

Submission to the United Nations International Convention on the Elimination of All Forms of Racial Discrimination



Lelu Island & Flora Bank, Skeena River Estuary – Proposed site of Pacific NorthWest LNG Plant

Executive Summary

Malaysia's state-owned oil and gas company, Petronas, and its partners, are proposing to build one of the largest liquefied natural gas (LNG) facilities in the world on Lelu Island, near Prince Rupert on the West Coast of Canada. This area features some of the most important and sensitive salmon habitat in Canada, supporting over 300 million juvenile salmon each year. These salmon are the cultural, economic and dietary foundation for dozens of Indigenous groups throughout the Skeena River watershed (an area the size of Switzerland) and nearby coastal communities.

The project, called Pacific NorthWest LNG (PNW LNG), would wholly alter critical salmon habitat in and around Lelu Island, and would require:

- Leveling the entire island, blasting, and "hardening" large portions of the shoreline
- Dredging 200,000 cubic metres of seafloor that is contaminated by toxins from a decommissioned pulp mill. These toxins would be re-released into the food chain impacting fish, crabs, and the people who eat them <https://vimeo.com/183724209>
- Underwater blasting of 400,000 cubic metres of rock
- Trenching 4.6 kilometers of pipeline on the sea floor



Juvenile salmon in eelgrass on Flora Bank



Example of underwater dredging

- Building a 1.6 kilometer suspension bridge and 1.1 kilometer trestle and loading facility over top of Flora Bank (for context, this infrastructure is the same size as the Golden Gate bridge)
- 350 tankers (on average 330 metres long) a year would be used to export the LNG, posing significant threat to ecosystem function and major hazards to local marine traffic and fishing fleets in some of the most hazardous waters in North America



Salmon die off due to unusually warm water & low stream flow

The project would also be the largest climate polluter in Canadian history – undermining Canada’s ability to meet its international climate commitments under the Paris Agreement. The Skeena watershed and its salmon are already experiencing the effects in the form of receding glaciers, warming river temperatures, and low summer flows. Enabling large-scale pollution, such as PNW LNG, would perpetuate our countries impacts and the regional impacts to the Skeena for 30 plus year - the expected life span of the project.

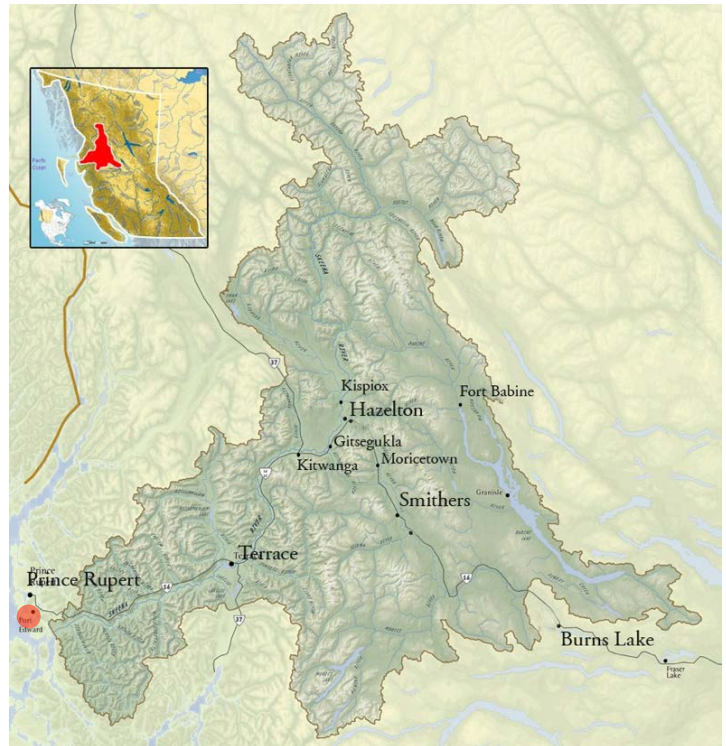


Receding glacier: non-vegetated area shows where glacier was only a few years ago

Impacts on Indigenous Communities

The area Petronas and its partners propose to develop for PNW LNG is the largest and most important estuarine salmon habitat for all juvenile Skeena salmon.

This is confirmed by past research from Canada’s Department of Fisheries and Oceans (DFO), and more recent scientific research by Simon Fraser University, Indigenous groups, and conservation organizations. This habitat is so critical because it is where juvenile salmon adapt to life in the ocean, when their mortalities are highest and they are most vulnerable. Past and current research confirms that massive disturbance from this project could devastate Skeena salmon and the Indigenous communities that depend on them.



