
**WRITTEN RESPONSE OF STK'EMLÚPSEMC TE SECWÉPEMC NATION TO TRANS
MOUNTAIN CORPORATION'S DEVIATION APPLICATION**

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1. OVERVIEW

1. These are the written submissions of Stk'émłúpsémc te Secwépemc Nation (“**SSN**”) and its constituent First Nations in response to Trans Mountain Corporation’s (“**Trans Mountain**”) application pursuant to section 211 of the *Canadian Energy Regulator Act*¹ to seek approval for a deviation to the approved Plan, Profile and Book of Reference in relation to certain tracts for the Trans Mountain Expansion Project (the “**Project**”) (C25832) (this application will be referred to as the “**Deviation Application**”).
2. The purpose of these submissions is to inform the Canada Energy Regulator (“**CER**”) of SSN’s position in respect of the Deviation Application.
3. The Deviation Application is based on Trans Mountain’s intention to deviate from a previous application for deviation made by Trans Mountain (C17686) and approved on March 3, 2022 (C17990) (“**Previous Deviation Application**”), for which SSN provided a letter of support to the CER dated January 6, 2022 (C02680) (the “**Letter of Support**”). The Previous Deviation Application pertained to Trans Mountain’s construction methodology and associated routing of the Project that sought to minimize surface disturbances (by implementing specific trenchless construction methods) to the approximately four-kilometre corridor near Pípsell (Jacko Lake) (the “**Pípsell (Jacko Lake) Corridor**”), which holds profound spiritual and cultural significance to SSN. SSN provided the Letter of Support for the Previous Deviation Application only after negotiations with Trans Mountain and agreement upon conditions (specific trenchless construction methods utilizing micro-tunnelling) specifically designed to address SSN’s opposition to the detailed route.
4. Trans Mountain’s current Deviation Application seeks to return to the original construction methodology proposed by Trans Mountain in a specific portion of the segment through the Pípsell (Jacko Lake) Corridor for which SSN has never given its support or consent and, rather, directly opposed as outlined in its Statement of Opposition filed on April 24, 2017 (A82838) (“**2017 SOO**”) and its Statement of Opposition filed on September 5, 2019 (C01501) (“**2019 SOO**”).
5. SSN continues to support the Project, but does not support the Deviation Application for several reasons, each set out in detail below:
 - a. the Deviation Application seeks to reverse and contravene the very conditions on which SSN’s support for the Previous Deviation Application, as well as SSN’s support for the Project (expressed through withdrawal of the 2019 SOO (C02680)), was obtained;

¹ Appendix “L”, Tab 3, *Canadian Energy Regulator Act*, SC 2019, c 28, s 10.

- b. the impacts of a change in construction methodology of the Deviation Application if approved will cause significant and irreparable harm to SSN’s culture and the integrity of the Pípsell (Jacko Lake) Corridor;
 - c. the Deviation Application is not required for Trans Mountain to complete construction as Trans Mountain has failed to demonstrate that the trenchless construction methods within the Pípsell (Jacko Lake) Corridor approved under the Previous Deviation Application (“**Micro-Tunnelling**”) are no longer a viable method of construction. Trans Mountain has made it clear that financial considerations unrelated to the implementation of the Micro-Tunnelling as the approved trenchless construction method within the Pípsell (Jacko Lake) Corridor and Trans Mountain’s preference for a January 1, 2024 in-service date (“**In-Service Date**”) are the rationale for submitting the Deviation Application. These reasons are insufficient to demonstrate that Micro-Tunnelling in the Pípsell Area is no longer a viable method of construction, and do not meet the standards required for a deviation as agreed between SSN and Trans Mountain in the Mutual Benefits Agreement executed on October 30, 2019 in respect of the Project (“**MBA**”) which formed the basis on which the 2019 SOO was withdrawn; and
 - d. SSN has not provided its free, prior, and informed consent in respect of the Deviation Application as required pursuant to Articles 19, 26, and 32 of the *United Nations Declaration on the Rights of Indigenous Peoples*² (“**UNDRIP**”).
6. For greater certainty, SSN submits that the financial obligations of Trans Mountain in relation to the Project as a whole are not – and cannot be – a sufficient reason for the CER to accept that Micro-Tunneling is no longer a viable method of construction in the remaining portion of the Pípsell (Jacko Lake) Corridor.
 7. For the reasons above and as more fully detailed below, SSN requests that the CER reject the Deviation Application and maintain the conditions outlined in the Previous Deviation Application that require the use of Micro-Tunnelling in the remaining portion of the Pípsell (Jacko Lake) Corridor.

2. **IMPORTANCE OF THE PÍPSELL (JACKO LAKE) CORRIDOR TO SSN**

2.1 **Overview of the Significance of the Pípsell Area**

8. Pípsell, including the Pípsell (Jacko Lake) Corridor and the broader surrounding areas (“**Pípsell Area**”), holds profound spiritual and cultural significance to SSN. The obligation to maintain and steward the Pípsell Area has always been and continues to be SSN’s paramount concern in relation to the Project.

² Appendix “L”, Tab 5, Schedule to UNDA.

9. Since time immemorial, Secwépemc have had an ancestral, cultural, and spiritual connection to the Pípsell Area, which is a “cultural keystone place” for the Secwépemc who exercise cultural and spiritual rights in and through the Pípsell Area. The Pípsell Area is exceptionally well-known, is associated with deep spiritual values associated, is critical to the community’s identity and well-being, is part of its seasonal round, and is a source of Secwépemc laws and governance.
10. Protection of the Pípsell Area is therefore SSN’s legal and spiritual obligation.

2.2 The Trout Children Story

11. Pípsell means ‘trout-place’ in the Secwépemc language. Secwépemc law derives from stseptékwll (ancient stories). Stseptékwll are narratives about past events on Secwepemcúlecw (Secwépemc territory) and about the actions of SSN’s ancestors. Stseptékwll embody SSN’s stsqéy’ or laws of land tenure, of relations with other nations, of good social conduct, and of good conduct on the land or an “environmental ethic”. In addition, stseptékwll are educational, moral, and spiritual teachings about the origins and history of Secwepemcúlecw, its geography, fauna and flora, and the activities of ancient people embodied as animals and their social relations. They express and clarify Secwépemc social values and beliefs, and cultural, spiritual, and symbolic concepts. These stories are akin to deeds to the land from Secwépemc ancestors. They are deeply spiritual because they embody the essence of SSN as a people.
12. The precise location of the Pípsell Area is known to SSN through the Secwépemc way of knowing: stsq’eyu’lecw (that which is “marked on the land”) and is recorded in the Trout Children stseptékwll (“**Trout Children Story**”). The Trout Children Story encapsulates and expresses SSN’s connection to the Pípsell Area, and it sustains Secwépemc law about conduct on the land and reciprocal accountability to living beings on the land, across generations and within generations.
13. Though not reproduced in these submissions, the Trout Children Story, in its plot, message and meaning, connects the world of humans in a landscape of root-bearing grasslands, the under-the-water world of a trout-bearing lake, and the “upper world” of the sky country.
14. The Trout Children Story references real environment and subsistence activities, including plant gathering activities, habitations, animals. These should not be understood as fictional environments, but as referring to actual places, and specifically as referencing the Pípsell Area. The Trout Children Story exemplifies the interconnectedness between being and place as it involves landscape, humans across generations, animals, and natural elements. The Trout Children Story speaks to a multitude of environmental interrelationships and gives Secwépemc people spiritual, cultural, and environmental teachings and guidance.

2.3 Interconnection of Secwépemc Law and Spirituality

15. Secwépemc are yecwemínem (caretakers and stewards) of the land and, under Secwépemc law, have legal obligations to steward and protect sacred sites like the Pípsell Area. Allowing Trans Mountain to proceed with forms of construction that would disturb and damage the Pípsell (Jacko Lake) Corridor would be a violation of SSN's obligations under Secwépemc law. To put this in a Western context, it would be illegal under SSN's laws and legal orders.
16. The relationship of Secwépemc people with the Pípsell Area is an instance of reciprocal accountability (eyentwécw) where causing harm to such a place violates the past and present Secwépemc responsibility to protect these places. This responsibility, in turn, derives from the historical, spiritual, and cultural connection to these places as they are inscribed in stsptékwll, and place names that anchor past experiences to the land and create responsibility of caretakership (yecwmíñmen) for present and future generations.
17. As the Pípsell Area laws, these deeds from past peoples are in contradiction with resource extraction developments to the extent that such developments involve long-term alteration of the landscape, and potential irreversible harm to resources and ecologies.
18. Secwépemc peoples' spiritual connection to the Pípsell Area is inseparable from the physical place. Every aspect of the Pípsell Area is sacred. Secwépemc are spiritually connected to the Pípsell Area where Secwépemc ancestors' spirits are contained. The Pípsell Area was and is a place for the long-term planning for protecting the territory, healing, trade, spiritual ceremonies, and burial. SSN must protect their legacy and links to the Pípsell Area as it defines SSN as a Nation. Any disturbance and damage to the land would injure and possibly sever this spiritual connection, regardless of reclamation efforts following the disturbance.

