May 8, 2020

To: Mineral Development Strategy Panel

From: Carcross/Tagish First Nation

Re: **Response to Request for Comments**

Thank you for the opportunity to provide comments regarding the Yukon's mineral exploration and development regime. The Carcross/Tagish people were and continue to be greatly affected by the influx of non-First Nation people and the government-control of First Nation people and interests, values, and lands that followed the discovery of gold in the Klondike. The small benefit to a few Carcross/Tagish people was greatly overshadowed by the adverse effects. The adverse effects included and were amplified by the colonial government's assumption that the best use of land was the extraction of minerals. Despite the recognition of the value of natural ecosystems and an approach to development that supposedly protects them, the current Yukon mineral legislation continues to place most other values, including but not limited to the well-being of natural ecosystems, second to the extraction of minerals.

The Carcross/Tagish First Nation strives to preserve, revive and enhance its traditional values, customs, and ways of interacting with the land. Despite the First Nation's efforts, the Yukon's current mineral legislation and management regime places short-sighted economic gain above the land-use practices that have supported Indigenous Peoples for generations. The Carcross/Tagish First Nation does not wish to roll back the clock but wants to provide for those values and interests that have served it well. To do so, the following is provided to the Mineral Development Strategy panel in the hope that a rational and forward-thinking approach will be taken to the new Yukon mineral legislation.

Background

The Yukon's *Quartz Mining Act* and *Placer Mining Act* are premised on the view that mineral extraction is the highest and best use of land. The legislation, still largely intact today, was brought into effect when the Yukon was generally void of non-First Nation settlement. First Nation peoples occupied the landscape and were considered by the dominant Canadian culture as of no importance and obstructions to development and colonial expansion in the north. Therefore, the First Nation peoples had no rights, a subservient status in law, and no ownership of the land.

By entrenching a free-entry system, where any legal person, of which First Nations people were not, could stake a mining claim and extract mineral resources, the government encouraged non-First Nation people to come and develop the Yukon's mineral resources. Over time, amendments to the mineral legislation required limited compensation for those holding particular surface rights to portions of land that sub-surface mineral rights holders damaged as they extracted the resources.

More recently, National and Yukon Territorial Parks and otherwise protected areas have been withdrawn from *Quartz Mining Act* and *Placer Mining Act* mineral claim staking and municipalities have generally been withdrawn from *Placer Mining Act* mineral claim staking. The Carcross/Tagish First Nation Final Agreement provides the First Nation with the option to develop mineral resources on its Category A Settlement Land and not be controlled by the Yukon's mineral legislation. However, the First Nation's interests go beyond its Settlement Land and extend to its Traditional Territory and beyond as those areas' resources and their well-being affect all Indigenous People and people in general. It is that interest in the management of land and resources beyond Category A Settlement Land that prompted this paper.

The *Quartz Mining Act* section 50 provides the mineral claim holder with access to all minerals below the surface of the mining claim. The *Placer Mining Act* provides similar access. The *Yukon Environmental and Socio-economic Assessment Act* (YESAA) provides for an assessment of *Quartz Mining Act* based activities and constraints on the activities, but due to provisions of the Act mine development cannot be denied.

Constraints and conditions may be imposed on mining activities such as the contents of water leaving the mining claim development and the use of some substances, such as mercury, but they are few and do not directly prevent mining activity.

Free Entry

The free entry system for staking *Quartz Mining Act* and *Placer Mining Act* mineral claims allows for claim staking in all but limited areas of the Yukon. The current system, now acknowledged as antiquated, has resulted in displaced homes, displaced First Nation peoples' traditional harvesting and severely damaged ecosystems that include fish and wildlife resources. Although *Quartz Mining Act* claims activity may be constrained, claim staking until recently was permitted in residential sections of Whitehorse and is still permitted in some municipal areas.

The rationale for the free entry system, to provide incentives and reward interest in the Yukon, was a by-product of a colonial perspective of northern Canada as an area of no other potential use or interests. While vestiges of the past colonial perspective have survived to the present, recent court decisions and modern attitudes provide reasons to change the free entry system to a constrained claim staking system.

