

Appendix D.12 – Penelakut Tribe

I - Background Information

The main community of Penelakut Tribe (Penelakut) is located on Kuper Island, off the east coast of Vancouver Island, approximately 60 kilometres (km) north of Victoria, British Columbia (BC). Historically, Penelakut villages were found on Kuper Island, Galiano Island, and on Vancouver Island near the mouth of the Chemainus River. Today, Penelakut has four reserves: *Penelakut Island Indian Reserve no. 7* (556.7 hectares [ha]), *Tent Island no. 8* (34.4 ha), *Galiano Island no. 9* (29.1 ha), and *Tsussie no. 6* (15.5 ha). All reserves are location on the lower reaches of the Chemainus River. As of July 2016, Penelakut counts 952 registered band members: 525 living on their own reserves, 72 living on other reserves and 355 living off reserve.

Penelakut is a party to the Hul'qumi'num Nation protective *Writ* of Summons, which was filed in the BC Supreme Court in December, 2003, asserting Aboriginal title to a territory identified in the *writ*. Penelakut is party to the Hul'qumi'num Treaty Group *Statement of Intent*, which also includes Stz'uminus (Chemainus) First Nation, Lake Cowichan First Nation, Halalt First Nation, Cowichan Tribes, and Lyackson First Nation. The Hul'qumi'num Treaty Group is currently in Stage 4 of the BC Treaty process (i.e. Agreement-in-Principle).

Ethnographic sources, which inform the Province's assessment of strength of claim, often refer to Cowichan people, rather than individual groups. Traditionally, the Cowichan people were organized into politically and economically independent local groups, occupied winter villages, and followed a seasonal round of resource exploitation from early spring to late fall with overlapping or shared use of many resource sites. Please note that the term 'Cowichan people' as used in the following *Preliminary Strength of Claim Assessment* includes all six HTG member nations (Cowichan Tribes, Lake Cowichan, Halalt, Stz'uminus, Lyackson and Penelakut).

Cowichan Tribes, Stz'uminus, Penelakut, and Halalt are also part of the Cowichan Nation Alliance focussed on resolution of Aboriginal rights, including title, on the south arm of the Fraser River.

II - Preliminary Strength of Claim Assessment

- The right of way (RoW) transects the asserted traditional territory of the Hul'qumi'num, between the Westridge terminal and Surrey, and again between Chilliwack and Hope (approximately 72 km of new RoW). The following Project facilities are located within the asserted traditional territory of the Hul'qumi'num: Hope Station, Wahleach Station, Port Kells Station, Burnaby Terminal, and Westridge Marine Terminal (WMT). The marine shipping route would pass through approximately 265 km of Hul'qumi'num Treaty Group's traditional territory.
- The Crown's preliminary assessment of Penelakut's Aboriginal rights in areas proximal to the marine shipping corridor of the Project, which transits the Strait of Georgia, is assessed as having a *prima facie* claim of Aboriginal rights ranging from weak to strong as follows. Areas of strong claims are areas within what ethno historic sources generally describe as pre-contact traditional territory of the Penelakut and where there is information of their historic use as part

of their traditional seasonal round, including areas in the Strait of Georgia proximal to, and within the southern reaches of, the southern arm of the Fraser River, portions of the southern Gulf islands that lie to the west of Galiano Island and above Active Pass and areas proximal to Penelakut Island. Areas of weak claims include areas proximal to the Strait of Georgia north of Gabriola passage and north and south of the South arm of the Fraser River, the Strait of Georgia south of Active Pass, and areas within Haro and Juan de Fuca Straits, which were not considered within the pre-contact traditional territory of the Penelakut and/or Cowichan people¹.

