



Canada Energy Regulator Régie de l'énergie du Canada

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20 October 2023

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Dear Dorothy Golosinski, Sander Duncanson, and Joelle Walker:

**Trans Mountain Pipeline ULC
Trans Mountain Expansion Project
Certificate of Public Convenience and Necessity OC-065
Application pursuant to section 211 of the *Canadian Energy Regulator Act*
Segment 5.3 – Pípsell (Jacko Lake)
Reasons for decision**

**Before: K. Penney, Presiding Commissioner; M. Watton, Commissioner;
S. Luciuk, Commissioner**

1 DECISION

On 10 August 2023, Trans Mountain Pipeline ULC (**Trans Mountain**) filed an application ([C25832](#)) pursuant to section 211 of the *Canadian Energy Regulator Act* (**CER Act**) for approval of a deviation on lands between Kilometre Post (**KP**) 851.60 and KP 852.95 in Segment 5.3 of the Trans Mountain Expansion Project (**TMEP**), which appear on Plan, Profile and Book of Reference (**PPBoR**) Sheet M002-PM03011-014 (**Deviation Application**).

Trans Mountain also requested relief, pursuant to subsection 211(3) of the CER Act, from the requirement to deposit the certified PPBoR before constructing the deviation.

Stk'émłúpsemc te Secwépemc Nation (**SSN**) opposed the deviation located in the Pípsell area of British Columbia, which includes Jacko Lake and surrounding areas (**Pípsell Area**). The Pípsell Area holds profound spiritual and cultural significance to SSN. Specifically, SSN sought to minimize surface disturbances in the approximately 4-kilometre-long corridor near Pípsell (Jacko Lake) [**Pípsell Corridor**].

On 25 September 2023, the Commission of the Canada Energy Regulator approved the Deviation Application ([C26318](#)), including Trans Mountain's request made pursuant to subsection 211(3) of the CER Act, and issued Order AO-003-OPL-003-2020 reflecting this approval. The Commission took the exceptional step of issuing its decision with reasons to

follow with a view to providing scheduling and practical certainty to both parties, regardless of the outcome.

This letter provides the Commission's reasons and is organized as follows:

- Section 2** Background regarding the TMEP regulatory process and the Pípsell Area
- Section 3** Deviation Application overview
- Section 4** Deviation Application process
- Section 5** Written and oral submissions received by the Commission
- Section 6** Views of the parties and the Commission's analysis and findings
- Section 7** Conclusion

2 BACKGROUND REGARDING THE TMEP REGULATORY PROCESS AND THE PÍPSELL AREA

Section 2 has two key purposes. The section provides an overview of the TMEP's regulatory background leading up to the August 2023 Deviation Application, starting in December 2013 with the National Energy Board's¹ [NEB] consideration of Trans Mountain's application for the TMEP. It also provides the context within which the Deviation Application has been considered, including a summary of the Pípsell Area and its spiritual and cultural significance to SSN.

The Commission's adjudication of the Deviation Application is the latest regulatory process through which the TMEP, including its routing, has been considered by the Commission (and the NEB before it). As described below, each successive regulatory step has generally involved a narrower focus and scope, both in terms of the issues considered and geographical extent.

2.1 The TMEP's approval via the OH-001-2014 and MH-052-2018 proceedings

The NEB established the OH-001-2014 proceeding to consider Trans Mountain's 16 December 2013 application for the TMEP. The proceeding involved over 1,600 participants (intervenor and commenters), with participation by Indigenous² Peoples (including SSN), businesses, communities, landowners, individuals, and non-government and government organizations.

The OH-001-2014 proceeding informed the NEB's recommendation to the Minister that the TMEP and its general pipeline corridor³ were in the public interest.

¹ On 28 August 2019, pursuant to the *Canadian Energy Regulator Act*, the National Energy Board was replaced with the Canada Energy Regulator. The National Energy Board's adjudicative work has been transferred to the Commission of the Canada Energy Regulator.

² The use of the term "Indigenous" has the meaning assigned by the definition of "aboriginal peoples of Canada" in subsection 35(2) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, which states:

In this Act, **aboriginal peoples of Canada** includes the Indian, Inuit and Métis peoples of Canada.

³ The TMEP pipeline corridor refers to the general, wider pipeline route between Edmonton, Alberta and Burnaby, British Columbia within which Trans Mountain conducted studies to determine the potential impacts of the TMEP and its proposed mitigation to minimize those impacts.

The NEB's recommendation report OH-001-2014, issued on 19 May 2016 ([A77045](#)) addressed a broad range of topics and issues, including the need for the project and its economic feasibility, potential impacts on Indigenous Peoples, potential impacts on the environment, emergency preparedness and response, pipeline and facility integrity, and the adequacy of consultation.

The Governor in Council approved the TMEP and its general pipeline corridor on 29 November 2016. The NEB issued Certificate of Public Convenience and Necessity (**Certificate**) OC-064 in December 2016 and then conducted various post-approval processes.

On 30 August 2018, the Federal Court of Appeal set aside the Governor in Council's decision to approve the TMEP⁴ and the NEB's TMEP regulatory work was paused. The following month, the Governor in Council directed the NEB to reconsider certain aspects of the TMEP related to marine shipping and the NEB did so through the MH-052-2018 proceeding. On 18 June 2019, following that proceeding and after Canada reinitiated consultation with potentially affected Indigenous Peoples, the Governor in Council once again approved the TMEP and its general pipeline corridor, subject to 156 conditions aimed at, among other things, minimizing potential impacts of the TMEP. Subsequently, on 21 June 2019, the NEB issued Certificate OC-065 ([C00061](#)).

2.2 Detailed route determinations

After the approval of a general pipeline corridor in a certificate hearing, the Commission must approve the precise location of the pipeline within that corridor (referred to as the detailed route). The company illustrates those details, along with landowner information, on a series of filed PPBoR sheets containing overview maps and elevation profiles of particular tracts of land within the route.

In 2016-2018, the NEB held several detailed route hearings, including one requested by SSN. However, after SSN's detailed route hearing concluded but before the NEB issued its decision, the Federal Court of Appeal set aside the TMEP's approval, as described above.

On 19 July 2019, the NEB issued decisions on how it would resume the TMEP's post-approval regulatory processes ([C00593](#)). The NEB directed Trans Mountain to refile its PPBoR for the entire TMEP route and to publish notices showing the location of the detailed route and explaining how to seek a detailed route hearing by filing a Statement of Opposition. Trans Mountain was required to serve these notices on landowners and the NEB provided notices with similar information to potentially affected Indigenous Peoples. If a valid Statement of Opposition was received, a detailed route hearing was set down specific to the relevant tract(s) of land of interest.

In accordance with section 203 of the CER Act, detailed route hearings examine only three issues:

- 1) The best possible detailed route of the pipeline (that is, the exact placement of the pipeline on the tract[s] of land that it crosses).
- 2) The most appropriate methods of constructing the pipeline.
- 3) The most appropriate timing of constructing the pipeline.

⁴ *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153.

The TMEP detailed route hearing processes did not revisit or alter the approved pipeline corridor or reconsider matters already addressed during the larger Certificate proceedings.

Trans Mountain filed its PPBoR for Segment 5 (parts of which are at issue in this Deviation Application) on 31 July 2019 ([C00798](#)), including PPBoR Sheets M002-PM03011-014 and 015. On 5 September 2019, in accordance with the process set out by the NEB, SSN filed a Statement of Opposition ([C01501](#)). SSN's Statement of Opposition pertained to, among other lands, the entirety of the TMEP detailed route in Segment 5.3. On 30 October 2019, SSN and Trans Mountain executed a Mutual Benefits Agreement in respect of the TMEP. On 4 November 2019, SSN withdrew their Statement of Opposition, stating that they no longer wished to participate in the detailed route process ([C02680](#)) and that Trans Mountain had addressed their pipeline route concerns.

Via Order OPL-003-2020 dated 30 April 2020 ([C06126](#)), the Commission approved various PPBoR sheets (and the route depicted on them) in Segments 3, 4, and 5.3, including PPBoR Sheets M002-PM03011-014 and 015 in Segment 5.3 (**Original Route**).

2.3 Deviations

Once a PPBoR sheet is approved, the route depicted on it is considered final and the company may begin construction along that portion of the route, subject to requirements that the PPBoR be deposited at a land registry office and that the company meets all applicable condition requirements. However, a company may determine that a change to the route within the approved pipeline corridor is required. In such cases, a company must apply for a deviation pursuant to subsection 211(1) of the CER Act, which states:

211 (1) If a deviation is required by a company to be made in a pipeline, or a part of a pipeline, that has been constructed or for which a detailed route has been approved, a plan, profile and book of reference of the part of the pipeline proposed to be changed, showing the deviation proposed to be made, must be submitted to the Regulator for the approval of the Commission.

The main issues considered and decided in a Certificate proceeding and detailed route hearings are generally not reconsidered by the Commission in its review of a deviation application. Rather, the Commission, as an expert regulatory tribunal, determines whether the deviation is required pursuant to section 211 of the CER Act. The onus is on the applicant to persuade the Commission that a deviation is required.

The Commission's consideration of a deviation application must also take into account section 56 of the CER Act, which creates a statutory duty for the Commission to consider any adverse effects that its decision may have on the rights of the Indigenous Peoples of Canada, recognized and affirmed by section 35 of the *Constitution Act, 1982*.

On 11 February 2022, Trans Mountain filed an application ([C17686](#)) pursuant to section 211 of the CER Act for a deviation on lands between KP 851.5 and KP 856.12 appearing on PPBoR Sheets M002-PM03011-014 and 015 (**2022 Revised Route**). The 2022 Revised Route was aimed at minimizing surface disturbances in the Pípsell Area. Trans Mountain proposed this route to accommodate a change in construction methodology from conventional open trench to micro-tunnelling for approximately 4.2 kilometre (**km**). Trans Mountain submitted that it developed the 2022 Revised Route collaboratively with SSN. Trans Mountain also indicated that, in January 2022, SSN consented to the 2022 Revised Route and proposed construction methodology. The Commission approved the 2022 Revised Route via Order AO-001-OPL-003-2020 dated 28 February 2022 ([C17990](#)).

Trans Mountain noted that the revised route proposed in its 10 August 2023 Deviation Application, which is limited to KP 851.60 and KP 852.95 in Segment 5.3 (**2023 Revised Route**), would result in approximately 1.3 km of the pipeline following the alignment of the Original Route approved by the Commission in April 2020. SSN opposed the Deviation Application due to the impacts it would have on the Pípsell Area.

2.4 Pípsell

SSN stated that Pípsell means “trout-place” in the Secwépemc language. Pípsell, including the Pípsell Corridor and the broader surrounding Pípsell Area, holds profound spiritual and cultural significance to SSN. Since time immemorial, Secwépemc have had an ancestral, cultural, and spiritual connection to the Pípsell Area. The Secwépemc exercise cultural and spiritual rights in and throughout the Pípsell Area, which is a cultural keystone place for them. The Pípsell Area is associated with deep spiritual values, is critical to the community’s identity and well-being, is part of their seasonal round, and is a source of Secwépemc laws and governance. The Pípsell Area was and is a place for the long-term planning for protection of the territory, healing, trade, spiritual ceremonies, and burial. Protecting the Pípsell Area is SSN’s legal and spiritual obligation.

So Pípsell is extremely important to us. The whole area is extremely important, and when you're walking along the land, there are other sacred places that will show themselves and that will be refound. [...] They've been there since time immemorial. And they need to be with us, and they need to be there. They need to be looked after. When you remove everything from there, you can't put it back exactly. And it would be detrimental to our people and especially to our future generations.

Jeanette Jules, SSN Knowledge Keeper, Transcript Volume 1, PDF page 36 of 158

SSN submitted that the unique position of the Pípsell Area in the ecology and cultural resource harvesting pursuits of SSN, and its close proximity to the main Stk’emlúpsemc settlement at Tk’emlups, 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. In the recent and more remote past, SSN people from Tk’emlups considered the area important for gathering medicinal plants and berries, fishing for trout and kokanee, and hunting.

SSN submitted that the precise location of the Pípsell Area is known to them through the Secwépemc way of knowing – stsq’eyu’lecw (that which is “marked on the land”) and is recorded in the Trout Children stsptékwll, or Trout Children Story. The Trout Children Story encapsulates and expresses SSN’s connection to the Pípsell Area. It also sustains Secwépemc law about conduct on the land and reciprocal accountability to living beings on the land, across generations, and within generations.

3 DEVIATION APPLICATION OVERVIEW

This section provides a high level overview of Trans Mountain’s Deviation Application. **Section 6** summarizes the parties’ views regarding the substantive issues raised and provides the Commission’s analysis and findings with respect to those issues.

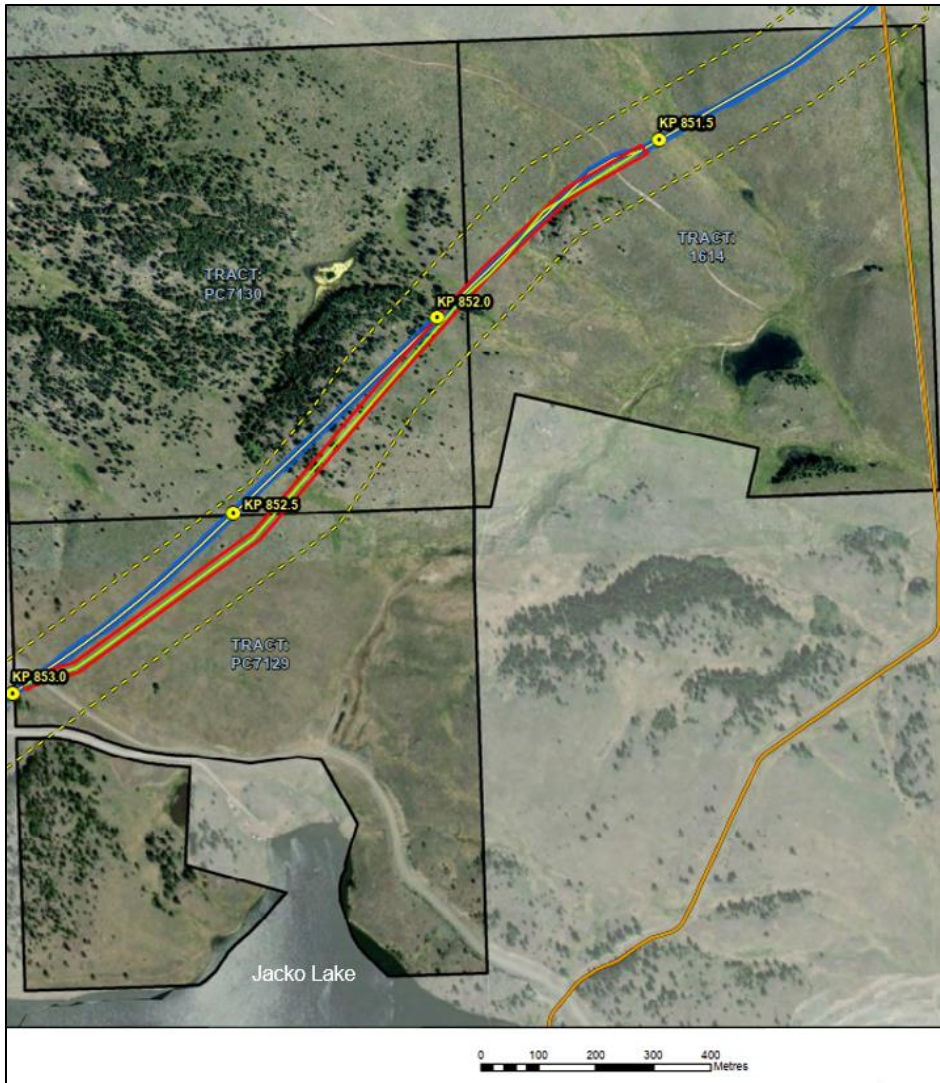
3.1 Location and lands

As noted above, the deviation is limited to lands between KP 851.60 and KP 852.95 in Segment 5.3 of the TMEP. The 2023 Revised Route is approximately 1.3 km long and located entirely within the approved pipeline corridor on privately owned land, specifically

Tracts 1614 and PC 7130 (both owned by KGHM Ajax Mining Inc.) and Tract PC 7129 (owned by Sugarloaf Ranches Limited). Similar to the 2022 Revised Route, the 2023 Revised Route is located in the Pípsell Area. The 2023 Revised Route does not traverse Jacko Lake itself. As noted in **Section 2.3**, approximately 1.3 km of the TMEP route would revert back to the alignment of the Original Route.

