

May 1, 2020

**VIA EMAIL**

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Dear Minister and Madam:

**Re: Request for Designation under the *Impact Assessment Act* of Coalspur Mine (Operations) Ltd.'s Vista Coal Mine Expansion**

**1. INTRODUCTION**

We are counsel for Louis Bull Tribe ("**Louis Bull**" or the "**Tribe**") with respect to the above noted matter.

Louis Bull writes to request that the Impact Assessment Agency ("**Agency**") designate expansion plans for Coalspur Mine (Operations) Ltd.'s ("**Coalspur**") existing Vista Mine ("**Vista Mine**" or "**Phase I**") pursuant to Schedule 2, section 19(a) of the *Physical Activities Regulations*<sup>1</sup>. In the alternative, Louis Bull respectfully requests the Minister exercise his discretion to designate Coalspur's mine expansion plans under section 9 of the *Impact Assessment Act* ("**IAA**")<sup>2</sup>. The Vista Mine is a thermal coal mine located in Alberta's Eastern Slopes.

We are aware of the December 20, 2019, decision by the Minister of Environment and Climate Change ("**Minister**") not to designate the proposed Vista Coal Mine Phase II Expansion Project ("**Phase II**") under the IAA ("**2019 Designation Decision**").<sup>3</sup> Since then, there have been significant and material developments which necessitate a fresh consideration by the Agency and the Minister. In February, 2020, Coalspur filed applications with provincial regulators for a further

<sup>1</sup> SOR/2019-285 [*Physical Activities Regulations*].

<sup>2</sup> SC 2019, c 28, s 1 [**IAA**].

<sup>3</sup> Minister's Decision, Coalspur Vista Coal Mine Phase II Expansion Project (20 December 2019): <https://iaac-aeic.gc.ca/050/evaluations/document/133222> [**2019 Designation Decision**].

expansion of the Vista Mine, beyond Phase II, for underground mining operations. As well, there has been confirmation that the provincial regulatory process will not provide for consultation with Louis Bull, nor will it assess or address adverse effects on the Tribe's rights and interests arising from any expansion to the Vista Mine.

Further, the federal Strategic Assessment on Thermal Coal announced on the same date as the 2019 Designation Decision will not assess the project-specific impacts on Louis Bull's rights, nor does it displace the Crown's duty to consult and accommodate the Tribe's rights with respect to the expansion to the Vista Mine.

## **2. BACKGROUND**

### **2.1. Louis Bull Tribe**

Louis Bull is signatory to Treaty No. 6 and is one of four First Nations with reserve lands in Maskwacis, Alberta (the other three being: Ermineskin, Samson, and Montana Cree Nations). Louis Bull citizens live on and off its reserve lands. Some citizens of Louis Bull live in the Smallboy Camp. The Smallboy Camp is located on Crown land about 55 kilometres away from the Vista Mine.

The Vista Mine is located in the Tribe's traditional territory and in close proximity to the Smallboy Camp. The mountains and the Eastern Slopes, where the Vista Mine is located, are sacred to Louis Bull.

The Smallboy Camp was founded in approximately 1968, by members of Maskwacis based First Nations, including citizens from Louis Bull. It was motivated by a desire to live in a way and in a location that allowed them to maintain their culture and connection with the land. The Smallboy Camp persists as a community to this day, and some Louis Bull citizens continue to live there.

Information collected to date by the Tribe shows that Louis Bull family groups residing at the Smallboy Camp as well as on the reserve exercise Treaty rights in the area around the Vista Mine. As further detailed below, Louis Bull citizens, hunt, fish, gather and conduct other Indigenous land uses in the lands in and around the Vista Mine.

### **2.2. 2019 Designation Decision**

In 2019, Louis Bull and others asked the Agency to designate Phase II under the IAA. At that time, Coalspur proposed Phase II, a westward expansion of the existing Vista Mine ("**Phase I**").

On December 20, 2019, Louis Bull was informed that the Agency decided that Phase II did not meet the thresholds in the *Physical Activities Regulations* and the Minister decided that designation

of Phase II was not warranted.<sup>4</sup> The Minister found that Phase II may result in adverse effects within federal jurisdiction, including adverse impacts on the rights of Indigenous peoples, and adverse or incidental effects from the exercise of federal powers. Notwithstanding, he declined to designate Phase II under the IAA for the following reasons:

- a. in the Minister's opinion, provincial assessment and regulatory processes are sufficient to address potential adverse effects and concerns raised by Indigenous peoples and provide for consultation with Indigenous peoples; and
- b. in the Minister's opinion, adverse effects within federal jurisdiction, and related concerns, will be appropriately managed by, *inter alia*, the provincial assessment and regulatory processes.

There have been two significant and material developments since the 2019 Designation Decision:

- a. In January 2020, the Alberta Consultation Office ("ACO") rejected the Tribe's request to be included in consultations related to Phase II; and
- b. In February, 2020, the Alberta Energy Regulator ("AER") posted Public Notice of an application by Coalspur for approval of the Vista Test Underground Mine ("VTUM"). If approved, the VTUM would result in a further expansion to the Visa Mine. The ACO found **no** consultation with any Indigenous communities was required for the VTUM.<sup>5</sup>

Taken together, Phase II and the VTUM (collectively, the "**Mine Expansion**") clearly meet the threshold for a "designated project" as set out in Schedule 2, section 19(a) of the *Physical Activities Regulations*.

