



**ОЮУ ТОЛГОЙН
ХЯНАЛТ
ТББ**

Огноо April 1, 2014
Улаанбаатар хот

Дугаар 018 /14

Via Electronic Mail

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Re: Policy Violations Committed By Oyu Tolgoi LLC and Energy Resources LLC in South Gobi, Mongolia

Dear Ms. Begoyan and Ms. Wildau,

This letter supplements complaints submitted to the European Bank for Reconstruction and Development's ("EBRD") Project Complaint Mechanism ("PCM"), namely:

- the complaint dated July 1, 2013, submitted by nomadic herders of Javhlant *bagh* in Khanbogd *soum*, Mongolia, as well as 2 Mongolian NGOs, OT Watch and Shuteen Gaviluut (hereinafter, the "July 1, 2013 Complaint");
- complaints submitted by an electronic mail dated September 6, 2013 from OT Watch to the PCM Officer, including the complaint dated August 5, 2013, submitted by nomadic herders of Jargalant, Uekhii *bagh* in Manlai *soum*, Mongolia (hereinafter, the "Aug. 5, 2013 Complaint"), and 4 complaints from individual herders, 3 of which are dated July 28, 2013, and one of which is dated August 9, 2013.
(collectively, the "Complaint")

The Complaint relates to negative impacts caused by construction and use of all project-related roads associated with 2 EBRD-financed mining operations: (1) Oyu Tolgoi LLC's copper mining operation; and (2) Energy Resources LLC's coal mining operation at Tavan Tolgoi.

This letter first describes the physical imprint and harmful impacts of project-related roads and railroad, then summarizes the associated violations of the EBRD's Performance Requirements ("PRs")¹, which the herders alluded to in the interviews but could not put on paper in a form of a formal request for a compliance review. The roads and railroad described below are, or should have

¹ This letter was prepared with support from Accountability Counsel.

been, considered part of the Oyu Tolgoi and Energy Resources projects' areas of influence.² As such, the EBRD should have conducted due diligence and performed ongoing supervision regarding the impacts of, and appropriate mitigation for, these roads and railroad. Impacts and violations arising from the beginning of these projects, and not only those arising after the approval of EBRD financing, are relevant. Failure by the EBRD to adequately consider impacts and violations that had already occurred in deciding whether to finance the projects would itself be a violation of the Bank's Environmental and Social Policy.³

I. Physical Imprint and Impact of the Roads

A. Roads Associated with Oyu Tolgoi

The Oyu Tolgoi mining operation relies on, or impacts, a multitude of roads, which include roads resulting specifically from its operations, as well as existing roads. These roads include:

- (i) The 105-kilometer Oyu Tolgoi-Gashuun Sukhait route. An existing earth (dirt) road along this route has been used by Oyu Tolgoi since around 2010 to deliver materials to the Oyu Tolgoi site from China.⁴ This route has been identified by Oyu Tolgoi and the EBRD as a facility associated with the project. Despite plans to upgrade the road to a "high-specification sealed road,"⁵ as of this date, the route remains an earth road, albeit one that Oyu Tolgoi has graded.⁶ While this road is also used for local transportation and trade, according to a traffic survey conducted in March 2011, more than half of the traffic along this road belongs to Oyu Tolgoi.⁷ Notably, the brother of one of the complainants in this Complaint died in an accident with a road construction truck along the Oyu Tolgoi-Gashuun Sukhait road due to low visibility caused by dust.⁸
- (ii) The diversion road from Tsagaan Khad to the Gashuun Sukhait border crossing, which Oyu Tolgoi constructed.⁹ This diversion road is an unsealed earth road.¹⁰
- (iii) The existing 42-kilometer Oyu Tolgoi-Khanbogd earth road. In September 2011, approximately 1,372 workers were commuting daily between Khanbogd *soum* centre and the Oyu Tolgoi mining site.¹¹ Oyu Tolgoi and the EBRD recognize this road as an "area of influence."¹² According to Oyu Tolgoi, it maintains this earth road "on a regular basis" and may consider further improvements to the road in future.¹³ Notably, the same

² See PR 1 ("Environmental and social impacts and issues will be appraised in the context of the project's area of influence. This area of influence may include... (iii) Associated facilities... that are not funded by the EBRD as part of the project and may be separate legal entities yet whose viability and existence depend exclusively on the project and whose goods and services are essential for the successful operation of the project... (v)... cumulative impacts from further planned development of the project or sources of similar impacts in the geographical area...").

³ See, e.g., *EBRD Environmental and Social Policy*, paras. 14-16, 28-29 (hereinafter "ESP").

⁴ Oyu Tolgoi, *Environmental and Social Impact Assessment*, "Chapter A4: Project Description," July 31, 2012, available at http://ot.mn/sites/default/files/documents/ESIA_OT_A4_PD_EN.pdf, p. 65 (hereinafter, "OT ESIA Project Description"); OT ESIA, "Chapter C12: Community Health, Safety and Security," available at http://ot.mn/sites/default/files/documents/ESIA_OT_C12_Community_HSS_EN.pdf, p. 3 (hereinafter, "OT ESIA on Community Health, Safety and Security").

⁵ OT ESIA Project Description, p. 65.

⁶ OT ESIA Project Description, p. 65.

⁷ OT ESIA, "Supplemental Appraisal: Diversion Road and Realignment Road," October 7, 2010, available at http://ot.mn/sites/default/files/documents/ESIA_OT_SI_Supplemental_Appraisal_Diversion_Road_EN.pdf, p. 7 (hereinafter, "OT-GS Diversion and Realignment Road Appraisal"). According to the survey, 150 of 278 heavy and light vehicles were registered to Oyu Tolgoi.

⁸ Complaint of Bud BATBAATAR dated August 9, 2013.

⁹ OT ESIA, "Supplementary Memorandum: Oyu Tolgoi to Gashuun Sukhait," September 1, 2012, available at http://ot.mn/sites/default/files/documents/ESIA_Supplemental_OT_GS_Road_Zone_EN.pdf, p. 3-4 (hereinafter, "OT-GS Supplementary Memorandum").

¹⁰ OT-GS Diversion and Realignment Road Appraisal, p. 42.

¹¹ OT ESIA, "Chapter B11: Transport and Infrastructure," available at http://ot.mn/sites/default/files/documents/ESIA_OT_B11_Transport_and_Infrastructure_EN.pdf, p. 18. (hereinafter, "OT ESIA on Transport and Infrastructure").

¹² EBRD, "Oyu Tolgoi: Project Description," available at <http://www.ebrd.com/english/pages/project/psd/2012/41158.shtml>.

