Tenable Tenure

The need for oil and gas tenure reform in British Columbia

Jennifer Dagg

Karen Campbell • Terra Simieritsch

the PEMBINA institute

Sustainable Energy Solutions

March 2011

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About the Pembina Institute

The Pembina Institute is a national non-profit think tank that advances sustainable energy solutions through research, education, consulting and advocacy. It promotes environmental, social and economic sustainability in the public interest by developing practical solutions for communities, individuals, governments and businesses. The Pembina Institute provides policy research leadership and education on climate change, energy issues, green economics, energy efficiency and conservation, renewable energy, and environmental governance. For more information about the Pembina Institute, visit www.pembina.org or contact info@pembina.org. Our engaging monthly newsletter offers insights into the Pembina Institute's projects and activities, and highlights recent news and publications. Subscribe to Pembina eNews: http://www.pembina.org/enews/subscribe.

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The need for oil and gas tenure reform in British Columbia

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Oil and gas activity is currently the largest resource industry in British Columbia, in terms of resource revenue to government and arguably also in terms of impact on the environment.

The first step in the oil and gas development process is the sale of tenures — or subsurface rights. In recent years the tenure system has been coming into conflict with communities, strongly held public environmental values and First Nations legal rights. Government is conflicted because it relies on the resource revenues from auctioning tenures, but at the same time is under pressure to respond to environmental and wildlife impacts.

The oil and gas tenure process in B.C. was designed in an era when the main issue was how to grant subsurface rights to stimulate the economy, create jobs and reap the benefits of resource use. It has operated for many years with little public scrutiny and in some areas developments have happened so quickly that the consequences and impacts have rapidly escalated.

The essential problem is that the current system is backwards. Instead of planning for and dealing with concerns up front, the province advertises and awards tenures, then belatedly attempts to patch up the problems using weak legal means, such as caveats. Such measures are designed to place some limits on industry access, but often neither satisfy industry interest or community concern. The end result is that continued community concern is bad for everyone — companies, government and the public.

The Pembina Institute has reviewed the process through which oil and gas tenures are sold in B.C.,and has concluded that there are a number of reforms that would strengthen this practice to make it more responsive to the interests of communities and the needs of the environment.

This report provides an overview of the tenure process, consideration of some tenure-related issues and provides a brief overview of three case studies that provide lessons on how the current tenure system is flawed. Case studies include the Shell tenure in the Sacred Headwaters, the Outrider tenure in northwest B.C., and the BP tenure near the Crowsnest coalfield in southeast B.C. Recommendations such as pre-tenure planning; free, prior and informed consent of First Nations; and a more meaningful use of caveats placed on tenure parcels in advance of their sale are just some of the measures that could strengthen tenure practices in B.C.

1. Introduction

In recent years, proposed oil and gas activity in parts of British Columbia has increasingly come into conflict with communities and the environment. This is particularly true where unconventional gas development, such as coalbed methane, shale gas or tight gas, is being proposed. Whether it is Shell Canada's proposal to drill for coalbed methane at the headwaters of three great salmon rivers in the northwest, or Encana's proposal to drill wells in rural subdivisions near Dawson Creek, there is a need for increased public understanding of this type of development before it occurs.

When the government sells land tenure for oil and gas development, it is essentially providing rights to a company to substantially impact that land. Given that oil and gas activities are exempted from the B.C. environmental assessment requirements, and subjected to site-specific permitting, it is all the more critical that oil and gas tenures be granted in a manner that is consistent with community values, environmental values and the broader public interest.

Since one of the first steps of oil and gas development is the sale of tenure (or subsurface) rights, the Pembina Institute has reviewed the process by which oil and gas tenures are sold in British Columbia in order to make recommendations to reform the system and better contribute to responsible development.

This report provides an overview of the tenure process, consideration of some tenure related issues, a brief review of three case studies to show how different approaches to tenures have created different challenges and opportunities. The final section of this report makes recommendations to strengthen oil and gas tenure practices in B.C.

