

BC MINING LAW REFORM



B.C. Fails to Meet Indigenous Consent Standard for Mining—8 recent cases

November 2021

Introduction

The passing of the *Declaration on the Rights of Indigenous Peoples Act* (DRIPA)¹ by the B.C. Legislature in November 2019 was supposed to be the start of a new chapter in the nation-to-nation relationships between Indigenous peoples and the provincial government. DRIPA legally requires the provincial government to "take all measures necessary" to ensure that B.C.'s laws are consistent with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).



KAMLOOPS STK'EMLUPSEMC TE SECWEPHEMC NATION AT PIPSELL JACKO LAKE. PHOTO: STK'EMLUPSEMC TE SECWEPHEMC NATION

But two years on, implementation of the standard of Free, Prior and Informed Consent (FPIC) of Indigenous Nations before mining activity can take place on their territories—one of the bedrock principles on which UNDRIP is based—is still as distant as it was in 2019. Indigenous Nations across B.C. too often remain locked in long and costly legal battles or adversarial relationships with mining companies that continue to behave as if DRIPA doesn't exist.

While B.C.'s mining legislation as a whole continues to allow mining companies to operate with little regard for Indigenous rights, the *Mineral Tenure Act*²—which has its origins in the colonial gold rush days of the 1850s—

is arguably the worst offender. In over 150 years, it has not been updated to reflect Indigenous rights.³

Many jurisdictions have reformed their mineral staking regime in the last two decades, while others have seen legal challenges that support FPIC. Notably, in 2013, by denying to hear an appeal brought forward by the Yukon government, the Supreme Court of Canada maintained the Yukon Court of Appeal's decision stating that the government has a duty to consult with the Ross River Dena Council before the recording of a mineral claim.⁴

As currently written, the *Mineral Tenure Act* allows mineral claims to be staked in a First Nation's land by registering them automatically online, without the Nation's consent or even notification that it has happened. This generally means that, by the time a First Nation finds out about a mining proposal, the underlying mineral rights have already been granted by B.C. without any consultation. When First Nations object to mining activity on their territory, the province then has few tools to get rid of the mineral claims, except to buy them back based on their speculative value to create a park. This can be prohibitively expensive and may not be appropriate if the land use goals for the area do not include creating a park.⁵

The B.C. government made a great play of how DRIPA would position the province as a leader in the implementation of UNDRIP. This should mean FPIC is required for all stages of decision-making about mining projects that may affect an Indigenous Nation or its territories, from the granting of mineral rights to the decision on whether to proceed with a project to the conditions under which a project is designed, implemented, monitored, evaluated, and reclaimed.

The eight examples in this document illustrate how mining interests are prioritized under B.C. law even over the objection of First Nations and how FPIC remains elusive even after passage of DRIPA by the B.C. government. This is especially concerning given that in 2020 alone, approximately 5,000 new mineral claims (1.9 million hectares) and approximately 1,400 new placer claims (63,000 hectares) were acquired without First Nations' knowledge.⁶

1. The Gitxaʼa Nation challenges B.C.'s mineral claim regime in court

On October 25, 2021, the Gitxaʼa Nation filed a legal challenge to force B.C. to withdraw mineral claims on their land, to which they had not consented.⁷ Specifically, the Nation is seeking to overturn multiple mineral claims granted by the province between 2018 and 2020 on Banks Island in Gitxaʼa territory, without the Nation's consent, consultation, or even notification. The Nation is also asking the court to suspend claim staking in Gitxaʼa territory.

The Nation argues that the colonial "free entry" system of mineral claim staking is unconstitutional and breaches the Crown's duty to consult and accommodate. The case also argues that B.C.'s free entry mineral claim system is inconsistent with UNDRIP, directly confronting the failure of British Columbia to align its mining laws with its commitments made through DRIPA.

