

TOO MUCH AT STAKE

THE NEED FOR MINERAL TENURE REFORM IN BRITISH COLUMBIA



ecojustice

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Executive Summary

In British Columbia, mineral tenure is regulated under a ‘free-entry’ system – a remnant of the frontier days of the 1800s. With free-entry, mineral prospectors are permitted to enter almost any land, including private land, and claim exclusive rights to subsurface resources. Where a mineral claim is staked, the government has no discretion to refuse it – even if, for example, the claim is made in an ecologically sensitive area. What’s more, the free-entry system grants mineral prospectors automatic rights once a claim is staked, including a prioritized right to access and develop their mineral claims.

Free-entry translates into a “two-zone” mining regime in B.C. where in every area of the province mineral activities are either prioritized or prohibited. Under this system, mineral exploration is prioritized in the vast majority of the province with only about 13 per cent of land off-limits to mining and contained within “protected areas.” Examples of “protected areas” where mining activities are restricted include provincial parks, conservancies, ecological reserves, mineral and coal land reserves, and areas subject to an order prohibiting mining under the *Environment and Land Use Act*.

There a number of serious shortcomings with free-entry and B.C.’s two-zone mining regime. For one, free-entry undermines land use planning by prioritizing mining activities and permitting them to take place absent any restrictions whatsoever, even in areas recognized as having significant environmental value. For another, free-entry grants mineral prospectors automatic rights without first consulting with local First Nations, so that the constitutionality of free-entry has even been called into question. In addition, these shortcomings have become more apparent since the B.C. government switched over to electronic map-staking in 2005, greatly simplifying the process for staking a mineral claim. As a result of this switch, the total area staked in the province increased from 1.1 million hectares in 2004 to 5.2 million hectares in 2008. This massive increase will inevitably lead to additional land use conflicts.

In short, the out-dated free-entry system prioritizes mining activities throughout the vast majority of the province to the detriment of other interests, including preserving the natural environment. It is time for the mineral tenure system in B.C. to be brought into the modern era. At the very least, the mining industry should be put onto a level playing field with other interests. Prior to enabling mineral prospecting and exploration, a modern tenure system must ensure that: the environmental impacts of the proposed prospecting or exploration are assessed; consent of local First Nations is obtained; relevant land use plans are complied with; consent of any private landowners is obtained; and that various other interests in the land are not undermined.

BC’s free-entry system prioritizes mining activities throughout the vast majority of the province to the detriment of other interests, including preserving the natural environment.



Introduction

Society has reaped tremendous benefits from the mining and development of subsurface mineral resources. At the same time, industrial activities must be conducted in a manner that is sustainable, does not unduly harm the natural environment, and does not pass environmental burdens (such as pollutants and contaminated sites) onto society at large. The mineral tenure system – i.e. the legal regime governing where mineral exploration can and cannot occur – must not be permitted to undermine efforts to meet these goals. Unfortunately, the free-entry system for mineral tenure in BC does exactly that. It allows a “two-zone” mining policy that opens the entire province, outside of already existing protected areas, to mineral exploration. This includes private lands, ecologically sensitive lands, lands proposed for protection, lands that do not yet have a completed land use plan, lands of significance to First Nations, and so on.

Moreover, mineral exploration is on the rise in B.C. This substantial increase is largely due to the province’s shift in 2005 from ground staking (where a prospector stakes a claim in the ground), to map staking (where a claim is registered electronically). The adoption of electronic map staking resulted in an immediate four-fold increase in the amount of land staked in the province.¹ As a result, absent mineral tenure reform, conflicts between mining activities and other land interests are likely to increase in BC.

This report discusses the free-entry system in B.C., including its historical roots, how the system works, as well as its problems and shortcomings. It then examines the legal mechanisms available in B.C. to put areas off-limits to mining activities. The report then examines two significant wilderness areas as case studies – the Flathead Valley and the Muskwa-Kechika Management Area – to demonstrate some of the problems of the free-entry system. Finally, the report concludes with a set of recommendations for the reform of mining law in B.C.

It is time for BC’s outdated mineral tenure system to be brought into the modern era. At the very least, the mining industry should be put onto a level playing field with other interests.

Environmental Impacts of Mining



The more intensive exploration activities can contaminate both surface water and groundwater, including with the use of drilling muds and drill-hole lubricants.

Mining and mineral exploitation takes place in a mining sequence that begins with mineral prospecting and exploration, moves to mineral development and production, and then finally to mine closure and reclamation. Each stage of the mining sequence has potential environmental impacts, thoroughly examined elsewhere,² and briefly reviewed here.

Prospecting/Exploration

There are a variety of exploration activities with varying degrees of impact on the natural environment, ranging from low impact activities like soil and sediment sampling, to higher impact activities like stripping, trenching, blasting, and mechanical drilling. The more intensive exploration activities can contaminate both surface water and groundwater, including with the use of drilling muds and drill-hole lubricants.³ As well, trees and other “overburden” are often removed during the exploration stage, which can cause erosion as well as habitat fragmentation and loss. In most cases under B.C.’s free-entry system, special use permits to remove such “overburden” *must* be granted to mineral rights holders upon application, regardless of the ecological value of the surface area.⁴

In addition, infrastructure may be required to support mineral exploration – such as new roads to access mineral claims or to bring in larger exploration equipment – which can result in additional habitat loss and fragmentation as well as increased hunting pressure on wildlife.⁵ The presence of infrastructure can also encourage new development, resulting in cumulative impacts to the affected wilderness.



Development/Production

The B.C. government stresses that only 1/10 of 1 per cent of the provincial land base is impacted by mining activities.⁶ Nonetheless, mineral development has huge adverse impacts on the environment, including through the production of vast quantities of hazardous waste.⁷ This waste is disposed of in large overburden heaps and waste rock or tailings disposal areas.⁸ For their part, tailings routinely contain a variety of toxic chemicals including cyanide, arsenic, mercury, lead and copper.⁹ The *Metal Mining Effluent Regulations* under the *Fisheries Act* have even deemed 15 natural water bodies in Canada (including three in B.C.) as “tailings impoundment areas” where *any* substance in *any* concentration at *any* PH can be discharged¹⁰ (see *Natural Lakes as Tailings Ponds* on page 10).

Mining activities can also contaminate surface water and groundwater through the production and improper containment of acid rock drainage.¹⁶ Later stages in the production process, in particular smelters, are major emitters of air pollutants and greenhouse gases in Canada.¹⁷

Closure/Reclamation

According to MiningWatch Canada: “[i]n the 150 year history of mining in Canada, there are few if any examples of a major mining operation which has been fully closed out.”¹⁸ Abandoned and contaminated mining sites (or “orphaned mines”) are particularly problematic, although most of these stem from an earlier time, when regulation of mining was less stringent.¹⁹ The Britannia Mine in B.C. is a prime historical example of failed mine reclamation which, despite being shut down in 1974, has continued to discharge huge amounts of toxic substances into Howe Sound.²⁰ Although progress has been made on a remediation program,²¹ the B.C. government still describes Britannia Mine as “one of the largest metal pollution sources in North America.”²²

For their part, tailings routinely contain a variety of toxic chemicals including cyanide, arsenic, mercury, lead and copper.





Natural Lakes as Tailings Ponds

In order to extract the mineral content of ore body, it is crushed down and combined with large amounts of water and a variety of toxic chemicals. Since the valuable mineral content of the ore body ranges from around 5 per cent in base metals like iron and copper to around 0.00005% in precious minerals like gold, the vast majority of ore body ends up as a waste product, or “tailings.”¹¹

Tailings, which contain high levels of arsenic, cyanide, mercury and other harmful toxic chemicals, are often stored in large human-made tailings ponds. The toxic effluent contained in such tailings ponds can leak into natural waterways and groundwater, and can also migrate through exposure to air and wind.

Despite the *Fisheries Act* prohibition of depositing a deleterious substance into water frequented by fish, the *Metal Mining Effluent Regulations* permit the owner or operator of a mine to discharge tailings at allowable concentrations or into contained man-made or natural structures. These regulations also deem 15 natural water bodies in Canada as “tailings impoundment areas” where any substance in any concentration at any PH can be discharged.¹²

In B.C., three natural water bodies are already listed on Schedule 2 to the *Metal Mining Effluent Regulations*, allowing each to be used as a tailings impoundment area: Albino Lake, South Kemess Creek, and Tom McKay Lake.¹³ In addition, 2008 saw a proposal rejected to add Duncan Lake to Schedule 2 for the Kemess North Copper-Gold Mine. This proposal was rejected by the federal government after a Joint Review Panel determined that the local Aboriginal communities “would bear a disproportionate share of actual and potential costs” particularly given the sacred status of the lake.¹⁴

At the time of writing this report, a proposal by Taseko Mines to designate Fish Lake as a tailings impoundment area for the Prosperity Gold-Copper Mine was undergoing an environmental assessment before a Federal Review Panel.¹⁵

Free-Entry and the Regulation of Mining Activities in B.C.

As noted above, mining and mineral exploitation takes place in a mining sequence that begins with mineral prospecting and exploration, moves to mineral development and production, and then finally to mine closure and reclamation. This chapter touches on each stage of the mining sequence, but focuses on the early stages of prospecting and exploration.

B.C.'s "free-entry" system for the prospecting and exploration of minerals was first developed in Europe during the 1500s, and adopted in B.C. in the early gold rushes of the 1850s.²³ With free-entry, a prospector is permitted to enter almost any land, both public and private, and claim exclusive rights to the subsurface resources below. Once a claim is made, a number of rights automatically flow to the claim-maker including the right of priority access to the claim area. In B.C., free entry applies to all minerals, which includes metals but not coal, gravel, earth, petroleum or natural gas.²⁴

Much has been written criticizing free-entry and calling for its reform.²⁵ At its heart, free-entry prioritizes mineral development over every other land use, and gives the mining industry preferential access to the majority of public and private land. Free-entry therefore thwarts most land use planning efforts, including legal mechanisms created to protect significant wilderness areas. The free-entry system also jeopardizes private landowners' security by granting unknown prospectors priority access to private land with or without the landowner's consent. Free-entry is even unfair to other resource extraction sectors, which do not enjoy the same rights and privileges as a "free-miner."

A number of provinces have abandoned free-entry and adopted a mineral tenure system that allows for more oversight and discretion. Alberta abolished free entry in 1967, and like Nova Scotia and Prince Edward Island, now uses a discretionary tenure system where anyone wishing to explore for minerals must first apply for a permit, which the minister may or may not grant.²⁶ Ontario has similarly begun moving toward a discretionary tenure system.²⁷ B.C., however, has yet to follow suit.



A number of provinces have abandoned free-entry and adopted a mineral tenure system that allows for more oversight and discretion. BC has yet to follow suit.

This chapter provides an overview of mining law in B.C. focusing on the free-entry system which governs prospecting and exploration. Note that Aboriginal rights and title, highly relevant and important to the issue of mineral tenure and free-entry in BC, are not within the scope of this report.

Constitutional Jurisdiction Over Minerals

The *Constitution Act, 1867*, granted the provinces jurisdiction over all lands, mines, minerals and royalties within their respective provincial boundaries.²⁸ In 1982, this power was clarified (not altered) with the adoption of section 92A(1) of the Constitution, which grants each province the exclusive authority to make laws in relation to (a) exploration for non-renewable natural resources in the province, and (b) development, conservation and management of non-renewable natural resources and forestry resources in the province.²⁹

Notwithstanding that mining comes within the exclusive jurisdiction of the provinces, the federal government maintains a role in its regulation. For example, mining activities that harmfully alter fish habitat require an authorization under the federal Fisheries Act, which in turn triggers the Canadian Environmental Assessment Act.



Notwithstanding that mining comes within the exclusive jurisdiction of the provinces, the federal government maintains a role in its regulation. For example, mining activities that harmfully alter fish habitat require an authorization under the federal *Fisheries Act*, which in turn triggers the *Canadian Environmental Assessment Act*. In addition, the by-products of mineral extraction, including waste rock and tailings, must be reported to the federal *National Pollutant Release Inventory* established under the *Canadian Environmental Protection Act* (or CEPA).³⁰ Mining is nonetheless primarily regulated under provincial law.