- The Crown's preliminary assessment of Penelakut's *prima facie* claim of Aboriginal title to upland areas proximal to the marine shipping corridor of the Project ranges from weak to strong. Strong claims are supported in certain upland areas proximate to Penelakut Island, proximate to Penelakut historic villages. In other areas where there is limited information supporting specific Penelakut sufficient and exclusive occupation use of areas at 1846, the claim is weak. The Crown does not have clarity regarding how Hul'qumi'num Treaty Group members are asserting Aboriginal title in certain areas where there is limited indication that any of the Hul'qumi'num Treaty Group member First Nations could have excluded each other at 1846. For example, upland areas proximal to the marine shipping corridor, including by the southern arm of the Fraser River; in this area, the Crown would assess the *prima facie* claim of Aboriginal title of the Penelakut Tribe as ranging from weak to moderate, with the stronger claims located in proximity to uplands in the vicinity of the large village site of Tl'ektines. The Crown also does not have clarity regarding how Hul'qumi'num Treaty Group members are asserting Aboriginal title in the southern Gulf Islands that lie to the west of Galiano Island and above Active Pass and to the west of Valdes and Gabriola; in these areas, the Crown would assess the *prima facie* claim of Aboriginal title of the Penelakut Tribe to upland areas as ranging from weak to weak-to-moderate as there is some indication of habitation and resource gathering sites utilized by Cowichan people likely at 1846. The following areas are generally described by ethno historic sources as outside the traditional territory of the Cowichan people without evidence of their occupation or use, such that there is no support for a *prima facie* claim of Aboriginal title to upland areas: proximal to the Strait of Georgia north of Gabriola passage and north of the South arm of the Fraser River, the Strait of Georgia south of Active Pass and south of the south arm of the Fraser River, and within Haro and Juan de Fuca Straits².
- In November 2014, Cowichan Tribes, Stz'uminus First Nation, Penelakut Tribe and Halalt First Nation filed an *Amended Notice of Civil Claim* seeking a declaration of Aboriginal title to an area described as the Tl'uqtinus Lands and fishing rights to the South Arm of the Fraser River. The above assessment of the strength of claimed Aboriginal title to the upland area west of and proximate to the Tl'uqtinus/Tl'ektines site was conducted to inform the scope of consultation regarding this project. It is a preliminary assessment only, considering only information reasonably available at the time of consultation and is not based on an exhaustive review of all

¹ The Hul'qumi'num Treaty Group: Review of Ethnographic, Historical and Archaeological Resources: Cowichan, Lake Cowichan, Halalt, Chemainus, Lyackson, Penelakut and Hwlitsum First Nations. Prepared by Aboriginal Research Division, Legal Services Branch, Ministry of Attorney General. September 8, 2009.

² Ibid

information and legal issues related to this potential claim, and does not reflect the Crown's opinion of whether the court will ultimately decide in favour of the First Nation in the litigation of this claim.

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

Penelakut participated as an intervenor in the National Energy Board (NEB) process as part of the Hul'qumi'num Treaty Group affiliation. The Crown understands that Penelakut did not participate in the Oral Traditional Evidence Hearing, Information Request rounds, nor did they file written evidence or written final arguments. Penelakut did not participate in the oral summary argument hearing, nor have they sent additional correspondence to the NEB. Penelakut signed a letter of support with the proponent on April 2, 2015.

Penelakut was awarded \$40,000 plus travel for two to the hearing from the NEB as part of its Participant Funding Program. The Major Projects Management Office (MPMO) offered Penelakut \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Penelakut an additional \$14,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Penelakut signed contribution agreements with the MPMO in response to both of these offers, for a total of \$26,000 in allocated funding. On October 6, 2016, EAO issued \$5,000 in capacity funding to Penelakut to assist with the consultation process.

Penelakut met with the Crown consultation team on September 28, 2016 as part of the Cowichan Nation Alliance, in order to discuss their concerns about the Project.

The Crown provided a first draft of this Report to Penelakut on August 17, 2016 and a second draft on November 3, 2016. The Crown did not receive comments from Penelakut on the draft Report.

IV - Summary of Key Penelakut Issues and Concerns Raised

The Crown has gained its understanding of Penelakut Tribe's issues and concerns through information provided to the NEB and through direct engagement with the Crown. In addition, the Crown has considered information regarding the proponent's engagement with Penelakut Tribe, as described in the proponent's *Aboriginal Engagement Report* (July 2016). The Crown's understanding of Penelakut's key Project-related issues and concerns are summarized in the sections below. This section offers a summary of the key issues raised by Penelakut Tribe, 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 Penelakut's key Project-related issues and concerns are summarized below:

Penelakut places a strong cultural value on the natural resources within its territory. The Penelakut people travelled throughout their territory, fishing, hunting and gathering a rich variety of foods. At the onset of each winter, Penelakut ancestors returned to their villages and focused on the ceremonies and cultural traditions of the Coastal Salish peoples. They have a rich tradition of carving monumental art such as house posts; their carvers are also masters of smaller works, such as spindle whorls, sacred masks and rattles, and decorated tools. Clothing was woven from cedar bark and their Coast Salish mountain goat blankets are world renowned. Fishing — from salmon and cod to oysters, clams and crabs — continues to provide a critical food on their tables today. Penelakut continues to use plants for medicines and foods, as well as hunt for waterfowl and large game. The forest also provides the materials for on-going practices of building ceremonial houses and living spaces, providing firewood, and crafting tools, canoes, art and ceremonial gear.

Methodology, Process, and Consultations

- Penelakut stated that they did not have access to enough funding to participate in the NEB process;
- Penelakut has expressed their discontent with what was perceived as the Federal Government's absence from the consultation process; and
- Penelakut raised concerns that the current regulatory regime is inadequate in protecting Penelakut's Aboriginal rights and title interests from the risk of spills within its traditional territory.

Impacts on Access to Harvesting Areas

- Penelakut expressed concern with construction and operation phase impacts on lands, water, fish, wildlife and other habitat that they feel will lead to restricted harvesting access.

Cumulative Impacts

- Penelakut expressed concern with the lack of shellfish, as it is one of their traditional foods. This would potentially worsen the already alarming food insecurity that their community suffers today.

Impacts of Increased Marine Traffic

- Penelakut is concerned about the potential for collision between tankers and other marine traffic;
- Penelakut is concerned on the risks that tankers bring to the safety of their small vessels;
- Penelakut is concerned that increased tanker traffic will result in waves affecting places where Penelakut fish and gather marine resources; and
- Penelakut stated that they are concerned about anchorages on the coast.

Accidents and Malfunctions

- Penelakut is concerned about marine health and human safety throughout the construction and operation of the pipeline in close proximity to the Fraser River;
- Penelakut is concerned about the potential for oil spills to adversely impact marine resources; and
- A pipeline malfunction in proximity of the Fraser River or a tanker casualty near the Salish Sea is of paramount concern to Penelakut, as they view this risk as impacting their Aboriginal rights and title interests.

Accommodation Measures

- Penelakut asked for anchorages regulation to prevent/prohibit ships to anchorage all around their reserves' coast; and
- Penelakut would like to seek to engage in the economic opportunities associated with the Project.

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 Penelakut 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.

Penelakut's Response to *NEB Recommendation Report*

Penelakut did not provide comments specific to the *NEB Recommendation Report*.

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

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Section 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 Penelakut's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Penelakut'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 land 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 Penelakut's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Penelakut, Penelakut's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate (EAC) issued by the Province.

Penelakut completed a third-party Traditional Marine Resource Use (TMRU) study in 2013. The focus of the study was on Crown lands and waters within the asserted territory of Penelakut crossed by the Marine Regional Study Area (RSA)³. In its Supplemental Technical Report ([A4A0W1](#)), the proponent estimated approximate distances and directions from the marine shipping lanes based on information in Penelakut's report. Additional TMRU information for Penelakut was presented in *Volume 8B* ([A3S4K3](#)) of the Project application. Traditional land uses identified by Penelakut include hunting aquatic birds, coastal mammals and marine mammals, gathering plants, information on fishing sites, sacred sites, habitation sites, gathering areas for community members, and trails and travelways.

Impacts on Hunting, Trapping, and Plant Gathering

As described in the TMRU study, Penelakut community members hunt species such as duck, seal, sea lion, mink, otter, porpoise, killer whale, deer, raccoon, beaver and grouse. Plants gathered include yellow cedar, seaweed, ochre, wild cherry, blackberries, black / red cap berries, huckleberries, salal berries, and soap berries.

Eleven hunting sites were identified within the Marine RSA during the TMRU study, of which 10 are located in the Marine RSA. In *Volume 8B*, two additional marine hunting sites (Chemainus Bay / Chemainus River Estuary and Willy Island) were identified in the Marine RSA. Nine plant gathering sites were identified during the TMRU study, all of which are located in the Marine RSA. Shipping lanes are not crossed to access any of the hunting sites; however shipping lanes are crossed to access the Strait of Georgia plant gathering site. The nearest hunting site is approximately 4.5 km west of the shipping lanes.