The court hearings are expected to begin in 2022. Accounting for potential appeals, this fight could last years, unless the B.C. government accepts its obligations to the Gitxaʼa and updates its mineral tenure law to reflect Indigenous rights.

“In an era where the provincial government seeks to score political points by trumpeting its commitment to reconciliation and UNDRIP, it is deeply disappointing that B.C. continues to stand behind the colonial relic that is the Mineral Tenure Act. Gitxaʼa is going to court to require B.C. to live up to its obligations, since the province does not seem to be willing to do so on its own. One way or another, B.C.'s "free entry" mineral tenure regime deserves to become history.”—Hereditary Chief Clarence Innis⁸

“Gitxaʼa is still dealing with the damage caused on Banks Island by the Yellow Giant Gold Mine, and it all started with a mineral claim.”—Chief Councillor Linda Innes⁹

2. Nuxalk Nation evicts Juggernaut Exploration in absence of government consultation



NUSKMATA JACINDA MACK SPEAKS ON BEHALF OF THE NUXALKMC STATALMC AT A PROTEST AT COP26 IN GLASGOW IN NOVEMBER 2021. PHOTO: LMN-EARTHWORKS

In August 2021, the Nuxalk Nation issued an eviction order to Juggernaut Exploration. "Our lands have been illegally occupied by British Columbia and Canada in their various forms since the time of the gold rush," said Nuskmata Jacinda Mack, speaking on behalf of the Nuxalkmc Statalmc, the nation's hereditary leadership. "It's our duty and our responsibility to protect these lands—so that's what we're doing."¹⁰

Despite opposition from the Nuxalk, Juggernaut received two five-year permits from the province in November 2020 and March 2021, authorizing exploratory work at a pair of sites near the town of Bella Coola. One permit for

exploratory mining work is on Qw'miixw (Mount Pootlass), a glaciated peak overlooking the community and above the Nutciets'kwani (Necleetsconnay) River, which drains into the Bella Coola River where it meets the Pacific Ocean. The estuary is protected as a conservancy and is an important habitat that supports fish, birds, and wildlife.

The Nuxalk Nation was not consulted or informed about these mineral exploration permits in advance. They were only aware exploration had begun when community members noticed an influx of workers in the territory and an increase in helicopter flights as the company shuttled people and equipment into the mountains. "The helicopters are going every single day, several times a day," Mack said. "They obviously have resources but they have not reached out to the community—Indigenous or not—in any way and people were shocked when they found out how advanced it was."

In a statement addressed to the federal and provincial governments, the Stataitmc made it clear that mining is not permitted in Nuxalk territory.¹¹ "We have not and do not consent to any mining activities including exploration. We do not recognize tenures/permits issued by Canada or British Columbia."

This isn't the first time the Nuxalk Nation has voiced opposition to resource extraction on the territory. In early 2019, the hereditary leadership issued a letter of opposition to Goliath Resources, a Toronto-based company prospecting for gold in the area.

"Our fight really isn't with the company," Mack said. "It's with the province for issuing these permits. Anybody who has any type of moral fibre to them will understand that this is wrong, and the way that they're going about it is wrong."

3. B.C. not yet recognizing Gitanyow Nation's Indigenous Protected and Conserved Area to stop mineral exploration



In September 2021, the hereditary chiefs of the Gitanyow Nation declared *Wilp Wii Litsxw Meziadin* an Indigenous Protected and Conserved Area to immediately protect 54,000 hectares of land and water in their territory.¹²

Although the Gitanyow have been working with the province to protect the Meziadin watershed for more than four years, the hereditary chiefs felt the process was not moving quickly enough. The glacial-fed creek

systems that provide ideal habitat for the fish have their headwaters in the northern Coast Mountains, where mineral exploration companies are staking claims and looking for new opportunities as glaciers recede, revealing potential deposits of valuable minerals. There are six companies with active claims above the salmon habitat.