Skeena Watershed – Site of proposed LNG facility (red dot)

Failure to Engage Indigenous Communities & Traditional Governance Systems

Skeena watershed and coastal Indigenous

communities depend on the health of Skeena salmon for food, and their economies and culture. Canadian and international law requires Indigenous groups be consulted, and that they are afforded "free, prior and informed consent" before the Canadian government approves a project with such large-scale impacts. This has not occurred.

<https://vimeo.com/153284640>

Actually, this project is a prime example of what's wrong with Canada's approach to engaging Indigenous communities in large-scale industrial developments:

- The current review and approval process offers no consideration of the cumulative impacts of multiple projects.
- It continuously fails to honor the legal obligations to Indigenous peoples in protecting their traditional resources.
- The Canadian government generally consults with Indigenous communities through band councils, which were created under the colonial Indian Act, and often fails to consult with Hereditary leadership or respect traditional governance systems.
- Canada's environmental review system often ignores good science (usually in favor of industry proponents), and most often does not lead to its desired consequence of empowering economic development, but instead results in conflict and resentment on the part of industry and local communities alike.



Skeena Indigenous groups launch legal action against the Government of Canada – October 2016

Despite sustained objections to Petronas' ill-advised plans by Indigenous communities and many others, Canada's federal cabinet approved the project in September 2016.

Skeena River Indigenous groups have identified two critical legal issues that emerged from Canada's approval of PNW LNG. These issues were not resolved by the environmental assessment process under the federal *Canadian Environmental Assessment Act, 2012* ("CEAA"), an act the Canadian government acknowledges is inadequate and that is currently under reform.

We submit that the following issues deserve immediate attention and action on the part of the UN International Convention on the Elimination of All Forms of Racial Discrimination (UN CERD):

- The absence of adequate consultation with, and accommodation of, Indigenous groups whose rights under the Canadian Constitution and the UN Declaration on the Rights of Indigenous Peoples (UN DRIP) will be adversely impacted by the project;
- The outright exclusion of many Indigenous groups from the consultation process, notwithstanding the reasonable possibility of adverse impacts on their Constitutionally

protected and recognized Aboriginal fishing rights.

We ask that you petition the Canadian government to:

- Withhold the environmental assessment certificate for the project until proper consultation has been undertaken with *all* affected Indigenous communities, to a standard that is objectively and independently adjudged to have met the test of “free, prior and informed consent” (FPIC) under international law, on the understanding that failure to do so is an inherent act of racial discrimination disallowed under Canadian and international law.

Should the government fail to do so, we further ask that you make a declaration that Canada is out of compliance with UN CERD, specifically Article 2 (c), which requires that “Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.” Canada’s environmental laws, in failing to respect UN DRIP and, specifically, FPIC, clearly perpetuate racial discrimination against its Indigenous peoples.

Failure to Obtain FPIC of Indigenous Rights Holders

The project is proposed to be built on Lelu Island and Flora and Agnew Banks, part of the traditional territory of the Gitwilgyoots Tribe of Lax Kw’alaams, which is part of the Tsimshian First Nation. Gitwilgyoots people have occupied this area for millennia, using it to harvest traditional foods, including salmon. The Gitwilgyoots traditional governance system remains intact and under their laws, they have an obligation to protect their traditional territory and the resources it contains for the benefit of the tribe. The obligation of the tribe’s hereditary leaders and members is to protect their territory, and to use it in such a way that does not deprive future generations of the benefit of the land. This is not only foundational in traditional laws, but in Canadian law and the precedents set under the *Delgamuukw*¹ and *Tsilhqot’in*² decisions in the Supreme Court of Canada.

The Gitwilgyoots tribe has had since contact, and continues to have, the duties and powers under Tsimshian Indigenous law to protect its members and their exclusive possessions, including their territories. As such, the Gitwilgyoots are an Aboriginal people with the meaning of section 35 of the Canadian Constitution and assert certain Aboriginal rights, including Aboriginal title (ownership of the land).

In conducting an environmental assessment under *CEAA 2012* that may affect asserted constitutional Indigenous rights or title, the Crown’s legal duties were to:

- Consult with each Indigenous group based on the unique facts and circumstances pertinent to it.
- Engage in a dialogue with each group based on its strength of claim including not only the nominal depth of consultation required, but each claim's subject matter or

¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010

² *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44

content, and its extent.