Mineral Tenure and Free-Entry

Prospecting – Free Miner Certificate

The first step in the mining sequence is prospecting – the process of finding land with mineral deposits of sufficient quality and quantity that mining is profitable.³¹ In B.C., in order to have the right to prospect for minerals, you must first obtain a Free Miner Certificate.³² So long as submitted in the correct form, the minister is *required* to grant the certificate to any resident of Canada over the age of 18 who provides the annual fee of \$25 (free for seniors over 65), and to any Canadian corporation for an annual fee of \$500.³³

Once a Free Miner Certificate is obtained, the “free-miner” or his or her agent can enter any “mineral lands” in the province to explore for minerals. “Mineral lands” is defined in the *Mineral Tenure Act* to include all land, both public and private, where the mineral rights remain reserved to the Crown.³⁴ Since B.C. has retained the mineral rights on all grants of Crown land to private landowners since 1891,³⁵ this means that the vast majority of the provincial land base, including both public and private land, is open to mineral staking. The limited exceptions to this free-entry system are described the next chapter and include buildings and dwellings, parks, conservancies, ecological reserves, and mineral reserves.³⁶ Beyond such exceptions, the *Mineral Tenure Act* makes clear that no other land use designation impacts mining activities.³⁷

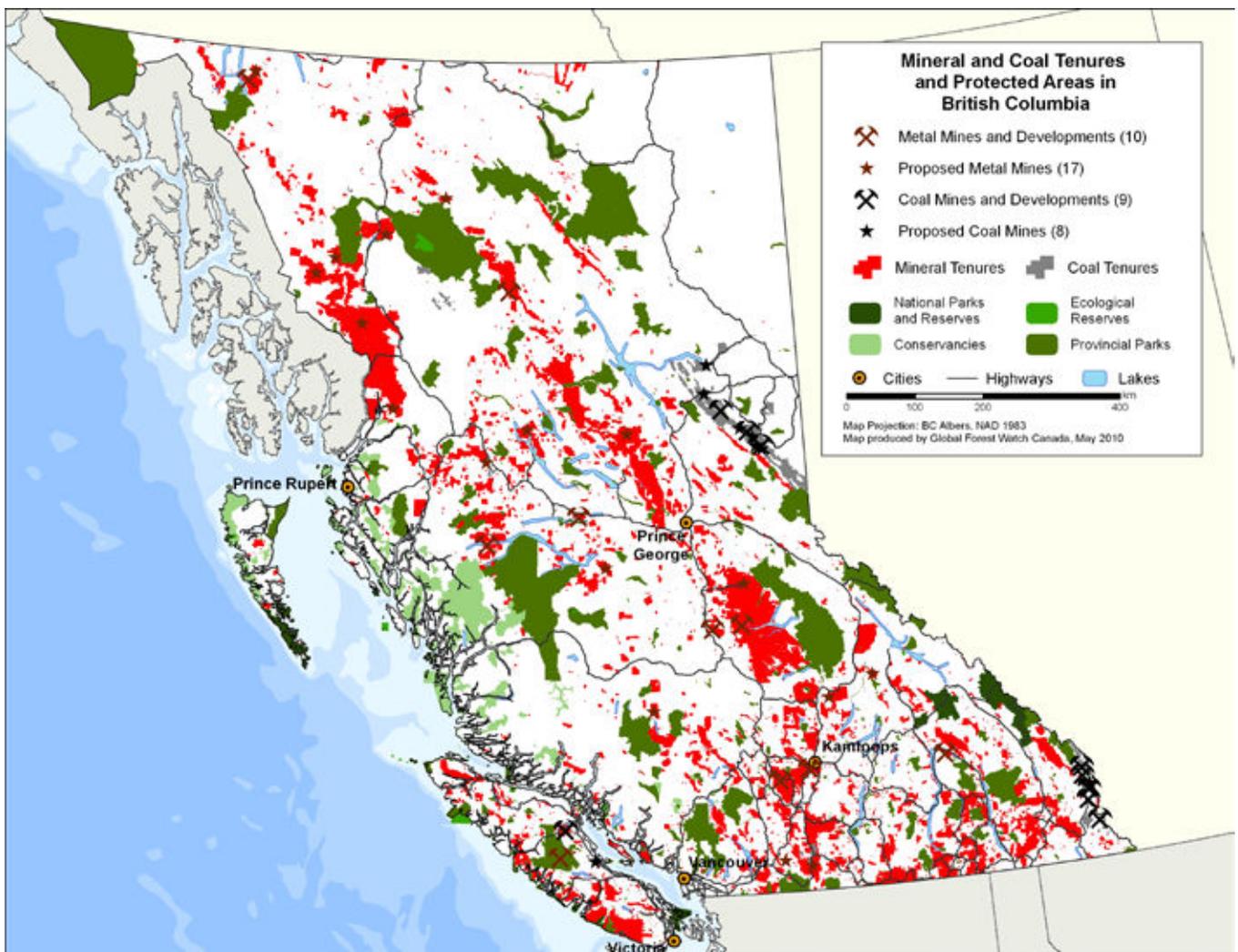
Mineral Claims

Where valuable minerals are found, or anticipated to be found, a mineral claim can be made. Depending on the jurisdiction, staking a mineral claim is done in one of two ways:

- Ground staking – where prospectors drive posts into claimed land, cut sight lines through the brush, and blaze trees to mark the claim boundaries; or
- Map staking – where a claim is made on paper or through an on-line registry system.

Until 2005, mineral claims in BC were staked with a two-post ground staking system (similar to the more common four-post staking system). With passage of the *Mineral Tenure Amendment Act, 2004*, the BC government switched to an Internet-based mineral claims system and claims are now registered instantly online. The government's express purpose for moving to the Internet-based map-staking system was to increase the amount of mineral claims in the province.³⁸ It worked: the total area staked in the province skyrocketed from 1.1 million hectares in 2004 to 4.9 million hectares in 2005, reaching 5.2 million hectares in 2008³⁹ (see Map 1 below).

Map 1: Mineral and Coal Tenures and Protected Areas in British Columbia



Mineral claims are registered on a first-come, first-served basis in B.C., unlike other sectors, such as oil and gas, where rights are obtained through a bidding or auction process that both increases government revenues and raises the incentive for tenure holders to undertake exploration.



Mineral claims are registered on a first-come, first-served basis in B.C., unlike other sectors, such as oil and gas, where rights are obtained through a bidding or auction process that both increases government revenues and raises the incentive for tenure holders to undertake exploration.⁴⁰ For minerals, the cost to register a claim is currently 40 cents per hectare in a standardized cell.⁴¹ In comparison, to obtain petroleum and natural gas rights the average price paid per hectare was \$3,519 in 2008.⁴²

Rights Automatically Conferred with Mineral Claims

Under BC law, a number of rights automatically flow from the registration of a mineral claim, including:

- The exclusive right to exploit the minerals beneath the claimed area;⁴³
- The right to produce ore from the claimed area;⁴⁴
- The right to use, enter and occupy the surface of the claimed area for exploration and development of minerals;⁴⁵ and
- The right to obtain a special use permit under the *Forest Practices Code* allowing the construction on Crown lands of access roads to the claimed area.⁴⁶

Some, including the Ontario Court of Appeal, have called into question the constitutionality of free-entry, due to the fact that free-entry makes the registration of claims automatic, despite constitutional requirements for consultation and accommodation of First Nations' rights and title in the area.

Where a claim is staked on private land, the free-miner has the right to take and use the private land even without consent from the landowner⁴⁸ (note that written approval from the minister is required prior to exercising this right and compensation may be owed where land is taken without consent).⁴⁹ The free-miner must also give private landowners eight days' notice prior to commencing any mining activity on their land;⁵⁰ and must compensate the landowner for any property loss that ensues.⁵¹ Nonetheless, private landowners cannot stop mining activities from taking place on their land.

Exploration Activities

After initial prospecting and staking of a claim, the next step in the mining sequence is exploration. As noted above, exploration activities range from low-impact activities like soil and sediment sampling, to more advanced and higher-impact activities like blasting, drilling and road construction.

According to the provincial government, between 2001 and 2008 expenditures on mineral exploration rose over 1,000 per cent, with an estimated value of \$367 million.⁵² At last count, there were 388 ongoing exploration projects in B.C., 98 of which had a budget over \$1 million.⁵³

Prior to commencing many mining activities, including exploratory drilling or mechanical disturbance of the ground, a Notice of Work permit is required pursuant to section 10



The Constitutionality of Free-Entry and the Duty to Consult Aboriginals

In 2007 and 2008, members of the Ardoch Algonquin First Nation (AAFN) in Ontario peacefully blockaded Frontenac Ventures Corporation from exploring for uranium on mining claims held on Crown Land claimed by the AAFN to be part of its traditional territory. After admitting to not complying with two court orders to stop interfering with Frontenac's exploration activities, two members of the AAFN were sentenced to six months in jail (with one actually serving time), and they and the AAFN were fined between \$10,000 and \$25,000. The Ontario Court of Appeal found these sentences to be too harsh in the circumstances, ordered the release of the one member in jail, and significantly reduced the fines.

Of importance here are the specific circumstances considered by the Court of Appeal in overturning the sentences. The first was that the Algonquin Nation and Ontario were in an existing land claim negotiation. The second, as noted by the court, is the nature and content of Ontario's *Mining Act*:

It is a remarkably sweeping law. It establishes a "free entry" system whereby all Crown lands, including those subject to aboriginal land claims, are open for prospecting and staking, without any consultation or permitting required. Anyone with a prospector's licence may stake claims and prospect for minerals on any Crown land. Once a claim has been staked, in accordance with the Act, the Mining Recorder must record the claim. There is nothing in the Mining Act about considering aboriginal land claims or interests.

The intersection of these two background circumstances creates an obvious problem, indeed the problem that lies at the heart of this case. What Frontenac wants to do on Crown land – staking and exploration – is legal under the Mining Act. However, the appellants' response, although in contempt of two court orders, is grounded, at a minimum, in a respectable interpretation of 35 of the Constitution Act, 1982 and several recent decisions of the Supreme Court of Canada. In summary, the appellants' character and circumstances, their actual conduct, and the difficult legal context within which it occurred, should have counted as significant mitigation when sentences were imposed on them. The circumstances of the offences and these aboriginal offenders are such that ... sentences of incarceration were inappropriate.⁴⁷

The use of cash payments in lieu of work simplifies maintenance requirements, and in one sense may limit the environmental impacts of claims by removing the incentive to undertake superfluous digging or tree-cutting. On the other hand, it may lead spurious mineral claims being held for longer.



of the *Mines Act*.⁵⁵ Applications for such permits must include a plan outlining details of the proposed work. Plans, in turn, must be prepared in accordance with the *Health, Safety and Reclamation Code for Mines in British Columbia* (the “Code”), which mandates detailed information including a program for the environmental protection of land and watercourses during the construction and operational phases of the mining operation.⁵⁶

Maintaining Mineral Claims

To avoid the hoarding of mineral claims, all provinces require some type of maintenance of the claim.⁵⁷ Most often claims must be maintained on an annual basis, although sometimes it is less often.⁵⁸ Various activities constitute maintenance, including digging trenches or pits, shallow drilling and surveying. Many jurisdictions, including B.C., now allow cash payments in lieu of such maintenance work.⁵⁹

The use of cash payments in lieu of work simplifies maintenance requirements, and in one sense may limit the environmental impacts of claims by removing the incentive to undertake superfluous digging or tree-cutting just to meet maintenance requirements. On the other hand, it may lead spurious mineral claims being held for longer. Currently in B.C., a claimholder must work a value of \$4 per hectare annually for the first three years, and \$8 per hectare for each subsequent year, or make a payment of the same amount in lieu of such work.⁶⁰ Failure to perform the necessary maintenance work results in forfeiture and cancellation of the mineral claim, with the mineral rights reverting back to the Crown.⁶¹ The failure to maintain a claim thorough work or payment is the primary reason mineral claims are forfeited, abandoned or cancelled.⁶²

Mineral Leases

Before developing an exploration site, mineral claims are often converted into mineral leases, which requires providing the prescribed fee and meeting public notice requirements set out in the *Mineral Tenure Act*.⁶³ Similar to Free Miner Certificates, the minister *must* issue a mineral lease upon application in the prescribed form.⁶⁴ The automatic grant of a lease upon application is another basic element of the free entry system, because “a miner who has explored for and found a mineral deposit may freely obtain the tenure or disposition needed to exploit the minerals and to obtain a recoupment of the exploration effort.”⁶⁵

Leases offer enhanced security over simple mineral claims as the term for a mineral lease is often upwards of 30 years, unlike mineral claims which run year to year.⁶⁶ In addition, although the *Mineral Tenure Act* prescribes annual rental fees for mineral leases,⁶⁷ leases are not subject to the same maintenance requirements as mineral claims, meaning that the failure to pay rent does not cancel the lease and result in the forfeiture of all mineral rights back to the Crown.⁶⁸ Furthermore, a mineral lease is an interest in land whereas a mineral claim is a proprietary or chattel interest, a fact that could have various implications including the availability of compensation for expropriation.⁶⁹

Coal Tenure

Coal is not a mineral for the purposes of the *Mineral Tenure Act*, but is instead regulated under the *Coal Act* and its regulations. Coal mining does not benefit from free-entry to the same extent as minerals do. Instead, the minister has discretion to issue or refuse an application for a coal licence,⁷⁰ and coal licences are granted for particular locations.⁷¹ In other words, unlike minerals where a free-miner can stake any unclaimed mineral land and automatically obtain exclusive rights to any minerals present, for coal one must first apply to the minister to obtain a licence to explore a particular area, and the minister has discretion over whether to issue the licence.

