratory birds in order to consider any changes in seasonal variations, movement pattern changes, project activities or cumulative effects; and
- Preparing an adaptive management plan that includes shutdowns during peak bird migration periods.

Mitigation measures proposed by Upper Nicola related to cumulative effects include:

- Utilizing members of Upper Nicola and ONA to identify problem areas that may be unknown to the proponent's engineering and environmental specialists to ensure topography, degree of disturbance, soil erosion potential, snow depth, access limitations, and timing constraints are properly considered and assessed, based on our local and traditional knowledge;
- The proponent and Canada must commit to ensure a comprehensive assessment of all proposed crossings of wetlands/watercourses, which also includes a review of the cumulative impacts and effects; and
- The proponent should commit to involving Upper Nicola in carrying out and monitoring any construction, clean up and re-seeding in Upper Nicola/Syilx Territory.

Mitigation measures proposed by Upper Nicola related to accidents and malfunctions include:

- The proponent must commit, with Upper Nicola's meaningful involvement, to identify and complete a comprehensive set of control point plans for the entire Project pipeline route in Upper Nicola/Syilx Territory, and to ensure logistics planning takes into consideration how and where spill response equipment is stored, how it would be transported within Upper Nicola/Syilx Territory and how and where trained personnel capable of deploying response tactics are located;
- The proponent must commit to train and equip Upper Nicola crews with specialized local knowledge of the land to monitor for spills and leaks on an ongoing basis;
- The proponent must be required to provide a comprehensive mitigation plan and compensation plan that assures that the proponent will be fully responsible for all spill clean-up and damage costs from a pipeline spill within Upper Nicola/Syilx Territory;
- The proponent and Canada must commit to carry out more research and acquire more knowledge and experience regarding the fate and behavior of diluted bitumen in the freshwater environment before the Project is approved and precious ecosystems within Upper Nicola/Syilx Territory are placed at increasing risk;
- Implementing a dual leak detection system;
- Developing detailed plans for inland spill response in collaboration with Aboriginal groups, industry and government;
- Publication of inland spill response plans, including planning and preparedness tools, for accessibility to the general public;
- Regularly conducting spill response drills and exercises;
- Modelling for worst case on-land spills in watershed drainages within Upper Nicola Territory must be completed; and
- Upper Nicola Band members must be trained as first responders, with funding provided by the proponent.

Mitigation measures proposed by Upper Nicola related to Project construction include:

- Upper Nicola should be provided capacity to have meaningful involvement and input into the development of environmental management plans to ensure the Band's concerns are incorporated into the construction and operational aspects of the Project and have Upper Nicola representation in any environmental or archaeological monitoring activities; and
- Developing an ARD Mitigation Toolbox for use during construction.

Mitigation measures proposed by Upper Nicola related to cultural and social impacts include:

- Providing Upper Nicola with the capacity to provide input into management recommendations relating to archaeological and cultural heritage resource issues related to the Project;
- Involving Upper Nicola in monitoring construction and operations, including implementation of environmental and cultural heritage resource management plans in the event that previously unidentified sites are discovered during clearing or construction;
- Carrying out a Pre-field Reconnaissance, Archaeological Overview, Inventory or Impact Assessment by qualified archaeologist to determine the extent of archaeological sites;
- Ensuring that sacred and spiritual sites, as well as historically significant areas, are no go zones and cannot be developed and every effort must be made to avoid, protect and manage these areas;
- Upper Nicola has exclusive proprietary and intellectual property rights to all cultural and traditional knowledge and information shared to advance the interests of Upper Nicola in the planning, use, and management of lands and resources within the traditional territory of Upper Nicola;
- Ensure that areas of spiritual significance in the vicinity of the Project corridor are subject to enhanced discussions between Upper Nicola and the proponent to arrive at a clear understanding of culturally sensitive areas ;
- Upper Nicola will hold discussions with other Syilx communities with interests in the area to determine their position on the Project and to let them know of Upper Nicola's concerns about impacts to the area's spiritual values;
- The proponent develop appropriate buffer zones around areas of cultural and spiritual practice, in consultation with Upper Nicola, to mitigate the effects of noise and other effects from the Project; and
- Upper Nicola members must be included in environmental and archaeological and cultural heritage monitoring during and after construction activities.

