Submission prepared by Dr Irene Watson, chairperson Kungari Aboriginal Heritage Association, 29th January 2015.

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Dr Irene Watson would be available to provide further oral presentations to the committee.

NATURAL RESOURCES COMMITTEE INQUIRY INTO UNCONVENTIONAL GAS (FRACKING), pursuant to section 16 (1) (a) of the Parliamentary Committees Act 1991: POTENTIAL RISKS AND IMPACTS IN THE USE OF HYDRAULIC FRACTURE STIMULATION TO PRODUCE GAS IN THE SOUTH EAST OF SOUTH AUSTRALIA.

Introduction

Kungari Association has a membership comprising the Tanganekald, Meintangk and Boandik First Nations Peoples. Our unceded territories include the South East of South Australia, lands subject to your inquiry and consideration of unconventional gas (fracking) production.

Prior to the invasion and colonisation of our Boandik-Meintangk territories our lands were pristine and had provided a sustainable lifestyle from time immemorial; records provide an account of our connection to our territories more than 40,000 years long. First Nations sovereign and self-determining peoples have never consented to our material dispossession which is the direct result of state colonial power.

In this submission it is argued that we continue to have the authority and the responsibility to care for and ensure our territories are alive and well for future generations. We do not have a

mandate to agree to the destruction of our natural world. Under international law the state is compelled to consult and obtain our free, prior and informed consent regarding any proposals to develop our lands, it is important to note that from a sovereign, self-determining, First Nations, ontological perspective we could not consent to the destruction of our territories.

In this submission I will address the failure of the state to address the sovereign position of First Nations Peoples in relation to the proposal to produce gas from our territories.

Kungari Association has concern for the impact the proposed gas-fracking process will have on the South East of South Australia and in particular upon the quality of our air, water and earth-soils. We are concerned that fracking, as has been noted in many other areas in Australia and the rest of the world[1] has the potential to negatively impact the South-East region. In particular we are concerned with environmental threats to our lands and waters and also our future food security. As the First Nations Peoples we have a mandate and an obligation to ensure our territories continue to sustain future generations of First Nations Peoples. It is our understanding that in general unconventional gas projects have a short term life of up to 30 years. Such short term gain cannot be offset by the high probability of long-term risk to our lands and waters. First Nations Peoples know that without the sustainability of the land to provide food and water, the future of humanity, along with other species, is threatened.

The evidence is mounting against fracking as a way forward in providing for the energy needs for future generations. Beach Energy's Statement of Environmental Objectives, reveals some of the company's awareness of the potential risk to the quality of water, land and air in the South-East.[2]

Due to the mounting evidence against fracking Kungari Association supports the proposal for the South East region of South Australia to be made exempt from any unconventional gas

[1] The Northern Inland Council For the Environment, "The Truth Spills Out – A Case Study Of Coal Seam Gas Exploration In The Pilliga". See also, http://www.stoppilligacoalseamgas.com.au/wp-content/uploads/2011/12/The_Truth_Spills_Out_Final_May_2012_without_appendices.pdf ; http://www.smh.com.au/environment/santos-coal-seam-gas-project-contaminates-aquifer-20140307-34csb.html According to a United Nations Environment Programme document, between 15 and 30 million litres of highly pressured water is used per fracked well. These production costs are unsustainable on our water resources in the South East region. http://na.unep.net/geas/archive/pdfs/GEAS_Nov2012_Fracking.pdf

[2] http://www.petroleum.dmitre.sa.gov.au/__data/assets/pdf_file/0017/232145/Presentation_-_Barry_Goldstein_-_23_October_2014_Roundtable.pdf

developments. We need to protect our lands and cultural integrity along with the need to provide for future generations food security.[3]

The following terms of reference will be addressed in this submission:

1. **The impact of groundwater contamination**

This submission will consider the effects of groundwater contamination upon the territories of the Boandik and Meintangk First Nations peoples'. As this inquiry would be aware, almost 200 years ago this region was a vast wetland, an ecological paradise and homeland for our people and a diverse range of animal and bird life. Following the clearing and draining of our lands much of that wetland ecology has vanished and our lands are now drying up. This is all occurring at a time when the entire state of South Australia is also facing water shortages, and where it has been noted in a 2012 SA government report *Conserving Nature 2012 – 2020* at p 20 that

> Drought conditions are likely to increase in frequency across many parts of South Australia, as a consequence of climate change, particularly in agricultural areas.[4]

First Nations are concerned for and have the responsibility to ensure our lands do not suffer further destruction through the contamination of our remaining ground waters. This is while evidence indicates our remaining waters are threatened by the possibility of waste water, solid wastes (eg salts, drilling muds) and their potential impact on groundwater aquifers.[5]

Kungari's concern is for the high risk to water security and in the threat of aquifer contamination and the difficulties with cleaning up our aquifer which has led many to the conclusion that any contaminated residue water is likely to remain, (Penola public meeting April 2004). These concerns present too high a risk to go ahead with gas production.