Once issued, coal licensees obtain similar rights as mineral claim holders, including a general right of entry to both public and private land within the claimed area, as well as the right to be issued surface use permits to carry out exploration and development.⁷² Where coal is located on private land, the licensee must give notice to private landowners prior to entry as well as pay compensation for any damage caused to the surface area.⁷³

Like minerals (and described in more detail in the next chapter), various areas are off-limits to coal exploration, such as buildings, dwellings and orchards, and in specified protected areas such as conservancies, ecological reserves, and areas where mining is prohibited under the *Environment and Land Use Act*.⁷⁴ Outside of these areas, however, the *Coal Act* makes it clear that no land use designation or objective impacts coal exploration.⁷⁵ Consequently, just like mineral claims, extensive strategic land use planning can be nullified by the issuance of coal licenses.

Before coal mining proceeds to the operational phase, miners typically obtain a coal lease which can be for terms of up to 30 years.⁷⁶ Here, coal licensees enjoy similar rights to the free-miners so that upon application in the prescribed form a coal lease *must* be issued by the minister, although the minister may attach terms and conditions to the lease.⁷⁷

Mine Development and Operation

Before mineral development can commence, various permits must be obtained at both the provincial and federal level. At the provincial level, a permit to operate a mine is required under s. 10 of the *Mines Act*.⁷⁸ Other permits typically required include a licence under the *Water Act* to make changes in and about a stream,⁷⁹ and a special use permit under forestry legislation to clear trees for both the mine itself and for associated infrastructure.⁸⁰ At the federal level, common necessary permits include: authorizations under the *Fisheries Act* and associated *Metal Mining Effluent Regulations*⁸¹ to discharge effluent or for the harmful alteration, disruption or destruction of fish habitat (HADD), authorizations to impact navigable waters under the *Navigable Waters Protection Act*,⁸² and approvals under the *Explosives Act*.⁸³

In addition, mining developments usually trigger an environmental assessment, again often at both the provincial and federal level. A provincial environmental assessment under B.C.'s *Environmental Assessment Act* is triggered if a new mineral mine has production capacity over 75,000 tonnes per year, or if a new coal mine has a production capacity of



Coal mining does not benefit from free-entry to the same extent as minerals do. Instead, the minister has discretion to issue or refuse an application for a coal licence.

over 250,000 tonnes per year.⁸⁴ A federal assessment under the *Canadian Environmental Assessment Act* (CEAA) can be triggered in a number of ways, including with an application for a HADD authorization.⁸⁵ If triggered, the extent of a federal environmental assessment (such as whether a comprehensive study rather than a more simple screening is required, and how much of the project should be ‘scoped’ into the assessment), has been the source of much litigation, and may change again with recent proposed amendments to the CEAA.⁸⁶

In 2009, there were eight metal mines, nine coal mines, and 32 industrial mineral mines operating in BC.⁸⁷ There was also one metal mine in construction, 17 metal mines proposed, eight coal mines proposed, and one industrial mineral mine proposed⁸⁸ (see map on page 13).

Mine Closure and Reclamation

As noted above, Canada and B.C. have a legacy of incompletely closed mines. To ensure that “once operations cease, mine site lands are returned to a useful and productive state,”⁸⁹ B.C. relies on the *Mines Act* and the *Health, Safety and Reclamation Code for Mines in British Columbia*.⁹⁰ The Act provides the overarching structure for the reclamation process, while the Code mandates what is required for complete reclamation of a mine site in more specific detail. Companies can set their own reclamation targets on a site by site basis, as long as they comply with the relevant legislation.

To make miners more accountable for reclamation, in 1994 BC enacted the *Mine Reclamation Fund Regulation*.⁹¹ Miners are now required to pay security into a fund to guarantee reclamation and “to provide for protection of, and mitigation of damage to, watercourses and cultural heritage resources affected by the mine.”⁹² Requiring security to ensure mine reclamation is a practice that BC adopted through experience, as many mines in the past have not been correctly reclaimed.⁹³ The amount of security required is decided on a case to case basis by the Chief Inspector of Mines. If long term drainage treatment is required after mine closure due to metal leaching and/or acid mine drainage, the B.C. Ministry of Energy, Mines and Petroleum Resources states that full security will be required.⁹⁴

Canada and B.C. have a legacy of incompletely closed mines. Miners are now required to pay security into a fund to guarantee reclamation and “to provide for protection of, and mitigation of damage to, watercourses and cultural heritage resources affected by the mine.





Penalties

It is an offence to explore for or develop minerals contrary to the *Mineral Tenure Act* or its regulations (including the Code) subject to a maximum fine of \$25,000 or six months' imprisonment.⁹⁵ It is also an offence to contravene the *Mines Act* or its regulations (which also includes the Code) subject to a fine of \$100,000 or one year imprisonment or both.⁹⁶ Mineral claims can also be cancelled by the chief gold commissioner where the claimholder *deliberately* fails to comply with the Act or the Code.⁹⁷

Summary

This chapter provided an overview of the free-entry system – the legal regime governing mining activities in B.C. Free-entry, which stems from the frontier days of the 1800s, continues to give the mining industry prioritized rights in the vast majority of the province. Of particular note are:

- A free miner certificate *must* be issued so long as very basic requirements are met;
- Anyone holding a free miner certificate can stake a mineral claim electronically and instantaneously, and, in most cases, the government cannot refuse to register the claim even if it is made in a significant wilderness area or on private land; and
- Mineral claims confer automatic and considerable rights, including the right of priority access to the claimed land and the right to take and use most of the claimed land.

Moreover, this all occurs without having to obtain the consent of, or even consult with, other stakeholders, including private landowners. The out-dated free-entry system can therefore be expected to lead to increasing land use conflicts and can serve to undermine years of strategic land use planning.

Nevertheless, as noted above, some areas in B.C. are off-limits to free-entry. The next chapter looks at these 'protected areas' in some detail, to help explain the limits of free-entry and to understand the range of existing legal tools to control its spread.

The out-dated free-entry system can therefore be expected to lead to increasing land use conflicts and can serve to undermine years of strategic land use planning.





Protected Areas – Off-Limits to Mineral Exploration

As noted above, B.C. currently operates a “two-zone” mining regime where an area is either off-limits to mineral exploration or governed by free-entry. Approximately 13 per cent of B.C. is contained within protected areas and off-limits to mineral exploration. The remaining vast majority of the provincial land base is governed by free-entry so that mining activities are prioritized.

This chapter provides an overview of the various legal mechanisms in B.C. to put areas off-limits to mineral exploration and development. Some of these mechanisms are specifically created to restrict mining activities such as mineral and coal land reserves; others are more general land protection mechanisms such as provincial parks, conservancies and ecological reserves. Still others allow government wide discretion to restrict or prohibit any activities including mining, most notably orders under section 7 of the *Environment and Land Use Act*.

Provincial Parks

The most common and well-known provincial land use designation related to conservation is provincial parks. Of the more than 13 million hectares of land considered to be protected in B.C., approximately three-quarters (or 10.5 million hectares) is protected through classification as a provincial park.⁹⁸

Provincial parks are created, and their boundaries amended, in one of two ways: either through an order-in-council by cabinet pursuant to the *Park Act*,⁹⁹ or by the legislature via inclusion in Schedules C or D of the *Protected Areas of British Columbia Act*. Provincial Parks are subdivided into three Classes – A, B, or C – with Class A parks garnering the highest amount of protection.¹⁰⁰ Virtually all provincial parks are designated Class A parks (604 of 620 in the province).¹⁰¹



The most common and well-known provincial land use designation related to conservation is provincial parks. Of the more than 13 million hectares of land considered to be protected in B.C., approximately three-quarters is protected through classification as a provincial park.

Not every park in BC is established for conservation purposes – some are established for recreational uses, others to protect historical features.

Section 12 of the *Park Act* further permits the Environment Minister to specify that a Class A or C park be in one of six categories:

- Category 1: If the main purpose of the park is the preservation of its particular atmosphere, environment or ecology;
- Category 2: If the main purpose of the park is the preservation and presentation to the public of specific features of scientific, historic or scenic nature;
- Category 3: If the main purpose of the park is to offer enjoyment, convenience and comfort to the travelling public;
- Category 4: If the main purpose of the park is to offer recreational opportunity to the public of a particular community or area;
- Category 5: If the main purpose of the park is to offer opportunities to participate in a specific recreational activity; and
- Category 6: If the park has two or more purposes.

As can be seen from this list, not every park is established for conservation purposes – some are established for recreational uses, others to protect historical features.

Where a park has been designated into a specific category, the *Park Act* prohibits a person from carrying on any activity that will restrict, prevent or inhibit the use of the park for that designated purpose.¹⁰² Where the minister has not designated a park for a specific category, the courts have found that the dominant purpose of the park is not necessarily nature conservation. Instead, to quote Justice Melnick in *Friends of Cypress Provincial Park Society*, the *Park Act* “provides the framework for the creation and preservation of parkland for a variety of purposes to serve a broad cross-section of the citizens of British Columbia whose interests are as diverse as its landscape.”¹⁰³

Compensation for New Parks and Conservancies

For the purpose of establishing or enlarging a park or conservancy, the minister has the authority to expropriate land and interests in land, including mineral claims and leases, as well as coal licenses and leases.¹¹⁰ In *R. v. Tener*, the Supreme Court of Canada ruled that establishing a park over existing mineral tenures and refusing to issue any permit to develop such minerals, amounts to an expropriation, and that such an expropriation requires the government to give compensation even if it is not expressly required in the governing legislation.¹¹¹

Today, where a mineral claim or lease is expropriated through the establishment or expansion of a park or conservancy, section 17.1 of the *Mineral Tenure Act* requires the minister to compensate the rights holder in an amount equal to the value of the rights expropriated.¹¹² Where a coal license or lease is expropriated, section 4 of the *Coal Act* provides for similar compensation.¹¹³

In all parks, activities with respect to “natural resources”¹⁰⁴ require a park use permit, except licensed hunting and fishing, photographing and nature viewing.¹⁰⁵ By definition, a “park use permit” includes a licence for the use, development, exploitation or extraction of any natural resource.¹⁰⁶ Nonetheless, the *Park Act* puts restrictions on issuing such permits relevant to mining activities. For example, in Class A and C parks, permits respecting natural resources may only be issued if it is, “in the opinion of the minister, necessary for preserving or maintaining the recreational values within the relevant park.”¹⁰⁷

In addition, subsection 30(3) of the *Park Act* expressly prohibits mining in those parks listed in Schedule D of the *Protected Areas of British Columbia Act*. The broadest protection related to mining in parks, however, is found in the *Mineral Tenure Act* which, as discussed further below, expressly states that the right of a free miner to enter lands or to locate a mineral claim or lease does not extend to a park, unless authorized by the Lieutenant Governor in Council (i.e. cabinet).¹⁰⁸

Of course, an area outside a park will not receive the protections afforded within a park, and drawing a park’s boundaries around existing mineral claims has been one way government has dealt with such claims. For example, the boundaries of Morice Lake Provincial Park are described as follows:

All those parcels or tracts of Crown land, together with all that foreshore or land covered by water, situated in Range 4, Coast District and Range 5, Coast District and contained within the described boundaries as shown on the Official Plan deposited in the Crown Land Registry as Plan 13 Tube 1984; except (1) Mineral Claim “Onuki 3” 525101; (2) Mineral Claim “Onuki” 525098; (3) Mineral Claim “Onuki 2” 525099; (4) Mineral Claim “AT 9” 551830; (5) Mineral Claim “Lucky Ship” 519568...¹⁰⁹

Mineral claims can therefore become a barrier to the drawing of park boundaries according to ecological principles as well as to the creation or expansion of protected areas.



Mineral claims can become a barrier to the drawing of park boundaries according to ecological principles as well as to the creation or expansion of protected areas.

Class A Parks Versus Conservancies

In 2006, when asked in the BC Legislature to explain the difference between newly-coined conservancies and Class A parks, Minister Barry Penner responded:

Conservancies and class-A parks are not exactly the same. Both conservancies and class-A parks provide a high level of protection to biodiversity, ecosystem, recreational and other values. Conservancies, however, explicitly recognize the importance of these areas to First Nations for social, ceremonial and cultural purposes.