Mitigation measures proposed by Upper Nicola related to impacts on Aboriginal title claims include:

- Upper Nicola has requested to see accommodations related to their stewardship, use of the land, governance of the water, governance of the land, governance of the land and water together, and all related pieces.

In their comments on the Consultation and Accommodation Report provided to the Crown on November 18, 2016, Upper Nicola proposed the following accommodation measures:

- Upper Nicola must be included in all information gathering by the proponent, starting with what occurs during the pre-construction field assessments (technical studies) to ensure protection of traditional sites and areas. Upper Nicola must also be provided with capacity to engage in those assessments;
- According to Upper Nicola, the Crown must provide clarity on the accommodation of impacts on traditional land and resource use including impacts to water, water crossing, habitat and

vegetation in the construction corridor, loss of cultural and spiritual enjoyment, impacts to hunting areas along the pipeline corridor;

- A Nation-to-Nation process must be used for this and other projects in Upper Nicola/Syilx Territory starting from the outset. Upper Nicola wants a commitment to Nation-to-Nation discussions with the Crown regarding this and other Projects;
- Upper Nicola requires capacity funding to actively engage in ongoing consultation, management plan review and development, and to engage in monitoring activities for the Project;
- Upper Nicola stated there must be a completion of the proper risk assessment using Onshore Pipeline Regulation requirements prior to a decision being made so that the risks of the Project can be properly considered by all affected communities. Upper Nicola wants the Crown to require strain-based design for areas that are seismically susceptible and other geo-hazard sites identified through ongoing geotechnical investigations;
- With regards to acid rock drainage, Upper Nicola expressed the belief that assessing and managing the geo-hazard and seismic risks of the Project should not be deferred until after Project approval. Upper Nicola must be actively involved in the development and finalization of plans and Upper Nicola must be included in all information gathering, starting with what occurs during the pre-construction field assessments;
- With regards to water, Upper Nicola identified the need to clearly identify all potential pipeline water crossings and power line watercourse crossings prior to approval of the Project. This work must include analysis of the impacts of climate change on water and watercourse crossing design in Upper Nicola/Syilx Territory. Further work is needed to determine the location of aquifers in Upper Nicola/Syilx Territory that would be impacted by the construction and operation of the Project. This must be done prior to Project approval. Upper Nicola also expressed the need to be involved in any groundwater monitoring program and have capacity funding to participate in monitoring;
- Upper Nicola must be provided with un-redacted draft copies of the Environmental Protection Plans for Syilx Territory so that they can assess impacts on Upper Nicola/Syilx title and rights. Upper Nicola also stated they must be consulted with respect to the development of Environmental Protection Plans, as part of the conditions of the Project in addition to common law requirements concerning consultation;
- Greater clarity around *Fisheries Act* authorization(s) required for the Project, including any authorizations being considered for fisheries habitat in Upper Nicola/Syilx Territory and timing for when Upper Nicola would be advised of whether they will be considered;
- The Crown must consult with Upper Nicola with respect to heritage resource and archaeological permitting well in advance of permitting, including following Upper Nicola's policies.
- Upper Nicola requires a schedule of proposed permitting, as well as all permit application referrals from the arch branch that are related to the Project to be identified separately from all other permit application referrals;
- Upper Nicola asserts that there should be a separate cumulative effects study conducted independently for the Project that should be developed in partnership with Upper Nicola and neighbouring nations for a whole of region cumulative effects analysis;
- Upper Nicola requires that control point plans to be developed for inland spills by the proponent for Upper Nicola/Syilx Territory, if the Project were to be approved. Upper Nicola expressed that this ought to be made a condition of any approval of the Project and that Upper Nicola needs to be consulted regarding about the control point plans early on for control points in Upper Nicola/Syilx Territory;