2. Oil and gas tenures in B.C.

2.1 Overview of tenures

Tenure is the temporary ownership of the rights to underground oil and gas resources.[1] Before a company can drill for oil or gas, it must obtain the right to access the subsurface oil and gas from the B.C. government first. A **tenure agreement** allows companies to access these resources. Tenure agreements give rights to a specific parcel of land, and may reach to all depths underground, or be restricted to certain underground geological formations.[2] For example, one company may have the right to drill to the 1,000 to 1,500 metre layer, and another company may have the right to drill into the 1,501 to 2,000 metre layer formation.

Since 1891, ownership rights to oil and natural gas haven't generally been included in land sales, meaning that most subsurface oil and natural gas rights are still owned by the B.C. government.[3] B.C. landowners rarely own the rights to oil and natural gas under their property, except in areas of early settlement, mostly located on Vancouver Island.[4] Section 50 of the *Land Act*[5] allows the government or a person acting under government authority to enter into an area for the purpose of extracting oil and gas.

Most oil and gas activities in B.C. are located on public land, also known as Crown land, rather than on privately owned land. While there are many landowners who deal with oil and gas activity on their land, particularly in northeast B.C. where the industry has operated for more than 50 years, this report will focus on the tenure process as it relates to provincial Crown and Aboriginal lands, not private land.

Where developers wish to access oil and gas found under privately owned land, they must enter into an agreement with the landowner for surface access once they have acquired the subsurface tenure. Issues around this process have been previously addressed by West Coast Environmental

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[1] Ministry of Energy, Mines and Petroleum Resources, Oil and Gas Landowner Notification Program. *Frequently Asked Questions for Landowners* http://www.gov.bc.ca/empr/popt/oil_and_gas_lnp2.html (accessed June 2nd, 2010)

[2] Ministry of Energy, Mines and Petroleum Resources, Titles Division, *Petroleum and Natural Gas Rights in B.C.* http://www.empr.gov.bc.ca/Titles/OGTitles/Documents/PNGrightsinBC.pdf

[3] Oil and Gas Commission. *Surface Rights in British Columbia: A Guide to the Legislation and Regulations for the Oil and Gas Industry*. 11 July, 2001. http://www.ogc.gov.bc.ca/documents/informationbulletins/SURFACE%20RIGHTS%20IN%20BC-A%20Guide.pdf

[4] Ministry of Energy, Mines and Petroleum Resources Regulatory Information. *Surface and Subsurface rights* http://www.empr.gov.bc.ca/OG/oilandgas/petroleumgeology/UnconventionalOilAndGas/CoalbedGas/TechandRegInfo/Pages/RegulatoryInformation.aspx#surface%20and%20subsurface%20rights

[5] *Land Act,* R.S.B.C., 1996, c. 245. http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96245_01

Law and Ecojustice in *When the Landman Comes Knocking: A Toolkit for B.C. Landowners Living with Oil and Gas*, published in 2004.[6]

2.1.1 Oil and gas regulations in B.C.

Oversight of oil and gas activities is shared among a number of provincial government bodies, primarily the Ministry of Energy, the Ministry of Forests, Mines and Lands, and the new Ministry of Natural Resource Operations. Changes announced in October 2010 have resulted in a re-alignment of government roles and responsibilities for resource development in British Columbia, of which the full implications are not yet fully understood.[7]

The Ministry of Energy remains the primary ministry with responsibility for oil and gas development, including tenures. The Ministry of Energy creates the laws and regulations governing oil and gas development, and provincially owned oil and natural gas rights are managed by the Titles Division of the Ministry of Energy.[8] The Titles Division is responsible for issuing sub-surface oil and gas tenure, managing existing tenure and collecting rental fees for tenure.

