



# “Standing Rock of the North”:

## *An updated Summary Risk Assessment of the Trans Mountain Pipeline Expansion*

*Prepared by the Indigenous Network on Economies and Trade (INET).*

This summary report lays out the financial risks to Kinder Morgan Canada (KML) and Kinder Morgan, Inc. (KMI) associated with the rejection of the Kinder Morgan Trans Mountain Expansion Project (TMEP) by the Secwepemc people, whose unceded territory, Secwepemcul’ecw, covers more than half of the proposed pipeline project and route. The basis for these risks are the jurisdiction and land rights of the Secwepemc and the obligation of the Canadian government under both domestic and international law to obtain consent from the Secwepemc as the Aboriginal title and rights holders. These risks have been amplified by the Canadian government’s approval of the pipeline despite the lack of Indigenous consent. The government has failed to even fully engage the Secwepemc. They are further amplified by the declarations of solidarity among the Secwepemc, other Indigenous Peoples, non-Indigenous NGOs and many municipalities, including the City of Vancouver. Finally, these risks are amplified by the assertion of Secwepemc land defenders that they will stop the pipeline “by any means necessary.”

Cambridge political anthropologist Donald Bray notes that half of mining risks globally are due not to technical issues but rather to socio-political and community risks. Canada traditionally has been considered a stable jurisdiction for resource extraction. The inherent jurisdiction being asserted by Indigenous Peoples challenges that.

## **KML CANADA SUSPENDS NON-ESSENTIAL SPENDING ON TRANSMOUNTAIN EXPANSION PROJECT**

On April 8, Kinder Morgan announced the suspension of all non-essential spending on the project. The stated reason for the suspension were the “continued actions in opposition to the Project by the Province of British Columbia”. Despite the company’s insistence that the threats to the pipeline come from the provincial government, it is Indigenous jurisdiction that poses the greatest threat. Indigenous Peoples from across B.C., as well as non-Indigenous allies, have shown their opposition to the project, and its violation of Indigenous jurisdiction, through physical blockades. Kinder Morgan indicated that they would: “consult with various

stakeholders in an effort to reach agreements by May 31st.” Indigenous Peoples are not stakeholders, they are rights holders, and the failure to take into account indigenous land rights and jurisdiction, including failure to obtain the prior informed consent of Indigenous Peoples, constitutes the greatest risk to the proposed development and investments.

The surprise announcement from Kinder Morgan came on that same weekend that the company refrained from having high-profile Indigenous leaders arrested that joined in a blockade at its facility in Burnaby. This indicates the company recognizes the risks posed from rejection of the project by Indigenous Peoples. The failure of KML to yet again disclose those risks should be deeply disconcerting to investors and lenders.

In the wake of Kinder Morgan’s declared suspension, the Explorers and Producers Association of Canada identified that investment in Canada’s resource sector has become riskier. The EPAC claimed Canada is has a “growing reputation as a state where the rule of law is not respected and enforced by national and subnational governments.” The group is correct. However, the approval of the project rests of a violation of international and Canadian law that recognized Indigenous jurisdiction and land rights, which require Indigenous free prior informed consent to access to their territories. Indigenous Peoples and their supporters have had to enforce those rights by other means, blockades are an expression of indigenous law and jurisdiction. Financial backers of resource projects, including pipelines, should reassess their risk exposure stemming from Indigenous jurisdiction, lack of consent and the diversity of tactics for defending territories, including the targeting of lenders and investors.

In November, 2016, the late Secwepemc leader, and INET founder Arthur Manuel wrote to Prime Minister Justin Trudeau to remind him that the Trans Mountain project “requires the consent of the Secwepemc people.” INET subsequently produced an analysis that set out risks associated with Kinder Morgan’s failure to account for Indigenous jurisdiction and land rights (available at <https://www.secwepemculecw.org/>). Those risks meant lenders and investors over-valued KML. The latest announcement proves the point made by Manuel and INET, while Kinder Morgan’s continues to avoid directly addressing the risks posed by Indigenous jurisdiction and land defence.

## **INDIGENOUS JURISDICTION AND LAND DEFENCE RISKS**

In 1951, when the federal government unilaterally approved the original Trans Mountain pipeline through Secwepemcul’ecw, the local community was not legally in a position to oppose the development because the Indian Act prohibited Indigenous peoples in Canada from organizing on land issues and hiring lawyers. The original Trans Mountain pipeline went into operation in 1953 without the Secwepemc people’s consent. The Secwepemc are determined that history will not repeat itself.

Unlike much of the rest of Canada, the British Crown assumed sovereignty over British Columbia without signing treaties with Indigenous Nations in most of the Province. According to the Royal Proclamation of 1763, all “Indian lands” had to be *ceded* to the Crown in order to legally transfer possession to the province. The Royal Proclamation is enshrined as law in the Constitution Act, 1982. The Indigenous Nations of the Interior of B.C., including the Secwepemc, have never ceded, released or surrendered their land.

Secwepemc jurisdiction is collectively held. This means the deals KMI/KML has made with individual bands do not replace the need for engagement with the nation as the proper title and rights holder on a territorial basis. Thus, the company has incurred significant risks associated with failure to obtain consent from the appropriate jurisdictional authority.