- Upper Nicola has requested that the Crown must ensure that the Environment and Climate Change Canada's recommendation that Trans Mountain commit to providing spill responders and regulators a specific suite of test data for all types of hydrocarbon products to be shipped be a requirement for approval. A further review of the fate and behaviour of spilled diluted bitumen from pipelines must be conducted by the Crown, and how this might affect oil spill risk and response, given the new evidence available after the evidentiary record had closed in the NEB hearings. The weathering of diluted bitumen must be addressed in the risk assessment for oil spills and the clean-up of diluted bitumen needs to be addressed through emergency response and preparedness in consultation with Upper Nicola. Upper Nicola also requested that a leak detection system update needs to be provided to Upper Nicola prior to Governor in Council decision and the plan to validate the performance of the system should include Upper Nicola and this would be a required accommodation measure;
- Upper Nicola requires emergency response equipment to be located on Upper Nicola/Syilx Territory as an accommodation. The type of equipment, training and upkeep and maintenance costs should be further discussed between Upper Nicola and the Crown; and
- With regards to emergency response, Upper Nicola requested that the leak detection system update must be provided to Upper Nicola and a plan to validate the performance of the system should include Upper Nicola. Upper Nicola requires that in-line inspections be initiated prior to commencing operations in Upper Nicola/Syilx Territory and also requires additional inspections as part of ongoing stewardship and monitoring. Further information would be needed to know how Emergency Response Plan development will involve Upper Nicola and how and when these will be finalized.

Sections 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 Upper Nicola that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests

#### ***Upper Nicola's Response to NEB Recommendation Report***

No specific comments received on the *NEB Recommendation Report*.

#### **V - Potential Impacts of the Project on Syilx Nation'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 Syilx Nation's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Syilx Nation'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 Syilx Nation's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Upper Nicola and the ONA, Upper Nicola and the ONA's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificates issued by the Province.

Upper Nicola completed a traditional land and resource use (TLRU) study in 2014 entitled "*Upper Nicola Band Traditional Use Study for the Kinder Morgan Trans Mountain Pipeline Expansion*" ([A4Q1T2](#)). The report identified traditional land use values in Upper Nicola/Syilx traditional territory in the segment of the Project pipeline from Black Pines to Hope. Upper Nicola identified sites within the LSA, which is comprised of the Project corridor that intersects with Syilx territory and an additional 500-m buffer. The Regional Study Area (RSA) is comprised of Syilx territory<sup>5</sup>, which includes Upper Nicola's Area of Responsibility; Upper Nicola defines their traditional territory as the entirety of Syilx territory. In the RSA, Upper Nicola identified 779 site-specific and 28 non-site-specific traditional use values, of which 779 site-specific traditional values and 273 site-specific traditional use values intersect the LSA. In its Supplemental Technical Report ([A4S7I7](#)), the proponent estimated approximate distances and directions from the Project's pipeline corridor based on information in Upper Nicola's TLRU study.

To better understand the effects of the Kingsvale Transmission Line and additional Kingsvale segment access roads on Upper Nicola's traditional use values, an additional TUOS was completed in 2016 by Upper Nicola entitled "*Upper Nicola Band Traditional Use and Occupancy Study for the Kingsvale Transmission Line in Support of the Trans Mountain Expansion Project*". The Project footprint for this TUOS is within Upper Nicola's area of responsibility within the larger Syilx Nation traditional territory. This study identifies traditional use values, which are defined as a specific place, resource, or interest important to the ongoing practice of Upper Nicola's land-use, as reported by an Upper Nicola member. Sites are identified within the LSA (Kingsvale LSA), which is comprised of the proposed Kingsvale Powerline and proposed access roads, including a 500-m buffer. Sites are also identified in the larger RSA (Kingsvale RSA), which is comprised of the Syilx Territory<sup>6</sup>, including Upper Nicola's Area of Responsibility. The study identified 120 site-specific, and 137 non-site-specific traditional use values in the RSA, which include 120 site-specific traditional use values and 24 site-specific traditional use values in the LSA. In addition to the 5 site-specific traditional use values in the LSA mapped in a previous traditional use study, a total of 29 site-specific traditional use values were reported within the LSA. Upper Nicola notes that traditional use values under-represent actual traditional uses since areas mapped represent multiple uses by groups of community members over decades.

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<sup>5</sup> According to Upper Nicola, Syilx territory extends north to the area of Mica Creek, just north of modern day Revelstoke, B.C., and the eastern boundary extends to between Kaslo and Kootenay Lakes. The southern boundary extends to the vicinity of Wilbur, Washington and the western border of the territory extends into the Nicola Valley.

<sup>6</sup> Ibid.

