



BEARING THE BURDEN

The Effects of Mining on First Nations in British Columbia



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TABLE OF ACRONYMS

AME BC	Association for Mineral Exploration British Columbia
B.C.	British Columbia
BCEAA	B.C. Environmental Assessment Act
CLRB	Crown Land Restoration Branch
EA	Environmental Assessment
EAO	Environmental Assessment Office
HCA	Heritage Conservation Act
HSRC	Health, Safety and Reclamation Code for Mines
IBA	Impact-Benefit Agreement
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRC	Harvard Law School International Human Rights Clinic
LRMP	Land and Resource Management Plan
MABC	Mining Association of British Columbia
MEMPR	Ministry of Energy, Mines and Petroleum Resources
MTA	Mineral Tenure Act
MTO	Mineral Titles Online
MXC	Mineral Exploration Code
NOW	Notice of Work
OHCHR	Office of the U.N. High Commissioner for Human Rights
U.N.	United Nations
UNDRIP	U.N. Declaration on the Rights of Indigenous Peoples
UNFCCC	U.N. Framework Convention on Climate Change

I. SUMMARY

Rich in mineral resources, the traditional lands of First Nations in British Columbia (B.C.) have been targets of Canada's active mining industry. Mining has provided important revenue for the province, so many people have welcomed it. Mining has also frequently interfered with First Nations' use of their traditional lands and significantly harmed the environment to which their cultures are inextricably linked. B.C. mining laws have provided some safeguards for First Nations and the environment, but they have favored the industry they are intended to regulate and have not adequately institutionalized the special protections to which First Nations are entitled under international and domestic law. While some First Nations have benefited from mining within their boundaries, in general, First Nations have borne an unfair burden at every point in the mining process,¹ from the registration of claims to exploration, production, and abandonment of closed sites. Urgent law reform is needed to shift at least some of that burden to government and industry. There should be a presumption that aboriginal rights require heightened scrutiny of mining activities. Reform should ensure more involvement by First Nations in decision-making, increase environmental and cultural protection, and balance the potential benefits among all key stakeholders.

The experiences of Takla Lake First Nation (Takla), which is based in remote northern British Columbia, illuminate that the province's mining laws have been a problem in practice as well as on paper. While Takla has had good relations with some mining companies, it has generally been ambivalent or even hostile to new projects. This attitude has stemmed largely from the fact that community members have felt excluded from the process that reviews proposals and inundated with mining claims and projects on their traditional territory. In addition, Takla's territory—home to exploration sites, a major open-pit mine, and multiple abandoned operations—has

¹ The Mineral Tenure Act (MTA) defines "mining activity" as "any activity related to (a) the search for a mineral or placer mineral, the search for minerals, (b) the exploration and development of a mineral or placer mineral, or (c) the production of a mineral or placer mineral, and includes the reclamation of a previously mined area and the monitoring and long term protection, control and treatment of a previously mined area." Mineral Tenure Act, R.S.B.C., ch. 292, pt. 1(1) (1996) (Can.), *available at* http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96292_01. This report uses the MTA's definition and specifies when referring to a particular stage of the process.

seen the range of harms caused by different stages of mining. These harms have included destruction of habitat, a decrease in wildlife, and a fear of health problems from contaminants.² Because of Takla's close ties to the land, these effects have caused cultural as well as environmental injury. Finally, even those members who have been willing to accept mining have said that they have not received the benefits that are supposed to accrue from the industry—in particular, revenue sharing and employment opportunities. Takla's story—its experience with disenfranchisement and harms accompanied by few benefits—illustrates that the current legal regime needs reform to preserve First Nations' lands and cultures more effectively.³

The situation has been particularly troublesome given that international and Canadian law require special protections for First Nations. Canada is party to international human rights and environmental treaties that recognize the close connection between indigenous peoples and the land. First Nations have the right to self-determination, which includes the right to decide how their traditional lands and resources are used. They also have a right to practice their cultures, which requires the use of traditional lands. Treaty law not only enumerates these rights but also obligates Canada to ensure First Nations are able to enjoy them. In addition, Canada has a duty under international environmental law to encourage sustainable development and protect the quality of its environment. The Canadian Constitution, meanwhile, establishes aboriginal rights at the domestic level, and a growing body of Canadian case law, notably the 2004 *Haida Nation v. British Columbia* decision, has strengthened the protection of First Nations by mandating consultation with and accommodation of the communities. Consultation and accommodation by the government mandate “good faith efforts to understand each other's concerns and move to address them.”⁴

International and constitutional standards thus provide a framework for the protection of First Nations that calls for heightened scrutiny of projects affecting these

² See, e.g., PAM TOBIN ET AL., *HEALTHY LAND, HEALTHY FUTURE* (2008), available at http://www.ceaa.gc.ca/050/documents_staticpost/cearef_3394/hearings/SM48.pdf [hereinafter *HEALTHY LAND, HEALTHY FUTURE*].

³ The unfair burden that First Nations in British Columbia bear could be described as an environmental injustice. In other words, mining in the province causes a disproportionate negative effect on a disadvantaged group and gives disproportionate benefits to those outside that group. While this report will present its arguments in terms of aboriginal rights rather than environmental justice, its call for burden and benefit sharing is consistent with both frameworks.

⁴ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (Can.).

indigenous peoples and the incorporation of aboriginal rights into domestic mining law. The standards are designed to give First Nations a voice in decision-making through consultation and an assurance that the environment with which they are linked is healthy. B.C. mining laws on their face and in their implementation, however, have failed to guarantee either.

The Harvard Law School International Human Rights Clinic (IHRC) has based this report on a field mission to Takla's traditional territory and surrounding areas in September 2009 and follow-up research through September 2010.⁵ The IHRC team conducted some fifty interviews with representatives of First Nations (especially Takla), the B.C. government, and the mining industry.⁶ During its field research, the team made personal observations of the environmental damage that mining, including exploration, has caused in Takla's traditional territory.⁷ It has also drawn on a range of legal sources for an extensive analysis of international and domestic aboriginal rights law and British Columbia's mining law.⁸

This report first presents IHRC recommendations to government, industry, and First Nations and then provides analysis of the issues laid out in the summary. It opens with a background chapter about Takla and an overview of international and domestic aboriginal rights law. The report then considers the problems mining has raised for First Nations in detail. It provides an extensive legal analysis of the existing mining regime. It also documents the concerns of the Takla community, considering the experiences with and opinions about inadequate consultation, harms of mining,

⁵ IHRC has done extensive work on issues involving human rights and the environment, including on mining in Africa, the Americas, and Asia. It decided to investigate the situation in British Columbia after learning about the controversy over free entry, although the final report covers much more. IHRC chose to focus its field research on Takla Lake First Nation because the mineral-rich nature of its traditional territory has led to a particular vulnerability to and extensive experience with mining.

⁶ The IHRC team conducted interviews with thirty-one members of Takla, including chief and council, *keyoh* holders, and individuals who had worked in mining. It spoke with representatives of other First Nations and Takla's former and present mining coordinators and lawyer. It also interviewed officials from the B.C. Ministry of Energy, Mining and Petroleum Resources, the B.C. Ministry of Environment's Environmental Assessment Office, and the B.C. Ministry of Agriculture and Lands' Crown Lands Restoration Branch. Finally, it had interviews with representatives of industry, including leaders of two companies that operate within Takla's traditional territory and two provincial mining associations. Other companies provided additional information in written form.

⁷ During its field mission, the IHRC team visited an abandoned mine (Bralorne-Takla), a current exploration project (Kwanika), and sites near proposed operations (Aiken Lake and Bear Lake).

⁸ This report does not address mining regulations in other Canadian provinces, nor does it address important issues regarding First Nations relations with other industries, such as logging or fishing, or with the B.C. government generally.

and lack of benefits. It concludes that structural, procedural, and substantive legal reforms are needed to establish firmly the heightened protections to which First Nations, such as Takla, are legally entitled and to balance more effectively the burdens and benefits of mining.

BACKGROUND ON TAKLA LAKE FIRST NATION

Takla Lake First Nation, which consists of approximately 1,000 members, has a traditional territory—the land it has historically used and occupied—of approximately 27,250 square kilometers rich in minerals and timber. As for most First Nations, the land is essential to the identity and survival of Takla. Many members still depend on traditional subsistence activities, such as hunting and gathering, for food and medicine. Subsistence activities also serve important social and cultural functions. Passing on this way of life links generations, and Takla has been engaged in a conscious effort to revive and maintain its heritage. A spiritual connection instills respect for the land and teaches members of Takla not to disturb it unless necessary.

Takla's traditional governance structure reflects this close relationship to the land. Known as the potlatch system, it is centered around *keyohs*, families' traditional tracts of land. A family leader represents the *keyoh* at community gatherings and is commonly described as “speaking for the land.” The names these *keyoh* holders inherit often indicate their responsibilities to the environment. The name “Wise Fish,” for example, belongs to a man who must protect the water so that fish can safely spawn.

The Canadian government, however, banned the potlatch system for many years and created an alternative governance structure—an elected chief and four council members—that still survives. The existence of two types of spokespeople has sometimes created tensions because government officials have communicated primarily with the chief and council as representatives of the whole community while ignoring *keyoh* holders who “speak for the land.”

Use of local First Nations' resources began with the fur trade in the late eighteenth century and then turned to logging in the mid-nineteenth century. Logging, in particular changed the environment and Takla's relationship to it. For example, it made hunting more difficult because clear cutting led to a reduction in caribou. As

logging has started to decline, mining has risen to take its place as the key extraction industry in northern British Columbia and on Takla's traditional territory.

As mentioned above, Takla has experienced all stages of the mining process. Claims, which give holders exclusive rights to explore an area for minerals, have blanketed the majority of Takla's territory. The prevalence of these claims has been thanks in large part to free entry, a regime that allows almost anyone to register a claim without consulting landholders. Companies, such as Alpha Gold, CJL Enterprises, and Serengeti Resources, have turned many of those claims into exploration sites, where they test the sub-surface soil and rock for the presence of minerals. The next stage of the process involves actively producing mines, i.e., those that extract minerals from the ground for sale. The most notable in this region has been Northgate's Kemess South Mine, a large open-pit operation in the north of Takla's traditional territory that is scheduled to end production in early 2011. Finally, while inactive, abandoned mines, including Bralorne-Takla and Ogden Mountain, have posed lingering risks of contamination and no longer have identifiable corporate owners to hold responsible for their cleanup.

LEGAL REGIME GOVERNING MINING

The legal regime that has governed this activity on Takla's territory consists of a complex collection of laws that can be difficult to understand and navigate. Provincial land-use planning, in the form of Land and Resource Management Plans (LRMPs), has helped determine what land is open to mining. The government and First Nations advocates have disagreed, however, about the effectiveness of the consultation efforts during that process.

The rest of the relevant laws are administered by multiple B.C. agencies, particularly the Ministry of Energy, Mines and Petroleum Resources (MEMPR), the Ministry of Environment, and the Ministry of Agriculture and Lands. MEMPR's principle of free entry permits claim registration, or staking, with no consultation. Its recent online version called Mineral Titles Online (MTO) allows miners from anywhere in the world to register at the click of a button; they must pay only a small fee and need not speak with traditional landholders. Companies that wish to pursue exploration must submit a Notice of Work (NOW), which the government forwards to First Nations; however, the process usually gives First Nations only thirty days to

respond with any concerns. The tight deadline and the shortage of information to which First Nations have access have made it unrealistic to prepare an adequate response. In addition, the NOW process provides only limited environmental protection and takes place after some harm has occurred.

The Ministry of Environment's Environmental Assessment Office (EAO) conducts a more rigorous review, in the form of an environmental assessment (EA), when a company seeks to move from exploration to development (preparation for production) and production itself. Even here, however, First Nations have argued that, in implementing the EA, the government and mining companies have not taken their rights and environmental concerns fully into account. Much of the design of the process is left to the discretion of a government official. Furthermore, First Nations again have received incomplete information and have had limited resources to supplement or challenge that information when developing a case against a particular project.

Finally, the government bears legal responsibility for abandoned mines that predate a 1969 remediation bond requirement and have no clear private owner. The Ministry of Agriculture and Lands' Crown Land Restoration Branch (CLRB), formed only in 2003, oversees their remediation. Its limited resources can slow cleanup of sites that potentially contaminate First Nations' traditional territories.

While international and domestic aboriginal rights law mandate added protections for First Nations and require that projects are subjected to higher scrutiny for possible adverse effects, the B.C. legal regime and its implementation have regularly fallen short of that standard. They have favored industry, left broad discretion to government, and denied First Nations an effective means to have a say in what happens to their land.

TAKLA'S EXPERIENCE

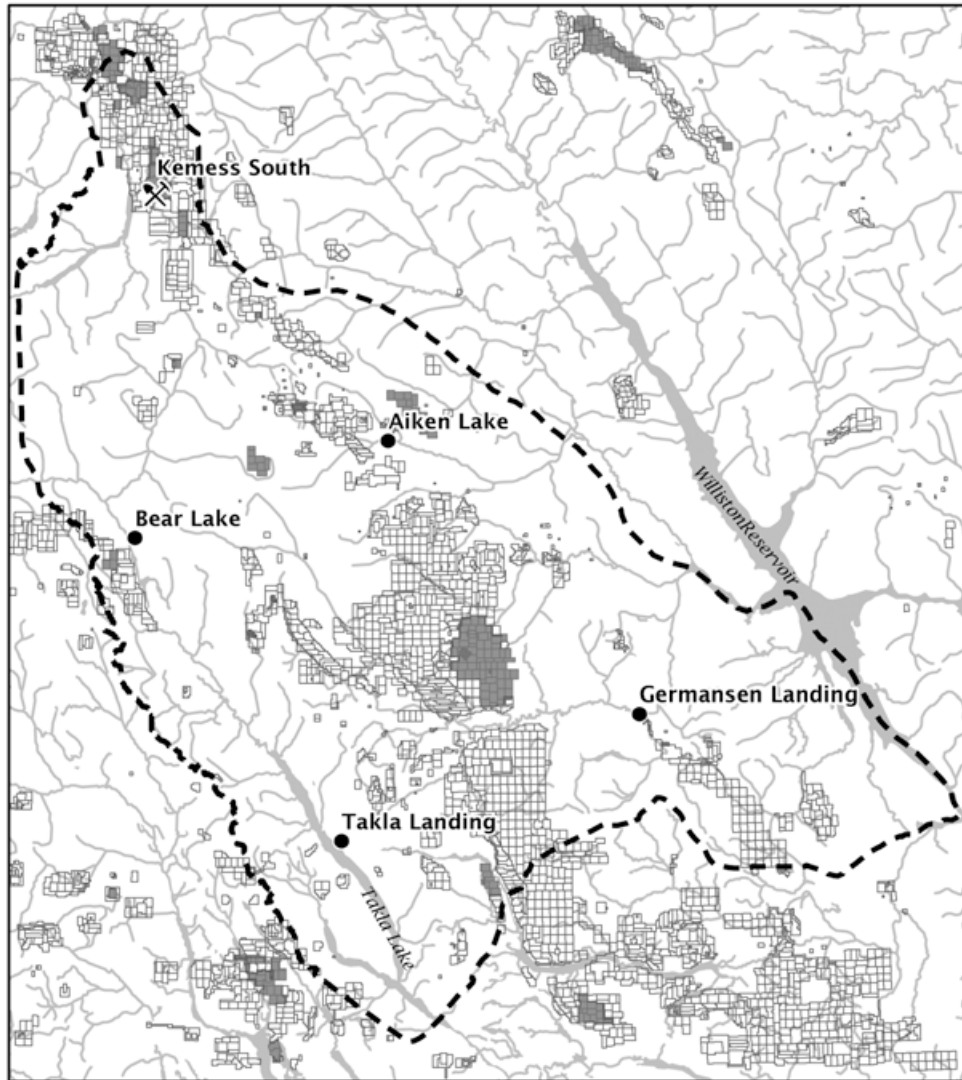
Takla's experiences with mining illustrate the unjust situation that British Columbia's imbalanced mining laws can create in practice. Inadequate consultation has imposed on Takla the burden of overcoming, without access to full information, the presumption that individual mining projects are acceptable on their land. When Takla has failed to prevent or ensure adequate regulation of mining, it has borne the consequences of adverse environmental and cultural impacts. Finally, to exacerbate

these inequities, its members have received limited benefits from the industry. Cumulatively, these difficulties have infringed on Takla's enjoyment of its aboriginal rights to use its land and participate in decision-making regarding its land.







During interviews, Takla's members voiced particularly adamant criticism of inadequate consultation. Because free entry does not require consultation, residents have often only learned about claims registered on their traditional lands through chance encounters with miners. These encounters have become increasingly rare since the advent of online registration in 2005, even while the number of claims has skyrocketed.⁹ Takla's leaders told IHRC researchers they have been overwhelmed with NOWs for exploration proposals. They have had neither the time nor the financial resources to conduct in-depth studies to supplement the superficial information they have received and to identify any problems before the deadline. Mining companies have sometimes voluntarily consulted with Takla directly, and the community has often trusted them more than the government. These efforts to reach out, however, have taken place on an *ad hoc* basis and have had mixed results. To complicate matters, confusion has existed among all parties about whether government and industry should consult with chief and council or *keyoh* holders and which of these representatives of Takla should have final say on a proposal.

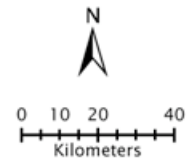
While exploration permits have been the most common challenges it has faced, Takla has had, at least on one occasion, more success having a voice at the EA stage, where production proposals are reviewed. Takla participated in a groundbreaking process involving a proposed open-pit mine at Kemess North. The federal and provincial governments created a joint review panel to evaluate the proposal. In the end, after the panel submitted its recommendation, the B.C. Minister of Environment rejected the application for the mine. While this result was a victory for the coalition of First Nations opposing the project, it was the first time such a panel had been appointed. The law does not require that such a panel conduct the EA in every instance. Furthermore, the same company, Northgate Minerals, announced in 2010 that it was investigating the possibility of an underground, rather than open-pit mine at the site, showing that mining still poses a threat to the area.

⁹ See map Claims Registered on Takla Lake First Nation's Traditional Territory in this report.



Claims Registered on Takla Lake First Nation's Traditional Territory

-  Producing Mine
-  Rivers
-  Lakes
-  Mineral Titles Online (MTO) Claims
-  Pre- MTO claims
-  Takla Lake First Nation's Traditional Territory



Tenure data from the B.C. Integrated Land Management Bureau's Land and Resource Data Warehouse

In addition to experiencing inadequate consultation, Takla has seen evidence of the harms mining can cause. While open-pit mines can completely destroy their areas, exploration sites, which have been more common, have had a significant cumulative effect on the environment. Deforestation for roads, spurs, and drill pads combined with noise pollution have disrupted habitat, and members of Takla reported a decline in the wildlife they hunt. In addition, they have feared the effects of contamination from the many chemicals that different stages of the mining process require. The presence of abandoned mines, such as the sixty-year-old Bralorne-Takla mercury mine whose contaminants are potentially linked to a cluster of illnesses, has heightened the concern that exposure to poisons could affect human health. The government and mining companies have often argued that the problems have not been as serious as Takla has portrayed, and IHRC does not have the scientific expertise to determine the exact environmental and health effects of mining on Takla's traditional territory. Nevertheless, eyewitness reports and IHRC observations suggest that some harm has occurred and that there is a need for independent studies—not done by government, industry, or First Nations—to allay or confirm Takla's fears.

Mining has also threatened Takla's culture and spiritual life. The registration of claims without consultation may be viewed as culturally insulting to Takla given their historic occupation and claims to traditional lands. At later stages of the process, environmental degradation has interfered with Takla's subsistence hunting, food gathering, and use of medicinal plants, and with the transmission of cultural knowledge that accompanies those activities. Finally Takla members generally feel a spiritual connection to the land, and some told IHRC that they have experienced mental anguish when they have seen the environment injured by mining.

While Takla has felt the burden of inadequate consultation and suffered environmental and human consequences from mining, the community has received few of the direct economic benefits that should accompany mineral development. Many members of Takla said they would like to see revenue and/or profit sharing, but most mining in the region has been at the exploration stage and exploration is not a profitable venture. Northgate has had a financial compensation agreement with Takla and residents of *keyohs* near the producing Kemess South Mine, but several recipients told IHRC they considered it inadequate. In 2008, the B.C. government adopted a revenue sharing plan, in which the revenue generated from mineral production can be shared with affected First Nations. In August 2010, the government signed its first two

revenue sharing agreements, one with the McLeod Lake Indian Band involving the Mt. Milligan mine,¹⁰ and the other with Tk'emlups First Nation and Skeetchestn First Nation concerning the New Afton mine.¹¹ The revenue sharing program recognizes that First Nations should share in the economic gains of mining, but Takla has received no benefits from it yet, and the program applies only to newly approved projects, not to existing ones. Takla members also repeatedly called for jobs and associated training. Some mining companies have voluntarily entered into *ad hoc* employment agreements with Takla, but these jobs have been seasonal and, given the nature of the work, have rarely provided health benefits. The jobs have also been limited in number because they have often required skills that members of Takla and other First Nations have not possessed.

RECOMMENDATIONS

To help shift the burden of mining from First Nations and to increase respect for their aboriginal rights, this report makes recommendations to each of the major stakeholders. The government should recognize aboriginal rights as a guiding principle of any development decision that affects First Nations, thus solidifying the presumption that First Nations are entitled to heightened protections. The government should clarify the requirements of meaningful consultation, developed in conjunction with First Nations, and initiate such consultation at the beginning of the mining process. The government should also facilitate independent studies of environmental and human rights impacts, impose more stringent requirements on proposed mining projects, oversee the expeditious cleanup abandoned mines, and encourage the sharing of mining's economic benefits with First Nations.

This report also makes recommendations to industry and First Nations. Mining companies should acknowledge that indigenous peoples have special rights and interests and take them into account in their interactions with First Nations. They can do so by enhancing consultation efforts and negotiating, in a fair and transparent

¹⁰ Press Release, Ministry of Energy, Mines and Petroleum Resources, First Nation to Share Benefits of Mt. Milligan Mine (Aug. 25, 2010), *available at* http://www2.news.gov.bc.ca/news_releases_2009-2013/2010EMPR0031-000986.htm.

¹¹ Wendy Stueck, *B.C. Cuts Deal with Natives to Share Mining Revenues*, MAIL AND GUARDIAN, Aug. 24, 2010, *available at* <http://www.theglobeandmail.com/news/national/british-columbia/bc-cuts-deal-with-natives-to-share-mining-revenues/article1684257/>.

manner, to share the benefits of mining. At the same time, Takla and other First Nations should internally determine their wishes, such as their desired means of consultation and how many and what type of benefits they want. They should then clearly convey these preferences to other stakeholders. Takla, in particular, should also finish its land-use plan so that all parties know where it is willing to permit mining and where traditional uses or spiritual significance make mining unacceptable.

II. RECOMMENDATIONS TO ALL STAKEHOLDERS

Mining on First Nations' traditional lands has raised complex and multi-faceted problems relating to aboriginal rights. Rights protection can only be addressed through an equally multi-faceted approach that includes key stakeholders, namely the provincial and federal governments, mining companies and associations, and First Nations, including the Takla Lake First Nation. The recommendations that follow would elevate and better institutionalize aboriginal rights principles within legal frameworks, including statutory and regulatory regimes.

B.C. PROVINCIAL GOVERNMENT AND CANADIAN FEDERAL GOVERNMENT

The Canadian Constitution grants authority over aboriginal issues to the federal government and authority over lands and natural resources to the provincial governments. As a result, both governments have roles to play, and an efficient legal regime to protect aboriginal rights to natural resources requires a collaborative and integrated approach. The federal and B.C. provincial governments should:

1. Recognize aboriginal rights as foundational in any development decisions regarding First Nations' lands and territories.

The current legal regime has favored allowing mining activity, especially in the claims registration and exploration phases. This approach creates momentum for further mining operations that can be hard to slow, placing First Nations in a more difficult position to defend their rights. "Deep consultation," as required by Canadian case law,¹² should be explicitly mandated, beginning no later than the exploration stage, so that First Nations receive the special protections required to respect their unique situations and rights; consultation at the time of claim registration should also be meaningful. Other protections should include: deference to First Nations' internal decision-making processes; assessment of cumulative effects—both historic and current—in evaluating additional mining projects; and assurance that substantive

¹² See *Haida*, [2004] 3 S.C.R. 511, ¶ 44.

protections, such as environmental law, embody First Nations' traditions. In short, with regard to development on traditional lands, the government should forefront deep consultation and preservation of what First Nations value so that their core rights—to the integrity of their land and traditions and to management over their resources—are institutionalized into mining decisions.

2. Incorporate explicit reference to aboriginal rights, including international human rights and environmental law standards, into reformed legislation and policies.

Canada is a party to international human rights and environmental law treaties that contain provisions on the use of natural resources on indigenous lands. Legal reform should incorporate relevant international standards for indigenous groups' rights to self-determination and enjoyment of their cultures, as well as the precautionary and sustainable development principles of international environmental law. The addition of explicit rights protections into legislation and regulations would help ensure respect for and eliminate uncertainty concerning the specific rights of First Nations. It would thus clarify standards of conduct and provide guidance for mining agencies and companies.

3. Provide more funding for independent studies on the effects of mining.

Individual mining companies, government consultants, and First Nations have all conducted studies on the potential environmental and health effects of mining. Because these reports have been produced by interested parties, they have sometimes provided an incomplete picture. In addition, few reports have examined the long-term and cumulative effects of mining. Without studies on these issues, neither the government nor First Nations can make informed decisions regarding the costs and benefits of future mining proposals. To remedy this situation, the government should provide funding for independent experts to conduct impartial and public studies on the effects of mining. For example, environmental studies should—taking into account indigenous as well as other knowledge—focus on the cumulative impacts of deforestation, multiple access roads, and other mining activities, the potential for chemical contamination in waterways, and the effects on flora and fauna. Studies

should also review the efficacy of existing mitigation and reclamation efforts to determine whether the long-term and cumulative effects of mining can be minimized or remediated in the future. Health studies should examine potential primary and secondary health effects from past and present mining, such as the results of switching from a traditional diet to a processed diet, the availability and quality of healthy foods in remote First Nations' areas, the possibility of increased disease rates among some First Nations, and the appropriateness of current chemical guidelines and contaminant standards for people who subsist off the land. Finally, parties that have conducted or are conducting studies should be encouraged to release their results to the public. The government should ensure broad public access to these studies, including via the internet, so that the data may be validated by independent third parties.

B.C. PROVINCIAL GOVERNMENT

In addition to working with the federal government to reform the legal regime, B.C. provincial authorities should take independent and supplemental steps to protect the constitutional and international human rights of First Nations faced with mining in their traditional territories. The B.C. provincial government should:

1. Reform mining permitting laws and procedures to enhance meaningful consultation with First Nations.

Existing mining law and permitting procedures in British Columbia have not required adequate consultation measures with First Nations. Without an informed response from First Nations at all stages of a mining project, the consultation procedure cannot give meaningful consideration to First Nations' concerns. Canadian courts have outlined rules to guide consultation. The B.C. government should elaborate on these general standards to develop specific guidance for key stakeholders on the exact nature, timing, and substance of required consultation and accommodation measures. It should do so in cooperation with the First Nations so that their concerns with the existing procedures can be addressed and remedied. In particular, the B.C. government should:

- recognize that mining activity, at least by the exploration stage, should trigger deep consultation under the *Haida* standard.¹³
- revisit all LRMPs so that deep consultation is integrated into planning. Indigenous land-use plans, such as the one Takla has been developing, should be given prominence within the planning process.
- require government and mining companies to undertake meaningful consultation with First Nations from the outset, including during the claim registration phase. The free entry system must be updated to make it compliant with the modern framework of rights that protects aboriginal communities. If registering online claims through the MTO system is still permitted, more stringent expectations for all the parties should be outlined when a claim is registered on First Nations' lands. For example, the MTO system could include maps of First Nations' lands that overlay with lands open to mining. For claims on First Nations' lands, it should be clear that meaningful consultation would be required—and what that entailed beyond normal procedures—before a project could move forward. Mining companies should not be penalized for any delays to the process caused by consulting with First Nations.
- develop a consultation database, so that once First Nations decide with whom consultation should take place, for example, with chief and council or with individual *keyoh* holders, the government can identify the affected parties for any particular project and can provide mining companies and First Nations with contact information. Such information could also be made available through the MTO.
- lengthen the typical response windows for Notices of Work at the exploration phase and environmental assessments at the development and production stage so that First Nations can respond to project proposals more thoroughly. Silence from the community should not be considered to indicate consent or a lack of concern about a project. The time period for response should reasonably accommodate the internal consultations and decision-making traditions of the given First Nation.

¹³ See *Haida*, [2004] 3 S.C.R. 511.

- provide greater financial and personnel support for First Nations to conduct studies or surveys that are necessary to provide informed response to mining referrals and other mining permit applications.

2. Require mining companies to submit human rights impact assessments, in addition to the already mandatory environmental impact assessments, before beginning a mining project.

Environmental impact assessments, which are an existing part of the permitting process, do not adequately capture the potential human rights impact of a mining project. A human rights impact assessment should consider how the project would affect the rights of aboriginal communities and should explore how the company will deal with any related problems that arise. For example, the assessment should include an evaluation of archaeological, sacred, or burial sites on or near the proposed mining site and measure the impacts against the aboriginal right to preserve their cultures. It should address the impact of any expected environmental damage and its link to aboriginal rights, such as interference with hunting grounds or traplines and potential health effects from chemical contamination. In evaluating the human rights impact assessment, the government should not consider the given project in isolation. Instead, it should consider the cumulative effects of previous mining and development activities so that the integrity of the aboriginal land as a whole is not threatened. The government and industry should involve First Nations in the production of the human rights impact assessment.

3. Complete cleanup efforts at abandoned mines as soon as possible.

Abandoned mines present a significant threat to the health of local populations and the environment. Cleanup efforts at some abandoned mines have gone on for decades without resolution. The B.C. government should take positive steps to ensure that abandoned mines, including the Bralorne-Takla Mine in Takla's traditional territory, are adequately cleaned in the near future. In particular, the government should provide greater funding to the Ministry of Agriculture and Lands for abandoned mine reclamation to ensure that all sites—not just the most severe—are explored, analyzed, and, if necessary, remediated. Abandoned sites should continue to be identified,

secured, and monitored for ongoing contamination, and the government should consider the effects of such sites when evaluating the potential impacts of new development initiatives on aboriginal rights. The B.C. government should also conduct educational seminars and release information on the exact nature and extent of the health threat posed by abandoned mines. The whole process should be carried out with full and meaningful involvement of the affected First Nations.

4. Ensure that the interests of First Nations are adequately represented in decision-making regarding mining activity on First Nations' lands.

The provincial government has controlled decision-making and approval for mining activities, primarily through ministries dealing with mining and the environment. A new framework should be developed so that when decisions are made (and not just during consultation), the interests of mining, the environment, and First Nations are all institutionally represented by decision-makers. First Nations should choose a representative or agree to an ombudsman who would represent their rights.

5. Coordinate and consolidate oversight of the effects of mining across government agencies.

Many government agencies have been involved in regulating the environmental and human impact of mining operations. This approach has had benefits in that each agency has brought its own expertise and its own specific concerns. It has also led to confusion, however, as to which agency is responsible for what portion of oversight and monitoring. The B.C. government has taken some steps to consolidate the permitting process for mining companies, with reportedly great success. It should do the same for project oversight and short- and long-term monitoring of mining sites, and it should coordinate with the federal government as well as across provincial agencies. Consolidation would ensure that one agency (or alternatively an independent body) assumes primary responsibility in a comprehensive manner.

6. *Develop a uniform and accessible method for distributing information to First Nations.*

The B.C. government has distributed many kinds of information to First Nations: claim registrations, permitting referrals, environmental impact studies, revenue sharing plans, etc. Members of First Nations and independent third parties, however, have sometimes had difficulty accessing these documents. The shortage of information creates suspicion of the government and makes it difficult to validate or analyze the information. The government could improve this situation by providing a method for publishing information that is both accessible and understandable to laypeople.

7. *Clarify its revenue sharing program and encourage mining companies to undertake revenue and/or profit sharing plans and increase employment programs with First Nations.*

First Nations have borne the burden of mining on their lands but have not always reaped economic benefits. Although the B.C. government has taken an important first step by adopting a revenue sharing plan at the government level, it should make the details of its approach clearer and ensure that it takes First Nations' views into account. In addition, the government should encourage mining companies, in collaboration with First Nations, to develop individual revenue sharing plans, to increase job training programs, and to expand hiring of members of indigenous communities near their mining operations. Better revenue and/or profit sharing plans, along with more employment opportunities, would improve relations with the First Nations and help to ensure that the First Nations benefit from as well as bear the burden of mining.

MINING COMPANIES AND MINING ASSOCIATIONS

To develop better relations with First Nations and to respect the First Nations' international and constitutional rights, mining companies should:

1. Adopt a rights-based approach to interactions with First Nations.

Mining companies and associations should acknowledge that aboriginal communities have special rights and interests. They should put into place systems that incorporate an aboriginal rights analysis in their operations and activities. For example, they should develop, with First Nations, guidelines for voluntary consultation that ensure aboriginal rights are protected during mining activities as a matter of course. (While consultation technically refers to a government obligation to First Nations, this report will also use the term to refer to industry's discussions with First Nations.)

2. Increase consultation efforts with First Nations at all stages of the mining process.

Mining companies should engage in consultation efforts with First Nations more frequently and earlier in the mining process. Legislative and regulatory reforms of consultation measures may be slow, but mining companies and associations have an opportunity to better the process immediately. Mining companies should approach local First Nations before registering a claim on First Nations' traditional territories to provide the communities with notice of the possibility of future mineral exploration and to determine whether the First Nations consider the claim's location off limits to mining. This outreach would facilitate later consultation efforts and encourage a spirit of collaboration between First Nations and mining companies should a project proceed.

3. Coordinate, through existing mining associations, to develop a uniform and accessible method for distributing information to First Nations.

Like the government, mining companies have distributed many kinds of information to First Nations: permitting referrals, environmental impact studies, mining proposals, revenue sharing plans, job openings, etc. Members of First Nations and independent third parties, however, have often had difficulty accessing these documents. The shortage of information has created suspicion of the companies and made it difficult for third parties to validate or analyze the information. Mining companies could

improve this situation by developing an industry-wide method for publishing information that is both accessible and understandable to laypeople.

4. Develop revenue and/or profit sharing plans with and provide training and job opportunities for First Nations that are affected by mining development.

First Nations have borne the burden of mining on their lands, but many have not seen the economic benefits aside from those that trickle down through employment agreements. Mining companies should share the revenue and/or profits from their operations with affected First Nations. Companies should also expand their employment agreements with local First Nations and ensure that the terms of those agreements and the mechanisms for implementing them are publicized within the community. In addition, companies should establish training programs for First Nations in advance of and during a mining project so that members are qualified to fill the available jobs. These steps, all of which should involve input from community members, would improve relations with First Nations and help distribute the benefits of mineral development to local communities.

FIRST NATIONS, INCLUDING TAKLA LAKE FIRST NATION

To facilitate consultation efforts and protect their aboriginal rights during future mining efforts, First Nations should take the following steps. The recommendations focus on Takla Lake First Nation, but they are applicable more generally. Takla should:

1. Decide how it would like to interact with mining companies and government officials, including whether keyoh holders, the chief and council, or some other mechanism should be used to represent the community.

Mining companies have voiced frustration at being unclear whether they should consult directly with Takla's *keyoh* holders or communicate through the chief and council. Some mining companies have expressed their preference to discuss projects with the *keyoh* holder directly because chief and council change every few years. Others have preferred to speak with the elected body, and the provincial government

has recommended companies adopt that approach. The result is that mining companies have sometimes completed negotiations with both *keyoh* holders and chief and council, which has led to confusion, or have negotiated with neither. Takla has the right to self-determination as a group, and it should decide which members serve as its contact point for the mining industry, then communicate that decision to government and industry. A process for deciding on representatives should be consistent with human rights principles, such as the right to participation and non-discrimination.

2. Develop an internal consultation and contact system that notifies members of mining developments even when members are hunting or living in isolated portions of Takla's territory.

If Takla chooses to have someone represent the whole community in dealings with the government and industry, it should develop a transparent, internal mechanism. Even if Takla chooses to give individual *keyoh* holders decision-making power over their own land, the entire community should be apprised of the developments related to mining. Takla should create better notification systems, which could complement the possibly modified MTO process discussed above. Takla members have reported being surprised when they have encountered miners on traditional lands; sometimes these encounters have occurred even after mining companies have submitted permits to the Takla chief and council. To ameliorate this situation, Takla should develop a system through which the community representative can easily notify all Takla members of developments. While Takla hunting and cultural practices may make communication difficult, Takla should take steps to ensure that all members are informed, updated, and adequately consulted regarding mining projects. The B.C. government could provide financial assistance for this process or require mining companies to do so.

3. Finish developing a land-use plan that identifies areas where it is willing to permit mining and those where traditional uses or spiritual significance make mining unacceptable.

Takla has been in the process of developing a land-use plan that would document the traditional uses of Takla territory and identify areas where mining is or is not

acceptable to the community. Such a land-use plan would not bind Takla to permit or refuse mining, but it would inform Takla's decisions and provide a coherent long-term plan to which mining companies and the provincial government could refer when planning operations and reviewing LRMPs. Such a plan should be given due weight in judicial proceedings if Takla needed to turn to litigation to protect its rights. The development of the land-use plan would also provide an agreed-upon, long-term strategy to inform future Takla representatives as well as industry and government.

4. Decide, as a community, on the economic benefits Takla wishes to receive from mining operations, articulate those desires, and invest in training for those members interested in mineral-related jobs.

Takla has received relatively few economic benefits from mining operations on its traditional territory, and if mining continues on its lands, Takla should benefit more. As a community, Takla should determine what economic benefits it wants to receive from mining, and it should make those wishes known to the B.C. government and mining companies. In particular, Takla should decide how it prefers the B.C. government or individual companies distribute financial benefits and on what the money will be spent. Takla should also decide what kind of employment agreements it is willing to accept: how many individuals should be employed, in what capacity they should be employed, and how employees should be selected. At the same time, rather than relying exclusively upon training being provided, Takla should ensure that its members are educated and provided training in mineral industry jobs to facilitate their employment with mining companies allowing them to reap benefits from any mineral development in their traditional territory.

III. BACKGROUND ON TAKLA LAKE FIRST NATION

The traditional territory of Takla Lake First Nation is located in northern British Columbia, an isolated part of the province that is thinly populated but mineral rich. The people who live there have a close cultural and spiritual connection to the environment that is exemplified by their significant reliance on a subsistence way of life and a hereditary governance system tied to land tracts associated with individual families.

In the twentieth century, the federal government sought to assimilate First Nations by imposing compulsory schooling and banning traditional forms of governance. Meanwhile, fur traders, loggers, and miners extracted resources from First Nations lands, usually with limited communication with or benefits to the traditional owners. While treatment of First Nations today is better than in the past, the First Nations of northern British Columbia, including Takla, still have limited political power compared to the primarily non-indigenous population in the more densely inhabited south.

THE PEOPLE AND THE PLACE

The Takla Lake First Nation is composed of approximately 1,000 on- and off-reserve members.¹⁴ Its traditional territory, which it has used and occupied for centuries, covers roughly 27,250 square kilometers.¹⁵ Takla has never signed a treaty relinquishing its rights to this land, but the state has failed to recognize Takla's aboriginal title or reserve land status. Within that traditional area, there are eighteen federally protected reserves;¹⁶ the government has set them aside "for the use and

¹⁴ Carrier Sekani Tribal Council, Takla Lake First Nation, <http://www.cstc.bc.ca/cstc/36/takla+lake+first+nation> (last visited June 3, 2010).

¹⁵ Takla Lake First Nation, Our Territory, <http://www.taklafn.ca/nation/1/our+territory> (last visited June 3, 2010). *See also* Takla Lake First Nation, Takla Lake Location in BC, http://www.taklafn.ca/downloads/location_bc.pdf (last visited June 3, 2010); Takla Lake First Nation, Takla Lake Territory, http://www.taklafn.ca/downloads/Takla_Territory.pdf (last visited June 3, 2010).

¹⁶ Takla Lake First Nation, Reserves, <http://www.taklafn.ca/nation/3/reserves> (last visited June 3, 2010). A reserve is defined by the Indian Act as "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a

benefit of [the] band,” but they make up just a fraction of Takla’s traditional territory. Takla’s largest residential community, the reserve at Takla Landing, is approximately 1.0 by 1.5 miles (1.6 by .8 kilometers) on the shores of Takla Lake and is home to about 250 Takla members.¹⁷ The community is quite isolated, most accessible by 260 kilometers of logging road from the town of Fort St. James (population 4,757, including surrounding rural areas and First Nations’ reserves).¹⁸

Takla is represented on the Carrier Sekani Tribal Council, which serves eight member nations in British Columbia with a combined population of more than 10,000 people and a combined traditional territory of about 78,700 square kilometers.¹⁹ The Union of British Columbia Indian Chiefs and the British Columbia Assembly of First Nations support and advocate for all First Nations in the province.²⁰

The name Carrier Sekani reflects part of Takla’s heritage; the First Nation is an amalgam of three distinct historic groups, the Dakelh (or Carrier), the Sekani, and the Gitksan, all Athabaskan speaking peoples.²¹ Dakelh means “people who ‘travel upon water,’”²² and the Dakelh people also refer to themselves in their own dialects as Dakelh-ne, Yinka Dene, and Yinka Whut’en; European explorers introduced the name Carrier.²³ Sekani means “people of the rocks,”²⁴ and Gitksan means “People of the River of Mist.”²⁵ The different groups are interconnected, but they also retain some

band.” Indian Act, R.S. C., ch. I-5, § 2(1) (1985) (Can.), *available at* <http://laws.justice.gc.ca/PDF/Statute/I/I-5.pdf>.

¹⁷ Takla Lake First Nation, Communities, <http://www.taklafn.ca/nation/2/communities> (last visited June 3, 2010).

¹⁸ Stuart Nechako Regional Economic Development Society, Fort St. James, <http://www.stuartnechako.ca/fort-st-james> (last visited June 3, 2010).