Conservancies provide for a wider range of low-impact, compatible economic opportunities than do class-A parks. However – and I need to stress this – commercial logging, mining and hydroelectric power generation, other than local run-of-the-river projects, are not allowed in conservancies.¹²²



Conservancies

In 2006, the government introduced a new type of protection designation called conservancies.¹¹⁴ Conservancies are the designation used to protect the second most amount of land in the province after provincial parks. At last count, there were 143 conservancies in the province, covering more than 2.1 million hectares.¹¹⁵

Subsection 5(3.1) of the amended *Park Act* proclaims that conservancies are set aside:

- (a) for the protection and maintenance of their biological diversity and natural environments,
- (b) for the preservation and maintenance of social, ceremonial and cultural uses of first nations,
- (c) for protection and maintenance of their recreational values, and
- (d) to ensure that development or use of their natural resources occurs in a sustainable manner consistent with the purposes of paragraphs (a), (b) and (c).

A new type of protection designation introduced in BC in 2006, there are now 143 conservancies covering more than 2.1 million hectares.



There are many similarities between provincial parks and conservancies, and the majority of provisions in the *Park Act* apply equally to both designations. Similar to parks, conservancies can be established in one of two ways: either through an order-in-council under the *Park Act*, or by inclusion in Schedules E or F to the *Protected Areas of British Columbia Act*.¹¹⁶ In addition, a park use permit is required for activities respecting natural resources within a conservancy,¹¹⁷ and such permits may only be issued if they will not ‘hinder’ the purposes for which the conservancy was established.¹¹⁸

Despite the similarities, there are important differences between parks and conservancies. Provincial parks can be established for various purposes; some for conservation and others for recreation and still others for both. All conservancies, on the other hand, are established for the same multiple purposes set out above, namely: protecting its biodiversity and natural environment; conserving its use by First Nations; protecting its recreational values; and ensuring any resource development is done sustainably.¹¹⁹ In addition, section 20.1 of the *Park Act* gives the Minister of Environment explicit authority to authorize road construction in certain conservancies for the purpose of providing access to natural resources lying beyond the conservancy, while there is no similar explicit power with respect to provincial parks.¹²⁰ Finally, subsection 9(10) of the *Park Act* explicitly prohibits the issuance of a park use permit for various activities in a conservancy, including mining.¹²¹ The *Park Act* does not have a similar explicit prohibition against issuing park use permits for mining in provincial parks.

Ecological Reserves

Ecological reserves are the most restrictive land use designation in the province of B.C. There are currently 148 ecological reserves in the province, protecting about 0.16 million hectares.¹²³ Like parks and conservancies, ecological reserves are established or modified in one of two ways: either through an order-in-council¹²⁴ which is then listed in the *Application of Park Legislation to Ecological Reserves Regulation*,¹²⁵ or through an Act of the Legislature by amending Schedules A and B of the *Protected Areas of British Columbia Act*.¹²⁶

Pursuant to the *Ecological Reserve Act*, the government may reserve Crown land for a variety of “ecological purposes” including:

- (a) areas suitable for scientific research and educational purposes;
- (b) areas that are representative examples of natural ecosystems in B.C.;
- (c) areas that serve as examples of ecosystems modified by humans and offer an opportunity to study the recovery of the natural ecosystem;
- (d) areas where rare or endangered native plants and animals in their natural habitat may be preserved; and
- (e) areas that contain unique and rare examples of botanical, zoological or geological phenomena.¹²⁷

As can be seen, ecological reserves are established solely for ecological purposes, and not for a multitude of purposes like parks and conservancies. Most activities, including mineral exploration, are prohibited within ecological reserves. Section 1 of the *Ecological Reserve Regulations* reads:

*No person shall enter upon an ecological reserve for a purpose inconsistent with the Ecological Reserve Act, and without limiting the generality of the foregoing, no person shall prospect for minerals, cut timber, allow domesticated animals to graze, camp, light fires, trap or molest animals, build roads or trails, use motorized vehicles within an ecological reserve, or remove plants, animals or material from an ecological reserve.*¹²⁸

While research and educational activities are permissible in ecological reserves, a permit is required even for these low-intensity activities.¹²⁹

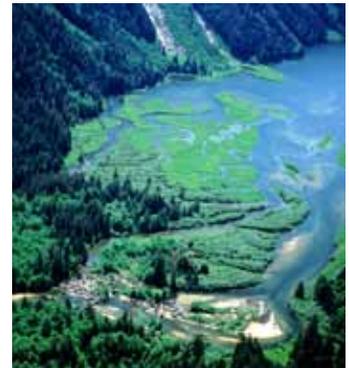
Orders under Section 7 of the Environment and Land Use Act

Section 7 of the *Environment and Land Use Act* reads:

7(1) On the recommendation of the committee, and despite any other Act or regulation, the Lieutenant Governor in Council may make orders the Lieutenant Governor in Council considers necessary or advisable respecting the environment or land use.

(2) A minister, ministry or agent of the Crown specified in an order under subsection (1) must not exercise a power under any other Act or regulation except in accordance with the order.

Ecological reserves are the most restrictive land use designation in B.C. There are currently 148 ecological reserves protecting about 0.16 million hectares.



Section 7 orders are particularly useful where the government wants to maintain flexibility by, for example, prohibiting one activity (such as logging) while allowing another (such as mining) which would not be possible in more stringent land use designations such as parks and conservancies.



This section grants a broad power for government to issue any order-in-council it “considers necessary or advisable respecting the environment or land use.” There are at least 71 areas in the province where such a designation applies, protecting approximately 0.5 million acres.¹³⁰ Some section 7 orders explicitly prohibit mining, such as the recent order issued with respect to the Flathead Watershed discussed later in this report.¹³¹ Each order is distinct and offers a varying degree of protection. Orders under section 7 of the *Environment and Land Use Act* are particularly useful where the government wants to maintain flexibility by, for example, prohibiting one activity (such as logging) while allowing another (such as mining), which would not be possible in more stringent land use designations such as parks and conservancies.

Mineral Tenure Act and Coal Act

The *Mineral Tenure Act Regulation* lists parks, conservancies, ecological reserves, areas subject to an order under the *Environment and Land Use Act*, and Indian reserve land as “alienated land” and does not allow new mineral claims to be registered within them.¹³² Thus, although adoption of an online registration system has made the act of staking a mineral claim much simpler in B.C., it has not opened up any protected areas to mining activities.¹³³

In addition, the *Mineral Tenure Act* exempts certain areas from the free-miner’s general right of entry to explore for minerals, including:¹³⁴

- Land occupied by a building and the “curtilage” (including the yard) of a dwelling house;
- Orchard land and land under cultivation; and
- Land in a park, unless authorized by the Lieutenant Governor in Council (i.e. cabinet) on recommendation of the person responsible for the park.

Similarly, the *Coal Act* notes that the right of a holder of a coal licence or lease to enter and explore for or develop coal does not extend to these same exempted areas.¹³⁵

Ministerial Restrictions

Section 17 of the *Mineral Tenure Act* grants the minister a broad power to restrict mining activities without compensation if the minister is of the opinion that the land should be used for other purposes:

17(1) Despite this or any other Act, the minister may, by order, restrict the use of surface rights, or restrict the right to or interest in minerals or placer minerals, comprised in all or part of a mineral title [i.e. a claim or lease] if the minister considers that all or part of the surface area is or contains a cultural heritage resource or that the surface area, or the right to or interest in the minerals or placer minerals, should be used for purposes other than a mining activity.

(2) No compensation is payable as a result of an order under subsection (1).

Section 17 goes on to give a right of appeal to BC's Supreme Court, and then to the Court of Appeal with leave, to any person aggrieved by a s.17(1) order.

Similarly, the *Coal Act* includes the following:

2(4) Despite this or any other Act, the minister may restrict the use of surface rights by a person who holds a licence if, after inspection and giving reasonable notice to that person, the minister considers that the surface area is so situated that it should be used for purposes other than mining.

(6) No compensation is payable as a result of a restriction under subsection (4).

Given the explicit provision that no compensation is payable, the use of these ministerial powers would presumably result in considerable resistance from the mineral or coal tenure holders affected.

Mineral and Coal Land Reserves

The Chief Gold Commissioner, who is appointed under the *Public Service Act*,¹³⁶ has the authority to prohibit, in whole or in part, any mining activity respecting one or more minerals within areas designated “mineral reserves.”¹³⁷ Similarly, under the *Coal Act* the Chief Gold Commissioner has the authority to establish “coal land reserves” which, unless provided otherwise in the corresponding regulation, prohibit all exploration, development and production of coal, as well as the issuance of any licence or lease within its boundaries.¹³⁸

There are hundreds of mineral and coal land reserves throughout BC, a list of which is published in Part II of the British Columbia Gazette. Despite the flexibility of mineral and coal land reserves and their ability to circumscribe mining activity in any number of ways, they most often prohibit mining outright in a particular area.¹³⁹

Summary

There is a broad array of legal tools available to put areas partially or completely off-limits to mining activities in B.C. The most broadly used of these tools are provincial parks, conservancies and ecological reserves, whereas less broadly used tools include section 7 orders under the *Environment and Land Use Act* and *mineral and coal land reserves*. Despite this array of tools to put areas off-limits to mineral tenure, the creation or expansion of such protected areas is obviously subject to existing mineral tenure claims.



Despite the flexibility of mineral and coal land reserves and their ability to circumscribe mining activity in any number of ways, they most often prohibit mining outright in a particular area.

CASE STUDY 1

Flathead Valley



The Flathead River Valley is reputed to support the highest density of non-coastal grizzly bears in North America.

The Flathead River Valley is a world-renowned wilderness area and among the most pristine river valleys remaining in the Rocky Mountains. It is home to a variety of significant wildlife species including Bighorn sheep, wolves, wolverines and Canada lynx, and is reputed to support the highest density of non-coastal grizzly bears in North America.¹⁴⁰ This area has been described as the “ecological engine” for the surrounding ecosystems.¹⁴¹

The Flathead watershed is located in the southeastern most corner of British Columbia extending south into the State of Montana. The Flathead River flows from BC into Montana before emptying into Flathead Lake, the largest natural freshwater lake in the continental U.S. west of Mississippi.¹⁴² Given the transboundary nature of the Flathead River and Watershed, as well as the fact that the species living there do not respect borders, many have argued that the Flathead must be managed co-operatively by the two jurisdictions.¹⁴³ The river is also an example of a transboundary waterway governed by the *Boundary Waters Treaty Act*, including Article IV, which stipulates: “boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.”¹⁴⁴

Strong U.S. Protection, But (Until Recently) Weak B.C. Protection

On the U.S. side of the border, the river forms the western boundary of Glacier National Park, and so much of the watershed has been protected within the Waterton-Glacier International Peace Park and UNESCO World Heritage Site.¹⁴⁵ Several federal and state laws maintain the rest of the watershed in Montana in a relatively non-degraded state.¹⁴⁶

In great contrast, and until very recently, only a small part of the Flathead was protected in B.C., namely the portion contained within Akamina-Kishinena Provincial Park. The Flathead is also included within the provincial Southern Rocky Mountain Management Plan (or SRMMP), which encompasses the Flathead, Wigwam, Elk and Bull River Valleys.¹⁴⁷



The SRMMP is an example of a Strategic Resource Management Plan (or SRMP) which sets out guidelines for protection and development (See Appendix A). Objective 3.1.2 of the SRMMP states:

Management intent and objectives for other resource values in the SRMMP (including, but not limited to, old-growth, connectivity, ungulate winter range, riparian, visual landscapes and recreation) will not preclude application for, or approval of, mining activities lands referred to in Objective 3.1.1.¹⁴⁸

Prior to issuance of the Flathead Watershed Area Order on February 9, 2010, mining and mineral exploration were therefore expressly permitted throughout the entire Flathead region, with the exception of existing protected areas.¹⁴⁹ This led to considerable concern not only within B.C., but also downstream in the U.S.

