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Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments



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Preface

This paper was written to respond to the Government of Yukon's request for comments on proposed changes to the *Quartz Mining Act* and *Placer Mining Act* posted June 3, 2013. Changes to these acts became necessary when the Yukon Court of Appeal¹ ruled that, "The Government of Yukon has a duty to notify and, where appropriate, consult with and accommodate the plaintiff [Ross River Dena Council] before allowing any mining exploration activities to take place within the Ross River area, to the extent that those activities may prejudicially affect aboriginal rights of the plaintiff [Ross River Dena Council]."

We have chosen to use a numbered paragraph format for easy reference to information within this paper. This paper will be a valuable resource for those who need to better understand their right to consultation and how it can be used to create a path to respectfully share resources and protect the land. There is a way!

The term "Aboriginal" is used frequently in this paper. We apologize if the word is found to be offence to our First Nation brothers. "Aboriginal" has become a legal expression of sorts in Canada when discussing First Nation rights. So, we have used the word when we discuss rights and common law (court cases).

Submitted to: The Government of Yukon, Department of Energy, Mines and Resources.

Shared with: The Council of Yukon First Nations and the Unsettled First Nations of the Yukon.

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Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

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Table of Contents

| | |
|--|----|
| Preface | i |
| Table of Contents | ii |
| Introduction | 1 |
| Meaningful Consultation | 1 |
| Settled v. Unsettled | 4 |
| Is there Meaningful Consultation | 8 |
| Is There Accommodation | 9 |
| Specific Comments | 9 |
| Summary | 13 |
| Appendix A Excerpts From Umbrella Final Agreement | 15 |
| Appendix B Excerpts From <i>Yukon Environmental and Socio-economic Assessment Act</i> | 16 |
| Appendix C Government of Yukon Discussion Paper | 18 |
| Appendix D Government of Yukon Process Chart | 25 |

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

Introduction

1. Aboriginal rights in Canada derive from Section 35 of the *Constitution Act* (1982). These rights are predominantly defined by common law (court cases). Defined rights are then included into legislation and further defined by regulations. This is how the Crown – Canada – defines Aboriginal rights.
2. Canada's First Nations derive their rights through their connections to the land and their family ties, both of which were given to them by our Creator. The rights of the land and its people are defined by their relationship with each other. Defined rights find their way into traditional law and are further defined through respect as the situation arises (as life requires).
3. The Crown does not understand that the rights of the land are both separate and entwined with the rights of its First People. The Crown does not see that there is only one people to whom the land was entrusted; and from there the land can be shared.
4. The Crown claims to have sovereignty over land that was given to a people long before the colonists arrived. It is this claim to sovereignty that forces the reconciliation of the rights of the Crown with the rights of First Nations.

Meaningful Consultation

5. The Government of Yukon (YTG) must change legislation and regulations (*Quartz Mining Act* (2002) and *Placer Mining Act* (2002)) to include the right of First Nations in the Yukon to be consulted and accommodated on mineral exploration activities undertaken within their traditional territories.¹ To understand if the YTG's proposed legislative and regulatory changes will suffice (See Appendices C and D), we need to know that the right of First Nations to consultation has been met and that rights under consultation have been accommodated.
6. In Section 35 (1) of the *Constitution Act* (1982) the Crown recognizes and affirms the constitutional character of Aboriginal and treaty rights with, "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."
7. The meaning of Section 35 (1) was clarified² with, "More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and

¹ *Ross River Dena Council v Government of Yukon*, [2012] YKCA 14, at para. 56.

² *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 at para. 31.

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”

8. This need for reconciliation of pre-existing societies with the sovereignty of the Crown created the constitutional right for Canada's Aboriginal people to consultation. The Crown has a duty to consult³ that finds its origin in both the fiduciary⁴ (big brother) nature of its relationship with Aboriginal people and in the need for the Crown to uphold its honour.^{5,6,7}
9. The duty to consult arises⁸, “...when the Crown has sufficient knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.” The courts have gone on to define a three part test to determine whether the duty to consult is triggered. The Ross River Dena Council court case¹ against mining claims and exploration met these 3 elements. They are⁹:
 - a. Does the Crown have knowledge, actual or constructive, of a potential Aboriginal claim or right that may be affected;
 - b. Could the contemplated Crown conduct affect a potential Aboriginal claim or right; and,
 - c. Is there the potential the contemplated conduct may adversely affect an Aboriginal claim or right.
10. This duty to consult, “...can be triggered even where the Aboriginal interest is insufficiently specific to require that the Crown act in the Aboriginal group's best interest.”¹⁰
11. Unfortunately, Aboriginal consultation has become confusing to the average person since the words “consult” and “consultation” are used to describe a number of different things. Consult

³ *R. v. Sparrow*, [1990] 1 SCR 1075.

⁴ *Guerin v. Canada*, [1984] 2 SCR 335.

⁵ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73.

⁶ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 SCR 550, 2004 SCC 74.

⁷ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69.

⁸ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, at para 35.

⁹ *Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council*, [2010] SCC 43, 2010 2 SCR 650 at para 31.

¹⁰ *Dene Tha' First Nation v. British Columbia (Minister of Environment)*, [2006] F.C. 1354, 2008 FCA 20, at para. 81.

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

means to discuss and consultation is the act of consulting. To the Crown, consultation has also come to mean the nuts and bolts (due process) of the act of consulting.