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3 https://www.adelaide.edu.au/saces/economy/regionprofiles/Fact_sheet_RDA_Limestone_Coast_Final_May_2012.pdf

4 http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCoQFjAB&url=http%3A%2F%2Fwww.environment.sa.gov.au%2Ffiles%2F2bb8f9db-e497-4ec0-b15d-a07d00ac194d%2Fcons-gen-conserving-nature-sections-1-4.pdf&ei=z8unVKr6B4vX8gW_9YCABg&usg=AFQjCNEwR3YJRh7lhZxPflqv7FhOnNCzUA&sig2=U3u4FzucIF1TbAXV__1m_g&bvm=bv.82001339,d.dGc

5 http://www.ntn.org.au/wp/wp-content/uploads/2014/12/NTN-Tasmania-HF-Submission.pdf

2. The impacts upon landscape

According to a First Nations ontology the impact on landscape would include the connected and collective relationships we share with the natural world, including our relations to all birds and animals that like humans are dependent upon the health and well-being of our natural environment. Those considerations are different from a neo-liberal view of the world and one where the natural environment has been commodfied and objectified and left open and at risk to environmental contamination and destruction.

The proposed developments will have a negative impact upon the South East and include; changes to the natural environment, the construction of gas pipelines, construction of well pad; construction of contaminated water pond; building of roadways between wells and major depots; building of processing plants; the impact of a 24 hour operation; siesmic activity and history and intensity of earthquakes in the vicinity; impact upon existing sinkholes; the building of infrastructure including depots, temporary offices and accommodation; the lifetime of wells; and the rehabilitation of wells and well pads, pipelines, roads; all of these developments will impact the natural environment.

3. The effectiveness of existing legislation and regulation

Kungari submits the Boandik and Meintangk First Nations Peoples have not been given due recognition as the first peoples of the South East of South Australia nor has there been adequate consultation in accordance with international law. Instead a terra nullius approach to First Nations Peoples has prevailed, and this is even though the state is well aware of our peoples existence in the region.

The ongoing effect of a terra nullius approach has been to ignore Boandik-Meintangk Peoples sovereignty. The state in applying its governance framework overlooks indigenous ontological understandings of the natural environment. Indeed, the conceptualisation of nature as a resource for appropriation, economic growth as an endless process for the development of the 'nation state', and accumulation as a natural activity of all human societies are the premises of this gas industry and are in opposition to an Indigenous ontological way of knowing.[6]

The Boandik-Meintangk position is similar to the Mithaka peoples of Queensland, that is, the state government of Queensland had violated international law due to a lack of consultation with Mithaka peoples over proposals to frack on their lands, in 2014. I refer your inquiry to the proscribed minimum standards in international law as enshrined in the United Nations

[6] Roger Merino, "The politics of extractive governance: Indigenous peoples and socio-environmental conflicts", 2 (2015), *The Extractive Industries and Society*, 85–92.

Declaration on the Rights of Indigenous Peoples, (UNDRIP). It is our claim that our ongoing sovereignty and rights to self-determination should be considered in accord with international law, in relation to the proposed gas production and its potential impact upon what we perceive as a health danger, environmental hazard and risk to our future food and water security.

Under *UNDRIP* and *ILO Convention 169 on indigenous and tribal peoples* we are entitled to be meaningfully consulted and involved in any decisions about proposals to exploit resources on our traditional lands, particularly when that exploitation threatens our future survival.

Both UNDRIP and the ILO Convention provide a human rights framework and standards by which state governments should work with First Nations Peoples. The 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by the General Assembly includes the right of indigenous peoples to self-determination, to our lands and resources, and to consultation in good faith in order to obtain our free and informed consent prior to any large-scale economic activities that might affect our lands and communities.

It is expected that both the state and industries that are involved in the extraction of non-renewable resources would comply with these international law standards. In particular any discussions regarding the exploration and exploitation of non-renewable resources consideration for the impact of developments that could create any violation of the right to life, forced displacement and destruction of the environment on which indigenous peoples depend and including the effect of gas production on the health and well-being of indigenous peoples and the impact of destroyed sacred sites thereby affecting the right to our spirituality.

Those minimum standards and expectations around consultation are set out in UNDRIP, in particular article 32 requires that states undertake good faith consultations in order to obtain our free and informed consent to any large-scale projects.

We also claim the rights to a clean environment, clean water, health, food and subsistence, particularly at a time when there is a possibility of damage to our territories. In some regions the duty to clean up first nations lands is evolving and in particular an Ecuadorian court fined Chevron to help clean up the 440,000 hectares of land where a reported 32,000 barrels of oil were spilt yearly into Ecuador's Amazon River system. These are precedents with persuasive authority in Australian courts should those same violations occur on our territories.

The right of self-determination of all peoples is recognized in Article 1 of the two international covenants on human rights. The right of indigenous peoples to self-determination is acknowledged in article 3 of the UNDRIP but is an underlying right present in almost all other provisions. To recognize the right to self-determination is to accept that indigenous peoples can and should decide the appropriate development that can take place on

our lands. When and if there is no consultation by outside parties in line with the procedures set out in the Declaration would deny indigenous peoples our right to determine our own development.