In addition to providing traditional use information, Penelakut raised the following specific concerns with potential Project impacts relating to their hunting and gathering activities:

- Construction and operation phase impacts on lands, wildlife and other habitat that Penelakut asserts will lead to restricted harvesting access; and
- Potential for oil spills to adversely impact marine resources.

³ The area extending beyond the LSA boundary (i.e. the zone of influence or area where the element and associated indicators are most likely to be affected by Project-related marine vessel traffic.) where the direct and indirect influence of other activities could overlap with Project-specific effects and cause cumulative effects on the environmental or socio-economic indicator.

The general direct and indirect effects of the Project on hunting, trapping, and gathering, along with key mitigation measures, are described in Section 4.3.1 of the main body of this Report.

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 terrestrial wildlife and wildlife habitat (including species at risk), marine mammals, and marine birds.

Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Penelakut's hunting, trapping, and plant gathering activities. The Crown understands that this short-term disruption could temporarily alter the behaviour of community members' hunting, trapping or plant gathering activities during construction, and that reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project, could have spiritual and cultural impacts on community members.

Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Section 4.3.1 of this Report). The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP) and the vegetation and wildlife management plans. The proponent would implement a range of mitigation measures that would reduce potential effects associated with Penelakut's hunting, trapping, and plant gathering activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

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 in providing traditional knowledge related to the location and construction of the Project

NEB Condition 81 would require the proponent to develop a WMT-specific EPP, including mitigation and monitoring plans, to be finalized in consultation with Fisheries and Oceans Canada and potentially affected Aboriginal groups. The proponent would also be required to conduct a post-construction

monitoring program for marine mammals from the expansion of the WMT. The proponent has committed to various mitigation measures to reduce effects of construction and operation of the WMT on marine birds, further the proponent has committed to compile information regarding mortality and collision events and to include that information in post-construction monitoring reports.

In consideration of the information available to the Crown from the NEB process, consultation with Penelakut, Penelakut's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province, Project construction and routine maintenance during operation as well as project-related marine shipping are expected to result in a negligible-to-minor impact on Penelakut's hunting, trapping and plant gathering activities.

Impacts on Freshwater Fishing, and Marine Fishing and Harvesting

As summarized in the TMRU study, Penelakut community members fish species such as salmon, cod, herring, scallop, flounder, surf smelt, lingcod, sturgeon, perch, dogfish, trout, rockfish, and ray. Marine harvested species include clam, cockle, sea urchin, crab, herring roe, oyster, and geoduck. Community members also identified locations with unspecified fishing and marine harvesting.

Thirty-three fishing sites were identified during the TMRU study, of which 30 are within the Marine RSA. In *Volume 8B*, three additional marine harvesting sites (Kulleet Bay, Kuper Island and Oyster Bay) were also identified in the Marine RSA. The shipping lanes are crossed to access two fishing sites: Strait of Georgia and the Fraser River area.

In addition to providing traditional use information, Penelakut raised specific concerns with potential Project impacts relating to their freshwater fishing and marine fishing and harvesting activities:

- Increased tanker traffic will result in waves affecting places where Penelakut fish and gather marine resources;
- Construction and operation phase impacts on water, fish, wildlife and other habitat that Penelakut asserts will lead to restricted harvesting access;
- Impacts on marine health throughout the construction and operation of the pipeline in close proximity to the Fraser River; and
- Potential for oil spills to adversely impact marine resources.

The general direct and indirect effects of the Project on freshwater fishing, along with key mitigation measures, are described in Section 4.3.2 of the main body of this Report. The general direct and indirect effects of the Project on marine fishing and harvesting, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report.

Project-related marine vessels are expected to cause temporary disruptions to Penelakut's marine fishing and harvesting activities. The Crown appreciates that community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping

lanes. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Penelakut community members to take measures to reduce potential disruptions from tankers and allow planning for fishing activities to take place that minimizes disturbance from Project-related tankers. Reduced harvests, while not expected to occur from temporary access restrictions, could impact Penelakut's cultural activities and sharing of marine food with the community.

The conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with marine fishing and harvesting sites (Section 4.3.3 of this Report). The proponent would implement a range of mitigation measures that would reduce potential effects associated with Penelakut's marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, and scheduling and notification of Project activities (via the proponent's marine public outreach program).

In consideration of the information available to the Crown from the NEB process, consultation with Penelakut, Penelakut'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 EAC issued by the Province, Project construction and routine maintenance during operation and project-related marine shipping are expected to result in minor impacts on Penelakut's marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

As described in the TMRU study, gathering places identified by Penelakut community members include historic village sites, cultural and spiritual sites, cultural secular sites, and unspecified cultural sites. Sacred areas identified include historical cultural and burial sites, cultural and spiritual sites, and cultural secular sites.

Seven travelways were identified by Penelakut during the TMRU study, all of which are within the Marine RSA. The shipping lanes are not crossed to access the travelways. The nearest travelway identified is approximately 9 km from the shipping lanes. Forty-three gathering places were identified during the TMRU study, of which 36 are within the Marine RSA. In *Volume 8B*, three settlement areas (Kulleet Bay, Oyster Bay and Kuper Island) were also identified. Shipping lanes are crossed to access two gathering places: Fraser River area and Boundary Bay. Ten sacred areas were identified during the TMRU study, of which nine are within the Marine RSA. Shipping lanes are not crossed to access any sacred area, and the nearest area is approximately 8 km from the shipping lanes.

The general direct and indirect effects of the Project on traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this Report.

Marine mammals are of importance to many Coast Salish Aboriginal groups, and killer whales specially hold strong spiritual and cultural importance for many Aboriginal groups. The NEB concluded that effects on the endangered Southern resident killer whale and Aboriginal cultural use of Southern resident killer whale from Project-related shipping activities would be significant. The Crown is not aware of any specific cultural use of or concerns regarding killer whales raised by Penelakut during the NEB and Crown consultation processes.

Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown understands that there will be temporary interruptions to Penelakut's traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups 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 Penelakut, Penelakut'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 EAC issued by the Province, Project construction and routine maintenance during operation and Project-related marine shipping are expected to result in negligible-to-minor impacts on Penelakut's other traditional and cultural practices.

Impacts on Aboriginal Title

Penelakut raised the following specific concerns with potential Project impacts relating to their Aboriginal title claim:

- The current regulatory regime is inadequate in protecting Penelakut's Aboriginal rights and title interests from the risk of spills within its traditional territory; and
- A pipeline malfunction in proximity of the Fraser River or a tanker accident near the Salish Sea is of paramount concern to Penelakut as they view this risk as impacting their Aboriginal rights and title interests.

The Crown provides a description of the potential impacts of the Project on Aboriginal title in Section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid/reduce Project impacts associated with the degree of disturbance to terrestrial, marine and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as well as NEB Conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved.

The Crown notes that Penelakut executed a Mutual Benefits Agreement with the proponent. Although these agreements are confidential, the Crown understands they may contain provisions for financial, environmental and training benefits that could further reduce or accommodate impacts to Aboriginal title claims if the Project proceeds.

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

Impacts Associated with Accidental Pipeline, Terminal, and Tanker Spills

Penelakut expressed concerns regarding the impact of a potential oil spill on their Aboriginal Interests, including the effects of a potential spill on:

- Marine resources; and
- The Fraser River and the Salish Sea.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. Section 4.3.6 of the main body of this Report sets out the impacts associated with accidental spills. In consideration of this information and analysis, as well as information available to the Crown on Penelakut's Aboriginal Interests and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts on Penelakut's Aboriginal Interests. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.⁴

VI - Conclusion

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 and marine safety regimes would only partially address these ongoing burdens and risks.

Under the typical conditions for pipeline construction and operations and for marine vessel use of the area between the WMT and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of Project-related activities on the exercise of Penelakut's Aboriginal Interests would be up to minor.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Penelakut's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of

⁴ Trans Mountain Final Argument, p. 85 and 207

Penelakut in emergency response planning activities. The federal Crown is considering incremental measures that would further accommodate the potential adverse impacts of the Project on Penelakut, as discussed in Sections 4 and 5 of the main body of this Report.

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