2.4 Historic Use of the Pípsell Area

19. Secwépemc people have respectfully and lightly used the Pípsell Area for generations. An archeological assessment conducted in 2002 demonstrated that the Pípsell Area was occupied as early as 7500-6000 years ago. There is evidence of the historic and continuing Secwépemc presence in the area, including traces of fire pits from the ceremonial sweat lodges of Secwépemc ancestors that have been located and are in current use.
20. The unique position of the Pípsell Area in the ecology and cultural resource harvesting pursuits of the SSN, and its close proximity to the main St'k'emlupsemc settlement at Tk'emlups (a place that has been densely populated by Secwépemc for several thousand years), explains some of its overall significance in the lives of past, present, and future generations of Secwépemc people. The Pípsell Area is also in close proximity to the travel route that Skeetchestn people took to visit Tk'emlups and beyond. SSN people from

Tk'emlups, in the recent and more remote past, considered the area important for gathering medicinal plants and berries, fishing for trout and kokanee, and hunting.

2.5 Continued Use of the Pípsell Area

21. Secwépemc people continue to use the Pípsell Area for hunting, fishing and plant harvesting despite being fenced out of the area for the last hundred years pursuant to colonialist systems of government over unceded territory. The Pípsell Area is a refuge for deer, moose, and a variety of other mammals, amphibians, birds, and reptiles that are culturally and spiritually significant to Secwépemc and critical for ecosystem resiliency. The intimate knowledge of managing micro-ecosystems is and was integral to SSN's life cycle. SSN members remain obligated to protect lands and resources for the next generation.
22. The Pípsell Area is unique; it has grasslands, good wetlands, and is located in a key transitional zone. For Secwépemc people, the grasslands in the Pípsell Area represent a "bread basket" of species diversity connected to human resource harvesting. It is mid elevation grasslands or "uplands" that are the most severely endangered, in a combined ecological and cultural sense. The Pípsell Area also represents significant plant biodiversity, including about 130 species that are and were historically utilized by the Secwépemc.
23. In light of the ecological significance of the Pípsell Area and the flora and fauna therein, and in light of the precarious zoological diversity of species, SSN consider it of utmost importance to the integrity of SSN cultural and economic practices, now and in the future, to preserve the Pípsell Area.

2.6 The Integrity of the Pípsell Area is of Utmost Importance

24. While the Pípsell Area has suffered injury and indignity, it is still fundamentally intact. The connection to animals and plants, and the site of the Trout Children Story, remains. It continues to be a sacred site of immense cultural significance. SSN considers the Pípsell Area in its current form to be fundamentally intact and firmly believes that it can be restored for future generations in a way that will preserve and revitalize its historic ecological integrity. As mentioned above, the Pípsell Area is a "cultural keystone area", which must be preserved in a state consistent with the traditional importance of the site to Secwépemc. The Pípsell Area must only be used in ways which preserve and sustain the area, and which allow for the rights and culture of the Secwépemc people to be exercised and maintained.
25. Accordingly, the SSN assert their rights and responsibility to a continued cultural existence, the integrity of Secwépemc culture, laws, language, cultural practices, and way of life, all of which are inseparably connected to Secwépemc lands and resources, including the Pípsell Area. SSN also asserts the right and the responsibility to ensure the

health of Secwépemc people, now and into the future, which encompasses a responsibility to care for the Pípsell Area.

26. To affirm SSN's obligation to steward the Pípsell Area, on June 11, 2017, members of SSN gathered at the Pípsell Area to formally designate the area as a Secwépemc Nation Cultural Heritage Site.
27. Open trench construction, or any form of construction with significant ground disturbance, is inconsistent with maintaining the Pípsell Area as a sacred area that allows SSN to exercise its laws, governance, and inherent rights. SSN maintains that the Secwépemc spiritual and religious connection to the Pípsell Area is inseparable from that physical place. Accordingly, trenched construction or construction with significant ground disturbance will cause irreparable harm to the Pípsell Area and will threaten to sever the Secwépemc connection to the Pípsell Area. Attempts at remediation as "mitigation" are not spiritually possible, environmentally accountable, or legally acceptable pursuant to SSN's laws and legal orders.
28. By enabling open trench construction to be used in the Pípsell Area, the Deviation Application, if approved, will have direct and significant adverse impacts on SSN and the ability of both present and future generations of Secwépemc to exercise their internationally affirmed and constitutionally protected inherent rights.

3. SSN-TRANS MOUNTAIN ENGAGEMENT ON CONSTRUCTION METHODOLOGIES IN PÍPSELL (JACKO LAKE) CORRIDOR

29. Since 2019, SSN and Trans Mountain have been communicating about the construction methodology to be employed in the Pípsell (Jacko Lake) Corridor. SSN has maintained throughout these communications that it will not support or provide its consent for construction methodologies that threaten to disturb or harm the Pípsell (Jacko Lake) Corridor. Any support or consent that SSN has provided for the Project has been based on conditions that explicitly protect the Pípsell (Jacko Lake) Corridor from disturbance or harm.

3.1 SSN-Trans Mountain Engagement from 2019-2022

Trans Mountain Delayed Implementing Trenchless Construction

30. In early 2019, the Crown initiated Phase III of consultation on the Project. SSN submitted the 2019 SOO ([C01501](#)), updated from but consistent with the 2017 SOO ([A82838](#)), which led to negotiations between SSN and Trans Mountain.
31. On October 30, 2019, following these negotiations, SSN and Trans Mountain reached an agreement on the terms of their MBA in respect of the Project. Trans Mountain has previously and repeatedly acknowledged the sacred significance of the Pípsell (Jacko Lake) Corridor to SSN and that the protection of the Pípsell (Jacko Lake) Corridor was

SSN's primary consideration for entering into the MBA. Accordingly, Trans Mountain committed to undertaking certain efforts to protect the sacred cultural resources within this area, including ultimately agreed to using Micro-Tunnelling as the construction approach through the Pípsell (Jacko Lake) Corridor. Importantly, the specific commitments concerning the use of Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor were required to obtain SSN's support for the Project.

32. Following execution of the MBA in October 2019, Trans Mountain delayed conducting meaningful work to plan trenchless construction methods in collaboration with SSN. On September 22, 2020, Trans Mountain provided SSN its proposed construction approach in the Pípsell (Jacko Lake) Corridor that failed to meaningfully progress trenchless construction plans, and which relied on open trench construction methods, contrary to the commitments that had been made as the basis for SSN's support. Subsequently, Trans Mountain did not pursue meaningful discussions with SSN to develop suitable trenchless construction methods until directly pressured to do so, including through letters sent to the former President and CEO of Trans Mountain in November and December of 2020 in which SSN raised serious concerns about Trans Mountain's commitments to using best efforts to complete Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor, as agreed to under the MBA.
33. Following this delay, Trans Mountain did not begin substantially planning the current trenchless construction methods with SSN until the spring of 2021. However, initial construction options put forward by Trans Mountain on April 9, 2021 proposed only the *partial* use of trenchless construction in the Pípsell (Jacko Lake) Corridor. In response, SSN notified Trans Mountain that "Trans Mountain's proposed construction method options [proposed on April 9, 2021] are unacceptable and inconsistent with the [MBA] between Trans Mountain and SSN".
34. Despite this notice, Trans Mountain proceeded to propose three new construction options at meetings held on May 27, 2021, June 10, 2021, and June 18, 2021, that would each only partially implement trenchless construction. One of the options initially put forward by Trans Mountain to SSN as an alternative to trenched construction was a construction methodology known as horizontal directional drilling ("**HDD**"). SSN rejected HDD in the Pípsell (Jacko Lake) Corridor given the extent of ground disturbance HDD was projected to cause. Ultimately, construction methods that threatened to cause disturbance and destruction of the Pípsell Area were unacceptable to SSN and failed to adequately address SSN's concerns that had been previously outlined in the 2019 SOO (C01501).
35. It was not until July 7, 2021 that Trans Mountain introduced a "micro-tunnelling approach" as a trenchless construction methodology in the Pípsell (Jacko Lake) Corridor. On August 12, 2021, SSN leadership ("**SSN Joint Council**") subsequently reviewed and approved Micro-Tunnelling as an acceptable form of trenchless construction in the Pípsell (Jacko Lake) Corridor.

36. On January 6, 2022, SSN provided the Letter of Support to the CER, indicating that the Micro-Tunnelling was an acceptable form of trenchless construction in the Pípsell (Jacko Lake) Corridor (C02680). Unfortunately, by that time Trans Mountain had already created significant delays in developing construction plans.
37. In fact, the Previous Deviation Application to implement the Micro-Tunnelling was filed by Trans Mountain after an approximately two-year delay from the date of SSN's withdrawal of the 2019 SOO. This delay is a critical detail, given that the impacts of a delayed In-Service Date are among Trans Mountain's primary concerns, as stated in paragraph 22 of the Deviation Application.
38. This nearly two-year delay is the responsibility of Trans Mountain, and Trans Mountain had been aware throughout this timeframe that its proposed Micro-Tunnelling timeline would extend into the first quarter of 2024. Had Trans Mountain acted diligently following the signing of the MBA by proposing construction methods that would give effect to its obligations in respect of the Pípsell (Jacko Lake) Corridor, the Project would likely have been able to meet the In-Service Date timeline – a timeline that has been unilaterally imposed by Trans Mountain – while employing the agreed to Micro-Tunnelling. This fact was confirmed by Trans Mountain in a meeting with SSN Joint Council on July 6, 2023, where Trans Mountain's President and CEO, Dawn Farrell, stated:

The challenge is ... really the first 400 metres of land...Even putting down a new shaft...isn't going well, it's just taking forever, and it's the geology of that land. So I guess if we had known that the geology of the land was that in the first place, perhaps we would have proposed a different solution in the first place. I think we would have done something ahead of that. I know that it's not your concern that this is taking longer and that it's causing problems with the schedule and all the rest of it but it is significantly...we are constrained to options that are economic and feasible within the remaining time frame. If we could turn back the clock and we could have started [trenchless construction in the Pípsell (Jacko Lake) Corridor] two or three years ago, which is like everything at Trans Mountain, we would have the time to finish this, and we should just be honest about that, but at this point with the number of times that we've been trying to address this risk it's becoming one of those risks where we're not even sure now even if we get it done ... do we face more of this as we go ahead (emphasis added).

