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MINING AND FIRST NATIONS

This background brief examines the evolution of First Nations participation in the B.C. mining industry.

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MINING AND FIRST NATIONS

In 1990, as the Oka Crisis dominated headlines across Canada, British Columbia was experiencing its own hot summer of First Nations protest.

Aboriginal groups turned to road and rail blockades to press their demands for recognition of aboriginal title and rights.¹ That same year, a Price Waterhouse study reported that uncertainty over unresolved First Nations land claims was holding up \$1 billion in economic development in British Columbia.²

Fast-forward nearly two decades and the political and economic landscape has changed. Many First Nations are signing agreements and taking an active role in resource development, including mining. They are also seeing mineral rights protected in recent treaties. The B.C. Minister of State for Energy and Mines, Gordon Hogg, has noted that mining is now the largest employer of the province's Aboriginal people.³ While non-natives are protesting exploratory drilling for a copper mine in Clayoquot Sound, the Ahousaht First Nation supports the project on its traditional territory.⁴

This background brief examines the evolution of First Nations participation in the B.C. mining industry.

MINING, THEN AND NOW

It was mining that spurred permanent non-native settlement in B.C. in the 1800s, but from the start it was contested by First Nations. While European settlers learned of coal on Vancouver Island in the 1830s, the Kwakiutl controlled its extraction and sale until 1849 when the Hudson Bay Co. built Fort Rupert and brought in Scottish miners to sink underground shafts.⁵ Governor James Douglas's 1851 treaty with two Kwakiutl tribes in 1851 purchased the land around the coal deposits for 150 pounds sterling (an amount equal at that time to about \$730 U.S. or about three times the average annual miner's wage).⁶

During the 1858 Fraser River Gold Rush natives tried to keep control of the gold. There were reports of attempts to stop miners from going up river and demands for payment from anyone working on grounds claimed as aboriginal territory.⁷ When gold was discovered near aboriginal settlements, First Nations mined it alongside the non-native prospectors.⁸ Tensions between aboriginals and non-natives led to killings on both sides and fears of a race war.⁹

Aboriginal reserves cover only a small portion of the territory claimed by B.C. First Nations, but they provide a hint of the extent of mineral potential on native-claimed lands.

Saleem H. Ali writes in his 2003 book, *Mining, the Environment and Indigenous Development Conflicts*, that 3,276 "mineral occurrences" were found on the 2,267 First Nations reserves in Canada in an inventory of on-reserve mineral potential by the Canadian Department of Indian Affairs and Northern Development in 1990. Of that number, 770 showed precious and base metal potential, and 184 were described as "of significant interest." Ali states there has been a high demand for assessment of mineral resources on First Nations lands.¹⁰

Despite the potential, as of 2002 there were no large metal mine operations on First Nations reserves in Canada, although sand and gravel operations were located on several B.C. reserves.¹¹

In a recent paper on mineral exploration conflicts in Canada's boreal forest, a map shows much of British Columbia's forested land covered with overlapping aboriginal land claims and mineral claims.¹² The report notes that under the "free entry" tenure system dating back to the gold rush era, miners acquired rights without any consultation or consideration for conflicting aboriginal claims. The situation began to change after the mid-1980s with recognition of aboriginal and treaty rights in Canada's Constitution and in the courts. While some companies negotiate with First Nations for concessions and benefits, others continue to stake claims and carry out exploration without prior consultation or agreement with affected communities.¹³

LEGISLATION AND LEGAL PRECEDENT

In British Columbia, management of resource rights on First Nations reserves was set out in a 1943 federal-provincial agreement, entitled the British Columbia Indian Reserves Mineral Resources Agreement. That agreement stipulated that 50 per cent of mining revenues from reserve lands went to the province, and 50 per cent to the Government of Canada in trust for the band. The interpretation of the term "revenues" by the province excluded mineral taxes, which was the major source of mining revenues to government. As a result of the reduced income potential, First Nations were reluctant to allow mining on reserves.¹⁴