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

As identified in their TLRU study and Kingsvale Transmission Line TUOS, small and large animals hunted by Upper Nicola/Syilx community members include beaver, wolf, rabbit, porcupine, muskrat, moose, deer, caribou, grizzly bear, elk, black bear, mountain sheep, and woodland buffalo. Community members also hunt grouse, chicken, duck, goose, swan, eagle, loon, ptarmigan, and owl, and gather waterfowl eggs. In terms of trapping activities, community members trap for marten, fisher, wolf, otter, beaver, muskrat, weasel, lynx, fox, wolverine, mink and squirrel. Western spotted frog, black bear, black-tailed deer, river otter, and yellow-bellied marmot are also used. Roots, nuts, tree bark, seeds, berries [red huckleberries, black gooseberry, sá<sup>w</sup> usm (soapberries), Saskatoon berries, raspberries, wild strawberries, wild currents, blueberries, salmon berries, high bush cranberries, choke cherries] and other plants such as mushrooms (lightning mushrooms, and poplar mushrooms), Labrador tea, wild potatoes, arrowleaf balsamroot, cluster lilies, yellow bell, mariposa lily, bitterroot, blackcap and thimbleberry shoots, the inner-bark (cambium) of ponderosa and lodge pole pines, cow parsnip, devil's club, Indian hellebore, fire weed, camas, and wild onions are harvested for a variety of purposes, including subsistence. Medicinal plants harvested by Upper Nicola/Syilx people include ayúí7, red and other willow species, juniper, and rosebush. More than 200 plants used by Upper Nicola are listed in the TLRU study.

Upper Nicola identified several concerns related to environmental effects of the Project on hunting, trapping, and plant gathering activities, including impacts on everything that relies upon watersheds, such as wildlife, birds, deer, and moose, loss of lands, food and medicinal plants, and spread of invasive species and use of herbicides. In addition, Upper Nicola expressed concern about the mountain pine beetle epidemic and the effect this is having on the environment such as loss of trees leading to soil disturbance leading to erosion and instability, which could in turn be impacted by the Project. Finally, Upper Nicola raised concerns around sensory disturbance, direct mortality of wildlife, changes to wildlife populations, changes to deer migration routes and wintering areas, and consumption of contaminated wildlife.

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 Upper Nicola, the proponent would implement several mitigation measures to reduce potential effects to species important for Upper Nicola's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP), and the vegetation and wildlife management plans. The Crown understands that the proponent has committed to, in response to specific concerns raised by Lower Nicola Indian Band about risk of avian mortality, an Avian Protection Plan that will be prepared for the Project which will provide more detail on the potential effects and proposed mitigation measures. The proponent is also committed to consult with the Upper Nicola and the ONA regarding their concerns during the development of detailed reclamation planning and prior to

the finalization of the Reclamation Management Plan. Further, the proponent is committed to continue engaging directly with Upper Nicola and the ONA to address their concerns regarding the Project directly.

According to Upper Nicola/Syilx written evidence [A4Q1T1], many gathering sites are located within the TLRU study's LSA and many of the gathering sites for food and medicinal plants are near lakes and streams. One of the gathering sites is along Mill Creek. Another plant, ayúł7, a medicinal plant important to Upper Nicola people, grows along the western portion of Nicola Lake. Red willow, juniper and rosebush are also gathered for medicinal and cleansing purposes. Red willow has always been significant for Upper Nicola people, as it is used for medicinal baths and for washing houses after funerals. Red willow is collected from the Nicola Dam to the east side of Merritt and all up and down the Nicola River. Other kinds of willow are used for sweatlodge frames, for hoops for traditional games such as spearthrow, for rattles and traditionally for fish weirs. Willow is collected up and down the Nicola River as well as along other streams and creeks in Upper Nicola/Syilx Territory. In his written evidence submitted during the NEB hearings [A4Q1R7], Chief Harvey McLeod states that Upper Nicola/Syilx people hunt in areas between Monck Park and Guichon Ranch, west of Stump Lake, as well as around Pleasant Valley, Mabel Mountain, Fox Creek, Fox Lake, Moore Creek, and Anderson Creek.