Figure 1 depicts the difference between the 2022 Revised Route (in blue) and the approximately 1.3-km-long 2023 Revised Route/Original Route (in red). The general pipeline corridor approved by Certificate OC-065 is represented by the hatched yellow lines.

Figure 1 – Difference between the 2022 Revised Route and the 2023 Revised Route/Original Route



Source: [C25832-3](#) (PDF page 1 of 5)

3.2 Rationale

Trans Mountain submitted that the deviation is required to accommodate a change in construction methodology – from micro-tunnelling to a combination of horizontal directional drilling (**HDD**) and conventional open trench – due to significant technical challenges encountered with micro-tunnelling along a portion of the 2022 Revised Route.

As the layout in **Figure 2** illustrates, Trans Mountain's original micro-tunnelling plans along the 2022 Revised Route involved four tunnel drives between five pads along a 4.2-km-long section of the TMEP in the Pípsell Area.⁵

The 1.3-km-long tunnel drive located between Pad 1 and Pad 2 (**Tunnel Drive #2**), which is the subject of the Deviation Application, experienced upward migration of the reinforced concrete jacking pipe⁶ (**RCJP**), limiting the ability to apply jacking force to the micro-tunnel boring machine⁷ (**MTBM**). Trans Mountain submitted that it has made several unsuccessful, costly attempts to address the problem of upward RCJP migration.

Trans Mountain indicated that continuing to pursue Tunnel Drive #2 would extend the TMEP's mechanical completion date and could hinder successful pipeline installation in this area. It added that every month of delay results in significant increased construction costs well beyond initial cost estimates for micro-tunnelling, as well as costs and impacts to various third parties who are relying upon the TMEP's timely completion.

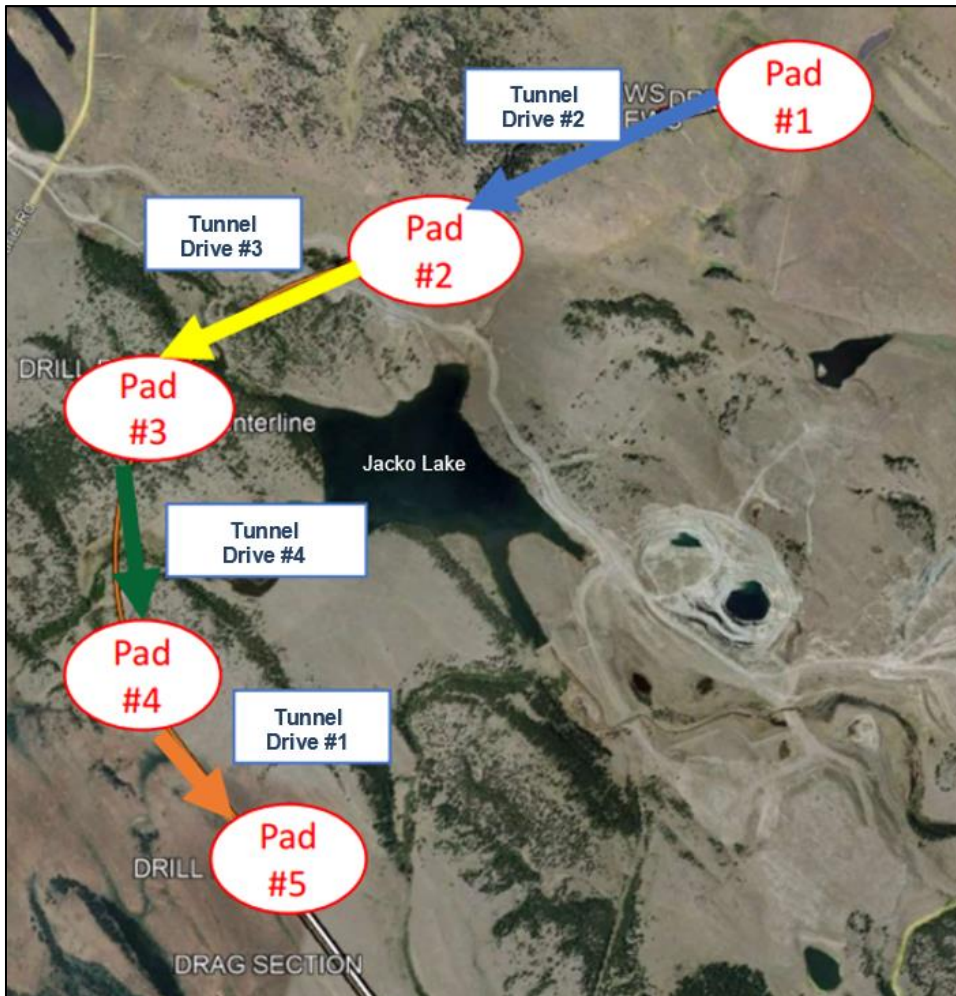
Trans Mountain did not request route changes in respect of Tunnel Drives #1, #3, or #4 as it anticipated successfully completing micro-tunnelling along these 2.9 km (combined) of the 2022 Revised Route.

⁵ A pad is the area needed for safe construction during pipe laydown and for storing equipment and other materials.

⁶ Reinforced concrete jacking pipe are sections of concrete pipe that are installed piece by piece. They are designed to withstand the combined effects of external and internal loads during pipeline construction and operations.

⁷ A micro-tunnel boring machine is used to construct small underground tunnels using a drilling mechanism (or cutting head) to remove soil or rock.

Figure 2 – Micro-tunnelling tunnel drive and pad layout along the 2022 Revised Route



Source: [C26152-3](#) (PDF page 2 of 12)

3.3 Engagement with respect to the 2023 Revised Route

3.3.1 Impacted landowners

The 2023 Revised Route is located on fee simple lands owned by KGHM Ajax Mining Inc. and Sugarloaf Ranches Limited. Trans Mountain engaged these impacted landowners with respect to the 2023 Revised Route. On 29 June 2023, these landowners confirmed to Trans Mountain that they have no concerns about the 2023 Revised Route and no objection to its regulatory approval. Trans Mountain confirmed that it served notices on these landowners regarding the 2023 Revised Route, pursuant to subsection 322(1) of the CER Act.

3.3.2 SSN

The 2023 Revised Route is located within SSN's traditional territory. Trans Mountain provided details of its engagement with SSN regarding the TMEP in the Pípsell Area for the period between 18 October 2019 and 9 August 2023, including engagement regarding the technical challenges identified with micro-tunnelling and Trans Mountain's proposed change in construction methodology and route location.

Trans Mountain confirmed that SSN expressed concerns, on multiple occasions, about deviating from entirely trenchless construction methods in the Pípsell Corridor.

3.3.3 Other Indigenous communities

On 4 August 2023, Trans Mountain provided written notice of the 2023 Revised Route to the following Indigenous communities whose traditional territories overlap both the 2022 Revised Route and the 2023 Revised Route:

- Adams Lake Indian Band
- Ashcroft Indian Band
- Boston Bar First Nation
- BC Métis Federation
- Coldwater Indian Band
- Cook's Ferry Indian Band
- Lower Nicola Indian Band
- Métis Nation British Columbia
- Neskonlith Indian Band
- Nicomen Indian Band
- Nlaka'pamux Nation Tribal Council
- Nooaitch Indian Band
- Scw'exmx Tribal Council
- Shackan Indian Band
- Siska Indian Band
- Skeetchestn Indian Band
- Spuzzum First Nation
- Tk'emlups te Secwépemc
- Whispering Pines / Clinton Indian Band

Trans Mountain stated that, with the exception of the First Nations constituting SSN (Tk'emlups te Secwépemc and Skeetchestn Indian Band), none of the Indigenous communities listed above raised concerns regarding the 2023 Revised Route.

3.4 Effects assessment and mitigation

In accordance with the Filing Manual, Trans Mountain addressed the potential environmental and socio-economic effects associated with the deviation and stated that they are similar to those already addressed in its application for the TMEP and related filings. Trans Mountain stated that no new studies would be required and that no new mitigation measures are recommended beyond those established through the OH-001-2014 and MH-052-2018 Certificate proceedings and subsequent condition compliance filings, which are incorporated within the updated Pipeline Environmental Protection Plan (**EPP**) for the TMEP (filed under Condition 72 of Certificate OC-065).

Trans Mountain expressed confidence that its suite of proven mitigation measures to avoid or minimize potential environmental, traditional land use, and cultural impacts, as well as its proposed combination of HDD/conventional open trench construction, would reasonably avoid or minimize impacts on the lands impacted by the 2023 Revised Route. Trans Mountain submitted that even with the deviation, it was confident that approximately 80 per cent of construction within the approximately 4.2-km-long Pípsell Corridor would be completed using trenchless construction.

3.5 Compliance-related information

With respect to complying with existing regulatory requirements, Trans Mountain's 15 June 2021 filing for Condition 74 of Certificate OC-065 addressed its Noise Management Plan for HDD sites with no nearby dwellings, which includes the proposed HDD site near KP 853. The Commission approved this filing on 1 October 2021 ([C15201](#)). Accordingly, Trans Mountain submitted that no additional Condition 74 filing is required for the Deviation Application.

Trans Mountain also submitted that, consistent with the Commission's direction when issuing Order AO-001-OPL-003-2020 with respect to the 2022 Revised Route, it would file updated alignment sheets reflecting the 2023 Revised Route. The Commission notes that Trans Mountain satisfied this commitment by filing an updated environmental alignment sheet on 23 August 2023 ([C25972-5](#)) and an updated engineering alignment sheet on 29 September 2023 ([C26365](#)) reflecting the 2023 Revised Route and related change in construction methodology.⁸

3.6 Relief from the requirement to deposit the certified PPBoR before construction

Trans Mountain requested relief, pursuant to subsection 211(3) of the CER Act,⁹ from the timing requirement in subsection 211(2) that would require it to register the certified PPBoR in advance of constructing the deviation.¹⁰ Trans Mountain submitted that its request for an exemption from the timing requirements of subsection 211(2) benefits a public purpose by allowing Trans Mountain to avoid further TMEP construction delays. In addition, Trans Mountain indicated that the centre line for the deviation is located at a maximum distance of 60 metres (m) from the centre line of the route shown in the approved PPBoR depicting the 2022 Revised Route.

Trans Mountain submitted that as soon as possible following the Commission's approval (if granted), it would deposit the certified PPBoR as required under paragraph 198(d) of the CER Act.¹¹

The Commission granted the requested relief in its 25 September 2023 decision. The Commission finds that the deviation does not exceed a distance of 60 m from the centre line of the pipeline as approved and that the relief from this requirement benefits a public purpose for the reasons described in these reasons. Trans Mountain filed confirmation on 27 September 2023 ([C26333](#)) that it deposited certified Order AO-003-OPL-003-2020 and

⁸ The updated engineering alignment sheet was filed after the Deviation Application record closed and the Commission issued its decision. That filing is an administrative matter and has been referenced here for completeness.

⁹ Subsection 211(3) states:

(3) The Commission may exempt a company from all or any of the provisions of this section if the deviation was made or is to be made for the purpose of benefitting a pipeline, or for any other public purpose, if it considers it appropriate to do so, but the deviation must not exceed the distance that is specified by the Commission from the centre line of the pipeline located or constructed in accordance with the plans, profiles and books of reference approved by the Commission under this Act.

¹⁰ Subsection 211(2) states:

(2) If the plan, profile and book of reference of the part of the pipeline proposed to be changed have been approved by the Commission, and copies have been deposited as provided in this Act with respect to the original plan, profile and book of reference, the company may make the deviation, and all the provisions of this Act are applicable to the part of the pipeline, as changed or proposed to be changed, in the same manner as they are applicable to the original pipeline.

¹¹ Paragraph 198(d) states:

Except as otherwise provided in this Act, a company must not begin the construction of a section or part of a pipeline unless

...

(d) copies, certified by the Regulator, of the approved plan, profile and book of reference have been deposited in the land registry office or other office where title to land is recorded for the area through which the section or part of the pipeline is to pass.

revised PPBoR Sheet M002-PM03011-014 with the Land Title and Survey Authority of British Columbia on 26 September 2023.¹²

4 DEVIATION APPLICATION PROCESS

This section describes the process established by the Commission for the Deviation Application.

On 12 July 2023, SSN filed a letter ([C25495](#)) with the Canada Energy Regulator (**CER**), indicating that they were aware of Trans Mountain's plans to file a deviation application. SSN highlighted the importance of the Pípsell Area and noted that Trans Mountain's engagement on the substance of the forthcoming application had been limited. SSN stated that they were not in a position to assess whether they could support the deviation and confirmed that they would be requesting additional information from Trans Mountain prior to undertaking an analysis to determine their position.

Trans Mountain filed its Deviation Application on 10 August 2023, requesting an expedited decision from the Commission (by no later than 21 August 2023) to allow Trans Mountain to proceed with construction at the earliest possible date and maintain its anticipated construction schedule in the Pípsell Area.

On 16 August 2023, the Commission established a hearing process ([C25914](#)), which included steps for the Commission to ask written information requests (**IRs**) of Trans Mountain, for SSN to file written submissions, and for Trans Mountain to file reply submissions. The Commission also reserved 6 September 2023 as a possible oral hearing day, noting that Trans Mountain would be expected to attend in person, while SSN would have the option of attending in person or virtually. The Commission indicated that it established the steps and deadlines with a view to providing SSN a fair opportunity to provide their submissions, taking into account Trans Mountain's engagement with SSN in advance of the regulatory process and the urgency of Trans Mountain's request.

In their 28 August 2023 written submissions ([C25999](#)), SSN requested that the Commission leave open the possibility of further IRs following SSN's written submissions and Trans Mountain's reply submissions. SSN also requested that the Commission delay the 6 September 2023 oral hearing date to allow the parties to properly prepare.

On 30 August 2023, the Commission issued a letter ([C26015](#)) confirming that an oral hearing day would be held and delaying (and expanding) the oral hearing dates to 14-15 September 2023 (reserving 18 September 2023 as a possible third day). The Commission also set out procedures and guidance for the oral hearing. In addition, the Commission added a step for the parties to ask IRs of each other and indicated that it would ask IRs of SSN and additional IRs of Trans Mountain.

On 8 September 2023 ([C26131](#)), SSN requested that the Commission move the oral hearing to 18-19 September 2023 to accommodate the availability of their cultural heritage expert and Knowledge Keeper. SSN indicated that Trans Mountain agreed to the date change. The Commission granted SSN's request on 11 September 2023 ([C26148](#)) and moved the oral hearing to the requested dates.

¹² The Commission references the deposition of these documents, which occurred after the Deviation Application record closed and the Commission issued its decision, for completeness.

On 12 September 2023, SSN filed a letter ([C26175](#)) requesting that the Commission issue an order, pursuant to paragraphs 60(a) and (b) of the CER Act, that the entirety of the Mutual Benefits Agreement be filed on a confidential basis and not be made part of the public record. SSN advised that Trans Mountain agreed with filing the Mutual Benefits Agreement on a confidential basis, subject to mutually agreed-upon redactions of provisions containing financial figures. The Commission granted SSN's request on 15 September 2023 ([C26229](#)).

On 13 September 2023, the Indigenous Caucus of the Indigenous Advisory and Monitoring Committee for the Trans Mountain Expansion and Existing Pipeline (**IAMC Indigenous Caucus**) filed a letter of comment ([C26190](#)). The IAMC Indigenous Caucus provided background information on the IAMC's design, purpose, and role in relation to the TMEP, as well as some of the Caucus' experiences in working as part of the IAMC.