¹³ OT ESIA on Transport and Infrastructure, p. 18.

complainant who lost his brother along the Oyu Tolgoi-Gashuun Sukhait road, lost his father in an accident along this road, also due to low visibility caused by dust.¹⁴

- (iv) The long Oyu Tolgoi-Ulaanbaatar gravel/earth road, which goes through Khanbogd *soum*, Manlai *soum* and Choir, and the Oyu Tolgoi-Ulaanbaatar gravel/earth road, which goes through Mandalgovi. While the total length of these roads is unclear, the distance of road between Khanbogd and Manlai is itself 110 kilometers.¹⁵ Oyu Tolgoi transports fuel, supplies and any hazardous materials along these roads.¹⁶ In 2011 on the former road, an average of 140 out of 178 heavy vehicle movements per day and 38 out of 165 light vehicle movements per day were attributed to Oyu Tolgoi.¹⁷
- (v) The Oyu Tolgoi-Gunii Hooloi gravel road, a 5 meter wide road constructed by Oyu Tolgoi.¹⁸ This road provides Oyu Tolgoi with access to its water borefields for construction, inspections and maintenance.¹⁹
- (vi) All formal and informal roads leading to and from various project facilities, only some of which are gravel roads, while the rest are earth roads.²⁰ These include:
 - a. roads to the international airport and temporary airport that service the Oyu Tolgoi project;²¹
 - b. an estimated 70 roads leading to quarries and water bore holes and 56 roads leading to water stations associated with Oyu Tolgoi;²² and
 - c. roads leading to worker camps, river diversions and electricity transmission lines.²³
- (vii) Other local roads. In this regard, Oyu Tolgoi's Environmental and Social Impact Assessment observes that "[t]raffic on local roads (i.e. earth roads) will also increase as a result of population influx and commercial activity associated with the [Oyu Tolgoi] Project".²⁴

B. Roads and Railroad Associated with Energy Resources

Energy Resources' Ukhaa Khudag coal mine is located at Tsogttsetsii. The main route of concern associated with this project is the Tavan Tolgoi-Gashuun Sukhait coal road leading from the coal mine to the Gashuun Sukhait border crossing. As of early 2011, 300 coal trucks per day from the Ukhaa Khudag coal mine used the earth road, of a total of 800 to 1,300 coal trucks per day on the road.²⁵ The road was temporarily closed in 2011 due to violations of national legislation and severe negative impacts on the environment and human health.²⁶ A 245-kilometer paved road has since been built along that route by a consortium of coal mining companies, including Energy Resources.

Energy Resources also uses multiple other unsealed roads, for example:

- approximately 400 kilometers of unsealed roads from Choir to the mining site, which are used to transport fuel; and

¹⁴ Complaint of Bud BATBAATAR dated August 9, 2013.

¹⁵ OT ESIA on Transport and Infrastructure, p. 18.

¹⁶ OT ESIA on Community Health, Safety and Security, p. 3; OT ESIA Project Description, p. 61.

¹⁷ OT ESIA on Community Health, Safety and Security, p. 3.

¹⁸ EBRD, "Oyu Tolgoi: Project Description," p. 61.

¹⁹ EBRD, "Oyu Tolgoi: Project Description," p. 61.

²⁰ Response by complainants to questions from the EBRD PCM regarding Oyu Tolgoi-related roads, submitted by electronic mail dated September 6, 2013 by OT Watch to the PCM Officer (hereinafter "Response to PCM's Questions on Oyu Tolgoi").

²¹ July 1, 2013 Complaint.

²² Response to PCM's Questions on Oyu Tolgoi.

²³ July 1, 2013 Complaint.

²⁴ OT ESIA on Community Health, Safety and Security, p. 3.

²⁵ Leslie Johnston, USAID, *Mongolia – Oyu Tolgoi Copper/Gold/Silver Mine Project Trip Report*, May-June 2011, p. 8 (hereinafter "USAID Report").

²⁶ OT Watch Report, p. 30.

- the unpaved Dalangzadgad-Tsogtsetsii and Ulaanbaatar-Tsogtsetsii roads, which are used to transport personnel and supplies for the mine and mine camp.²⁷

Energy Resources will also use the Ukhaa Khudag-Tsagaan Khad railroad, which is currently under construction. While there are alleged future plans to connect this railroad to the national railroad grid, for now, it will only be used to transport coal and, as its name implies, it will run from Energy Resources' Ukhaa Khudag coal mine to the Chinese border. Although the railroad is being constructed by the Samsung Corporation and is reportedly being financed by the Government of Mongolia, it is clearly a production-to-market road for Energy Resources' Ukhaa Khudag mine and should, therefore, be considered an associated facility of the EBRD-funded project.²⁸ This 225-kilometer railroad will run through Tsogtsetsii, Khanbogd and Bayan-Ovoo soums. A 15-kilometer section of the railroad lies within the Gashuin Sukhait crossing territory. Construction of the railroad began in mid-2013, and there are plans to complete the construction of the railroad, as well as a 3.383-hectare transshipment area and five railroad-crossing sections by 2016. The railroad capacity is planned at 25 tons for coal transport,²⁹ with maximum speeds of 80 kilometers/hour for loaded cars and 100 kilometers/hour for unloaded cars.³⁰ There will also be a service road running the entire length of the railway.³¹

In addition, for the roads and railroad related to both Oyu Tolgoi and Energy Resources, large quarries are created alongside roads for construction purposes, which are also of concern to the complainants.

Finally, the planned coal road from Tavan Tolgoi to Oyu Tolgoi is also of concern to the complainants, although its status is uncertain at this time. Regardless of who ultimately constructs this road, it will clearly be a facility associated with these two projects and will pose similar concerns to the roads described above.

C. Brief Summary of Harm Caused by the Roads and Railroad

The use of unpaved (i.e. graded, gravel or earth) roads, the South Gobi's windy and arid climate and the volume of traffic associated with Oyu Tolgoi's and Energy Resources' mining activities have been causing:

- Dust pollution: The mines are located in the South Gobi desert, which is one of the windiest places in Mongolia.³² Heavy vehicles driving on unpaved roads raise huge amounts of dust. To illustrate the extent of dust pollution that can be created, Oyu Tolgoi's Environmental and Social Impact Assessment ("ESIA") observes that dust from the coal stockpile at Tsagaan Khad can be seen from 10 to 20 kilometers away, even on windless days.³³
- Fragmentation of pastures and local rivers and streams: The roads cut through pastures the nomadic herders use for grazing their livestock. Roads have also separated grazing areas from wells and other water sources.³⁴ The Ukhaa Khudag-Tsagaan Khad railroad will increase fragmentation and related problems.

²⁷ Energy Resources LLC, *Environmental and Social Impact Assessment: UHG Phase II Project*, February 26, 2010, available at http://www.energyresources.mn/uploads/14649Hrpt_-_ESIAfinal.pdf, p. 3-2 (hereinafter "ER ESIA").

²⁸ The applicability of EBRD policies to the railroad is supported by the fact that Energy Resources' ESIA for Phase II of the Ukhaa Khudag mine specifically mentions the proposed railway to the Chinese border as "within the scope of this ESIA," see ER ESIA, p. 1-2, and references EBRD's policies as applicable. See ER ESIA, p. 2-22.

²⁹ ER ESIA, p. 3-45.

³⁰ ER ESIA, p. 3-42.

³¹ ER ESIA, p. 3-43.

³² OT-GS Diversion and Realignment Road Appraisal, p. 22.

³³ OT-GS Diversion and Realignment Road Appraisal, p. 22.