39. Trans Mountain did know the geology of the land "in the first place". On August 12, 2021, in a meeting between SSN and Trans Mountain, then Trans Mountain CEO, Ian Anderson, stated: "If the geotechnical work supports it, we will absolutely use micro-tunnelling at Pípsell/Jacko Lake." Mr. Anderson went on to say: "however, we won't make that decision until we have the full geotechnical review results by late October, but nothing we know now suggests the geotechnical work will rule out micro-tunneling."

40. The first borehole, BH1, was drilled August 21, 2021. The final borehole, BH21 was drilled May 30, 2022. Thurber Engineering Ltd. (contracted by Trans Mountain for geotechnical work) completed a 1483-page report, dated July 18, 2022, reviewing the geology in the area ("**2022 Thurber Report**"). The 2022 Thurber Report noted at page 48, section 6.3: "The findings from the geotechnical investigation completed to date indicate that micro-tunnelling should be a feasible trenchless method with appropriate MTBM equipment and methods" (emphasis added). Page 49 references the area of the tunnel between Pad 1 and Pad 2 (Tunnel Drive #2). The relevant portions of the 2022 Thurber Report are appended to these written submissions as Appendix "**A**".
41. Furthermore, a report prepared by Innovative Pipeline Crossings Inc., dated July 15, 2021, titled "Trenchless Sections Feasibility and Estimates Report (Rev 3): Spread 5A – Jacko Lake Area" ("**IPC Report**"), describes the ground conditions in a similar manner as the 2022 Thurber Report. SSN SMEs advise that the geology was adequately understood in subsequent meetings. The relevant portions of the IPC Report are appended to these written submissions as Appendix "**B**".

SSN Provided Notice that its Support of the Project is Conditional

42. SSN's conditional support for the Project was expressed shortly after entering the MBA in a letter of support for the Project provided to Natural Resources Canada on November 4, 2019, and a letter to then-Premier John Horgan, dated February 3, 2020, which qualified that, "The ongoing support of the SSN for the Project is based on the compliance of [Trans Mountain] with the [MBA], including its commitments in respect of environmental, culture and heritage, regulatory, and consultation matters." The letters to Natural Resources Canada and to then-Premier John Horgan are appended to these written submissions as Appendix "**C**".
43. SSN's conditional support was also expressed to the CER through the regulatory process. As stated above, on September 5, 2019, SSN filed the 2019 SOO to the detailed route of the Project, including with respect to construction in the entirety of the Pípsell (Jacko Lake) Corridor (C01501). SSN subsequently withdrew the 2019 SOO on November 4, 2019, noting that SSN's route concerns had been addressed by Trans Mountain (via the agreement to the use of Micro-Tunnelling in and through the Pípsell (Jacko Lake) Corridor) (C02680).
44. On February 11, 2022, Trans Mountain filed the Previous Deviation Application (C17686), which was developed collaboratively with SSN. Paragraphs 11 and 12 of the Previous Deviation Application read, in part:

Trans Mountain and SSN have collaboratively developed a construction methodology and associated routing that seeks to minimize surface disturbances at Pípsell, including Jacko Lake and surrounding areas,

which hold spiritual and cultural significance to SSN based on this engagement.

Between May and August 2021, Trans Mountain assessed the feasibility of various trenchless construction methodologies for the Lands and engaged with SSN on options. Based on this assessment, Trans Mountain has determined that the most appropriate construction methodology for the Lands to address SSN's concerns is microtunneling. ... Trans Mountain anticipates that the proposed microtunnel will minimize surface disturbances on the Lands. In January 2022, SSN consented to the Revised Route and the proposed construction methodology and confirmed that they address SSN's concerns (emphasis added).

45. Were it not for Trans Mountain's commitment to Micro-Tunnelling, SSN would not have provided the Letter of Support in respect of the Previous Deviation Application. The Previous Deviation Application was approved by the CER with its acknowledgement that Trans Mountain had obtained SSN's support. SSN's support and consent were only provided upon the agreement that Trans Mountain would use Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor. Trans Mountain's request in paragraph 16 of the Deviation Application disregards this fact and requests that the CER approve a previous plan without having obtained SSN's support or consent for that previous plan. In fact, SSN expressly opposed the previous plan, as demonstrated through the 2019 SOO (C01501).
46. SSN's Letter of Support to the CER highlighted that the Previous Deviation Application (and SSN's subsequent support of such) reflected the "good faith discussions and collaboration" between Trans Mountain and SSN. The Letter of Support provided SSN's support to the Previous Deviation Application on behalf of its collective membership on the condition that Trans Mountain upholds its commitment to completing construction through the Pípsell (Jacko Lake) Corridor using Micro-Tunnelling.
47. The CER's approval of the Previous Deviation Application in Order AO-001-OPL-003-2020 (C17990) acknowledged the context in which SSN withdrew its opposition and expressed its support, stating:

Trans Mountain states that the proposed deviation was developed collaboratively through engagement with [SSN]. It is intended to minimize surface disturbances in the Pípsell area, which holds spiritual and cultural significance to SSN. The revised route incorporates changes to the TMEP right-of-way to accommodate a change in construction methodology from conventional open trench to micro-tunneling. In January 2022, SSN consented to the revised route and proposed construction methodology and confirmed that they address SSN's concerns.

48. SSN's ongoing support of the Project remains conditional upon Trans Mountain upholding its commitment to using Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor. This conditional support is not an arbitrary decision by SSN: it flows directly from the caretaking obligations to the lands and resources with the Pípsell Area borne by SSN pursuant to Secwépemc law.
49. The CER previously acknowledged SSN's conditional support of the Project. Now, the very condition on which SSN's support for the Project was obtained has been reneged. Accordingly, the CER must recognize that the Deviation Application is in direct contravention of the conditions required for SSN's continued support and must require Trans Mountain to adhere to those conditions if the Project is to proceed through the Pípsell (Jacko Lake) Corridor as previously approved.

3.2 SSN-Trans Mountain Engagement in 2023

50. On April 27, May 25, and June 14, 2023, SSN's technical team met with Trans Mountain to discuss updates to Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor. A leadership meeting between Trans Mountain and SSN Joint Council was also held on July 6, 2023. As described below, these meetings effectively demonstrate that Trans Mountain has not worked with SSN in good faith to protect the Pípsell (Jacko Lake) Corridor pursuant to the Previous Deviation Application despite SSN's support for that work.
51. These meetings were primarily concerned with adherence to the MBA, which, though outside the specific scope of the CER's considerations, is relevant to the CER's decision regarding the Deviation Application. In effect, the MBA is the framework on which SSN's support for the Previous Deviation Application was acquired. Trans Mountain's failure to uphold the terms of the MBA undermines SSN's previous support and consent for the Project, which must be considered by the CER in assessing the current Deviation Application.
 - (a) April 27, 2023
52. During the meeting on April 27, 2023, Trans Mountain presented its updates to the ongoing Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor, including certain technical challenges being encountered in its drilling program, but noted a "very high" degree of confidence that Micro-Tunnelling remained feasible (i.e., that it remained a viable method of construction). Trans Mountain did not identify concerns relating to its anticipated timelines for the completion of the Project as impacting this work. Trans Mountain omitted details of this meeting in the Deviation Application, instead stating that engagement began in May 2023 (at paragraph 31 of the Deviation Application). This is an important omission because it demonstrates that as of April 2023, Micro-Tunnelling not only remained feasible, but that Trans Mountain carried a "very high" degree of confidence as such. What changed between April and May 2023 was not the feasibility of Micro-Tunnelling but, critically, Trans Mountain's desire to meet the new In-Service Date.

(b) May 25, 2023

53. During the meeting on May 25, 2023, Trans Mountain informed SSN that the previously discussed technical “challenges” in its drilling program would delay the completion of Micro-Tunnelling until February or March 2024. At no point during this meeting did Trans Mountain state that Micro-Tunnelling was no longer a viable option in the Pípsell (Jacko Lake) Corridor. Rather, Trans Mountain stated that, due to certain financial obligations, it requires the Project’s In-Service Date to be January 1, 2024, and that continuing to employ Micro-Tunnelling would threaten the In-Service Date. More specifically, Trans Mountain stated:

We’ve come to a conclusion that we aren’t going to be successful in completing that tunnel in time to meet the requirements and bring this project online. And, at this point in time, bringing the project online is something that we need to do. The executive made that clear, the board of directors made that clear. It’s an expectation of ... the contracts we have in place. There are triggers around financial obligations that Trans Mountain has that it needs to have that line of service and the direction has been that it needs to be mechanically complete by the end of this year. Even the challenges we’re having at Pad 1, which we shared with you and we are continuing to have.... We’ve had to look at contingencies to bring the project in on time... we’ve been meeting with executive ... over the last month or so... and it was made clear to us very, very recently that we are really down to having no other choice but to move to a different form of construction ... (emphasis added).

