

A Report to the BC Provincial Ministers of:  
Environment and Energy and Mines

Re: THE ENVIRONMENTAL ASSESSMENT &  
CONSULTATION PROCESSES ASSOCIATED  
WITH THE TCP – EA AMENDMENT PROCESS  
(Air Cushion Barge Alternative Access)

Submitted by  
Taku River Tlingit First Nation  
February 25, 2009

## Table of Contents

Introduction .....	4
Environmental Assessment .....	4
The Project .....	4
The Review Process .....	5
Impact Assessment .....	6
EA Review .....	6
Environmental Impacts .....	6
Requirement #1 .....	8
Environmental Monitoring Programs .....	8
Requirement #2 .....	8
Regulatory Oversight .....	8
Requirement #3 .....	9
Impacts to Tlingit Rights and Interests .....	9
Tlingit Impacts Study .....	9
1. Lost Commercial Fishing Opportunities .....	10
Requirement #4 .....	11
2. Interactions between ACB & Tlingit Fishery .....	11
Requirement #5 .....	12
3. Alienation of Tlingit Land Use .....	13
Requirement #6 .....	13
4. Increased Winter Wildlife Poaching .....	13
Requirement #7 .....	14
5. Wildlife Displacement .....	14
Deficiencies in the EAO's Assessment Report .....	15
Access Road Alternative .....	15
Environmental Oversight Committee .....	16
Requirement #8 .....	18
EAO's Conclusions .....	18

TRTFN Conclusions from the EA Process .....19

IBA .....20

Consultation & Accommodation .....20

    The Process .....20

    Non-compliance with Existing Certificate .....25

        Wildlife Monitoring .....25

        Wildlife Training .....26

        Redfern’s Requirement for an IBA .....26

            Requirement #9 .....27

    Social Impacts .....27

        Requirement #10 .....28

TRTFN Participation in Ongoing Regulatory Processes .....28

Environmental Supervision .....29

    Requirement #11 .....31

    Requirement #12 .....31

Outstanding Issues .....31

## Introduction

This report to the BC Ministers of Environment and Mines Energy & Petroleum Resources presents the findings of Taku River Tlingit First Nation in relation to an impact assessment conducted by the BC Environmental Assessment Office (EAO) of Redfern Resource's proposed air cushion barge (ACB) project that would service the Tulsequah Chief mine. As of this writing, the proponent has just announced an indefinite suspension the project, including all activities at the site, because of major financing challenges in constructing the project.

In principle, TRTFN Government has never opposed the opening of the Tulsequah Chief mine. But it has insisted that the project be done in a way that contributes to, and does not undermine, the sustainability of the TRTFN people and territory. This concept is now entrenched in the 2007 *TRTFN Mining Policy*. As explained in this report, much work has yet to be done to make this a sustainable project for the TRTFN. Since there is no urgency for a speedy approval from BC, nor a legislated timeline to meet, there is an opportunity now for the ministers to fix the problems that remain before they issue an approval to the company.

In deciding whether to approve new mining projects in its territory, the TRTFN Government must evaluate the project in accordance with its *Mining Policy*. The *Policy* requires that a proposed mine must be subject to an environmental assessment, and that both an *Impacts & Benefits Agreement* (IBA) with the proponent, and an *Accommodation Agreement* (AA) with the Crown, be negotiated and subjected to community ratification. With these three pieces in place, TRTFN Government and the Tlingit community is then in a position to make a decision about whether or not to approve the project.

This report to the Ministers and TRTFN Government describes the status of each of these components, and outlines the further conditions necessary to get us to a point where approval for the project could be given by TRTFN. For reasons that will be evident below, the TRTFN differs significantly on some of the conclusions made by the EAO in its reports to the minister, which has necessitated the preparation of this separate report to accompany the referral package submitted by the EAO to the ministers for their decision.

## Environmental Assessment

### The Project

The ACB transportation project is being advanced by Redfern as an alternative access mode for the Tulsequah Chief mine which was permitted

for construction in late 2008. This permit was issued following issuance of an environmental approval certificate in 2002 for the mine and the then preferred access of a new 160 km road north from Tulsequah to Atlin. Instead of building the road, Redfern has chosen instead to apply for a river-based transportation mode for the following reasons:

“This option offers several distinct and significant advantages over the road, including [a] reduced environmental impact; [b] small overall project footprint; [c] lower capital cost; [d] reduced operating costs of shipping concentrate and mine re-supply; [e] accelerated project construction schedule; [f] reduced risk of cost overruns associated with road construction schedule; [g] greater operational flexibility; and, [h] safer transportation alternative in winter months.”<sup>[1]</sup>

The project being assessed is the use of an air-cushioned hover-barge (ACB) to transport concentrate down the Taku River from a landing near the mine site to a storage depot in Juneau, and to use the return trips to deliver equipment and supplies to the mine. The ACB is to operate year round except for a couple of short transition seasons between ice-covered and open water. In the open water season, with Taku flows greater than 250 m<sup>3</sup>/sec, the ACB will be towed and/or pushed by conventional shallow-draft tugs. Redfern estimates that the ACB will make about 202 round trips during the open water season, for an average of approximately 1.6 transits per day.

In the winter when the river is frozen, the ACB will be moved by a mixed team of multi-tracked vehicles and skidders along the sides of the river. The ACB itself floats on a low-pressure cushion of air supplied by diesel engines on board, but has no independent means of propulsion. During freeze-up in the fall, and thaw in the spring, ACB operations will be suspended for a few weeks until the appropriate operating parameters for the new season are attained.

It is important to note that the proposed transport technology is relatively novel. While ACBs have documented successful use in a few other places in the world, the mixed configuration of tracked vehicles and logging skidders to move the barge is new and undocumented. An additional area of uncertainty is the dynamic river environment in which the ACB would be operating.

## **The Review Process**

TRTFN participated as a member of the EAO's technical working group established to review the proposed project. The working group met several times during the review period, as did two subcommittees of the working

---

<sup>1</sup> Redfern. Vol.2 ACB Application (p.1-5).

group formed to focus on the major areas of interest for impact assessment—aquatic resources and wildlife. During the course of the review, the proponent presented, and revised through several reviews by the subcommittees, impact tables summarizing the predicted impacts of the project on wildlife and aquatic resources along the road and river corridor used by the ACB. From the impact analyses, monitoring programs and mitigation plans were prepared, reviewed and finalized by the subcommittees.

TRTFN Government, with funding supplied by the proponent, also commissioned an independent study of the potential effects of the project on TRTFN interests and rights in the lower Taku. This study was submitted to the EAO and is discussed separately below.

## **Impact Assessment**

### **EA Review**

From information submitted by the proponent, and the assessment conducted through the subcommittee process, the TRTFN identified the following issues of concern as posed by the ACB project:

1. uncertainty of impacts of the new technology of proposed barging equipment;
2. uncertainty of operating characteristics predicted in the context of a dynamic environment characterized by weather and hydrological extremes;
3. inadequate baseline information to properly document existing habitat conditions and fish and wildlife populations and ecology;
4. as a result of items 1-3, the uncertainty about the significance of predicted impacts to wildlife and aquatic resources from interactions with the ACB along the waterway, and with truck traffic on the mine-barge landing access road;
5. the absence of a provincial and federal regulatory framework to control the operation after the *Environmental Certificate* is issued;
6. as a result of item 5, the heightened need for detailed monitoring plans to be developed during the EA review and included as conditions in the *Certificate*;
7. as a result of items 5 & 6, the heightened need for a responsive and effective oversight body on the environmental performance of the ACB during operations; and,
8. the need for TRTFN Government to have an effective, properly resourced role in the oversight body.

### **Environmental Impacts**

With respect to wildlife and fish impacts from the ACB project, TRTFN shares the general view reported in the EAO's *Assessment Report* that the ACB

project, with one exception, is unlikely to have any significant adverse effects to wildlife or aquatic resources if the mitigation and monitoring proposed by Redfern is effectively undertaken.

