

WILSON LAYCRAFT

• BARRISTERS & SOLICITORS •

Richard E. Harrison*
Email: rharrison@wilcraft.com
Direct: 403.441.2257

Assistant: Anggi Chen
Email: achen@wilcraft.com
Direct: 403.476.0150

*Denotes Professional Corporation

Our File: 4114-001REH

By Regular Mail and Email: ec.ministre-minister.ec@canada.ca
iaac.vancouver.aeic@canada.ca

March 15, 2021

The Honourable Jonathan Wilkinson
Minister of Environment and Climate Change
Fontaine Building, 2nd Floor
200 Sacré-Coeur Boulevard
Gatineau, QC K1A 0H3

Dear Sir:

Re: Montem Resources Alberta Operations Ltd.'s Tent Mountain Project

We are counsel for E. Macleay Blades, Rocking P. Ranch Ltd., John Smith and Plateau Cattle Co. Ltd. Our clients have grazing leases in category 2 lands, as those lands are defined in *A Coal Development Policy for Alberta* (the “**1976 Coal Policy**”). The grazing leases are generally located west of Chain Lakes Provincial Park in the Eastern Slopes of the Rocky Mountains at the headwaters and confluence of the Oldman and Livingston Rivers.

Our clients seek an impact assessment of Montem Resources Alberta Operations Ltd.'s proposed Tent Mountain Project (“**Tent Mountain**”) pursuant to section 9(1) of the *Impact Assessment Act*. They repeat the submissions made in the March 2, 2021 correspondences sent by the Blood Tribe/Kainai and Siksika Nation, copies of which are enclosed.

The March 2, 2021 correspondences provide sound bases for you to exercise your discretion under section 9(1) and require an impact assessment of Tent Mountain. The arguments contained in the letters outline your expansive jurisdiction over Tent Mountain, notwithstanding that the project is 75 tonnes/day short of the threshold set out in section 18(a) of the *Physical Activities Regulations*.

In addition to the arguments contained in the March 2, 2021 correspondences, our clients provide the following rationale for exercising your jurisdiction accordingly.

Species at Risk Act

Tent Mountain is in designated critical habitat for both the bull trout and westslope cutthroat trout. The designations were issued under two separate Recovery Strategies, incorporated under section 44 of the *Species at Risk Act*. The westslope cutthroat trout recovery strategy was incorporated December 12, 2019 and the bull trout recovery strategy was incorporated September 10, 2020.

Enclosed are extracted portions of both recovery strategies. The following watersheds contain critical habitat and are directly impacted by Tent Mountain (among others):

- Castle River (page 41 of the westslope cutthroat trout recovery strategy; page 79 of the bull trout recovery strategy);
- Crowsnest River (page 42 of the westslope cutthroat trout recovery strategy; page 82 of the bull trout recovery strategy); and
- Oldman River (page 48 of the westslope cutthroat trout recovery strategy; page 96 of the bull trout recovery strategy).

Each of these watersheds will be directly impacted by Tent Mountain. Significantly, the Castle River watershed will suffer a catastrophic impact should the project proceed. It is one of the most significant watersheds for both species.

The Recovery Strategies also set out a list of activities likely to destroy critical habitat. The list includes water extraction, mechanical forest removal, linear disturbances, mining and off-highway vehicle use. Each activity is contemplated in Tent Mountain. We refer you to part 4.3 of the westslope cutthroat trout recovery strategy and Part 5 of the bull trout recovery strategy, enclosed.

Selenium, a chemical element released in watersheds from coal mining activities, is known to cause debilitating deformities in westslope cutthroat trout and bull trout. Tent Mountain is in the headwaters for a significant portions of the species' critical habitat and will catastrophically impact downstream populations.

Section 58 of the *Species at Risk Act* sets out a prohibition on the destruction of any critical habitat for an aquatic species:

Destruction of critical habitat

58(1) Subject to this section, no person shall destroy any part of the critical habitat of any listed endangered species or of any listed threatened species — or of any listed extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada — if

...

- (b) the listed species is an aquatic species;

Successive courts have held that your ministry and the Minister of Fisheries, Oceans and the Canadian Coast Guard, not only have the jurisdiction to protect the critical habitat for aquatic species listed under the *Species at Risk Act*—you are legally required to. The Federal Court of Appeal in *Canada (Fisheries and Oceans) v David Suzuki Foundation* held as follows:

[117] Section 57 of the *SARA* provides in no uncertain language that the purpose of section 58 is to ensure that all the critical habitat is protected by provisions in, or measures under, an Act of Parliament or by a protection order issued under subsections 58(1) and (4) of the *SARA*. Surely this is an indication that there must be some equivalence between the two contemplated means of protection. They need not be the same, but surely they must have the same objective. Pursuant to subsection 58(1), the objective of a protection order is to ensure that “no person [...] destroy any part of the critical habitat of any listed endangered species or of any listed threatened species [...] if the listed species is an aquatic species”. Provisions in, or measures under, an Act of Parliament should thus – in principle – achieve the same objective if they are to be resorted to as a substitute to a protection order.

