



Court File No. T-1008-20

FEDERAL COURT

COALSPUR MINES (OPERATIONS) LTD.

Applicant

– and –

**THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE,
THE ATTORNEY GENERAL OF CANADA,
LOUIS BULL TRIBE, KEEPERS OF THE WATER COUNCIL, KEEPERS OF THE
ATHABASCA WATERSHED SOCIETY, THE WEST ATHABASCA WATERSHED
BIOREGIONAL SOCIETY, and STONEY NAKODA NATIONS (BEARSPAW FIRST
NATION, CHINIKI FIRST NATION AND WESLEY FIRST NATION)**

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Calgary, Alberta.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** after being served with this notice of application.

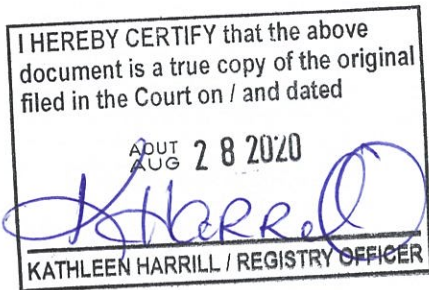
Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

DATED: August 28, 2020.

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**ORIGINAL SIGNED BY
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A SIGNÉ L'ORIGINAL**

Issued by: _____

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APPLICATION

This is an application for judicial review in respect of the order (the “**Designation Order**”) of the Minister of Environment and Climate Change Canada (the “**Minister**”), issued on July 30, 2020 (and communicated to the Applicant on the same date), pursuant to subsection 9(1) of the *Impact Assessment Act*, S.C. 2019, c. 28, s. 1 (“*IAA*”), to designate physical activities known as the Vista Coal Underground Test Mine Project (the “**Underground Test Mine**”) and the Vista Coal Mine Phase II Expansion Project (the “**Phase II**”).

THE APPLICANT MAKES APPLICATION FOR:

1. An order quashing the Designation Order and:
 - (a) requiring the Minister to issue an order declining to designate the Underground Test Mine and/or Phase II under the *IAA*;
 - (b) in the alternative, referring the Underground Test Mine and/or Phase II back to the Minister for redetermination on the basis that the only reasonable decision is that the Underground Test Mine and/or Phase II is not designated under the *IAA*; and
 - (c) in the further alternative, referring the matter back to the Minister for a new decision consistent with the Court’s reasons for decision.
2. Alternatively, an order declaring that ss. 7 and 9 of the *IAA* are inapplicable to the Underground Test Mine and/or Phase II;
3. In the further alternative, an order declaring that the Designation Order is of no force and effect;
4. The Applicant’s costs; and
5. Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

The Parties

6. The Applicant, Coalspur Mines (Operations) Ltd. (“**Coalspur**”), is a coal development company incorporated pursuant to the laws of Alberta, with offices in Hinton and Calgary, Alberta. It is the proponent of the Underground Test Mine and Phase II.

7. The Respondent, the Minister, is a statutory decision-maker with various powers under the *IAA*, including the discretionary power to designate physical activities. The Minister issued the Designation Order being challenged in this judicial review proceeding and has additional powers under the *IAA* that will be affected by the result of this proceeding.

8. The Respondent, the Attorney General of Canada (the “**AGC**”), is the Chief Legal Officer of the federal Crown, with regulation and conduct of all litigation for and against the federal Crown or any federal department, pursuant to the *Department of Justice Act*, R.S.C., 1985, c. J-2. The AGC has been named as a Respondent to present the Government of Canada’s evidence and arguments on the constitutional dimensions of this proceeding.

9. The Respondent, Louis Bull Tribe (“**Louis Bull**”), is a signatory to Treaty No. 6 with reserve lands approximately 300 km away from the Underground Test Mine. By way of written submissions from their legal counsel, Louis Bull requested that the Minister designate the Underground Test Mine and Phase II.

10. The Respondents, Keepers of the Water Council, Keepers of the Athabasca Watershed Society, and the West Athabasca Watershed Bioregional Society are societies registered pursuant to the laws of Alberta. Together, they requested through their legal counsel, Ecojustice, that the Minister designate the Underground Test Mine and Phase II.

11. The Respondent, Stoney Nakoda Nations (“**Stoney Nakoda**”), are comprised of the Bearspaw, Chiniki and Wesley First Nations, and are signatories to Treaty No. 7. By way of written submissions from their legal counsel, Stoney Nakoda requested that the Minister designate the Underground Test Mine and Phase II.

The Projects

12. Initially proposed in 2012, Coalspur has operated the Vista Coal Mine Project (the “Phase I”) since 2019. Phase I is an open-pit surface mine, processing plant and associated infrastructure located about 10 kilometres east of Hinton, Alberta. On an annual basis, Phase I produces roughly 6 million tonnes of clean coal (or roughly 65 million tonnes over its approximately 10-year life) that is eventually transported by third-party rail carrier and exported to foreign markets.