Regarding the above-mentioned letter, the Commission did not set out a step for receiving letters of comment. Trans Mountain argued that the IAMC Indigenous Caucus' letter should be given no weight as it was untested and not adopted under oath. SSN argued that the Commission should consider the letter as the IAMC can serve in an advisory capacity to regulators pursuant to its terms of reference. The Commission recognizes the importance of the IAMC and its contributions toward advancing the protection of the environment and Indigenous interests in the lands and waters impacted by the TMEP. The Commission regularly receives and considers as appropriate, letters of comment, and the Commission has considered the IAMC Indigenous Caucus' letter of comment in this matter.

The oral hearing was held from 18-20 September 2023 in Calgary, Alberta and included oral Indigenous knowledge from Jeanette Jules, SSN's Knowledge Keeper, as well as cross-examination of witnesses and argument. While a hybrid hearing option was offered to the parties, all witnesses and counsel attended in person. Live audio and video feeds of each oral hearing day were broadcast on the CER's website and daily written transcripts were placed on the public registry.

5 WRITTEN AND ORAL SUBMISSIONS RECEIVED BY THE COMMISSION

The table below identifies all written and oral submissions received and considered by the Commission in this proceeding:

Date (2023)	Participant	Submission(s)	Filing ID
12 July	SSN	Pre-application letter	C25495
10 August	Trans Mountain	Deviation Application	C25832
23 August	Trans Mountain	Response to Commission IR No. 1	C25972
28 August	SSN	Written submissions	C25999
29 August	SSN	Refiled Appendix D to written submissions	C26001
31 August	Trans Mountain	Reply submissions	C26029
11 September	Trans Mountain	Response to Commission IR No. 2	C26152
	Trans Mountain	Response to SSN IRs	C26163
	SSN	Response to Trans Mountain IRs	C26157
	SSN	Response to Commission IR No. 1	C26156
13 September	SSN	Refiled response to Commission IR No. 1	C26182

Date (2023)	Participant	Submission(s)	Filing ID
	SSN	Refiled response to Trans Mountain IRs	C26183
	IAMC Indigenous Caucus	Letter of comment	C26190
15 September	SSN / Trans Mountain	Mutual Benefits Agreement	n/a (filed confidentially)
	Trans Mountain	Opening statement	C26228
18 September	SSN / Trans Mountain	<ul style="list-style-type: none"> Oral Indigenous knowledge Oral cross-examination of Trans Mountain 	C26250 (Transcript Volume 1)
	Trans Mountain	Corrections to response to Commission IR No. 2.3	C26240
19 September	SSN / Trans Mountain	Oral cross-examination of SSN	C26253 (Transcript Volume 2)
	Trans Mountain	Book of authorities	C26252
	SSN	Book of authorities	C26255
	SSN	Supplemental book of authorities	C26259
20 September	Trans Mountain	Corrections to 18 September 2023 transcript	C26261
	SSN / Trans Mountain	Oral argument	C26271 (Transcript Volume 3)
21 September	Trans Mountain	Corrections to 20 September 2023 transcript	C26276
22 September	Trans Mountain	Corrections to 19 September 2023 transcript	C26299

6 VIEWS OF THE PARTIES AND THE COMMISSION'S ANALYSIS AND FINDINGS

This section highlights views of the parties on the substantive issues raised with respect to the Deviation Application – related to engineering (**Section 6.1**), economics (**Section 6.2**), environmental and socio-economic effects (**Section 6.3**), and the rights and interests of Indigenous Peoples (**Section 6.4**) – and provides the Commission's analysis and findings regarding those issues.

6.1 Engineering

6.1.1 Views of Trans Mountain

6.1.1.1 MTBM selection

Trans Mountain's tunnelling contractor (Innovative Pipeline Crossings Inc./Bothar) recommended the MTBM AVN2000 for the four tunnel drives proposed for the Jacko Lake area. In a July 2021 report titled *Trenchless Sections Feasibility and Estimates for the Spread 5a – Jacko Lake Area Project, Kamloops, BC (Bothar Report)*, Bothar stated that based on the available geological information, two AVN2000 slurry-based machines with rock-cutting tools were proposed for the project. The decision regarding the MTBM selection

was also confirmed in consultation with Herrenknecht (the MTBM manufacturer) based on a project in Auckland, New Zealand (involving a 1 296-m-long micro-tunnel) as a case study. In that case, the geotechnical conditions were similar to the geotechnical findings and proposed plans to complete Tunnel Drive #2.

Trans Mountain stated that the MTBM selection also considered the importance to SSN of minimizing the size of the pads. Trans Mountain submitted that changing to a larger MTBM would have significantly increased the required size of the staging area. For example, an MTBM requiring segmental liner would require a staging area approximately 250 m long and 125 m wide (approximately 31 000 m²), or a six-fold increase compared to the area needed to deploy an AVN2000 (approximately 5 000 m²).

6.1.1.2 Technical challenges with micro-tunnelling

Trans Mountain started its geotechnical studies in the Pípsell Area in 2021, which ultimately led it to start micro-tunnelling by mid-2022. It stated that micro-tunnelling along Tunnel Drive #2 has been particularly difficult due to RCJP's upward migration – which Trans Mountain referred to as the “hump.” This has substantially limited the ability to apply jacking force to the MTBM (from 1,400 tons to 300 tons). The deflection at the RCJP connections has increased over time as micro-tunnelling has progressed, which has increased the risk of losing a watertight seal and/or damaging the RCJPs.

Trans Mountain submitted that there are currently three intermediate jacking stations (**IJS**) located within the tunnel, spaced approximately 120 to 140 m apart. IJSs are designed to provide jacking force to overcome the frictional resistance to pipe motion over the distance between them. IJSs have a capacity of up to approximately 1,427 tons.

Trans Mountain submitted that it was not able to implement any more IJS rings, in addition to the three IJSs already in place, as the induced bending between two concrete pipe joints was causing damage to the IJS. Further, if the tunnel trajectory is too far out of alignment, the bending radii imposed on the product pipe could be too tight and may add stress to the product pipe or potentially cause damage to the tunnel spacers.

6.1.1.3 Mitigation

Trans Mountain implemented a three-stage corrective plan to address the hump, with each stage being more invasive in nature and more impactful to the progress of tunnelling operations. The multi-stage approach was implemented to preserve or maintain tunnelling operations for as long as feasibly possible. Stage 3, which Trans Mountain was attempting at the time of filing its Deviation Application, required a complete shutdown of tunnelling operations.

The first mitigation (Stage 1) was invert flushing, in which Trans Mountain attempted flushing to remove the material from beneath the bottom of the RCJPs (the invert) at the hump location, with the intent that the pipes would come back down into alignment under their own weight. The anticipated result did not materialize as the bell and spigot joints of the RCJPs were able to provide sufficient support to maintain the RCJPs at their deformed position. As of 9 February 2023, Trans Mountain considered Stage 1 ineffective and paused tunnelling to implement Stage 2.

The second attempted mitigation (Stage 2) entailed using ballast weight installed within the tunnel to provide extra downward force to counter the resultant upward force from the jacking. The total installed ballast weight was 20 tons based on jacking forces at the time, with ballast being distributed from chainage 0+16 m to 0+20 m, or approximately over 4 to 5

concrete pipes. The ballast weight was able to mitigate further heave until 14 April 2023, at which point hump migration resumed and Trans Mountain decided to proceed to Stage 3.

The final attempted mitigation (Stage 3) involved installing an intermediate jacking shaft¹³ (**Shaft-6**) to bypass the hump by revising the jacking frame location. As a varying level of vertical deviation was identified over approximately the first 53 m of the tunnel drive, with the largest deviation noted over an approximately 20-m-long section, Shaft-6 is positioned roughly 60 m in front of Shaft-1. As such, Trans Mountain anticipates that approximately 53 m of the tunnel would be abandoned between Shaft-1 and Shaft-6, with conventional open trench being used as the construction method for this 53 m. As part of Stage 3, a full shutdown of tunnel progress was required as of 14 June 2023.

Trans Mountain submitted that Tunnel Drive #2 has taken longer than expected and faces serious technical risks that render the likelihood of successfully completing it as low.

6.1.1.4 Potential challenges after constructing Shaft-6

Trans Mountain submitted that the challenges faced with resuming micro-tunnelling include:

- avoiding damage to the RCJPs that it plans to leave in place and use in completing the tunnel;
- inducing vibration in the annular space around the existing RCJPs, which could compact the native materials and increase skin friction; and
- maintaining perfect alignment of the new shaft for the jacking forces to be applied in line with the existing tunnel alignment.

Trans Mountain stated that the MTBM and approximately 500 m of RCJP have been dormant since tunnelling stopped on 14 June 2023 to accommodate Shaft-6 construction. Shutting down tunnel progress and resuming tunnelling operations created risk related to restoring the annular space as it was anticipated that the bentonite in the annulus had drained off into the rock joints or had been diluted by the surrounding groundwater, causing degradation of the annular space. This was expected to increase the skin friction along the MTBM and the trailing RCJP, which in turn was expected to significantly increase the force required to restart the tunnel. Additional friction and applied force may result in high local stresses on the RCJP (especially at curved sections), potentially resulting in crack formation in the RCJP.

While there is no practical way to know or assess the extent of annular space deterioration, Trans Mountain calculated the following values:

- Jacking forces at main jacking station prior to shutdown = 950 tons
- Design capacity of main jacking station = 1,400 tons

For comparison purposes, Trans Mountain explained that Tunnel Drive #4 experienced a four-week period of inactivity earlier in summer 2023. Data from Tunnel Drive #4 suggests that before the stoppage, IJS 1, located approximately 60 m behind the MTBM, was able to

¹³ A shaft is an excavation into which the micro-tunnelling equipment is launched, accessed, driven, repaired, or recovered. Trans Mountain noted that all shaft numbers correspond with pad numbers, with exception of Pad 1 (Shaft-1 and Shaft-6).

advance the cutterhead using 400 tons. In addition, approximately 400 m of RCJP column were pushed ahead using 720 tons from the main jacking system.

Upon resuming tunnelling operations on Tunnel Drive #4, four weeks later, the jacking forces needed to advance the cutter wheel increased by 50 per cent to 600 tons. A combined jacking force of 1,400 tons (among the main jacking station, IJS 3, and IJS 2) was needed to advance the approximately 400-m-long concrete pipe column ahead. This indicated that the frictional force between the tunnel and the formation surrounding it had doubled during the period of inactivity.

Trans Mountain is unsure of the exact force required to restart Tunnel Drive #2 after suspending its forward progress. Based on the findings for Tunnel Drive #4, and due to the approximate four-month period of inactivity of Tunnel Drive #2, the jacking force required to advance the tunnel is expected to, at a minimum, double or triple that which was required for Tunnel Drive #4, to a total of 2,000 to 3,000 tons (approximately 4-6 tons/m). Trans Mountain would seek to apply the necessary force by opening and closing the IJSs located throughout the tunnel's length.

With a maximum of 140 m between adjacent IJSs, and approximately 1,427 tons available at each IJS, approximately 10 tons/m of thrust force is available to resume forward motion. This could be enough to overcome the skin friction if similar increases are seen as on Tunnel Drive #4. However, an average increase of one kilopascal (approximately 0.15 pounds per square inch) in the friction between the tunnel and the formation would render the tunnel immobile using the main jacking station. This condition is likely to occur following a long period of inactivity. If the frictional pressures on the concrete pipe cannot be overcome by the jacking equipment, the MTBM and tunnel pipe would not be able to progress forward.

In an August 2022 report prepared by Thurber Engineering Ltd. for Trans Mountain – titled *Spread 5A – SSEID 005-19 KP 851+600 to KP 856+000 Geotechnical Investigation for Micro-tunnelling Installation Jack Lake Area (2022 Thurber Report)* – it was noted that the highest rock strength (>250 megapascals [MPa]) in the entire Jacko Lake Program is estimated to be situated between chainages 0+500 m and 0+600 m of Tunnel Drive #2, with the balance of the tunnel drive in the 150 MPa range. The anticipated rock strength would take a significant toll on the main bearing and other key mechanical components of the MTBM, which is already displaying signs of wear and fatigue. In addition, Trans Mountain noted that, as an added issue, the MTBM has been inundated with water, which could add delays.

In concluding that continuing micro-tunnelling Tunnel Drive #2 has a high risk of failure, Trans Mountain cited the hump and associated annular space deterioration, the length of the drive, the nature of the rock (with the hardest rock still ahead), fatigue or wear noted in key mechanical components of the MTBM, and no clear way to access the MTBM for major repairs or replacement. These risks are present even if Shaft-6 is successfully completed. Trans Mountain assessed the probability of successfully completing micro-tunnelling as low.

6.1.1.5 HDD and conventional open trench construction

The 2023 Revised Route would include approximately 455 m of HDD and 880 m of conventional open trench construction. Conventional open trench construction would be employed along the 2023 Revised Route on either side of the HDD portion. Based on a map Trans Mountain provided as part of its response to Commission IR No. 1 ([C25972-23](#)), the conventional open trench portions would be located from approximately KP 851.60 to KP 851.94 and KP 852.40 to KP 852.95.

Trans Mountain stated that the risk assessment completed for the HDD portion concluded that the HDD has a low to low-medium risk. The formations identified in Thurber Engineering Ltd.'s June 2023 report titled *Spread 5A – Geotechnical Assessment KP852 Trenchless Crossing (Jacko Hill)* [2023 Thurber Report] are suitable for HDD installation methodologies. In response to SSN IR No. 1.14, Trans Mountain provided a list of 36 completed and in-progress HDD crossings on the TMEP. In response to Commission IR No. 2.2(a), Trans Mountain identified five of these as HDD crossings that are comparable to the HDD proposed in the Deviation Application. The significant experience gained through successfully completing similar lengths of HDD in hard rock formations forms the basis for Trans Mountain's high degree of confidence that HDD installation in this area would be successful.

Should the initial HDD be unsuccessful, the contingencies would be to modify the initial HDD geometry to facilitate a successful installation or to re-drill entirely. Such contingencies have been successful at other locations along the TMEP by moving entry and exit locations to new positions within the footprint.

Trans Mountain stated that while implementing the HDD/conventional open trench approach, it would attempt to minimize the temporary workspace outside the 18-m-wide permanent easement to the extent practicable. Trans Mountain has considered this in execution planning. However, there are sections of the footprint (a combination of the permanent easement and temporary workspace) where additional temporary workspace would be required. Trans Mountain intends to limit the footprint to between 25 and 30 m along most of the pipeline's length, but where the HDD pad must be installed, the required workspace would need to be wider.

Trans Mountain noted that an HDD for the entire length between Pad 1 and Pad 2 is not preferred for the following reasons:

- HDDs require a drag section equal to the length of the crossing. Local topography and right-of-way geometry do not support establishing a longer drag section.
- Constructing such a long HDD crossing in hard rock formation would present a significantly higher risk profile in terms of technical viability.
- Constructing an HDD of that length would have a much longer schedule compared to the HDD proposed in the Deviation Application.

In response to Commission IR No. 2.3, Trans Mountain compared the HDD/conventional open trench and micro-tunnelling approaches in terms of the total amount of disturbance, anticipated cost, and completion timing. The Commission asked Trans Mountain to provide information using two different assumptions:

- A **Best-Case Scenario** where potential risks associated with the methodology do not materialize. For micro-tunnelling, this scenario reflects successfully completing Shaft-6 and resuming micro-tunnelling. For HDD/conventional open trench construction, this scenario reflects a successful first HDD attempt.
- A **Worst-Case Scenario** where potential risks materialize short of a failure to complete the pipeline's installation using the chosen construction methodology. For micro-tunnelling, this scenario reflects the need for a rescue shaft to recover the MTBM. For HDD/conventional open trench construction, this scenario reflects the need for contingency HDD.

Trans Mountain also identified a **Worst-Worst-Case Scenario** where micro-tunnelling is not ultimately successful. In this scenario, the MTBM becomes stuck, and it is not possible to either recover the MTBM drive using a rescue shaft or to restart the tunnel drive. In that case, Trans Mountain would have completed some or all of the work in the Worst-Case Scenario, after which the amount of disturbance, anticipated cost, and completion timing associated with HDD/conventional open trench construction would still be required.