Part 9 of the *Petroleum and Natural Gas Act* establishes Crown reserves for petroleum and natural gas, and details how reserves may be allocated by the government.[9] There are two means of allocating tenure — the first, and most common, is by way of public auction; the second is to withdraw an area from public disposition and either not sell it at all, or allow it to be sold at a price set by the government and approved by Cabinet.

Once tenures are awarded, general responsibility for oversight and implementation of the oil and gas regime in B.C. lies with the Oil and Gas Commission.[10] It was initially designed to be independent of B.C. government policy, but a legal change in 2002 minimized this independence, giving the Deputy Minister of the Ministry of Energy a role on the Board of the Commission.[11] Its responsibilities include issuing surface tenure under the *Land Act* for primary oil and gas purposes including compressor stations, processing facilities, drill sites, well sites, permanent and temporary campsites, and roads and airstrips that are needed to access oil and gas operations.[12]

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[6] *When the Landman Comes Knocking: A Toolkit for B.C. Landowners Living with Oil and Gas.* West Coast Environmental Law, 2004. http://wcel.org/resources/publication/when-landman-comes-knocking-toolkit-bc-landowners-living-oil-and-gas. Individuals with specific questions could also contact the BC Farmers Advocate at www.farmersadvocate.ca.

[7] Government changes announced in October 2010 changed the names of several ministries. The Ministry of Energy, Mines and Petroleum Resources is now the Ministry of Energy, but we have not revisited all of the footnote references in this report.

[8] Ministry of Energy, Mines and Petroleum Resources *Service Plan 2010/11 – 2012/13*. 2010. www.bcbudget.gov.bc.ca/2010/sp/pdf/ministry/empr.pdf

[9] Petroleum and Natural Gas Act. R.S.B.C. 1996, c. 361, ss. 71 and 72.

[10] Authorized under the *Oil and Gas Commission Act* [SBC 1998] Chapter 39

[11] Bill 36: Energy and Mines Statutes Amendment Act, 2002. http://www.leg.bc.ca/37th3rd/1st_read/gov36-1.htm

[12] Ministry of Lands and Agriculture, *Crown Land Use Operational Policy: Oil and Gas* http://www.agf.gov.bc.ca/clad/leg_policies/policies/oil_gas.pdf

The recent government changes have moved the Oil and Gas Commission to the Ministry of Natural Resource Operations, in an effort to further streamline government approvals. Currently, the Oil and Gas Commission Board of Directors reports to the Minister of Natural Resource Operations and the Deputy Minister of Natural Resource Operations is the Chair of the Oil and Gas Commission Board of Directors. The other two board members are the CEO of the Commission and an industry representative.

The Ministry of Natural Resource Operations is also responsible for the issuance of surface crown land tenure under the *Land Act* but regulates only those purposes that are secondary to oil and gas production (such as electric power lines, linear telecommunications, gravel pits, and campsites and airstrips that have multiple uses). The Ministry is responsible for the sale of Crown land and issuing *Land Act* tenures for federally regulated pipelines (such as the proposed Enbridge Northern Gateway pipeline). When determining how to issue Crown land, social, economic and environmental outcomes are to be considered, while taking into account the interests of First Nations governments.[13]

Essentially, everything up to and including the granting of the tenure is the responsibility of the Ministry of Energy, but activities that take place once the tenure has been sold are the responsibility of the Oil and Gas Commission and the Ministry of Natural Resource Operations.

2.1.2 Process to obtain oil or gas tenures

When a company is interested in accessing oil and natural gas, they must obtain the rights to these resources from the B.C. government. The primary means by which oil and gas tenures are allocated in B.C. is the public auction process, whereby companies express interest in an area to the Ministry of Energy. Based upon this, the Ministry will then select a tenure area and put it up for auction.

The general process for acquiring tenure follows nine steps:

Geological Research. A potential developer applies to the Oil and Gas Commission for a geophysical license for a parcel of land, which allows them to determine whether there is oil and gas and where the potential pools might be. Geophysical activity can include seismic testing, and other techniques to assess oil and gas potential, including evaluating past drilling results. A geophysical license is valid for up to three years.[14] Seismic activity can involve explosive tests (which involves drilling holes which are filled with explosives and detonated) or non-explosive tests (which often involve using heavy metal plates to vibrate the land surface).[15] An individual or company can also apply for tenures without having conducted any seismic testing.