¹⁹ Carrier Sekani Tribal Council, About CSTC, <http://www.cstc.bc.ca/cstc/7/about+cstc> (last visited June 3, 2010). Incorporated in 1979, the Carrier Sekani Tribal Council advocates for and provides technical and political support to its member nations. *Id.*; CARRIER SEKANI TRIBAL COUNCIL, A CSTC BACKGROUND 3 (2007), *available at* <http://www.cstc.bc.ca/cstc/7/about+cstc>.

²⁰ See Union of British Columbia Indian Chiefs, <http://www.ubcic.bc.ca/> (last visited June 3, 2010); British Columbia Assembly of First Nations, <http://www.bcafn.ca/> (last visited June 3, 2010).

²¹ CARRIER SEKANI TRIBAL COUNCIL, A CSTC BACKGROUND, *supra* note 19, at 6.

²² Carrier Sekani Tribal Council, About CSTC, *supra* note 19.

²³ CARRIER SEKANI TRIBAL COUNCIL, A CSTC BACKGROUND, *supra* note 19, at 6. According to one story, the Carrier received their name from the fact that widows sometimes carried the ashes of their dead husbands on their backs. BRIDGET MORAN, STONEY CREEK WOMAN: THE STORY OF MARY JOHN 29 (2007).

²⁴ CARRIER SEKANI TRIBAL COUNCIL, A CSTC BACKGROUND, *supra* note 19, at 6.

²⁵ Gitksan, The Gitksan, <http://www.gitksan.com/our-way/2-the-gitksan.html> (last visited June 3, 2010).

cultural differences such as dialect. Many people interviewed for this report identified themselves with one or more of these groups.²⁶

FEDERAL AND TRADITIONAL GOVERNANCE SYSTEMS

The name Takla Lake First Nation and the Nation's elected chief and council governance structure are the result of Canadian federal intervention. This federal construction coexists with the traditional potlatch system, which the Canadian government outlawed from 1884 until 1951.²⁷ In the potlatch, or *Bahl'ats*, system, each family has a traditional land base, or *keyoh*, with one family leader at a time "holding the name" or "speaking for the land."²⁸ Each family protects its *keyoh*, and the *keyoh* holder sits in his or her family's designated seat at potlatch ceremonies to provide a voice for the family and the land. Families are parts of four larger clans: the Bear Clan (Likh Ji Bu), the Frog Clan (Jilh Ts'e Yu), the Beaver Clan (Likh Ts'a Mis Yu), and the Caribou Clan (Gil Lan T'en).²⁹ Clan membership is matrilineal.³⁰

The federal and provincial governments have communicated primarily with chief and council, whom they have viewed as speaking for the entire community, much as elected representatives speak for Canadians in the federal and provincial governments. The governments' inadequate communication with the *keyoh* holders has caused tension at times. Even some members of Takla's 2009-2011 council readily noted the problems with the federally imposed system and expressed a desire to have outsiders negotiate directly with the traditional individual landholders.³¹

British Columbia has made some efforts to improve its dealings with First Nations although not at the potlatch level. In March 2005, the province held meetings

²⁶ See, e.g., Interview with William Alexander, at Aiken Lake, B.C. (Sept. 14, 2009); Interview with Lillian, Edna, and Antoine Johnny, in Takla Landing, B.C. (Sept. 14, 2009); Interview with Terry Johnny, in Takla Landing, B.C. (Sept. 15, 2009); Interview with Terry Teegee, Vice Tribal Chief, Carrier Sekani Tribal Council, in Prince George, B.C. (Sept. 11, 2009).

²⁷ Carrier Sekani Tribal Council, A Chronology of Contact, <http://www.cstc.bc.ca/cstc/31/a+chronology+of+contact> (last visited June 3, 2010).

²⁸ CARRIER SEKANI TRIBAL COUNCIL, A CSTC BACKGROUND, *supra* note 19, at 9-10; Interview with Victor West, in Takla Landing, B.C. (Sept. 15, 2009).

²⁹ CARRIER SEKANI TRIBAL COUNCIL, A CSTC BACKGROUND, *supra* note 19, at 9-10 (2007). In a visit to Takla's potlatch house, IHRC observed signs designating the seating arrangement by clan.

³⁰ *Id.*

³¹ Interview with Irene French, Councilor for Education and Fisheries, Takla Lake First Nation, in Takla Landing, B.C. (Sept. 15, 2009); Interview with Jeanette West, Councilor for Operations and Maintenance, Takla Lake First Nation, in Takla Landing, B.C. (Sept. 16, 2009).

with First Nations' leaders and created a list of principles and goals called the New Relationship, which recognized a government-to-government relationship with the First Nations and committed the province to respecting aboriginal rights and title.³² Members of Takla, however, have shown skepticism toward the program. Takla Councilor Jeanette West told IHRC that the New Relationship is “not working” because “industry has too much influence.”³³ She said that mining companies have taken advantage of the fact that Takla has no treaty with British Columbia and that as a result, its land claims are unsettled; in the midst of this uncertainty, the mining companies have been simply “taking over.”³⁴ West said she believes the provincial government has been deliberately stalling on the land claims to exploit the wealth of resources on First Nations' land.³⁵

RELATIONSHIP TO THE LAND

The potlatch system, in which the family name is inseparable from that family's *keyoh*, exemplifies how Takla's traditional culture is inextricable from its land base. When members of Takla receive their hereditary name, they give away ceremonial gifts, including traditional local foods such as moose and bear meat and berries, to other members.³⁶ Stories passed down orally from one generation to the next sometimes describe the responsibilities that come with “holding the name” or “speaking for the land.” *Keyoh* holder Victor West has the hereditary name “Naugh,” meaning a “Wise Fish” that is responsible for looking after the other fish during spawning season and making sure that all of the eggs are released and fertilized as the salmon come upstream. “Naugh is a legend that's been passed on to me. And it's my job to protect the water because if there's no water, there will be no fish. It's that simple,” he said.³⁷ By telling the stories to each new generation, Takla members share pieces of their history and the lessons learned from the past at appropriate times, particularly during potlatch ceremonies.

³² The New Relationship with Aboriginal People, http://www.gov.bc.ca/themes/new_relationship.html (last visited June 3, 2010).

³³ Interview with Jeanette West, *supra* note 31.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Interview with Lillian, Edna, and Antoine Johnny, *supra* note 26.

³⁷ Interview with Victor West, *supra* note 28.

As one of the more geographically isolated First Nations in British Columbia, Takla's attachment to the land remains strong. While many Takla members live relatively modern lives in town and many have received university educations, they still depend on traditional food sources for a significant portion of their diet.³⁸ As of March 2010, unemployment in Takla was about seventy to eighty percent, making living off of the land as important as it ever was.³⁹ For some, the ongoing reliance on hunting and gathering is also a matter of preference stemming from cultural values and a desire not to eat processed foods. Takla members eat bear, moose, groundhog, beaver, salmon, trout, arctic char, huckleberries, and blueberries.⁴⁰ Balsam, pitch, devil's club, sowberries, and rhubarb are among the plants that still provide traditional medicines.⁴¹

Takla's relationship with the land has important social and health effects. Lisa Sam, a community health nurse from the nearby Nak'azdli First Nation, has worked on environmental health issues. She explained that "even little changes in hunting patterns have a big social impact" and pointed to a study done with First Nations in northeastern Canada showing that the size of a deer population was inversely correlated with alcoholism, violence, domestic strife, and car accidents.⁴² In other words, when hunting has been good, First Nations communities have been healthier.

Spiritual life in Takla is often a mix of Catholicism and native oral traditions, but members widely share a reverence for the earth and a sense of obligation to protect it. Twenty-year-old Carmelita Abraham told IHRC that she lamented her lack of knowledge about "living in the bush," but she remembered learning to say a prayer and make an offering of tobacco when she cut down a tree or caught a grouse.⁴³ Council member Anita Williams said that she believes that the Creator "gave us a role to play here on earth. . . . If we say go ahead [with mining] we have to remember we're

³⁸ See Interview with Lisa Sam, Nak'azdli First Nation, in Prince George, B.C. (Sept. 19, 2009).

³⁹ E-mail from David Radies, Takla Mining Coordinator, to IHRC (Mar. 17, 2010).

⁴⁰ Interview with Marvin Abraham, at Aiken Lake, B.C. (Sept. 14, 2009).

⁴¹ Interview with Terry Johnny, *supra* note 26; Interview with Irene French, *supra* note 31; Interview with Paul French, at Bralorne-Takla Mine site, B.C. (Sept. 17, 2009); Interview with Lillian, Edna, and Antoine Johnny, *supra* note 26.

⁴² Interview with Lisa Sam, *supra* note 38; see generally Chantelle A.M. Richmond & Nancy A. Ross, *The Determinants of First Nation and Inuit Health: A Critical Population Health Approach*, 15 HEALTH & PLACE 407 (2009).

⁴³ Interview with Richard, Esther, and Carmelita Abraham, in Takla Landing, B.C. (Sept. 13, 2009).

here to take care of the land. [The Creator] will take something away from here.”⁴⁴ Another council member, Irene French, recalled being raised in the Omenika Mountains by her grandfather, who taught her how to survive in the bush and showed her how to meditate and visit sacred areas. He also taught her that “disturbing the land” raised “bacteria” to the surface and that she should never disturb it unless she absolutely needed to.⁴⁵

Takla takes great pride in its natural resources and cultural heritage. “We’re so proud of our water,” said Irene French. “We wake up in the morning and see that water, and it’s just pure joy.”⁴⁶ During IHRC’s visit to Takla Lake in September 2009, Takla was working on the restoration and reopening of historic trails, and Takla members explained the importance of burial grounds and culturally modified trees.⁴⁷ People of all generations noted that cultural traditions, survival skills, and a sense of history are interdependent and integral to healthy family relationships and the development of Takla’s youth.⁴⁸

RESIDENTIAL SCHOOLS

Given these views of their environment, it is not surprising that many people in Takla have believed that one of the primary tragedies of the residential school system was that it robbed children of their physical and spiritual connection to the land.⁴⁹ From 1920 to 1948, the federal government made attendance at a residential school compulsory between the ages of six and fifteen.⁵⁰ In practice, however, forced attendance seems to have gone on for much longer, as stories of state-sanctioned

⁴⁴ Interview with Anita Williams, Councilor for Social Development, Takla Lake First Nation, in Takla Landing, B.C. (Sept. 16, 2009).

⁴⁵ Interview with Irene French, *supra* note 31.

⁴⁶ *Id.*

⁴⁷ Culturally modified trees, or CMTs, are trees that have been altered by indigenous people as part of their traditional land use practices. B.C. MINISTRY OF SMALL BUS., TOURISM & CULTURE, CULTURALLY MODIFIED TREES OF BRITISH COLUMBIA 1 (2001), available at <http://www.for.gov.bc.ca/hfd/pubs/Docs/Mr/Mr091/cmthandbook.pdf>.

⁴⁸ Interview with Richard, Esther and Carmelita Abraham, *supra* note 43; Interview with William Alexander, *supra* note 26.

⁴⁹ See, e.g., Interview with Anita Williams, *supra* note 44.

⁵⁰ Indian Residential School Survivors Society, History, <http://www.irsss.ca/history.html> (last visited June 3, 2010). While the schools received government funding, Canada relied on the existing structure of missionary schools, and about seventy percent of them were run by the Catholic Church. *Id.* For a first-person account of life in residential schools in the 1920s, see MORAN, *supra* note 23, at 49-66.

kidnapping stretch at least into the early 1960s.⁵¹ This forced assimilation program not only took children from their families, but also resulted in many instances of systematic physical, emotional, and sexual abuse. Children were also malnourished, overworked, and punished for speaking their native language.⁵²

During interviews with IHRC, Takla members were quick to point out the loss of cultural knowledge that took place when these generations of children were torn from their families. Richard Abraham, a resident of Takla Landing who was first taken from his family in 1963 at the age of six, remembers “getting it from both sides”: he was abused at school for speaking his native language, but ridiculed at home for having lost cultural knowledge. When he came home from school for the summer, he was missing many of the survival skills he had begun to learn as a child. He explained, “My grandpa taught us to be hunters. If you go out, you have to get something. If you come back with nothing, he’d say, ‘What happened, you turned white?’”⁵³ His niece Carmelita said she wished that she could understand her grandmother Esther when she speaks in her native tongue, but noted that “older people won’t teach it because they used to be beaten for speaking it.”⁵⁴

The First Peoples’ Heritage, Language and Culture Council⁵⁵ claimed in May 2010 that the languages of most First Nations in British Columbia will be completely lost by 2016 unless action is taken to save and teach the languages.⁵⁶ The report attributes a 95 percent drop in fluent speakers over the past 120 years largely to colonization and residential schools.⁵⁷ Currently, only 5.1 percent of First Nations

⁵¹ See, e.g., Interview with Richard, Esther, and Carmelita Abraham, *supra* note 43; Interview with Marvin Abraham, *supra* note 40.

⁵² See generally RHONDA CLAES & DEBORAH CLIFTON (LAW COMMISSION OF CANADA), NEEDS AND EXPECTATIONS FOR REDRESS OF VICTIMS OF ABUSE AT NATIVE RESIDENTIAL SCHOOLS (1998), available at http://epe.lac-bac.gc.ca/100/200/301/lcc-cdc/needs_expectations_redres-e/html/claes.html. Many First Nations people believe the residential school experience is at the root of high rates of domestic violence and alcoholism among their communities. See, e.g., Interview with Irene French, *supra* note 31.

⁵³ Interview with Richard, Esther, and Carmelita Abraham, *supra* note 43.

⁵⁴ *Id.*

⁵⁵ The First Peoples’ Heritage, Language and Culture Council is a Crown corporation created in 1990 “to assist B.C. First Nations in their efforts to revitalize their languages, arts and cultures.” First Peoples’ Heritage, Language and Culture Council, <http://www.fphlcc.ca/about-us> (last visited Sept. 20, 2010).

⁵⁶ FIRST PEOPLES’ HERITAGE, LANGUAGE AND CULTURE COUNCIL, REPORT ON THE STATUS OF B.C. FIRST NATIONS LANGUAGES 2010 at 11, available at <http://www.fphlcc.ca/language/language-report>.

⁵⁷ *Id.* at 9.

members (5,609 people), most of whom are at least 65 years old, are fluent speakers of their native languages.⁵⁸

NON-MINING LAND USE AND RESOURCE EXTRACTION

The loss of children to residential schools happened simultaneously with the use of Takla's land by outsiders without limited consultation. According to Takla's lawyer, Murray Browne, the resource-rich northern part of the province that is home to Takla has served as the "cash cow" for Vancouver and Victoria.⁵⁹ Unlike in those major cities, First Nations have constituted a significant percentage of the population in northern British Columbia.⁶⁰ The region's relatively sparse population, however, has given those groups very little political power compared to the southern part of the province.⁶¹

Mining has long been a part of the framework of resource extraction, but it has not always been the primary concern. The fur trade, which dates to the late eighteenth century, is perhaps the oldest form of resource use that has disrupted the traditional subsistence livelihoods and social relations in Takla. Takla's involvement in the fur trade after contact with Europeans affected how the community viewed and shared the land. The provincial government defined trapline boundaries,⁶² which only roughly follow *keyoh* boundaries. Today, families refer to these traplines in ownership terms.⁶³ *Keyohs* are not considered fungible, but traplines can be bought and sold.⁶⁴ Thus, members of Takla generally do not consider a sold trapline to have displaced the *keyoh* system. These overlapping property systems have created confusion between First Nations and outsiders to whom traplines are sold. In addition, the interference by the B.C. government in traditional boundaries may have created internal territorial disputes where none existed before.

⁵⁸ *Id.* at 4, 18.

⁵⁹ Telephone Interview with Murray Browne, Woodward & Company (Apr. 1, 2010).

⁶⁰ Vancouver's aboriginal population is 1.9 per cent; in the northernmost regions of British Columbia the percentage of aboriginal people ranges from 13.1 to 59.3 per cent. BRITISH COLUMBIA, STATISTICAL PROFILE OF ABORIGINAL PEOPLES 2 (2001), *available at* http://www.bcstats.gov.bc.ca/data/cen01/abor/tot_abo.pdf.

⁶¹ Telephone Interview with Murray Browne, *supra* note 59.

⁶² "Trapline" refers to the route along which an individual or family sets traps for animals.

⁶³ CARRIER SEKANI TRIBAL COUNCIL, A CSTC BACKGROUND, *supra* note 19, at 9.

⁶⁴ *Id.*

Takla members also recounted to IHRC two stark instances in which the government exploited the land without adequately consulting Takla or other area First Nations: the flooding of the Williston Reservoir and the building of the British Columbia Railway. In 1968, the government built the W.A.C. Bennett Dam, creating the Williston Reservoir and flooding a large portion of Tsay Keh Dene (Sekani) land.⁶⁵ People in Takla recalled this event bitterly, as it resulted in the displacement of friends and relatives.⁶⁶ Around the same time, the railway was seeking land through Takla's territory to build a railroad. In 1974, the company struck a deal with the province, the federal government, and Takla, in which the government agreed to give Takla three acres of reserve land for every single acre taken by the railroad. Although the railroad has been built, no such transfer of ownership has taken place.⁶⁷

This railroad, originally intended to reach Alaska,⁶⁸ was built largely for extractive industries, which at the time primarily meant logging. Many Takla residents have been employed in some way by the logging industry. Irene French, a current council member, readily expresses her troubled relationship with the industry. She once owned a small logging company and referred to that experience as "a really destructive part of [her] life" for which she spent ten years "paying" and suffering.⁶⁹ The logging industry has been dominated by outsiders, however, and has dramatically changed Takla's environment and Takla's relationship with the environment.⁷⁰ William Alexander, one member who still lives almost completely "in the bush," described how his father taught him to track bears as a child. Now, said Alexander, "you don't need

⁶⁵ Carrier Sekani Tribal Council, A Chronology of Contact, *supra* note 27.

⁶⁶ Interview with Mona and Lillian French, in Takla Landing, B.C. (Sept. 15, 2009); Interview with Victor West, *supra* note 28.

⁶⁷ Takla is still fighting, with the help of lawyer Murray Browne, to get what it was promised. Terry Teegee, Vice Tribal Chief of the Carrier Sekani Tribal Council, told IHRC that the land should add up to about 860 acres. The construction of the railroad also necessitated the blasting of a rock that had historic pictograms on it. The government reportedly took a picture of it before the blasting and placed a plaque on the site, but as Ernie French, a member of Takla, put it, "that's one part of our history that we can never get back." Telephone Interview with Murray Browne, *supra* note 59; *3 for 1 Meeting Info*, TAKLA LAKE NEWSLETTER, July 2009, at 3, available at <http://www.taklafn.ca/downloads/July%202009%20Newsletter.pdf>; Interview with Mona and Lillian French, *supra* note 66; Interview with Terry Teegee, *supra* note 26; Interview with Raphael West, in Takla Landing, B.C. (Sept. 15, 2009); Interview with Ernie French, in Prince George, B.C. (Sept. 19, 2009).

⁶⁸ E-mail from JP Laplante, former Mining Coordinator, Takla Lake First Nation, to Susannah Knox, IHRC (Jan. 22, 2010).

⁶⁹ Interview with Irene French, *supra* note 31. Nevertheless, when Takla could not raise money for a new potlatch house, they logged a portion of their land and paid for the building with the profits. Interview with Jeanette West, *supra* note 31.

⁷⁰ See, e.g., Interview with Julie Jacques, in Takla Landing, B.C. (Sept. 13, 2009).

to track. You just go to a cut block [a part of the forest that has been clearcut] and shoot the first bear you see.”⁷¹ Caribou, another animal that Takla members hunt, has also been vulnerable to the exposure caused by deforestation,⁷² and a 2009 study noted the potentially devastating effect of their decline on northern indigenous cultures.⁷³

Fish are an additional important resource that has been adversely affected by modern industry. As British Columbia’s salmon stock has suffered from a sharp decline,⁷⁴ many First Nations have been unable to fish for the past several years.⁷⁵ The precise causes of the decline are unknown and may be myriad, but studies have suggested that industrial uses of the land such as logging and mining may play a part.⁷⁶ Living at the headwaters of three major watersheds, members of Takla have

⁷¹ Interview with William Alexander, *supra* note 26.

⁷² Caribou eat lichens that only grow in old-growth forests, and the higher snow accumulation in open cut blocks makes it more difficult for them to escape from predators, such as wolves. *Id.* See also Interview with Terry Teegee, *supra* note 26. See generally Wildlife Conservation Society, Caribou, <http://www.wcs.org/saving-wildlife/hoofed-mammals/caribou.aspx> (last visited June 3, 2010).

⁷³ The study found that caribou populations worldwide have plunged by sixty percent in the past three decades. It cited climate change and loss of habitat to industrial modification as contributing factors. Liv Vors and Mark Boyce, *Global Declines of Caribou and Reindeer*, 15 GLOBAL CHANGE BIOLOGY JOURNAL 2626, 2626, 2630–31 (2009). See also Robert Roy Britt, *Reindeer and Caribou Populations Plunge*, LIVESCIENCE, June 11, 2009, <http://www.livescience.com/environment/090611-reindeer-populations-plunge.html>; Matt Walker, *Reindeer Herds in Global Decline*, BBC EARTH NEWS, June 11, 2009, http://news.bbc.co.uk/earth/hi/earth_news/newsid_8094000/8094036.stm.

In addition, the loss of the natural forest fire cycle because of logging, government intervention to protect logging, and warming temperatures have helped the mountain pine beetle move northward, killing vast swaths of pine trees. Steve Taylor & Allan Carroll, *Disturbance, Forest Age, and Mountain Pine Beetle Outbreak Dynamics in BC: A Historical Perspective*, in MOUNTAIN PINE BEETLE SYMPOSIUM: CHALLENGES AND SOLUTIONS 41, 42 (T.L. Shore, J.E. Brooks & J.E. Stone eds., 2003); Allan Carroll et al., *Effects of Climate Change on Range Expansion by the Mountain Pine Beetle in British Columbia*, in MOUNTAIN PINE BEETLE SYMPOSIUM, *supra*, at 223, 227. See also Interview with Terry Teegee, *supra* note 26.

⁷⁴ Samantha Chilcote, *As Salmon Continue to Decline, A Long-Term Study to Understand Their Needs*, EARTHSKY, Aug. 24, 2009, <http://earthsky.org/biodiversity/more-physically-complex-rivers-are-best-for-wild-salmon-populations> (explaining that many salmon runs are currently at ten percent of their historic populations and that wild salmon, as opposed to hatchery-bred fish, often make up less than twenty-five percent of those runs); David Suzuki & Faisal Moola, *Uncovering the Mystery of B.C.’s Disappearing Sockeye*, SCIENCE MATTERS, Aug. 26, 2009, available at http://thegreenpages.ca/portal/bc/2009/08/uncovering_the_mystery_of_bcs.html (noting that the 2009 salmon run had one of the lowest number of sockeye returning in the past fifty years).

⁷⁵ Interview with Terry Teegee, *supra* note 26.

⁷⁶ See, e.g., FORESTRY IMPACTS ON FISH HABITAT IN THE NORTHERN INTERIOR OF BRITISH COLUMBIA: A COMPENDIUM OF RESEARCH FROM THE STUART-TAKLA FISH-FORESTRY INTERACTIVE STUDY (E.A. Maclsaac, Fisheries and Oceans Canada, ed., 2003), available at <http://www.dfo-mpo.gc.ca/Library/329257.pdf>; B.C. PACIFIC SALMON FORUM, FINAL REPORT & RECOMMENDATIONS TO THE GOVERNMENT OF BRITISH COLUMBIA (2009), available at

expressed an obligation to protect the fish not only for their own community, but for those who live downstream.

MINING

Takla's negative past experiences with resource extraction have also included mining, an industry to which it has been particularly vulnerable. The Quesnel Trough runs through Takla's traditional territory, making it rich in minerals such as gold, copper, mercury, jade, and molybdenum, which is used primarily in steel alloys. The area has as a result been blanketed by mineral claims. Takla itself has never run any mining operations.⁷⁷ Ancestors of Takla members used minerals to make implements such as axes and arrowheads. Their traditional use, however, had few environmental consequences.⁷⁸ Later some members engaged in small-scale placer mining through joint ventures with prospectors. The lingering existence of contaminated abandoned mines and memories of how previous miners treated their families, however, have tainted many Takla members' views toward mining in Takla's territory today.

The stories Takla members shared with IHRC painted a disturbing picture of early dealings with miners. Several people recalled parents and grandparents who befriended prospectors, answering questions about the land and teaching them survival skills.⁷⁹ Some worked for the miners, hauling supplies to the camps and minerals out of the camps by horseback on traditional trails.⁸⁰ According to members of Takla, however, miners often gave the families who held the land almost nothing in return for their help but wasted landscapes. Roy French told IHRC that "it's like robbing someone's bank."⁸¹ Esther Abraham remembers how miners at Aiken Lake took advantage of the knowledge of the land possessed by her father-in-law, Thomas, and her husband, Dominic, and "we never get not even a dollar out of that place."⁸²

<http://www.pacificsalmonforum.ca/final/BCPSFFinRptqSm.pdf>; FISHERIES AND OCEANS CANADA, UNDERWATER WORLD: PACIFIC SALMON 7 (2002), available at <http://www.dfo-mpo.gc.ca/science/publications/uww-msm/pdf/pacificsalmon-saumonpacifique-eng.pdf>.

⁷⁷ E-mail from JP Laplante (Jan. 22, 2010), *supra* note 68.

⁷⁸ Interview with Irene French, *supra* note 31.

⁷⁹ Interview with William Alexander, *supra* note 26; Interview with Richard, Esther, and Carmelita Abraham, *supra* note 43.

⁸⁰ See interview with Irene French, *supra* note 31; Interview with Richard, Esther, and Carmelita Abraham, *supra* note 43; Interview with Mona and Lillian French, *supra* note 66.

⁸¹ Interview with Roy French, in Takla Landing, B.C. (Sept. 15, 2009).

⁸² Interview with Richard, Esther and Carmelita Abraham, *supra* note 43.

Esther and her family used to walk the 160-kilometer trail between Aiken Lake and Germansen Landing to trap animals, and selling furs was their primary source of income for buying food. When miners built a road in 1970 that plowed over traps and campsites, Esther said, the Abraham family was never compensated.⁸³

Takla's understanding of how mining was being conducted has made many people distrustful and less open with outsiders. Frank Williams said that his ancestors called gold "the bright metal," but he and his family have deliberately kept knowledge about minerals on their land quiet.⁸⁴ Richard Abraham said that his family's experience with miners taking advantage of their knowledge has made them distrustful of people "coming around and asking questions."⁸⁵ He also said he believes that miners deliberately attempted to pit different families with overlapping territories against each other by bribing them.⁸⁶ He was not the only member of Takla who told IHRC that he did not want any mining on Takla's land because of the fighting and disharmony it has caused within Takla in the past.⁸⁷

Mining has overtaken logging as Takla's primary concern regarding resource use by outsiders. The logging industry in Canada has declined,⁸⁸ but mineral prices have risen steadily over the past ten years.⁸⁹ Thus, a rapid increase in the number of mining operations has characterized recent development on Takla's land.

⁸³ *Id.*; Interview with Marvin Abraham, *supra* note 40.

⁸⁴ Interview with Frank Williams, in Takla Landing, B.C. (Sept. 17, 2009).

⁸⁵ Interview with Richard, Esther, and Carmelita Abraham, *supra* note 43.

⁸⁶ *Id.*

⁸⁷ Interview with Victor West, *supra* note 28; Interview with Margo French, at Bralorne-Takla Mine site, B.C. (Sept. 17, 2009); Interview with David Alexander, Jr., in Takla Landing, B.C. (Sept. 15, 2009); Interview with Tony Johnny, in Takla Landing, B.C. (Sept. 15, 2009). *See also* Interview with Lisa Sam, *supra* note 38 (describing story passed down among Nak'adzli people about rejecting mining because it causes fighting).

⁸⁸ B.C. STATS & B.C. MINISTRY OF ADVANCED EDUCATION AND LABOUR MARKET DEVELOPMENT, *Forestry and Logging*, in A GUIDE TO THE B.C. ECONOMY AND LABOUR MARKET, available at http://www.guidetobceconomy.org/major_industries/forestry.htm (last visited March 17, 2010).

⁸⁹ Mineralstox.com, Mineral Prices and Charts, <http://www.mineralstox.com/charts/default.asp?focus=128&mode=all> (last visited March 17, 2010); B.C. STATS & B.C. MINISTRY OF ADVANCED EDUCATION AND LABOUR MARKET DEVELOPMENT, *Mining, Oil and Gas Extraction*, in A GUIDE TO THE B.C. ECONOMY AND LABOUR MARKET, *supra* note 88; Interview with Terry Teegee, *supra* note 26; Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, B.C. (Mar. 1, 2010).

IV. INTERNATIONAL AND DOMESTIC LAW PROTECTING ABORIGINAL LAND RIGHTS

Both international law and Canadian domestic law define the aboriginal rights of First Nations. International human rights and environmental law explicitly recognize the close connection between indigenous economic and cultural development and traditional lands and natural resources. Through rights to self-determination and enjoyment of culture, human rights law establishes First Nations' rights to use their traditional lands and to be involved in decisions relating to their lands and resources. It also requires states parties, including Canada, to protect, respect, ensure, and realize progressively these rights. In addition, through the precautionary principle and the principle of sustainable development, international environmental law provides guidelines for regulating mining on First Nations' traditional lands.

Canadian aboriginal law is enshrined primarily in constitutional guarantees and subsequent case law. Canada recognizes aboriginal title and rights as a means of protecting First Nations' ownership of lands and their ability to conduct traditional practices. It permits infringement on aboriginal territory in certain situations but makes such infringement contingent on consultation and accommodation. While the line of cases has increased protection of First Nations' interests, the rules should be supplemented with statutes or regulations to provide clarity and specificity. Together, international and Canadian law call for greater scrutiny of proposed activities and a presumption that aboriginal rights take precedence over potential encroachments on indigenous land.

INTERNATIONAL LAW ON ABORIGINAL LAND AND RESOURCES

Human rights treaties, U.N. declarations, and international environmental law all protect aboriginal rights to traditional lands and resources. Canada is party to, and thus legally bound by, three relevant human rights law instruments:⁹⁰ the

⁹⁰ For Canada's status as a state party, see Office of the U.N. High Comm'r for Human Rights (OHCHR), Status by Country, <http://www.unhchr.ch/tbs/doc.nsf/Statusfrset> (click on the arrow next to "Canada") (last visited June 3, 2010).

International Covenant on Civil and Political Rights (ICCPR),⁹¹ the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁹² and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).⁹³ The first two are the foundational treaties of human rights law;⁹⁴ the third supplements them with more specific provisions.

U.N. declarations, notably the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP), which was adopted in 2007, complement these treaties and reaffirm the critical principles of heightened protections for indigenous communities.⁹⁵ Although Canada was one of the objecting nations, all but four of the U.N. member states voted to support UNDRIP. Canada found fault with the language of several UNDRIP provisions.⁹⁶ Ambassador John McNee, however, expressed Canada's long-term commitment to advancing indigenous rights at home and abroad even if such efforts would not be conducted on the basis of UNDRIP.⁹⁷ Despite Canada's objections, UNDRIP's provisions represent broad international agreement on the special rights and privileges to be accorded to aboriginal peoples.⁹⁸

⁹¹ International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

⁹² International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

⁹³ International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter ICERD].

⁹⁴ The U.N. Charter was the first international agreement to protect the fundamental rights of all individuals, not just certain groups. Articles 55 and 56 of the Charter commit the United Nations and its member states to promote human rights. U.N. Charter arts. 55-56. All modern international human rights law springs from these provisions. The nonbinding Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), is the foundational document advanced to define the human rights in the Charter, and it ultimately gave rise to the ICCPR and ICESCR.

⁹⁵ See *generally* U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 3, U.N. GAOR, 61st Sess., 107th plen. mtg., U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP].

⁹⁶ Canadian Ambassador John McNee voiced Canada's response to UNDRIP: "We have stated publicly that we have significant concerns with respect to the wording of the current text, including the provisions on lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of indigenous peoples, member States and third parties." Statement by Ambassador McNee to the General Assembly on UNDRIP, New York, Sept. 13, 2007, http://www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/statements-declarations/general_assembly-assemblee-generale/10373.aspx?lang=eng.

⁹⁷ *Id.*

⁹⁸ UNDRIP is neither binding law (because it is a declaration) nor customary law. Nevertheless, it was nearly unanimously endorsed, which shows widespread support for its principles.

International environmental law is also relevant to the extraction of natural resources on aboriginal land. Environmental law seeks to reduce the adverse effects of environmental degradation on the enjoyment of human rights, particularly those of indigenous peoples whose survival and cultures are often tied to their environment. Its principles should govern resource extraction to ensure that development does not preclude cultural and subsistence uses of the land.⁹⁹

First Nations' Right to Self-Determination

One of the founding purposes of the United Nations (U.N.) is to protect the self-determination of peoples.¹⁰⁰ Article 1 of both the ICCPR and ICESCR articulate this principle, declaring that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹⁰¹ Notably, the U.N. Charter, ICCPR, and ICESCR do not refer to a right of self-determination for states; all three confer the right upon *peoples*.¹⁰² As indigenous peoples, therefore, First Nations have a collective right to self-determination as well as individual rights to participate in decisions that affect their political, economic, and cultural development.¹⁰³ ICERD, by which Canada is bound,¹⁰⁴ and UNDRIP further confer these rights specifically upon indigenous people.¹⁰⁵

⁹⁹ U.N. Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, princ. 22, U.N. Doc. A/CONF.151/26 (June 16, 1992), available at

<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163> [hereinafter *Rio Declaration*].

¹⁰⁰ U.N. Charter, *supra* note 94, art. 1, ¶ 2 (stating that the purpose of the United Nations is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”).

¹⁰¹ ICCPR, *supra* note 91, art. 1, ¶ 1; ICESCR, *supra* note 92, art. 1, ¶ 1.

¹⁰² The International Court of Justice refers to the right to self-determination as a right held by people rather than a right held by governments alone. See *Western Sahara Case*, 1975 I.C.J. 12, 31.

¹⁰³ The Human Rights Committee explained the distinction between the right to self-determination, enjoyed by groups, and the participatory rights enjoyed by individuals under Article 25 of the ICCPR. See Human Rights Comm., General Comment No. 25, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (Dec. 7, 1996) (“Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs.”).

¹⁰⁴ ICERD, *supra* note 93, art. 5, ¶ c. See also Comm. on the Elimination of Racial Discrimination, General Comment No. 23, ¶ 4(d), U.N. Doc. HRI/GEN/1/Rev.6 (1997), available at

<http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument>

Self-determination has an economic component that encompasses the right of a people to dispose of their natural resources. Notably, Canada's own Royal Commission on Aboriginal Peoples¹⁰⁶ recommended that Canada provide First Nations with enough land to have "resources for economic self-reliance, [and] to contribute significantly to the financing of self-government."¹⁰⁷ The economic component of self-determination is mentioned in Article 1(1) of the ICCPR and ICESCR and stated explicitly in Article 1(2): "[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources. . . . In no case may a people be deprived of its own means of subsistence."¹⁰⁸ The U.N. General Assembly has adopted a series of declarations that have recognized the importance of "the right of peoples and nations to permanent sovereignty over their natural wealth and resources."¹⁰⁹ In its Declaration of December

(requiring states parties to ensure "indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent").

¹⁰⁵ See UNDRIP, *supra* note 95, art. 3 (stating that all indigenous peoples have a right to self-determination); see also *id.* art. 4 (stating that self-determination includes all the "ways and means for financing their autonomous functions"); *id.* art. 26, ¶ 1 (affirming that indigenous peoples have the right to their lands and natural resources); *id.* art. 20, (stating that indigenous peoples have the right to maintain and develop their lands); *id.* art. 23, (stating that indigenous peoples have the right to participate in decisions regarding development); *id.* art. 32 (requiring consultation prior to mineral exploitation); *id.* art. 29 (stating that indigenous peoples have the right to conservation and protection of their environment).

¹⁰⁶ The Royal Commission on Aboriginal Peoples was established in 1991 to address many issues of aboriginal status that had come to light following events such as the Oka Crisis and the Meech Lake Accord. The Commission culminated in a final report of 4,000 pages, published in 1996. For key points of this report, see Indian and Northern Affairs Canada, Highlights of the Report of the Royal Commission on Aboriginal Peoples, <http://www.ainc-inac.gc.ca/ap/pubs/rpt/rpt-eng.asp> (last visited June 3, 2010).

¹⁰⁷ Indian and Northern Affairs Canada, Highlights of the Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, <http://www.ainc-inac.gc.ca/ap/pubs/rpt/rpt-eng.asp> (last visited June 3, 2010). See also *Lands & Resources: The Case for a New Deal*, in ROYAL COMMISSION ON ABORIGINAL PEOPLES' REPORT, VOL. 2: RESTRUCTURING THE RELATIONSHIP (1991), http://www.collectionscanada.gc.ca/webarchives/20071211054613/http://www.ainc-inac.gc.ca/ch/rcap/sg/sh38_e.html#4%20Lands%20and%20Resources (last visited June 3, 2010).

¹⁰⁸ ICCPR, *supra* note 91, art. 1, ¶ 2; ICESCR, *supra* note 92, art. 1, ¶ 2.

¹⁰⁹ See generally U.N. Special Rapporteur for the Subcommittee on Prevention of Discrimination and Protection of Minorities Erica-Irene A. Daes, *Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous Peoples' Permanent Sovereignty over Natural Resources*, ¶ 12, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/Sub.2/2004/30 (July 13, 2004) (stating that "The United Nations has adopted more than 80 resolutions relating to permanent sovereignty over natural resources"). See, e.g., Permanent Sovereignty over National Resources, G. A. Res. 1803 (XVII), ¶ 1, at 15, U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217 (Dec. 14, 1962); Right to Exploit Freely Natural Wealth and Resources, G.A. Res. 626 (VIII) (Dec. 21, 1952) (recognizing the rights of "peoples" to freely "use and exploit their natural wealth and resources"); Recommendations Concerning International Respect for the Rights of Peoples and Nations to Self-Determination, G.A. Res.

1952, the General Assembly recommended that U.N. members should “refrain from acts, direct or indirect, designed to impede the exercise of . . . sovereignty . . . over . . . natural resources.”¹¹⁰ Canadian law has also recognized this principle through the exclusive nature of aboriginal title to lands.¹¹¹ The right to dispose freely of natural resources is a critical element of self-determination.

Beyond simply preventing interference with First Nations’ resources, Canada has an obligation actively to promote the economic development of First Nations. The ICESCR requires states parties to implement the treaty “to the maximum of [their] available resources” to achieve “progressively the full realization of the rights” it protects.¹¹² This obligation includes a responsibility to “promote the realization of the right of self-determination,” which, as explained above, encompasses the right to economic development provided in Article 1 of the Covenant.¹¹³ The Committee on Economic, Social and Cultural Rights (ICESCR Committee) has interpreted the language of the ICESCR as placing an affirmative burden on states parties, including Canada, to promote the economic development of their peoples.¹¹⁴ Economic development should proceed through sustainable development and should be done in a manner consistent with First Nations’ cultures and decisions about the future.

Another important guarantee central to aboriginal rights is that of free, prior, and informed consent. To ensure that economic development occurs in accordance with First Nations’ wishes, the ICESCR Committee has commented that “parties should respect the principle of free, prior and informed consent of indigenous peoples

837 (IX) (Dec. 14, 1954) (recognizing the right of “peoples and nations to self-determination, including . . . their permanent sovereignty over their natural wealth and resources.”).

¹¹⁰ G.A. Res. 626 (VII), ¶ 2, 7 U.N. GAOR, Supp. No. 20, U.N. Doc. A/2361 (Dec. 21, 1952).

¹¹¹ See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, ¶¶ 112-119 (Can.) (describing aboriginal title as encompassing exclusive use).

¹¹² ICESCR, *supra* note 92, art. 2, ¶ 1.

¹¹³ *Id.* art. 1, ¶ 3.

¹¹⁴ See Comm. on Econ., Soc. and Cultural Rights, General Comment No. 3, ¶ 9, U.N. Doc. HRI/GEN/1/Rev.1 (Dec. 14, 1990), *available at*

<http://www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664>. See also PATRICK MONAHAN, POLITICS AND THE CONSTITUTION: THE CHARTER, FEDERALISM AND THE SUPREME COURT OF CANADA 126 (1987) (noting the fiscal implications of judicially enforced social welfare rights). The Canadian government demonstrated its agreement with this view in the arguments it made to oppose strong powers of judicial review for the ICESCR Committee. See Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 10, 226 U.N. Doc. A/HRC/8/7 (May 6, 2008) (explaining “Canada and the United States of America argued that the progressive nature of those rights made it difficult to adjudicate them without interfering with decisions by Governments concerning resource allocation”).

in all matters covered by their specific rights.”¹¹⁵ UNDRIP similarly requires a nation to obtain “free, prior and informed consent” from the indigenous group before the nation passes legislation that affects indigenous lands or natural resources.¹¹⁶ This standard of consent represents an accepted interpretation of the ICESCR and one that Canada could adopt to protect the First Nations’ right to political and economic self-determination. Canada has expressed opposition to the principle, however, and this report does not take a stand on whether aboriginal communities enjoy a right to free, prior, and informed consent in that country.¹¹⁷ Regardless, the right to self-determination requires that First Nations have a special opportunity to participate meaningfully in decisions regarding the use of their lands and natural resources. Therefore, even if Canada is unwilling to adopt the free, prior, and informed consent standard of participation and consultation, the Canadian government has an obligation not to interfere with First Nations’ rights to economic development and self-determination, as well as to take progressive steps towards their full realization.

First Nations’ Right to Enjoy Their Own Cultures

First Nations have not only the right to determine how their lands are used but also the right to use their lands to practice their cultures and to pass them on to future generations. Article 27 of the ICCPR establishes the rights of “ethnic, religious or linguistic minorities . . . to enjoy their own culture, to profess and practise their own religion, or to use their own language.”¹¹⁸ For indigenous peoples, the right to

¹¹⁵ Comm. on Econ., Soc. and Cultural Rights, General Comment No. 21, ¶ 37, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009).

¹¹⁶ UNDRIP, *supra* note 95, arts. 10-11, 19, 28-29, 32.