In the alternative, the Minister ought to exercise his discretion pursuant to section 9 of the IAA to designate the Mine Expansion for the following reasons:

- i. The Mine Expansion will cause adverse effects within federal jurisdiction or adverse direct or incidental effects, including adverse effects on Indigenous peoples;
- ii. There is public concern regarding the adverse effects of the Mine Expansion;
- iii. The Mine Expansion will have adverse impacts on the rights of Indigenous peoples, in particular, Louis Bull's Treaty and Aboriginal rights; and

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<sup>4</sup> *Ibid.*

<sup>5</sup> Coalspur, Vista Test Underground Mine Application No. 1927365, at 101, online: [https://dds.aer.ca/iar\\_query/ApplicationAttachments.aspx?AppNumber=1927365](https://dds.aer.ca/iar_query/ApplicationAttachments.aspx?AppNumber=1927365) [VTUM Application].

- iv. The provincial assessment and regulatory processes are an inadequate substitute for the IAA process, and are insufficient to address potential adverse effects and concerns raised by Louis Bull.

### 3. VISTA MINE

The current Vista Mine (Phase I), and the proposed Mine Expansion is and will be located in Alberta's Eastern Slopes, on the edge of Alberta's Rocky Mountains. This region is known for its beauty and wealth of resources, including water, timber, forage, wildlife, fisheries and minerals. This area is highly valuable by Indigenous peoples, including Louis Bull citizens, for hunting, fishing, gathering, camping, as well as carrying out Indigenous ceremonies.

Cumulatively, the production capacity of Phase I, Phase II and the VTUM will make the combined Vista project the largest or one of the largest thermal coal mining operations in Canada.<sup>6</sup>

#### 3.1. Phase I

In May, 2012, Coalspur applied for provincial approvals to construct and operate an open-pit surface thermal coal mine known as the Vista Coal Project near Hinton, Alberta.<sup>7</sup> Phase I was approved by the AER in 2014.<sup>8</sup> Phase I was originally approved with a production capacity of 5 million tonnes of coal per year.<sup>9</sup>

On December 19, 2014, Coalspur applied to increase the production capacity of Phase I to 6.5 million tonnes of coal per year.<sup>10</sup> The AER issued approvals for this increase on January 20, 2016.<sup>11</sup> On May 8, 2018, Coalspur applied to decrease Phase I's production capacity from 6.5

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<sup>6</sup> Karen Kornelsen, "Another coal mine is in the works for Hinton, Alberta" (19 September 2012) *Canadian Mining and Energy*, online: [https://www.miningandenergy.ca/alberta/article/another\\_coal\\_mine\\_is\\_in\\_the\\_works\\_for\\_hinton\\_alberta/](https://www.miningandenergy.ca/alberta/article/another_coal_mine_is_in_the_works_for_hinton_alberta/).

<sup>7</sup> Coalspur, Vista Mine (Phase I), Application No. 1726915, online: [https://dds.aer.ca/iar\\_query/ApplicationAttachments.aspx?AppNumber=1726915](https://dds.aer.ca/iar_query/ApplicationAttachments.aspx?AppNumber=1726915).

<sup>8</sup> Decision 2014 ABAER 004: Coalspur Mines (Operations) Ltd., Applications for a Mine Permit Amendment, Coal Processing Plant Approval Amendment, Coal Mine Pit Licence, and Coal Mine Dump Licences, McLeod River Coal Field, online: <https://www.aer.ca/documents/decisions/2014/2014-ABAER-004.pdf> [**Phase I Approval Decision**].

<sup>9</sup> *Ibid* at para 4.

<sup>10</sup> Coalspur, Vista Mine (Phase I) Amendment 1, Application No. 1819010, online: [https://dds.aer.ca/iar\\_query/ApplicationAttachments.aspx?AppNumber=1819010](https://dds.aer.ca/iar_query/ApplicationAttachments.aspx?AppNumber=1819010).

<sup>11</sup> Vista Mine (Phase I) Amendment 1, Disposition Document, Coal Mine Permit No. C 2011-5B, online: [https://dds.aer.ca/iar\\_query/ApplicationAttachments.aspx?AppNumber=1819010](https://dds.aer.ca/iar_query/ApplicationAttachments.aspx?AppNumber=1819010).

million tonnes of coal per year to 5.2 million tonnes of coal per year.<sup>12</sup> This reduction was approved by the AER on January 11, 2019.<sup>13</sup>

Louis Bull was not consulted about the initial or subsequent applications regarding Phase I.

Phase I was not subject to a federal environmental assessment under either the former *Canadian Environmental Assessment Act*<sup>14</sup>, nor the former *Canadian Environmental Assessment Act, 2012* ("CEAA 2012")<sup>15</sup>.

### 3.2. Phase II

In 2018, Coalspur proposed Phase II, which is a westward expansion of Phase I. Publicly available information about Phase II indicates that, if approved, it will increase maximum production of coal by 6 million tonnes of coal per year (about 17,000 tonnes/day) and has a predicted ten-year production life. Coalspur optimistically estimates that reclamation for the surface mine will take and additional five years, with five more years of monitoring.<sup>16</sup>

The impacts on Louis Bull's rights will persist beyond 20 years. Provincial reclamation standards do not factor in Indigenous land use. Louis Bull is not aware of reclamation techniques that have successfully returned lands subject to surface mining to a state suitable to support Indigenous land use.