The history of resource rights and revenues has been particularly complicated in the case of the Fort Nelson band, whose largest reserve and traditional land sits atop underground pools of natural gas. In 1961 when the B.C. Government transferred reserve lands to the Fort Nelson band under the terms of Treaty 8, it withheld the mineral rights despite insistence by the government of Canada and the band that those rights belonged to the First Nation.¹⁵ After several years of negotiation the 1977 Fort Nelson Indian Reserve Minerals Revenue Sharing Agreement, and the 1980 Act by the same name, assigned ownership and control of any coal, oil or gas resources to the province, and splitting profits and revenues between the province and the federal government.¹⁶ The agreement and legislation did not end disagreements over revenue-sharing with the band.¹⁷ Meanwhile in 2003 the Fort Nelson First Nation forged a joint-venture partnership with Ensign Drilling Services Group. Inc. of Calgary in B.C., giving the band a direct role in drilling for natural gas.¹⁸

Several legal decisions in the British Columbia's superior courts and the Supreme Court of Canada have reinforced the obligation of governments to consult and accommodate First Nations over proposed development on their traditional territories. Starting in 1973, decisions in the cases of *Calder*, *Guerin*, *Martin*, *Sparrow* and *Delgamuukw* advanced the legal definitions of aboriginal title and rights to land and resources.¹⁹

More recently, in 2004 the Supreme Court of Canada ruled that the Crown has an inescapable legal duty to consult and accommodate First Nations in a meaningful and timely way if the government has reason to believe its actions or policies could infringe on aboriginal rights or title. The ruling involved the Haida First Nation challenge of logging rights awarded to Weyerhaeuser Company Limited in the form of a renewal of

their tree farm license on Haida Gwaii (Queen Charlotte Islands.)²⁰ However, at the same time in a separate ruling involving the Taku River Tlingit, the Supreme Court ruled that adequate consultation and accommodation had occurred. The Taku River Tlingit First Nation wanted the cancellation of a permit for the Tulsequah Chief Mine in northwest B.C.²¹

In 2007, the B.C. Supreme Court judgment in the Tsilhqot'in case warned governments that resource tenures and other policies could be struck down if they are brought in without First Nations consultation.²²

NEW RELATIONSHIPS

In the mining industry, recent initiatives by industry and government have signaled a changed relationship with First Nations. The 1994 Whitehorse Mining Initiative was developed with the mining industry, federal and provincial governments, labour, first nations and environmental groups. It recognizes the principle that "Aboriginal peoples are entitled to opportunities to participate fully in mineral development at all stages of mining and associated industries and at all employment levels."²³ In 2001 the federal government revised its mining regulations based on the Whitehorse Mining Initiative, and the federal Department of Natural Resources (now Natural Resources Canada) eventually became "trustees of the process."²⁴ In 2005 the Association for Mineral Exploration British Columbia drafted its own "Ten Principles of Sustainable Relationships between the Mineral Sector and First Nations."²⁵

In 1989 a federal subcommittee was created specifically to identify issues and assist governments' efforts to increase aboriginal participation in the mining industry. The Intergovernmental Working Group on the Mineral Industry Subcommittee on Aboriginal Participation in Mining published annual reports which monitored barriers, incentives and best practices.²⁶

First Nations are identified as a cornerstone of the 2005 *British Columbia Mining Plan*, which outlined actions to help increase mining investment, jobs, training and benefits for First Nations and B.C. communities.²⁷ A 2007 update on the plan cited the creation of the B.C. Mining Job Strategy to help aboriginal and rural youth acquire skills and training for the 8,500 additional mining jobs anticipated by 2010.²⁸ In addition, a Provincial Coal Coordinator was appointed in 2005 to support First Nations and community partnerships with industry on new coal projects and exploration.²⁹

In 1991, when the British Columbia Claims Task Force set out its recommendations for a treaty negotiations process in British Columbia, it urged creation of interim measures agreements to manage competing First Nations and non-native interests in natural resources until treaties were reached.³⁰ More than 300 interim measures agreements had been approved by Cabinet by 2004. They included 69 treaty related measures, 145 economic development projects and 15 agreements for co-management of parklands.³¹

Some other examples of recent agreements between the B.C. government and First Nations include:

- Tk'emlups Indian Band and Skeetchestn Band (the Kamloops Division of the Secwepmec Nation [KDSN]). A Mining and Minerals Accord signed in March 2008 provides a framework for mineral exploration and

development, allows the KDSN to participate and benefit, and ensures that any mining development is environmentally and culturally sustainable.³²