6.1.2 Views of SSN

6.1.2.1 MTBM selection

SSN questioned whether Trans Mountain's choice of MTBM was appropriate. SSN's subject matter expert, Jens Hornbruch, provided *Geotechnical Comments on the Feasibility of Continued Microtunnelling of Drive 2 between Shaft 6 and 2* dated 24 August 2023 (**Hornbruch Micro-Tunnelling Feasibility Comments**), which included the following points:

- During pre-construction consultations with the MTBM manufacturer, the manufacturer advised that other machines would be available that have completed longer drives in similar ground conditions and that Trans Mountain selected the MTBM based on schedule and availability.
- The ground conditions encountered appear to be in full alignment with the geotechnical information gathered prior to construction, which resulted in selecting the MTBM used.

SSN submitted that problems with the MTBM can hardly be brought up to support terminating micro-tunnelling in the Pípsell Corridor.

6.1.2.2 Micro-tunnelling feasibility

SSN submitted that micro-tunnelling remains a viable construction option for the remaining portion of the Pípsell Corridor.

SSN stated that Trans Mountain knew the geology of the land from the beginning. Thurber Engineering Ltd. completed several boreholes between 2021 and 2022 and produced the 2022 Thurber Report, which indicated that micro-tunnelling should be a feasible trenchless method with appropriate MTBM equipment and methods.

SSN also referred to and filed an August 2021 report prepared by Innovative Pipeline Crossings Inc. titled *Trenchless Sections Feasibility and Estimates Report – Spread 5A – Jacko Lake Area (2021 IPC Report)*, which describes similar ground conditions as those described in the 2022 Thurber Report.

In addition, SSN's subject matter expert, Dr. Peter Uffman, wrote a report dated 20 August 2023 (**Uffman Report**) that concludes that micro-tunnelling with a MTBM DN2000/DA2500 in rock up to 200 MPa would be challenging but clearly feasible. The Uffman Report noted that its assessments were based on the "extremely little informative information" available, particularly with respect to geological conditions.

The Hornbruch Micro-Tunnelling Feasibility Comments include the following statements:

- A review of daily records did not identify significant impacts of coarse gravel, cobbles, or boulders on micro-tunnelling progress. The main reason for slow progress appeared to be the presence of hard rock, as well as the use of reduced

jacking force due to the RCJP's upward migration.

- The current Stage 3 mitigation to prevent further upward migration (i.e., Shaft-6 installation) appears to be a feasible solution to prevent further RCJP deflection and associated negative impact on the micro-tunnel drive and pipe insertion. During a 27 July 2023 site visit with SSN's subject matter experts, representatives of Trans Mountain's contractor expressed a high degree of confidence that they would be able to successfully complete the micro-tunnel drive within the proposed schedule.
- The tunnel boring contractor should advise whether micro-tunnelling can successfully be completed. Based on SSN's subject matter experts' document review, the ground conditions encountered appear to be in full alignment with the geotechnical information gathered prior to construction, which resulted in selecting the MTBM model used.

SSN's subject matter experts also prepared a report titled *Debrief for Canada Energy Regulator in relation to Pípsell/Jacko Lake Area Micro Tunnelling Assessment* dated 23 August 2023 (**SSN Subject Matter Expert Report**), which concluded the following:

- Trans Mountain selected micro-tunnelling as the best alternative to ensure the protection of this sacred area.
- There have been no insurmountable issues reported to date requiring a change to this construction methodology.
- There have been no surprise geological or hydrological issues found that would affect the viability of micro-tunnelling in the Pípsell Corridor.

The SSN Subject Matter Expert Report included a document titled *SSN Response on Proposed Geotechnical Drilling Program* dated 15 July 2021, which is based on the revision of a document titled *Trans Mountain's Jacko Lake Geotechnical Program Execution Plan* dated 13 July 2021. SSN's response proposes that Trans Mountain continue working on the geotechnical program with SSN and that it starts the week of 19 July 2021 (as planned). It also suggests five borehole locations.

SSN argued that Trans Mountain has left reasonable and available options unconsidered by seeking to abandon micro-tunnelling through the remaining portion of the Pípsell Corridor before the Stage 3 mitigation (i.e., Shaft-6 installation) had been fully realized.

SSN reiterated that they have maintained their commitment to micro-tunnelling. Specifically, SSN noted that they reacted quickly to Trans Mountain's request to construct Shaft-6 as a mitigation strategy. In this regard, after Trans Mountain identified geotechnical challenges with Tunnel Drive #2, SSN's subject matter experts and a Knowledge Keeper reviewed the footprint for Shaft-6 on short notice. As there were no features identified in the new footprint, the additional land was used to extend Pad 1 and create Shaft-6.

In cross-examination, SSN's subject matter expert, Jens Hornbruch, acknowledged the possibility of Trans Mountain's micro-tunnelling Worst-Worst-Case Scenario. Jens Hornbruch submitted that, in case of a fatal failure, pursuing a rescue shaft or retrieving the MTBM would not be recommended from a technical perspective and due to the additional surface disturbance that would be required.

6.1.2.3 HDD and conventional open trench construction

SSN opposes Trans Mountain's proposed HDD/conventional open trench construction. SSN's subject matter experts stated that the combined HDD/conventional open trench

construction scenario would create much greater ground disturbance due to the length of the conventional open trench portions and the laydown space required for inserting pipe into the HDD bore.

The Uffman Report concluded that the proposed HDD is not feasible. As noted above, the Uffman Report acknowledged the limited information available to conduct the assessment.

SSN provided Jens Hornbruch's *Geotechnical Comments on the Feasibility of HDD Construction Between Shaft 6 and 2* dated 24 August 2023 (**Hornbruch HDD Feasibility Comments**). These comments referred to the 2023 Thurber Report and identified a 2021 Trans Mountain PowerPoint presentation in which Trans Mountain assessed the risk of an HDD failure in respect of an HDD path 300 m longer than that proposed in the Deviation Application as moderate to high.

In response to Commission IR No. 1.3, SSN raised the possibility of an HDD from Pad 2 to Shaft-6 (approximately 1 250 m in length) to complete the crossing of the remainder of the Pípsell Corridor. While the proposal was conceptual and would require project engineering and constructability approvals, SSN considered that such an alternative could minimize further disturbance in the area. SSN indicated that this concept demonstrates the potential to complete the TMEP's crossing of the Pípsell Corridor and maintains the intent of the Mutual Benefits Agreement.

SSN also suggested, at a high level, that it would consider a reroute around the Pípsell Corridor as the only proposed mitigation supported and consented to by SSN Joint Council.

6.1.3 Trans Mountain's reply to alternatives raised by SSN

Trans Mountain responded to both of SSN's proposed alternatives. Regarding a potential HDD between Pad 2 and Shaft-6, Trans Mountain described the idea as conceptual, with no technical assessment associated with it. Moreover, Trans Mountain submitted that a longer HDD than that proposed in the Deviation Application would be riskier from a geotechnical perspective. This length of HDD would also be difficult, if not impossible, to execute given the lack of area available to use for pulling back the pipe string.

Regarding a potential reroute around the Pípsell Corridor, Trans Mountain noted that any such reroute would involve a multi-kilometre reroute outside of the approved pipeline corridor. This would trigger new regulatory processes, including variances to Certificate OC-065 and the environmental assessment certificate from the British Columbia Environmental Assessment Office. Moreover, there was no evidence before the Commission to suggest that this would be a better route or a more appropriate method than what Trans Mountain proposed in the Deviation Application, or whether it is even feasible to construct. New engineering and constructability assessments, environmental studies, and land acquisition would be required. Trans Mountain noted that any reroute would add many months before construction could begin and many hundreds of millions of dollars in costs.

6.1.4 Commission analysis and findings

The Commission, as an expert regulatory tribunal, assessed the technical evidence of both Trans Mountain and SSN.¹⁴ This included expert evidence from both parties regarding the

¹⁴ This evidence includes the following technical reports and submissions: the Bothar Report, the 2022 Thurber Report, the 2023 Thurber Report, the 2021 IPC Report, the Uffman Report, the Hornbruch HDD

feasibility of the different construction methodologies at issue (summarized in **Sections 6.1.1** and **6.1.2**). Having weighed the technical evidence, the Commission makes the following findings:

- Successful tunnel completion and subsequent pipeline installation between KP 851.60 and 852.95 presents an unacceptably high risk of failure such that its completion via micro-tunnelling is not technically feasible.¹⁵
- For micro-tunnelling, there is a very low probability of the Best-Case Scenario materializing – namely, successful completion of micro-tunnelling after Shaft-6 is constructed. There is a low probability that the Worst-Case Scenario can be achieved – namely, successful completion of micro-tunnelling after a rescue shaft recovers the micro-tunnel boring machine. The Worst-Worst Case Scenario, where micro-tunnelling cannot be successfully completed and would have to be abandoned to pursue HDD and conventional open trench, is the most probable outcome.
- There is a very high probability that HDD can be successfully completed, either on the first attempt (Best-Case Scenario) or subsequent attempts (Worst-Case Scenario). A scenario where HDD cannot be successfully completed on any number of attempts is extremely low probability.

After assessing the construction scenarios, the Commission considers that micro-tunnelling is most likely to fail, such that the deviation is required. The Commission is also of the view that the construction methodology reflected in the 2023 Revised Route (HDD and open trench construction) is most likely to succeed.

As a whole, the Commission found Trans Mountain's expert evidence more compelling than SSN's for several reasons. First, Trans Mountain's expert evidence was substantially more detailed and provided more definitive conclusions than SSN's expert evidence. Second, Dr. Peter Uffman acknowledged in the Uffman Report the limited information available for his review on behalf of SSN. In addition, Dr. Uffman did not attend the oral hearing. As such, neither the Commission nor Trans Mountain had the opportunity to test the Uffman Report via cross-examination. Third, Jens Hornbruch outlined his training and experience in relevant areas, but acknowledged in cross-examination that he did not have the same expertise as Trans Mountain's internal technical team, who are dedicated to working on pipelines, tunnels, and HDD.

The Commission acknowledges that Trans Mountain's contractors initially considered that micro-tunnelling could be feasible. However, both Trans Mountain and SSN were aware from the outset that micro-tunnelling might prove to be infeasible, in which case other construction methods might be required. Trans Mountain made extensive and prolonged efforts to successfully complete the full 4.2 km identified for micro-tunnelling. Trans Mountain provided substantial evidence regarding the challenges that have materialized during micro-tunnelling, including the hump associated with the RCJP's upward migration. Trans Mountain also demonstrated that it attempted a variety of mitigation strategies to address challenges that have materialized.

Feasibility Comments, the Hornbruch Micro-Tunnelling Feasibility Comments, and the SSN Subject Matter Expert Report. Details regarding each of these reports are provided throughout **Section 6.1**.

¹⁵ In the *Commission analysis and findings* sections of these reports, the term "technically feasible" refers to the term as used in engineering practice. It does not refer to the term as defined in the Mutual Benefits Agreement.

In particular, the Commission finds that the mitigations Trans Mountain attempted to address the hump were extensive and appropriate. The Commission notes that these mitigation measures cost \$32 million, which is more than the originally anticipated construction cost for Tunnel Drive #2, as described in **Section 6.2.1**. Further, Trans Mountain was diligent in implementing its three-stage corrective plan. SSN argued that Stage 3 of the corrective plan (namely installing Shaft-6 to bypass the hump by revising the jacking frame location) had yet to be fully completed, such that micro-tunnelling might yet prove to be successful. However, the Commission accepts Trans Mountain's substantial evidence that the risks of failure associated with continued micro-tunnelling would remain even if Shaft-6 is ultimately completed. Specifically, the Commission concurs that restarting tunnelling after an extended period of inactivity presents considerable challenges, including applying sufficient jacking force, particularly given Trans Mountain's evidence that the MTBM is already showing signs of fatigue and the indication in the 2022 Thurber Report that the hardest rock formation remains ahead.

The Commission considered SSN's submissions that Trans Mountain failed to select appropriate equipment to support micro-tunnelling, specifically the use of the micro-tunnel boring machine AVN2000, which is a slurry-based machine with rock-cutting tools. The Commission finds that the AVN2000 was suitable for Tunnel Drive #2, given Trans Mountain's evidence that selection of the MTBM was supported by both Trans Mountain's tunnelling contractor and the manufacturer of the AVN2000.

The Commission finds that Trans Mountain's proposed method of construction in the deviation will employ well-proven techniques of HDD and conventional open trench construction, which have a very high probability of success given Trans Mountain's experience with similar HDDs and the required borehole size for HDD. Furthermore, the Commission finds compelling Trans Mountain's evidence that it is currently executing, and has executed in the past, various successful HDD crossings with similar rock quality designations.

The Commission acknowledges that parties other than the pipeline company should not be required to develop alternative routes or methods of construction when objecting to a deviation application. Rather, the onus remains with the applicant to persuade the Commission that a deviation is "required" as per subsection 211(1) of the CER Act. While the Commission acknowledges that SSN identified two alternatives – a reroute around the Pípsell Corridor and a longer HDD – the Commission is of the view that Trans Mountain's proposed deviation is required. The Commission notes that a reroute around the Pípsell Corridor would be outside the approved pipeline corridor, is beyond the scope of this application, and would require a variance to the Certificate (including consideration of adverse impacts to additional landowners and rights holders). Regarding the possibility of a longer HDD, Trans Mountain's evidence established that the length of the drag section and other technical challenges impact the feasibility of a longer HDD. Both alternatives, even if feasible, would result in significant added costs and delay and potentially additional surface disturbance.

6.2 Economics

6.2.1 Views of Trans Mountain

Trans Mountain submitted that even if continuing with micro-tunnelling did not result in a delay to the TMEP, Tunnel Drive #2 is not economically feasible. Trans Mountain indicated that micro-tunnelling costs have significantly exceeded the typical costs of completing trenchless construction, and provided the following:

- The original, expected cost for micro-tunnelling the full 4.2 km (as previously proposed and approved) was approximately \$200 million, or nearly \$50,000/m. Although this was almost double the average per-metre cost for trenchless construction, Trans Mountain agreed to micro-tunnelling because of its importance to SSN.
- Tunnel Drive #2 was originally expected to cost approximately \$23 million to \$25 million.¹⁶ Trans Mountain's updated forecast at completion is \$58.9 million, including \$32 million in costs already incurred to address the RCJP's upward migration.

In response to Commission IR No. 2.3, Trans Mountain provided a range of potential go-forward costs and schedules for Tunnel Drive #2, if it were to continue. These included the following:

- In the Best-Case Scenario, Trans Mountain's go-forward spend on Tunnel Drive #2 would be \$25.7 million and the tunnel completion date would be April 2024. Based on developments after this estimate was prepared, Trans Mountain indicated that there would be delays associated with the Best-Case Scenario.
- In the Worst-Case Scenario, Trans Mountain's go-forward spend on Tunnel Drive #2 would be \$85.7 million and the tunnel completion date would be December 2024.
- In the Worst-Worst-Case Scenario, Trans Mountain would first have completed some or all of the work contemplated in the Worst-Case Scenario, thereby incurring costs and taking time for that work. After that, costs and timelines associated with HDD/conventional open trench construction would still be required, with a possible construction delay well into 2025.

For the proposed HDD/conventional open trench construction along the 2023 Revised Route, Trans Mountain provided the following go-forward costs and schedules:¹⁷

- In the Best-Case Scenario, the cost would be \$36.6 million and the completion date would be January 2024.
- In the Worst-Case Scenario, the cost would be \$40.8 million and the completion date would be February 2024.

Trans Mountain also explained that continuing with Tunnel Drive #2 would likely delay the TMEP's in-service date. While Trans Mountain indicated that several key risks for the TMEP are currently being mitigated through contingency planning, delivery of first oil on the expanded system is anticipated late in Q1 2024. For that to occur, construction between KP 851.60 and KP 852.95 would need to be completed by the end of January 2024. Whereas Tunnel Drive #2 was originally expected to take approximately 7.5 months to complete, construction has been underway since late October 2022 and tunnelling has yet to be completed for 800 m of the tunnel's approximately 1.3 km total length.