³⁴ Document titled "August 5, 2013 Photos From Manlai To Oyu Tolgoi Road" submitted by electronic mail dated September 6, 2013 by OT Watch to the PCM Officer (hereinafter, "OT-Manlai Photos"); USAID Report, p. 19.

- Loss of pasture land: Roads and their associated quarries occupy land that could otherwise be used for pasture. Importantly, herders traditionally use the best grazing sites in the region, and many of the roads have deprived them of these sites.³⁵
- Loss of access to water sources: The roads run across river beds, blocking the free flow of local rivers and streams, especially the Undai River, which is an important source of water in the region,³⁶ and impeding access to these water sources.³⁷
- Noise pollution from traffic: In addition to vehicular noise, there has been loud honking from drivers along the roads.³⁸
- Pollution from vehicles and drivers: Traffic on the roads has resulted in trash littered around the road areas, e.g. plastic bags, rubber tire material and fuel and lubricant stains.³⁹ Wells have also been contaminated by fuel and lubricants, as drivers have used buckets or containers previously used for fuel or lubricants to take water from wells.⁴⁰

These problems have resulted in the following adverse impacts on the complainants' health and safety, livelihoods and indigenous tradition and culture.

1. Health and safety impacts

As stated in the Complaint, the increased dust is adversely affecting the health of the complainants. It has caused an increase in respiratory illnesses, such as bronchitis, in Khanbogd.⁴¹ Doctors in Khanbogd do not have the capacity to monitor or address dust-related health issues.⁴²

The dust has also dangerously decreased visibility on the roads. In 2010, during the construction phase of the Oyu Tolgoi mine and the operation of the Ukhaa Khudag mine, a police report on traffic accidents in the area cited overloaded coal trucks, poor roads surfaces and poor visibility due to dusty conditions as factors leading to these accidents.⁴³ As mentioned above, the father and brother of one of the complainants died in traffic accidents caused by low visibility due to dust along Oyu Tolgoi-associated roads.⁴⁴

2. Livelihood and economic impacts

Due to pasture fragmentation problems, as well as dust and traffic associated with the roads described above, herders are losing livestock and the quality of their livestock is deteriorating. Traffic on the roads and low visibility have led to collisions that have killed livestock.⁴⁵ Livestock have also suffered fatal falls into large, unfenced quarries created for road construction. These quarries are often left unreclaimed despite no longer being in use.⁴⁶

In addition, dust, noise and water pollution have directly harmed the health of livestock. Livestock that graze near the roads are dying off and, in most cases, are found with black internal organs as a

³⁵ USAID Report, p. 17.

³⁶ OT-Manlai Photos. Energy Resources' road to Tsagaan Khad has blocked the Undai River in a significant way.

³⁷ USAID Report, p. 19.

³⁸ OT-Manlai Photos.

³⁹ OT-Manlai Photos.

⁴⁰ Response to PCM's Questions on Oyu Tolgoi.

⁴¹ CEE Bankwatch et al., *Spirited Away – Mongolia's mining boom and the people development left behind*, December 2011, available at <http://bankwatch.org/sites/default/files/spirited-away-mongolia-mining.pdf>, p. 22 (hereinafter, "CEE Bankwatch Report").

⁴² CEE Bankwatch Report, p. 22.

⁴³ OT-GS Diversion and Realignment Road Appraisal, p. 22, citing Oyu Tolgoi, *Community Health, Safety and Security Impact Assessment. Supplemental Community Field Study Report*, 2010.

⁴⁴ August 5, 2013 Complaint.

⁴⁵ OT-Manlai Photos.

⁴⁶ OT Watch and Gobi Soil, *Oyu Tolgoi – Gashuun Sukhait Copper Concentrate Road Construction Work Observation Visit*, August 7, 2013, submitted by electronic mail dated September 6, 2013 from Oyu Tolgoi Watch to the PCM Officer (hereinafter "OT Watch Observation Visit").

result of the dust.⁴⁷ Contaminated vegetation and water, as well as trash, poison animals, and trash is also a choking hazard.⁴⁸ There are insufficient veterinary services to help treat ailing livestock.⁴⁹

There are also more subtle but still significant impacts on livestock. Due to emotional stress from the noise and dust, livestock are experiencing poor weight and fat gain, which makes it less likely that they will survive the harsh South Gobi winters.⁵⁰ Difficulty in accessing water sources and dust pollution may be resulting in greater dehydration of livestock.⁵¹ Animal grazing patterns have also changed due to the loss of good quality pasture, access to water and other physical effects of roads.⁵²

In short, the roads and traffic are negatively impacting the quantity and quality of the complainants' livestock. The decrease in quantity and quality of livestock has an adverse economic impact on herders. According to the complainants, the loss of *each* animal is a loss amounting to thousands of dollars.⁵³ Deterioration in quality also means a reduction in marketability of the livestock. Further, the loss of good quality pasture for grazing, and fragmenting of pastures into small grazing areas inadequate for large herds, has also rendered uncertain the viability of herders continuing with their nomadic pastoralist livelihood. While Oyu Tolgoi has formulated sustainable pasture management plans, it is questionable whether settled agriculture is viable in the South Gobi desert.

The full extent of the economic impacts on complainants is unclear as neither Oyu Tolgoi or Energy Resources has conducted adequate assessments of the impacts of the roads described above on the livelihoods of the herders in the region.

This pattern is continuing with the construction of the Ukhaa Khudag-Tsagaan Khad railroad, which started prior to an adequate assessment of impacts on local herders.⁵⁴ Pasture fragmentation from the railroad project will be particularly severe, considering that the railway will be fenced the its entire length, with the exception of the railway stations.⁵⁵

3. Impacts on indigenous tradition and culture

The complainants' nomadic pastoralist lifestyle defines their cultural identity. For the reasons given above, the roads greatly impede herders' ability to manage their livestock in the traditional nomadic way, and complainants believe they will have to leave behind their traditional nomadic lifestyle in order to survive.⁵⁶ Moreover, Oyu Tolgoi's sustainable pasture management plans are geared towards settled as opposed to nomadic modes of agricultural activity.⁵⁷ Most of the complainants desire to continue with their ancient tradition of nomadic pastoralist lifestyle and view this transition as unacceptable.⁵⁸

⁴⁷ Aug. 5, 2013 Complaint; Response to PCM's Questions on Oyu Tolgoi; CEE Bankwatch Report, p. 15.

⁴⁸ Response to PCM's Questions on Oyu Tolgoi.

⁴⁹ CEE Bankwatch Report, p. 22.

⁵⁰ OT-Manlai Photos; Response to PCM's Questions on Oyu Tolgoi.

⁵¹ Response to PCM's Questions on Oyu Tolgoi.

⁵² Response to PCM's Questions on Oyu Tolgoi.

⁵³ Response to PCM's Questions on Oyu Tolgoi ("The cost of an animal depends on its uses: transportation, breeding, meat, dairy, wool/cashmere or race breed. Animals that have good genes for training as race horse or camel can reach up to \$9,000-20,000. Horses or camels for breeding purposes cost \$3000-6,500. Animals sold for meat reach on average: horses \$1,000-1,400; camels 1,800-3,000; camels for wool \$3,700-6,000 (cost depends on the micron quality of hair) dairy animals (cost vary based on age) mare - \$3,700-6,000; camel 3,750- 5,500. A fowl from a mare with medals from horse races can reach up to \$85,000. These are significant losses, which are never recompensed adequately.").

