

# **BEARING THE BURDEN**

The Effects of Mining on First Nations in British Columbia

*A report by*

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**IHRC**

The International Human Rights Clinic  
at Harvard Law School



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AME BC	Association for Mineral Exploration British Columbia
B.C.	British Columbia
BCEAA	B.C. Environmental Assessment Act
CESCR	Committee on Economic, Social and Cultural Rights
CLRB	Crown Land Restoration Branch
CSTC	Carrier Sekani Tribal Council
EA	Environmental Assessment
EAO	Environmental Assessment Office
HCA	Heritage Conservation Act
HRC	Human Rights Committee
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

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ILMB	Integrated Land Management Bureau
IHRC	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 provides important revenue for the province, so many people welcome it. It also, however, frequently interferes with First Nations' use of their traditional lands and significantly harms the environment to which their culture is inextricably linked. B.C. mining laws provide some safeguards for First Nations and the environment, but they favor the industry they are intended to regulate and do not adequately institutionalize the special protections First Nations are entitled to under international and domestic law. While some First Nations have benefited from mining within their boundaries, in general, First Nations bear an unfair burden at every point in the mining process,<sup>1</sup> 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

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<sup>1</sup> The Mineral Tenure Act (MTA) defines "mining activity" as "any activity related to" the search for minerals, "exploration and development of a mineral," or "the production of a 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](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96292_01). This report will use the MTA's definition and will specify when referring to a specific stage of the process.

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burden onto government and industry. Current law presumes that mining is an acceptable use of a piece of land, but the presumption should instead be 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, which is based in remote northern British Columbia, illustrate that the province's mining laws are a problem in practice as well as on paper. While Takla has good relations with some mining companies, it has generally been ambivalent or even hostile to new projects. This attitude stems largely from the fact that community members feel excluded from the process that reviews proposals and inundated with mining claims and projects on their traditional territory. In addition, Takla—home to exploration sites, a major open-pit mine, and multiple abandoned operations—has seen the range of harms caused by different stages of mining. Members of Takla widely report destruction of habitat, a decrease in wildlife, and a fear of health problems from contaminants. Because of Takla's close ties to the land, these effects cause cultural as well as environmental injury. Finally, even those members who are willing to accept mining say 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 better to preserve First Nations’ lands and culture.<sup>2</sup>

The situation is 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 unique 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 culture, 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

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<sup>2</sup> 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.

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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.”<sup>3</sup>

International and constitutional standards thus provide a framework for the protection of First Nations that calls for heightened scrutiny of projects affecting these 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, fail to guarantee either.

Harvard Law School’s 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 May 2010.<sup>4</sup>

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

<sup>4</sup> IHRC has done extensive work on human rights and the environment issues, 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

The IHRC team conducted at least fifty interviews with representatives of First Nations (especially Takla), the B.C. government, and the mining industry.<sup>5</sup> During its field mission, the team made personal observations of the environmental damage that mining, including exploration, has caused in Takla's traditional territory.<sup>6</sup> It has also drawn on a range of legal sources for an extensive analysis of international and domestic aboriginal rights law and B.C.'s mining law.<sup>7</sup>

After making recommendations to government, industry, and First Nations, this report expands on the issues laid out

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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.

<sup>5</sup> 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.

<sup>6</sup> 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).

<sup>7</sup> 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.

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in the summary in greater depth. It opens with a background chapter about Takla and an overview of international and domestic aboriginal rights law. The report then analyzes the problems mining raises for First Nations in detail. It provides an extensive legal analysis of the existing mining regime. It also documents the situation of Takla, describing the community's experiences with and opinions about lack of consultation, harms of mining, and lack of benefits. It concludes that structural, procedural, and substantive legal reforms are needed firmly to establish the heightened protections to which Takla is legally entitled and better to balance the burdens and benefits of mining.

### **Background on Takla Lake First Nation**

Takla Lake First Nation, which consists of approximately 1000 members, has a traditional territory—the land it has historically used and occupied—of approximately 27,250 square kilometers of mineral- and timber-rich country. 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 is currently engaged in a conscious effort to revive and

maintain its heritage. A spiritual connection to the land makes them respect it and teaches them not 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 sometimes creates tensions because government officials communicate primarily with 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 and then turned to logging. The latter in particular changed the environment and Takla's relationship to it. For example, it made hunting more difficult because of a decline in caribou. As logging has started to decline, mining has

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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 mining operations at all stages in the process. Claims, which give holders exclusive rights to explore an area for minerals, blanket the majority of its territory. Their prevalence is 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. Representing the next stage of the process are actively producing mines, i.e., those that extract minerals from the ground for sale. The most notable in this region is Northgate's Kemess South Mine, a large open-pit operation in the north of Takla's traditional territory. Finally, while inactive, abandoned mines, including Bralorne-Takla and Ogden Mountain, pose lingering risks of contamination and no longer have identifiable corporate owners to hold responsible for their cleanup.

### **The Legal Regime Governing Mining**

The legal regime that governs 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 determined what land is open to mining, but the government and First Nations advocates disagree about the effectiveness of the consultation efforts during that process.

The rest of the 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 do not have to speak with traditional landholders. Companies that want 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 combined with the shortage of information to which First Nations have access makes 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.

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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 argue that, in implementing the environmental assessment, the government and mining companies do not take 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 receive incomplete information and have limited resources to supplement it when they want to build 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 Lands Restoration Branch, formed only in 2003, oversees their remediation. Its limited resources combined with extensive studies 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

regularly fall short of that standard. They favor industry, leave great discretion to government, and deny First Nations an effective means to have a say in what happens to their land.

### **Takla's Experience**

Takla's experiences with mining exemplify the unjust situation British Columbia's imbalanced mining laws create. The lack of consultation imposes on Takla the burden of overcoming, without access to full information, the presumption that individual mining projects are acceptable on their land. When Takla fails to prevent or ensure adequate regulation of mining, it bears the consequences of adverse environmental and cultural impacts. Finally, to exacerbate these inequities, its members receive disproportionately few benefits from the industry. Cumulatively, these difficulties infringe 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 the lack of consultation. Because free entry does not require consultation, they often only learn about claims registered on their traditional lands through chance encounters with miners. These encounters have become rare since the advent of online registration, yet the

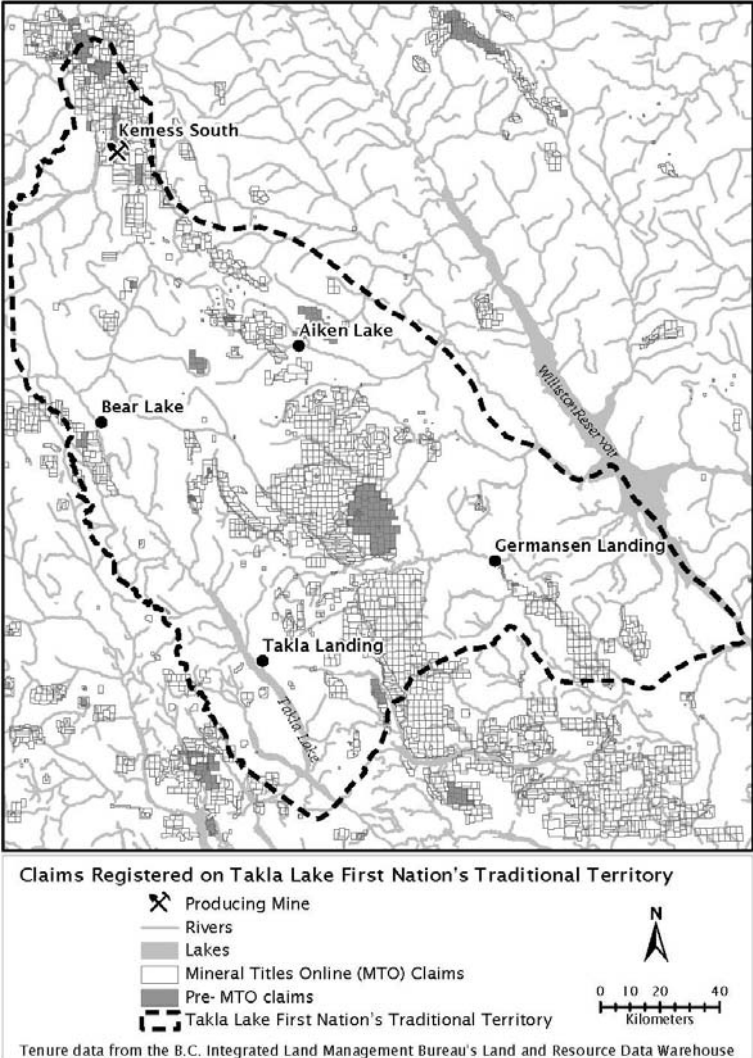
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number of claims has skyrocketed.<sup>8</sup> Takla's leaders said they are overwhelmed with NOWs for exploration proposals. They have neither the time nor the financial resources to conduct in-depth studies to supplement the superficial information they receive and to identify any problems before the deadline. Even when they do respond, Takla's former Mining Coordinator said, "99.9 percent of the time" the government dismisses their objections. Mining companies sometimes voluntarily consult with Takla directly, and the community often seems to trust them more than the government. These efforts to reach out, however, take place on an *ad hoc* basis and have had mixed results. To complicate matters, confusion exists among all parties about whether government and industry should consult with chief and council or *keyoh* holders and which of these representatives of Takla have final say on a proposal.

While exploration permits are the most common challenges it faces, Takla has had, at least on one occasion, more success having a voice at the environmental assessment stage, where production proposals are reviewed. Takla participated in a groundbreaking process involving a proposed open-pit mine at Kemess North. The government agreed to create a joint review panel—consisting of representatives of the provincial government, federal

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<sup>8</sup> See map "Claims Registered on Takla Lake First Nation's Traditional Territory" in this report.



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government, and First Nations—to evaluate the proposal. In the end, after the panel submitted its recommendation, the 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 and the law does not require that such a panel conduct the environmental assessment in every instance.

In addition to experiencing a lack of consultation, Takla has seen evidence of the harms mining can cause. While open-pit mines can completely destroy their areas, exploration sites, which are more common, have 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 report a decline in the wildlife they hunt. In addition, they fear 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, heighten the concern that exposure to poisons could affect human health. The government and mining companies often argue that the problems are not as serious as Takla portrays, 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 does occur and that there is a need for independent studies—not done by government, industry, or First Nations—to allay or provide support for Takla's fears.

Mining also threatens 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 interferes 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 experience personal pain when they see the environment injured by mining.

While Takla feels the burden of a lack of consultation and faces environmental and human consequences from mining, the community receives 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 is at the exploration stage and exploration is not a profitable venture. Northgate reportedly has a financial compensation

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agreement with Takla and residents of *keyohs* near the producing Kemess South Mine, but several recipients called it inadequate. In 2008, the B.C. government adopted a revenue sharing plan, in which the revenue generated through permitting and regulation procedures will be shared with affected First Nations. The 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 voluntarily enter into *ad hoc* employment agreements with Takla, but these jobs are seasonal and, given the nature of the work, rarely provide health benefits. They are also limited in number because they often require skills that members of Takla and other First Nations do not possess.

## Recommendations

To help shift the burden of mining off First Nations and to increase respect for their aboriginal rights, this report makes recommendations to each of the key 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 and initiate it from the beginning of the mining process because once the momentum of a project gets started it is hard for First Nations to stop it. The government should also facilitate independent studies of environmental and human rights impacts, impose more stringent requirements on proposed mining projects, expeditiously clean up 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 increasing consultation efforts and negotiating, in a fair and transparent 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.

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## **II. RECOMMENDATIONS TO ALL STAKEHOLDERS**

Mining on First Nations' traditional lands raises 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, regulatory, and customary 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, while both governments have individual roles to play, 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:

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### ***1. Recognize aboriginal rights as foundational in any development decisions on First Nations' lands and territory, changing the presumption that mining activity is acceptable.***

The current legal regime assumes that mining activity, especially in the claims registration and exploration phases, is acceptable. This approach creates momentum for further mining operations that can be hard to slow down, placing First Nations in a more difficult position to defend their rights. “Deep consultation,” as required by Canadian case law,<sup>9</sup> should be explicitly mandated, beginning no later than the exploration stage, so that it is clear that First Nations will receive special protections beyond those mandated for the general public; consultation at the time of claims 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 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—the integrity of their

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<sup>9</sup> See *Haida*, [2004] 3 S.C.R. 511, ¶ 44.

land and traditions and management over their resources—are institutionalized into decisions around mining.

***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 related to the use of natural resources on lands belonging to indigenous populations. Legal reform should incorporate relevant international human rights standards for indigenous groups to self-determination and to practice of their culture and the precautionary and sustainable development principles of international environmental law. Adding explicit rights protections into legislation would help implement protections for First Nations and eliminate any uncertainty that such communities have specific rights, thus clarifying standards of conduct and providing 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, but as these

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reports have been produced by interested parties, sometimes they provide an incomplete picture. In addition, few reports examine 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 effects on flora and fauna, the potential for chemical contamination in waterways, and cumulative impacts relating to deforestation, multiple access roads, and other related issues. 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 repaired in the future. Health studies should examine potential primary and secondary health effects from 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 that increased disease rates among some First Nations are related to chemical contamination from past mining operations, and the appropriateness of current chemical guidelines and contaminant standards for areas

where people subsist off the land. Finally, parties that have conducted or are conducting studies should be encouraged to release their results to the public, and the government should provide public access to these studies, including on 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, the B.C. provincial government 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 clarify and enhance meaningful consultation with First Nations.***

Existing mining law and permitting procedures in British Columbia do not require 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, but the B.C. government should elaborate on these general standards to develop specific

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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 triggers deep consultation under the *Haida* standard.
- revisit all LRMPs so that deep consultation is integrated into planning. Indigenous land-use plans, such as the one Takla is 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 claims registration phase. Fundamentally, 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 were 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 would be clear that meaningful consultation would be required—and what that entailed beyond normal procedures—before a project could move ahead. 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

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First Nations can respond to project proposals more thoroughly. Furthermore, 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 internal consultations and decision-making traditions of the given First Nation.

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

### ***2. Obligate mining companies to submit human rights impact assessments, in addition to the already required 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 cultural way of life. 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 decision-makers should not consider the given project in isolation. Instead, evaluators 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. Such human rights impact assessments should be produced in close collaboration with First Nations.

### ***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

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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 effects of such sites should be considered 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' land.***

The provincial government currently controls 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 separate decision-makers. A joint review panel of provincial, federal, and First Nations representatives during the environmental assessment process

for the proposed Kemess North Mine has demonstrated that such a system can work. First Nations should choose a representative or agree to a government-appointed ombudsman who would represent their rights.

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

Many government agencies are involved in regulating the environmental and human impact of mining operations. This approach has benefits in that each agency brings its own expertise and its own specific concerns. It also leads 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 is assuming primary responsibility in a comprehensive manner.

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

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The B.C. government distributes 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, often have difficulty accessing these documents. The shortage of information creates suspicion of the government and makes it difficult for third parties 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 bear the burden of mining on their lands but do not always reap 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 make sure 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. The principles of deep consultation should be integrated into all such agreements, and First Nations should be represented adequately during negotiations.

### **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 in systems that incorporate rights analysis into their operations and activities. For example, they should recognize that mining should trigger deep consultation requirements as outlined in the *Haida* decision. They should share best practices with their industry associations and develop guidelines for consultation that ensure rights are incorporated into mining activities as a matter of course.

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### ***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 than is currently required by statute. Legislative reform to improve 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 when registering a claim on First Nations' traditional territory and provide the communities with notice that mineral exploration may eventually occur. This outreach will facilitate later consultation efforts and encourage a spirit of collaboration between First Nations and mining companies so that if projects proceed, they are more likely to do so with the cooperation and support of the local community.

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

Like the government, mining companies distribute 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, often have difficulty



accessing these documents. The shortage of information creates suspicion of the companies and makes it difficult for third parties to validate or analyze the information. Mining companies could improve this situation by providing 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.***

The B.C. provincial government has announced a revenue sharing plan with First Nations, and mining companies should adopt similar plans for projects that are approved. First Nations bear the burden of mining on their lands, but many do not see the economic benefits aside from those that trickle down through employment agreements. This situation is particularly problematic because the revenue is derived from the natural resources found on traditional First Nation lands and comes at the expense of harm to those lands. Mining companies can improve upon this situation by sharing their revenue and/or profits from mining 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

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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 the First Nations and help distribute the benefits of mineral development to the 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 situation of Takla Lake First Nation is illustrative of the situations of many First Nations, and thus the recommendations focus on them to exemplify the more general principles. Takla Lake First Nation 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 express 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 prefer to speak with the elected body, and the provincial government requires companies to adopt that approach. The result is that mining companies sometimes complete negotiations with both *keyoh* holders and chief and council, which can lead to confusion, or negotiate 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 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 an internal consultation and decision-making mechanism and make it clear to other key stakeholders so that they understand and can better accommodate the Takla's wishes for consultation. Even if Takla chooses to give individual *keyoh* holders decision-making power over their own land, the entire community should be apprised of the

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developments related to mining. Takla therefore should create better notification systems, which could complement a modified MTO process discussed above. Takla members currently report being surprised when they encounter miners on traditional lands; sometimes these encounters occur even after mining companies have submitted permits to the Takla chief and council. In order 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.

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

Takla is 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. 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 enforceable in court 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 and articulate those desires and invest in training for those members interested in mineral-related jobs.***

Takla currently does not receive sufficient economic benefit from mining operations on traditional Takla lands. If mining continues on Takla lands, Takla should receive enough economic benefit from the mining operations to offset the environmental and cultural costs of the mining. 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 wants the B.C. government or individual companies to 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, and how employees will be selected. At the same time, rather than relying

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exclusively upon training being provided, Takla should ensure that its members are educated and should promote training for its members in mineral industry jobs so that they can gain employment with mining companies and thereby reap benefits from any mineral development they agree to 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 family tracts of land.

In the twentieth century, the government sought to assimilate First Nations by imposing compulsory schooling and banning the traditional form 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.

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### The People and the Place

The Takla Lake First Nation is composed of approximately 1000 on- and off-reserve members.<sup>10</sup> Its traditional territory, which it has used and occupied for centuries, covers about 27,250 square kilometers.<sup>11</sup> Takla has never signed a treaty relinquishing its rights to this land, but the tract has not been confirmed as aboriginal title or reserve land. Within that traditional area, there are eighteen federally protected reserves;<sup>12</sup> the government has set them aside “for the use and 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 one by one-half miles (1.6 by .8 kilometers) on the shores of Takla Lake and is home to about 250 Takla

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<sup>10</sup> Carrier Sekani Tribal Council, Takla Lake First Nation, <http://www.cstc.bc.ca/cstc/36/takla+lake+first+nation> (last visited June 3, 2010).

<sup>11</sup> 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](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](http://www.taklafn.ca/downloads/Takla_Territory.pdf) (last visited June 3, 2010).

<sup>12</sup> 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 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>.



members.<sup>13</sup> 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).<sup>14</sup>

Takla is represented on the Carrier Sekani Tribal Council (CSTC), 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.<sup>15</sup> 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.<sup>16</sup>

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

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<sup>13</sup> Takla Lake First Nation, Communities, <http://www.taklafn.ca/nation/2/communities> (last visited June 3, 2010).

<sup>14</sup> Stuart Nechako Regional Economic Development Society, Fort St. James, <http://www.stuartnechako.ca/fort-st-james> (last visited June 3, 2010).

<sup>15</sup> Carrier Sekani Tribal Council, About CSTC, <http://www.cstc.bc.ca/cstc/7/about+cstc> (last visited June 3, 2010). Incorporated in 1979, the CSTC 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>.

<sup>16</sup> 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).

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Gitxsan, all Athabaskan speaking peoples.<sup>17</sup> Dakelh means “people who ‘travel upon water,’”<sup>18</sup> 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.<sup>19</sup> Sekani means “people of the rocks,”<sup>20</sup> and Gitxsan means “People of the River of Mist.”<sup>21</sup> The different groups are interconnected, but many people interviewed for this report identified themselves specifically with one or more of these groups.<sup>22</sup> They also retain cultural differences such as dialect.

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<sup>17</sup> CARRIER SEKANI TRIBAL COUNCIL, A CSTC BACKGROUND, *supra* note 15, at 6.

<sup>18</sup> Carrier Sekani Tribal Council, About CSTC, *supra* note 15.

<sup>19</sup> CARRIER SEKANI TRIBAL COUNCIL, A CSTC BACKGROUND, *supra* note 15, 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).

<sup>20</sup> CARRIER SEKANI TRIBAL COUNCIL, A CSTC BACKGROUND, *supra* note 15, at 6.

<sup>21</sup> Gitxsan, The Gitxsan, <http://www.gitxsan.com/our-way/2-the-gitxsan.html> (last visited June 3, 2010).

<sup>22</sup> *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).

## The 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.<sup>23</sup> 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."<sup>24</sup> 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 larger four 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).<sup>25</sup> Clan membership is matrilineal.<sup>26</sup>

The federal and provincial governments communicate primarily with chief and council, whom they view as speaking for the entire community, just as elected

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<sup>23</sup> Carrier Sekani Tribal Council, A Chronology of Contact, <http://www.cstc.bc.ca/cstc/31/a+chronology+of+contact> (last visited June 3, 2010).

<sup>24</sup> CARRIER SEKANI TRIBAL COUNCIL, A CSTC BACKGROUND, *supra* note 15, at 9–10; Interview with Victor West, in Takla Landing, B.C. (Sept. 15, 2009).

<sup>25</sup> CARRIER SEKANI TRIBAL COUNCIL, A CSTC BACKGROUND, *supra* note 15, at 9–10 (2007). In a visit to Takla's potlatch house, IHRC observed signs designating the seating arrangement by clan.

<sup>26</sup> *Id.*

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representatives speak for Canadians in the federal and provincial governments. The governments' lack of 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.<sup>27</sup>

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 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.<sup>28</sup> Takla, however, has shown skepticism toward the program. Takla Councilor Jeanette West told IHRC that the New Relationship is "not working" because "industry has too much influence."<sup>29</sup> She said that mining companies in particular are taking advantage of the fact that

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<sup>27</sup> 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).

<sup>28</sup> The New Relationship with Aboriginal People, [http://www.gov.bc.ca/themes/new\\_relationship.html](http://www.gov.bc.ca/themes/new_relationship.html) (last visited June 3, 2010).

<sup>29</sup> Interview with Jeanette West, *supra* note 27.

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 are simply “taking over.”<sup>30</sup> West believes the provincial government is deliberately stalling on the land claims to exploit the wealth of resources on First Nations’ land.<sup>31</sup>

### Relationship to the Land

The potlatch system, where the family name is inseparable from that family’s *keyoh*, exemplifies how inextricable Takla’s traditional culture is 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.<sup>32</sup> Stories passed down orally from one generation to the next are often specific to the physical space of one *keyoh*. In addition to recounting historical events, these stories may 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

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Interview with Lillian, Edna, and Antoine Johnny, *supra* note 22.

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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.<sup>33</sup> By telling the stories to each new generation, Takla members continue to share pieces of their history and the lessons learned from the past at appropriate times, particularly during potlatch ceremonies.

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 university educations, they still depend on traditional food sources for a significant portion of their diet.<sup>34</sup> 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.<sup>35</sup> 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,

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<sup>33</sup> Interview with Victor West, *supra* note 24.

<sup>34</sup> *See also* Interview with Lisa Sam, Nak’azdli First Nation, in Prince George, B.C. (Sept. 19, 2009).

<sup>35</sup> E-mail from David Radies, Takla Mining Coordinator, to IHRC (Mar. 17, 2010).

blueberries, and more.<sup>36</sup> Balsam, pitch, devil's club, sowberries, and rhubarb are among the plants that still provide traditional medicines.<sup>37</sup>

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 deer population was inversely correlated with alcoholism, violence, domestic strife, and car accidents.<sup>38</sup> In other words, when hunting is good, First Nations communities are 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

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<sup>36</sup> Interview with Marvin Abraham, at Aiken Lake, B.C. (Sept. 14, 2009).

<sup>37</sup> Interview with Terry Johnny, *supra* note 22; Interview with Irene French, *supra* note 27; Interview with Paul French, at Bralorne-Takla Mine site, B.C. (Sept. 17, 2009); Interview with Lillian, Edna, and Antoine Johnny, *supra* note 22.