The one exception is the predicted 'moderate' rating of residual impacts (bear displacement from high value seasonal habitat) in the zone of influence of the ACB project—impacts for which the *Assessment Report* proposes no monitoring or mitigation. While the proponent has agreed to undertake grizzly track surveys to gain information about grizzly bear presence in a small portion of the affected habitats immediately adjacent to the ACB road, it is agreed by both TRTFN and MOE that such surveys yield little useful results to managers, and are of essentially no use in determining whether the project is the cause of any change in bear presence that might be detected.

TRTFN proposed a hair DNA-sampling program that would, for less than \$7500 per year, deliver significantly more useful information to wildlife managers about grizzly bear numbers, distribution, habitat use and behaviour in the potentially affected habitats. Because the proponent stated that it would not fund such a program (although it stated that it would be "willing to discuss the possibility with the TRTFN" about supporting such a program in the future), the EAO would not consider this as a condition for approval. To us, it makes more sense to require the proponent to conduct a monitoring program that will deliver some useful information, as opposed to one that will deliver none. The EAO provided no justification for the grizzly track surveys, and we do not agree with its position on this issue since it is neither technically sound nor precautionary.

In the absence of an effective monitoring program to measure the realized impacts, it is necessary to assume that significant moderate impacts to the grizzly bear population will occur as a result of the proposed project. This is of substantive concern to TRTFN, as the lower Taku bear subpopulation is already of conservation concern due to reported low population and impacts from a diversity of existing human activities. Given the inability to effectively mitigate these impacts through alterations in project design, it falls to the Province to provide meaningful mitigation for the project impacts if the project is to be sustainable and with no significant environmental impacts. In the January 2009 Working Group meeting, the TRTFN sought to explore potential mitigation options that could be feasibly implemented by the Province, including providing protection to habitats of similar quality as those predicted to be impacted. Protection of habitats in an area near the potentially affected habitats provides alternative locations for bears displaced by the proposed project, and ensures these adjacent habitats will not be impacted by future developments. Not only would this assist in mitigating the expected impacts to grizzly bears, but also will assist in mitigating

potential residual impacts to other wildlife species, including the blue-listed fisher. The EAO refused to seriously explore or consider this proposed option, but gave no justification why this was not included as a condition to effectively mitigate significant residual impacts of the proposed project.

### **Requirement #1**

The Province and TRTFN need to establish a collaborative process to identify, and protect under appropriate legislation, an area of high quality grizzly bear habitat in the lower Taku that would compensate for the predicted impacts from the ACB project.

### **Environmental Monitoring Programs**

While there are a number of uncertainties about the predicted fish and wildlife impacts, TRTFN believes that the monitoring programs developed by the proponent are reasonably robust in design and, if effectively implemented with review by an oversight body, would be successful in documenting any environmental change caused by the ACB operation. These monitoring programs will be essential to deliver the information that managers will need to have in order to properly understand any project impacts that arise and how they will be addressed.

Many of the environmental effects monitoring programs are proposed to be conducted only for a year or two beyond project start-up, with the programs to be extended if monitoring results so indicate. Who makes the determination about whether programs need to be continued is not clear in the various documents. TRTFN requires that this be clarified, and that this determination be made by the environmental oversight body, not the proponent.

### **Requirement #2**

The amended *Certificate* should require that all the monitoring programs committed to by the proponent be continued at their stated frequency throughout the lifetime of the project unless otherwise recommended by the environmental oversight body on the basis of supporting monitoring data.

### **Regulatory Oversight**

The various management and monitoring programs have been committed to by Redfern, and will become conditions of approval. However, since there is no apparent regulatory framework that can monitor and enforce compliance with these programs, effective oversight of these programs will be essential in the post certificate world.

Two key features are yet to be resolved. First, TRTFN Government needs to be fully engaged in the oversight process. Second, the oversight process requires some mechanism that can ensure the proponent has a powerful incentive to adopt the recommendations or direction provided to it by the oversight body. Unfortunately, the EAO has provided only last-minute, cursory details of its concept of the oversight body—the issue was not substantively addressed as part of the working group process, but appeared only in the final version of the *Assessment Report*.

The project is unlikely to be acceptable to TRTFN Government if no such role is established and assured prior to project approval.

### **Requirement #3**

Consultation with the Crown is required to finalize the concept of environmental oversight for the project, including the role of TRTFN in this.

### **Impacts to Tlingit Rights and Interests**

The *Tlingit Impacts Study* reveals that the ACB project poses unavoidable impacts on TRTFN interests and rights in the area. These, presently unresolved by the EA process, are discussed separately in the following section. Although submitted to the EA process as an assessment of the project's impacts on Tlingit interests, the EAO failed to properly grapple with this report. Its status seemed to be uncertain, and it was left by the EAO for the proponent to extract the key recommendations and respond, even though some of the issues are clearly matters for the Crown to resolve. The EAO provided no independent assessment of the report, or recommendations on how the issues might be addressed in the EA process. Its view seems to be that where the proponent voluntarily agrees to modify the project operation then the TRTFN has been accommodated, and where the proponent does not agree then 'tough luck'—there is nothing that BC will do to remedy the problem. As a result of this, issues relating to the ACB's interactions with TRTFN's are essentially trivialized in the *Assessment Report* and given little serious analysis in the EAO's *Consultation Report*—as we discuss below.

### **Tlingit Impacts Study**

From the *Tlingit Impacts Study* (TIS) submitted to the EAO in October, 2008, the following issues were identified:

1. loss of commercial fishing opportunities during ACB transits;
2. potential loss or damages to TRTFN commercial fisher assets through interactions with ACB, and potential loss of income due to temporary shutdown of fisheries due to ACB-related incidents;

3. alienation and displacement of Tlingit land users from mine lease area;
4. increased wildlife winter poaching; and,
5. diminished wildlife protection.

## **1. Lost Commercial Fishing Opportunities**

The *TIS* concludes that an average of 6 hours per day, or some 500 hours (approximately 31 days) from the cumulative total of all Tlingits' annual fishing season will be lost due to the ACB operation in the Canadian commercial fishing zone. Using catch data from 2006, for example, this lost fishing time translates into an income loss of approximately \$43,500 for Tlingit commercial fishers.

Requiring the ACB to operate under a fixed schedule of travel so that fishers have some certainty about the timing of ACB transits may help to 'organize' the interference effect for the fishers, but it would not reduce the lost fishing time.

The proponent has committed to developing a *Transportation Communications Plan* on or before March 31 of each year prior to the commencement of aquatic operations, in order to provide river users notification of general operations. The company also states that it will provide current traffic updates when the ACB is underway.

The TRTFN view this as an advantageous design feature, but it does not mitigate the adverse impact. The provision of a *Transportation Communications Plan*, and other notices of ACB travel, puts the responsibility for mitigation on the fishers—it is they who will have to adjust their activities in response to the proponent's operation. This is not mitigation.

An actual schedule of anticipated ACB travel through the Canadian commercial fishing zone would improve the certainty for the fishers, although it still would not mitigate the effect. While it is recognized that some flexibility of travel will be required by the ACB operation, and that the schedule will not necessarily be consistently adhered to, striving to keep to a fixed schedule should be an objective of the ACB management so as to minimize interference with all other river users.

Redfern has agreed to transport fuel for the fishers free of charge to the ACB landing site as a compensatory measure for the ACB interference. This measure has been relegated to the IBA for confirmation, and so remains uncertain at this point.

Adoption of these measures, however, will not offset the time displacement estimated to result from the ACB operations over the fishing season. The effect cannot be quantified ahead of time, but can be better defined through

monitoring and annual follow-up meetings between TRTFN fishers and the proponent.

#### **Requirement #4**

The *Certificate* should require the proponent to:

1. in collaboration with TRTFN commercial fishers, develop and commit to an operating schedule for the ACB that accommodates Tlingit fishing activity to the extent practicable;
2. describe in its *Transportation Communications Plan* how deviations from daily scheduled transits will be communicated to other river users in a timely fashion;
3. develop in collaboration with TRTFN commercial fishers a compensation program for the lost fishing time each season due to ACB travel (if the Crown feels that the proponent should not be obliged to this, then the Crown should commit to such a program through further consultation with TRTFN); and,
4. meet annually with the TRTFN fishers (commercial and food) following the close of each fishing season to discuss the season's performance of the ACB interactions with the fisheries, and to identify additional management adjustments in the ACB operation or other compensatory measures that may be required.