[13] Ministry of Lands and Agriculture, *Crown Land Allocation Principles* http://www.agf.gov.bc.ca/clad/leg_policies/policies/allocation_principles.pdf

[14] Oil and Gas Commission *Geophysical Manual*. 2007. http://www.ogc.gov.bc.ca/documents/guidelines/Geophysical%20Manual.pdf

[15] Oil and Gas Commission *Landowner's Information Guide* April 2005. http://www.ogc.gov.bc.ca/documents/forms/communications/ogc_lom.pdf

Request for Tenure. If a developer expects that oil and gas are on the site, the developer applies to the Ministry of Energy and requests that oil and natural gas rights for that land parcel be made available for auction.

Internal Referral. The Ministry reviews the application to determine whether there are any existing claims on the tenure, if the parcel is an adequate distance from other wells, and which other groups or individuals may be affected by the application. The Oil and Gas Commission participates in this internal referral process.

External Referral. The Ministry consults with groups that may be affected by oil and gas development on the land parcel, including First Nations, local governments and as well as other provincial agencies (including the Oil and Gas Commission). This is to gather information about traditional use of the land, conflict with wildlife or hunting areas, drinking water supply or residential areas. The goal of this process is to collect feedback about potential environmental issues or conflicts around land use, such as an access conflict.[16]

From these consultations, **caveats** (see below) may be developed and added to the tenure when it is posted for sale.[17]

If any of the organizations that are consulted during the External Review have serious unresolved issues or conflicts around land use, the tenure process can be deferred (paused) or halted completely.[18]

Seven weeks before the auction, details of the available land parcels are announced in local newspapers, oil and gas trade journals, the B.C. Gazette and posted on the government website.[19]

During monthly auctions, the province receives sealed bids from potential developers for the posted land parcels. [20]

If the highest bid is greater than the minimum price established internally by the Ministry before the auction, tenure is awarded to that developer.[21] The minimum price is established based on a variety of factors, including recent sales from similar parcels, relative level of past exploration and whether it is a popular development area.

This process is described in Figure 1.

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[16] Ministry of Energy, Mines and Petroleum Resources, "Oil and Gas Landowner Notification Program: Frequently Asked Questions for Landowners," http://www.gov.bc.ca/empr/popt/oil_and_gas_lnp2.html

[17] Ibid.

[18] Ibid.

[19] Ministry of Energy, Mines and Petroleum Resources, "B.C. Tenure Regulations," presentation to the Canadian Association of Petroleum Landmen. October 20, 2009.
http://www.empr.gov.bc.ca/Titles/OGTitles/OtherPublications/Pages/default.aspx

[20] Ibid.

[21] Ibid.