<sup>38</sup> Interview with Lisa Sam, *supra* note 34; *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).

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tobacco when she cut down a tree or caught a grouse.<sup>39</sup> 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 here to take care of the land. [The Creator] will take something away from here.”<sup>40</sup> 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.<sup>41</sup>

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.”<sup>42</sup> 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

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<sup>39</sup> Interview with Richard, Esther, and Carmelita Abraham, in Takla Landing, B.C. (Sept. 13, 2009).

<sup>40</sup> Interview with Anita Williams, Councilor for Social Development, Takla Lake First Nation, in Takla Landing, B.C. (Sept. 16, 2009).

<sup>41</sup> Interview with Irene French, *supra* note 27.

<sup>42</sup> *Id.*



trees.<sup>43</sup> 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.<sup>44</sup>

### Residential Schools

Given these views of their environment, it is not surprising that many people in Takla believe 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.<sup>45</sup> From 1920 to 1948, the federal government made attendance at a residential school compulsory between the ages of six and fifteen.<sup>46</sup> In practice, however, forced

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<sup>43</sup> 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>.

<sup>44</sup> Interview with Richard, Esther and Carmelita Abraham, *supra* note 39; Interview with William Alexander, *supra* note 22.

<sup>45</sup> See, e.g., Interview with Anita Williams, *supra* note 40.

<sup>46</sup> 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 19, at 49-66.

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attendance seems to have gone on for much longer, as stories of kidnapping stretch at least into the early 1960s.<sup>47</sup> This forced assimilation program not only took children from their families, but also resulted in different forms of abuse.<sup>48</sup>

Takla members are 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?’”<sup>49</sup> 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

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<sup>47</sup> See, e.g., Interview with Richard, Esther, and Carmelita Abraham, *supra* note 39; Interview with Marvin Abraham, *supra* note 36.

<sup>48</sup> Many First Nations people believe the 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 27.

<sup>49</sup> Interview with Richard, Esther, and Carmelita Abraham, *supra* note 39.

won't teach it because they used to be beaten for speaking it.”<sup>50</sup>

### **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 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.<sup>51</sup> Unlike in those major cities, First Nations constitute a significant percentage of the population in northern British Columbia.<sup>52</sup> The region's relatively sparse population, however, gives those groups very little political power compared to the southern part of the province.<sup>53</sup>

Mining has long been a part of the framework of resource extraction, but it has not always been the primary

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<sup>50</sup> *Id.*

<sup>51</sup> Telephone Interview with Murray Browne, Woodward & Company (Apr. 1, 2010).

<sup>52</sup> 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](http://www.bcstats.gov.bc.ca/data/cen01/abor/tot_abo.pdf).

<sup>53</sup> Telephone Interview with Murray Browne, *supra* note 51. See BRITISH COLUMBIA, STATISTICAL PROFILE OF ABORIGINAL PEOPLES, *supra* note 52.

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concern. The fur trade 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<sup>54</sup> boundaries, which only roughly follow *keyoh* boundaries, and families today refer to these traplines in ownership terms.<sup>55</sup> *Keyohs* are not considered fungible, but traplines can be bought and sold.<sup>56</sup> Thus, Takla generally does not consider a sold trapline to have displaced the *keyoh* system. These overlapping property systems create 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.

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

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<sup>54</sup> "Trapline" refers to the route along which a person or family sets traps for animals.

<sup>55</sup> CARRIER SEKANI TRIBAL COUNCIL, A CSTC BACKGROUND, *supra* note 15, at 9.

<sup>56</sup> *Id.*

Williston Reservoir and flooding a large portion of Tsay Keh Dene (Sekani) land.<sup>57</sup> People in Takla recalled this event bitterly, as it resulted in the displacement of friends and relatives.<sup>58</sup> 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.<sup>59</sup>

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<sup>57</sup> Carrier Sekani Tribal Council, A Chronology of Contact, *supra* note 23.

<sup>58</sup> Interview with Mona and Lillian French, in Takla Landing, B.C. (Sept. 15, 2009); Interview with Victor West, *supra* note 24.

<sup>59</sup> 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 51; *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 58; Interview with Terry Teegee, *supra* note 22; Interview with Raphael West, in Takla Landing, B.C. (Sept. 15, 2009); Interview with Ernie French, in Prince George, B.C. (Sept. 19, 2009).

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This railroad, originally intended to reach Alaska,<sup>60</sup> 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 refers to that experience as “a really destructive part of [her] life” for which she spent ten years “paying” and suffering.<sup>61</sup> The logging industry is dominated by outsiders, however, and has dramatically changed Takla’s environment and Takla’s relationship with the environment.<sup>62</sup> 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, says Alexander, “you don’t need 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.”<sup>63</sup> Caribou, another animal that Takla members hunt, are also vulnerable to the exposure caused by

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<sup>60</sup> E-mail from JP Laplante, former Mining Coordinator, Takla Lake First Nation, to Susannah Knox, IHRC (Jan. 22, 2010).

<sup>61</sup> Interview with Irene French, *supra* note 27. 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 27.

<sup>62</sup> *See, e.g.*, Interview with Julie Jacques, in Takla Landing, B.C. (Sept. 13, 2009).

<sup>63</sup> Interview with William Alexander, *supra* note 22.

deforestation,<sup>64</sup> and a 2009 study noted the potentially devastating effect of their decline on northern indigenous cultures.<sup>65</sup>

Fish are an additional important resource that has been adversely affected by modern industry. As British

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<sup>64</sup> 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 22. See generally Wildlife Conservation Society, Caribou, <http://www.wcs.org/saving-wildlife/hoofed-mammals/caribou.aspx> (last visited June 3, 2010).

<sup>65</sup> The study found that caribou populations worldwide have plunged by sixty percent in the past three decades; the study 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](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, and government intervention to protect logging, combined with warming temperatures, has 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: CHALLENGES AND SOLUTIONS 223, 227 (T.L. Shore, J.E. Brooks & J.E. Stone eds., 2003). See also Interview with Terry Teegee, *supra* note 22.

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Columbia's salmon stock is suffering from a sharp decline,<sup>66</sup> many First Nations have had no fishing at all for the past several years.<sup>67</sup> The precise causes of the decline are unknown and may be myriad, but studies suggest that industrial uses of the land such as logging and mining may play a part.<sup>68</sup> Living at the headwaters of three major watersheds, members of Takla express an obligation to protect the fish not only for their own community, but for those who live downstream.

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<sup>66</sup> 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](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).

<sup>67</sup> Interview with Terry Teegee, *supra* note 22.

<sup>68</sup> KQED Education Network, California Salmon Educator Guide, available at [http://www.kqed.org/quest/files/download/85/307a\\_CaliforniaSalmon.pdf](http://www.kqed.org/quest/files/download/85/307a_CaliforniaSalmon.pdf) (last visited June 3, 2010) (noting that industrial activities, such as mining, road-building, logging, and water diversion, can destroy salmon breeding areas).



## Mining

Takla's negative past experiences with resource extraction also include mining, an industry to which it is particularly vulnerable. The Quesnel Trough runs through Takla's traditional territory, making it rich in minerals such as gold, copper, mercury, jade, and molybdenum. The area is as a result now blanketed by mineral claims. Takla itself has never run any mining operations.<sup>69</sup> Ancestors of Takla members used minerals to make implements such as axes and arrowheads, but "they left the land in the beautiful state it was in."<sup>70</sup> 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, taint many Takla members' views toward mining in Takla's territory today.

The stories Takla members shared with IHRC painted a disturbing picture of the consultation that has historically been employed by miners. Several people recalled parents and grandparents who befriended prospectors, answering questions about the land and teaching them survival skills.<sup>71</sup> Some worked for the miners, hauling supplies to the camps

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<sup>69</sup> E-mail from JP Laplante (Jan. 22, 2010), *supra* note 60.

<sup>70</sup> Interview with Irene French, *supra* note 27.

<sup>71</sup> Interview with William Alexander, *supra* note 22; Interview with Richard, Esther, and Carmelita Abraham, *supra* note 39.

## Bearing the Burden

and minerals out of the camps by horseback on traditional trails.<sup>72</sup> 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.”<sup>73</sup> 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.”<sup>74</sup> 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.<sup>75</sup>

Takla’s understanding of how mining was being conducted 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

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<sup>72</sup> See interview with Irene French, *supra* note 27; Interview with Richard, Esther, and Carmelita Abraham, *supra* note 39; Interview with Mona and Lillian French, *supra* note 58.

<sup>73</sup> Interview with Roy French, in Takla Landing, B.C. (Sept. 15, 2009).

<sup>74</sup> Interview with Richard, Esther and Carmelita Abraham, *supra* note 39.

<sup>75</sup> *Id.*; Interview with Marvin Abraham, *supra* note 36.

kept knowledge about minerals on their land quiet.<sup>76</sup> Chief Dolly Abraham told IHRC that missionaries used to tell their ancestors not to touch the gold “because it is Jesus’ blood,” and “things like that lead to no trust.”<sup>77</sup> 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.”<sup>78</sup> He also said he believes that miners deliberately attempted to pit different families with overlapping territories against each other by bribing them.<sup>79</sup> 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.<sup>80</sup>

Mining has overtaken logging as Takla’s primary concern regarding resource use by outsiders. The logging

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<sup>76</sup> Interview with Frank Williams, in Takla Landing, B.C. (Sept. 17, 2009).

<sup>77</sup> 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).

<sup>78</sup> Interview with Richard, Esther, and Carmelita Abraham, *supra* note 39.

<sup>79</sup> *Id.*

<sup>80</sup> Interview with Victor West, *supra* note 24; Interview with Margo French, at Bralorne-Takla Mine site, B.C. (Sept. 17, 2009); Interview with David Alexander, Jr., in Takla Landing (Sept. 15, 2009); Interview with Tony Johnny, in Takla Landing, B.C. (Sept. 15, 2009). *See also* Interview with Lisa Sam, *supra* note 34 (describing story passed down among Nak’adzli people about rejecting mining because it causes fighting).

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industry in Canada has declined,<sup>81</sup> but, as of the time of writing, mineral prices have risen steadily over the past ten years.<sup>82</sup> Thus, a rapid increase in the number of mining operations has characterized recent development on Takla's land.

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<sup>81</sup> 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](http://www.guidetobceconomy.org/major_industries/forestry.htm) (last visited March 17, 2010).

<sup>82</sup> 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 81; Interview with Terry Teegee, *supra* note 22; 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 arises primarily from 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 tempers it with

## Bearing the Burden

consultation and accommodation obligations. The line of cases is moving toward increased protection of First Nations' interests, although the rules should be supplemented with statutes to provide clarity and specificity. Together, international and Canadian law call for higher 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 espouse principles that protect aboriginal rights to traditional lands and resources. Canada is party to, and thus legally bound by, three relevant instruments of human rights law<sup>83</sup>: the International Covenant on Civil and Political Rights (ICCPR),<sup>84</sup> the International Covenant on Economic, Social and Cultural

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<sup>83</sup> Office of the U.N. High Comm'r for Human Rights (OHCHR), Status by Country, <http://www.unhcr.ch/tbs/doc.nsf/Statusfrset> (click on the arrow next to "Canada") (last visited June 3, 2010).

<sup>84</sup> 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].

Rights (ICESCR),<sup>85</sup> and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).<sup>86</sup> The first two are the foundational treaties of human rights law,<sup>87</sup> and 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.<sup>88</sup> Although Canada was one of the objecting nations, all but four of the U.N. member states voted to

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<sup>85</sup> 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].

<sup>86</sup> International Convention on the Elimination of All Forms of Racial Discrimination art. 1, ¶ 1, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter ICERD].

<sup>87</sup> 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, and this is a legally binding obligation. 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.

<sup>88</sup> *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].

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support UNDRIP. Canada found fault with the language of several UNDRIP provisions.<sup>89</sup> 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.<sup>90</sup> Despite Canada's objections, UNDRIP's provisions represent broad international agreement on the special rights and privileges to be accorded to aboriginal peoples.<sup>91</sup>

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 culture are often tied to their environment. Its

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<sup>89</sup> 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](http://www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/statements-declarations/general_assembly-assemblee-generale/10373.aspx?lang=eng).

<sup>90</sup> *Id.*

<sup>91</sup> 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.



principles should govern resource extraction to ensure that development does not preclude cultural and subsistence uses of the land.<sup>92</sup>

### *First Nations' Right to Self-Determination*

One of the founding purposes of the United Nations is to protect the self-determination of peoples.<sup>93</sup> Article 1 of both the ICCPR and ICESCR articulate this principle, by 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.”<sup>94</sup> Notably, the U.N. Charter, ICCPR, and ICESCR do not refer to a right of self-determination for states; they all confer the right upon

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<sup>92</sup> 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*].

<sup>93</sup> U.N. Charter, *supra* note 87, 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”).

<sup>94</sup> ICCPR, *supra* note 84, art. 1, ¶ 1; ICESCR, *supra* note 85, art. 1, ¶ 1.

## Bearing the Burden

peoples.<sup>95</sup> 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.<sup>96</sup> ICERD, to which Canada is bound,<sup>97</sup> and UNDRIP further confer these rights specifically upon indigenous people.<sup>98</sup>

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<sup>95</sup> 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.

<sup>96</sup> The Human Rights Committee (HRC) explained the distinction between the right to self-determination, enjoyed by groups, and the participatory rights enjoyed by individuals under article 25. *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.”).

<sup>97</sup> ICERD, *supra* note 86, 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> (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”).

<sup>98</sup> *See* UNDRIP, *supra* note 88, 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 (stating 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).

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 Peoples<sup>99</sup> 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."<sup>100</sup> 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."<sup>101</sup> The U.N. General Assembly has adopted a series of declarations

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<sup>99</sup> 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 4000 pages, published in 1996. For highlights of this report, see <http://www.ainc-inac.gc.ca/ap/pubs/rpt/rpt-eng.asp> (last visited June 3, 2010).

<sup>100</sup> 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, [http://www.collectionscanada.gc.ca/webarchives/20071211054613/http://www.ainc-inac.gc.ca/ch/rcap/sg/sh38\\_e.html#4%20Lands%20and%20Resour](http://www.collectionscanada.gc.ca/webarchives/20071211054613/http://www.ainc-inac.gc.ca/ch/rcap/sg/sh38_e.html#4%20Lands%20and%20Resour) ces (last visited June 3, 2010).

<sup>101</sup> ICCPR, *supra* note 84, art. 1, ¶ 2; ICESCR, *supra* note 85, art. 1, ¶ 2.

## Bearing the Burden

that have recognized the importance of “the right of peoples and nations to permanent sovereignty over their natural wealth and resources.”<sup>102</sup> In its Declaration of December 1952, it recommended that U.N. members should “refrain from acts, direct or indirect, designed to impede the exercise of . . . sovereignty . . . over . . . natural resources.”<sup>103</sup> Canadian law has also recognized this principle through the exclusive nature of aboriginal title to lands.<sup>104</sup> The right to dispose freely of natural resources is a critical element of self-determination.

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<sup>102</sup> See generally U.N. Special Rapporteur for the Subcommittee on Prevention of Discrimination and Protection of Minorities, *Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous Peoples’ Permanent Sovereignty over Natural Resources*, Erica-Irene A. Daes, ¶ 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. 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.”).

<sup>103</sup> G.A. Res. 626 (VII), ¶ 2, 7 U.N. GAOR, Supp. No. 20, U.N. Doc. A/2361 (Dec. 21, 1952).

<sup>104</sup> See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, ¶¶ 112-19 (Can.), (describing aboriginal title as encompassing exclusive use).

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 lays out.<sup>105</sup> 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.<sup>106</sup> The Committee on Economic, Social and Cultural Rights (CESCR) 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.<sup>107</sup> Economic development should proceed through

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<sup>105</sup> ICESCR, *supra* note 85, art. 2, ¶ 1.

<sup>106</sup> *Id.* art. 1, ¶ 3.

<sup>107</sup> 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 CESCR. See Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and*

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sustainable development and should be done in a manner consistent with First Nations' culture and decisions about the future.

Another important concept to aboriginal rights is that of free, prior and informed consent. To ensure that economic development occurs in accordance with First Nations' wishes, the CESCR has commented that "parties should respect the principle of free, prior, and informed consent of indigenous peoples in all matters covered by their specific rights."<sup>108</sup> 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.<sup>109</sup> This standard of consent represents an accepted interpretation of the ICESCR and one that Canada could adopt in order to protect the First Nations' right to political and economic self-determination. Canada has expressed opposition to the principle, however,

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*Cultural Rights, Including the Right to Development*, ¶ 10, 226 U.N. Doc. A/HRC/8/7 (May 6, 2008), available at <http://www2.ohchr.org/english/issues/escr/docs/A-HRC-8-7.doc>; General Assembly, *Report of the Human Rights Council*, ¶ 6, U.N. Doc. A/63/435 (Nov. 28, 2008), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N08/624/87/PDF/N0862487.pdf?OpenElement>.

<sup>108</sup> Comm. on Econ., Soc. and Cultural Rights, General Comment No. 21, ¶ 37, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009), available at <http://www2.ohchr.org/english/bodies/cescr/docs/gc/E-C-12-GC-21.doc>.

<sup>109</sup> UNDRIP, *supra* note 88, arts. 10-11, 19, 28-29, 32.

and this report does not take a stand on whether aboriginal communities enjoy a right to free, prior, and informed consent in the country.<sup>110</sup> 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 to not interfere with First Nations' rights to economic development and self-determination as well as to take progressive steps towards their full realization.

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<sup>110</sup> *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). Even if Canada does not grant First Nations free, prior, and informed consent, the First Nations have other internationally guaranteed rights that provide protection and are being violated by the current system.

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### *First Nations' Right to Enjoy Their Own Culture*

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 culture and pass it 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.”<sup>111</sup> For indigenous peoples, the right to enjoy their own culture is inextricable from their right to use their traditional lands and to participate in decisions relating to their natural resources. The Human Rights Committee (HRC) has recognized the link between indigenous culture 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

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<sup>111</sup> ICCPR, *supra* note 84, art. 27. The HRC 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 also applies to the situation of First Nations because their connection to the land is a spiritual as well as cultural one. The ICCPR also establishes a general right to freedom of religion for all people. ICCPR, *supra* note 84, art. 18.



fishing or hunting and the right to live in reserves protected by law.<sup>112</sup>

The CESCR has similarly noted that culture is 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.<sup>113</sup>

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

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<sup>112</sup> Human Rights Comm., General Comment No. 23, *supra* note 111, ¶ 7. The HRC 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 26 March 1990.

<sup>113</sup> Comm. on Econ., Soc. and Cultural Rights, General Comment No. 21, *supra* note 108, ¶ 36. *See also Rio Declaration, supra* note 92, 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.”).

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natural environment.<sup>114</sup> UNDRIP further articulates international recognition of the close “spiritual relationship” indigenous peoples often have with the land.<sup>115</sup>

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 upon 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 culture<sup>116</sup> or as a right in and of itself: a right to a healthy environment.<sup>117</sup>

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<sup>114</sup> 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).

<sup>115</sup> UNDRIP, *supra* note 88, art. 25. UNDRIP has also explicitly stated that indigenous peoples have rights “to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired”; these rights include ownership, use, development, and official legal recognition and protection of these rights. *Id.* art. 26.

<sup>116</sup> Environmental protection similarly can be seen as required to protect the right to health. For example, as a means of improving

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human life and health, Article 12(2) of the ICESCR demands that nations take steps to improve environmental and industrial hygiene. ICESCR, *supra* note 85, art. 12, ¶ 2(b). The CESCR 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,CESCR> (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, State parties should ensure that natural water resources are protected from contamination by harmful substances and pathogenic microbes.”).

<sup>117</sup> In addition to supporting the enjoyment of human rights, international law is beginning to recognize the right to a healthy environment as a right in itself. A Draft Declaration on Human Rights and the Environment was proposed by the U.N. Sub-commission on Prevention of Discrimination and Protection of Minorities. 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). However, 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,

## Bearing the Burden

The ICCPR requires states parties to respect and ensure the right to culture.<sup>118</sup> 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.<sup>119</sup> Furthermore, states are obligated to

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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](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 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.

<sup>118</sup> ICCPR, *supra* note 84, arts. 1(3) and 2(1).

<sup>119</sup> *See* Human Rights Comm., General Comment No. 23, *supra* note 111, ¶ 6.1; Comm. on Econ., Soc. and Cultural Rights, General Comment No. 21, *supra* note 108, ¶ 36; *see also id.* ¶ 50(c) (explaining that states parties have the duty to respect and protect the "cultural productions" of indigenous peoples, including

ensure that their citizens have a judicial remedy for violations of the ICCPR, including violations of the right to culture.<sup>120</sup> As the HRC 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.”<sup>121</sup> Among these positive measures is an obligation to ensure that the lands and resources necessary for First Nations, including Takla, to practice their culture 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 their functional ecosystems destroyed. To some indigenous communities, the land and the environment are inextricably intertwined with their traditions so meaningful protection

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protection of their lands from unjust or illegal exploitation by both private and state actors).

<sup>120</sup> ICCPR, *supra* note 84, art. 2. *See also Rio Declaration, supra* note 92, princ. 10 (requiring “[e]ffective access to judicial and administrative proceedings, including redress and remedy” regarding environmental issues).

<sup>121</sup> Human Rights Comm., General Comment No. 23, *supra* note 111, ¶ 7.

## Bearing the Burden

requires preserving the quality of those lands. Thus, environmental principles are another critical component for protecting their rights as a people.

The Convention on Biological Diversity, to which Canada is bound,<sup>122</sup> 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.<sup>123</sup> 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,<sup>124</sup> and the Rio Declaration draws a link

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<sup>122</sup> Convention on Biological Diversity, List of Parties, <http://www.cbd.int/convention/parties/list/> (last visited June 3, 2010).

<sup>123</sup> 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*].

<sup>124</sup> *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,

between indigenous peoples and their environment.<sup>125</sup> 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.<sup>126</sup>

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

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*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 92, 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).

<sup>125</sup> *Rio Declaration*, *supra* note 92, princ. 22.

<sup>126</sup> UNDRIP, *supra* note 88, art. 29.

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compromising the ability of future generations to meet their own needs.”<sup>127</sup> The concept relates to Canada’s fiduciary role towards First Nations and their combined responsibility to preserve resources for future indigenous generations.<sup>128</sup> 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.”<sup>129</sup>

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<sup>127</sup> 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>.

<sup>128</sup> See *Rio Declaration*, *supra* note 92, princ. 22 (noting that states should enable indigenous peoples to play a role in “the achievement of sustainable development.”).

<sup>129</sup> *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



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 in order to help 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 Canada is often left to domestic bodies and institutions,<sup>130</sup> however, so in practice, the Canadian

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Protocol); Convention on Biological Diversity, *supra* note 123 (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].”).

<sup>130</sup> 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-

## Bearing the Burden

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,"<sup>131</sup> none of which may be interpreted to "abrogate or derogate from" aboriginal rights.<sup>132</sup> Section 35 of Part II explicitly refers to the "rights of the aboriginal

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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](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 33<sup>RD</sup> 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>.

<sup>131</sup> PATRICK MACKLEM, *INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA* 203–04 (2001).

<sup>132</sup> Part I of the Constitution Act, 1982, § 25, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

peoples of Canada”<sup>133</sup> and makes particular note of the “treaty rights” that First Nations maintain by virtue “of land claims agreements.”<sup>134</sup> 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.<sup>135</sup> 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 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 guidelines to remove any ambiguity that exists.

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.* § 35(3).

<sup>135</sup> 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”).

## Bearing the Burden

### *Establishing Aboriginal Rights and Title*

Aboriginal rights and title, used here as terms of art of 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.<sup>136</sup> 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.<sup>137</sup> Aboriginal title is a communal right, a “collective right to land held by all members of an aboriginal nation,”<sup>138</sup> and it includes the right to exclusive use and occupation of land for uses including, but not limited to,

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<sup>136</sup> 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).

<sup>137</sup> *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶¶ 112, 114.

<sup>138</sup> *Id.* ¶ 115.

those integral to the group's culture.<sup>139</sup> Although aboriginal title also includes mineral rights<sup>140</sup> and the right to choose how the land is used,<sup>141</sup> current use of the land must not destroy the land for use by future generations.<sup>142</sup> 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.