¹¹⁷ *See, e.g.*, Indian and Northern Affairs Canada, Canada’s Position: United Nations Draft Declaration on the Rights of Indigenous Peoples, <http://www.ainc-inac.gc.ca/ap/ia/pubs/ddr/ddr-eng.asp> (last visited June 3, 2010) (describing the reasons for Canada’s decision to vote against the declaration); Indian and Northern Affairs Canada, Statement—Legal Commentary on the Concept of Free, Prior and Informed Consent, July 20, 2005, <http://www.ainc-inac.gc.ca/ap/ia/stmt/unp/05/pop/lgl-eng.asp> (listing Canada’s objections to the use of free, prior, and informed consent as a standard for participation of indigenous peoples).

¹¹⁸ ICCPR, *supra* note 91, art. 27. The Human Rights Committee again elucidated that Article 27 rights, unlike Article 1 rights, inhere in the individual and not “peoples.” Human Rights Comm., General Comment No. 23, ¶ 3.1, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Aug. 4, 1994), *available at*

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/fb7fb12c2fb8bb21c12563ed004df111](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/fb7fb12c2fb8bb21c12563ed004df111). Although not discussed in depth here, Article 27’s right to practice one’s religion as a minority applies to the situation of First Nations because their connection to the land is a spiritual as well as

enjoy their own cultures is inextricable from their right to use their traditional lands and to participate in decisions relating to their natural resources. The Human Rights Committee has recognized the link between indigenous cultures and traditional lands:

[C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.¹¹⁹

The ICESCR Committee has similarly noted that indigenous cultures are related to the natural environment:

Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity.¹²⁰

The U.N. Special Rapporteur on the Situation of the Rights of Indigenous Peoples has sought to protect the special relationship between many indigenous groups and their natural environment.¹²¹ UNDRIP further articulates international recognition of the close “spiritual relationship” indigenous peoples often have with the land.¹²²

cultural one. The ICCPR also establishes a general right to freedom of religion for all people. ICCPR, *supra* note 91, art. 18.

¹¹⁹ Human Rights Comm., General Comment No. 23, *supra* note 118, ¶ 7. The Human Rights Committee adopted these views from the Lubicon Lake Band in Canada, which asserted that grants of land for timber production violated its Article 27 right to culture. *Forty-fifth Session, Supplement No. 40*, (A/45/40), vol. II, annex IX, sect. A, Communication No. 167/1984 (Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada), views adopted on March 26, 1990.

¹²⁰ Comm. on Econ., Soc. and Cultural Rights, General Comment No. 21, *supra* note 115, ¶ 36. *See also Rio Declaration*, *supra* note 99, princ. 22 (“Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”).

¹²¹ *See generally* Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, <http://www2.ohchr.org/english/issues/indigenous/rapporteur> (last visited June 3, 2010) (listing recent reports that note the need for self-determination and development for indigenous groups in Australia, participation and redress for past wrongs for indigenous peoples in Botswana, and action to prevent discrimination against indigenous peoples in Nepal).

¹²² UNDRIP, *supra* note 95, art. 25. UNDRIP has also explicitly stated that indigenous peoples have rights “to the lands, territories and resources which they have traditionally owned,

As a result of the tie between indigenous peoples' cultures and their practices on traditional lands, states must protect the indigenous peoples' ability to use their lands in order to protect the right to culture. This ability inherently depends on the existence of an environment that is conducive to traditional uses, for example, lands that contain native flora and fauna and clean waters. Thus, protection of the right to culture requires protection of indigenous lands themselves. Environmental protection may be seen either as a means of ensuring indigenous peoples are free to practice their cultures¹²³ or as a right in and of itself: a right to a healthy environment.¹²⁴

occupied or otherwise used or acquired"; these rights include ownership, use, development, and official legal recognition and protection of these rights. *Id.* art. 26.

¹²³ Environmental protection similarly can be seen as required to protect the right to health. For example, as a means of improving human life and health, Article 12(2) of the ICESCR demands that nations take steps to improve environmental and industrial hygiene. ICESCR, *supra* note 92, art. 12, ¶ 2(b). The ICESCR Committee has interpreted the right to an adequate standard of living to encompass the right to water; this interpretation gives rise to a duty to protect the water supply from toxic contamination. *See* Comm. on Econ., Soc. and Cultural Rights, General Comment No. 15, ¶ 8, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003), *available at* <http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94?OpenDocument&Highlight=0,ICESCR> (noting that "Environmental hygiene, an aspect of the right to health under article 12, paragraph 2(b) of the Covenant, encompasses taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions. For example, States parties should ensure that natural water resources are protected from contamination by harmful substances and pathogenic microbes.").

¹²⁴ In addition to supporting the enjoyment of human rights, international law has begun to recognize the right to a healthy environment as a right in itself. The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed a Draft Declaration on Human Rights and the Environment. U.N. Econ. & Soc. Council, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Human Rights and the Environment: Final Report*, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994) (*prepared by* Mrs. Fatma Zohra Ksentini, Special Rapporteur). The U.N. Human Rights Council has created special procedures with mandates related to environmental health, including an independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation. OHCHR, Special Procedures Assumed by the Human Rights Council,

<http://www2.ohchr.org/english/bodies/chr/special/themes.htm> (last visited June 3, 2010).

The right to a healthy environment is also listed in some constitutions. For a non-exclusive list of countries with such constitutional provisions, see Kaniye S.A. Ebeku, *Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: Gbemre v. Shell Revisited*, 16 REV. EUR. COMMUNITY & INT'L ENVTL. L. 312, 312-14 (2008).

Canada's Charter of Rights and Freedoms does not explicitly recognize this right. *See* Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.), *available at* <http://laws.justice.gc.ca/eng/Const/9.html>. In 2006 the Office of the Auditor General of Canada declined to make a determination whether or not § 7 of the Charter could be interpreted to include such a right, asserting that it was not necessary in light of Canada's commitment to protecting the environment and human health. Office of the Auditor General of Canada, Right to Clean Air, Clean Water, and a Healthy Environment, http://www.oag-bvg.gc.ca/internet/English/pet_163A_e_28897.html (last visited June 3, 2010). The Supreme Court of Canada has, however, explicitly endorsed "the right to a safe environment." *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, ¶ 55 (Can.) (referred to with approval in *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, ¶ 124 (Can.)). In the international sphere, Canada has been equivocal with regard to a right to a healthy environment. On the one hand, it is party to

The ICCPR requires states parties to respect and ensure the right to culture.¹²⁵ States must protect indigenous lands against violations not only by government actors but also by third parties, including non-governmental actors such as mining companies.¹²⁶ Furthermore, states are obligated to ensure that their citizens have a judicial remedy for violations of the ICCPR, including violations of the right to culture.¹²⁷ As the Human Rights Committee notes, the enjoyment of the right to culture “may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”¹²⁸ Among these positive measures is an obligation to ensure that the lands and resources necessary for First Nations, including Takla, to practice their cultures are available and protected.

Sustainable Development and the Precautionary Principle

Protecting the right of indigenous peoples to use their traditional lands for economic and cultural development has limited value if those lands become polluted or if their functional ecosystems are destroyed. To some indigenous communities, the land and the environment are inextricably intertwined with their traditions such that meaningful protection requires preserving the quality of those lands. Thus, environmental principles are another critical component for protecting their rights as a people.

the Hague Declaration on the Environment, which recognizes the universal “right to live in dignity in a viable global environment, and the consequent duty of the community of nations vis-à-vis present and future generations to do all that can be done to preserve the quality of the atmosphere.” Hague Declaration on the Environment, Mar. 11, 1989, 28 I.L.M. 1308 (1989). Yet Canada has argued against the recognition of such a right in other international negotiations. *See, e.g.*, Mike Blanchfield, *Our ‘Painful’ Vote Against Clean Water*, OTTAWA CITIZEN, Sept. 21, 2003, at A4.

¹²⁵ ICCPR, *supra* note 91, arts. 1(3) and 2(1).

¹²⁶ *See* Human Rights Comm., General Comment No. 23, *supra* note 118, ¶ 6.1; Comm. on Econ., Soc. and Cultural Rights, General Comment No. 21, *supra* note 115, ¶ 36; *see also id.* ¶ 50(c) (explaining that states parties have the duty to respect and protect the “cultural productions” of indigenous peoples, including protection of their lands from unjust or illegal exploitation by both private and state actors).

¹²⁷ ICCPR, *supra* note 91, art. 2. *See also Rio Declaration*, *supra* note 99, princ. 10 (requiring “[e]ffective access to judicial and administrative proceedings, including redress and remedy” regarding environmental issues).

¹²⁸ Human Rights Comm., General Comment No. 23, *supra* note 118, ¶ 7.

The Convention on Biological Diversity, to which Canada is a party,¹²⁹ recognizes the “close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources” and evinces a commitment to sustainable resource use.¹³⁰ The Stockholm and Rio declarations, both of which Canada assisted in creating and which were adopted unanimously, further articulate international recognition that enjoyment of human rights generally requires environmental preservation.¹³¹ The Rio Declaration draws a link between indigenous peoples and their environment.¹³² The connection between indigenous peoples’ use of their traditional lands and the quality of the environment is explicitly recognized in UNDRIP, which provides a right to conservation of land and calls on states to assist with such conservation.¹³³

In order to protect the environment, and the human rights that depend on the environment, international environmental law articulates two important principles that should inform Canada’s protection of First Nations’ lands and resources: sustainable development and the precautionary principle. Sustainable development is defined as “development that meets the needs of the present without compromising

¹²⁹ Convention on Biological Diversity, List of Parties, <http://www.cbd.int/convention/parties/list/> (last visited June 3, 2010).

¹³⁰ Convention on Biological Diversity, pmbl., *opened for signature* June 5, 1992, 1760 U.N.T.S. 142 (entered into force Dec. 29, 1993), *available at* <http://www.cbd.int/doc/legal/cbd-un-en.pdf> [hereinafter Convention on Biological Diversity].

¹³¹ See U.N. Conference on the Human Environment, June 5-16, 1972, *Stockholm Declaration of the United Nations Conference on the Human Environment*, ¶ 1, U.N. Doc. A/CONF.48/14 (June 16, 1972) [hereinafter *Stockholm Declaration*], *available at* <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503> (“[b]oth aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself.”); *id.* princ. 1 (declaring “the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being.”); U.N. Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Constitution of the Conference*, ¶ 5, U.N. Doc. A/CONF.48/14, *available at* <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1496> (listing Canada as a member of the Preparatory Committee); U.N. Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Proceedings of the Conference*, ¶ 13, U.N. Doc. A/CONF.48/14, *available at* <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1519> (listing Canada as a participant); *Rio Declaration, supra* note 99, princ. 1 (“[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”); STEPHANIE MEAKIN, THE RIO EARTH SUMMIT: SUMMARY OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT (1992), *available at* <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/bp317-e.htm> (discussing Canada’s participation in the Summit).

¹³² *Rio Declaration, supra* note 99, princ. 22.

¹³³ UNDRIP, *supra* note 95, art. 29.

the ability of future generations to meet their own needs.”¹³⁴ Sustainable development imposes fiduciary duties on the state towards First Nations and promotes the combined state and indigenous responsibility to preserve resources for future indigenous generations.¹³⁵ Under the principle of sustainable development, neither First Nations nor the Canadian government should be permitted to destroy traditional resources in favor of short-term economic gain.

The precautionary principle guides decision-making when it is unclear whether a project will destroy traditional resources. The Rio Declaration defines the precautionary principle as the idea that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”¹³⁶ According to this principle, where there is scientific uncertainty regarding the nature or extent of the harms caused by mining on First Nations’ lands, Canada should take a precautionary approach when evaluating mining proposals. It should err on the side of caution to protect First Nations’ right to culture, which is closely linked to a healthy environment, and not to violate the principle of sustainable development by destroying resources for future generations of First Nations.

CANADIAN ABORIGINAL RIGHTS LAW

International human rights and environmental treaties, including those discussed above, bind Canada and set standards for government relations with industry and indigenous peoples. The implementation of such international law in

¹³⁴ World Comm’n on Env’t & Dev., *Our Common Future*, ch. 2, ¶ 1, U.N. Doc. A/42/427 (Aug. 4, 1987), available at <http://www.un-documents.net/ocf-02.htm>.

¹³⁵ See *Rio Declaration*, *supra* note 99, princ. 22 (noting that states should enable indigenous peoples to play a role in “the achievement of sustainable development.”).

¹³⁶ *Id.* princ. 15. This principle is reiterated in the U.N. Framework Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity, to which Canada is also bound. See U.N. Framework Convention on Climate Change, art. 3, princ. 3, *opened for signature* May 9, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994), available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>; U.N. Framework Convention on Climate Change, Canada Ratification Status, <http://maindb.unfccc.int/public/country.pl?country=CA> (showing that Canada has ratified the UNFCCC and the Kyoto Protocol); Convention on Biological Diversity, *supra* note 130 (reinforcing that “lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize [a threat of significant reduction or loss of biological diversity].”).

Canada is often left to domestic bodies and institutions, however.¹³⁷ Thus, in practice, the Canadian Constitution and its subsequent interpretation by the courts provide the country's primary sources of aboriginal law.

Part I of the Canadian Constitution Act of 1982 consists of the Canadian Charter of Rights and Freedoms, which establishes the "rights and freedoms guaranteed to all Canadians,"¹³⁸ none of which may be interpreted to "abrogate or derogate from" aboriginal rights.¹³⁹ Section 35 of Part II explicitly refers to the "rights of the aboriginal peoples of Canada"¹⁴⁰ and makes particular note of the "treaty rights" that First Nations maintain by virtue "of land claims agreements."¹⁴¹ While historically attempts to resolve contested land claims between First Nations and provincial governments have centered on treaty negotiations, many negotiations have failed, leaving litigation in federal courts as the primary venue for resolving land disputes.¹⁴² Therefore, most of the interpretation of Canada's aboriginal rights law comes from judicial decisions.

On the one hand, Canadian jurisprudence has moved in the direction of strengthening First Nations' rights to consultation and accommodation. It thus

¹³⁷ Treaties are not self-executing in Canada, and execution often results in unclear interpretation in the courts. See LAURA BARNETT, LEGAL & LEGISLATIVE AFFAIRS DIVISION, PARLIAMENTARY INFORMATION AND RESEARCH SERVICE, CANADA'S APPROACH TO THE TREATY-MAKING PROCESS 5 (2008), available at <http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0845-e.pdf> ("Turning international law into domestic law is not a self-executing process in Canada."); see also *Attorney General for Canada v. Attorney General for Ontario*, [1937] A.C. 326, 347 (J.C.P.C.) (Can.) ("Labour Conventions Case") ("Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action."), quoted in Stephane Beaulac, *Westphalia, Dualism and Contextual Interpretation: How to Better Engage International Law in Domestic Judicial Decisions* 8 (EUI Working Paper MWP No. 2007/03), available at http://cadmus.eui.eu/dspace/bitstream/1814/6923/1/MWP_2007_03.pdf; Jutta Brunnée & Stephen Toope, *A Hesitant Embrace: The Application of International Law by Canadian Courts*, in 40 CAN. Y.B. INT'L L. 3, 22-42 (Donald M. McRae ed., 2002), cited in Elisabeth Eid and Hoori Hamboyan, *Implementation by Canada of its International Human Rights Treaty Obligations: Making Sense out of the Nonsensical*, in LEGITIMACY AND ACCOUNTABILITY IN INT'L L., PROC. OF THE 33RD ANN. CONF. OF THE CAN. COUNCIL ON INT'L L. (Canadian Council of Int'l Law ed., 2005), available at <http://law.queensu.ca/international/globalLawProgramsAtTheIsc/courseInfo/courseOutlines/internationalHumanRights/cCILPresentation-RevisedFinal1.pdf>.

¹³⁸ PATRICK MACKLEM, INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA 203-04 (2001).

¹³⁹ Part I of the Constitution Act, 1982, § 25, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

¹⁴⁰ Part II of the Constitution Act, 1982.

¹⁴¹ *Id.* § 35(3).

¹⁴² Patricia Ochman, *Recent Developments in Canadian Aboriginal Law: Overview of Case Law and of Certain Principles of Aboriginal Law*, 10 INT'L COMMUNITY L. REV. 319, 320 (2008) (stating that the courts "have been the most important actor in the development of Aboriginal law").

reinforces the international principle that indigenous peoples are entitled to special protections under the law. On the other hand, it has not always provided enough specificity to guarantee adequate safeguards for First Nations. To address this problem, the jurisprudence on rights should be supplemented with statutory or administrative guidelines to remove ambiguity.

Establishing Aboriginal Rights and Title

Aboriginal rights and title, used here as terms of art in Canadian law, represent important approaches to protecting aboriginal use and ownership of traditional lands and resources. Aboriginal title is a type of right, but it provides stronger legal protection in the form of land ownership than do other rights (which have a specific meaning different than under international law). Aboriginal title land is not the same as a federal reserve.¹⁴³ In the 1997 case *Delgamuukw v. British Columbia*, the Supreme Court of Canada described aboriginal title as a unique type of land interest that arises out of aboriginal possession and occupation before British sovereignty—that is, before the imposition of British law in Canada.¹⁴⁴ Aboriginal title is a communal right, a “collective right to land held by all members of an aboriginal nation,”¹⁴⁵ and it includes the right to exclusive use and occupation of land for uses including, but not limited to, those integral to the group’s culture.¹⁴⁶ Although aboriginal title also includes mineral rights¹⁴⁷ and the right to choose how the land is used,¹⁴⁸ current use of the land must not destroy the land for use by future generations.¹⁴⁹ These provisions of aboriginal title mirror First Nations’ international rights to self-determination and culture as well as the sustainable development principle to preserve land for future generations.

¹⁴³ The federal Crown retains legal title to a reserve while the First Nation has beneficial use. By contrast, “aboriginal title is ‘the right to the land itself’” and more closely resembles fee simple private land. For example, while Takla has many reserves it has no proven title land. The two types of land are similar in that “neither can be sold to third parties on the open real estate market without first being ‘surrendered’ to the federal Crown.” E-mail from Murray Browne, Woodward & Co., to Bonnie Docherty, Lecturer on Law and Clinical Instructor, IHRC (June 2, 2010).

¹⁴⁴ *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶¶ 112, 114.

¹⁴⁵ *Id.* ¶ 115.

¹⁴⁶ *Id.* ¶¶ 118–19.

¹⁴⁷ *Id.* ¶ 122.

¹⁴⁸ *Id.* ¶ 168.

¹⁴⁹ *Id.* ¶¶ 126–29.

To prove aboriginal title, a First Nation must show that it possessed or occupied the land at the time when British sovereignty began.¹⁵⁰ Occupation must be exclusive from non-aboriginal settlers; if another First Nation historically occupied the same land, the two communities may gain joint title.¹⁵¹ In some instances it can be difficult to prove occupation before sovereignty, so current occupation may be used as support for historic occupation so long as there is some evidence of continuity based on “substantial maintenance of the connection’ between the people and the land.”¹⁵² In *Delgamuukw*, the Supreme Court eased the evidentiary burden on First Nations by holding that Canada’s laws of evidence should be interpreted flexibly to give oral histories the same weight as historic documents.¹⁵³

While aboriginal title establishes ownership of the land, aboriginal rights as defined by Canadian jurisprudence are based on a connection to the land that does not necessarily rise to the level of title. Therefore, they may provide lesser legal protection, ensuring only the ability of an aboriginal group to conduct traditional activities.¹⁵⁴ To qualify as an aboriginal right in this sense, the activity must be “integral to the distinctive culture of the aboriginal group”¹⁵⁵ and must have been practiced continuously since before British sovereignty.¹⁵⁶ In this test, the term “distinctive” is intended to “incorporate an element of Aboriginal specificity,”¹⁵⁷ but the practice does not need to go “to the core of a society’s identity”: activities pursued as a means of survival may be considered culturally integral.¹⁵⁸ Continuity of practice may be shown by evidence that the activity in question was important to the group’s culture before contact with Europeans. Continuity, however, does not require aboriginal activities be “frozen in time.”¹⁵⁹ There is some flexibility for traditional activities to evolve: “Changes in method do not change the essential character of the practice.”¹⁶⁰

¹⁵⁰ *Id.* ¶ 143.

¹⁵¹ Ochman, *supra* note 142, at 325.

¹⁵² *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶¶ 152–53 (quoting *Mabo v. Queensland* (1992) 107 A.L.R. 1 (Austl.)).

¹⁵³ Ochman, *supra* note 142, at 325.

¹⁵⁴ *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶¶ 138–39.

¹⁵⁵ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, ¶ 46 (Can.).

¹⁵⁶ Ochman, *supra* note 142, at 321.

¹⁵⁷ *Id.* at 330.

¹⁵⁸ *Id.* at 340.

¹⁵⁹ *Id.* at 328, 330.

¹⁶⁰ *R. v. Morris*, [2006] S.C.R. 915, ¶ 33 (Can.), *quoted in id.* at 334.

Aboriginal rights in Canada are not unlimited. Like aboriginal title, aboriginal rights are communal and must be exercised by individuals with the intent to “assist the Aboriginal society in preserving its distinct character.”¹⁶¹ Under this limitation, for example, in *R v. Sappier* and *R. v. Gray*, the Supreme Court of Canada recognized a right for individuals to log for personal use,¹⁶² but in *R. v. Marshall* and *R. v. Bernard*, it found that the Mi’kmaq Indians’ aboriginal rights did not include the right to log commercially because commercial logging was not a traditional activity of the Mi’kmaq.¹⁶³ For a First Nation to prove that an activity is a traditional activity that qualifies as an aboriginal right, it must prove that the activity is integral to cultural traditions that have been practiced since before contact with Europeans.¹⁶⁴ In practice, however, this proof is often fulfilled by proof of occupancy.¹⁶⁵

The method of proving both aboriginal rights and title therefore most often turns on occupancy and proof of traditional use of the land. The determination whether continuous occupancy provides aboriginal rights or title is sometimes conceived of in terms of the intensity of the First Nation’s use of the land. In 2005, the Supreme Court of Canada established that when use of an area falls short of “intensive use,” it will usually confer aboriginal rights rather than title.¹⁶⁶ This distinction could present a challenge for many First Nations, who use different portions of their vast territories during different seasons and therefore could have difficulty establishing “intensive use” of an entire territory. In 2007, however, the B.C. Supreme Court suggested that intensive use may be found where a community has established villages, cultivated medicinal plants, or created a network of trails and waterways.¹⁶⁷ This test for intensive use may make it easier for First Nations to be able to prove aboriginal title, which confers exclusive use of the land, and it may therefore help protect First Nations’ lands against invasive mining practices.

¹⁶¹ Ochman, *supra* note 142, at 329 (citing *R. v. Sappier*, *R. v. Gray*, [2006] 2 S.C.R. 686, ¶¶ 24–26 (Can.)).

¹⁶² *Sappier*, *Gray*, 2 S.C.R. 686, at ¶¶ 24–26.

¹⁶³ *R. v. Marshall*, *R. v. Bernard*, [2005] S.C.R. 220 (Can.); *see also* Ochman, *supra* note 142, at 324, 327.

¹⁶⁴ *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶ 144; *Van der Peet*, [1996] 2 S.C.R. 507, ¶ 60.

¹⁶⁵ *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶ 142.

¹⁶⁶ Ochman, *supra* note 142, at 326.

¹⁶⁷ *Id.* at 339 (citing *Tsilhqot’in Nation v. British Columbia*, [2007] B.C.S.C. 1700, ¶ 960 (Can.)).

Protection of Aboriginal Rights and Title versus Justified Infringement

Canadian First Nations often see aboriginal rights and title as offering protection against government and corporate incursions onto their lands, particularly from potentially damaging extraction activities such as mining and forestry. They also point to court rulings and statements from respected sources that suggest aboriginal rights and title provide a secure foundation for each First Nation's territory, culture, health, and prosperity. For example, the Report of the Canadian Royal Commission on Aboriginal Peoples recommended that aboriginal peoples should have enough land "to give them something to call 'home'—not just adequate physical space but a place of cultural and spiritual meaning as well[—]to allow for traditional pursuits, such as hunting and trapping, [to provide] resources for economic self-reliance, [and] to contribute significantly to the financing of self-government."¹⁶⁸ During a visit to Canada in 2004, however, the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, noted that Canada had still failed to achieve this goal.¹⁶⁹

Even when a First Nation overcomes the evidentiary hurdles and proves aboriginal rights or title, the protections are not absolute. This limitation was first established in the 1990 case *R. v. Sparrow*. The Supreme Court of Canada held that infringement of aboriginal rights and title may occur unless it is "unreasonable," imposes "undue hardship," or denies the holder of the "preferred means of exercising that right."¹⁷⁰ Even if such factors are shown, the government may prove the infringement is still justified. The *Sparrow* test for justification of infringement first asks whether there is a valid legislative objective and then considers whether the particular regulation gives priority to First Nations, infringes as little as possible, provides fair compensation in case of expropriation, and occurs after appropriate consultation.¹⁷¹ The Court set out a test that enables the government to infringe on

¹⁶⁸ Highlights from the Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, *supra* note 107. See also *Lands & Resources*, *supra* note 107.

¹⁶⁹ U.N. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, on his Mission to Canada*, ¶ 42, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2005/88/Add.3 (Dec. 2, 2004).

¹⁷⁰ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, ¶ 70 (Can.).

¹⁷¹ *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶¶ 160–62.

aboriginal rights if it meets these key elements of the test. The Supreme Court decision in *Sparrow* left significant room for future decisions on justification, although it stated that the infringement analysis must be developed based on “sensitivity to and respect for the rights of aboriginal peoples.”¹⁷² In practice, this lack of clarity of and detail on the infringement analysis has meant that, in order to prevent infringement upon their rights, First Nations often have to resort to litigation, a strategy that has been both costly and time consuming. Even if successful, litigation may not produce a solution in time to prevent the harms caused by infringement. First Nations may seek more timely injunctions to prevent contested use of titled land, but Canadian courts have generally refused to grant such injunctions to protect aboriginal rights and title.¹⁷³ Their refusal may indicate the lack of a presumption in favor of heightened scrutiny for indigenous communities.

Since the 1990 *Sparrow* decision, a series of court cases has continued to develop the case law on infringement of aboriginal rights and title.¹⁷⁴ In the 1997 *Delgamuukw* decision, the Supreme Court of Canada ruled on the infringement test in *Sparrow* as it applies to aboriginal title. The Court pointed out that aboriginal title is distinguishable from aboriginal rights for at least three reasons: first, it “encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable economic component.”¹⁷⁵

In light of the special nature of aboriginal title, the Supreme Court of Canada refined the infringement test. On the one hand, the Court stated that aboriginal title could be infringed on for a broad range of legislative purposes including mining. On the other hand, the Court mandated a greater focus on ensuring the government’s

¹⁷² *Sparrow*, [1990] 1 S.C.R. 1075, ¶ 83.

¹⁷³ Dominique Nouvet, The Duty to Consult and Accommodate: Overview of the Current Law, Presentation at the Pacific Business & Law Institute Mining in Aboriginal Communities Conference, Vancouver, B.C. 17, March 11–12, 2009, *available at* http://landkeepers.ca/images/uploads/reports/PBLI_paper_on_Consultation_and_Accommodation.pdf. *See also* Kitkatla Band v. Canada (Minister of Fisheries and Oceans), [2000] 181 F.T.R. 172, ¶¶ 18–20 (Can.) (finding that allowing a fishery to be developed would violate the Kitkatla’s right to priority in fishing, but refusing to issue an injunction against the fishery on the grounds that the First Nation did not demonstrate that it would suffer irreparable harm if the fishery was developed).

¹⁷⁴ *See* Ochman, *supra* note 142, at 349.

¹⁷⁵ *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶ 166.

fiduciary duty toward First Nation people has been met¹⁷⁶ and on providing fair economic compensation for the infringement.¹⁷⁷ The Court's ruling on fiduciary duty and consultation requirements are relevant to mining:

[T]he fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. . . . The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases . . . it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. . . . [T]his consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.¹⁷⁸

Thus, heightened scrutiny appears to exist in some circumstances, though this passage does not supply complete clarity on when it occurs in the mining context.

In 2004, the cases *Haida Nation v. British Columbia* and *Taku River Tlingit First Nation v. British Columbia* further specified the timing, scope, and procedures required to demonstrate adequate consultation and accommodation by the government.¹⁷⁹ In *Haida*, the Supreme Court of Canada held that the government has a duty to consult and possibly accommodate aboriginal peoples at the time when those peoples assert rights and title subject to infringement, even if the rights and title have not yet been proven in court.¹⁸⁰ The duty to consult with aboriginal peoples arises as soon as “the Crown has knowledge, real or constructive, of the *potential* existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”¹⁸¹ The Court reasoned that if the government were not required to take asserted rights into account, it would risk granting First Nations lands that had been stripped of natural

¹⁷⁶ *Id.* at ¶¶ 160–62.

¹⁷⁷ *Id.* See also Nouvet, *supra* note 173.

¹⁷⁸ *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶ 168.

¹⁷⁹ *Haida*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 (Can.).

¹⁸⁰ The *Haida* case arose when the government renewed and then transferred a Tree Farm License (TFL) several times without the consent and over the objections of the Haida people between 1994 and 1999. At the time of the lawsuit, the Haida people had claimed title to their traditional homeland on the Queen Charlotte Islands, but the claim was still in process and the title was not yet recognized. *Haida*, [2004] 3 S.C.R. 511.

¹⁸¹ *Id.* ¶ 35 (emphasis added).

resources and traditional meaning.¹⁸² This duty is imposed primarily on the federal government but also extends to provincial governments when they have jurisdiction over the land at issue.¹⁸³

The *Haida* Court found that the scope of the government's duty to consult and accommodate aboriginal peoples depends upon the "strength of the case supporting the existence of the right or title" and "the seriousness of the potentially adverse effect" upon that right or title.¹⁸⁴ The Court established a spectrum: when the claim is weak, the significance of the asserted right limited, and the potential adverse impact minor, the duty is simply "to give notice, disclose information, and discuss" the potential infringement and any First Nations' concerns.¹⁸⁵ When the claim is strong, the asserted right significant, and the potential adverse impact serious, the government has a duty to conduct "deep consultation," potentially including the "opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision."¹⁸⁶ Near the strong end of the spectrum, deep consultation may also require accommodation. For cases falling between the two extremes, the level of consultation required is decided on a case-by-case basis.¹⁸⁷ Accommodation is a term that the law does not clearly define, but which has been interpreted as encompassing everything from minor mitigation to compensation.¹⁸⁸

The application of this spectrum test is demonstrated in *Taku River Tlingit First Nation v. British Columbia*. In *Taku River*, the Supreme Court of Canada held that merely following legislative requirements for consultation with First Nations, such as those provided in the B.C. Environmental Assessment Act, may not be sufficient to discharge the government's duty to consult and accommodate aboriginal peoples.¹⁸⁹ Rather, the consultation and accommodation efforts should be judged by their reasonableness and by the extent to which government efforts are meaningful and go

¹⁸² *Id.* ¶ 33.

¹⁸³ *Id.* ¶ 59.

¹⁸⁴ *Id.* ¶ 39.

¹⁸⁵ *Id.* ¶ 43.

¹⁸⁶ *Id.* ¶ 44.

¹⁸⁷ *Id.* ¶ 45.

¹⁸⁸ E-mail from Murray Browne (June 2, 2010), *supra* note 143.

¹⁸⁹ Nouvet, *supra* note 173.

beyond baseline consultation procedures intended for the general public.¹⁹⁰ The Court also held that even in a situation that falls on the stringent end of the spectrum outlined in *Haida*, the government may discharge its duty to consult and accommodate by involving the First Nation in the review process and assisting First Nation leadership in contacting other government agencies.¹⁹¹

The *Haida* and *Taku River* decisions both noted that the duty to consult and accommodate requires good faith by all parties. The duty includes “good faith efforts to understand each other’s concerns and move to address them.”¹⁹² There is no duty for the government and aboriginal peoples to reach an agreement during the consultation procedures. Consultation, however, must be more than simply an opportunity for First Nations leaders to “blow off steam.”¹⁹³ While the government may advocate strongly for its position, it must enter negotiations willing to “make changes to its proposed action,”¹⁹⁴ and the First Nations must not take unreasonable positions or seek to frustrate the negotiation process. Accommodation, similarly, “requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns.”¹⁹⁵

The recent B.C. Supreme Court ruling in *Tsilhqot’in Nation v. British Columbia* was the first ruling on aboriginal title since *Delgamuukw*.¹⁹⁶ The Court ruled that the provincial government in British Columbia did not have the constitutional competence to infringe aboriginal title because, under the Canadian Constitution, such title falls within exclusive federal jurisdiction.¹⁹⁷ While the facts of the case involved the Forestry

¹⁹⁰ *Taku River*, [2004] 3 S.C.R. 550, ¶ 2; *Dene Tha’ First Nation v. Canada (Minister of Environment)*, [2006] 378 N.R. 251, ¶ 104 (Can.).

¹⁹¹ *Taku River*, [2004] 3 S.C.R. 550.

¹⁹² *Haida*, [2004] 3 S.C.R. 511, ¶ 49.

¹⁹³ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.C. 69, ¶ 54 (Can.). See also *Nouvet*, *supra* note 173, at 7.

¹⁹⁴ *Haida*, [2004] 3 S.C.R. 511, ¶ 46. See also *Nouvet*, *supra* note 173, at 7.

¹⁹⁵ *Taku River*, [2004] 3 S.C.R. 550, ¶ 2.

¹⁹⁶ *Tsilhqot’in*, [2007] B.C.S.C. 1700. The Court did not grant aboriginal title to the claimant *Tsilhqot’in Nation* due to a technicality in the pleadings. The claimant had originally made what Justice Vickers termed an “all or nothing claim” to the entire areas of Tachelach’ed (Brittany Triangle) and the Trapline Territory. *Tsilhqot’in Nation* later attempted to refine its claim to smaller areas that it defined within these territories. The Court deemed the proposed change a reframing of the case that would be prejudicial to defendants. Justice Vickers, however, stated the *Tsilhqot’in* had provided sufficient evidence to prove title to more than 200,000 hectares of its territory.

¹⁹⁷ *Id.* ¶ 1031 (“The *Forest Act*, an Act of general application, cannot apply to Aboriginal title land because the impact of its provisions all go to the core of Aboriginal title. The management, acquisition, removal and sale of this Aboriginal asset falls within the protected core of federal jurisdiction.”).

Act, its logic applies equally to mining. *Tsilhqot'in* implies that the provincial government in British Columbia has no jurisdiction to authorize mining on aboriginal title land or to justify any infringements for mining purposes on such lands. As of September 2010, the *Tsilhqot'in* case was being appealed to the B.C. Court of Appeal, with the potential to be heard in November 2010, but it will remain the law unless the appeals court decides otherwise.¹⁹⁸

Under current case law, therefore, federal and provincial governments have a duty to provide special protections for First Nations. The government must consult with First Nations as soon as it has notice that an action may infringe on an aboriginal right or title. Such consultation must be reasonable, must be greater than that extended to the general non-indigenous population, and must be conducted in good faith by both parties. The government may infringe on aboriginal rights and title if it meets the *Sparrow* test and its progeny for infringement, that is 1) there is a significant governmental interest for doing so; 2) infringement prioritizes First Nations and involves consultation and compensation; 3) the infringement is not unreasonable and does not impose an undue hardship upon the First Nations; and 4) the infringement does not deny the right holder of the preferred means of exercising a right. In the case of significant infringement of aboriginal rights and title, however, the government may be required to provide accommodation, such as compensation, mitigation, or benefit sharing, to the affected First Nations.

Canadian case law establishes certain special protections for First Nations and plays an important role in articulating a domestic regime of aboriginal rights, using the term here in the broad sense. While the courts make clear that at least some circumstances require consultation, stakeholders still lack specific guidance on its meaning. A statute or regulation codifying Canadian common law on aboriginal rights could provide more detailed direction on what is required to meet the consultation obligations. Such a statute or regulation would thus facilitate implementation of the protections without requiring First Nations to turn to expensive and time-consuming litigation for clarity. A statute or regulation would at the same time reinforce the rights protected in international and Canadian constitutional law, especially if it articulated this goal in its stated purpose.

¹⁹⁸ Devlin Gailus Barristers and Solicitors, *Litigation: Tsilhqot'in v. British Columbia*, <http://www.devlingailus.com/litigation/Tsilhqot'in/Tsilhqot'in.html> (last visited Sept. 23, 2010).

Despite the ambiguity that continues to exist with the Canadian and B.C. legal frameworks, both international law and Canadian constitutional law articulate several key aboriginal rights. They include the rights of First Nations to use their lands, to participate in decisions regarding their lands and natural resources, and to have a healthy environment in order to promote economic and cultural development and protect traditions. The rest of this report will examine how those rights have been implemented—or not—in the case of mining in British Columbia.

V. PROVINCIAL REGULATION OF THE MINING PROCESS

From claim registration to permitting to closure, B.C. mining laws have created an unbalanced system that provides advantages to industry at the expense of First Nations. The legal regime has weighed in miners' favor, given much discretion to very few government officials, not allowed for adequate consultation with First Nations, and failed to curb the industry's cumulative effects on the environment. It thus has not provided First Nations, such as Takla, viable avenues that they can use to protect their interests or the environment from the burdens of mining. B.C. mining law has fallen far short of ensuring that projects that affect indigenous peoples receive the heightened protection required under international law, and therefore the law has threatened First Nations' rights to control and use their land as well as to preserve their culture and way of life. The B.C. legal framework has also generally failed to meet Canada's own constitutional case law standards on government consultation and accommodation.

FEDERAL AND PROVINCIAL POWERS

Canada's government consists of a federal system with authorities distributed among the central government, ten provincial governments, and three territorial governments. The term "the Crown" refers to either the central or provincial governments. This fragmented authority complicates the governance of mining that affects aboriginal lands. The federal government has jurisdiction over issues related to aboriginal peoples, but provincial governments have primary jurisdiction over natural resources, including minerals. The provincial authority includes "the legal power to control virtually all aspects of mining"¹⁹⁹ and the right to collect royalties from developers of mineral resources.²⁰⁰ Federal laws only apply in limited cases.²⁰¹ "[A]ll

¹⁹⁹ COLIN CHAMBERS & MARK WINFIELD, *MINING'S MANY FACES: ENVIRONMENTAL MINING LAW AND POLICY IN CANADA* 14 (2000), *available at* <http://www.cielap.org/pdf/mining.pdf>.

²⁰⁰ ENVTL.-ABORIGINAL GUARDIANSHIP THROUGH LAW AND EDUC. & ENVTL. MINING COUNCIL OF B. C., *BENEATH THE SURFACE: ABORIGINAL RIGHTS AND MINING LAW IN BRITISH COLUMBIA* 23-24 (2001) [hereinafter *BENEATH THE SURFACE*].

federal and provincial laws must comply with [the Constitution],”²⁰² however, and Canada has relevant international obligations that bind the provincial as well as federal governments.

Surface and subsurface rights to land are separate in British Columbia, so minerals generally “belong to the provincial government” regardless of who owns the surface area.²⁰³ Exceptions to this general rule include minerals on federal land (such as First Nations’ reserves) or on land for which First Nations have proven their rights and title in court or negotiated their rights and title and had them set out in a treaty.²⁰⁴ Access to First Nations’ reserves, land set aside by the Crown for the “use and benefit of a band,” is restricted.²⁰⁵ Reserves, however, are quite small compared to traditional territories, lands that First Nations have used for generations yet do not privately own under the law. The reserve at Takla Landing encompasses only about 0.63 square kilometers,²⁰⁶ and the area of all of Takla’s reserves totals 8.1 square kilometers.²⁰⁷ By contrast, its traditional territory spans 27,250 square kilometers.²⁰⁸ Developers have nearly unfettered access to the portions of traditional territories outside of reserves.

²⁰¹ The federal government has authority over mining only in limited circumstances, such as mining activity that occurs on federal lands or in territories or that straddles a provincial boundary. When a proposed project threatens fish or migratory birds or their habitat or interferes with navigable waterways, a federal environmental assessment may be required before the project is approved. CHAMBERS & WINFIELD, *supra* note 199, at 14. Unless the project is on federal lands, however, agreements between the provincial and federal governments give British Columbia authority over the administration of environmental assessment process. Canadian Environmental Assessment Agency, Canada-British Columbia Agreement for Environmental Assessment Cooperation, <http://www.acee-ceaa.gc.ca/default.asp?lang=En&n=EA76AACC-1> (last visited June 3, 2010).

²⁰² BENEATH THE SURFACE, *supra* note 200, at 11.

²⁰³ B.C. MINISTRY OF ENERGY, MINES AND PETROLEUM RESOURCES, FACTSHEET: INFORMATION FOR FREE MINERS AND MINERAL TITLE HOLDERS: NOTICE FOR ACCESS ON PRIVATE LAND 1 (May 7, 2008), http://www.empr.gov.bc.ca/Titles/MineralTitles/Documents/Factsheet_LON_Miners.pdf.

²⁰⁴ BENEATH THE SURFACE, *supra* note 200, at 25.

²⁰⁵ Indian Act, R.S.C., ch. I-5, § 2(1) (defining a reserve as “a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band”). For more information on the regulation of mining on reserves, see the BENEATH THE SURFACE, *supra* note 200, at 28–29.

²⁰⁶ Indian and Northern Affairs Canada, Reserves/Settlements/Villages, http://pse5-esd5.ainc-inac.gc.ca/fnp/Main/Search/FNReserves.aspx?BAND_NUMBER=608&lang=eng (last visited June 4, 2010).

²⁰⁷ Ministry of Aboriginal Relations and Reconciliation, Carrier Sekani Tribal Council, http://www.gov.bc.ca/arr/firstnation/carrier_sekani/default.html (last visited June 4, 2010).

²⁰⁸ Takla Lake First Nation, Our Territory, *supra* note 15.