Trans Mountain indicated that each month of delay in the TMEP's in-service date results in

¹⁶ In its reply submissions, Trans Mountain stated that "prior to starting micro-tunnelling, Trans Mountain expected the total construction costs for tunnel drive #2 to be approximately \$23 million." In response to SSN's IR No. 1.3, Trans Mountain stated that "[t]he forecasted budget to complete Tunnel Drive #2, prior to start of tunnelling, was \$24,700,000, not including the construction of Shaft-1 or Shaft-2."

¹⁷ In preparing these scenarios, Trans Mountain used the assumption provided by the Commission in IR No. 2.3 that the Deviation Application would be approved on 1 October 2023.

approximately \$200 million in lost revenues for Trans Mountain and approximately \$190 million in carrying charges for the project (approximately \$390 million total). In cross-examination, Trans Mountain acknowledged that the monthly carrying charges would be roughly the same in the months before the in-service date as the cost of capital in the initial months after the in-service date. In addition, Trans Mountain highlighted that standby costs could be incurred elsewhere on the TMEP, and shippers and other parties relying upon the TMEP would also incur losses with each month of the TMEP's delay.

Trans Mountain concluded that it is no longer reasonable or prudent for it to continue with micro-tunnelling because of the significant related risks, costs, and delays.

In response to SSN's suggestion that Trans Mountain delayed advancing trenchless construction options in the Pípsell Area, Trans Mountain submitted that in addition to the complexities involved in staging the construction of a roughly 1 000-km-long pipeline through multiple spreads and multiple construction seasons while determining a new construction methodology for the pipeline segment in the Pípsell Corridor, several factors outside of Trans Mountain's control impacted starting trenchless construction in this area (and across the TMEP generally). This included severe flooding, forest fires and related air quality issues, and the onset of the COVID-19 pandemic and resulting shortages and delays in the global supply chain. Trans Mountain also responded to statements that SSN attributed to Trans Mountain's President and Chief Executive Officer (**CEO**) during a July 2023 meeting with SSN Joint Council (see **Section 6.2.2**). Trans Mountain noted that it did not have access to a transcript or recording of the meeting to verify the accuracy of the statements, but in any event, SSN had taken the statements out of context.

Trans Mountain outlined that after executing the Mutual Benefits Agreement in October 2019, it began engaging with SSN in November 2019 regarding land access requirements for geotechnical work. From November 2019 to 2021, Trans Mountain assessed various trenchless construction methodologies for use in the Pípsell Corridor, considering a number of factors, including constructability, grading plans, construction schedule, geotechnical formations, and engineering. Trans Mountain confirmed to SSN in October 2021 that micro-tunnelling was a feasible option, subject to detailed design. With SSN's acceptance of micro-tunnelling, Trans Mountain then proceeded to prepare and develop the final design and plans for commencing construction.

TMEP construction in the Pípsell Area started in Q4 2021 and was expected to be completed by May 2023, followed by pipe insertion and final tie-ins by August 2023. This would have allowed micro-tunnelling in the area to be completed in alignment with the overall TMEP construction schedule.

6.2.2 Views of SSN

In SSN's oral Indigenous knowledge presentation, Jeanette Jules stated the following:

And when you look at economics, there is no price, there is no compensation that could give anything to us for our cultural heritage treasures. That's what I call them. Everybody says artifacts or archeological different things. They [are] cultural heritage treasures, and they need to be looked after, they need to be protected.

Jeanette Jules, SSN Knowledge Keeper, Transcript Volume 1, PDF page 29 of 158

SSN submitted that Trans Mountain's financial obligations in relation to the overall TMEP are not and cannot be a sufficient reason to no longer consider micro-tunnelling a viable construction method. SSN also initially submitted that Trans Mountain did not provide a

construction cost analysis showing that continuing with Tunnel Drive #2 would require it to incur costs that are unreasonably in excess of the construction costs normally associated with micro-tunnelling. In any event, the delays and higher costs that Trans Mountain faces must be held up against its own conduct and the significant and irreparable harm to SSN's cultural and spiritual rights from surface disturbances in the Pípsell Corridor.

SSN suggested that after executing the Mutual Benefits Agreement, if Trans Mountain had acted diligently in advancing trenchless construction methods that would give effect to its obligations in respect of the Pípsell Corridor, it likely would have been able to complete micro-tunnelling without impacting the TMEP's in-service date. SSN asserted that this was confirmed by Trans Mountain in a July 2023 meeting with SSN Joint Council. In this regard, SSN provided a quote that they attributed to Trans Mountain's President and CEO that attended that meeting.

SSN provided a chronology of the timeline between executing the Mutual Benefits Agreement on 30 October 2019 and the parties' agreement to a trenchless construction approach consistent with the Mutual Benefits Agreement. SSN submitted that it was not until July 2021 that Trans Mountain introduced micro-tunnelling as a possible trenchless construction methodology. SSN leadership approved micro-tunnelling in August 2021. SSN submitted that Trans Mountain did not pursue meaningful discussions with SSN to develop suitable trenchless construction methods until SSN directly pressured it to do so. Trans Mountain filed its application for the 2022 Revised Route, in which it proposed implementing micro-tunnelling, after an approximately two-year delay from the date that SSN withdrew their Statement of Opposition. SSN argued that given they cannot control how Trans Mountain has managed the TMEP budget or schedule, any burden resulting from a delay should not shift to SSN and their rights and title.

6.2.3 Views of the IAMC Indigenous Caucus

The IAMC Indigenous Caucus submitted that cost considerations related to changes to the TMEP's in-service date should not override Trans Mountain's commitments to Indigenous communities related to measures intended to address the TMEP's impacts. A significant resource imbalance exists when discussing potential accommodation measures. This leads to Indigenous communities relying upon project proponents to ensure that agreed-upon mitigation can actually be carried out.

6.2.4 Commission analysis and findings

In addition to its findings regarding engineering matters in **Section 6.1.4**, the Commission is of the view that economic considerations further demonstrate that the deviation is required. Specifically, there are substantial additional construction costs anticipated with micro-tunnelling versus HDD/conventional open trench construction. Continuing with micro-tunnelling would also be expected to significantly delay the TMEP's completion, resulting in many hundreds of millions of dollars in lost revenues and secondary impacts on shippers and other parties dependent upon the TMEP.

The Commission carefully considered the evidence provided by Trans Mountain regarding Best-Case and Worst-Case Scenarios and accepts that costs for micro-tunnelling are likely to be higher in all potential scenarios, except for the micro-tunnelling Best-Case Scenario, which the Commission has found to have a very low probability of materializing. In other words, the Commission finds that go-forward construction costs for micro-tunnelling would very likely be significantly higher than costs estimated for HDD/conventional open trench construction. Under the most probable micro-tunnelling outcome, where micro-tunnelling is ultimately not successful (the Worst-Worst Case Scenario), the costs associated with

HDD/conventional open trench construction would be incurred in addition to some or all of the costs associated with the micro-tunnelling Worst-Case Scenario, which has an expected cost of \$85.7 million, more than double that of the HDD/conventional open trench scenarios (\$36.6 million for Best-Case Scenario and \$40.8 million for Worst-Case Scenario).

With respect to construction schedules, based on the evidence related to the current circumstances of the TMEP and Tunnel Drive #2, the Commission is of the view that continuing with micro-tunnelling would likely result in material delays to the overall completion of the TMEP. Having found that that the micro-tunnelling Best-Case Scenario is very low probability, the Commission finds that the delay would likely be at least 10 months, if micro-tunnelling could be completed at all, and even longer in the Worst-Worst Case Scenario where micro-tunnelling continues to be unsuccessfully pursued and is eventually abandoned in favour of HDD/conventional open trench.

In considering the financial impact of a delay to the TMEP's completion, the Commission finds that continuing with micro-tunnelling would likely result in many hundreds of millions of dollars of lost revenues. Specifically, the Commission accepts that Trans Mountain would lose approximately \$200 million in monthly revenues for each month of TMEP delay associated with micro-tunnelling, resulting in a loss of approximately \$2 billion in the case of the 10-month delay. The Commission notes that delays to the TMEP's completion resulting from continuing with Tunnel Drive #2 would also adversely impact shippers and other parties dependent upon the TMEP.

Regarding carrying charges, the Commission accepts that approximately \$190 million of carrying charges would be added to the overall cost of the TMEP for each month of delay, which could see at least \$1.9 billion added to the cost of the TMEP if micro-tunnelling were to continue. However, the Commission finds that Trans Mountain did not clearly establish why the cost of TMEP delays should also include carrying charges in addition to foregone revenues, given that monthly carrying charges ahead of the TMEP's completion are similar to the monthly cost of capital following completion. As such, the Commission's findings above regarding costs of delays do not include carrying charges.

The Commission is not persuaded by SSN's submission that Trans Mountain failed to diligently advance trenchless construction in a timely manner, such that Trans Mountain itself is to blame for delays to the TMEP's completion due to micro-tunnelling. First, further to the Commission's findings in **Section 6.1.4**, there is considerable doubt as to whether Tunnel Drive #2 could have been completed at all, regardless of when construction began. Second, the Commission finds that the evidence does not support SSN's assertion that Trans Mountain failed to diligently progress micro-tunnelling. The Commission assessed Trans Mountain's diligence and timeliness in progressing micro-tunnelling taking into account the technical complexity of trenchless construction options, the efforts to proceed collaboratively with SSN, the overall complexity of progressing and executing the TMEP, and a number of significant events outside of Trans Mountain's control, including a pandemic, wildfires, and severe flooding that affected its ability to progress significant parts of the TMEP. When considering all the evidence regarding Trans Mountain's efforts, or lack thereof, to develop construction methods that minimized disturbance in the Pípsell Corridor, the Commission is persuaded that Trans Mountain engaged SSN on constructions options, developed a micro-tunnelling strategy, and initiated construction, acting reasonably and within a reasonable timeframe. The Commission was not persuaded that the quote which SSN attributed to Trans Mountain's President and CEO actually suggested otherwise in respect of any of the above.

In finding that economic factors provide support for the need for the deviation, the Commission also considered and reflected on Jeanette Jules' submission that there is no

acceptable amount of compensation for SSN's cultural heritage treasures. In doing so, the Commission must balance a range of considerations. The Commission notes that a number of conditions on the TMEP project as a whole remain applicable to the TMEP and provide relevant mitigation. As discussed in **Section 6.3.4**, Trans Mountain identified significant mitigation measures aimed at protecting and reducing harm to any cultural heritage treasures that are identified. Moreover, given the Commission's findings in **Section 6.1.4** that micro-tunnelling is most likely to fail, the Commission must also consider the risk of additional surface disturbance in the area (as discussed in **Section 6.4.5.4**) arising from continued micro-tunnelling efforts, which could ultimately have greater impacts on the Pípsell Area. Finally, while the Commission does not find it necessary to assess compliance with the Mutual Benefits Agreement to reach a decision on the Deviation Application, the Commission notes that in the Agreement, SSN and Trans Mountain turned their minds to the possibility that trenchless construction might prove infeasible and agreed to a framework for associated financial compensation to SSN for any portion of the TMEP where Trans Mountain does not use trenchless construction in the area.

6.3 Environmental and socio-economic effects

6.3.1 Views of Trans Mountain

Trans Mountain submitted that the potential environmental and socio-economic effects associated with the deviation are similar to those already addressed in its application for the TMEP and related filings. Trans Mountain stated that no new studies would be required and no new mitigation measures are recommended beyond those established during the OH-001-2014 and MH-052-2018 Certificate proceedings and subsequent condition compliance filings.

Trans Mountain submitted that it would mitigate the potential environmental and socio-economic effects of the deviation in the Pípsell Area through the following strategies and commitments:

- Continued implementation of all environmental and socio-economic mitigation measures outlined in the Pipeline EPP.
- Implementing site-specific environmental and socio-economic mitigation measures, (previously approved by the Commission) as outlined in the Resource Specific Mitigation Table developed for the 2023 Revised Route ([C25972-3](#)).
- Implementing its established and robust Environmental Compliance Management Plan and Environmental Inspection and Indigenous Monitoring Program.
- Implementing the same standards for executing and monitoring reclamation work as Trans Mountain adhered to for its construction activities within Jasper National Park.
- Significantly reducing overall disturbance by:
 - using reduced grading and low-disturbance practices (e.g., matting on access roads and workspaces where feasible);
 - using existing access roads wherever possible;
 - implementing HDD for approximately 455 m of the 2023 Revised Route; and
 - reducing the conventional open trench construction footprint to 25 to 30 m for most of the 2023 Revised Route.
- Fulfilling its obligations under the Mutual Benefits Agreement, specifically those in relation mitigation measures.

Trans Mountain further submitted that it has previously conducted extensive archaeological studies in the area of the deviation and that this area has been subject to past studies for other projects. Over the course of developing the TMEP, there have been numerous walkthroughs with SSN community Elders and Knowledge Keepers to identify traditional land uses and cultural features.

Trans Mountain further committed to walking the route with SSN Knowledge Keepers before “putting any shovel in the ground or starting a machine.”¹⁸ It confirmed that it would avoid site-specific cultural features and archaeological sites within the Pípsell Area, noting that there are no known burial mounds along the 2023 Revised Route. In response to SSN’s submissions about two culturally significant features being close to the area of disturbance for the proposed deviation (including a directional tree within the proposed construction footprint), Trans Mountain confirmed that all culturally significant features identified by SSN would be avoided and protected during construction. With respect to the directional tree, this feature is located within the HDD portion of the deviation and would be avoided by installing the pipeline without surface disturbance in that area.

Trans Mountain submitted that it has an established chance find procedure as part of its EPP, through which chance finds can often be addressed relatively quickly and reasonably inexpensively. In respect of its processes, Trans Mountain stated that if a cultural or archaeological feature or artifact is discovered, work is stopped, a buffer is put in place in the area, and consultation is triggered with the potentially affected Indigenous community. Further archeological work would then proceed through permitted archaeologists, in consultation with affected Indigenous communities.

Trans Mountain noted that the SSN Indigenous Monitors responsible for monitoring work have first-hand knowledge of the area. They 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.

6.3.2 Views of SSN

SSN submitted that 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. Secwépemc people continue to use the Pípsell Area for hunting, fishing, and plant harvesting. The Pípsell Area is located in a key transitional zone, with grasslands, wetlands, and significant plant biodiversity, including about 130 species that are and were historically used by the Secwépemc. SSN members remain obligated to protect lands and resources for the next generation. In light of the Pípsell Area’s ecological significance, including the diversity of flora and fauna, it is of utmost importance to the integrity of SSN cultural and economic practices, now and in the future, to preserve the Pípsell Area.

There are only four leks where they come to do their breeding, and they do their dances in the springtime, and at Pípsell is one of the -- one of the sites. And we need to make sure that everything is looked after. When you go and you see the deer that are within that area, they're bigger than anywhere else, and it's because that area is protected, and it's looked after. That's where the does go and calve because it's a quiet place. It's protected from all of the other areas. There's the grasslands there, which – all over Secwepemcúlucw, there were numerous grasslands. There are very

¹⁸ Transcript Volume 1, PDF page 129 of 158.

few spots that still have our grasslands, that have our native grasses, and that can be looked after.

Jeanette Jules, SSN Knowledge Keeper, Transcript Volume 1, PDF pages 28 and 29 of 158

SSN submitted that the cultural and spiritual significance of the Pípsell Corridor cannot be artificially limited to a single archaeological site; the entire Pípsell Area is a sacred site. To SSN, the land is sacred and, as a whole, is the source of Secwépemc law. In addition, their Knowledge Keeper identified two culturally significant features that are close to the area of disturbance for the deviation. First, there is a burial mound that is less than 10 m from a temporary workspace for the HDD. As well, there is a directional tree that is within the footprint of the extra workspace required for the conventional open trench.

SSN submitted that the onsite presence of Indigenous Monitors to watch the disturbance or destruction of the remaining portion of the Pípsell Corridor in no way ameliorates the harm of that disturbance or destruction. SSN stated that there are no conceivable mitigation strategies for the significant and irreparable harm that SSN would incur as a result of HDD/conventional open trench construction in the Pípsell Corridor.

6.3.3 Views of the IAMC Indigenous Caucus

The IAMC Indigenous Caucus does not share Trans Mountain's confidence about its ability to mitigate damage to sites of cultural significance when using trenched construction methods. Rather, Trans Mountain has vastly underestimated the number of sites of significance to Indigenous communities in other construction spans. Based on the experience of Indigenous Monitors with the IAMC, the potential for chance finds and for disturbing sites of significance is likely greater than presently understood, should more trenched construction methods be authorized in the Pípsell Area.

