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February 25, 2025

By Email (hearing.services@aer.ca)

Alberta Energy Regulator
Suite 1000, 250 - 5 Street SW
Calgary, AB T2P 0R4

Attention: Elaine Arruda, Hearing Coordinator, Hearing Services

Dear Ms. Arruda:

Re: Summit Coal Inc. ("Summit")
Alberta Energy Regulator ("AER") Proceeding 449 (the "Proceeding")
Application Nos. *Coal Conservation Act* 1945552, 1945553; *Environmental Protection and Enhancement Act* 001-00496728; *Water Act* 001-00496729, 001-496730; and *Public Lands Act* 32212208 and 32230703 (the "Applications")
Summit Request for Pre-Hearing Meeting

Introduction

Further to our correspondence of February 11, 2025, we have now had an opportunity to consider the Hearing Panel's participation decisions. Summit remains committed to obtaining the remaining regulatory authorizations sought in the Applications, and maintains that the Mine 14 Project, near Grande Cache, Alberta, remains in the public interest, as it was when approved by the Energy Resources Conservation Board ("**ERCB**") in 2009. Summit expects the AER will complete the remaining regulatory review and issue a decision on the Applications before the end of 2025. This necessitates a hearing into the merits of the applications during or before September of 2025.

However, prior to conducting a hearing into the merits of the Applications, it is our view that the scope of the hearing, issues regarding costs, and the participation status of the environmental non-governmental organizations ("**ENGOs**"), should be clarified by the Hearing Panel. Therefore, we formally request a Pre-Hearing Meeting in accordance with section 15 of the *Alberta Energy Regulator Rules of Practice* (the "***Rules***").[1] Specifically, we request that:

1. This letter be treated as Summit's Written Pre-Hearing Submissions;

[1] Alta Reg 99/2013 [*Rules*].

2. All other parties be given 3 weeks from the date of this letter to file their Written Pre-Hearing Submissions addressing the issues raised herein and any other issues requiring the Hearing Panel's attention prior to the hearing on the merits;

3. Summit be given an additional week to file its Written Pre-Hearing Reply Submissions; and

4. A Pre-Hearing Meeting be held as soon as possible after all Written Pre-Hearing Submissions have been filed.

The dates for both the Pre-Hearing Meeting and hearing on the merits should be established as soon as possible and we are committed to working with AER legal counsel and others to facilitate this. We appreciate that the Hearing Panel will require time to consider these submissions and confirm that other parties should proceed to prepare Written Pre-Hearing Submissions. However, our view is that the parties should immediately begin identifying suitable dates for both the Pre-Hearing Meeting and hearing on the merits. Therefore, we will be in contact with AER counsel and counsel or representatives for the other parties in the next couple of days to identify suitable dates for a virtual Pre-Hearing Meeting and eventual hearing on the merits.

Summary of Substantive Issues for Adjudication at the Pre-Hearing Meeting

In this letter, we provide substantive positions on the following issues, and we request that the Hearing Panel provide its determinations on each of these issues as part of a Pre-Hearing Decision, to be issued following the Pre-Hearing Meeting:

(a) the scope of Indigenous law issues to be addressed at the hearing of the Applications;

(b) the scope of non-Indigenous law issues to be addressed at the hearing of the Applications;

(c) the eligibility of the ENGOs to recover costs from Summit;

(d) the eligibility of the Indigenous groups to recover costs from Summit;

(e) an advanced determination as to whether the hearing will be cancelled if the four Indigenous groups granted participation rights withdraw their requests to participate, but the two ENGOs do not; and

(f) the applicable process steps and timelines for the hearing into the merits of the Applications.

With respect to item (f), above, as previously indicated, we will be contacting AER counsel and other parties' counsel or representatives to begin identifying suitable dates for a hearing into the merits of the Applications.

Background on Mine 14 and Summit

For the benefit of the Hearing Panel, we advise that, as set out in the following excerpt from a press release issued by Maxim Power Corp on February 11, 2025, Summit is undergoing a change of ownership:

> **CALGARY, Alberta (February 11, 2025)** – Maxim Power Corp. ("MAXIM" or the "Corporation") (TSX: MXG) announces that, pursuant to the Option to Purchase Agreement entered into in February 2022, and subsequently amended and restated in March 2023, it has received notice (the "Notice") from Valory Resources Inc. ("Valory") that Valory is exercising its right to purchase the Corporation's wholly-owned subsidiaries Summit Coal Limited Partnership and Summit Coal Inc. (collectively "Summit"). Following receipt of the Notice, MAXIM and Valory have until February 18, 2025 to enter into a Purchase and Sale Agreement (the "PSA"). Closing of the PSA ("Closing") will be subject to each party satisfying customary closing conditions and is expected to occur in the first half of 2025.[2]

As set out in the above-noted press release, Valory Resources Inc. ("**Valory**") acquired an option to purchase Summit pursuant to an Option to Purchase Agreement signed in February of 2022. Valory has been actively engaged in the operations of Summit, including the advancement of the Applications, since that time. The PSA referred to in the press release has been executed by the parties but not yet closed. In addition, Valory has maintained its own office in Grande Cache since November 1, 2023.

As set out in the Applications, the Mine 14 Project has been the subject of extensive community and Indigenous consultation for 20 years, beginning in 2005.[3] Prior to Mine 14 being approved by the ERCB in 2009, Summit gave numerous stakeholder presentations, held meetings with local stakeholders, conducted open houses, conducted socio-economic assessment interviews, and held various meetings with the Aseniwuche Winewak Nation ("**AWN**") and the Mountain Métis (then known as Métis Local 1994).[4] Between 2008 and 2011, Summit reached agreements with the AWN and Mountain Métis to formalize their support of Mine 14 and ensure they would benefit from its advancement. As a result of Summit's work with these Indigenous groups and local stakeholders, the Mine 14 Project was approved by the ERCB, without a hearing, and in December of 2009 the ERCB issue Mine Permit C2009-6 and in April of 2011, it issued Mine Licence C2011-9. These authorizations under the *Coal Conservation Act* remain in good standing.[5]

In addition to obtaining the authorizations under the *Coal Conservation Act*, pursuant to the *Public Lands Act* ("**PLA**"), Summit was issued a Mineral Surface Lease for the mine and Licence of Occupation for the main access road in July of 2013. Summit was also provided with draft approvals under the *Environmental Protection and Enhancement Act* ("**EPEA**") and *Water Act*. However, at Summit's request, final EPEA and *Water Act* approvals were not issued because Summit chose not to proceed with the Project at that time. Summit's decision not to finalize the EPEA approval, combined

[2] Maxim Power Corp. News Release, "Maxim Power Corp. Receives Notice from Valory Resources Inc. to Exercise the Option to Purchase Summit Coal" (11 February 2025), available online: link.
[3] Exhibit 2.0, PDF p. 33.
[4] Exhibit 2.0, PDF p. 33.
[5] Exhibit 2.0, PDF p. 27.

with the expiry of the PLA dispositions in 2021, necessitated that Summit reply to the AER by way of the Applications.