LAND-USE PLANNING

Land and Resource Management Plans have set the stage for mining by determining what land in British Columbia is open to which activities. The Integrated Land Management Bureau of British Columbia initiated the LRMP program in the early 1990s, but over the past few years has started to wind it down.²⁰⁹ The Bureau provided First Nations with an opportunity to participate in the process, but very few did.²¹⁰ While apparently receptive to different viewpoints on paper, the process has been the subject of criticism from First Nations advocates. Murray Browne, a lawyer who represents many First Nations, including Takla, and the B.C. Treaty Commission, an “independent and neutral body responsible for facilitating treaty negotiations among the governments of Canada, BC and First Nations in BC,”²¹¹ have both cited a number of problems with the LRMP process. According to the B.C. Treaty Commission, the first round of LRMPs, completed between 1992 and 1995, failed to involve First Nations in “most cases.”²¹² Browne said that this lack of involvement left the plans with “very little legitimacy.”²¹³ While First Nations received invitations to participate in the LRMP process as “stakeholders,” according to Browne, many “declined because the process was not a joint planning process.”²¹⁴ The B.C. Treaty Commission noted that many First Nations preferred “government-to-government negotiations on land issues” over the LRMP process.²¹⁵ To address these concerns, the government has reworked a few of the plans through a joint planning process with more input from First Nations, but so far has only addressed the plans for the central and north coast areas.²¹⁶ Browne described the new land-use planning process as a

²⁰⁹ For more information on LRMPs’ history and replacement, Strategy Land and Resource Planning, which pledges increased involvement for First Nations, see INTEGRATED LAND MANAGEMENT BUREAU, B.C. MINISTRY OF AGRICULTURE AND LANDS, A NEW DIRECTION FOR STRATEGIC LAND USE PLANNING IN BC: SYNOPSIS (2006).

²¹⁰ FOREST PRACTICES BOARD, PROVINCIAL LAND USE PLANNING: WHICH WAY FROM HERE?, FPB/SR/34, at 5 (November 2008). See also Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 89.

²¹¹ B.C. Treaty Commission, *About Us*, http://www.bctreaty.net/files/about_us.php (last visited Sept. 20, 2010).

²¹² B.C. Treaty Commission, *Land and Resources*, http://www.bctreaty.net/files/issues_landres.php (last visited Sept. 20, 2010).

²¹³ Telephone Interview with Murray Browne, *supra* note 59.

²¹⁴ E-mail from Murray Browne, Woodward & Co., to Bonnie Docherty, Lecturer on Law and Clinical Instructor, IHRC (Apr. 23, 2010).

²¹⁵ B.C. Treaty Commission, *Land and Resources*, *supra* note 212.

²¹⁶ Telephone Interview with Murray Browne, *supra* note 59. The revised plans include a Central Coast LRMP and a Haida Gwaii Strategic Land Use Implementation Plan. “Province

“vast improvement” over the earlier one but said he understood that “the provincial government has stated these new processes are not available to other First Nations.”²¹⁷

To present an alternative to the LRMPs, some First Nations have completed their own land-use plans, and at least one (for the Squamish First Nation) has received judicial recognition.²¹⁸ Enforcing these plans, however, can require direct action and litigation, which many First Nations are unable to afford.

STAGES OF THE MINING PROCESS

Phase I: Claim Registration—Free Entry and the Mineral Tenure Act

Overview

The first step in the mining process itself is registering (also called staking) a claim to the minerals under a given piece of land, which gives the miner exclusive rights to explore for and extract subsurface minerals within the claim.²¹⁹ The registration system is governed by a permissive free entry regime, as codified in the Mineral Tenure Act (MTA) of 1996.²²⁰ Free entry describes a mining regime in which virtually any person has a right to “freely access lands and resources for mining purposes.”²²¹ Therefore, entrepreneurs or companies in Canada can “prospect most lands, acquire mineral rights by staking claims, and mine discovered ore deposits, often irrespective of who occupies, uses or owns the lands.”²²² While this system has been tempered somewhat over time by environmental regulations and recognition of First Nation rights, the dominance of the free entry regime for mining in Canada has

Announces New Vision for Coastal B.C.,” News Release, Feb. 7, 2006, *available at* http://www2.news.gov.bc.ca/news_releases_2005-2009/2006AL0002-000066.htm; “Sustainable Land-Use Agreement Reached for Haida Gwaii,” News Release, Dec. 12, 2007, *available at* http://www2.news.gov.bc.ca/news_releases_2005-2009/2007OTP0197-001608.htm (last visited May 30, 2010).

²¹⁷ E-mail from Murray Browne (Apr. 23, 2010), *supra* note 214.

²¹⁸ Telephone Interview with Murray Browne, *supra* note 59.

²¹⁹ BENEATH THE SURFACE, *supra* note 200, at 42, 44.

²²⁰ Mineral Tenure Act, R.S.B.C. ch. 292.

²²¹ Ugo Lapointe, *Origins of Mining Regimes in Canada & the Legacy of the Free Mining System 2*, Presentation at the Conference Rethinking Extractive Industry: Regulation, Dispossession, and Emerging Claims, The Centre for Research on Latin America and the Caribbean and the Extractive Industries Research Group (Mar. 5-7, 2009), *available at* <http://www.yorku.ca/cerlac/EI/papers/Lapointe.pdf> [hereinafter Lapointe, *Origins*].

²²² *Id.* at 9. See also Mineral Tenure Act, R.S.B.C. ch. 292, pt. 2(11).

not fundamentally changed since its development during the gold rushes of the late 1800s.²²³

The MTA assumes that all public, or Crown, lands owned by the provincial or federal governments are open for exploration, with a few exceptions.²²⁴ Crown lands are vast—94 percent of British Columbia’s land is public,²²⁵ and 84 percent of the province is available for prospecting.²²⁶ Virtually anyone can become a “free miner” in British Columbia. The MTA requires that prospectors either be Canadian corporations or be individuals who are 18 years old and residents of Canada for half of each year or are authorized to work in Canada; free miners must also pay a small fee, ranging from CDN\$25 for an individual to CDN\$500 for a corporation.²²⁷

Since the 2005 advent of British Columbia’s Mineral Titles Online system, as one conservation group observes, anyone with a “free miner certificate, an internet connection, and a credit card” can register a mineral claim.²²⁸ The B.C. Ministry of Energy, Mines and Petroleum Resources describes the system as designed to meet industry and government needs by making it “easier for miners to find, acquire, explore, and develop properties.”²²⁹ A user-friendly website offers tutorials on a number of different MTO processes and online features.²³⁰ Thus far, the MTO has demonstrated its success in meeting its stated objectives by generating huge savings

²²³ Lapointe, *Origins*, *supra* note 221, at 4.

²²⁴ For example, land occupied by a building, the yard of a house, a farm, an orchard, land already used for other mining purposes, “protected heritage property,” and park land are off limits. Restrictions also apply to provincial parks and recreation areas. Mineral Tenure Act, R.S.B.C. ch. 292, pt. 2(11).

²²⁵ Prospectors & Developers Ass’n of Can., British Columbia, Protected Areas, Lands and Regulations, Issues & Advocacy, <http://www.pdac.ca/pdac/advocacy/land-use/pa-bc.html> (last visited June 4, 2010).

²²⁶ Ramsey Hart, Editorial, *B.C. Should Make Things Right with First Nations during Mining Slowdown*, STRAIGHT.COM, Mar. 2, 2009, <http://www.straight.com/article-203932/ramsey-hart-bc-should-make-things-right-first-nations-during-mining-slowdown>.

²²⁷ Mineral Tenure Act, R.S.B.C. ch. 292, pt. 2(8)(d)(a); B. C. Ministry of Energy, Mines and Petroleum Resources, Information Update: No. 1—Free Miner Certificate, *available at* <http://www.empr.gov.bc.ca/Titles/MineralTitles/InformationUpdates/Pages/InformationUpdateNo1.aspx> (last visited June 4, 2010); *see also* BENEATH THE SURFACE, *supra* note 200, at 36.

²²⁸ INT’L BOREAL CONSERVATION CAMPAIGN, MINERAL EXPLORATION CONFLICTS IN CANADA’S BOREAL FOREST 7 (May 2008), <http://www.borealcanada.ca/documents/MiningExplorationConflicts-Report-May2008.pdf>.

²²⁹ B. C. Ministry of Energy, Mines and Petroleum Resources, Mineral Titles Online: Introduction to MTO, <http://www.empr.gov.bc.ca/Titles/MineralTitles/mto/about/intro/Pages/default.aspx> (last visited June 4, 2010).

²³⁰ *See, e.g.*, B. C. Ministry of Energy, Mines and Petroleum Resources, Mineral Titles Online: Help Guide, <http://www.empr.gov.bc.ca/Titles/MineralTitles/mto/Help/Pages/default.html> (last visited June 4, 2010).

for the mining industry. By eliminating the need to travel to a site and physically mark one's claim, the MTO system is estimated to have saved the mining industry CDN\$8.5 million annually.²³¹ The savings increase to CDN\$35 million per year if one accounts for the reduction in costs for "complaint adjudication, field surveys," and erroneous decisions made based on outdated maps or title information.²³²

The MTO system has also prompted a "record-breaking level of staking activity."²³³ MTO began on January 12, 2005,²³⁴ and in the eight days that followed, miners registered 3,100 claims that covered more hectares than all of the previous year's claims combined.²³⁵ A staff member at MEMPR confirmed that MTO has resulted in an increase in the amount and area of claims staked.²³⁶ As Chris Warren, operations director of the mining company CJL Enterprises, observed, MTO produced "quite a boom" in claim registration.²³⁷

Debate over Free Entry and the MTO System

Primacy of Mining

The free entry system has become outdated, and British Columbia needs a background regime that better protects the environment and the rights of First Nations. The system seems to have given mining primacy over most other land uses.

²³¹ Inst. of Pub. Admin. in Can., Innovative Management Award: 2007 Finalist, http://www.ipac.ca/Award_InnovativeManagement2007MineralLand.

²³² *Id.*

²³³ *Mineral Titles Online BC*, THE EXPLORATIONIST (Ont. Prospectors Ass'n, Thunder Bay, Ont.), Mar. 2006, at 2 available at <http://www.ontarioprospectors.com/publications/0603-Explorationist.pdf>.

²³⁴ B.C. Ministry of Energy, Mines and Petroleum Resources, Mineral Titles Online, <http://www.empr.gov.bc.ca/Titles/MineralTitles/mto/Pages/default.aspx> (last visited Sept. 20, 2010).

²³⁵ Will Horter, *Online Mineral Staking in Conflict with Supreme Court Ruling*, PEACE, EARTH & JUSTICE NEWS, Jan. 21, 2005, <http://www.pej.org/html/modules.php?op=modload&name=News&file=article&sid=1588&mode=thread&order=0&thold=0>. Some attribute at least part of this increase to other factors, including record-high mineral prices and the B.C. government's efforts to promote mineral exploration in the province. See Editors [sic] Comment on *Mineral Titles Online BC*, THE EXPLORATIONIST (Ont. Prospectors Ass'n, Thunder Bay, Ont.), Mar. 2006, at 2 available at <http://www.ontarioprospectors.com/publications/0603-Explorationist.pdf>.

²³⁶ E-mail from staff member #2 of Ministry of Energy, Mines and Petroleum Resources, B.C., to Bonnie Docherty, Lecturer on Law and Clinical Instructor, IHRC (May 7, 2010).

²³⁷ Telephone Interview with Chris Warren, Operations Director, and Lorne Warren, President, CJL Enterprises (Mar. 30, 2010).

Free entry leaves all land open to mining unless it is specifically withdrawn and therefore embodies the presumption that mining is an appropriate use of land.²³⁸ The adoption of MTO further illustrates that mining is a favored activity because it makes claim registration even easier.

Inadequate Consultation

Because the MTO system allows miners to register claims from anywhere in the world, miners have gained legal access to First Nations' traditional territories without confronting a specific consultation requirement or even determining whether people use the land at issue. Prior to the MTO system, prospectors had to visit the land personally to register a claim, which meant that First Nations were more likely to find out who was on their land. Since adoption of MTO, First Nations communities have borne the burden of determining who has registered claims and may be conducting work in their traditional territories.

While the MTO system may have some advantages, First Nations advocates have objected to it. Government and industry representatives have contended that the MTO system has had the benefit of reducing disturbances on the land since prospectors can register a claim without physically traveling to and staking a given site.²³⁹ Pierre Gratton, President and CEO of the Mining Association of British Columbia (MABC) noted that the system has been "more transparent" because claims are recorded online.²⁴⁰ Regarding the lack of consultation, a staff member of MEMPR defended MTO, arguing that First Nations had had the opportunity to consult during the earlier LRMP process that decided what land would be open to mining.²⁴¹ The LRMP argument has fallen short, however, because, as discussed above, the process largely failed to engage many First Nations. First Nations lawyer Murray Browne told IHRC researchers that he understands aboriginal rights case law to establish a general

²³⁸ NIGEL BANKES & CHERYL SHARVIT, ABORIGINAL TITLE AND FREE ENTRY MINING REGIMES IN NORTHERN CANADA 13–14 (Northern Minerals Program Working Paper No. 2, 1998).

²³⁹ Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 89; Telephone Interview with Pierre Gratton, President and CEO, and Zoe Carlson, Vice President of Corporate Affairs, Mining Association of British Columbia (Apr. 7, 2010).

²⁴⁰ Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 239.

²⁴¹ Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 89.

duty to consult even for online registration. As a result, based on this understanding, he believes the MTO process would violate constitutional standards.²⁴² Browne added, however, that the duty to consult before registering a claim has rarely been fulfilled, and no legal challenge has yet been brought against the MTO system.²⁴³ As currently designed and implemented, there are questions about whether the MTO system is consistent with the rights that aboriginal communities are guaranteed.

Preliminary Exploration without Permits

Miners may quickly become invested in their claims because they have been allowed to do a significant amount of work without a permit. The MTO system requires miners either to do work on site or to make annual payments in order to retain their rights to a claim.²⁴⁴ The value of the work or the payment in lieu of work must be CDN\$4 per hectare per year for the first three years, and CDN\$8 per hectare for every year after that.²⁴⁵

Miners can invest much more, however, without triggering permitting requirements. They can perform more costly activities, such as flying over the area, taking water samples, surveying, digging with hand tools, and setting up exploration grid lines and felling any trees that would otherwise “create a hazard to safe passage.”²⁴⁶ Due to the seasonal nature of preliminary exploration work and of First Nations’ traditional land use, miners may establish significant momentum through their investment of time and money without encountering or consulting First Nations people who use and depend on the land. This momentum can make miners unwilling simply to abandon the claim when they learn that someone objects to their presence.

²⁴² Telephone Interview with Murray Browne, *supra* note 59.

²⁴³ *Id.*

²⁴⁴ B.C. Ministry of Energy, Mines and Petroleum Resources, Mineral Titles Online: Introduction to MTO, *supra* note 229.

²⁴⁵ B.C. Ministry of Energy, Mines and Petroleum Resources, Frequently Asked Questions, <http://www.empr.gov.bc.ca/Titles/MineralTitles/faq/Pages/claim.aspx#10> (last visited June 4, 2010); *see also* Mineral Tenure Act Regulation, B.C. Reg. 529/2004, §§8, 10 (2005), *available at* http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/11_529_2004.

²⁴⁶ B.C. Ministry of Energy, Mines and Petroleum Resources, Mining and Minerals Division Health, Safety, and Reclamation Code for Mines in British Columbia, definitions and §9(1) (2008), *available at* <http://www.empr.gov.bc.ca/MINING/HEALTHANDSAFETY/Pages/HSRC.aspx> [hereinafter Health, Safety and Reclamation Code]; Telephone Interview with staff member #2 of Ministry of Energy, Mines and Petroleum Resources, B.C. (Mar. 4, 2010).

Limited Safeguards

The MTA includes some safeguards for surface landowners, but they have lent little protection to First Nations. For example, the MTA blocks free entry on certain categories of land, including land occupied by a building, the yard of a house, or an orchard or farm;²⁴⁷ however, since First Nations have usually used their traditional territories for non-residential and non-farming activities such as hunting, trapping, and berry picking, miners have been unlikely to encounter obstacles, such as buildings or farms, that often exist on other land that is in use. As of 2008, another safeguard requires miners to inform private landowners at least eight days before entering to carry out any mining activity, describing the location, type, and time of work to be done, and the number of workers that will be present.²⁴⁸ Despite First Nations' continued use of and reliance on their traditional territories, and the disputed nature of First Nations' claims to the land, they have not been considered private owners of their traditional territories. As a result, the MTA does not entitle them to any notification or consultation.

As discussed in the previous chapter, consultation with First Nations is required by case law that interprets their constitutional rights, but neither the statutes nor regulations governing mining codify the requirement. The law should recognize the momentum that begins when a party manifests the intention to use a piece of land for mining by registering a claim. The law should ensure that First Nations are consulted at this stage thus enabling them to act to protect their internationally and constitutionally guaranteed rights in a timely fashion.

Industry Critiques

Some in the mining industry have also seen problems with the MTO system. MABC's Gratton told IHRC that within the industry, while most people have been in favor of MTO, "there is by no means consensus."²⁴⁹ In an interview with IHRC, for

²⁴⁷ BENEATH THE SURFACE, *supra* note 200, at 38, 40.

²⁴⁸ The Chief Gold Commissioner can "exempt miners from the notice requirements in certain circumstances." B.C. MINISTRY OF ENERGY, MINES AND PETROLEUM RESOURCES, FACTSHEET: INFORMATION FOR FREE MINERS AND MINERAL TITLE HOLDERS, *supra* note 203, at 3; Mineral Tenure Act, R.S.B.C. ch. 292, pt. 2(19).

²⁴⁹ Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 239.

example, Chris Warren of CJL Enterprises said that MTO has led some to register ambitious claims. This trend has led his company to register large blocks before others stake claims, postponing decisions about what areas are actually of interest.²⁵⁰ In addition, Lorne Warren, Chris's father and President of CJL, expressed concern that the MTO may be modified in the future to raise the cost of maintaining a claim.²⁵¹ Gratton said that while MTO offers some benefits, it may encourage speculation by people who are not actually interested in prospecting, thus preventing exploration from taking place.²⁵²

Industry experts have also recognized that there have been problems with the consultation process for registering claims leading some to suggest reforms. Chris Warren told IHRC that the industry would like the government to provide information, at the time of registration, regarding whom they should speak to from the local First Nations group.²⁵³ He observed that a potential benefit of online claim registration would be the organization and dissemination of such information. Laureen Whyte, Vice President of Sustainability and Operations of the Association for Mineral Exploration British Columbia (AME BC), agreed, telling IHRC that it would be helpful if people could learn from the MTO system which First Nations were in the area and needed to be consulted prior to registering a mineral claim.²⁵⁴ AME BC has been discussing the problematic issue of inadequate consultation at the registration stage in meetings with industry groups, the government, and First Nations. The problem, Whyte said, is that no one has identified a manageable system that could address the issue of notification and consultation either within the existing tenure system or with an alternative to free entry.²⁵⁵ A governance system is needed to provide a way to “[manage] the pace of activity” and to determine who has the right to explore in each given area.²⁵⁶

²⁵⁰ Telephone Interview with Chris Warren and Lorne Warren, *supra* note 237.

²⁵¹ *Id.*

²⁵² Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 239.

²⁵³ Telephone Interview with Chris Warren and Lorne Warren, *supra* note 237.

²⁵⁴ Telephone Interview with Laureen Whyte, Vice President, Sustainability and Operations, Association for Mineral Exploration British Columbia (Mar. 30, 2010).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

Phase II: Exploration—Regulations and Notices of Work

Overview

Mineral exploration, which has been particularly common on Takla's territory, is the next phase of mining activity. Once a miner has registered a claim, his or her mineral title "conveys the right to use, enter and occupy the surface of the claim" to explore for and produce minerals.²⁵⁷ Exploration includes a variety of activities, notably drilling for core samples, intended to assess the presence of minerals and determine whether further development is worthwhile. Exploration is regulated under the Mineral Exploration Code (MXC), which is Section 9 of the Health, Safety and Reclamation Code for Mines (HSRC) (promulgated under the Mines Act).²⁵⁸ The HSRC establishes permitting requirements, safety protocols, reclamation processes, and some provisions to protect the environment. The MXC applies when miners disturb the ground surface through mechanical means or construct access roads and camps.²⁵⁹

When exploration activities require regulation by the HSRC, miners must submit a Notice of Work, including maps, schedules, and proposed environmental mitigation plans, to an inspector at MEMPR.²⁶⁰ The Chief Inspector of Mines then decides whether to issue a permit and whether to require a deposit to be held until reclamation of the site is complete.²⁶¹ Relevant government agencies and affected stakeholders, including First Nations groups, receive the NOW, commonly called a referral.²⁶² It is the first point at which the law opens an individual project to discussion and requires consultation with First Nations by the provincial government. It occurs, however, only after companies have registered claims and conducted certain low-impact activities on First Nations' lands. Upon receipt of a referral notifying a First

²⁵⁷ B. C. Ministry of Energy, Mines and Petroleum Resources, Mineral and Placer Rights in British Columbia, <http://www.empr.gov.bc.ca/Titles/MineralTitles/mto/about/intro/Pages/MineralPlacerRights.aspx> (last visited Sept. 28, 2010); Mineral Tenure Act, R.S.B.C. ch. 292, pt. 2 (14).

²⁵⁸ B.C. MINISTRY OF ENERGY, MINES AND PETROLEUM RESOURCES & MINISTRY OF ENVIRONMENT, HANDBOOK FOR MINERAL AND COAL EXPLORATION IN BRITISH COLUMBIA: A WORKING FIELD GUIDE 1 (Ass'n for Mineral Exploration in B.C. & Mining Ass'n of B.C. 2008-09), *available at* <http://www.empr.gov.bc.ca/Mining/Exploration/Documents/MXHandbook2008-09.pdf>.

²⁵⁹ Health, Safety and Reclamation Code, § 9.1.1.

²⁶⁰ *Id.* § 9.2.1.

²⁶¹ CHAMBERS & WINFIELD, *supra* note 199, at 23–24.

²⁶² B.C. Ministry of Energy, Mines and Petroleum Resources, Mine Approval Process in British Columbia, Canada, <http://www.empr.gov.bc.ca/MACR/investors/Documents/mine%20approval%20process%20jan.pdf> (last visited June 4, 2010).

Nation of proposed exploration work on its traditional territory, the First Nation typically has thirty days to respond.²⁶³

Debate over Exploration Regulations

Aside from the NOW process, exploration regulations do not mandate any consultation with First Nations that traditionally use the area, even though their subsistence activities, including hunting, trapping, berry picking, and gathering of medicinal plants, can be adversely affected by an influx of people, road construction, and heavy machinery. The referral process alone has been inadequate.

Primacy of Mining

Like free entry and the MTO system, the regulations that govern exploration establish a presumption in favor of mining activity. While regulations require miners to obtain a permit for exploration, the permitting requirements are relatively easy to fulfill and present few hurdles to disturbance of First Nations' land. They also do not involve any aboriginal rights analysis. Once allowed to explore, miners may make significant investments in their projects, leading them to resist attempts to stop them at the next permitting stage. Momentum, which creates a major obstacle to First Nations' efforts to protect their land and rights, thus continues to build. This dynamic can lead to conflict if First Nations try to oppose a project at a later stage.

Vague and Unfair Standards

The standards that guide the process are also vague and unfair. A staff member at MEMPR told IHRC that the Ministry's consultation is guided by court decisions such as *Haida*.²⁶⁴ No matter how strong that decision may be, its standards have not

²⁶³ Interview with JP Laplante, former Mining Coordinator, Takla Lake First Nation, and David Radies, Mining Coordinator, Takla Lake First Nation, in Takla Landing, B.C. (Sept. 13, 2009); Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 89.

²⁶⁴ Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 89.

been clearly articulated in a relevant statute or regulation. This ambiguity has left even well-intentioned miners with little guidance on how to fulfill consultation requirements, and no specific requirements that they must meet. Of critical importance, for example, is whether exploration plans trigger deep consultation requirements. Laureen Whyte of AME BC told IHRC that her members have not always been “really clear what is expected of industry or required of industry” under aboriginal rights law.²⁶⁵

Regardless of the exact requirements, B.C. regulations that apply to consultation about exploration have placed a burden on First Nations in two ways. First Nations have had to deal with an imbalance of information because they have not had time and resources to prepare their own studies on the potential problems of exploration. At the same time, they have had to overcome a presumption that individual mining projects are acceptable. To protect the aboriginal rights of First Nations, both of these burdens should be shifted in the other direction.

Short Response Time

Some First Nations representatives have complained that the thirty-day response time limit has been too short.²⁶⁶ First Nation attorney Murray Browne called the time frame “brutal” for some types of referrals.²⁶⁷ One staff member of MEMPR told IHRC that the short time frame should not have presented a problem. He said First Nations must provide information regarding how the project might affect aboriginal rights, but explained that that information need relate only to topics such as the presence of medicinal plants and archaeological sites. Further, according to the staff member, First Nation communities need not provide a technical assessment of the proposed project.²⁶⁸ Browne countered that a proper traditional-use assessment requires collaboration with First Nations and knowledgeable elders, and it is simply not possible to conduct such a study in thirty days.²⁶⁹ He said the problem has been exacerbated by the fact that referrals have often failed to provide sufficient

²⁶⁵ Telephone Interview with Laureen Whyte, *supra* note 254.

²⁶⁶ See Health, Safety and Reclamation Code, § 10.2.2 (allowing an affected or interested party thirty days to respond to a NOW).

²⁶⁷ Telephone Interview with Murray Browne, *supra* note 59.

²⁶⁸ Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 89.

²⁶⁹ Telephone Interview with Murray Browne, *supra* note 59.

information. For example, they have not always included detailed maps or studies analyzing environmental issues, such as the impacts of helicopters on caribou or the cumulative impact of road development.²⁷⁰ A failure to respond adequately to the NOW deadline has undermined the special protections First Nations are supposed to receive from consultation because the permitting process has proceeded without their direct input. MEMPR should allow for a time period that is sensitive to First Nations' traditions and needs and facilitates deep consultation.

Government Handling of First Nations' Concerns

According to Browne, regardless of the deadline, MEMPR has often failed to take into account First Nations' concerns. A staff member of MEMPR told the IHRC that it has "absolutely not [been] the case" that MEMPR has permitted proposals over First Nations' objections at the referral stage.²⁷¹ He told IHRC researchers that the government is required to determine whether the proposed project might have an impact on aboriginal rights. When the government has found that there would be an infringement, it has developed accommodation measures to mitigate the harm. Such measures have consisted of legally binding conditions to permits designed to address First Nations' environmental and economic concerns.²⁷² Further study of how the government has handled responses to referrals is warranted.

Regulations have also failed to address the environmental impact of exploration sufficiently. Exploration plans do not trigger a formal environmental assessment process, which will be discussed in more depth below.²⁷³ The exploration regulations that do exist, primarily the HSRC, describe a number of conditions miners must meet regarding fisheries, watersheds, and health and safety. For example, exploration activities must maintain natural drainage patterns and "not degrade water quality at a

²⁷⁰ *Id.*

²⁷¹ Telephone Interview with staff member #2 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 246.

²⁷² *Id.*

²⁷³ Environmental Assessment Act, Reviewable Projects Regulation, B.C. Reg. 370/2002, Dec. 19, 2002 including amendments up to March 2, 2009, *available at* http://www.bclaws.ca/Recon/document/freeside/--%20E%20--/Environmental%20Assessment%20Act%20%20SBC%202002%20%20c.%2043/05_Regulations/13_370_2002.xml#part3.

potable water supply intake.”²⁷⁴ The regulations, however, offer virtually no practical guidance on how to meet these conditions. A handbook published by the B.C. government and two industry associations provides some guidelines, but given that they are not legally binding, companies have been left with a great deal of discretion.²⁷⁵ Furthermore, the HSRC does not require reclamation until one year after exploration has completely ended (though an Inspector may waive even this lenient requirement).²⁷⁶ Exploration on a large claim may take many years and involve felling trees for roads, dozens of access spurs, and drill pads. Because it delays reclamation, the rule allows negative effects such as habitat fragmentation and increased erosion to continue for much longer than is necessary. Some miners may choose not to begin costly reclamation before it is required.²⁷⁷

Limited Attention to Protection of Cultural Heritage

Finally, the HSRC does not address the exploration’s potential effects on First Nations’ cultural heritage. On this subject, the permitting process leaves a great deal of discretion to the Chief Inspector of Mines. For example, no assessment of archaeological resources is required unless MEMPR or the Chief Inspector decides to attach such a condition.²⁷⁸

The B.C. Heritage Conservation Act of 1996 (HCA), which could in theory help protect First Nations’ heritage sites from mining, also contributes little. It prohibits damage, alterations, or removal of sites or objects that have “heritage value,” defined

²⁷⁴ Health, Safety and Reclamation Code, § 9.4.1.

²⁷⁵ B.C. MINISTRY OF ENERGY, MINES AND PETROLEUM RESOURCES & MINISTRY OF ENVIRONMENT, HANDBOOK FOR MINERAL AND COAL EXPLORATION IN BRITISH COLUMBIA, *supra* note 258, at 2.

²⁷⁶ Health, Safety and Reclamation Code, § 9.13.1(1).

²⁷⁷ When IHRC visited Serengeti Resources’ Kwanika exploration site in September 2009, the company had cleared approximately seventy drill pads, each of which required cutting a strip of trees to create an access spur. Hugh Samson, Serengeti’s Project Geologist at Kwanika, told IHRC that it would not make financial sense to hire a tree planting crew to reclaim a limited area each time a team finished with a particular drill site. He said the company planned to wait until it finished exploration at the entire site and then hire a crew to replant the entire area at once. Serengeti’s President and CEO, David Moore, however, later told IHRC that by May 2010, Serengeti had reclaimed “many” of these drill pads. Regardless, the law did not require the company to restore the area until it finished work. Interview with Hugh Samson, Project Geologist, Serengeti Resources, at Kwanika exploration site, B.C. (Sept. 12, 2009); E-mail from David Moore, President & CEO, Serengeti Resources, Inc., to Bonnie Docherty, Lecturer on Law and Clinical Instructor, IHRC (May 11, 2010).

²⁷⁸ Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 89.

as “the historical, cultural, aesthetic, scientific or educational worth or usefulness of a site or object.”²⁷⁹ This protection extends to sites that “are of particular spiritual, ceremonial or other cultural value” to a First Nation,²⁸⁰ although a permit granted at the discretion of the Ministry of Tourism, Culture and the Arts can remove it.²⁸¹ According to one government official, however, the HCA does not specifically address aboriginal rights or title: “Questions concerning the infringement of aboriginal rights and title are beyond the jurisdiction of the HCA, which is concerned with the protection and conservation of heritage property in British Columbia.”²⁸² The Union of B.C. Indian Chiefs has claimed that the government has used this limited interpretation of its mandate to avoid classifying permit applications under the Act as referrals, which require consultation with First Nations.²⁸³

Phase III: Mining Development and Production—Environmental Assessment Process

Overview

As mines approach the development and production phase, they face the most intense regulatory hurdle, the environmental assessment process.²⁸⁴ An environmental assessment is supposed to consider not only environmental issues but also a given project’s potential “economic, social, heritage, and health effects.”²⁸⁵ The B.C. Environmental Assessment Act (BCEAA) requires an EA if, for example, a new mineral mine will have production capacity of at least 75,000 tonnes per year of mineral ore,²⁸⁶

²⁷⁹ Heritage Conservation Act, R.S.B.C., ch. 187 § 1 (1996), *available at* http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96187_01.

²⁸⁰ *Id.* § 4.4(a).

²⁸¹ *Id.* § 12.

²⁸² Letter from Ray Kenny, Manager of Archaeology Branch, Ministry of Sustainable Resource Management, June 6, 2005, *quoted in* Letter from Union of B.C. Indian Chiefs to Premier Gordon Campbell, Sept. 12, 2005, *available at* http://www.ubcic.bc.ca/News_Releases/UBCICNews09120502.htm.

²⁸³ Letter from Union of B.C. Indian Chiefs to Premier Gordon Campbell, *supra* note 282.

²⁸⁴ Mine operators usually have to obtain environmental permits—for example, to ensure water quality—but these are beyond the scope of this paper.

²⁸⁵ B.C. ENVIRONMENTAL ASSESSMENT OFFICE, USER GUIDE 11 (2009). There is also a federal EA process, but it is beyond the scope of this report. Canadian Environmental Assessment Act, ch. 37 (1992), *available at* <http://laws.justice.gc.ca/en/C-15.2/>.

²⁸⁶ Environmental Assessment Act, Reviewable Projects Regulation, B.C. Reg. 370/2002. This standard applies only to mineral mines, excluding, for example, sand and gravel mines. A mine producing less than 75,000 tonnes per year would be a “very small underground mine,” such as a gold vein mine. Many of today’s mines in British Columbia are large, open pit mines that

if the Ministry of Environment believes it may have significant adverse major environmental, economic, social heritage, or health impacts,²⁸⁷ or if the proponent requests to “opt-in” to the review process.²⁸⁸ An expansion of an existing project can also trigger an EA if it disturbs at least 750 hectares of land or increases the size of the previously approved disturbances by at least 50 percent.²⁸⁹

The Ministry of Environment’s Environmental Assessment Office oversees the EA process and vests much power in the Executive Director, who is appointed by the Lieutenant Governor in Council.²⁹⁰ Even if a proposal fits the criteria for an EA described above, the Executive Director may decide that a project “will not have significant adverse environmental, economic, social, heritage, or health effects” and allow the project to move forward *without* an EA.²⁹¹ In addition, the Executive Director determines the details of the EA process to be followed. Given the sweeping and discretionary nature of this official’s authority, the efficacy of the EA process may depend largely upon who is in office at any given time.

While the Executive Director’s discretion largely shapes the process, he or she must operate within certain guidelines. The assessment process begins with the formation of a working group—including members of the Canadian Environmental

typically produce 60,000–120,000 tonnes per *day*. Interview with Graeme McLaren, Executive Project Assessment Director, Environmental Assessment Office, Ministry of Environment, B.C. (Mar. 10, 2010).

²⁸⁷ B.C. Environmental Assessment Act, S.B.C. ch. 43, § 6 (2002), *available at* http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_02043_01.

²⁸⁸ *Id.* § 7; B.C. ENVIRONMENTAL ASSESSMENT OFFICE, USER GUIDE, *supra* note 285, at 12–13. If a proposed project will require a permit under the Fisheries Act or the Navigable Waters Act, the federal government gains jurisdiction, triggering the Canadian Environmental Assessment Act. Canadian Environmental Assessment Act, ch. 37. The Canada-wide Accord on Environmental Harmonization, however, established a “single-window” approach, under which the “lead party” is responsible for administering the assessment process. CHAMBERS & WINFIELD, *supra* note 199, at 35. Under the Canada-British Columbia Environmental Assessment Agreement ([available at http://www.ceaa.gc.ca/010/0001/0003/0001/0002/2004agreement_e.htm](http://www.ceaa.gc.ca/010/0001/0003/0001/0002/2004agreement_e.htm)), the provincial government is the lead party for projects within the province, except for projects on federal lands. This arrangement allows British Columbia largely to determine its own EA process and effectively eliminates the potential for the federal process to strengthen weaker provincial EA processes. CHAMBERS & WINFIELD, *supra* note 199, at 35. In British Columbia, however, both parties generally view this as a collaborative and efficient approach to conducting EAs in the province. *Id.* British Columbia is also permitted to accept other jurisdictions’ assessments as “equivalent” to its own and has done so with respect to both federal and local governments. B.C. ENVIRONMENTAL ASSESSMENT OFFICE, USER GUIDE, *supra* note 285, at 12. Independent evaluations of provincial government performance “under these agreements have been consistently poor.” CHAMBERS & WINFIELD, *supra* note 199, at 47.

²⁸⁹ Telephone Interview with Graeme McLaren, *supra* note 286.

²⁹⁰ B.C. ENVIRONMENTAL ASSESSMENT OFFICE, USER GUIDE, *supra* note 285, at 11, 14.

²⁹¹ B.C. Environmental Assessment Act, S.B.C. ch. 43, § 10(1)(b)(ii); WEST COAST ENVIRONMENTAL LAW, DEREGULATION BACKGROUNDER: BILL 38: THE NEW ENVIRONMENTAL ASSESSMENT ACT 1 (Nov. 2, 2004).

Assessment Agency if it is a joint project; federal, provincial, and local governments; and First Nations—that plays an advisory role to EAO. The EAO determines the necessary components of the EA; in practice the EAO generally requires a description of the project and consultation plans, and an assessment of potential adverse effects and possible mitigation measures.²⁹² The process includes an initial determination of the application information requirements, followed by a screening of the application (to ensure it satisfies the requirements), a detailed review of the project in which the working group plays a key role, and public comment periods. While First Nations are invited to participate in the working group, according to an EAO representative, if they decline, the EAO will arrange separate consultation,²⁹³ with meetings usually held in or near the First Nation communities.²⁹⁴ The EAO then drafts an assessment report that describes the issues raised by stakeholders and notes possible adverse effects and potential mitigation measures. It also explains whether and how the duty to consult and accommodate has been met. The working group, including First Nations, generally receives three weeks to comment on the draft assessment report.²⁹⁵

The assessment process concludes with EAO's final comprehensive assessment report, which includes comments from the working group.²⁹⁶ If First Nations disagree with the report, their views can be put in writing and sent to the ministers with the report.²⁹⁷ Two ministers—one of whom is the Minister of Environment and one the minister responsible for that project category (for a mine, this would be the Minister of Energy, Mines and Petroleum Resources)—make a final decision within forty-five days on whether the project can proceed.²⁹⁸ A “key factor” in their decision is “whether the Province has satisfied its legal duty to consult” and accommodate First Nations in accordance with *Haida* and related cases.²⁹⁹

Technically, the Minister of Environment can refer an application to a commission, panel, or other forum for a hearing and further study.³⁰⁰ In practice, only one project has been referred for such a hearing panel: the Kemess North open-pit mine in Takla's territory, which was ultimately rejected as proposed. (This project will

²⁹² B.C. ENVIRONMENTAL ASSESSMENT OFFICE, USER GUIDE, *supra* note 285, at 25.

²⁹³ *Id.* at 32.

²⁹⁴ Telephone Interview with Graeme McLaren, *supra* note 286.

²⁹⁵ B.C. ENVIRONMENTAL ASSESSMENT OFFICE, USER GUIDE, *supra* note 285, at 11, 33.

²⁹⁶ Telephone Interview with Graeme McLaren, *supra* note 286.

²⁹⁷ *Id.*

²⁹⁸ B.C. ENVIRONMENTAL ASSESSMENT OFFICE, USER GUIDE, *supra* note 285, at 11, 33–34.

²⁹⁹ *Id.* at 7, 16–17, 34.

³⁰⁰ B.C. Environmental Assessment Act, S.B.C. ch. 43, § 14(3).

be discussed in more depth in the next chapter.) Graeme McLaren, the EAO's Executive Project Assessment Director, told IHRC that he considers the EA process a "fairly rigorous" review that "should meet everyone's needs."³⁰¹ Once the approval is granted, the Minister of Environment then retains the power to "suspend, cancel, or amend a certificate" for various reasons.³⁰²

The EAO seems to have been cognizant of the importance of First Nations' interests. The office has provided limited funding to facilitate First Nations' participation in the EA process and has encouraged project proponents to supplement this funding.³⁰³ In addition, it has devoted a section of its "service standards" to First Nations' issues, pledging its commitment to "working constructively with First Nations to ensure that the Crown fulfills its duties of consultation and accommodation." The EAO has defined First Nations' legal rights to consultation as those established in *Haida* and "related case law."³⁰⁴ The office has offered a number of principles, based on its interpretation of case law, that should guide the consultation process, including starting early, sharing all relevant information, offering clear explanations for all decisions, developing ways for First Nations to provide feedback and genuinely considering their concerns, and being "respectful, open, reasonable, and responsive."³⁰⁵ EAO's McLaren told IHRC that meaningful consultation that fulfills the honor of the Crown has been "a fundamental, completely overarching requirement" and that his office has used case law to guide it in being "honest and fair and reasonable."³⁰⁶ He noted, "We start at deep consultation with pretty much all First Nations. We may then back off if we don't see the strength of the claim."³⁰⁷ McLaren added that the process has aimed to "learn what their [First Nations'] rights and interests are" and to "find ways to accommodate" both First Nations' rights and the

³⁰¹ Telephone Interview with Graeme McLaren, *supra* note 286.

³⁰² B.C. ENVIRONMENTAL ASSESSMENT OFFICE, USER GUIDE, *supra* note 285, at 14.

³⁰³ The amount provided varies with government budgets, but in 2008 and 2009 First Nations typically received CDN\$5,000-10,000 during the pre-application stage, and another installment of the same amount during the review stage. The EAO encourages project proponents to supplement this funding. Studies regarding traditional uses of the land can run in the tens of thousands of dollars, so an entire review can often cost more than CDN\$100,000. Telephone Interview with Graeme McLaren, *supra* note 286. Companies often do help, but the amount of funding is an open question.

³⁰⁴ B.C. ENVIRONMENTAL ASSESSMENT OFFICE, USER GUIDE, *supra* note 285, at 6-7 (2009).

³⁰⁵ *Id.* at 17.

³⁰⁶ Telephone Interview with Graeme McLaren, *supra* note 286.

³⁰⁷ *Id.*

project.³⁰⁸ Even when the relationship between a First Nation and the government has been strained, McLaren said that it had been his responsibility to “work through it.”³⁰⁹

Debate about the Environmental Assessment Process

Flawed Studies

Nevertheless, some First Nations members believe that their opportunities to participate in the EA process have been inadequate. For example, Lisa Sam of the Nak’azdli First Nation told IHRC that mining companies have used the same “cookie-cutter” studies everywhere and have refused to take traditional knowledge into account.³¹⁰ McLaren recognized that some First Nations have disagreed with the entire consultation process “at a very high level” and have had philosophical or principled objections to it.³¹¹ While First Nations may have refused to participate, he said the EAO has still aimed to articulate their views in its recommendations to the best of its ability.³¹²

Limits on First Nations’ Responses

As with the NOW process, First Nations have not always had the time or resources to respond adequately to an EA. While they are legally entitled to special protections, they generally have received three weeks to review the draft assessment report and to give input before the final report is developed—the same short amount of time that the proponent and the working group have had to respond.³¹³ McLaren acknowledged that his office has received “complaints about this amount of time” from First Nations who have said they have not had the capacity to respond so quickly. Often, he said, more time has been given, but since the office itself has by law only 180 days total to review the project application, extending the amount of time given for review of the draft can make timing too tight in other areas. Sometimes, he said, First

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ Interview with Lisa Sam, *supra* note 38.

³¹¹ Telephone Interview with Graeme McLaren, *supra* note 286.

³¹² *Id.*

³¹³ B.C. ENVIRONMENTAL ASSESSMENT OFFICE, USER GUIDE, *supra* note 285, at 33.