In its TLRU, Upper Nicola identified 174 sites in the LSA associated with past and present subsistence activities and three critical wildlife/ecological values. Site-specific subsistence values associated with hunting and gathering activities include moose, deer, grouse, elk, bear, huckleberries, soapberries, Saskatoon berries, raspberries, blueberries, choke cherries, lightning mushrooms, poplar mushrooms, Labrador tea, wild potatoes, and wild onions. The three critical wildlife/ecological values relate to locations of calving grounds, nesting sites, and mineral licks, among other values. According to the Supplemental Technical Report submitted by the proponent, Upper Nicola identified nine hunting sites, two trapping ranges and several plant gathering sites (number of sites and locations were not disclosed). Two hunting sites, including Pleasant Valley, two trapping ranges, one range used for plant gathering are located within the Project's pipeline corridor. Two hunting sites are located within 2 km of the Project's pipeline corridor, four are within 30 km of the Project Area, and one is over 30 km from the Project Area. In the Kingsvale Transmission Line TUOS, 22 subsistence sites currently used for hunting, fishing, and plant gathering were identified in the Kingsvale LSA. Sites related to hunting and plant gathering include moose, deer, and elk, as well as picking huckleberries, Saskatoon berries, and wild potatoes.

Upper Nicola raised concerns with the Project's potential impacts relating to specific locations and access on hunting, trapping, and plant gathering activities, including increased access to Upper Nicola territory due to construction and operations, reduced or loss of Upper Nicola members' access to the land to exercise their Aboriginal rights, and direct mortality of wildlife being killed by increased vehicular access. Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Syilx Nation'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 Syilx Nation members. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access associated with hunting, trapping, and gathering sites (Section 4.3.1 of this Report). With regards to specific concerns raised by Upper Nicola and the ONA, the proponent would implement several mitigation measures to reduce potential effects on TLRU sites important for Syilx Nation's hunting, trapping, and plant gathering activities, 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 Syilx Nation's traditional lands. The proponent has committed to minimizing the development of access routes, controlling public access along the construction RoW, 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 has also committed to 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 Upper Nicola and the ONA prior to construction, the sites would be assessed, and appropriate mitigation measures would be determined. The proponent committed to working with Upper Nicola and the ONA to develop strategies to most effectively communicate the construction schedule and work areas to community members. Further, the proponent has committed to the review of the information on hunting, trapping, gathering or fishing in the area of the Coldwater and Nicola Rivers (upon receipt) for consideration in Project planning and continued engagement with Upper Nicola and ONA to discuss mitigation measures to minimize potential impacts.

Upper Nicola expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities, including disturbance or losses to Upper Nicola/Syilx way of life such as loss of access to land and resources, impacts to hunting, food gathering, and Upper Nicola/Syilx management of lands and resources for present and future generations. Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Syilx Nation's hunting, trapping, and plant gathering activities. The Crown appreciates that this short-term disruption could temporarily alter the behaviour of Syilx Nation 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 social, cultural, spiritual, and experiential effects associated with hunting, trapping, and plant gathering activities (Section 4.3.1 of this Report). With regards to specific concerns raised by Upper Nicola, the proponent would implement several mitigation measures to reduce potential effects to Syilx Nation's hunting, trapping, and plant gathering activities. The proponent is committed to implementing weed management (as outlined in the Weed and Vegetation Management Plan) to reduce the potential for weed infestation following construction, and utilizing an Integrated Vegetation Management approach intended to reduce the use of herbicides and promote healthy ecosystems. The proponent will consult with Aboriginal groups regarding problem vegetation management and methods of treatment. Measures outlined in the proponent's Reclamation Management Plan are intended to stabilize and revegetate affected lands to achieve land productivity along the construction RoW and footprint, equivalent to the adjacent land use. 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 Upper Nicola and the ONA, Upper Nicola and the ONA'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, Project construction and routine maintenance during operation are expected to result in a minor-to-moderate to moderate impact on Syilx Nation's hunting, trapping and plant gathering activities. The moderate

impacts on Syilx Nation's trapping activities would arise from Project construction and routine maintenance, and would occur within the Project footprint. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

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

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

Upper Nicola members, as well as other Syilx people, engage in fishing in both the lakes and rivers within the LSA and RSA. Fishing in the spring runs have historically been an important time of year to provide a food source. Currently, fish resources identified in the TLRU study include, but are not limited to, six species of suckerfish, three species of Kokanee, two species of white fish, squawfish, lipstick fish, a landlocked sockeye salmon, lamprey, s'pukli7c (Burbot/Lingcod), Dolly Varden char, Coho salmon, grayling pickerel, perch, steelhead (rainbow) trout, and cutthroat trout. Kokanee is particularly vital to Upper Nicola/Syilx people. Three species of kokanee continue to be caught in large numbers and dried for winter use.