13. In 2018, Coalspur proposed to expand the Phase I footprint westward through Phase II, which will use existing infrastructure for transportation, processing and disposal. Through Phase II, Coalspur will increase the volume of coal to be transported for eventual export to foreign markets. Construction of Phase II is proposed to commence in January 2022 with operations projected to commence in April 2022.

14. Coalspur proposed the Underground Test Mine in 2019. The Underground Test Mine is an exploratory underground mine, with limited life and production, located within the boundaries of existing Phase I permits and licenses. It will test various safety and production methods to determine the feasibility of developing additional underground coal mines within the areas Coalspur has leased. Further, it will increase the production of coal by about 1,200 tonnes per day or a total of 1.8 million tonnes during its approximately three-years of operation, without creating any new disturbance area or increasing environmental impacts above those presented and assessed in the provincial impact assessment of Phase I. Coalspur intends to commence construction of the Underground Test Mine in 2020.

15. Each of Phase I, Phase II and the Underground Test Mine are located entirely within the borders of the Province of Alberta and subject to Alberta’s exclusive jurisdiction over local works and undertakings, property and civil rights, and/or the management, development and conservation of provincially owned natural resources.

Phase II and the Underground Test Mine require Provincial Regulatory Authorizations

16. To proceed, each of Phase II and the Underground Test Mine must be approved by the Alberta Energy Regulator (“AER”) pursuant to its authority under several Alberta statutes,

including the *Responsible Energy Development Act*, *Coal Conservation Act*, *Water Act*, *Environmental Protection and Enhancement Act*, and *Public Lands Act* (as applicable).

17. Through the provincial regulatory process, the AER will assess whether Phase II and the Underground Test Mine comply with legislative requirements and industry best practices, including those pertaining to environmental protection.

18. Coalspur has not yet filed an application with the AER for approval of Phase II. If or when that application is filed, Phase II will require a provincial environmental impact assessment report that will consider, among other things, potential adverse effects on the environment and the exercise of Indigenous and treaty rights, as well as mitigation measures to lessen or avoid impacts on same.

19. Coalspur commenced the provincial regulatory process for the Underground Test Mine by filing an application with the AER on April 17, 2019, and resubmitting on February 5, 2020. No provincial environmental impact assessment report is required for the Underground Test Mine because it is located entirely within an existing mine footprint; therefore, novel adverse effects are not anticipated.

Federal Impact Assessment Legislation

20. In 2019, Parliament passed the *IAA*. The pith and substance of the *IAA* is to impose federal decision-making and comprehensive federal impact assessment over “designated projects”.

21. Under the *IAA*, the Impact Assessment Agency (the “Agency”) and the Minister have regulatory powers over “designated projects”. There are two ways that proposed physical activities may qualify as “designated projects” under the *IAA*.

22. First, the physical activities may fall under one of the enumerated categories within the *Physical Activities Regulations*, SOR/2019-285 (the “*Regulations*”). For example, coal mine expansions that will increase the area of mining operations by 50 percent or more and have a total coal production capacity of 5,000 tonnes per day or more are a “designated project” under s. 19(a) of the *Regulations* (the “**Coal Mine Expansion Threshold**”).

23. Second, the Minister may exercise discretionary authority under s. 9(1) of the *IAA* to order a physical activity not prescribed by the *Regulations* to be a “designated project”. The Minister may exercise this power, where, in the Minister’s opinion, the physical activity may cause adverse effects within federal jurisdiction or adverse direct or incidental effects, or public concerns related to those effects warrant the designation. Pursuant to s. 9(4) of the *IAA*, the Minister must provide reasons for decision regarding any designation request.

24. When exercised, the Minister’s designation power has significant effects on a proposed project. Among other things, a “designated project” is subject to s. 7 of the *IAA*, which prohibits activities connected to the “designated project” that may cause enumerated environmental, health or socio-economic effects until either: (i) the federal Impact Assessment Agency (the “Agency”) decides that no impact assessment is required; (ii) the proponent complies with the conditions included in a decision statement (following a federal impact assessment); or, (iii) the Agency permits the activity to occur for one or more enumerated purposes under the *IAA*.

25. By Order in Council 160/2019, the Lieutenant Governor in Council of Alberta referred the constitutionality of the *IAA* to the Court of Appeal of Alberta (the “**Reference Proceeding**”). The Reference Proceeding remains ongoing. Among other things, the AGC argues in the Reference Proceeding that: “any alleged overreach may be addressed by way of judicial review of a decision on a particular project on administrative and constitutional law grounds.”

The Minister Initially Declined to Designate Phase II

26. Neither the Underground Test Mine nor Phase II, alone or in combination, meet the Coal Mine Expansion Threshold. Therefore, they can only be “designated” under the *IAA* through a discretionary determination by the Minister.