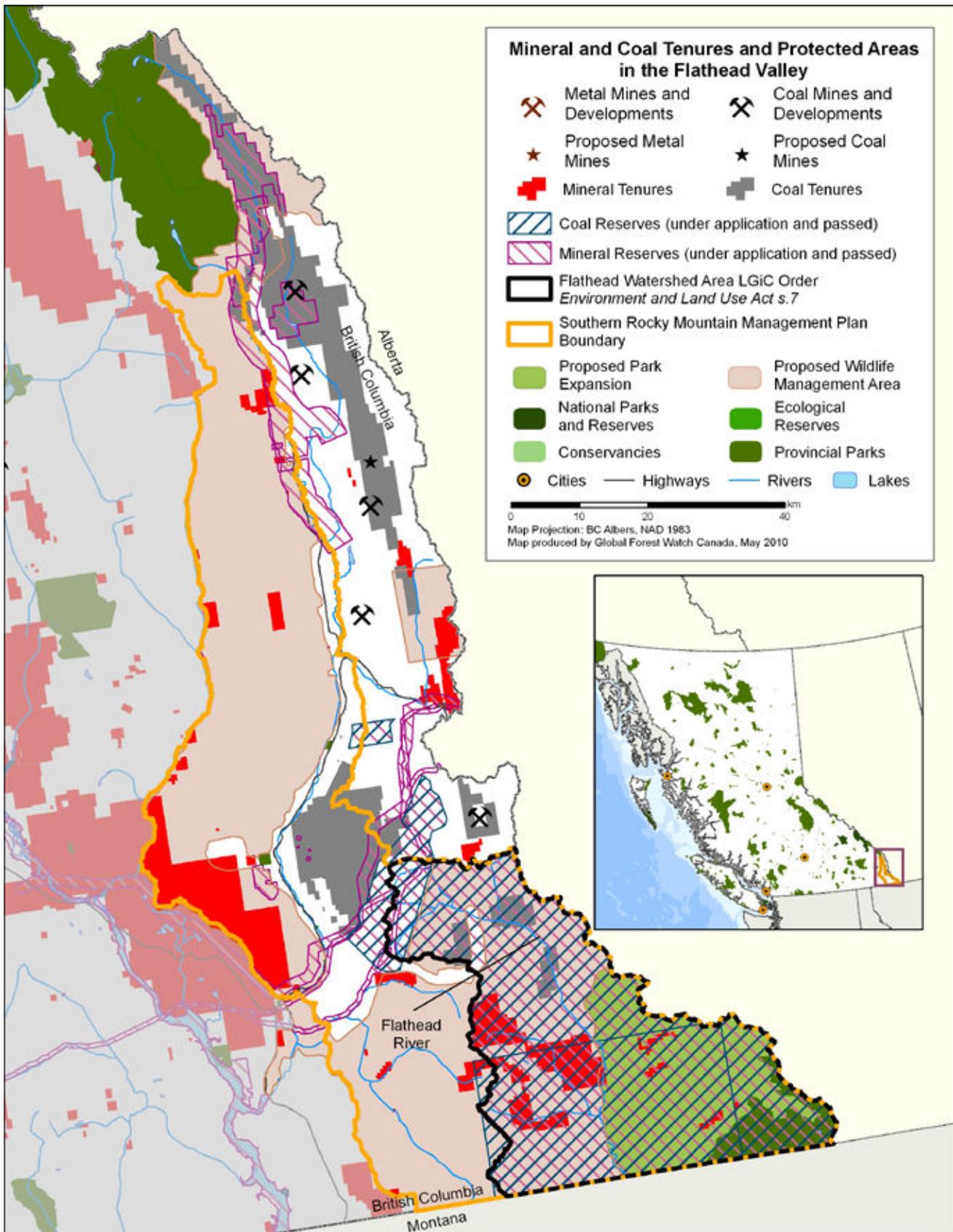
Proposed Mining and Resulting Conflict

It has long been known that significant coal deposits exist within the vicinity of the Flathead watershed. The neighbouring Elk Valley contains five active open pit coal mines and numerous other sites where coal was mined in the past¹⁵⁰ (see Map 2 on page 32). The area is also thought to potentially contain significant petroleum reserves.¹⁵¹ This led to the Flathead River being number five on the 2009 list of America's Most Endangered Rivers, with proposed mining identified as the primary threat.¹⁵²

In 2008, MAX Resource Corp., a Vancouver-based mining company, made a discovery of high-grade gold deposits just north of Glacier National Park.¹⁵³ This received international press and prompted two Montana state senators to ask Secretary of State Hillary Clinton to both ensure long-term protection of the Flathead River and to commence a U.S. federal environmental assessment with respect to mining's impact on the watershed.¹⁵⁴

The Flathead River area is thought to potentially contain significant petroleum reserves. This led to the Flathead River being number five on the 2009 list of America's Most Endangered Rivers, with proposed mining identified as the primary threat.

Map 2: Mineral and Coal Tenures and Protected Areas in the Flathead Valley



Around the same time, a number of conservation groups, including Ecojustice, submitted a request to the UNESCO World Heritage Committee to place Waterton-Glacier International Peace Park on its List of World Heritage in Danger.¹⁵⁵ In response, the World Heritage Committee “noted with concern” the potential threat from mining and energy development in the Flathead and requested the U.S. and Canada to submit a joint report, by February 2010, to address conservation of the area, including the status of all mining and energy development proposals within the Flathead Valley.¹⁵⁶

BC Moves to Restrict Mining in the Flathead

On February 9, 2010, the B.C. government passed the Flathead Watershed Area Order, an order-in-council pursuant to section 7 of the *Environment and Land Use Act*, restricting mining activities and approvals within the Flathead Watershed (see Appendix B).¹⁵⁷ In particular, the order prohibits government from disposing of Crown land, or issuing a lease or licence to occupy Crown land, for mining activities, and prohibits the Chief Inspector of Mines from issuing or amending a permit under section 10 of the *Mines Act* (or exempting anyone from the requirement to obtain such a permit). The order therefore does not alter the fact that a prospector continues to have preferential access to the land-base within the Flathead Valley. Nonetheless, the order does mean that within the Flathead Watershed, a person cannot obtain the requisite permits for mineral development, making any mineral find virtually worthless. Consequently, the Flathead Watershed is protected from mineral activities, at least for the time being.

Summary

The Flathead Valley is a stark example of the shortcomings of B.C.’s two-zone mining policy. Despite the internationally-recognized wilderness values of the Flathead region, as well as the existence of a comprehensive strategic land use plan designed to protect these natural values, prior to issuance of the recent Flathead Watershed Area Order mining was not only permitted throughout the vast majority of the Flathead, it took precedent over every other interest.

Thankfully, the B.C. government has now issued an order restricting mining activities within the Flathead watershed. However, this took not only pressure from within B.C., but also from high levels of the U.S. government, and the international body UNESCO. Protection was no doubt made all the more difficult by the mineral and coal tenure that already existed within the watershed (although this case study does show that the existence of such tenure is not a complete bar to eventual protection from mining).

A key lesson to be learned is that mineral tenure should be granted only after consideration of other values in the claimed area and the appropriateness of permitting mining activities. Yet free-entry is the exact opposite; it denies any form of forethought and permits an automatic grant of mineral tenure with no discretion. This approach can only be expected to lead to further land use conflict, as was experienced in the Flathead.



A key lesson to be learned from the Flathead is that mineral tenure should be granted only after consideration of other values in the claimed area and the appropriateness of permitting mining activities. Yet free-entry is the exact opposite.

CASE STUDY 2

Muskwa-Kechika Management Area



At 6.4 million hectares, the Muskwa-Kechika is one of the few remaining large, intact and predominantly roadless wilderness areas. It is home to key wildlife species – and valuable mineral resources.

The Muskwa-Kechika is a vast and largely undisturbed wilderness area in the Northern Rockies of northeastern British Columbia. At 6.4 million hectares, it is approximately the size of Ireland or as large as seven Yellowstone.

In 1998, following the completion of two strategic Land and Resource Management Plans (LRMPs), Fort St. John and Fort Nelson, the Muskwa-Kechika Management Area (“M-KMA”) was created and management of the area was put under the *Muskwa-Kechika Management Area Act* (“M-KMA Act”).¹⁵⁸ The two LRMP processes suggested formal legal designation over the M-KMA as a way to provide certainty for both economic development and environmental protection.¹⁵⁹ A third LRMP, Mackenzie, added additional land into the M-KMA in 2001.¹⁶⁰

According to the preamble of the *M-KMA Act*, the M-KMA is “an area of unique wilderness... endowed with a globally significant abundance and diversity of wildlife.”¹⁶¹ The M-KMA encompasses 50 undeveloped watersheds,¹⁶² and is home to key wildlife species including Northern (woodland) caribou, elk, grizzly bear, moose, mountain goat, Stone’s sheep, wolf and many species of furbearers and birds.¹⁶³ The M-KMA also contains valuable mineral resources, including lead and zinc.¹⁶⁴ Indeed, a large portion of the M-KMA (11.6 per cent) has been rated as having a very high likelihood for discovery of metallic mineral deposits of economic interest.¹⁶⁵

The stated vision for the M-KMA is:

*The M-KMA is a globally significant area of wilderness, wildlife and cultures, to be maintained in perpetuity, where world class integrated resource management decision-making is practiced ensuring that resource development and other human activities take place in harmony with wilderness quality, wildlife and the dynamic ecosystems on which they depend.*¹⁶⁶



The M-KMA is therefore intended to be a model of sustainability, enabling some economic development while at the same time protecting the ecological integrity of one of the few remaining large, intact and predominantly roadless wilderness areas south of the 60th parallel.¹⁶⁷

Land and Resource Management Planning in the M-KMA

As noted above, the M-KMA originated from two LRMPs (Fort Nelson and Fort St. John), with a third adding additional territory in 2001 (Mackenzie).

The Fort Nelson LRMP was approved in October 1997. It took a core group of 30 people four years to recommend approval of the LRMP, which “reflects the full consensus management direction on all aspects of land and resource management within a 98,000 square kilometre area.”¹⁶⁸ The intent of the Fort Nelson LRMP “is to provide direction for management of land, water, ecosystems and resources.”¹⁶⁹

In order to do so, the LRMP divides the planning area into four Resource Management Zones:

- Enhanced Resource Development Zones – comprising 36 per cent of the land base where investments in resource development are encouraged;
- General Resource Management Zones – comprising 24 per cent of the land base where resource development is integrated with the requirements for other resource values;
- Muskwa-Kechika Special Management Zones – comprising 29 per cent of the land base where resource development can proceed while minimizing impacts on other resource values; and
- Protected Areas – comprising 11 per cent of the land base where logging, mining, energy and hydroelectric exploration and development is prohibited.¹⁷⁰

The M-KMA is therefore intended to be a model of sustainability, enabling some economic development while at the same time protecting the ecological integrity of one of the few remaining large, intact and predominantly roadless wilderness areas south of the 60th parallel.

The LRMP also sets out three levels of strategic directions:

- General Management Directions – these objectives apply to all resource values and to all four zones listed above;
- Category Management Directions – these objectives apply to each of the corresponding Resource Management Zones; and
- Resource Management Zone Directions – these objectives apply to specific resource values within specific Resource Management Zones.

To illustrate how this works, consider one Muskwa-Kechika Special Management Zones (SMZ), such as the Rabbit Resource Management Zone, an area of approximately 420,000 hectares in which significant metallic and industrial mineral potential were identified. First, all of the General Management Directions apply. Second, Category Management Directions for SMZs apply, which include the following:

- Where there is significant risk to high fish and wildlife values, access may be limited, restricted, or on a site-specific basis prohibited. However, where an access route is prohibited alternative routes will be identified;
- For mineral exploration and development, road building into currently roadless areas will be subject to review and approval through established procedures and all applicable legislation; and
- At the end of the development cycle, the area must be returned, as closely as possible and practical, to its natural state.¹⁷¹

Third, specific Resource Management Zone Directions apply including:

- Ensure industrial exploration activities are undertaken with sensitivity to Stone's sheep, caribou and grizzly habitat;
- Manage access to avoid disturbance within ungulate winter habitat and minimize disturbance near winter habitat; and
- Minimize and manage creation of new access in roadless areas.¹⁷²

As can be seen, each zone within the Fort Nelson LRMP has multiple layers of directions meant to ensure protection and maintenance of varying resource values.

The Fort St. John, like all LRMPs, was the product of years of planning and efforts to reach consensus among the various stakeholders within the planning area.¹⁷³ It has a similar structure to the Fort Nelson LRMP and divides the planning area into six zones: Agriculture/Settlement Areas (12 per cent); Enhanced Resource Development Zones (20 per cent); General Resource Development Zones (46 per cent); Special Management Zones (14 per cent); Major River Corridors (4 per cent, a particular type of Special Management Zone); and Protected Areas (4 per cent).¹⁷⁴

Besides Protected Areas, the zone placing the greatest restrictions on development within the Fort St. John LRMP is Special Management Zones defined as “areas where enhanced levels of management are required to address sensitive values such as fish and wildlife

The Fort St. John LRMP was the product of years of planning and efforts to reach consensus among the various stakeholders within the planning area.



habitat, visual quality, etc.”¹⁷⁵ and where “[r]esource development is permitted but must consider and address all significant values identified.”¹⁷⁶ These zones roughly equate with the Muskwa-Kechika Special Management Zones in the Fort Nelson LRMP.

Finally, the Mackenzie LRMP is similar to both the Fort Nelson and Fort St. John LRMPs with the most restrictive designation (besides Protected Areas) called Special: Wildland Zones. According to the Mackenzie LRMP, these special zones were created to “recognize an emphasis on the remote and natural back-country characteristics of the zone and a priority for ecological conservation while providing for commercial and industrial activities (mineral and oil and gas development). Timber harvesting is not allowed...”¹⁷⁷

In short, the Fort Nelson, Fort St. John and Mackenzie LRMPs all identified areas with significant natural values and created a framework meant to ensure protection of these natural values if and when industrial activity was permitted.