To prove aboriginal title, a First Nation must show that it possessed or occupied the land at the time when British sovereignty began.<sup>143</sup> Occupation must be exclusive from non-aboriginal settlers; if another First Nation historically occupied the same land, the two communities may gain joint title.<sup>144</sup> 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.”<sup>145</sup> In *Delgamuukw*, the Supreme Court eased the evidentiary burden on First Nations through its holding that

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<sup>139</sup> *Id.* ¶¶ 118–19.

<sup>140</sup> *Id.* ¶ 122.

<sup>141</sup> *Id.* ¶ 168.

<sup>142</sup> *Id.* ¶¶ 126–29.

<sup>143</sup> *Id.* ¶ 143.

<sup>144</sup> Ochman, *supra* note 135, at 325.

<sup>145</sup> *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶¶ 152–53 (quoting *Mabo v. Queensland* (1992) 107 A.L.R. 1 (Austl.)).

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Canada's laws of evidence should be interpreted flexibly to give oral histories the same weight as historic documents.<sup>146</sup>

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 and therefore may provide lesser legal protection, protecting only the ability of an aboriginal group to conduct traditional activities.<sup>147</sup> To qualify as an aboriginal right in this sense, the activity must be “integral to the distinctive culture of the aboriginal group”<sup>148</sup> and must have been practiced continuously since before British sovereignty.<sup>149</sup> In this test, the term “distinctive” is supposed to “incorporate an element of Aboriginal specificity,”<sup>150</sup> 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.<sup>151</sup> 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 to be “frozen in time.”<sup>152</sup> There is some

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<sup>146</sup> Ochman, *supra* note 135, at 325.

<sup>147</sup> *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶¶ 138–39.

<sup>148</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507, ¶ 46 (Can.).

<sup>149</sup> Ochman, *supra* note 135, at 321.

<sup>150</sup> *Id.* at 330.

<sup>151</sup> *Id.* at 340.

<sup>152</sup> *Id.* at 328, 330.

flexibility for traditional activities to evolve: “Changes in method do not change the essential character of the practice.”<sup>153</sup>

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.”<sup>154</sup> Under this limitation, for example, in *R v. Sappier* and *R. v. Gray*, the Court recognized a right for individuals to log for personal use,<sup>155</sup> but in *R. v. Marshall* and *R. v. Bernard*, the Court 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.<sup>156</sup> 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 the

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<sup>153</sup> *R. v. Morris*, [2006] S.C.R. 915, ¶ 33 (Can.), *quoted in id.* at 334.

<sup>154</sup> Ochman, *supra* note 135, at 329 (citing *R. v. Sappier*, *R. v. Gray*, [2006] 2 S.C.R. 686, ¶¶ 24–26 (Can.)).

<sup>155</sup> *Sappier, Gray*, 2 S.C.R. at ¶¶ 24–26.

<sup>156</sup> *R. v. Marshall*, *R. v. Bernard*, [2005] S.C.R. 220 (Can.); *see also* Ochman, *supra* note 135, at 324, 327.

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Europeans.<sup>157</sup> In practice, however, this proof is often fulfilled by proof of occupancy.<sup>158</sup>

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.<sup>159</sup> 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.<sup>160</sup> Under this test for intensive use, First Nations are much more likely to be able to prove aboriginal title, which confers exclusive use of the

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<sup>157</sup> *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶ 144; *Van der Peet*, [1996] 2 S.C.R. 507, ¶ 60.

<sup>158</sup> *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶ 142.

<sup>159</sup> Ochman, *supra* note 135, at 326.

<sup>160</sup> *Id.* at 339 (citing *Tsilhqot'in Nation v. British Columbia*, [2007] B.C.S.C. 1700, ¶ 960 (Can.)).



land and may therefore be more powerful in protecting the First Nations' lands against invasive mining practices.

*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 into their territories, 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 on which to base each First Nation's land base, 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."<sup>161</sup> During a visit to Canada in 2004, however,

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<sup>161</sup> Highlights from the Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, *supra* note 100. See also, *Lands & Resources*, *supra* note 100.

## Bearing the Burden

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.<sup>162</sup>

Even when a First Nation overcomes the evidentiary hurdles and proves aboriginal rights or title, those 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.”<sup>163</sup> 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.<sup>164</sup> The Court set out a

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<sup>162</sup> 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).

<sup>163</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075, ¶ 70 (Can.).

<sup>164</sup> *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶¶ 160–62.

test that enables the government to infringe on 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.”<sup>165</sup> 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 must resort to litigation, a strategy that has been both costly and time consuming. Even if successful, litigation may not procure 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.<sup>166</sup> Their

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<sup>165</sup> *Sparrow*, [1990] 1 S.C.R. 1075, ¶ 83.

<sup>166</sup> Dominique Nouvet, *The Duty to Consult and Accommodate: Overview of the Current Law*, Presentatoin 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](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). *But see* *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, [2008] O.N.C.A. 534, ¶

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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 surrounding infringement of aboriginal rights and title.<sup>167</sup> 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 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.”<sup>168</sup>

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 fiduciary duty

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23 (granting First Nations’ injunction in Ontario and encouraging parties to submit to three-way mediation with the provincial government).

<sup>167</sup> See Ochman, *supra* note 135, at 349.

<sup>168</sup> *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶ 166.

toward First Nation people has been met<sup>169</sup> and on providing fair economic compensation for the infringement.<sup>170</sup> 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.<sup>171</sup>

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.

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<sup>169</sup> *Id.* at ¶¶ 160–62.

<sup>170</sup> *Id.* See also Nouvet, *supra* note 166.

<sup>171</sup> *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶ 168.

## Bearing the Burden

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. 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.<sup>172</sup> 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.”<sup>173</sup> The Court reasoned that if the government was not required to take asserted rights into account, it risked granting First Nations lands that had been stripped of natural resources and traditional meaning.<sup>174</sup> This duty primarily vests in the federal government but also extends to provincial

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<sup>172</sup> 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.

<sup>173</sup> *Id.* ¶ 35 (emphasis added).

<sup>174</sup> *Id.* ¶ 33.

governments when they have jurisdiction over the land at issue.<sup>175</sup>

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.<sup>176</sup> 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.<sup>177</sup> 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."<sup>178</sup> Near the strong end of the spectrum, deep consultation may also require accommodation. For cases falling between the two extremes, the level of consultation

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<sup>175</sup> *Id.* ¶ 59.

<sup>176</sup> *Id.* ¶ 39.

<sup>177</sup> *Id.* ¶ 43.

<sup>178</sup> *Id.* ¶ 44.

## Bearing the Burden

required is decided on a case-by-case basis.<sup>179</sup> Accommodation is a term that the law does not clearly define, but which has been interpreted as encompassing everything from minor mitigation to compensation.<sup>180</sup>

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 Environmental Assessment Act, may not be sufficient to discharge the government's duty to consult and accommodate aboriginal peoples.<sup>181</sup> Rather, the consultation and accommodation efforts should be judged by their reasonableness and by the extent to which government efforts are meaningful and go beyond baseline consultation procedures intended for the general public.<sup>182</sup> 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

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<sup>179</sup> *Id.* ¶ 45.

<sup>180</sup> E-mail from Murray Browne (June 2, 2010), *supra* note 136.

<sup>181</sup> Nouvet, *supra* note 166.

<sup>182</sup> *Taku River Tlingit First Nation v. British Columbia* (Project Assessment Director), [2004] 3 S.C.R. 550, ¶ 2 (Can.); *Dene Tha' First Nation v. Canada* (Minister of Environment), [2006] 378 N.R. 251, ¶ 104 (Can.).



the review process and assisting First Nation leadership in contacting other government agencies.<sup>183</sup>

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.”<sup>184</sup> 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.”<sup>185</sup> While there is no obligation to refrain from hard bargaining,<sup>186</sup> the government must enter negotiations “willing to alter its proposed course of actions,”<sup>187</sup> 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.”<sup>188</sup>

The recent B.C. Supreme Court ruling in *Tsilhqot’in Nation v. British Columbia* was the first ruling on aboriginal

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<sup>183</sup> *Taku River*, [2004] 3 S.C.R. 550.

<sup>184</sup> *Haida*, [2004] 3 S.C.R. 511, ¶ 49.

<sup>185</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.C. 69, ¶ 54 (Can.). *See also* Nouvet, *supra* note 166.

<sup>186</sup> *Haida*, [2004] 3 S.C.R. 511, ¶ 42.

<sup>187</sup> *Id.* ¶ 46. *See also* Nouvet, *supra* note 166.

<sup>188</sup> *Taku River*, [2004] 3 S.C.R. 550, ¶ 2.

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title since *Delgamuukw*.<sup>189</sup> 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.<sup>190</sup> While the facts of the case involved the Forestry Act, it logically applies equally to mining. It 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 May 2010, the *Tsilhqot'in* case is being appealed to the B.C. Court of Appeal, but it will remain good law unless the appeals court decides otherwise.

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 upon an aboriginal right or title. Such consultation must be reasonable, must be greater than that extended to the general

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<sup>189</sup> *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, but Justice Vickers stated the Tsilhqot'in had provided sufficient evidence to prove title to over 200,000 hectares of its territory.

<sup>190</sup> *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.”).

non-indigenous population, and must be conducted in good faith by both parties. The government may infringe upon aboriginal rights and title if it meets the *Sparrow* test and its progeny for infringement: 1) there is a significant governmental interest for doing so; 2) infringement prioritizes First Nations and involves consultation and compensation; and 3) the infringement is not unreasonable and does not impose an undue hardship upon the First Nations, and 4) 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 broader sense. While the courts make clear that at least some circumstances require consultation, the parties involved lack specific guidance on its meaning. A statute codifying Canadian common law on aboriginal rights could provide more detailed direction on what is required to meet the consultation obligations. It would thus facilitate implementation of the protections without requiring First Nations to turn to expensive litigation for clarity. A statute

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would at the same time reinforce the rights laid out in international and Canadian constitutional law, especially if it articulated this goal in its stated purpose.

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 are 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 create an unbalanced system that provides advantages to industry at the expense of First Nations. The legal regime weighs in miners' favor, gives much discretion to very few government officials, does not allow for adequate consultation with First Nations, and fails to curb the industry's cumulative effects on the environment. It thus does not provide First Nations, including Takla, viable avenues that they can use to protect their interests or the environment from the burdens of mining. B.C. mining law falls far short of ensuring that projects that affect indigenous peoples receive the heightened protection required under international law, and therefore it threatens First Nations' rights to control and use their land as well as preserve their culture and way of life. The B.C. legal framework also generally fails to meet Canada's own constitutional case law standards regarding government consultation and accommodation.

### **Federal and Provincial Powers**

Canada's government consists of a federal system with authorities distributed among the central government, ten

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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”<sup>191</sup> and the right to collect royalties from developers of mineral resources.<sup>192</sup> Federal laws only apply in limited cases.<sup>193</sup> “[A]ll federal

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<sup>191</sup> 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>.

<sup>192</sup> 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*].

<sup>193</sup> The federal government has authority over mining only in limited circumstances, such as mining activity that occurs on federal lands, 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 191, at 14. Unless the project is on federal lands, however, agreements between the provincial and federal governments give British Columbia authority over administering the 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).

and provincial laws must comply with [the Constitution],”<sup>194</sup> 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.<sup>195</sup> 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.<sup>196</sup> Access to First Nations’ reserves, land set aside by the Crown for the “use and benefit of a band,” is restricted.<sup>197</sup> 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

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<sup>194</sup> BENEATH THE SURFACE, *supra* note 192, at 11.

<sup>195</sup> 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](http://www.empr.gov.bc.ca/Titles/MineralTitles/Documents/Factsheet_LON_Miners.pdf).

<sup>196</sup> BENEATH THE SURFACE, *supra* note 192, at 25.

<sup>197</sup> 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 on the regulation of mining on reserves, see the BENEATH THE SURFACE, *supra* note 192, at 28–29.

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square kilometers,<sup>198</sup> and the area of all of the Takla's reserves totals 8.1 square kilometers.<sup>199</sup> By contrast, its traditional territory spans 27,250 square kilometers.<sup>200</sup> Developers have fairly unfettered access to the portions of traditional territories outside of reserves.

### Land-Use Planning

Land and Resource Management Plans (LRMPs) 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 (ILMB) initiated the LRMP program in the early 1990s but over the past few years has started to wind it down.<sup>201</sup> The ILMB provided First Nations with an opportunity to participate in the

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<sup>198</sup> 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](http://pse5-esd5.ainc-inac.gc.ca/fnp/Main/Search/FNReserves.aspx?BAND_NUMBER=608&lang=eng) (last visited June 4, 2010).

<sup>199</sup> Ministry of Aboriginal Relations and Reconciliation, Carrier Sekani Tribal Council, [http://www.gov.bc.ca/arr/firstnation/carrier\\_sekani/default.html](http://www.gov.bc.ca/arr/firstnation/carrier_sekani/default.html) (last visited June 4, 2010).

<sup>200</sup> Takla Lake First Nation, Our Territory, *supra* note 11.

<sup>201</sup> For more information on LRMP's 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).



process, but very few did.<sup>202</sup> While apparently receptive to different viewpoints on paper, the process has been the subject of criticism from First Nations advocates. According to Murray Browne, a lawyer who represents many First Nations, including Takla, LRMP planning was generally undertaken with only marginal consultation with First Nations, leaving the plans with “very little legitimacy.”<sup>203</sup> While First Nations received invitations to participate in the LRMP process as “stakeholders,” many “declined because the process was not a joint planning process.”<sup>204</sup> To address these concerns, the government has reworked a few of the plans through a joint planning process with more input of First Nations, but so far has only addressed the plans for the central and north coast areas.<sup>205</sup> Browne described the new

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<sup>202</sup> 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 82.

<sup>203</sup> Telephone Interview with Murray Browne, *supra* note 51.

<sup>204</sup> E-mail from Murray Browne, Woodward & Co., to Bonnie Docherty, Lecturer on Law and Clinical Instructor, IHRC (Apr. 23, 2010).

<sup>205</sup> Telephone Interview with Murray Browne, *supra* note 51. The revised plans include a Central Coast LRMP and a Haida Gwaii Strategic Land Use Implementation Plan. “Province 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](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

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land-use planning process as a “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.”<sup>206</sup>

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.<sup>207</sup> Enforcing these plans, however, can require direct action and litigation, which many First Nations are unable to afford.

## Stages of the Mining Process

### *Phase 1: Claim Registration—Free Entry and the Mineral Tenure Act (MTA)*

#### *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

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[http://www2.news.gov.bc.ca/news\\_releases\\_2005-2009/2007OTP0197-001608.htm](http://www2.news.gov.bc.ca/news_releases_2005-2009/2007OTP0197-001608.htm) (accessed May 30, 2010).

<sup>206</sup> E-mail from Murray Browne (Apr. 23, 2010), *supra* note 204.

<sup>207</sup> Telephone Interview with Murray Browne, *supra* note 51.

claim.<sup>208</sup> The registration system is governed by a permissive free entry regime, as codified in the Mineral Tenure Act (MTA) of 1996.<sup>209</sup> Free entry describes a mining regime in which virtually any person has a right to “freely access lands and resources for mining purposes.”<sup>210</sup> 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.”<sup>211</sup> 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 not fundamentally changed since its development during the gold rushes of the late 1800s.<sup>212</sup>

The MTA assumes that all public, or Crown, lands owned by the provincial or federal governments are open for

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<sup>208</sup> BENEATH THE SURFACE, *supra* note 192, at 42, 44.

<sup>209</sup> Mineral Tenure Act, R.S.B.C. ch. 292.

<sup>210</sup> 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/ceclac/EI/papers/Lapointe.pdf> [hereinafter Lapointe, *Origins*].

<sup>211</sup> *Id.* at 9. Mineral Tenure Act, R.S.B.C. ch. 292, pt. 2(11).

<sup>212</sup> Lapointe, *Origins*, *supra* note 210, at 4.

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exploration, with a few exceptions.<sup>213</sup> Crown lands are vast—94 percent of British Columbia’s land is public,<sup>214</sup> and 84 percent of the province is available for prospecting.<sup>215</sup> 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 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.<sup>216</sup>

Since the 2005 advent of British Columbia’s Mineral Titles Online (MTO) system, anyone with a “free miner certificate, an internet connection, and a credit card” can

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<sup>213</sup> For example, land occupied by a building, the yard of a house, a farm or orchard, already used for other mining purposes, “heritage property,” and mineral reserves are off limits. Restrictions also apply to provincial parks and recreation areas. Mineral Tenure Act, R.S.B.C. ch. 292, pt. 2(11).

<sup>214</sup> 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).

<sup>215</sup> 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>.

<sup>216</sup> 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 192, at 36.

register a mineral claim.<sup>217</sup> The B.C. Ministry of Energy, Mines and Petroleum Resources (MEMPR) describes the system as designed to meet industry and government needs by making it “easier for miners to find, acquire, explore, and develop properties.”<sup>218</sup> A user-friendly website offers tutorials on a number of different MTO processes and online features.<sup>219</sup> Thus far, the MTO has demonstrated its success in meeting its stated objectives by generating huge savings 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 save the mining industry an annual CDN\$8.5 million.<sup>220</sup> The savings increase to CDN\$35 million per year if one accounts for the reduction in costs for “complaint

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<sup>217</sup> 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>.

<sup>218</sup> 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).

<sup>219</sup> *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).

<sup>220</sup> The Inst. of Pub. Admin. in Can., Innovative Management Award: 2007 Finalist, [http://www.ipac.ca/Award\\_InnovativeManagement2007MineralLand](http://www.ipac.ca/Award_InnovativeManagement2007MineralLand).

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adjudication, field surveys,” and erroneous decisions made based on outdated maps or title information.<sup>221</sup>

The MTO system has also prompted a “record-breaking level of staking activity.”<sup>222</sup> In the eight days after MTO began, miners registered 3100 claims that covered more hectares than all of the previous year’s claims combined.<sup>223</sup> A staff member at MEMPR confirmed that MTO has resulted in an increase in the amount and area of claims staked,<sup>224</sup> and Chris Warren of CJL Enterprises said that MTO produced “quite a boom” in claim registration.<sup>225</sup>

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<sup>221</sup> *Id.*

<sup>222</sup> *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>.

<sup>223</sup> 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>.

<sup>224</sup> 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).

<sup>225</sup> Telephone Interview with Chris Warren, Operations Director, and Lorne Warren, President, CJL Enterprises (Mar. 30, 2010).

*Debate over Free Entry and the MTO System*

Primacy of Mining:

The free entry system is outdated, and British Columbia needs a background regime that better protects the environment and the rights of First Nations. First, the system seems to give mining primacy over most other uses of the land. Free entry leaves all land open to mining unless it is specifically withdrawn and therefore embodies an assumption that mining is an appropriate use of land.<sup>226</sup> The adoption of MTO further illustrates that mining is a favored activity because it makes claim registration even easier.

Lack of Consultation:

Second, since the MTO system allows miners to register claims from anywhere in the world, miners gain 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 in order to register a claim, which meant that First Nations were more likely to find out who was on their land. Now, First Nations communities bear the burden of determining who has

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<sup>226</sup> NIGEL BANKES & CHERYL SHARVIT, ABORIGINAL TITLE AND FREE ENTRY MINING REGIMES IN NORTHERN CANADA 13–14 (Northern Minerals Program Working Paper No. 2, 1998).

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registered claims and may be conducting work in their traditional territory.

While the MTO system may have some advantages, First Nations advocates have objected to it. Government and industry representatives said that the MTO system has the benefit of reducing disturbance of the land since prospectors can register a claim without physically traveling to and staking the site.<sup>227</sup> Pierre Gratton, President and CEO of the Mining Association of British Columbia (MABC) noted that the system is “more transparent” because claims are recorded online.<sup>228</sup> Regarding the lack of consultation, a MEMPR staff member defended MTO, arguing that First Nations had the opportunity to consult during the earlier LRMP process that decided what land would be open to mining.<sup>229</sup> The LRMP argument falls short, however, because, as discussed above, the process was flawed due to limited to no involvement by many First Nations. The First Nations lawyer Murray Browne said that he understands aboriginal rights case law to establish a general duty to consult even for

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<sup>227</sup> Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 82; Telephone Interview with Pierre Gratton, President and CEO, and Zoe Carlson, Vice President of Corporate Affairs, Mining Association of British Columbia (Apr. 7, 2010).

<sup>228</sup> Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 227.

<sup>229</sup> Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 82.



online registration, meaning that he believes that the MTO process may be illegal under constitutional standards.<sup>230</sup> He added, however, that the duty to consult before registering a claim is rarely fulfilled, and no legal challenge has yet been brought against the MTO system.<sup>231</sup> As currently designed and implemented, there are questions about whether the MTO system adequately is consistent with the rights that aboriginal communities are guaranteed.

Preliminary Exploration without Permits:

Third, miners quickly become invested in their claims because they are 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.<sup>232</sup> 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.<sup>233</sup>

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<sup>230</sup> Telephone Interview with Murray Browne, *supra* note 51.

<sup>231</sup> *Id.*

<sup>232</sup> B.C. Ministry of Energy, Mines and Petroleum Resources, Mineral Titles Online: Introduction to MTO, *supra* note 218.

<sup>233</sup> 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](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/11_529_2004).

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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.”<sup>234</sup> 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.

### Limited Safeguards:

The MTA includes some safeguards for surface landowners, but they lend little protection to First Nations. For example, the MTA blocks free entry on certain categories of land, including land occupied by a building, the

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<sup>234</sup> 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).

yard of a house, or an orchard or farm;<sup>235</sup> however, since First Nations' traditional territories are usually used for subsistence activities such as hunting, trapping, and berry picking, miners are 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 being done, and the number of workers that will be present.<sup>236</sup> Despite First Nations' continued use of and reliance upon their traditional territories, and the disputed nature of their claims to the land, they are not considered private owners of their traditional territories. Therefore 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

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<sup>235</sup> BENEATH THE SURFACE, *supra* note 192, at 38, 40.

<sup>236</sup> 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 195, at 3; Mineral Tenure Act, R.S.B.C. ch. 292, pt. 2(19).

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articulates 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 so that they can protect their internationally and constitutionally guaranteed rights before it is too late for them to stop a project.

### Industry Critiques:

Some in the mining industry also see problems with the MTO system. MABC's Gratton said that within the industry, while most people are in favor of MTO, "there is by no means consensus."<sup>237</sup> For example, Chris Warren of CJL Enterprises said that MTO has led to people registering much bigger claims, and that his company feels it needs to register large blocks before others do and then to figure out which areas are of future interest.<sup>238</sup> In addition, Lorne Warren, Chris's father and President of CJL, is worried that the MTO may be modified in the future to raise the cost of maintaining a claim.<sup>239</sup> Gratton said that while MTO offers some benefits, it may encourage speculation by people who

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<sup>237</sup> Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 227.

<sup>238</sup> Telephone Interview with Chris Warren and Lorne Warren, *supra* note 225.

<sup>239</sup> *Id.*

are not actually interested in prospecting, thus preventing exploration from taking place.<sup>240</sup>

Industry also recognizes that there are problems with the consultation process for registering claims, and some members has offered suggestions for reforms. Chris Warren said that 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.<sup>241</sup> He said that a potential benefit of having claim registration online could be that it would facilitate organizing and disseminating 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.<sup>242</sup> AME BC has been discussing the problematic issue of a lack of consultation at the registration stage in meetings with industry groups, the government, and First Nations. The problem, Whyte said, is that no one has

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<sup>240</sup> Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 227.

<sup>241</sup> Telephone Interview with Chris Warren and Lorne Warren, *supra* note 225.

<sup>242</sup> Telephone Interview with Laureen Whyte, Vice President, Sustainability and Operations, Association for Mineral Exploration British Columbia (Mar. 30, 2010).

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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.<sup>243</sup> 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.<sup>244</sup>

### *Phase II: Exploration—Regulations and Notices of Work*

#### *Overview*

Mineral exploration, which is 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” in order to explore for and produce minerals.<sup>245</sup> 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. It is regulated under the Mineral Exploration Code (MXC),

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> 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>; Mineral Tenure Act, R.S.B.C. ch. 292, pt. 2 (14).

which is Section 9 of the Health, Safety and Reclamation Code for Mines (HSRC) (promulgated under the Mines Act).<sup>246</sup> The HSRC lays out 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.<sup>247</sup>

When exploration activities require regulation by the HSRC, miners must submit a Notice of Work (NOW), including maps, schedules, and proposed environmental mitigation plans, to an inspector at MEMPR.<sup>248</sup> 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.<sup>249</sup> Relevant government agencies and affected stakeholders, including First Nations groups, receive the NOW, commonly called a referral.<sup>250</sup> It is the

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<sup>246</sup> 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>.

