



KLUANE FIRST NATION

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August 28, 2020

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

Dear Members of the Yukon Mineral Development Strategy Panel:

Re: Kluane First Nation Comments, Yukon Mineral Development Strategy

Kluane First Nation (KFN) wants a vibrant and sustainable economy for the Yukon, which provides employment, training and business opportunities for Yukon First Nation citizens and local residents. KFN strongly supports the modernization of the Yukon's mineral resource regime as it current does not reflect the changes to the social and political landscape that have occurred over the last century. Legislative change is required to ensure a sustainable and successful mineral management system that will support future generations of Yukon First Nations peoples and Yukon residents. KFN has prepared this submission to identify key issues and gaps in the existing mineral resources regime.

The Yukon's current mineral resources regime is outdated, inadequate, and inconsistent with the KFN Final Agreement. KFN Government and citizens have experience negative impacts to culture, land, and community directly because of the outdated regime and legislation. The lack of transparency with Yukon First Nations and the public is especially concerning and does not provide avenues for co-management and development.

Of importance to KFN is Yukon Governments interim approach to consultations with White River First Nation (WRFN). KFN's Rights and Title continue to be infringed upon by Yukon Government when they consult with White River First Nation on projects on KFN Settlement Land (Category A & B). We understand that the federal and territorial governments have a duty to consult with the WRFN where the WRFN claims that it has aboriginal titles, rights and interests that may be impacted by a proposed action or decision, but the level of consultation must be based the strength of that claim. It is our view that the WRFN's claims of aboriginal titles and rights in the KFN Core Area are not supported by any fact or evidence of its traditional use or occupancy and the WRFN's claim in the KFN-WRFN Overlapping Area has not been proven.

The mineral development regime must be consistent with the letter and spirit of the Yukon Final Agreements. Co-development of new legislation with Yukon First Nations and Yukon Government will ensure that Yukon's mineral resource regime is transformed to reflect our current realities under self-government and the political and legal environment, as it works towards a fundamental shift in the way lands and resources in the Yukon are managed. 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.

Shāwníthän (Thank you) and Dak'ánútà jè (take care),



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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

Yukon Mineral Development Strategy Process
Kluane First Nation Submission
August 28, 2020

1. Consultation

YG has a clear and recognized Duty to Consult with all potentially affected First Nations, including Settled, Un-settled and Trans-Boundary First Nations. The Supreme Court of Canada, several times over in the past two decades, had made decisions clarifying and increasing YG's responsibility on Duty to Consult. Aboriginal and Treaty Rights must be recognized and built into updated legislation.

In accordance with the commitments made in the DTA, YG and Yukon First Nations need to develop new territorial legislation to replace the mirror mining legislation. This legislation would be consistent with the mineral development strategy.

Resource development must also respect Treaty and Aboriginal Rights, per the Kluane First Nation (KFN) Final Agreement. Following the 2016 endorsement of Canada of UNDRIP, consideration of FPIC has become paramount in land use and resource development planning.

The requirement for consent is an expression of Indigenous sovereignty, articulated in the KFN FA. Consultation requirements have been strengthened and clarified in Yukon and Canada's legal landscape through case law.

Consent, as such, is one of the standards for proper relations between Crown and Indigenous governments. This is reflected throughout UNDRIP, where the need to obtain consent from Indigenous peoples is expressed in numerous articles.

KFN strongly encourages YG to consider the following factors in updating resource management legislation:

- a. Duty to Consult principles and engagement
- b. UNDRIP implementation
- c. FPIC principles and engagement

Credit for consultation "work": The costs of community outreach and First Nation consultation must be included in the definition of "work" in resource management legislation, regulations and cost calculation schedules. This would incentivize proponents to undertake engagement with affected Yukon First Nations throughout a project life cycle. It would demonstrate proponent interest and commitment, and lead to greater understanding of First Nation values and concerns.

Consultation must be consistent across all fronts. KFN notes government-to-government dialogue often changes from person-to-person, branch-to-branch, department-to-department. While we recognize there needs to be a spectrum of dialogue, the starting point must be clearly and consistently defined and applied. The communications and engagement from YG AR versus YG EMR is notable. Even within EMR, the difference in engagement between

MRB and CMI is stark.

2. Kluane First Nation (KFN) - White River First Nation (WRFN) Overlap Issue

KFN acknowledges that portions of its Traditional Territory are overlapped with the Traditional Territories of neighbouring First Nations. However, KFN retains constitutional rights as contained within the Kluane First Nation Final Agreement and has jurisdiction over its Settlement Land, Citizens and resources as set out in Kluane First Nation Self Government Agreement. This gives Kluane First Nation primacy of governmental authority within the core area of the KFN Traditional Territory. The core area concept was developed through negotiations with the Governments of Canada and Yukon.