According to the IAA's report, "Whether to Designate the Coalspur Mine Ltd. Vista Coal Mine Phase II Project in Alberta, Analysis Report" (the "**Analysis Report**"), Phase II will result in an increase in the area of mining operations of Phase I by between 42.7% to 49.4%.<sup>17</sup>

A provincial environmental impact assessment ("EIA") is required for Phase II. Coalspur has not yet submitted its application, including its EIA, for Phase II to the AER. Coalspur has not yet contacted Louis Bull to arrange for the collection of its Indigenous land use information for inclusion in the EIA.

To our knowledge, Phase II has not been subject to any federal oversight. On November 8, 2018, the Agency determined that Phase II did not meet the thresholds of a designated project pursuant

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<sup>12</sup> Vista Mine (Phase I) Amendment 2, Notice of Application No. 1909172, online: <https://www.aer.ca/regulating-development/project-application/notices/application-1909172.html>.

<sup>13</sup> Vista Mine (Phase I) Amendment 2, Disposition Document, Coal Mine Permit No. C 2011-5D, online: [https://dds.aer.ca/iar\\_query/ApplicationAttachments.aspx?AppNumber=1909172](https://dds.aer.ca/iar_query/ApplicationAttachments.aspx?AppNumber=1909172).

<sup>14</sup> SC 1992, c 37.

<sup>15</sup> 2012, SC 2012, c 19, s 52.

<sup>16</sup> Coalspur Information Package provided to CEAA (2019 August 9) [**Coalspur Information Package**].

<sup>17</sup> Impact Assessment Agency of Canada, "Whether to Designate the Coalspur Mine Ltd. Vista Coal Mine Phase II Project in Alberta, Analysis Report" (December 2019), online: <https://iaac-aeic.gc.ca/050/evaluations/document/133221> [**Analysis Report**].

to the then section 17(d) of the *Regulations Designating Physical Activities*<sup>18</sup> under CEAA 2012, because it would not result in an increase in the area of mine operations of 50% or more and a total coal production capacity of 3,000 tonnes per day or more.<sup>19</sup>

Louis Bull, another Indigenous community, and others asked that Phase II be designated pursuant to section 9(1) of the IAA. As noted above, the Minister declined to do so for the following reasons:

- a. in the Minister's opinion, provincial assessment and regulatory processes are sufficient to address potential adverse effects and concerns raised by Indigenous peoples and provide for consultation with Indigenous peoples; and
- b. in the Minister's opinion, adverse effects within federal jurisdiction, and related concerns, will be appropriately managed by, *inter alia*, the provincial assessment and regulatory processes.

On January 10, 2020, in response to a request from the Tribe, the ACO informed Louis Bull that the Tribe would not be consulted with respect to Phase II because Phase II is outside the area where the ACO normally consults with the Tribe. The ACO relies primarily on information provided through the provincially run Geodata Mapping Project Committee ("GMPC") to determine First Nations consultation areas. The ACO's decision to not consult the Tribe with respect to Phase II is based on incomplete data regarding Tribe members' use in the Eastern Slopes.<sup>20</sup>

### 3.3. VTUM

In February, 2020, the AER issued a Public Notice of Application for the VTUM, the Vista Test Underground Mine. The VTUM will increase the surface footprint of the existing Vista Mine (Phase I)<sup>21</sup> and includes the following components as referenced in the VTUM application:<sup>22</sup>

- development of the underground entry area for an underground mine;
- test underground mine that will produce approximately 1.7 million tonnes;

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<sup>18</sup> SOR/2012-147.

<sup>19</sup> Coalspur Information Package, *supra* note 16.

<sup>20</sup> Louis Bull has been working with GMPC for three years to update its Geodata map. The Tribe has provided traditional use assessments and mapping projects with Elders and land users confirming Louis Bull Tribe citizens practice rights further west than the current western boundary shown on the Tribe's map. GMPC does not update First Nations' maps upon provision of land use information in real time. In fact, often the GMPC will simply refuse to update a map despite new land use information provided by a community. In cases where GMPC does update a map, it generally takes more than a year to do so and only following persistent follow-up from the community.

<sup>21</sup> VTUM Application, *supra* note 5.

<sup>22</sup> *Ibid* at 6.

- areas proposed to be developed and extend northeast;
- mine yard that will include various support infrastructure including ventilation fans; and
- raw coal beltline, mine office, bathhouse, water diversion, parking, and coal stockpile area.

The characterization of the VTUM as a "test" mine is, with respect, misleading. Coalspur estimates that the VTUM will produce 635,000 million tonnes of coal per year<sup>23</sup>. To put that in perspective, the entire annual production of the Cardinal River Mine is about 2 million tonnes per year.<sup>24</sup> Moreover, the VTUM application states that further expansions are planned following this "test" mine.<sup>25</sup>

In reviewing the VTUM application, Louis Bull was for the first time made aware that on January 20, 2019, the ACO issued a pre-consultation assessment for the VTUM and determined that no Indigenous consultation would be required in respect of the VTUM.<sup>26</sup> Coalspur acknowledges in its application that it has no specific consultation or engagement plans for the VTUM beyond the existing communications Coalspur already performs.<sup>27</sup> The application further mentions carrying out discussions with five Indigenous communities with whom Coalspur has confidential agreements.<sup>28</sup> Louis Bull is not one of these five Indigenous communities.

Louis Bull filed a Statement of Concern in respect of the VTUM with the AER on March 30, 2020. Given the ACO's pre-consultation assessment, it is unlikely that the Tribe will be consulted in respect of the VTUM. It is also unlikely that it will have any ability to participate in the provincial assessment and approval process.

