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Environmental Law Alliance Worldwide

**Evaluation of the Environmental and Social Impact Assessment (ESIA)
for the Oyu Tolgoi Copper and Gold Project
and the application of IFC and EBRD Performance Standards**

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ELAW appreciates the opportunity to comment on the Environmental and Social Impact Assessment (ESIA) for the Oyu Tolgoi Copper and Gold Project. ELAW reviewed the ESIA for compliance with the International Finance Corporation (IFC) Performance Standards and the European Bank for Reconstruction and Development (EBRD) Performance Requirements related to indigenous peoples, involuntary resettlement, community health, and cultural heritage. ELAW finds that neither institution should finance the Oyu Tolgoi mine until the project proponents ensure that the project will not breach the banks' own standards/requirements.

This review complements the review of the technical aspects of the ESIA and how the project design will impact the environment and communities living near the project prepared by ELAW Staff Scientists Mark Chernaik and Heidi Weskel.

I. Indigenous Peoples

The ESIA inappropriately dismisses the application of IFC Performance Standard (PS) 7, *Indigenous Peoples*, to this project. The ESIA simply concludes: "There are no indigenous peoples associated with this Project. Herder communities are part of the mainstream of Mongolian society from an ethnic and cultural perspective. Herder communities are treated as a 'vulnerable group' within the ESIA given the pressures being placed on their traditional lifestyle by economic development and social changes." (ESIA A2, p. 27).

PS 7 should be implemented for this project. PS 7 describes Indigenous Peoples as social groups with identities that are distinct from dominant groups in national societies. The Performance Standard defines "Indigenous Peoples" as "a distinct social and cultural group possessing the following characteristics in varying degrees:

- Self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;
- Collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories;
- Customary cultural, economic, social, or political institutions that are separate from those of the mainstream society or culture; or
- A distinct language or dialect, often different from the official language or languages of the country or region in which they reside." (PS 7, sec. 5)

The herders should be considered indigenous peoples. They possess at least the first three characteristics of the definition excerpted above. These characteristics are clearly acknowledged by the project proponent throughout the ESIA. The herders have lifestyles very different from their urban counterparts. Among other differences, the herders maintain their own culture, inhabit distinct types of dwellings, form close attachments to the geographic areas they inhabit, and exhibit different relationships with the natural resources. While it may be true that the mainstream populations living in Mongolia's urban areas relate well to the herders, and may even come from herding families, that does change the fact that the herders are indigenous peoples.

PS 7 applies to "communities or groups of Indigenous Peoples who maintain a collective attachment, i.e., whose identity as a group or community is linked, to distinct habitats or

ancestral territories and the natural resources therein.” (PS 7, sec. 6) This characteristic clearly applies to the Mongolian herders.

The report titled, *State of the World's Minorities and Indigenous Peoples 2011 – Mongolia* (July 2011), published by Minority Rights Group International, available from the UN Refugee Agency's website, includes the following statement: “Mongolian herders, mostly minorities and indigenous peoples, were confronted with severe drought and a harsh winter, forcing thousands of them to abandon their nomadic life. . . .”
<http://www.unhcr.org/refworld/docid/4e16d36711.html>.

The IFC indigenous peoples performance standard must be applied to ensure the rights of the herders are adequately protected. The performance standard recognizes that indigenous peoples, such as the Mongolian herders, will be impacted differently than mainstream society (those living in urban communities in Mongolia) because of their distinct culture and unique relationship with the land and natural resources. The herders of Mongolia will suffer different impacts than people living in Ulaanbaatar and other urban centers. The IFC standard requires more than simply classifying these communities as “vulnerable” populations: They must be considered indigenous peoples whose free, prior and informed consent must be obtained before the project moves forward.

II. Involuntary Resettlement

Although the ESIA explains that all of the physically displaced families have been relocated and agreements have been reached with those families, it appears that the project proponents have not adequately complied with IFC Performance Standard 5, *Land Acquisition and Involuntary Resettlement*, and EBRD Performance Requirement 5, *Land Acquisition, Involuntary Resettlement and Economic Displacement*.