12. Unfortunately, most First Nations understand the word consultation to include more than just discussion. They see the Crown's consultation as advice seeking that obliges the one seeking the advice to adjust their actions accordingly. This misconception has its roots in traditional Elder Seeking in which Elders are the ultimate authority. It is of paramount importance that everyone realize that what First Nations expect in a consultation is very often different than what the Crown is delivering; a due process that hears but does not listen.
13. What First Nations expect is something that has been legally defined as Meaningful Consultation. The rule of law (a combination of the constitution, legislation and court cases) in Canada dictates that the Crown must provide Meaningful Consultation to meet the right to consultation. Meaningful Consultation is actually the "proper name" for the rights reconciliation process, much like John Smith is a proper name. It was first defined by the Supreme Court of Canada in 2004 and includes both a consultation (discussion) component and an accommodation (adjust actions) component.¹¹ So, the accommodation expected by First Nations is actually part of the Aboriginal right to consultation guaranteed by the *Constitution Act* (1982). Accommodation during Meaningful Consultation first begins with the recognition and accommodation of the distinct features in Aboriginal society that need to be respected in the consultation process.¹²
14. This comment paper will not go into the details defining the consultation and accommodation components of Meaningful Consultation, they have been defined elsewhere¹³. It should suffice to say though, that the adequacy of the Crown's effort to fulfill its duty to Meaningful Consultation is assessed by its overall offer of accommodation weighed against the potential impact of the infringement on the Aboriginal right under consultation.¹⁴
15. The Crown's responsibilities for ensuring Meaningful Consultation in Canada are not the sole responsibility of the federal government. Meaningful Consultation is also the duty of provincial and territorial governments.¹⁵ The YTG will not be negotiating in good faith and a willingness to accommodate Yukon First Nations' interests with respect to exploration activity

¹¹ *Haida Nation v. British Columbia* (Minister of Forests), [2004] 3 SCR 511, at para 60, 61, 62 and 63.

¹² *Wii'litswx v. British Columbia* (Minister of Forests), [2008] BCSC 1139, at para 7.

¹³ (2009) Herbert, R. G., *Meaningful Consultation in Canada: The Alternative to Forced Aboriginal Assimilation*. <http://caid.ca/MeaCon092409.pdf>.

¹⁴ *Gitanoyow First Nation v. British Columbia* (Minister of Forests), [2004] BCSC 1734, at para. 63.

¹⁵ *Haida Nation v. British Columbia* (Minister of Forests), [2004] 3 SCR 511, at para 59).

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

changes, if it does not make reasonable concessions during a Meaningful Consultation process.¹⁶

Unsettled versus Settled Yukon First Nations

16. The YTG must engage Yukon's First Nations in Meaningful Consultation to change legislation and regulations on mining exploration activities. The Yukon has First Nations with Final Land Claim and Self-Government Agreements (Settled First Nations) and those without Land Claims or Treaties (Unsettled First Nations).

Section 35

17. Both Settled and Unsettled First Nations have constitutional rights under Section 35. Settled First Nations have willingly modified their constitutional Aboriginal rights with their Land Claim Agreements. These modifications set out processes and remedies that define rights such as hunting and forest management so that much of the Meaningful Consultation process for these rights has been undertaken. However, Land Claim and Self-Government Agreements do not extinguish constitutional Aboriginal rights. Because of this, even for the most defined right in a Land Claim Agreement the Crown still has a duty to consult Settled First Nations. The depth of that consultation depends on details within the Land Claim Agreement that apply to the issue at hand. This is because it is impossible to have included every potential situation or issue within the agreement.¹⁷

Settled First Nations

18. In the current situation, with the need to consult on changes to mining exploration activities, there is no specific process in the Yukon's Settled First Nations' Final Land Claim Agreements that will provide a remedy for the consultation before us. While YTG may argue that land planning, hunting, forestry and land access processes within Yukon's Land Claims are relevant to the needed consultation or that sections 2.6.2 or 18.3.2 of the Umbrella Final Agreement¹⁸ apply, the YTG cannot make a bonafide legal argument that Meaningful Consultation was undertaken on class 1 mineral exploration and its legislation/regulations during land claim negotiations. Therefore, Section 2.2.4 of the Umbrella Final Agreement prevails. Settled First Nations in the Yukon must be consulted as per their Section 35 right to consultation on proposed changes to legislation on mining exploration activities. (See Appendix A).

¹⁶ *Gitanyow First Nation v. British Columbia (Minister of Forests)*, [2004] BCSC 1734, at para. 50.

¹⁷ *Beckman v. Little Salmon/Carmacks First Nation*, [2010] SCR 53.

¹⁸ (1993) *Umbrella Final Agreement*.

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

Unsettled First Nations

19. The YTG may have valid arguments to limit the depth of consultation with Settled First Nations on class 1 mining exploration activities, but they do not have an argument for the depth of Meaningful Consultation that must be undertaken with Unsettled First Nations. Mining exploration activities in general, and class 1 activities in specific, effect First Nation individual and communal rights to hunt, fish and manage resources. Meaningful Consultation on legislative and regulatory changes to mining activities must therefore be deep and include:
- a. The Crown establishing a reasonable consultation process to meet its duty to consult Unsettled First Nations;¹⁹
 - b. A consultation process that recognizes the distinct features of the Unsettled First Nation consulted;²⁰
 - c. Aboriginal Elders since they are the oral repository for historical knowledge on culture, pre-contact practices, and for the values and morals of their culture that must be used to define Aboriginal pre-contact practices for reconciliation with the Crown;²¹
 - d. Wildlife conservation and natural resource management;^{22 23}
 - e. Hunting and fishing rights;^{24 25}
 - f. Deep consultation since the Aboriginal rights and the potential infringement on the rights are of high significance to the Unsettled First Nation; and, the risk of non-compensable damage is high;²⁶
 - g. The full consent of the Unsettled First Nation community since communal rights will be affected;^{24 27} and,

¹⁹ *Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al.*, [2005] BCSC 697, at para. 123.