<sup>247</sup> Health, Safety and Reclamation Code, § 9.1.1.

<sup>248</sup> *Id.* § 9.2.1.

<sup>249</sup> CHAMBERS & WINFIELD, *supra* note 191, at 23–24.

<sup>250</sup> 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).

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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 Nation of proposed exploration work on its traditional territory, the First Nation typically has thirty days to respond.<sup>251</sup> Occasionally this deadline is extended, but sometimes First Nations are given an even shorter amount of time.<sup>252</sup>

### *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 loud machinery. The referral process alone, however, is inadequate.

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<sup>251</sup> 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 82.

<sup>252</sup> Telephone Interview with Murray Browne, *supra* note 51.



### Primacy of Mining:

First, like free entry and the MTO system, the regulations that govern exploration establish a presumption that such mining activity is acceptable. 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 make significant investments in their projects and are likely strongly to resist any attempts to stop them at the next permitting stage. Momentum, which creates a major obstacle to First Nations trying to protect their land and their rights, thus continues to build and 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 said that the Ministry's consultation is guided by court decisions such as *Haida*.<sup>253</sup> No matter how strong that decision may be, its standards are not clearly laid out in a relevant statute. It thus leaves even well-intentioned miners with little guidance on how to fulfill consultation requirements, and no specific requirements that

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<sup>253</sup> Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 82.

## Bearing the Burden

they must meet. Of critical importance, for example, is whether exploration plans trigger deep consultation requirements. Laureen Whyte of AME BC said that her members are “not always really clear what is expected of industry or required of industry” under aboriginal rights law.<sup>254</sup>

Regardless of the exact requirements, as is, B.C. regulations that apply to consultation about exploration place a burden on First Nations in two ways. First Nations must deal with an imbalance of information because they do not have time and resources to prepare their own studies on the potential problems of exploration. At the same time, they must overcome a presumption that 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 is too short.<sup>255</sup> First Nation attorney Murray Browne called the time frame “brutal” for some types of referrals.<sup>256</sup> One staff member of MEMPR told IHRC that the short time frame should not

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<sup>254</sup> Telephone Interview with Laureen Whyte, *supra* note 242.

<sup>255</sup> See Health, Safety and Reclamation Code, § 10.2.2 (allowing an affected or interested party thirty days to respond to a NOW).

<sup>256</sup> Telephone Interview with Murray Browne, *supra* note 51.

present 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 and that First Nation communities do not need to provide a technical assessment of the proposed project.<sup>257</sup> 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.<sup>258</sup> He said the problem is exacerbated by the fact that referrals often fail to provide sufficient information. For example, they may not include detailed maps or studies analyzing environmental issues, such as the impacts of helicopters on caribou or the cumulative impact of road development.<sup>259</sup> A failure to respond adequately to the NOW deadline undermines the special protections First Nations are supposed to receive from consultation because the permitting process proceeds without their direct input. MEMPR should allow for a time period that is sensitive to First Nations' traditions and needs and facilitates deep consultation.

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<sup>257</sup> Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 82.

<sup>258</sup> Telephone Interview with Murray Browne, *supra* note 51.

<sup>259</sup> *Id.*

## Bearing the Burden

### Government Handling of First Nations' Concerns:

According to Browne, regardless of the deadline, MEMPR often fails to take into account First Nations' concerns. A staff member of MEMPR told the IHRC that it is "absolutely not the case" that MEMPR permits proposals over First Nations' objections at the referral stage.<sup>260</sup> He said the government is required to determine whether the proposed project might have an impact on aboriginal rights. If the government finds that there will be an infringement, it develops accommodation measures to mitigate the harm. Such measures consist of legally binding conditions to permits designed to address First Nations' environmental and economic concerns.<sup>261</sup> Further study of how the government handles responses to referrals is warranted.

Regulations also fail 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.<sup>262</sup> The exploration regulations that do exist, primarily the HSRC, describe a

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<sup>260</sup> Telephone Interview with staff member #2 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 234.

<sup>261</sup> *Id.*

<sup>262</sup> 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](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).

number of conditions to be 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 potable water supply intake.”<sup>263</sup> The regulations, however, offer virtually no practical guidance on how to meet these conditions. A handbook put out by the B.C. government and two industry associations provides some guidelines, but given the fact that they are not legally binding, companies are left with a great deal of discretion.<sup>264</sup> Furthermore, the HSRC does not require reclamation until one year after exploration has completely ended (though an Inspector can waive even this lenient requirement).<sup>265</sup> Exploration on a large claim can take many years and involve felling trees for roads, dozens of 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 will choose not to begin costly reclamation before it is required.<sup>266</sup>

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<sup>263</sup> Health, Safety and Reclamation Code, § 9.4.1.

<sup>264</sup> B.C. MINISTRY OF ENERGY, MINES AND PETROLEUM RESOURCES & MINISTRY OF ENVIRONMENT, HANDBOOK FOR MINERAL AND COAL EXPLORATION IN BRITISH COLUMBIA, *supra* note 246, at 2.

<sup>265</sup> Health, Safety and Reclamation Code, § 9.13.1(1).

<sup>266</sup> 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

## Bearing the Burden

### Limited Attention to Protection of Cultural Heritage:

Finally, the HSRC does not deal with exploration's potential affects 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.<sup>267</sup>

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": "historical, cultural, aesthetic, scientific or

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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 to 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 (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).

<sup>267</sup> Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 82.

educational worth or usefulness of a site or object.”<sup>268</sup> This protection extends to sites that “are of particular spiritual, ceremonial or other cultural value” to a First Nation<sup>269</sup> although a permit granted at the discretion of the Ministry of Tourism, Culture and the Arts can remove it.<sup>270</sup> 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.”<sup>271</sup> The Union of B.C. Indian Chiefs has claimed that the government is using this limited interpretation of its mandate in order to avoid classifying permit applications under the Act as referrals, which require consultation with First Nations.<sup>272</sup>

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<sup>268</sup> 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](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96187_01).

<sup>269</sup> *Id.* § 4.4(a).

<sup>270</sup> *Id.* § 12.

<sup>271</sup> Letter from Mr. 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](http://www.ubcic.bc.ca/News_Releases/UBCICNews09120502.htm).

<sup>272</sup> Letter from Union of B.C. Indian Chiefs to Premier Gordon Campbell, *supra* note 271.

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### *Phase III: Mining Development and Production—Environmental Assessment Process*

#### *Overview*

As mines approach the development and production phase, the biggest regulatory hurdle is usually the environmental assessment (EA) process.<sup>273</sup> EAs aim to consider not only environmental issues but also a given project's potential "economic, social, heritage, and health effects."<sup>274</sup> 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,<sup>275</sup> if the Ministry of Environment believes it may have significant adverse major

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<sup>273</sup> Mine operators usually have to obtain environmental permits—for example, to ensure water quality—but these are beyond the scope of this paper.

<sup>274</sup> 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/>.

<sup>275</sup> 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 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).



environmental, economic, social heritage, or health impacts,<sup>276</sup> or if the proponent requests to “opt-in” to the review process.<sup>277</sup> An expansion of an existing project can also trigger an EA if it disturbs at least 750 hectares of land

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<sup>276</sup> 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](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_02043_01).

<sup>277</sup> *Id.* § 7; B.C. ENVIRONMENTAL ASSESSMENT OFFICE, USER GUIDE, *supra* note 274, 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. However, the Canada-wide Accord on Environmental Harmonization established a “single-window” approach, under which the “lead party” is responsible for administering the assessment process. CHAMBERS & WINFIELD, *supra* note 191, 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 191, 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 274, at 12. Independent evaluations of provincial government performance “under these agreements have been consistently poor.” CHAMBERS & WINFIELD, *supra* note 191, at 47.

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or increases the size of the previously approved disturbances by at least 50 percent.<sup>278</sup>

The Ministry of Environment's Environmental Assessment Office (EAO) oversees the EA process, and it vests much decision-making power in the Executive Director, who is appointed by the Lieutenant Governor in Council.<sup>279</sup> Even if a proposal fits the criteria for an EA described above, the Executive Director can 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.<sup>280</sup> 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 the 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 Assessment Agency if it is a joint project;

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<sup>278</sup> Telephone Interview with Graeme McLaren, *supra* note 275.

<sup>279</sup> B.C. ENVIRONMENTAL ASSESSMENT OFFICE, USER GUIDE, *supra* note 274, at 11, 14.

<sup>280</sup> 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).

federal, provincial, and local governments; and First Nations—that plays an advisory role to EAO. The EAO determines the necessary components of the EA, but it generally requires a description of the project and consultation plans, and an assessment of potential adverse effects and possible mitigation measures.<sup>281</sup> 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,<sup>282</sup> including government-to-government consultation, with meetings usually held in or near the First Nation communities.<sup>283</sup> 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,

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<sup>281</sup> B.C. ENVIRONMENTAL ASSESSMENT OFFICE, USER GUIDE, *supra* note 274, at 25.

<sup>282</sup> *Id.* at 32.

<sup>283</sup> Telephone Interview with Graeme McLaren, *supra* note 275.

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generally receive three weeks to comment of the draft assessment report.<sup>284</sup>

The assessment process concludes with EAO's final comprehensive assessment report, which includes comments from the working group.<sup>285</sup> If First Nations disagree with the report, their views can be put in writing and sent to the ministers with the report.<sup>286</sup> Two ministers—one being the Minister of Environment and one being 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 45 days on whether the project can proceed.<sup>287</sup> 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.<sup>288</sup>

Technically, the Minister can refer an application to a commission, panel, or other forum for a hearing and further study.<sup>289</sup> In practice, only one project has been referred for such a hearing panel: the Kemess North mine in Takla's territory, which was ultimately rejected as proposed. (This

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<sup>284</sup> B.C. ENVIRONMENTAL ASSESSMENT OFFICE, USER GUIDE, *supra* note 274, at 11, 33.

<sup>285</sup> Telephone Interview with Graeme McLaren, *supra* note 275.

<sup>286</sup> *Id.*

<sup>287</sup> B.C. ENVIRONMENTAL ASSESSMENT OFFICE, USER GUIDE, *supra* note 274, at 11, 33–34.

<sup>288</sup> *Id.* at 7, 16–17, 34.

<sup>289</sup> B.C. Environmental Assessment Act, S.B.C. ch. 43, § 14(3).

project will be discussed in more depth in the next chapter.) Graeme McLaren, the EAO's Executive Project Assessment Director, said he considers the EA process a "fairly rigorous" review that "should meet everyone's needs."<sup>290</sup> Once the approval is granted, the Minister of Environment then retains the power to "suspend, cancel, or amend a certificate" for various reasons.<sup>291</sup>

The EAO seems cognizant of the importance of First Nations' interests. The EAO provides limited funding to facilitate First Nations' participation in the EA process and encourages project proponents to supplement this funding.<sup>292</sup> In addition, it devotes 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 defines First Nations' legal rights to consultation as those established in *Haida* and "related case law," and it

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<sup>290</sup> Telephone Interview with Graeme McLaren, *supra* note 275.

<sup>291</sup> B.C. ENVIRONMENTAL ASSESSMENT OFFICE, USER GUIDE, *supra* note 274, at 14.

<sup>292</sup> The amount provided varies with government budgets, but in 2008 and 2009 First Nations typically received CDN\$5000-10,000 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 275. Companies often do help, but the amount of funding is an open question.

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offers 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.”<sup>293</sup> EAO’s McLaren said that meaningful consultation that fulfills the honor of the Crown is “a fundamental, completely overarching requirement” and that his office uses case law to guide it in being “honest and fair and reasonable.”<sup>294</sup> “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,” he said.<sup>295</sup> McLaren added that the process aims to “learn what their [First Nations’] rights and interests are” and to “find ways to accommodate” both First Nations’ rights and the project.<sup>296</sup> Even when the relationship between a First Nation and the government is strained, McLaren believes that it is his responsibility to “work through it.”<sup>297</sup>

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<sup>293</sup> B.C. ENVIRONMENTAL ASSESSMENT OFFICE, USER GUIDE, *supra* note 274, at 17 (2009).

<sup>294</sup> Telephone Interview with Graeme McLaren, *supra* note 275.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

*Debate about the EA Process*

Flawed Studies:

Nevertheless, some First Nations members believe that their opportunities to participate in the EA process are inadequate. For example, Lisa Sam of the Nak'azdli First Nation told IHRC that mining companies use the same “cookie-cutter” studies everywhere and refuse to take traditional knowledge into account.<sup>298</sup> McLaren recognized that some First Nations disagree with the entire consultation process “at a very high level” and have philosophical or principled objections to it.<sup>299</sup> While First Nations may refuse to participate, he said the EAO still aims to articulate their views in its recommendations to the best of its ability.<sup>300</sup>

Limits on First Nations' Responses:

As with the NOW process, First Nations do not have the time or resources to respond adequately to an EA. While they are legally entitled to special protections, they generally have three weeks to review the draft assessment report and to give input before the final report is developed—the same limited amount of time that proponent and working group

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<sup>298</sup> Interview with Lisa Sam, *supra* note 34.

<sup>299</sup> Telephone Interview with Graeme McLaren, *supra* note 275.

<sup>300</sup> *Id.*

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have to respond.<sup>301</sup> McLaren acknowledged that his office receives “complaints about this amount of time” from First Nations who say they do not have the capacity to respond so quickly. Often, he said, more time is 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 Nations will report that they simply do not have the capacity to respond to the report, especially in such a short time frame.<sup>302</sup> While the government provides limited funding to assist First Nations in their review, and project proponents frequently supplement this, full participation may remain out of their reach.

### Politicization:

The EA regulations also leave 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.”<sup>303</sup> Thus, if the government states policy goals related to production of mineral revenues, for example, the EA may be

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<sup>301</sup> B.C. ENVIRONMENTAL ASSESSMENT OFFICE, USER GUIDE, *supra* note 274, at 33.

<sup>302</sup> Telephone Interview with Graeme McLaren, *supra* note 275.

<sup>303</sup> B.C. Environmental Assessment Act, S.B.C. ch. 43, § 11(3).



slanted toward this policy rather than objectively assessing the potential for environmental harm.<sup>304</sup>

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 essentially unfettered 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. In addition, the Executive Director or Minister determines the "scope, procedure, and methods of the EA."<sup>305</sup>

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."<sup>306</sup> For example, the EAO created an "e-Guide" that "lays out every step of the

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<sup>304</sup> WEST COAST ENVIRONMENTAL LAW, DEREGULATION  
BACKGROUND, *supra* note 280, at 3.

<sup>305</sup> B.C. Environmental Assessment Act, S.B.C. ch. 43, § 11, 14;  
WEST COAST ENVIRONMENTAL LAW, DEREGULATION  
BACKGROUND, *supra* note 304, at 3.

<sup>306</sup> Telephone Interview with Graeme McLaren, *supra* note 275.

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process” including relevant legislation and regulations, which has helped to increase internal consistency.<sup>307</sup> 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.<sup>308</sup> 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.<sup>309</sup> Pierre Gratton of MABC said that the EA process is fairly comprehensive, involving “binders that go up to the ceiling.”<sup>310</sup>

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<sup>307</sup> 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).

<sup>308</sup> 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, .

<sup>309</sup> ENVIRONMENTAL ASSESSMENT OFFICE, PROSPERITY GOLD-COPPER PROJECT ASSESSMENT REPORT 25-26 (2009).

<sup>310</sup> Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 227.

Fragmented Responsibility:

Fragmented responsibility that leaves the duty to monitor mines in the hands of Ministry of Energy, Mines and Petroleum Resources while the EAO has imposed many of the conditions that need to be monitored. It potentially reduces an EA's effectiveness because MEMPR monitors may not have the same understanding of the conditions as EAO officials and they might have less incentive to use 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."<sup>311</sup> While the EAO has the legal authority to conduct inspections, the agency does not "have staff who go out in the field and inspect projects."<sup>312</sup> Instead, the office relies on mines inspectors from other ministries. McLaren said, "We kind of trust to the eyes and ears of our fellow government workers who are out in the field."<sup>313</sup>

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<sup>311</sup> Telephone Interview with Graeme McLaren, *supra* note 275.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

## Bearing the Burden

There is also a detailed permit required under the Mines Act after an EA certificate is issued.<sup>314</sup> 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 include mining engineers, reclamation specialists, and health and safety specialists, with expertise EAO officials do not have.<sup>315</sup> A staff member of MEMPR told IHRC that his office does "frequent inspections of all mine sites," including exploration projects, and "major mine audits" every year.<sup>316</sup> If a mine refuses to comply with its conditions, MEMPR does not hesitate to shut it down, he said, but the Ministry prefers to talk with the company and offer them a chance to comply first.<sup>317</sup>

### Proposed Reforms:

The First Nations Summit, a group of First Nations and Tribal Councils in British Columbia that provides a forum to address treaty negotiations and "other issues of common

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<sup>314</sup> 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](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96293_01).

<sup>315</sup> E-mail from Graeme McLaren, *supra* note 307.

<sup>316</sup> Telephone Interview with staff member #2 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 234.

<sup>317</sup> *Id.*

concern,”<sup>318</sup> has called for a comprehensive overhaul of the EA system. The current process, the Summit claims, is “dysfunctional, harmful to aboriginal interests, and structurally prone to failure.”<sup>319</sup> With the current distrust many First Nations have of the government, the EA process is essentially a “case-by-case battle on the ground.”<sup>320</sup> The Summit recommends establishing an independent group that would work to “achieve consensus” among First Nations, industry, and government. This group would be separate from the government, reporting to both the legislature and First Nations.<sup>321</sup> 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.

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<sup>318</sup> First Nations Summit, About the First Nations Summit, <http://www.fns.bc.ca/about/about.htm> (last visited June 4, 2010).

<sup>319</sup> 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 a First Nations Summit discussion paper).

<sup>320</sup> *Id.* (quoting Grand Chief Ed John, a member of the political executive of the First Nations Summit).

<sup>321</sup> *Id.*

### *Phase IV: Mine Closure and Reclamation*

While mining is technically a temporary land use, pollution and habitat destruction can 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.<sup>322</sup> The B.C. Mines Act regulates some aspects of reclamation, such as waste disposal.<sup>323</sup> 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.”<sup>324</sup> Since then, MEMPR has decided, based on a company’s proposal, how much money the company must put into a

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<sup>322</sup> Health, Safety and Reclamation Code, § 9.13.1(4).

<sup>323</sup> 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.).

<sup>324</sup> 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).

security bond so that if it fails to clean up its mining site, the government can use its money to ensure proper reclamation.<sup>325</sup> Initially, the B.C. government collected small security bonds that were inadequate to completely reclaim mining sites; starting in 1984, security deposits increased from CDN\$18 million to more than CDN\$197 million by March 31, 2002.<sup>326</sup> The government returns the money to the companies when the Chief Mine Inspector is satisfied that the reclamation work meets the standards established by the HSRC.<sup>327</sup> 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

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<sup>325</sup> 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 82; Telephone Interview with staff member #2 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 234.

<sup>326</sup> See John C. Errington, *Towards Results-Based Standards for Mine Reclamation in British Columbia*, PROC. OF THE 26<sup>TH</sup> 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>.

<sup>327</sup> CHAMBERS & WINFIELD, *supra* note 191, at 44; Health, Safety and Reclamation Code, § 9.13.1(6).

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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.”<sup>328</sup> If that same company proposes a new project, however, 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 involves taking the company to court.<sup>329</sup>

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 fails to require a sufficient amount of money.<sup>330</sup>

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 is

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<sup>328</sup> Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 82.

<sup>329</sup> *Id.*

<sup>330</sup> Telephone Interview with Murray Browne, *supra* note 51.



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 laws fail adequately to enshrine and protect First Nations' rights under international law and domestic constitutional law. They do not meet the standards for higher scrutiny for projects that infringe on aboriginal rights. Rights protection should be explicitly instilled into statutes, like the ones discussed in this chapter, so that no questions remain that aboriginal communities have strong protections when choosing their own development path and negotiating 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 are needed because the current ones do not suffice.

Existing B.C. mining laws fall short of providing First Nations opportunities to exercise self-determination and participate in decisions involving their traditional territories. The current free entry paradigm, especially the MTO system,

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allows miners to register claims, thus setting the stage for mining, with no prior consultation with First Nations. The NOW process gives First Nations only limited time to respond before exploration takes place. The NOW and EA processes give too much discretion to individuals in the government. They create an imbalance of information because government and industry have more resources to do studies of environmental and human impacts, and First Nations cannot counter with their own studies. The mining laws in effect place a burden of stopping or delaying a project on the parties that international law dictates should benefit from special protections—namely the affected aboriginal community. Instead, the legal framework should better balance the rights of First Nations with the interests of industry.

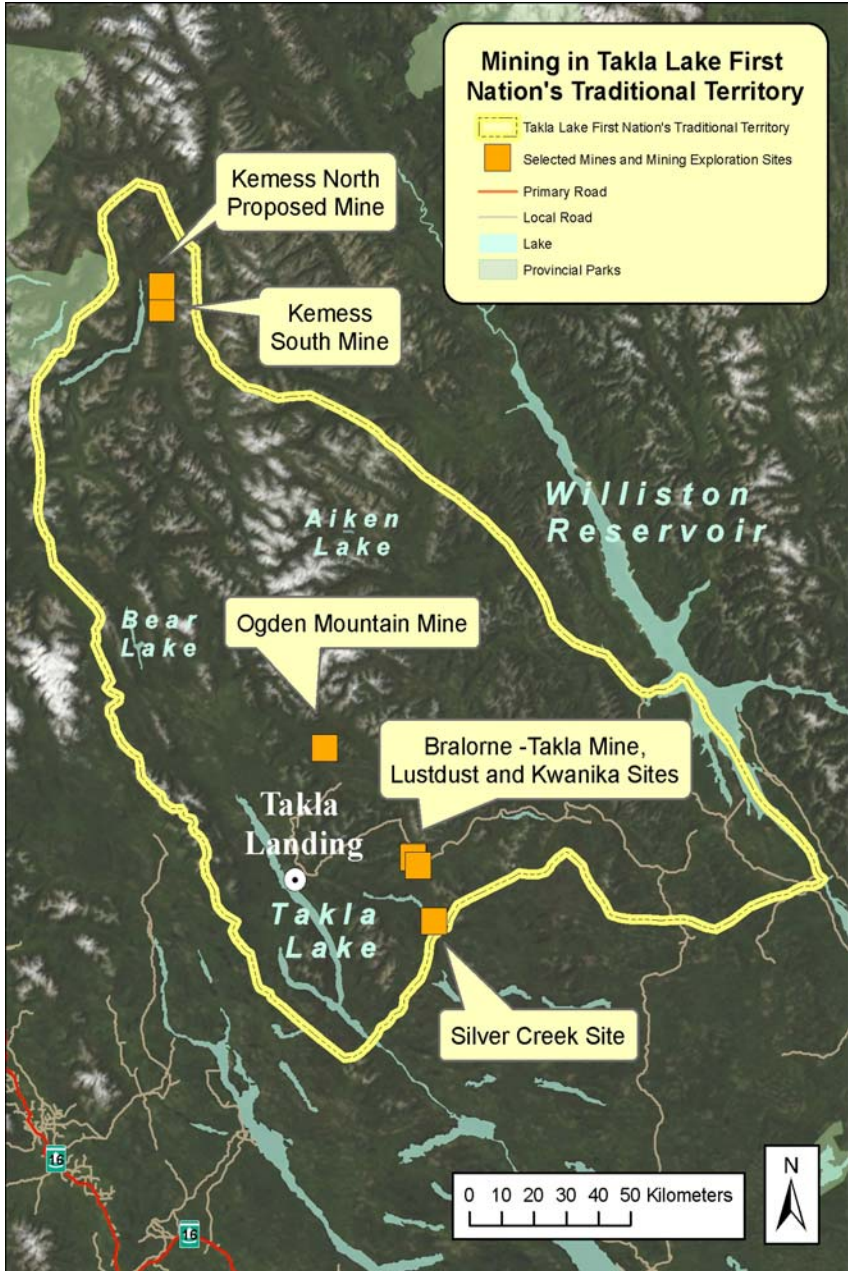
The government also relies on laws that do not adequately protect the environment on which First Nations' enjoyment of culture depends. For example, its laws are not stringent enough to limit exploration, which can disturb habitat and wildlife, and thus the subsistence way of life. Even if an individual exploration site does not cause as much harm as an active mine, cumulatively such sites can have an adverse effect and they are prerequisites for the highly destructive production stage of mining. 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.