Upper Nicola raised concerns related to environmental effects of the Project on fishing activities, including impacts on fish and fish habitat, impacts on water, watersheds and water crossings, including wetlands, drainages, ground water, drinking water, and everything that relies upon those watersheds, such as fish.

As described in the *NEB Recommendation Report*, Project-related construction and operation could result in low to moderate magnitude 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 Upper Nicola, the proponent would implement several mitigation measures to reduce potential effects to species important for Syilx Nation's fishing activities. 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 Crown understands the proponent, in response to specific concerns raised by Upper Nicola and the ONA with respect to Coldwater River 4 crossing, is committed to preparing and filing (with the NEB) a summary report of the geotechnical investigation and any reassessment of the HDD feasibility associated access to the site for Coldwater River 4 crossing. The proponent is committed to detailed field investigations that will be carried out where HDD is planned to locate the HDD appropriately. Should additional, unmapped defined or fish-bearing watercourses be identified during survey or a

route walk prior to construction, the proponent has committed to updating the Watercourse Crossing Summary Table, providing estimates and assessing riparian disturbance, and assessing fish-bearing watercourses for the potential for Serious Harm.

In its TLRU, Upper Nicola identified 174 sites in the LSA associated with past and present subsistence activities and three critical wildlife/ecological values. Site-specific subsistence values associated with fishing activities include fishing for trout. The three critical wildlife/ecological values relate to locations of fish spawning areas, among other values. According to the Supplemental Technical Report submitted by the proponent, Upper Nicola identified eleven fishing sites in the TLRU study, none of which are within the Project's pipeline corridor. The nearest fishing site is approximately 2.2 km east of the Project Area at Nicola Lake. Three sites are located within 30 km of the Project Area and the remaining six sites are beyond 30 km from the Project Area. According to the TLRU study, there was also good early spring sucker fishing at Trapp Lake, along with many other lakes along the route to Kamloops. After early spring fishing at Nicola Lake, community members go to Chapperon Lake for shiners, suckers, and other fish. From here Upper Nicola members rely on Peter Hope Lake and Glimpse Lake for more trout and small game hunting, then eastward to Pennask Lake. In the Kingsvale Transmission Line TUOS, 22 subsistence sites currently used for hunting, fishing, and plant gathering were identified in the Kingsvale LSA. Fishing-related sites include those where Upper Nicola community members fish for trout and dry fish.

Upper Nicola raised concerns with the Project's potential impacts relating to specific locations and access to fishing activities, including reduced access to *siwłkʷ* (water) in their traditional territory, avoidance of fishing sites in the Project area due to perceptions of biophysical contamination, and increased access to outsiders that will put pressure on Upper Nicola fishing areas. Project-related construction and routine maintenance activities are expected to cause short-term, temporary disruptions to Syilx Nation'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 Syilx Nation 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 important for Syilx Nation (Section 4.3.2 of this Report). With regards to specific concerns raised by Upper Nicola and the ONA, the proponent would implement several mitigation measures to reduce potential effects to fishing sites important for Syilx Nation's fishing activities. As previously discussed, the proponent is committed to minimize disturbance to access to Syilx Nation's traditional lands, as described in the Access Management Plan. The proponent is committed to working with Upper Nicola and the ONA to develop strategies to most effectively communicate the construction schedule and work areas to community members.

As described in the TLRU study, Syilx relatives are invited to Quilchena and Spaxomin to participate in Upper Nicola ceremony and to fish, and Upper Nicola members bring fish to their relatives for ceremony and for sharing, which is reflective of Syilx laws of sharing and reciprocity.

