August 4, 2020

Yukon Mineral Development Strategy Panel
PO Box 372
108 Elliott Street
Whitehorse, YT Y1A 6C4

Dear Members of the Yukon Mineral Development Strategy Panel:

Re: Yukon Mineral Development Strategy North Yukon First Nation Submissions

The political and legal landscape in Yukon has changed dramatically in the last forty years, with the entrenchment of Aboriginal and treaty rights in the Constitution Act, 1982, the signing of the Umbrella Final Agreement in 1993, and Canada's unqualified endorsement of the United Nations Declaration on the Rights of Indigenous Peoples in 2016. Yet, Yukon's mineral regime remains mired in a different era, standing largely unchanged for more than a century. The modernization of the Yukon's mineral resources regime is urgently needed and long overdue.

Our Nations of Tr’ondëk Hwëch’in and Na-Cho Nyäk Dun have experienced first-hand the impact of the current outdated mining regime on our citizens, our land and our culture, given that the largest number of active mining claims are within our traditional territories.

As leaders of our Northern Nations, we want to ensure future generations of North Yukon people enjoy the same opportunity to live off the land that past and present generations have enjoyed. The protection of the resources and traditional values of Yukon First Nations people is an integral objective of Sustainable Development.

We have prepared submissions for the Yukon Mineral Development Strategy Panel to identify key issues and gaps in the existing mineral resources regime, to outline at a high level the range of changes needed, and to articulate from the perspective of our Nations the nature of the process required to modernize the mineral resources regime. As explained in greater detail in our individual submissions, our Northern Nations firmly believe a new mineral resource development regime—including new quartz and placer mining legislation—is desperately required. The existing regime is woefully antiquated and can no longer be tolerated.

The development of new legislation must be a key priority, and the Yukon government and Yukon First Nations must work collaboratively and expeditiously toward new, co-drafted, “made-in-the-North” legislation that is rooted in co-management, sustainability, and respect for the treaties.

The modernization of the Yukon’s mineral resources regime and legislation, however, must be understood within the broader rubric of activities required to ensure the management of lands and resources is consistent with the spirit and letter of the Yukon Final Agreements. The development of a new mineral resource development regime must be pursued in conjunction with discussions about what steps need to be taken to ensure the promises of our treaties—including promises around land use planning and the protection of special management areas—are being implemented fully. It must also be pursued in conjunction with discussions about what immediate or interim steps can be taken to protect Yukon First Nations’ rights while the work of updating legislation and implementing treaty promises unfolds.

In unity,

Deputy Chief Simon Nagano
Tr’ondëk Hwëch’in

Chief Simon Mervyn
Na-Cho Nyäk Dun

Chief Dana Tizya-Tramm
Vuntut Gwitchin

cc  Self-Governing Yukon First Nation Chiefs
    Peter Johnston, CYFN Grand Chief
    Sandy Silver, Premier of Yukon
    Honourable Larry Bagnell, Member of Parliament for Yukon
    Honourable Carolyn Bennett, Minister of Crown-Indigenous Relations
    Honourable Dan Vandal, Minister of Northern Affairs
    Honourable Marc Miller, Minister of Indigenous Services
Issues and Gaps in the Existing Regime

The preamble to the TH Final Agreement states that Canada, Yukon and TH “wish to recognise and protect a way of life that is based on an economic and spiritual relationship between Tr’ondëk Huch’in and the land”. That way of life and spiritual relationship involves a stewardship obligation towards the land. The Final Agreement accordingly recognises certain rights that are essential to TH and our way of life, including the right to harvest Fish and Wildlife (Chapter 16), the right to have Water which is on or flowing through or adjacent to TH Settlement Land remain substantially unaltered as to quantity, quality and rate of flow (Chapter 14), the right to use and peaceful enjoyment of Settlement Land (Chapter 5 and Chapter 18), and the right to meaningful participation in the management of public resources (Chapter 11 and Chapter 12). As Justice Binnie stated in Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53:

Under the Yukon treaties, the Yukon First Nations surrendered their Aboriginal rights in almost 484,000 square kilometres, roughly the size of Spain, in exchange for defined treaty rights in respect of land tenure and a quantum of settlement land (41,595 square kilometres), access to Crown lands, fish and wildlife harvesting, heritage resources, financial compensation, and participation in the management of public resources.

Our Traditional Territory includes the vast majority of mining in the Yukon. Almost a quarter of the Dawson Land Use Planning Region is now subject to mineral rights. Mining activities displace fish and wildlife, destroy plants and make it impossible for TH citizens to engage in traditional pursuits in large swathes of our Traditional Territory. In the absence of adequate enforcement and reclamation, land that has been mined is permanently damaged. This in turn severely impacts our ability to pass on our culture to our youth and our ability to exercise our stewardship obligations to the land.

Free entry staking in the absence of a land use plan or an interim withdrawal; instances of Yukon Government approving mining projects in sensitive wetlands in the Indian River against the clear recommendations of YESAB, First Nations and scientific opinion; the continued working of mining claims in areas designated for protection through the land use planning process; and the unilateral announcement by Yukon Government of significant financial incentives for mining before land use planning has been completed, are recent examples of Yukon Government conduct under the existing mining legislation that is inconsistent with the spirit and intent of our Final Agreement and a collaborative government-to-government relationship.
This is not to say that TH opposes responsible mining. We recognise that resource development, including mining, can bring significant economic benefits and can contribute towards building healthy and prosperous communities. That is why a key objective of Chapters 11 and 12 of our Final Agreement is to ensure Sustainable Development i.e. beneficial socio-economic change that does not undermine the ecological and social systems upon which communities and societies are dependent. TH entered into the Final Agreement on the basis of an understanding, as reflected in the Devolution Transfer Agreement (“DTA”), that Yukon Government would work with Yukon First Nations to quickly update the outdated Yukon mining regime. Almost 20 years later, that promise has not been fulfilled.

The new mining regime must respect and uphold the spirit and intent of our Final Agreement. It must allow decision makers to take into account the cumulative impact of over a century of mining on our land, our way of life and our ability to enjoy rights protected by the Final Agreement. It must not render those rights hollow over time. To achieve this, the new regime must have Sustainable Development at its core.