Despite the Secwepemc's inherent jurisdiction over their lands, as reiterated by both the Supreme Court and international laws, the Crown makes competing assertions of jurisdiction. This unlawful insistence is the source of much uncertainty. This uncertainty is compounded by the well-established history of the Secwepemc defending their land against encroachment from outsiders by exercising their jurisdiction on the ground.

There are many examples throughout the twentieth century of Secwepemc land defense. The most striking example happened in 1995 at Ts'Peten (Gustafsen Lake). A standoff between the Secwepemc and the Royal Canadian Mounted Police saw the largest paramilitary operation in Canadian history. In 2000, the Secwepemc affirmed their sovereignty against the expansion of the Sun Peaks ski resort, maintaining a protection camp until 2010. Most recently, the Secwepemc Women Warrior Society disrupted the 2017 Annual General Meeting of Imperial Metals over the latter's tailings pond spill at Mount Polley in Secwepemcul'ecw. If the Canadian government makes good on their threat of executive force and militarized action against Indigenous land protectors, a growing coalition of civil society allies and Indigenous nations are preparing for the land defence. Secwepemc land defenders have already been arrested confronting Kinder Morgan and the initial construction on the expanded pipeline. The spectre of a "Standing Rock of the North" looms large.

Among the announced tactics of Secwepemc land defenders is the use of 'tiny houses.' The Tiny House Warriors have built the first of these houses, ten of which they plan to place along the pipeline route. This tactic was learned and developed from a similar manoeuvre at Standing Rock. These houses would be lawful structures according to the jurisdiction of the Secwepemc. KML faces the spectre of having to physically remove these houses or require the deployment of security forces to do so. Not only will this delay pipeline construction, it will threaten the company's reputation as well as opening the company up to civil and criminal charges.

The Secwepemc have started plans to target financial backers of the TMEP. Representatives of the land defenders have travelled to Europe to assert their rights and warn European banks that their funds are at risk if they back the pipeline project. There have also been interventions with other types of service providers, including insurers. Insurance giant AXA has divested from fossil fuel businesses and announced that it will no longer provide insurance coverage for pipeline projects.

The pipeline project has already seen significant delays. In KMI's 2012 annual report, it estimated the pipeline would be in operation by late 2017. In its 2016 report, this had been extended to December, 2019, with construction estimated to begin in September, 2017. This has been extended another year in KML's 2017 10-K. The company noted that timely completion of the project, once started, is "critical."

The estimated cost of construction has increased by two billion dollars (CDN) since Kinder Morgan first proposed the project. In an affidavit filed with the B.C. Supreme Court, a Trans

Mountain representative stated that each month of delay directly costs the company \$5.643 million (CDN). Further delays will likely increase costs further.

In addition to direct costs, the affidavit claims delays result in \$88 million per month in foregone revenue. KML will depend on that revenue to sustain its announced \$0.65/share dividend to restricted shareholders. At a total cost of \$67.4 million, this was 70 percent of the company's distributable cash flow (DCF) available to shareholders in 2016. In 2017, it was 123 percent of DCF. The expected \$88 million per month in additional revenue from the TMEP would reduce the dividend payout to restricted shareholders to about 30 percent of DCF, which is close to the ratio KMI adopted when it cut its dividend in the fourth quarter of 2015. This strongly suggests that KML is relying on expected earnings from the TMEP to sustain its dividend.

If the pipeline is not built and KML cuts its dividend to 30 percent of current DCF, the company would pay out \$0.24/share. Before the announced suspension of non-essential spending, the dividend yielded about 3.5% on equity. A 3.5% yield for a \$0.24 dividend would see a value of \$6.88/share. In other words, KML appears to be almost 250% overvalued.

Delays also create greater uncertainty about future costs stemming from inflation and rising interest rates. However, Kinder Morgan's borrowing costs may also increase as banks and other lenders grow weary about lending to pipelines. Dutch bank ING has said it will no longer provide financial backing to projects associated with the Canadian oil sands. Canadian credit union Desjardin temporarily halted its lending for pipeline projects. Concerns about higher future borrowing costs may have been a factor in the suspension of non-essential spending.

The weariness of lenders may stem from increased attention by pipeline opponents to financing. The Union of B.C. Indian Chiefs has launched a campaign calling on banks not to finance Trans Mountain. More broadly, a campaign called Mazaska Talks is targeting the financial backers of pipelines with a boycott. This increases the risks associated with Kinder Morgan Canada's access to capital. Opponents intend to leverage the fact identified by Kinder Morgan that "[l]imitations on our ability to access external financing sources could impair our ability to complete [the TMEP]." Kinder Morgan has failed to properly assess pipeline resistance as a risk factor in capital access.

A spokesperson for the Tiny House Warriors stated, "As we assert our legal rights and title, pipeline financiers will face tremendous pressure, greater risk and uncertainty. We advise major pipeline funders, including TD Canada and JPMorgan Chase, to get out of the pipeline business now." Lenders will base their decisions on financial calculations. A widespread and vociferous campaign against the pipeline should be included in those calculations.

Kinder Morgan cannot rescue this project from their failure to properly identify the risks associated with Indigenous jurisdiction. The TMEP has come to a breaking point. There will either be a decision to cut the losses and stop the project now, or provoke conflict and confrontation, which will only increase risks and lead to further human and indigenous rights violations. Nothing the government or the company can do will earn the project approval from the Secwepemc and other Indigenous Peoples who hold Aboriginal title and rights.