⁵⁴ For example, Energy Resources' ESIA admitted that "many herder households were in other soums because of...drought conditions" during in-field surveys in July and August 2009. ER ESIA, p. 6-166. Prime Minister N. Altankhuyag issued Decree #111 ordering expedited earth works for the railroad, which resulted in moving ahead with quarries and construction material production without an ESIA by Samsung regarding the railroads current design and impacts.

⁵⁵ ER ESIA, p. 3-44.

⁵⁶ July 1, 2013 Complaint.

⁵⁷ July 1, 2013 Complaint.

⁵⁸ July 1, 2013 Complaint.

II. Violations of the EBRD's Social and Environmental Policies

This section briefly describes some of the most serious policy violations associated with Oyu Tolgoi's and Energy Resources' roads and railroads and the impacts outlined in the Complaint and described above.

A. Oyu Tolgoi

1. Failure to assess impacts from roads at the early stages of project development

EBRD PR 1.4, on environmental and social appraisal and management, clarifies that "potential environmental or social risks and impacts . . . should be assessed in the early stages of project development, and managed on an ongoing basis."

The Oyu Tolgoi mine is a Category A project. This means that it is likely to have significant and diverse adverse environmental and social impacts that require a comprehensive, formalised and participatory ESIA.⁵⁹ It is therefore a project whose impacts should have been assessed in the early stages of project development.

However, in violation of PR 1.4, the Oyu Tolgoi ESIA was not completed until July 31, 2012. At that time, the construction phase was over 94% complete; mine exploration had begun in 1997, the investment agreement between Oyu Tolgoi and the Mongolian government was signed in 2009, and construction on the project began in 2009.⁶⁰

The tardiness of the comprehensive ESIA meant that Oyu Tolgoi created and heavily used roads prior to identifying the actual and potential environmental and social risks and impacts. This left no opportunity for preventive or mitigation measures commensurate with the nature of these risks and impacts. Indeed, the mitigation measures applied from the time construction began to the publication of the ESIA have been wholly inadequate.

As will be explained below, the Operational Management Plans ("OMPs") are still inadequate. This calls into question whether the Bank properly considered the tardiness of the comprehensive ESIA and whether it is being sufficient proactive in engaging with Oyu Tolgoi to ensure that the project complies with the PRs.

2. Inadequate health and safety measures

PR 4.7, on community health, safety and security, requires Oyu Tolgoi to "establish preventive measures and address them in a manner commensurate with the identified risks and impacts... [which] will favour the prevention or avoidance of risks and impacts over minimisation and reduction." This requirement has been violated by Oyu Tolgoi's failure to adequately prevent or mitigate dust pollution and its failure to properly implement road safety measures.

a) *Inadequate dust pollution measures*

In violation of PR 4.7, Oyu Tolgoi's relative inaction regarding dust pollution from most of the project-related roads is greatly disproportionate to the serious impacts and risks to human life and health and to the herders' livestock.

⁵⁹ See ESP, para. 20 (An environmental category A project "could result in potentially significant and diverse adverse future environmental and/or social impacts and issues which, at the time of categorisation, cannot readily be identified or assessed and which require a formalised and participatory assessment process carried out by independent third party specialists in accordance with the PRs.").

⁶⁰ Oyu Tolgoi Watch et. al, 'A Useless Sham' A Review of the Oyu Tolgoi Copper/Gold Mine Environmental and Social Impact Assessment, December 2012, p. 6 (hereinafter, "OT Watch Report").

First, Oyu Tolgoi's due diligence documents and management plans do not begin to address the full scope of the problem. The ESIA specifies mitigation measures for only 3 roads: the Oyu Tolgoi-Gashuun Sukhait road, the Oyu Tolgoi-Khanbogd road and the Oyu Tolgoi-Ulaanbatar road.⁶¹ Even for these 3 roads, the mitigation measures are wholly inadequate.

- Oyu Tolgoi-Gashuun Sukhait road: Oyu Tolgoi began using this road during the construction phase, while it was still an earth road. Oyu Tolgoi graded the road, which makes the road smoother, but does not mitigate the dust impacts. To mitigate dust during the construction phase, Oyu Tolgoi reportedly watered the road twice a day.⁶² However, this measure is of limited utility, given the arid climate and strong winds.⁶³
- Oyu Tolgoi-Khanbogd road: The only mitigation measure cited by Oyu Tolgoi for this road is regular maintenance.⁶⁴ It remains an earth road.
- Oyu Tolgoi-Ulaanbatar road: The only mitigation measure cited is to ensure "good traffic management measures," such as enforcing speed limits.⁶⁵ This does not address the health or livelihood impacts of dust.

Similarly, the OMPs fail to address dust impacts related to a multitude of roads, such as the estimated 70 roads leading to Oyu Tolgoi's quarries and water bore holes, the 56 roads leading to its water stations and the numerous roads leading to its worker camps, river diversions and electricity transmission lines.⁶⁶ Further, neither the ESIA nor OMPs contain any provision for minimizing the construction of new roads.

Moreover, none of the roads in use by Oyu Tolgoi are paved. A few are gravel roads, while the majority are earth roads. Although the company has constructed a sealed road for the Oyu Tolgoi-Gashuun Sukhait route, this comes too late to properly prevent or mitigate many of the impacts, such as the heavy traffic during the construction phase, as required by PR 4.7.

b) Inadequate road safety measures

Oyu Tolgoi has also violated PR 4.7 by failing to take adequate road safety measures. As explained above, the company has failed to take responsibility for many project-related roads. Failure to undertake regular maintenance and other mitigation measures in relation to these project-related roads causes or contributes to accidents, which threaten the lives of herders and their livestock. The complainants also report that roads have been created too close to existing herders' camps, putting families and animals living near these roads at additional risk.⁶⁷ Further, as mentioned above, the father and brother of one of the complainants were killed in road accidents along Oyu Tolgoi-related roads due to poor visibility caused by dust.⁶⁸

⁶¹ OT ESIA on Community Health, Safety and Security, p. 4-5, 15.

⁶² USAID Report, p. 19.

⁶³ USAID Report, p. 19.

⁶⁴ OT ESIA on Community Health, Safety and Security, p. 15.

⁶⁵ OT ESIA on Community Health, Safety and Security, p. 15.

⁶⁶ The OMP titled "Road and Power Line Inspection Procedure" only applies to 3 roads and provides only for a visual inspection to determine the roads' biodiversity impacts. See Oyu Tolgoi LLC, *Health, Safety and Environment Management System Procedures, Road and Power Line Inspection Procedures*, effective Aug. 1, 2013, available at http://ot.mn/sites/default/files/documents/ESIA_OT_OMP_Road_and_Power_Line_Inspection_Procedure.pdf. The OMP on transport management specifically identifies measures for only 3 major roads and the roads between Oyu Tolgoi and the international and temporary airports. See Oyu Tolgoi LLC, *Health, Safety and Environment Management System Procedures, Transport Management Plan*, effective Aug. 1, 2013, available at http://ot.mn/sites/default/files/documents/ESIA_OT_OMP_Transport_Management_Plan_EN.pdf.