As has been promised to TH by the Yukon Government on many occasions, including the 2017 Yukon Forum where Premier Silver and Minister Pillai stated that Yukon First Nations “are at the lead” in terms of decisions about mining, that Yukon Government is determined to work “in a co-governance way” and that Yukon Government acknowledges “the veto power of First Nations as regarding mining”, the new regime must also provide Yukon First Nations with a meaningful role in the management of public resources through co-management, co-governance and collaboration. Yukon First Nations must have a meaningful role in decisions relating to mining in their Traditional Territories, from staking/locating to closure and reclamation, and including decisions on financial and other incentives for mining activity. This submission provides some specific examples of provisions that will support this, but the principle of co-management should be incorporated throughout the new mineral regime. The United Nations Declaration on the Rights of Indigenous Peoples and the provisions relating to decision-making agreements in section 7 of the B.C. Declaration on the Rights of Indigenous Peoples Act provide an example of how co-management may be built into legislation. Similar principles should be incorporated into the new mining regime.

This submission intends to make recommendations that are compatible with the letter and spirit of the THFA but also to be mindful of possible limits under s.59 of the Yukon Act on Yukon’s ability to legislate with respect to claims that existed before April 1, 2003.

**Nature of Changes Required**

In considering the future of mineral development in the Yukon, a central objective must be to ensure that the constitutionally protected rights of Indigenous peoples are fully recognized and respected. The mineral development regime must comply with the letter and spirit of the TH Final Agreement and those of other Yukon First Nations, as well as the case law respecting Aboriginal and treaty rights, including the decisions of the Supreme Court of Canada in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53⁴ and *First Nation of Nacho Nyak Dun v. Yukon*⁵ and of the Yukon Court of Appeal in

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⁴ 2010 SCC 53
⁵ 2017 SCC 58
Ross River Dena Council v Government of Yukon. Changes are also required to ensure consistency with the United Nations Declaration on the Rights of Indigenous Peoples and the principle of free, prior, informed consent.

The changes required to Yukon’s mineral development legislation will be significant. The Placer Mining Act and Quartz Mining Act were developed more than one hundred years ago and require a fundamental overhaul to account for the monumental changes in the political, legal, and social landscape in the Yukon since. The goal must be to develop true “made-in-the-North” legislation that is modern, and that encourages mineral development while also respecting the constitutionally protected rights of Indigenous peoples and protecting the environment for present and future generations.

Most fundamentally, the process of co-developing the legislation will need to explore how to reflect the co-governance and co-management promise of the treaties in the regulation of mineral development. This will require a re-assessment of the overly broad free entry system and the assumptions on which it is based. In particular, any new mining legislation must clearly recognize First Nation jurisdiction over settlement lands and reflect appropriate restrictions on the exercise of mineral rights based on the spirit and language of the Final Agreements, such as a requirement that permitted activities be limited to what is necessary for the purpose of the working and extraction of Minerals and compliance with conditions of access. The changes, however, will need to go beyond this. The cascading rights that flow from the staking of mineral claims and the ease of extending tenure under existing legislation essentially give claim holders perpetual priority rights over every other land use. The rights under the TH Final Agreement are rendered hollow under this regime, which allows for the gradual erosion of the land, water, and resources of the TH traditional territory. The new mining legislation should introduce discretion relating to renewal of claims and a requirement to consult affected Yukon First Nations, and provide incentives to explore or develop resources in a timely manner, for example by increasing the minimum value of annual assessment work.

The legislative co-development process will also need to address legislative changes required to facilitate meaningful Indigenous participation in the benefits generated by mineral development—by requiring benefit agreements to be concluded with affected Indigenous governments, facilitating First Nation investments in projects, and addressing resource royalty rates and the sharing of royalties.

Other issues that will need to be addressed include changes to ensure that development is undertaken in a manner that is sustainable and protective of the environment. This will require discussion on security and reclamation bonds, the assessment of cumulative effects, protection of wetlands, incorporation of sustainable development and stewardship principles and best practices, the establishment of progressive restoration as a requirement or standard procedure, and other matters.

In order for the YMDS Panel to appreciate the scope and nature of the changes required to the Placer Mining Act and Quartz Mining Act, we have included an annex providing an overview of the preliminary interests of TH. The list of issues is intended to be illustrative, as the co-development process TH is strongly advocating for will necessarily require the parties to come together to determine the changes that are required through collaborative, interest-based discussions.

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6 2012 YKCA 14
Proposed Process

The development of the new regime must be undertaken by the territorial government in full collaboration with TH and other Indigenous governments. Since the Umbrella Final Agreement was signed, the modern treaty relationship between public government and First Nations has been the foundation upon which policy and law-making should occur in the Yukon. The work of the Panel and engagement around the Yukon Mineral Development Strategy are important. However, a key priority must be the development of a multilateral process between public government and TH and other First Nations that will see collaboration in the actual development, drafting and implementation of new legislation, regulations, and policies.

There are precedents in Canada for the kind of collaboration that TH proposes. Drawing on the approaches employed and lessons learned elsewhere, TH advocates strongly for the development of technical working groups in which representatives of all of the Indigenous governments and public government would participate. This would be a forum where representatives would listen to each other’s perspectives and work towards workable compromises, with the ultimate aim of co-developing and co-drafting modernized legislation that will facilitate sustainable mineral development that is consistent with the letter and spirit of the modern treaties and consistent with the status of TH and other self-governing Indigenous Nations as integral parts of the mosaic of governance in the Yukon.

Such an approach would be consistent not only with the constitutionally-protected modern treaties, and with the requirements of s. 35 of the Constitution Act, 1982, but also with the commitments made under the DTA and the establishment of the successor resource legislation working group under section 4 of Appendix B—YTG—First Nation Agreements of the DTA.

However, new legislation—while critical—will not, on its own, be enough. The Yukon Government and First Nations must also come together to determine how the co-management and co-governance promises of the treaties can be fully implemented.