#### **4. THE MINE EXPANSION IS A DESIGNATED PROJECT UNDER THE REGULATIONS**

##### **4.1. Phases II and the VTUM are a single Mine Expansion**

Phases II and the VTUM are expansions of the same Vista Mine<sup>29</sup>, are temporally and geographically linked, and therefore ought to be treated as a single expansion project for the

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<sup>23</sup> *Ibid* at 6.

<sup>24</sup> Teck Resources, "Cardinal River Operations", online: <https://www.teck.com/operations/canada/operations/cardinal-river/>.

<sup>25</sup> VTUM Application, *supra* note 5 at 5.

<sup>26</sup> *Ibid*, Vol 1 at s 4.2, and 105 – 106.

<sup>27</sup> *Ibid*, Vol 1 at s 1.8.

<sup>28</sup> *Ibid*, Vol 1 at s 4.2.

<sup>29</sup> *Ibid*, Vol 1 at 13.

purposes of designation under the *Physical Activities Regulations*. In these circumstances, the decision by Coalspur to split the Mine Expansion into two stand-alone AER applications ought not drive the Agency in its assessment. The *Physical Activities Regulations* and the IAA must drive the Agency's determination about designation.

Based on the timing of Coalspur's applications, we submit that it is apparent that Coalspur intentionally split Phase II and the VTUM in an attempt to avoid a federal impact assessment. Coalspur received confirmation from the ACO that it was not required to consult with respect to the VTUM in January of 2019.<sup>30</sup> Coalspur submitted its application for the VTUM to the AER in February 2020, shortly after the Minister's 2019 Designation Decision. These acts demonstrate that Coalspur was working on the VTUM while corresponding with the Agency and the Minister regarding Phase II in 2018 and 2019. Yet, it appears that Coalspur made no mention of the VTUM to the Agency or the Minister.

The effect of splitting the Mine Expansion into two smaller projects misrepresents and artificially minimizes the scale of the actual expansion, which also minimizes the required studies of impacts, particularly studies of impacts on Louis Bull's rights and interests. This in turn results in an unreliable prediction of the eventual impacts that the Tribe and its members will face as a result of Coalspur's activities as well as impermissibly forecloses or limits the scope of consultation and potential accommodation measures.

It would undermine the purpose and object of the IAA and the *Physical Activities Regulations* to condone Coalspur's attempt to proceed through the regulatory process to expand the same mine with two separate applications contemporaneously and not characterize them as a single expansion under the regulations. Further, it would run contrary to guidance from the Supreme Court of Canada and send a message to proponents that project-splitting is encouraged by the IAA.<sup>31</sup>

#### **4.2. The Mine Expansion is a Designated Project**

The Mine Expansion is a designated project under Schedule 2, section 19(a) of the *Physical Activities Regulations*. The Mine Expansion would result in an increase in the area of mining operations of Phase I by 50% or more and would result in an increase to total coal production capacity by over 5,000 tonnes per day or more.

Based on Phase II alone (excluding highwall mining), the Agency calculated the area of mining operations would increase between 42.7 to 49.4%. VTUM will increase the surface footprint for the Mine Expansion further.<sup>32</sup>

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<sup>30</sup> *Ibid*, Vol 1 at 101.

<sup>31</sup> *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, at para 40.

<sup>32</sup> VTUM Application, *supra* note 5, Vol 1 at 7.



The footprint for Phase I is 1319.6 ha. The upper threshold footprint for Phase II is 652.2 ha., excluding highwall mining.<sup>33</sup> Based on mapping data provided by Coalspur, Louis Bull estimates that the upper threshold footprint for VTUM is 60 ha. Accordingly, taken together, we estimate that Phase II and the VTUM have the potential to increase the footprint for Phase I by 54%. This exceeds the 50% threshold in the *Physical Activities Regulations*. If highwall mining is included, the area of mining increases beyond 54%.

Phase II will have a maximum coal production capacity of 6 million tonnes per year and the VTUM will have a maximum coal production capacity of 635,000 tonnes per year. Together, Phases II and the VTUM have the potential to increase the maximum coal production capacity of Phase I by about 6.6 million tonnes per year (about 18,100 tonnes per day); or **362%** of the 5,000 tonnes per day threshold in the *Physical Activities Regulations*.

## **5. THE MINISTER OUGHT TO EXERCISE HIS DISCRETION TO DESIGNATE THE MINE EXPANSION**

In the alternative, if the Agency concludes that the Mine Expansion is not a designated project under the *Physical Activities Regulations*, Louis Bull submits that the Minister ought to exercise his discretion to designate the Mine Expansion pursuant to section 9 of the IAA for the following reasons:

- a. The Mine Expansion will cause adverse effects within federal jurisdiction;<sup>34</sup>
- b. There is public concern regarding the adverse effects of Phase II, and VTUM of the Project will no doubt exacerbate that concern;<sup>35</sup>
- c. The Mine Expansion will adversely impact on the rights of Indigenous peoples of Canada, and in particular the Tribe's Treaty and Aboriginal rights;<sup>36</sup> and
- d. The provincial assessment and regulatory processes are an inadequate substitute for the IAA process.

### **5.1. Adverse Effects within Federal Jurisdiction**

When deciding whether to exercise his jurisdiction to designate the Mine Expansion, the Minister must determine whether it has the potential to cause adverse effects that within federal jurisdiction

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<sup>33</sup> Email from Shelly Boss to Fraser Thomson, EcoJustice, (30 March 2020).