54. For these reasons, Trans Mountain informed SSN of its assessment that Micro-Tunnelling is likely infeasible for the remainder of the proposed drilling program in the Pípsell (Jacko Lake) Corridor. However, despite this concern, Trans Mountain proposed several alternative open trench options at this meeting that each included a proposed timeline that extended beyond the In-Service Date, either wholly or in part as a possible timeline range.
55. Prior to the May 25, 2023 meeting, Trans Mountain had not communicated to SSN its intentions to meet an In-Service Date of January 1, 2024. Each of Trans Mountain’s Project construction schedules that were previously shared with SSN contemplated an In-Service Date after January 1, 2024. This aligns with information available in Trans Mountain’s 2022 and 2023 Management Reports, which contemplate that commercial service for the Project would occur sometime in the first quarter of 2024.³
56. SSN is deeply concerned by Trans Mountain’s unilateral decision to impose a January 1, 2024 deadline on the Project, with significant knock-on effects of this decision to SSN,

³ See Trans Mountain’s Management Report for Year End 2022 and Trans Mountain’s Management Report for Q1 2023, which are appended to these written submissions as Appendix “J” and Appendix “K”.

without communicating this information to SSN prior to May 2023. Trans Mountain now relies on the risk of higher Project costs overall arising from the current construction timeline as a primary reason that Micro-Tunnelling is no longer viable. This is particularly concerning given the timeline of engagement between Trans Mountain and SSN from 2019 to 2021 that details Trans Mountain's delays in conducting meaningful work to plan Micro-Tunnelling in collaboration with SSN. In SSN's view, the financial obligations of Trans Mountain in relation to the overall Project are not – and cannot be – a sufficient reason for the CER to accept that Micro-Tunneling is no longer a viable method of construction in the remaining portion of the Pípsell (Jacko Lake) Corridor.

57. Following the meeting on May 25, 2023, SSN and Trans Mountain exchanged several letters regarding Trans Mountain's commitments to complete Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor. In these letters, SSN identified its serious concerns regarding Trans Mountain's commitments to Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor. Trans Mountain communicated that it had not confirmed that it intends to complete Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor given its current Project timeline concerns.

(c) June 14, 2023

58. On June 14, 2023, Trans Mountain's technical team arranged a meeting with SSN to share what it characterized as new and relevant information regarding the technical and economic feasibility of Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor. At this meeting, Trans Mountain notified SSN that:
- a. Micro-Tunnelling is no longer Trans Mountain's "preferred" means of completing construction through the Pípsell (Jacko Lake) Corridor due to a potential delay of the In-Service Date;
 - b. Trans Mountain would require an approval from the CER to deviate from its current Micro-Tunnelling plans for the remaining route within the Pípsell (Jacko Lake) Corridor to pursue trenched construction methods and would seek SSN's support for the Deviation Application; and
 - c. Trans Mountain's preference to proceed with trenched construction for the remaining work is directly connected to the speed at which it prefers the work to be completed to meet its unilaterally imposed In-Service Date.
59. The language used by Trans Mountain concerning its "preferred" means of completing construction is of note. It is not clear that Trans Mountain is unable to complete construction using Micro-Tunnelling, only that it will be more costly than expected and may delay the In-Service Date. This is further evident in paragraphs 21 through 23 of the Deviation Application, where Trans Mountain does not state that Micro-Tunnelling cannot be completed, only that the costs are higher than anticipated and that technical challenges *could* hinder pipeline installation and cause delay to the In-Service Date. Moreover, Trans

Mountain's emphasis on increased costs relates to the In-Service Date rather than the costs directly related to implementing Micro-Tunnelling. The In-Service Date is not about construction in the Pípsell (Jacko Lake) Corridor but refers to the Project as a whole.

60. The delays and higher costs that Trans Mountain faces must be held up against both its own conduct and the significant and irreparable harm to SSN's cultural and spiritual rights from surface disturbances in the Pípsell (Jacko Lake) Corridor, in particular given that Micro-Tunnelling remains a viable method of construction (although one that Trans Mountain may not "prefer").
61. On June 16, 2023, following the meeting on June 14, SSN sent Trans Mountain a letter stating that SSN provided its free, prior, and informed consent in entering the MBA, and then supported Trans Mountain's Previous Deviation Application specifically to ensure the protection of the Pípsell (Jacko Lake) Corridor through Micro-Tunnelling. SSN informed Trans Mountain that SSN members continue to have significant concerns about impacts to the Pípsell (Jacko Lake) Corridor and will not accept the partial fulfillment of Trans Mountain's obligation to use Micro-Tunnelling.

(d) July 6, 2023

62. At the leadership meeting with SSN Joint Council and Trans Mountain on July 6, 2023, Trans Mountain provided an update on its construction progress and stated that it is no longer possible, in its opinion, to complete construction using Micro-Tunnelling due to its concerns regarding the technical challenges and the impact on the Project completion. As noted above, on July 6, 2023, Trans Mountain's President and CEO, Dawn Farrell, stated: "If we could turn back the clock and we could have started [Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor] two or three years ago, which is like everything at Trans Mountain, we would have the time to finish this." Given the delays by Trans Mountain between 2019 and 2021 that have materially contributed to the current Project timelines with respect to the Pípsell (Jacko Lake) Corridor, SSN found this comment deeply troubling.
63. At the meeting on July 6, 2023, SSN reiterated that it opposed any disturbance or destruction of the land in the Pípsell (Jacko Lake) Corridor, as it would violate SSN's sacred and legal obligations to protect its ancestors. SSN also reiterated that rehabilitation of the land would not remedy the initial damage of disturbing the land on this sacred site.
64. Given the above, Trans Mountain's Deviation Application does not represent a collaborative process between SSN and Trans Mountain. SSN has significant concerns regarding the Deviation Application, its inconsistency with what SSN previously supported in respect of the construction methods in the Pípsell (Jacko Lake) Corridor, and the potential impacts of this deviation on the Pípsell (Jacko Lake) Corridor.

4. SSN'S ASSESSMENT THAT MICRO-TUNNELLING REMAINS A VIABLE CONSTRUCTION METHOD

4.1 Review of Trans Mountain's Proposed Construction Methodologies

65. As noted above, following negotiations and Trans Mountain's feasibility assessment, Micro-Tunnelling was determined to be the optimal trenchless construction method to be used for the entirety of the Pípsell (Jacko Lake) Corridor. At paragraph 23 of the Deviation Application, Trans Mountain states that it has determined that its "only feasible option" is to change the construction methodology to a combination of HDD and conventional open trench ("**COT**") in order to complete construction within the final 1.3-kilometre segment of the Pípsell (Jacko Lake) Corridor.
66. For SSN, both HDD and COT are unacceptable construction methodologies in the Pípsell (Jacko Lake) Corridor, as both would cause significant and irreparable damage and disturbance to this sacred site in direct contravention of Secwépemc law. In fact, as will be addressed below, SSN's technical team and subject matter experts ("**SSN SMEs**") identified high risks in the risk matrix for HDD. HDD and COT are not the only viable construction methods, nor are they the "only feasible option".
67. In paragraph 23 of the Deviation Application, Trans Mountain expresses that Micro-Tunnelling would be completed in approximately 80% of the approximately four-kilometre Pípsell (Jacko Lake) Corridor. SSN entered the MBA with Trans Mountain and subsequently withdrew its opposition to the Project to ensure the protection of the Pípsell (Jacko Lake) Corridor *in its entirety*. SSN does not consent or support Trans Mountain only fulfilling 80% of its obligation to undertake Micro-Tunnelling as previously approved by the CER.
68. Throughout all of SSN and Trans Mountain's discussions and interactions, and until August 8, 2023, Trans Mountain had not provided details to SSN that would establish how the currently approved Micro-Tunnelling was not feasible in light of any reasonable technical or geological challenges that could meet the standards that were agreed to in the MBA for deviation from the use of the agreed-to Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor.
69. On August 9, 2023, Trans Mountain wrote to SSN Joint Council confirming that Trans Mountain had determined that Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor was no longer technically or economically feasible, citing and listing "significant technical challenges and geotechnical hazards we have encountered during construction within the [Pípsell Area] and the accompanying construction delays" and "continued inability to overcome these geological impediments in a timely and predictable way". The specific and technical details purportedly supporting this determination are set out in these written submissions and are reproduced below:

- a. Trans Mountain is encountering significant technical issues with the micro-tunnel drive between pads 1 and 2, which is one of the longest micro-tunnel drives that has ever been attempted in a hard rock formation anywhere in the world with the type of micro-tunnelling boring machine (“**MTBM**”) that Trans Mountain is using (known as the AVN2000).
- b. The geotechnical hazards we are encountering include boulders and bedrock that result in high tooling breakage rates, which is a type of condition specifically referenced in Schedule “D” of the MBA.
- c. This micro-tunnel drive has been particularly difficult with abnormal upward migration of the Reinforced Concrete Jacking Pipe (“**RCJP**”) that has substantially limited the ability to apply jacking force to the MTBM (from 1400 tons to 300 tons).
- d. As a result, RCJP deflection at the joints has increased over time as Micro-Tunnelling has progressed and is expected to increase until it results in RCJP joint failure before the end of the micro-tunnel drive.
- e. As RCJP joint deflection increases, the risk of losing watertight seal and/or damage to the RCJPs also increases and properly inserting new RCJPs becomes more difficult and, at some point, impractical. It also makes it impossible to ultimately insert the product pipe through an RCJP, which would need to be done in order for this segment to be completed using Micro-Tunnelling.