²⁰ *Wii'litswx v. British Columbia (Minister of Forests)*, [2008] BCSC 1139, at para. 247.

²¹ *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, at para 84, 85, 86 and 87.

²² *R. v. Sparrow*, [1990] 1 SCR 1075.

²³ *R. v. Badger*, [1996] 1 SCR 771, at para 97.

²⁴ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, at para 40.

²⁵ *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, at para 168.

²⁶ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, at para 44.

²⁷ *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, at para 115.

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

- h. A moratorium (freeze) on mining exploration to prevent the unilateral exploitation of the resources under consultation.²⁸
20. Any consultation process established by the YTG for Unsettled First Nations will not meet its duty to provide Meaningful Consultation if:
- a. YTG only meets with Aboriginal leaders, given the high significance of the consultation at hand²⁹;
 - b. YTG does not give First Nations enough time to respond³⁰;
 - c. YTG does not provide technical assistance and funding for Unsettled First Nations to fully participate in the consultation process^{31 32 33};
 - d. YTG does not invite the Unsettled First Nations individually to consult²⁹;
 - e. YTG uses a public consultation process to consult Unsettled First Nations³⁴;
 - f. YTG provides a consultation process that excludes accommodation from the outset; provides “due process” only³⁵;
 - g. YTG provides mitigation and not accommodation³⁶;
 - h. YTG fails to reconcile Unsettled First Nation pre-existing traditional law and regulation on land and resource management with the sovereignty of the Crown³⁶; and,
 - i. YTG finalizes legislation or regulations that make no attempt to accommodate

²⁸ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, at para 27.

²⁹ *Dene Tha' First Nation v. British Columbia (Minister of Environment)*, [2006] FC 1354, 2008 FCA 20, at para. 118.

³⁰ *Dene Tha' First Nation v. British Columbia (Minister of Environment)*, [2006] FC 1354, 2008 F.C.A. 20, at para. 116.

³¹ *Dene Tha' First Nation v. British Columbia (Minister of Environment)*, [2006] FC 1354, 2008 FCA 20, at para. 134.

³² *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] CanLII 20790 (ONSC) at para 27.

³³ *White River First Nation v. Yukon Government*, [2013] YKSC 66, at para. 108.

³⁴ *Dene Tha' First Nation v. British Columbia (Minister of Environment)*, [2006] FC 1354, 2008 FCA 20, at para. 115.

³⁵ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388, [2005] SCC 69, at para. 54.

³⁶ *Dene Tha' First Nation v. British Columbia (Minister of Environment)*, [2006] FC 1354, 2008 FCA 20, at para. 82.

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

constitutionally enshrined Aboriginal rights^{37 38}.

Transboundary Consultation

21. The final caveat that must be considered with Unsettled First Nations is the transboundary issue. Final Yukon Land Claim Agreements address the transboundary issue, but without the inclusion of the three Unsettled First Nations (Liard First Nation, Ross River First Nation and White River First Nation) approximately thirty percent of the Yukon's land mass is still subject to asserted Aboriginal rights and title; including transboundary claims. The rule of law is clear³⁹, each First Nation with asserted (or recognized) rights or title to a particular tract of land must be consulted and accommodated.
22. In the case of White River First Nation's asserted traditional territory, which is completely overlapped by the traditional territory claims of Settled Yukon First Nations, White River First Nation must be meaningfully consulted to advance any proposal or project contemplated in its asserted traditional territory; subject to the three element test mentioned earlier in this document.
23. In the case of all three Unsettled First Nations, each of the three has a right to Meaningful Consultation in all claimed areas of their traditional territories regardless of if their traditional territory overlaps a Settled First Nation's territory or extends beyond the boundaries of the Yukon.
24. Settled First Nations have a right to Meaningful Consultation on all land they have recognized rights or title. However, all Aboriginal rights defined in their Final Land Claim Agreements are now limited by those agreements. The right to transboundary claims is one of the rights that was defined and limited.
25. First Nations located outside the Yukon may also have transboundary claims within the Yukon. These include, but are not limited to, those First Nations within the Kaska Dena Council, Taku River Tlinkit First Nation, Tahltan Tribal Council, Treaty 8 and Treaty 11.

Resolving Needed Changes in Exploration Activities

26. The YTG represents the citizens of the Yukon, except when it comes to Aboriginal rights. With Aboriginal rights, the YTG represents the Crown and therefore negotiates on behalf of non-aboriginal citizens with First Nations. Although, both the honour of the Crown and its

³⁷ *R. v. Goodon*, [2008], MBPC 59, at para. 81.

³⁸ *R. v. Powley*, [2003] 2 SCR. 207, 2003 SCC 43, at para. 55.

³⁹ *Nlaka'pamux Nation Tribal Council v. British Columbia (Environmental Assessment Office)*, [2011] BCCA 78.