The Muskwa-Kechika Management Area Act and Plan

The M-KMA is one of the few places in the province where the strategic objectives contained in an LRMP have been incorporated into law.¹⁷⁸ First, the *Muskwa-Kechika Management Area Act* (“M-KMA Act”) was passed. Under that Act, the *Muskwa-Kechika Management Plan Regulation* (“M-KMA Plan”) then incorporates many of the strategic objectives contained within the original two LRMPs (Fort Nelson and Fort St. John).

As noted in the preamble to the *M-KMA Act*:

*the management intent for the M-KMA is to maintain in perpetuity the wilderness quality, and the diversity and abundance of wildlife and the ecosystems on which it depends while allowing resource development and use in parts of the M-KMA designated for those purposes including...mineral exploration and mining.*¹⁷⁹

To achieve this goal, the *M-KMA Act* establishes a multi-layered planning regime to guide the issuance of all “operational instruments” (i.e. permits and licences) within the M-KMA.¹⁸⁰ In addition, the management of natural resources within the M-KMA, as well as the issuance of any permits with respect to natural resources, including mining related permits, must be consistent with the M-KMA Plan.¹⁸¹

The *M-KMA Act* and the Plan incorporate various ‘local strategic plans’ to guide specific resource values within the M-KMA, including oil and gas activities, recreational activities, and wildlife management. Once approved, activities within the M-KMA must be consistent with any relevant local strategic plans. Local strategic plans are an example of integrated management as they required joint approval from several governmental ministries.¹⁸²

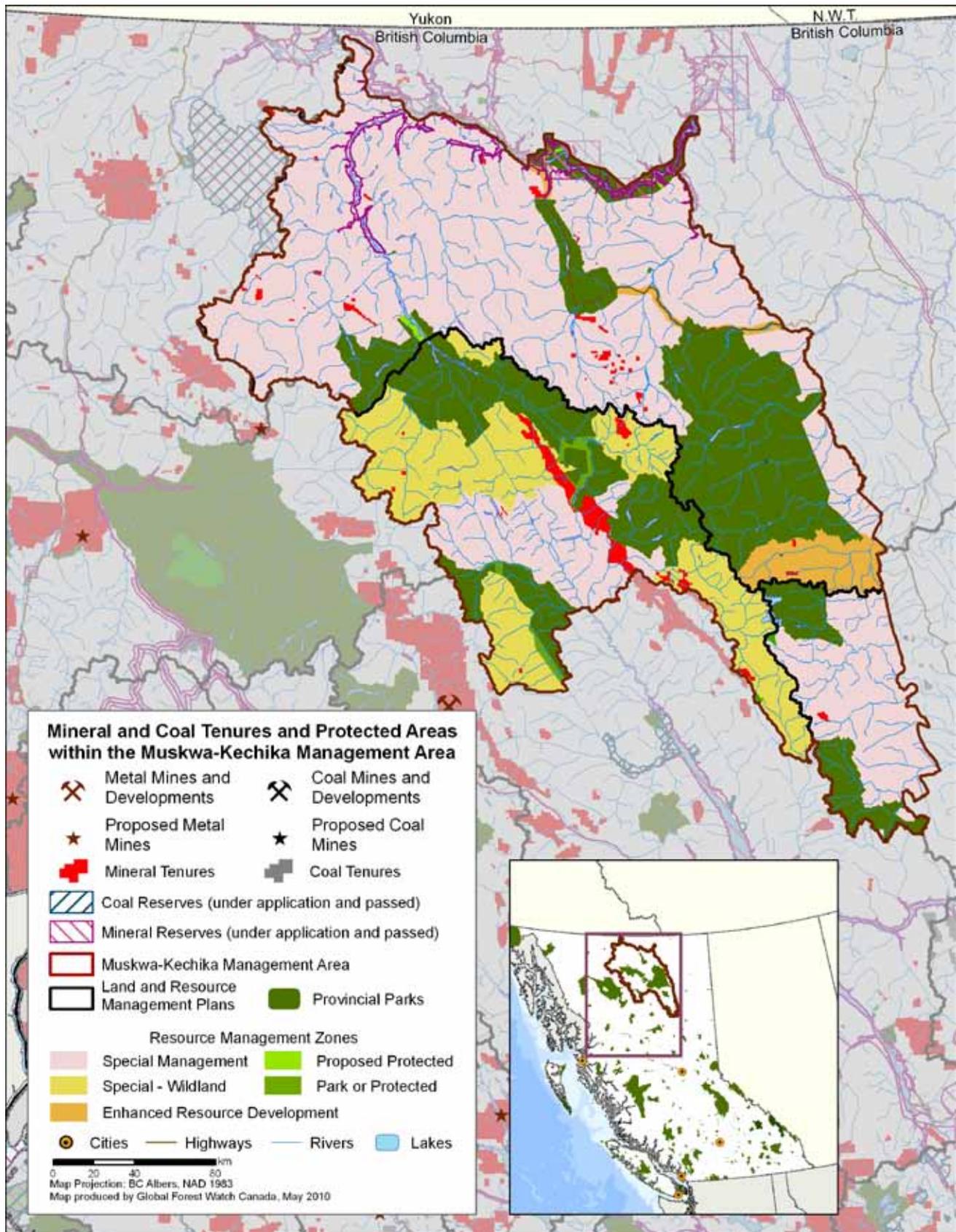
Notably absent from the *M-KMA Act* is a requirement for a local strategic plan with respect to mineral exploration or mining. Despite this, special-use permits allowing road access or infrastructure to support mineral exploration or development require joint approval from the ministries of forestry, environment, and employment and investment.¹⁸³

The *M-KMA Act* also established the Muskwa-Kechika Advisory Board to advise government regulators on natural resource management within the M-KMA.¹⁸⁴ Among the Advisory



In short, the Fort Nelson, Fort St. John and Mackenzie LRMPs all identified areas with significant natural values and created a framework meant to ensure protection of these natural values if and when industrial activity was permitted.

Map 3: Mineral and Coal Tenures and Protected Areas within the Muskwa-Kechika Management Area



Board's legislated responsibilities is to conduct semi-annual reviews of the issuance of tenures and approved operational activities in the M-KMA to ensure achievement of the Plan's objectives.¹⁸⁵ The role of the Advisory Board is to merely advise, and it does not have the authority to block instruments. Instead, ensuring that "operational instruments" within the M-KMA are consistent with the *M-KMA Act*, the Plan and any relevant local strategic plans is the responsibility of governmental regulatory agencies issuing permits.¹⁸⁶

In addition to all of the above, the *M-KMA Act* and Plan also incorporate a number of strategic objectives and directions contained in the Fort Nelson and Fort St. John LRMPs.¹⁸⁷ The legal implications of codifying these strategic objectives and directions is not entirely clear, although it does seem that before issuing permits within the M-KMA, the strategic objectives and directions incorporated into the legislation must be considered.¹⁸⁸

Free-entry in the M-KMA

On its official website, the M-KMA is described as including:

*Parks and Protected Areas where resource extraction is prohibited, and management zones where resource extraction may occur, according to higher standards than elsewhere in the province (e.g. best management practices for oil and gas development).*¹⁸⁹

This statement that 'resource extraction may occur according to higher standards than elsewhere in the province' is true for virtually all types of resource extraction within the M-KMA, *except mining*. Despite the years of work, and the adoption of multiple legal instruments of varying degrees of enforceability (including the *M-KMA Act*, the Muskwa-Kechika Management Plan, multiple local strategic plans, and the incorporation of the Fort Nelson and Fort St. John LRMPs and their strategic objectives into the Plan), the free-entry system persists in the M-KMA just as it does throughout the rest of the province.

None of the instruments explored above seem to have any implications for free entry miners. In the M-KMA, just as throughout the rest of the province, mineral exploration and development can take place everywhere except within protected areas. Indeed, as noted in the B.C. government's *Mineral Exploration and Mining Orientation Guidebook for the Muskwa-Kechika Management Area*: "The *M-KMA Act*...specified local strategic plans for some industrial sectors (but not mineral exploration and mining) to ensure maintenance of wilderness characteristics, wildlife and the habitat on which they depend."¹⁹⁰ Therefore, unlike every other resource extraction industry which must comply with additional restrictions owing to the high environmental values of the M-KMA, miners are merely 'encouraged' to adhere to recommendations and best practices when operating within the M-KMA.¹⁹¹

As Map 3 shows, mineral tenure is now present in the Special Management Zones of all three LRMPs, particularly the Special Wildlife Zones of the Mackenzie LRMP. Given the way free-entry works, no special considerations or consultations are required before mineral claims are registered, even in these carefully designated zones identified as requiring special care.

None of the instruments for the area seem to have any implications for free entry miners. In the M-KMA, just as throughout the rest of the province, mineral exploration and development can take place everywhere except within protected areas.



Conclusions and Recommendations

A remnant of the frontier days of the 1800s, the free-entry system should now be replaced with a discretionary mineral tenure system. There is no longer sufficient justification to give mineral prospectors preferential rights in the vast majority of the provincial land base.

As this report has explored, the free-entry system is a remnant of the frontier days of the 1800s and there is no longer sufficient justification to give mineral prospectors preferential rights in the vast majority of the provincial land base. In 1993, Barry J. Barton wrote in his preeminent book, *Canadian Law of Mining*:

Historically, the covenant was that the miner would be pioneer and would open up the wilds, the untamed and forbidding wilderness. The miner would be the first agent of settlement and would push back the frontier, permitting other settlers such as farmers to follow in due course...

The premises on which the parties entered into this covenant in the nineteenth century have changed. Above all, our concept of wilderness has changed...Now we are aware of the value of wilderness and undeveloped land for a multitude of purposes such as wildlife habitats or recreational and tourism resources. There are other values besides mineral exploration that need nurturing...The reality is that the frontier has closed.¹⁹²

Fundamentally, the free-entry system prioritizes mineral exploration over all other land uses by giving priority rights to mining interests to, among other things, access and use land without the need for consent or consultation even on private land. The free-entry system is no longer appropriate for modern society as it fails to: ensure conservation and protection of significant wilderness areas; treat other land users and resource sectors equally; recognize detailed strategic land use planning documents; and respect First Nation's rights and title. As a result, until it is abandoned, the free-entry system will inevitably lead to more land use conflicts.

We therefore make the following recommendations:

- Free-entry should be replaced with a discretionary mineral tenure system that requires both prior consideration of other interests in the area as well as the environmental sensitivity and significance of the claimed area;
- A modern mineral tenure system must require miners to consult with and obtain consent from both private landowners and First Nations prior to engaging in any mining activities on their land.



Land use plans reflect the public interest in balancing competing land uses. To preserve this balance, mining activities must be required to adhere to land use plans just as every other industry is required to do.

In addition, a clear problem with B.C.'s mineral tenure system is that it undermines the years and sometimes decades of strategic land use planning in the province. Land use plans reflect the public interest in balancing competing land uses. To preserve this balance, mining activities must be required to adhere to land use plans just as every other industry is required to do. Accordingly, we recommend that:

- No mineral tenure should be granted in areas without approved land use plans; and
- In areas with approved land use plans, mineral tenure should be granted only after the objectives and directions contained within the relevant land use plan are considered. Specifically, no mineral tenure should be granted in Special Management Zones absent scrutiny of the potential impacts of such a grant on the identified natural (and other) values. This is particularly crucial in significant wilderness areas, including the Flathead Valley and the Muskwa-Kechika Management Area.

With respect to permitting mining activities, we recommend:

- Advanced exploration activities be required to undergo an environmental assessment prior to commencement.¹⁹³

Strategic Land Use Planning in BC



Protection of the environment is just one aspect of strategic land use planning. As stated by CORE in its seminal report: “In much the same way that protected areas are protected for environmental and recreational uses, resource lands are set aside for resource utilization.”

Historically, economic development drove land use decisions in BC, with most seeing the province as a limitless source of natural bounty. Over time, however, as demands for land and resources could no longer be met by simply moving on to a new frontier, conflicts between divergent interests in land use emerged.¹⁹⁴ Most vigorous was the debate between the conservation and logging of old growth forests, culminating in the ‘war in the woods’ in the early 1990s. More generally, it was becoming apparent that the whole range of land values needed to be more carefully considered, including logging, biodiversity, community water sources, watershed support of fisheries, First Nations traditional use, recreation, mining, and others.

CORE and Regional Planning

In 1991, Michael Harcourt’s newly-elected NDP government initiated a multi-stakeholder land use planning process. To guide it, an independent land use commission known as CORE, the Commission on Resources and Environment, was established.¹⁹⁵ Four large regional planning areas were the initial focus, namely the Cariboo-Chilcotin, Vancouver Island, East Kootenay, and West Kootenay-Boundary regions. Each regional plan covered an area of between 3 million and 8 million hectares¹⁹⁶ CORE was to guide the planning process and seek consensus with the stakeholder interests in each region. Where consensus could not be reached, CORE was given the power to recommend a land use plan to cabinet.¹⁹⁷

Protection of the environment is just one aspect of strategic land use planning. As stated by CORE in its seminal report: “In much the same way that protected areas are protected for environmental and recreational uses, resource lands are set aside for resource utilization.”²⁰⁰ Strategic land use planning is therefore a process of dividing up the provincial Crown land base between sectors that hold differing views on what values should be given priority in a particular location.²⁰¹

What is Strategic Land Use Planning?