The core area concept for Kluane First Nation is now constitutionally protected under KFN Final Agreement. KFN recognizes the actual area of overlap with White River First Nation is located between the Donjek River and the White River, and is identified in the KFN Final Agreement (Appendix B, Sheet 22) as a cooperative management area between KFN and WRFN. The process for resolving “overlaps” are identified in the Kluane First Nation Agreement. If an unsettled Yukon First Nation believes that it has existing aboriginal rights and title then it must either prove those rights and titles exist in a court of competent jurisdiction or negotiate an overlap agreement with KFN. Until this occurs then KFN will continue to pursue and protect its constitutionally recognized rights within its Final Agreement and the applicable common law.

We understand that the federal and territorial governments have a duty to consult with the WRFN where the WRFN claims that it has aboriginal titles, rights and interests that may be impacted by a proposed action or decision but the level of consultation must be based the strength of that claim. It is our view that the WRFN’s claims of aboriginal titles and rights in the KFN Core Area are not supported by any fact or evidence of its traditional use or occupancy and the WRFN’s claim in the KFN-WRFN Overlapping Area has not been proven. Our oral history confirms and the discussions of the WRFN and KFN over the past 20 years, including the 1999 Overlap Agreement, acknowledge that the WRFN members have not traditionally used or occupied any lands or sites within the KFN Core Area on an intensive or ongoing basis.

The ongoing consultation of WRFN by YG Energy Mines and Resources (EMR) on projects within the KFN Core Area and specifically on KFN Settlement Lands (Category A & B), diminishes KFNs rights, titles and interests. YG needs to abide by their interim approach to consultation with WRFN and respect KFN’s Final Agreement. Multiple projects have been held up this year because of delays by WRFN, which has also led to a negative economic impact for KFN who provides numerous services to mine sites in the area through its development corporation.

3. Mineral Tenure

Given the free-entry system for claim staking, there are only two bars to be met by claim stakers. One is age and the other is legal status – which is relevant only for business/corporate entities. The management system can easily validate age, however it falls

down on verifying the legality of business/corporate entities. While age is a threshold, the legal status of business/corporate entities requires is a continuum. When a business/corporate entity legal status is no longer valid, they do not have the ability to legally hold claims, permit, licenses or authorizations. YG needs a better means of verification and validation of the legal status of business/corporate entities. This applies to both mineral tenure and authorizations.

KFN believes every claim must have a default, baseline security amount attached to it. Where the value of security can be increased for reasons defined in new regulations, such as First Nation land status, operator history, ecological values at risk, etc. The Yukon already has legislation and related tools which ascribe default security, such as the Yukon *Forest Resources Act*. Mineral claim acquisition and development must work in a similar manner. The baseline security must be sufficient to cover claim abandonment after the most common, minimum activities conducted.

4. Mining Authorizations

KFN is pleased the Class 1 system has been expanded to the level it has. However, there is a continued challenge related to consultation and changes to authorizations, permits and licenses. Yukon First Nations must be consulted prior to changing operating conditions which were the outcome of a consultation process. This includes Class 1 through 4 mining and exploration programs. KFN proactively developed a “proponents engagement guide”

The current system allows for changes to take place with little oversight, little to no consultation, and often avoidance of the YESAB. CMI inspectors can issue field variances which substantially changes programs and operating conditions. Mining recorders can authorize similar work changes, where programs have been reviewed, consulted on and filed in advance of any activity.

Consultation dialogue must be a continuum, versus a check list of one-time actions.

Similar to mineral tenure, KFN believes there must be a baseline, default security amount determined and applied to mining and exploration program authorizations, permits and licenses. The minimum must be high enough to encourage operators to complete reclamation. There must be a matrix for assessing projects that pass the default threshold. Wolverine Mine is a prime example of YG failing at security assessment and implementation.

Security costs for both mineral tenure and mining and exploration programs must not be allowed to be waived or off-set. Yukon First Nations must have a role in determining security where TT and Settlement Lands are impacted. In addition to determining security, expenditure must include consultation and engagement of affected First Nations.

5. Royalties and cost off-sets

The royalty calculations and cost off-sets must be addressed. The PMA royalty is so meaningless, the time spent by YG employees calculating royalty fees is significantly greater than the royalty collected. Both the PMA and QMA need to have royalties updated. Royalty off-sets also need to be reconsidered. The work which is allowed to off-set royalties needs to

be narrowed down in scope. KFN suggests off-sets be based on costs related to consultation, community engagement and socio-economic investment.

Royalty and cost off-sets for development costs send the wrong message to companies. Not only are they poorly implemented and monitored by YG, they also do not encourage investment in places past closure. If YG chooses to allow royalty reduction and cost off-sets, the Traditional Territory, community and local residents affected must see those benefits directly. This would increase visibility of local investment/engagement and community infrastructure development.