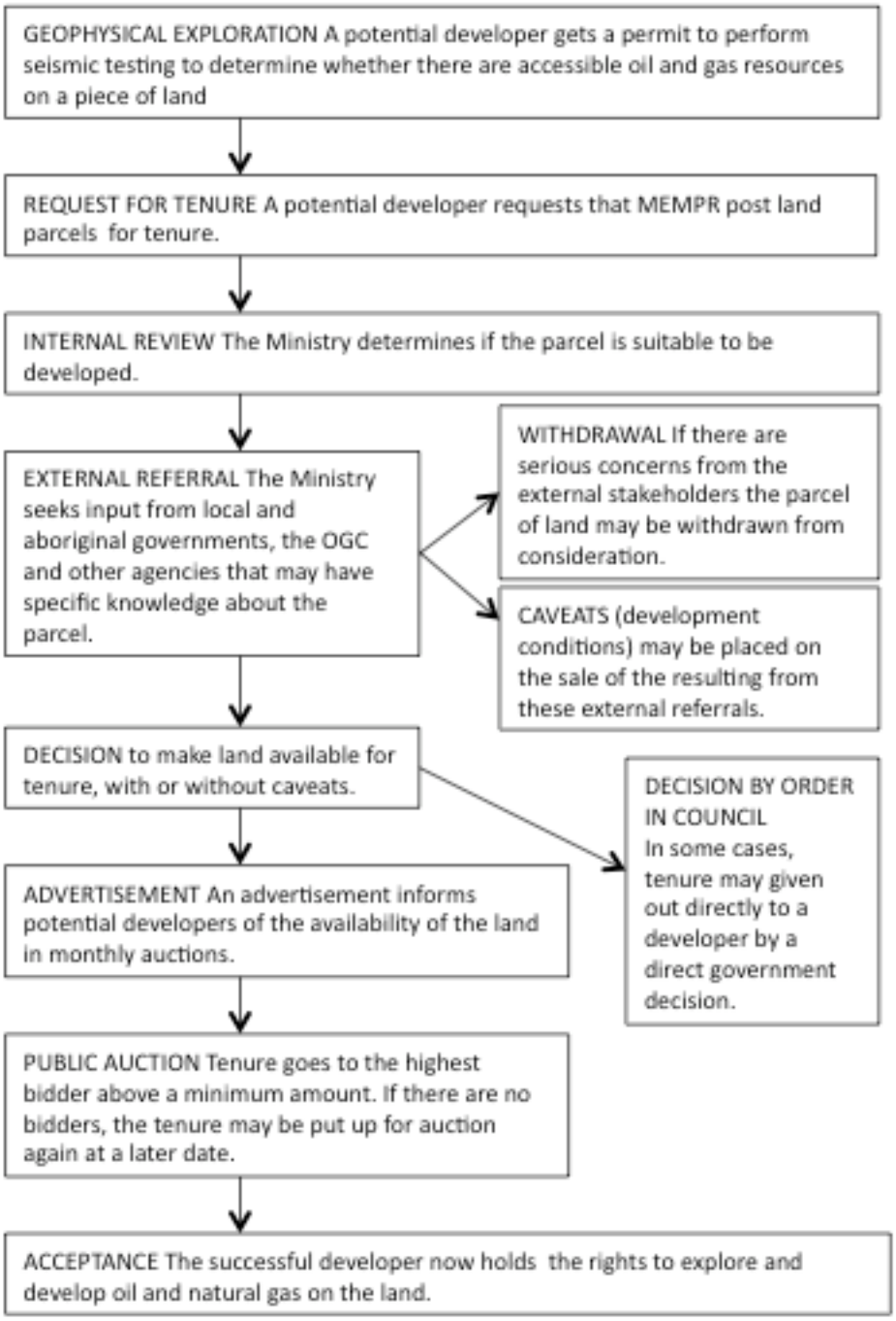

Figure 1. Process of obtaining oil and natural gas tenures in B.C.[22]

2.1.3 Fees and rent

[22] Modified from MEMPR Oil and Gas Landowner Notification Program-*Petroleum and Natural Gas Tenure Process* http://www.gov.bc.ca/empr/popt/down/png_tenure_flowchart_march12.pdf

The application fee for tenure is $500.[23] If tenure is awarded, an annual permit rental is $250. Annual rent for a drilling licence of occupation is 7.5% of the land value, and for a lease is 8% of the land value.[24] Land value is based on appraised market value for industrially zoned land at the beginning of the agreement, and from then on is based on the government land assessment process.[25]

2.1.4 Types of oil and gas tenures

The different forms of tenure are authorized under the *Land Act*. Generally, they are:

An **investigative permit**, which provides the right to conduct seismic testing to better understand the resource potential of the area. This permit allows a company to undertake activities such as appraisals, inspections, inventories or surveys, but does not allow commercial activity or construction on the land. An investigative permit can be held for up to two years.[26]