[emphasis in original]

In addition to your jurisdiction to legally protect critical habitat, your ministry and the Minister of Fisheries, Oceans and the Canadian Coast Guard have the jurisdiction to issue protection orders under section 80 of the *Species at Risk Act*.

In *Le Groupe Maison Candiac Inc. v Attorney General of Canada*, the Federal Court of Appeal confirmed that you have the jurisdiction to issue protection orders under section 80 for species within provincial jurisdiction:

[2] The appellant has challenged each of these conclusions before us. It essentially argued that the Federal Court made an error of law in concluding that the enabling statute suppresses an “evil” within the meaning of 91(27) of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), reproduced in *R.S.C., 1985, App II, No. 5 (Constitution Act, 1867)* and does not encroach on provincial jurisdiction. It also argued that the Federal Court erred in considering that the concepts of disguised or *de facto* expropriation did not apply in this case.

[3] Having carefully weighed the arguments of the parties and considered the applicable law, I am of the view that this appeal should be dismissed.

Your government’s jurisdiction to protect species listed under the *Species at Risk Act* provides a sound basis to require an impact assessment. An assessment is the most comprehensive mechanism available to evaluate the impact of Tent Mountain on the critical habitat of listed species. It is necessary in this case because Tent Mountain’s impact over both species will be significant.

Preamble to the *Impact Assessment Act*

Legislative “preambles are relied on most often in statutory interpretation to reveal legislative purpose, either directly by setting out the purposes of the legislation or indirectly by describing the evils or concerns that motivated the legislature”: Sullivan, Ruth, *Statutory Interpretation* at p 162 – 165. In this regard, the preamble to the *Impact Assessment Act* is telling:

Whereas the Government of Canada is committed to fostering sustainability;

Whereas the Government of Canada recognizes that impact assessments provide an effective means of integrating scientific information and Indigenous knowledge into decision-making processes related to designated projects;

Whereas the Government of Canada recognizes the importance of public participation in the impact assessment process, including the planning phase, and is committed to providing Canadians with the opportunity to participate in that process and with the information they need in order to be able to participate in a meaningful way;

...

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

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

...

Whereas the Government of Canada recognizes that impact assessment contributes to Canada’s ability to meet its environmental obligations and its commitments in respect of climate change;

...

And whereas the Government of Canada recognizes the importance of regional assessments in understanding the effects of existing or future physical activities and the importance of strategic assessments in assessing federal policies, plans or programs that are relevant to conducting impact assessments;

Three themes are highlighted in the preamble to the *Impact Assessment Act*. They are, in order of prominence: indigenous relations, protecting the environment and public participation. Each of those elements add further bases to requiring an impact assessment over Tent Mountain.

The March 2, 2021 correspondences outline the importance placed upon the Tent Mountain lands to First Nations. They articulate the historical and current reliance upon those lands.

The remaining themes are noteworthy. The environment is a key factor, both in terms of contributions to climate change and the destruction of physical and aquatic spaces.

As highlighted by this correspondence, there is a clear desire for public participation in the decision to approve Tent Mountain. The diversity of voices concerned about Tent Mountain is, on its own, sufficient to ground your powers under section 9(1). Your ability to require an impact assessment may be predicated on “public concerns related to those effects warrant[ing] the designation” as that phrase is found in section 9(1).

A chorus of voices have spoken against expanded coal mining in the Eastern Slopes. There is clearly a public concern about development and that concern merits an impact assessment.

The preamble provides further support for requiring an impact assessment in this case. Evaluating Tent Mountain through the *Impact Assessment Act* falls within the express purpose of the Act.

Cumulative Effects

The March 2, 2021 correspondences outline the cumulative effects associated with Tent Mountain.

Our clients’ grazing leases and residences are not directly affected by Tent Mountain. However, the cumulative affects associated with multiple heavy resource extraction projects does have a direct impact on our clients.

Our clients currently draw water from the Oldman and Livingston Rivers for their and their livestock’s survival. Further pressure on those watersheds will impact our clients because water will need to be reallocated to accommodate the addition of Tent Mountain’s industrial output.

There is a dearth of water in South Western Alberta. There is no capacity to support this project.

Closing Remarks

The purpose of this correspondence was twofold: to provide you with further bases to found your jurisdiction to require an impact assessment of Tent Mountain and to inform you that a diverse array of Canadians seek further participation in the Tent Mountain approval process. These two facts support you exercising your discretionary authority to require an impact assessment.

Yours very truly,
WILSON LAYCRAFT

Richard E. Harrison
Barrister & Solicitor

Encl.: March 2, 2021 correspondence sent by Blood Tribe/Kainai
March 2, 2021 correspondence sent by Siksika Nation
Extracts of the Westslope Cutthroat Trout Recovery Strategy
Extracts of the Bull Trout Recovery Strategy

Cc: Janet Shaw, Impact Assessment Agency of Canada (janet.shaw@canada.ca)
Mae Price, Jeff Langlois and Clayton Leonard, JFK Law (mprice@jfklaw.ca)
Shireen Ouellet (souellet@montem-resources.com)
Robert Drummond (robert.drummond@justice.gc.ca)