## **2. Interactions between ACB & Tlingit Fishery**

During the 8 year operating life of the project, it is likely that there will be physical interactions between the ACB and TRTFN fishing activity and assets that could result in damages or losses to TRTFN.

The fishery could also be closed for indeterminate periods for some project-related reason (e.g., contaminant spill) and that, as a result, individual commercial fishers and Taku Wild could lose income, and food fishers lose fishing opportunities. Taku Wild maintains records of daily commercial and food fishing landings for each fisher, and these data could be used to develop an agreeable methodology for determining a compensation program. Additionally, the terms and timelines for payment should be agreed upon in advance through discussions between the parties.

With respect to the food fishery, it is proposed that Redfern provide, consistent with an agreed upon plan, compensation to TRTFN sufficient to permit the purchase and acquisition of the same volume and species of fresh salmon that would have been harvested if not for the closure, from alternative sources for distribution to community members.

Redfern has stated that it will compensate fishers for damages to nets caused by the ACB, and that it will provide compensation for a net that it was obviously responsible for damaging where the net was not in the normal navigable channel used by the tug and barge. (*emphasis added*) The

company should be liable for damages it causes to TRTFN fisher property regardless of where located, unless negligence on the part of the net owner can be shown. If the company decided to compensate for any such damage the first recourse would be for repair of the net in order to minimize costs.

Redfern has also stated that it "expects" there will be an adaptive management program involving provincial/federal/Alaskan/US Federal agencies, and that the TRTFN would be welcome to bring fishery-related reports or issues forward directly to the company, or to this other body for resolution. With no systematic monitoring program, or formalized compensation program, in place, the burden of proof will be on the individual fisher suffering the damage. These conditions simply transfer all the risk and uncertainty to the river user, and absolve the proponent of any obligation to mitigate or compensate an impact. It is not reasonable to ask that Tlingit fishers take on this burden with no meaningful framework in place to address impacts fairly, consistently, and with due diligence.

The *TIS* recommended (p.71-72) a more systematic approach by having a monitoring program for this purpose, with a fishery monitor position established for each fishing season to document interactions between the ACB operation and fishing activity. Redfern has stated that it will not fund a fishery monitoring position. TRTFN's view is that it is not important who funds the program, but that such a program is necessary to properly document ACB-fishery interactions—without this, impact predictions cannot be verified with any of reliability or consistency, nor can impacts be addressed.

The proponent's *Aquatic Effects Monitoring Program* is designed to document interactions between the ACB and fish resources, but not interactions with the commercial or food fishery. Redfern's 'expected' adaptive management program involving multi-jurisdictions is speculative at this time and lacking in detail and commitment. Further, there is no indication to date that TRTFN fishery impact issues could be addressed in such a forum. This is an unresolved issue.

### **Requirement #5**

To deal with potential adverse effects arising from the interaction of the ACB and Tlingit fishing interests, TRTFN requires the following three measures to be in place at the time of approval by BC:

1. The *Certificate* should require the proponent to develop and implement, through consultation with TRTFN, a monitoring program to document interactions between the ACB operation and Tlingit fishing activity on the Taku. A monitor, agreeable to both Redfern and TRTFN, should be hired to travel with the ACB during the period that Tlingit fishers are on the river in order to determine whether passage of the ACB is having any adverse

effects on Tlingit assets. The monitor should be equipped with a boat to move independently of the ACB, and should record all incidents that occur as a result of the ACB interacting with Tlingit fishing assets. This program should operate at least for two open water seasons, after which the parties could agree to modify or eliminate the program if results justify it.

2. To formalize Redfern's stated commitment to compensate fishers for damages caused by the ACB operation, the *Certificate* should require that a compensation plan be developed in consultation with, and agreeable to, TRTFN prior to the start of the first open-water operating season for the ACB. A net replacement program should form a component of this plan.
3. The compensation plan should also address TRTFN fishery income losses incurred by any official closure of commercial fishing activity that might arise as a result of an ACB-caused incident, or where the Tlingit food fishery is voluntarily interrupted as a result of a spill and perceived contamination of relevant fish habitat. The details should be negotiated between the parties.

### **3. Alienation of Tlingit Land Use**

The *TIS* documents (but does not quantify) the contemporary use of the barge landing vicinity, including Maple Ridge and the south end of Big Bull Slough as productive resource harvesting areas for TRTFN members. Use of this area for mining activity will cause a displacement of TRTFN members and a loss of their rights to use this area for resource harvesting. This is also an area over which TRTFN asserts aboriginal title, which would confer ownership of the resources now being alienated by the Crown and undermine the value of the land.

These issues have not been addressed at this point.

#### **Requirement #6**

The issue of TRTFN land ownership and user displacement from the mining lease area and zone of influence of the ACB project needs to be resolved through negotiations with British Columbia prior to project approval.

### **4. Increased Winter Wildlife Poaching**

The *TIS* documented the concerns of Tlingit citizens about the possible effects of the ACB on wildlife resources of the lower Taku and, in particular, increased poaching of wildlife due to enhanced winter access as a result of the ACB ploughed route. While the EAO wildlife subcommittee did not see this a significant issue, there is some significant uncertainty about this that should not be discounted until better data are available. While the proponent's *Wildlife Management Plan* includes occasional track surveys for

moose and grizzly bear along the ACB corridor, no monitoring has been proposed for wildlife conservation purposes. There is no provincial regulatory oversight in this area during the winter and no effective regulatory monitoring in this relatively remote region during any season. It is common knowledge by long time users of the lower Taku that poaching is a significant issue, including poaching from people crossing into BC from Alaska, and it is likely that increasing the ease of access will exacerbate the problem.

The *TIS* proposes that a full-time Tlingit wildlife guardian position be established to provide capacity to monitor for poaching or other infractions of the *Wildlife Act*. During the winter the guardian could travel with ACB in one of the accompanying vehicles. In the open-water season this same person could function as the fisheries monitor described above. The balance of the TRTFN guardian time would be spent on the ground monitoring cross border activities by skidoos and boaters, monitoring and reporting on any incidences of theft/damage/vandalism of TRTFN cabins and/or Taku Wild facilities during the winter months.

Details of the role could be worked out with BC. It should be noted that, although not implemented to date, this concept was given as one of the reasons the Ministers felt they could proceed with re-issuing the Certificate to Redfern in 2002:

“The Province, through the Treaty Negotiations Office (TNO), will offer financial support as reasonably required for training regarding wildlife protection and management and so that members of the TRTFN can secure employment associated with mineral exploration and mining in the region.”<sup>[2]</sup>

### **Requirement #7**

BC, in cooperation with TRTFN Government, needs to establish a full-time position for a wildlife guardian for the lower Taku for the life of the project. Adequate training needs to be part of the program. This should be committed to by BC prior to project approval.

## **5. Wildlife Displacement**

The *TIS* documents the concerns TRTFN members about the possible displacement or other harm to important wildlife resources from the operation of the ACB project. In the EA review the proponent took a reasonably conservative approach to predicting the project’s adverse effects on wildlife. However, there is some uncertainty generally about the assessment because of the lack of current baseline information for both the assessment and the operating characteristics of the ACB. The residual

---

<sup>2</sup> Reasons for Decision.

impact rating for impacts to grizzly bear seasonal habitat, for example, is 'moderate'. Despite this rating, the effect of the ACB on this valued ecosystem component will go unmonitored (the subcommittee could not identify a workable monitoring program) and unmitigated (the subcommittee did not discuss how to mitigate this effect).

We believe that, since there is no monitoring proposed to verify the lack of ACB-caused impacts to wildlife, BC should exercise a precautionary approach and should not assume that there will be no adverse effects to wildlife. The *TIS* suggested, among other things, that BC protect Flannigan Slough (or some other candidate area) as a special area to provide protected high quality habitats for animals that may be displaced by the ACB, and from future cumulative effects. This is consistent with requirement #1 above.