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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 by Bonnie Docherty*



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



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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 oppose a proposed mining exploration site in the vicinity.



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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.

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

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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.



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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. THE LACK OF CONSULTATION**

British Columbia's imbalanced mining laws, which privilege mining at the expense of the special protections to which First Nations are legally entitled, present 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 a lack of consultation establishes a presumption that individual mining projects are acceptable and leaves Takla with insufficient information to show they should be rejected. The next chapter illustrates that Takla suffers from a range of consequences of mining activities that it is unable to stop or regulate sufficiently. The final chapter of this trio shows that Takla not only bears the weight of mining but also receives disproportionately few benefits in return.

Takla is 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 is now "blanketed" by mineral claims. Takla also lacks a recognized land-use plan, so there is no framework in place to guide work with the government in making decisions regarding its land. Instead, each project is dealt with individually, producing an unmanageable amount of administrative work for Takla and providing no comprehensive overview for assessing the cumulative impact of various industries,

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projects, and roads. Finally, Takla and other First Nations in northern British Columbia may be disadvantaged by the political process. First Nations people form the majority of the population in Takla's remote area of the province, but with a low population there are very few voters there, and politicians tend to see the region as a "cash cow" where natural resource revenues can fund projects in more populous areas like Victoria and Vancouver.<sup>331</sup> Although this combination of conditions is specific to Takla, its situation reveals the presence of flaws in the existing mining regime and the need for reform.

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

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<sup>331</sup> Telephone Interview with Murray Browne, *supra* note 51.

animals that can't talk," said Victor West.<sup>332</sup> Finding a forum to express that voice has presented difficulties.

The lack of consultation by government has led to an atmosphere of mistrust, and the people of Takla therefore sometimes approach mining companies directly. They have found that some companies volunteer to talk with them about new or expanded projects. These examples 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 with lack of consultation is twofold. First, Canadian case law does not make it clear when deep consultation is triggered. IHRC believes it should apply to all stages of mining given the potential cumulative and long-term effects to which even early stages have the potential to lead. To interpret it otherwise presumes that mining should take precedence over protection of First Nations' rights. Second, because the law comes primarily from jurisprudence, it does not provide clear guidance regarding what steps must be followed, and industry representatives told IHRC that they were often confused about what proper consultation would look like. For example, they were unsure about whether to meet with Takla's chief and council or individual *keyoh* holders. The government bears the primary

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<sup>332</sup> Interview with Victor West, *supra* note 24.

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responsibility for ensuring that adequate consultation takes place. It should work with Takla and other First Nations to clarify the general standards laid out in Canadian aboriginal rights case law, and it should ultimately codify them in statutes or regulations.

### **The Lack of Consultation by the Government**

British Columbia's provincial government is responsible for making many decisions regarding mining, including what the claims registration regime should be, whether to issue permits at various stages of the process, and when and how to conduct environmental assessments. In addition, the legal responsibility to consult with First Nations rests with the government rather than with private companies.<sup>333</sup> The B.C. government requires consultation at several stages of the mining process, but the way in which consultation is conducted has left First Nations with the belief that they lack access to the information needed to challenge a project effectively. Takla's particular experience with government consultation highlights many of the concerns outlined in the previous chapter.

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<sup>333</sup> Telephone Interview with Graeme McLaren, *supra* note 275.



### *Land-Use Plans*

The development of LRMPs, which determine what land is open to what uses, is supposed to be an opportunity for consultation before the mining process begins.<sup>334</sup> Two of the early LRMPs—Mackenzie and Fort St. James—which were undertaken with only marginal consultation with First Nations, leaving the plans with “very little legitimacy,” cover Takla’s territory.<sup>335</sup> The Mackenzie LRMP, approved by the government in 2000, notes 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.”<sup>336</sup> 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 former Mining Coordinator, explained that Takla’s representatives “walked out” of the LRMP planning process

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<sup>334</sup> Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 82.

<sup>335</sup> Telephone Interview with Murray Browne, *supra* note 51.

<sup>336</sup> 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](http://archive.ilmb.gov.bc.ca/slrp/lrmp/princegeorge/fort_stjames/plan/toc.htm).

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“when they realized that they were simply stakeholders with [the same] rights as the snowmobiling club.”<sup>337</sup> 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.”<sup>338</sup> A “key issue” for Takla in reopening negotiations is that the government commit to designating additional protected areas.<sup>339</sup>

### *Claims Registration*

Free entry and the new MTO system have heavily affected Takla’s traditional territory. A map of registered claims shows that they cover large swaths of Takla’s land, and 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.”<sup>340</sup>

Members of Takla told IHRC they opposed the online process particularly because it allows prospectors to register a claim without physically traveling to the land. Prior to MTO, members said, they would often encounter claim

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<sup>337</sup> 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).

<sup>338</sup> E-mail from Murray Browne (Apr. 23, 2010), *supra* note 204.

<sup>339</sup> E-mail from JP Laplante (Apr. 27, 2010), *supra* note 337.

<sup>340</sup> Telephone Interview with Murray Browne, *supra* note 51.

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 now he does not see prospectors coming in, and “that’s not fair.”<sup>341</sup> 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 and who was responsible for it. Takla members also implied that they objected to the new online system because registration of a claim to their traditional territory without consulting them was 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 is fortunate among First Nations to be able to hire a mining coordinator to respond to these referrals, but it still lacks the capacity fully to consider each project and adequately to determine and express how the project would affect their

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<sup>341</sup> Interview with Raphael West, *supra* note 59.

## Bearing the Burden

interests.<sup>342</sup> A Takla member and Vice Tribal Chief of the CSTC said the community has found it is virtually impossible to respond within the thirty-day window that the First Nations are usually allowed.<sup>343</sup> 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. JP Laplante, Takla's first 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,<sup>344</sup> and according to Browne, sometimes Takla is not even given the full thirty days.<sup>345</sup>

Takla usually also lacks the funds and expertise required to conduct its own studies that would provide the information needed to determine the effects that proposed projects would have on its land and community.<sup>346</sup> Browne said that a traditional use assessment requires working with local elders and hiring the appropriate people. Given the

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<sup>342</sup> Interview with Terry Teegee, *supra* note 22.

<sup>343</sup> *Id.*

<sup>344</sup> Interview with JP Laplante and David Radies, *supra* note 251.

<sup>345</sup> Telephone Interview with Murray Browne, *supra* note 51.

<sup>346</sup> 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 34.

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 often finds it impossible to respond effectively to referrals, which highlights the limits of the consultation process.<sup>347</sup>

According to representatives of Takla, when Takla responds to a referral, its concerns are rarely 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."<sup>348</sup> Laplante told IHRC that "99.9 percent of the time, the community's 'no' to a [referral] notice is ignored."<sup>349</sup> Laplante said that when Takla responds to a referral with an objection to the proposed project, the government typically replies that the community has not proven a right and that their objections were too vague to prevent the mining development from going forward.<sup>350</sup> Murray Browne also said that MEMPR often fails

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<sup>347</sup> 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 82.

<sup>348</sup> Transcript from meeting between Imperial Minerals and Takla Lake First Nation (Apr. 25, 2006).

<sup>349</sup> Interview with JP Laplante and David Radies, *supra* note 251.

<sup>350</sup> *Id.*

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adequately to take into account Takla's concerns. He said that the government's most common response is "thank you for your concerns, the project is going ahead," and mitigation will be taken care of later. The second most common response is that MEMPR has asked the company to avoid a certain area, but the revised plan usually involves only a small shift in the route of a road, for example, rather than a true change. Browne said that the Ministry will "often" require monitoring, but will "almost never" require the company to invest in further studies.<sup>351</sup>

When Imperial Metals Corporation sought to conduct mineral exploration near Bear Lake, for example, the government sent Takla a NOW at the end of January 2006 and requested a response by March 3, 2006.<sup>352</sup> On February 15, Browne, in his capacity as Takla's attorney, responded with a letter saying 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."<sup>353</sup> He also requested that permitting be halted until the consultation and

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<sup>351</sup> Telephone Interview with Murray Browne, *supra* note 51.

<sup>352</sup> 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).

<sup>353</sup> Letter from Murray Browne, Woodward & Co., to Bob Lane, Regional Geologist, B.C. Ministry of Energy, Mines and Petroleum Resources (Feb. 15, 2006).

accommodation process was complete.<sup>354</sup> MEMPR granted the company permits for exploration work in June 2006.<sup>355</sup>

A MEMPR staff member vigorously denied that his Ministry permits proposals over First Nations' objections at the referral stage.<sup>356</sup> If there is opposition, he said, the Ministry "won't go ahead without consultation." He further explained that the consultation process aims "to get to the root of what opposition is about," so that the company can amend its proposal to eliminate First Nations' concerns, for example, about water quality.<sup>357</sup> Far from ignoring First Nations' claims, the staff member said that MEMPR adds legally binding conditions to permits in order to address First Nations' environmental and economic concerns.<sup>358</sup>

### *Environmental Assessment*

Takla has had a better experience at the EA stage. It participated in an unprecedented review process that blocked development of an open pit mine called Kemess North, which would have been located next to the existing Kemess

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<sup>354</sup> *Id.*

<sup>355</sup> Letter from Bob Lane, Regional Geologist, B.C. Ministry of Energy, Mines and Petroleum Resources, to Stephen Robinson, Imperial Metals Corp. (June 29, 2006).

<sup>356</sup> Telephone Interview with staff member #2 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 234.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

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South Mine. 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 Minister of Sustainable Resource Management agreed to a joint panel review, which allowed for “independent recommendations from independent experts,” and research and advocacy by First Nations.<sup>359</sup> The panel brought together an environmental consultant, mining engineer, and a “natural resource and community development consultant” with experience working with indigenous people.<sup>360</sup> 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.<sup>361</sup>

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<sup>359</sup> Telephone Interview with Murray Browne, *supra* note 51.

<sup>360</sup> KEMESS NORTH COPPER-GOLD MINE PROJECT, JOINT REVIEW PANEL REPORT 276 (Sept. 17, 2007).

<sup>361</sup> *Id.* at 274-75.



The joint review panel process, which seemed to meet *Haida's* consultation standards, allowed Takla more meaningful participation in the decision and showed Takla that at least in some cases, they did have the power to stop a project.<sup>362</sup> Murray Browne attributed Takla's success partly to the fact that the panel members visited the site with First Nations members, participated in ceremonies, and therefore developed a real understanding of the "cultural and spiritual values of the area," in a way that government officials usually do not.<sup>363</sup> Browne noted, however, that the government often tries to scale back legislation in response to First Nations' victories.<sup>364</sup> Furthermore, the joint review panel process conducted for Kemess North has yet to be repeated.<sup>365</sup>

While the case represented a victory for Takla and other First Nations, it required a great deal of time and resources,

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<sup>362</sup> Interview with Tara Marsden, Gitanyow First Nation, in Prince George, B.C. (Sept. 11, 2009).

<sup>363</sup> Telephone Interview with Murray Browne, *supra* note 51.

<sup>364</sup> 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 204. 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).

<sup>365</sup> Telephone Interview with Graeme McLaren, *supra* note 275.

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including those devoted to increasing information about the situation. The project proponent is supposed to commission and pay for all of the necessary studies, but Browne said that in this case, some of its studies were “so superficial or deeply flawed” that Tse Keh Nay, a group of three First Nations including Takla, decided to use some of its participation funding to hire experts to conduct independent studies.<sup>366</sup> Therefore, 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.<sup>367</sup> 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, and consultation measures are an important way that the community gains information about particular mining projects and has an opportunity to voice its concerns. Takla’s chief and council, however, have frequently come away from meetings with government

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<sup>366</sup> E-mail from Murray Browne (Apr. 23, 2010), *supra* note 204.

<sup>367</sup> Telephone Interview with Murray Browne, *supra* note 51.

officials frustrated. Councilor Irene French said, “I don’t think they [government officials] listen to what we’re saying. . . . They just have this ‘Indian problem,’ like in the early days when Europeans first came.”<sup>368</sup> Chief Dolly Abraham said that “we have to fight until someone gets hurt before we get noticed.”<sup>369</sup>

These frustrations predate the current leadership of Takla. Takla leaders have claimed in the past that they have been 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.”<sup>370</sup> He told the company that “the government is not working with us in any meaningful discussions.”<sup>371</sup> At the same meeting, Terry Teegee said, “the government is not showing us any respect. Who has been here thousands of years?”<sup>372</sup>

John Allen French suggested elsewhere that the meetings that do take place are ineffective and that

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<sup>368</sup> Interview with Irene French, *supra* note 27.

<sup>369</sup> Interview with Dolly Abraham, Chief, Takla Lake First Nation, at Bear Lake, B.C. (Sept. 14, 2009).

<sup>370</sup> Transcript from meeting between Imperial Minerals and Takla Lake First Nation, *supra* note 348.

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

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government officials make promises on which they later fail 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 and said:

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.<sup>373</sup>

In order 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. Moreover, the government must take seriously its obligation to hear Takla's concerns and to protect their rights to participation, self-determination, and

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<sup>373</sup> Letter from Chief John Allen French, Takla First Nation, to Bill Bennett, Minister of State for Mining (Sept. 15, 2006).

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, and members of Takla said an agency sometimes professes ignorance or refers Takla to a different agency.<sup>374</sup> For example, at one consultation meeting with the Environmental Assessment Office regarding Kemess North, the government representative was asked about cumulative effect 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.<sup>375</sup>

A staff member from MEMPR acknowledges 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,

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<sup>374</sup> Interview with Irene French, *supra* note 27; Interview with Victor West, *supra* note 24. *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).

<sup>375</sup> Transcript from meeting between Tse Keh Nay and Environmental Assessment Office, Prince George B.C. 33 (May 10, 2007).

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the Ministry of Environment, and the Ministry of Forests.<sup>376</sup> He said that this process can be “exhausting” for First Nations, and he worries that fragmented consultation procedures may cause the communities’ interests and concerns to get lost during the consultation process.<sup>377</sup>

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 claimed that so far, coordinated consultation has been well-received by both First Nations and government,<sup>378</sup> and MABC’s Pierre Gratton said that it is good for First Nations and industry because it provides one point of contact in the government. In addition, he said, it is good for government because it allows them to “do more with less.”<sup>379</sup> Chris Warren of CJL Enterprises said, however, that “coordinated consultation doesn’t work” because the

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<sup>376</sup> Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 82.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*; Telephone Interview with staff member #2 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 234.

<sup>379</sup> Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 227.

government lacks the personnel to manage it effectively.<sup>380</sup> 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.

### **The Lack of Consultation by Miners**

Although the law officially requires government consultation with First Nations on the use of natural resources that might infringe on aboriginal rights, much discussion regarding resource use actually occurs 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, say that some companies are talking to them more than the B.C. government is.<sup>381</sup> The quality of this type of consultation, however, varies across companies and projects.<sup>382</sup> Takla members have often stumbled across miners on their traditional territories with no previous knowledge that they

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<sup>380</sup> Telephone Interview with Chris Warren and Lorne Warren, *supra* note 225.

<sup>381</sup> Interview with Irene French, *supra* note 27.

<sup>382</sup> 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.

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were working in the area. In other cases, companies have been more proactive about seeking contact with Takla, but these 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, a mining application triggers consultation requirements and the Ministry sends the NOW to the affected First Nation, unofficially MEMPR encourages companies to talk to First Nations communities “early and often” in order to build trust and good relationships.<sup>383</sup> The AME BC, an industry group with approximately 300 corporate members, worked with First Nations to develop guidelines for their engagement,<sup>384</sup> and MABC is involved in producing guides on “aboriginal inclusion” as well, but both sets of principles lack the force of law.<sup>385</sup> As a result, the quality of consultation with affected First Nations ultimately depends on each company’s willingness to cooperate. Without legal requirements behind industry’s action, these voluntary consultation procedures are inherently limited.

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<sup>383</sup> Interview with staff member #2 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 234.

<sup>384</sup> Telephone Interview with Lauren Whyte, *supra* note 242.

<sup>385</sup> Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 227.



Some companies are 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.<sup>386</sup> “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.”<sup>387</sup> Councilor Jeanette West said that companies think sending letters is enough consultation, and that silence means consent, but “that’s not the way we do business.”<sup>388</sup>

### *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, and community members report a noticeable increase in outsiders observed on the land since that time.<sup>389</sup> The status of the many hundreds of claims that have been registered, however, can be elusive. Frank Williams and his family are aware that valuable minerals are present on their *keyoh*, but they must go out of their way to find out which outsiders know about their land and how they

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<sup>386</sup> Interview with Terry Teegee, *supra* note 22.

<sup>387</sup> Interview with Irene French, *supra* note 27.

<sup>388</sup> Interview with Jeanette West, *supra* note 27.

<sup>389</sup> *Id.*; Interview with Terry Teegee, *supra* note 22; Interview with Aaron Young, in Takla Landing, B.C. (Sept. 15, 2009).

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are planning to exploit it.<sup>390</sup> He found “blue rock” (molybdenum) while hunting beaver with his wife, Cecile, fifteen years ago. He also has seen black sand, which he knows to be a sign of gold, on his *keyoh*.<sup>391</sup> Even though he and his family have not shared this knowledge with miners, Williams knows there are claims on his land because he occasionally visits an office in Smithers to find out who holds the claims and what kinds of minerals they are looking for.<sup>392</sup> Raphael West said Chief Dolly Abraham told him that there are five companies prospecting on his territory, but as of September 2009 he was unable to find out more details from Chief Abraham because she had been so busy. 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.<sup>393</sup>

It is not uncommon for Takla members, in the course of everyday activities, to find miners on their land, having no

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<sup>390</sup> Interview with Frank Williams, *supra* note 76.

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> Interview with Raphael West, *supra* note 59.

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.”<sup>394</sup> Chief Dolly Abraham once encountered a man who told her he was in Takla to visit a claim he had registered online.<sup>395</sup> 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.<sup>396</sup> Chief Abraham said she told the miner that he should have consulted with Takla before coming onto their land.<sup>397</sup> 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.”<sup>398</sup> 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.<sup>399</sup> Since most Takla members use land seasonally, however, they may

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<sup>394</sup> Interview with Marvin Abraham, *supra* note 36.

<sup>395</sup> Interview with Chief Dolly Abraham and Councilor Kathaleigh George, *supra* note 77.

<sup>396</sup> *Id.*

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> Transcript from meeting between Imperial Minerals and Takla Lake First Nation, *supra* note 348.

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miss miners' presence completely because exploration operations generally run for short periods each year.

Some members of Takla told IHRC about confrontations resulting from these encounters. Such confrontations often arise when Takla members do not have advance warning of the claims registered on their traditional territory and when mining companies are not 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.<sup>400</sup> Miners got out of their trucks and swore at David 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.<sup>401</sup> 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 Jeanette West and her brother, who was Chief at the time, through the gate. In order to get the gate moved, Jeanette and her brother brought their lawyer, *keyoh* holders and band

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<sup>400</sup> Interview with David Alexander, Jr. *supra* note 80.

<sup>401</sup> *Id.*

manager, and a RCMP officer who was First Nation.<sup>402</sup> “[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.”<sup>403</sup>

Other Takla members are 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, but she is afraid to confront people on her land directly.<sup>404</sup>

### *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

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<sup>402</sup> Interview with Jeanette West, *supra* note 27.

<sup>403</sup> *Id.*

<sup>404</sup> Interview with Julie Jacques, *supra* note 62.

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government permitting processes can move more quickly.<sup>405</sup>

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, they 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.<sup>406</sup>

Companies focused on actual mine development, such as Newcrest, can pick and choose which exploration sites they want to develop, and completely avoid those where conflict with local communities is likely.<sup>407</sup> Exploration companies like Serengeti, which tend to be smaller operations, are focused on prospecting many sites, wherever they think there might be minerals, and so in some cases they listen more to First Nations' concerns up front. Hugh Samson, the Serengeti Project Manager at Kwanika, told IHRC that the company takes local communities into account before it begins exploration: "The number one [factor] is access—communities and physical access. We have to find

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<sup>405</sup> Telephone Interview with staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 82.

<sup>406</sup> Interview with Marvin Abraham, *supra* note 36; Interview with JP Laplante and David Radies, *supra* note 251.

<sup>407</sup> Interview with Tara Marsden, *supra* note 362.

something better than infrastructure. Here there is good access. Takla is a good community with which to work.”<sup>408</sup>

Takla’s relationship with Serengeti provides an interesting case study of the state of consultation with First Nations. Some companies, including Serengeti, do voluntary consultations with First Nations beyond what is required by the B.C. government.<sup>409</sup> 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.”<sup>410</sup> He explained that Serengeti “makes a point” of meeting with affected First Nations before projects to explain their plans and listen to the community’s concerns and of meeting again afterwards to ensure that the company honors any commitment that it has made.<sup>411</sup> Hugh Samson told IHRC that Serengeti talks 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.”<sup>412</sup> He explained that Serengeti has agreed to accommodate Takla in ways that are not required

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<sup>408</sup> Interview with Hugh Samson, *supra* note 266.

<sup>409</sup> *Id.*

<sup>410</sup> Telephone Interview with David Moore, President & CEO, Serengeti Resources, Inc. (Mar. 2, 2010).

<sup>411</sup> *Id.*

<sup>412</sup> Interview with Hugh Samson, *supra* note 266.

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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.<sup>413</sup> With respect to its Kwanika site, Serengeti also conducted a “valued ecosystems component study” in order to identify the community’s concerns so that it could mitigate potential impact.<sup>414</sup>

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.”<sup>415</sup> 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 he said that Serengeti is “not telling us everything . . . [but] at least they are talking to us, whereas the government isn’t.”<sup>416</sup> Terry Teegee, whose family is from the Kwanika area, gave a similar assessment, saying that “for the most part [Serengeti’s consultation has] been okay,” but that negotiations over moving from exploration to full-scale development have stalled.<sup>417</sup> Sometimes the company claims to be mitigating Takla’s

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<sup>413</sup> *Id.* See also Telephone Interview with David Moore, *supra* note 410.

<sup>414</sup> Telephone Interview with David Moore, *supra* note 410.

<sup>415</sup> Interview with Irene French, *supra* note 27.

<sup>416</sup> *Id.*

<sup>417</sup> Interview with Terry Teegee, *supra* note 22.



concerns, but their efforts are insufficient. 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 claimed that there was no problem since the caribou were in the hills and Kwanika is in the valley, and that if the caribou came down from the mountain, their monitors would see them and they would move away. As Browne pointed out, Takla knows that the caribou generally come down from the mountains in that area, and that if Kwanika's monitors fail to see them, it is because Serengeti's exploration has scared them away.<sup>418</sup>

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.<sup>419</sup> Serengeti may have lost its initially planned investor, however;<sup>420</sup> Newcrest pulled out of the project at least temporarily when it realized that local people were opposed. Former Mining Coordinator Laplante

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<sup>418</sup> Telephone Interview with Murray Browne, *supra* note 51.

<sup>419</sup> E-mail from David Moore, President & CEO, Serengeti Resources, Inc., to Bonnie Docherty, Lecturer on Law and Clinical Instructor (Apr. 23, 2010).

<sup>420</sup> Telephone Interview with David Moore, *supra* note 410.

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explained that Newcrest knows about issues with aboriginal rights, and that “if Newcrest smells hassle, it goes somewhere else.”<sup>421</sup>

Some companies choose 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 contamination.<sup>422</sup> According to an email Alpha Gold sent to IHRC, the company has a memorandum of understanding with Takla, but it did not specify the subject of that memorandum,<sup>423</sup> and Irene French wrote that she knows of no agreement between Alpha Gold and her family.<sup>424</sup>

Representatives of CJL Enterprises, a small family-owned company, told IHRC that it, too, prefers to deal directly with *keyoh* holders than with chief and council. They said that they cannot pay for people to go to meetings

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<sup>421</sup> Interview with JP Laplante and David Radies, *supra* note 251.

<sup>422</sup> Interview with John David French, in Takla Landing, B.C. (Sept. 15, 2009).