70. In the letter dated August 9, 2023, Trans Mountain went on to say:

The continued inability to overcome these geological impediments in a timely and predictable way has created an extraordinary financial impediment which makes continued trenchless construction not “Technically Feasible”. These technical challenges have also resulted in construction costs that are unreasonably in excess of the costs normally associated with trenchless construction which makes continued trenchless construction “Economically Infeasible”. This scenario is exactly what was contemplated by the parties under the MBA in providing the right for Trans Mountain to determine that trenchless construction is not feasible.

71. As set out below, SSN disagrees that trenchless construction in the Pípsell (Jacko Lake) Corridor is not feasible in the manner contemplated by the parties under the MBA. Accordingly, SSN submits that Micro-Tunnelling remains a viable construction option for the remaining portion of the Pípsell (Jacko Lake) Corridor.

4.2 Micro-Tunnelling Remains a Viable Construction Option in the Pípsell (Jacko Lake) Corridor

72. Throughout July 2023, SSN SMEs and SSN Joint Council responded to Trans Mountain's requests for engagement through timely requests for information, diligent desktop review, a site visit on July 27, 2023 in areas of Micro-Tunnelling at "Pad 6" and the tunnel from "Pad 1" to "Pad 2", and through continued correspondence on this matter. SSN SMEs have not identified any reasonable concerns referenced by Trans Mountain at the meeting on July 6, 2023, or in its subsequent correspondence on August 9, 2023, that would demonstrate that Micro-Tunnelling is no longer viable, or that would rise to the technical thresholds mutually agreed to in the MBA relating to the feasibility of Micro-Tunnelling. Further, SSN has been informed that work on this site has been moved to a 24-hour a day schedule and that tunnelling is forecasted to resume on August 26, 2023.
73. In relation to geotechnical challenges that arose, and to maintain progress with Tunnel Drive #2 (referred to as "**TD2**"), Trans Mountain suggested a mitigation strategy that included moving the MTBM downstream of the "humping" issue they had encountered (the "**Humping Issue**"). On short notice, SSN sent SSN SMEs and an SSN knowledge keeper to review the new footprint required for Pad 6/Shaft-6. As there were no features identified in the new footprint, the additional land was utilized to extend Pad 1 and create "Pad 6". The intent of Pad 6/Shaft-6 was purely to mitigate the Humping Issue encountered by Trans Mountain and their tunneling contractor. SSN reacted quickly to the request to disturb another footprint of land so that Micro-Tunneling could proceed as quickly as possible.
74. As stated above, SSN submits that the financial obligations of Trans Mountain in relation to the Project *as a whole* are not – and cannot be – a sufficient reason for the CER to accept that Micro-Tunneling is no longer a viable method of construction in the remaining portion of the Pípsell (Jacko Lake) Corridor.
75. Furthermore, after conducting a thorough review, SSN SMEs have concluded that:
 - a. Micro-Tunnelling was selected by Trans Mountain as the best alternative to ensure the protection of this sacred area;
 - b. There have been no insurmountable issues reported to date to change this construction methodology selection; and
 - c. There have been no surprise geological or hydrological issues found.
76. In support of the above, and as requested by the CER on August 16, 2023, appended to these written submissions as Appendix "**D**" is a document prepared by the SSN SMEs titled "Debrief for Canada Energy Regulator in relation to Pípsell/Jacko Lake Area Micro Tunneling Assessment" ("**SME Report**"). The SME Report includes reports produced through SSN SME desktop assessment review leading to their assertion that Micro-

Tunnelling remains a viable construction option, information regarding who conducted the desktop assessment review, and SSN's comments on Trans Mountain's characterization of their engagement with SSN regarding the proposed deviation.

Trans Mountain Previously Raised Serious Concerns Regarding HDD Feasibility

77. Contrary to what is stated in the Deviation Application, HDD and COT are not the "only feasible option[s]" to complete construction within the Pípsell (Jacko Lake) Corridor. This is evidenced through the information found in the SME Report, as well as through concerns raised by Trans Mountain itself.
78. In fact, when HDD was previously put forward to SSN as an alternative to COT, it was rejected on the basis of the amount of ground disturbance it would cause.
79. In a presentation from Trans Mountain titled "Jacko Lake, March 2021" regarding construction methodologies within the Pípsell (Jacko Lake) Corridor ("**Jacko Lake Presentation**"), appended to these written submissions as Appendix "E", Trans Mountain stated the following:
 - a. "HDD will need a drag section of equivalent length to that of the bore hole to be accommodated inside the permitted Corridor."
 - b. "Slope along drag sections: Problematic from technical and safety perspectives."
 - c. "Contingency plans in case of failure: In the event HDD failed, open cut is typically considered as the contingency plan."
 - d. "HDD within the bedrock is considered to have **moderate to high risk of failure** of completion of the bore" (emphasis in original). (Note: The new proposed alignment is ~300 m shorter than proposed in 2021.)
 - e. "HDD crossing of this feature is feasible but difficult to construct, mostly due to the potential to encounter highly fractured bedrock at depth." (Note: HDD depths remains the same for new drill path.)
 - f. "Subsurface conditions ... present potential issues for coating integrity for HDD installation."
 - g. "Cobbles and fractured bedrock along the hole can become dislodged during pullback operations, introducing foreign objects into the drill path which may cause coating damage."
 - h. "Once the pipe coating is damaged during HDD installation thus starting the pipe corrosion process."

80. A geotechnical assessment prepared by Thurber Engineering Ltd. for Trans Mountain, dated June 15, 2023 (“**2023 Thurber Report**”), appended to these written submissions as Appendix “**F**”, stated:
- a. “Consequently, the main concern with faulting in the area is with respect to constructability of the trenchless crossing which could be affected by drilling fluid losses and/or instability of drill hole walls due to fracturing of the rock or presence of weak gouge material.”
 - b. “If an entry pit is not excavated to bedrock, surface casing will likely need to extend far enough to provide a seal with the bedrock.” (Note: Drill path 23/05/11 does not show entry pit.)
 - c. “Outside of the entry and exit areas, the majority of the drill path is anticipated to be within diorite bedrock ... The possibility exists of encountering highly fractured zones, faults and joints along the drill path. HDD within the bedrock is considered to have low to moderate risk of failure of completion of the crossing. Based on the above, it is anticipated that an HDD crossing of this feature is feasible but potentially difficult to construct, mostly due to the potential to encounter highly fractured bedrock.”
81. Drawing from the Jacko Lake Presentation and the 2023 Thurber Report, SSN SMEs prepared the following geotechnical comments, appended in report form to these written submissions as Appendix “**G**”:
- a. Both documents describe HDD construction as feasible but difficult to construct. The 2023 Thurber Report states that HDD within bedrock is considered to have low to moderate risk of failure. However, it concludes that HDD is feasible but difficult to construct, mostly due to the potential to encounter highly fractured bedrock.
 - b. The Jacko Lake Presentation states that HDD construction within bedrock is considered to have a moderate to high risk of failure. Contingency plans would be required, and typically COT would be considered as contingency plan.
 - c. HDD installation may also negatively affect the coating integrity. Fractured bedrock may lead to coating damage and subsequently to pipe corrosion.
82. SSN notes that despite Trans Mountain’s statement at paragraphs 20 and 21 of the Deviation Application concerning the significant technical challenges presented with the use of Micro-Tunnelling over the remaining tunnel length to be constructed, Trans Mountain’s proposed use of HDD would present similar challenges and risks of delaying the mechanical completion date. While both micro-tunnelling and HDD are trenchless construction methods, micro-tunnelling would allow for underground crossings that minimize disturbances to a range of areas, including sensitive environmental areas such

as the Pípsell (Jacko Lake) Corridor by efficiently drilling narrow underground tunnels. HDD is not suitable for use in such areas because it would still result in significant areas of disturbance to account for the construction of the pipe. COT methods are also unsuitable due to their requirement that the land be opened for the placement of the pipe within the trench.

83. From the outset, SSN has repeatedly stated that such disturbance within the Pípsell (Jacko Lake) Corridor (as would be caused by HDD or COT) is unacceptable. Indeed, this particular concern was the very reason SSN and Trans Mountain entered into the MBA and SSN withdrew its objections to the detailed route.

Inconsistencies in Trans Mountain's Response to the CER's Information Request

84. On August 17, 2023, the CER sent Trans Mountain an information request in respect of the Deviation Application (C25931) ("**Information Request No. 1**"). On August 23, 2023, Trans Mountain filed its response to Information Request No. 1 (C25972) ("**Information Request Response**"). SSN notes that the Information Request Response contains various contradictions or errors as detailed below.
85. On page 2 of the Information Request Response, Trans Mountain states: "The Indigenous Monitors who will be responsible for monitoring work in this area are SSN members, have first-hand knowledge of the area, and are subject matter experts on Pípsell and its cultural significance. The Indigenous Monitors also have an important reporting responsibility as the direct link back to the community they represent, and a role to engage Trans Mountain on any new issues or concerns, as necessary." SSN Indigenous Monitors are not "subject matter expert[s] on Pípsell"; the subject matter experts are the SSN knowledge keepers. Moreover, the presence of Indigenous Monitors onsite to watch the disturbance or destruction of the remaining portion of the Pípsell (Jacko Lake) Corridor in no way ameliorates the harm of the disturbance or destruction itself. SSN submits that the fact of having Indigenous Monitors or knowledge keepers available to monitor the construction process is irrelevant as SSN does not support or consent to the deviation from Micro-Tunnelling.
86. On page 2 of the Information Request Response, Trans Mountain states: "Trans Mountain notes that implementation of the HDD for approximately 450 m of the length of the deviation will avoid ground disturbance and consequently minimize impacts to the environment and cultural and heritage resources in that area." According to SSN SMEs, it is not accurate to report that implementation of HDD will "avoid ground disturbance". On the contrary, HDD will result in significant areas of disturbance to account for the construction of the pipe. Furthermore, the contingency plan for HDD will be COT, which, in the event on a contingency, would cause significant – and, in SSN's view, unacceptable – ground disturbances.