In the words of environmental lawyer Mark Haddock, “Strategic land use planning...sets high level direction for the full range of land use activities that occur on public land, and generally ascribes priority uses to given areas. It is contrasted to “operational planning” which defines how and where site-specific land use activities, such as logging, mining or grazing, will occur.”¹⁹⁸ Strategic land use planning can also be contrasted to municipal land use planning – the latter separates lands within municipal boundaries (which is mostly private land) into various zones, such as industrial, commercial, residential and parks.¹⁹⁹

Land and Resource Management Plans (LRMPs)

The NDP government ultimately disbanded CORE in 1996 and shifted the planning process to be run by individual tables of stakeholders.²⁰² Land and Resource Management Plans (LRMPs) were now to be developed for smaller, ‘subregional’ areas, which normally covered an area between one million and six million hectares.²⁰³ The intention was to develop roughly 40 LRMPs, which would cover all Crown land in the province.²⁰⁴ Given that Crown land makes up just over 94 per cent of BC, these plans would cover most of the province. Public participation was to be encouraged at every stage of the LRMP process, with the aim that “all levels of government and all members of the public with an interest in land use and resource management; and, the public directly affected by the outcome” would all be invited to participate.²⁰⁵

The aim of each LRMP table was to develop, by consensus where possible, a zoning of the area covered by the LRMP, with each zone restricting and/or encouraging certain activities. Protected area zones, for example, would be the most restricted to protect the environment or other values, while ‘general’ or ‘enhanced’ resource management zones would be the least restricted to allow for extensive resource development. Thus the primary output of each LRMP table was a zoning map, together with a description of what should or should not be allowed in each zone. The LRMP process also came to be used as a means of implementing the 1993 *Protected Areas Strategy for British Columbia* (PAS), which committed to more than double protected areas to 12 per cent of the province by the year 2000, by zoning new areas for protection.²⁰⁶

At its heart, the LRMP process in BC was designed to enhance public participation in land use decisions by promoting consensus-based, multi-stakeholder decision making, thereby reducing conflicts over land use. Land use planning was also espoused as providing certainty to industry, which was finding it difficult to predict which lands would be withdrawn into protected status, particularly given the government’s Protected Area Strategy.²⁰⁷ In this regard, LRMPs were promoted as a means of ensuring “the certainty required to attract investors to B.C. willing to undertake high risks and expense of subsurface resource exploration and development.”²⁰⁸

At its heart, the LRMP process in BC was designed to enhance public participation in land use decisions by promoting consensus-based, multi-stakeholder decision making, thereby reducing conflicts over land use.

Once approved, an LRMP became government policy, but was not in itself legally binding. Nevertheless, an approved LRMP creates a strong expectation that objectives contained in land-use plans will guide subsequent decisions within the applicable area.

Zoning in BC's LRMPs

Although individual LRMPs sometimes use different terminology, typical zones found in an LRMP include:²⁰⁹

- Settlement and private lands;
- Agriculture areas;
- General or enhanced resource management zones, in which little or no restriction is usually placed on development (beyond usual resource management laws);
- Special Resource Management Zones (SRMZs), in which resource development activities are usually permitted and sometimes even “encouraged”, provided they meet stated objectives in the plan. For example, logging and mining might be allowed provided significant natural values are not harmed, such as a specific watershed values or wildlife habitat. SRMZs were often used as a compromise at LRMP tables, if some stakeholders wanted an area to be open to unrestricted resource development whereas others wanted the area to be a protected area. Thus designation of an area as an SRMZ was sometimes the only way for a table to reach consensus; and
- Protected areas (also called ‘protection resource management zones’), in which logging, mining and energy exploration and development are usually prohibited.²¹⁰

In practice, not all LRMP tables were able to reach consensus, and in any case, cabinet held the final say in approving an LRMP (leading to some inevitable conflicts). Once approved, an LRMP became government policy, but was not in itself legally binding. Nevertheless, an approved LRMP creates a strong expectation that objectives contained in land-use plans will guide subsequent decisions within the applicable area.²¹¹

A variety of methods have been used to legally implement certain elements of some LRMPs. For example, areas zoned by an LRMP to be protected areas could be legally designated as protected areas under BC's *Park Act*, while restraints on logging in SRMZs could be legally designated as higher level plans under BC's *Forest Practices Code*.

Sustainable Resource Management Plans (SRMPs)

After taking power, the liberal government introduced Bill 46,²¹² which became the *Land Amendment Act, 2003*,²¹³ and put in place statutory amendments to implement the government's ‘working forest’ policy.²¹⁴ The goal of the Bill was to “provid[e] greater certainty and access to Crown land and resources through changes in how the province implements strategic land use decisions.”²¹⁵ The stated intention of the Bill was not to “waste the tremendous amount of effort put into the LRMP process, but rather to build

on the plans, and put some teeth behind them.”²¹⁶ It was also not intended to reduce the near 13 per cent of the province that had become parks and protected areas under the previous government.²¹⁷

Alongside the *Land Amendment Act*, 2003, a decision was made to not initiate any new LRMP processes.²¹⁸ Instead, the Liberal government introduced a new type of strategic land use plan, Sustainable Resource Management Plans, intended to cover an area of between 50,000 and 100,000 hectares.²¹⁹ SRMPs were described by the government as “one level more detailed” than LRMPs.²²⁰ The scope of individual SRMPs is intended to vary, with some narrowly focusing on a small number (or even one) resource value, while others comprehensively address multiple resource values such as the Southern Rocky Mountain Management Plan discussed in the Flathead case study above.²²¹

The *Land Amendment Act*, 2003 and new SRMP process were criticized for, among other things, shifting land use decisions away from the public (as they had been, at least in theory, under the LRMP process),²²² and for nullifying a significant aspect of the LRMP process, namely monitoring of land use plans and making adjustments where the plans were ineffective (i.e. adaptive management).²²³

In December 2006, the government announced a *New Direction for Strategic Land Use Planning in BC* (the *New Direction*).²²⁴ The *New Direction* limits updates and amendments of existing LRMPs and SRMPs “to specific components of a plan, rather than the plan as a whole,”²²⁵ and also states that new planning will be initiated only in circumstances where required to, among other priorities, address major emerging land use conflicts or competition among different user groups.²²⁶ According to government, this would have the “significant advantage of giving planners the flexibility to tailor their plans to unique factors (e.g., resource development, conservation, use of First Nations traditional territory) that may be most pressing at the local level.”²²⁷ The *New Direction* also confirmed that planning in BC no longer requires public participation, but instead, “how often, or even if, stakeholders were contacted during planning would vary depending on the project.”²²⁸ As of 2006, the *New Direction* states that 85 per cent of the provincial Crown land base is covered by 26 regional land use plans and LRMPs, and there are an additional 102 completed SRMPs and another 93 ongoing for a total of 195.

Strategic Land Use Planning and Mining

The NDP government was clear that protected areas were the only Crown land “off limits” to mineral exploration and that subsurface resource sectors had “full access to all lands outside of protected areas.”²²⁹ The Liberal government has been similarly clear that the ‘two-zone mining policy’ remains intact. Indeed, part of the Liberal government’s rationale for its 2006 *New Direction* was to respond to “increasing global and North American mineral and energy demands and resultant increases in exploration and development activities on land, in streams and offshore.”²³⁰

Unlike forestry, where restrictions have been put in place from LRMPs and SRMPs outside of protected areas, there is nothing comparable for the mining sector. It is nonetheless “expected” that operational decisions (including the granting of tenures) will be made consistent with the direction provided within approved plans.²³¹



The *New Direction* confirmed that planning in BC no longer requires public participation, but instead, “how often, or even if, stakeholders were contacted during planning would vary depending on the project.”

Flathead Watershed Area Order

Definitions

1. In this order:

“*Flathead watershed area*” means all those parcels or tracts of land that on November 9, 2009, were situated in the Kootenay District and contained within the boundaries as shown on the official plan for the Flathead Watershed Area, deposited in the Media Vault, GeoBC, Victoria as Official Plan: Flathead Watershed Area, dated November 9, 2009, but does not include the following:

- (a) a park, recreation area or conservancy, as those terms are defined in section 1 of the *Park Act*;
- (b) an ecological reserved named and described in Section A or Section B to the *Protected Areas of British Columbia Act*;
- (c) an area that is established as a protected area by an order in council under the *Environment and Land Use Act*;

“*Crown Land*” means land, whether or not it is covered by water, that is owned by the government;

“*mining activity*” means any activity related to:

- (a) the exploration and development of a mineral, a placer mineral or coal, or
- (b) the production of a mineral, a placer mineral or coal.

Mining Activity in the Flathead Watershed Area

- 2. (1) The minister responsible for the administration of a section of the *Land Act* referred to in paragraphs (a) to (c) must not, under that section, for or in relation to a mining activity in the Flathead watershed area,
 - (a) dispose of Crown land in the Flathead watershed area under section 11 of the *Land Act*
 - (b) issue a lease of Crown land or grant an option to purchase Crown land in the Flathead watershed area under section 38 of the *Land Act*, or
 - (c) grant a licence to occupy and use Crown land in the Flathead watershed area under section 39 of the *Land Act*.
- (2) The minister responsible for the administration of the *Ministry of Lands, Parks and Housing Act* must not, for or in relation to a mining activity in the Flathead watershed area,
 - (a) dispose of Crown land in the Flathead watershed area under section 9 (1) (a) of that Act, or
 - (b) provide in an agreement for the disposition of Crown land in the Flathead watershed area under section 9 (1) (c) of that Act.
- (3) The chief inspector under the *Mines Act* must not, for or in relation to a mining activity in the Flathead watershed area,
 - (a) issue or amend a permit under section 10 of that Act, or
 - (b) exempt any person under section 10 (2) of that Act from the requirement to obtain a permit under section 10 of that Act.