A **drilling licence,** which provides the right to drill oil and gas wells for testing but not for production. A licence can be obtained only by Crown Sale. A licence can last three to five years, and the term may be extended or converted into a lease. [27] To convert a licence into a lease, a company must show it is willing to invest in production by drilling a well.[28]

A **lease, which** provides the right to explore for and produce oil and gas, and allows the lease-holder to make substantial changes to the land, such as putting in processing equipment. A lease is available for 10 to 30 years but may be extended.[29]

If the owner of tenure does not meet the requirements of the agreement for their tenure type (i.e., complete the exploration requirements), the agreement is cancelled and the rights are returned to the province.[30]

After the lease has been granted, producer activities are then regulated by the Oil and Gas Commission.

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[23] Ministry of Lands and Agriculture, *Land Tenure Purpose and Application Fees*
http://www.al.gov.bc.ca/clad/leg_policies/cabinet/fees-land.pdf

[24] Ministry of Lands and Agriculture, *Crown Land Use Operational Policy: Oil and Gas*
http://www.agf.gov.bc.ca/clad/leg_policies/policies/oil_gas.pdf

[25] Ibid.

[26] Ministry of Lands and Agriculture Land Policy. *Form of Crown Land Allocation*
http://www.al.gov.bc.ca/clad/leg_policies/policies/crown_land_allocation.pdf

[27] "B.C. Tenure Regulations" Presentation to the Canadian Association of Petroleum Landmen. October 20th, 2009.
http://www.empr.gov.bc.ca/Titles/OGTitles/OtherPublications/Pages/default.aspx

[28] Petroleum and Natural Gas Act Fee, Rental and Work Requirement Regulation, B.C. Reg. 378/82

[29] Ministry of Lands and Agriculture Land Policy. *Form of Crown Land Allocation*
http://www.al.gov.bc.ca/clad/leg_policies/policies/crown_land_allocation.pdf

[30] Ministry of Energy, Mines and Petroleum Resources, Titles Division, *Petroleum and Natural Gas Rights in B.C.*
http://www.empr.gov.bc.ca/Titles/OGTitles/Documents/PNGrightsinB.C..pdf

2.1.5 Tenure caveats

According to the Ministry of Energy, caveats are conditions of development, such as requirements that the tenure holders gather data on specific biophysical conditions, or allow surface access to a certain group or for a certain activity (such as traditional food gathering).[31] However, as will be discussed below, caveats often do not contain explicit conditions on development and are seen by the industry only as cautions. Some caveats address very significant issues that are of high importance to communities, First Nations, wildlife and sustainability, but they do not resolve the issues in any concrete way — they simply put the tenure holder on notice that there are some outstanding issues that may affect conditions placed on development. This uncertainty has led to litigation by one tenure holder who is suing the province to recoup millions of dollars paid for development rights that it has not been able to exercise due to First Nations opposition.[32] Caveats could be used as a means of addressing critical issues that should be addressed prior to tenures being awarded. However, this may not generally be the case.

[31] Ministry of Energy, Mines and Petroleum Resources, Oil and Gas Landowner Notification Program. *Frequently Asked Questions for Landowners*.
http://www.empr.gov.bc.ca/Titles/MineralTitles/Pub/Documents/LON/LON_FAQs.pdf

[32] Statement of Claim filed in Hunt Oil Company of Canada Ltd. v. British Columbia, BC Supreme Court, No.092725, Vancouver Registry.

3. Pre-tenure issues

One of the main shortcomings of the B.C. oil and gas tenure system is its failure to adequately address key issues and environmental impacts prior to awarding tenure. Once tenures have been granted and resource rents have been paid by industry for rights to explore for and develop oil and gas resources, the balance of power and political will shifts considerably, making it much more challenging to resolve any outstanding issues. These issues can include:

- Community and First Nations concerns about appropriate land use;
- Treaty and Aboriginal rights;
- Wildlife habitat issues, such as critical habitat for species at risk;
- A host of access management issues arising from seismic lines and industrial roads in sensitive environments and wilderness areas;
- Impacts to other resources, such as the vast amounts of water required for non-conventional gas developments;
- The cumulative effects of multiple oil and gas exploration and production activities on the landscape, as well as other resource extraction such as forestry and mining projects.