B.C. has so far refused to recognize the Indigenous Protected and Conserved Area and withdraw mineral tenures in it. *"The free entry system in B.C. is archaic, it's outdated, and it's really the colonial legacy in British Columbia,"* explains Naxginkw Tara Marsden.¹³ The Gitanyow are not against mining, Marsden notes, but they're not willing to risk losing one of the few viable salmon populations left in the watershed.¹⁴

4. Lake Babine Nation: Government failing to act on ongoing damages from Glencore's closed mines

In February 2021, the Lake Babine Nation and SkeenaWild Conservation Trust issued a report outlining major deficiencies in B.C. government regulations and monitoring of Glencore's two decommissioned metal mines in the heart of Lake Babine Nation's territory.¹⁵ Now owned by Glencore, the Bell Mine, which operated from 1972 to 1992, and the Granisle Mine, which operated from 1966 to 1982, have been discharging wastewater contaminated with metals into the north end of Babine Lake since the mines started.



BELL MINE IN THE LAKE BABINE NATION TERRITORY. PHOTO: DANIEL MESEC / SKEENAWILD CONSERVATION TRUST

Babine Lake—the longest natural lake in the province—provides critical nursery habitat for 30 spawning populations of sockeye salmon. About 90% of all sockeye salmon in the Skeena watershed start their lives there. For thousands of years, the Lake Babine people operated salmon weirs on the lake and Babine River, but in 1906, the federal government banned this traditional fishery.¹⁶ The Lake Babine Nation was not able to bring it back until 2010.

The report with SkeenaWild found that current permits regulating discharges of mine-impacted water from the decommissioned mines are limited in extent

and stringency, and allow high concentrations of many harmful metal contaminants to be discharged directly into the lake.¹⁷ For instance, bottom-dwelling fish near the mines have persistently elevated levels of copper in their bodies, which can affect their ability to smell—a sense they rely on to find food and avoid predators. Copper concentrations in lake trout tissues have also worsened in recent years, and the most polluted fish are always found closest to the mines.¹⁸ Furthermore, the aquatic monitoring program of Babine Lake contains significant gaps that severely limit the monitoring information obtained, making it nearly impossible to detect and track mine-related aquatic impacts, especially to sockeye salmon.

The Lake Babine Nation, SkeenaWild, and other organizations have been urging the province to tighten regulations and strengthen monitoring of the mines. The Bell and Granisle mines are emblematic of a much bigger problem in B.C. According to a map recently published by SkeenaWild and the BC Mining Law Reform Network, 116 known or potentially

contaminated mine sites threaten water, wildlife, and communities across the province.¹⁹ The map shows 173 coal and metal mines, both active and inactive, and includes all of B.C.'s major mines and historical mines with high levels of ore extraction. Indigenous and local communities are often left with the pollution impacts from legacy mine sites with no remedy options.

The Bell and Granisle mines continue to be a disaster for the Lake Babine Nation long after their closure. Implementation of DRIPA needs to happen for the whole lifecycle of mines.



BLUE RUNOFF FROM THE BELL MINE IN THE LAKE BABINE NATION TERRITORY.
PHOTO: DANIEL MESEC / SKEENAWILD CONSERVATION TRUST

5. B.C. fails to recognize Tla-o-qui-aht Nation's Tribal Parks to protect land and water from mining



In 2013, Imperial Metals began exploring its mineral claims for the Pandora gold mine in the Tranquil Creek watershed near Tofino.²⁰ In response, the Tla-o-qui-aht Nation declared their entire 103,000-hectare territory, including Tranquil Valley, as a series of Tribal Parks, *Onadsilth-Eelsukis*, and therefore off limits to mining.²¹ Despite this declaration, the B.C. government has still not acknowledged the right of the Nation to declare their territory off limits to mining.