Upper Nicola expressed concern with direct and indirect effects of Project-related activities on social, cultural, spiritual, and experiential aspects of its fishing activities, including disturbance or losses to Upper Nicola/Syilx way of life caused by impacts to fishing and water in Upper Nicola/Syilx territory. As described previously, the Project construction and routine maintenance is expected to cause short-term, temporary disruptions to Syilx Nation'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 reduce potential social, cultural, spiritual or experiential effects associated with fishing activities (Section 4.3.2 of this Report).

In consideration of the information available to the Crown from the NEB process, consultation with Upper Nicola and the ONA, Upper Nicola and the ONA'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 Syilx Nation's freshwater fishing activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

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

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

In their TLRU study, Upper Nicola identified one trail and one travelway, both of which are located within the Project's pipeline corridor.

Upper Nicola identified concerns related to environmental effects of the Project on other traditional and cultural practices, including the potential for ongoing cultural and spiritual losses, and the protection of sacred and culturally significant areas in the region, which include, but are not limited to, cultural material, bone, basalt, fire-cracked rock, burial sites, habitation sites such as keekwilee ("pithouses") and cache pits, petroforms and pictographs ([A4Q1T0](#)). 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 (Section 4.3.4 of this Report). With regards to specific concerns raised by Upper Nicola and the ONA, the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources important for Syilx Nation's traditional and cultural practices. The proponent has also committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during RoW finalization, narrowing the RoW 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.

As described in their Final Written Argument ([A4X5V5](#)), Upper Nicola/Syilx peoples also have various village sites and campsites within their Territory, which continue to exist today. One of the Upper Nicola/Syilx communities is Spā'xamEn or Spā'xEmEn, which means a "shaving", "paring", or "shave", "bare", "smooth", and it is located at Spā'xā mEn or Douglas Lake, on the Upper Nicola River. Douglas Lake is located more than 20 km from the Project. In addition to Spā'xā mEn, other villages include a small settlement known as Komkona'tko or KomkEna'tku ("head water") at Fish Lake, on the

headwaters of the Upper Nicola River, and Kā'īEmīx ("bushes", or "willow bushes"), a fairly large village near Guichons on the mouth of the Upper Nicola River, where it flows into Nicola Lake. Another village was Kwiltca'na at the mouth of Quilchena Creek. Today the village of Kā'īEmīx has become known as Quilchena. Kā'īEmīx, or Quilchena, is located approximately 6.5 km from the Project. It was noted that there is a winter village site at the north side of Nicola Lake, as well as a camping site on the south side of the lake, and that trail systems through the hills around Stump Lake (approximately 2 km from the pipeline corridor) that were and are used for moose and deer hunting.

In its TLRU, Upper Nicola identified 7 transportation, 32 habitation, 41 site-specific cultural/spiritual, and 12 Indigenous landscape values associated with past and present subsistence activities in the LSA. Transportation values include, among other things, locations of roads, water transportation routes, trails, old wagon roads, and footpaths, while habitation values include locations of cabins, and camps, among other values. The cultural/spiritual and Indigenous landscape values are areas of cultural or spiritual value including burial sites, ceremonial areas, medicinal plant gathering areas, and gathering places, as well as place names. According to the Supplemental Technical Report submitted by the proponent, Upper Nicola identified three gathering places at Salmon Lake, Pennask Lake and Kettle Falls. These places are used for gathering, camping, and fishing (including drying fish). No gathering places identified are located within 25 km of the Project Area. Eight habitation sites were identified, of which five ranges where habitation sites (cabins, camps and village sites) are located within the Project's pipeline corridor. Three winter village sites (at Douglas Lake, Quilchena Creek and on the north side of Nicola Lake) are located more than 2 km from the Project Area. An important spiritual site is located on the North side of Nicola Lake where there is a large rock with pictographs on it [\[A4Q1R7\]](#).

In the Kingsvale Transmission Line TUOS, Upper Nicola identified two site-specific cultural/spiritual values and five transportation values identified in the Kingsvale LSA. The two cultural/spiritual values include critically important cultural and historical sites; this area is intensively used by community members for cultural practices including gathering medicinal plants. The five transportation values include a trail of particular importance that connects Douglas Lake to the Kingsvale area and Pennask Lake. According to Upper Nicola, this travel corridor is a well-known and historically important route that provides access to the Syilx hunting, fishing and gathering places in the Kingsvale LSA as well as Pennask Lake.