Summit engaged in significant work with the AER and local stakeholders prior to filing the Applications for the remaining regulatory authorizations in March of 2023. As shown in the background materials for the Applications on the record of this Proceeding, Summit began engaging with local Indigenous groups, municipalities, property owners, and other stakeholders in early 2022 and held a number of meetings to provide stakeholders with updates regarding the Mine 14 Project.[6] Summit also first engaged with Government of Alberta officials in September 2021, with such engagement focused on minimizing impacts on the area surrounding the Mine 14 Project, such as a commitment by Summit to leave Canadian Death Race trails intact.[7] Summit also prepared and distributed two newsletters for the Mine 14 Project in June 2022 and February 2023.[8]

As a result of these extensive community consultation efforts, Valory, in its capacity as the potential future owner of Summit, entered into agreements with the Grande Cache Golf Club, Grande Cache Saddle Club, and Grande Cache Medical Center, securing their long-term support for the Project. It is our view that Summit's public participation program was clearly effective and robust, as demonstrated by the numerous supportive requests to participate ("**RTPs**") and letters of support submitted to the AER, and absence of any RTPs expressing concerns about the Project from any parties who live or do business near the Mine 14 Project.

With respect to Indigenous engagement, Summit was proactive in identifying those Indigenous groups that may have constitutional rights potentially impacted by the regulatory authorizations issued in connection with the Mine 14 Project. First, Summit reviewed its records to identify all Indigenous groups that expressed any interest in the Mine 14 Project since community engagement and the permitting process began in 2005.[9] Through this exercise, Summit identified the AWN and the Mountain Métis as being potentially affected.[10] Historical records showed that none of the Driftpile Cree Nation ("**Driftpile**"), Louis Bull Tribe ("**LBT**"), Sucker Creek First Nation ("**SCFN**"), or Lac Ste. Anne Métis Community Association ("**LSAMCA**") previously expressed concerns, attended any open houses, or participated in any regulatory reviews regarding Mine 14.

In addition to relying on its long history in the Grande Cache area and significant involvement in the local community, in March of 2022 Summit also engaged the Alberta Consultation Office ("**ACO**") to determine if the AER's decisions on the Applications may trigger consultation obligations with Indigenous groups and if so, which groups. The ACO identified three Indigenous groups as having constitutional rights that may be impacted by Mine 14: the AWN, East Prairie Metis Settlement, and Horse Lake First Nation. In response, Summit carried out its consultation program, which included a site visit at the request of Horse Lake First Nation.[11] In addition, Summit engaged in further extensive negotiations with the AWN. The ACO was provided regular updates of Summit's consultation efforts

[6] Exhibit 2.0, PDF pp. 33-34.
[7] Exhibit 2.1, PDF p. 9.
[8] Exhibit 2.0, PDF pp. 34 and 441.
[9] Exhibit 2.0, PDF pp. 33-37.
[10] This is because AWN and Mountain Metis entered into agreements regarding the Mine 14 Project around 2009.
[11] Exhibit 2.0, PDF p. 33 and 37-39.

with the three Indigenous groups identified by the ACO as having constitutional rights that may be impacted by the AER's subsequent decisions on Mine 14. During this time, the ACO also engaged directly with these groups. As a result, after over a year of consultations, in April of 2023, the ACO issued its Adequacy Assessment determining that consultation with each of AWN, East Prairie Metis Settlement, and Horse Lake First Nation was complete and Summit could proceed to file the Applications with the AER.[12]

Summit proceeded to file the Applications with the AER in June of 2023. On July 27, 2023, the AER issued the Notice of Application providing until August 28, 2023, for parties to file Statements of Concern ("**SOC**"). The only Indigenous group with constitutional rights recognized by the ACO to file an SOC was the AWN. However, Summit and Valory continued to engage with the AWN and a new agreement was reached between Valory and AWN to ensure the AWN substantially benefits from the development of the Project through employment opportunities, business contracting opportunities and other valuable commitments. Therefore, the AWN withdrew its SOC and expressed its unqualified support for the timely approval of the Applications.[13]

Four other Indigenous groups, who have never previously expressed an interest in Mine 14, also filed SOCs. The ACO, which regularly consults with these groups on other projects, already determined that none of these groups have any constitutional rights that may be impacted by the Project. The main communities or reserves of the Driftpile, LBT, SCFN, and LSAMCA, are located, respectively, 265, 384, 250, and 338 kilometers from Mine 14.[14] In addition, two ENGO's, the Alberta Wilderness Association ("**AWA**") and the Canadian Parks and Wilderness Society ("**CPAWS**"), also filed SOCs.

On October 3, 2024, the AER advised the Chief Hearing Commissioner that the Applications should be decided upon by a panel of hearing commissioners. The letter confirms that Summit submitted a project summary in December of 2021 and refers to a Ministerial Order previously issued by the Minister of Energy. The letter does not refer to any of the SOCs that were submitted in connection with the Applications and does not provide any rationale or explanation as to why the Applications were referred to a hearing.

On November 26, 2024, the AER issued a Notice of Hearing providing parties with an opportunity to file RTPs. Nineteen parties filed RTPs in support of the timely approval of the Applications without a hearing. Four parties filed letters of support. Unsurprisingly, the two ENGOs, AWA and CPAWS, filed RTPs seeking participation rights in the hearing and advocating that the Applications be denied. AWA expressly stated that if the AER does not let it participate in hearings, this may impact its ability to obtain funding from its donors.