87. On page 3 of the Information Request Response, Trans Mountain states: “The proposed construction footprint for the deviation interacts with a single archaeological site, EdRc-68, and Trans Mountain confirms it will avoid the entirety of this archaeological site.” This classification of the “construction footprint” is one-dimensional, colonial, and inaccurate. It fails to understand the significance of the Pípsell (Jacko Lake) Corridor as a whole, rather than just a single site within the Pípsell (Jacko Lake) Corridor.
88. The cultural and spiritual significance of the Pípsell (Jacko Lake) Corridor cannot be artificially limited to a single archaeological site. To SSN, the land is sacred, and the land *as a whole* is the source of Secwépemc law. In SSN’s view, the entire Pípsell Area is a sacred site; it’s sacredness is not limited to discrete archaeological sites as narrowly defined within the provincial legislative framework under the *Heritage Conservation Act*⁴. Furthermore, there are *two* culturally significant features close to the area of disturbance. A burial mound identified by SSN’s knowledge keeper is less than ten metres from a temporary work space for the HDD. There is also a directional tree identified by the same SSN knowledge keeper that is within the footprint an extra work space for the COT area.
89. On page 6 of the Information Request Response, Trans Mountain states: “If Trans Mountain is successful in completing the intermediate jacking shaft (Shaft-6) described in b), and the proposed deviation is not approved by [CER], Trans Mountain would seek to restart tunnelling operations and employ mitigation as required to address any new challenges that are experienced with the tunnelling. For the reasons described below, however, completing this tunnel drive is considered high risk even if the intermediate jacking shaft (Shaft-6) is successfully completed.” SSN SMEs note that Shaft-6 is substantially complete⁵ and, as such, there is no need to discuss risks associated with shaft installation.
90. On page 6 of the Information Request Response, Trans Mountain states: “There remains a risk that the force required to progress the tunnel may be greater than the RCJP design force. If this occurs, the Project team will review the situation with the stamping engineers to determine if an increased load can be safely applied on the RCJP. A Trans Mountain review of risks and a consensus would be required to proceed due to the increased risk of damage to the RCJP. In this situation, damage in the form of cracking or breaking of the concrete pipe would be catastrophic and could render the tunnel drive incompletable”. SSN SMEs note that this was expected and does not create a new or additional risk. In any event, commencement of tunnelling is scheduled soon.
91. On page 7 of the Information Request Response, Trans Mountain states:
- In addition to the extensive tunnel length of 1,312 m (longest drive on Jacko Lake Major Trenchless Program and one of the longest hard rock

⁴ Appendix “L”, Tab 4, *Heritage Conservation Act*, RSBC 1996, c 187.

⁵ On August 28, 2023, SSN SMEs advised SSN that there is no definitive anticipated completion date due to fires in the area.

drives ever completed by an AVN2000), the tunnel profile features a significant elevation difference of more than 60 m between the deepest part of the drive and surface. This height difference creates an incremental risk as a large static head pressure would be applied on both the feed line and slurry return line. If a breakage were to occur, the system would be shut off, and the system would hydrostatically balance. There is an inherent risk of potential leaks or breakage in the lines that may flood the MTBM, causing significant damage to the electrical and controls and resulting in the need for extensive repair and recommissioning of the equipment. Potential mitigation at this location may be to install isolation valves at each slurry pump and feed pump with appropriate controls to shut down the valves quickly to limit the volume of release in the tunnel. This mitigation would require weeks of additional schedule delay (procurement lead time and installation) associated with installation of 20 or more gate valves and modification of the lines inside.

92. SSN SMEs notes that Trans Mountain reviewed other MTBM options together with the manufacturer. The AVN2000 was selected by Trans Mountain's contractor. Trans Mountain cannot now complain about their own choices in an attempt to justify the Deviation Application.
93. On page 7 of the Information Request Response, Trans Mountain states: "The risk assessment completed for the HDD portion of the deviation concludes that the proposed HDD is low to low-medium risk. The formations identified within the geotechnical report are suitable for HDD installation methodologies. As a result, Trans Mountain has a reasonably high degree of confidence that HDD installation in this area will be successful."
94. As stated above, this is contrary to what Trans Mountain said in the Jacko Lake Presentation, as well as what was recently reported in the 2023 Thurber Report, which was prepared for Trans Mountain.
95. The Information Request Response also contains conjecture that SSN submits constitutes an insufficient basis upon which the CER can decide that Micro-Tunnelling is no longer a viable option within the remaining portion of the Pípsell (Jacko Lake) Corridor.
96. At page 4 of the Information Request Response, Trans Mountain states: "If the construction of the new shaft is successful and the tunnel commences forward progression, there remains approximately 800 metres of tunnel length to be constructed in medium to hard rock formations (with the potential to encounter other unfavourable construction conditions), which has its own material risk to the project and schedule."
97. SSN SMEs note that combined COT and HDD construction would create much greater ground disturbance, due to the length of COT section as well as required laydown space

for pipe insertion into the HDD bore. On a technical level, the proposed HDD Execution Plan states that the “drilling in formations (i.e., diorite bedrock) like this can lead to increased drilling times, increase the wear on the [Bottom Hold Assembly, i.e., the drill bit], and have an affect on the efficiency of downhole tooling.” It appears that there is a risk of potential HDD failure, given the description of the HDD contractor. The proposed HDD Execution Plan is appended to these written submissions as Appendix “H”.

98. Furthermore, the potential to encounter unfavourable construction conditions, and material risk to the Project and Project schedule as a whole, are not sufficient to conclude that that Micro-Tunnelling is no longer a viable option within the remaining portion of the Pípsell (Jacko Lake) Corridor, nor do they satisfy the definitions under the MBA that would justify Trans Mountain’s determinations as to feasibility.

Addressing Other Technical Issues Raised by Trans Mountain

99. Two other issues reported by Trans Mountain are:
- a. The Humping Issue downstream from Pad 1, which SSN SMEs conclude will be eliminated upon completion of the relocation of the thruster to Pad 6; and
 - b. Numerous mechanical issues on the tunnelling equipment, which SSN SMEs conclude will be minimized when the best of the equipment in the field is relocated to the drill in question, and when the best operators and mechanics are used for this drill.
100. Regarding the Humping Issue, during a technical meeting between Trans Mountain and SSN on April 27, 2023, where there was discussion around the mitigation methods to address the issue of the “humping” of the tunnel, SSN SMEs asked if Trans Mountain’s proposed methodology to relocate the pushing device to a new shaft (Pad 6) and continue the bore was likely to succeed, Trans Mountain’s trenchless expert stated that the likelihood to succeed was “very high. Because we are leaving the problem area behind us, we are not even trying to correct the [hump], we are just going to be putting a shaft at the downstream of that area...”
101. Regarding the mechanical issues on the tunnelling equipment, SSN SME Dr. Peter Uffman, an expert in pipe jacking and micro-tunnelling concluded: “due to the ability to replace the working equipment, this type of tunnelling equipment has no actual practical range issue, if the tunnel has many bends, then it gets challenging, but our tunnel is relatively straightforward. We just need to meet all the other criteria, i.e., well trained people”.

The Ground Conditions Are in Full Alignment with the Geotechnical Information Gathered Prior To Construction

102. Trans Mountain notes at paragraph 20 of the Deviation Application that it has “made several unsuccessful, costly attempts to address the problem of upward [Reinforced Concrete Jacking Pipe] migration to date”. On this issue, SSN SMEs concluded in a geotechnical report dated August 24, 2023, appended to these written submissions as Appendix “I”:
- a. During the pre-construction consultation with the micro-tunnelling machine manufacturer, the manufacturer advised that other machines would be available that are proven to complete longer drives in similar ground conditions. SSN SMEs were also advised that Trans Mountain’s contractor selected this MTBM based on their own reasons (availability, schedule, etc.). This argument can hardly be brought up to support termination of Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor.
 - b. Schedule “D” to the MBA includes coarse gravel, cobbles, and boulders as a potential geotechnical hazard but not bedrock. The SSN SMEs’ review of daily records did not identify significant impacts of coarse gravel, cobbles, or boulders on the micro-tunnelling progress. The main reason for slow progress appeared to be presence of hard rock, as well as use of reduced jacking force due to upward migration of the RCJP.
 - c. The current Stage 3 mitigation to prevent further upward migration (installation of Shaft-6) appears to be a feasible solution to prevent further RCJP deflection and associated negative impact on the micro-tunnel drive and pipe insertion. During the July 27, 2023 site visit, the contractor’s representatives expressed a high degree of confidence that they will be able to successfully complete the micro-tunnel drive within the proposed schedule.
 - d. Soft ground conditions were identified as probable cause of the upward tunnel migration. Since then, the MTBM has advanced into more consistent bedrock conditions. A repeat of the upward migration is therefore unlikely.
 - e. Although the upward migration of the tunnel is uncommon, the proposed mitigation appears to be a feasible solution to continue Micro-Tunnelling. Installation of Shaft-6 appears to be almost complete. It is acknowledged that the tunnelling difficulties incurred an economic impact. However, since mitigation measures are almost complete, this impact does not reasonably rise to the level of infeasibility as required under the MBA, and does not render Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor as no longer being a viable method of construction.
103. On the issue of “several unsuccessful, costly attempts to address the problem of upward ... migration”, SSN SMEs advise that there were two such attempts: bolting plates on

upper inside to stop pipe from spreading apart and adding weight to inside of pipe to add downward pressure to stop pipe from lifting. SSN further notes that this assessment of “costly” is vague and must not be accepted by the CER without evidence to support it.