<sup>423</sup> E-mail from Richard Whatley, CEO, Alpha Gold Corp., to Bonnie Docherty, Lecturer on Law and Clinical Instructor, IHRC (Mar. 29, 2010).

<sup>424</sup> E-mail from Irene French, Councilor, Takla Lake First Nation, to Bonnie Docherty, Lecturer on Law and Clinical Instructor, IHRC (Apr. 7, 2010).

at Takla Landing, and “it is better to meet on neutral ground and to have to open lines of communication.” Therefore, CJL prefers the offices in Prince George.<sup>425</sup>

CJL has had a long-standing, but deteriorating, relationship with the Takla family on whose *keyoh* it has been prospecting. In the case of Silver Creek, Chris and Lorne Warren said that they have “always had good relations with the Alexanders.” The families knew each other he said, and CJL always “kept them aware of what we were doing.”<sup>426</sup> David Alexander, Jr. concurred about this historically positive interaction that dates back to the 1970s.<sup>427</sup> Alexander remembers Lorne Warren and his wife asking his grandfather for permission to continue to explore. His grandfather agreed on the condition that they employed his family members, but according to Alexander this has not happened.<sup>428</sup> Chris Warren said the Alexanders that CJL had planned to hire found jobs with other companies.<sup>429</sup> 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

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<sup>425</sup> Telephone Interview with Chris Warren and Lorne Warren, *supra* note 225.

<sup>426</sup> *Id.*

<sup>427</sup> Interview with David Alexander, Jr., *supra* note 80.

<sup>428</sup> *Id.*

<sup>429</sup> E-mail from Chris Warren, CJL Enterprises, to Bonnie Docherty, Lecturer on Law and Clinical Instructor, IHRC (Apr. 23, 2010).

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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.”<sup>430</sup> While the Warrens said that they “try to involve locals” in CJL's projects, they said that they have difficulty working with chief and council because they are “adamant” about jobs for Takla, but that at the exploration stage, the company is not really making any money.<sup>431</sup> In addition, Lorne said, he has “spent forty-five years developing the company and expertise,” and that now he is “reluctant to give it away” to First Nations who “want control.”<sup>432</sup>

### **The Need for Guidance on Consultation**

The lack of consultation presents 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 applies it only rarely at any stage. IHRC argues that the government should instead follow the deep consultation standard from the beginning. As will be

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<sup>430</sup> Interview with David Alexander, Jr., *supra* note 80.

<sup>431</sup> Telephone Interview with Chris Warren and Lorne Warren, *supra* note 225.

<sup>432</sup> *Id.*

discussed in detail in the next chapter, mining has the potential to have a serious adverse impact on First Nations and their land, and once a company starts to invest in mining operations, momentum builds that becomes hard for First Nations to reverse, even if consulted at a later point.

In addition to determining when deep consultation should start, the government could improve Takla's relationships with miners by clarifying what the proper process for consultation is. Company and industry representatives repeatedly argued that they are trying to do right by Takla and other First Nations, but that they need more guidance regarding who is in charge of certain pieces 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 said that her association is “not always really clear what is expected of industry or required of industry” under aboriginal rights law.<sup>433</sup> Zoe Carlson, MABC's Vice President of Sustainability and Operations, agreed and said that court decisions leave a lot of ambiguity.<sup>434</sup> “The court says we need to do something else,

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<sup>433</sup> Telephone Interview with Lauren Whyte, *supra* note 242.

<sup>434</sup> Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 227.

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but they don't tell you what that is," she said.<sup>435</sup> Carlson described a "quagmire" where "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."<sup>436</sup> 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, "it is not consistent between First Nations and the provincial and federal governments or between provinces."<sup>437</sup>

Industry also seeks guidance on how to address First Nations' concerns that extend beyond a particular project.<sup>438</sup> Even when companies comply with the law, sometimes, MABC's Gratton said, "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." In certain cases, Whyte said, a community will raise general issues in response to a specific proposal. Takla, for example, voiced concerns to some AME BC members regarding land-use

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<sup>435</sup> *Id.*

<sup>436</sup> *Id.*

<sup>437</sup> Telephone Interview with Laureen Whyte, *supra* note 242.

<sup>438</sup> *Id.*

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,” she said, because they are too broad and relate to government’s relationship with Takla, more than that of industry.<sup>439</sup>

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 lament the fact that cooperation with First Nations seems to be getting worse.<sup>440</sup> 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 the location of a cabin.<sup>441</sup> Warren’s proposal implies that companies should consult with individual *keyoh* holders, but even that is open to debate. There is general confusion regarding whether companies should talk to First Nations’ elected leaders or

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<sup>439</sup> Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 227; Telephone Interview with Laureen Whyte, *supra* note 242.

<sup>440</sup> Telephone Interview with Chris Warren and Lorne Warren, *supra* note 225.

<sup>441</sup> *Id.*

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*keyoh* holders. As elected officials, chief and council represent all of Takla, but they have two-year terms so there is 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.<sup>442</sup>

Companies also need to know with whom to consult when two First Nations have overlapping claims to a given territory.<sup>443</sup> 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.”<sup>444</sup>

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 the EA process begins, the government meets with First Nations to determine whether they are even talking to the right people. It seeks to determine how First Nations wish to engage in

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<sup>442</sup> *Id.*

<sup>443</sup> Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 227.

<sup>444</sup> Transcript from meeting between Imperial Metals and Takla Lake First Nation, *supra* note 348.



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.”<sup>445</sup>

Finally, the miners’ confusion about whom to consult extends to when it is appropriate to consult the provincial or federal government and when First Nations. Some industry representatives said that they seem to be stuck between those two groups. Pierre Gratton of MABC said, “We’re caught in 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.”<sup>446</sup> Moreover, the provincial and federal governments do not always have 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.<sup>447</sup>

While mining companies and industry should take on voluntary consultation regarding the use of aboriginal lands, the government bears the primary responsibility to ensure

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<sup>445</sup> Telephone Interview with Graeme McLaren, *supra* note 275.

<sup>446</sup> Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 227.

<sup>447</sup> *Id.*

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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 take into account.

### **Aboriginal Rights Analysis**

In practice, the existing consultation system denies 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 are not universally implementing consultation procedures on a volunteer basis 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 their culture. There have been notable *ad hoc* successes, such as the Kemess North joint review panel, but the government needs to institutionalize them to maximize their benefits for meaningful consultation.

Lack of information has made it particularly difficult for Takla to defend and exercise its rights. Takla receives no notice of claim registrations and incomplete information about exploration and development proposals. It also has limited opportunities to gather its own information and has been frustrated in some of its attempts to communicate with government officials. This situation challenges 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 instead bears 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 not only protection for First Nations on paper but also a guarantee that such protection is in fact practiced on a day-to-day basis.

If the government improved its consultation mechanisms, it might change the way mining companies do

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business and, in so doing, protect aboriginal rights. Currently, mining companies have very low barriers to start projects because free entry is “such a part of their business plan.”<sup>448</sup> 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.

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<sup>448</sup> Interview with JP Laplante and David Radies, *supra* note 251.

## **VII. THE HARMS CAUSED BY MINING**

When Takla cannot stop mining activities or regulate them to their satisfaction because of the lack of consultation, it bears their environmental and human consequences. Mining operations, whether small-scale exploration or full-scale production, cause significant immediate and long-term effects on Takla's lands and its people. Just as worrying is the fact that while particular individual projects may be in technical compliance with the law, the cumulative effects of all the projects may impinge on Takla's rights. As outlined in this chapter, mining at all stages leads to deforestation; contamination, especially of water; and disturbances to wildlife. In addition, it threatens human health because it potentially leads to illness and changes in diet. Finally, it endangers 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, disrupts their link to the land. It places a disproportionate burden on Takla and interferes with its enjoyment of its aboriginal rights.

### **The Effects of Deforestation on Takla and the Land**

To conduct their operations and access underground mineral deposits, mineral companies clear swaths of land on

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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 affected roughly sixteen hectares (39.5 acres).<sup>449</sup> This area is significant but still much smaller than that covered by a producing mine. Kemess South, an open-pit mine operated by Northgate Minerals Corporation,<sup>450</sup> covers 33,610 hectares (88,052 acres).<sup>451</sup>

Regardless of the size of the swath, however, mining activities disturb surface areas. While most of the current mining activity on Takla's territory is in the exploratory

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<sup>449</sup> Telephone Interview with David Moore, *supra* note 410. 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 225.

<sup>450</sup> See Mineral Resources Education Program of British Columbia, Kemess, [http://www.bcminerals.ca/files/bc\\_mine\\_information/000129.php](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).

<sup>451</sup> 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>.

phase, it still requires deforestation, which has 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.<sup>452</sup> Terry Teegee, a member of Takla and the vice tribal chief of the CSTC, noted that there are many exploration operations across Takla's traditional territory and that the cumulative impact is, therefore, quite dramatic.<sup>453</sup> In addition, every exploration has the potential to develop into a producing mine, which raises significant concerns for the Takla people. Mining development and production necessitates building additional roads access, 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.

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<sup>452</sup> Observed by IHRC during visit to Kwanika exploration site.

<sup>453</sup> Interview with Terry Teegee, *supra* note 22.

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### *Impact of Roads*

In addition to destroying the traditional topography of the land, the roads created by mining companies open up Takla's territory to outsiders who may inflict further damage on the land and its flora and fauna.<sup>454</sup> Roy French of Takla told IHRC that mining roads increased human traffic on Takla's traditional territory starting in the late 1950s.<sup>455</sup> Even if outsiders who come to the area take great care, they may unintentionally harm graves, sacred places, or archaeological sites. They may also frighten away wildlife and destroy plants that Takla depends upon.<sup>456</sup> Creating new roads also facilitates entry of trophy hunters.<sup>457</sup> Many Takla members expressed frustration that trophy hunters take from a dwindling supply of game and then leave 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.'"<sup>458</sup> Whether outsiders intentionally cause harm or not, their

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<sup>454</sup> *Id.*

<sup>455</sup> Interview with Roy French, *supra* note 73.

<sup>456</sup> 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 (4<sup>th</sup> Ed., 2000).

<sup>457</sup> The harms of mining on wildlife will be discussed in more detail in the subsection on Harm to Wildlife and Its Effects on Takla in this chapter.

<sup>458</sup> Interview with Julie Jacques, *supra* note 62.



ever-increasing presence on lands that were traditionally accessed by Takla alone disrupts the community's pattern of hunting and gathering.

At least some mining companies attempt 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.<sup>459</sup> CJL Enterprises similarly attempts to reduce deforestation by using old access roads and by flying in equipment whenever possible, as flying in equipment leads to less surface damage.<sup>460</sup> Gold Fields reported that it uses a "boots on the ground" approach to minimize environmental impact, in which ATV use is limited to existing roads, and that the company relies on historical roads for access.<sup>461</sup>

### *Reclamation Efforts*

In order to prevent long-term harm, mining companies say they strive to reclaim forests after mining operations have ceased. Hugh Samson of Serengeti told IHRC that

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<sup>459</sup> Observed by IHRC during visit to Kwanika exploration site.

<sup>460</sup> Telephone Interview with Chris Warren and Lorne Warren, *supra* note 225. Lorne Warren stated that the noise does not disturb the wildlife and that, in fact, wildlife are curious and approach helicopters. Some would dispute this claim.

<sup>461</sup> Letter from Ross Sherlock, Gold Fields, to Bonnie Docherty, Lecturer on Law and Clinical Instructor, IHRC, May 13, 2010.

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Serengeti spends a “significant” amount of money to restore the land.<sup>462</sup> Serengeti’s reclamation process involves cutting up felled trees and spreading that wood, along with any other organic material that was removed, back onto the cleared land and then covering the site with grass seed.<sup>463</sup> CJL also follows this method.<sup>464</sup> Lorne Warren, CJL’s President, noted that “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.”<sup>465</sup> John David French, who worked on Alpha Gold’s Lustdust site in 2008, described similar remediation measures.<sup>466</sup>

The efficacy of these measures is 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.<sup>467</sup> Ernie French, who worked

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<sup>462</sup> Interview with Hugh Samson, *supra* note 266. *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).

<sup>463</sup> Telephone Interview with David Moore *supra* note 410 (noting that grass seed is purchased locally and is used by all government forest agencies and mining companies in the region).

<sup>464</sup> Telephone Interview with Chris Warren and Lorne Warren, *supra* note 225.

<sup>465</sup> *Id.*

<sup>466</sup> Interview with John David French, *supra* note 422.

<sup>467</sup> Interview with JP Laplante and David Radies, *supra* note 251.

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.”<sup>468</sup> David Moore of Serengeti acknowledged that the company does not reclaim all the roads it creates because those roads may be necessary for current mineral exploration.<sup>469</sup>

Even if a mining company takes all possible steps to remediate affected sites, some of the damage to the land may be irreversible. While Northgate has won an environmental reclamation award<sup>470</sup> and has committed CDN\$18.7 million to environmental remediation at Kemess South Mine,<sup>471</sup> Victor West of Takla notes that “there’s no money that can replace what happened. Everything will be destroyed, and

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<sup>468</sup> Interview with Ernie French, *supra* note 59.

<sup>469</sup> Telephone Interview with David Moore, *supra* note 410.

<sup>470</sup> 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](http://www.mineralsnorth.ca/pdf/main_1.pdf) (stating that Northgate received a Reclamation and Environmental Citation in 2002 for excellence and the Edward Prior Award for the safest open pit mine in British Columbia during 2001).

<sup>471</sup> SKRECKY, *supra* note 451, at 3 (§2.2(4)) (reporting that Northgate will increase its reclamation bond every year until it reaches CDN\$18.7 million in 2010, when Kemess South is scheduled to close). See also Northgate Management’s Discussion & Analysis, 17, 20, *available at* <http://www.northgateminerals.ca/Theme/Northgate/files/pdf/2003MDA.pdf> (reporting that Northgate will increase its reclamation bond until it reaches CDN\$18.8 million in 2009, when Kemess South is scheduled to close).

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it's priceless."<sup>472</sup> 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."<sup>473</sup>

### *Historical Effects on the Land*

The people of Takla are 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:<sup>474</sup> "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,

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<sup>472</sup> Interview with Victor West, *supra* note 24.

<sup>473</sup> Interview with Tony Johnny, *supra* note 80.

<sup>474</sup> 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").

white creeks. It's so sad."<sup>475</sup> 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.'"<sup>476</sup> When Marvin was little, the road made him happy because "it meant trucks, no more walking."<sup>477</sup> Now, he says he 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.<sup>478</sup> 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."<sup>479</sup>

### *Cultural and Spiritual Harm*

For Takla, deforestation and other disturbances represent more than damage to an external environment. They are injuries community members may experience personally. Takla's traditional governance system centers around *keyoh*

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<sup>475</sup> Interview with Irene French, *supra* note 27.

<sup>476</sup> Interview with Marvin Abraham, *supra* note 36.

<sup>477</sup> *Id.*

<sup>478</sup> *Id.*

<sup>479</sup> Interview with Ernie French, *supra* note 59.

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holders who “speak for the land,” and members of Takla consider themselves its custodians, a role they take very seriously.<sup>480</sup> 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.”<sup>481</sup> 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.

### **The 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 drives them to abandon their traditional subsistence

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<sup>480</sup> Interview with Anita Williams, *supra* note 40.

<sup>481</sup> Interview with Irene French, *supra* note 27.

practices, which may affect their health<sup>482</sup> and which prevents the transmission of their traditions and important subsistence skills to younger generations.

The greatest concern of both Takla and mining companies is that contaminants used during the mining process will seep into nearby waterways.<sup>483</sup> Pollution can occur if mining companies leave behind equipment or toxins or if contaminants are released or spilled during operations. 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.<sup>484</sup> The potential exists therefore for contamination, and mining companies must take significant steps to prevent contamination and to clean up accidental spills as soon as possible.

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<sup>482</sup> A discussion on how switching from traditional local foods to processed foods may cause health problems in indigenous populations may be found below in the subsection on Health Concerns in this chapter.

<sup>483</sup> Telephone Interview with David Moore, *supra* note 410 (stating that water pollution is a huge 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).

<sup>484</sup> 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).

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### *Contaminated Abandoned Mines*

Pollution was more common at historic mine sites, before better methods were developed to manage mining wastes to prevent water pollution and other potential environmental harms.<sup>485</sup> Many abandoned mines have still not been cleaned up, however, and the possibility of contamination remains a serious concern for the Takla people who live in the area and rely upon neighboring waterways and the wildlife that they support. Takla members are particularly concerned about the cumulative and long-term consequences of abandoned mines. Margo French, a member of Takla and an environmental expert, expressed this concern: “The mine owners have walked away, but we are left to clean up the mess.”<sup>486</sup> Radies, Takla’s Mining

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<sup>485</sup> 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/](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 82 (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 325 (stating that a few decades ago the government had very little awareness about the contamination effects of mining).

<sup>486</sup> Margo French, Hearing Testimony, Canadian Environmental Assessment Agency, slide 9, *available at* [http://www.ceaa.gc.ca/050/documents\\_staticpost/cearef\\_3394/hea](http://www.ceaa.gc.ca/050/documents_staticpost/cearef_3394/hea)



Coordinator, noted that limited liability for mining companies is part of the problem: “Mine disasters last hundreds of years, but corporate entities don’t have to.”<sup>487</sup>

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 Ministry of Agriculture and Land’s Crown Land Restoration Branch (CLRB) addresses contaminated sites that have defaulted to the Crown where no responsible person or company exists. The Office of the Auditor General of B.C. estimates there are more than 2000 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.<sup>488</sup> To date, the CLRB

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rings/SM50.pdf (last visited Mar. 8, 2010) [hereinafter Margo French EAA Testimony].

<sup>487</sup> Interview with JP Laplante and David Radies, *supra* note 251.

<sup>488</sup> 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 2000 historic mines in British Columbia); *B.C. Leads the Nation in Contaminated Sites*, CANADA.COM, June 13, 2008 (reporting British Columbia has 4088 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

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has spent CDN\$135 million of its CDN\$229 million budget for cleanup and reclamation efforts.<sup>489</sup> The program has investigated seventy-two sites since its inception in 2003, and ten sites have been completely remediated.<sup>490</sup> 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 will investigate five additional priority sites.<sup>491</sup>

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Brian Clarke and Gregg Stewart, *supra* note 325 (Brian Clarke estimated that eight-five to ninety percent of the contaminated sites are from mining) (Gregg Stewart stated that the contaminated sites list includes mines, pulp mills, forest sites and others; Stewart disagreed with Clarke's estimate); CHAMBERS & WINFIELD, *supra* note 191 (reporting there are nearly 10,000 abandoned mines in Canada and that rehabilitating these sites would cost CDN\$6 billion).

<sup>489</sup> 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](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](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).

<sup>490</sup> *See* News Release, B.C. Ministry of Agriculture and Lands, *supra* note 489; BIENNIAL REPORT 2010, *supra* note 489.

<sup>491</sup> News Release, B.C. Ministry of Agriculture and Lands, *supra* note 489.

*Bralorne-Takla Mine*

Mining operations also require the use of toxic contaminants that can pollute the surrounding land and waters for years to come if they are released. The old mercury mine at Bralorne-Takla demonstrates the lingering danger that such pollution can cause. The area has been contaminated for decades. Adults 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 in order to access various parts of their *keyohs*.<sup>492</sup> 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.<sup>493</sup> Margo French remembers that as children they even brought bottles of mercury 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.<sup>494</sup> Paul French said of the unusually colored

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<sup>492</sup> Interview with Irene French, *supra* note 27; Interview with Paul French, *supra* note 37; Interview with Margo French, *supra* note 80.

<sup>493</sup> Interview with Irene French, *supra* note 27; Interview with Paul French, *supra* note 37; Interview with Margo French, *supra* note 80.

<sup>494</sup> Interview with Margo French, *supra* note 80.

## Bearing the Burden

greenish-blue water, “We thought the water was so pretty; we didn’t know it was contaminated.”<sup>495</sup> Adequate remediation has not been forthcoming despite the knowledge of potential dangers.

The B.C. government lists 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.”<sup>496</sup> In 2008, the Crown Contaminated Sites Program conducted an ecological and human health risk assessment of Bralorne-Takla.<sup>497</sup> According to an interview with CLRB officials, the site assessment and risk assessment reports indicate that mercury contamination at

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<sup>495</sup> Interview with Paul French, *supra* note 37.

<sup>496</sup> BIENNIAL REPORT 2010, *supra* note 489, at 19-20 (noting that the Bralorne-Takla Mine is a priority site and defining the nature of priority sites).

<sup>497</sup> 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](http://www.bceia.com/documents/08_CCSB_report.pdf) [hereinafter BIENNIAL REPORT 2008]. *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> (identifying Bralorne-Takla as having the greatest potential for environmental impacts, as measured through water quality and mine inspections; study also raises concern for mercury contamination at the site in soil and water).

the Bralorne-Takla Mine appears to be restricted to the core mining area, the water quality is good, and the potential for human health risk is minimal unless people consume the soil.<sup>498</sup> 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.”<sup>499</sup> As IHRC observed, however, the fence is low and animals could easily cross it, which raises health concerns for Takla members who subsist off game from that region. In addition, the road to the Bralorne-Takla Mine remains open, which concerns Takla residents because the road was built from potentially contaminated mine tailings and passing trucks raise potentially toxic dust.<sup>500</sup> The next step for the CLRB to address the Bralorne-Takla Mine is to develop a remediation plan that will include consolidation of mine waste and could take up to a year to design and more to implement.<sup>501</sup> Ministry officials said that the Ministry has

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<sup>498</sup> Telephone Interview with Brian Clarke and Gregg Stewart, *supra* note 325.

<sup>499</sup> Interview with Irene French, *supra* note 27; Interview with Margo French, *supra* note 80.

<sup>500</sup> Interview with Dolly Abraham and Kathaleigh George, *supra* note 77.

<sup>501</sup> Telephone Interview with Brian Clarke and Gregg Stewart, *supra* note 325.

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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.<sup>502</sup> Despite Takla's fear that the mercury contamination at Bralorne-Takla poses has the potential to pose severe health threats, the cleanup process has been "slow and frustrating" according to Takla's lawyer Murray Browne.<sup>503</sup>

### *Monitoring*

In order to ensure that modern mining companies are taking appropriate mitigation and remediation efforts, MEMPR and the Ministry of Environment monitor company efforts. A MEMPR staff member reported that his Ministry regularly sends inspectors to mining operations, as does the Ministry of Environment, and that MEMPR conducts major mine audits every year.<sup>504</sup> Not everyone agrees on the current or ideal level of government oversight. Hugh Samson, the Kwanika Project Manager from Serengeti, told the IHRC that a government inspector would not physically check environmental remediation measures until after the

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<sup>502</sup> *Id.*; BIENNIAL REPORT 2008, *supra* note 497, at 15 (reporting that cleanup is ongoing and will occur in coordination with the Takla people).

<sup>503</sup> Telephone Interview with Murray Browne, *supra* note 51.

<sup>504</sup> Telephone Interview with staff member #2 of Ministry of Energy, Mining and Petroleum Resources, *supra* note 234.

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.”<sup>505</sup> Laureen Whyte of AME BC recognized that regional inspectors provide an invaluable resource for mining companies, but she also noted that budget cuts are beginning to reduce the number of available inspectors.<sup>506</sup> These uncertainties and contradictions raise concerns that B.C. regulations may not be adequately implemented or enforced by government agencies. A lack of inspectors is 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.

*Contemporary Mining Operations’ Potential  
Water Pollution*

Modern pollution standards enforced by the B.C. government attempt to prevent pollution in current and future mines, but mining activities continue to affect water levels and quality. Exploration and production use a great deal of water and their drilling patterns often alter the water level in streams and lakes, thereby affecting nearby ecosystems. While working as an environmental monitor for

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<sup>505</sup> Interview with Hugh Samson, *supra* note 266.

<sup>506</sup> Telephone Interview with Laureen Whyte, *supra* note 242.