Both policies apply to projects that may cause physical displacement and/or economic displacement as a result of land acquisition or restrictions on land use. Both policies state that the first objective is to avoid or minimize involuntary resettlement where possible. It cannot be determined from the ESIA whether the project proponents made adequate efforts to avoid and minimize involuntary resettlement. Efforts are described in brief summaries in ESIA Chapter D15, *Resettlement Action Plan*; however, the ESIA does not adequately describe or consider feasible alternative project designs to avoid or minimize physical and/or economic displacement.

It is also not clear whether all of the people who will be physically or economically displaced by the project have been identified in the assessment. ESIA Chapter D15, *Resettlement Action Plan*, describes activities that will cause displacement (see for example Table 15.9 on p. 27). The Plan does not seem to address displacement that will be caused by worker housing or the planned business park. Construction of these facilities is likely to displace more herders, yet these impacts have not been identified or evaluated in the ESIA.

Additionally, the expected influx of people to the region is likely to displace even more herding families. The impacts caused by the influx of people cannot be adequately studied without first determining where the worker housing will be constructed. That decision has a central role to

play in how migration of people to the project area will impact existing communities and land uses. The ESIA asserts that new people to the area “will likely occupy vacant and uninhabited spaces within the existing rural and town landscapes.” (ESIA C8, p. 5) However, the ESIA does not offer any information to support that conclusion. Are these “vacant” or “uninhabited” lands areas that have been used traditionally during a different season? Will herders come back to these lands and find someone settled there?

Although the ESIA states in one place that the “assessment covers the construction phase, the life of the mine (operation), and post-mine legacy” (C8, p. 5), other sections state that specific impacts will be studied later. For example: “A supplemental ESIA will be prepared by Oyu Tolgoi as part of the site selection and planning process for Oyu Tolgoi worker housing, the business park area and applicable activities and infrastructure either being developed or proposed to be developed by Oyu Tolgoi that are related to the development of Khanbogd *soum* centre.” (C8, p. 6.) These developments are likely to displace more herder families and need to be studied as part of this ESIA to ensure that the developments comply with IFC policies.

The long-term impacts of the physical or economic displacement have not been properly addressed in the ESIA. While a resettled herder family may be fine during the first year or two of resettlement – shortly after they are given new livestock, feed and a well – that does not mean that the family will be well off 5, 10 or 50 years later. The long term stability of the displaced herder families that have lived successfully as pastoralists for generations needs to be studied.

The resettlement process and impacts have not been described adequately. While the ESIA discussion of the resettlement programs is generally positive, a different story can be found in a report by a USAID representative who visited the area in 2011. It is worth including substantial text from that report:

Project-affected Herders

Mongolian herders are semi-nomadic pastoralists as a consequence of the environment they have lived in for centuries and are tied to their winter camp sites and water sources. There is no historical concept of land ownership or privatization. Prior to privatization, the *soum* would track which families used which areas for pasture by season and authorized those families to use those areas. The OT license area is 10 km x 10 km which overlays traditional pasture and water sources of a group of 11 herder families who were involuntarily resettled.

During our visit to the OT site, we were able to visit with several herder families that are being impacted by the project. Reportedly, in Han Bogd, approximately 630 herder families with more than 100,000 livestock are directly or indirectly impacted.

All herder families stated that they did not want the project to stop or slow down as they understand mining will develop their country; however, it is having a very negative impact on their lifestyle and culture. Some interviewees questioned whether there are any other alternative opportunities for Mongolia to develop since it will take decades for the soil to rehabilitate following mining and associated development. They have never asked for cash payment, only employment. Initially the herders believed OT would bring

positive development to their area but at this point they are not sure. OT is perceived as a very large company that does not consider issues at the individual level. The herders want to be treated fairly and have adequate access to pasture and water for their livestock. Several herders did not want to be identified as they feared it would cause problems for their and other herder families. All families wanted a good future for their children which appears difficult to provide at this point in time.