The Nation's moratorium was supported by the Town of Tofino, the City of Victoria, and many environmental groups. However, the province responded that the declaration of a mining moratorium by the Nation does not, in their view, "have any legal enforceability," and requires a decision by the

legislature.²² Ten years later, this position has not been reversed by B.C. To this day, Imperial Metals continues to conduct exploration based activities on the site.²³

Consultation with the Tla-o-qui-aht primarily took the form of sometimes-tense letters and meetings between the Nation and the provincial government. The Nation reported that the government was not concerned with actually securing their consent. When the exploration started, members of the Nation repeatedly asked Imperial Metals workers to leave their territory.²⁴

Imperial Metals also holds claims on Catface Mountain in Clayquot Sound, which were also vigorously opposed by the Ahousat First Nation and the Town of Tofino.²⁵ In August 2014, a catastrophic failure of a tailings dam at Imperial Metals' Mount Polley Mine resulted in the release of 24 million cubic metres of contaminated mine waste into Hazeltine Creek and Quesnel Lake,²⁶ raising the cause for concern among First Nations on whose territory the company holds further claims.

On October 14, 2021, the Tla-o-qui-aht Nation and B.C. signed a *hisiikcumyin* Pathway Agreement that will guide future reconciliation negotiations between the Tla-o-qui-aht and the province on areas ranging from sustainable land stewardship to protection of cultural heritage.²⁷ As one of the priorities, the parties to the agreement will "explore tribal parks management and stewardship", however the underlying issue of mineral tenures remains.²⁸

6. T̓silhqot'in Nations' opposition to mines falls on B.C.'s deaf ears



MEMBERS OF THE T̓SILHQOT'IN NATION AT THE DASIQOX TRIBAL PARK (FISH LAKE) WHERE TASEKO AIMS TO DEVELOP THE NEW PROSPERITY MINE.
PHOTO: GARTH LENZ, PROVIDED BY FRIENDS OF NEMAH VALLEY

For more than thirty years, the T̓silhqot'in Nation has struggled to protect their lands and waters from mining companies, including most notoriously, the Hunter Dickinson's Taseko Mines Limited and Amarc Resources.²⁹ With the 2014 Supreme Court of Canada decision recognizing aboriginal title to a portion of T̓silhqot'in Nation territory leading to various government-to-government negotiations, three main mining projects continue to drain their time and resources given B.C.'s archaic mining laws.

- A. The **Prosperity/New Prosperity Mine** was first proposed by Taseko in 1995. Despite the T̓silhqot'in Nation's vigorous opposition, B.C. has continued to approve mining claims and environmental assessments on their lands. The federal government turned the project down twice at the environmental assessment stage and were unsuccessfully sued by Taseko, but the province continued to approve it regardless. Taseko Mines embroiled the Nation in over a decade of lawsuits with no shift in B.C. mining laws or consent requirements.³⁰

- B. To protect parts of their territory outside their title area from mineral development, the T̓silhqot'in established the Dasiqox Nexwagwež?wen Tribal Park in 2016. However, while the Park was being considered, the province granted a large swath of mineral claims to Amarc Resources,³¹ another Hunter Dickinson company. Despite numerous protests and letters from the T̓silhqot'in Nation Government (TNG), the province has not withdrawn the claims or recognized the Tribal Park.
- C. The **Gibraltar Mine**, also owned by Taseko, is the second largest open pit copper-gold mine in Canada, discharging untreated effluent into the Fraser River near the community of ʔEsdilagh (Alexandria) and adjacent to traditional fishing sites of the ʔEsdilagh First Nation, a T̓silhqot'in nation member.³² The mine was reopened under Taseko ownership in 2004 when the company said it would not be asking for permits for effluent discharges into the Fraser River. But with its constant expansion, Taseko has requested changes in its discharge permit three times, including most recently in 2019. The B.C. Ministry of Environment and Climate Change Strategy authorized the 2019 permit amendment for a 50% increase in untreated discharge from the tailings pond directly into the Fraser River.³³ The Nation called on the Environmental Appeal Board to revoke or amend the 2019 amendment to Taseko's discharge permit, arguing that B.C. failed to consider T̓silhqot'in laws and principles in the consultation and accommodation process associated with the 2019 amended permit, and failed to adequately protect the environment in authorizing the permit amendment. The virtual hearing took place the week of March 15-19, 2021 with ʔEsdilagh and TNG presenting their case before the B.C. Environmental Appeal Board.³⁴