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

fiduciary duty to First Nations are also in play. It is a curious quirk of history that finds the YTG in this position but the implications are profound.

27. In the case at hand, there are 3 general groups that must be at the table. These are the YTG, Unsettled First Nations and Settled First Nations. However, the YTG will split its interest (as the Crown) at the table between the public and businesses; effectively creating a place at the table for mining corporations. This division of the YTG's interests dilutes the constitutional rights of Yukon's First Nations. This dilution should not occur and the YTG must remind itself that public opinion and business investments do not trump Aboriginal rights.
28. The only mechanism open to First Nations to assert their rights, aside from litigation and civil disobedience, is through Meaningful Consultation. That is, if Meaningful Consultation includes both the consultation and accommodation components it is meant to have.
29. Has the YTG developed an appropriate consultation process for necessary changes to exploration activities that will respect Aboriginal rights and culture? Do the proposed changes provide the appropriate level of accommodation to First Nations, both Settled and Unsettled? Keeping these questions in mind, we can now comment on the YTG's proposed changes for class 1 exploration.

Is there Meaningful Consultation occurring on YTG's Proposed Changes?

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| <p>* Please, refer to the sections on "Meaningful Consultation" and "Settled versus Unsettled Yukon First Nations" for specific legal arguments to support comments made in this section.</p> |
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30. The duty to consult on legislative changes cannot be fulfilled by the YTG unilaterally developing a discussion paper on proposed changes to the *Quartz Mining Act* (2002) and *Placer Mining Act* (2002), and then releasing that discussion paper for public consultation without prior First Nation consultation and accommodation on the proposed changes; even if Yukon's First Nations are invited to participate in the public consultation process. The YTG has failed to provide Meaningful Consultation. Most reasons for this conclusion are self-evident:
 - a. There was no consultation on proposed changes before the discussion paper was written and there was no accommodation of Aboriginal rights placed in the discussion paper before its public release;
 - b. A public consultation process cannot suffice for Meaningful Consultation;
 - c. The legislative changes under consultation require deep consultation;

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

- d. Distinct features for First Nations cannot be recognized and accommodated within a public consultation process;
- e. There is no accommodation in a public consultation process for differences between Unsettled versus Settled First Nations;
- f. The two month time allotted to the public consultation process does not provide Unsettled First Nations with enough time to be meaningfully consulted on each and every right potentially affected by mining exploration and proposed legislation changes;
- g. There is no provision of funds and technical expertise to First Nations to consult experts, their Elders on pre-existing societal values or their communities on potentially affected communal rights; and,
- h. A public consultation process does not provide a mechanism for the reconciliation of pre-existing First Nation societies with the sovereignty of the Crown and is therefore consultation without accommodation.

Do the Proposed YTG Changes in Legislation Provide Accommodation?

*** Please, refer to the sections on “Meaningful Consultation” and “Settled versus Unsettled Yukon First Nations” for specific legal arguments to support comments made in this**

- 31. The proposed mitigation of adverse effects will not accommodate First Nation rights.
- 32. There is no attempt to include (accommodate) constitutionally enshrined Aboriginal rights in the proposed legislative changes, including the right to consultation. Both Unsettled and settled First Nations have a right to Meaningful Consultation for each and every project that is proposed within their traditional territory. This right must be accommodated in legislation.
- 33. The proposed legislative changes to the *Quartz Mining Act (2002)* and *Placer Mining Act (2002)* do not accommodate Yukon's First Nations.

Specific Comments on Proposed Changes

*** Please, refer to the sections on “Meaningful Consultation” and “Settled versus Unsettled Yukon First Nations” for specific legal arguments to support comments made in this section.**

- 34. First and foremost, there is not enough detail in the proposed legislative changes to make

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

more than preliminary comments (See Appendix C).

35. In the court case that sparked the proposed legislative changes under consideration, it was also ruled that First Nations have a right to be meaningfully consulted by the Crown, the YTG in this circumstance, on mineral claim staking before minerals claims are staked.¹ The YTG has applied for Leave to Appeal this ruling to the Supreme Court of Canada. However, during the court case the YTG conceded that the First Nation, Ross River First Nation, had a right to Meaningful Consultation on mineral claims after they were staked and registered. So, with or without the Leave to Appeal, the YTG must provide Meaningful Consultation to First Nations on mineral claims that are staked in the Yukon; it will simply occur either before or after claims are registered. As a result of the court case, Unsettled First Nations will require full Meaningful Consultation for mineral claims within their traditional territories and Settled First Nations will require Meaningful Consultation for claims as modified by their Final Land Claim Agreements.
- a. There is no inclusion of the court-ordered requirement for Meaningful Consultation on minerals claims in legislative changes proposed by the YTG. This consultation (both consultation and accommodation) is currently triggered by the registering of the mineral claim. This need for this consultation process is in addition to the need for Meaningful Consultation on mining exploration. So, there must be two Meaningful Consultation protocols created:
- i. One to meet the consultation requirement triggered by the registering of the mineral claim:
- The accommodation for this consultation is an outcome of the after-claim-staking consultation which must precede the exploration consultation process. Therefore, this Meaningful Consultation process must be given access to a full spectrum of outcomes; including, in extreme circumstances, the right to refuse all exploration and development of the mineral claim. To allow for anything less in the accommodation spectrum, creates a consultation process that excludes accommodation from the outset.
- ii. The second consultation protocol is required for proposed exploration projects:
- All exploration programs must be subject to Meaningful Consultation, class 1 through 4
 - The accommodation for this consultation process must be finished before exploration begins and include the choice to reject an exploration plan; and,
 - In the present context with the YTG public consultation on proposed changes to mining exploration, the exploration notifications should occur after this second consultation process is finished due to the indefinite time needed to

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

complete consultation and accommodation. Starting a notification time clock without finishing the consultation process will invite costly litigation.