Project information/Political Pressure There was consensus that from the beginning there was a lack of information on the project, a lack of understanding of the herders' land ownership laws and knowledge of their own rights. Previous government officials told at least a couple of herder families to not complain or speak out against the project and that they were asking for too much. Consequently herder families signed the resettlement contracts without adequate knowledge of what they were signing. There was also at least one instance where it appears that the head of the family was provided misinformation by local government official and consequently was not at home when the contract was signed. The residents in the area where the groundwater will be taken never agreed to OT using it and are still "protesting." In discussions with herders, it is clear that there continues to be a lack of information and confusion. One family stated that local citizens affected by the mining do not have much opportunity to speak out so wanted to meet with the USAID team. There was discussion about herder families going to court but they lacked the knowledge and means.

Involuntary resettlement The resettlement of the 11 families from their traditional pasture areas started in 2004. One family was moved 10 km from their traditional pasture. Another family was relocated since their main source of water will be fenced within OT's property. Reportedly, the last two families resettled were not assisted by OT due to issues associated with the OT person in charge of resettlement. The process for resettlement was reportedly short. OT asked the herders to find pasture but the herders said they did not have adequate time to select and consequently their selections of sites were not good. OT built new fences, animal shelters for livestock and also dug wells at the new sites. For one herder family, the well had broken within a year of operation and the animal shelter made from wood was not as well constructed and protective as their previous stone one. This family was also located approximately 400 m from the Tavan Tolgoi coal road. They acknowledged being consulted and selecting the site but they had no knowledge that the coal haul road would be so close. Now they are trapped between the coal road and OT's road. Being this close to the coal road also results in problems with their livestock with noise and dust impacting productivity and grazing pasture. Several herder families have moved back to their original sites. The primary reason for moving back was to accommodate their livestock since in many cases their livestock either went back to their original pasture on their own or herders took them back because of better pasture, housing and water conditions. Out of the families that were initially resettled, 4-5 continue herding and the remaining have stopped altogether – although we were not able to determine what their current status is.

One aspect of the relocation and site selection that is often overlooked, is that the herders, prior to 2004, were using the best sites that the region had to offer so any alternative site

will be inferior. Therefore, herders are being asked to continue their lifestyles in pastures that are inferior.

The Undai River has both functional and cultural values to the herders. Trees along the riverbed are considered sacred. Several herders believe that the Undai River has been impacted by climatic changes.

We were told by one herder that years ago, the river would run up to a month. Now it only contains water when it rains.

Project Employment Employment opportunities with OT were discussed. OT will hire one employee per herder family and of the 11 families, seven or eight have a family member working for OT. Several herders stated that after conversations with OT personnel they purchased vehicles to be able to work for OT as drivers. Even if they could not use the vehicles purchased, they were willing to drive OT's shuttle buses between the soum center and OT camps. OT personnel who had encouraged the herders to purchase the vehicles with the prospect of future jobs, were not working in the same section when the herders returned to discuss the issue with them. Consequently, neither of these options came to fruition although there was committed interest on the part of the several herders.

It is difficult for individuals to propose projects to OT for employment opportunities. After attending a training course on operating a business, one herder took the initiative and submitted a proposal to OT. In response to the proposal, OT reportedly stated that they do not deal with individuals and that soum government approval for the proposal was required. Some herders expressed interest in the carpentry profession and learning to run a business. The herders perceive that OT does not consider herding as a profession and that OT has the impression that herders are stupid and not educated.

At this point, herders do not have the skills to be employed in positions that pay well. For unskilled workers, the salary does not match the income generated by what a herder with 100 goats would earn so a greater sense of security is not realized. Herders that are employed with companies are stuck between those jobs and herding with no special privileges or advantages. Livestock ownership is still considered the primary safety net.

Working Group for additional project-affected herders USAID understands that there is a working group for assessing the needs of herder families that are affected by project activities, such as those located along the transmission lines or roads. The soum Deputy Governor is the chair of the working group which is also represented by about four herder families. Concern was raised that there could be a conflict of interest with the Deputy Governor as chair of the working group. The working group is trying to establish the number of families affected and the extent to which they are affected by project activities. For some families the situation is difficult since some project activities are separating water resources from pasture. The working group has the right to hire outside legal advisors, however, there is no financial support to assist. Independent technical advisors would also be of value to the process. Since the working group was not given any information as to the problems each family is facing, there is a desire to meet with each

impacted herder family but to date they have not been able to since they are also maintaining their regular jobs. The working group is resolved to not make any decisions/compromises on their own but will discuss with each family because conditions for each family are very different. OT will negotiate with the working group on conditions of the contract for each family affected. There is no time frame for concluding the agreement although the impression is that OT wants this concluded sooner rather than later.