1. Role of MDS panel

The Yukon Government has an obligation under s.2.27 and Appendix B of the DTA to create a working group consisting of representatives of the Yukon Government and the Yukon First Nations parties to the DTA, in respect of the preparation of successor territorial legislation. In doing so, the Yukon Government must give Yukon First Nations a significant role in the development of successor resource legislation. Given that the MDS panel is an independent, three-person panel that does not represent the Yukon First Nations parties to the DTA, the MDS process must be limited to making non-binding recommendations to the working group established under the DTA. The process for developing successor resource legislation must preserve the role of the parties to the DTA to make final recommendations to the Yukon Government and the Yukon First Nations under Appendix B. MDS can inform but should not take away

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7 Two notable examples are the recent process for the co-development of legislation in the Northwest Territories and the collaborative development of a new federal fiscal policy for self-governing Indigenous governments.

8 Ross River Dena Council v Canada, 2017 YKSC 59
from the process agreed under Appendix B of the DTA. Submissions made by Yukon First Nations to the MDS should not limit the proposals or discussions that take place under Appendix B.

2. Timelines for MDS process
The DTA was finalized on October 29, 2001. Almost 20 years later, the successor legislation contemplated by section 2.27 of Chapter 2 and Appendix B to the DTA is still not in place. The honour of the Crown requires Yukon Government to diligently perform its duties under the DTA.

While Appendix B to the DTA acknowledged that consultation with the public and with stakeholders is an important element in the development of successor resource legislation, and while TH supports the MDS process, this process should not further unduly delay the timelines for fulfilling the Yukon Government’s obligations under Appendix B of the DTA and working with Yukon First Nations to implement successor resource legislation.

Yukon Government must therefore identify and publicly announce specific timelines for the completion of the MDS process. Prior to the outbreak of the pandemic, the MDS panel was scheduled to submit Final Yukon Mineral Development Strategy Recommendations to Yukon Government and Yukon First Nations in January 2021. We appreciate that COVID-19 has created challenges in completing community engagement, which was scheduled to run from December 2019 to May 2020, but we urge the Panel to use creative solutions to proceed with this work. This is particularly important as Yukon Government has deemed mining an essential service and has recently announced a $2.5m increase in funding for the Yukon Mineral Exploration Program, with the stated goal of encouraging mineral exploration. If mining is to continue and accelerate, so must the discussions on updated mining legislation. Specific timelines will also provide much-needed certainty for both Yukon First Nations and industry. It therefore appears reasonable to extend the timelines for the Panel’s work by four months, and to require submission of final Recommendations by the end of May 2021.

TH would also like to see a commitment from the Yukon Government to work with Yukon First Nations, once the Panel submits final Recommendations, to develop recommendations in respect of successor resource legislation in accordance with the DTA prior to the 2021 territorial elections.

3. Interim measures
The development of new legislation on its own, is not sufficient.

The development of successor resource legislation must be accompanied by diligent progress in terms of land use planning, supported by an interim withdrawal of land within the planning region from staking/locating. In the absence of a completed land use planning process, the free entry system results in mining in locations that are ecologically and culturally sensitive, creates potential future land use conflicts and may predetermine the use of the land, undermining the Chapter 11 land use planning process. A withdrawal should be put in place as soon as the land use planning process begins, and remain in place until an approved land use plan is implemented. Land use planning must be completed before the Yukon Government makes any decisions about transformative mining, including significant projects and projects in areas where YESAB has identified significant cumulative effects.

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9 See for example *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at paras. 77 – 80
For the Dawson region, where a land use planning process is already underway, TH has repeatedly requested an interim withdrawal since at least 2013 in order to uphold Chapter 11 of our Final Agreement. TH believes that an interim withdrawal is the best way to balance protection of ecological and cultural values and economic development until a land use plan is in place, and thereby to avoid potential land use conflicts. This compromise is reasonable given the alternative is to require the consent of the relevant Yukon First Nation for any staking/locating or mining, or to expropriate existing claims once a land use plan is approved.
Annex

As noted above, in order for the YMDS Panel to appreciate the scope and nature of the changes required to the Placer Mining Act and Quartz Mining Act, we have prepared this annex to provide an overview of the preliminary interests of TH. The list of issues is intended to be illustrative, as the co-development process TH is strongly advocating for will necessarily require the parties to come together to determine the changes that are required through collaborative, interest-based discussions.

Negotiation of impact benefit agreements

A key objective in modernizing the mineral management regime must be to ensure that mineral development meaningfully supports and contributes to the economic development and prosperity of Yukon First Nations. For too long, Indigenous peoples have been excluded from the benefits of extractive industries and only borne its harms. The modernization of the mineral management regime must reflect the Truth and Reconciliation Commission’s call to the corporate sector to “ensure… that Aboriginal communities gain long-term sustainable benefits from economic development projects.”\(^\text{10}\)

For decades, Yukon First Nations have been seeking to work with public government towards this goal. Close to fifty years ago, in 1973, in *Together Today for our Children Tomorrow*, Yukon First Nations wrote:

> Many people of native descent in the Yukon are searching for the means whereby they can become self-sufficient members of today’s society. Many have good ideas about how this can be accomplished through private enterprise... This Position Paper offers our recommendations as to how it can be done. We trust it may become a part of Government policy in the Yukon. The Yukon Native Brotherhood is prepared to help achieve the goals of that policy.\(^\text{11}\)

Among other things, the new mineral management regime must require proponents to enter into impact benefit agreements with affected Yukon First Nations to ensure that local communities and residents have opportunities for long-term benefits, such as employment, training, and contracting opportunities while also ensuring that First Nations benefit meaningfully from the wealth generated from their traditional lands. Proponents must be required to conclude benefit agreements with affected Yukon First Nations in order to undertake advanced exploration projects that may proceed to mine development. It should also encourage proponents to engage with affected Yukon First Nations as soon as practicable when undertaking new exploration work, by entering into exploration agreements.

The new legislation should set out the topics to be discussed in the negotiation of benefit agreements, including:

- employment opportunities;
- contracting opportunities;
- scholarships, education and training opportunities;
- economic benefits;
- community infrastructure development;


\(^{11}\) *Together Today for our Children Tomorrow: A Statement of Grievances and an Approach to Settlement by the Yukon Indian People*, January 1973.
equity participation; and
mitigation and monitoring of social, cultural and environmental impacts.
A benefit agreement would not need to incorporate all of these matters, and they could include other items, so long as the substance of the benefit agreement is fair and proportional to the scope of the project. The content of the agreements would be flexible and reflect the priority areas of the affected First Nation.