- Engage in a dialogue to identify the potential for the project to infringe on each group's rights or title.
- Engage in a dialogue to accommodate any infringements of rights or title that the project will likely cause.

The Canadian government is obligated to take into account the Indigenous groups' concerns and interests and to satisfy that the conditions they established accommodate those concerns and interests.

The Canadian government says that its role was to consider the Indigenous groups' concerns and interests and to satisfy itself that those concerns and interests have been accommodated for the purpose of deciding whether the significant adverse environmental effects are justified in the circumstances.

In the span of a single day, September 27, 2016, the Canadian government's decision makers received the environmental assessment report, accepted it, and decided that the significant adverse effects from the project were justified and that the Indigenous concerns and interests were accommodated.

The Canadian government therefore failed abjectly in its legal duty to engage in a meaningful dialogue on Gitwilgyoots consultation and accommodation by:

- Not providing the agency responsible for undertaking the environmental assessment with the delegated authority or the instructions to engage in such a dialogue;
- Not providing the time and the necessary information to engage in such a dialogue;
- Failing to properly consult with all Indigenous groups asserting rights or title by selecting only certain *Indian Act* bands to engage its environmental assessment process.

In addition, the Canadian government's report and subsequent decision to approve the project fail as a basis for justifying the infringement of Gitwilgyoots rights and title because:

- They offered the Gitwilgyoots an interaction process in respect of the project's environmental assessment that was no different from that offered to members of the general public;
- They made an arbitrary assessment of the Gitwilgyoots' strength of claim and did not solicit information on the subject matter and extent of the tribe's rights or its title claims;
- They did not provide a time extension in the environmental assessment to properly conduct a dialogue with the Gitwilgyoots on the nature of its rights and the accommodation required to justify any infringement;
- The approval process did not consider environmental effects that may potentially infringe Gitwilgyoots' rights and title beyond those narrowly defined under the current flawed environmental assessment legislation (i.e. cumulative impacts, failure of mitigation measures);

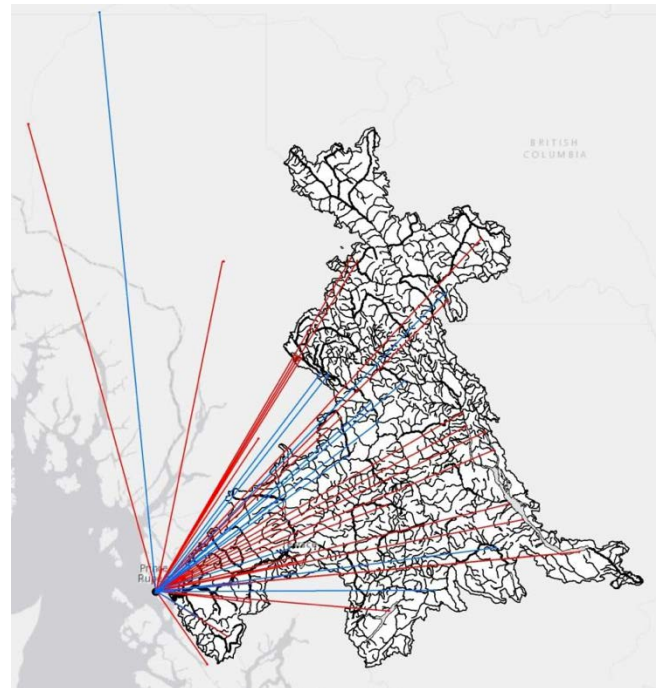
- They allowed the proponent to design the monitoring program and to establish the threshold values for environmental parameters to trigger additional mitigation;
- They did not consider that, should any of the assessments of potential environmental impacts prove incorrect, or if any of the measures to protect or create new fish habitat do not work as predicted, the Gitwilgyoots and other indigenous communities will bear all the costs, at great expense to their food, culture and economy. The company and the government bear no significant risks or costs.

Inadequate Consultation with Upriver Indigenous Groups

The keystone estuary features found on Lelu Island, and Flora and Agnew Banks and their abundant eelgrass beds, is critical habitat for juvenile salmon that emerge each spring from the Skeena watershed. No other Skeena estuary area is as crucial as this specific area. In fact, recent studies conducted by independent science experts demonstrated that Flora and Agnew Banks support 20 times more salmon than any other part of the Skeena estuary. Further, independent research submitted to the Canadian government's environmental assessment process shows that all five species of juvenile salmon and steelhead from all over the Skeena watershed use this part of the estuary. The young fish spend weeks to months here each year, as they adapt from the freshwater to the saltwater environment. These findings were confirmed with DNA testing by the DFO.