## **Deficiencies in the EAO's Assessment Report**

### **Access Road Alternative**

The *Assessment Report* notes that the proposed project would facilitate the development of the Tulsequah Chief Mine by providing a viable transportation system. This makes it sound like there is no alternative but, of course, there already is an approved transportation system—one with serious environmental drawbacks, as noted below.

The *Assessment Report* notes, without any corroboration or independent evaluation, that the *Application* identifies the following environmental benefits of the ACB over the approved 160km access road including:

- 92% reduction in footprint area;
- reduced carbon dioxide emissions from transportation;
- reduced noise impacts;
- 90% reduction in required stream crossings resulting in reduced potential impacts to water quality, sedimentation and fish habitat at stream crossings;
- 92% reduction in potential impacts to vegetation;
- 92% reduction in potential impacts to wildlife and wildlife habitat; and,
- reduced impacts to identified cultural, sustenance and archaeological sites.

Despite this impressive list of environmental benefits, there is an additional list of socio-economic and land use impacts posed by the road that is not identified here. The above list on its own illustrates clearly the substantive environmental benefits of the ACB option over the Atlin access road option. Strangely, however, the EAO makes no recommendation that the new proposal ought to be preferred by the ministers as the appropriate route.

The EAO should, after all, be assessing projects only on the basis of their environmental costs and benefits. Indeed, it takes the position explicitly in reviews that economic viability of a project is never up for discussion. If the EAO were acting independently and objectively, conducting an evidence-based analysis, it would here be making a recommendation that the ACB option should be approved, and the road option should be dropped from the certificate on the grounds that it is by far more environmentally damaging. Unfortunately the EAO does not do this, thereby undermining its credibility and leaving both options on the table as if it didn't matter, and, consequently, leaving it to the proponent to decide which of the two options, or both, might ultimately be used.

The TRTFN has previously communicated its position on the access road to the ministers, and this position remains unchanged—the access road should be dropped from the amended *Certificate*. Nobody believes that the access road will ever be constructed, particularly now in light of the capital financing that the proponent is experiencing with an access alternative 1/3 the cost of the road, and it is disingenuous to keep the fiction alive.

### **Environmental Oversight Committee**

To justify project approval ahead of the field trial results, the EAO states that we can depend upon the proposed Environmental Oversight Committee to [a] “review and respond to monitoring results”; and [b] “direct the proponent to modify or suspend operations through adaptive management if impacts are observed.” Perhaps, but this reassuring statement is somewhat misleading. First, there are no provincial regulations and, hence, no enforcement regime that can effectively regulate overall ACB performance on the Canadian side. While the proposed oversight committee might recommend an operational change, the proponent cannot be compelled by law or regulation to adopt it.

Second, the *Assessment Report (AR)* states that the *Certificate* conditions will regulate the operation and monitoring of the project. Here, a major issue lies with the effectiveness of the enforcement of environmental certificates. No one has been doing this, as we discuss below under a separate section.

Third, while an oversight committee has been proposed, the details of how such a committee might operate were not resolved by the Working Group and, at any rate, are only presented in the *AR* on a preliminary basis (p.35).

The TRTFN was an ardent supporter of the concept of an environmental oversight body, as we were for getting the proponent to develop detailed, robust environmental monitoring plans during the working group review. From our perspective, such a body is the key mitigation measure required for this project—without which there will be no effective oversight of the project and its impacts. It is therefore a serious flaw that the EAO did not prioritize

oversight for early discussion as an essential mitigation requirement in the post-certificate world, instead leaving it to the last draft of the AR to present a concept that had not had the benefit of a discussion by the affected parties.

Earlier in the EA process the TRTFN submitted a proposal to the EAO for an independent technical oversight body to be established which would serve the role as a watchdog for the ACB project. The working group heard evidence from provincial regulatory officials that the time needed for them to participate in ongoing oversight of this project was a problem, so the concept behind the TRTFN proposal was to remove the burden of requiring the various regulatory officials and TRTFN to participate in direct review of the monitoring data and reports generated by the proponent's monitoring programs. Meeting twice per year, the independent body, comprised of approximately four independent experts in the fields of fish and wildlife ecology, and environmental monitoring, would review the results of the ACB's performance in each of the operating seasons, including the relevant monitoring programs, and issue recommendations for changes in the programs or the ACB operation if required to mitigate unpredicted effects. Its output would be directed to all parties. The concept was to achieve the following objectives:

1. streamline and formalize a focused, responsive, and high quality oversight process;
2. significantly decrease, and in some cases eliminate, the workload of each of the parties;
3. maximize certainty of the parties for obtaining objective, technically rigorous review and recommendations in a timely fashion;
4. ensure that the oversight process is transparent and sustainable, and doesn't suffer adversely over time due to regulatory exhaustion, lack of commitment, lack of resources, etc.; and,
5. eliminate uncertainty for TRTFN about both its ability to engage in the process over the long-term, and its need for a neutrally-administered, objective review of the environmental impacts of the ACB project.

TRTFN estimated the annual cost of operating the independent oversight body at approximately \$80,000. Because the proponent stated that it would not fund such a program, the EAO refused to distribute TRTFN's proposal to the working group, or to seriously discuss it as a viable alternative. If nothing else, it apparently stimulated the EAO to design the MEMPR-housed committee option described in the *Assessment Report*.

**Requirement #8**

How the environmental oversight committee will operate, and how TRTFN will be enabled to participate in this committee, needs to be resolved through the accommodation talks between BC and TRTFN Government before an amended Certificate is issued.

**EAO's Conclusions**

In our view the AR makes several indefensible conclusions respecting the results of the EA process. The report summarizes its conclusions by stating that the EAO is satisfied that:

1. "the environmental assessment process has adequately identified and assessed the potential significant adverse environmental, economic, social, heritage and health effects of the Proposed Amendment;
2. the public and First Nations consultation, and the distribution of information about the Proposed Amendment have been adequately carried out by the Proponent;
3. issues identified by the public, local and provincial government agencies, and TRTFN which were within the scope of the environmental assessment, were adequately addressed by the Proponent during the review of the Application;
4. the potential for adverse effects on asserted aboriginal rights of the TRTFN has been avoided, mitigated or otherwise accommodated to an appropriate level such that they would not significantly impact the TRTFN from exercising their rights;
5. the Crown has fulfilled its obligations for consultation and accommodation to the TRTFN relating to the issuance of an Environmental Assessment Certificate for the Proposed Amendment; and
6. practical means have been identified to prevent or reduce any potential significant adverse effects of the Proposed Amendment."

Items 1-2 we agree with. Item 3 is not correct because, as the analysis in this report shows, not all of TRTFN's issues were adequately addressed by the proponent. Item 4 is not true—as explained below under 'Consultation' the potential for adverse effects on TRTFN's aboriginal rights has not been avoided, and serious impacts remain to be addressed.

Item 5 is also incorrect—there are a number of issues identified below which now require consultation and accommodation to resolve. Item 6 may be true

for some proposed measures, but is not true for significant impacts predicted for grizzly bears, and there are sufficient uncertainties about some of the mitigation measures (e.g., availability of alternate routing for ACB, willingness of proponent to suspend operations on the recommendation of the oversight committee, effectiveness of speed reductions, vegetation screens, etc.) that effective implementation in the time of need is not assured. The means in some cases are more speculative than practical, and the AR errs in painting an unequivocal picture of mitigation success. Besides, no practical means of avoiding the impacts predicted for TRTFN's interests and rights, as identified above, have been identified by the EAO.

### **TRTFN Conclusions from the EA Process**

As a result of its participation in the EA process, TRTFN concludes that the potential effects of the ACB operation have been identified with a reasonable degree of certainty, and that most of the environmental risks could be made acceptable if the proponent's monitoring programs and adaptive management approaches were effectively implemented. It is important to remember, as noted in the previous section, that some of the proposed 'adaptive management' measures are not proven—they are more speculative than practical. Ineffectiveness of some measures can be realistically anticipated.

However, there are a number of impacts described above that were not effectively addressed during the EA, and these remain unmitigated or uncompensated at this point. The EAO did not accurately identify these issues in its final reports, and consequently did not acknowledge the fact that effective mitigation has yet to be emplaced and accommodation yet to be completed. Its conclusions about the adequacy of protection for TRTFN's aboriginal rights and interests achieved through the EAO's consultation and EA processes are in error. We address this problem in the final section of this report.