Nations have reported that they simply did not have the capacity to respond to the report, especially in such a short time frame.³¹⁴ While the government has provided limited funding to assist First Nations in their review, and project proponents have frequently supplemented this, full participation has often remained out of their reach.

Politicization

The EA regulations have also left the process vulnerable to politicization. The BCEAA requires an EA to “reflect government policy identified . . . by a government agency or organization responsible for the identified policy area.”³¹⁵ Thus, if the government states policy goals related to production of mineral revenues, for example, the EA may be slanted toward this policy rather than objectively assessing the potential for environmental harm.³¹⁶

Individual Discretion

As mentioned above, many aspects of the EA process are highly discretionary, meaning that the quality of review may depend largely upon the Executive Director. First, the Executive Director has broad discretion to decide that a given project does not require an EA. First Nations are not given an opportunity to provide their perspective on the proposed project or to offer information that may inform the Director’s decision at that stage. In addition, the Executive Director or Minister determines the “scope, procedure, and methods of the EA.”³¹⁷

The EAO’s McLaren told IHRC that there is “not a lot in the way of regulations” constraining the discretion of the individuals in charge. While there is significant discretion in setting up each EA process, however, McLaren says that the “rigor around [the EAO’s] decision-making has been tightened up in the last few years.”³¹⁸ For example, the EAO created an “e-Guide” that “lays out every step of the process” including relevant legislation and regulations, which has helped to increase internal

³¹⁴ Telephone Interview with Graeme McLaren, *supra* note 286.

³¹⁵ B.C. Environmental Assessment Act, S.B.C. ch. 43, § 11(3).

³¹⁶ WEST COAST ENVIRONMENTAL LAW, DEREGULATION BACKGROUNDER, *supra* note 291, at 3.

³¹⁷ B.C. Environmental Assessment Act, S.B.C. ch. 43, § 11, 14; WEST COAST ENVIRONMENTAL LAW, DEREGULATION BACKGROUNDER, *supra* note 291, at 3.

³¹⁸ Telephone Interview with Graeme McLaren, *supra* note 286.

consistency.³¹⁹ In addition, one of the critical components that helps the EAO determine whether an EA is necessary, and that guides the consultation and accommodation process under Canadian common law, is determining whether a project poses a risk of “significant adverse effect.” Recently, the factors to be considered in this determination have been written down by the EAO, improving both consistency and transparency.³²⁰ The EAO considers the “magnitude or severity of the effect,” its “geographic extent,” duration, and frequency, whether it is reversible, the ecological sensitivity of the area, and the probability of the adverse effect occurring.³²¹ Pierre Gratton of MABC told IHRC that the EA process is fairly comprehensive, involving “binders that go up to the ceiling.”³²²

Fragmented Responsibility

Fragmented responsibility leaves the duty to monitor mines in the hands of MEMPR while the EAO imposes many of the conditions that need to be monitored. This fragmentation may reduce an EA’s effectiveness because MEMPR monitors may not have the same understanding of the conditions as EAO officials. MEMPR monitors might also have less incentive to use their agency’s limited resources to enforce another ministry’s rules. The certificates granted under the EA process always include a number of legally binding conditions and a lengthy table of proponent commitments that are also legally binding. These conditions usually include a requirement that the company report back to the EAO to prove that they are “living up to the promises they made in the application.”³²³ While the EAO has the legal authority to conduct inspections, the agency has not had “staff who go out in the field and inspect projects.”³²⁴ Instead, the office has relied on mines inspectors from other ministries.

³¹⁹ E-mail from Graeme McLaren, Executive Project Assessment Director, Environmental Assessment Office, Ministry of Environment, B.C., to Bonnie Docherty, Lecturer on Law and Clinical Instructor, IHRC (April 28, 2010).

³²⁰ These factors are based upon those used in federal level environmental assessments, but the B.C. EAO added an additional factor of their own. Telephone Interview with Graeme McLaren, *supra* note 286.

³²¹ ENVIRONMENTAL ASSESSMENT OFFICE, PROSPERITY GOLD-COPPER PROJECT ASSESSMENT REPORT 25-26 (2009).

³²² Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 239.

³²³ Telephone Interview with Graeme McLaren, *supra* note 286.

³²⁴ *Id.*

McLaren said, “We kind of trust to the eyes and ears of our fellow government workers who are out in the field.”³²⁵

The Mines Act also requires a detailed permit after an EA certificate is issued.³²⁶ This permit covers all the technical aspects of mining operations so it is appropriate that MEMPR officials, who have relevant expertise, monitor those pieces. According to McLaren, MEMPR’s inspectors have included mining engineers, reclamation specialists, and health and safety specialists, with expertise EAO officials do not have.³²⁷ A staff member of MEMPR told IHRC that his office has done “frequent inspections of all mine sites,” including exploration projects, and “major mine audits” every year.³²⁸ If a mine has refused to comply with its conditions, MEMPR has not hesitated to shut it down, he said, but the Ministry has preferred to talk with the company and offer them a chance to comply first.³²⁹

Proposed Reforms

The First Nations Energy & Mining Council has called for a comprehensive overhaul of the EA system.³³⁰ The existing process, the Council has claimed, has been “dysfunctional, harmful to Aboriginal interests, and structurally prone to failure.”³³¹ Given the distrust many First Nations have had of the government, the EA process has essentially been a “case-by-case battle on the ground.”³³² The Council has recommended replacing the EAO with a “Sustainability Authority,” consisting of independent commissioners nominated by the B.C. government and First Nations and appointed by the legislature. The group would be separate from the government and

³²⁵ *Id.*

³²⁶ See Mines Act, R.S.B.C. ch. 293, § 10 (1996) (Can.), available at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96293_01.

³²⁷ E-mail from Graeme McLaren, *supra* note 319.

³²⁸ Telephone Interview with staff member #2 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 246.

³²⁹ *Id.*

³³⁰ See generally FIRST NATIONS ENERGY & MINING COUNCIL, ENVIRONMENTAL ASSESSMENT AND FIRST NATIONS IN BC: PROPOSALS FOR REFORM (2009).

³³¹ *Id.* at 62.

³³² Mark Hume, *Natives Call for Overhaul of B.C. Environmental Assessment Process*, GLOBE AND MAIL, Apr. 2, 2010, <http://www.theglobeandmail.com/news/national/british-columbia/natives-call-for-overhaul-of-bc-environmental-assessment-process/article1526871/> (quoting Grand Chief Ed John, a member of the political executive of the First Nations Summit).

report to the legislature.³³³ The creation of such a group, while proposed for the EA process, could increase rights protections and improve stakeholder relations at all stages of mining.

Phase IV: Mine Closure and Reclamation

While mining is technically a temporary land use, pollution and habitat destruction may remain problems long after a mine has closed. The HSRC contains regulations pertaining to reclamation and describes the condition to which a company must return a site. For example, it states that sites must be replanted with self-sustaining, site-appropriate vegetation.³³⁴ The B.C. Mines Act regulates some aspects of reclamation, such as waste disposal.³³⁵ In 1969, it also established a “mine reclamation fund,” to which companies contribute as part of the permitting process. It is designed to “provide reasonable assurance that the Province will not have to contribute to the costs of reclamation if a mining company defaults on its reclamation obligations.”³³⁶ MEMPR decides based on a company’s proposal, how much money the company must place into a security bond to finance government remediation if necessary.³³⁷ Initially, the B.C. government collected small security bonds that were inadequate to reclaim mining sites completely; starting in 1984, security deposits increased from CDN\$18 million to more than CDN\$197 million by March 31, 2002.³³⁸ The government returns the money to the companies when the Chief Mine Inspector is

³³³ FIRST NATIONS ENERGY & MINING COUNCIL, ENVIRONMENTAL ASSESSMENT AND FIRST NATIONS IN BC, *supra* note 330, at 4-5.

³³⁴ Health, Safety and Reclamation Code, § 9.13.1(4).

³³⁵ While the Mines Act controls what goes on within a mine’s boundaries, the Environmental Management Act (formerly the Waste Management Act) under the B.C. Ministry of Environment controls what goes on off the mine site. Environmental Management Act, S.B.C. ch. 53, § 174 (2003) (Can.).

³³⁶ B.C. Ministry of Energy, Mines and Petroleum Resources, Reclamation Costing and Security, <http://www.empr.gov.bc.ca/Mining/Permitting-Reclamation/Costing-Security/Pages/default.aspx> (last visited June 4, 2010).

³³⁷ Telephone Interview with Brian Clarke, Director, Crown Land Restoration Branch, and Gregg Stewart, Manager, Crown Contaminated Sites Program, Ministry of Agriculture and Lands, B.C. (Mar. 29, 2010); Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 89; Telephone Interview with staff member #2 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 246.

³³⁸ See John C. Errington, *Towards Results-Based Standards for Mine Reclamation in British Columbia*, PROC. OF THE 26TH ANN. BRITISH COLUMBIA MINE RECLAMATION SYMP., DAWSON CREEK B.C., 97, 98 (2002), available at <http://circle.ubc.ca/bitstream/handle/2429/9423/2002%20-%20Errington%20-%20Towards%20Results-Based%20Standards.pdf?sequence=1>.

satisfied that the reclamation work met the standards established by the HSRC.³³⁹ Even projects with higher bonds, however, must be closely scrutinized and monitored because bonds will not last the hundreds of years it can take the environment to recover from mining.

Before British Columbia instituted the bond requirement, “there were circumstances where people in the 1950s or 60s made applications and were not required to put up a security bond, so there may be some sites out there that may not be properly reclaimed.”³⁴⁰ According to a MEMPR staff member, however, if that same company proposes a new project, MEMPR will “go after that person to clean up their own mess” because “the public taxpayer should [not] be responsible for cleaning up someone else’s mess.” Sometimes, it has involved taking the company to court.³⁴¹

As in other stages of the mining process, the law gives the Inspector great discretion; he or she decides whether reclamation work is complete and how high the reclamation bond should be. While the bond requirement is an important step toward protecting the environment, First Nations attorney Murray Browne told IHRC that he believes the government often has often failed to require a sufficient amount of money.³⁴²

In cases where the government cannot identify a party responsible for an abandoned mine or other contaminated site, the Crown Land Restoration Branch within the B.C. Ministry of Agriculture and Land is responsible for the investigation and remediation of Crown contaminated sites, including orphaned/abandoned mines. For example, it has been conducting risk assessment studies of the abandoned Bralorne-Takla mercury mine. This process and concerns about it are described in detail below in Chapter 7.

ABORIGINAL RIGHTS ANALYSIS

British Columbia’s mining regime has failed adequately to enshrine and protect First Nations’ rights under international law and domestic constitutional law. The

³³⁹ CHAMBERS & WINFIELD, *supra* note 199, at 44; Health, Safety and Reclamation Code, § 9.13.1(6).

³⁴⁰ Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 89.

³⁴¹ *Id.*

³⁴² Telephone Interview with Murray Browne, *supra* note 59.

regime's standards have not guaranteed higher scrutiny for projects that infringe on aboriginal rights. Protections should be explicitly incorporated into statutes or regulations, like the ones discussed in this chapter, so that no doubt remains about aboriginal communities' right to choose their own development path and negotiate with the mining industry. At the national level, Canadian case law, including *Haida*, requires consultation and accommodation in case of infringement on First Nations' rights, but it provides insufficient guidance on the exact parameters for both procedural and substantive protections in the mining context. Supplementary statutes or regulations are needed because the current ones have not sufficed.

Existing B.C. mining laws have not ensured fully First Nations opportunities to exercise self-determination and participate in decisions involving their traditional territories. The current free entry paradigm, especially the MTO system, permits miners to register claims, thus setting the stage for mining, with no prior consultation with First Nations. The NOW process allows First Nations only limited time to respond before exploration takes place. The NOW and EA processes give too much discretion to government agents. They create an imbalance of information because government and industry have greater resources to undertake studies of environmental and human impacts, which First Nations are unable to counter. The mining laws in effect have placed the burden of stopping or delaying a project on the parties that international law dictates should benefit from special protections—namely the affected aboriginal communities. Instead, the legal framework should better balance the rights of First Nations with the interests of industry.

The government has also relied on laws that do not adequately protect the environment on which First Nations' enjoyment of culture depends. For example, its laws are not stringent enough to limit exploration, which can disturb habitat and wildlife, and thus the subsistence way of life. Even if an individual exploration site does not cause as much harm as an active mine, cumulatively such sites can have an adverse effect. Cumulative impacts from mining, including historic legacies, should be a central consideration when evaluating land-use plans and proposed new projects because aboriginal rights mandate protection for the community's entire territory and future generations. Furthermore, environmental law's precautionary principle dictates rejecting a project if its impact at any stage is in doubt.







Takla Lake First Nation wants to protect Bear Lake because of its environmental and cultural significance. Imperial Metals proposed mineral exploration near the lake, but the project has yet to go forward. *All photos were taken by Bonnie Docherty in September 2009.*



Chief Dolly Abraham is one of several members of Takla with a cabin in the woods on Bear Lake.



The Abraham family's cabin looks over Aiken Lake toward a proposed mining exploration site. Marvin Abraham has named the island Dominic Island after his grandson for whom he is trying to save the land.



The logging industry left this road and tract of clear-cut land near Aiken Lake. Many members of Takla have opposed a proposed mining exploration site in the vicinity.



A backhoe used at the Kwanika exploration site stands on a road that has been cut through the forest to allow drilling equipment to pass.



This spur leads to one of seventy drill pads at the Kwanika exploration site. Exploration requires clearing swaths of forest and disturbs the wildlife in the area. Reclamation will consist of covering the cut logs with grass seed.



The abandoned Bralorne-Takla Mine, which dates to World War II, still has rusted equipment that was used in mercury mining operations.



Margo French points to the tailings pond at the abandoned Bralorne-Takla mercury mine. Contamination is evident in the water's color and silt. Use of the water by the nearby Lustdust exploration site has caused the water levels to go down exposing the mound of dirt seen here.



Roy and Paul French stand by a warning sign posted by the B.C. Ministry of Agriculture and Lands at the abandoned Bralorne-Takla Mine.



Takla's chief and council visited Aiken Lake in September 2009. From left to right, they are: Jeanette West, Irene French, Chief Dolly Abraham, Kathaleigh George, and Anita Williams.



Takla's potlatch house is the center of the community's traditional governance system. It is used for meetings of *keyoh* holders and other local gatherings.

VI. INADEQUATE CONSULTATION

British Columbia's imbalanced mining laws, which privilege mining at the expense of the special protections to which First Nations are legally entitled, have presented problems in practice as well as on paper. The next three chapters examine the experiences of Takla Lake First Nation with these mining laws. The first chapter demonstrates that inadequate consultation has created a *de facto* presumption in favor of mining projects and has left Takla with insufficient information to show they should be rejected. The next chapter illustrates that Takla has suffered from a range of harms from mining activities that it has been unable to stop or regulate sufficiently. The final chapter of this trio shows that Takla has not only borne the weight of mining but also received disproportionately few benefits in return.

Takla has been particularly vulnerable to the problems of mining. Due to the presence of the Quesnel Trough, Takla's traditional territory is a mineral-rich area that has become "blanketed" by mineral claims. Takla has also lacked a recognized land-use plan, so there has been no framework in place to guide work with the government in making decisions regarding its land. Instead, each project has been treated individually, imposing unmanageable administrative demands on Takla and providing no comprehensive overview for assessing the cumulative impact of various industries, projects, and roads. Finally, Takla and some other First Nations in northern British Columbia may have been disadvantaged by the political process. First Nations people have formed the majority of the population in Takla's remote area of the province. Given the low population in the region, however, there have been very few voters. Politicians have thus tended to see the region as a "cash cow" from which natural resource revenues can fund projects in more populous areas like Victoria and Vancouver.³⁴³ Although this particular combination of conditions may be specific to Takla, the situation illuminates flaws in the existing mining regime that are also relevant to other First Nations and highlights the need for reform.

Takla has faced multiple obstacles to protecting its land as a result of limited consultation by the government. Under current mining laws, analyzed in the previous chapter, Takla has generally received no notice of new claims and incomplete information about proposed projects. It also has had insufficient resources and time to conduct its own research into possible adverse effects. Despite these disadvantages,

³⁴³ Telephone Interview with Murray Browne, *supra* note 59.

Takla has borne much of the burden for proving that a project that threatens its way of life or its environment should be rejected. The members of Takla believe that they are a voice not only for themselves but also for the land on which they depend: “I feel like I have to step up and talk for the plants that can’t talk. Talk for the water, the trees, the ground, and the animals that can’t talk,” Victor West told IHRC.³⁴⁴ Finding a forum to express that voice effectively has presented difficulties.

Inadequate consultation by government has led the people of Takla to mistrust state authorities and approach mining companies directly. The Takla community has found that some companies volunteer to talk with them about new or expanded projects. These interactions show that productive First Nation–industry discussions are achievable. In Takla’s case, however, such relationships have to date been inconsistent and *ad hoc*.

The problem of inadequate consultation is twofold. First, Canadian case law has not made it clear when deep consultation is triggered. IHRC believes it should apply at least by the exploration phase of mining given the potential cumulative and long-term effects to which even early stages have the potential to lead; consultation regarding claim registration should also be meaningful. To interpret the law otherwise presumes that mining should take precedence over protection of First Nations’ rights. Second, because the law has come primarily from jurisprudence, it has not provided clear guidance regarding what steps must be followed. Industry representatives told IHRC that they have often been confused about what proper consultation would look like. For example, they have been unsure about whether to meet with Takla’s chief and council or individual *keyoh* holders. The government bears the primary responsibility for ensuring that adequate consultation takes place. It should work with Takla and other First Nations to clarify the general standards established in Canadian aboriginal rights case law, and it should codify them in statutes or regulations.

INADEQUATE CONSULTATION BY GOVERNMENT

British Columbia’s provincial government has made many decisions regarding mining, including the nature of the claim registration regime, whether to issue permits at various stages of the process, and when and how to conduct EAs. In addition, the

³⁴⁴ Interview with Victor West, *supra* note 28.

legal responsibility to consult with First Nations has rested with the government rather than with private companies.³⁴⁵ The B.C. government has required consultation at several stages of the mining process, but the way in which consultation has been conducted has left First Nations with the belief that they lack access to the information needed to challenge a project effectively. Takla's particular experiences with government consultation highlight many of the concerns outlined in the previous chapter.

Land-Use Plans

The development of LRMPs, which determine what land is open to what uses, should provide an opportunity for consultation before the mining process begins.³⁴⁶ Two of the early LRMPs—Mackenzie and Fort St. James—cover Takla's territory. They were undertaken with only marginal consultation with First Nations, leaving the plans with “very little legitimacy.”³⁴⁷ The Mackenzie LRMP, approved by the government in 2000, states that while Takla received notes of meetings, participation for some First Nations “was not possible because of their concerns that the LRMP process could prejudice land claims and treaty negotiations.”³⁴⁸ Takla believes that it should be treated as more than a “stakeholder” with regard to the traditional territory that it has cared for and relied upon, physically, culturally, and spiritually, for many generations. JP Laplante, Takla's first Mining Coordinator, explained that Takla's representatives “walked out” of the LRMP planning process “when they realized that they were simply stakeholders with [the same] rights as the snowmobiling club.”³⁴⁹ Takla has requested a new planning process to address the LRMPs that affect its traditional territory, but to date “the government has declined to engage.”³⁵⁰ A “key issue” for Takla in

³⁴⁵ Telephone Interview with Graeme McLaren, *supra* note 286.

³⁴⁶ Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 89.

³⁴⁷ Telephone Interview with Murray Browne, *supra* note 59.

³⁴⁸ BRITISH COLUMBIA, MACKENZIE LAND AND RESOURCE MANAGEMENT PLAN 21 (2000), *available at* <http://archive.ilmb.gov.bc.ca/slrp/lrmp/princegeorge/mackenzie/index.html>. The St. James LRMP of 1999 also covers Takla's territory. BRITISH COLUMBIA, FORT ST. JAMES LAND AND RESOURCE MANAGEMENT PLAN (1999), *available at* http://archive.ilmb.gov.bc.ca/slrp/lrmp/princegeorge/fort_stjames/plan/toc.htm.

³⁴⁹ E-mail from JP Laplante, former Mining Coordinator, Takla Lake First Nation, to Bonnie Docherty, Lecturer on Law and Clinical Instructor, IHRC (Apr. 27, 2010).

³⁵⁰ E-mail from Murray Browne (Apr. 23, 2010), *supra* note 214.

reopening negotiations has been that the government commit to designating additional protected areas.³⁵¹

Claim Registration

Free entry and the new MTO system have heavily affected Takla's traditional territory. A map of registered claims shows that they have covered large swaths of Takla's land. Murray Browne, attorney for Takla as well as other First Nations, described the territory as "blanketed" with claims. Browne also called online registration and the lack of accompanying consultation a "major problem."³⁵²

Members of Takla told IHRC they opposed the online process particularly because it allows prospectors to register claims without physically traveling to the land. Prior to MTO, members said, they would often encounter claim stakers and sometimes even get paid to help them. For example, Raphael West said that he and his family used to charge miners CDN\$100 for a ride when they came to stake claims. "That helped," he said, but since the MTO took effect, he has not seen prospectors coming in, and "that's not fair."³⁵³ Although the old form of consultation was *ad hoc*, local residents preferred it because they had a better sense of the activity on their traditional land. Takla members also implied that they objected to the new online system because registration of a claim to their traditional territory without consulting them is an affront to their culture and their sense of ownership of the land.

Referral Process

Takla also has experienced poor consultation at the referral stage, which is part of the exploration permitting process. As discussed in the previous chapter, the NOW is the first point at which an individual mining project is reviewed and at which the law requires consultation. Takla has been fortunate among First Nations to be able to hire a mining coordinator to respond to these referrals, but it has still lacked the capacity fully to consider each project and adequately to determine and express how

³⁵¹ E-mail from JP Laplante (Apr. 27, 2010), *supra* note 349.

³⁵² Telephone Interview with Murray Browne, *supra* note 59.

³⁵³ Interview with Raphael West, *supra* note 67.

the project would affect its interests.³⁵⁴ A Takla member and Vice Tribal Chief of the Carrier Sekani Tribal Council told IHRC that the community has found it virtually impossible to respond within the thirty-day window that the First Nations have usually been allowed.³⁵⁵ With the advent of the MTO, the number of mineral claims exploded, adding to the burden created by logging and hydropower referrals and leaving Takla overwhelmed. Laplante, Takla's former Mining Coordinator, who helped Takla respond to referrals during his tenure, said he handled about thirty a year, almost all of which arrived in May and June. He said that thirty days was not enough time to do a thorough analysis of a proposal and prepare a proper response.³⁵⁶ According to Browne, sometimes Takla has not even been given the full thirty days.³⁵⁷

Takla usually has also lacked the funds and expertise required to conduct its own studies that would have provided the information needed to determine the potential effects of proposed projects on its land and community.³⁵⁸ Browne told IHRC researchers that a traditional use assessment requires working with local elders and hiring the appropriate people.³⁵⁹ Given the short time frame allowed for a response, the number and timing of referrals, and the First Nation's inability to conduct studies on the potential impact of each proposed project, Takla has often found it impossible to respond effectively to referrals, which highlights the limits of the consultation process.³⁶⁰

According to representatives of Takla, when Takla has responded to a referral, its concerns have rarely been addressed to its satisfaction. At a 2006 meeting between Imperial Metals and Takla, then Chief John Allen French said, "All we get are referral letters. No matter what we put in our letters, they just get ignored."³⁶¹ Laplante told IHRC that when Takla has responded to a referral with an objection to the proposed

³⁵⁴ Interview with Terry Teegee, *supra* note 26.

³⁵⁵ *Id.*

³⁵⁶ Interview with JP Laplante and David Radies, *supra* note 263.

³⁵⁷ Telephone Interview with Murray Browne, *supra* note 59.

³⁵⁸ Lisa Sam from neighboring Nak'azdli First Nation noted that the sheer number of mining and other industrial operations on First Nations' lands makes research by First Nations impractical. She said, "Each company is just doing one thing, but for us as a band there's too much going on." Interview with Lisa Sam, *supra* note 38.

³⁵⁹ Telephone Interview with Murray Browne, *supra* note 59.

³⁶⁰ A staff member of MEMPR said that the government has an obligation to look at prior concerns regarding a given area, and to practice "self-mitigation" even if a First Nation fails to respond to a referral. Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 89.

³⁶¹ Transcript from meeting between Imperial Minerals and Takla Lake First Nation (Apr. 25, 2006).

project, the government typically has replied that the community has not proven a right and that their objections were too vague to prevent the mining development from going forward.³⁶² Murray Browne also said that MEMPR often has failed adequately to take into account Takla's concerns. He said that the government's most common response has been "thank you for your concerns, the project is going ahead," and mitigation will be taken care of later. The second most common response has been that MEMPR has asked the company to avoid a certain area; however, the revised plan usually has involved, for example, only a small shift in the route of a road, rather than any significant change. Browne said that the Ministry has "often" required monitoring but has "almost never" required the company to invest in further studies.³⁶³

When Imperial Metals Corporation sought to conduct mineral exploration near Bear Lake, the government sent Takla a NOW at the end of January 2006 and requested a response by March 3, 2006.³⁶⁴ On February 15, Browne, in his capacity as Takla's attorney, responded with a letter stating that "the proposed permit raises serious concerns for Takla" due to the road construction, tree cutting, and drilling that would "have significant potential to infringe Takla's aboriginal rights and title."³⁶⁵ He also requested that permitting be halted until the consultation and accommodation process was complete.³⁶⁶ MEMPR granted the company permits for exploration work in June 2006.³⁶⁷

A staff member of MEMPR vigorously denied that his Ministry has permitted proposals over First Nations' objections at the referral stage.³⁶⁸ If there is opposition, he said, the Ministry "won't go ahead without consultation." He further explained that the consultation process has aimed "to get to the root of what opposition is about," so that the company can amend its proposal to eliminate First Nations' concerns, such as those about water quality.³⁶⁹ Far from ignoring First Nations' claims, the staff member

³⁶² Interview with JP Laplante and David Radies, *supra* note 263.

³⁶³ Telephone Interview with Murray Browne, *supra* note 59.

³⁶⁴ Letter from Bob Lane, Regional Geologist, B.C. Ministry of Energy, Mines and Petroleum Resources, to Chief John Allen French, Takla Lake First Nation (Jan. 30, 2006).

³⁶⁵ Letter from Murray Browne, Woodward & Co., to Bob Lane, Regional Geologist, B.C. Ministry of Energy, Mines and Petroleum Resources (Feb. 15, 2006).

³⁶⁶ *Id.*

³⁶⁷ Letter from Bob Lane, Regional Geologist, B.C. Ministry of Energy, Mines and Petroleum Resources, to Stephen Robinson, Imperial Metals Corp. (June 29, 2006).

³⁶⁸ Telephone Interview with staff member #2 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 246.

³⁶⁹ *Id.*

told IHRC, MEMPR has added legally binding conditions to permits in order to address First Nations' environmental and economic concerns.³⁷⁰

Environmental Assessment

On the whole, Takla has enjoyed greater success at the EA stage. It participated in an unprecedented review process that, at least temporarily, blocked development of a mine called Kemess North, which would have been located next to the existing Kemess South Mine.³⁷¹ The success of this process from Takla's perspective suggests that it could help improve protection of First Nations' rights if it became a standard part of the EA mechanism and/or was instituted earlier in mining review process, particularly at the exploration stage.

Takla and two other First Nations—Kwadacha and Tsey Keh Dene—challenged the proposal because it called for using Amazay Lake as a tailings pond. For the first time in B.C. history, the B.C. Minister of Sustainable Resource Management agreed to a joint panel review, which allowed for “independent recommendations from independent experts,” as well as research and advocacy by First Nations.³⁷² The panel brought together an environmental consultant, mining engineer, and a “natural resource and community development consultant” with experience working with indigenous people.³⁷³ The review involved consideration of the purpose and need for the project, environmental effects, including cumulative effects of this and other projects in the area, “economic, social, heritage and health effects,” possible mitigation measures, and the need for a “follow up” or remediation program. The panel also received and considered comments from the public and First Nations.³⁷⁴

The joint review panel process, which seemed to meet *Haida's* consultation standards, allowed Takla more meaningful participation in the decision than usual and showed Takla that, at least in some cases, First Nations have the power to stop a

³⁷⁰ *Id.*

³⁷¹ While the B.C. Minister of Environment rejected the open-pit proposal based on the joint review panel's recommendation, Northgate has reported that in early 2010 it began evaluating the possibility of an underground, rather than open-pit, mine at the Kemess North site. Northgate Minerals Corporation, Kemess Underground, <http://www.northgateminerals.com/OperationsProjects/KemessUnderground/default.aspx> (last visited Sept. 27, 2010).

³⁷² Telephone Interview with Murray Browne, *supra* note 59.

³⁷³ KEMESS NORTH COPPER-GOLD MINE PROJECT, JOINT REVIEW PANEL REPORT 276 (Sept. 17, 2007).

³⁷⁴ *Id.* at 274-75.

project.³⁷⁵ Murray Browne attributed Takla's success partly to the fact that the panel members visited the site with First Nations members and participated in ceremonies; therefore, they developed a real understanding of the "cultural and spiritual values of the area," in a way that government officials rarely have.³⁷⁶ Browne noted, however, that the B.C. government has tried to scale back protections in response to First Nations' case law victories.³⁷⁷ Furthermore, the joint review panel process conducted for Kemess North has yet to be repeated.³⁷⁸

While the case represented a victory for Takla and other First Nations, it required a great deal of time and resources, such as those devoted to increasing information about the situation. The project proponent intended to commission and pay for all of the necessary studies, but Browne told IHRC that in this case, some of its studies were "so superficial or deeply flawed" that Tse Keh Nay, the group of three First Nations including Takla, decided to use some of its participation funding to hire experts to conduct independent studies.³⁷⁹ Tse Keh Nay "hired proper researchers and anthropologists" who "found the journal of a Scottish explorer." This journal provided important evidence of the historical presence of First Nations people in the area, which helped demonstrate that Tse Keh Nay had rights to the territory.³⁸⁰ The government, by contrast, had simply looked at the company's studies and concluded that the impact would be low.

Takla's Frustration

Takla has traditionally taken a cautious approach to supporting mining on its lands. While consultation should be a vital source of information for the Takla community, its chief and council have frequently come away from meetings with government officials frustrated. Councilor Irene French told IHRC, "I don't think they

³⁷⁵ Interview with Tara Marsden, Gitanyow First Nation, in Prince George, B.C. (Sept. 11, 2009).

³⁷⁶ Telephone Interview with Murray Browne, *supra* note 59.

³⁷⁷ For example, after the Supreme Court determined that the government had failed adequately to consult the Taku River Tlingit First Nation regarding a mine development, the B.C. government amended their EA legislation, removing requirements that First Nations be included in a committee created to provide the EAO with recommendations. E-mail from Murray Browne (Apr. 23, 2010), *supra* note 214. CARRIER SEKANI TRIBAL COUNCIL, CRITIQUE OF THE B.C. ENVIRONMENTAL ASSESSMENT PROCESS FROM A FIRST NATIONS PERSPECTIVE, *available at* <http://www.cstc.bc.ca/downloads/EAO%20Critique.pdf> (last visited June 4, 2010).

³⁷⁸ Telephone Interview with Graeme McLaren, *supra* note 286.

³⁷⁹ E-mail from Murray Browne (Apr. 23, 2010), *supra* note 214.

³⁸⁰ Telephone Interview with Murray Browne, *supra* note 59.

[government officials] listen to what we're saying. . . . They just have this 'Indian problem,' like in the early days when Europeans first came."³⁸¹ Chief Dolly Abraham told IHRC that "we have to fight until someone gets hurt before we get noticed."³⁸²

These frustrations predate the current leadership of Takla. Takla leaders contended in the past that they were unable to meet with the right people. In a 2006 meeting between Imperial Metals and Takla regarding exploration at Bear Lake, then Chief John Allen French said, "We never even get meetings with higher ups. They just send lower down officials. . . . When it comes to government we are still trying to prove we exist."³⁸³ He told the company that "the government is not working with us in any meaningful discussions."³⁸⁴ At the same meeting, Terry Teegee of Takla and the Carrier Sekani Tribal Council said, "The government is not showing us any respect. Who has been here thousands of years?"³⁸⁵

John Allen French suggested elsewhere that the meetings that did take place were ineffective and that government officials made promises on which they later failed to deliver. For example, two months after a July 2006 meeting with the Minister of State for Mining from MEMPR, French wrote to the Minister:

You met with us on July 4th and made commitments. You agreed with us that we need to work together to find a new way of doing business. You agreed that we should be involved in initial planning and decision-making and have a meaningful role in permitting processes. Unfortunately, nobody from your Ministry has followed this up. You committed that our rights and title would be taken seriously but we have not seen any evidence of this. We appreciate your commitments but while we are waiting for someone from your Ministry to follow through, mining companies are carving up our Territory with complete disregard for our rights and title.³⁸⁶

For consultation meetings with the government to be effective, the government must send officials who have sufficient rank not only to make informed decisions regarding mining on Takla lands but also to make sure those decisions are implemented.

³⁸¹ Interview with Irene French, *supra* note 31.

³⁸² Interview with Dolly Abraham, Chief, Takla Lake First Nation, at Bear Lake, B.C. (Sept. 14, 2009).

³⁸³ Transcript from meeting between Imperial Minerals and Takla Lake First Nation, *supra* note 361.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ Letter from Chief John Allen French, Takla First Nation, to Bill Bennett, Minister of State for Mining (Sept. 15, 2006).

Moreover, the government should take seriously its obligation to hear Takla's concerns and to protect its rights to participation, self-determination, and enjoyment of culture, no matter the potential economic benefits of a given mining project.

Need for Coordinated Consultation

Takla's meetings with government officials also have revealed a lack of accountability and communication among different agencies. Members of Takla told IHRC researchers that one agency has sometimes professed ignorance or referred Takla to a different agency.³⁸⁷ For example, at a consultation meeting with the EAO regarding Kemess North, the government representative was asked about the cumulative effects of mining on Takla lands and admitted that she did not know the names, locations, or number of mines in the area because she was not from MEMPR.³⁸⁸

A staff member from MEMPR acknowledged that dealing with multiple government agencies can be difficult. Obtaining the necessary permits for a mining project can be a complicated and fragmented process, he explained to IHRC; different authorizations are required from MEMPR, the Ministry of Environment, and the Ministry of Forests.³⁸⁹ He said that this process can be "exhausting" for First Nations, and he worried that fragmented consultation procedures may cause the communities' interests and concerns to get lost during the consultation process.³⁹⁰

As a result, MEMPR has been testing a new process called "coordinated consultation," which involves developing interagency teams to discuss projects with First Nations in a more holistic way. This approach went through a trial phase and then began implementation throughout British Columbia as of April 1, 2010. Two MEMPR staff members contended that so far, coordinated consultation has been well received by both First Nations and government.³⁹¹ Pierre Gratton of MABC told IHRC

³⁸⁷ Interview with Irene French, *supra* note 31; Interview with Victor West, *supra* note 28. See also Interview with Ray Izony, Karl Sturmanis, and Darcy Tomah, in Prince George, B.C. (describing similar frustrations from the perspective of the nearby Tsay Key Dene First Nation).

³⁸⁸ Transcript from meeting between Tse Keh Nay and Environmental Assessment Office, Prince George B.C. 33 (May 10, 2007).

³⁸⁹ Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 89.

³⁹⁰ *Id.*

³⁹¹ *Id.*; Telephone Interview with staff member #2 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 246.

that it should be good for First Nations and industry because it provides one point of contact in the government. In addition, he continued, it should be good for government because it allows them to “do more with less.”³⁹² Chris Warren of CJL Enterprises noted, however, that “coordinated consultation doesn’t work” because the government has lacked the personnel to manage it effectively.³⁹³ Further study of this process is warranted; the principles of reducing the bureaucratic burden on First Nations and improving coordination within the government are positive, but implementation may need to be reconsidered as the process becomes more widely used.

INADEQUATE CONSULTATION BY MINERS

Although the law requires government consultation with First Nations on the use of natural resources that might infringe on aboriginal rights, in practice much discussion regarding resource use has actually occurred between the First Nations and individual mining companies. In fact, members of Takla, many of whom seem even more distrustful of the government than the mining companies, have said that some companies have been talking to them in greater depth than the B.C. government has.³⁹⁴ The quality of this type of consultation,³⁹⁵ however, has varied across companies and projects. Takla members have often stumbled across miners on their traditional territories with no previous knowledge that they were working in the area. In other cases, companies have been more proactive about seeking contact with Takla. Still, even well-intentioned relationships may break down when a company seeks to explore in an area that Takla considers sacred and completely off-limits to mining activity.

There have been some government and industry efforts to encourage corporate consultation with First Nations. While officially, an exploration application triggers consultation requirements and the Ministry sends the NOW to the affected First Nation, unofficially MEMPR has encouraged companies to talk to First Nations

³⁹² Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 239.

³⁹³ Telephone Interview with Chris Warren and Lorne Warren, *supra* note 237.

³⁹⁴ Interview with Irene French, *supra* note 31.

³⁹⁵ While consultation technically refers to a government obligation to First Nations, this report will also use the term to refer to industry’s discussions with First Nations.

communities “early and often” to build trust and good relationships.³⁹⁶ The AME BC, an industry group with approximately 300 corporate members, has worked with First Nations to develop guidelines for their engagement,³⁹⁷ and MABC has been involved in producing guides on “aboriginal inclusion” as well. Nonetheless, both sets of principles lack the force of law.³⁹⁸ As a result, the quality of consultation with affected First Nations has ultimately depended on each company’s willingness to cooperate. Without legal requirements behind industry’s action, these voluntary consultation procedures have been inherently limited.

Some companies have been more willing than others to engage and negotiate with local communities, but IHRC did not learn of any consultation to date that has completely satisfied Takla.³⁹⁹ “Why is it that mining companies can’t talk to us?” asked Councilor Irene French. “We have to work really hard to flesh information out . . . They’re famous for changing the subject.”⁴⁰⁰ Councilor Jeanette West told IHRC researchers that companies seemed to think sending letters was enough consultation, and that silence meant consent, but “that’s not the way we do business.”⁴⁰¹

Chance Encounters with Miners

High mineral prices and the advent of online claim registration in 2005 led to an explosion in the number of claims on Takla’s territory. Community members have reported a noticeable increase in outsiders observed on the land since that time.⁴⁰² The status of the many hundreds of claims that have been registered, however, has been elusive. Frank Williams and his family have been aware that valuable minerals are present on their *keyoh*, yet they have had to undertake to discover which outsiders know about their land and how they might be planning to exploit it.⁴⁰³ He found “blue rock” (molybdenum) while hunting beaver with his wife, Cecile, fifteen years ago. He

³⁹⁶ Interview with staff member #2 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 246.

³⁹⁷ Telephone Interview with Laureen Whyte, *supra* note 254.

³⁹⁸ Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 239.

³⁹⁹ Interview with Terry Teegee, *supra* note 26.

⁴⁰⁰ Interview with Irene French, *supra* note 31.

⁴⁰¹ Interview with Jeanette West, *supra* note 31.

⁴⁰² *Id*; Interview with Terry Teegee, *supra* note 26; Interview with Aaron Young, in Takla Landing, B.C. (Sept. 15, 2009).

⁴⁰³ Interview with Frank Williams, *supra* note 84.

also has seen black sand, which he knows to be a sign of gold, on his *keyoh*.⁴⁰⁴ Even though he and his family have not shared this knowledge with miners, Williams knows there have been claims on his land because he has occasionally visited an office in Smithers to find out who holds the claims and what kinds of minerals they are seeking.⁴⁰⁵ Raphael West said Chief Dolly Abraham told him that there were five companies prospecting on his territory, but as of September 2009, he had been unable to find out more details from Chief Abraham. West learned more by happening upon companies on his land and by questioning people during a 2008 blockade, which the chief and council had organized because of a standoff with Imperial Metals over exploration near Bear Lake. The blockade led to many surprise encounters with prospectors, and West was able to confront some on his land—ranging from land surveyors and samplers to a group of women searching for jade for jewelry.⁴⁰⁶

It has not been uncommon for Takla members, in the course of everyday activities, to find miners on their land, having no previous knowledge that they were there. A controversy over mining near Aiken Lake began when Marvin Abraham was hunting in 2008: “All of a sudden I heard a motor. Sure enough they had a drill all set up. . . . It was close to the creek that runs into the lake.”⁴⁰⁷ Chief Dolly Abraham once encountered a man who told her he was in Takla’s territory to visit a claim he had registered online.⁴⁰⁸ The only reason she met him was that he asked her for a place to stay, and she directed him to the hotel in Takla Landing.⁴⁰⁹ Chief Abraham said she told the miner that he should have consulted with Takla before coming onto their land.⁴¹⁰ Explaining her feelings on the subject to IHRC, the Chief said, “You can’t just walk right into somebody else’s house and start cooking.”⁴¹¹ When Imperial Metals began meeting with Takla in 2006 regarding their plans to conduct exploration near Bear Lake, community members were angry to learn that the company had been working in their territory for two years without contacting them.⁴¹² Since most Takla

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ Interview with Raphael West, *supra* note 67.

⁴⁰⁷ Interview with Marvin Abraham, *supra* note 40.

⁴⁰⁸ Interview with Dolly Abraham, Chief, Takla Lake First Nation, and Kathaleigh George, Councilor of Economic Development, Takla Lake First Nation, in Prince George, B.C. (Sept. 11, 2009).

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² Transcript from meeting between Imperial Minerals and Takla Lake First Nation, *supra* note 361.

members use land seasonally, however, they can miss miners' presence completely because exploration operations generally run for short periods each year.