The current system assumes that all of these issues can be effectively addressed or mitigated by conditions placed on subsequent permitting by the Oil and Gas Commission, or be addressed through the *Oil and Gas Activities Act* and regulations. However, it is increasingly clear that this is simply not the case, particularly for bigger picture, strategic issues such as climate change, access management and recovery planning for species at risk.

While there are many ways to address these larger strategic issues, this report will focus on land use planning and environmental assessment.

3.1 Land use planning

B.C. has made a considerable investment in collaborative land use planning, beginning in the early 1990s. In an effort to coordinate the many and sometimes competing demands for land for economic, environmental, social and cultural uses, a number of Land and Resource Management Plans were completed for parts of the province, including in areas of interest to the oil and gas industry. These plans were concluded with input from a variety of different stakeholders.[33] In some areas First Nations were not participants in this process for a variety of reasons, ranging from inadequate consultation processes to strategic choices. Some felt that their constitutionally protected treaty and Aboriginal rights required negotiation government-to-government at the political level rather than as one among many competing stakeholders in a bureaucratic exercise at the agency level.

[33] Integrated Land Management Bureau. *About Land and Marine Planning* http://www.ilmb.gov.bc.ca/slrp/index.html (accessed June 2nd, 2010).

In northeastern B.C., where most of the oil and gas exploration has occurred, management plans have been created for the Fort Nelson[34], Fort St. John[35], and Dawson Creek[36] regions. Given the history of oil and gas development in these areas, the plans clearly contemplated oil and gas exploration and development and addressed it to a limited degree. Elsewhere in the province, in areas without significant oil and gas industry history, the current interest in unconventional gas, such as shale gas and coalbed methane, were not known or considered in the plans. Thus these plans may be of limited value and not reflective of current realities with respect to the resource potential of oil and gas development.

Given the high level and scale at which much of this planning was done, and the time frames during which they were carried out, there is considerable variation in the content of the plans. The earlier plans tend to be more strategic and conceptual, while later plans provide more detail to inform operational decision-making for various industries. The plans for the northeast, where oil and gas issues are prominent, were among the first written and therefore address more general land use objectives and strategies on the assumption that further planning would be carried out to provide better operational guidance to industries operating on the land base. This was in part because some issues, such as caribou populations and critical habitat, weren't adequately understood by stakeholders at the time.

The Fort Nelson Plan[37], for example, cites the need for baseline data and subsequent planning to inform forestry and oil and gas operations in several instances, as borne out in the following excerpts:

> *General access management principles were developed to provide licensed and government authorized resource users access through a number of innovative strategies. Further refinement will be developed in more detailed planning processes. Where public access restrictions are recommended, in order to manage critical values such as wildlife habitats, public consultation and educational processes are endorsed.*
>
> …
>
> *Identify and map caribou populations and habitats to provide information for more detailed strategic or operational planning processes.*

For certain resource management zones in the Fort Nelson Plan, an overarching objective to "minimize habitat fragmentation" was accompanied by the following strategies:

- Ensure industrial exploration and timber management activities are undertaken with sensitivity to Stone's sheep, grizzly, elk, moose and caribou habitat;
- Access planning to take into account connectivity corridors;

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[34] Integrated Land Management Bureau. *Fort Nelson Land and Resource Management Plan* http://archive.ilmb.gov.bc.ca/slrp/lrmp/fortstjohn/fort_nelson/plan/files/fort_nelson_lrmp.pdf

[35] Integrated Land Management Bureau. *Fort St. John Land and Resource Management Plan* http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/415784/toc.htm

[36] Integrated Land Management Bureau. *Dawson Land and Resource Management Plan* http://www.ilmb.gov.bc.ca/slrp/lrmp/fortstjohn/dawson_creek/docs/dawson_creek_lrmp_march_1999.pdf

[37] Integrated Land Management Bureau. *Fort Nelson Land and Resource Management Plan*

- Manage for wildlife habitat using range enhancement in a subsequent more detailed planning process; and
- Identify and map caribou populations and habitats to provide information for more detailed planning processes.