<sup>34</sup> IAA, *supra* note 2, s 9(1).

<sup>35</sup> *Ibid*,

<sup>36</sup> *Ibid*, s 9(2).

or adverse direct or incidental effects. Pursuant to section 2 of the IAA, "effects within federal jurisdiction" means:

- (a)** a change to the following components of the environment that are within the legislative authority of Parliament:
  - (i)** fish and fish habitat, as defined in subsection 2(1) of the *Fisheries Act*,
  - (ii)** aquatic species, as defined in subsection 2(1) of the *Species at Risk Act*,
  - (iii)** migratory birds, as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*, and
  - (iv)** any other component of the environment that is set out in Schedule 3;
- (b)** a change to the environment that would occur
  - (i)** on federal lands,
  - (ii)** in a province other than the one where the physical activity or the designated project is being carried out, or
  - (iii)** outside Canada;
- (c)** with respect to the Indigenous peoples of Canada, an impact — occurring in Canada and resulting from any change to the environment — on
  - (i)** physical and cultural heritage,
  - (ii)** the current use of lands and resources for traditional purposes, or
  - (iii)** any structure, site or thing that is of historical, archaeological, paleontological or architectural significance;
- (d)** any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; and
- (e)** any change to a health, social or economic matter that is within the legislative authority of Parliament that is set out in Schedule 3.

The Minister and the Agency have already found that Phase II may have adverse effects within federal jurisdiction, as defined in section 2 of the IAA. According to the IAA's Analysis Report, these include:

- a. Effects to fish and fish habitat, including aquatic species at risk. Specifically, Phase II has the potential to have adverse effects on Rainbow Trout and Bull Trout, two endangered and threatened species under the *Species at Risk Act*.<sup>37</sup>
- b. Effects to migratory birds, including nine species of migratory birds listed under the *Species at Risk Act*. Specific effects include: "changes to key habitat; changes to

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<sup>37</sup> SC 2002, c 29; Analysis Report, *supra* note 17 at 6.

movement via sensory disturbance or physical blockage; bird mortality and effects to health through exposure to deleterious substances, including via water and air pathways or secondary receptors (e.g., vegetation); and direct effects such as collisions and interactions with mine waste."<sup>38</sup>

- c. Effects on the rights of Indigenous peoples, including:<sup>39</sup>
- i. effects to pre-contact archeological sites;
  - ii. effects to current use of lands and resources for traditional activities; and
  - iii. adverse health effects through air emissions, release of coal dust, noise, water quality and food contamination.

Based on the Application package for the VTUM, the Tribe understands that the VTUM may result in further adverse effects within federal jurisdiction. Coalspur acknowledges in its Application for the VTUM that three watercourses in Coalspur's existing permit area provide fish habitat<sup>40</sup>: MacPherson Creek, MCT2 and MRT1. However, the Application for VTUM lacks any meaningful assessment of adverse effects to fish and fish habitat. The Application for VTUM further lacks any consideration of the impacts of the VTUM on migratory birds.

Despite any analysis by Coalspur on the effects of the VTUM on areas within federal jurisdiction, Louis Bull understands that underground mining can have significant adverse impacts on the local, federal and global environment by:

- Resulting in the release of waste earth and rocks that may become toxic;
- Causing changes to groundwater and streams; and
- Causing greenhouse gas emissions, both at the project site as well as emissions arising from downstream combustion.

*5.1.1. Adverse Effects on Tribe Members' Health, Social and Economic Conditions (s. 2(d))*

As noted above, the Minister and the Agency already concluded that Phase II will result in adverse health effects on Indigenous Peoples through air emissions, release of coal dust, noise, water quality and food contamination.

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<sup>38</sup> Analysis Report, *supra* note 17 at 7.

<sup>39</sup> *Ibid.*

<sup>40</sup> VTUM Application, *supra* note 5 at 125.

The Tribe points out the following additional adverse effects of the Mine Expansion on the Tribe Members' health, social and economic conditions:

1. Direct hardship through increased costs associated with traveling further and further from, to access traditional foods such as moose, deer, elk, rabbit, goose and grouse, to name a few.
2. The loss of medicinal plants used for sustenance and health.
3. Decreased abundance of culturally significant species necessary to support the exercise of Treaty and Aboriginal rights as well as their health.

The VTUM will exacerbate these impacts.

The mining and burning of thermal coal will further contribute to climate change. As noted by the Department of Environment and Climate change, “Coal-fired electricity has significant adverse environmental and health impacts”.<sup>41</sup>

The Tribe has significant concerns about climate change and how it will further impact the Tribe's social and economic conditions. Specifically, the Tribe is concerned that climate change will affect the environment's ability to support members' way of life and continued viability of their Treaty rights.

## 5.2. Public Concern

Public concerns with respect to Phase II were raised by numerous interested persons for consideration in the 2019 Designation Decision. Concerns included:<sup>42</sup>

- Effects to biophysical environment (e.g., release of contaminants; changes to air quality, surface and groundwater quality and quantity; noise effects on wildlife and nearby communities; effects to vegetation, wetlands and wildlife) and cumulative effects may result in adverse effects to areas of federal jurisdiction including fish and fish habitat, migratory birds, species at risk, and with respect to the Indigenous peoples of Canada;
- Impacts to established Aboriginal and Treaty rights such as fishing, hunting and gathering rights;

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<sup>41</sup> “Canada launches strategic assessment of thermal coal mining”, December 12, 2019. Online: <https://www.canada.ca/en/environment-climate-change/news/2019/12/canada-launches-strategic-assessment-of-thermal-coal-mining.html>

<sup>42</sup> Analysis Report, *supra* note 17 at 9-10.