“In May of 2020, ʔEsdilagh First Nation enacted the ʔElhdaqox Dechen Ts'edilhtan (Sturgeon River Law),³⁵ which is the written version of the Nation's T̓silhqot'in Dechen Ts'edilhtan (traditional laws) which have existed since time immemorial. This law states that all who use waters in the ʔEsdilagh caretaker area must keep those waters clean for future generations, and non-degradation of these important waters (through, for example, use for dilution) is therefore not permitted.”³⁶



DASIQOX TRIBAL PARK (FISH LAKE) IN THE T̓SILHQOT'IN NATION TERRITORY. PHOTO: JOE FOY / WILDERNESS COMMITTEE

7. Union of British Columbia Indian Chiefs leads coalition in opposition to mining claims in the transboundary Skagit Watershed

In the 1980s when the Manning Park boundary lines were redrawn, an area was left out of the park because of mining interests.³⁷ On one side of the area is Manning Park and on the other is Skagit Valley Provincial Park.

These headwaters are unceded Indigenous lands. Upper Skagit, Swinomish Stó:lō, Syilx and Nlaka'pamux people have accessed the Skagit headwaters forests, meadows and streams since time immemorial for essentials such as clean water, wild foods, ancient trees, and other cultural materials needed for medicines and spirituality. None of them were consulted when the mining claims were issued for the "doughnut hole" between the parks.

Imperial Metals now owns the mining tenures and wants to conduct advanced exploration there.³⁸

“The proposed mining in the Skagit headwaters poses a significant and devastating threat to our inherent Indigenous Title and Rights and the fish, wildlife and natural and cultural resources on which our existence is based. We call on the British Columbia government to honour their obligation to our people and preserve benefits for all of us who call British Columbia home, and exercise their authority to deny this permit. We need a provincial government that will stand up for the environment and uphold the UN Declaration on the Rights of Indigenous Peoples.”