27. In 2019, the Minister received requests to “designate” Phase II as part of an Ecojustice-led letter campaign.

28. After seeking input from federal and provincial agencies and the requesters, the Agency concluded, in December 2019, that Phase II did not warrant “designation”. Among other things, the Agency concluded that any adverse effects from Phase II on areas of federal jurisdiction are

expected to be appropriately managed by comprehensive legislative mechanisms and the provincial assessment process.

29. The Minister agreed, deciding on December 20, 2019, not to “designate” Phase II because “adverse effects within federal jurisdiction, and related concerns, are expected to be appropriately managed by comprehensive legislative mechanisms such as the review of any Application for Authorization under the Fisheries Act by Fisheries and Oceans Canada, the Migratory Birds Convention Act and the provincial environmental assessment and regulatory processes.” Through these processes, consultation will occur with Indigenous peoples.

The Minister Changed His Mind by Designating Phase II and the Underground Test Mine

30. On May 1, 2020, Louis Bull and Ecojustice wrote to the Minister to request that he reconsider his decision not to designate Phase II. The requesters argued that Coalspur’s February 2020 application to the AER for approval of the Underground Test Mine constituted a change of circumstances and asked that the Underground Test Mine be considered for designation in combination with Phase II. On June 30, Stoney Nakoda made a similar request.

31. On May 14, 2020, the Agency requested information from Coalspur to assist it in “assessing the applicability of the IAA to the Test Underground Mine and Phase II Projects if considered together”.

32. Coalspur responded on May 29, 2020, providing the requested information. Among other things, Coalspur confirmed that the Underground Test Mine is not connected, associated, or incidental with Phase II and will not impact Phase II; rather, it is entirely contained within the boundaries of Phase I and may proceed regardless of the status of Phase II, for which no application has yet been filed.

33. On July 30, 2020, the Agency issued a report in which it concluded that designation of the Underground Test Mine and Phase II is unwarranted because, among other things:

- (a) the potential for adverse effects will be limited through project design, standard mitigation measures and existing legislative mechanisms;

- (b) the requesters' concerns are expected to be addressed through the provincial regulatory processes; and,
- (c) adverse effects within federal jurisdiction and related concerns can be appropriately managed through the provincial process and other existing mechanisms such as the review of any Application for Authorization under the *Fisheries Act* by Fisheries and Oceans Canada (if necessary).

34. On the same date, the Minister issued the Decision, in which he came to a different conclusion from the Agency by designating the Underground Test Mine and Phase II. The Minister provided the following reasons:

- (a) considered together, the mining operations of the Underground Test Mine and Phase II are just below the 50 percent threshold and well above the total coal production capacity threshold of 5,000 tonnes per day described in item 19(a) of the *Regulations*; and,
- (b) cumulatively, the Underground Test Mine and Phase II may result in adverse effects of greater magnitude to those previously considered.

35. The Minister asserted that the following areas of federal jurisdiction are potentially affected by the Underground Test Mine and/or Phase II: fish and fish habitat, species at risk, and Indigenous peoples. However, the Minister did not explain, among other things: (i) how those areas of federal jurisdiction will or may be impacted; (ii) how the Underground Test Mine, proposed to take place on already disturbed lands within Phase I, will cause Phase II to go from being a non-designated project to a designated project; (iii) why the Underground Test Mine and Phase II must be considered together under s. 9 of the *IAA*; or, (iv) why he departed from the Agency's recommendation.

36. By designating the Underground Test Mine and/or Phase II, the Minister acted unlawfully, unreasonably and unconstitutionally.

Grounds of Review

37. The Designation Order is an unlawful, incorrect, unreasonable and/or unconstitutional exercise of ministerial discretion and should be quashed or set aside. Indeed, the Minister's reasons for the Designation Order are internally incoherent and present an irrational chain of analysis that cannot be justified based on the facts and law, including the constitutional division of powers.

38. In particular, the Designation Order is based on the following errors, among others, which individually and/or together require that the Designation Order be quashed or set aside:

- (a) Contrary to the principles of justification, intelligibility and transparency, the Minister's reasons do not meaningfully account for the central issues, arguments and concerns raised by Coalspur, the Agency's recommendations and/or the *IAA*, including:
 - (i) whether it is lawful or reasonable to combine the Underground Test Mine and Phase II for the purpose of the Designation Order;
 - (ii) whether, and on what basis, the Minister ought to depart from his December 2019 decision not to designate Phase II;
 - (iii) whether, and on what basis, the Minister ought to depart from the Agency's recommendation that neither Phase II nor the Underground Test Mine, alone or in combination, should be designated;
 - (iv) how it is lawful or reasonable for the Underground Test Mine to be designated, and to tip the scales in favour of Phase II designation, when it is a nominal increase of mining operations and fails to meet the threshold for increased area disturbances based on the existing Phase I (which federal authorities elected not to designate);
 - (v) the purposes of the *IAA*, including a fair and predictable process, cooperation and coordinated action between governments, and ensuring timely procedures; and/or,