The key to resolving the outstanding issues now lies in continuing the Crown's consultation process at a government-to-government level, so that a workable accommodation of them can be negotiated. This should be done prior to the ministers issuing a *Certificate*. Since the project has been indefinitely suspended by the proponent, and since the ministers are not under a regulated timeline to issue a decision on the project, there is ample opportunity for the ministers to now engage TRTFN and resolve the outstanding matters arising from the EA process.

## IBA

The TRTFN *Mining Policy* requires that an IBA be negotiated and be in a state ready for ratification by the TRTFN Government before it can make a decision to approve a mining project. A process to negotiate the IBA was established by the two parties in 2008 and, while there were several meetings, insignificant progress has been made to this point. At this point, Redfern has suspended IBA discussions because of an admitted lack of human and financial resources.

At this point, neither TRTFN nor BC should assume that there will be an IBA in place to provide any additional accommodation of TRTFN's interests beyond what can be attained in the *Certificate*. Both the EAO's *Consultation Report* and *Assessment Report* indicate that the EAO is relying to some extent on an IBA to provide accommodation by delivering further impact compensation and economic benefits to the TRTFN. This is not acceptable. Efforts by the parties to reach an agreement on their own cannot be relied upon, as the lack of progress over the past year has revealed. What is needed now is additional pressure on the parties to conclude an IBA in the immediate future. The Crown should now require the parties to reach an agreement prior to an environmental certificate being issued.

## Consultation & Accommodation

### The Process

The TRTFN *Mining Policy* requires that, where accommodation measures are required by the Crown to effectively address issues identified through the EA process, some agreed upon understanding with the Crown as to how these will be implemented is an essential part of the package. The TRTFN view the EA as the first stage of the consultation process—essentially fact-finding about the project's implications for TRTFN's interests.

In some cases, identified issues can be resolved in the EA process by modifying the design, or by identifying potential mitigation or compensatory measures that can be implemented through an environmental certificate. In other cases where a certificate cannot capture the accommodation measure that is needed, issues can only be resolved through a subsequent bilateral agreement between TRTFN and the proponent (IBA) or, alternatively, between TRTFN and the Crown. In the latter case, TRTFN is of the view that the appropriate way to do this involves dedicated meetings between the TRTFN and appropriate BC officials, once the EA has been completed, to discuss the issues and how the Crown might be willing to address them—i.e., attempt accommodation. For the TRTFN, the consultation and accommodation process is a 'problem-solving' exercise.

The TRTFN and the EAO clearly have different notions of consultation and accommodation. It is therefore unfortunate that EAO, which apparently has its own internal requirements for reporting on the consultation duty to the ministers, did not inform the TRTFN what the process would look like, nor work out with the TRTFN early in the day a mutually agreed understanding how consultation would be conducted.

The EAO attempted to cover off its consultation and accommodation duty, in part, through the preparation of a separate report for the ministers entitled *Tulsequah Chief Proposed Amendment Taku River Tlingit First Nation Consultation Report*. This was distributed to TRTFN for comment as a draft on January 15, 2009. TRTFN did not provide comments specifically on the draft report. As part of the Working Group meeting on January 22 we did discuss with the EAO separately a number of issues that we felt should be part of its consultation process and its report to the ministers.

It is not known whether the final version of the *Consultation Report* submitted to the ministers reflects these discussions.

As stated in that report,

“EAO is of the view that the consultation and accommodation that takes place during the environmental assessment, when coupled with opportunities for government-to-government engagement on issues of aboriginal rights, represents “deep consultation”. At the deep end of the spectrum, the consultation required may entail the opportunity to make submissions for consideration, formal participation in the decision making process and provision of written reasons to show that aboriginal concerns were considered and to reveal the impact they had on the decision. It is EAO’s view that the environmental assessment process for the proposed amendment manifests all of these elements with respect to demonstrating “deep consultation”.

The logic expressed in the above statement is confusing, and at odds with TRTFN’s view as noted previously. First, the statement expresses the EAO’s view that (all) consultation and accommodation takes place within the EA process. This, of course, is impossible, since that process allows for neither commitments nor undertakings to be made by the Crown to the TRTFN, nor does it provide for commitments to be made by the proponent to the TRTFN. While some consultation is occurring through TRTFN’s engagement in the EA process, and some problems are being remedied through design modifications or certificate conditions, the EA process cannot address all problems on its own. For this project, there are clearly some problems unresolved at the end of the EA stage and, therefore a need for additional discussions outside of the EA process among the various parties.

Second, consultation should not be an end in itself, but a process to explore, and attempt to resolve, problems posed by the project for TRTFN. 'Deep' consultation is meaningless if there is no 'deep' attempt by the Crown to fix the problems. The more serious the potential consequence of a Crown decision is for TRTFN, the 'deeper' should be the Crown attempts to accommodate. Lots of talks and meetings in the EA process, even with extensive engagement of the TRTFN, is of little avail if there is no real attempt to solve outstanding problems.

The *Consultation Report* describes the analysis the EAO conducted to determine the strength of the TRTFN's rights and interests in the lower Taku. It concluded,

"EAO's preliminary assessments indicated that deep consultation with the Taku River Tlingit First Nation is warranted for the proposed amendment based on the potential for significant impacts on aboriginal rights, in particular subsistence fishing, and in light of the strong prima facie claim for fishing and other rights."

The EAO report then outlines what it means by 'deep' consultation, and what 'opportunities' it offered the TRTFN in the process, as follows:

- Received all information on proposed amendment;
- Participation in the intergovernmental Working Group;
- Opportunities to provide and discuss comments on all proposed amendment documents;
- Comments/ issues responded to by the Proponent/ EAO in writing;
- Opportunity to provide feedback on this report; and
- Opportunity to provide a separate report to ministers with their views on the proposed amendment.

Notably absent from this list is an indication of any process where the parties meet to discuss, and attempt to resolve, issues posed by the project for TRTFN—i.e. the accommodation task. The list above reveals that if TRTFN gets all the information, participates in the meetings, comments on issues and receives responses, and can choose to write a separate report to ministers, then the EAO believes that deep consultation has occurred. This is an impoverished view of deep consultation—these information exchange opportunities are better characterized as lying at the 'shallow' end of the spectrum. Where are the bilateral meetings to discuss and work out remedies for the infringements to TRTFN rights and interests that the Crown should undertake—i.e., where does the process of reconciliation occur?

As the BC Court of Appeal recently stated, quoting *Haida 46-47*,<sup>[3]</sup>,

---

<sup>3</sup> Kwikwetlem First Nation v. British Columbia (Utilities Commission), 2009 BCCA 68.

“Consultation requires an interactive process with efforts by both the Crown actor and the potentially affected First Nations to reconcile what may be competing interests. It is not just a process of gathering and exchanging information. It may require the Crown to make changes to its proposed action based on information obtained through consultations. It may require accommodation.”

The *Consultation Report* outlines a number of steps the EAO took to effect ‘deep’ consultation with the TRTFN and, in so doing, misconstrues some of the actions taken by TRTFN.

“EAO initially contacted the Taku River Tlingit First Nation to discuss their involvement in the environmental assessment for the proposed amendment in May 2007 and subsequently invited the Taku River Tlingit First Nation to participate in the Working Group. Through the Working Group and its technical subcommittees, the EAO engaged the Taku River Tlingit First Nation in review of the proposed amendment Application materials commencing in May 2007. EAO has also offered to meet with the Taku River Tlingit First Nation individually to discuss the proposed amendment and Taku River Tlingit First Nation interests; however the Taku River Tlingit First Nation indicated they were satisfied with the arrangement to engage in the EA review through the Working Group and its technical subcommittees. These indications were made by the Taku River Tlingit First Nation at the initial Working Group meeting in May 2007 and at subsequent meetings and through email correspondence throughout the EA review. In December 2008, the Taku River Tlingit requested that the Working Group be the forum for discussing their issues with respect to the impacts of the proposed amendment on their rights as identified in the Tlingit Impact Study (see First Nations Involvement with the Proponent below).”