- Threats to populations of endangered Rainbow Trout (Athabasca River populations) and threatened Bull Trout (Saskatchewan - Nelson Rivers populations), and their habitat, in the Project area;
- Adverse effects to the function of and habitats within the watershed, including wetlands;
- Contribution of impacts of coal-fired electricity on human health and climate change from the export of thermal coal;
- Concerns of downstream GHG emissions on areas of federal jurisdiction;
- Concerns with waste management, e.g., radiation, waste water, risk of a tailings pond breach;
- Concerns with fragmentation of woodland caribou habitat;
- Concern that no part of the Vista project has been subject to a federal environmental assessments despite its large scale;
- Concern that Phase II avoided federal impact assessment due to the revision of the mine plan to be under the thresholds in the Regulations;
- Provincial processes may not address effects in areas of federal jurisdiction, provide opportunities for public input, or provide regulatory oversight for safety (e.g., catastrophic failing of an earthen dam at Obed Coal Mine);
- The need for the Alberta Environmental Impact Statement Terms of Reference for the Project to include requirements to properly assess potential impacts to traditional land use, such as more detailed requirements for baseline and impact assessment information;
- There has been a lack of engagement by the proponent; and
- There is a lack of provincial consultation with Indigenous peoples.

These public concerns will only be exacerbated by the addition of the VTUM to mine expansion plans.

### **5.3. Adverse Impacts on Rights of Indigenous Peoples**

In addition to these adverse effects on the health, social or economic conditions of Indigenous peoples, the Mine Expansion will result in adverse impacts on the section 35 rights of Indigenous peoples.

The Minister and IAA have already concluded that Phase II has the potential to adversely impact section 35 rights of Indigenous peoples, including adverse effects within federal jurisdiction that could impact section 35 rights.<sup>43</sup>

As noted, Louis Bull is a signatory to Treaty No. 6. and has Treaty and Aboriginal rights within and adjacent to the Vista Mine which is located in its traditional territory. Louis Bull's rights under Treaty No. 6, as expanded by the *Natural Resource Transfer Agreement, 1930*, include but are not limited to:

- The right to hunt, fish, trap and gather "on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access";
- The right to carry out ceremonies;
- The right to transmit Indigenous knowledge to subsequent generations; and
- The right to participate in practices reasonably incidental to Treaty harvesting rights, including use of traditional trails to access an area, camping, habitation to support harvesting such as hunting cabins and other activities.<sup>44</sup>

Louis Bull's Aboriginal and Treaty rights are recognized and affirmed by section 35 of the Constitution.

The Mine Expansion will cause adverse effects on the Tribe's rights in the following manner:

1. The Mine Expansion will "take-up" additional Crown land within Treaty No. 6, and in the Eastern Slopes area;
2. The exercise of Treaty and Aboriginal rights by Louis Bull citizen will be directly and indirectly impacted by the Mine Expansion. The loss of plants and wildlife that will result from the Mine Expansion will prevent Louis Bull citizens from exercising their rights for a generation or more in the project area. In addition to losing access to the lands and waters directly affected by the Mine Expansion, the Mine Expansion and its safety set-backs may result in members being cut off from adjacent lands.
3. The Mine Expansion will add to the cumulative impacts to Aboriginal and Treaty rights, and the cultural way of life of the Tribe.

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<sup>43</sup> *Ibid*, at 10.

<sup>44</sup> *R v Sundown*, [1990] 1 SCR 393; *R v Badger*, [1996] 1 SCR 771.

The Mine is located within an area historically and currently used by Louis Bull citizens, including those from Smallboy, to go out on the land. Specifically, citizens report exercising their rights in and around Coal Valley, north of the Athabasca River, and in surrounding water bodies and rivers.

Subsistence hunting, fishing and gathering is an integral and important aspect of the Tribe citizens' way of life and a defining feature of their special relationship with the land. Louis Bull citizens harvest a variety of wildlife and plant species in and around the lands surrounding the Mine Expansion for their sustenance. They hunt various species including moose, deer, elk, geese, grouse, ducks, rabbits and prairie chicken (grouse), and gather various medicines. Citizens also fish in and around the Mine Expansion for whitefish, pickerel, jackfish, suckers, and various types of trout.

Construction and operation of the Mine Expansion will adversely impact lands and waters Louis Bull citizens rely on to hunt, fish and gather, by rendering them unsuitable, or possibly unsafe, for Indigenous land use activities. These direct impacts will extend beyond the footprint of the Mine Expansion.

Louis Bull citizens are concerned that the Mine Expansion will force them to travel further away to exercise their rights. They are also concerned about the impacts of the Mine Expansion their ability to pass on Indigenous knowledge, thereby reducing future generations' Indigenous knowledge and land use activities in this area.