6.3.4 Commission analysis and findings

The Commission is satisfied that no additional studies are required and that the Deviation Application does not change the conclusions reached in the NEB's previous environmental and socio-economic assessment conducted as part of the TMEP Certificate proceedings (namely that any effects identified can be addressed through appropriate mitigation measures). In making this finding, the Commission notes that the 2023 Revised Route is within the approved pipeline corridor and follows the same alignment as the Original Route approved by the Commission in April 2020 and that no new environmental or socio-economic effects were identified in the Deviation Application.

The Commission acknowledges SSN's concerns in **Section 6.3.2**, about possible disturbances to culturally significant features and their emphasis on the importance of the entirety of the Pípsell Area. Concerns in relation to chance finds were echoed by the IAMC Indigenous Caucus in its letter of comment. However, the Commission is of the view that the information provided by SSN does not rise to the level of new environmental or socio-economic effects not previously considered in earlier TMEP proceedings. The Commission notes that during the proceeding, Trans Mountain demonstrated an understanding of the archaeological resources in the area, based in part on working closely with SSN Elders, Knowledge Keepers, and Indigenous Monitors over several years in relation to the TMEP. Moreover, the Commission notes that the mitigation measures highlighted by Trans Mountain, including those detailed in **Section 6.3.1**, are robust and sufficiently address any potential environmental and socio-economic effects of the proposed deviation. The Commission notes that many of the identified mitigation measures were established as

binding conditions through past TMEP regulatory proceedings and remain applicable to the deviation. These include:

- all measures outlined in the Pipeline EPP (Condition 72 of Certificate OC-065), including:
 - the specific, previously approved measures detailed in the Resource Specific Mitigation Table developed for the 2023 Revised Route; and
 - Trans Mountain’s chance find procedures and process;
- Trans Mountain’s Noise Management Plan for HDD sites with no nearby dwellings (Condition 74 of Certificate OC-065); and
- Trans Mountain’s Environmental Inspection and Indigenous Monitoring Program (resulting from Condition 98 of Certificate OC-065).

The Commission expects Trans Mountain to fulfil all of the conditions and commitments made aimed at minimizing environmental and socio-economic effects of the deviation. These measures include dedicating the necessary time and resources to working with Indigenous Monitors at the construction site, avoiding known cultural features and archaeological sites, walking the route with SSN Knowledge Keepers prior to construction, and following the robust processes and procedures described by Trans Mountain in the event of a chance find.

The potential impacts of the deviation on the rights of Indigenous Peoples, as distinct from any potential effects stemming from environmental and socio-economic matters, are addressed in **Section 6.4**.

6.4 Rights and interests of Indigenous Peoples

6.4.1 Trans Mountain’s engagement with Indigenous Peoples

Significant submissions were made throughout this proceeding about Trans Mountain’s engagement with SSN regarding both the Deviation Application and the TMEP more generally in the Pipsell Area. As part of Trans Mountain’s broader engagement process, and following negotiations between the parties, on 30 October 2019, SSN and Trans Mountain entered into a private Mutual Benefits Agreement related to portions of the TMEP that would be constructed on lands in which SSN has an interest. The Mutual Benefits Agreement describes its purpose as promoting a positive, collaborative, and long-term relationship between SSN and Trans Mountain aimed at promoting and sustaining SSN’s interests and to bring certainty to the TMEP.

As noted in **Section 4** the Mutual Benefits Agreement was filed with the Commission on a confidential basis. Both parties submitted that the Commission should not extensively interpret or apply the Mutual Benefits Agreement in making a decision on the Deviation Application. However, as referenced throughout **Section 6**, the parties did refer to the Mutual Benefits Agreement in their written and oral submissions and highlighted various ways in which the Commission ought to consider it.

6.4.1.1 Views of Trans Mountain

As noted in **Section 3.3.3**, Trans Mountain provided written notice of the 2023 Revised Route to all Indigenous communities whose traditional territories overlap both the 2022 Revised Route and the 2023 Revised Route. Only SSN expressed concerns with the 2023 Revised Route.

Trans Mountain filed a summary of its engagement with SSN for the period between 18 October 2019 and 9 August 2023. This included details on the dates and types of communication methods (e.g., emails, meetings, phone calls), information regarding site visits conducted, and details about the topics of discussion (e.g., different methods of trenchless construction, micro-tunnelling viability, construction activity locations, environmental events, capacity funding, challenges using trenchless construction, timing challenges and frustrations, and contingency plans and options).

Trans Mountain also provided a general timeline of its engagement with SSN regarding TMEP construction in the Pípsell Area. With respect to its engagement efforts for the Deviation Application, Trans Mountain noted, among other things, the following:

- After encountering significant challenges with Tunnel Drive #2 and attempts to address the problem proved unsuccessful, Trans Mountain began engaging with SSN on 4 May 2023, specifically regarding the significant challenges associated with this section of the micro-tunnel drive.
- Between May and July 2023, Trans Mountain undertook significant efforts to engage with SSN Joint Council and their technical advisors on the challenges encountered in undertaking trenchless construction within the Pípsell Corridor and regarding Trans Mountain's mitigation strategy. This included a meeting between SSN leadership and Trans Mountain leadership on 6 July 2023.
- On 24 July 2023, Trans Mountain provided SSN with a draft of the Deviation Application for their review and comment and committed to notifying SSN before filing the Deviation Application.
- On 27 July 2023, Trans Mountain participated in a site tour with SSN staff to review ongoing micro-tunnel construction throughout the Pípsell Corridor, during which SSN representatives declined to view the area where conventional open trench construction was proposed.
- On 3 August 2023, Trans Mountain notified SSN leadership that it would be filing the Deviation Application in the near future and stated that it remained committed to engaging with SSN in good faith as it moves ahead with the deviation.
- On 4 August 2023, SSN advised Trans Mountain that based on their desktop assessment review, they considered micro-tunnelling to remain a viable construction option and did not see a need for the Deviation Application.
- On 9 August 2023, Trans Mountain sent a letter to SSN indicating that despite the challenges faced, it remained confident that approximately 80 per cent of construction within the Pípsell Corridor would be completed using trenchless construction.

Trans Mountain submitted that through its engagement, it worked closely and proactively with SSN and placed a high priority on carrying out TMEP construction in a manner that minimizes impacts on the lands in the Pípsell Area, and on SSN's cultural values, consistent with the Mutual Benefits Agreement. Trans Mountain submitted that it is for this reason that it agreed to pursue trenchless construction within the Pípsell Area where feasible, has taken costly steps to address the challenges it experienced with micro-tunnelling, and proposed an extensive suite of mitigation measures for the proposed deviation.

With respect to the Deviation Application, Trans Mountain noted that SSN chose not to engage regarding an alternative option to micro-tunnelling for the 2023 Revised Route. In discussing this fact, Trans Mountain asserted that engagement is a two-way street and

that SSN's choice not to engage with Trans Mountain on these issues would not demonstrate any deficiency in Trans Mountain's process. Rather, Trans Mountain provided various legal authorities for the proposition that Indigenous communities cannot refuse to participate in good faith in the consultation process, or only commit to part of that process, and subsequently suggest there has been inadequate Crown consultation.

Trans Mountain submitted that it remains committed to continuing its engagement with SSN on the execution of the 2023 Revised Route, as well as potentially finding opportunities to enhance its current engagement practices. Trans Mountain made specific reference to its existing practices of working with SSN's subject matter experts, Knowledge Keepers, and archaeologists; employing SSN Indigenous Monitors; and engaging with SSN in implementing any HDD contingency plans (in the event a contingency HDD is required).

6.4.1.2 Views of SSN

With respect to Trans Mountain's engagement regarding the Deviation Application, SSN submitted the following timeline:

- In a meeting with Trans Mountain on 27 April 2023, Trans Mountain raised certain technical challenges with micro-tunnelling but noted its "very high" degree of confidence that micro-tunnelling remained a viable construction method.
- In a meeting with Trans Mountain on 25 May 2023, Trans Mountain informed SSN that micro-tunnelling was "likely infeasible for the remainder of the proposed drilling program in the Pípsell Corridor." Trans Mountain proposed several alternative open trench options.
- Following the 25 May 2023 meeting, SSN and Trans Mountain exchanged several letters regarding Trans Mountain's commitments to complete micro-tunnelling in the Pípsell Corridor.
- In a meeting with Trans Mountain on 14 June 2023, Trans Mountain's technical team shared "new and relevant information regarding the technical and economic feasibility" of micro-tunnelling in the Pípsell Corridor.
- On 16 June 2023, SSN sent Trans Mountain a letter advising that SSN members continue to have significant concerns about impacts to the Pípsell Corridor and would not accept Trans Mountain's partial fulfillment of its obligation to use micro-tunnelling.
- At a leadership meeting between SSN Joint Council and Trans Mountain on 6 July 2023, Trans Mountain stated that it is no longer possible to complete construction using micro-tunnelling. SSN reiterated that they opposed any disturbance or destruction of lands in the Pípsell Corridor, as that would violate SSN's sacred and legal obligations to protect its ancestors. SSN reiterated that rehabilitating the land would not remedy the initial damage of disturbing lands on this sacred site.

SSN submitted that since 2019, they and Trans Mountain have been communicating about the construction methodology to be used in the Pípsell Corridor. SSN stated that throughout this time, SSN maintained that they would not support or provide their consent for construction methodologies that threaten to disturb or harm the Pípsell Corridor. SSN stated that any support or consent they have provided for the TMEP has been based on conditions that explicitly protect the Pípsell Corridor from disturbance or harm.

During cross-examination, SSN's witness confirmed that SSN had not engaged in any discussions with Trans Mountain about potential mitigation measures for the proposed

HDD/conventional open trench construction. However, SSN asserted that their refusal to engage on the alternative methodology or on the Deviation Application did not represent a refusal to engage. Rather, SSN was merely focused on micro-tunnelling as the mitigation measure that should continue before SSN spent their resources and capacity looking at an option with which they did not agree.

SSN stated that the Deviation Application does not represent a collaborative process between SSN and Trans Mountain. Despite what SSN described as their best efforts to work with Trans Mountain on addressing the construction methodology in the Pípsell Corridor, Trans Mountain proceeded to file the Deviation Application without SSN's support or consent.

6.4.2 The CER's consultation with Indigenous Peoples

Regulatory tribunals such as the Commission must perform the duties and exercise the powers assigned to them in their governing legislation, not only in accordance with their legislative mandates, but also in accordance with section 35 of the *Constitution Act, 1982* and other applicable laws. The regulatory framework within which the Commission's decisions are made can provide a practical, effective, and efficient way for Indigenous Peoples to raise concerns and seek resolution from an applicant or the Commission regarding potential impacts on their rights and interests.

The Commission designed the process for the Deviation Application in a procedurally fair manner and with a view to being transparent, accessible, flexible, and responsive to the needs of the parties, including SSN as a rights-bearing Nation. To that end, the Commission established process steps to allow for meaningful consultation with, and the participation of, SSN, including the following:

- SSN was provided notice of the opportunities to bring their concerns forward to the Commission, including the opportunity to propose any mitigation that was beyond that identified by Trans Mountain, if the Commission were to approve the Deviation Application.
- A Process Advisor was assigned to assist with procedural questions.
- The parties were able to provide written submissions.
- The parties were able to ask IRs of each other.
- The oral hearing was delayed and expanded to provide additional time for parties to properly prepare and to accommodate the attendance of SSN's cultural heritage expert and Knowledge Keeper.
- A three-day oral hearing was held during which the Commission heard SSN's oral Indigenous knowledge, and cross-examination and argument by the parties.

6.4.2.1 Views of Trans Mountain

Trans Mountain acknowledged that the Commission's consideration of the public interest in the circumstances of the Deviation Application requires that it ensure that the Crown has met its constitutional duty to consult with, and where appropriate accommodate the interests of, Indigenous Peoples whose established Aboriginal and Treaty rights may be adversely affected by the Commission's decision. Trans Mountain further acknowledged that a decision that violates the rights of Indigenous Peoples cannot be in the public interest. In addition, Trans Mountain provided various legal authorities for the proposition that Indigenous Peoples do not hold a veto over Crown decisions.

6.4.2.2 Views of SSN

SSN submitted that as an agent of the Crown, the CER owes Indigenous communities a constitutional duty to consult and accommodate. The basis upon which SSN asserts its rights is described in **Section 6.4.4.2**. As discussed in **Section 6.4.3**, SSN further asserted that the *United Nations Declaration on the Rights of Indigenous Peoples Act (UNDA)* reflects a shift in the context in which Crown duties towards Indigenous Nations are viewed.

6.4.3 United Nations Declaration on the Rights of Indigenous Peoples

In 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (**UN Declaration**), which sets out the minimum standards for the survival, dignity, and well-being of Indigenous Peoples throughout the world. In 2016, the Government of Canada announced that it fully supported the UN Declaration, without qualification.

The UNDA came into force on 21 June 2021. Section 4 of the UNDA states that its purpose is to affirm the UN Declaration as a universal international human rights instrument with application in Canadian law, and to provide a framework for the Government of Canada's implementation of the UN Declaration.

The CER Act, which came into force in 2019, also contains several provisions that address the CER's obligations to consider the rights of Indigenous Peoples. These provisions include, among others, preambular references to the federal government's commitment to achieving Reconciliation and implementing the UN Declaration, as well as the regulator's mandate, which includes an obligation to perform its duties and functions in a manner that respects the government's commitments with respect to the rights of Indigenous Peoples.¹⁹

While several articles of the UN Declaration were specifically raised during the proceeding, the parties' submissions were primarily focused on articles relating to:

- self-determination (article 3 and 4);
- lands, resources, and their development (article 26); and
- free, prior, and informed consent (**FPIC**) (articles 19 and 32).

SSN's submissions also referenced articles respecting:

- the right to maintain, protect, and develop archaeological and historical sites (article 11);

¹⁹ Preamble

(...) Whereas the Government of Canada is committed to achieving reconciliation with First Nations, the Métis and the Inuit through renewed nation-to-nation, government-to-government and Inuit-Crown relationships based on recognition of rights, respect, co-operation and partnership;

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

CER Act, section 11:

The Regulator's mandate includes

(...) **(h)** exercising its powers and performing its duties and functions in a manner that respects the Government of Canada's commitments with respect to the Indigenous peoples of Canada.

- the right to maintain, protect, and have access in privacy to religious and cultural sites (article 12); and
- the right to participate in decision-making (articles 3-5, 10-12, 14, 15, 17-19, 22, 23, 26-28, 30-32, 36, 38, 40, and 41).

6.4.3.1 Views of Trans Mountain

Trans Mountain submitted that the UN Declaration does not displace the legal tests for whether the Crown owes a duty to consult in any given circumstance, or the content of that duty as set out in Canadian law. Even after Canada signed onto the UN Declaration, the Courts have reiterated that Indigenous communities are not entitled to a veto. In addressing the issue of consent, Trans Mountain submitted that the concept of FPIC is not a legal requirement in Canada. Despite this, it asserted that the Mutual Benefits Agreement it entered into with SSN is evidence that SSN provided its consent and support for the TMEP through the Pipsell Area. In Trans Mountain's view, the text of the Mutual Benefits Agreement is evidence of SSN's consent for the TMEP and the basis upon which that consent was provided. The consent demonstrated through the Mutual Benefits Agreement was not, in Trans Mountain's view, premised on any particular construction method being used.

Trans Mountain asserted, however, that the Mutual Benefits Agreement does not impact the legal framework that applies to the Commission's decision on the Deviation Application.

6.4.3.2 Views of SSN

SSN stated that the UNDA applies the standards of the UN Declaration to the Crown's relations with Indigenous Peoples and its interpretation of Canadian law. To that end, SSN submitted that the UNDA requires the CER, in exercising its delegated authority pursuant to the CER Act, to adopt robust positions that are imbued by and are founded in a meaningful affirmation of the rights to self-determination and self-governance.