36. The proposed notification must be given for all classes of exploration to fulfill the court's order.
37. There is no mechanism(s) to provide First Nations funding to meet new obligations under proposed changes to the legislation:
 - a. It is projected that one to two fulltime positions and their supporting infrastructure plus additional resources will need to be created in First Nations to respond to notifications and the exploration consultations; and,
 - b. It is projected that additional staff, resources and support infrastructure will be needed to meet additional Meaningful Consultation obligations that must be completed before exploration consultations can be commenced and notification filed.
38. There is no inclusion for transboundary claims and multiple affected First Nations with recognized or asserted rights.
39. The proposed time of 25 calendar days for a First Nation to respond to exploration notification is too short:
 - a. The time allotted for this notification to be responded to must exclude the time for mandatory Meaningful Consultation requirements to occur; and,
 - b. The time needed will vary depending on funding levels provided to First Nations by YTG to procure staff and create the infrastructure necessary for First Nations to respond.
40. It is not appropriate for the Chief of Mining Land Use to have the authority to approve class 1 exploration requests, to provide environmental and socio-economic assessments, to decide unilaterally on mitigation measures and then to ensure Aboriginal rights are being appropriately consulted and accommodated. The Chief's position and duties in mining legislation promote mining interests and not Aboriginal rights.
 - a. The mitigation proposed for the Chief does not and cannot provide accommodation for Aboriginal rights; it does though, accommodate mining rights:
 - i. The YTG must incorporate the two Meaningful Consultation protocols mentioned previously, but the YTG must also provide a meaningful consultation

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

process to define needed legislative and regulatory changes. Without consultation on needed changes, there will be no accommodation of Aboriginal rights within the changed legislation and regulations.

- b. It is suggested that the Minister Consider creating a prospecting license and move Class 1 exploration into the YESAB (Yukon Environmental and Socio-economic Assessment Board) process:
 - i. A self-monitored prospecting license would allow for benign mineral exploration in the Yukon; and,
 - ii. Under the authority of Section 48(1)(c) and (2) of the *Yukon Environmental and Socio-Economic Assessment Act* (2003)⁴⁰, the Minister could require class 1 exploration projects be subject to assessment under Section 48(3)(b) due to potential cumulative adverse environmental damage and under Section 48(4)(a), (b) and (c) for special areas. (See Appendix B).

- 41. Legislative changes should require mandatory security deposits and enforced reclamation plans for all classes of exploration, including class 1.
- 42. A requirement for a First Nation Resource Management Plan should be included within new mining legislation.
- 43. The proposed process outlined in the provided chart (Appendix D) lacks sufficient detail and:
 - a. Does not include an identifiable accommodation process;
 - b. Replaces the court ordered accommodation with mitigation (which excludes accommodation from the outset);
 - c. Provides for an insufficient 25 day time limit for Meaningful Consultation (consultation and accommodation) on exploration programs;
 - d. Provides for an inappropriate electronic notification for document service to First Nations;
 - e. Provides notification to First Nation land offices which may not exist in some First Nations;
 - f. Does not provide for the rejection of exploration programs (which excludes accommodation from the outset); and,
 - g. Does not indicate when Meaningful Consultation on the mineral claim should occur.

⁴⁰ (2003) *Yukon Environmental and Socio-Economic Assessment Act*.

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

Summary

* Please, refer to the sections on “Meaningful Consultation” and “Settled versus Unsettled Yukon First Nations” for specific legal arguments to support comments made in this section.

44. The inclusion of First Nation rights into legislation through the process of Meaningful Consultation is not an addendum that can be tagged on as an afterthought to mining legislation. Meaningful Consultation and the inclusion of Aboriginal rights form the foundation for the Crown's access to the land and its resources. The YTG lost sight of this. We now have an opportunity to correct legislation and move forward together, if the YTG will truly accommodate First Nation rights. The following is a very cursory summary for most of the points we have presented.
45. The application of common law on Meaningful Consultation to the consultation process provided by the YTG for proposed changes to the *Quartz Mining Act (2002)* and *Placer Mining Act (2002)* reveals:
- a. The public consultation process initiated by the YTG cannot provide for the Meaningful Consultation of Yukon's First Nations on the proposed changes;
 - b. The changes proposed by the YTG do not meet the common law standards for consultation. As a result, the accommodation of First Nation rights was excluded from proposed changes in legislation and regulations; and,
 - c. The YTG must still provide Meaningful Consultation to Yukon First Nations on the need to change legislation. This should have been done before the YTG released proposed changes for public consultation. A proper consultation of First Nations on the need to change legislation will result in accommodation of First Nation rights into proposed legislation and regulation changes.
46. We identified several areas within the proposed legislative and regulatory changes that, if maintained, would violate the rights of Yukon's First Nations. These include:
- a. Failing to include a Meaningful Consultation process for mineral claims before the consultation process for exploration programs;
 - b. Failing to include accommodation for First Nations in the exploration program consultation;
 - c. Replacement of accommodation for Aboriginal rights with mitigation measures;
 - d. Unreasonably limiting the time frame for consultation and accommodation to occur on exploration programs;