Some members of Takla told IHRC about confrontations resulting from encounters with miners. Such confrontations have often arisen when Takla members have not had advance warning of the claims registered on their traditional territory or when mining companies have not been made aware of the local First Nations members, *keyoh* holders, and hunters who will be on the land. David Alexander, Jr. remembers being blocked from entering his own *keyoh* on Heart Mountain in 1993 by a mining company that owned a claim there before selling it to Teck Cominco.⁴¹³ Miners climbed out of their trucks and swore at Alexander and his friend, so he yelled back and angrily told them that it was his property. They eventually let him pass, apologetically explaining that they thought he was another miner.⁴¹⁴ Takla Councilor Jeanette West told IHRC about a confrontation with security at the Kemess South site in 1985. The company then in charge had blocked the road over thirty miles away from where the mine began, near where Takla has an annual gathering in Moose Valley. Security refused to let West and her brother, who was Chief at the time, through the gate. In order to get the gate moved, West and her brother brought their lawyer, *keyoh* holders, band manager, and an RCMP officer who was First Nation.⁴¹⁵ “[My brother] said, ‘This is our land, and you are gating us out from our hunting and fishing rights.’ He almost ripped the gate out with his truck, so they let him through. Then they moved the gate up to where the mine was. That was one thing we accomplished.”⁴¹⁶

Other Takla members have been reluctant to confront miners on their land. In 2008, Julie Jacques saw miners at a camp called Bodine who had blocked her with a fence from part of her own trapline about two miles away from her family's cabin on Silver Lake. She told Chief Abraham about it, and her husband, Al, called the mining company's office in Smithers. Still, she continues to be afraid to confront people on her land directly.⁴¹⁷

⁴¹³ Interview with David Alexander, Jr. *supra* note 87.

⁴¹⁴ *Id.*

⁴¹⁵ Interview with Jeanette West, *supra* note 31.

⁴¹⁶ *Id.*

⁴¹⁷ Interview with Julie Jacques, *supra* note 70.

Ad Hoc Consultations between Takla and Mining Companies

Some mining companies have shown a greater willingness to consult with Takla. In fact, it is in companies' best interests to communicate openly with First Nations, so that potential conflicts can become clear early on and so that government permitting processes can move more quickly.⁴¹⁸ In some cases, listening to objections from local residents can make a company shy away from getting involved in a project at all because the company may be reluctant to invest money in a project that will face significant opposition. When the junior mining company Serengeti Resources sought to explore for minerals near Aiken Lake, it secured an investor in large Australian company Newcrest. Newcrest pulled out, however, when Marvin Abraham and other members of Takla resisted development in their territory.⁴¹⁹ Companies focused on actual mine development, such as Newcrest, can choose which exploration sites they want to develop, and thus avoid those where conflict with local communities is likely.⁴²⁰ Exploration companies like Serengeti, which tend to be smaller operations, focus on prospecting many sites—wherever they think there might be minerals—and so in some cases may listen more to First Nations' concerns up front. Hugh Samson, the Serengeti Project Geologist at Kwanika, told IHRC that the company has taken local communities into account before it has begun exploration: "The number one [factor] is access—communities and physical access. We have to find something better than infrastructure. Here, there is good access. Takla is a good community with which to work."⁴²¹

Takla's relationship with Serengeti provides an interesting case study of the state of consultation with First Nations. Some companies, including Serengeti, have done voluntary consultations with First Nations beyond what is required by the B.C. government.⁴²² David Moore, President and CEO of Serengeti, told IHRC that his company does "as a matter of course communicate [with First Nations] before, during and after [its] projects."⁴²³ He explained that Serengeti "makes a point" of meeting with

⁴¹⁸ Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 89.

⁴¹⁹ Interview with Marvin Abraham, *supra* note 40; Interview with JP Laplante and David Radies, *supra* note 263.

⁴²⁰ Interview with Tara Marsden, *supra* note 375.

⁴²¹ Interview with Hugh Samson, *supra* note 277.

⁴²² *Id.*

⁴²³ Telephone Interview with David Moore, President & CEO, Serengeti Resources, Inc. (Mar. 2, 2010).

affected First Nations before projects to explain their plans and listen to the community's concerns and afterwards to ensure that the company honors any commitment that it has made.⁴²⁴ Hugh Samson told IHRC that Serengeti has talked to Councilor Kathaleigh George or the Takla Mining Coordinator (formerly JP Laplante, currently David Radies), and that, at least with regard to new exploration projects or major project activities, "[W]e don't do anything without letting Takla know."⁴²⁵ He explained that Serengeti has agreed to accommodate Takla in ways that are not required by law, such as by hiring as many people from Takla and nearby Nak'azdli as possible, and by performing an archaeological assessment and then avoiding important areas accordingly.⁴²⁶ With respect to its Kwanika site, Serengeti also conducted a "valued ecosystems component study" to identify the community's concerns so that it could mitigate potential impacts.⁴²⁷

Takla's response to these overtures on the Kwanika project has been qualified but relatively positive. Councilor Irene French described Serengeti as "an isolated example of communication."⁴²⁸ She said, "At least [Serengeti] came to the table. . . . It was not exactly what we wanted, but they did it. They are providing work for our people." Expressing some mixed feelings, she added that Serengeti is "not telling us everything . . . [but] at least they are talking to us, whereas the government isn't."⁴²⁹ Terry Teegee, whose family is from the Kwanika area, gave a similar assessment, telling IHRC that "for the most part [Serengeti's consultation has] been okay," but that negotiations over moving from exploration to full-scale development have stalled.⁴³⁰ Sometimes the company has appeared to respond to Takla's concerns, but its efforts have not always satisfied the community. For example, in March 2010, Murray Browne met with Serengeti to discuss the fact that Kwanika is close to a known caribou calving ground. The company contended that there was no problem since the caribou were in the hills and Kwanika was in the valley, and that if the caribou came down from the mountain, its monitors would see them and it would move operations away. As Browne pointed out, Takla knows that the caribou generally come down from

⁴²⁴ *Id.*

⁴²⁵ Interview with Hugh Samson, *supra* note 277.

⁴²⁶ *Id.* See also Telephone Interview with David Moore, *supra* note 423.

⁴²⁷ Telephone Interview with David Moore, *supra* note 423.

⁴²⁸ Interview with Irene French, *supra* note 31.

⁴²⁹ *Id.*

⁴³⁰ Interview with Terry Teegee, *supra* note 26.

the mountains in that area, and that if Kwanika's monitors have failed to see them, it is likely because Serengeti's exploration has scared the animals away.⁴³¹

In August 2010, after these comments were made, Serengeti's voluntary consultation with Takla produced an exploration access agreement for Kwanika. Serengeti stated that under the agreement it "will continue to provide Takla with opportunities to provide meaningful input into such aspects as environmental monitoring, protection of habitat for cultural important species, and protection of sites of important cultural or spiritual significance."⁴³² In return the company will receive guaranteed access to the property and local support for the project. When the agreement was announced, Chief Dolly Abraham stated, "Takla has a policy of requiring all companies operating in our Territory to sit down with us and work out respectful agreements. Serengeti from the very beginning has been very proactive in seeking out a relationship with us, which is very important."⁴³³

Relations with Serengeti have been less positive with regard to exploration at Aiken Lake. David Moore expressed frustration after having to negotiate with multiple families with overlapping territories, and then having Takla oppose his plans. Despite continuing objections from Takla, and in particular the Abraham family, whose territory is in the area, MEMPR granted Serengeti permits to continue exploration in the summer of 2010.⁴³⁴ Serengeti may have lost its initial investor, however;⁴³⁵ Newcrest pulled out of the project at least temporarily when it realized that local people were opposed. Former Mining Coordinator Laplante explained that Newcrest has known about issues with aboriginal rights, and that "if Newcrest smells hassle, it goes somewhere else."⁴³⁶

Some companies have chosen to communicate with the families living near their exploration projects rather than with chief and council. John David French told IHRC that Alpha Gold, the company exploring at Lustdust, has had meetings with his family, but it is not clear whether or not the company has changed any of its plans in response to the family's concerns about environmental damage and water

⁴³¹ Telephone Interview with Murray Browne, *supra* note 59.

⁴³² Press Release, Serengeti Resources Inc., Serengeti Completes Exploration Access Agreement for Kwanika Project with Takla Lake First Nation (Aug. 5, 2010), *available at* <http://www.serengetiresources.com/s/NewsReleases.asp?ReportID=412816>.

⁴³³ *Id.*

⁴³⁴ E-mail from David Moore, President & CEO, Serengeti Resources, Inc., to Bonnie Docherty, Lecturer on Law and Clinical Instructor (Apr. 23, 2010).

⁴³⁵ Telephone Interview with David Moore, *supra* note 423.

⁴³⁶ Interview with JP Laplante and David Radies, *supra* note 263.

contamination.⁴³⁷ According to an email Alpha Gold sent to IHRC, the company has had a memorandum of understanding with Takla, but it did not specify the subject of that memorandum.⁴³⁸ Irene French informed IHRC that she knew of no agreement between Alpha Gold and her family.⁴³⁹

Representatives of CJL Enterprises, a small family-owned company, told IHRC that they too, have preferred to deal directly with *keyoh* holders rather than with chief and council. They said that they have not been able to pay for people to go to meetings at Takla Landing and would rather meet in Prince George. “It is better to meet on neutral ground and to have open lines of communication,” a company officer told IHRC.⁴⁴⁰

CJL has had a long-standing, but deteriorating, relationship with the Takla family on whose *keyoh* it has been prospecting. Chris and Lorne Warren told IHRC that, in the case of Silver Creek, they have “always had good relations with the Alexanders.” The families knew each other, they said, and CJL always “kept them aware of what we were doing.”⁴⁴¹ David Alexander, Jr. concurred about this historically positive interaction that dates back to the 1970s.⁴⁴² Alexander remembers Lorne Warren and his wife asking his grandfather for permission to continue to explore. His grandfather agreed on the condition that the company employ his family members, but according to Alexander this has not happened.⁴⁴³ Chris Warren informed IHRC that CJL had planned to hire some members of the Alexander family but did not because it believed they had found jobs with other companies.⁴⁴⁴ Alexander expressed some bewilderment about the relationship between CJL and his family: “[Lorne] been there since the ’70s cutting trails and drilling and he hasn’t put us to work. But he’s still friendly. I don’t know what to call it—doing damage in our trapline and being nice.”⁴⁴⁵ While the Warrens said that they have “tr[ied] to involve locals” in CJL’s projects, they said that they have had difficulty working with chief and

⁴³⁷ Interview with John David French, in Takla Landing, B.C. (Sept. 15, 2009).

⁴³⁸ E-mail from Richard Whatley, CEO, Alpha Gold Corp., to Bonnie Docherty, Lecturer on Law and Clinical Instructor, IHRC (Mar. 29, 2010).

⁴³⁹ E-mail from Irene French, Councilor, Takla Lake First Nation, to Bonnie Docherty, Lecturer on Law and Clinical Instructor, IHRC (Apr. 7, 2010).

⁴⁴⁰ Telephone Interview with Chris Warren and Lorne Warren, *supra* note 237.

⁴⁴¹ *Id.*

⁴⁴² Interview with David Alexander, Jr., *supra* note 87.

⁴⁴³ *Id.*

⁴⁴⁴ E-mail from Chris Warren, CJL Enterprises, to Bonnie Docherty, Lecturer on Law and Clinical Instructor, IHRC (Apr. 23, 2010).

⁴⁴⁵ Interview with David Alexander, Jr., *supra* note 87.

council. The elected Takla officials have been “adamant” about jobs for Takla, but at the exploration stage, the company is not really making any money.⁴⁴⁶ In addition, Lorne told IHRC, he has “spent forty-five years developing the company and expertise,” and he has been “reluctant to give it away” to First Nations who “want control.”⁴⁴⁷

NEED FOR GUIDANCE ON CONSULTATION

Inadequate consultation has presented problems at legal and practical levels. The *Haida* case requires deep consultation with First Nations when a community has a strong claim to rights or title and the potential adverse impact is serious. The facts of the case did not involve mining so the Court did not rule on what stage of the mining process triggers deep consultation. A review of the current situation suggests that the government has applied deep consultation only rarely at any stage. As the report discusses in detail in the next chapter, mining can produce serious adverse impacts on First Nations and their lands. Furthermore, as noted earlier, once a company starts to invest in mining operations, momentum builds and it becomes hard for First Nations to reverse, even if they are consulted at a later point. IHRC thus believes that the government should instead follow the deep consultation standard at least from the exploration stage as well as institute some form of meaningful consultation for with claim registration.

In addition to determining when deep consultation should start, the government should improve Takla’s relationships with miners by clarifying the standards of the process for consultation. Company and industry representatives repeatedly argued that they have been trying to do right by Takla and other First Nations, but that they have needed more guidance regarding who is in charge of certain parcels of land, whom should be contacted regarding use of traditional territories, and exactly what constitutes appropriate consultation and accommodation.

Industry associations complained to IHRC about a general lack of clarity in the law of consultation. Lauren Whyte of AME BC told IHRC that her association has “not always [been] really clear what is expected of industry or required of industry” under aboriginal rights law.⁴⁴⁸ Zoe Carlson, MABC’s Vice President of Sustainability and

⁴⁴⁶ Telephone Interview with Chris Warren and Lorne Warren, *supra* note 237.

⁴⁴⁷ *Id.*

⁴⁴⁸ Telephone Interview with Lauren Whyte, *supra* note 254.

Operations, agreed, telling IHRC that court decisions have left a lot of ambiguity.⁴⁴⁹ “The court says we need to do something else, but they don’t tell you what that is,” she said.⁴⁵⁰ Carlson described a “quagmire” in which “people are divided on the issue of aboriginal rights and title,” and “on the very understanding of what the law says and means and how to implement both the case law and legislation. It’s not easy.”⁴⁵¹ MABC would like both a predictable process for assessing projects and clear input from the government explaining exactly what companies need to do for each project to comply with the law. While some provincial governments and First Nations have begun to offer some guidance to mining companies, Whyte said that guidance “is not consistent between First Nations and the provincial and federal governments or between provinces.”⁴⁵²

Industry has also sought guidance on how to address First Nations’ concerns that extend beyond a particular project.⁴⁵³ According to MABC’s Gratton, even when companies comply with the law, sometimes, “despite your best efforts, certain First Nations won’t support what you’re doing. It doesn’t create a legal challenge but a political one.”⁴⁵⁴ In certain cases, Whyte said, a community has raised general issues in response to a specific proposal. Takla, for example, voiced concerns to some AME BC members regarding land-use planning, the consultation process in general, and pre-1969 abandoned mines. “Those are not things the industry association or company can enter into a dialogue on,” Whyte said, because they are too broad and relate to government’s relationship with Takla, more than that of industry.⁴⁵⁵

In addition to legal and political clarity, mining company representatives called for practical guidance to help them implement the consultation that is required. Chris Warren said he and his father, Lorne, who run CJL Enterprises, love the land too and have lamented the fact that cooperation with First Nations seems to have worsened.⁴⁵⁶ To improve the situation, he suggested that the government provide information on landholders at the time of claim registration. He would like to know from the beginning who has trapping or other rights on a given piece of land, with whom to consult, and how to make contact with them—whether through an email address or

⁴⁴⁹ Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 239.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² Telephone Interview with Laureen Whyte, *supra* note 254.

⁴⁵³ *Id.*

⁴⁵⁴ Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 239.

⁴⁵⁵ Interview with Laureen Whyte, *supra* note 254.

⁴⁵⁶ Telephone Interview with Chris Warren and Lorne Warren, *supra* note 237.

the location of a cabin.⁴⁵⁷ Warren's proposal implies that companies should consult with individual *keyoh* holders, but even that has been open to debate. There has been general confusion regarding whether companies should talk to First Nations' elected leaders or *keyoh* holders or both. As elected officials, chief and council represent all of Takla, but because they serve two-year terms, there has often been a lack of continuity. *Keyoh* holders speak only for a specific piece of land, but it is their land that is most affected and they have a long-term interest in and authority over it.⁴⁵⁸ Companies also need to know with whom to consult when two First Nations have overlapping claims to a given territory.⁴⁵⁹ Finally, Imperial Metals expressed frustration in trying to figure out who actually had the authority to give them permission to explore. In a 2006 meeting with Takla regarding exploration at Bear Lake, Imperial Metals President Brian Kynoch said, "[W]e want to work things out here. I've told [the provincial government] 100 times, just tell me who the landlord is. . . . All I want to know is what the rules are."⁴⁶⁰

For government as well, understanding First Nation government structures and with whom to consult for any given project can be complex. Graeme McLaren from British Columbia's EAO said that when an EA process has begun, the government has met with First Nations to determine whether it is even talking to the right people. It has sought to determine how First Nations wish to engage in consultation—whether, for example, through individual First Nations, tribal associations (which sometimes exist), or both. "That can be pretty complicated," he said, but "once we can get it clear whom we should be consulting with, we then continue a dialog with them."⁴⁶¹

Finally, the miners' confusion about whom to consult has extended to when it is appropriate to consult the provincial or federal government and when First Nations. Some industry representatives said that they seem to have been stuck between those groups. Pierre Gratton of MABC told IHRC that, "We're caught in a situation where First Nations claim title over the land where the Crown exercises it. We really don't, at a broad business level, have an opinion or preference over whom we negotiate with or pay taxes to. But we'd like it to be clear."⁴⁶² Moreover, the provincial and federal

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 239.

⁴⁶⁰ Transcript from meeting between Imperial Metals and Takla Lake First Nation, *supra* note 361.

⁴⁶¹ Telephone Interview with Graeme McLaren, *supra* note 286.

⁴⁶² Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 239.

governments have not always harmonized processes. Carlson of MABC said that “those two arms of government are taking different approaches” to addressing aboriginal rights and title and developing revenue sharing agreements.⁴⁶³

While mining companies and industry should take on voluntary consultation regarding the use of aboriginal lands, the government bears the primary responsibility to ensure that adequate consultation does happen, and to clarify with whom it should take place. The government should reach out to First Nations, clarify who should be contacted with respect to each project, and relay this information to the appropriate companies. Codifying its rules in a statute or regulation would be the best way of accomplishing these goals. In addition, First Nations, including Takla, can assist by expressing their preferences for proper targets of consultation and culturally appropriate ways of approaching and communicating with the community. Their involvement would help ensure that their perspectives are best taken into account.

ABORIGINAL RIGHTS ANALYSIS

In practice, the existing consultation system has denied First Nations their constitutional rights to consultation and their international rights to participation and self-determination. The B.C. government’s current implementation of rights guaranteed under *Haida* and other jurisprudence has not provided Takla adequate opportunities to participate in decisions that affect its land and way of life. Mining companies have not universally implemented voluntary consultation procedures that could help fill the gap. This system will likely lead to decisions that threaten Takla’s rights to enjoy its culture and means of subsistence by allowing mining activity that cumulatively damages the natural environment and harms the wildlife that is important as both a food source and a cornerstone of its culture. There have been notable *ad hoc* successes, such as the Kemess North joint review panel. These successes, as well as the failures, have underscored the need for the government to institutionalize procedures to ensure meaningful consultation.

Lack of information has made it particularly difficult for Takla to defend and exercise its rights. Takla has received no notice of claim registrations and incomplete information about exploration and development proposals. It also has had limited

⁴⁶³ *Id.*

opportunities to gather its own information and has been frustrated in some of its attempts to communicate with government officials. This situation has challenged Takla's right to participate in decisions that affect its traditional land and resources. While international and domestic law calls for heightened scrutiny of projects that interfere with indigenous rights, Takla has instead borne much of the burden of proving—with limited information—that such projects are unacceptable after they have already gained momentum. A mining law regime founded on rights demands guaranteed protection for First Nations not only on paper but also in practice.

If the government improved its consultation mechanisms, it might change the way mining companies do business and, in so doing, more fully protect aboriginal rights. Mining companies have had very low barriers to start projects because free entry has been “such a part of their business plan.”⁴⁶⁴ If the government took Takla's concerns more into account, companies would be encouraged to incorporate them into their assessments of the feasibility of each mining project. Such a change could help balance the burdens and benefits associated with mining and better protect the aboriginal rights to which First Nations are entitled.

⁴⁶⁴ Interview with JP Laplante and David Radies, *supra* note 263.

VII. HARMS CAUSED BY MINING

When Takla has not been able to stop mining activities or regulate them to their satisfaction because of inadequate consultation, it has borne environmental and human consequences. Mining operations, whether small-scale exploration or full-scale production, have caused significant immediate and long-term effects on Takla's lands and its people. Just as worrying is the fact that while particular projects may have been in technical compliance with the law, the cumulative effects of the projects might impinge on Takla's rights. As outlined in this chapter, mining at all stages has led to deforestation; contamination, especially of water; and disturbances to wildlife. In addition, it has threatened human health because it has the potential to cause illness and changes in diet. Finally, it has endangered Takla's heritage sites, spiritual life, and cultural traditions. Takla's members depend on the environment for their livelihood, food and medicine, spiritual fulfillment, and unique culture. Mining, however, has disrupted their link to the land. It has placed a disproportionate burden on the members of Takla and has interfered with their enjoyment of their aboriginal rights.

EFFECTS OF DEFORESTATION ON TAKLA AND ITS LAND

To conduct their operations and access underground mineral deposits, mineral companies have cleared swaths of land on Takla's traditional territory. The different stages of mining require different degrees of clearance: exploration affects a smaller tract of land than full-scale mineral production. David Moore of Serengeti Resources estimated in March 2010 that exploration at Kwanika had affected roughly sixteen hectares (39.5 acres).⁴⁶⁵ This area is significant but still much smaller than that

⁴⁶⁵ Telephone Interview with David Moore, *supra* note 423. Lorne Warren, president and owner of CJL Enterprises, a mining company that conducts initial exploration activities, estimated that each drill requires only ten square meters to work; however, this estimate is for each drill pad, not for the exploration activity as a whole. Telephone Interview with Chris Warren and Lorne Warren, *supra* note 237.

covered by a producing mine. Kemess South, an open-pit mine operated by Northgate Minerals Corporation,⁴⁶⁶ has covered 33,610 hectares (88,052 acres).⁴⁶⁷

Regardless of the size of the swath, mining activities have disturbed surface areas. While most of the mining activity on Takla's territory has been in the exploratory phase, it has still required deforestation, which has had an effect on the environment and the people who live off the land. At its exploration operation at Kwanika, Serengeti carved out many spurs off the main roads in order to move workers and equipment between drill sites. To create these spurs, workers had to cut down trees, expand main roads, and disturb waterways. One of the approximately seventy drill sites at Kwanika consisted of a thirty meter-long path of cut trees leading to a twenty square meter clearing filled with muddy water and possibly drilling fluids.⁴⁶⁸ Terry Teegee, a member of Takla and the Vice Tribal Chief of the Carrier Sekani Tribal Council, noted that there have been many exploration operations across Takla's traditional territory and that the cumulative impact has, therefore, been quite dramatic.⁴⁶⁹ In addition, every exploration has the potential to develop into a producing mine, which has raised significant concerns for Takla. Mining development and production necessitates building additional access roads, felling more trees to make room for large equipment, creating tailings ponds and dams to store polluted waters, and blasting or drilling into rocks to access the minerals within. All of these activities change the natural face of the land and fragment and disrupt the habitat of animals upon which Takla depends.

Impact of Roads

In addition to destroying the traditional topography of the land, the roads created by mining companies have opened Takla's territory up to outsiders who have

⁴⁶⁶ See Mineral Resources Education Program of British Columbia, Kemess, http://www.bcminerals.ca/files/bc_mine_information/000129.php (last visited June 4, 2010); Northgate Minerals Corporation, Kemess South, <http://www.northgateminerals.com/OperationsProjects/KemessSouth/default.aspx> (last visited June 4, 2010).

⁴⁶⁷ GORDON SKRECKY, TECHNICAL REPORT ON THE DECEMBER 31, 2007 RESERVES FOR KEMESS SOUTH, PREPARED FOR NORTHGATE MINERALS CORPORATION 3 (2008), *available at* <http://www.northgateminerals.com/Theme/Northgate/files/pdf/Technical/Kemess%20South%20re-filed%20%20May%209%20Technical%20Report.pdf>.

⁴⁶⁸ Observed by IHRC during visit to Kwanika exploration site.

⁴⁶⁹ Interview with Terry Teegee, *supra* note 26.

sometimes inflicted further damage on the land and its flora and fauna.⁴⁷⁰ Roy French of Takla told IHRC that mining roads increased human traffic on Takla's traditional territory starting in the late 1950s.⁴⁷¹ For example, such roads have facilitated entry of trophy hunters.⁴⁷² Many Takla members expressed frustration that trophy hunters have taken from a dwindling supply of game and then have left the meat to rot. "You can't shoot the bears," Julie Jacques told IHRC. "We eat the meat, and you leave it here and it stinks. They say, 'We have a license,' and we say, 'Go somewhere else.'"⁴⁷³ Even if outsiders who come to the area take great care, they may unwittingly harm graves, sacred places, or archaeological sites. They may also frighten away wildlife and destroy plants upon which Takla depends.⁴⁷⁴ Whether outsiders have intentionally caused harm or not, their ever-increasing presence on lands that were traditionally accessed by Takla alone has disrupted the community's pattern of hunting and gathering.

At least some mining companies have attempted to minimize their impact by re-using existing roads. For example, when Serengeti began exploration at Kwanika, the company used old logging roads rather than building new ones.⁴⁷⁵ CJL Enterprises similarly has tried to reduce deforestation by using old access roads and by flying in equipment whenever possible because flying in equipment leads to less surface damage.⁴⁷⁶ Gold Fields reported to IHRC that to minimize environmental impact, it has used a "boots on the ground" approach in which it has relied on historical roads for access and limited all-terrain vehicle use to existing roads.⁴⁷⁷

⁴⁷⁰ *Id.*

⁴⁷¹ Interview with Roy French, *supra* note 81.

⁴⁷² The harms of mining on wildlife will be discussed, *infra*, in more detail in the subsection on Harm to Wildlife and Its Effects on Takla in this chapter.

⁴⁷³ Interview with Julie Jacques, *supra* note 70.

⁴⁷⁴ In traditional common law, trespass to land is actionable *per se*. Thus, the party whose land is entered may sue even if no actual harm is done. Simple presence upon the land is considered sufficient harm. See generally VIVIENNE HARPWOOD, PRINCIPLES OF TORT LAW 220 (4th Ed., 2000).

⁴⁷⁵ Observed by IHRC during visit to Kwanika exploration site.

⁴⁷⁶ Telephone Interview with Chris Warren and Lorne Warren, *supra* note 237.

⁴⁷⁷ Letter from Ross Sherlock, Gold Fields, to Bonnie Docherty, Lecturer on Law and Clinical Instructor, IHRC, May 13, 2010.

Reclamation Efforts

Mining companies contend that, in order to prevent long-term harm, they have strived to reclaim forests after mining operations have ceased. Hugh Samson of Serengeti told IHRC that Serengeti has spent a “significant” amount of money to restore the land.⁴⁷⁸ Serengeti’s reclamation process has involved cutting up felled trees and spreading that wood, along with any other organic material removed, back onto the cleared land and then covering the site with grass seed.⁴⁷⁹ CJL has also followed this method.⁴⁸⁰ Lorne Warren, CJL’s President, noted, “In a matter of a year or so, you would never know [a drill site] was there. I’ve gone looking for old drill sites and couldn’t find them.”⁴⁸¹ John David French, a Takla member who worked on Alpha Gold’s Lustdust site in 2008, described similar remediation measures.⁴⁸²

The efficacy of these measures has been unclear, however. David Radies, Takla’s Mining Coordinator, who has a degree in biology from the University of Northern British Columbia in Prince George, believes that cutting up trees and seeding over them is not an effective way of returning the forest to its original state.⁴⁸³ Takla member Ernie French, who worked for Gold Fields, reported that that company was “trying not to disturb [culturally modified trees and caribou habitat] . . . [but] when my Chief went up, he pointed out [damage to the trees] I hadn’t even noticed.”⁴⁸⁴ David Moore of Serengeti acknowledged that the company has not reclaimed all the roads it has created because those roads may be necessary for further mineral exploration.⁴⁸⁵

Even if a mining company takes all possible steps to remediate affected sites, some of the damage to the land may be irreversible. Northgate has won an environmental reclamation award⁴⁸⁶ and has committed CDN\$18.7 million to

⁴⁷⁸ Interview with Hugh Samson, *supra* note 277. See also Serengeti Resources Inc. Interim Financial Statements, May 31, 2009, at 5, available at <http://www.serengetiresources.com/i/pdf/2009Q1.pdf> (recording investment of CDN\$27,000 in reclamation bonds in 2007).

⁴⁷⁹ Telephone Interview with David Moore *supra* note 423 (noting that grass seed is purchased locally and is used by all government forest agencies and mining companies in the region).

⁴⁸⁰ Telephone Interview with Chris Warren and Lorne Warren, *supra* note 237.

⁴⁸¹ *Id.*

⁴⁸² Interview with John David French, *supra* note 437.

⁴⁸³ Interview with JP Laplante and David Radies, *supra* note 263.

⁴⁸⁴ Interview with Ernie French, *supra* note 67.

⁴⁸⁵ Telephone Interview with David Moore, *supra* note 423.

⁴⁸⁶ See Maurice Ethier, General Manager of Northgate Minerals Limited, Presentation at Minerals North Conference, Smithers, Canada (April 15, 2004), slide 15, available at http://www.mineralsnorth.ca/pdf/main_1.pdf (stating that Northgate received a Reclamation

environmental remediation at Kemess South Mine, which is scheduled to end production in early 2011.⁴⁸⁷ Victor West of Takla noted, however, that “there’s no money that can replace what happened. Everything will be destroyed, and it’s priceless.”⁴⁸⁸ Tony Johnny, whose family is one of the *keyoh* holders on the site of the Kemess South told IHRC, “My kids are going to say ‘Dad, where’s the place we used to hunt and fish?’ And there’s going to be nothing. . . . We lived off our land for years and years. Now we’re going to be homeless.”⁴⁸⁹

Historical Effects on the Land

The people of Takla have been concerned about the future effects of exploration sites and active mines on their land in part because they have witnessed the lasting damage done by mines in the past. Takla Councilor Irene French described visiting the abandoned Baker Mine, a silver and gold mine operated by DuPont of Canada in the early 1980s:⁴⁹⁰ “When you stand on the mountain, you look down on the mine and tailings pond and see all scars. . . . It’s really sparse, a few clumps of brush, a few flowers here and there. Pink creeks, white creeks. It’s so sad.”⁴⁹¹ Marvin Abraham remembers how, in 1969, his father reacted to the road that was built through their land to go to Kemess South: “My dad sat at the end of the fire and started crying. . . . He said, ‘Son, the country is bust wide open now. Mining is going to kill the land.’”⁴⁹² When Marvin was little, the road made him happy because “it meant trucks, no more

and Environmental Citation in 2002 for excellence and the Edward Prior Award for the safest open pit mine in British Columbia during 2001).

⁴⁸⁷ SKRECKY, *supra* note 467, at 3 (§2.2(4)) (reporting that Northgate would increase its reclamation bond every year until it reached CDN\$18.7 million in 2010, when Kemess South was scheduled to close). In September 2010, Northgate announced the mine would end production in early 2011. Liezel Hill, *Northgate Studies Underground Gold Mine at Kemess in BC*, MINING WEEKLY.COM, Sept. 21, 2010, <http://www.miningweekly.com/article/northgate-studies-underground-gold-mine-at-kemess-in-bc-2010-09-21>.

⁴⁸⁸ Interview with Victor West, *supra* note 28.

⁴⁸⁹ Interview with Tony Johnny, *supra* note 87.

⁴⁹⁰ See B.C. Ministry of Energy, Mines and Petroleum Resources, MINFILE, <http://minfile.gov.bc.ca/> (search record number 094E 026) (last visited May 6, 2010) (recording that the Baker Mine was operated by DuPont of Canada Exploration Ltd. from 1979 to 1983). See also Welcome to Sable Resources, <http://www.sableresources.com> (last visited June 4, 2010) (stating that Sable now has a 100% interest in the mine and is “currently engaged in underground development of this key asset”).

⁴⁹¹ Interview with Irene French, *supra* note 31.

⁴⁹² Interview with Marvin Abraham, *supra* note 40.

walking.”⁴⁹³ He said he now recognizes the prescience of his father’s words; not only did the road plow through traplines and lead to more human traffic and development, but the mine has reduced a once beautiful and bountiful mountain to an open pit, several large tailings ponds, a large camp for the workers, and piles of rock.⁴⁹⁴ When asked about the effects of mining in Takla, Ernie French responded simply, “Kemess is a big hole now; it used to be a mountain.”⁴⁹⁵

Cultural and Spiritual Harm

For Takla, deforestation and other disturbances have represented more than damage to an external environment. They have been injuries some community members have experienced personally. Takla’s traditional governance system centers around *keyoh* holders who “speak for the land,” and members of Takla consider themselves its custodians, a role they take very seriously.⁴⁹⁶ Irene French said of the abandoned Baker Mine site, “The plants are trying to keep the ecosystem going, but you can see the mountain dying. . . . It’s not just a pretty mountain. It’s alive, and I feel its life. It really hurts me. I go up to those plants and hold them and apologize to them.”⁴⁹⁷ Reactions to environmental destruction like the one expressed by French reflect the spiritual connection members of Takla have with the land and the unique pain they feel when it is harmed.

EFFECTS OF CHEMICAL CONTAMINATION ON TAKLA AND ITS WATER

In addition to contributing to deforestation and other forms of surface disturbance, mining activities use harmful substances that, if spilled or released, contaminate the surrounding lands and waterways, potentially making water unsafe to drink and poisoning fish and other nearby wildlife. Many members of Takla fear such contamination, and this fear has driven some of them to abandon their

⁴⁹³ *Id.*

⁴⁹⁴ *Id.*

⁴⁹⁵ Interview with Ernie French, *supra* note 67.

⁴⁹⁶ Interview with Anita Williams, *supra* note 44.

⁴⁹⁷ Interview with Irene French, *supra* note 31.

traditional subsistence practices, which may affect their health⁴⁹⁸ and which prevents the transmission of their traditions and important subsistence skills to younger generations.

The greatest concern of both Takla and mining companies has been that contaminants used during the mining process would seep into nearby waterways.⁴⁹⁹ Mineral exploration, development, and production are water-intensive processes; water is needed to, among other things, lubricate and cool drills, clear excess rock from holes, and keep drilling holes stable.⁵⁰⁰ Pollution can occur if mining companies leave behind equipment or toxins or if contaminants are released or spilled during operations. Mining companies must, therefore, take significant steps to prevent contamination and to clean up accidental spills as soon as possible.

A recent study of environmental and health of mining effects in Taka's territory reinforces members' fears of contamination. Between 2006 and 2008, a team led by Pam Tobin, a researcher from the University of Northern British Columbia, tested sites near abandoned and current mining operations, including Baker, Bralorne-Takla, and Kemess South mines; all the samples showed high levels of contaminants, including arsenic, mercury, and petroleum hydrocarbons.⁵⁰¹ The report, released as *Healthy Land, Healthy Future*, could not conclude that these contaminants had been the direct result of mining,⁵⁰² but the significant health risk posed by their presence warrants

⁴⁹⁸ A discussion on how switching from traditional local foods to processed foods may cause health problems in indigenous populations may be found *infra* in the subsection on Human Health Concerns in this chapter.

⁴⁹⁹ Telephone Interview with David Moore, *supra* note 423 (stating that water pollution is a significant concern for all people within British Columbia because the province has so much water and that Serengeti is conscious of the need to prevent water pollution).

⁵⁰⁰ Existing diamond drill bits require water flushing to remove balings, lubricate the diamond matrix/rock interface, and dissipate heat. *See generally* S. Boucher, The Adaptation of Terrestrial Mining Exploration Drilling Technology to Space, Presentation at Meeting on Concepts and Approaches for Mars Exploration, July 18-20, 2000, Houston, Texas, *available at* <http://www.lpi.usra.edu/meetings/robomars/pdf/6020.pdf> (discussing the need for water to use existing diamond drills).

⁵⁰¹ HEALTHY LAND, HEALTHY FUTURE, *supra* note 2, at 43-48, 82-85. *See also* GREGG G. STEWART & LISA N. BARRAZUOL, B.C. MINISTRY OF ENERGY AND MINES, HISTORIC MINE SITES PROJECT 14 (2003), *available at* <http://circle.ubc.ca/bitstream/handle/2429/9036/12%20Stewart.pdf?sequence=1> (noting concern about mercury contamination at the site in soil and water).

⁵⁰² Compare A. Plouffe et. al, *Mercury and Antimony in Soils and Non-Vascular Plants near Two Past-Producing Mercury Mines, British Columbia, Canada*, 4 GEOCHEMISTRY: EXPLORATION, ENVIRONMENT, ANALYSIS, 353, 353 (2004) (concluding that the levels of mercury at Bralorne-Takla are no higher than would be expected from natural sources and therefore are unlikely due to anthropogenic sources) *with* CANADIAN COUNCIL OF MINISTERS OF THE ENV'T, CANADIAN SOIL QUALITY GUIDELINES FOR PROTECTION OF ENVIRONMENTAL AND HUMAN HEALTH 1 (2001), *available at* <http://ceqg-rcqe.ccme.ca> [hereinafter CANADIAN SOIL QUALITY GUIDELINES] (search "arsenic")

significant caution by Takla, the B.C. government, and mining companies in the area.⁵⁰³

Contaminated Abandoned Mines

Pollution was more common at historic mine sites because they predated the development of better methods to manage mining wastes and prevent water pollution and other potential environmental harms.⁵⁰⁴ Many abandoned mines have still not been cleaned up, however, and the possibility of contamination has been a serious concern for the Takla people who live in the area and rely upon neighboring waterways and the wildlife that they support. Members of Takla have been particularly concerned about the cumulative and long-term consequences of abandoned mines. Margo French, a member of Takla and an environmental expert, said, “The mine owners have walked away, but we are left to clean up the mess.”⁵⁰⁵ Radies, Takla’s Mining Coordinator, noted that limited liability for mining companies has been part of the problem: “Mine disasters last hundreds of years, but corporate entities don’t have to.”⁵⁰⁶

While security bonds provide a mechanism to reclaim mining sites that have been abandoned since 1969, Takla has earlier mines on its territory, notably the Bralorne-Takla mercury mine which dates to World War II. The Crown Land Restoration Branch of the Ministry of Agriculture and Lands deals with contaminated sites that have defaulted to the Crown because no responsible person or company exists. The Office of the Auditor General of British Columbia estimated there are more

(stating that industrial actions from smelting ores during mining is the predominant source of arsenic in Canada).

⁵⁰³ See generally HEALTHY LAND, HEALTHY FUTURE, *supra* note 2.

⁵⁰⁴ See Jason Dearing, *Mercury Leaking at Closed California Mine Sites*, MSNBC, Sept. 18, 2009, http://www.msnbc.msn.com/id/32900375/ns/us_news-environment/ (reporting on the lasting effects of closed mines in California, that are still leaking and contaminating the food chain and drinking water); Telephone Interview with staff member #1 of the Ministry of Energy, Petroleum and Mining Resources, *supra* note 89 (noting that in the past, mining companies were not required to post reclamation bonds, so there was a great deal more pollution, and those sites are still being cleaned); Telephone Interview with Brian Clarke and Gregg Stewart, *supra* note 337 (stating that a few decades ago the government had very little awareness about the contamination effects of mining).

⁵⁰⁵ Margo French, Hearing Testimony, Canadian Environmental Assessment Agency, slide 9, *available at*

http://www.ceaa.gc.ca/050/documents_staticpost/cearef_3394/hearings/SM50.pdf (last visited Mar. 8, 2010) [hereinafter Margo French EAA Testimony].

⁵⁰⁶ Interview with JP Laplante and David Radies, *supra* note 263.

than 2,000 known or potentially contaminated sites on Crown land in British Columbia. The CLRB has made a conscious decision not to inventory or investigate each site but to focus instead on the sites that present the highest risk to human health and the environment.⁵⁰⁷ To date, the CLRB has spent CDN\$135 million of its CDN\$229 million budget for cleanup and reclamation efforts.⁵⁰⁸ The program has investigated seventy-two sites since its inception in 2003; of these, ten sites have been completely remediated.⁵⁰⁹ At many sites the contamination level is minimal, and the program's work will end after initial location and analysis of the site. For others, however, the contamination poses a higher risk and may cost a significant amount of money to clean. There are currently eighteen sites in British Columbia, including Bralorne-Takla, that are classified as priority contaminated sites. In 2010, the CLRB planned to investigate five additional priority sites.⁵¹⁰

Bralorne-Takla Mine

The case of the old Bralorne-Takla mercury mine demonstrates the lingering danger that mining pollution can cause. The area where it is located has been contaminated for decades. Adult members of Takla remember the abandoned mine as once being a popular picnic spot, particularly for members of the French and Alexander families, who often traveled through the area to access various parts of their

⁵⁰⁷ See Gregg Stewart, Jurisdictional Update, Statement to the NOAMI Workshop on Best Practices for Orphaned and Abandoned Mines, Oct. 26-27, 2006, *available at* <http://www.abandoned-mines.org/pdfs/presentations/JurisdictionalUpdateStewart.pdf> (reporting an estimated 2,000 historic mines in British Columbia); *B.C. Leads the Nation in Contaminated Sites*, CANADA.COM, June 13, 2008 (reporting British Columbia has 4,088 contaminated sites on federal land) (quoting Brian Clarke as stating, "We've made a conscious decision to not go out and spend a lot of time and money trying to identify every one of them"); Telephone Interview with Brian Clarke and Gregg Stewart, *supra* note 337 (Brian Clarke estimated that eight-five to ninety percent of the contaminated sites are from mining. Gregg Stewart disagreed with Clarke's estimate and noted that the contaminated sites list includes mines, pulp mills, forest sites and others); CHAMBERS & WINFIELD, *supra* note 199 (reporting there are nearly 10,000 abandoned mines in Canada and that rehabilitating these sites would cost CDN\$6 billion).

⁵⁰⁸ CROWN LAND RESTORATION PROGRAM, BIENNIAL REPORT 2010, at 19 (2010), *available at* http://www.al.gov.bc.ca/clad/ccs/cabinet/reports/10_CLRB_Biennial_Report.pdf [hereinafter BIENNIAL REPORT 2010]. See also News Release, B.C. Ministry of Agriculture and Lands, Report Shows B.C.'s Commitment to Cleaning Up Crown Land (Apr. 1, 2010), *available at* http://www2.news.gov.bc.ca/news_releases_2009-2013/2010AL0006-000366.htm (stating that the province has dedicated \$229 million to reclamation of contaminated sites).

⁵⁰⁹ See News Release, B.C. Ministry of Agriculture and Lands, *supra* note 508; BIENNIAL REPORT 2010, *supra* note 508.