Some Canadian jurisdictions provide a non-free entry mineral development system. In the Northwest Territories, a prospecting licence is required. Further to that, the consent of the holder of any surface rights is required prior to entry for prospecting or staking.[1] The Alberta government website notes that Alberta uses an application process to secure mineral rights for exploration and development.[2] Ontario limits the areas available for mineral claim staking more than the Yukon[3]. Quebec limits mineral claim staking to lands designated for that purpose.[4]

The Yukon with its multiple governments and varied land uses and interests would be well advised to adjust legislated provisions related to mineral staking. Whatever access to staking is provided, the claims should be subject to an initial assessment as to the socio-economic and environmental matters related to a prospective major exploration program or mine development. The assessment need not include extremely detailed exploration or mine development plans but should include the consideration of adverse effects of potential major development activities, access and ground disturbance in the area. Such early consideration will reduce later potential conflicts and costs to the claim holder. If the initial staking is not subject to the assessment, any exploration or development activity beyond simple hand tool prospecting should be. Further to that, any mineral exploration or development on First Nation Category B Settlement Land, the surface of which is owned by the First Nation, should be subject to compensation to the First Nation; the compensation's form being subject to First Nation agreement.

[1] https://www.aadnc-aandc.gc.ca/eng/1100100027895/1100100027896
[2] https://www.alberta.ca/additional-mineral-information.aspx
[3] Province of Ontario, nd, *A Guide to Staking Mining Claims*, Publications Ontario, 50 Grosvenor Street, Toronto ON M5A 1N8
[4] https://mern.gouv.qc.ca/english/publications/online/mines/claim/index.asp

Another staking related matter is the staking of access to a future exploration and/or mine area. Provisions of YESAA provide for an assessment of proposed roads in the Yukon. The recent support of the Department of Energy, Mines and Resources for a mining company to stake the road to their proposed exploration/mine area is a clear abrogation of the department's responsibility to support the law and the intent of the noted legislation. It is also an affront to the proponents and public that participate in the implementation of the assessment legislation. Mining legislation should include provisions stipulating staked claims shall not be used for access to other staked areas unless the access is assessed via the assessment legislation as a road.

Impact Benefit Agreements

Large exploration projects and mines affect communities in the project's proximity and often communities on the related transportation routes. While some mineral development corporations provide some benefits to a community in the proximity of the project, the benefits vary. Benefit agreements with the local First Nation are confidential and the agreements are usually only with the local First Nation.

Impacts go beyond the generalized understanding in YESAA of the "scope" of the project. For example, the increased highway truck traffic due to the Victoria Gold project has a direct effect on the highway mortality of subsistence harvest species such as caribou and moose as well as the harvest by non-First Nation people. The direct and indirect effects of mineral exploration and development activities on subsistence plant and animal harvest activities include, but are not limited to disturbance of furbearers, increased access to sensitive areas, the crossing of trapping trails, clearing and stripping of ground cover that is habitat for animals and that provides plants used for a multitude of purposes by First Nation people.

Since the resource belongs to the public at large, there is a need to not limit the agreement to the local First Nation. Community benefits such as local recreational facilities, additional health care support and infrastructure improvements may also be added to what may be First Nation citizens and others' employment and contracting provisions. While agreements with a First Nation may remain confidential if the First Nation wishes, not the mineral development corporation, provisions supporting community benefits should be publicly available.

Finally, an Impact Benefit Agreement establishes a relationship; it's not a transaction. This needs to be comprehensively understood with process frameworks developed in partnership with the First Nation and community to adequately meet the needs of all involved. A requirement for a community benefits agreement and affected First Nations benefits agreement, including the development of framework processes, must be included in new Yukon mineral legislation.

Royalties

Royalty, the amount paid by a mining company to the Yukon government (public) to secure the mineral obtained via a mining operation, in the *Quartz Mining Act* context is rather complex. On the other hand, the royalty in the *Placer Mining Act* context is not only simple but antiquated. Once paid, the mining company can sell the mineral on the open market.

Royalties paid for minerals obtained via the *Quartz Mining Act* regime are determined by a complicated system of deductions and allowances. The current system is designed to encourage mineral development and provide relatively little return to the government (public) for the publicly owned mineral resources. The rationale for the minor return is that there is a second-hand benefit to the public and government via local employment with the mining operation and mining supporting businesses and the related income taxes. This is a flawed perspective in that the same can be said of any business venture and all business ventures have

associated risks. The sharing of royalties with First Nations via the Final Agreements does not change the fact that the royalties are far too low.