⁶⁷ OT-Manlai Photos.

⁶⁸ Complaint of Bud BATBAATAR dated August 9, 2013.

3. Inadequate measures to prevent, mitigate and compensate for the physical and economic displacement of complainants

PR 5 on land acquisition, involuntary resettlement and economic displacement applies to all project-related physical or economic displacement.⁶⁹ Under PR 5.11, Oyu Tolgoi must “consider feasible alternative project designs to avoid or at least minimise physical and/or economic displacement.” Additionally, PR 5.39 requires Oyu Tolgoi to promptly compensate economically displaced persons for loss of assets, or loss of access to assets, at full replacement cost.⁷⁰ Nonetheless, the company has failed to appropriately consider alternative road placement or design features to avoid economic displacement and has failed to adequately compensate those experiencing economic or physical displacement due to project-related roads.

a) *Failure to implement adequate dust pollution and road safety measures*

Oyu Tolgoi’s failures to implement adequate dust pollution measures and road safety measures, as described above, adversely impact not only complainants’ health and safety, but also their livelihoods due to the harm caused to their livestock. These failures are hence also violations of PR 5.11.

b) *Failure to mitigate pasture fragmentation*

In violation of PR 5.11, there is no evidence that Oyu Tolgoi has considered feasible alternative road designs or road placement to avoid or at least minimise the physical or economic displacement caused by the fragmentation of pastures by roads and their associated quarries. Rather, the multitude of roads that have proliferated due to the Oyu Tolgoi project demonstrate a lack of planning or optimisation of road infrastructure. For example, Oyu Tolgoi has chosen a route for the Oyu Tolgoi-Gashuun Sukhait route that runs a significant distance away from the parallel Tavan Tolgoi-Gashuun Sukhait coal road. Choosing instead to either share the coal road or construct a parallel route nearer to the coal road would have mitigated pasture fragmentation. Yet, there is no clear evidence that Oyu Tolgoi considered all such measures or gave sufficient weight to preventing or minimizing pasture fragmentation when planning the location of this road. Further, neither the ESIA nor OMPs consider measures to minimize the construction of roads. This has resulted in the unnecessary and harmful fragmentation of herders’ pastures. As explained above, such fragmentation has adversely impacted herders’ livelihoods.

Additionally, Oyu Tolgoi has failed to build wildlife passages in the Oyu Tolgoi-Gashuun Sukhait paved road.⁷¹ Similarly, it has failed to build flood culverts into roads to allow for the free flow of local streams and rivers.⁷² These are feasible alternative project designs that could have mitigated the impacts of pasture fragmentation and other road-related problems on the complainants’ livelihoods. Oyu Tolgoi’s failure to consider these alternatives is a violation of PR 5.11.

⁶⁹ PR 5.7 (“This PR applies to physical or economic displacement, that can be full, partial, permanent, or temporary, resulting from the following types of transactions:

- land rights for a project acquired through expropriation or other compulsory procedures
- land rights for a project acquired through negotiated resettlements with property owners or those with legal rights to land, including customary or traditional rights recognised or recognisable under the laws of the country, if expropriation or other compulsory process would have resulted upon the failure of negotiation
- imposition of restrictions that result in people experiencing loss of access to physical assets or natural resources irrespective of whether such rights of restriction are acquired through negotiation, expropriation, compulsory purchase, or by means of government regulation.”).

⁷⁰ PR 5.39 (“If a transaction of the types described in paragraph 7 causes loss of income or livelihood, through for example interruption or elimination of a person’s access to his/her employment or productive assets, regardless of whether or not the affected people are physically displaced, the client will: Promptly compensate economically displaced persons for loss of assets or access to assets at full replacement cost. Where compensation is to be paid by a responsible government agency, the client should collaborate with the agency to help accelerate the payments. Where prompt compensation payments cannot be made due to government policy or practice, the client shall explore resettlement assistance options to help the displaced people with temporary loss of income.”).

⁷¹ OT Watch Observation Visit.

⁷² OT-Manlai Photos.

c) *Failure to properly identify all physically or economically displaced complainants and provide adequate compensation or resettlement*

Oyu Tolgoi has failed to properly identify complainants who have been physically or economically displaced. The livelihood losses experienced by herders as a result of impacts from project-related roads fulfill PR 5's definition of economic displacement.⁷³ Additionally, the roads and quarries, which physically occupy land that herders used to use, have physically displaced herders from traditional pastures. Moreover, some herders may need to relocate in order to mitigate serious damage to their health caused by the roads.⁷⁴

Oyu Tolgoi's ESIA, however, only identified one road, the Oyu Tolgoi-Gashuun Sukhait road, as a project component relevant to an "impact zone" (i.e. that will result in physical or economic displacement meriting compensation or mitigation).⁷⁵ Accordingly, and in violation of PR 5.7, persons physically or economically displaced by other roads relied on or impacted by Oyu Tolgoi have not been eligible for the company's compensation and resettlement package.

Additionally, in violation of PR 5.39, Oyu Tolgoi's compensation and resettlement scheme does not include compensation for loss of livestock from impacts associated with project-related roads.

4. Failure to consult and inform affected persons

PR 10.17 requires disclosure and consultation to be built into *each* stage of a Category A project.⁷⁶ Additionally, PR 4.8 requires Oyu Tolgoi to disclose relevant project-related information to enable the affected communities and relevant government agencies to understand the project's material health and safety risks and potential impacts, as well as its proposed protective measures.⁷⁷

In violation of these requirements, Oyu Tolgoi routinely failed to consult herders about the siting of its transport routes, or about appropriate measures to mitigate impacts of these routes, prior to constructing new roads or using the existing ones. Herders have reported that they were rarely given advance notice of important aspects of the Oyu Tolgoi project and its potential impacts, and that while Oyu Tolgoi staff would write down their concerns during interactions, there was never further feedback.⁷⁸ Moreover, it is unclear whether Oyu Tolgoi made any attempt to consult herders regarding the many roads not identified as impact zones.⁷⁹

Further, while Oyu Tolgoi claims to have "extensively consulted" with herders along the Oyu Tolgoi-Gashuun Sukhait road about dust and other road impacts,⁸⁰ there is no evidence that these consultations occurred prior to the use of the road or involved questions such as whether the company should take protective measures prior to using the road. Moreover, the ESIA does not refer to consultations in relation to other project-related roads.

⁷³ See PR 5.7 (defining economic displacement as resulting from "the imposition of restrictions that result in people experiencing loss of access to physical assets or natural resources..." including "demonstrated decreases in...livestock...yields resulting from project-related disturbance and/or pollution.").

⁷⁴ Response to PCM's Questions on Oyu Tolgoi.

⁷⁵ OT ESIA, "Chapter C10: Land Use and Displacement," July 31, 2012, *available at* http://ot.mn/sites/default/files/documents/ESIA_OT_C10_Land_EN.pdf, p. 15 (hereinafter "OT ESIA on Land Use and Displacement").