⁵¹⁰ News Release, B.C. Ministry of Agriculture and Lands, *supra* note 508.

keyohs.⁵¹¹ The French siblings—Irene, Margo, Marvin, and Paul—all told IHRC about playing there frequently as children: they swam in the tailings pond, made tea from the water, and used old bottles of mercury they discovered in the abandoned cabins as toys.⁵¹² Margo French said that as children they even brought mercury in bottles to school, where teachers let them play with it. She recalled playing with the mercury by repeatedly spilling it onto the ground and then licking her fingers to gather the droplets back together.⁵¹³ Paul French said of the unusually colored greenish-blue water, “We thought the water was so pretty; we didn’t know it was contaminated.”⁵¹⁴

The B.C. government has listed the Bralorne-Takla Mine as a “priority site” in the Crown Contaminated Sites Biennial Report: a priority site is one “that has been identified for current action based on potential high risks to human health and the environment.”⁵¹⁵ In 2008, the Crown Contaminated Sites Program conducted an ecological and human health risk assessment of Bralorne-Takla.⁵¹⁶ According to an interview with CLRB officials, the site assessment and risk assessment reports indicated that mercury contamination at the Bralorne-Takla Mine appeared to have been restricted to the core mining area, the water quality was good, and the potential for human health risk was minimal unless people consumed the soil.⁵¹⁷ The Ministry nevertheless decided, in fall 2008, to erect a perimeter fence to reduce access to the site as a precautionary measure. It also installed a sign reading: “CAUTION. Area Contains Mercury Contaminated Soil. Access is Restricted. Do Not Enter Without Written Authorization of the B.C. Ministry of Agriculture and Lands.”⁵¹⁸ As IHRC observed, however, the fence is low and animals could easily cross it, which has raised

⁵¹¹ Interview with Irene French, *supra* note 31; Interview with Paul French, *supra* note 41; Interview with Margo French, *supra* note 87.

⁵¹² Interview with Irene French, *supra* note 31; Interview with Paul French, *supra* note 41; Interview with Margo French, *supra* note 87.

⁵¹³ Interview with Margo French, *supra* note 87.

⁵¹⁴ Interview with Paul French, *supra* note 41.

⁵¹⁵ BIENNIAL REPORT 2010, *supra* note 508, at 19-20 (noting that the Bralorne-Takla Mine is a priority site and defining the nature of priority sites).

⁵¹⁶ A Preliminary Site Investigation and Detailed Site Investigation have both been completed and report elevated levels of antimony, arsenic, cadmium, chromium, and mercury in the soil at the mine site. Ongoing work includes a Human Health and Ecological Risk Assessment. CROWN CONTAMINATED SITES PROGRAM, CROWN CONTAMINATED SITES BIENNIAL REPORT 2008, at 15 (2008), *available at* http://www.bceia.com/documents/08_CCSB_report.pdf [hereinafter BIENNIAL REPORT 2008]. *See also* STEWART & BARRAZUOL, *supra* note 501 (identifying Bralorne-Takla as having the greatest potential for environmental impacts, as measured through water quality and mine inspections; the study also raises concern for mercury contamination at the site in soil and water).

⁵¹⁷ Telephone Interview with Brian Clarke and Gregg Stewart, *supra* note 337.

⁵¹⁸ Interview with Irene French, *supra* note 31; Interview with Margo French, *supra* note 87.

health concerns for Takla members who subsist off game from that region. In addition, the road to the Bralorne-Takla Mine has remained open, which has worried Takla residents; the road was built from mine tailings, and passing trucks stir up potentially toxic dust.⁵¹⁹ CLRB's next step in addressing the Bralorne-Takla Mine is to develop a remediation plan including consolidation of mine waste. The plan could take up to a year to design and more to implement.⁵²⁰ Ministry officials noted that the Ministry has been consulting with Takla since 2007 and will continue to pursue remediation of the Bralorne-Takla Mine in consultation with the Takla chief and council.⁵²¹ Despite Takla's expressed fear that the mercury contamination at Bralorne-Takla may pose severe health threats, the cleanup process has been "slow and frustrating" according to Takla's lawyer Murray Browne.⁵²²

Contemporary Mining Operations' Potential Water Pollution

British Columbia's modern pollution standards are designed to prevent contamination from current and future mines, but mining activities have continued to affect water. Exploration and production have used a great deal of water and their drilling patterns have often altered the water level in streams and lakes, thereby affecting nearby ecosystems.

Water quality is as important as water quantity to environmental health. Takla members reported observing waterways that appear polluted. They described local creeks that had turned unnatural colors including red, pink, purple, peach, white, green, and blue.⁵²³ "The fashion industry would love it," said Irene French, "but you can't touch it."⁵²⁴ John David French told IHRC that his nephew who has worked on Alpha Gold's exploration operations near the old Bralorne-Takla mine site has seen yellow water that "looked like acid" going into creeks.⁵²⁵ IHRC does not have the scientific expertise to determine the source of these colors, and David Moore of Serengeti noted that a single cup of diesel fuel can create a rainbow shimmer on a

⁵¹⁹ Interview with Dolly Abraham and Kathaleigh George, *supra* note 408.

⁵²⁰ Telephone Interview with Brian Clarke and Gregg Stewart, *supra* note 337.

⁵²¹ *Id.*; BIENNIAL REPORT 2008, *supra* note 516, at 15 (reporting that cleanup is ongoing and will occur in coordination with the Takla people).

⁵²² Telephone Interview with Murray Browne, *supra* note 59.

⁵²³ Interview with Tony Johnny, *supra* note 87; Interview with Irene French, *supra* note 31.

⁵²⁴ Interview with Irene French, *supra* note 31.

⁵²⁵ Interview with John David French, *supra* note 437.

creek surface.⁵²⁶ Nevertheless, Takla's concerns about potential contamination, supported by the *Healthy Land* report, should be the subject of further independent investigation.

Moore told IHRC that at least Serengeti's exploration work has not contributed to contamination, and in any event, his company has collected and precipitated drill cuttings in sumps, which it has backfilled subsequent to drilling. Even if drilling has released minerals, he continued, those minerals occur naturally in the area.⁵²⁷ When mining exposes inherently harmful substances, such as mercury, however, the fact that mercury is native to the area is not essential; what is of consequence is that mining has raised mercury from a contained underground location to a surface location where it can cause harm to health.⁵²⁸

Water pollution from contemporary mining exploration has in some cases been tied to the contamination from abandoned mines, which illustrates one reason why the government should take the legacy of past operations into account when it considers new exploration proposals. At its Lustdust site, Alpha Gold explorations have used enough water from the former Bralorne-Takla tailings pond to lower the water level by roughly four feet, according to Margo French, who has done research on the abandoned mine.⁵²⁹ Lowering the water level in these ponds and streams may not only impinge on the health of ecosystems but also spread pollution from old mines that is contained in the water. Margo and Paul French both expressed concern that dropping water levels may allow the wind to blow underlying mercury-containing dust into the nearby environment. They also noted that spreading contaminated water (as from old tailings ponds) could introduce pollutants into a wider area and affect even more plant and animal life.⁵³⁰

With producing mines, the long-term security of tailings ponds has created additional pollution concerns. MABC described dealing with tailings as one of the

⁵²⁶ Telephone Interview with David Moore, *supra* note 423.

⁵²⁷ *Id.* Moore noted that even during full mineral exploration, drill cuttings are collected and precipitated into sumps, which are then back filled after drilling to prevent contamination.

⁵²⁸ See also AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, U.S. DEPT OF HEALTH AND HUMAN SERV., TOXICOLOGICAL PROFILE FOR MERCURY 74 (1999), *available at* <http://www.atsdr.cdc.gov/toxprofiles/tp46.pdf> (discussing the health concerns caused by mercury contamination) [hereinafter U.S. TOXICOLOGICAL PROFILE FOR MERCURY].

⁵²⁹ Interview with Margo French, *supra* note 87. Margo French worked on the *Healthy Land, Healthy Future* report. See HEALTHY LAND, HEALTHY FUTURE, *supra* note 2.

⁵³⁰ Interview with Paul French, *supra* note 41; Interview with Margo French, *supra* note 87.

biggest environmental challenges of mining.⁵³¹ One U.S. study found that the security of old tailings ponds posed a significant threat to the local environment even decades after the mines left the area.⁵³² Takla Councilor and former Chief Jeanette West told IHRC, “If those three tailings ponds let go [at Kemess South], we’ll be wiped out down to Johansen [Lake]. They’re not strong.”⁵³³ These types of long-term hazards should be given greater weight when considering the cumulative effects of mining on Takla lands; the potential harms of a mine do not end when the mine itself closes.

Finally, producing mines pose threats of contamination through spills and dumping. Mining companies in the Takla region have used trucking as their major mode of transportation, which has presented significant opportunity for spills. For example, Northgate has trucked its gold-copper concentrate in bulk from Kemess South to the railroad at Mackenzie, B.C., covering approximately 380 kilometers of gravel road.⁵³⁴ Irene French said she has seen as many as nine ore trucks passing on some days from Kemess South.⁵³⁵ Tony Johnny reported as many as thirty-six truck passings in a day.⁵³⁶ Paul French told IHRC that one of the trucks had an accident along the way; he said that Northgate told the community not to approach the site because the truck had spilled tailings that were contaminated with arsenic.⁵³⁷ Tom Patrick, who speaks for his family’s *keyoh* at Kemess, said he has visited the mine, but “they won’t tell you what they dump into the waters. . . . They show you what they want you to see.”⁵³⁸ IHRC could not independently verify any spills or dumping, and Northgate did not respond to multiple requests for information. The potential seriousness of such allegations, however, warrants further investigation.

⁵³¹ Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 239.

⁵³² D. W. CHAPMAN & K. L. WITTY, S.P. CRAMER & ASSOCIATES, INC., BONNEVILLE POWER ADMIN., U.S. DEP’T OF ENERGY, HABITATS OF WEAK SALMON STOCKS OF THE SNAKE RIVER BASIN AND FEASIBLE RECOVERY MEASURES ii (2004), *available at* http://www.nww.usace.army.mil/planning/ep/fishres/reports/940600_BPA_Weak-Salmon-Stocks.pdf (reporting from a 1994 study of U.S. mines that “[s]udden failures of existing tailings ponds remain a threat.”).

⁵³³ Interview with Jeanette West, *supra* note 31.

⁵³⁴ Northgate Minerals Corporation, Kemess South, *supra* note 466.

⁵³⁵ Interview with Irene French, *supra* note 31.

⁵³⁶ Interview with Tony Johnny, *supra* note 87.

⁵³⁷ Interview with Paul French, *supra* note 41.

⁵³⁸ Interview with Tom Patrick, at Bear Lake, B.C. (Sept 14, 2009).

Cultural and Spiritual Harm

Takla has a similar relationship to water as it does to the land. For members of Takla, water is more than a source of food and drink. Irene French told IHRC that she felt pride in the water and described the experience of seeing it as “pure joy.”⁵³⁹ In addition, community members feel responsible for its protection. As mentioned earlier, Victor West told IHRC that he speaks for all of nature, including the water, and that his hereditary name, “Wise Fish,” gives him the duty to care for it.⁵⁴⁰ Contamination of the water has been, therefore, more than an environmental and health issue. It has also been a personal affront that reflects the culture’s inextricable link to all aspects of the environment.

Minimizing and Monitoring Contamination

Some mining companies have taken steps to minimize and monitor contamination. Before beginning its operations, Serengeti conducted an extensive baseline environmental assessment of the water quality surrounding Kwanika.⁵⁴¹ It has also tested selected streams annually, before and after drilling, to monitor for impacts.⁵⁴² At the site IHRC observed, Serengeti had erected sumps and silt barriers to prevent the disruption of nearby streams.⁵⁴³ David Moore of Serengeti noted that standard practice has been to use absorbent matting and booms when handling diesel fuel to prevent spills from reaching the soil or watercourses.⁵⁴⁴

Takla members who worked for other mining companies also reported environmental protection measures. Each day when working for Gold Fields, Ernie French and other monitors checked campsites and drill sites for erosion and gas spills, determined the location of diesel tanks (required to be one hundred meters from the Finlay River in double-walled containers), and changed absorbent matting for

⁵³⁹ Interview with Irene French, *supra* note 31.

⁵⁴⁰ Interview with Victor West, *supra* note 28.

⁵⁴¹ Telephone Interview with David Moore, *supra* note 423; Interview with Hugh Samson, *supra* note 277.

⁵⁴² E-mail from David Moore (May 11, 2010), *supra* note 277.

⁵⁴³ Interview with Hugh Samson, *supra* note 277; *see also* Telephone Interview with David Moore, *supra* note 423 (noting that erecting silt screens is usual practice).

⁵⁴⁴ Telephone Interview with David Moore, *supra* note 423.

leaks.⁵⁴⁵ Gold Fields reported that it employed three First Nation environmental monitors during the 2009 season.⁵⁴⁶ It also hired an independent consulting group to conduct a baseline water sampling program before and after its 2009 exploration activities at Finlay River; the study concluded that Gold Fields' exploration activities had no impact on the water quality.⁵⁴⁷ John David French told IHRC that Alpha Gold built temporary bridges over creeks to avoid running machinery through the creeks.⁵⁴⁸ Alpha Gold also tested the waters at its mining operations sites, but those results have not been regularly released to the public.⁵⁴⁹ Thus, they cannot be independently verified to alleviate Takla's fears regarding contamination.

The government has taken steps to ensure that mining companies mitigate contamination and remediate sites. MEMPR and the Ministry of Environment in particular have monitored industry efforts. A staff member of MEMPR reported that his Ministry has regularly sent inspectors to mining operations, as has the Ministry of Environment, and that MEMPR has conducted major mine audits every year.⁵⁵⁰ Not everyone has agreed on the current or ideal level of government oversight. Hugh Samson, the Kwanika Project Geologist from Serengeti, told the IHRC that a government inspector would not physically check environmental remediation measures until after the camp closes and that even then "the Ministry doesn't know what to do. They are satisfied with [Serengeti's reclamation]. No one tells us what to do."⁵⁵¹ Lauren Whyte of AME BC recognized that regional inspectors have provided an invaluable resource for mining companies, but she also noted that budget cuts have

⁵⁴⁵ Interview with Ernie French, *supra* note 67.

⁵⁴⁶ Letter from Ross Sherlock, Gold Fields, *supra* note 477. The monitors submitted weekly reports to Rescan (an independent consulting group). Gold Fields also noted that environmental monitors "were responsible for pre-drilling evaluation checks including pre-disturbance photography, checking of riparian setback distances, and flagging in shortest distance road routes. During drilling they would visit the site daily to complete a checklist including items such as monitoring of sump water levels, check[ing] for secondary containment around hydrocarbon storage and general site cleanliness. When drilling was completed they were responsible for checking the drill site, photographing and removal of any remaining materials. In many cases where further attention was required the monitors were to rectify matters themselves or with the assistance of contractors and if necessary bring the matter to the attention of management for further guidance. When they completed daily tasks and drilling related activities they were to complete habitat evaluation and wildlife monitoring." *Id.*

⁵⁴⁷ *Id.*

⁵⁴⁸ Interview with John David French, *supra* note 437.

⁵⁴⁹ Interview with Roy French, *supra* note 81; Interview with Margo French, *supra* note 87; Interview with Paul French, *supra* note 41.

⁵⁵⁰ Telephone Interview with staff member #2 of Ministry of Energy, Mining and Petroleum Resources, *supra* note 246.

⁵⁵¹ Interview with Hugh Samson, *supra* note 277.

begun to reduce the number of available inspectors.⁵⁵² These uncertainties and contradictions have raised concerns that B.C. regulations may not be adequately implemented or enforced by government agencies. A lack of inspectors has been of particular concern in an area like Takla's, where the land is sparsely populated and potential for environmental damage to go unnoticed for some time is high.

Detailed public studies are necessary to supplement monitoring and to inform government officials and Takla members about the potential and actual harms from mining contamination. Given that Takla's identity and culture depend on the integrity of its entire territory, studies should take a broad view and consider the harms across time and space. In its Environmental Guiding Principles, the AME BC has encouraged its members to "conduct initial and periodic assessments, baseline studies, and environmental assessments in an effective, efficient, and transparent manner."⁵⁵³ The Ministry of Agriculture and Lands has contracted with environmental consulting firms throughout British Columbia to conduct environmental impact studies. All its studies have been made public.⁵⁵⁴ Takla itself commissioned the *Healthy Land* report, which is now posted on the internet.⁵⁵⁵ Without such information, stakeholders cannot make informed decisions regarding the potential costs of future mining projects, and many Takla members may continue to fear the worst due to their past experiences with mining contamination.

The varied and at times confusing results reached by studies by government, industry, and Takla, however, suggest that independent research is necessary to verify the situation regarding contamination. Independent studies should also focus on the questions left unanswered by research to date, such as the potential for pollutants to spread through dust or water and to move through the local food chain. The precautionary principle of international environmental law proposes that governments proceed cautiously in the absence of scientific data. In this case, the B.C. government should not only proceed cautiously but also actively seek to expand scientific knowledge of the potential for chemical contamination to result from mining. Furthermore, independent studies should investigate the cumulative impacts of

⁵⁵² Telephone Interview with Laureen Whyte, *supra* note 254.

⁵⁵³ Environmental Guiding Principles, Association for Mineral Exploration British Columbia, <http://www.amebc.ca/policy/guiding-principles/Environmental-guiding-principles.aspx> (last visited June 4, 2010).

⁵⁵⁴ Interview with Brian Clarke and Gregg Stewart, *supra* note 337.

⁵⁵⁵ See HEALTHY LAND, HEALTHY FUTURE, *supra* note 2.

mining and how they affect the rights of Takla and other First Nations to enjoy their cultures and use their traditional lands.

HARM TO WILDLIFE AND ITS EFFECTS ON TAKLA

Mining activity on Takla's traditional territory has not only changed topography and posed the threat of contamination but also disrupted wildlife, thereby adversely affecting members of Takla who rely on local animals for food sources and cultural identity. Noise, deforestation, and road construction have interfered with wildlife migration patterns and driven animals further into remote untouched areas of Takla's lands. Community members have worried that those creatures that have not fled may be contaminated by chemicals from mining operations. Takla members have thus been deterred from hunting and eating their traditional foods. The increased difficulty of hunting and potential contamination of local wildlife has meant that fewer members of Takla have been able to subsist off the land and convey their traditional knowledge of hunting to their children.

Adverse Effects on Wildlife

While thorough surveys have not been done, members of Takla offered anecdotal evidence of a problem that should be investigated further. They reported declining numbers of animals, including a few species, such as frogs and porcupines, that seem to have completely disappeared.⁵⁵⁶ They attributed the change to mining activities, including widespread exploration. William Alexander, who subsists almost completely off the land, told IHRC he has had to go "farther into the bush" to hunt because of mining exploratory operations.⁵⁵⁷ "[Mining] scares away all the animals I

⁵⁵⁶ Interview with Dolly Abraham and Kathaleigh George, *supra* note 408; Interview with Julie Jacques, *supra* note 70; Interview with Frank Williams, Jr., in Takla Landing, B.C. (Sept. 16, 2009). See also Robert Tomah, Wildlife Coordinator for the Tsay Keh Dene Band Office, Comments at Meeting Between Tse Key Nay and Environmental Assessment Office, re Kemess, Prince George, B.C., Canada, May 10, 2007, available at http://www.ceaa.gc.ca/050/documents_staticpost/cearef_3394/hearings/SM45.pdf (describing the impact of Kemess South on the animal populations: "I mean the roads spoil their corridors and how do you expect the animals to come together?" Tomah also noted that moose were not breeding, salmon were being harmed, and groundhogs were omitted from monitoring at mining sites.).

⁵⁵⁷ Interview with William Alexander, *supra* note 26.

depend on,” said Marvin Abraham, who lives by Aiken Lake. “The ones ripping up [the land] don’t realize that they’re ripping up the plants and roots the grizzly bears depend on. . . . They don’t even consider that before they start ripping up the place.”⁵⁵⁸ David Alexander, Jr. contended that the exploration camps on his family’s land have scared away the moose and caribou making it almost impossible to hunt:

Helicopters are always flying. There’s a road in there, but they use helicopters to fly people to work sites every day, lots of times a day. Big bosses are flying around looking at what’s going on and bringing workers in. . . . There are too many [helicopters] to count. They run twenty-four hours a day.⁵⁵⁹

Some members told IHRC they faced increased difficulties gathering plants as well as hunting. “We go miles and miles to find berries these days,” Raphael West said.⁵⁶⁰

Community members with land in the Kemess South area complained that that mine in particular has interfered with hunting. Edna Johnny said her family has been cut off from their whole trapline by mining operations at Kemess South for the past thirteen years.⁵⁶¹ Tony Johnny, her brother, expressed frustration that he and his family have not even been able to use the roads to hunt because of the ore trucks.⁵⁶² He told IHRC that the hunting has been getting worse every year:

This past summer, I saw nothing. We usually get two or three moose the first day. We went up on two mountains where we usually hunt . . . and saw no groundhogs. There were truck tracks all over the mountain, and holes. It’s starting to happen on every mountain. . . . We used to fill the deep freezer for winter within a month and make jerky. Now this is the first year we don’t have any moose meat.⁵⁶³

Tom Patrick, one of the *keyoh* holders affected by Kemess South, expressed concern about the food supply that is common to many Takla members: “I live off salmon and moose and bear. . . . Pretty soon I can’t do that.”⁵⁶⁴

In addition to disrupting habitats and scaring populations away, mining operations can lead to unhealthy wildlife if animals ingest contaminated plants,

⁵⁵⁸ Interview with Marvin Abraham, *supra* note 40.

⁵⁵⁹ Interview with David Alexander, Jr., *supra* note 87.

⁵⁶⁰ Interview with Raphael West, *supra* note 67.

⁵⁶¹ Interview with Lillian, Edna, and Antoine Johnny, *supra* note 26.

⁵⁶² Interview with Tony Johnny, *supra* note 87.

⁵⁶³ *Id.*

⁵⁶⁴ Interview with Tom Patrick, *supra* note 538.

animals, water, or soil.⁵⁶⁵ When conducting research for the *Healthy Land, Healthy Future* report, Pam Tobin and Takla's Margo French found a moose that was so sick from mercury poisoning that French had to shoot it. Although Tobin described the moose as "an outlier," and "not a moose anyone would have eaten,"⁵⁶⁶ members of Takla reported that wildlife in Moose Valley near the Kemess South Mine has become scarce or sickly and deformed and that they have seen visible signs of contamination.⁵⁶⁷ Sick or deformed animals have been widely reported throughout Takla's traditional territory.⁵⁶⁸ Some members told IHRC's research team that they have seen caribou, moose, beavers, groundhog and rabbits with no hair⁵⁶⁹ or with greenish flesh and internal infections.⁵⁷⁰ Though the causes have been mysterious and may be myriad, many community members have feared that contamination from abandoned mines and current mining activities has played a role.⁵⁷¹

Mining has the potential to harm fish populations in particular when the operations divert, fill, or pollute waterways. Takla member Julie Jacques reported finding prematurely dead fish in local waters.⁵⁷² The past few years have also seen a dramatic decrease in salmon stocks,⁵⁷³ a resource on which Takla and other nearby

⁵⁶⁵ See CANADIAN SOIL QUALITY GUIDELINES, *supra* note 502 (noting the effects of arsenic on wildlife and how arsenic gets into the food chain through the air, soil, and to a lesser extent through local fauna).

⁵⁶⁶ Interview with Pam Tobin, Clinical Project Leader, Northern Cancer Control Strategy, in Prince George, B.C. (Sept. 19, 2009).

⁵⁶⁷ Interview with Irene French, *supra* note 31; Interview with Lillian, Edna, and Antoine Johnny, *supra* note 26; Margo French EAA Testimony, *supra* note 505.

⁵⁶⁸ Interview with John David French, *supra* note 437; Interview with David Alexander, Jr., *supra* note 87; Interview with Julie Jacques, *supra* note 70 (providing observations from Kelly Creek and Silver Lake); Interview with Lillian, Edna, and Antoine Johnny, *supra* note 26 (connecting Cheni, Baker, and Kemess mines to skinny, sick, and deformed animals); Interview with Tony Johnny, *supra* note 87; Interview with Tom Patrick, *supra* note 538; Interview with Irene French, *supra* note 31 (providing observations from Moose Valley); Interview with Pam Tobin, *supra* note 566; Interview with Aaron Young, *supra* note 402 (making observations from Kwanika, Tom Lake, and Humphrey's Lake).

⁵⁶⁹ Interview with Dolly Abraham and Kathaleigh George, *supra* note 408; Interview with Frank Williams, *supra* note 84; Interview with Frank Williams, Jr., *supra* note 556; Margo French EAA Testimony, *supra* note 505.

⁵⁷⁰ Interview with Dolly Abraham and Kathaleigh George, *supra* note 408; Interview with Julie Jacques, *supra* note 70; Interview with Irene French, *supra* note 31.

⁵⁷¹ See, e.g., Interview with John David French, *supra* note 437; Interview with William Alexander, *supra* note 26; Interview with Julie Jacques, *supra* note 70; Interview with Marvin French, in Takla Landing, B.C. (Sept. 15, 2009).

⁵⁷² Interview with Julie Jacques, *supra* note 70.

⁵⁷³ See *As Salmon Continue to Decline, A Long-Term Study to Understand Their Needs*, EARTHSKY, Aug. 24, 2009, <http://earthsky.org/biodiversity/more-physically-complex-rivers-are-best-for-wild-salmon-populations> (stating some salmon runs are ten percent of their historic populations; wild salmon are even worse off); *Officials Warn of Salmon Population "Collapse,"* KTVU.COM, Jan 30, 2009, <http://www.ktvu.com/news/15167129/detail.html> (citing a sixty-

First Nations have depended heavily.⁵⁷⁴ Terry Teegee told IHRC that the most prized salmon run has been the Frazer Sockeye run; in 2009 Takla expected ten million fish, but only 900,000 came.⁵⁷⁵ While it is unclear whether and how much mining has contributed to the problem,⁵⁷⁶ Takla members have been very concerned that new mining and a continued lack of environmental remediation could make it worse.⁵⁷⁷

Some mining companies disputed that their activities have negatively affected wildlife. Hugh Samson of Serengeti reported that animals have fled the area around Kwanika during drilling seasons but have returned in between.⁵⁷⁸ Regardless of its temporary nature, such a disturbance can harm a species if it occurs during breeding seasons or drives animals away from their summer food stores.⁵⁷⁹

CJL maintained that its use of helicopters has not affected wildlife because the area has limited wildlife to begin with (only moose, not caribou) and pilots have not been allowed to chase game. Chris Warren said, “Animals get used to the noise pretty quick. Caribou don’t care at all. They are curious and follow the helicopters. Caribou like cutlines.”⁵⁸⁰ Scientists have found, however, that noise has a significant and long-term detrimental effect on local caribou populations. They determined that calves exposed to noise lack selection for favorable traits and that cows abandon their traditional calf-rearing areas. Researchers worried that calves would imprint on the

seven percent drop in population of chinook salmon from the year before); David Suzuki, *Uncovering the Mystery of B.C.'s Disappearing Sockeye*, THEGREENPAGES.CA, Aug. 26, 2009, http://thegreenpages.ca/portal/bc/2009/08/uncovering_the_mystery_of_bcs.html (reporting that 2009 had the lowest sockeye population in fifty years); KQED, *California Salmon Educator Guide*, http://www.kqed.org/quest/files/download/85/307a_CaliforniaSalmon.pdf (last visited May 6, 2010) (noting that industrial activities such as mining, road-building, logging, and water diversion can destroy salmon breeding areas and thereby harm salmon populations).

⁵⁷⁴ Interview with Terry Teegee, *supra* note 26; Interview with John David French, *supra* note 437; *see also* Margo French EAA Testimony, *supra* note 505.

⁵⁷⁵ Interview with Terry Teegee, *supra* note 26.

⁵⁷⁶ *See* William J. Hauser, Fish Talk Consulting, Potential Impacts of the Proposed Pebble Mine on Fish Habitat and Fishery Resources of Bristol Bay 5-16 (2007), *available at* <http://eyeonpebblemine.org/wp-content/uploads/pebble-fish-habitat-report-hauser-sep-07.pdf> (describing the concerns of tailings ponds and full-scale mining operations depleting salmon stock by polluting and blocking waterways); CHAPMAN & WITTY, *supra* note 532, at ii (studying the salmon stocks in Snake River and concluding that “mining damage has seriously damaged or eliminated fish production in some drainages. Damage will continue. Sudden failures of existing tailings ponds remain a threat.”).

⁵⁷⁷ Interview with Terry Teegee, *supra* note 26; Interview with John David French, *supra* note 437; *see also* Margo French EAA Testimony, *supra* note 505.

⁵⁷⁸ Interview with Hugh Samson, *supra* note 277.

⁵⁷⁹ *See* AUTUMN LYN RADLE, THE EFFECT OF NOISE ON WILDLIFE: A LITERATURE REVIEW 4-7 (2007), *available at*

http://interact.uoregon.edu/MediaLit/wfae/library/articles/radle_effect_noise_wildlife.pdf.

⁵⁸⁰ Telephone Interview with Chris Warren and Lorne Warren, *supra* note 237.

less favorable new territory and would not go back to the better traditional habitat even after the noise source was removed. The events of exposure to noise “are cumulative and could result in reduced calf survival or aborted fetuses in cows” thus endangering the survival of the entire population.⁵⁸¹

Despite companies’ claims that the effects of mining on wildlife have been minimal, in some cases, their monitoring has been *ad hoc*. Hugh Samson of Serengeti told IHRC that workers who have happened to spot wildlife while on the job have been required to keep track of sightings in a logbook.⁵⁸² David Moore, President and CEO, confirmed Serengeti’s practice, but he noted that the company could do a better job of monitoring local wildlife.⁵⁸³ Gold Fields reported more detailed wildlife monitoring practices at its exploration camp and wrote that all sightings have been collected and sent to a consulting firm in Vancouver. Ernie French of Takla, who served as a Gold Fields monitor, corroborated this description.⁵⁸⁴

While the effects of mining activities on wildlife in Takla’s traditional territory have not been fully studied, a report prepared for the Mining Association of Canada and the Canadian Nature Federation polled rangers in several national parks and found that the rangers’ primary concern for the future of their parks was the potential impact of industrial activity on wildlife.⁵⁸⁵ Industrial activities, including mining, contribute to habitat fragmentation, loss of habitat, decrease in habitat quality, and increased direct and indirect mortality risks.⁵⁸⁶ The rangers’ other concerns included the introduction of non-native plant species, changes to ground and water quality, impact on terrain, and increased human use of the land.⁵⁸⁷

⁵⁸¹ See RADLE, *supra* note 579, at 4-7.

⁵⁸² Interview with Hugh Samson, *supra* note 277.

⁵⁸³ Telephone Interview with David Moore, *supra* note 423.

⁵⁸⁴ Interview with Ernie French, *supra* note 67. See also Letter from Ross Sherlock, Gold Fields, *supra* note 477 (confirming that wildlife reports are sent weekly to Rescan, an independent consulting group). See Rescan, <http://www.cmos.ca/PrivateSector/companies/rescan.htm> (last visited June 4, 2010) (noting that Rescan is based in Vancouver).

⁵⁸⁵ AXYS ENVIRONMENTAL CONSULTING LTD., SCOPING OF ECOLOGICAL IMPACTS OF MINING ON CANADA’S NATIONAL PARKS 7, 7 (2002), available at <http://www.naturecanada.ca/pdf/Impact%20of%20Mining%20on%20Canada's%20NPs.pdf>. The study covers mining, logging and other industries and notes the harmful effect of noise, migration disruption (from road-building and forest clearing), and harm to local fauna, which affects the food supply for local wildlife.

⁵⁸⁶ *Id.*

⁵⁸⁷ *Id.*

Interference with Culture

All of these effects on wildlife have not only caused harm to animals but have also interfered with Takla's cultural traditions. Animals have become scarcer and more difficult to hunt because mining activities have destroyed their habitat and pushed them into more remote territory.⁵⁸⁸ The presence of sickly and deformed animals has further interfered with hunting because it has made members of Takla fear eating the animals that they have always eaten. The decrease in hunting has limited community members' ability to pass this traditional practice on to the next generation as well as reduced the range of food sources.⁵⁸⁹ Pam Tobin noted that even temporary disturbance to the food chain can have long-term consequences for Takla's culture: "Industry says they will only be there ten years; they'll put the lake back and repopulate it with fish. But it changes the . . . dynamics of the culture, and [it will] never come back."⁵⁹⁰

A relationship with wildlife is an important part of Takla's culture. Margo French described the importance of hunting on traditional lands as a means for conveying cultural practices to younger generations:

[My brothers and sisters] have many happy memories of time shared with my mother telling stories and teaching the children . . . how to put a thick lining of spruce bows on the ground before you set your bedding to keep moisture away from your body . . . how to properly prepare snares, traps, and connibear for groundhog to ensure there is no damage to the meat.

These are important skills to learn for survival and it is very much a part of our culture. My mother tells stories of when she was a little girl and first started to trap with her parents and grandparents. My nieces and nephews can now tell similar stories. Our history goes back for thousands of years, and we have held onto our knowledge since time immemorial. Our land is our life, and it is important for you to understand that.⁵⁹¹

Beyond hunting and gathering, Takla's culture incorporates local wildlife into its spiritual life. For example, the members of Takla traditionally made beads out of

⁵⁸⁸ Interview with Pam Tobin, *supra* note 566.

⁵⁸⁹ Interview with Margo French, *supra* note 87; HEALTHY LAND, HEALTHY FUTURE, *supra* note 2, at 17. It in turn exacerbates the effects of the residential school system that disrupted transmission of traditional knowledge.

⁵⁹⁰ Interview with Pam Tobin, *supra* note 566.

⁵⁹¹ Margo French EAA Testimony, *supra* note 505.

porcupine quills as a symbol of their spiritual connection with the land, but the *Healthy Land* report states that “it has been more than ten years since [a single porcupine] has been seen” on Takla’s territory.⁵⁹² The loss of animal species such as the porcupine has thus negatively affected a range of cultural practices and the possibility of passing them on to future generations.

HUMAN HEALTH CONCERNS

Mining and the harms it causes have raised health as well as environmental and cultural issues for Takla. Community members told IHRC they are concerned that mining on their lands could harm them directly, if they drink polluted water or breathe tailings dust, or indirectly, when the decrease and poisoning of local wildlife forces them to transition to a diet of processed foods.

Illness

Many Takla members told IHRC they worried that mining might contaminate food and water sources and poison those who ingest them. The Canadian Environmental Quality Guidelines Report notes that gold and copper ores are the predominant source of arsenic in Canada.⁵⁹³ Arsenic, which the *Healthy Land* report documented in Takla’s territory, is so consistently connected to cancer and organ damage that the Canadian Bureau of Chemical Hazards has classified arsenic as a Group 1 carcinogen to be considered a non-threshold toxicant: a substance for which there is believed to be chance of adverse health effect at *any* level of exposure.⁵⁹⁴

Some members of Takla reported an unusually high incidence of health problems—including cancer and strokes—that they suspect local mining contamination might have caused. Tom Patrick, one of the *keyoh* holders affected by Kemess South, stated, “Nobody got cancer a long time ago. . . . It’s because of the

⁵⁹² HEALTHY LAND, HEALTHY FUTURE, *supra* note 2, at 18.

⁵⁹³ CANADIAN SOIL QUALITY GUIDELINES, *supra* note 502, at 1.

⁵⁹⁴ *Id.*; see also AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, U.S. DEP’T OF HEALTH AND HUMAN SERV., TOXICOLOGICAL PROFILE FOR ARSENIC 7, 8, 18, 165-66, 174, 194, 252 (2007), available at <http://www.atsdr.cdc.gov/toxprofiles/tp2.pdf> (noting that arsenic causes: aneurysm, lung cancer, pancreatic cancer, skin cancer, liver cancer, arterial cancer, and diabetes) [hereinafter U.S. TOXICOLOGICAL PROFILE FOR ARSENIC]. See also HEALTHY LAND, HEALTHY FUTURE, *supra* note 2, at 10 for health concerns from arsenic.

chemicals.”⁵⁹⁵ The French family, which lived in the Bralorne-Takla Mine area, has experienced significant health problems. It was directly exposed to mercury from the mine and may have been exposed to other possible contaminants, such as arsenic. Three members of the French family have had Bell’s Palsy (partial facial paralysis).⁵⁹⁶ Three more have had brain aneurysms. Two members had major lung surgery as children; another member died of lung cancer. Members of the family have died from pancreatic, liver, and arterial cancer; other members have had skin cancer.⁵⁹⁷ One French member was diagnosed with leukemia at the age of ten.⁵⁹⁸ Another three members have had Type Two diabetes.⁵⁹⁹ It is impossible to establish a direct causal relationship between mining pollutants and a specific individual’s health problems, but all of the health problems noted above have been shown in scientific studies to be related to exposure to arsenic and mercury, two of the major contaminants released during gold and mercury mining operations. When Irene French spoke informally to a doctor about the health problems in her extended family, she told IHRC, “he was shocked. . . . He said that it was not normal and that something is definitely wrong.”⁶⁰⁰

Such patterns of disease, which suggest a link with arsenic and mercury poisoning from abandoned mines, have exacerbated Takla’s fears regarding proposed mines. The fact that the Bralorne-Takla Mine has remained contaminated for more than fifty years has made Takla skeptical about the expediency and efficacy of remediation at future mines, mines that might give their children and grandchildren similar health problems.

Takla has been particularly sensitive to contamination and disruptions of ecosystems because of its continuing dependence on traditional food sources. The Canadian government has produced guidelines on water and soil contamination levels

⁵⁹⁵ Interview with Tom Patrick, *supra* note 538.

⁵⁹⁶ E-mail from Irene French to David Loewen, J.P. Laplante, Karl Sturmanis, and Robert Tomah (Nov. 3, 2007). For a description of Bell’s Palsy, see WebMD, Bell’s Palsy–Topic Overview, <http://www.webmd.com/brain/tc/bells-palsy-topic-overview> (last visited June 4, 2010).

⁵⁹⁷ E-mail from Irene French (Nov. 3, 2007), *supra* note 596. See U.S. TOXICOLOGICAL PROFILE FOR ARSENIC, *supra* note 594, at 8, 18, 174, 194 (noting that arsenic causes lung cancer, pancreatic cancer, skin cancer, liver cancer, and arterial cancer). Also note that Canadian guidelines have classified arsenic as a zero-tolerance substance because it can cause cancer even in very small doses. See CANADIAN SOIL QUALITY GUIDELINES, *supra* note 502.

⁵⁹⁸ E-mail from Irene French (Nov. 3, 2007), *supra* note 596. See U.S. TOXICOLOGICAL PROFILE FOR MERCURY, *supra* note 528, at 74 (showing mercury exposure is related to leukemia).

⁵⁹⁹ E-mail from Irene French (Nov. 3, 2007), *supra* note 596. See U.S. TOXICOLOGICAL PROFILE FOR ARSENIC, *supra* note 594, at 252 (showing arsenic exposure is thought to cause diabetes).

⁶⁰⁰ E-mail from Irene French (Nov. 3, 2007), *supra* note 596.

based on the type of occupancy of the land, but the guidelines have not taken aboriginal practices into account. The government should reconsider the appropriate guidelines for aboriginal people, like members of Takla, who live off local wildlife and are substantially more connected to the land than most populations.⁶⁰¹ Using the existing guidelines, the CLRB determined that the mercury levels at the Bralorne-Takla Mine would only be dangerous if a person were actually consuming the contaminated soil.⁶⁰² It is unclear if CLRB used standards tailored to First Nations' behavior.

Change in Diet

Takla members' fears of eating local plants and animals, whether a real or perceived danger, have been one of the leading causes for them to switch from traditional to processed foods.⁶⁰³ During an interview on the Bralorne-Takla site, Paul French told IHRC that he was uncomfortable even being there, much less berry-picking or hunting near the mine shafts, mercury processing equipment, and tailings ponds.⁶⁰⁴ The *Healthy Land* study found mercury in high levels in many of the freshwater fish tissue samples.⁶⁰⁵ This finding has raised concerns for the Takla people who regularly eat these fish, as mercury is known to cause cardiovascular, neurological, and autoimmune diseases.⁶⁰⁶

Lisa Sam, a community health nurse and member of the nearby Nak'adzli First Nation, related similar fears of contamination in her own community. She also noted that a departure from traditional food sources has been correlated with a high

⁶⁰¹ HEALTHY LAND, HEALTHY FUTURE, *supra* note 2; Interview with Pam Tobin, *supra* note 566; Interview with Lisa Sam, *supra* note 38. See also CANADIAN SOIL QUALITY GUIDELINES, *supra* note 502, at 5 (presenting different standard guidelines for agricultural, residential, and industrial areas). Takla lands are currently being used for both residential purposes (by the Takla) and industrial purposes (by the mining companies) so these distinctions are not helpful for Takla lands. See also WORLD HEALTH ORG. [WHO], GUIDELINES FOR DRINKING WATER QUALITY 22 (3d ed. 2008), available at http://www.who.int/water_sanitation_health/dwq/fulltext.pdf (recognizing that water quality guidelines must take culture into account; they must be appropriate for national, regional, and local circumstances including the environmental, social, economic, and cultural circumstances).

⁶⁰² Telephone Interview with Brian Clarke and Gregg Stewart, *supra* note 337.

⁶⁰³ Interview with Pam Tobin, *supra* note 566; HEALTHY LAND, HEALTHY FUTURE, *supra* note 2, at 5-6.

⁶⁰⁴ Interview with Paul French, *supra* note 41.

⁶⁰⁵ HEALTHY LAND, HEALTHY FUTURE, *supra* note 2, at 86.

⁶⁰⁶ See *id.* at 7. See also U.S. TOXICOLOGICAL PROFILE FOR MERCURY, *supra* note 528, at 74.

incidence of diabetes and other health problems among First Nations people.⁶⁰⁷ This phenomenon has raised specific concerns for First Nations, including Takla, whose remote locations and high rates of unemployment make it very difficult to access and afford nutritious foods if they are forced away from their traditional diets.⁶⁰⁸

Takla's fear of chemical contamination originates from its experience with abandoned mines; though it may be less apt today, given modern technology and increased regulation at mining sites, Takla members have received little accurate information from government officials or mining companies on the current threat from chemical contamination. Regaining trust must be part of any solution by the government and industry moving forward.