SSN noted that subsection 56(1) of the CER Act requires that the Commission, when making a decision or an order (including under section 211 of the CER Act), consider any adverse effects that the decision or order may have on the rights of Indigenous Peoples, recognized and affirmed by section 35 of the *Constitution Act, 1982*. SSN asserted that the Commission's duty pursuant to section 56 of the CER Act must be interpreted through the lens of the UN Declaration, in light of the UNDA. This would require a meaningful recognition and reflection of the right to self-determination throughout the Commission's consideration of any adverse effects that its decision on the Deviation Application may have on SSN's rights.

In SSN's view, the UNDA would further specifically require that the Crown obtain Indigenous Peoples' FPIC in relation to projects or measures that would affect their lands. SSN referenced articles 19, 26, and 32 of the UN Declaration in support of this position. SSN asserted that while the Mutual Benefits Agreement is the mechanism that demonstrates SSN's support of, and consent to, the TMEP, the contract alone cannot be relied upon to infer SSN's FPIC. SSN explained that in the case of the Deviation Application, they have determined that the thresholds set out in the Mutual Benefits Agreement have not been met, and their consent has not otherwise been given. As such, SSN has not provided their FPIC. SSN argued that the Deviation Application was filed without their support or consent and contravenes the rights guaranteed to SSN through the UN Declaration.

SSN submitted that if the Commission were to approve the Deviation Application without SSN having provided their FPIC pursuant to articles 19, 26, and 32 of the UN Declaration, it would do harm to the constitutional imperative of Reconciliation.

6.4.4 Effects on the rights of the Indigenous Peoples of Canada

6.4.4.1 Views of Trans Mountain

Trans Mountain's efforts to minimize surface disturbance in the Pípsell Area

Trans Mountain stated that it appreciates and acknowledges the cultural significance of the Pípsell Area to SSN, and the values that the area holds for past, current, and future generations. The importance of the Pípsell Area to SSN is reflected not only in the extensive engagement undertaken by Trans Mountain, but also in the Mutual Benefits Agreement entered into by the two parties.

Trans Mountain highlighted a number of specific measures as being reflective of its acknowledgment of the cultural significance of the Pípsell Area to SSN, including the following:

- Working closely and proactively with SSN and placing a high priority on carrying out TMEP construction in a manner that minimizes impacts on the Pípsell Area and SSN's cultural values.
- Agreeing to pursue trenchless construction within the Pípsell Corridor, where feasible, using best efforts.
- Taking costly steps to address the challenges faced with micro-tunnelling.
- Proposing an extensive suite of mitigation measures for the proposed deviation, including those referenced in response to Commission IR No. 1.1.
- Establishing, through the Mutual Benefits Agreement, a specific formula for Trans Mountain to provide financial compensation to SSN for any portion of TMEP construction in the Pípsell Corridor for which Trans Mountain does not use trenchless construction.

Trans Mountain further noted that although efforts were made to limit surface disturbance to the extent possible, some disturbances within the Pípsell Corridor and the broader Pípsell Area were required and were accepted by SSN. Specifically, and among others, Trans Mountain noted that in the Pípsell Corridor SSN accepted disturbances in relation to 28 geotechnical boreholes, 6 pads for tunnel operations, and 5 roads that were required. With SSN's support, open trench construction was also undertaken for certain sections within the broader Pípsell Area.

Disturbances related to the 2023 Revised Route and in the Pípsell Area

In discussing potential effects of the 2023 Revised Route, Trans Mountain submitted that all new disturbance in the Pípsell Corridor would occur on privately held, previously disturbed lands. In addition, Trans Mountain noted that existing disturbances in the Pípsell Area (as distinct from the Pípsell Corridor) include mining activities, access road development, ongoing cattle grazing/ranching and historical pasture improvement activities (including fencing), Trans Mountain Line 1, and current TMEP construction work as agreed to by SSN.

Trans Mountain acknowledged that if the Deviation Application were approved, planned TMEP construction would create additional ground disturbance within the construction

footprint. However, this disturbance would be restored through Trans Mountain’s reclamation practices, to equivalent capability, allowing all ongoing land uses to continue.

Trans Mountain argued that there is no credible or reliable evidence that the deviation would result in significant and irreparable harm relative to other disturbances in the Pípsell Area, to which SSN has expressly agreed. While SSN filed written evidence regarding the relative impacts of the deviation, their witnesses at the oral hearing were not community members and were unable to answer questions about this written evidence or these potential impacts.

Additional considerations

In response to Commission IR No. 2.3, Trans Mountain compared the surface disturbance associated with both the HDD/conventional open trench and micro-tunnelling methods of construction, as follows:

Construction method	New surface disturbance (ha) ²⁰	
	Best-Case Scenario	Worst-Case Scenario
Micro-tunnelling	0	1.5
HDD/conventional open trench	2.4	3.0

Trans Mountain submitted that if it continues to pursue micro-tunnelling and its attempts are ultimately unsuccessful, then additional surface disturbance would occur to complete construction using an alternate methodology. This Worst-Worst Case Scenario would result in additive surface disturbance, meaning that the surface disturbance associated with the micro-tunnelling Worst-Case Scenario would be added to the disturbance for an HDD/conventional open trench scenario (i.e., it could result in 1.50 ha of new disturbance from micro-tunnelling plus 2.40 ha (Best- Case Scenario) or 3.00 ha (Worst-Case Scenario) of new disturbance from HDD/conventional open trench).

Finally, in considering the extent to which Secwépemc laws should be applied to the Commission’s analysis, Trans Mountain argued that the Commission has no jurisdiction to modify its legislative requirements for reasons of Indigenous law or any other reason.

6.4.4.2 Views of SSN

SSN submitted that the Pípsell Area is a source of Secwépemc laws and governance. Therefore, protection of the Pípsell Area is SSN’s legal and spiritual obligation. The Pípsell Area must only be used in ways that preserve and sustain the area and which allow for the rights and culture of the Secwépemc people to be exercised and maintained.

Our children need to be taught our songs, our dances, our stseptékwlls, our stsptekwle, and they can only be taught if they're brought directly to the place where the stseptékwlls and the stsptekwle are. You can tell them the story, but it's not the same as being physically on the ground.

Jeanette Jules, SSN Knowledge Keeper, Transcript Volume 1, PDF page 28 of 158

SSN asserts rights and responsibilities in relation to a continued cultural existence and the integrity of Secwépemc culture, laws, language, cultural practices, and way of life, all of

²⁰ The table does not include the 1.52 ha of surface disturbance that has already occurred and is therefore common to all construction methods.

which are inseparably connected to Secwépemc lands and resources, including in 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.

But Pípsell is an extremely sacred site to us because it comes from one of our creation stories, and when you destroy anything along there, then you're destroying a piece of the Secwépemc people because Stk'emlúpsmc is the caretaker of our campfire on behalf of the whole Secwépemc Nation, just like each of the other campfires are the caretakers of their area that they're tasked with looking after.

Jeanette Jules, SSN Knowledge Keeper, Transcript Volume 1, PDF pages 27 and 28 of 158

SSN submitted that the obligation to maintain and steward the Pípsell Area has always been, and continues to be, SSN's paramount concern in relation to the TMEP. Any form of construction with significant ground disturbance is inconsistent with maintaining the Pípsell Area as a sacred area that allows SSN to exercise their laws, governance, and inherent rights. Specifically, HDD and conventional open trench construction are unacceptable methodologies for the Pípsell Corridor, as both would cause significant damage and disturbance to this sacred site, which is in direct contravention of Secwépemc law. Combined HDD/conventional open trench construction would create much greater ground disturbance than trenchless methods due to the length of conventional open trench construction, as well as the laydown space required for inserting pipe into the HDD bore.

Attempts at remediation as "mitigation" are not spiritually possible, environmentally accountable, or legally acceptable pursuant to SSN's laws and legal orders.

And to know the land is to walk the land, and I know the land there because I've walked the land. I've sat on the ground. I've laid on that ground. I've done ceremony on the ground. And throughout the whole corridor, there are numerous, numerous sites. There are numerous prayer sites, ancestors, and those all need to be looked after. That's the importance. If you go in and you do an open trench [...] and if you go and destroy things, how are you going to put it back? It doesn't matter if you're saying that it will be restored to the area, be reclaimed to the area, or, you know, remediated to the area. All of those cannot replace what would be destroyed.

Jeanette Jules, SSN Knowledge Keeper, Transcript Volume 1, PDF pages 33 and 34 of 158

SSN submitted that the proposed deviation would have a direct and significant adverse impact on SSN and the ability of both present and future generations of Secwépemc to exercise their internationally affirmed and constitutionally protected inherent rights. Granting the Deviation Application would prevent SSN people from exercising their rights and stewardship obligations under Secwépemc law in the area.

SSN added that in assessing the potential impacts of the Deviation Application on section 35 rights, the Commission must consider the effect that approving the application would have on the exercise of rights. SSN further asserted that the Commission must consider not only Canadian law (including constitutional law), but it must also look at Secwépemc law and SSN's legal orders. Indigenous legal traditions are among Canada's legal traditions and form part of the law of the land. SSN noted that in light of the articles of the UN Declaration (including the right to self-determination) and the application of the UNDA to the laws of Canada, it is SSN who is best positioned to determine whether the Deviation Application would have any adverse effects on SSN's rights, either under Canadian law or Secwépemc

law. Any adverse effects must be considered from SSN's perspective and not from the perspectives of Trans Mountain or the Commission.

6.4.5 Commission analysis and findings

6.4.5.1 Trans Mountain's engagement with Indigenous Peoples

The Commission heard competing views from the parties with respect to the sufficiency of the consultation and engagement and whether the process preceding the Deviation Application was collaborative. The Commission finds that Trans Mountain adequately designed and implemented engagement activities with Indigenous Peoples for the Deviation Application, consistent with the general expectations outlined in the Filing Manual. In making its findings on the adequacy of Trans Mountain's engagement activities, the Commission considered Trans Mountain's substantial efforts to engage with SSN on the 2023 Revised Route. These engagement efforts included email and information exchanges, a site visit, a meeting between leadership of SSN and Trans Mountain, and discussions with SSN Joint Council and their technical advisors on the challenges encountered with trenchless construction within the Pípsell Corridor and related mitigation strategies.

Relationship between Trans Mountain and SSN

The record before the Commission contains substantial evidence of a long-standing relationship between the parties in relation to the larger TMEP. This relationship was evidenced by the extensive engagement logs and submissions on engagement efforts over the past four years, as well as through the Mutual Benefits Agreement that was entered into between the parties. The Commission understands that the Mutual Benefits Agreement was premised on promoting a collaborative and long-term relationship between the parties, capable of promoting their respective interests. The Commission acknowledges and supports the parties' willingness for "give-and-take" and to undertake true collaborative efforts and processes.

The evidence on the parties' engagement efforts further demonstrates how the parties worked collaboratively over the years to share their respective interests and seek to find ways to meet their respective interests. The Commission accepts that the outcomes reached, as described in the engagement logs and Mutual Benefits Agreement, included significant obligations on Trans Mountain to reduce and then mitigate surface disturbance in the Pípsell Corridor (acknowledging that some disturbance from construction would be inevitable). While micro-tunnelling was identified as the preferred trenchless construction methodology, alternative conventional trenched methods were also contemplated.

Engagement on the Deviation Application

Despite earlier, robust engagement between the parties regarding the broader TMEP, the Commission understands that SSN initially declined to engage with Trans Mountain on alternative HDD/conventional open trench methodologies or any additional mitigation measures that may be required as a result of the Deviation Application. As SSN asserted, this was because SSN was focused on exhausting micro-tunnelling as the agreed-upon and SSN's preferred construction methodology. The Commission appreciates the significant time and resources required to engage with a project proponent. Nonetheless, now that the

Deviation Application is approved, the Commission encourages SSN to avail themselves of future opportunities to engage with Trans Mountain on the 2023 Revised Route.²¹

As noted elsewhere in these reasons, the Commission also expects Trans Mountain to fulfill all commitments that it made throughout the proceeding and any applicable regulatory requirements. This includes the commitment to continue existing engagement practices with SSN, with a view to finding opportunities to enhance those practices. In particular, the Commission expects Trans Mountain to continue to dedicate the time necessary to meaningfully engage and involve SSN in the construction of the 2023 Revised Route, notwithstanding schedule pressures affecting the TMEP.

Results of engagement on the Deviation Application

Ultimately, in determining the adequacy of Trans Mountain's engagement activities, the Commission is not limited to considering only the outcomes of engagement, which in this case was a failure of the two parties to reach an agreement about the Deviation Application. There are many situations when reasonable parties acting in a reasonable manner can disagree with each other. The Commission finds that Trans Mountain and SSN have engaged with each other in a reasonable manner, but unfortunately were unable to reach an agreement about how to proceed.

In the Commission's view, the engagement efforts undertaken by both parties are reflective of a consultative process rooted in Reconciliation. They were premised on a constructive relationship, based on mutual respect, where the concerns of SSN were taken on board, considered, and only rejected after informed reflection and for good reason.²² However, the Commission is also mindful that, as noted by the Federal Court of Appeal in *Coldwater* (citing from *Ktunaxa*):

[52] (...) the goal [of consultation] is to reach an overall agreement, but that will not always be possible (...). The process of consultation based on a relationship of mutual respect advances reconciliation regardless of the outcome.

[53] Put another way, reconciliation does not dictate any particular substantive outcome (...)

6.4.5.2 The CER's consultation with Indigenous Peoples

The Commission finds that there has been adequate consultation with Indigenous Peoples and accommodation of their interests for the purpose of the Commission's decision on the Deviation Application. The engagement between Trans Mountain and SSN as described in **Section 6.4.1**, and the proceeding established by the Commission for the Deviation Application as described in **Section 6.4.2**, form part of the overall consultative process in relation to the Crown's duty to consult and accommodate. This overall consultative process enabled the Commission to hear SSN's concerns about potential impacts of the Deviation

²¹ In *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)* 2017 SCC 54 (*Ktunaxa*), the SCC, summarized its findings from *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (*Haida*), at para 80, as follows (...) "The duty to consult and, if appropriate, accommodate the Aboriginal interest is a two-way street. (...) The obligations on the Aboriginal group include: defining the elements of the claim with clarity (para 36); not frustrating the Crown's reasonable good faith attempts; and not taking unreasonable positions to thwart the Crown from making decisions or acting where, despite meaningful consultation, agreement is not reached (para 42).

²² See *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34 (*Coldwater*) at para 49 to 50.

Application on their rights and interests, to consider measures to mitigate these impacts, and to balance any residual effects with other societal interests at play when considering the Deviation Application.

In considering the specific procedural steps taken, the Commission notes that its process was robust and considerably exceeded the procedural steps typically undertaken for a deviation application under section 211 of the CER Act. To that end, the Commission notes that ample opportunities were provided to raise concerns with the Commission, including through IRs and written submissions, as well as through an oral hearing that incorporated oral Indigenous knowledge, cross-examination, and argument. This enhanced process was appropriate in the circumstances, as it was established to address the concerns identified by SSN regarding the potential impacts of the deviation on the Pípsell Corridor, an area of profound spiritual and cultural significance to SSN.

The Commission's process also acted as a necessary and important check on the engagement conducted by Trans Mountain, by providing SSN an additional avenue to explain their concerns about the Deviation Application and have the Commission meaningfully consider those concerns. This included any concerns that SSN had with how Trans Mountain developed and then implemented its engagement process.

The Commission finds that SSN was provided adequate notice and sufficient opportunities to raise concerns and provide specific information about the potential impacts of the deviation on their rights and interests. The Commission further finds that Trans Mountain's engagement, as part of the consultative process, demonstrated a genuine effort to consider and address SSN's concerns. Trans Mountain's commitments and mitigations identified through the proceeding, as detailed in **Sections 6.3.1 and 6.4.4.1**, were sufficiently responsive to the concerns raised.

Impacts of the UN Declaration on the Crown's duty to consult and accommodate

In considering the Crown's duty to consult and accommodate in light of the passage of the UNDA, the Commission accepts that the UN Declaration does not displace the legal tests for whether the Crown owes a duty to consult, or the content of that duty as set out in Canadian law. No authorities were provided to the Commission to suggest otherwise.