⁷⁶ PR 10.17 ("Projects classified as Category A could result in potentially significant and diverse adverse future environmental and/or social impacts that cannot be readily identified, assessed and mitigated and therefore require a formalised and participatory assessment process. Disclosure and consultation requirements are built into each stage of this process.").

⁷⁷ See PR 4.8 ("8. Where the project or stage of the project poses material risks to or potential adverse impacts on the health and safety of affected communities, the client will disclose relevant project-related information to enable the affected communities and relevant government agencies to understand these risks and potential impacts, as well as the client's proposed prevention, mitigation and emergency response measures, as appropriate. The client will consult with affected communities and relevant government agencies about the proposed measures before they are finalised and take their concerns and comments into account. The client will review the measures regularly, and engage the affected communities and agencies on an ongoing basis, informing them on the status of implementation of plans and commitments, results, and discussing with them any material changes needed to the plans, in advance of changes.").

⁷⁸ USAID Report, p. 20.

⁷⁹ See OT ESIA on Land Use and Displacement, p. 8.

⁸⁰ OT ESIA on Community Health, Safety and Security, p. 15.

5. Failure to prevent or mitigate adverse impacts on complainants' culture and tradition

a) *Failure to properly identify nomadic herders as indigenous peoples and afford them protections such as the right to free, prior and informed consent*

Mongolia's nomadic herders are indigenous peoples under the definition in PR 7.10.⁸¹ First, in the Complaint, the herders self-identify as traditional, nomadic pastoralists with an ancient culture, which fits within the EBRD's description of indigenous peoples.⁸² They are also recognized as indigenous by others.⁸³ Second, they maintain an intimate attachment to distinct ancestral territories in and surrounding the project area. This centuries-old collective attachment is displayed in a seasonal and cyclical migration from one traditional location to the next. This attachment is also evidenced by the sacred status of various sites, such as the Bor Ovoo spring. Third, the herders descend from, and are themselves, nomadic pastoralists who have pursued traditional, non-wage subsistence strategies for centuries. Fourth, they are separated from mainstream culture by distinct cultural and economic customs, namely a nomadic lifestyle rooted in a natural-resource based livelihood that is tied to the geographic area they inhabit. Finally, the herders' use of words and phrases not heard in the mainstream Mongolian language distinguishes them from the rest of the country. This particularized dialect plays a significant role in the nomadic pastoralist identity.

Moreover, and perhaps more importantly, the nomadic herders demonstrate precisely the type of identity PR 7 intends to protect. They will suffer unique impacts because of their ties to the land,⁸⁴ and must be regarded as more than simply "vulnerable" affected communities.⁸⁵ Yet, despite the herders' distinct nomadic pastoralist identity, neither Oyu Tolgoi nor the EBRD undertook any analysis to determine whether the nomadic herders should be recognized as indigenous peoples under PR 7.⁸⁶

As a result of this failure, Oyu Tolgoi has failed to afford the herders the protections provided for by PR 7. For example, where a project is proposed to be located on indigenous peoples' customary land, PRs 7.31 and 7.33 require that free, prior and informed consent is obtained, that the indigenous peoples are given an opportunity for informed participation, that efforts are made to avoid or at least minimize the size of indigenous land to be used and that indigenous peoples are provided with compensation, whether in cash, land or in kind, as well as culturally appropriate development opportunities.⁸⁷ In this case, as a result of Oyu Tolgoi's the the EBRD's failure to identify the

⁸¹ See PR 7.10 ("In the Policy and this PR, the term 'Indigenous Peoples' is used in a technical sense to refer to a social and cultural minority group, distinct from dominant groups within national societies, possessing the following characteristics in varying degrees:

- self-identification as members of a distinct indigenous ethnic or cultural group and recognition of this identity by others
- collective attachment to geographically distinct habitats, traditional lands or ancestral territories in the project area and to the natural resources in these habitats and territories
- descent from populations who have traditionally pursued non-wage (and often nomadic/transhumant) subsistence strategies and whose status was regulated by their own customs or traditions or by special laws or regulations
- customary cultural, economic, social, or political institutions that are separate from those of the dominant society or culture
- a distinct language or dialect, often different from the official language or dialect of the country or region."

⁸² See PR 7.9 (recognizing that "Indigenous Peoples may ... be referred to in different countries by different terms").

⁸³ See, e.g., Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2011 Mongolia*, 2011, available at <http://222.unhcr.org/refworld/docid/4e16d36711.html> ("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").

⁸⁴ See PR 7.32 (recognizing that "Indigenous Peoples are often closely tied to their customary lands and its forests, water, wildlife, and other natural resources, and therefore special considerations apply if the project affects such ties").

⁸⁵ OT Watch Report, p. 9-10.

⁸⁶ PR 7.11 specifically provides that the EBRD may seek expert advice in ascertaining whether a particular group is considered as indigenous peoples for the purpose of PR 7.

⁸⁷ See PR 7.31 ("As Indigenous Peoples may be particularly vulnerable in the project circumstances described below, the following special requirements will also apply, in addition to the General Requirements above. Common to these requirements is the need for the client to:

- enter into good faith negotiation with Indigenous Peoples
- ensure the Indigenous Peoples' informed participation
- obtain the free, prior and informed consent⁷ of Indigenous Peoples before starting with an activity described in paragraphs 32–37.")

and PR 7.33 ("If the client proposes to locate the project on, or commercially develop natural resources located within, customary lands under use, and adverse impacts can be expected on the livelihoods, or cultural, ceremonial, or spiritual uses that define the identity and community of the Indigenous Peoples, the client will respect their use as follows:

nomadic herders as indigenous peoples, Oyu Tolgoi failed to fulfill these requirements in relation to the project and, more specifically, the project-related roads.

b) Inadequate measures to preserve the complainants' traditional nomadic pastoralist lifestyle

Moreover, regardless of whether the herders meet the EBRD's definition of indigenous peoples, their ancient tradition of nomadic pastoralism qualifies as cultural heritage under PR 8 and should therefore be protected.⁸⁸ Specifically, PR 8.12 requires Oyu Tolgoi to locate and design the project so as to avoid significant damage to cultural heritage,⁸⁹ and PR 8.15 requires it to develop appropriate measures to reduce and mitigate any adverse impacts on the herders' cultural heritage.⁹⁰

Oyu Tolgoi's ESIA correctly identifies the herders' nomadic pastoralism to be an intangible cultural heritage,⁹¹ but then fails to appropriately consider measures to protect it. For instance, although the ESIA identifies the loss of traditional nomadic pastoralist livelihoods associated with the transition to wage-based employment as an impact to intangible heritage,⁹² it fails to identify the additional harm to cultural heritage caused by project-related roads. In violation of PR 8.12, there is no evidence that Oyu Tolgoi located and designed the many roads it relies on in a manner that would avoid harming the herders' nomadic pastoralist tradition. Further, the ESIA does not include any mitigation measures aimed at preserving the traditional nomadic pastoralist lifestyle of the herders from impacted caused by project-related roads. Rather, in violation of PR 8.15, the ESIA regards the diminishing of such a lifestyle as inevitable.⁹³

B. Energy Resources

1. Inadequate health and safety measures

a) Failure to adequately assess health and safety impacts of roads

-
- The client will enter into good faith negotiation with the affected communities of Indigenous Peoples, and document their informed participation and consent as a result of the negotiation.
 - The client will document its efforts to avoid or at least minimise the size of land used, occupied and/or owned by Indigenous Peoples which is proposed for the project.
 - ...
 - The affected communities of Indigenous People will be informed of their rights with respect to these lands under national laws, including any national law recognising customary rights or use.
 - The client will offer affected communities of Indigenous Peoples at the minimum compensation and due process available to those with full legal title to land in the case of commercial development of their land under national laws, together with culturally appropriate development opportunities; land-based compensation or compensation-in-kind will be offered in lieu of cash compensation, where feasible.”)