The reason why the EAO offered separate meetings (i.e., outside the working group process) to TRTFN to discuss its particular issues was never made clear to TRTFN. The difficulty with these additional meetings is that the EAO presumed TRTFN had the resources (people, time and funding) to engage in these. This was far from the case, and the extra meetings would have placed an increased burden on the First Nation. It must be remembered that during this period a full-scale *Mines Act* permitting process for the Tulsequah Chief mine was underway, which involved a considerable investment of TRTFN’s limited capacity.

Joint planning of the consultation exercise at the outset of the project review would have avoided this, and other process issues, that arose during the EA. This would have provided some integrity and credibility to the process and, as it turns out, a much more accurate picture of the accommodation issues that need to be resolved.

On July 31, 2008, the EAO wrote to the TRTFN stating that it would be compiling a 'consultation report' for the ministers,

"as part of EAO's effort to ensure that the Crown has taken appropriate and reasonable steps to discharge the duty to consult with and to accommodate the concerns of the TRTFN in relation to potential impacts of the Amendment Project on the TRTFN's asserted Aboriginal rights. In doing so, the EAO will of necessity assess the *prima facie* strength of those assertions, the potential adverse impacts of the Amendment Project, and the adequacy of consultation and accommodation in the circumstances. To ensure that the assessment is based on the most accurate information as possible, EAO invites the TRTFN to identify, with specificity, the activities and asserted Aboriginal rights of the TRTFN that could be impacted by the Amendment Project. We ask that you provide this information by no later than August 29, 2008."

This request was patently unreasonable, and the TRTFN was unable to respond to it. For one thing, the EA process had not been completed and findings of impact and mitigation had not been finalized. Further, the *Tlingit Impacts Study*, which was dealing with these issues, was not yet completed, being submitted to the EAO in October, 2008. The request to attend to this matter on such short notice was a surprise to TRTFN, and would have required them to allocate considerable resources to this task during a period when the key people who would do this work were on the land and not available. Had the EAO properly consulted with TRTFN at the outset of the EA review, and made the necessary arrangements (including resourcing) to design a mutually agreeable process to develop the required information, it is conceivable that the task could have been completed satisfactorily.

As it turns out, the EAO conducted the analysis unilaterally, using information already on the record. The EAO reached the conclusion in its *Consultation Report* that,

"it is likely that a court would find that the Taku River Tlingit First Nation could establish a strong *prima facie* claim to aboriginal title to the proposed amendment area (and, as noted above, a strong *prima facie* claim to aboriginal rights to hunt, fish, trap and gather)."

Despite the fact that this conclusion should have led the EAO to make a 'deep' effort in attempting accommodation on the outstanding issues, no such effort was made. The last half day of the working group process (January 22, 2009) was dedicated to a discussion of TRTFN's issues, including issues outstanding from the EA review; problems of compliance with commitments under the existing certificate; and issues arising from the *Tlingit Impacts Study*, which had not been resolved to that point. By this time, however, the EAO had completed its draft *Consultation Report* and had distributed to TRTFN for comment. For reasons previously stated, TRTFN had

not been able to review that report and so had no specific comments to make at that meeting. Instead, we reviewed with the EAO our identified issues that we felt needed to be part of the accommodation discussions with BC, and which we had assumed would be reflected in the EAO's report to the minister.

The issues we discussed with the EAO fall into two camps: [1] issues of non-compliance with the existing Certificate; and, [2] issues outstanding from the EA process. We discuss these in turn.

## **Non-compliance with Existing Certificate**

Both the *Assessment Report* and the *Consultation Report* sent to the ministers by the EAO present a picture that attempts to show that all the issues of concern to TRTFN have been addressed, that consultation and accommodation have been diligently carried out, and the Crown's duty to the TRTFN in approving the project has been successfully discharged. By implication, TRTFN Government should be happy with the result. The EAO assumes that the *Certificate* will effectively address the issues, and where there are residual issues not addressed by the *Certificate*, the IBA will deal with these. Moreover, the *Certificate* will serve the TRTFN's interests thereafter as a viable regulatory instrument for ensuring that things get done properly.

This is not an accurate portrayal of reality, and we comment further on this in the following section. However, one of the problems that now requires attention is that the existing *Certificate* hasn't dependably delivered the goods. Several of the commitments made in the previous provincial decision documents for the Tulsequah project, and at least one of the proponent's commitments, were never realized. If TRTFN is to rely on such documents for delivery of the Crown's undertakings with respect to this project, then there is a credibility problem that needs to be addressed.

As previously stated, TRTFN Government would like to be able to approve the ACB project, and believes that if the outstanding issues from the EA review can be resolved with some certainty and clarity in the very near future, the project will enhance the sustainability of Tlingit rights and interests in the lower Taku.

These issues, as identified below, need to be resolved through government-to-government discussions before an amendment to the *Certificate* is issued.

## **Wildlife Monitoring**

MOE raised the issue in the last working group meeting that the proponent had not been contributing its annual payment of approximately \$56,000 toward the collection of wildlife baseline data. Redfern is required to

contribute this amount annually for 10 years to MOE following issuance of the certificate. As we understand it, approximately two payments were made, and then payments stopped. This appears to be a breach of the *Certificate* that no one enforced. What good are the *Certificate* requirements if they are not complied with, or if there is no effective control to deal with non-compliance? This is a question that needs a serious response from BC.

## Wildlife Training

In issuing the *Certificate* in 2002, the Minister's *Reasons for Decisions* noted a commitment to provincial funding for the training of TRTFN members in wildlife management as a way of addressing the potential social and economic impacts of the Tulsequah Chief mine. Specifically:

"The Province, through the Treaty Negotiations Office (TNO), will offer financial support as reasonably required for training regarding wildlife protection and management and so that members of the TRTFN can secure employment associated with mineral exploration and mining in the region."

This condition has never been fulfilled. Requirement #7 above addresses this issue.

## Redfern's Requirement for an IBA

Although we could not locate this provision in the *Certificate*, the Ministers also note in their *Reasons for Decision* that,

"Redfern has committed to and is required by the *Certificate* to enter into negotiations with the TRTFN to develop an agreement to ensure benefits to the TRTFN from the Project."

This acknowledgement from the Ministers presumably arose through statements made in the EAO's 1998 *Recommendations Report* that clearly reflected the kinds of things the province expected, and indeed was relying upon in approving the project, to make the project more sustainable for TRTFN. The EAO stated as follows:

"The proponent has offered to provide the financial support necessary to the TRTFN to complete negotiations on various plans and agreements, and is also amenable to undertake these activities cooperatively with both the TRTFN and Atlin residents. The proponent has offered equity participation in the project to TRTFN, an annual royalty based on project profitability, preferential hiring and contracting opportunities for TRTFN members, the development of a training/human resources plan targeted at TRTFN members interests in project-related employment (e.g., training, recruitment, support to small businesses for acquiring loans, scholarships,

continuing education, etc.), and hiring a liaison to work with the proponent and the TRTFN on employment matters.”

The ministers separately noted in their *Reasons for Decision* another IBA-related measure committed to by the company to deliver economic benefits to the TRTFN. Specifically,

“Redfern has provided a framework of the agreement to the TRTFN to include training of members of the TRTFN to obtain employment associated with the mine, direct employment opportunities, and to develop counseling and family support programs.”

Again, in approving the original project, the ministers were relying on the IBA to deliver the accommodation.

The IBA content envisioned in these statements by the province outlines a package that would likely be attractive to TRTFN had it been possible to conclude such an agreement with the proponent. As previously noted, however, not much progress has yet been made on IBA negotiations and, with the company now in an indefinite state of suspension, the proponent has suspended the talks, even while it continues with its permitting activities.

However, it is important to recognize that even if the project should proceed in the near future, the parties cannot assume that an IBA can be successfully negotiated. The IBA is clearly part of the package that BC considers when assessing the adequacy of accommodation, and yet the proponent is making no effort to complete this task. To give greater effect to this, the Crown needs to increase the pressure on the proponent to invest the necessary effort to complete the IBA negotiations.