Access to the area in and around the Mine Expansion is even more crucial to the Tribe now considering the ever-decreasing amount of land available for traditional activities. There are numerous existing coal projects in the area surrounding the Mine Expansion. The Vista Mine is located in an area that is surrounded by the following existing coal mines:<sup>45</sup>

- Phase I of Vista Mine, owned by Coalspur;
- Obed Mine owned by Prairie Mines & Royalty Ltd.;
- McLeod River Mine owned by Mancal Coal Inc.;
- Coal Valley Mine owned by Coal Valley Resources Inc.;
- Gregg River Mine owned by Coal Valley Resources Inc.;
- Luscar Mine owned by Cardinal River Coals Ltd.; and
- Cheviot Mine owned by Cardinal River Coals Ltd.

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<sup>45</sup> Alberta Energy Regulator, Coal Mine Map Viewer, online: <https://extmapviewer.aer.ca/AERCoalMine/Index.html>.

As a result of the shrinking amount of available land to exercise their section 35 rights in the Eastern Slopes, citizens of Louis Bull have found themselves travelling further and further in search of viable clean Crown lands to practice their traditions, pass down their knowledge to future generations, and exercise their rights.

The loss of areas suitable to exercise traditional activities implies a loss much greater than access to resources for subsistence purposes: it represents a threat to the web of cultural norms, spiritual values, sense of self, place, and purpose, and knowledge that are invariably embedded within the physical act of land use and connections between Indigenous peoples and the land. Importantly, the loss of available lands to practice traditional activities endangers the intergenerational transfer of traditional knowledge which would imperil the opportunities of future generations to practice the traditional way of life.

As noted above, the Mine Expansion will lead to increased greenhouse gas emissions, further exacerbating climate change. Climate change has and will continue to adversely impact the ongoing viability of the Tribe's Treaty harvesting rights. Courts have recognized that climate change has had a particularly serious impact on Indigenous communities because of the traditionally close relationship between Indigenous peoples and the land and waters on which they rely.<sup>46</sup>

#### **5.4. Provincial Assessment and Regulatory Processes are Inadequate**

In the 2019 Designation Decision, you found that other approvals processes would "provide mechanisms for consultation with Indigenous peoples, including addressing potential adverse effects and concerns raised by Indigenous peoples and members of the public." Recent developments have made clear that these alternative approval processes will not provide meaningful, or any, opportunities for consultation with Louis Bull.

First, in January 2020, the ACO rejected the Tribe's request to be included in consultations related to Phase II. In Alberta, the ACO is responsible for determining whether a project triggers the duty to consult and which First Nations must be consulted. The ACO's rejection of Louis Bull's request to be included in consultations related to Phase II means that Louis Bull will not be consulted with respect to Phase II. There are no other means for Crown-Indigenous consultation in the Alberta regulatory process.

Second, the VTUM Application clearly states that the ACO determined no consultation with any First Nations is required. The ACO's determination means that Louis Bull will not be consulted with respect to the VTUM. Again, there are no other means for Indigenous consultation in the Alberta regulatory process.

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<sup>46</sup> *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at paras 11-14.



Allowing the Mine Expansion to go ahead in these circumstances would be entirely inconsistent with your government's commitment to reconciliation. The overriding objective of consultation is reconciliation. Reconciliation also furthers the Government of Canada's commitment to implement the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"). Article 32 of UNDRIP provides that governments must consult with Indigenous peoples "prior to the approval of any project affecting their lands or territories and other resources":

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

This international duty to consult works in conjunction with the duty to consult mandated by section 35 of the *Constitution Act, 1982*. The duty to consult plays an important role in furthering reconciliation.<sup>47</sup>

The language in the IAA confirms that reconciliation with Indigenous peoples of Canada is one of the central purposes of the legislation. The preamble of the IAA states, in part:

Whereas the Government of Canada is committed, in the course of exercising its powers and performing its duties and functions in relation to impact, regional and strategic assessments, to ensuring respect for the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*, and to fostering reconciliation and working in partnership with them;

Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples;

Pursuant to the "Interim Guidance: Indigenous Participation in Impact Assessment"<sup>48</sup> and "Interim Policy Context: Indigenous Participation in Impact Assessment"<sup>49</sup>, integrating Indigenous participation in impact assessments fosters reconciliation by providing Indigenous peoples with the tools to meaningfully and effectively participate in the assessment process, and ensures that the Crown secures free, prior and informed consent for all decisions that affect Indigenous peoples' rights and interests.

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<sup>47</sup> *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 1.

<sup>48</sup> Impact Assessment Agency of Canada, "Interim Guidance: Indigenous Participation in Impact Assessment", online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/interim-guidance-indigenous-participation-ia.html>.

<sup>49</sup> Impact Assessment Agency of Canada, "Interim Policy Context: Indigenous Participation in Impact Assessment", online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/interim-policy-indigenous-participation-ia.html>.

**To date, there has been no consultation with Louis Bull about any part of the Vista project. The ACO will not consult the Tribe regarding Phase II, and based on its pre-consultation assessment for the VTUM, the ACO will not require any consultation with respect to the VTUM.**

In the absence of any ACO-directed consultation, the AER's process has not and is unlikely to achieve adequate consultation or accommodation for Louis Bull. These gaps and limitations are as follows:

- a. There has been no project-specific assessment of the Mine Expansion's impacts on Louis Bull citizens' constitutionally protected section 35 rights.
- b. The AER process cannot be relied upon to ensure an assessment of impacts on Indigenous rights and interests occurs in advance of an approval. While Part 5 of the Terms of Reference ("TOR") for the provincial EIA *theoretically* mandates baseline information on current Indigenous land use<sup>50</sup>, *in practice*, this aspect of the EIA is largely ignored. The AER regularly publicly posts project applications with this part of the EIA missing or incomplete. Further, the AER routinely finds project applications "complete" (i.e., having conformed with the TOR) with the studies contemplated by Part 5 of the TOR missing, even in the face of objections by Indigenous communities. The AER's technical review of an EIA for completeness does not include a review of Part 5 or any material included therein. Our understanding is that the AER takes the position that the provision of Indigenous land use information is a private matter between the proponent and the Indigenous community to resolve outside the AER process.
- c. The AER process cannot be relied upon to for accommodation in the form of conditions to an approval. The AER generally does not include mitigation measures specific to Indigenous land use or other interests in its approval conditions. It generally takes the position that mitigation measures to address impacts on Indigenous rights and interests are a private matter between the proponent and the Indigenous community to resolve outside the AER process.
- a. The AER's governing legislation provides that it has "no jurisdiction with respect to assessing the adequacy of Crown consultation associated with the rights of aboriginal peoples".<sup>51</sup> The ACO's decision to exclude Louis Bull Tribe from consultation means

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<sup>50</sup> See: Final Terms of Reference, Environmental Impact Assessment Report for Coalspur Mine (Operations) Ltd. Proposed Vista Coal Mine – Phase II, at Part 5, Traditional Ecological Knowledge And Land Use, online: <https://open.alberta.ca/dataset/ab136e20-299b-4bc0-ac76-0c6f946b0eb4/resource/8c8c777f-01e8-4929-b121-dff5957af6ba/download/ftor-coalspur-vista-project-phase-ii.pdf>.

<sup>51</sup> *Responsible Energy Development Act*, SA 2012, c R-17.3, s 21.

that there will be no assessment of the Crown's consultation with Louis Bull in relation to the Mine Expansion.

Moreover, consultations that may occur with Department of Fisheries and Oceans, or other federal authorities in relation the *Species At Risk Act* or the *Migratory Birds Convention Act* will focus on the incremental impacts of the specific authorization under consideration, not on impacts arising from the project as a whole. Piecemeal consultation with federal departments as contemplated by the Minister, in the absence of consultation with Louis Bull on the project as a whole, is not an adequate substitute for the IAA process, and is insufficient to address potential adverse effects on Louis Bull.

Finally, in relation to statements made by Coalspur in its August 9, 2019, submission to the Agency with respect to First Nation engagement, we wish to provide some context. Coalspur outlines having undertaken an engagement and assessment of Phase II's impacts and says that all traditional land use studies will be done by the fall of 2019. Coalspur has not engaged Louis Bull nor done any impact assessment on the Tribe's rights. Further, commitments Coalspur makes about providing reports that "discuss all findings on a community and regional basis; presenting resolutions and mitigation plans including long term reporting and monitoring plans to ensure TK [traditional knowledge], resource access and Indigenous rights remain at the forefront throughout the mine life" are in no way legally enforceable in Alberta's regulatory system unless they are included as conditions in a project approval. As noted above, the AER's position is that mitigation measures specific to Indigenous interests are a private matter between the proponent and the Indigenous community to resolve outside the AER process.

## 6. CONCLUSION

In conclusion, the Mine Expansion (i.e. Phase II and the VTUM) are a designated project under the *Physical Activities Regulations*, as they would result in an increase in the area of mining operations of the Vista Mine (Phase I) by 50% or more, and would result in an in an increase to total coal production capacity of the Vista Mine (Phase I) by significantly more than 5,000 tonnes per day. Any characterization of Phase II and VTUM are separate projects would thwart the intent of the IAA and its regulations, and would be an unjustified attempt at project splitting

In the alternative, the Minister ought to exercise his discretion to designate the Mine Expansion. In direct response to the questions posed in the Annex to the IAA's "Operational Guide: Designating a Project under the *Impact Assessment Act*"<sup>52</sup>, Louis Bull submits:

1. Is the project near a threshold set in the Project List? **It exceeds it.**
2. Is the project near or in an environmentally or otherwise sensitive location? **Yes.**

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<sup>52</sup> Impact Assessment Agency, "Operational Guide: Designating a Project under the *Impact Assessment Act*", online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/designating-project-impact-assessment-act.html>.

3. Does the project involve new technology or a new type of activity? **Yes, highwall mining is novel for this region.**
4. Does the project have the potential to cause adverse effects that are of concern to you and fall within federal jurisdiction? **Yes.**
5. Does the project have the potential to cause adverse effects that are directly related or incidental to a federal authority either (i) making a decision that would permit the carrying out, in whole or in part, of the project or (ii) providing financial assistance for the purpose of enabling the project to be carried out, in whole or in part? **Yes.**
6. Does the project have the potential to cause adverse impacts on the section 35 rights of the Indigenous peoples of Canada? **Yes.**

Louis Bull acknowledges that the province and Canada have shared jurisdiction over the environment and may approve the Mine Expansion so long as the Crown's duty to consult is met. Given the potential adverse effects within federal jurisdiction including on Tribe's section 35 rights, the Government of Alberta's decision not to consult Louis Bull, and public concerns, the Minister ought to exercise his discretion to designate the Mine Expansion to ensure that impacts to the Tribe members' constitutionally protected rights are properly assessed and impacts are mitigated.

We trust that the foregoing is in order and invite you to contact the writer should you require any further information.

Sincerely,

**MLT AIKINS LLP**

<original signed by>

~~Per:~~

For: ~~M~~ Meghan M. Conroy  
"Arooj Shah"

MMC:as

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