DFO's DNA analysis also confirmed that salmon from throughout the Skeena watershed depend on Flora and Agnew Banks to fulfill key parts of their life history. All of these populations are crucial to Indigenous communities for food. The Indigenous communities relying on this habitat for the health of their salmon include the Tsimshian (including the Gitwilgyoots Tribe whose traditional territory the project is proposed to be built on), Gitanyow, Gitksan, Wet'suwet'en, Lake Babine Nation, Talhtan, Takla First Nations and their respective Tribes.

The Flora Bank region supports salmon from throughout the Skeena watershed and beyond. Lines connect fish collected in the estuary with where they are from. Some of these salmon populations are currently in a depressed state due to decades of habitat and harvesting impacts. For example, Kitwanga sockeye are one of the ten larger wild sockeye populations in the Skeena deserving special management attention. Kitwanga sockeye have been depressed for over 50 years due to over-fishing and habitat degradation in the Kitwanga watershed. Sadly, overharvesting and other Crown authorized actions have failed to

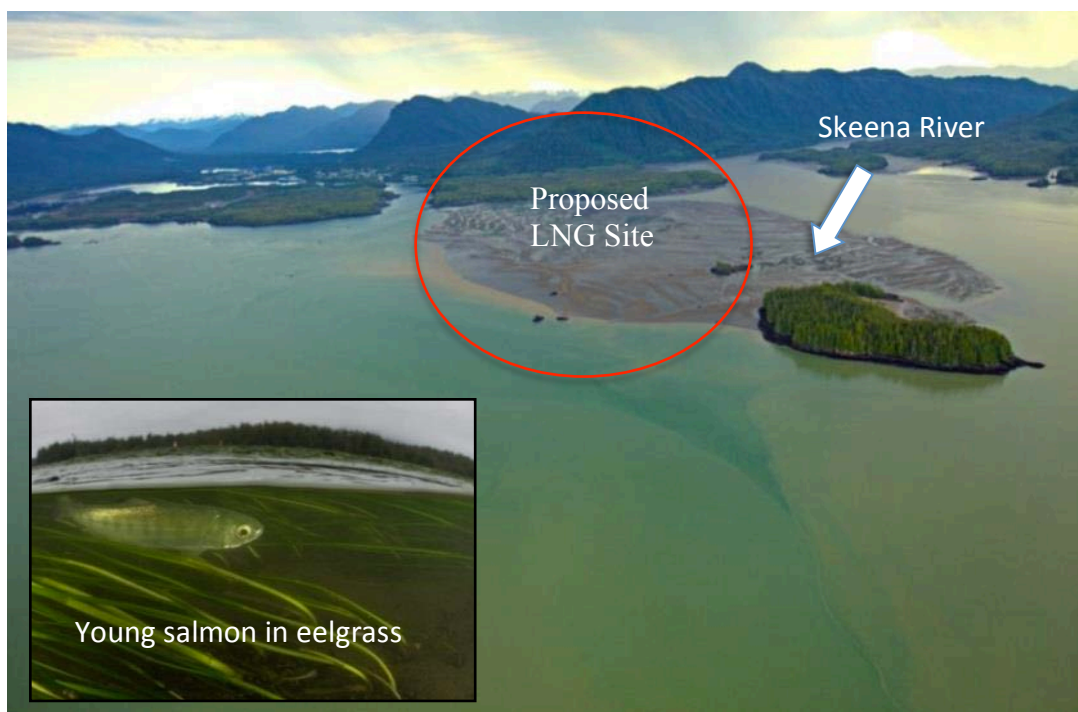


The area of the Skeena estuary proposed for development supports salmon from the entire Skeena watershed and beyond. Lines connect salmon collected in the estuary with where they are from. Source: Simon Fraser University

effectively manage for risk when it came to Kitwanga sockeye conservation. Currently, Kitwanga sockeye are so depressed that they can no longer support the Gitanyow's constitutionally protected fisheries, despite the fact that the Gitanyow have relied on them for sustenance and socio-economic well being for millennia leading up to the sockeye crash. In the mid-1970s, in an effort to protect Kitwanga salmon and preserve Gitanyow's Aboriginal rights for future generations, and despite resulting hardships, Gitanyow chiefs had no choice but to stop harvesting Kitwanga sockeye due to the low returns. More recently, the Gitanyow, through partnerships with the Canadian government and other groups, have invested millions to rebuild the stock and efforts are still on going. The Gitanyow have constitutionally protected Aboriginal rights to Kitwanga sockeye. Pacific NorthWest LNG poses a significant threat to these fish and therefore Gitanyow's ability to rebuild and harvest this population of salmon. The crown should not make decisions that could impact this right without the Gitanyow's consent.