Driftpile, SCFN, LBT, and LSAMCA, also filed RTPs claiming that the AER's decision on the Applications may impact their constitutional rights. They provided brief summaries asserting that some of their members may have at times visited the area where the Mine 14 Project is located. However, although all of these groups are aware of the ACO, none of the SOCs or RTPs filed by these groups acknowledge the role of the ACO in managing Alberta's consultation obligations to Indigenous

[12] Exhibit 2.1, PDF p. 484.
[13] Exhibit 2.2 at PDF pp. 107-108.
[14] Two other Indigenous groups also filed SOCs but subsequently withdrew them.

groups. In addition, Driftpile, SCFN and LBT all acknowledged that they only learned of Mine 14 from the AER's website and not because their activities were in any away impacted by activities in the area or that they were engaged in community discussions regarding Mine 14. The LBT acknowledged it is not even a Treaty 8 signatory (Mine 14 is on Treaty 8 territory), and is actually a Treaty 6 signatory, whose territory is considerably to the south of Grande Cache.

On February 7, 2025, the Hearing Panel issued its decisions on hearing participation[15] affording broad participatory rights to both ENGOs and the four Indigenous groups that the ACO already determined do not have any constitutional rights that may be impacted by the Applications.

As stated above, Summit remains committed to securing the regulatory authorizations sought in the Applications and is prepared to prosecute a hearing if necessary. However, Summit must do so in a manner that is respectful of its investors and key stakeholders, which includes the AWN and Mountain Métis, two Indigenous groups that are well-known in the Grande Cache area and who have been actively involved with the development of Mine 14 for almost two decades.

The Hearing Panel's participation decisions with respect to the four Indigenous groups not recognized by the ACO and the two ENGOs create significant uncertainties regarding how the AER will process the Applications through a hearing. These uncertainties need to be addressed not only so that the Applications can be efficiently processed, but also so future investors in Alberta's resource economy have some certainty and predictability regarding how Alberta manages its obligations to Indigenous communities and what the role of ENGOs are in Alberta's regulatory processes.

Therefore, we request that these matters be clarified by the AER by way of a Pre-Hearing Meeting in advance of a hearing on the merits of the Applications, and the following constitutes Summit's submissions on these issues.

Summit Submissions on Issues to be Addressed at Pre-Hearing Meeting

Scope of Issues Raised by Indigenous Groups

Summit seeks clarity on the scope of issues that will be considered with respect to the four Indigenous groups granted full participation in the hearing: namely, Driftpile, LBT, SCFN, and LSAMCA.

The Panel's decisions on hearing participation for these Indigenous groups are unclear. Our understanding is that the Panel has provided these groups with participation rights to represent those few members who may choose on their own time to use the area in their *personal* capacity. Our view is that it would be highly inappropriate if the Panel intended to usurp the mandate and expertise of the ACO to determine whether an Indigenous group's *collective constitutional rights* are at issue. We seek confirmation from the Panel that our understanding is correct.

Although they have not challenged the ACO's decision that they were not entitled to consultation, the requests to participate filed by each of the four Indigenous groups allege that the Crown's duty to

[15] Exhibits 37.0, 38.0, 39.0, 40.0, 41.0, 42.0, 43.0, 44.0, 45.0, 46.0, 47.0, 48.0, and 49.0.

consult in connection with the Project has not been discharged.[16] Given that Summit has already engaged with the ACO and received an adequacy determination for its consultation efforts in connection with the Project, the prospect of having to conduct a detailed examination of the potential impacts of the Project on the *constitutional rights* of four *additional* Indigenous groups not identified by the ACO is concerning. Such a hearing would constitute a collateral attack on the ACO's decisions and would in effect eviscerate the ACO's role in effectively managing Alberta's obligations to Indigenous groups.

In its hearing participation decisions for each of Driftpile, LBT, SFCN, and LSAMCA, the Panel reasoned that it "cannot simply adopt the ACO's conclusions as [the Panel does] not have the same information the ACO relied on to make its Determination."[17] In departing from the ACO's findings regarding the Indigenous groups that may be impacted by the Project, the Panel relied on the following statements from the Alberta Court of Appeal's decision in *O'Chiese First Nation v Alberta Energy Regulator* ("***O'Chiese***") regarding the duty to consult:

> However, that duty does not inform the requirements of the relevant legislation that some party in the position of the O'Chiese First Nation must be "directly and adversely affected" by a decision of the AER as a pre-condition to be accorded a regulatory appeal. The O'Chiese First Nation, having chosen to adduce no evidence to show how it would be directly and adversely affected by the Approvals cannot now seek regulatory appeals therefrom.
>
> A decision of the AER can, as a matter of fact, "directly and adversely" affect a party such as the O'Chiese First Nation. Whether it does so or not is to be considered by the AER in light of the evidence properly adduced before it.[18]

There are critical differences between the circumstances before the Court in *O'Chiese* and those before the Panel in the subject Proceeding. In Summit's submission, these differences impact the applicability of the reasons provided by the Court in *O'Chiese* and the Panel's assessment of whether Driftpile, LBT, SFCN, and LSAMCA may be directly and adversely affected by its decision on the Applications.

In *O'Chiese*, Shell Canada Limited ("**Shell**") filed regulatory applications for two natural gas pipelines which were located between 16 and 20 kilometres away from the O'Chiese First Nation ("**OCFN**") reserve lands. The ACO identified the OCFN as requiring consultation in connection with the two Shell pipelines, as these pipelines were situated within the O'Chiese First Nation Consultation Area ("**OCFNCA**") – an area established by the Government of Alberta specifically for the purpose of identifying and discharging the Crown's duty to consult.[19] The ACO deemed consultation to have been adequate vis-à-vis the OCFN,[20] and the approvals were subsequently issued to Shell.

[16] See Exhibits 26.0, 29.0, 30.0, and 31.0.
[17] See, for example, Exhibit 37.0 at PDF p. 2.
[18] 2015 ABCA 348 at paras 42 and 43 [*O'Chiese*].
[19] *Ibid* at para 22.
[20] *Ibid* at para 8.

The OCFN filed requests for regulatory appeal in respect of the approvals issued to Shell, and the AER denied these requests on the basis that the OCFN had not demonstrated that it was directly and adversely affected.[21] The OCFN then appealed the AER's denial of its requests for regulatory appeal.