UNDRIP refers extensively to participation in decision-making, consultation and free, prior and informed consent and are formulated as procedural rights as well as duties and are also essential principles enabling indigenous peoples to exercise the right of self-determination. There is general agreement on the obligation of states to undertake consultations with indigenous peoples that might be affected by a state-endorsed activity and the principal is found in several articles of UNDRIP, as follows; articles 10, 11(2), 19, 28(1), 29(2), 30(1) and 32(2). Article 32 (2) of the Declaration is particularly relevant to the extractive industries and stipulates:

> *"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."*

Article 32 requires consultation with the object of obtaining the free, prior and informed consent of the indigenous peoples concerned. The principle of free prior and informed consent is also referred to in articles 6 and 15 of ILO Convention 169. Article 6 states that:

> "*consultations carried out in application of this convention shall be undertaken […] with the objective of achieving agreement or consent to the proposed measures*."

The article can be read alongside article 15 and in relation to indigenous peoples and extractive industries:

> *"In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples […] before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands."*

While some states have argued that the principle of consent is absent from the Convention, the ILO's Committee of Experts on the Application of Conventions and Recommendations has on several occasions recalled that, in accordance with Article 6, governments shall consult the peoples concerned with the objective of "*achieving agreement or consent to the proposed measures*".

There is also an argument that the principle of free, prior and informed consent as it is elaborated in the 2007 Declaration is not an automatic and enforceable right because the Declaration is not binding on states. However it is increasingly being accepted by judicial and quasi-judicial bodies that the principle of free, prior and informed consent as the framework

for any future political action that might be taken in relation to extractive industries, indigenous peoples and human rights.

The Special Rapporteur notes, the "*Declaration and various other international sources of authority, along with practical considerations, lead to a general rule that extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent*"(United Nations 2013, para. 27).

The Committee on the Elimination of Racial Discrimination (CERD) in its General Comment 23 of 1997 calls upon states parties to "*ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent*."

The Committee has called for implementation of the principle of free prior and informed consent when adopting measures affecting the rights of indigenous peoples as a means of preventing the disappearance of their cultures and as necessary for their survival.

In the case of the Maya of Belize, the Inter-American Commission noted that, although countries may assign ownership of sub-surface mineral and water rights to the state, it does not imply that indigenous peoples do not have rights in relation to the process of mineral exploration and exploitation, nor does it imply that the authorities have freedom to dispose of such resources at their discretion (IACHR, 2004, para.180).

In the case of the Inter-American Court on the *Saramaka people v Suriname*, it was the conclusion of the Court that the state had:

> "*a duty, from the onset of the proposed activity, to actively consult with the Saramaka people in good faith and with the objective of reaching an agreement, which in turn requires the State to both accept and disseminate information in an understandable and publicly accessible format*" (IACHR, 2007, para 17).

While the Court recognized that the form of consultation may depend on the nature of the project, it recognized that large-scale developments require the state to obtain the affected people's consent. The Court stated that:

> *"in addition to the consultation that is always required when planning development or investment projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior, and informed consent of the Saramaka, in accordance with their traditions and customs"* (IACHR 2007, para. 137).

While consultation and the process of free prior and informed consent are fundamental protocol in any dealings with First Nations Peoples territories it has also been argued in this submission and in accord with First Nations ontologies and laws that proposals that would impact negatively the relationship between peoples and the natural world could not be considered. These principles outlined above have become customary international law given the general acceptance of them and should be considered so as to balance the limitations in Australian law regarding the inherent rights of First Nations Peoples. That is to ensure proper consultation processes that include free prior and informed consent.

4. **The potential net economic outcomes to the region and the rest of the state.**

It is Kungari's submission that any destruction and/or reduction of the natural environment would impact negatively upon the future sustainability of all peoples in the region and including non-indigenous peoples. The security of food and water should be a priority of the state government.

Conclusion

It is Kungari Association's submission that the state has failed to consult with the First Nations Peoples Boandik-Meintangk, and more importantly the proposal to frack on our territories presents such a high risk to our natural environment and a conflict with our ancient sovereign rights and interests, to ensure the future survival of our peoples and the natural environment, that we would have to exercise our authority and say no to any fracking on the unceded territories of the Boandik-Meintangk Peoples.

Kungari also acknowledges and endorses in general the concerns submitted by the LCPA to not support the unconventional gas and fracking in the SE of SA for the following reasons:

- potential for water contamination caused by spills, leaks, chemicals and accidents
- potential for well integrity failure due to finite lifespan of cement and steel
- potential for air pollution detrimental to health of natural environment, humans and animals
- potential for industrialisation of landscape and loss of "clean and green" image
- unsustainable competition with existing industries such as agriculture, horticulture, viticulture and tourism which will have a detrimental impact on local economy
- unsustainable competition for finite water resources
- potential for release of greenhouse gases as fugitive emissions which increases climate change
- unconventional gas and fracking is as yet unproven technology and many questions remain to be answered on its impacts on our water, air, biodiversity and human health