⁸⁸ Traditional nomadic pastoralism falls within the definition of intangible cultural heritage. See PR 8.7 (“For the purposes of this PR, the term cultural heritage is defined as a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions... Intangible cultural heritage means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognise as part of their cultural heritage and which are transmitted from generation to generation.”).

⁸⁹ See PR 8.12 (“The client is responsible for locating and designing a project so as to avoid significant damage to cultural heritage. If potential impacts are identified at the early stages of project development, preference should be given to avoiding adverse impacts during the design and site selection phases.”).

⁹⁰ See PR 8.15 (“Based on the results of the field surveys, expert assessment of the significance of cultural heritage, requirements of national legislation and relevant international conventions, as well as on the results of consultations with affected communities (see paragraph 17), the client will be required to develop appropriate mitigation measures in order to reduce and mitigate any adverse impacts on the cultural heritage, along with the implementation schedule and required budget for such measures.”).

⁹¹ OT ESIA, “Chapter C11: Cultural Heritage,” p. 9-10, available at http://ot.mn/sites/default/files/documents/ESIA_OT_C11_Cultural_heritage_EN.pdf (hereinafter, “OT ESIA on Cultural Heritage”).

⁹² OT ESIA on Cultural Heritage, p. 9.

⁹³ OT ESIA on Cultural Heritage, p. 12-13 (“Loss of traditional livelihoods is also considered to be a moderate adverse impact although conditions and livelihoods of those under waged employment are likely to be better than those under pastoralism in terms of: access to healthcare and education opportunities, access to raised incomes and finance, access to food and heating etc.”).

In violation of PR 4.7,⁹⁴ Energy Resources' failed to take adequate health and safety measures in relation to its heavy use of earth roads. In particular, Energy Resources has failed to adequately assess the health and safety impacts of its use of the Tavan Tolgoi-Gashuun Sukhait earth road. Energy Resources' Phase II ESIA does not sufficiently consider the impacts of transportation by trucks on the unpaved coal road, nor does it adequately explore possible mitigation measures.⁹⁵

b) Failure to mitigate adverse health and safety impacts of roads

Additionally, despite serious concerns regarding use of the Tavan Tolgoi-Gashuun Sukhait earth road, Energy Resources has failed to mitigate its harmful health and safety impacts. It continued to use the earth road even after commencement of mining operations in 2009 and expansion of mining operations in 2011. The alternative paved road built by Energy Resources with a consortium of other coal mining companies was not completed until September 2011.⁹⁶ In the meantime, the number of trucks on the earth coal road had reached over 1,000 per day, with about 300 belonging to Energy Resources.⁹⁷

The paved Tavan Tolgoi-Gashuun Sukhait road constructed by Energy Resources also fails to comply with PR 4.7. It does not have safe crossings for people, community vehicles or animals, which has resulted in road accidents that have injured or killed people and animals.⁹⁸

Finally, Energy Resources' risk assessment and implementation of mitigation measures in relation to other project-related roads needs to be further investigated.

c) Failure to maximize the capacity of the Tavan Tolgoi-Gashuun Sukhait paved road

Even though the Tavan Tolgoi-Gashuun Sukhait paved road is one of very few paved roads, if not the only one, used by mining companies in the area, and even though it was intended to be used by heavy coal trucks travelling between the coal mines and the Mongolia-China border,⁹⁹ Energy Resources has constructed it in such a way that it cannot carry all of the trucks wanting to use it. According to a report by Oyu Tolgoi, the paved road imposes weight restrictions, which limits its use by the many coal trucks that exceed these weight limits.¹⁰⁰ Consequently, coal trucks that do not meet these limits have to use the other roads leading from the coal mines to Gashuun Sukhait, which are all unpaved roads.

The frequent use of unpaved roads by heavy coal trucks inevitably results in dust pollution and the other adverse health and safety impacts described above. In particular, coal trucks are using the Oyu Tolgoi-Gashuun Sukhait earth road that leads from Tsagaan Khad to the border with China, creating heavy congestion and impeding the ability of Oyu Tolgoi to complete its sealing of the earth road to reduce adverse health and safety impacts.¹⁰¹

2. Inadequate measures to prevent, mitigate and compensate for the physical or economic displacement of complainants

a) Failure to implement adequate dust pollution and road safety measures

⁹⁴ PR 4.7 requires the client to "establish preventive measures and address them in a manner commensurate with the identified risks and impacts... [which] will favour the prevention or avoidance of risks and impacts over minimisation and reduction."

⁹⁵ See ER ESIA, p. 6-155 & 6-160; see also CEE Bankwatch Report, p. 15.

⁹⁶ CEE Bankwatch Report, p. 15.

⁹⁷ USAID Report, p. 8.

⁹⁸ Response by complainants to questions from the EBRD PCM regarding Energy Resources-related roads, submitted by electronic mail dated August 26, 2013 by OT Watch to the PCM Officer (hereinafter "Response to PCM's Questions on Energy Resources").

⁹⁹ OT-GS Supplementary Memorandum, p. 3.

¹⁰⁰ OT-GS Supplementary Memorandum, p. 3.

¹⁰¹ OT-GS Supplementary Memorandum, p. 3.

Energy Resources' failures to implement adequate health and safety measures, as described above, have adversely impacted not only complainants' health and safety, but also their livelihoods due to the harm caused to their livestock. These failures are hence also violations of PR 5.11. Notably, the severe adverse impacts caused by the Tavan Tolgoi-Gashuun Sukhait road on livestock led to protests by herders in May 2011 and a temporary closure of the road.¹⁰²

b) *Failure to mitigate pasture fragmentation*

In violation of PR 5.11,¹⁰³ there is no evidence that Energy Resources has considered feasible alternative project designs to avoid or at least minimise the physical or economic displacement caused by the fragmentation of pastures by the roads it has constructed or relies on. Instead, the Tavan Tolgoi-Gashuun Sukhait paved road has closed the local community's nomadic tracks, blocking movement between *baghs* and to the *soum*.¹⁰⁴ The road's route has also separated at least one herder's pasture from the well.¹⁰⁵ Another consequence is that the locals are driving farther than usual to move between winter camps, pastures and herd animals, wasting more gasoline and time on the road, which results in them having less time to earn a living, and directly and indirectly reducing their income.¹⁰⁶