The Court in *O'Chiese* rejected the position taken by the OCFN that any development undertaken within the OCFNCA would automatically lead to a finding that there were direct and adverse effects on the OCFN.[22] In other words, despite the fact that the ACO had determined that the applied-for Shell pipelines may impact the OFCN's *constitutional rights* and had therefore triggered the Crown's duty to consult the OCFN,[23] the Court found that the OCFN still needed to put forward evidence showing that it was directly and adversely affected in order to be granted a regulatory appeal. The circumstances surrounding the involvement of Driftpile, LBT, SFCN, and LSAMCA in the current Proceeding are dramatically different because the ACO has already determined that none of these Indigenous groups hold *constitutional rights* which are engaged by Summit's Applications. This is why consultation was not directed with these groups. Therefore, none of these groups are in a position that is akin to that held by the OCFN in *O'Chiese*.

With respect, *O'Chiese* means that even if Alberta, through the ACO, has determined an Indigenous group's *constitutional rights* may be impacted by a project, and a duty of consultation is therefore owed, this does not mean the AER must find that Indigenous group to be directly affected by the specific project being proposed, which requires a more careful examination. In fact, in our previous submissions we referenced other AER cases where although the ACO found an Indigenous group was owed consultation, the AER nevertheless declined to hold a hearing.[24] However, *O'Chiese* does not in any way endorse the AER second guessing the ACO's determination that an Indigenous group does not have *constitutional rights*. Again, if the AER were to do so, it would eviscerate the entire purpose of the ACO and render all its work in managing Alberta's constitutional obligations to Indigenous people meaningless.

Further, just because a project is in the Treaty territory of a First Nation does not mean that the First Nation is necessarily impacted by that project. In *Athabasca Chipewyan First Nation v Alberta* ("***Athabasca Chipewyan***"),[25] the Athabasca Chipewyan First Nation ("**ACFN**") sought judicial review of the ACO's determination that the Crown's duty to consult was not triggered by the Grand Rapids Pipeline Project proposed by TransCanada Pipelines Limited and Phoenix Energy Holdings Limited ("**TransCanada**"). ACFN advanced the position that any taking up of Treaty 8 land automatically resulted in an adverse effect on ACFN's rights under Treaty 8, such that the Crown's duty to consult was triggered. The Court endorsed the ACO's findings and dismissed the appeal, commenting that:

> […] it cannot be presumed that a First Nation suffers an adverse effect by a taking up anywhere in the treaty lands. A contextual analysis must occur to determine if the

[21] *Ibid* at para 21.
[22] *Ibid* at paras 37, 38, and 44.
[23] The Crown's duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it…"; See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35, citing *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1997 CanLII 2719 (BC SC), [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71.
[24] See, for example, Exhibit 2.2 at PDF pp. 473-477.
[25] 2019 ABCA 401 [*Athabasca Chipewyan*].

> proposed taking up may have an adverse effect on the First Nation's rights to hunt, fish and trap. If so, then the duty to consult is triggered.[26]

It is the ACO, and not the AER, that is tasked with undertaking the "contextual analysis" to determine if the constitutional rights held by an Indigenous group may be impacted by a proposed project. After this analysis has been undertaken, it is the ACO's role to then "advise the AER on whether actions may be required to address potential adverse impacts of a project on Treaty rights and traditional uses."[27] In other words, the ACO is responsible for delineating the Aboriginal rights that exist in relation to a proposed project, and the AER is responsible for considering potential adverse impacts that the proposed project might have on those rights.

The Court in *Athabasca Chipewyan* also discussed the tools that the ACO uses to identify Aboriginal rights that may trigger the Crown's duty to consult within a certain geographic area:

> The GeoData Mapping Project is a cross-ministry initiative whose goal is to create standardized maps, continually updated with contributions from First Nations, of the areas in which First Nations exercise their treaty rights. The purpose of the maps is to provide assistance in determining whether a given project might adversely affect a First Nation's treaty rights and, therefore, whether the Crown owes a duty to consult.[28]

Notably, Driftpile, LBT, and SCFN are each listed on the Government of Alberta's website as having recently provided additional information regarding their respective consultation areas.[29] Furthermore, as set out in Summit's previous submissions, Alberta's Ministry of Indigenous Relations carried out a lengthy and rigorous credible assertion process to determine the extent of the LSAMCA's constitutional rights.[30] It follows that the AER should confidently rely on the ACO's findings that these groups do not have *constitutionally recognized rights* that may be impacted by the Project. The AER does not have the mandate in law or the expertise to interfere with the ACO's determination.

Proponents rely on the ACO's determinations to identify which Indigenous groups they must consult with in advance of and after filing applications with the AER. In this case, Summit spent years developing its relationships with the groups identified by the ACO and this produced the desired result, namely no outstanding objections from Indigenous groups with recognized constitutional rights potentially impacted by the Applications. Summit invested considerable time, resources and effort to consult and to reach agreement with the AWN and Mountain Métis on comprehensive agreements that will provide substantial long-term benefits from the development of the Project though employment opportunities, business contracting opportunities and other valuable commitments.

The legal principles reflected in the above cases are entirely consistent with the *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities* ("**JOP**"), with which, pursuant to Ministerial Order, the AER must legally comply.[31] The JOP explicitly confirm that it is

[26] *Ibid* at para 61.
[27] *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163 at para 49.
[28] *Athabasca Chipewyan* at para 18.
[29] Government of Alberta, Ministry of Indigenous Relations, "Indigenous consultation areas in Alberta" (2025), available online: link.
[30] Exhibit 33.0 at para 32.
[31] Energy Ministerial Order 105/2014, at s. 2.

the ACO which is responsible to determine if an Indigenous group has constitutional rights that trigger the duty of consultation:[32]

> The ACO has the responsibility to
>
> - determine if consultation is required,
> - manage the consultation process,
> - assess the adequacy of consultation undertaken, and
> - provide advice to the AER on whether actions may be required to address potential adverse impacts on Treaty rights and traditional uses.

In contrast, the AER's responsibility is to consider how to mitigate potential impacts to those groups that the ACO has found have constitutional rights:[33]

> The AER has a responsibility to consider and accommodate (avoid, minimize, or mitigate) the impacts of energy applications on the constitutionally recognized rights of aboriginal peoples.