- (vi) the absence of adverse effects on areas of federal jurisdiction from the Underground Test Mine.
- (b) Alternatively, the Minister incorrectly or unreasonably:
- (i) combined the Underground Test Mine and Phase II for the purpose of the Designation Order;
 - (ii) departed from his December 2019 decision not to designate Phase II;
 - (iii) departed from the Agency's recommendation that neither Phase II nor the Underground Test Mine, alone or in combination, should be designated;
 - (iv) designated the Underground Test Mine, notwithstanding the absence of any new area mine operations or disturbances, nor any new material area mine operations or disturbances, beyond Phase I;
 - (v) concluded that the Underground Test Mine may have adverse, or novel adverse, environmental effects and/or effect Indigenous peoples in areas of federal jurisdiction, and used that finding to justify designating both the Underground Test Mine and Phase II;
 - (vi) relied on a project that will have no effects on areas of federal jurisdiction (the Underground Test Mine) to designate Phase II;
 - (vii) relied on volume criteria for new mines under the *Regulations* to justify designating mine expansion activities; and/or,
 - (viii) exercised discretion to designate the Underground Test Mine and/or Phase II.
- (c) Alternatively, the Minister fettered his discretion by unlawfully proceeding on the basis that the requesters' combination of the Underground Test Mine and Phase II required that he consider both together for the purpose of the Designation Order.

- (d) Alternatively, the Minister failed to take into account or properly take into account relevant facts and factors or, alternatively, fundamentally misapprehended or failed to account for the evidence before him, including:
 - (i) that the Underground Test Mine will not cause adverse effects or novel adverse effects on areas of federal jurisdiction;
 - (ii) that the Underground Test Mine and Phase II are independent projects in different locations, proceeding on different timelines; and/or,
 - (iii) that designating Phase II in combination with the Underground Test Mine will unnecessarily and unreasonably delay the latter by years, contrary to the purposes of the *IAA* that include a fair and predictable process, cooperation and coordinated action between governments, and ensuring timely procedures.
- (e) Alternatively, the Minister was *functus officio* to reconsider his December 2019 decision not to designate Phase II and there were no new circumstances that permitted him or reasonably permitted him to reconsider that decision.
- (f) Alternatively, by triggering the prohibition in s. 7 of the *IAA* and thereby asserting a federal veto power over the Underground Test Mine and/or Phase II, the Minister impaired the core of provincial legislative power over local works and undertakings, property and civil rights, and/or the development, management and conservation of non-renewable natural resources; therefore, the Designation Order (or, alternatively, ss. 7 and 9 of the *IAA*) is inapplicable to the Underground Test Mine and/or Phase II.
- (g) Alternatively, and subject to the outcome of the Reference Case, the *IAA* is constitutionally invalid because its pith and substance is outside the scope of federal

legislative powers; therefore, the *IAA* and the Designation Order thereunder are of no force and effect.¹

39. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

40. one or more affidavits to be sworn;

41. notice of constitutional question, to be filed in accordance with s. 57 of the *Federal Courts Act* (if necessary);

42. the Designation Order;

43. the record before the Minister in respect of the Underground Test Mine and Phase II;

44. the *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12, and regulations thereunder;

45. the *IAA* and the *Regulations*;

46. sections 91, 92 and 92A of the *Constitution Act, 1867* and section 52 of the *Constitution Act, 1982*;

47. sections 18, 18.1, 18.2, and 57 of the *Federal Courts Act*, R.S.C. , 1985, c. F-7;

48. the *Federal Courts Rules*, SOR /98-106; and,

49. such further and other evidence and legislation as counsel may advise and this Honourable Court may permit.

¹ Coalspur does not intend to file a notice of constitutional question in this proceeding challenging the validity of the *IAA* as a whole, as that matter is being considered in the Reference Case. However, in the event that the Court of Appeal of Alberta or, if appealed, the Supreme Court of Canada opines that the *IAA* or s. 9 thereof is constitutionally invalid, Coalspur will rely on the same to argue that the Designation Order is of no force and effect.

REQUEST FOR MATERIAL IN THE POSSESSION OF TRIBUNAL:

Pursuant to Rules 317 and 318 of the *Federal Courts Rules*, the Applicant requests that the Minister send to the Applicant and to the Federal Court Registry certified copies of all the materials that were placed before and/or considered by the Minister in making the Designation Order, or that are in the Minister's possession and otherwise related to the Designation Order, and are not in possession of the Applicant.

Dated at Calgary, Alberta this 28th day of August, 2020.



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