The Yukon Government would have no role in the negotiation of benefit agreements. The Yukon Government should not prescribe, oversee, or interfere with the content of the benefit agreement. The proponent would only need to show that a benefit agreement has been concluded in order to discharge this legislative requirement. Written confirmation from the proponent and affected Yukon First Nations would suffice to assure the Minister that the requirements of the new legislation have been met.

The new legislation should also establish a dispute resolution body to adjudicate issues relating to negotiation impasses with respect to benefit agreements. This dispute resolution body would only have jurisdiction over benefit agreements, not other issues arising between the affected Yukon First Nation and a proponent, such as the mitigation of impacts. While the dispute resolution body would be funded and set up by the Yukon Government, it would be an independent body which operates separately from the Yukon Government. The dispute resolution body’s design would ensure expertise, independence, public trust, and efficient use. Indigenous and public governments would have equitable representation on such a body, with 50 percent of the members appointed by public governments, and 50 percent appointed by Indigenous governments.

Engagement with First Nations

The new mineral management regime should develop tools and/or impose a requirement on proponents to engage early with First Nations in whose traditional territory proponents intend to conduct activities. This will ensure that First Nations have the opportunity to shape measures to protect the environment and their rights, as well as the opportunity to participate fully in employment and business opportunities from the outset. Optimally, engagement between proponents and First Nations should occur before any staking occurs and certainly before an activity to work a staked and recorded claim proceeds. Consistent with the earlier comments in this document, staking would also only occur in an area after land use planning has, at a minimum, reached a draft stage and the necessary interim protection(s) have been implemented.

Compatibility with Yukon First Nation laws

A central element of Appendix B to the DTA is the goal of developing “compatible or, where appropriate, common natural resource management and legislative regimes in the Yukon”12. Further, we believe the honour of the Crown requires the Yukon Government to develop new legislation that is compatible with laws validly enacted by Yukon First Nations.

Any new legislation must be compatible with existing Yukon First Nation laws, such as the TH Tenure and Land Use Regulations, as well as any future laws that Yukon First Nations are empowered to make under the Final Agreements and Self-Government Agreements.

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12 DTA, Appendix B, 2.1 and 4.3(b)
Permitted activities on Settlement Land must be only what is necessary for the purpose of the working and extraction of Minerals

Under the Final Agreements, with respect to Category B and Fee Simple Settlement Land, the Yukon Government reserved to itself the Right to Work mines and minerals. The Right to Work is defined in the Final Agreements to include the right to enter on, use and occupy the land or as much thereof and to such extent as may be necessary for the purpose of the working and extraction of Minerals. The Yukon Government cannot legally grant miners any rights that go beyond this, yet the current regime has allowed miners to occupy land in circumstances that are not necessary for the working and extraction of Minerals. For example the low levels of assessment work required and the lack of a discretion at renewal has resulted in claims continuing for many years without any mining activity. Further, claims have been used for non-mining purposes such as the storage of debris and construction of residences. The new legislation must expressly permit miners to hold claims and undertake activities on Settlement Land only if the miner can demonstrate that doing so is necessary for the purpose of the working and extraction of Minerals. Any activity that does not meet this requirement must require the consent of the affected Yukon First Nation.

Category B and Fee Simple Settlement Lands

Under the Final Agreement, access to Settlement Land for the exercise of New Mineral Rights, including staking/locating, is permitted without First Nation consent only in limited circumstances. First Nation consent is required:

a) where a person crosses Settlement Land, if the access is not of a casual and insignificant nature and does not use a generally recognized route,
b) where a person uses Category B. or Fee Simple Settlement Land, where the use requires heavy equipment or methods more disruptive or damaging to the land than hand labour methods,
c) for any use of Category A Settlement Land (see definition of New Mineral Right and THFA 18.4.1, 18.4.2).

On Category B and Fee Simple Settlement Land, the exercise of New Mineral Rights, including staking, that exceeds the thresholds in the Final Agreement must require First Nation consent. The current mining legislation is inconsistent with the Final Agreements as it does not reflect these conditions and the distinct regime that must apply to the exercise of New Mineral Rights, including staking/locating, on Category B and Fee Simple Settlement Land.

The new regime must reflect the restrictions on the exercise of New Mineral Rights, including staking/locating, on Category B and Fee Simple Settlement Land. For example some Class 1 activities and most Class 2 and up activities require heavy equipment or methods more disruptive or damaging to the land than hand labour methods, and will therefore require First Nation consent, not just notification and consultation.

Under the Final Agreement, use of Settlement Land for the exercise of Existing Mineral Rights is permitted without First Nation consent “where provided by Laws of General Application”. Our view is that the new regime, as a Law of General Application, should require First Nation consent (as an additional condition under s.59(2) of the Yukon Act) where the exercise of Existing Mineral Rights on Settlement Land requires heavy equipment or methods more disruptive or damaging to the land than hand labour methods.
Traditional Knowledge

The development of the new mineral management regime must consider how to facilitate the incorporation of traditional knowledge in mineral development decisions. The TH Final Agreement explicitly acknowledges the role traditional knowledge must play in the assessment of projects. The opportunity to incorporate traditional knowledge must be built into all stages of the mineral development process, including the planning and assessment of activities.

Misuse of claims and leases

The new mineral management legislation should expressly state that mining on Settlement Land must comply with the requirements of Final Agreements, in particular the conditions of access in 18.6.0 i.e. no significant/unnecessary damage to Settlement Land or significant/unnecessary interference with Yukon First Nation use and peaceful enjoyment, no activities that are not necessary for mining purposes or that are not miner-like working.

Further, Yukon Government should ensure that it takes enforcement action where misuse of claims breaches the conditions on access in 18.6.0 or exceeds the access rights that Yukon Government can grant under Final Agreements.

Subject to the restrictions in s.59 of the Yukon Act, the new regime should also provide authority for Yukon Government to cancel claims and leases (on and off Settlement Land) that are not being used for mining or where a miner has not complied with terms and conditions set out in regulations or permits.

Requirement for security

The costs to reclaim damage caused by mining activities, including the replacement of overburden or removal of garbage and debris, including discarded machinery, are often significant. In many cases, such matters remain unaddressed. This is particularly the case where miners become bankrupt or are resident outside of the Yukon.