The AER's role is not, however, to determine if any Indigenous group has *constitutional rights* that may be impacted and therefore require consultation. This is clearly the role of the ACO, on behalf of the Government of Alberta. This is reflected in section 21 of the *Responsible Energy Development Act* which prevents the AER from assessing the adequacy of Crown consultation with Indigenous groups. It is further emphasized in the *Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013*:

> ***Alberta Energy Regulator***
>
> Alberta has established the Alberta Energy Regulator ("the Regulator"). This Regulator has no jurisdiction with respect to assessing the adequacy of Crown consultation-associated First Nations' Treaty rights as recognized and affirmed under Part II of the *Constitution Act, 1982*. The consultation office will work closely with the Regulator to ensure that any needed consultation occurs for decisions on energy project applications within the Regulator's mandate.

Considering the above, Summit should not be required to participate in a hearing, and the AER should not conduct a hearing, that includes the issue of whether Driftpile, LBT, SFCN, and LSAMCA hold constitutional rights which may be impacted by the Project. First, consistent with the AER's governing

[32] JOP, s. 2.
[33] JOP, s. 2.

legislation and the decisions discussed above, this is the role of the ACO, and none of Driftpile, LBT, SFCN, or LSAMCA have challenged the ACO's determination that they do not hold any such rights.

Second, determining whether a particular Indigenous group has constitutional rights is an extensive process (as noted by the Court in *Athabasca Chipewyan*) and the obligation to make this determination falls on the Crown, not Summit. Typically, ethnohistoric research and anthropologists are called on to provide expert analysis on this issue, often in trials that last months if not years.[34] Given that Summit has already received a determination from the ACO that Driftpile, LBT, SFCN, and LSAMCA do not hold constitutional rights which stand to be impacted by the Project, Summit is not prepared to participate in an AER hearing that revisits the ACO's findings at Summit's cost.

Further, Summit submits that the AER cannot properly determine the extent of these groups' constitutional rights in the area because it does not possess the expertise to do so and will be doing so in a vacuum without the benefit of knowing which other Indigenous groups may claim the area as their traditional territory, including those already identified by the ACO. Unlike the ACO, the AER: (i) does not perform the contextual analysis required to determine the traditional territories of Indigenous groups; (ii) does not assess the adequacy of Crown consultation; (iii) does not regularly engage with Indigenous groups; and (iv) does not provide funding to help Indigenous groups delineate their traditional territories. These are all activities that are undertaken by the ACO.

With respect, one of the main reasons why Alberta created the ACO, and why other provinces have employed similar regimes where a specific government department is assigned responsibility for managing the Crown's obligations to Indigenous communities, was to prevent the predictable but untenable situation that has arisen in this Proceeding. By proactively engaging with an expert body responsible for managing Alberta's obligations to Indigenous people, proponents can have certainty that they are engaging with those Indigenous groups that Alberta has already determined have constitutionally recognized rights in an area. Prior to the formation of the ACO, proponents were left on their own to judge which groups were owed a duty of consultation. On the other hand, Indigenous groups seeking to establish the extent of their constitutional rights could only do so through project-specific processes established by the AER or other regulators. There was no other government body mandated to receive this information and manage it in a coordinated manner. This resulted in highly inefficient and complex hearings that were improperly focused not on the merits of the project itself, but instead on whether an Indigenous group could establish aboriginal or treaty rights over a given area. Further, it resulted in the predicament we now face in this case where legal advisors or consultants to Indigenous groups can, at the last minute after not having participated in relevant consultations or regulatory reviews over the previous 20 years, trigger an extensive hearing process by way of a short letter making generalized and untested statements claiming that someone uses or has used the area.

Section 21 of the *Responsible Energy Development Act* was enacted to make it clear that the AER was no longer to decide on whether Alberta had met its constitutional obligations to consult with Indigenous groups. This is explicitly recognized in the Notice of Hearing issued November 26, 2024,

[34] *Yahey v British Columbia*, 2021 BCSC 1287 at paras 554 to 660; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 7.

wherein it states: "Crown consultation with Alberta's First Nations and Métis settlements and assessment of its adequacy are managed by the Aboriginal Consultation Office." Consistent with this, we respectfully request the AER confirm that:

1. the scope of the hearing will be restricted to how the Applications, if approved, may impact individuals who use the area and what, if any, mitigation measures may mitigate these impacts; and

2. whether any Indigenous groups have aboriginal, treaty or constitutional rights in the area is not within the scope of the hearing.

To the extent the scope of the hearing is confined to how the Project may impact certain individuals associated with Driftpile, LBT, SFCN, and LSAMCA (*i.e.*, those individuals specifically named in the statements of concern and requests to participate), Summit is prepared to provide technical evidence to address these issues, as it would if any other individual Albertan were granted standing to participate in the hearing.

Scope of Remaining Issues

In Summit's submission, the scope of the remaining issues for the merit hearing (*i.e.*, those raised by the two ENGOs) should be similarly limited. In its SOC and RTP, AWA raises potential wildlife impacts (with respect to migratory and resident birds, grizzly bears, mountain goats, bighorn sheep, woodland caribou, and provincially listed species such as the western toad) and water impacts (with respect to Grande Cache Lake, Victor Lake, the Smoky River, and their associated watersheds). AWA's previous submissions also contain criticisms of Summit's proposed water management plans.

Much like AWA, CPAWS has indicated that it intends to focus on the impacts that the Mine 14 Project will have on wildlife and biodiversity in the region. Species referenced in CPAWS' previous submissions also include the grizzly bear, bighorn sheep, mountain goat, woodland caribou, and bull trout. CPAWS also raises land use planning concerns and also takes issue with Summit's proposed water management practices. In aggregate, the issues raised by CPAWS overlap significantly with those raised by AWA.

Summit therefore requests that the AER limit the scope of the remaining issues for the hearing to include only: (i) wildlife impacts; (ii) impacts on waterbodies which are immediately proximate to the Mine 14 Project site; and (iii) the appropriateness and effectiveness of Summit's proposed water management practices. Given the obvious similarities between the submissions filed by AWA and CPAWS, Summit further seeks an advance direction from the Panel requiring AWA and CPAWS to coordinate with one another in order to reduce the occurrence of duplicate filings, which Summit submits will negatively impact the efficiency of the hearing process.