The Commission notes, however, that the UN Declaration, as affirmed through the UNDA, can be taken into account to inform how the CER, as a federal regulator, approaches its legal duties and obligations going forward, including those in relation to the duty to consult and accommodate.²³ To that end, Canada's commitments and obligations to Reconciliation and to implement the UN Declaration have informed meaningful regulatory processes that allowed for deep consultation with SSN in a manner that supports several key objectives of the UN Declaration. Specifically, the Commission's process for the Deviation Application was developed in a manner that allowed for the use of oral traditions (article 13), participation in decision-making (article 18), participation in decision-making surrounding the development and use of lands (article 26), and the protection of traditional knowledge (article 31).

²³ Government of Canada, Backgrounder: *United Nations Declaration on the Rights of Indigenous Peoples Act*, <https://www.justice.gc.ca/eng/declaration/about-apospos.html>.

6.4.5.3 United Nations Declaration on the Rights of Indigenous Peoples

With the UNDA's passage in June of 2021, the UN Declaration was affirmed as a source for the interpretation of Canadian law.²⁴ While the UNDA establishes a framework through which the government will work to implement the UN Declaration at the federal level, it does not immediately or directly alter existing Canadian law, including the CER Act. However, this is a rapidly evolving area of law. As recently articulated in *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*²⁵ (***Thomas and Saik'uz***), while the effect of UN Declaration legislation on the common law has yet to be determined by the courts, it supports a robust interpretation of Indigenous rights.²⁶

The Commission is also mindful of references in the preamble to the CER Act to the government's commitments to Reconciliation and implementation of the UN Declaration, as well as the regulator's mandate in paragraph 11(h), which includes an obligation to perform its duties and functions in a manner that respects the government's commitments with respect to the rights of Indigenous Peoples.

Free, prior, and informed consent

The Commission acknowledges that the UN Declaration is meant to be read holistically, as together it constitutes the minimum standards for the survival, dignity and well-being of the Indigenous Peoples of the world. While the Commission understands that the articles of the UN Declaration are to be considered as a whole, it has limited its findings and observations to those specific articles that were raised during the proceeding.

To that end, the Commission notes that SSN took the position that the UNDA would require the Crown to obtain SSN's FPIC in relation to projects or measures that would affect their lands (being, in this case, the Deviation Application). Articles 19, 26, and 32 were noted to support this position. In contrast, Trans Mountain argued that FPIC is not a legal requirement in Canada.

Article 32(2) of the UN Declaration provides as follows:

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.

The specific requirements of FPIC will vary depending on the surrounding context in which it is being considered, as well as the specific article being relied upon.

As noted above, article 32(2) of the UN Declaration imposes an obligation on the state to "consult and cooperate" in order to obtain FPIC from Indigenous Peoples prior to approving a project affecting their lands, territories, or resources. This is notably distinct from stronger provisions related to FPIC elsewhere in the UN Declaration, such as articles 10 (forcible removal from lands) and 29(2) (storage or disposal of hazardous materials).

²⁴ *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c.14, preamble

²⁵ *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*, 2022 BCSC 15.

²⁶ *Thomas and Saik'uz* at para 212.

In considering FPIC under article 32 for the purposes of the Deviation Application, the Commission considered the views of the parties as well as the Government of Canada's *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*.²⁷ Principle 6 specifically states that the Government of Canada recognizes that meaningful engagement with Indigenous Peoples **aims to secure** their FPIC when Canada proposes to take actions that impact them and their rights, including their lands, territories, and resources.

The Commission understands that the concept of FPIC is focused on parties working together in partnership and respect, and striving to achieve consensus in good faith regarding decisions that may impact the rights and interests of Indigenous Peoples. While the Commission considers that the concept of FPIC, as articulated through the UN Declaration, is not a direct legal requirement in Canada, the core elements of FPIC are best practices. The record demonstrates that at many points in their engagement regarding the TMEP, Trans Mountain and SSN achieved these standards.

With respect to the efforts undertaken to obtain SSN's FPIC, the Commission notes the views of both parties that the Mutual Benefits Agreement is evidence of SSN's support of, and consent to, the broader TMEP. The Commission notes that shortly after the parties executed the Mutual Benefits Agreement, SSN withdrew their Statement of Opposition and advised that it no longer wished to participate in the detailed route process for the TMEP in the Pípsell Area. The Commission finds that this agreement represents the significant efforts made by the parties to work together in good faith and strive to reach consensus regarding decisions and measures that could impact SSN's rights and interests in the Pípsell Area.

The Commission is also mindful of SSN's position that FPIC cannot be inferred from the Mutual Benefits Agreement alone, particularly where there is a disagreement about whether the terms of the Mutual Benefits Agreement have been met. As such, in making its findings regarding consent, the Commission has not only considered the Mutual Benefits Agreement and the extensive engagement and negotiations surrounding that agreement, but also Trans Mountain's efforts to engage SSN on the Deviation Application, as previously described in **Section 6.4.1**. The Commission also considered the steps taken and opportunities provided through its process for the Deviation Application.

Based on all of the above, the Commission finds that there were good faith efforts to reach consensus among the parties and that the relevant requirements for consent that flow from article 32 of the UN Declaration, as affirmed through the UNDA, were met in this case.

6.4.5.4 Effects on the rights of Indigenous Peoples

In assessing the effects of the Deviation Application on SSN's rights and interests, the Commission acknowledges that Indigenous Peoples have a unique constitutional relationship with the Crown. Indigenous and Treaty rights are recognized and affirmed in section 35 of the *Constitution Act, 1982*. The Commission recognizes that it must uphold the honour of the Crown in all its dealings with Indigenous Peoples. In addition to the constitutional obligation to uphold the honour of the Crown, the CER Act contains specific references and requirements regarding the consideration of the rights of Canada's Indigenous Peoples. This includes section 56 that requires the Commission to consider the effects of proposed applications on the rights of Indigenous Peoples. As discussed above, the UNDA also supports a robust interpretation of Indigenous rights.

²⁷ <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>

Effects of the Deviation Application on SSN's rights

The Commission received sufficient information during the proceeding to allow it to assess the effects of the Deviation Application on SSN's rights. This information included evidence from SSN about the context in which their rights are exercised or practiced in the Pípsell Area and the potential effects of the Deviation Application on these rights. The Commission notes that of the 4.2-km-long stretch of the TMEP in the Pípsell Corridor, approximately 1.3 km is the subject of the Deviation Application, with the remaining 2.9 km expected to be completed through micro-tunnelling. Conventional open trench construction was proposed for 880 m of this remaining segment, while trenchless construction (HDD) was proposed for 455 m.

The Commission acknowledges SSN's evidence about the importance of the Pípsell Corridor as a sacred area and the critical importance to SSN of reducing surface disturbance within it, as described in the Mutual Benefits Agreement. It is clear to the Commission that SSN leadership has a strong preference, based on SSN's legal and spiritual obligations, for micro-tunnelling in the entirety of the Pípsell Corridor, to reduce the amount of surface disturbance and the related effects on SSN's rights.

The Commission further notes that SSN submitted that the deviation would have direct and significant adverse impacts, including on the ability of both present and future generations of Secwépemc to exercise their inherent rights, including those in relation to their stewardship obligations in the area. Although, at the oral hearing, SSN did not produce witnesses for cross-examination who were community members or otherwise able to answer questions about the potential impacts of the Deviation Application on SSN's right and interests, significant oral evidence was brought forth by Jeanette Jules, SSN's Knowledge Keeper. Jeanette Jules shared her deep understanding of SSN's laws, language, cultural practices, and way of life, all of which are connected to Secwépemc lands in the Pípsell Area.

In considering the effects of the Deviation Application on SSN's rights, in light of their rights to self-determination, the Commission was urged to consider adverse effects from SSN's perspective. To that end, the Commission accepts SSN's assessment that the Deviation Application – in particular, the use of HDD and conventional open trench construction – would result in surface disturbance in the Pípsell Corridor, creating impacts on SSN's rights. This determination, however, must be considered in the context of other findings, including the technical evidence and findings in the proceeding regarding the likelihood of micro-tunnelling succeeding.

Technical evidence and the Commission's findings on the Deviation Application

The Commission's assessment of the potential adverse effects of the Deviation Application on the rights of Indigenous Peoples has been considered in the context of these technical findings. In **Section 6.1.4**, the Commission set out its technical findings, including that the most probable outcome if Trans Mountain were to continue with micro-tunnelling is the "Worst-Worst-Case Scenario" - namely that micro-tunnelling would not be successfully completed, and HDD/conventional open trench construction would still be required in order to complete the TMEP in the 1.3 km segment under consideration. In that scenario, a new, incremental, surface disturbance of 1.50 ha could be incurred to construct a rescue shaft to retrieve the MTBM and for access. This new disturbance would be in addition to either the HDD/open trench construction Best-Case Scenario (2.40 ha of new disturbance) or Worst-Case Scenario (3.00 ha of new disturbance). From this perspective, the Commission's decision to approve the Deviation Application would avoid the additional disturbance of 1.5 ha.

The Commission further notes, that even if the Worst-Worst Case Scenario were not to occur, its technical findings suggest a moderate difference in new disturbance between the potential methodologies. Specifically, the new disturbance for the Worst-Case Scenario for micro-tunnelling would be 1.50 ha; the Best-Case Scenario for the HDD/conventional open trench would be 2.40 ha of new disturbance.

The Commission notes that SSN's subject matter expert, Jens Hornbruch, also acknowledged the possibility of Trans Mountain's micro-tunnelling Worst-Worst-Case Scenario and submitted that in that scenario, pursuing a rescue shaft or retrieving the MTBM would not be recommended due to the additional surface disturbance that would be required.

The Commission further notes that while micro-tunnelling was identified by the parties as the preferred methodology, they also turned their minds to the fact that neither this specific methodology, nor trenchless construction more generally, was guaranteed to succeed. This is reflected in the framework of the Mutual Benefits Agreement.

Mitigating the potential effects of the Deviation Application on the rights of Indigenous Peoples

In its assessment of the potential adverse effects of the Deviation Application on the rights of Indigenous Peoples, the Commission has also considered the means through which those effects may be mitigated (i.e., measures identified to avoid, minimize, restore, and compensate for potential adverse effects).

In this regard, the Commission notes Trans Mountain's commitment to continue engaging with SSN and to execute the 2023 Revised Route in a manner that minimizes impacts on the Pípsell Corridor, as generally described in **Sections 6.3.1 and 6.4.4.1**. These commitments include both those in relation to Trans Mountain's existing practices and processes and any future opportunities for additional mitigation measures or engagement. Specifically, the Commission notes that the measures identified include avoiding surface disturbances by using HDD for 455 m, avoiding interactions with known burial mounds, minimizing the footprint for open trench construction, restoring lands with enhanced reclamation, and compensating SSN for any portion of TMEP construction in the Pípsell Corridor for which Trans Mountain does not use trenchless construction (as agreed to in the Mutual Benefits Agreement). As noted throughout these reasons, the Commission expects Trans Mountain to uphold these commitments.

The Commission finds these commitments and the approach identified by Trans Mountain to be appropriate and consistent with existing conditions of Certificate OC-065, including Condition 96 (Reports on engagement with Indigenous groups – construction) and Condition 98 (Plan for Indigenous group participation in construction monitoring). The Commission further finds that the potential adverse effects of the Deviation Application on the rights of SSN, after the implementation of mitigation measures (including those proposed by Trans Mountain and required by the Commission as part of the TMEP Certificate proceedings), can be meaningfully addressed.

The Commission notes however, the position taken by SSN that there are no conceivable mitigation strategies for the harm that SSN would incur as a result of HDD/conventional open trench construction in the Pípsell Corridor. The Supreme Court of Canada also recognized in *Haida* that “the Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns”. The Court provided that in such instances, “[b]alance and compromise will then be necessary” (*Haida*, at para. 45). The Supreme Court of Canada has recognized that a decision to authorize a project cannot be in the public interest if the Crown's duty to consult has not been met (*Clyde River (Hamlet) v.*

Petroleum Geo-Services Inc.,²⁸ at para. 40). This does not mean that the interests of Indigenous communities cannot be balanced with other interests at the accommodation stage. Indeed, it is for this reason that the duty to consult does not provide Indigenous communities with a “veto” over final Crown decisions (*Haida*, at para. 48). Rather, proper accommodation “stress[es] the need to balance competing societal interests with Aboriginal and Treaty rights” (*Haida*, at para. 50).

In balancing the relevant societal interests engaged through the Deviation Application the Commission has considered this application in the context of the broader regulatory context of the TMEP and the limited scope of a deviation application. Specifically, the Commission notes, as discussed in detail in **Section 2**, that the TMEP has undergone a rigorous multi-year review, which included assessment of public interest considerations and the balancing of competing societal interests. The result of that process was the approval of a general pipeline corridor, which traversed through the Pípsell Area, in the OH-001-2014 and MH-052-2018 Certificate proceedings, in which the TMEP was found to be in the overall public interest.

Based on the mitigation measures described above, its technical findings regarding feasibility of continued micro-tunnelling, and the overall balancing of societal interests addressed in detail during earlier TMEP proceedings and in the Deviation Application, the Commission finds, that the accommodation of SSN’s rights and interests in the context of the Deviation Application is appropriate in the circumstances.

7 CONCLUSION

The Pípsell Area holds profound cultural and spiritual significance to SSN. In response, Trans Mountain agreed to attempt to construct a 4.2-km-long segment of the TMEP in this area using micro-tunnelling, with the aim of minimizing surface disturbance. During construction, Trans Mountain encountered significant technical challenges in 1.3 km of the 4.2 km originally identified for micro-tunnelling. Trans Mountain tried unsuccessfully to overcome these challenges, incurring an additional \$32 million in costs to do so and extending construction timelines by several months. Following engagement efforts with SSN, among others, Trans Mountain applied to revise the route for the 1.3-km-long segment to accommodate a change in construction methodology from micro-tunnelling to a combination of HDD and conventional open trench construction.

The Commission considered all submissions made by the parties. As an expert regulatory tribunal, the Commission finds that the deviation is required based on the available technical and economic evidence. Specifically, the Commission finds that continued micro-tunnelling is most likely to fail, whereas the proposed 455-m-long HDD is likely to be successfully completed. Requiring Trans Mountain to continue with micro-tunnelling in the face of substantial technical challenges and other impediments risks causing additional and avoidable surface disturbance, would likely delay the TMEP’s completion by at least 10 months, and could lead to a loss of at least \$2 billion in revenues by Trans Mountain with additional adverse impacts on shippers and other parties.

The 2023 Revised Route is within the approved pipeline corridor and follows the same alignment as the Original Route approved by the Commission in April 2020. Of the 1.3 km under consideration, only 880 m will be completed through open trench construction. Any environmental or socio-economic impacts of the deviation will be sufficiently addressed by the full suite of environmental and socio-economic mitigation measures identified for the

²⁸ *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40.

TMEP. The Commission also notes that the HDD is itself a mitigation measure aimed at reducing surface disturbance.

Based on Trans Mountain's robust engagement efforts and the Commission's hearing process, the Commission finds that the duty to consult with Indigenous Peoples and accommodate their interests has been met. The Commission also considered its duties and obligations in light of the *United Nations Declaration on the Rights of Indigenous Peoples Act* and the CER's commitment to Reconciliation and finds that any requirements thereunder were adequately addressed. The Commission also assessed the effects of the Deviation Application on the rights of Indigenous Peoples in the context of its technical findings and finds that any impacts can be meaningfully addressed, based on the mitigation measures identified in the Deviation Application and through conditions imposed by earlier TMEP regulatory processes.

Accordingly, the Commission approves the Deviation Application, including the 2023 Revised Route. The Commission expects Trans Mountain to uphold its commitments in respect of the Deviation Application and construction in the Pípsell Area in relation to the broader TMEP, many of which are noted throughout these reasons. These include commitments related to enhanced reclamation standards, taking measures to reduce overall disturbance (including by reducing grading and the size of the footprint for open trench construction, where possible) and continuing to dedicate the time necessary to meaningfully engage and involve SSN in the construction of the 2023 Revised Route.

Yours sincerely,

K. McAllister

for
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