## Bearing the Burden

Gold Fields in summer 2009, Ernie French observed the level of Pine Lake recede about a meter during the drilling of the very first hole.<sup>507</sup>

Water quality is as important as water quantity. Takla members reported observing apparently polluted waterways. They described local creeks that had turned unnatural colors including red, pink, purple, peach, white, green, and blue.<sup>508</sup> “The fashion industry would love it,” said Irene French, “but you can’t touch it.”<sup>509</sup> John David French told IHRC that his nephew who works on Alpha Gold’s exploration operations near the old Bralorne-Takla mine site has seen yellow water that “looked like acid” going into creeks.<sup>510</sup> 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 creek surface.<sup>511</sup> Nevertheless, Takla’s concerns about potential contamination should be the subject of further independent investigation. Moore also said that exploration work does not contribute to contamination, and in any event, drill cuttings are collected and precipitated in sumps, which are back filled subsequent to drilling. Even if minerals from drilling were

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<sup>507</sup> Interview with Ernie French, *supra* note 59.

<sup>508</sup> Interview with Tony Johnny, *supra* note 80; Interview with Irene French, *supra* note 27.

<sup>509</sup> Interview with Irene French, *supra* note 27.

<sup>510</sup> Interview with John David French, *supra* note 422.

<sup>511</sup> Telephone Interview with David Moore, *supra* note 410.



released, he said those minerals are naturally occurring in the area.<sup>512</sup> When mining exposes inherently harmful substances like mercury, however, the fact that mercury is native to the area is not important; what is important is the fact that mercury is being raised from a contained underground location to a surface location where it can cause health damage.<sup>513</sup>

Water pollution from current mining operations is in some cases tied to the contamination from abandoned mines, which exemplifies why the legacy of past operations should be taken into account when considering 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.<sup>514</sup> Lowering the water level in these ponds and streams may not only impinge on the health of ecosystems

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<sup>512</sup> *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.

<sup>513</sup> See also AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, U.S. DEP'T 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].

<sup>514</sup> Interview with Margo French, *supra* note 80. Margo French also took part in the *Healthy Land, Healthy Future* report. See PAM TOBIN ET AL., HEALTHY LAND, HEALTHY FUTURE (2008) [hereinafter HEALTHY LAND, HEALTHY FUTURE].

## Bearing the Burden

but also spread pollution from old mines that is currently 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.<sup>515</sup>

With regard to producing mines, the long-term security of tailings ponds creates additional concerns. MABC described dealing with tailings as one of the biggest environmental challenges of mining.<sup>516</sup> 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.<sup>517</sup> 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

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<sup>515</sup> Interview with Paul French, *supra* note 37; Interview with Margo French, *supra* note 80.

<sup>516</sup> Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 227.

<sup>517</sup> 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.nwww.usace.army.mil/planning/ep/fishres/reports/940600\\_BPA\\_Weak-Salmon-Stocks.pdf](http://www.nwww.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.”).

[Lake]. They're not strong."<sup>518</sup> These type 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.

### *Spills*

Finally, many members of Takla reported that they had seen toxic spills. Mining companies in the Takla region use trucking as their major mode of transportation, which presents significant opportunity for spills. For example, Northgate trucks its gold-copper concentrate in bulk from Kemess South to the railroad at Mackenzie, B.C., covering approximately 380 kilometers of gravel road.<sup>519</sup> Irene French said she had seen as many as nine ore trucks passing on some days from Kemess South.<sup>520</sup> Tony Johnny reported as many as thirty-six trucks in a day.<sup>521</sup> 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.<sup>522</sup> Tony Johnny reported that the

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<sup>518</sup> Interview with Jeanette West, *supra* note 27.

<sup>519</sup> Northgate Minerals Corporation, Kemess South, *supra* note 450.

<sup>520</sup> Interview with Irene French, *supra* note 27.

<sup>521</sup> Interview with Tony Johnny, *supra* note 80.

<sup>522</sup> Interview with Paul French, *supra* note 37.

## Bearing the Burden

company is doing reclamation work, but he was disappointed that Northgate was not including any First Nations in this work, and he expressed skepticism regarding the efficacy of the work itself.<sup>523</sup> Tom Patrick, who speaks for his family's *keyoh* at Kemess, said he has visited the mine, but "they won't tell you what the dump into the waters. . . . They show you what they want you to see."<sup>524</sup> IHRC could not independently verify these claims, and Northgate did not respond to multiple requests for information. The number of such reports warrants further investigation.

### *Protection Measures*

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,<sup>525</sup> and it annually tests selected streams before and after drilling to monitor for impacts.<sup>526</sup> At the site IHRC observed, Serengeti had erected sumps and silt barriers to prevent the

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<sup>523</sup> Interview with Tony Johnny, *supra* note 80.

<sup>524</sup> Interview with Tom Patrick, at Bear Lake, B.C. (Sept 14, 2009).

<sup>525</sup> Telephone Interview with David Moore, *supra* note 410;

Interview with Hugh Samson, *supra* note 266.

<sup>526</sup> E-mail from David Moore (May 11, 2010), *supra* note 266.

disruption of nearby streams.<sup>527</sup> David Moore of Serengeti also reported that standard practice is to use absorbent matting and booms when handling diesel fuel to prevent spills from reaching the soil or water courses.<sup>528</sup>

Takla members who worked for mining companies reported other environmental protection measures. While working for Gold Fields, every day Ernie French and other monitors checked campsites and drill sites for erosion and gas spills, checked the location of diesel tanks (required to be one hundred meters from the Finlay River in double-walled containers), changed absorbent matting for leaks, and conducted wildlife surveys.<sup>529</sup> Gold Fields reported that during the 2009 season it hired three First Nation environmental monitors who conducted daily drill site and camp inspections and completed wildlife habitat studies.<sup>530</sup>

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<sup>527</sup> Interview with Hugh Samson, *supra* note 266; *see also* Telephone Interview with David Moore, *supra* note 410 (noting that erecting silt screens is usual practice).

<sup>528</sup> Telephone Interview with David Moore, *supra* note 410.

<sup>529</sup> Interview with Ernie French, *supra* note 59.

<sup>530</sup> Letter from Ross Sherlock, Gold Fields, *supra* note 461. 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 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

## Bearing the Burden

Gold Fields 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.<sup>531</sup> John David French said that Alpha Gold built temporary bridges over creeks to avoid running machinery through the creeks.<sup>532</sup> Alpha Gold also tested the waters at its mining operations sites, but those results are not regularly released to the public.<sup>533</sup> Thus, they cannot be independently verified or alleviate Takla fears regarding contamination.

Public studies are necessary in order to inform government officials and Takla members about the potential and actual harms from mining. 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 encourages its members to "conduct

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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.*

<sup>531</sup> *Id.*

<sup>532</sup> Interview with John David French, *supra* note 422.

<sup>533</sup> Interview with Roy French, *supra* note 73; Interview with Margo French, *supra* note 80; Interview with Paul French, *supra* note 37.

initial and periodic assessments, baseline studies, and environmental assessments in an effective, efficient, and transparent manner.”<sup>534</sup> The Ministry of Agriculture and Lands also currently contracts with environmental consulting firms throughout British Columbia to conduct environmental impact studies, and all its studies are made public.<sup>535</sup> Without this information, stakeholders cannot make informed decisions regarding the potential costs of future mining projects, and without current information, many Takla members fear the worst due to their past experiences with mining contamination.

Takla recently commissioned a study of the environmental and health effects of mining in its territory, which was released as *Healthy Land, Healthy Future*.<sup>536</sup> 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 Bralorne-Takla, Kemess South, and Baker Mine; all the samples showed high levels of contaminants, including arsenic, mercury, and petroleum

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<sup>534</sup> 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).

<sup>535</sup> Interview with Brian Clarke and Gregg Stewart, *supra* note 325.

<sup>536</sup> HEALTHY LAND, HEALTHY FUTURE, *supra* note 514.

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hydrocarbons.<sup>537</sup> The report could not conclude that these contaminants are the direct result of mining,<sup>538</sup> but the significant health risk posed by their presence warrants significant caution by Takla, the B.C. government, and mining companies in the area. The Canadian Environmental Quality Guidelines Report notes that gold and copper ores are the predominant source of arsenic in Canada,<sup>539</sup> and arsenic 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.<sup>540</sup> The *Healthy Land* study also found mercury in

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<sup>537</sup> *Id.* at 43-48, 82-85. See also STEWART & BARRAZUOL, *supra* note 497 (noting concern about mercury contamination at the site in soil and water).

<sup>538</sup> 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 so is 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") (stating that industrial actions from smelting ores during mining is the predominant source of arsenic in Canada).

<sup>539</sup> CANADIAN SOIL QUALITY GUIDELINES, *supra* note 538, at 1.

<sup>540</sup> *Id.*; see also AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, U.S. DEP'T OF HEALTH AND HUMAN SERV.,



high levels in many of the freshwater fish tissue samples.<sup>541</sup> This finding raises concerns for the Takla people who regularly eat these fish, as mercury is known to cause cardiovascular, neurological, and autoimmune diseases.<sup>542</sup>

The different results reached by government or industry studies and the Takla study suggest that independent research is necessary to verify the true situation. Independent studies should also focus on the questions left unanswered by existing ones, such as the potential for contaminants to spread through dust or water and to move through the local food chain. The precautionary principle of international environmental law proposes that governments should proceed cautiously in the absence of scientific data. In this case, the B.C. government should not only proceed cautiously but should 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 mining and how they

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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 514, at 10 for health concerns from arsenic.

<sup>541</sup> HEALTHY LAND, HEALTHY FUTURE, *supra* note 514, at 86.

<sup>542</sup> *See id.* at 7. *See also* U.S. TOXICOLOGICAL PROFILE FOR MERCURY, *supra* note 513, at 74.

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affect the rights of Takla and other First Nations to enjoy their culture and use their traditional lands.

### *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 said she felt pride in the water and described the experience of seeing it as “pure joy.”<sup>543</sup> In addition, community members feel responsible for its protection. As mentioned earlier, Victor West said 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.<sup>544</sup> Contamination of the water is, therefore, more than an environmental and health issue. It is also a personal affront that reflects the culture’s inextricable link to all aspects of the environment.

### **Harm to Wildlife and Its Effects on Takla**

Mining activity on Takla’s traditional territory not only changes topography and poses the threat of contamination but also disrupts local wildlife, thereby adversely affecting members of Takla who rely on those populations for their

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<sup>543</sup> Interview with Irene French, *supra* note 27.

<sup>544</sup> Interview with Victor West, *supra* note 24.

food sources and cultural identity. Noise, deforestation, and road construction disrupt wildlife migration patterns and drive them further into distant untouched areas of Takla's lands. Community members worry that those animals that do not flee may be contaminated by chemicals from mining operations, and they become scared away from hunting and eating their traditional foods. The increased difficulty of hunting and potential contamination of local animals means that fewer members of Takla are able to subsist off the land and convey their traditional hunting knowledge to their children.

### *Company Monitoring*

Mining companies sometimes monitor the presence of local wildlife, but for the most part, their studies are *ad hoc*. Hugh Samson of Serengeti told IHRC that workers who happen to spot wildlife while on the job are required to keep track of sightings in a logbook.<sup>545</sup> David Moore, President and CEO, confirmed Serengeti's practice, but he noted that the company could do a better job of monitoring local wildlife.<sup>546</sup> Ernie French confirmed Gold Field's report of similar wildlife monitoring practices at its exploration camp:

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<sup>545</sup> Interview with Hugh Samson, *supra* note 266.

<sup>546</sup> Telephone Interview with David Moore, *supra* note 410.

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all sightings are collected and sent to a consulting firm in Vancouver.<sup>547</sup>

### *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.<sup>548</sup> They attributed the change to mining activities, including widespread exploration. William Alexander, who lives almost completely off the land, told IHRC he had to go

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<sup>547</sup> Interview with Ernie French, *supra* note 59. *See also* Letter from Ross Sherlock, Gold Fields, *supra* note 461 (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).

<sup>548</sup> Interview with Dolly Abraham and Kathaleigh George, *supra* note 77; Interview with Julie Jacques, *supra* note 62; 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](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, among other things, that moose were not breeding, salmon were being harmed, and groundhogs were omitted from monitoring at mining sites.).

“farther into the bush” to hunt because of mining exploratory operations.<sup>549</sup> “[Mining] scares away all the animals I 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.”<sup>550</sup> David Alexander, Jr. claims 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.<sup>551</sup>

Some members said they faced increased difficulties gathering plants as well as hunting. “We go miles and miles to find berries these days,” says Raphael West.<sup>552</sup>

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

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<sup>549</sup> Interview with William Alexander, *supra* note 22.

<sup>550</sup> Interview with Marvin Abraham, *supra* note 36.

<sup>551</sup> Interview with David Alexander, Jr., *supra* note 80.

<sup>552</sup> Interview with Raphael West, *supra* note 59.

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South for the past thirteen years.<sup>553</sup> Tony Johnny, her brother, expressed frustration that he and his family cannot even use the roads to hunt because of all the ore trucks.<sup>554</sup>

He told IHRC that the hunting is 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.<sup>555</sup>

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."<sup>556</sup>

Some mining companies disputed that their activities have caused a decrease in wildlife. CJL maintains that its use of helicopters does not affect wildlife because the area has limited wildlife to begin with (only moose, not caribou) and pilots are not allowed to chase game. Chris Warren said, "Animals get used to the noise pretty quick. Caribou don't

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<sup>553</sup> Interview with Lillian, Edna, and Antoine Johnny, *supra* note 22.

<sup>554</sup> Interview with Tony Johnny, *supra* note 80.

<sup>555</sup> *Id.*

<sup>556</sup> Interview with Tom Patrick, *supra* note 524.

care at all. They are curious and follow the helicopters. Caribou like cutlines.”<sup>557</sup> Hugh Samson of Serengeti reported that animals flee the area around Kwanika during drilling seasons but return in between.<sup>558</sup> Even temporary disturbance, however, could damage species if the disruption occurs during breeding seasons or drives animals away from their summer food stores.<sup>559</sup>

Although the effects of mining activities on wildlife in Takla’s traditional territory have not been 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

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<sup>557</sup> Telephone Interview with Chris Warren and Lorne Warren, *supra* note 225.

<sup>558</sup> Interview with Hugh Samson, *supra* note 266.

<sup>559</sup> 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](http://interact.uoregon.edu/MediaLit/wfae/library/articles/radle_effect_noise_wildlife.pdf) (reporting that noise has a significant and long-term detrimental effect on local caribou populations; researchers found 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 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.).

## Bearing the Burden

industrial activity on wildlife.<sup>560</sup> Industrial activities, including mining, contribute to habitat fragmentation, loss of habitat, decrease in habitat quality, and increased direct and indirect mortality risks.<sup>561</sup> 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.<sup>562</sup>

Mining also has the potential to harm fish populations when the operations pollute, divert, or fill waterways used by fish. The past few years have seen a dramatic decrease in the Takla salmon stocks,<sup>563</sup> a resource that Takla and other

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<sup>560</sup> 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.

<sup>561</sup> *Id.*

<sup>562</sup> *Id.*

<sup>563</sup> *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 67% 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](http://thegreenpages.ca/portal/bc/2009/08/uncovering_the_mystery)



nearby First Nations depend on heavily.<sup>564</sup> Terry Teegee told IHRC that the most prized salmon run is the Frazer Sockeye run; in 2009 Takla expected ten million fish, and only 900,000 came.<sup>565</sup> While it is unclear whether and how much mining has contributed to the problem,<sup>566</sup> Takla members are very concerned that new mining and a continued lack of environmental remediation could make it worse.<sup>567</sup>

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\_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](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).

<sup>564</sup> Interview with Terry Teegee, *supra* note 22; Interview with John David French, *supra* note 422; *see also* Margo French EAA Testimony, *supra* note 486.

<sup>565</sup> Interview with Terry Teegee, *supra* note 22.

<sup>566</sup> *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 517, 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.”).

<sup>567</sup> Interview with Terry Teegee, *supra* note 22; Interview with John David French, *supra* note 422; *see also* Margo French EAA Testimony, *supra* note 486.

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In addition to disrupting habitats and scaring populations away, mining operations can lead to unhealthy wildlife if animals ingest contaminated plants, animals, water, or soil.<sup>568</sup> When conducting research for the *Healthy Land, Healthy Future* report, Pam Tobin and Margo French of Takla 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,”<sup>569</sup> 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.<sup>570</sup> Less successful hunting and sick or deformed animals are widely reported all over Takla’s traditional territory.<sup>571</sup> Some members said

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<sup>568</sup> See CANADIAN SOIL QUALITY GUIDELINES, *supra* note 538 (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).

<sup>569</sup> Interview with Pam Tobin, Clinical Project Leader, Northern Cancer Control Strategy, in Prince George, B.C., Canada (Sept. 19, 2009).

<sup>570</sup> Interview with Irene French, *supra* note 27; Interview with Lillian, Edna, and Antoine Johnny, *supra* note 22; Margo French EAA Testimony, *supra* note 486.

<sup>571</sup> Interview with John David French, *supra* note 422; Interview with David Alexander, Jr., *supra* note 80; Interview with Julie Jacques, *supra* note 62 (providing observations from Kelly Creek and Silver Lake); Interview with Lillian, Edna, and Antoine Johnny, *supra* note 22 (connecting Cheni, Baker, and Kemess mines to skinny, sick, and deformed animals); Interview with Tony Johnny, *supra* note 80; Interview with Tom Patrick, *supra* note

they have seen caribou, moose, beavers, groundhog and rabbits with no hair<sup>572</sup> or with greenish flesh and internal infections,<sup>573</sup> and prematurely dead fish.<sup>574</sup> Though the causes are mysterious and may be myriad, many community members fear that contamination from abandoned mines and current mining activities have played a role.<sup>575</sup>

### *Interference with Culture*

All of these effects on wildlife have not only caused harm to animals but have also interfered with Takla's hunting and cultural traditions. Animals are scarcer and more expensive to reach when their habitat is destroyed by mining activities and they are forced to move into more remote

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524; Interview with Irene French, *supra* note 27 (providing observations from Moose Valley); Interview with Pam Tobin, *supra* note 569; Interview with Aaron Young, *supra* note 389 (making observations from Kwanika, Tom Lake, and Humphrey's Lake).

<sup>572</sup> Interview with Dolly Abraham and Kathaleigh George, *supra* note 77; Interview with Frank Williams, *supra* note 76; Interview with Frank Williams, Jr., *supra* note 548; Margo French EAA Testimony, *supra* note 486.

<sup>573</sup> Interview with Dolly Abraham and Kathaleigh George, *supra* note 77; Interview with Julie Jacques, *supra* note 62; Interview with Irene French, *supra* note 27.

<sup>574</sup> Interview with Julie Jacques, *supra* note 62.

<sup>575</sup> See, e.g., Interview with John David French, *supra* note 422; Interview with William Alexander, *supra* note 22; Interview with Julie Jacques, *supra* note 62; Interview with Marvin French, in Takla Landing, B.C. (Sept. 15, 2009).

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territory.<sup>576</sup> In addition, observing such sickly and deformed animals creates fear among members of Takla so that they do not want to eat the animals that they have always hunted. The decrease in hunting both limits community members' ability to pass this practice on to the next generation and reduces the number of food sources.<sup>577</sup> 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."<sup>578</sup>

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

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<sup>576</sup> Interview with Pam Tobin, *supra* note 569.

<sup>577</sup> Interview with Margo French, *supra* note 80; HEALTHY LAND, HEALTHY FUTURE, *supra* note 514, at 17. It in turn exacerbates the effects of the residential school system that educated Takla away from their ancestors and disrupted transmission of traditional knowledge.

<sup>578</sup> Interview with Pam Tobin, *supra* note 569.

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.<sup>579</sup>

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 porcupine quills as a symbol of their spiritual connection with the land, but the *Healthy Land* report states that “[I]t has been more than ten years since [a single porcupine] has been seen” on Takla's territory.<sup>580</sup> The loss of animal species such as the porcupine thus negatively affects a range of cultural practices and the possibility for passing them on to future generations.

## Health Concerns

Mining and the harms it causes raise health as well as environmental and cultural concerns for Takla. Community

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<sup>579</sup> Margo French EAA Testimony, *supra* note 486.

<sup>580</sup> HEALTHY LAND, HEALTHY FUTURE, *supra* note 514, at 18.

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members worry that mining on their lands could harm them directly, if they drink contaminated water or breathe tailings dust, or indirectly, as the decrease and poisoning of local wildlife forces them to transition to a diet of processed foods.

### *Illness*

Older mines, such as Bralorne-Takla, that have a history of chemical contamination create fears that new mines might continue to contribute to contamination of water and food sources, poisoning the Takla members who ingest them. Some members of Takla reported unusually high incidence of health problems—including cancer and stroke—that they fear might be related to local mining contamination. Tom Patrick, one of the *keyoh* holders affected by Keness South, stated, “Nobody got cancer a long time ago. . . . It’s because of the chemicals.”<sup>581</sup> 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 Bell’s Palsy (partial facial paralysis).<sup>582</sup> Three more have

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<sup>581</sup> Interview with Tom Patrick, *supra* note 524.

<sup>582</sup> E-mail from Irene French to David Loewen, J.P. Laplante, Karl Sturmanis, Robert Tomah (Nov. 3, 2007). For a description of

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 skin cancer.<sup>583</sup> One French member was diagnosed with leukemia at the age of ten.<sup>584</sup> Another three members have Type Two diabetes.<sup>585</sup> 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 said, "He was shocked. . . . He said that it was not normal and that something is

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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).

<sup>583</sup> Email from Irene French (Nov. 3, 2007), *supra* note 582. See U.S. TOXICOLOGICAL PROFILE FOR ARSENIC, *supra* note 540, 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 538.

<sup>584</sup> Email from Irene French (Nov. 3, 2007), *supra* note 582. See U.S. TOXICOLOGICAL PROFILE FOR MERCURY, *supra* note 513, at 74 (showing mercury exposure is related to leukemia).

<sup>585</sup> Email from Irene French (Nov. 3, 2007), *supra* note 582. See U.S. TOXICOLOGICAL PROFILE FOR ARSENIC, *supra* note 540, at 252 (showing arsenic exposure is thought to cause diabetes).

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definitely wrong.”<sup>586</sup> Such patterns of disease, which suggest a causal link with mercury and arsenic poisoning from abandoned mines, exacerbate Takla’s fears regarding future potential mines. The fact that the Bralorne-Takla Mine has remained contaminated for more than fifty years makes Takla skeptical about the expediency and efficacy of remediation at future mines, mines that might give their children and grandchildren similar health problems.

Takla, and First Nations in general, are particularly sensitive to contamination and disruptions of ecosystems because of their continuing dependence on traditional food sources. The Canadian government produces guidelines on water and soil contamination levels based on the type of occupancy of the land, but the current guidelines do not take aboriginal practices into account. The government should reconsider the appropriate guidelines for an aboriginal people, like Takla, who live off local wildlife and are substantially more connected to the land than an average residential population.<sup>587</sup> Using the existing guidelines, the

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<sup>586</sup> Email from Irene French (Nov. 3, 2007), *supra* note 582.

<sup>587</sup> HEALTHY LAND, HEALTHY FUTURE, *supra* note 514; Interview with Pam Tobin, *supra* note 569; Interview with Lisa Sam, *supra* note 34. *See also* CANADIAN SOIL QUALITY GUIDELINES, *supra* note 538, 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



CLRB determined that the mercury levels at the Bralorne-Takla Mine would only be dangerous if a person were actually consuming the contaminated soil.<sup>588</sup> It is unclear if CLRB used standards tailored to First Nations' behavior.

### *Change in Diet*

The cases of illness have contributed to Takla's fear of chemical contamination, and such fear of eating local foods and animals, whether a real or perceived danger, is one of the leading causes for Takla members to switch from traditional to processed foods.<sup>589</sup> 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.<sup>590</sup> Lisa Sam, a community health nurse and member of the nearby Nak'adzli First Nation, related

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HEALTH ORG. [WHO], GUIDELINES FOR DRINKING WATER QUALITY 22 (3d ed. 2008), *available at* [http://www.who.int/water\\_sanitation\\_health/dwq/fulltext.pdf](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).

<sup>588</sup> Telephone Interview with Brian Clarke and Gregg Stewart, *supra* note 325.

<sup>589</sup> Interview with Pam Tobin, *supra* note 569; HEALTHY LAND, HEALTHY FUTURE, *supra* note 514, at 5-6.

<sup>590</sup> Interview with Paul French, *supra* note 37.

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similar fears of contamination in her own community, and she noted that a departure from traditional food sources is correlated with a high incidence of diabetes and other health problems among First Nations people.<sup>591</sup> This phenomenon raises specific concerns for First Nations, including Takla, whose remote locations and high rates of unemployment make it very difficult to access and afford nutritious Western foods if they are forced away from their traditional diets.<sup>592</sup>

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<sup>591</sup> Interview with Lisa Sam, *supra* note 34. See also HEALTHY LAND, HEALTHY FUTURE, *supra* note 514, at 5; 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). 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.