Further, as indicated above, the AER, including its predecessor the ERCB, has been regulating Mine 14 since 2009 when it determined the Project to be in the public interest and issued approvals under the *Coal Conservation Act*. In early 2022, Summit began actively engaging with the local community, government officials, and those Indigenous groups that Alberta directed Summit to consult with. The

Applications were then filed in March of 2023. AER officials engaged in extensive review of the Applications and issued information requests to Summit, to which Summit responded. It is our understanding that the AER, before deciding to refer the Applications to a hearing in October of 2024, prepared draft approvals that would be issued if the Applications were going to be approved without a hearing. Our view is that significant effort and expertise likely went into the preparation of these draft approvals and the Hearing Panel should therefore consider these as part of its deliberations. Otherwise, this process will be unnecessarily inefficient and the significant time and effort previously put into developing these draft approvals will have been wasted. We therefore request that the Hearing Panel direct AER staff to put these draft approvals on the hearing record. This will focus the scope of the hearing on those issues that were identified by the AER's subject matter experts as being relevant to the approval of the Applications.

Cost Eligibility of ENGOs

Summit seeks an advance determination that neither the AWA nor CPAWS will be eligible for cost recovery in connection with Proceeding 449. In its decisions on hearing participation, the Panel did not find that either of AWA or CPAWS may be directly and adversely affected by the Project, and instead reasoned that these parties *may* have information that can assist the Panel in rendering its decision on the Application.[35] However, AWA and CPAWS are private organizations which exist, and receive funding, for the sole purpose of opposing energy development projects. Indeed, AWA expressly acknowledged that its participation in AER proceedings is key to meeting donor expectations and securing funding.[36] This is reflected in recent social media posts by the AWA where the AWA celebrates the Hearing Panel's decisions on participation as being an "exciting and unexpected outcome" and commits to appearing with the "support of legal representation and expert witnesses".[37]

In the Panel's decisions on AWA's and CPAWS' hearing participation, it states: "Similarly, other AER decision makers decide matters before them based on relevant facts raised by the parties, to those matters. This panel has no authority over other decision-makers nor does it fetter their decision-making authority by granting [AWA or CPAWS] participation at this hearing." We agree that each hearing panel must make certain decisions based on the specific facts before it. However, whether ENGOs such as CPAWS or AWA are entitled to recoup costs from project proponents is a policy issue that should be applied consistently by the AER regardless of the individual hearing commissioners on any given panel.

Summit should not be potentially responsible for costs incurred by the AWA and CPAWS for a hearing for which the AER has provided no explanation for calling. There is no basis on which to assume that the Applications were referred to the Chief Hearing Commissioner because of the ENGOs. Furthermore, the AER's hearing process is typically focused on identifying measures to mitigate any potential project impacts. However, identifying feasible mitigation measures is not the objective of the

[35] Exhibit 41.0 at PDF page 3; Exhibit 42.0 at PDF page 3.
[36] Exhibit 23.0 at PDF page 3.
[37] **Appendix "A"** – AWA posts dated February 13, 2025 taken from Threads.net.

AWA and CPAWS. These groups are opposed to underground mining and not interested in proposing feasible mitigation measures.[38]

Pursuant to the *Rules*, the Panel has a very broad discretion to award costs to whoever it sees fit. This is unlike the previous ERCB regime where costs could only be awarded to a person with an interest in, or in occupation of, land that is "directly and adversely affected" by the ERCB's decision.[39] Under the old regime, a proponent could take comfort in the fact that it would not be liable for the costs incurred by ENGOs. However, under the present *Rules*, a proponent may be required to prosecute a hearing without any assurance whatsoever as to whether it will be liable for the payment of potentially hundreds of thousands of dollars to ENGO's whose sole purpose is to oppose all industrial development. While this might not be a concern to well-funded "majors" with existing production, this unlimited potential liability is a significant hurdle for smaller resource developers who must typically secure approvals before being able to secure investment capital.

We acknowledge the Panel's finding that the AWA and CPAWS may "have information that can assist the panel in reaching its decision on the applications." We assume this means that because there is a hearing, the Panel may as well receive information from AWA or CPAWS. The AER has its own internal subject matter experts who are well-equipped to scrutinize Summit's Applications and provide the Panel with advice related to same. Numerous applications are approved without any input from these ENGOs. In addition, we understand that the AER has already drafted approvals that would have applied to the Project had the AER not referred this matter to a hearing. Accordingly, while the information may "assist", it is clearly not necessary to the AER's deliberations. Therefore, these groups will not make a "substantial contribution" to the hearing and costs are not justified.[40] In addition, other factors in the *Rules* strongly suggest that neither ENGO should be entitled to costs:[41]

- whether there is a compelling reason why the participant should not bear its own costs;
- the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions; and
- whether the participant has made an adequate attempt to use other funding sources.

These ENGOs are private organizations without any statutorily recognized role in Alberta who actively seek to participate in the AER's regulatory processes to fundraise and secure media attention. They oppose mine development generally and are not interested in constructive dialogue on appropriate and feasible mitigation measures. We submit the Panel should therefore now confirm that Summit will not be required to pay any costs associated with the participation of AWA or CPAWS. In this regard, it should be noted that Summit will nevertheless incur additional and material costs on

[38] "AWA believes that coal exploration and extraction are no longer appropriate or feasible land-uses in the province. AWA opposes all further development or expansion of the industry and supports the expeditious closure of existing operations and rapid transition away from coal use, particularly within Alberta's Rocky Mountain and Foothills." at https://albertawilderness.ca/issues/wildlands/energy/coal/ and "No further coal exploration or development will be permitted, including expansions of existing operations." at https://cpaws-southernalberta.org/albertans-are-ready-to-move-on-from-coal/.
[39] See s. 28 of the *Energy Resources Conservation Board Act*, RSA 2000, c. E-10.
[40] *Rules*, s. 58.1(j).
[41] *Rules*, s. 58(a), (b), and (e).

its own account because of the participation by CPAWS and AWA because of additional hearing time and submissions.

Cost Eligibility of Indigenous Groups

We note that in the four relevant participation decisions it was found that the Indigenous groups may be directly affected but that:[42]

> We are not making a determination regarding Crown consultation or adequacy of consultation with [Indigenous group], nor are we making a final determination about whether [Indigenous group] will be directly and adversely affected.