The current low royalty paid for the gold obtained via the *Placer Mining Act* regime is based on a similar reason to the *Quartz Mining A*ct regime with the added consideration that any change to the gold royalty established in 1908 may be politically unpopular. The placer mining industry was often the sole incentive for non-First Nation people moving to the Yukon in 1898 and later. The placer mining activity, while growing and shrinking for over one hundred years, has been considered a colonial heritage matter, not just an economic matter. Yukon placer mining is considered by some Yukoners as a "Mom & Pop" operation that is similar to a family-owned and run corner grocery store. This is despite the reality that placer mining operations are corporately owned and often yield millions of dollars in profit each summer.

Any discussion of Yukon placer gold royalty also includes the anomaly of the royalty being set when gold sold for thirty-three dollars a Troy ounce. The thirty-seven point five cents a Troy ounce royalty no longer reflects the approximately seventeen hundred dollar Troy ounce price of today. The placer gold royalty is clearly out of date.

The current royalty for placer gold was established relative to the then price of gold on the market and the amount, not a formula of royalty to the market relationship, placed in legislation. Opposition to any change in the fixed amount by the placer mining industry has been supported by some politicians. The selling of a public resource for substantially less than market value to benefit mining corporations cannot be continued. The Yukon companies servicing the placer mining industry will not suffer due to an appropriate gold royalty regime tied to the market price. A change to the placer gold royalty such that it is a percentage tied to the market price of gold would provide the public with a realistic return for providing private interests with a publicly owned resource.

The *Quartz Mining Act* royalty system is not only quite complicated but does not yield a fair return for publicly-owned resources.[5] Business tax calculations provide deductions for business operations. The royalty is, in effect, a second tax paid per the *Quartz Mining Act* royalty regime. An important and odd aspect of the *Quartz Mining Act* regime is that section 50 of the Act conveys ownership of the mineral via the staking of the mining claim. There is no acknowledgement that the new owner obtained the mineral without paying its previous owner, the public. The only "price" paid for the publically owned commodity is a minor tax (royalty), one that does not reflect the value of the commodity.

A rational approach to the *Quartz Mining Act* royalty regime would be for the royalty or return to the public of the publically owned resource to be calculated on the market price of the resource; something the current royalty regime does not do. The oft-touted public benefit of a strong business sector should not include public resources being "sold" at prices substantially below market value.

Part of the problem with the *Quartz Mining Act* is that it conveys ownership of the mineral via section 50 without any direct benefit to its previous owner, the public. A change to the ownership needs to reflect the value obtained by the new owner. A royalty regime that reflects this is needed. If section 50 remains, the royalty regime needs to be changed to reflect the reality that the claim holder, at no point in the mining process and mineral sale, pays a reasonable price for the commodity to its previous owner. That price should be paid via an improved royalty regime.

A suggested change to the *Quartz Mining Act* royalty calculation is to eliminate the multiple complicated calculations and deductions and charge a simple percentage of the cost paid by the smelter receiving the mined

[5] http://www.emr.gov.yk.ca/mining/royalty_narrative.html

metal or the net smelter return. This will provide a simple, market-based royalty paid by mining companies to "obtain" a public asset.

Mine Closure

Yukon hard rock or *Quartz Mining Act* regime based mines that have ceased to operate have never been closed in the true sense of closed. There have been mines abandoned by the corporation that owned the mine and the responsibility for which has changed to the government and mines that have ceased operations but are still owned by a mining company that has yet to address the problems at the inactive mine site. Many hard rock mines and some major mineral exploration sites in the Yukon that have become inactive, regardless of ownership or responsibility, continue to spew contaminated water on the ground and/or into Yukon streams and rivers or the disturbed, often contaminated landforms have not been rehabilitated to support a return to a semi-natural state. This is a problem not just for the First Nation(s) in close proximity, this is an issue of national relevance and importance.

The Canadian taxpayer is paying, both financially and environmentally, for previously abandoned major exploration and mine sites. Now Yukoners are burdened with the financial and/or environmental costs of newly abandoned and in some cases inoperative mineral activity sites.

The current system, via its relationship to insufficient aspects of corporate law and inadequate financial security measures, is not realistic now that Yukoners have to pay for abandoned major exploration and mine site cleanup. As more and more seriously contaminated areas are discovered or current mineral exploration and mining activities experience catastrophic financial failure, the more the public as a whole and those with direct business and personal relationships with the operation and operation area will suffer the results. The social license for mining previously enjoyed has and will continue to erode as long as the antiquated and inadequate Yukon mineral regime remains.