104. SSN SMEs concluded that ultimately the tunnel boring contractor should advise whether Micro-Tunnelling can successfully be completed. Based on the document review conducted by SSN SMEs, the ground conditions encountered appear to be in full alignment with the geotechnical information gathered prior to construction, which resulted in selection of the MTBM used.

Conclusion on the Continued Viability of Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor

105. SSN SMEs concluded that Micro-Tunnelling remains a viable option within the Pípsell (Jacko Lake) Corridor. Micro-Tunnelling was chosen by Trans Mountain and its contractors as the best means for meeting the terms of the MBA, which itself was the means chosen for engendering SSN’s support for the Project. SSN SMEs concluded that there have been no insurmountable issues reported to date to change this construction methodology selection and there have been no surprise geological or hydrological issues found that would affect the viability of Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor.
106. Furthermore, Trans Mountain has not justified its claim that Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor is no longer economically viable. Trans Mountain has not provided an analysis of the cost of construction that would allow for the conclusion that continuing to implement Micro-Tunnelling for that discrete segment would require Trans Mountain to incur costs that are unreasonably in excess of the construction costs normally associated with Micro-Tunnelling. The CER should be cautious of accepting statements and determinations by Trans Mountain in the absence of clear evidence or analysis to support the same.
107. Trans Mountain’s desire to accelerate construction in the Pípsell (Jacko Lake) Corridor through the use of trenched construction methods is connected only to its preferred Project In-Service Date, which is contrary to the terms upon which SSN’s support for the Project was obtained. SSN again submits that the financial obligations of Trans Mountain in relation to the Project as a whole are not – and cannot be – a sufficient reason for the CER to accept that Micro-Tunneling is no longer a viable method of construction in the remaining portion of the Pípsell (Jacko Lake) Corridor. Despite SSN’s best efforts to work with Trans Mountain on addressing the construction methodology in the Pípsell (Jacko Lake) Corridor, Trans Mountain has proceeded to file the Deviation Application without SSN’s support or consent.
108. Given the above information, SSN submits that Trans Mountain has failed to sufficiently demonstrate that Micro-Tunnelling is no longer a viable method of construction in the

Pípsell (Jacko Lake) Corridor. This is demonstrated in paragraph 20 of the Deviation Application, where Trans Mountain notes only the difficulties – rather than the infeasibility – of continuing to use Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor. Rather, it is clear that construction in the Pípsell (Jacko Lake) Corridor can be completed using Micro-Tunnelling, as was previously approved by the CER. The reasons provided by Trans Mountain in the Deviation Application fail to meet the thresholds required for deviating from the agreed-to Micro-Tunnelling.

5. POTENTIAL IMPACTS OF THE DEVIATION APPLICATION

5.1 Cultural and Spiritual Impacts of HDD and COT Construction Methodologies in the Pípsell (Jacko Lake) Corridor

109. Any form of open trench construction in the Pípsell (Jacko Lake) Corridor will result in significant and irreparable harm to SSN culture and the spiritual integrity of the Pípsell (Jacko Lake) Corridor.
110. In 2019, a Crown Consultation and Accommodation Report concluded there was “up to a moderate impact on title” from using open trench construction in the Pípsell (Jacko Lake) Corridor. In its 2019 SOO, SSN strongly disagreed that the “digging up of a cultural heritage site contrary to the land use decisions SSN set for the Pípsell Area amounts to a “moderate” impact on title” (C01501). SSN maintains this position in relation to the current Deviation Application. SSN also raises concerns about the standards of consultation, accommodation and free, prior, and informed consent that are required in the current legal landscape following the royal assent of the federal *United Nations Declaration on the Rights of Indigenous Peoples Act* (“**UNDA**”).⁶
111. In paragraph 25 of the Deviation Application, Trans Mountain minimizes the cultural and spiritual significance of the revised route, stating that,
- while there is one registered archaeological site and two culturally modified trees within the Revised Route, they will be protected and avoided to ensure there are no impacts to them. Trans Mountain has worked directly with SSN to identify and avoid such sites, including site visits with SSN leadership and various shovel tests over the years from 2016 to present. Construction of the [Project] along the Revised Route will not have any impacts on other registered archaeological sites or site-specific [traditional land use] interactions.
112. This is not the first time Trans Mountain has attempted to minimize the spiritual and cultural importance of the Pípsell Area. On September 19, 2017 (A86135) and November

⁶ Appendix “L”, Tab 5, *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

7, 2017 (A87628), on the detailed route hearing in respect of the Project, SSN filed letters with the CER in response to Trans Mountain's reply and information request response.

113. In the letter dated September 19, 2017, SSN asked for the CER to request Trans Mountain to revise certain issues outlined in an appendix to its information request response as related to SSN. In particular, SSN took issue with Trans Mountain's mischaracterization of the Pípsell Area as "a culturally significant area" that "provides sustenance for SSN", when SSN stated (in great detail) in its 2017 SOO (A82838) that the Pípsell Area is a "cultural keystone place and sacred, spiritual, and historical site" (emphasis in original). Accordingly, SSN asserted that Trans Mountain was oversimplifying the Pípsell Area's significance and importance to SSN, also pointing out that the Pípsell Area has been declared a cultural heritage site by the larger Secwépemc Nation.
114. In the Deviation Application, Trans Mountain is once again, when before the CER, attempting to minimize or downplay the critical and sacred nature of the Pípsell (Jacko Lake) Corridor. For two critical reasons the CER ought to reject Trans Mountain's pattern of minimizing what, why, and how areas in and round the Pípsell Area need protection.
115. First, as expanded on below, Trans Mountain is not the party best placed to characterize and determine the spiritual, legal, political, and cultural significance of the Pípsell Area: SSN is. In fact, SSN has the inherent, internationally, and domestically recognized right of self-determination to do just that.
116. Second, and as demonstrated by the geotechnical assessment above, such a characterization fails to accurately reflect the reality of the issue. This minimization is despite Trans Mountain's previous, explicit, and repeated acknowledgments (in settings other than the CER) of the sacred and historical significance of the Pípsell Area, both generally and to SSN in particular. For example, on July 6, 2023, in a meeting with SSN Joint Council, Dawn Farrell acknowledged the historical and cultural significance of the Pípsell Area not just to SSN but to Canadians at large:

What do we really have to do to ensure that we respect the cultural significance of Pípsell? Because it's important for your children and it's important ... for all of us to have the legacy of that area in Canada and for hopefully Canadians to start to understand what that area means because ... the Canadians that I interact with don't understand the importance of what happened here, they don't understand the thousands of years of history ... the cultural groups that lived here, the way that people lived their lives ... and certainly we are learning as we are getting all of these artifacts organized just how vibrant the life is and how much of a mystery that is to most Canadians so finding a way to use what Trans Mountain has done to start to bring that awareness is an important part of this as well.

117. Trans Mountain also states at paragraph 20 of the Deviation Application that, due to its mitigation measures, “Trans Mountain is confident that its proposed combination of HDD and conventional open trench construction will allow Trans Mountain to reasonably avoid or minimize impacts on the Lands”. Trans Mountain’s statements directly contradict the substantial evidence that SSN has provided to Trans Mountain and the CER about the cultural and spiritual significance of the Pípsell (Jacko Lake) Corridor in relation to the Project (C01501), and the irreparable harm that would occur from open trench construction methodologies. Trans Mountain’s position on the effects of open trench construction in the Pípsell (Jacko Lake) Corridor also fails to account for SSN’s perspective on the cultural and spiritual impacts as is required under the Crown’s obligations under section 35 of the *Constitution Act, 1982* as determined by the Supreme Court of Canada in *Van der Peet*.⁷

5.2 Violation of SSN’s Rights as Recognized and Affirmed Under UNDRIP

118. The requirement to consider SSN’s perspective on the cultural and spiritual impacts to the Pípsell (Jacko Lake) Corridor – and not simply rely on Trans Mountain’s assessment – is also required by UNDRIP, and applicable to the CER and its decisions in respect of the Project, pursuant to UNDA.
119. The right to self-determination is considered the founding principle of Indigenous peoples’ rights and the central guiding principle of UNDRIP.⁸ Given the right to self-determination, Indigenous peoples are best positioned to determine whether and how a project or ‘measure’ affects them. In this way, any assessment necessarily requires the perspectives of the Indigenous peoples concerned.⁹ Trans Mountain’s assessment of the impacts of open trench construction in the Pípsell (Jacko Lake) Corridor ignores and contradicts SSN’s perspective and violates requirements under UNDA.
120. Further, the Deviation Application, which has been submitted to the CER without SSN’s support or consent, contravenes the rights guaranteed to SSN in UNDRIP, which guarantees that Indigenous peoples:
- a. have the right to practice and revitalize their cultural traditions and customs, including the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts ... (Article 11); and

⁷ Appendix “L”, Tab 2, *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*].

⁸ Appendix “L”, Tab 5, Schedule to UNDA, Article 3. Many provisions in UNDRIP relate to the right to participate in decision-making, highlighting the centrality and importance of this right, including Articles 3-5, 10-12, 14, 15, 17-19, 22, 23, 26-28, 30-32, 36, 38, 40 and 41.