However, the participation decisions offer no guidance as to why the Hearing Panel has chosen to emphasize that it only found these groups *may* be directly affected, but not that they *will* be directly affected. The relevance of this distinction is unclear. We therefore assume the Hearing Panel meant to convey that if these groups do not establish they are directly affected by the AER's decisions on the Applications, they will not be entitled to costs (as would have been the case under the ERCB regime). Although whether a group is "directly and adversely affected" is not an explicit factor that must be considered by the AER when awarding costs, our view is that the AER can and should consider this factor because it is appropriate to do so under the *Rules*.[43]

We recognize that a determination regarding costs for the Indigenous groups will need to consider the scope of the hearing, which will not be known until the Pre-Hearing Decision is issued. Assuming the scope is properly restricted to how the Applications, if approved, may impact individuals who use the area and what, if any, mitigation measures may mitigate these impacts, the Indigenous groups should not be entitled to any costs. This would be on the basis that the Indigenous groups themselves are not directly affected by the Applications.

Therefore, we request that the Hearing Panel establish a process to determine the eligibility of the four Indigenous groups to recoup hearing costs from Summit in advance of the hearing of the Applications. Specifically, we request that the AER:

1. Confirm that the Indigenous groups are not entitled to cost recovery if the scope of the hearing is properly restricted to how the Applications, if approved, may impact individuals who use the area and what, if any, mitigation measures may mitigate these impacts. This would be on the basis that the *constitutional rights* of these groups are not impacted by the hearing and they are therefore not "directly and adversely affected."

2. If the scope is other than what we have requested, or if the Hearing Panel for whatever reason does not confirm in advance that the Indigenous groups are not entitled to costs, we request that pursuant to section 60 of the *Rules*, the AER require each of the Indigenous groups to file a budget of anticipated costs within 10 days of the issuance of the Pre-Hearing Decision. This

[42] The emphasis appears in the decisions with respect to LBT, SCFN, and LSAMCA, but not Driftpile.
[43] *Rules*, s. 58.1(r).

will allow sufficient time for the budgets to be adjusted in accordance with the Hearing Panel's determination on the scope of the hearing.

3. Provide Summit with 7 days to provide comments on the budgets submitted and make submissions as to what, if any, of these budgeted costs Summit should be responsible for, without prejudice to Summit's right to contest all costs claimed by the Indigenous groups after the hearing.

4. Issue a decision on the appropriateness of the budgeted costs, without prejudice to Summit's right to contest all costs claimed by the Indigenous groups after the hearing.

Withdrawal of Indigenous Groups and Status of ENGOs

The AER's standard practice has been to cancel hearings in cases where all parties who may be directly and adversely affected have withdrawn from the hearing process.[44] In this case, however, it is unclear from the participation decisions whether the AER would proceed in this manner. Summit requires confirmation of the AER's intentions in this regard before it can engage in meaningful discussions with the four Indigenous groups granted participation rights.

Since receiving the Panel's participation decisions, Valory, as the potential future owner of Summit, has reached out to each of the Driftpile, SCFN, LBT and LSAMCA to request meetings to discuss their reasons for filing SOCs and RTPs in connection with the Applications. These groups have already agreed to meeting with Valory in its capacity as the potential future owner of Summit. Valory fully expects that these meetings will include discussions regarding the compensation each of these groups will receive, if Valory becomes the owner of Summit, in exchange for withdrawing their SOCs and RTPs.

Valory, as the potential future owner of Summit, must carefully assess numerous factors before determining whether to provide such compensation. For instance, Valory, as the potential future owner of Summit, will have to consider how any compensation to these groups, which may include business opportunities in connection with Mine 14, will impact the AWN, which has been found by Alberta to have constitutionally recognized rights in the area. Another factor Valory, as the potential future owner of Summit, must consider is whether it will still be required to go through a hearing if the four Indigenous groups withdraw from this Proceeding. Without knowing this, Valory, as the potential future owner of Summit, cannot with any confidence determine whether any payment to these groups is appropriate or justified. Therefore, we seek the following:

1. Confirmation that, if the four Indigenous groups withdraw from the Proceeding, but AWA and CPAWS do not, the hearing will be cancelled.

[44] See, for example, Proceeding 392: CSV Midstream Solutions Corp. Application to construct and operate a sour gas processing plant – AER Letter Decision dated April 30, 2021 (2021 ABAER 007) at para 9; Proceeding 408: Coalspur Mines (Operations) Ltd. Vista Coal Project – AER Letter Decision dated March 23, 2021 (2021 ABAER 006) at para 9; Encana Corporation Application For Acid Gas Disposal, Wembley Field – AER Letter Decision dated September 26, 2019 (2019 ABAER 012) at para 9.

2. In any event, clarification as to whether a hearing will be held if LBT is the only Indigenous group that does not withdraw from this Proceeding. We seek this clarification on the basis that LBT is not a signatory to Treaty 8 and that Treaty 6 territory, to which LBT is a signatory, does not include the Project area.

Hearing Timeline

Summit requests that the Panel establish strict timelines for the hearing, including the Panel's ultimate decision on the Applications. As set out in the introduction, Summit expects the AER will complete the remaining regulatory review and issue a decision on the Applications before the end of 2025. This is entirely reasonable given the Applications were filed in early 2023 and Mine 14 was originally approved by the ERCB in 2009. This necessitates a hearing into the merits of the applications during or before September of 2025. To accomplish this, we recommend the following timelines:

1. Pre-Hearing Meeting: April 2025
2. Issuance of Pre-Hearing Decision: May 2025
3. Summit Hearing Submission: June 2025
4. Participants' Hearing Submissions: July 2025
5. Summit Hearing Reply Submission: August 2025
6. Hearing: September 2025

The above assumes that the Hearing Panel will take, pursuant to section 28 of the *Rules*, the entire 90 days to issue a written hearing decision. As previously indicated, we will reach out to AER counsel and counsel and representatives of the participants to begin coordinating schedules to accommodate a timeline as proposed above.