Energy Resources has also failed to mitigate the fragmentation caused by the roads by constructing safe crossings for herders and their livestock to mitigate the fragmentation.¹⁰⁷ In addition, Energy Resources has failed to construct flood culverts that are adequate to allow the free flow of the Undai river, thereby impeding access to water sources.¹⁰⁸

c) *Failure to properly identify all physically or economically displaced complainants and provide adequate compensation or resettlement*

In violation of PR 5.7,¹⁰⁹ Energy Resources' compensation and resettlement measures apply only to herders who live within a fixed proximity of the Tavan Tolgoi-Gashuun Sukhait paved road, which has resulted in the exclusion from the scheme of herders whose livelihoods have suffered equal or greater harm due to the road.¹¹⁰

The new Ukhaa Khudag-Tasagaan Khad railroad, which as discussed above should be considered an associated facility of the EBRD-funded Ukhaa Khudag mine, is following a similar pattern. Only the 39 nomadic families whose winter camps are located closest to the planned route are being considered impacted by the project, without regard to impacts on herders located further away. This faulty system for identifying impacted herders was described in Energy Resources' ESIA, which itself recognized that the ESIA's "map [did] not identify all herder households that regularly use this area" and that, according to community leaders, "many herder households were in other soums" at the time of Energy Resources' in-field surveys.¹¹¹ Moreover, Energy Resources' ESIA anticipated

¹⁰² OT Watch Report, p. 30.

¹⁰³ See PR 5.11 (requiring Oyu Tolgoi to "consider feasible alternative project designs to avoid or at least minimise physical and/or economic displacement").

¹⁰⁴ Response to PCM's Questions on Energy Resources.

¹⁰⁵ Response to PCM's Questions on Energy Resources, referring to the case of herder Ser-Od.

¹⁰⁶ Response to PCM's Questions on Energy Resources.

¹⁰⁷ Response to PCM's Questions on Energy Resources.

¹⁰⁸ Response to PCM's Questions on Energy Resources.

¹⁰⁹ PR 5.7 ("This PR applies to physical or economic displacement, that can be full, partial, permanent, or temporary, resulting from the following types of transactions:

- land rights for a project acquired through expropriation or other compulsory procedures
- land rights for a project acquired through negotiated resettlements with property owners or those with legal rights to land, including customary or traditional rights recognised or recognisable under the laws of the country, if expropriation or other compulsory process would have resulted upon the failure of negotiation
- imposition of restrictions that result in people experiencing loss of access to physical assets or natural resources irrespective of whether such rights of restriction are acquired through negotiation, expropriation, compulsory purchase, or by means of government regulation.").

¹¹⁰ Response to PCM's Questions on Energy Resources.

¹¹¹ ER ESIA, p. 6-166. See also ER ESIA, p. 6-165 ("The railways affected households are those assumed to have either a summer or winter dwelling (or both) within 5km of the railway alignment.").

compensating physically displaced households “based on negotiation, to be conducted by ER’s community relations managers and in consultation with local soum and bagh governors,” without reference to EBRD standards regarding appropriate compensation levels.¹¹²

3. Failure to consult and inform affected complainants

As mentioned above, PR 10.17 requires disclosure and consultation to be built into *each* stage of a Category A project.¹¹³ Also, PR 4.8 requires Energy Resources to disclose relevant project-related information to enable the affected communities and relevant government agencies to understand the project’s material health and safety risks and potential impacts, as well as its proposed protective measures.¹¹⁴

In violation of these requirements, Energy Resources has failed to properly disseminate information about the health and safety impacts of the roads it constructs. The complainants report a “complete lack of information on potential health hazards and mitigation plans,” and call for evidence that Energy Resources has properly assessed the impacts of the mine and roads on their health and livestock.¹¹⁵ According to one report, officials in the soum administration in Tsogtetsii have stated that health risks associated with the Energy Resources project were not discussed in enough detail during public consultations to ensure that the affected community would understand them sufficiently.¹¹⁶

4. Failure to prevent or mitigate adverse impacts on complainants’ culture and tradition

Finally, as is the case with Oyu Tolgoi, Energy Resources has failed to identify and protect the herders as indigenous peoples and has failed to properly prevent or mitigate impacts on their culture and tradition.¹¹⁷

III. Conclusion

OT Watch requests that the PCM team take into account the numerous and serious violations of EBRD policy described above, and the specific requests made in the complaints submitted.¹¹⁸ It is especially necessary for Energy Resources, Oyu Tolgoi and the EBRD to conduct an assessment of the damages to herders’ health and livelihood caused by the roads and railroad and provide compensation accordingly.

¹¹² ER ESIA, p. 6-168. The ESIA also unduly minimized the impacts of economic displacement caused by pasture fragmentation, stating, without reference to any consultations with affected households or any other means of calculating the impact, that “any economic displacement from the railway will be minor” because “culverts will not be more than 5km apart in any section of the rail and herders will retain access to grazing lands in general.” ER ESIA, p. 6-168. The failure to adhere to EBRD requirements regarding adequate compensation for physical or economic displacement continues; Samsung and the Mongolian Railroad Authority reportedly asked herders what they thought would be adequate after showing them an English-language presentation of the project, rather than conducting studies or even culturally appropriate consultations.

¹¹³ PR 10.17 (“Projects classified as Category A could result in potentially significant and diverse adverse future environmental and/or social impacts that cannot be readily identified, assessed and mitigated and therefore require a formalised and participatory assessment process. Disclosure and consultation requirements are built into each stage of this process.”).

¹¹⁴ See PR 4.8 (“8. Where the project or stage of the project poses material risks to or potential adverse impacts on the health and safety of affected communities, the client will disclose relevant project-related information to enable the affected communities and relevant government agencies to understand these risks and potential impacts, as well as the client’s proposed prevention, mitigation and emergency response measures, as appropriate. The client will consult with affected communities and relevant government agencies about the proposed measures before they are finalised and take their concerns and comments into account. The client will review the measures regularly, and engage the affected communities and agencies on an ongoing basis, informing them on the status of implementation of plans and commitments, results, and discussing with them any material changes needed to the plans, in advance of changes.”).

¹¹⁵ Response to PCM’s Questions on Energy Resources.

¹¹⁶ CEE Bankwatch Report, p. 12.

¹¹⁷ See Section II.A.5 Failure to prevent or mitigate adverse impacts on complainants’ culture and tradition above.

¹¹⁸ See Response to PCM’s Questions on Energy Resources and Response to PCM’s Questions on Oyu Tolgoi.

Additionally, OT Watch finds that each of these violations is a result of a failure by the EBRD to conduct appropriate due diligence and supervision over these projects and therefore justifies a compliance review.

As a result of the significant policy violations associated with the project-related roads and railroad at issue in this Complaint, complainants and other herders are suffering serious impacts to their health and safety, livelihoods and traditional culture.

OT Watch appreciates your attention to this important matter.

OT Watch stands ready to provide any additional information or clarification on this communication.

Sincerely,




Sukhgerel Dugersuren
Executive Director
OT Watch
otwatch@gmail.com