The Placer Mining Act currently provides that adequate security is required if a person intends to undertake mining activities on lands owned or lawfully occupied by another person, and that security may be required where there is a risk of significant adverse environmental effect from a planned designated Class 1 placer land use operation or Class 2, Class 3 or Class 4 placer land use operation. The Quartz Mining Act includes similar provisions.

Rather than being discretionary, security should be required where:

a) there is risk of significant adverse environmental effects,

b) significant mitigation measures or restoration of the site is likely to be necessary,

c) the proponent is resident outside of the Yukon; or

d) there is a risk that the proponent’s financial responsibility will not be adequate for the completion of the undertaking, such mitigative measures as may be required, or the satisfactory maintenance and restoration of the site.

Further, YG should have discretion to require security in any other circumstances, to allow flexibility.

The legislation must require the amount of security to be adequate to fully reclaim mining sites, based on realistic independent estimates. The amount of security could take into account the ability of the proponent to pay the costs of mitigation measures and restoration, as well as the past performance of
the proponent; those proponents who have a proven record of good reclamation could be required to post smaller amounts of security or bonds.

**Determination of security amount and approval of reclamation plans**

The new mineral management regime must provide that adequate security is collected from proponents to carry out reclamation and closure activities. There must also be clarity and certainty about the costing system to determine security. The Yukon Government should not have the sole authority to approve security requirements and approve reclamation plans for specific projects so as to avoid any possible conflict of interest. The joint agreement of the Yukon Government and the affected Yukon First Nations should be required.

Additionally, progressive reclamation should be established as a standard procedure. The merits of shifting the focus to the “restoration of entire ecosystems” rather than on reclamation should also be assessed, given the narrow interpretation that the term “reclamation” has been accorded by proponents. There are already precedents for this kind of work and planning, including in the Peel Plan.

**Management and expenditure of security**

The new mineral management regime must establish a collaborative process for the management and expenditure of security. Such a process should ensure TH and other Yukon First Nations are part of the decision-making with respect to the management and expenditure of security. TH has two trusts with proven track records in the management of more than $30 million. Responsibility over, and a role in, the management of the bonds could serve to rebuild trust in proponents, trust in monitoring reclamation activities, and further economic reconciliation. As with all aspects of mineral development in the TH Traditional Territory, TH Government must be a full participant and decision maker, and not a mere bystander as happens all too often under the current regime.

**Monitoring**

A priority of the new mineral management regime must be effective compliance with applicable legislation and regulations, including any operating plans submitted by proponents and approved by the Yukon Government. It should also promote collaborative monitoring arrangements between the Yukon Government and Yukon First Nations, including TH, such as identifying inspection priorities and undertaking joint inspections. There is no need for new mining legislation to be drafted and brought into effect for this important change to be made. Through regulatory change and/or through cooperative agreements reached between First Nations and Yukon Government, joint inspections are an area that can be actioned immediately. Developing mechanisms for joint inspections in the short-term would be an early “win” for both Yukon Government and First Nation and could serve as a confidence-building mechanism as more substantial changes to the existing mining regime proceed.

**Inspectors**

The new mineral management regime must ensure that inspectors are qualified and have the capacity to deal with complex or large-scale projects. Inspectors should report to a territorial department other than Energy, Mines and Resources in order to avoid any real or perceived conflict of interests resulting from that department’s responsibility for both encouraging industry to undertake work in the Yukon and regulating industry for compliance with the applicable legislation, regulations, and policies.
Alternatively, the promotion, regulation and enforcement of mining should be separated in some other way within the Yukon Government.

**Enforcement tools**

The new mineral management regime must establish a range of enforcement tools to ensure that inspectors are able to effectively and efficiently address non-compliance with any licences and permits or the legislation or regulations. Inspectors should have the authority to issue an administrative monetary penalty or stop work order or order a proponent to undertake specific remedial work within a prescribed period of time. The legislation must provide authority to suspend or cancel a claim where a proponent is unable to provide evidence that the claim is being held for the purposes of mineral exploration or development.

**Penalties**

The new mineral management regime must establish substantive penalties for those who fail to comply with applicable licences and permits or the legislation and regulations. The legislation should include penalties for making a false or misleading statement to an inspector, obstructing an inspector, failing to pay a royalty payable as required, failing to file a report required under the legislation, conducting exploration activities in contravention of an order to cease activities, and generally doing anything in contravention of the legislation and its regulations. If a proponent is a “bad actor” who acts in bad faith or repeatedly violates the applicable licences and permits or the legislation and regulations, that proponent should be prohibited from undertaking or being involved in mineral activities and projects in the Yukon for a specified period of time.

**Sentencing principles**

There must be an element of deterrence, denunciation, and punitiveness for non-compliance with the applicable licences and permits or the legislation and regulations. For example, a person who illegally builds a 20-kilometre mining road in the pristine backcountry cannot simply be fined $1,200 upon conviction in the Yukon Territorial Court. That is not appropriate. It creates no deterrent for non-compliant behaviour. In addition, a court must be authorized to issue orders to require an offender to remediate and compensate for damage caused by their non-compliance with the applicable licences and permits or legislation and regulations.

**Discretion in renewal of claims and leases**

Subject to any restrictions that may be imposed by section 59 of the *Yukon Act*, the new mineral management regime should introduce a discretion relating to renewal and a requirement to consult affected Yukon First Nations on renewals. This would allow renewal to take into account whether claim holders have shown reasonable progress in mining the claims, Yukon First Nation plans to use the land, potential impacts on objectives under Final Agreements, and other matters. On Settlement Land this would help ensure that mining activities are limited to what is necessary for the purpose of the working and extraction of Minerals.

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Access

Legislation must allow access roads and trails for mining activities to be effectively managed and controlled. Although the Yukon Government has proposed new regulations for resource roads, that proposal excludes roads constructed on interests that are administered through the Quartz Mining Act or Placer Mining Act, yet the Yukon Government has repeatedly allowed miners to stake claims and apply for prospecting leases for the sole purpose of creating access to other claims that will be mined.