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

- e. Excluding deep Meaningful Consultation for the Aboriginal rights of Unsettled First Nations;
 - f. Proposing an untenable role for the Chief of Mining Land Use;
 - g. Failing to provide funds and funding mechanisms for First Nation participation in the consultation of proposed changes and the future consultation for mineral claims and exploration programs;
 - h. The exclusion of transboundary claims and multiple respondents;
 - i. Failing to include a mandatory requirement for security deposits and reclamation processes for Class 1 exploration;
 - j. An inappropriate notification delivery system;
 - k. Failing to include a First Nation Resource Management Plan; and,
 - l. Failing to include all classes of exploration in the proposed consultation process.
47. When providing comments on occasions such as these, there is no opportunity to provide constructive suggestions and discuss solutions. We prefer to be part of the solution and so avail our expertise should we be given the opportunity.

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Appendix A: Excerpts from the Umbrella Final Agreement

- 2.2.4 “Subject to 2.5.0, 5.9.0, 5.10.1 and 25.2.0, Settlement Agreements shall not affect the ability of aboriginal people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them.”
- 2.6.2 “Settlement Legislation shall provide that:
- 2.6.2.1 subject to 2.6.2.2 to 2.6.2.5, all federal, territorial and municipal Law shall apply to Yukon Indian People, Yukon First Nations and Settlement Land;
 - 2.6.2.2 where there is any inconsistency or conflict between any federal, territorial or municipal Law and a Settlement Agreement, the Settlement Agreement shall prevail to the extent of the inconsistency or conflict;
 - 2.6.2.3 where there is any inconsistency or conflict between the provisions of the Umbrella Final Agreement and the specific provisions applicable to a Yukon First Nation, the provisions of the Umbrella Final Agreement shall prevail to the extent of the inconsistency or conflict;
 - 2.6.2.4 where there is any inconsistency or conflict between Settlement Legislation and any other Legislation, the Settlement Legislation shall prevail to the extent of the inconsistency or conflict; and
 - 2.6.2.5 where there is any inconsistency or conflict between the Inuvialuit Final Agreement in effect on the date of ratification of the Umbrella Final Agreement by Yukon First Nations and a Settlement Agreement, the Inuvialuit Final Agreement shall prevail to the extent of the inconsistency or conflict.”
- 18.3.2 “Any Person having an Existing Mineral Right on Settlement Land has a right of access, for purposes of exercising that right, to use that Parcel of Settlement Land without the consent of the affected Yukon First Nation, where provided by Laws of General Application.”

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

Appendix B: Excerpts from the *Yukon Environmental and Socio-economic Assessment Act*

48. (1) Where an activity is listed under paragraph 47(1)(a) but is excepted under paragraph 47(1)(b), a declaration that the activity is subject to assessment may nevertheless be made, in circumstances referred to in subsection (3) or (4), by
- (a) a federal agency that is the proponent of the activity or that has the power to issue an authorization or to grant an interest in land required for the activity to be undertaken or has received an application for financial assistance for the activity;
 - (b) the federal minister, if the Governor in Council has the power to issue an authorization required for the activity to be undertaken or if a federal independent regulatory agency is the proponent of the activity, has the power to issue an authorization or to grant an interest in land required for the activity to be undertaken or has received an application for financial assistance for the activity;
 - (c) the territorial minister, if a territorial agency, a municipal government or a territorial independent regulatory agency is the proponent of the activity or has the power to issue an authorization or to grant an interest in land required for the activity to be undertaken; or (d) a first nation that is the proponent of the activity or that has the power to issue an authorization or to grant an interest in land required for the activity to be undertaken.
- (2) A declaration that a particular activity is subject to assessment must be consented to by every person or body referred to in subsection (1) that has the power to make that declaration.
- (3) A declaration that an activity is subject to assessment may be made by the federal agency, federal minister, territorial minister or first nation if they are of the opinion that the activity might
- (a) have significant adverse environmental or socio-economic effects in or outside Yukon; or
 - (b) contribute significantly to cumulative adverse environmental or socio-economic effects in combination with projects for which proposals have been submitted under subsection 50(1) or with other activities known to them that are proposed, undertaken or completed in or outside Yukon.
- (4) A declaration that an activity is subject to assessment may also be made in respect of an activity if the activity is to be undertaken

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

- (a) in an area that contains a heritage resource, other than a record only, or that is a heritage resource, and that is for that reason protected by federal, territorial or first nation law or that is identified, in a land use plan in effect under a final agreement, as an area that should be so protected;
- (b) in a special management area that is identified as such in a final agreement or that is established in accordance with a final agreement; or
- (c) in an area that forms the habitat for any species of plant or wildlife that is determined to be rare, threatened, endangered or at risk by or under federal, territorial or first nation law.