An example of the issues faced by the working group is a herder family impacted by the road and water pipeline construction since February 2011. The family is currently on their winter grounds which are considered their central place. OT is installing the 70 km water pipeline running from the borefield to the project site. The road construction and traffic are creating significant air quality issues and impacting the quality of the pastures and the ability of the herders to watch their 500 head of livestock. Equally important is the fact that the herder's pasture and water source are being separated by at least two roads and associated construction activities. The water source is approximately 4 km away and livestock need to cross the road in the midst of high volume construction traffic. The herder reported that it is difficult to manage the livestock under these conditions as the horses and camels will select their own path to water and even in a new location the cattle will continue to go back to the original water source. Additionally pasture size is reduced and their herd is divided on either side of the road. The herd needs to be watered 1-2 times a day depending on the stock. Crossing the road to water the livestock is very difficult due to the high volume of traffic and speed of the trucks, which will not stop and will honk, scaring the livestock. The cover to another water source they previously used has been damaged by vehicles running over it and is not useable. Construction noise is also a major problem for livestock. This has resulted in extremely difficult situation for the herder to manage his livestock in a productive and safe manner. OT has visited their ger but there has been no action beyond the discussions. The only limited measure OT has taken is watering the road down twice a day, which is not that helpful given the temperatures and wind. To date there has not been any compensation paid by OT. OT has promised another water source but as of USAID's visit this has not occurred. The option to move is limited since there are other families in the area so there is no space to go to. Their area is also within the area impacted by the airport. Additionally the UB road is close to another winter area and water source. So at this point all of their seasonal pastures/grasslands and territories are being impacted by various development activities.

Herder Concerns

- Negative impacts on ground water either through contamination or draw down by project activities. Although OT has stated that they will create new water sources, some herders do not believe that these new ones will work as well as the original ones. Herders have been experiencing a lowering of the water table over time which seems to be getting worse. It is becoming more and more difficult to find adequate water resources for livestock. For example, one herder reported that in the socialist time, water was sufficient to water 300 camels (60-100 l/day/camel)

but now there is not enough to water 30 camels. In one case there is a water source (Hajuu Hurur) that is used regularly by livestock, however, OT will be fencing it within their property so it will not be available for livestock. One family that depends on this water source has been relocated but moved back to their original site due to their livestock continuing to return to their original pasture and water source. The nexus between adequate pasture and access to water is critical for survival of livestock. It was suggested that new water sources need to be established in areas that can support summer pastures. The herders carry most of the risk and OT does not understand the dynamics of herding and the need to follow the livestock to adequate pasture and water sources.

- For herders that remain to be relocated or desire better relocation areas, it is difficult to decide where to move due to increased development and changes in the environment due to desertification. It is economically and psychologically difficult for herder families to move from their traditional land.
- Roads are causing multiple problems including damaging top soil, dust damaging vegetation and reducing pasture availability, and the new roads are a barrier for livestock movement since they are being built up and more difficult for livestock to cross – independent of traffic issues. There is no consultation with herders as to where to site the roads and which roads would be useful – such as the road from Han Bogd to UB.
- Lack of respect for herders cultural and spiritual sites. Specific examples were in relationship to OT removing what is considered sacred trees from the Undai riverbank that had been in existence for 150-200 years.
- Absence of ability to get issues resolved by either local government's public relations office or OT's community relations office. For example, the issue of a broken well was raised on several occasions with OT, but each time there was different personnel and consequently the well remains dysfunctional. Other examples were given that when OT public relations come to visit they just listen and do not offer help/advice. Additionally, follow-up meetings rarely happen.
- There rarely is advance notice or knowledge of what the project is going to do and potential impacts.
- Their concerns/ideas are written down by OT staff but there is never any feedback. They need to have the opportunity to meet with decision makers.
- Concern about the availability of social services with increased population and ensuring that everyone has access to schools and health clinics, etc. The perception is that social services are considered lower responsibility and priority by OT. For example, OT expanded a school however it was not large enough to accommodate all the local students after a couple of years.
- Herders are being pushed from all sides without a clear strategy as to how they will maintain their lifestyle in the face of development. One herder has about 800 livestock but with reduced area for pasture and moving he is not sure what to do with his livestock. It is not possible to stay in one area and rotate grazing since there is so little vegetation that the area will become overgrazed very soon. He recognizes that to become a farmer will require special inputs such as specialized breeds of livestock, which he lacks access and resources for. This has led some