Upper Nicola raised concerns with the Project's potential impacts relating to specific locations and access to other cultural and traditional practices, including 273 Traditional Use Values in the LSA which consist of highly valued hunting areas, fishing sites, important fish spawning areas, berry picking areas, medicinal plant gathering areas, sacred sites, and sites important for traditional ceremonies. Upper Nicola is also concerned about the increased opening of Upper Nicola/Syilx Territory to recreational use, which could lead to a lack of respect and protocol shown for cultural and spiritual sites. 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 the Syilx's opportunities for certain traditional and cultural activities would 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 Syilx'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.

Upper Nicola expressed concerns with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its other traditional and cultural practices, including that the cultural and social impacts of the Project are not limited to archaeological sites and sacred areas, but also include cultural heritage resources in Syilx territory such as Traditional Use Areas; Areas of Historical Significance, Sacred and Spiritual Areas, Archeological Sites and Cultural Material, as defined in the Upper Nicola Band Cultural Heritage Policy, 2005. Upper Nicola is concerned that the Project's construction and operation activities could directly and indirectly impact these areas. As described previously, the Crown appreciates that this may result in temporary interruptions to Syilx'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 Upper Nicola and the ONA, Upper Nicola and the ONA'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 moderate impact on Syilx Nation's other traditional and cultural practices. 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 Syilx Nation's traditional and cultural practices;
- Project-related construction and routine maintenance activities within Syilx Nation's traditional territory are temporary and thus, likely to cause minor disruptions to Syilx Nation'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 Syilx Nation 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 Syilx Nation's asserted traditional territory assessed as having strong *prima facie* claim to Aboriginal title in Nicola Lake's northeast portion, in proximity to a historic Okanagan village to the east of Douglas Lake likely occupied at 1846.

The Crown has actively consulted with Upper Nicola and the ONA 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. Upper Nicola raised the following concerns related to Aboriginal title during the NEB and Crown consultation process:

- Concerns around impacts that could impede or disrupt Upper Nicola's use of its asserted traditional territory, including potential Project impacts to lands and waters;
- Upper Nicola believe that they have a right to protect and make decisions regarding their rights, and the processes established by the Crown do not adequately defer to Upper Nicola decision making, including Upper Nicola/Syilx management of lands and resources for present and future generations;

- Upper Nicola argues that Syilx people have a responsibility to care for and ensure the protection and sustainability, and health and wellbeing, of the land and are concerned that these rights of stewardship are being impacted; and
- Upper Nicola believes the Crown should establish royalty and revenue sharing with Upper Nicola on a long term basis.

In its TLRU study, Upper Nicola identified four commercial values that intersect the LSA. Upper Nicola community members conduct commercial activities such as commercial trapping, guiding, and fishing, among others. The four sites identified primarily consist of sites used for the commercial trapping of fur-bearing animals.

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.

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

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

Upper Nicola expressed concern with direct and indirect effects of Project-related pipeline spills on their Aboriginal Interests, including oil spills and industrial accidents (including blowouts and leaks) as well as liability to heal the land in case of an accident, that Upper Nicola feels that they bear most of the risks from the Project, given a spill would happen on their traditional territory, and there are currently no benefits flowing to the community. Concerns were raised which include inadequate knowledge and experience with the fate and behavior of diluted bitumen, the adequacy, readiness and capacity of oil spill response, appropriate mechanisms for avoidance, mitigation, and compensation for impacts, and liability and responsibility for damages and ecosystem recovery.

The Crown also appreciates Upper Nicola's concerns regarding spills, and the potential for a spill to impact Syilx Nation'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 Syilx Nation 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 Syilx Nation's Aboriginal Interests and concerns raised by Upper Nicola and the ONA during the NEB process and Crown consultation process, a pipeline spill associated with the Project could result in minor to serious impacts on Syilx Nation's Aboriginal Interests. 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. 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>7</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, 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 Syilx Nation's Aboriginal Interests would be up to moderate.

The Crown is also supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Upper Nicola and the ONA'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 Upper Nicola and the ONA 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 Syilx Nation, as discussed in Sections 4 and 5 of the main body of this Report.

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<sup>7</sup> Trans Mountain Final Argument, p. 85 and 207