Concluding Remarks

Summit thanks the Panel for considering its request for a Pre-Hearing Meeting, and is committed to working with the AER and other participants to establish an efficient and orderly hearing process that is also predictable. In our view, an advanced determination of the issues identified in this letter will assist in this. To summarize, Summit requests that the Hearing Panel convene a Pre-Hearing Meeting and issue a subsequent Pre-Hearing Decision that:

1. with respect to the scope of Indigenous law issues, confirms that:

    a. the scope of the hearing will be restricted to how the Applications, if approved, may impact individuals who use the area and what, if any, mitigation measures may mitigate these impacts; and

b. whether any Indigenous groups have aboriginal, treaty or constitutional rights in the area is not within the scope of the hearing;

2. with respect to the remaining scope of issues, confirms that:

   a. issues for the hearing are to only include: (i) wildlife impacts; (ii) impacts on waterbodies which are immediately proximate to the Mine 14 Project site; and (iii) the appropriateness and effectiveness of Summit's proposed water management practices; and

   b. any draft approvals prepared by AER subject matter experts and staff will be put on the record of the Proceeding so they may be referred to during the hearing;

3. confirms Summit will not be required to pay any costs associated with the participation of AWA or CPAWS;

4. confirms Summit will not be required to pay any costs associated with the participation of the Indigenous groups;

5. confirms that if the four Indigenous groups withdraw from the Proceeding, but AWA and CPAWS do not, the hearing will be cancelled;

6. confirms that a hearing will not be held if all Indigenous groups other than LBT, which is a Treaty 6 signatory, withdraw from the hearing; and

7. establishes a hearing process as proposed herein.

A Pre-Hearing Decision addressing these issues will allow Summit to properly determine whether to proceed with the hearing, taking into account its obligations to its investors and other stakeholders.

Please contact the undersigned with any questions.

Yours truly,

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Encl.

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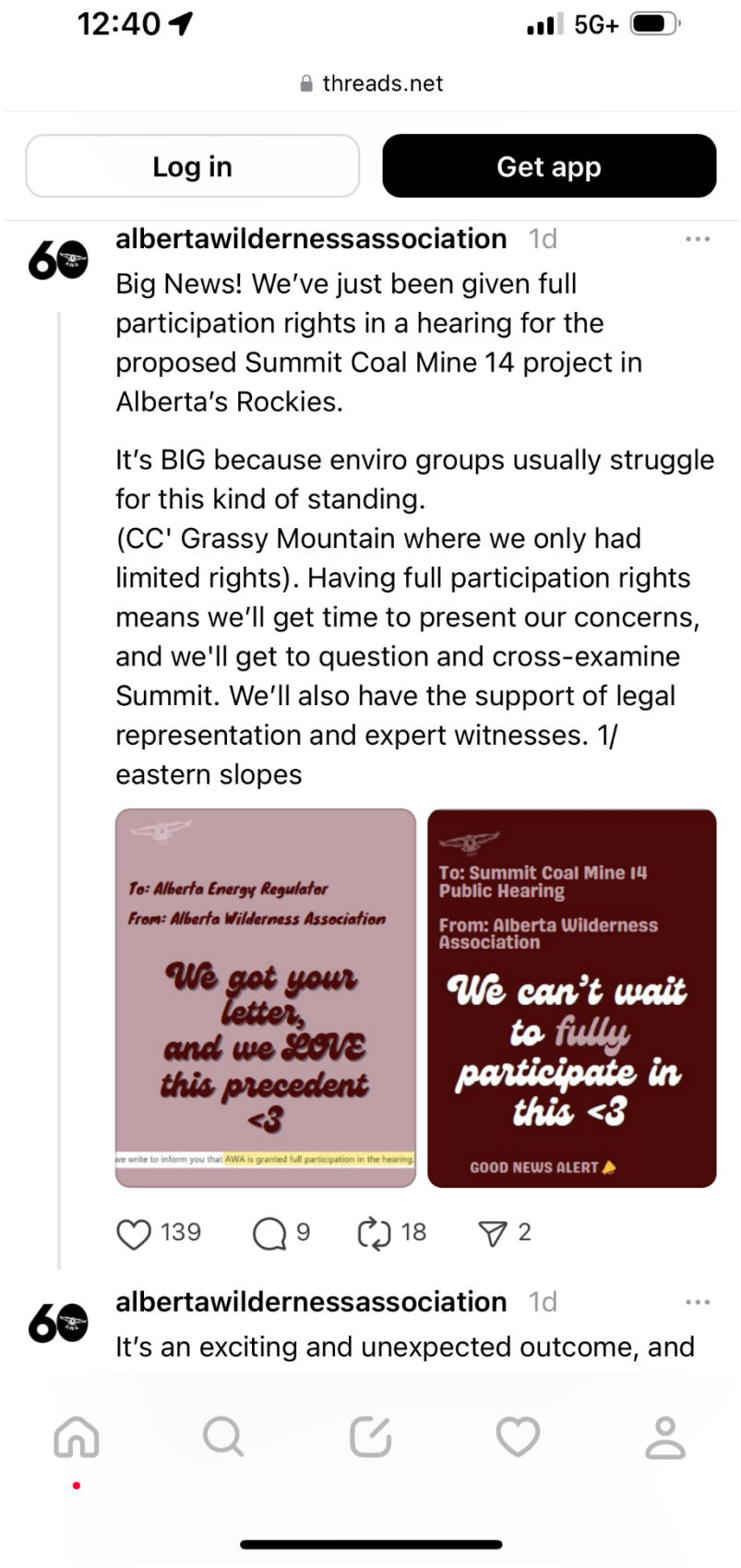
Appendix A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Big News! We've just been given full participation rights in a hearing for the proposed Summit Coal Mine 14 project in Alberta's Rockies.
It's BIG because enviro groups usually struggle for this kind of standing.
(CC' Grassy Mountain where we only had limited rights). Having full participation rights means we'll get time to present our concerns, and we'll get to question and cross-examine Summit. We'll also have the support of legal representation and expert witnesses. 1/ eastern slopes
To: Alberta Energy Regulator
From: Alberta Wilderness Association
We got your letter, and we LOVE this precedent <3
we write to inform you that AWA is granted full participation in the hearing
To: Summit Coal Mine 14 Public Hearing
From: Alberta Wilderness Association
We can't wait to fully participate in this <3
GOOD NEWS ALERT
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It's an exciting and unexpected outcome, and

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It's an exciting and unexpected outcome, and perhaps an indication that the government is taking the public's concerns seriously.

What's more?

Summit Coal has been poking the Alberta Energy Regulator (which decides which energy projects are approved) to expedite approvals for the mine. BUT, since the participants for the hearing were announced last week, Summit requested to pause the hearing process.

It seems that pushing a voice for nature is paying off!

MountainsNotMines
2/