### **Requirement #9**

The ministers should notify Redfern that they will not issue an environmental approval until there is an IBA in place with TRTFN.

## **Social Impacts**

There are potential social impact issues posed by the Tulsequah Chief mine that need to be addressed through further consultation and accommodation between TRTFN and BC. The *Certificate* provides for Redfern to partially address these, specifically,

“The proponent is prepared to implement a socio-economic monitoring plan and a transition plan to assist in mitigating any adverse impacts that may occur.” (Item 23.1, *Schedule B*)

But there is also an acknowledgement by the EAO of the Crown’s role in addressing these impacts, although this did not get carried through in the

government's decision documents. For example, at p.69, the *EA Report* noted the commitment:

"...the province has committed to provide assistance to establish a community impacts monitoring program. The specifics of the program will be determined through ongoing consultation and discussions with the TRTFN and the community of Atlin."

and again,

"Discussions between the TRTFN, the community of Atlin and the provincial government are planned to establish a monitoring program to assess the possible effects, and examine mitigation plans to offset possible negative effects that might occur."

While it is true that the predicted social impacts to Atlin and the Tlingit community would have been significantly more serious under the original scenario of the Atlin-Tulsequah mine access road than with the ACB alternative in place, the employment of Atlin-based Tlingits at the mine site almost certainly result in some level of adverse socio-economic effects to the community.

### **Requirement #10**

Continuing consultation between the parties needs to provide for the review and resolution of the Crown's role in addressing potential social impacts to the Tlingit Atlin community from the project.

## **TRTFN Participation in Ongoing Regulatory Processes**

An important recommendation in the EAO's 1998 *Recommendation Report*, never formally adopted by the ministers or implemented, is the following:

"The committee also recommends that if the project is approved, the TRTFN be given the opportunity to provide meaningful input to the review and approval of any required statutory permits, licenses and approvals as well as on-going follow-up and monitoring programs." (p.46)

However, the concept of meaningful TRTFN input into the regulatory process is implicit in the *Certificate* requirement for the company to:

"Participate with the Province, First Nations and third parties in a management process, established by the Province, to oversee and monitor the construction, operation decommissioning and abandonment phases of the Project, including the monitoring and management of the potential for project related community impacts." (Item 5.11)

Sec.2 of Appendix 11 is more explicit about detail, although more equivocal about the commitment:

'A Joint Management Arrangement between the provincial government and the TRTFN may be established, whereby the role of the TRTFN in the review of permit applications and in follow-up and monitoring would be enhanced. This Arrangement would be accompanied by sufficient resources to allow the TRTFN to effectively participate. Although the Province is unable to delegate provincial authority held by various statutes governing the issuance of permits, the committee could:

- have equal representation from the TRTFN and the Province;
- establish its own procedures;
- review, discuss and advise on the issuance of permits for Tulsequah and other tenure applications in TRTFN traditional territory;
- review environmental monitoring and reporting;
- review Redfern reports;
- issue annual reports;
- establish a dispute settlement mechanism based on acceptable principles for resolving disagreements; and,
- establish a mechanism to address monitoring and enforcement measures concerning wildlife mechanisms.

The possible Joint Management Arrangement is linked to further bilateral discussions and agreement between the TRTFN and the Province."

By invitation, and on an *ad hoc* basis, TRTFN has participated in the provincial regulatory processes to date, including the environmental assessment of the amended project (ACB) and various permitting processes underway with MEMPR and MOE for the licensing of construction and operation of the mine. However, there is no formal arrangement yet established that clarifies the working relationship and capacity issues of TRTFN Government vis a vis government regulatory agencies and processes, and there needs to be.

Government-to-government consultation leading to accommodation on this issue is a priority task for the parties.

## **Environmental Supervision**

Of particular concern for the TRTFN is its role in environmental oversight of the project, including the ACB, during operations and closure. Appendix 11 of the *EAO Project Committee Report* sets out the conditions for the Environmental Follow-up and Monitoring Program (EFMP). Item 5.7 of the *Certificate* explicitly requires Redfern to implement this program, designed to:

- track the progress and results of monitoring programs;
- report on the effects of project components on the environment;

- report on and provide a forum for discussion on the development and implementation of trigger/feedback mitigation measures; and,
- assess the accuracy of predictions of environmental assessment and the effectiveness of mitigation measures.

The management of the *EMFP* is stated as the responsibility of “Redfern and the government, with the enhanced participation of the TRTFN.” (*emphasis added*)

The proponent has submitted a *Construction Environmental Management Plan* as a component of its *Mines Act* permit application. However, that plan was designed, and is being implemented, unilaterally by the proponent, and does not reflect the collaborative nature outlined above in the *Certificate*. This issue has been brought to MEMPR’s attention by TRTFN, but has not been responded to as of this writing.

As a critical component of the *EMFP*, the *Certificate* requires that an ‘independent’ *Environmental Supervision Plan (ESP)* be developed and implemented during pre-construction, construction, and closure phases of the Tulsequah project. The objective is to identify ‘significant environmental sensitive areas’ prior to the start of construction in the relevant area to ensure that these are either avoided or impacts mitigated once construction starts.

The *ESP* is to be implemented by a Senior Environmental Supervisor (with the assistant of one or more Environmental Supervisors). The environmental supervisors are to report to the Tulsequah Chief Project Manager and various resource agencies, including TRTFN and otherwise provide these parties with regular reports (‘through the Joint Management Arrangement, if accepted’). The functions and duties of the environmental supervisors are set out in Sec.2.2, 5, and 6 of Appendix 1 of Appendix 11.

Individuals retained as independent environmental supervisors must be acceptable to all parties, including TRTFN, and are to be governed by terms of reference jointly established by the parties.(*emphasis added*) This did not happen in the jointly determined fashion mandated by the *Certificate*—rather, it was done unilaterally by the proponent.

As noted above, it is true that a environmental management plan for the construction phase of the mine is in place, and that TRTFN has been given opportunities to review and comment on this and associated plans. Regular reports on environmental management at the site are being produced by the senior environmental manager. However, TRTFN observers on site have indicated a number of environmental issues that [a] have arisen since work resumed on the property under the current MX and MA permits; and [b] not been documented in the weekly environmental reports. The formalized

collaborative process and 'independence' of the environmental follow-up programs, as envisioned by the *Certificate*, are not yet in place, and need to be. This will be particularly important during reclamation and closure of the project since the Environmental Follow-up and Monitoring Program is to be implemented during that period.

### **Requirement #11**

Consultation with BC (and the proponent) needs to reconsider both the terms of reference for the Environmental Follow-up and Monitoring Program, including the environmental supervisors, and the selection of the individuals acting as Senior Environmental Supervisor and any Environmental Supervisors. The definition of 'independence' should be discussed and agreed to. This should be done before an approval is given.

### **Requirement #12**

If and when the amended *Certificate* is issued, the terms of reference for the *Environmental Supervision Plan* need to be adjusted to drop reference to the mine access road, and to add the barge landing.

## **Outstanding Issues**

In addition to the problems of non-compliance described previously, the outstanding issues at the conclusion of the ACB review process that fall to the Crown to resolve are the following:

1. the economic losses in the commercial and food fishery due to a cumulative total of 500 lost hours of fishing time due to ACB transits;
2. the lack of certainty about on-going environmental oversight and the ability to compel the proponent to make operational changes to mitigate impacts should they arise in the future;
3. the lack of certainty about the TRTFN Government's role in whatever environmental oversight mechanism is established;
4. the alienation of TRTFN land use rights and displacement of land users from the mine lease area;
5. the lack of any meaningful monitoring or mitigation of habitat effects to grizzly bear.

The *Consultation Report* states that the proponent committed to a number of 'mitigation and accommodation measures' specifically to address potential impacts on TRTFN's interests and rights. (*emphasis added*) This statement is misleading—many of these measures were adopted to address the concerns of the fisheries subcommittee with respect to the ACB's effects on aquatic resources, not specifically to address TRTFN's interests and rights issues.