Similarly, the same DNA analysis shows that Morice sockeye, the main food source of the Wet'suwet'en people, use Flora and Agnew Banks. Wet'suwet'en chiefs have also voluntarily stopped harvesting Morice sockeye since the mid-1970s and that stock is also considered at risk of extirpation. Like the Gitanyow, for more than a decade, the Wet'suwet'en have been engaged in aggressive program to restore their salmon fishery. This salmon population, and populations throughout the entire Skeena watershed would be significantly impacted by Pacific NorthWest LNG – putting at risk the culture, food and economies of all Skeena indigenous groups.

Despite their demonstrated reliance on the salmon that pass through and rely on Flora and Agnew Banks, the Gitanyow, the Wet'suwet'en and all other Aboriginal groups upriver of the project were excluded from consultation on the project and specifically refused any recognition to participate in the CEEA review until immediately before the issuance of the draft Assessment Report and proposed Table of Conditions.



Skeena River Estuary

It is Important to note that although several populations are depressed, there remain many healthy populations of salmon in the Skeena watershed, which indigenous groups continue to depend upon for their primary food source and for trade, and the foundation of their economy and culture.

The Canadian government recognized that the Gitanyow, Gitxsan, Takla, Lake Babine Nation and Wet'suwet'en "expressed concern regarding the potential environmental effects that the project may cause to salmon that migrate throughout the Skeena watershed, and the impacts that any such effects may have on these groups' potential or established Aboriginal right of title" and that "the Agency considered these concerns as part of the environmental effects assessment of the project..." (pg. 149 environmental assessment report). However, it is clear (for example, by the lack of consultation) that the Canadian government does not understand or respect the Indigenous rights that are at stake, or what the potential adverse impacts to those rights and the ability to exercise them are. This is not surprising since the Canadian government denied that the Gitanyow had any right to be consulted on the project despite repeated requests made over several years, and refused them the opportunity to make submissions on the project until the end of the environmental assessment process.

Further, in the environmental assessment report's list of potential adverse impacts on indigenous rights, the Canadian government only refers to "marine fishing." Any potential adverse impacts on upriver fisheries are completely ignored.

Upriver indigenous groups repeatedly requested in writing that the government of Canada engage with them in consultation on the Project since 2013. The Canadian government in turn repeatedly refused their requests, citing that consultation is not within the "scope" of the assessment, specifically the government determined "spatial scope." However, it is important to note that pursuant to section 5 of the *Canadian Environmental Assessment Act, 2012*³, environmental effects that are to be taken into account in an environmental assessment are not limited by any geographic boundaries.⁴ Potential adverse impacts to the Indigenous rights to fish would occur not just in the area of the project, but also upriver, because salmon that are harvested and spawn upriver depend on the habitat that would be impacted by the project for their survival.

Recommendations & Questions

We ask that the CERD assist us in obtaining justice and holding Canada accountable to its domestic and international obligations. The Indigenous peoples of the North West Coast of British Columbia, Canada request the following clarifications of the Canadian government:

- Why was a massive industrial facility approved to be built overtop the most important and productive salmon habitat in Canada, an area that supports the food requirements, culture and economies foundational to the Indigenous peoples of the region?

- Why were the recognized traditional governance systems and leadership not included in the federal approval process?
- Why would Canada proceed without the free, prior and informed consent of the Indigenous rights holders, the Gitwilgyoots Tribe, of the area proposed for development?
- Why did Canada not properly consult with those Indigenous communities upriver in the Skeena Watershed whose salmon could be devastated by the PNW LNG project being built overtop of salmon habitat critical to their Indigenous and Constitutional rights?

We ask CERD to recommend that the Canadian government's approval of the project be subjected to appropriate processes to address all these serious issues. . No work should begin without the free, prior and informed consent of all the affected Indigenous Peoples.

Submitted by:

Chief Yahaan (Donnie Wesley), Gitwilgyoots Tribe
Chief Malii (Glen Williams), Chief Negotiator, Gitanyow Hereditary Chiefs
Chief Namox (John Ridsdale), Office of the Wet'suwet'en Hereditary Chiefs