DISRUPTION OF HERITAGE SITES

Mining and associated activities—clearing roads, felling trees, trenching, and drilling—all have the potential to disturb irreplaceable archaeological, cultural, or sacred heritage sites on Takla's traditional territory.⁶⁰⁹ Such sites represent an invaluable resource not only for Takla, but for other residents of British Columbia who

⁶⁰⁷ Interview with Lisa Sam, *supra* note 38. See also HEALTHY LAND, HEALTHY FUTURE, *supra* note 2, at 5; Richmond & Ross, *supra* note 42, at 407. Richmond and Ross report:

Limited access to the physical environment and a decline in the skill needed to harvest and procure traditional foods means that community members find it more and more difficult to access traditional foods such as fish, moose and deer, and there has been a significant shift to store-bought foods. . . . Due to anthropogenic activities, environmental contaminants (e.g., mercury and PCBs) are entering the traditional food systems (e.g., fish, game and plants) of Indigenous populations. . . . One prolific example that details the adverse health and social consequences of environmental contamination among Aboriginal peoples in Canada relates to the mercury contamination experienced by the Ojibway community of Grassy Narrows First Nation in North-western Ontario.

Id. at 404.

⁶⁰⁸ See HEALTHY LAND, HEALTHY FUTURE, *supra* note 2, at 5, 16-17. See also Richmond & Ross, *supra* note 42 (noting that along with decreased access to traditional foods, another dietary challenge for many remotely located indigenous communities relates to the prohibitive cost of fruits and vegetables, most of which are shipped by boat or plane. Once these foods arrive in the communities, their quality is often much reduced. Many community members will rely instead on less healthy, non-perishable, processed foods.).

⁶⁰⁹ See generally YUKON TOURISM AND CULTURE, YUKON MINERAL EXPLORATION BEST MANAGEMENT PRACTICES FOR HERITAGE RESOURCES 6 (2010), available at http://www.tc.gov.yk.ca/pdf/Mineral_Exploration_BMP_for_Heritage_Resources.pdf (describing the potential dangers of mining near archaeological and heritage sites and how mining companies should proceed with caution).

want to learn about the history of the province.⁶¹⁰ Some companies have made efforts to protect culturally important sites, but it is unclear whether those efforts have been sufficient. Hugh Samson of Serengeti told IHRC that his company has gone beyond what is required by law to avoid archaeologically significant sites and hereditary trails.⁶¹¹ Before its exploration activities at Finlay River, Gold Fields employed registered archaeologists from a consulting firm and a First Nations elder and assistant from each of the three local First Nations to conduct an archaeological survey of the area: the survey found no cultural sites, yet a chief later walking the site reportedly did.⁶¹² Many companies that have not consulted with local *keyoh* holders would not know to look for certain historical objects when conducting a heritage assessment.⁶¹³

The Tse Keh Nay, which includes Takla, has argued that mining companies that report heritage sites in their EAs often miss many relevant sites. Northgate created an archaeology impact report for its proposed activities at Amazay Lake, but the Tse Keh Nay noted that “[t]he company’s archaeology report missed culturally modified trees, traditional camping sites, spiritual and rite of passage sites, a gravesite and traditional trails.”⁶¹⁴ The Tse Keh Nay hired an independent archaeology team that recorded an additional eight archaeology sites in the proposed area.⁶¹⁵

Some sites have particular personal importance to individuals, while others have significance to the broader Takla community. Raphael West noted that “[t]here are a couple of graves in our land, [so mining companies] have to be careful where they dig.”⁶¹⁶ Marvin French expressed particular concern over burial sites because his

⁶¹⁰ See generally Bjorn O. Simonsen, *Mining and Archaeological Resources: Conflicts and Mitigation Procedures*, PROC. OF THE 2ND ANN. BRITISH COLUMBIA RECLAMATION SYMP. IN VERNON, B.C., 217, 217 (1978) (expressing his “apprehension” about discussing reclamation of archaeological sites: “How could I relate heritage resources, or more specifically, archaeological resources, to the concept of reclamation when such resources are in fact non-renewable? An archaeological site, once damaged or destroyed by any land altering activity, such as mining, cannot be replaced or reclaimed.”).

⁶¹¹ Interview with Hugh Samson, *supra* note 277.

⁶¹² Letter from Ross Sherlock, Gold Fields, *supra* note 477. Ernie French noted that although Gold Fields took care not to disturb culturally modified trees, his chief still noted several areas of damage. Interview with Ernie French, *supra* note 67.

⁶¹³ Interview with Ernie French, *supra* note 67; Interview with Raphael West, *supra* note 67.

⁶¹⁴ Western Mining Action Network, Tse Keh Nay, <http://wman-info.org/news/archive/tsekehnyay> (last visited May 9, 2010).

⁶¹⁵ *Id.*

⁶¹⁶ Interview with Raphael West, *supra* note 67.

brother is buried on the land, and he does not want the site disturbed.⁶¹⁷ At Bear Lake, the presence of graves makes the area very significant to local residents. Bear Lake is also tied to Takla's oral history, which is another reason many Takla members consider it sacred and why they are adamant about preventing mining in the area.⁶¹⁸ Such sites are important for the community. As Marvin French observed, "I'd like it all protected for my kids, grandkids, great grandkids."⁶¹⁹

ABORIGINAL RIGHTS ANALYSIS

Mining activities have caused a range of harms to the Takla community and its surroundings. They have felled trees, opened the territory to outside intrusion, contaminated the soil and waters, and scared off wildlife populations that sustain the community and its way of life and traditions. Mining has also threatened human health and endangered important cultural and heritage sites. In-depth and independent studies are needed to establish the full extent of these effects on the land and the community, but some damage is obvious. Such adverse impacts threaten Takla's right to enjoy its culture because its culture is inextricably linked to the land.

Because of their close connection to the land, indigenous communities including Takla deserve special protection. This principle is at the core of indigenous rights. It should provide a baseline that requires that the environmental and other impacts of mining do not fundamentally alter the integrity of Takla's land, which both sustains the community and provides the foundation for its way of life. Any rights analysis should take into account the historic legacy of mining. In the past, the community has borne a disproportionate burden of mining activities, as evidenced by sites such as the Bralorne-Takla Mine. The analysis should also examine the cumulative effects of mining to evaluate whether they may be infringing detrimentally on Takla's rights to have an intact territory. New projects, especially exploration sites, may have unacceptable costs when viewed as part of a whole rather than on an individual basis. Such an aboriginal rights approach to project review would better protect Takla's land and culture for future generations.

⁶¹⁷ Interview with Marvin French, *supra* note 571. Marvin French reported that logging companies previously were operating very close to the site of his brother's grave.

⁶¹⁸ Interview with Lillian, Edna, and Antoine Johnny, *supra* note 26.

⁶¹⁹ Interview with Marvin French, *supra* note 571.

Any uncertainty about how specific effects link to mining should not prevent government action. In accordance with international environmental law, the government should apply the precautionary principle when reviewing project proposals and planning for land use in the future.

VIII. LACK OF BENEFITS TO THE COMMUNITY

While many people in Takla have been ambivalent about allowing any mining activities on their traditional territory, all have argued that if mining does take place, they should share in its benefits, such as revenue and employment opportunities. Takla has received few of the benefits that flow from mining, exacerbating its feeling of injustice and concern about industry operations.

Many members of Takla have said that government and industry should provide part of their mining revenue and/or profits to help affected individuals and the community, a practice that has become common in Canada. In addition, they have called on companies to train community members and offer jobs at all stages of the mining process, from exploration to production to remediation.⁶²⁰ This chapter explores revenue sharing and employment in depth to show the importance of integrating transparent and equitable benefit-sharing arrangements in any planning and consultation efforts in the future. To make benefit-sharing meaningful, safeguards should be put in place so that Takla is adequately informed and represented when entering such agreements.

REVENUE SHARING

Most members of Takla told IHRC that they wanted to receive a share of mining revenue and/or profits. Tony Johnny said, “They donate to things, so why can’t they donate *here*? They come in and take our stuff and rape our land.”⁶²¹ Marvin French noted, “What’s theirs is ours too.”⁶²² Several people identified roughly half the revenue as Takla’s fair share.⁶²³ Others proposed less than half because companies make large investments in equipment and work, or because they believe First Nations should receive a percentage similar to what the province takes in royalties.⁶²⁴ Regardless,

⁶²⁰ Additional ideas, such as trust funds for current and future generations or support for cleanup efforts for abandoned mines, could also be considered.

⁶²¹ Interview with Tony Johnny, *supra* note 87.

⁶²² Interview with Marvin French, *supra* note 571.

⁶²³ Interview with Jeanette West, *supra* note 31. *See also* Interview with Anita Williams, *supra* note 44; Interview with Aaron Young, *supra* note 402; Interview with William Alexander, *supra* note 26; Interview with Margo French, *supra* note 87.

⁶²⁴ Interview with Marvin French, *supra* note 571; Interview with Raphael West, *supra* note 67.

there has been virtual consensus that Takla should receive some economic benefits for the burden of mining that it bears.

Corporate Revenue Sharing

Revenue and profit sharing arrangements have not been uncommon in Canada, especially at the production stage of mining.⁶²⁵ According to industry experts, mining companies and First Nations have often made agreements that economically benefit the community. Lauren Whyte of AME BC has seen a number of different approaches to benefit sharing with First Nations. She said that “typically there is some combination of sharing funds” and that the money may be distributed as equity, education and training, or community or business development projects, such as spin-off suppliers or joint ventures.⁶²⁶ Speaking of impact-benefit agreements (IBAs), Zoe Carlson of MABC noted that “pretty much all of the operating mines have some sort of arrangement with First Nations” because on a practical level, “if there’s a big hole next to them, you have to talk to them.”⁶²⁷

Takla has had a “financial compensation agreement” with the company operating Kemess South, the large open-pit mine on Takla’s traditional territory, but the agreement has drawn criticism from several community members. While Northgate began paying compensation in 2006,⁶²⁸ it gave Takla nothing for the nineteen years prior that it had been using the land, according to Jeanette West, current Councilor and Chief between 2003 and 2005.⁶²⁹ West noted that the CDN\$1 million per year now provided has been divided among Takla and two other affected First Nations. She described the amount as “peanuts—just to keep us quiet.”⁶³⁰ Tom Patrick, one of the *keyoh* holders where the mine now operates, told IHRC that Northgate calculated each trapline to be worth CDN\$14,000 per year and gave the families that amount; however, the money had to be split among fourteen people so each received about

⁶²⁵ Irene Sosa & Karyn Keenan, *Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: Their Use In Canada* (October 25, 2001), *available at* <http://www.cela.ca/files/uploads/IBAeng.pdf>.

⁶²⁶ Telephone Interview with Lauren Whyte, *supra* note 254.

⁶²⁷ Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 239.

⁶²⁸ KEMESS NORTH COPPER-GOLD MINE PROJECT, JOINT REVIEW PANEL REPORT SUMMARY 13, Sept. 17, 2007.

⁶²⁹ Interview with Jeanette West, *supra* note 31.

⁶³⁰ *Id.*

CDN\$1,000.⁶³¹ “What they give you when they set up mines is not worth the damage to your environment,” he said.⁶³² The Johnny family, whose *keyoh* is also in the area occupied by Kemess South, similarly complained about the arrangement with Northgate. As Edna Johnny put it, “they draft their own agreement and call it trapline compensation for Kemess.”⁶³³ Northgate did not respond to requests from IHRC to comment on these agreements and Takla’s reported concerns.

Government Revenue Sharing

The B.C. government has begun to offer an alternative way for First Nations to receive financial benefits from mining. In October 2008, MEMPR announced that it had authorized provincial negotiators “to include revenue sharing with First Nations on new mining projects.”⁶³⁴ According to a staff member of MEMPR, negotiations with an individual First Nation or tribal council are supposed to begin when it appears a new project or major expansion is close to receiving permits for production.⁶³⁵ The details of each plan are to be worked out on a case-by-case basis, with “a strong focus on community development.”⁶³⁶ “We are looking to have these agreements improve the social and economic conditions of the community,” the MEMPR staff member said.⁶³⁷ The government reached its first two revenue sharing agreements under this policy in August 2010. It agreed to share benefits from the Mt. Milligan mine with the McLeod Lake Indian Band⁶³⁸ and from the New Afton mine with the Tk’emlups and Skeetchestn First Nations.⁶³⁹

⁶³¹ Interview with Tom Patrick, *supra* note 538.

⁶³² *Id.*

⁶³³ Interview with Lillian, Edna, and Antoine Johnny, *supra* note 26.

⁶³⁴ Press Release, B.C. Ministry of Energy, Mines and Petroleum Resources, Province to Share Mining Benefits with First Nations (Oct. 23, 2008). MEMPR noted that the option is a key part of the New Relationship, a new provincial effort to address “Aboriginal concerns based on openness, transparency and collaboration—one that reduces uncertainty, litigation and conflict.” The New Relationship with Aboriginal People, *supra* note 32.

⁶³⁵ E-mail from staff member #1 of Ministry of Energy, Mines and Petroleum Resources, to Bonnie Docherty, Lecturer on Law and Clinical Instructor, IHRC (Apr. 27, 2010).

⁶³⁶ Press Release, B.C. Ministry of Energy, Mines and Petroleum Resources, Province to Share Mining Benefits with First Nations, *supra* note 634.

⁶³⁷ E-mail from staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 635.

⁶³⁸ Press Release, Ministry of Energy, Mines and Petroleum Resources, First Nation to Share Benefits of Mt. Milligan Mine *supra* note 10.

⁶³⁹ Stueck, *supra* note 11.

David Moore of Serengeti told IHRC that, in his view, revenue sharing should be the provincial government's responsibility because the government has collected mineral royalties.⁶⁴⁰ Takla's lawyer, Murray Browne, responded more skeptically. He noted that despite these commitments, nothing has changed for Takla yet, which is at least partly because the revenue sharing policy only applies to new projects.⁶⁴¹

Factors in Setting up Benefit Sharing Arrangements

Sharing revenue and/or profits among the many members of the Takla community has been complicated because the community has not always agreed on who should receive the benefits from projects and what form it should take.⁶⁴² Some members have argued that the money should go directly to the *keyoh* holders, who are most directly affected.⁶⁴³ Others have suggested that the money should go to the entire community. Councilor Kathaleigh George told IHRC that "everyone should benefit" and that she would like to see contributions to Takla's school, housing, or sports facilities.⁶⁴⁴ Jeanette West went even further, asserting that the money should go through the Carrier Sekani Tribal Council, so that all member First Nations could share it. In the Takla community, she said, it should be used for capital development, like housing, infrastructure, education, and business start-up money.⁶⁴⁵ In addition to determining to whom the money should go, Takla needs to weigh how much money to set aside for short-term investments and how much to invest for long-term benefits for future generations. As minerals resources are finite and revenue streams will end within a predictable period, some communities elsewhere have established trusts that can convert short-term revenue into more sustainable sources of funds.⁶⁴⁶

⁶⁴⁰ Telephone Interview with David Moore, *supra* note 423.

⁶⁴¹ Telephone Interview with Murray Browne, *supra* note 59.

⁶⁴² Interview with Dolly Abraham, *supra* note 382.

⁶⁴³ Interview with John David French, *supra* note 437; Interview with Raphael West, *supra* note 67; Interview with Anita Williams, *supra* note 44; Interview with William Alexander, *supra* note 26.

⁶⁴⁴ Interview with Dolly Abraham and Kathaleigh George, *supra* note 408. See also Interview with Tony Johnny, *supra* note 87.

⁶⁴⁵ Interview with Jeanette West, *supra* note 31.

⁶⁴⁶ See generally Theodore E. Downing et al., *Indigenous Peoples and Mining Encounters: Strategies and Tactics*, Mining, Minerals and Sustainable Development at the International Institute of Environment and Development Working Paper No. 57, 23 (2002), available at http://www.iied.org/mmsd/mmsd_pdfs/057_downing.pdf. See also, for a summary of international "lessons learned" on such trusts, Indian Ministry of Rural Development, International Experience Sharing Workshop on Land Acquisition, Resettlement and

Another challenge has been that much of the work on Takla's land involves exploration, which requires heavy investment but does not produce returns unless and until it turns into a productive mine. As a result, there are no profits to share during the exploration stage. David Moore said that Serengeti, for example, has invested to date between CDN\$16 and 17 million of "risk capital" at its Kwanika site, hoping to find enough mineral deposits to make a producing mine worthwhile.⁶⁴⁷ He continued, however, that "the odds are very, very long against" an exploration site turning into a full-scale mine, due to geologic realities, the need for capital, and permitting requirements.⁶⁴⁸ Chris Warren of CJL Enterprises agreed. He described exploration as "literally sweat equity. We don't get paid for prospecting. Nine times out of ten we don't get anything."⁶⁴⁹ Lorne Warren said that CJL is "a family operation," and that during exploration it has not had resources to share with First Nations. When there is a producing mine, he said, "the real money and jobs will come for local bands."⁶⁵⁰ Developing revenue sharing agreements would require CJL to set up a separate company for each site, and "the administrative costs would get astronomical."⁶⁵¹ In addition, Lorne Warren said he believes that the First Nations have been asking for too much. "We spent forty-five years developing the company and expertise," he said, and "we're reluctant to give it away. They want control. . . . I don't think it's a reasonable request."⁶⁵²

The complexities of revenue and/or profit sharing underline why safeguards need to be put in place around such arrangements. When government approves a project, key stakeholders should take good faith steps to negotiate and address the interests of the parties involved. Takla's members should decide internally who should receive the benefits and what form they should take. When granting permits, the government should encourage industry to spread the economic rewards of the approved operation. At the same time, it should set up a framework for making sure negotiations are fair, open, and equitable in line with the rights of both current and future generations. Finally, mining companies should make efforts to share the revenue and/or profits their operations generate.

Rehabilitation, and Benefit Sharing 16-18 (July 2007), *available at* http://dolr.nic.in/workshop/workshop_manesar1.pdf.

⁶⁴⁷ Telephone Interview with David Moore, *supra* note 423.

⁶⁴⁸ *Id.*

⁶⁴⁹ Telephone Interview with Chris Warren and Lorne Warren, *supra* note 237.

⁶⁵⁰ *Id.*

⁶⁵¹ *Id.*

⁶⁵² *Id.*

EMPLOYMENT BENEFITS

Members of Takla repeatedly said that if there is mining on their territory, they want to benefit not only from revenue sharing agreements, but also from job training and creation.⁶⁵³ “The most important thing,” said Victor West, “is who’s going to do [the work]? Are we going to be involved?”⁶⁵⁴ Some Takla residents have found employment in the mining industry, but many reported that there have been too few jobs and that existing opportunities have been only short term.⁶⁵⁵ “Despite the progress [companies] claim is going on, our people are still unemployed,” Irene French told IHRC.⁶⁵⁶ Industry representatives argued that a lack of training has limited their ability to hire First Nations people, but members of Takla said that even highly educated and certified people have had trouble finding work. Industry representatives also contended that the lack of long-term employment is inherent in the mining industry. Complicating matters further, community members who have opposed mining have been reluctant to work in the industry and have continued to press for alternative economic opportunities. To address these concerns, industry and Takla should not only reevaluate traditional employment arrangements but also discuss the possibility of creating more jobs in environmental reclamation and filling them with community members. Such arrangements would expedite cleanup and allow Takla to benefit from mines that damaged its territory.

Company Hiring Efforts

The mining companies with whom IHRC spoke supported hiring employees from First Nations, including Takla. Serengeti’s operation at Kwanika seems to have been somewhat successful on this account. Project Geologist Hugh Samson told IHRC that Serengeti has tried to hire from Takla as much as possible. Samson said, “Our relationship with Takla is mutually beneficial. We are able to keep local people happy.

⁶⁵³ Interview with Dolly Abraham, *supra* note 382; Interview with John David French, *supra* note 437; Interview with Jeanette West, *supra* note 31; Interview with Raphael West, *supra* note 67; Interview with Anita Williams, *supra* note 44; Interview with Marvin French, *supra* note 571.

⁶⁵⁴ Interview with Victor West, *supra* note 28.

⁶⁵⁵ Interview with Dolly Abraham and Kathaleigh George, *supra* note 408. *See also* Interview with Pam Tobin, *supra* note 566; Interview with Terry Johnny, *supra* note 26; Interview with Marvin French, *supra* note 571.

⁶⁵⁶ Interview with Irene French, *supra* note 31.

I understand it's not my home; we're coming in to exploit a resource."⁶⁵⁷ In turn, he said, most First Nations people Serengeti has hired have been excellent workers, and of the ten Serengeti employees working at Kwanika in September 2009, five were from First Nations.⁶⁵⁸ Serengeti reported that its 2010 on-site staff at Kwanika was seventy-five percent from Takla. The exploration access agreement the company reached with the community in August 2010 is designed to provide "training, employment, and business opportunities for members" of Takla.⁶⁵⁹ David Moore noted that since Kwanika has been operating for several years, the site has had "a number of returning employees" from Takla.⁶⁶⁰ Over a three-year period, Serengeti paid approximately CDN\$1.25 million to Kwanika employees from Takla.⁶⁶¹

Takla members have filled a variety of roles at Kwanika. During its 2009 visit, IHRC met several Takla members who were working at the exploration camp, one as a cook and others for a drilling subcontractor. David Moore said that drill helpers, catering staff, reclamation staff, line cutters, geophysical survey crews, and people who sample the drill core have usually been from Takla, and that the company hoped to identify someone from Takla to work as the core technician in the near future.⁶⁶² He added that when the company has anticipated a need for employees with particular skills, it has notified Takla so that community members can seek training.⁶⁶³

Representatives of CJL Enterprises also reported that they have "tr[ie]d to involve locals" in their projects. They said that employing a local workforce has made financial sense because it has saved them the money they would spend transporting people from the cities to remote areas.⁶⁶⁴ In 2007, forty-eight percent of CJL's 200 hires were First Nations people.⁶⁶⁵

⁶⁵⁷ Interview with Hugh Samson, *supra* note 277.

⁶⁵⁸ *Id.*

⁶⁵⁹ Press Release, Serengeti Resources Inc., *supra* note 432.

⁶⁶⁰ Telephone Interview with David Moore, *supra* note 423.

⁶⁶¹ *Id.*

⁶⁶² *Id.*

⁶⁶³ *Id.*

⁶⁶⁴ Telephone Interview with Chris Warren and Lorne Warren, *supra* note 237.

⁶⁶⁵ *Id.*

Challenges to Employment Benefits

The criteria for and nature of mining jobs have posed challenges to Takla receiving adequate employment benefits.⁶⁶⁶ Mining companies and industry officials claimed that one of the major challenges in hiring community members has been their shortage of skills. Lorne Warren of CJL pointed out that it can be difficult to hire First Nations people, including Takla members, when they lack necessary expertise and need to be trained.⁶⁶⁷ CJL's hires dropped from forty-eight percent in 2007 to thirty-eight percent in 2008 and again to thirty-three percent the following year.⁶⁶⁸ Chris Warren said the number has decreased because of the lack of entry-level work for which the First Nations members were qualified.⁶⁶⁹ Literacy may have been a problem for some people as well.⁶⁷⁰ Lorne Warren said he believes that having sixty-five percent of CJL employees from Takla—which is reportedly what Takla has wanted—has just not been realistic.⁶⁷¹ Zoe Carlson of MABC said that while one of MABC's member companies has claimed it would hire its entire work force from local First Nations if there were enough qualified people, mining companies across British Columbia have faced the same problem as CJL.⁶⁷² She said that “a gap exists” between the training opportunities available to rural as opposed to urban populations (whether First Nations communities or not), and that often, a local First Nations person would be a good worker but simply does not have the needed skills.⁶⁷³ Like many rural communities, those in northern British Columbia may be experiencing a “brain drain,” where skilled and educated people migrate to urban areas.⁶⁷⁴

Some Takla members said they would like to see companies provide training and scholarships to help the community gain the skills needed for higher-paid and longer-term employment.⁶⁷⁵ Margo French suggested that companies should start by

⁶⁶⁶ For example, according to the Joint Review Panel for Kemess North, Kemess South brought in a great deal of labor from far away, leaving few jobs for members of local communities, “as a result of the ready ability to bring workers from far away.” KEMESS NORTH COPPER-GOLD MINE PROJECT, *supra* note 628, at 13.

⁶⁶⁷ Telephone Interview with Chris Warren and Lorne Warren, *supra* note 237.

⁶⁶⁸ *Id.*

⁶⁶⁹ E-mail from Chris Warren, *supra* note 444.

⁶⁷⁰ Telephone Interview with Chris Warren and Lorne Warren, *supra* note 237.

⁶⁷¹ *Id.*

⁶⁷² Interview with Pierre Gratton and Zoe Carlson, *supra* note 239.

⁶⁷³ *Id.*

⁶⁷⁴ *Id.*

⁶⁷⁵ Interview with Margo French, *supra* note 87.

giving community members unskilled labor and providing scholarships to help people attend school in the off season. Eventually, Takla members would be qualified for better jobs.⁶⁷⁶ Irene French told IHRC that lack of training cannot fully account for the problem, however. French said, “A lot of [Takla members] are certified to death. They have all kinds of tickets [certifications to do certain kinds of work]. They could do anything, but there is no work for them.”⁶⁷⁷

Another challenge is that short-term employment is inherent to the mineral sector. Jobs that do not require a high level of skill tend to be the most short-term, and many Takla members have been most qualified for these types of jobs. Even if someone has been hired for multiple seasons, the job has lasted only as long as the summer. Takla residents, such as Terry Johnny, have done line-cutting work for mining companies, but this work has taken from a few days to two weeks.⁶⁷⁸ Aaron Young, who has worked for logging companies, for an archaeological consulting company, and as an environmental technician at Kemess South, said, “There’s no economy. We just finish a job and move to another job. Today log building, next year drilling, next year logging, next year prospecting—some other short-term project.”⁶⁷⁹ Chris and Lorne Warren of CJL recognized the problems associated with the nature of mining work, but they said that there has been no way around the “limited field season.”⁶⁸⁰ They have passed the names of community members on to larger mining companies because the latter can hire more people than their small outfit, but the larger companies have “spread the money out” so that each person has worked for a shorter amount of time.⁶⁸¹

Even employment at a producing mine has a limited duration: “When the mine is only operating for ten to fifteen years, that’s not a lifetime job that you can retire on,” said a member of a nearby First Nation.⁶⁸² David Radies noted that dependence on mining and other extractive industries has created a “boom and bust” economy—the money must be carefully invested in communities or it will simply disappear. Takla experienced this situation with the forestry boom in the 1980s.⁶⁸³

⁶⁷⁶ *Id.*

⁶⁷⁷ Interview with Irene French, *supra* note 31.

⁶⁷⁸ Interview with Terry Johnny, *supra* note 26.

⁶⁷⁹ Interview with Aaron Young, *supra* note 402.

⁶⁸⁰ Telephone Interview with Chris Warren and Lorne Warren, *supra* note 237.

⁶⁸¹ *Id.*

⁶⁸² Interview with Tara Marsden, *supra* note 375; *see also* Interview with Marvin French, *supra* note 571; Interview with Tony Johnny, *supra* note 87.

⁶⁸³ Interview with JP Laplante and David Radies, *supra* note 263.

Given their reservations about having any mining on Takla's territory, some members have been ambivalent about mining jobs. Certain people have found employment in the mineral sector unsatisfactory because they have felt it conflicted with their traditional way of life. John David French said he believes that the short-term job opportunities not only have been insufficient, but have also created problems:

I know money is power. Once they come in and develop a mine, they are going to make [native] people go different ways. . . . People in the logging industry did that. They worked for a while and have a good job and then turn to drugs and alcohol. It's sad to go that way. Same thing for the environment. It destroys everything.⁶⁸⁴

Irene French said, "Our people want work, but the only work available are these destructive jobs like mining."⁶⁸⁵ Her son Aaron Young felt guilty about his employment at Kemess South Mine; "I was considered something of a scabber. . . . My employment was putting someone's livelihood at risk" because First Nations depend on a healthy environment for their livelihood.⁶⁸⁶ For these members of Takla, mining jobs have not been worth the price.

By contrast, people in Takla have found the idea of employment in healing, rather than exploiting, the land appealing.⁶⁸⁷ Radies noted the potential for job creation in environmental reclamation. The number of abandoned mining and exploration sites has meant that there has been plenty of demand although money to make it happen has been limited.⁶⁸⁸ Government training and employment programs for First Nations people in this sector could serve a dual purpose: they would improve environmental study and cleanup by involving local First Nations, and they would allow affected communities to reap a long-delayed economic benefit from formerly productive mines.

As with revenue sharing, key stakeholders should come together to discuss the best way to promote employment benefits for First Nations. Mining companies should provide job training and employment to the extent they can while clarifying any limits they face. Takla should facilitate training and hiring by, for example, identifying

⁶⁸⁴ Interview with John David French, *supra* note 437.

⁶⁸⁵ Interview with Irene French, *supra* note 31.

⁶⁸⁶ Interview with Aaron Young, *supra* note 402.

⁶⁸⁷ See, e.g., Interview with Terry Johnny, *supra* note 26; Interview with JP Laplante and David Radies, *supra* note 263.

⁶⁸⁸ Interview with JP Laplante and David Radies, *supra* note 263.

appropriate and interested applicants. Government should monitor agreements to ensure they are open and equitable and assist with training whenever possible.

The parties could consider employment issues in tandem with revenue sharing agreements because both require taking a long-term view of the economic situation. For example, revenue sharing could provide funds for trusts to create training programs that would further benefit Takla in the future.

ABORIGINAL RIGHTS ANALYSIS

Under international law, Takla has the rights freely to dispose of its natural resources and to participate in decisions about how its land is used. Those rights entitle it a say not only in whether its traditional territory is developed but also in how the economic benefits of its resources are distributed. A rights-based regime should recognize that Takla has experienced significant costs from mining activities, and that some benefits to the community should offset these costs. Government and industry should heed Takla's calls for benefit sharing opportunities, which to date have been limited. Taking into account Takla's desires, the rights-based regime should ensure that some of the benefits of any mining that goes forward accrue to the people who traditionally occupy the land on which it takes place. The key stakeholders should develop and institutionalize a system for sharing benefits. Arrangements should be characterized by transparency and equity in their negotiation and distribution. They should instill both short- and long-term benefits for the community because aboriginal rights consider the interests not only of present generations but also of future ones.

IX. BALANCING THE BURDEN

Takla Lake First Nation has borne more than its share of the burdens imposed by British Columbia's mining industry. First, it has been marginalized by a deficient consultation process, which has given it little control over what industrial activity takes place on its own land. Second, Takla has seen damage done to its land and way of life. Finally, the community has not shared in the economic benefits of the industry that has so impinged on its culture and livelihood.

Because Takla is an indigenous community with a very close relationship with the land, it offers a case study in how the rights of all First Nations must be better balanced with the interests of extractive industries. In the long term, the key stakeholders—government, industry, and community—must develop solutions that would allow them to share the benefits and burdens of mining more equitably. This report has analyzed the current legal framework for mining and examined the Takla experience through the lens of aboriginal rights. It concludes that legal reform is needed on a number of fronts: structural, procedural, and substantive.

STRUCTURAL REFORMS

A rights-based regime that builds on international human rights law would necessitate a more balanced sharing of both the burdens and benefits for First Nations communities like Takla. B.C. law has created a *de facto* presumption favoring mining and placing the burden on the indigenous community to intervene to stop such activity. Human rights would shift this presumption, placing the rights of First Nations first. First Nations should receive a heightened level of protection with regards to land and natural resource issues on their traditional territory because of the cultural, spiritual, and economic importance of the land to their way of life. Raphael West of Takla said, “We should carry on our language, our culture, our potlatch system. . . . [We need our rights] to carry on our traditions. And to live. To carry on with our lives the way [they were] intended.”⁶⁸⁹ Activity, mining or otherwise, that intrudes on First Nations' protected areas thus should only occur when there is meaningful

⁶⁸⁹ Interview with Raphael West, *supra* note 67. See also Interview with John David French, *supra* note 437.

participation in the decision-making processes and when the intrusion does not infringe on the rights of the indigenous community. Solutions informed by human rights necessarily take into account the views and desires of affected First Nations and consider the long-term consequences of development on the integrity of the land and the population group as a whole.

A rights-based approach would help ensure that First Nations' diverse opinions about what should be done on mining are taken into account. Takla members, for example, posited one of two perspectives: they oppose all mining,⁶⁹⁰ or they accept limited mining with certain restrictions.⁶⁹¹ If the presumption is that Takla's rights to participate in decision-making around its land are the starting point, then both perspectives would be weighed instead of the assumption being that mining will proceed within certain parameters as is now the case. The change would thus help to implement what was the most widely shared sentiment in Takla regarding mining: that meaningful consultation should be a crucial part of such mining projects.⁶⁹²

The rights-based approach does not mean an end to mining activity, but it does mean that the opinions of the community should be taken more seriously. Similarly, this approach would help ensure that the environmental integrity of the territory, which is supposed to be protected for present and future generations, would be valued more highly compared to mining activity. All legal reforms should flow from these starting points. Communities should have their rights at the forefront instead of having to react defensively to mining activities to protect themselves.

⁶⁹⁰ Interview with Richard, Esther, and Carmelita Abraham, *supra* note 43. Ernie French, a college student in his twenties, said he would rather not have mining, and that he does not "really see what's the point of gold at all. It's just a mineral." Interview with Ernie French, *supra* note 67. For example, David Alexander, Jr. said, "I really wish mining would shut down. I don't care how much money is involved. The way I grew up is better than destroying it." Interview with David Alexander, Jr., *supra* note 87. Marvin Abraham agreed, saying, "Why would we sell out and tear up the land over a job?" Interview with Marvin Abraham, *supra* note 40. Lisa Sam of the Nak'azdli First Nation had a similar view: "If I had the choice I would always say no to mining." Interview with Lisa Sam, *supra* note 38.

⁶⁹¹ Many view mining as an unstoppable force but want something for the community in return. Several people made comments similar to that of Terry Johnny: "We can't beat 'em, so we may as well just join 'em." Interview with Terry Johnny, *supra* note 26. Terry Johnny also said, "if we had a chance to stop them I would, but if we can't, they should employ band members." *Id.* See also Interview with Tony Johnny, *supra* note 87; Interview with Aaron Young, *supra* note 402; Interview with Roy French, *supra* note 81.

Marvin Abraham described his thought process regarding whether he would give a mining company permission to use his family's traditional territory. "If the answer is yes," he said, "I might as well go to hell. But I won't go to hell without being part of your company. For every little bit that goes out, I want to get a bit." Interview with Marvin Abraham, *supra* note 40.

⁶⁹² See, e.g., Interview with Irene French, *supra* note 31.

Besides shifting the presumption that has favored mining, structural legal reform should move the environment and human rights assessment processes to early points in the process when First Nations are involved. Meaningful consultation should begin at the time of claim registration, and it should reach the level of *Haida's* deep consultation at least by the exploration stage. The current process fails to correct for the significant imbalance in bargaining and information-gathering power between the industry and First Nations, such as Takla. It also does not consider how bargaining is affected by the momentum that builds after exploration begins. Starting consultation earlier in the process would help alleviate both of these problems. It would help ensure that First Nations have the information they need to negotiate and that they can challenge a project before it becomes too difficult to do so.

A rights-based regime is not solely about reducing burdens on the community. Another important structural change would focus on benefit sharing. The rights of First Nations to their lands should be protected going forward, in part by ensuring that they receive a share of the benefits that helps ease the burden they assume if their land is mined. The need to share revenue and/or profits or other benefits has been self-evident to members of Takla.⁶⁹³

The details of how such agreements should be crafted, what the benefits should consist of, how they should be distributed and to whom, are less settled matters. The B.C. government, First Nations, and industry should, however, come up with a system for how future sharing the benefits of mining would be allocated. British Columbia has taken an important first step by announcing a revenue sharing policy at the government level, but it should work closely with affected First Nations to implement this policy, and if necessary, to revise it. First Nations should also come up with plans to use any expected revenues in a way that would benefit their communities in the long-term, possibly giving extra consideration to those families who are particularly affected by the mining activity producing the revenue. Mining companies in turn should make efforts to share revenue or profits, to hire local First Nations people when possible, and to train community members so that they have the skills to work in the industry.

⁶⁹³ See, e.g., Interview with Marvin French, *supra* note 571.

PROCEDURAL REFORMS

Beyond instituting structural changes that address fundamental assumptions about the balance between mining activity and the rights of First Nations, law reform should also address more particularized procedural questions. While Canadian courts have outlined vague rules of consultation, the provincial government should reform its laws and practices to provide specific guidance on the exact nature, timing, and content of required consultation measures.⁶⁹⁴ There should be clear, uniform protocols for consultation during all stages of the mining process, from regional land-use planning to environmental remediation of mine sites.

First Nations' input in decisions regarding the use of their lands is of paramount importance to the realization of their people's fundamental human rights. First Nations should have a much larger role in provincial land-use planning to establish certain clear parameters before any claim registration begins. Then British Columbia should implement mandatory, transparent consultation protocols for all stages of mining, beginning with notice and discussion during claim registration and requiring deep consultation no later than at the exploration phase. First Nations should have meaningful, not just token, involvement.⁶⁹⁵ For example, the B.C. government should lengthen the typical response windows given to First Nations during review procedures to permit them to give more thorough and informed responses. Silence by communities should not be considered consent.⁶⁹⁶

Information-sharing is particularly important.⁶⁹⁷ Access to better information about specific projects and their effects, or potential effects, on the environment of First Nations' territories would help level the playing field between the First Nation and industry. Involved companies or the government may need to pay for independent scientific assessments,⁶⁹⁸ since First Nations often lack the resources and expertise needed to conduct environmental or health impact assessments.⁶⁹⁹ They should

⁶⁹⁴ See, e.g., Telephone Interview with Murray Browne, *supra* note 59.

⁶⁹⁵ See, e.g., Interview with Jeanette West, *supra* note 31.

⁶⁹⁶ See, e.g., *id.*

⁶⁹⁷ See, e.g., Interview with David Alexander, Jr., *supra* note 87; Interview with Victor West, *supra* note 28; Interview with Anita Williams, *supra* note 44.

⁶⁹⁸ See, e.g., Interview with Lisa Sam, *supra* note 38.

⁶⁹⁹ Telephone Interview with Murray Browne, *supra* note 59.

support baseline and project-specific studies. First Nations also need education on the physical and political aspects of mining.⁷⁰⁰

To facilitate consultation, First Nations should decide on consistent procedures for communication with industry and the government. In particular, they should clarify with whom government officials and mining companies should consult, and who those parties are for a proposed project. First Nations should also strengthen their internal communications so that, regardless of whom the first points of contact are, the most affected members are fully informed and involved. There are diverse views within First Nations about which members of their community the consultation process should target,⁷⁰¹ but it should be as inclusive as practically feasible.

While meaningful and deep consultation could result in delays to some projects, it is necessary to protect First Nations' rights. If the extra burden changes the feasibility of a project, that expense simply reflects the true costs of mineral development, taking into account the communities who have thus far borne a disproportionate share of the burden.

SUBSTANTIVE REFORMS

Substantive law reforms are also necessary fully to protect First Nations and their land. The permitting of mining activity does not sufficiently consider potential interference with First Nations' uses of their traditional territories. For example, current laws fail to account for the cumulative and long-term impacts of projects on the environment or human rights. British Columbia's environmental regulations are also plagued by a lack of knowledge about baseline environmental conditions, which makes judging the impacts of mining difficult.

Making further studies possible is key to any efforts to guarantee First Nations' rights. Existing knowledge about the environmental and human health effects of mining in First Nations' territories are fragmented and incomplete, and at least in the

⁷⁰⁰ See, e.g., Interview with Pam Tobin, *supra* note 566.

⁷⁰¹ See, e.g., Interview with David Alexander, Jr., *supra* note 87; Interview with Tony Johnny, *supra* note 87; Interview with Raphael West, *supra* note 67; Interview with Aaron Young, *supra* note 402; Interview with Margo French, *supra* note 87; Interview with Marvin French, *supra* note 571; Interview with Jeanette West, *supra* note 31. Tara Marsden, who is from Gitanyow (a nearby First Nation) and worked with the CSTC of which Takla is a part, believes that First Nation councils should play only a supporting role for the hereditary leaders in this process. Interview with Tara Marsden, *supra* note 375.

case of Takla, it has been gathered without sufficient participation of First Nations members. It is difficult for the B.C. government and First Nations to make informed decisions about future mining operations without more comprehensive, geographically specific, culturally specific, and independent scientific study. Study is also an important first step towards remediation of abandoned sites, but it has only recently received any government attention and support. As Victor West of Takla said, “old business should be taken care of before new [mines] arise,” and “cleaning up the old before making [new messes] should be a number one priority.”⁷⁰²

Achieving protection of aboriginal rights alongside mining activity is no small undertaking. It involves structural, procedural, and substantive legal reforms and will require the attention of and compromise by all key stakeholders. In particular, reforms must deal with the existing lack of consultation, the harms of mining, and the shortage of benefits for First Nations. While the bar to be set is a high one, without such reforms mining will threaten the integrity of First Nations and their ways of life as they continue to bear the burden.

⁷⁰² Victor West, Statement at Mines Meeting, Takla Landing, B.C. (Sept. 15, 2009). *See also* Interview with Irene French, *supra* note 31.

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BEARING THE BURDEN

The Effects of Mining on First Nations in British Columbia

British Columbia's mining regime has placed an unfair burden on First Nations. First Nations have not been adequately consulted about potentially harmful projects, have suffered environmental and cultural consequences from mining activities, and have received a limited share of the industry's benefits.

Bearing the Burden offers a unique look at the B.C. mining regime through a human rights lens. First Nations have the rights to participate in decision-making about the future of their lands and to use their lands, which are inextricably linked to their cultures. British Columbia's mining laws, however, have failed to institutionalize these special aboriginal rights and favored the industry over First Nations and their environment.

This report analyzes B.C. mining laws and highlights the troubling experiences of Takla Lake First Nation, which is particularly vulnerable because its territory is rich in minerals. The report calls for urgent law reform to ensure government, industry, and First Nations more fairly share the benefits and burdens of mining. Law reform should make rights the foundation of the B.C. mining regime.

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cover photos:

top: Environmental damage at Kwanika exploration site

middle: Rusted equipment at abandoned Bralorne-Takla Mine

bottom: Open pit at Kemess South Mine *photo courtesy of Takla Lake First Nation*