⁹ This is further bolstered by Appendix “L”, Tab 5, Schedule to UNDA, Article 27, which requires the Province to give due recognition to Indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources.

- b. have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites ... (Article 12).

121. Importantly, the rights guaranteed in UNDRIP constitute the *minimum* standards for the survival, dignity and well-being of Indigenous peoples, including Secwépemc peoples.¹⁰
122. As Crown corporations and agents of the Crown, Trans Mountain and the CER (respectively) owe Indigenous communities a constitutional duty to consult and accommodate.¹¹ The CER acknowledges it holds “Crown consultation responsibilities as part of project reviews for new pipeline, power line, or offshore renewable energy projects, as well as for activities it regulates throughout the life of a project.”¹² Trans Mountain similarly acknowledges its obligations to consult and accommodate, stating that it will “[c]arry out Trans Mountain’s legal requirements as a regulated company under the [CER] jurisdiction to engage with and mitigate, where necessary, where there are any Project impacts on the assertion of Indigenous rights and title governing traditional and cultural use of the land and marine environment.”¹³
123. Both the CER and Trans Mountain must therefore meet the Crown’s constitutional obligations to consult *and accommodate* SSN.
124. The passing of UNDA promised to usher in a new era of transformed relationship between the federal Crown and Indigenous peoples in an effort to “shift to the recognition of rights as the basis for relations with Indigenous peoples.”¹⁴
125. Section 4(a) of UNDA states that the legislation’s purpose is to “affirm [UNDRIP] as a universal international human rights instrument with application in Canadian law.” Further, the preamble of UNDA states both that “the Government of Canada recognizes that all relations with Indigenous peoples must be based on the recognition and implementation of the inherent right to self-determination, including the right of self-government,” and “[UNDRIP] is affirmed as a source for the interpretation of Canadian law.”
126. The Royal Assent of UNDA reflected a collective shift in our understanding of Indigenous rights and a shift in the context in which Crown duties toward Indigenous Nations are viewed. In its preamble, UNDA condemns and proclaims as legally invalid “all doctrines, policies and practices based on or advocating the superiority of peoples or individuals on

¹⁰ Appendix “L”, Tab 5, Schedule to UNDA, Article 43.

¹¹ Appendix “L”, Tab 1, *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40.

¹² Appendix “L”, Tab 6, CER, “Crown Consultation,” online: <https://www.cer-rec.gc.ca/en/consultation-engagement/crown-consultation/>

¹³ Appendix “L”, Tab 8, Trans Mountain, “Indigenous Peoples” online: <https://www.transmountain.com/indigenous-peoples>

¹⁴ Appendix “L”, Tab 7, Department of Justice Canada, *Directives on Civil Litigation involving Indigenous Peoples* (2018) at page 3.

the basis of national origin or racial, religious, ethnic or cultural differences, including the doctrines of discovery and *terra nullius*".

127. In other words, any policy or practice that, in whole or in part, fails to begin from a place that affirms and upholds SSN's rights of self-determination and self-governance – including, specifically, policies and practices of Crown corporations *and* Crown regulators – has no legal basis and therefore does not accord with the rule of law.
128. UNDA applies the standards of UNDRIP to the Crown's relations with Indigenous peoples and its interpretation of Canadian law. In other words, in exercising its delegated authority pursuant to the *Canadian Energy Regulator Act*, UNDA requires the CER to adopt robust positions that are imbued by, and are founded in a meaningful affirmation of, the rights to self-determination and self-governance. Practically speaking, this means:
 - a. ensuring that SSN's views on construction methodology, as an expression of self-governance, are meaningfully and adequately considered and incorporated by the CER. SSN's agreement to Micro-Tunnelling and its support of the Previous Deviation Application were an exercise of SSN's self-governance and an embodiment of SSN's spiritual and political rights to oversee and protect its lands and resources, which must be respected;
 - b. rejecting Trans Mountain's characterization or classification of harm and impacts to the Pípsell (Jacko Lake) Corridor. Trans Mountain has no legal authority under Canadian, international, or Secwépemc law to opine on the harm that will occur if Micro-Tunnelling is abandoned in the remainder of the Pípsell (Jacko Lake) Corridor in favour of other methods of construction;
 - c. holding Trans Mountain, as a federal Crown corporation, to the highest possible standards, and requiring Trans Mountain to act with the utmost integrity and accountability with respect to Indigenous peoples. This means requiring Trans Mountain to found each of its claims in reliable and probative evidence, and, where necessary, to prioritize reconciliation over economic goals; and
 - d. recognizing and respecting Secwépemc jurisdiction and Yeri7 re stsqey's-kucw (SSN's legal tradition) in the process of determining issues relating to SSN lands and territories.
129. UNDA also requires that the Crown obtain Indigenous peoples' free, prior, and informed consent in relation to projects or measures that would affect their lands:
 - a. Art. 19: States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them;

- b. Art. 26: Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired; and
 - c. Art. 32(2): 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.
130. UNDA is a statutory signal of a paradigm shift of how Crown actors interact with Indigenous peoples. Accordingly, the application of UNDRIP through UNDA requires both Trans Mountain and the CER to meaningfully seek to support SSN's right to self-determination and self-governance in respect of decisions in the Pípsell Area. Trans Mountain has not met this standard.

5.3 Undermining SSN's Jurisdiction and Obligations to the Land

131. SSN asserts an existing Aboriginal right to self-determine and self-govern, which means continuing to operate within SSN's own governance model. While SSN has agreed to participate in the CER processes over the course of the Project, these processes do not represent traditional SSN decision-making.
132. SSN asserts jurisdiction through its own traditional decision-making process. Importantly, *the land is the source* of SSN's laws, legal orders, and jurisdiction. Therefore, open trench construction or HDD with significant ground disturbance would impact SSN's jurisdiction over their territory and their obligations to the land under Yerí7 re stsqéys-kucw (SSN's legal tradition). The ability to make decisions to preserve the Pípsell Area from further destruction or disruption is integral to SSN's jurisdiction, legal authority, and its exercise of SSN's Aboriginal title and rights, including the right to make decisions to preserve this cultural heritage area for future generations. Preventing SSN from fulfilling its obligations in respect of the Pípsell (Jacko Lake) Corridor is equivalent to a loss of governance and a loss of stewardship for this area. This is a violation of Yerí7 re stsqéys-kucw, SSN's section 35 rights and title, as well as SSN's rights as recognized and affirmed by Articles 3 and 4 of UNDRIP, which recognize the rights of self-determination and self-governance.

6. CONCLUSION AND ORDER SOUGHT

133. Trans Mountain's Deviation Application is, in SSN's view, a breach of the very terms and conditions that led to SSN's support of the Previous Deviation Application. Were it not for the commitments Trans Mountain made to use Micro-Tunnelling in the Pípsell (Jacko Lake) Corridor, SSN would not have withdrawn its 2019 SOO. Approving the Deviation Application within this context and history would be akin to giving Trans Mountain a backdoor to evade its constitutional, statutory, and contractual obligations to SSN in

relation to its construction of the Project in the Pípsell (Jacko Lake) Corridor. An approval in the current circumstances would also mean moving forward with construction without SSN's support or consent. This would certainly fall below the standards required to meaningfully pursue and achieve reconciliation between SSN and Canada.

134. For the reasons described above, SSN requests that the CER reject the Deviation Application and hold Trans Mountain to the conditions outlined in the Previous Deviation Application. For greater certainty, this means requiring Trans Mountain to complete Micro-Tunnelling in the remaining portion of the Pípsell (Jacko Lake) Corridor.

7. MITIGATION STRATEGIES PROPOSED SHOULD THE CER APPROVE THE DEVIATION APPLICATION

135. In the letter from the CER dated August 16, 2023 (C25914), the CER has requested SSN propose mitigation strategies that are beyond that identified by Trans Mountain in the Deviation Application and the Information Request Response, in the event the CER approves the Deviation Application.
136. SSN respectfully submits that should Trans Mountain be granted the ability to abandon Micro-Tunnelling for the remaining portion of the Pípsell (Jacko Lake) Corridor, there are no conceivable mitigation strategies for the significant and irreparable harm to SSN that will occur as a result of HHD or COT construction in the Pípsell (Jacko Lake) Corridor.
137. As a result, should the CER approve the Deviation Application, the only mitigation that SSN can support and consent to is to re-route the Project around the Pípsell (Jacko Lake) Corridor to Highway 5 to avoid the Pípsell (Jacko Lake) Corridor altogether. As the CER is aware, this was SSN's proposed mitigation during the detailed route hearings previously conducted by the CER in respect of the Project (see C01501).
138. For all the reasons described above in these written submissions, SSN has maintained the position from the beginning of the Project that the Pípsell (Jacko Lake) Corridor was not the proper route because of potential for significant and irreparable harm to SSN's culture and the spiritual and legal integrity of the Pípsell (Jacko Lake) Corridor. As set out in numerous previous filings with the CER,¹⁵ should the CER approve the Deviation Application, re-routing remains the only proposed mitigation supported and consent to by SSN.

8. PROCEDURAL CONSIDERATIONS

139. In addition, in light of the above and the complexity of the matter, SSN requests the CER:

¹⁵ See e.g., A82838 and C01501.

- a. leave open the possibility that further information requests may be required following the receipt of these written submissions and Trans Mountain's reply, which is due to be filed on August 31, 2023; and
- b. grant additional time for an oral hearing date in order to properly prepare, particularly in light of the statutory holiday on September 4, 2023.

All of which is respectfully submitted this 28th day of August, 2023.



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