Appendix C: Government of Yukon Discussion Paper



Quartz Mining Act and Placer Mining Act Review

Class 1 Mining Land Use

Discussion Paper

June 2013

Proposed Changes to Yukon’s Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

TABLE OF CONTENTS

| | | |
|-----|--|---|
| 1.0 | Introduction..... | 1 |
| 1.1 | Issue of Concern to be addressed by Amendments to the <i>Quartz Mining Act</i> and <i>Placer Mining Act</i> | 1 |
| 1.2 | Background..... | 2 |
| 2.0 | Key Amendments Proposed to the <i>Quartz Mining Act</i> and <i>Placer Mining Act</i> | 3 |
| | (1) Requirements for notification prior to the commencement of a Class 1 program..... | 3 |
| | (2) Establishment of a review period for Class 1 exploration activities with the ability to extend the period if needed..... | 4 |
| | (3) Establish the regulatory power for the Minister to define certain areas that would qualify as ‘identified areas’ in the legislation..... | 5 |
| 3.0 | Review Process and How to Provide your Input..... | 5 |

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

1.0 Introduction

In recent years, increased levels of mineral exploration have highlighted concerns about the lack of information around Class 1 exploration programs and Class 1 placer land use operations (Class 1 programs). The ongoing development of regional land use plans has also identified the need to review how government manages these types of activities and how the current regulatory system may need modification. Yukon is also aware of its obligations to work with Yukon First Nations – including those that have entered into Yukon First Nation Final Agreements and those that have not yet settled land claims – and mineral rights holders.

Added to the above is the recent declaration of the Yukon Court of Appeal which stated that the Government of Yukon (Yukon)¹ has a duty to notify and, where appropriate, consult with and accommodate the Ross River Dena Council before allowing any mining exploration activities to take place within the Ross River area, to the extent that those activities may prejudicially affect aboriginal rights of the Ross River Dena Council. This declaration takes effect December 27, 2013.

In light of the above, Yukon is proposing to amend the regulatory regime affecting Class 1 programs as set out in the *Quartz Mining Act* and the *Placer Mining Act* (the mining legislation). Amendments to the legislation must be in force by December 27, 2013 to meet the timeline imposed by the Court of Appeal for implementing the declaration of the Court of Appeal. This discussion paper sets out proposed changes to the legislation.

1.1 Issues of Concern to be addressed by Amendments to the *Quartz Mining Act* and *Placer Mining Act*

In summer of 2012, the Department of Energy, Mines and Resources undertook a review of the mining legislation to identify the issues and concerns with the current regime for Class 1 programs and to find possible solutions. Four main areas of concern were identified. These are discussed below.

(1) Environmental protection and compliance monitoring for Class 1 Activities – Persons carrying out Class 1 programs are required by law to undertake the program in accordance with operating conditions set out in regulations. Adding the requirement that a person must notify the Chief of Mining Land Use before carrying out a Class 1 program will enhance the ability of inspectors appointed under the mining legislation to monitor compliance with the operating conditions, including requirements to reclaim land as part of the Class 1 program. It will also enable Yukon to more easily share information about these activities with other users of the land.

(2) Consultation with Yukon First Nation – In some situations Class 1 programs may adversely affect asserted aboriginal and treaty rights. The present regime does not enable notification and, if required,

¹ *Ross River Dena Council v Government of Yukon*, 2012 YKCA 14

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

consultation and accommodation, in respect of these rights. Amendments to the mining legislation for Class 1 programs will enable notification, and if required, additional consultation.

(3) Security for Class 1 Exploration— Currently, the mining legislation enables the Chief of Mining Land Use to require a person undertaking a Class 2, 3, or 4 program to provide security if there is a risk of significant adverse environmental effect from the program. Security cannot be sought in relation to Class 1 programs. While the environmental effects of Class 1 programs are typically not significant, it would be beneficial in some situations if the Chief of Mining Land Use could require security.

(4) Identification of Areas for Specific Operating Conditions— Mining exploration, at all class levels, may have a greater impact in some areas of Yukon, particularly those areas identified in land use planning or other initiatives as having high or sensitive environmental or socio-cultural values. Amendments to the mining legislation enable designated of areas within which additional or site-specific operating conditions apply.

The following objectives for the amendments were identified:

- Ensure Yukon can meet its duty to consult, when such a duty arises, with respect to Yukon First Nations with Final Agreements and Yukon First Nations without Final Agreements.
- Improve information sharing between First Nations, government, and industry.
- Provide enhanced environmental protection and compliance monitoring.
- Manage multiple resource interests effectively in areas of high value or requiring specific operating conditions.

1.2 Background

The current framework for managing mineral exploration activities is set out in Part 2 of the mining legislation. Exploration activities are divided into classes, distinguished from one another by the type of activity and thresholds for each level of activity. There are four classes of exploration program, with the level of allowable activity increasing as you progress from a Class 1 program through to Class 4. The allowable activities include such things as construction of permanent structures, number of persons allowable per camp, storage of fuel, construction of cut lines, corridors and clearings and trenching.

Regulatory oversight occurs at all levels of activity, but requirements for oversight change significantly between Class 1 programs and Class 2, 3, and 4 programs. The current legislation does not require the person or company engaging in a Class 1 program to notify any government official of the commencement of the program, although it does require that all Class 1 programs be undertaken in accordance with operating conditions set out in the regulations. This differs from a Class 2 program where the program operator must provide notification acceptable to government or Class 3 and 4 programs, which may only proceed in accordance with an operating plan approved by government. Class 2, 3 and 4 exploration programs are all subject to evaluation under the *Yukon Environmental and Socioeconomic Assessment Act* (YESAA).