Notes

- 1 British Columbia, Ministry of Energy, Mines and Petroleum Resources, “Overview of Trends in Canadian Mineral Exploration” (2008), (website), online: Ministry of Energy, Mines and Petroleum Resources <www.empr.gov.bc.ca/mining/mineralstatistics/industryoverviews/pages/BCprovttrends.aspx>.
- 2 See, for example, Northwatch & MiningWatch Canada, *The Boreal Below: Mining Issues and Activities in Canada’s Boreal Forest*, and E.A. Ripley, R.E. Redmann & A.A. Crowder, *Environmental Effects of Mining*, (Delray Beach: St. Lucie Press, 1996).
- 3 E.A. Ripley, R.E. Redmann & A.A. Crowder, *Environmental Effects of Mining*, (Delray Beach: St. Lucie Press, 1996), at 13.
- 4 See *Mineral Tenure Act*, R.S.B.C. 1996, c. 292, online: <http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96292_01>, at ss. 11.1(2).
- 5 Northwatch & MiningWatch Canada, *The Boreal Below: Mining Issues and Activities in Canada’s Boreal Forest*, and E.A. Ripley, R.E. Redmann & A.A. Crowder, *Environmental Effects of Mining*, (Delray Beach: St. Lucie Press, 1996), at 13.
- 6 British Columbia, Legislative Assembly, *Debates* (22 April 2004) at 10389 (R. Neufeld), online: <<http://www.leg.bc.ca/hansard/37th5th/h40422p.htm#10387>>.
- 7 According to the U.S. Environmental Protection Agency’s Toxic Release Inventory, the mining sector produces more hazardous waste than any other industrial sector in the United States, see: Bruce Finnie, Jeffery Stuart, Linda Gibson and Fern Zabriskie, “Balancing environmental and industrial sustainability: A case study of the US gold mining industry”, *Journal of Environmental Management* Vol. 90, Issue 12 (September 2009), at 3690.
- 8 “Overburden” is made up of soil, trees and vegetation; “waste rock” is the rock that surrounds or overlays the ore; and “tailings” is the by-product from the crushing or processing of the ore. See for example, MiningWatch Canada, “EMCBC Mining and the Environment Primer: Environmental Impacts of Mining” (March 31, 2006), online: <<http://www.miningwatch.ca/en/emcbc-mining-and-environment-primer-environmental-impacts-mining>> and MiningWatch Canada, “Two Million Tonnes a Day: A Mine Waste Primer”, (December 2009), online: <http://www.miningwatch.ca/sites/miningwatch.ca/files/Mine_Waste_Primer.pdf>.
- 9 See Northwatch & MiningWatch Canada, *The Boreal Below: Mining Issues and Activities in Canada’s Boreal Forest*, (Ottawa: MiningWatch Canada, 2008) at 37 – 38, online: Mining Watch Canada, <http://www.miningwatch.ca/sites/miningwatch.ca/files/Boreal_Below_2008_web.pdf>. See also, MiningWatch Canada, “Two Million Tonnes a Day: A Mine Waste Primer”, (December 2009), online: <http://www.miningwatch.ca/sites/miningwatch.ca/files/Mine_Waste_Primer.pdf> at pg. 4. See also <http://www.cbc.ca/canada/north/story/2008/06/06/ekati-spill.html>.
- 10 See section 5 and Schedule 2 to the *Metal Mining Effluent Regulations*, SOR/2002-222, online: Government of Canada, <<http://laws.justice.gc.ca/en/SOR-2002-222/FullText.html>>.
- 11 MiningWatch Canada, “Two Million Tonnes a Day: A Mine Waste Primer” at 1.
- 12 See section 5 and Schedule 2 to the *Metal Mining Effluent Regulations*, SOR/2002-222.
- 13 See Schedule 2 to the *Metal Mining Effluent Regulations*, SOR/2002-222.
- 14 Canada, Kemess North Copper-Gold Mine Project Joint Review Panel, *Kemess North Copper-Gold Mine Project: Joint Panel Review Report*, (Ottawa: 2007), online: <http://www.ceaa.gc.ca/050/documents_staticpost/cearef_3394/24441E.pdf>, at 239.
- 15 See the CEA Agency website online: <<http://www.ceaa.gc.ca/050/details-eng.cfm?evaluation=44811>>.
- 16 See *Great Lakes United v. Canada (Environment)*, 2009 FC 408 (CanLII) at paras 3 – 8; and Northwatch & MiningWatch Canada, *The Boreal Below: Mining Issues and Activities in Canada’s Boreal Forest*, (Ottawa: MiningWatch Canada, 2008) at 35, online: Mining Watch Canada, <http://www.miningwatch.ca/sites/miningwatch.ca/files/Boreal_Below_2008_web.pdf> at 35 – 36.
- 17 See Northwatch & MiningWatch Canada, *The Boreal Below: Mining Issues and Activities in Canada’s Boreal Forest*, (Ottawa: MiningWatch Canada, 2008) at 32, online: Mining Watch Canada, <http://www.miningwatch.ca/sites/miningwatch.ca/files/Boreal_Below_2008_web.pdf>. See also Pollution Watch website: <http://pollutionwatch.org/rank.do?change=&year=2006&pwSourceSelected=N_PRI_COMBINED&pollutant_select=all&pollutant=612-00-0&casNumber=100-00-5&healthEffect=all&airleaseType=COMBINED&provincesByList=RELE_ON&facilitiesByList=RELE_ON&provincesListFac=all&facilitiesByButton=Rank&companiesByList=RELE_ON>.
- 18 See Northwatch & MiningWatch Canada, *The Boreal Below: Mining Issues and Activities in Canada’s Boreal Forest*, at 8.
- 19 E.A. Ripley, R.E. Redmann & A.A. Crowder, *Environmental Effects of Mining*, at 130
- 20 British Columbia, “Britannia Mine – recent observed flows and concentrations to January 2001” online: <<http://www>>

- agf.gov.bc.ca/clad/britannia/downloads/recent_discharge_table.pdf>.
- 21 See Golder Associates, 2008 *Data Report: Britannia Mine Environmental Monitoring* (Report # 08-1421-0091), (Ministry of Agriculture and Lands, 2009), online: Ministry of Agriculture and Lands, Crown Land Restoration Branch <http://www.agf.gov.bc.ca/clad/britannia/downloads/reports/summary_progress_reports/Rep%200223_09%20FINAL%20Britannia%20Annual%20Data.pdf>.
- 22 British Columbia, Ministry of Agriculture and Lands, “Britannia Mine: Background on Pollution and Remediation Issues” online: Ministry of Agriculture and Lands, Crown Land Restoration Branch <<http://www.agf.gov.bc.ca/clad/britannia/background.html>>.
- 23 See Northwatch & MiningWatch Canada, *The Boreal Below: Mining Issues and Activities in Canada’s Boreal Forest*, at 9.
- 24 *Mineral Tenure Act*, s. 1 at the definition of “mineral,”
- 25 See in particular, Northwatch & MiningWatch Canada, *The Boreal Below: Mining Issues and Activities in Canada’s Boreal Forest*; K. Campbell, *Undermining our Future: How Mining’s Privileged Access to Land Harms People and the Environment*, (Vancouver: West Coast Environmental Law, 2004), online: MiningWatch Canada <http://www.miningwatch.ca/sites/miningwatch.ca/files/WCEL_Free_Entry_paper.pdf>; and M. Carter-Whitney, J. Duncan, *Balancing Needs/Minimizing Conflict: A Proposal for a Mining Modernization Act*, (CIELAP & Ecojustice, 2008), online: Ecojustice <<http://www.ecojustice.ca/publications/reports/balancing-needs-minimizing-conflict-a-proposal-for-a-new-ontario-mining-act/>>.
- 26 See Northwatch & MiningWatch Canada, *The Boreal Below: Mining Issues and Activities in Canada’s Boreal Forest*, at 13.
- 27 See J. Bergenske & G. Heyman, “Modernize the mining act and end the free-for-all” *The Vancouver Sun* (19 January 2010), online: The Vancouver Sun <<http://www.vancouversun.com/technology/Modernize+mining+free/2458425/story.html>>.
- 28 *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, s. 109.
- 29 *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; see consolidated Constitution online: <http://laws.justice.gc.ca/eng/const/PRINT_E.pdf>.
- 30 See *Great Lakes United v. Canada (Environment)*, at paras. 200 – 202 and 208 in which the Federal Court allowed an application brought by lawyers from Ecojustice, on behalf of Great Lakes United and MiningWatch Canada, and ruled that waste rock and tailings must be reported under the *National Pollutant Release Inventory* despite the federal government’s reluctance to do so.
- 31 *The Boreal Below: Mining Issues and Activities in Canada’s Boreal Forest*, at 8.
- 32 *Mineral Tenure Act* at ss. 7 – 11.
- 33 *Mineral Tenure Act* at s. 8 and *Mineral Tenure Act Regulation*, B.C. Reg. 529/2004 at Schedule B. Note also that “Canadian Corporation” is defined in section 1 of the *Mineral Tenure Act*.
- 34 See *Mineral Tenure Act* at s. 1 at the definition of “mineral lands.”
- 35 K. Campbell, *Undermining our Future: How Mining’s Privileged Access to Land Harms People and the Environment*, at 19.
- 36 For the exceptions to free-entry, see *Mineral Tenure Act* at ss. 11(2).
- 37 *Mineral Tenure Act* at s. 14(5).
- 38 British Columbia, Legislative Assembly, *Debates* (22 April 2004) at 10388 (Hon. R. Neufeld), online: British Columbia <<http://www.leg.bc.ca/hansard/37th5th/h40422p.htm#10387>>.
- 39 British Columbia, Ministry of Energy, Mines and Petroleum Resources, “Overview of Trends in Canadian Mineral Exploration” (2008), online: <www.empr.gov.bc.ca/mining/mineralstatistics/industryoverviews/pages/BCprovtrends.aspx>.
- 40 See, in particular, *Petroleum and Natural Gas Act*, R.S.B.C. c. 362 at s. 71; as well as the *Net Profit Royalty Regulation*, B.C. Reg. 98/2008.
- 41 Standardized cells are between 16 and 21 hectares each depending on the location. British Columbia, Ministry of Energy, Mines and Petroleum Resources, “Mineral Titles Online,” online: <<http://www.empr.gov.bc.ca/Titles/MineralTitles/mto/about/reg/Pages/acquisition.aspx>>.
- 42 Ministry of Energy, Mines and Petroleum Resources, “British Columbia Oil & Gas Exploration Activity Report 2007 – 2008,” at 4.
- 43 *Mineral Tenure Act* at s. 28.
- 44 *Mineral Tenure Act* at s. 41.
- 45 *Mineral Tenure Act* at s. 14.
- 46 *Mineral Tenure Act* at s. 11.1, subject to written approval of the Chief Inspector of Mines. See also *Mineral Tenure Act* s.14(3) and (4).
- 47 *Frotenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534 (CanLII) at paras. 61 – 62, online: <http://www.canlii.org/en/on/onca/doc/2008/2008onca534/2008_onca534.html>.
- 48 *Mining Right of Way Act*, R.S.B.C. c. 294, at s. 2, online: BC Laws <http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96294_01>.
- 49 *Mining Right of Way Act* at ss. 4(1).
- 50 *Mineral Tenure Act Regulation* at s. 2.1.

- 51 *Mineral Tenure Act* at s. 19.
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- 81 *Metal Mining Effluent Regulations*, S.O.R./2002-222, online: <<http://laws.justice.gc.ca/eng/SOR-2002-222/index.html>>.
- 82 *Navigable Waters Protection Act*, R.S. 1985, c. N-22, s. 5, online: <<http://laws.justice.gc.ca/PDF/Statute/N/N-22.pdf>>.
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- 84 *Reviewable Projects Regulation*, B.C. Reg. 370/2002 at Part 3, Table 5; pursuant to the *BC Environmental Assessment Act*, S.B.C. 2002, c. 43.
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- 93 For example, see descriptions of the Britannia Mine and Mt. Washington Mine in: G. Simmons, M. Anderson et al., *Digging Up Trouble: The Legacy of Mining in British Columbia*, (Vancouver: Sierra Legal Defence Fund, 1998) at 24 – 31.
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- 98 Online: <http://www.env.gov.bc.ca/bcparks/aboutBCParks/prk_desig.html>.
- 99 Section 7(2) of the *Park Act*.
- 100 The three classes of parks are not expressly defined in the *Park Act*, but do have legal implications, for example with respect to issuing park use permits. Section 9 of the *Park Act* references all three types of classifications.
- 101 Online: <http://www.env.gov.bc.ca/bcparks/aboutBCParks/prk_desig.html>.
- 102 See ss. 12(3) of the *Park Act*.
- 103 See: *Friends of Cypress Provincial Park Society v. British Columbia (Minister of Environment, Lands & Parks)* 2000 BCSC 466, 33 C.E.L.R. (N.S.) 276 at para. 58 which involved the Friends of Cypress Provincial Park Society challenging the Minister of Environment, Lands and Parks for permitting the expansion of ski resort in Cypress Provincial Park. As part of determining whether the issuance of the permit was patently unreasonable, Melnick J. examined the purpose for which Cypress Provincial Park, and provincial parks generally, are established.
- 104 “natural resources” is defined very broadly in the Act as meaning “land, water and atmosphere, their mineral, vegetable and other components, and includes the flora and fauna on and in them”.
- 105 See sections 9 and 16 of the *Park Act*.
- 106 Section 1, “park use permit”.
- 107 Subsection 9(2) of the *Park Act*.
- 108 See section 11(2)(g) and 21 of the *Mineral Tenure Act*.
- 109 See Schedule D to the *Protected Areas of British Columbia Act*.
- 110 Subsection 11(2) of the *Park Act*.
- 111 *R. v. Tener*, [1985] 1 S.C.R. 533 at para. 59.
- 112 See also subsection 11(2.2)(a) of the *Park Act* and the *Mining Rights Compensation Regulation*.
- 113 See also subsection 11(2.2)(b) of the *Park Act*.
- 114 See Bill 28 – the *Park (Conservancy Enabling) Amendment Act*, 2006, online: <http://www.leg.bc.ca/38th2nd/3rd_read/gov28-3.htm>.
- 115 Online: BC Parks “Protected Area Overview” <http://www.env.gov.bc.ca/bcparks/aboutBCParks/prk_desig.html>
- 116 See section 1 of the *Park Act* which defines “conservancy” as: Crown land established by or under this Act or the *Protected Areas of British Columbia Act* as a conservancy;
- 117 See section 9(6.1) of the *Park Act*.
- 118 See section 9(9) of the *Park Act*.
- 119 See section 5(3.1) of the *Park Act*.
- 120 See section 20.1 of the *Park Act*. Note that this section applies only to conservancies listed in Schedule F to the *Protected Areas of British Columbia Act*.
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- 126 Section 3 of the *Ecological Reserve Act*, R.S.B.C. 1996, Ch. 103.
- 127 Section 2 of the *Ecological Reserve Act*
- 128 Section 1 of the *Ecological Reserve Regulations*, B.C. Reg. 335/75.
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- 132 *Mineral Tenure Act Regulation*, s. 4(2) and definition of ‘alienated land’ in s. 1.
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- 136 See section 4 of the *Mineral Tenure Act*.
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- 168 *Fort Nelson Land and Resource Management Plan*, at Executive Summary.
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- 171 *Fort Nelson Land and Resource Management Plan*, at 40.
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- 202 *Guide to Forest Land Use Planning*, at 1-4.
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