- Blueberry River First Nation. A series of agreements with the B.C. government in 2006 and 2007 with this Treaty 8 member set out economic benefits arrangements for resource development as well as consultation and participation in coal, oil and gas projects.³³ By mid-2007 the economic benefits agreement provided the band more than \$6-million in revenues from resource activity. In March 2008, four more Treaty 8 First Nations signed an economic benefits agreement; the Doig River, Fort Nelson, Prophet River and West Moberly First Nations. The agreement provides an initial equity payment of \$13.3 million plus annual revenue-sharing payments of between \$3.4 and \$13.4 million for 15 years, depending on the level of oil and gas, mining and forestry activity in the area.³⁴
- Upper Similkameen Indian Band. A mining and minerals protocol agreement signed with the B.C. government in July 2006, guarantees consultation before any mining takes place in the band's traditional territory.³⁵

Meanwhile another type of arrangement known as an impacts and benefits agreement has become standard between resource companies and First Nations. In a guidebook published by the Association for Mining Exploration British Columbia, IBAs are defined as "a broad term used to describe various contractual commitments related to development of land or resources subject to Aboriginal rights."³⁶

Recent IBAs include a May 2008 impacts and benefits agreement between the Osoyoos Indian Band and Merit Mining Corp. The agreement includes guarantees of jobs, job training, business opportunities and revenue sharing for the band and its members. A portion of the band's revenue from the mine will be shared with other members of the Okanagan Nation Alliance.³⁷

The signing of impacts and benefits agreements is just one stage in a complex process that may or may not lead to actual exploration and development. In late 2007, expectations of royalties and hundreds of jobs for the Tahltan First Nation collapsed with the cancellation of the planned Galore Creek copper and gold mine in northwestern B.C.³⁸ The massive mine project would have been one of the first major metal mines to open in the province in nearly 10 years and was heralded as a symbol of a mining renaissance in British Columbia. Tahltan council Chief Curtis Rattray described the impact and benefits agreement with the Tahltan First Nation as setting a new standard for aboriginal title and rights issues.

Despite the changes, uncertainty over aboriginal land claims remains a significant deterrent to investment by mining companies, according to the Fraser Institute Annual Survey of Mining Companies.³⁹ In May 2008, Pierre Lebel, outgoing chairman of the Mining Association of B.C., said getting First Nations approval adds to the complexity of bringing mines into production.⁴⁰ Rising global demand and market prices may outweigh the disincentives for companies, with mining industry earnings at record levels in recent years.⁴¹

MINING AND TREATIES

The recognition of mineral rights predates British Columbia's modern treaties. The 1993 Nunavut Land Claims Agreement includes mineral rights to 35,257 square kilometers of Inuit-owned land, and a share of federal government royalties from oil, gas and mineral development on Crown lands.⁴²

Recent B.C. treaties recognize First Nations interest in the minerals under their settlement lands by assigning ownership or providing compensation for their exclusion. The 1998 Nisga'a Final Agreement recognized the Nisga'a Nation as owners of all mineral resources on or under Nisga'a lands.⁴³

The 2007 Tsawwassen First Nation Final Agreement recognizes the First Nation as owners of subsurface resources except for the mines and minerals under English Bluff. The agreement provided \$2-million dollars in compensation for those mineral rights, which were to be transferred by the federal government to the province of British Columbia.⁴⁴

The Maa-nulth First Nations Final Agreement states that each First Nation in the Maa-Nulth treaty group owns subsurface resources on or under its settlement lands, with the exception of one privately owned parcel of subsurface resources within the Uchucklesaht Tribe lands.⁴⁵ The Maa-nulth First Nations have the right to set fees, rents, royalties and other charges, except for taxes, for exploration, development and production of mines and minerals and other subsurface resources.

In their 1988 book, *After Native Claims?* Frank Cassidy and Norman Dale wrote that, historically, aboriginal involvement in B.C. resource development tended to take the form of protest, not participation. However, they predicted, "unequivocal opposition to development may not be the way of the future after comprehensive claims settlements."⁴⁶

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