herders to change their life style because of future uncertainties with both development and climate change/desertification.

- It is hard to imagine any herder family living around OT because of the noise and traffic associated with its operations for 24 hours a day.

Taken as individual issues, these are easily solvable, however, as a whole they imply that livelihoods in the region are not improving as a result of OT activities. It is unclear how the 30% increase in GDP, attributed to OT, will benefit these herders.

Mongolia - Oyu Tolgoi Copper/Gold/Silver Mine Project Trip Report (May-June 2011), Prepared by Leslie Johnston USAID/Washington, EGAT/ESP, available at: <http://mongolia.usaid.gov/wp-content/uploads/Mongolia-Oyu-Tolgoi-Trip-Report.pdf>.

In addition to this report, there is more evidence that resettlement has not gone as smoothly as described in the ESIA. In fact, earlier this month, herder families filed a petition with the Compliance Advisor/Ombudsman of the IFC complaining that herders are not being adequately compensated for the impacts they are suffering.

III. Community Health

IFC Performance Standard 4 and EBRD Performance Requirement 4 require assessment of impacts to community health, safety and security. The ESIA chapters discussing impacts to community health (C12, D18) simply rely on information provided in other sections of the ESIA.

Perhaps the most critical impact on community health will be access to water. As noted in the technical review of the ESIA by ELAW Staff Scientists: “There is a wide agreement that the water demands of the Oyu Tolgoi mining project represent a threat to the availability of clean water for communities of the Southern Gobi desert, which will likely experience large growth. The key question is whether the cumulative impact of the Oyu Tolgoi mining project will cause water scarcity over the 27-year life of the project and beyond.” The ESIA does not include required baseline information about water resources in the area and does not adequately describe the likely impact of this project on the health of local communities. Water is the most basic resource needed to ensure a healthy life. This project should not move forward without more information about the available water resources and the impacts the project will have on the availability of water for the surrounding communities that are expected to grow quickly due to this project.

As also noted in ELAW’s technical review, the ESIA does not include enough information about other aspects of the project to adequately evaluate impacts on community health.

IV. Cultural Heritage

IFC Performance Standard 8 and EBRD Performance Requirement 8, which address cultural heritage, clearly require project developers to identify and protect cultural heritage. While the ESIA includes language about identifying and preserving important cultural heritage, it notes that some living heritage sites may be relocated: “If required, relocation of a living heritage site

(in case of movable features such as trees and ovoos) will be implemented in consultation with the groups/individuals associated with it and provided that appropriate rituals have been performed, with due deference to the local customs and traditions. The Oyu Tolgoi Project is fully aware of this requirement and will follow such an approach in all cases where relocation of the sacred features becomes unavoidable.” (ESIA B12, p.27).

It is improbable that living cultural heritage such as trees can be moved successfully and without changing the cultural significance of the object. Based on the field observations contained in USAID report noted above, it seems that the project proponents have already had problems protecting cultural heritage. The report includes the following complaint by herders: “Lack of respect for herders cultural and spiritual sites. Specific examples were in relationship to OT removing what is considered sacred trees from the Undai riverbank that had been in existence for 150-200 years.”

Operating a large mine in an area that has been home to pastoralist communities for generations is likely to have severe long-term impacts to those communities. Pastoralist or herding communities are closely tied to land and water, and may suffer long-term and severe impacts from the mining project. These impacts have not been studied and addressed well enough in the ESIA. The ESIA fails to comply with IFC Performance Standards and EBRD Performance Requirements. The banks should not finance this project until the project complies with the banks own policies.