6. YG Structure

KFN believes the YG structure must be modified to effectively manage mineral tenure, mining and exploration programs, investment and economic development opportunities, enforcement, consultation and decision making. It is problematic to have so many disparate functions located in one YG department. KFN strongly encourages YG to move functions not related to the maintenance of mineral tenure and mining and exploration programs to other departments.

Specifically - EMR houses the Mineral Resources branch which “regulates exploration and mining activity and encourages its development.” This dual mandate makes the branch part promoter, part regulator. EMR also includes the Compliance, Monitoring and Inspections branch, meaning that mining promotion, regulation, and enforcement fall under one department.

British Columbia’s Auditor General recently called on the province to move compliance and enforcement from the Ministry of Energy and Mines (MEM) to an independent agency. The Auditor General’s report concluded that:

“MEM’s role to promote mining development is diametrically opposed to compliance and enforcement. This framework, of having both activities within MEM, creates an irreconcilable conflict. Because compliance and enforcement is the last line of defense against environmental degradation, business as usual cannot continue.”

Yukon Government must ensure that regulators have a clear mandate to prioritize protection of people and the environment, and act in the public interest, not private industry’s. We recommend moving responsibility for project approval from EMR to an arms-length unit such as Development Assessment or Major Projects Yukon, and moving the mining enforcement program to an independent agency.

When it comes to consultation for projects, KFN’s experience is this conducted at a departmental level, resulting in varying depth and transparency in discharging YG’s Duty to Consult. There is no ‘voice’ or ‘will’ of YG clearly represented. Instead the dialogue is stilted and discordant. There have been times where one YG department has been strongly supportive of KFN interests in a process, while another YG department fights against KFNs interests.

Having one body of government responsible for the coordination of consultation would

improve the relationships and consistency of messaging. AR or an equivalent agency would be better suited to housing the responsibility versus having it fractioned across YG.

Yet another barrier is a lack of transparency for what must be fully transparent and publicly accessible files. For example, YWB hosts an online database called Waterline. This tool allows KFN to monitor files for compliance, deliverables, and deadlines. It is easy to use and transparent. MRB does not have an equivalent system or tool. More so, requests to MRB and CMI for what must be public records are frequently frustrated with instructions to place ATIPP requests. The responsibility lies with YG to conduct privacy and information assessments, not with KFN to navigate YG's understanding of transparency and privacy requirements. Providing information to First Nation partners in a timely manner must be the goal.

7. Update Legislation

The legislation must be updated. Since the enactment of the PMA and QMA, there have been monumental changes in the Yukon's political, economic and social environment: Establishment of responsible government, implementation of our land claim and self-government agreements, and enactment of the YESAA. Yukon exploration and mining legislation has remained relatively unchanged since its original enactment. First Nations' Aboriginal and Treaty Rights must be considered in all legislative, regulatory and policy change.

As previously mentioned, the entire lifecycle of a claim and mining related work must be re-worked; right to enter, prospecting, exploration, development, production, reclamation, closure, and post-closure.

The PMA and QMA and accompanying regulations are outdated with the focus on development and extraction of mineral resources. A responsible MDS framework must go further and specifically include Treaty and Aboriginal Rights at every step of the lifecycle above.

YG must also recognize that Laws of general application apply on Settlement Land. Compliance and enforcement issues have been pushed onto First Nations to deal with, ignoring that fact that Laws of general application give YG / Canada the responsibility to pursue and correct violations.

Legislative change must also include all aspects of land management and land use planning. Land use planning, embedded in Chapter 11 of the Umbrella Final Agreement, is a chance for people to come together and create a vision for Yukon's land and communities. The policies and maps in a land use plan provide tools to get there.

Mineral staking undermines these efforts if it continues while planning is underway. Ecologically and culturally important areas could be staked and mined before better options for these areas are considered and written into the plan. Mineral staking must stop in areas where land use planning is not complete. Land use planning is consistent with the content of

existing aboriginal title, which encompasses the right to exclusive occupation of title lands.

8. Abandoned Sites

The Wellgreen mill foundations, tailings dam and tailings pond are complicated abandoned site. This site is complicated due to jurisdictional dispute between the Yukon and Canada for responsibility. Mining of a Copper-Nickel-Platinum sulphide deposit was carried out for a brief period of time in the early 1970s. The ore was processed through a mill constructed on-site and a dam was constructed to create an area for disposal of the mill tailings. The mine was decommissioned during the late 1970s and the mill was repurposed elsewhere. Currently, the structures that remain are the mill foundations, the tailings dam, and the tailings pond.

The tailings dam poses a risk to the environment and KFN TT. Monitoring work is being done on the tailings and nearby environment; however the implementation of a long-term solution is still needed. YG must implement a comprehensive system to deal with abandoned sites. While Wellgreen is tied to the past and murky, future abandonment of sites will occur and YG must be prepared to address those issues with mechanisms such as increased security amounts.