The measures, listed at p.23, are itemized below with our comments attached:

1. Redfern will provide a transportation communications plan to river operators including the Taku River Tlingit First Nation commercial fishers prior by March 31 of each year, which is prior to the start of the aquatic operations and fishing season. The Plan would provide notification of general barging operations and advance notice of when the barge will be travelling. The Plan states that the barge operator will transmit the barge location by radio and use a pilot boat to inform river users of the barge's location and direction of travel (Commitment 2).  
As noted in the earlier discussion about the *Tlingit Impacts Study*, a communications plan is a design feature that may help the TRTFN arrange their schedules to better accommodate the ACB passage, but it does not mitigate or compensate for the impact. TRTRN requested that a travel schedule be established for the ACB, which would have provided greater certainty than a communications plan in planning TRTFN fishing operations. However, that, too, would not mitigate the impact. Five hundred fishing hours lost to the ACB is still five hundred fishing hours lost. The impact remains unmitigated.
2. Redfern is to adhere to aquatic and non-aquatic operating conditions and procedures (3 and 4). This was proposed by Redfern to satisfy concerns of the fisheries sub-committee, not the specific concerns of the TRTFN.
3. Redfern is to adhere to lead crossing procedure (Commitment 5). This was proposed by Redfern to satisfy concerns of the fisheries sub-committee, not the specific concerns of the TRTFN.
4. Redfern is to suspend operations during fall freeze-up and spring thaw (Commitment 6). This is a repeat of item 2, and was proposed by Redfern to satisfy concerns of the fisheries sub-committee, not the specific concerns of the TRTFN.
5. Redfern will compensate for property damage (Commitment 7). Redfern's conditions on the implementation of this measure are unreasonable, and it will not be effective. The deficiencies are discussed above under *Tlingit Impacts Study* results.
6. Redfern is to develop and implement a comprehensive Spill Prevention and Contingency Plan prior to commencement of operations (Commitment 10). This was proposed by Redfern to satisfy concerns of the fisheries sub-committee, not the specific concerns of the TRTFN.
7. Redfern is to implement the Aquatic Effects Monitoring and Management Plan (Commitment 11). This was proposed by Redfern to satisfy concerns of the fisheries sub-committee, not the specific concerns of the TRTFN.

8. Redfern is to implement the Wildlife Management Plan (Commitment 12). This was proposed by Redfern to satisfy concerns of the fisheries sub-committee, not the specific concerns of the TRTFN.

The *Consultation Report* then makes some perverse conclusions. First, with respect to the interruption of the Tlingit fishery the EAO concludes that the impact would not be a significant impact on the TRTFN:

“EAO acknowledges that there may be unavoidable disruptions to specific fishing sites and fishing activities by the barging operations, if the proposed amendment were to proceed. The transit of the barge through fishing grounds would disrupt fishers and could reduce the amount of available time to fishers in the fishing season. Based on the Taku River Tlingit First Nation estimations of less than 10% of available fishing time lost per day per fisher, EAO concludes that the disruption to fishers from the transit of the barge would not be a significant impact on the Taku River Tlingit First Nation’s right to fish on the Taku and Tulsequah Rivers.”

The EAO formed this conclusion without any apparent independent analysis of the situation or, more importantly, without any consultation with TRTFN. The EAO is not competent to make such a conclusion. This is a serious impact, and needs to be addressed. It is not responsible of the EAO to sweep it off the table with such an off-handed treatment.

The *Consultation Report* then concludes that there would be no significant adverse impacts to TRTFN’s land-based interests:

“As for the Taku River First Nations’ land based rights such as hunting, trapping and gathering the impacts to these rights have been appropriately mitigated and monitoring programs have been developed to minimize any unforeseen effects and determine the effectiveness of mitigation in order to modify operations. The Taku River First Nation has stated that they do not predict the impacts to land based rights to be significant and have agreed to the wildlife monitoring plans. Based on the Proponent’s commitments to wildlife monitoring and adaptive management, EAO concludes that the proposed amendment would not have any significant adverse impacts to the Taku River First Nation’s ability to continue to exercise their rights to hunt, trap and gather.”

This is twisted logic. The monitoring programs that have been developed, and which are generally acceptable to TRTFN, relate to the requirements of the two subcommittees of the working group, and are essentially environmental effects monitoring, not land use monitoring. The TRTFN have agreed that the barge operation on the river is unlikely to have significant adverse effects on Tlingit resource harvesting, exclusive of the commercial and food fisheries already discussed. However, the *Tlingit Impacts Study* identifies the displacement of Tlingit land users from the mine lease area,

and loss of the exercise of their aboriginal rights to harvest resources, as a distinct impact of the project. The proponent's commitments to its monitoring and adaptive management programs are irrelevant to the issue, and the EAO errs in concluding that the proposed amendment would not have any significant adverse impacts to the TRTFN's aboriginal rights.

The *Consultation Report* then makes another bizarre conclusion about the effects of the project on TRTFN's aboriginal title:

"As to the potential for impacts to aboriginal title, EAO concludes that the proposed amendment would not have any significant adverse impact on the Taku River Tlingit claimed aboriginal title to the area of the proposed amendment or on the use of the area if aboriginal title were to be proven in the future."

How this conclusion was arrived at is not explained. It is hard to imagine how the creation of a mining lease that will allow extraction of Tlingit-owned mineral wealth for the benefit of non-Tlingit parties, that will remove land from use by the TRTFN, and alienate it from any treaty negotiations or future beneficial ownership, cannot affect materially affect the Tlingits' aboriginal title if it were proven in the future. Such a conclusion is nonsense.

The *Consultation Report* then deals with the possibility of unforeseen impacts on Tlingit land-based aboriginal rights:

"It is however, reasonable to assume that the proposed amendment may have some unforeseen or unintended impacts on the claimed subsistence rights of the Taku River Tlingit First Nation. The Taku River Tlingit First Nation have stated they are in favour of the mine proceeding and the access as proposed in the proposed amendment and recognize that there may be unforeseen or unintended impacts of the (project) on their rights. The Proponent's commitment to continued monitoring of the impacts and adaptive management of the proposed amendment if the proposed amendment goes ahead will provide the basis for further mitigation to protect rights. The Taku River Tlingit First Nation have agreed to the monitoring and mitigation strategies proposed and committed to by the Proponent as a means to modify operations to reduce impacts of the proposed amendment."

Again, this statement misconstrues and trivializes the TRTFN position, and needs to be clarified. TRTFN can, indeed, approve the mine and the ACB project on the condition that the issues identified in this report are resolved to the satisfaction of the TRTFN. It is wrong to state, however, that the proponent's commitment to continued monitoring and adaptive management 'will provide the basis for further mitigation to protect rights'. The basis for further mitigation to protect rights lies in the accommodation that now needs to be provided by the Crown, and in further steps to be taken by the proponent through IBA.

Finally, the disappointing conclusion:

“Having regard to all of the above, EAO concludes that the process of consultation has been carried out in good faith, and that it was appropriate and reasonable in the circumstances and that the Crown has discharged its duty to accommodate the concerns about impacts on aboriginal rights. EAO also concludes that the potential for effects on asserted (and assumed) aboriginal rights has been avoided, mitigated or otherwise accommodated to an appropriate level such that they will not significantly impact the Taku River Tlingit First Nation from exercising their rights. EAO believes the environmental assessment review process has reasonably balanced aboriginal concerns about potential for impacts on asserted (and assumed) rights with other societal values.”

The process of consultation was not carried out in good faith, nor was it appropriate and reasonable in the circumstances. The circumstances should have required a mutually acceptable and ‘deep’ consultative process established by the parties jointly at the outset of the EA, with acknowledgement that a consultation report was going to be prepared and what the expectations of the parties were. The use of this report in the present instance seems to be to assure the ministers that “the Crown has discharged its duty to accommodate the concerns about impacts on aboriginal rights.” From our review of the draft *Consultation Report* nothing could be further from the truth. None of the real issues remaining at the end of the EA process requiring Crown attention have been dealt with. As previously noted, these are all issues that were discussed in the last working group meeting with the EAO. It will be a testament to the diligence and integrity of the EAO if the final version submitted to the ministers has been amended appropriately to properly reflect these concerns.

If any reader has any questions please contact the TRTFN Clan Director of Land and Resources – Susan M. Carlick