While mineral futures are dependant upon the market, there is ample room, opportunity, and reason to ensure that the closure plans for mines and reclamation plans for major exploration projects are a robust aspect of the permitted activity. The Yukon government has a responsibility to Yukoners and all of Canada to ensure closure and reclamation plans are complete, sound, and achievable.

The current Yukon government hard rock mineral permit regime requires a mining company to provide secured funds to be used for some exploration activities and to close a mine when operations cease. This approach appears to address exploration disturbances and the mine closure situation if the funds secured are sufficient, readily available and properly expended. In some cases, such as in the Carcross/Tagish First Nation Traditional Territory, funds were either not secured or expended, not sufficient to deter irresponsible practices or the situations not addressed by the Yukon or federal government as the case may be.

The determination of the cost of total mine closure is complicated and to a degree speculative. It is complicated insofar as identifying the multiple tasks required to achieve acceptable rehabilitation goals of any mine-related above or below ground modifications. These may include open pits, large piles of waste rock, large often water spewing portals and diverted streams. Difficulties have included specifying the amount of expertise, labour, and machine time required. Assuming an acceptable approach to closure is found, projecting or speculating what the labour and machine use costs will be years into the future is difficult. Also, predicting what rehabilitation techniques such as ground reforming will suffice to address erosion, contaminated water seepage/flow, revegetation, and access interests is difficult in a northern context. It is important that the current Yukon government efforts to improve its cost estimates are augmented by a publicly available third-party review of each case.

A current mine closure conundrum is related to water flowing from abandoned mines. In some cases, there is groundwater bringing subsurface contaminants to the surface as it flows from portals. In other cases, surface water flowing over waste rock or disturbed ground mobilizes contaminants. In some cases, tailings ponds contain contaminants mobilized by rain and snowmelt runoff. Earlier federally permitted mines are stark examples of irresponsible stewardship of the public resource.

Mineral legislation should include a requirement for any mineral exploration or development plan to identify progressive reclamation of exploration sites and/or the means by which a developed mine may be closed, subject to later monitoring. Perpetual water treatment is not an option. Any mineral development proposal that does not include a full and final closure plan with costing and fund security should not be allowed to proceed. Cost estimates and funds availability for a proposed mine closure need to include a risk assessment of cost increases and assured funding availability.

Management of the mine closure and funds is also a concern. The management of the Faro mine rehabilitation project has been brought into question publicly. One suggestion is to have an independent body of knowledgeable people established to oversee the funds and operations of a mine closure plan as has been adopted in the Northwest Territories. In the Yukon's case, it would be advisable to have a single independent body rather than a mine specific one as in the Northwest Territories. This may address the transparency and accountability issues that have plagued the Faro situation.

Finally, mine closure is also fundamentally linked to continued, effective and timely regulatory oversight. This is an aspect where there is a tremendous amount of improvement required. For a jurisdiction that values resources extraction as much as the Yukon, one would think that regulatory bodies would be amply resourced and actively monitoring. However this, like so many other aspects of enforcement in the Yukon, is grossly under-resourced. There is an opportunity to partner with First Nation governments to develop, enhance and increase the regulatory, monitoring and enforcement aspects of the Yukon's mineral regime as a way of supporting a more effective and accountable system.

Recommendations

- Abolishment of the Free Entry System

- Impact Benefit Agreements are a relationship, not a transaction. This needs to be comprehensively understood with process frameworks developed in partnership with the First Nations and communities to adequately meet the needs of all involved. A requirement for First Nation and community benefits agreements, including the development of framework processes must be included in new Yukon mineral legislation.

- A suggested change to the *Quartz Mining Act* royalty calculation is to eliminate the multiple complicated calculations and deductions and charge a simple percentage of the profit from the sale to the smelter or the net smelter return. This will provide a simple, market-based royalty paid by mining companies to "obtain" a public asset.

- Mineral legislation should include a requirement for any significantly sized mineral exploration and development plan to identify progressive reclamation of exploration sites and/or the means by which a developed mine may be closed, subject to later monitoring and the related funds secured.

- Increased and more effective regulatory oversight needs to be provided in new mineral legislation and regime.

Yukon First Nations have a long-standing and forward-looking understanding of the land and its values. Ensuring, with the Yukon First Nations, that those values are accommodated in new mineral legislation will reflect the provisions of the land claim agreements and the public good.

Thank you for the opportunity to provide suggestions on what may be included in the new Yukon mineral legislation and related regime.