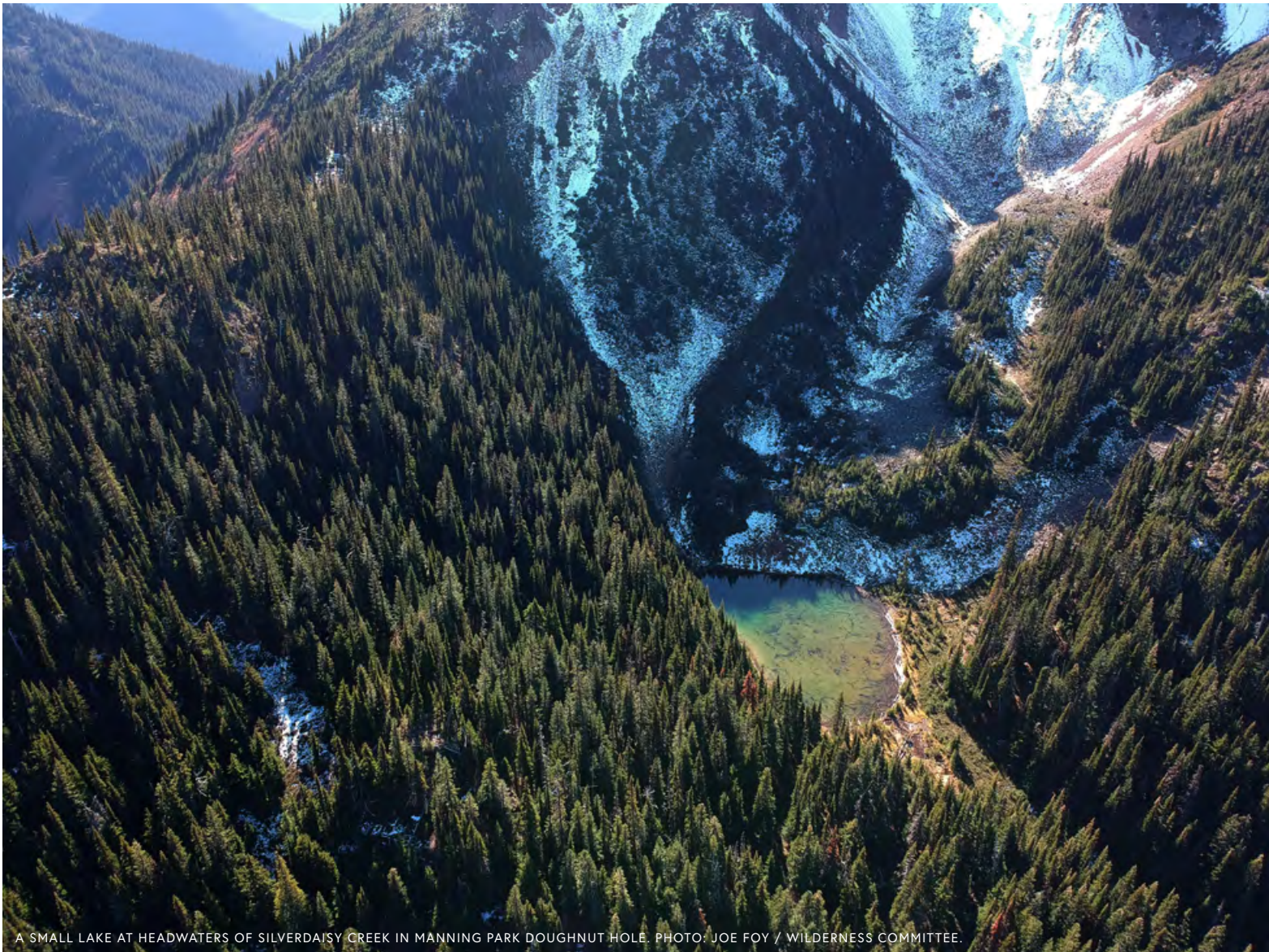
—Grand Chief Stewart Phillip, President of the Union of British Columbia Indian Chiefs³⁹

The Skagit Watershed is a transboundary issue. Mining could impact recreational and economic benefits on the Canadian side of the border, as well as fisheries and water quality in the U.S. as the Skagit River flows through Washington State, winding through the scenic North Cascades National Park, the Mt. Baker Snoqualmie National Forest and through the renowned Skagit

River Valley before reaching the Puget Sound. The Skagit River provides one third of the freshwater inputs to the Puget Sound and supports the largest populations of threatened steelhead and chinook salmon in the Puget Sound and the largest run of chum salmon in the contiguous U.S.⁴⁰

In Washington State, several Tribes formally opposed the mining permit because it could threaten their hard-fought treaty rights for hunting, fishing, and gathering in the Skagit basin.⁴¹ The Swinomish Indian Tribal Community passed a formal resolution opposing the mine.⁴²

Due to the pressure on both sides of the border, B.C. banned logging in the area in 2019 but has not resolved the tensions over the mineral claims.⁴³



A SMALL LAKE AT HEADWATERS OF SILVERDAISY CREEK IN MANNING PARK DOUGHNUT HOLE. PHOTO: JOE FOY / WILDERNESS COMMITTEE.

8. Ktunaxa Nation stands firmly against massive expansion of B.C.'s largest coal mine



ELK VALLEY COAL MINE. PHOTO: GARTH LENZ

For fifty years, the Ktunaxa Nation has seen its land and waters decimated by Teck's Fording River coal mine in the Elk River Valley, a mine for which they never gave their consent in the first place. In May 2020, the company proposed to extend the mine life by creating a new one beside it.⁴⁴ The mineral tenures enabling the mine expansion were granted without Ktunaxa consent.