Yukon legislation must require miners to obtain discretionary permits based on appropriate assessment for all proposed new mining roads and trails, whether located on or off a claim. Assessment may be conducted under the Yukon Environmental and Socio-economic Assessment Act or another framework that would ensure assessment of cumulative effects, impacts on fish, wildlife, habitats and Yukon First Nation use of the area.

The legislation must also provide tools to require mining proponents to limit the construction of new access roads and trails (e.g. mandate the use of existing roads where available), and to impose controls on public use of resource roads built by a proponent.

Operating plans

Currently, proponents are required to submit an operating plan to the Mining Lands Office that must be approved before any exploration activities can be commenced. These plans may set out multi-year exploration programs up to ten years, which the Chief of Mining Land Use may approve or alter. For Class 4 Programs, the Chief of Mining Land Use may require the operator to consult the public. The operating plan would outline all of the proposed project activities and requirements and identify measures that will be undertaken to minimize any adverse effects on the environment. The new mineral management regime must ensure that operating plans have a standardized form and require proponents to comply with these operating plans, unless they are amended. The affected Yukon First Nation must be involved in the approval and any amendment of these plans. These plans would be important for compliance, monitoring, and enforcement.

Temporary withdrawal

The new mineral management regime must establish a process for the Minister, with the agreement of the affected Yukon First Nation, to designate an area where mineral interests cannot be issued for a period of up to two years. This would be intended to protect defined areas of a limited size or “hotspot” areas where there is cultural, geological, or ecological significance. This would be an efficient process for the Yukon Government and the affected Yukon First Nation to protect specific areas in a timely manner rather than by way of an order-in-council approved by Cabinet. It would not be intended to replace existing land planning tools and processes. Instead these designations would function as a temporary arrangement to protect an area until the parties reach agreement on the long-term land use of the area.

Free entry

The free entry system presupposes that mining is the highest and best use of all land, yet this is not always the case. For the long-term welfare of our citizens, land also needs to be preserved for other

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14 Yukon Environmental and Socio-economic Assessment Act, SC 2003, c 7.
purposes such as housing and infrastructure, the pursuit of traditional activities such as hunting and trapping, and sustainable economic activity such as tourism and agriculture.

In the absence of final land use plans throughout the Yukon, the free entry system must be constrained to prevent miners pre-determining the use to which any land can be put. Decisions as to the best use of land must be made by the Yukon Government and Yukon First Nations, not individual miners. The new regime must therefore provide for constraints on free entry e.g. by requiring consent of the relevant Yukon First Nation and the holder of any surface rights, or requiring assessment before a staking permit is issued by the Yukon Government. The process for granting of dispositions in the Yukon Oil and Gas Act provides one example of legislation that requires either an active call for bids by the government, or an application by the proponent with discretion for the Minister to determine whether the issuance of the disposition is warranted in the circumstances.

**Mineral tenure**

The Yukon’s modern mineral management regime must ensure that proponents are incentivized to explore or develop mineral resources in a timely manner. The legislation must discourage the practice of holding large tracts of land for speculative purposes and encourage the development of mineral deposits into mines in a timely manner and the creation of employment and economic activity. There is no benefit for governments or industry when proponents can “sit” on claims for years or decades without undertaking any meaningful exploration or development work. For instance, the current legislation provides no limitation on how long work can be carried forward and recorded against annual claim obligations. This allows proponents to lock up claims for long periods based on legacy work. The new legislation should provide that work must be carried out within a specific period. For instance, work eligible for a year must not have occurred more than five or ten years earlier. The work requirements for the maintenance of a claim must be increased, and consideration should be given to whether new legislation should build in progressive increases the longer a claim has been in existence. At present, a claimholder is only required to spend $200 per year to maintain a placer claim and $100 for a quartz claim. These amounts have not been increased for decades. In fact, the Yukon Government has introduced measures in certain years to waive work requirements due to unfavourable market conditions. The Yukon Government has also allowed claimholders to group their claims so that extensive work on a single claim can be applied to other claims in the grouping. There must be a discussion about what constitutes “work,” including, potentially having the costs of community outreach and Yukon First Nation consultations included in the definition of “work.” This would incentivize proponents to undertake engagement with affected Yukon First Nations at an early stage.

**Grouping of placer claims**

The new mineral management regime should require Yukon Government to consult the relevant Yukon First Nation on the grant of any discretionary grouping of placer claims in its Traditional Territory.

Further, a priority of the new mineral management regime must be effective administration of existing placer groupings, including collaboration between Yukon Government and Yukon First Nations in reviewing whether there are grounds to cancel a grouping e.g. under the existing provisions in the PMA where there is no system of mining in place that is being installed or operated with reasonable diligence. The new regime could, for example, provide regulations or policies for the conduct of regular reviews on groupings, including matters that Yukon Government must take into account, or provide for an
interested party to trigger a review of an existing grouping, requiring consultation with the relevant Yukon First Nation and a public decision, with reasons, by Yukon Government.

**Prospecting leases**

We query whether leases to prospect are still required within the new regime. Prospecting leases are currently used by miners to circumvent the restriction in s.36 of the PMA that a person who records a claim cannot locate another discovery claim within the valley or basin of the same creek or river within 60 days. In this way, prospecting leases can dramatically accelerate the rate at which land is staked.

If prospecting leases are retained, the new mineral management regime must ensure effective administration of prospecting leases. This must require Yukon Government to consult affected Yukon First Nations prior to granting a prospecting lease, and to provide a public decision that sets out reasons e.g. reasonable evidence of an applicant’s financial ability and intention to incur the expenditure necessary to thoroughly prospect, and of the lands being abandoned if Yukon Government proposes to grant the lease under s.93 of the Placer Mining Act.

**Implement a training course**

The new mineral management regime should require a person to obtain a prospector’s licence in order to carry out prospecting and exploration activities under the Placer Mining Act or Quartz Mining Act. Applicants for this licence should be required to complete mandatory training and education programs set out by the Minister, which ought to include training and education regarding the Umbrella Final Agreement and the various Final Agreements concluded with Yukon First Nations, including TH. This would ensure that all claimholders understand and appreciate the uniqueness of the Yukon’s resource management regime.

