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SENT VIA EMAIL

December 12, 2022

Rob Sanderson, Jr.
Chair
Southeast Alaska Indigenous Transboundary Commission
715 Sawmill Creek Rd.
Sitka, AK 99835
c/o Guy Archibald
garch570@gmail.com

Dear Chair Rob Sanderson, Jr:

Thank you for your letter of November 18, 2022, in response to my letter of November 7, 2022, and in relation to the Southeast Alaska Indigenous Transboundary Commission's (SEITC) request to be a participating Indigenous nation in the Eskay Creek Revitalization Project (Eskay) Environmental Assessment (EA).

Firstly, I would like to thank your representatives for taking the time to meet with Environmental Assessment Office (EAO) staff and myself on November 17, 2022, to provide SEITC with an opportunity to be heard prior to my determination under Section 14(2) of the *Environmental Assessment Act* (2018) (the Act). I found the meeting to be useful as it allowed for our respective views to be shared in a respectful and collaborative manner.

In this letter, I will set out the reasons for my determination under Section 14(2) of the Act. By separate letter, the EAO will provide responses to the remaining points in your letter dated November 18, 2022.

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Environmental
Assessment
Office

Mailing Address:
PO Box 9426 Stn Prov Govt
Victoria BC V8W 9V1

Location:
1st & 2nd Fl – 836 Yates Street
Victoria BC V8W 1L8

CONTEXT

During the Eskay EA, the EAO has regularly communicated with SEITC regarding the EAO's engagement approach. The EAO's previous correspondence has responded to

feedback from SEITC and described further opportunities for SEITC to provide its views at key EA milestones. The EAO has also directed the proponent, Skeena Resources Limited (Skeena), to respond to SEITC's technical comments. We appreciate the input SEITC has provided to date in the Eskay EA, including with respect to the initial project description, the detailed project description, the draft readiness decision report and recommendations, and the draft application information requirements.

In your letter dated September 23, 2022, SEITC requested to be added as a "participating Indigenous nation" in the Eskay EA as the representative of 15 Tribal governments in southeast Alaska recognized by the US federal government. SEITC asserts that the Eskay project, if approved, will have potential transboundary impacts on its member Tribes' rights in Alaska, as well as adverse effects on its member Tribes' rights on the Canadian side of the border that are recognized and affirmed by Section 35 of the *Constitution Act, 1982* (Section 35 rights).

NATURE OF DECISION

Section 14(2) of the Act provides that, after giving an Indigenous nation that has provided notice under subsection 14(1) an opportunity to be heard, I may provide notice to the Indigenous nation that I have determined that there is no reasonable possibility the Indigenous nation or its Section 35 rights will be adversely affected by the project.

In making this determination, I have considered the Act in its entirety, relevant common law, the United Nations Declaration on the Rights of Indigenous Peoples, past EAO practice, all relevant information and submissions from participants in the EA, including submissions provided by SEITC, and the potential impacts of the decision on SEITC's asserted rights or interests.

CONSIDERATIONS

In determining whether SEITC or its asserted Section 35 rights will be adversely affected, I will first identify whether SEITC has established Section 35 rights or a credible but unproven claim to Section 35 rights.¹ If I identify that SEITC has established Section 35 rights or a credible but unproven claim to Section 35 rights, I would then consider whether there is a reasonable possibility that SEITC or its Section 35 rights will be adversely affected by the project.

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¹ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para 37.

SEITC's Member Tribes

As noted, SEITC's membership consists of 15 Tribes based in southeast Alaska. Of those members, the EAO identified seven Tribes as potentially affected by transboundary impacts in Alaska from the Eskay project.² In September 2021, the EAO requested that SEITC provide confirmation from these seven member Tribes that SEITC is authorized to represent their interests in engagements with the EAO regarding Eskay. The EAO has yet to receive such confirmation from any of these seven Tribes but did receive confirmation from three other member Tribes in late 2021.

Claims to Section 35 Rights

As SEITC has noted, the Supreme Court of Canada in *R v Desautel* found that the "Aboriginal peoples of Canada" who hold Section 35 rights are the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact, and this may include Aboriginal groups that are now outside Canada.³

In September 2021, SEITC's first letter to the EAO respecting the Eskay EA advised that SEITC would like to seek recognition of Section 35 rights. Since then, the EAO has engaged with SEITC regularly to seek to better understand SEITC's assertion of Section 35 rights on behalf of its member Tribes.

As a result of this engagement, I understand that SEITC is seeking status as a "participating Indigenous nation" in the Eskay EA on the basis that its member Tribes' are successors to Tlingit, Haida and Tsimshian Nations whose territories at the time of European contact included lands within British Columbia (B.C.), such as the Unuk River watershed, that are under consideration in the effects analysis of the Eskay project. SEITC asserts that its member Tribes' hold Section 35 rights as successors to these nations and that the Eskay project has the potential to adversely affect these rights, including impacts to traditional and subsistence fishing; legal, spiritual, and cultural practices; transmission of traditional culture, knowledge and law; and employment and economic opportunities.

In support of this assertion, SEITC has stated there is much evidence that Indigenous peoples now residing in southeast Alaska had territories extending into B.C., including oral history that the upper Unuk watershed was the location they took refuge in during the time of the last glacial advance. SEITC has also indicated that many citizens of SEITC member Tribes have family and kinship ties with the Tlingit, Haida and Tsimshian Nations in Canada and share a common history, language, and culture.

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² Craig Tribal Association, Hydaburg Cooperative Association, Ketchikan Indian Community, Klawock Cooperative Association, Metlakatla Indian Community, Organized Village of Kasaan, and the Organized Village of Saxman.