The expansion project would see the construction of another mine, converting an additional 2,500 hectares into open, terraced pits and waste rock piles and extending the life of the mine for decades.⁴⁵

The Ktunaxa are deeply concerned about this expansion. In an official comment submitted to the Impact Assessment Agency of Canada during the review of the Initial Project Description, the Ktunaxa Nation Council wrote:

“Based on Ktunaxa knowledge, the proposed Project footprint includes unique, regionally important, and largely intact environmental features, including critical sheep and ungulate habitat. The proposed Project footprint also includes related and preferred areas for practice of Ktunaxa rights including hunting, habitation and transportation (foot and horse trails). These activities within the Project footprint connect to a broader Ktunaxa cultural landscape that includes nearby mountain passes and that support deep past, current, and future Ktunaxa connections with lands and resources.

Disturbance caused by the existing coal mines has resulted in the displacement of Ktunaxa practices including in the Project area, and intensifies the importance of the Project area for Ktunaxa use and stewardship. At present, the KNC believes that the potential Project effects on Ktunaxa title, rights and interests could be extraordinary—and at a minimum will likely be significant. Furthermore, the potential impacts may not be mitigatable or easily offset. Through other regional work, the KNC has established both formal and informal planning goals and objectives for the Project area. The Project would extend the spatial and temporal disruption of Ktunaxa practices in Qukin ?amak?is for generations to come.”⁴⁶

Salish and Kootenai Tribes in the U.S.⁴⁷ and the U.S. Environmental Protection Agency⁴⁸ both expressed opposition to the mine expansion due to concerns about downstream consequences.

On March 26, 2021, Teck Resources announced that its subsidiary, Teck Coal Limited, had pled guilty to two charges under the federal *Fisheries Act* relating to discharges of selenium, nitrate, and calcite from its steelmaking coal operations into the Elk Valley watershed.⁴⁹ Teck was first charged back in 2012 when it was discovered that waste rock from the company's Fording

River and Greenhills coal operations was leaching pollutants and causing significant negative effects to local aquatic wildlife. Under the plea, Teck will pay a total of \$60 million for the two charges, the largest fine ever paid under the *Fisheries Act*. Teck will not face charges related to further pollutant discharges from 2013 to 2019.⁵⁰

The Ktunaxa Nation Council's response stressed the importance of the decision to the community:

“ There have been significant impacts to wu?u (the water) in Qukin ?ama?kis (Elk Valley) due to coal mining, and those impacts continue to grow today with Teck Coal Limited's operations. This case, the charges laid, and the fines assessed, are steps in acknowledging the harm that has been and continues to be done to ?amak & wu?u (the land and water) by development impacts done without Ktunaxa consent.”⁵¹



Conclusion

At the core of various mining conflicts in British Columbia is the outdated *Mineral Tenure Act* that is clearly inconsistent with DRIPA. The cases above, such as the Nuxalk, Gitanyow and Gitxaala, clearly highlight this inconsistency. Other examples exist, including the Tahltan Nation evicting Doubleview Gold for not respecting their own Indigenous laws,⁵² as well as the Stelat'en and Nadleh Whut'en First Nations, who had to go to court to get the government to recognize their rights to regulate the impacts of surface waters on their own territories from the leaking Endako Mine.⁵³

While several years of conflicts and the passing of DRIPA in 2019 have led to a number of government-to-government agreements, including with the Lake Babine Nation and Tla-o-qui-aht Nation, there remain core inconsistencies between DRIPA and B.C.'s mining laws and practices. To avoid future conflicts and uncertainty for all parties, the B.C. government must prioritize reforming these laws to be aligned with DRIPA throughout the lifecycle of mines.



CEREMONY AT PIPSELL JACKO LAKE. PHOTO: STK'EMLUPSEMC TE SECWEPENC NATION

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