**Online staking**

TH citizens and other Yukoners rely on staking as a source of income. TH therefore supports a requirement to physically stake land, but opposes the existing requirement to cut location lines, which cause unnecessary environmental damage. Cutting location lines on Settlement Land:

- unnecessarily damages Settlement Land contrary to conditions of access set out at UFA 18.6.2;
- breaches Yukon First Nations’ ownership and management of Forest Resources on Settlement Land under UFA 17.2.1 unless done with consent of the affected Yukon First Nation;
- breaches TH’s power under SGA to enact laws in relation to the use, management, administration, control and protection of Settlement Land; and
- conflicts with requirement under TH Tenure and Land Use Regulations (2013) to obtain a permit prior to cutting down trees on Settlement Land.

**Zones**

The new mineral management regime should permit the Minister, with the agreement of the affected Yukon First Nation, to designate certain areas as “zones” that either encourage or limit mineral activity in those areas. Work requirements, rents, and regulatory obligations could be decreased or increased as necessary to achieve this purpose for each specific zone. For instance, zones may be established where additional expenses or logistical efforts are required to explore and mine in remote regions or areas with shortened exploration seasons. A zone may be established in order to promote exploration and
development in a specific region. Or a zone could be established with stricter requirements and standards in areas of ecological or cultural significance. The Minister, with the agreement of the affected Yukon First Nation, should have the power to remove the designation of a particular area as a zone.

**Royalties**

The issue of royalties requires discussion between Yukon Government and Yukon First Nations. The legislation must provide for fair and reasonable royalties based on the current market price of the resource and the profits made by the miner. In the case of placer, the value of gold on which the royalty is calculated is vastly out of date.

Placer and quartz royalties need to increase substantially, placer exponentially. Specifically, placer royalties should be calculated as a standardized percentage of the actual, present-day value of the resource being extracted (net production) regardless of where it may be sold. This is in contrast to the Yukon Government’s current placer royalty regime whereby Yukon Government collects a 2.5% rate calculated from $15/ounce of gold leaving the Yukon. For context of how low our current royalty regime is, presently gold is priced at around $1800USD/ounce, or approximately $2,400CAN/ounce. The present placer royalty of $.375 (thirty-seven and one-half cents) per ounce represents less than 1/6000 (.0015%) of its value. This is unacceptable.

Quartz royalties should also be based on production. The present regime bases quartz royalties on net “profit” inviting proponents to minimize royalties through creative accounting.

Mining takes place on Crown Land, which is our collective wealth and legacy as Canadians and human beings. Even the best mining practises inflict significant damage on our land, and pre-empt its use for other public purposes. The public deserve to be fairly compensated for the use of our Land.

Further, Yukon Government and Yukon First Nations should enter into a state-of-the art Resource Revenue Sharing Agreement that is in alignment with precedent setting agreements across Canada with other First Nations. The arrangement should use the latest and fairest standards, with no less than 40% of the total resource revenue being shared equitably amongst all Yukon First Nations. For specific projects/activities with significant potential to affect traditional lifestyles, affected First Nations should be supported to negotiate a premium on the standard (40%) resource revenue sharing arrangements due to the direct impacts of the resource extraction on their rights.

**Environmental protection and sustainability**

Sustainability and environmental protection must be central objectives in developing the new mineral resources regime. Sustainable Development, as defined in the TH Final Agreement, must be at the core of the new legislation. Environmental stewardship and best practices, such as the mitigation hierarchy, should be considered and incorporated. The new legislation must align with the Yukon’s commitments to climate action and biodiversity conservation.

**Special operating areas**

The Yukon Government’s power to establish special operating areas under the *Placer Mining Act* and *Quartz Mining Act* should continue under the new regime. This power should be utilized fully to ensure the regulatory regime is tailored to the needs of specific areas, including those identified through the Chapter 11 land use planning process.
Cumulative Effects

Numerous small projects can have a cumulative effect that is similar to that of a transformative mining project. The Yukon Environmental and Socio-economic Assessment Act requires the Yukon Environmental and Socio-economic Assessment Board to take into consideration in conducting an assessment the significance of adverse cumulative effects and enables the executive committee to undertake studies of cumulative effects. In making decisions relating to mining projects, the Yukon Government must give full and fair consideration to the Yukon Environmental and Socio-economic Assessment Board’s cumulative effects determinations and studies, and provide adequate reasons where those determinations and studies are not followed.

Other legislation

The review and modernisation of Yukon’s mining legislation must take into account relevant provisions in other acts and regulations e.g. the Yukon Environmental and Socio-economic Assessment Act, the Lands Act, the Parks and Lands Certainty Act, the Yukon Forest Resources Act. We provide two examples of changes that may be required.

a) Conservation Areas – Parks and Lands Certainty Act
Conservation Areas established under Final Agreements or the Chapter 11 land use planning process must be protected from mining activity that conflicts with conservation and protection objectives. Yukon legislation must require that these areas be withdrawn from staking and mining (s. 15 of the current Parks and Lands Certainty Act, for example, provides only that land may be withdrawn), and must expressly prohibit industrial resource use, including mining, on existing claims once a conservation area designation (including designation as a park) is in place. The Quebec Parks Act, RSQ 1977, c.P-9, provides an example. Appropriate powers to expropriate existing interests in land may need to be included in relevant legislation.

b) YESAA
Where Yukon Government proposes to reject or vary a YESAB recommendation that arose from a Yukon First Nation’s participation in the YESAA process or was otherwise intended to mitigate project impacts on Yukon First Nation rights and interests, Yukon Government must engage in substantive two-way dialogue before Yukon Government issues a final decision document.

Research

To inform the new legislation, an evaluation of the economic costs and benefits of mining to the Yukon should be carried out. This must take into account cumulative impacts, impacts on fish and wildlife, impacts on other economic activities such as tourism etc.

Yukon Placer Mining Environmental Restoration Fund

We understand that YG has proposed a Yukon Placer Mining Environmental Restoration Fund. TH supports this proposal, subject to the comments set out below.

One of the primary goals of the fund should be reconciliation with First Nations that have experienced negative impacts from placer mining operations within their traditional territories. In addition, the

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15 Yukon Environmental and Socio-economic Assessment Act, ss 42(1)(d) & 112(1), supra note 5.
following are fundamental principles that TH believes should be incorporated into the design and development of this fund.