<sup>592</sup> See HEALTHY LAND, HEALTHY FUTURE, *supra* note 514, at 5, 16-17. See also Richmond & Ross, *supra* note 591 (noting that along with decreased access to traditional foods, another dietary challenge for many remotely located indigenous communities

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 needs to be part of any solution by the government and industry moving forward. Government studies of the problem currently fail to acknowledge that First Nations have a special relationship with their land and its ecosystems; as a result they do not recognize that contamination levels acceptable in a residential area might not be acceptable in a First Nation's territory.

### **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.<sup>593</sup> Such sites

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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.)

<sup>593</sup> See generally YUKON TOURISM AND CULTURE, YUKON MINERAL EXPLORATION BEST MANAGEMENT PRACTICES FOR HERITAGE RESOURCES 6 (2010), available at

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represent an invaluable resource not only for Takla, but for other residents of British Columbia who want to learn about the history of the province.<sup>594</sup> Some companies make efforts to protect culturally important sites, but it is not clear that these efforts are sufficient. 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.<sup>595</sup> Hugh Samson of Serengeti said that his company goes beyond what is required by law to avoid archaeologically significant sites and hereditary trails,<sup>596</sup> but

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[http://www.tc.gov.yk.ca/pdf/Mineral\\_Exploration\\_BMP\\_for\\_Heritage\\_Resources.pdf](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).

<sup>594</sup> See generally Bjorn O. Simonsen, *Mining and Archaeological Resources: Conflicts and Mitigation Procedures*, PROC. OF THE 2<sup>ND</sup> 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.”).

<sup>595</sup> Letter from Ross Sherlock, Gold Fields, *supra* note 461. 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 59.

<sup>596</sup> Interview with Hugh Samson, *supra* note 266.

many companies that do not consult with local *keyoh* holders would not know to look for certain historical objects when conducting a heritage assessment.<sup>597</sup>

The Tse Keh Nay, which includes Takla, has argued that mining companies that report heritage sites in their environmental assessments 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.”<sup>598</sup> The Tse Keh Nay hired an independent archaeology team that recorded an additional eight archaeology sites in the proposed area.<sup>599</sup>

Some sites have particular personal importance to individuals, while others have significance to the broader Takla community. Raphael West said, “There are a couple of graves in our land, [so mining companies] have to be careful where they dig.”<sup>600</sup> Marvin French expressed particular concern over burial sites because his brother is buried on the

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<sup>597</sup> Interview with Ernie French, *supra* note 59; Interview with Raphael West, *supra* note 59.

<sup>598</sup> Western Mining Action Network, Tse Keh Nay, <http://wman-info.org/news/archive/tsekehney> (last visited May 9, 2010).

<sup>599</sup> *Id.*

<sup>600</sup> Interview with Raphael West, *supra* note 59.

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land, and he does not want the site disturbed.<sup>601</sup> At Bear Lake, the presence of graves makes the area very important to local residents. Bear Lake is also extremely important in Takla's oral history, which is one reason it is considered sacred by many Takla members and why they are adamant about preventing mining in those areas.<sup>602</sup> Such sites represent important areas for the community. As Marvin French said, "I'd like it all protected for my kids, grandkids, great grandkids."<sup>603</sup> The destruction of valuable heritage sites irrevocably destroys a piece of the Takla culture, one that future generations will never experience.

### Aboriginal Rights Analysis

Mining activities have caused a range of harms to Takla 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 also may threaten human health and endanger important cultural and heritage sites. In-depth and independent studies are

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<sup>601</sup> Interview with Marvin French, *supra* note 575. Marvin French reported that logging companies previously were operating very close to the site of his brother's grave.

<sup>602</sup> Interview with Lillian, Edna, and Antoine Johnny, *supra* note 22.

<sup>603</sup> Interview with Marvin French, *supra* note 575.

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.

Aboriginal rights clearly acknowledge that because of their close connection to the land, indigenous communities like Takla deserve special protection. This principle 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 it 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 the overall impacts may be detrimentally infringing on the rights of Takla to have an intact territory that is not irrevocably affected. 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 rights as an indigenous people to pass on its culture and the land to future generations.

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Furthermore, any uncertainty about how specific effects link to mining, however, 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 are ambivalent about allowing any mining activities on their traditional territory, all argue that if mining does take place, they should share in its benefits, such as revenue and employment opportunities. At present, Takla receives few of the benefits that flow from mining, exacerbating its feeling of injustice and concern about industry operations.

Many members of Takla say 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 call on companies to train community members and offer jobs at all stages of the mining process, from exploration to production to remediation.<sup>604</sup> 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.

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<sup>604</sup> Additional ideas, such as trust funds for current and future generations or support for cleanup efforts for abandoned mines, could also be considered.

### Revenue Sharing

Most members of Takla told IHRC that they want to receive a share of mining revenue and/or profits. As Tony Johnny put it, “They donate to things, so why can’t they donate *here*? They come in and take our stuff and rape our land.”<sup>605</sup> Marvin French said, “What’s theirs is ours too.”<sup>606</sup> Several people identified roughly half the revenue as Takla’s fair share.<sup>607</sup> Others proposed less than half because the 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.<sup>608</sup> Regardless, there is virtual consensus that Takla should receive some economic benefits for the burden of mining that they bear.

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<sup>605</sup> Interview with Tony Johnny, *supra* note 80.

<sup>606</sup> Interview with Marvin French, *supra* note 575.

<sup>607</sup> Interview with Jeanette West, *supra* note 27. *See also* Interview with Anita Williams, *supra* note 40; Interview with Aaron Young, *supra* note 389; Interview with William Alexander, *supra* note 22; Interview with Margo French, *supra* note 80.

<sup>608</sup> Interview with Marvin French, *supra* note 575; Interview with Raphael West, *supra* note 59.

*Corporate Revenue Sharing*

Revenue and profit sharing arrangements are not uncommon in Canada, especially at the production stage of mining.<sup>609</sup> According to industry experts, mining companies and First Nations often make agreements that economically benefit the community. Laureen 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.<sup>610</sup> Speaking of impact-benefit agreements (IBAs), Zoe Carlson of MABC said 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.”<sup>611</sup>

Takla has a “financial compensation agreement” with the company operating Kemess South, the large open-pit mine on Takla’s traditional territory, but it has drawn criticism from several community members. While Northgate began

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<sup>609</sup> 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>.

<sup>610</sup> Telephone Interview with Laureen Whyte, *supra* note 242.

<sup>611</sup> Telephone Interview with Pierre Gratton and Zoe Carlson, *supra* note 227.

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paying compensation in 2006,<sup>612</sup> 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.<sup>613</sup> West noted that the CDN\$1 million per year now provided is divided among Takla and two other affected First Nations. She described the amount as “peanuts—just to keep us quiet.”<sup>614</sup> 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.<sup>615</sup> “What they give you when they set up mines is not worth the damage to your environment,” he said.<sup>616</sup> 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.”<sup>617</sup> Northgate did not respond to requests from IHRC to comment on these agreements and Takla’s reported concerns.

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<sup>612</sup> KEMESS NORTH COPPER-GOLD MINE PROJECT, JOINT REVIEW PANEL REPORT SUMMARY 13, Sept. 17, 2007.

<sup>613</sup> Interview with Jeanette West, *supra* note 27.

<sup>614</sup> *Id.*

<sup>615</sup> Interview with Tom Patrick, *supra* note 524.

<sup>616</sup> *Id.*

<sup>617</sup> Interview with Lillian, Edna, and Antoine Johnny, *supra* note 22.

### *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 authorized provincial negotiators “to include revenue sharing with First Nations on new mining projects.”<sup>618</sup> According to a MEMPR staff member, negotiations with an individual First Nation or tribal council generally begin when it appears a new project or major expansion is close to receiving permits for production.<sup>619</sup> The details of each plan are to be worked out on a case-by-case basis, with “a strong focus on community development.”<sup>620</sup> “We are looking to have these agreements improve the social and economic conditions of the community,” the MEMPR staff member said.<sup>621</sup> David Moore of Serengeti said that in his view, revenue sharing is the provincial government’s responsibility because the

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<sup>618</sup> 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 28.

<sup>619</sup> 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).

<sup>620</sup> Press Release, B.C. Ministry of Energy, Mines and Petroleum Resources, *supra* note 618.

<sup>621</sup> E-mail from staff member #1 of Ministry of Energy, Mines and Petroleum Resources, *supra* note 619.

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government collects mineral royalties.<sup>622</sup> Takla's lawyer, Murray Browne, responded more skeptically. He noted that despite these commitments, nothing has changed for Takla yet: "We'll see if [government officials] actually do any revenue sharing."<sup>623</sup>

### *Factors in Setting up Benefit Sharing Arrangements*

Sharing revenue and/or profits among the many members of the Takla community is complicated because the community does not always agree on who should receive the benefits from projects and what form it should take.<sup>624</sup> Some members believe that the money should go directly to the *keyoh* holders, who are most directly affected.<sup>625</sup> Others suggested, however, that the money should go to the entire community. Councilor Kathaleigh George said that "everyone should benefit" and that she would like to see contributions to Takla's school, housing, or sports facilities.<sup>626</sup> Jeanette West went even further, saying that the

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<sup>622</sup> Telephone Interview with David Moore, *supra* note 410.

<sup>623</sup> Telephone Interview with Murray Browne, *supra* note 51.

<sup>624</sup> Interview with Dolly Abraham, *supra* note 369.

<sup>625</sup> Interview with John David French, *supra* note 422; Interview with Raphael West, *supra* note 59; Interview with Anita Williams, *supra* note 40; Interview with William Alexander, *supra* note 22.

<sup>626</sup> Interview with Dolly Abraham and Kathaleigh George, *supra* note 77. *See also* Interview with Tony Johnny, *supra* note 80.

money should go through the CSTC, so that all member First Nations could share it. In Takla, she said, it should be used for capital development, like housing, infrastructure, education, and business start-up money.<sup>627</sup> Takla also 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 set up trusts that can convert short-term revenue into more sustainable sources of funds.<sup>628</sup>

Another challenge is that much of the work on Takla's land is 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 between CDN\$16 and 17 million to date of "risk capital" at its Kwanika site,

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<sup>627</sup> Interview with Jeanette West, *supra* note 27.

<sup>628</sup> 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](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 Rehabilitation, and Benefit Sharing 16-18 (July 2007), available at [http://dolr.nic.in/workshop/workshop\\_manesar1.pdf](http://dolr.nic.in/workshop/workshop_manesar1.pdf).

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hoping that it will find enough mineral deposits to make a producing mine worthwhile.<sup>629</sup> 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.<sup>630</sup> 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.”<sup>631</sup> Lorne Warren said that CJL is “a family operation,” and that during exploration it does not have resources to share with First Nations. When there is a producing mine, he said, “the real money and jobs will come for local bands.”<sup>632</sup> Developing revenue sharing agreements would require CJL to set up a separate company for each site, and “the administrative costs would get astronomical.”<sup>633</sup> In addition, Lorne Warren believes that the First Nations are 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.”<sup>634</sup>

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<sup>629</sup> Telephone Interview with David Moore, *supra* note 410.

<sup>630</sup> *Id.*

<sup>631</sup> Telephone Interview with Chris Warren and Lorne Warren, *supra* note 225.

<sup>632</sup> *Id.*

<sup>633</sup> *Id.*

<sup>634</sup> *Id.*



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.

### **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.<sup>635</sup> “The most important thing,” said Victor West, “is who’s going to do [the work]? Are we going to be

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<sup>635</sup> Interview with Dolly Abraham, *supra* note 369; Interview with John David French, *supra* note 422; Interview with Jeanette West, *supra* note 27; Interview with Raphael West, *supra* note 59; Interview with Anita Williams, *supra* note 40; Interview with Marvin French, *supra* note 575.

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involved?”<sup>636</sup> Some Takla residents have found employment in the mining industry, but many report that there are too few jobs and that existing opportunities are only short term.<sup>637</sup> “Despite the progress [companies] claim is going on, our people are still unemployed,” Irene French told IHRC.<sup>638</sup> Industry representatives claim that a lack of training limits their ability to hire First Nations people, but members of Takla reported that even highly educated and certified people have trouble finding work. The lack of long-term employment is also inherent in the mining industry. Complicating matters further, community members who oppose mining are reluctant to work in the industry, and continue 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.

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<sup>636</sup> Interview with Victor West, *supra* note 24.

<sup>637</sup> Interview with Dolly Abraham and Kathaleigh George, *supra* note 77. *See also* Interview with Pam Tobin, *supra* note 569; Interview with Terry Johnny, *supra* note 22; Interview with Marvin French, *supra* note 575.

<sup>638</sup> Interview with Irene French, *supra* note 27.

*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 tries 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. I understand it's not my home; we're coming in to exploit a resource."<sup>639</sup> 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.<sup>640</sup> David Moore noted that since Kwanika has been operating for several years, the site has "a number of returning employees" from Takla.<sup>641</sup> Over a three-year period, Serengeti paid approximately CDN\$1.25 million to Kwanika employees from Takla.<sup>642</sup>

Takla members fill a variety of roles at Kwanika. During its 2009 visit, IHRC met several Takla members who worked at the exploration camp, one as a cook and others for a drilling subcontractor. David Moore added that drill

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<sup>639</sup> Interview with Hugh Samson, *supra* note 266.

<sup>640</sup> *Id.*

<sup>641</sup> Telephone Interview with David Moore, *supra* note 410.

<sup>642</sup> *Id.*

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helpers, catering staff, reclamation staff, line cutters, geophysical survey crews, and people who sample the drill core are usually from Takla, and that the company hopes to identify someone from Takla to work as the core technician next year.<sup>643</sup> In addition, he said, when the company anticipates a need for employees with particular skills, it notifies Takla so that community members can seek training.<sup>644</sup>

Representatives of CJL Enterprises also reported that they “try to involve locals” in their projects. They said that employing a local workforce makes financial sense because it saves them the money they would send transporting people from the cities to remote areas.<sup>645</sup> In 2007, forty-eight percent of CJL’s 200 hires were First Nations people.<sup>646</sup>

### *Challenges to Employment Benefits*

The criteria for and nature of mining jobs pose challenges to Takla receiving adequate employment benefits.<sup>647</sup> Mining companies and industry officials claim

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<sup>643</sup> *Id.*

<sup>644</sup> *Id.*

<sup>645</sup> Telephone Interview with Chris Warren and Lorne Warren, *supra* note 225.

<sup>646</sup> *Id.*

<sup>647</sup> 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

that one of the major challenges in hiring community members is their lack 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.<sup>648</sup> 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.<sup>649</sup> Chris Warren said the number decreased because of the lack of entry-level work for which the First Nations members were qualified.<sup>650</sup> Literacy may be a problem for some people as well.<sup>651</sup> Lorne Warren said he believes that having sixty-five percent of CJL employees from Takla—which is reportedly what Takla wants—is just not realistic.<sup>652</sup> Zoe Carlson of MABC said that while one of MABC's member companies would hire their entire work force from local First Nations if there were enough qualified people, mining companies across British Columbia face the same problem as CJL.<sup>653</sup> She said that “a gap exists” between the training

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result of the ready ability to bring workers from far away.”  
 KEMESS NORTH COPPER-GOLD MINE PROJECT, *supra* note 612, at 13.

<sup>648</sup> Telephone Interview with Chris Warren and Lorne Warren, *supra* note 225.

<sup>649</sup> *Id.*

<sup>650</sup> E-mail from Chris Warren, *supra* note 429.

<sup>651</sup> Telephone Interview with Chris Warren and Lorne Warren, *supra* note 225.

<sup>652</sup> *Id.*

<sup>653</sup> Interview with Pierre Gratton and Zoe Carlson, *supra* note 227.

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opportunities available to rural versus 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.<sup>654</sup> Like many rural communities, those in northern British Columbia may be experiencing a “brain drain,” where skilled and educated people migrate to urban areas.<sup>655</sup>

Some Takla members would like to see companies provide training and scholarships to help the community gain the skills needed for higher-paid and longer-term employment.<sup>656</sup> Margo French suggested that companies should start by 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.<sup>657</sup>

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.”<sup>658</sup>

Short-term employment is also inherent to the mineral sector. Jobs that do not require a high level of skill tend to be

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<sup>654</sup> *Id.*

<sup>655</sup> *Id.*

<sup>656</sup> Interview with Margo French, *supra* note 80.

<sup>657</sup> *Id.*

<sup>658</sup> Interview with Irene French, *supra* note 27.

the most short-term, and these are the types of jobs for which many Takla members are more qualified. Even if someone is hired for multiple seasons, the job lasts only as long as the summer. Takla residents, such as Terry Johnny, have done line-cutting work for mining companies, but this work takes from a few days to two weeks.<sup>659</sup> 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.”<sup>660</sup> Chris and Lorne Warren of CJL recognize the problems associated with the nature of mining work, but said that there is no way around the “limited field season.”<sup>661</sup> They pass 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 “spread the money out” so that each person works for a shorter amount of time.<sup>662</sup>

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

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<sup>659</sup> Interview with Terry Johnny, *supra* note 22.

<sup>660</sup> Interview with Aaron Young, *supra* note 389.

<sup>661</sup> Telephone Interview with Chris Warren and Lorne Warren, *supra* note 225.

<sup>662</sup> *Id.*

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member of a nearby First Nation.<sup>663</sup> David Radies noted that dependence on mining and other extractive industries creates a “boom and bust” economy—the money must be carefully invested in communities or it will simply disappear. Takla experienced this with the forestry boom in the 1980s.<sup>664</sup>

Given their reservations about having any mining on Takla’s territory, some members are ambivalent about mining jobs. Employment in the mineral sector is unsatisfactory to certain people because they feel it conflicts with their traditional way of life. John David French said he believes that the short-term job opportunities not only are insufficient, but also actually create 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.<sup>665</sup>

Irene French said, “Our people want work, but the only work available are these destructive jobs like mining.”<sup>666</sup> Her son Aaron Young felt guilty about his employment at

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<sup>663</sup> Interview with Tara Marsden, *supra* note 362; *see also* Interview with Marvin French, *supra* note 575; Interview with Tony Johnny, *supra* note 80.

<sup>664</sup> Interview with JP Laplante and David Radies, *supra* note 251.

<sup>665</sup> Interview with John David French, *supra* note 422.

<sup>666</sup> Interview with Irene French, *supra* note 27.



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.<sup>667</sup> For these members of Takla, mining jobs are not worth the price.

By contrast, people in Takla find the idea of employment in healing, rather than exploiting, the land appealing.<sup>668</sup> Radies noted the potential for job creation in environmental reclamation. The number of abandoned mining and exploration sites means that there is plenty of demand although money to make it happen is limited.<sup>669</sup> Government training and employment programs for First Nations people in this sector could serve a dual purpose: it would improve environmental study and cleanup by involving local First Nations, and it 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

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<sup>667</sup> Interview with Aaron Young, *supra* note 389.

<sup>668</sup> *See, e.g.*, Interview with Terry Johnny, *supra* note 22; Interview with JP Laplante and David Radies, *supra* note 251.

<sup>669</sup> Interview with JP Laplante and David Radies, *supra* note 251.

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training and hiring by, for example, identifying 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 right freely to dispose of its natural resources and to participate in decisions about how its land is used. Those rights should give 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 experiences significant costs from mining activity, and that these costs should be offset by some benefits to the community. 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 that includes benefit-sharing arrangements for those situations where mining does proceed. Such 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 not only present generation interests but also future ones.

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## **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 physical 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 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

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the burdens and benefits for communities like Takla. At present, there is a *de facto* presumption that mining activity is acceptable and that the indigenous community—in this case Takla—must intervene to stop such activity. Human rights would shift this presumption, placing the rights of Takla first. Indigenous communities 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 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.”<sup>670</sup> Activity, mining or otherwise, that intrudes on their protected areas thus should only occur when there is a meaningful participation in the decision-making processes and when the intrusion does not infringe on the rights of indigenous communities. 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 Takla’s diverse opinions about what should be done on mining are

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<sup>670</sup> Interview with Raphael West, *supra* note 59. See also Interview with John David French, *supra* note 422.

taken into account. Takla members posit one of two perspectives: they oppose all mining<sup>671</sup> or they accept limited mining with certain restrictions.<sup>672</sup> 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

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<sup>671</sup> Interview with Richard, Esther, and Carmelita Abraham, *supra* note 39. 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 59. 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 80. Marvin Abraham agreed, saying, "Why would we sell out and tear up the land over a job?" Interview with Marvin Abraham, *supra* note 36. 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 34.

<sup>672</sup> Many view mining as an unstoppable force but want something for the community in return. Several people made comments like Terry Johnny's: "We can't beat 'em, so we may as well just join 'em." Interview with Terry Johnny, *supra* note 22. 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 80; Interview with Aaron Young, *supra* note 389; Interview with Roy French, *supra* note 73.

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 36.

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what was the most widely shared sentiment in Takla regarding mining: that meaningful consultation should be a crucial part of such mining projects.<sup>673</sup>

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, rights 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.

Besides shifting the presumption, 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 like Takla. It also does not consider how bargaining is affected by the momentum that builds after exploration begins. Starting

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<sup>673</sup> See, e.g., Interview with Irene French, *supra* note 27.



consultation earlier in the process will help alleviate both of these problems. It will 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 is self-evident to members of Takla.<sup>674</sup>

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, Takla, and industry should, however, should come up with a plan and 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 plan at the government level, but it should work closely with affected First Nations to implement this plan, and if necessary, to revise it. Takla should also come up with a plan to use any expected revenues in a way that will benefit the community in the long-term, possibly giving

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<sup>674</sup> See, e.g., Interview with Marvin French, *supra* note 575.

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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 when possible, and to train community members so that they have the skills to work in the industry.

### **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.<sup>675</sup> 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.

Takla's input in decisions regarding the use of its land is of paramount importance to the realization of its people's fundamental human rights. Takla, like all First Nations, should have a much larger role in provincial land-use

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<sup>675</sup> Telephone Interview with Murray Browne, *supra* note 51.

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 claims registration and requiring deep consultation no later than at the exploration phase. Takla should have meaningful, not just token, involvement.<sup>676</sup> 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.<sup>677</sup>

Information-sharing is particularly important.<sup>678</sup> Access to better information about specific projects and their effects, or potential effects, on Takla's environment 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,<sup>679</sup> since Takla lacks the resources and expertise needed to conduct environmental or health impact assessments.<sup>680</sup> They should support baseline

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<sup>676</sup> Interview with Jeanette West, *supra* note 27.

<sup>677</sup> *Id.*

<sup>678</sup> Interview with David Alexander, Jr., *supra* note 80; Interview with Victor West, *supra* note 24; Interview with Anita Williams, *supra* note 40.

<sup>679</sup> Interview with Lisa Sam, *supra* note 34.

<sup>680</sup> Telephone Interview with Murray Browne, *supra* note 51.

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and project-specific studies. Takla also needs education on the physical and political aspects of mining.<sup>681</sup>

To facilitate consultation, Takla should decide on consistent procedures for communication with industry and the government. In particular, it should clarify with whom government officials and mining companies should consult, and who those parties are for a proposed project. Takla should also improve its 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 Takla about which members of their community the consultation process should target,<sup>682</sup> 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 Nation rights. If the extra burden changes the feasibility of a project, that expense simply reflects the true costs of mineral

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<sup>681</sup> Interview with Pam Tobin, *supra* note 569.

<sup>682</sup> Interview with David Alexander, Jr., *supra* note 80. *See also* Interview with Tony Johnny, *supra* note 80; Interview with Raphael West, *supra* note 59; Interview with Aaron Young, *supra* note 389; Interview with Margo French, *supra* note 80; Interview with Marvin French, *supra* note 575; Interview with Jeanette West, *supra* note 27. 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 362.

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 Takla's uses of its traditional territory. 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 Takla's territory is fragmented, incomplete, and has been gathered without sufficient participation of Takla 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

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and support. As Victor West 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.”<sup>683</sup>

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.

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<sup>683</sup> Victor West, Statement at Mines Meeting, Takla Landing, B.C. (Sept. 15, 2009). *See also* Interview with Irene French, *supra* note 27.

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