2

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

2.0 Key Amendments Proposed to *Quartz Mining Act* and *Placer Mining Act*

The amendments are primarily focused on potential changes to the administration of Class 1 programs under the mining programs. The proposed changes to the regulation of Class 1 programs will result in these activities being treated very similarly to how Class 2 exploration programs and placer land use operations were considered prior to the introduction of YESAA. The changes to the regime include the following. A draft process chart has been included for discussion, see attached Appendix A.

(1) Requirements for notification prior to the commencement of a Class 1 program

In order to address the key issues above, the proposal requires notification Yukon-wide and to include both mining acts. Both regulatory regimes contain many of the same provisions and criteria for Class 1 exploration activities.

To allow for enhanced environmental protection and compliance monitoring, notification provides an opportunity for the Chief of Mining Land Use to place additional conditions on a Class 1 program and to determine whether security is necessary in areas where impacts from certain types of Class 1 activity might be significant. The notification will provide Client Services and Inspections Branch the information on where and when activities are occurring, so monitoring can take place from the beginning of a project.

The proposed notification would consist of a written notice by the person wishing to undertake the Class 1 program to the Chief of Mining Land Use. The notification would describe the location of the project and the activities to be undertaken. A limited amount of information associated with the notification – the date of entry, the name of the operator, the duration of the Class 1 program and the location of program – will be posted on a public register maintained by the Chief of Mining Land Use. Notification does not imply a permitting requirement; however, the Chief of Mining Land Use may require additional terms and conditions to be included in the program.

There will not be a requirement for a YESAA screening. Class 1 activities are not included in the project regulation listing under YESAA as they are understood not to create significant environmental risk if mitigated by application of the operating conditions.

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

Additional Powers of the Chief of Mining Land Use for Class 1

The proposed amendments will establish that the Chief of Mining Land Use has the authority to do four additional things in relation to a Class 1 program:

- (a) the Chief of Mining Land Use may amend a Class 1 notification if it is necessary to do so to mitigate potential adverse environmental or socioeconomic effects or to address potential adverse impacts on treaty rights or asserted aboriginal rights that are identified during consultation with a Yukon First Nation;
- (b) the Chief of Mining Land Use may refuse to allow the Class 1 program to be carried out as proposed if the environmental or socioeconomic effects cannot be mitigated or adverse effects on treaty rights or asserted aboriginal rights cannot be eliminated or accommodated;
- (c) the Chief of Mining Land Use may require the person carrying out the Class 1 program to provide security if there is a risk of significant adverse environmental effects from the program; and
- (d) the Chief of Mining Land Use must, when requested to do so, issue a certificate of compliance if security was required and the Chief of Mining Land Use is satisfied that the person has complied with all provisions of the Class 1 notification.

(2) Establishment of a review period for Class 1 exploration activities with the ability to extend the period if needed

Upon receipt of a Class 1 notification, the Chief of Mining Land Use would be required to do two things. First, review the notification to determine if any potential adverse environmental effects of the program would be mitigated. Second, the Chief of Mining Land Use must send a copy of the notification to any Yukon First Nation that may be affected by the Class 1 program.

The person submitting the Class 1 notification will be able to undertake the Class 1 program 25 days after submitting the notification, unless the person is notified by the Chief of Mining Land Use that additional time is required to ensure mitigation or carry out further consultation with a Yukon First Nation.

The process will also look to establish timely consultation procedures to avoid undue hardship to the proponent.

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

(3) Establish the regulatory power for the Minister to define certain areas that would qualify as 'identified areas' in the legislation.

The proposed amendments would enable the Minister of Energy, Mines and Resources to designate areas across Yukon where specific operating conditions would apply in addition to standard operating conditions currently found in the mining land use regulations.

'Identified areas' could include settlement land, land set aside for the purposes of furthering settlement of aboriginal land claims (i.e., interim protected land), and areas requiring a higher level of care as identified and approved through regional land use planning and zone designation. An example of a specific operating condition could be limiting access to certain areas during calving, lambing or other time periods essential to the well-being of wildlife, or limiting activities to certain seasons to avoid critical habitat disturbance for wildlife or plants at risk.

3.0 Review Process and How to Provide Your Input

The Department of Energy, Mines and Resources is looking for input on the key areas identified for amendment outlined above. The overall purpose of this review is to get feedback to ensure that the notification process developed from amendments to the QMA and PMA meet the needs of all parties.

Copies of this discussion paper are available for download on our website at www.emr.gov.yk.ca/mlnIng. For more information about the review or if you or your staff wish to meet to discuss the review, please contact Bryony McIntyre, Manager, Mineral Planning and Development at (867) 667 3422, or by e mail at Bryony.McIntyre@gov.yk.ca.

The review process will continue until July 31, 2013. Comments received during the review period will be compiled and considered in the finalization of the amendments to the QMA, the PMA and their regulations. A compilation of comments received will be made available on our website through posting of a post-consultation report after the review period has closed.

If you would like to provide written comments, please submit them by July 31, 2013 to Energy, Mines and Resources, Mineral Resources Branch at:

E-mail: mlnIng@gov.yk.ca
Fax: (867) 456-3899
Mail: Mineral Resources Branch, K-9
Yukon Mine Site Reclamation and Closure Policy Review
Box 2703
Whitehorse, Yukon Y1A 2C6

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5

Proposed Changes to Yukon's Class 1 Mining Exploration Quartz Programs and Placer Land Use Operations - Public Consultation Comments

Appendix D: Proposed Government of Yukon Process Chart