**Scope**

The fund should only be used to clean up legacy placer mining disturbance, specifically disturbance from placer mining pre-devolution (2003), as well as outstanding modern-day placer mining disturbance where liability to reclaim a site can no longer be enforced against the proponent e.g. the land use approval/water licence have lapsed and the proponent is bankrupt, is outside of Yukon, or cannot be located.

The fund should **not** be used to help miners achieve current regulatory standards. As a result, the fund should not be available to currently active mining operations due to the difficulty of ensuring that funds are allocated to reclamation that goes above and beyond regulatory standards and the risk that miners would use the funding to conduct reclamation that is already required under the legislation. In the alternative, if the fund is available to currently active mining operations to achieve reclamation outcomes **above and beyond regulatory requirements**, funding should only be provided once regulatory requirements have been achieved by the proponent, or should require extensive monitoring and reporting.

A database of legacy placer mining disturbance will be required. Within this database, areas should be prioritized based on the level of damage/concern, values e.g. water quality, wildlife habitat, human safety and traditional harvest rights, and the degree of natural reclamation.

**Permissions and Affected First Nation Approvals**

It is important that applicants to the fund acquire all necessary permissions (permits/water licence, First Nation land use permits) in advance of receiving funding. Applicants could demonstrate the steps they have taken to receive permissions, but not quite have permissions in hand, as long as the release of funding is conditional on successful permit acquisition.

Third party reclamation companies should be encouraged to access the fund. To receive funding, the third party would need an agreement with the active permit holders or, where there is no active permit, to acquire all necessary permits to conduct the reclamation.

On Settlement Land, funding should only be available if the site will be brought up to present-day PMA operating condition standards and any other reclamation requirements defined in First Nation land use permits or developed in consultation with the Affected First Nation.

**Source of funding**

The fund should be sourced as much as possible from miners themselves, for example through fees for permit applications. Similar to Alberta’s Orphan Well Fund, fees would be leveraged from present-day miners and put towards cleaning up legacy sites.

The fund should also be funded by the management bodies that were responsible for the oversight of the mining operation at the time the site was abandoned or left in a deleterious state. This would include both the Federal and Territorial governments and could be allocated based on information in the database of legacy sites.
It is important that funding is long-term and sustainable, rather than based on temporary funding through a budget cycle (4-yr term). This would provide consistency to the mining community and allow long-term and strategic planning in the use of the fund.

**Sensitive Ecosystems**

Certain types of ecosystems cannot be reclaimed or restored. An example is peat wetlands, such as fens and bogs, which in practice can only be converted to other types of wetlands such as shallow ponds. This results in loss of ecological function, as well as negative social and cultural impacts; conversion does not sufficiently mitigate negative impacts. These areas must be protected from mining rather than mined and converted.

Projects in these types of sensitive ecosystems should only be considered for funding if they relate to legacy sites; the fund should not be available for current or future mining activities in these kinds of ecosystems so that it does not promote further mining in these sensitive areas.

**Evaluation Criteria and Affected First Nation Participation in evaluation**

The evaluation committee responsible for reviewing proposals for the funding should include representation from the Affected First Nation in whose Traditional Territory the reclamation effort will take place, as well as representation/input from Yukon’s Department of Environment. A third-party expert in reclamation should also be a member of the evaluation committee.

The evaluation criteria should:

- Take into account land use planning and the views of the Affected First Nation on the preferred end use of the land;
- Ensure proposals address legacy disturbance as defined and described in the database, or are limited to reclamation that goes above and beyond current regulatory requirements;
- Prioritise proposals where the disturbance has significant adverse impact(s) on critical values, such as water quality, wildlife habitat, human safety and traditional harvest rights and use;
- Require Affected First Nation approval when reclamation efforts are located on Settlement Land;
- Promote the involvement of Affected First Nation owned and/or operated businesses; and
- Require past-performance evaluation for proponents who have applied to fund before, so as to not condone poor past-performance.

**Other Considerations**

Legacy disturbances on the landscape could also be addressed through other mechanisms in PMA reform. For example anyone staking a new claim on land that is already disturbed, or has contaminated sites, could be required to reclaim or clean-up the historic disturbance to current regulatory standards.

Support for information sharing on reclamation science, efforts, failures and successes, would be of great benefit in coordination with the fund. This could be done through an educational website/hub where information could be uploaded and shared amongst miners, regulators, First Nations and scientists.
Mammoth ivory

TH is increasingly concerned about the illegal excavation, export and sale of fossil tusks and ivory from woolly mammoth by miners, and the lack of YG enforcement where such activities occur. This lack of enforcement conflicts with the TH Final Agreement, the Yukon Historic Resources Act, the TH Heritage Act and the standard operating conditions in regulations under the PMA and QMA, which make clear that:

a) YG and TH own all paleontological objects found by miners in TH Traditional Territory - these objects do not belong to miners and cannot be sold or exported without a permit; and

b) any person who finds a paleontological object in TH Traditional Territory must cease mining and report the finding to TH and YG.

The illegal export and sale of fossil mammoth ivory deprives the Yukon of objects of cultural, scientific and historic significance, as well as potential monetary revenue, and it undermines TH’s responsibilities as stewards of the land. Fossil mammoth tusks/ivory are the remains of animals that inhabited this land; they form part of this land and should not be removed from it. Yukon fossil mammoth tusks/ivory have great scientific value because they are often well-preserved in the permafrost and hold scientific information about these now extinct animals. Enabling miners to illegally sell ivory that belongs to YG and TH also deprives YG and TH of potential revenue from this resource, or the ability to use it for scientific, educational or cultural purposes. Enabling miners to illegally excavate, sell and export fossils erodes and marginalizes TH and YG’s shared duty to manage the land and those resources on the land.

The new mining regime must ensure that YG enforces the prohibitions on illegal excavation, export and sale of fossil mammoth tusks/ivory by miners, for example through inspections and issuing appropriate fines. A communication campaign may be necessary to educate Yukoners and miners about the cultural, scientific and historical importance of fossil mammoth tusks/ ivory, and that the sale and export of these objects without a permit is illegal. Appropriate regulations under the Yukon Historic Resources Act and the TH Heritage Act may also be required.