³ *R v Desautel*, 2021 SCC 17, at para 31.

Despite repeated requests over the past year, the EAO has yet to receive the evidence that SEITC states would support its assertion of representing modern-day successors of

an Aboriginal society that occupied Canada at the time of contact that gives rise to the asserted Section 35 rights. As a result, after considering the available information, my view is that SEITC has not provided sufficient information to support that they represent a modern-day successor of an Aboriginal society that occupied Canada at the time of contact and, as such, has not asserted a credible claim to Section 35 rights in relation to Eskay.

The EAO has consistently communicated that we are open to receiving further information that could support SEITC's assertion of Section 35 rights in B.C. In that regard, the EAO's previous correspondence requested further information from SEITC, including: confirmation of which of its member Tribes assert Section 35 rights; confirmation that those member Tribes have authorized SEITC to represent them for the purposes of any consultation on potential adverse impacts to those rights; the geographic extent of those asserted rights; the specific nature of those Section 35 rights that may be impacted by the proposed project; and which Indigenous groups present in B.C. pre-contact these claims are based on. The EAO suggested that examples of helpful information would include descriptions of connections between SEITC's member Tribes and the historic groups in B.C.; evidence of activities that took place before contact in the relevant areas of B.C.; and any available ethnohistoric information related to those areas.

DETERMINATION

In light of the lack of confirmation from the seven member Tribes that SEITC represents them in relation to the Eskay EA and my finding that SEITC has not provided sufficient information to support that they represent a modern-day successor of an Aboriginal society that occupied Canada at the time of contact and, as such, has not asserted a credible claim to Section 35 rights in relation to Eskay, I have determined under Section 14(2) of the Act that there is no reasonable possibility that SEITC or its Section 35 rights will be adversely affected by the project.

In making this determination, I have considered that US-based Indigenous groups that have not made credible assertions of Section 35 rights are not owed obligations under the common law duty to consult and accommodate that would be fulfilled by the consensus-seeking opportunities provided to participating Indigenous nations under the Act, even if those US-based Indigenous groups may be subject to transboundary impacts in the US from the proposed project. Further, the purposes of the EAO, as set out on Section 2(2)(b) of the Act, include doing the following in carrying out its responsibilities under the Act: (i) promote sustainability by protecting the environment and fostering a sound economy and the well-being of British Columbians and their

communities; and (ii) support reconciliation with Indigenous peoples in B.C. including by acknowledging Indigenous peoples' Section 35 rights. Considering the scheme of the Act, I interpret the wording "Indigenous nation or its rights recognized and affirmed by Section 35 of the *Constitution Act, 1982*" within Section 14(2) as indicating that "Indigenous nation" in that section means an Indigenous nation with a credible claim to Section 35 rights in B.C.

From our meeting on November 17, 2022, we understand that SEITC expects to be able to provide additional information by December 31 that would support its assertion of Section 35 rights on behalf of its member Tribes. I would like to acknowledge the effort that SEITC is making to gather the requested information from its member Tribes and appreciate that these efforts take time. I may reconsider this determination under Section 14(2) and the EAO can adjust our engagement approach as needed should SEITC or its member Tribes provide additional supporting information.

As previously communicated, I would like to reiterate that the EA is not a rights-determining process as, in Canada, rights are established by the courts or by treaties between Indigenous nations and the Crown. However, information provided by SEITC will be considered appropriately and will inform B.C.'s assessment of whether the duty to consult and accommodate is triggered in relation to SEITC and its member Tribes. During our meeting SEITC indicated that it would like to initiate discussions with the appropriate provincial and federal agencies in relation establishment of Section 35 rights in B.C. and Canada. In support of this request, the EAO will follow up with SEITC and provide appropriate contacts.

FURTHER ENGAGEMENT

While the result of my determination under Section 14(2) of the Act is that SEITC is not considered a "participating Indigenous nation", the EAO intends to continue its active engagement approach with SEITC that has included similar opportunities to provide input as other Indigenous nations. As was discussed during our recent meeting, I have instructed staff to explore the creation of an Alaska Tribal Transboundary Advisory Committee (ATTAC). I am of the view that this forum will assist SEITC and the seven member Tribes in your active and ongoing participation in the Eskay EA.

Once again, should SEITC or its member Tribes provide additional supporting information, we would consider any appropriate adjustments to our current engagement approach.

As communicated in previous correspondence, the EAO continues to strongly recommend that any information provided by SEITC about your interests in the project area also be shared with the Tahltan Central Government (TCG). In order to maintain transparency, the EAO will seek SEITC's views prior to sharing any SEITC information with the TCG in relation to the Eskay EA.

If you have any questions or require further information, please reach out to David Grace at 778-698-9310 or David.Grace@gov.bc.ca, or to Breanna Merrigan at 778 698-9474 or Breanna.Merrigan@gov.bc.ca.

Yours truly,



Elenore Arend
Chief Executive Assessment Officer
Environmental Assessment Office

cc: Guy Archibald
Executive Director
SEITC
garch570@gmail.com

Christie Jamieson
Assistant Executive Director
SEITC
christiejamieson@seitc.org

Breanna Merrigan
Project Assessment Director
Environmental Assessment Office
breanna.merrigan@gov.bc.ca

David Grace
Project Assessment Director
Environmental Assessment Office
david.grace@gov.bc.ca

Katherine Zmuda
Project Manager
Pacific and Yukon Region, Impact Assessment Agency of Canada
katherine.zmuda@iaac-aeic.gc.ca