The B.C. government did carry out some of the necessary inventories, such as inventories of caribou populations and identifying critical habitat, but did not follow through with the necessary planning to guide operations. Species at risk recovery planning for threatened boreal caribou herds was begun, but was halted in 2004. Draft operational guidelines to protect caribou were commissioned by the Oil and Gas Commission but never adopted due to industry opposition. Between 2004 and 2009, the Ministry of Energy then issued oil and gas tenure rights to more than 675,000 hectares in the Horn River Basin alone, which has a considerable amount of critical caribou habitat.[38] The Province received almost $2 billion for auctioning these rights. Obviously, this has highly compromised the Province's ability to also protect the caribou herds, which are listed as threatened under the federal *Species at Risk Act*, as verified in recent studies by the Ministry of Environment.[39]

This is just one example of how the failure to carry out proper pre-tenure planning impacts the environment, wildlife and possibly First Nations treaty rights to hunt caribou. However, there is a solution, which B.C. has admirably followed in the Muskwa-Kechika Management Area.

3.1.1 Pre-tenure planning: the Muskwa-Kechika model

When land use plans were being developed in the 1990s, the Muskwa-Kechika area was designated by the B.C. government as worthy of special management given its ecological significance as home to continentally significant wildlife, including black and grizzly bears, moose, mountain goats and Stone's sheep. This 6.4-million hectare area has been less impacted by oil and gas development than other parts of northeastern B.C., and was designated under the Muskwa-Kechika Management Area Act in 1997. An Advisory Board, made up of representatives from conservation groups, industry, ecotourism and hunters provides advice to the government on how to best manage this area.

The Act allows for limited resource development while protecting important wildlife and environmental values, through establishment of a mix of:

- Protected zones where development is banned,
- Zones where limited development is permitted, and
- Zones that enable oil and gas exploration and development only after pre-tenure plans have been completed.[40]

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[38] Correspondence from Ministry of Energy, Mines and Petroleum Resources, Dec. 23, 2009 and Jan. 1, 2010.

[39] Steven F. Wilson, Chris Pasztor, Sara Dickinson, *Projected Boreal Caribou Habitat Conditions and Range Populations for Future Management Options in British Columbia*, Prepared for Ministry of, Energy, Mines and Petroleum Resources and Ministry of Environment, April 2010.

[40] Muskwa-Kechika Management Area, *Backgrounder* http://archive.ilmb.gov.bc.ca/slrp/lrmp/fortstjohn/muskwa/misc/backgrnd.htm (accessed May 12th, 2010)

The Muskwa-Kechika Management Plan specifies that pre-tenure plans must be carried out before any "issuance, approval, permitting or authorization, by a minister, ministry or agent of the Crown, of an oil and gas development plan, allocation, tenure, disposition, license or any other instrument or document of oil and gas development allocation or management." Any such approvals must also be consistent with the pre-tenure plan.

Pre-tenure planning involves a baseline assessment of climate, vegetation and wildlife, a summary of the known resources, and determination of management priorities with the goal of encouraging "environmentally responsible development."[41] In general, pre-tenure plans contain management objectives such as preserving wildlife populations and habitat, and minimizing area of land impacted by disturbance.[42] As of 2004, five pre-tenure plans were approved covering 1.8 million hectares.

While there are some concerns about government's commitment of resources to implement the Plan, the pre-tenure planning carried out in the Muskwa-Kechika demonstrates that B.C. is aware of the problems caused by awarding oil and gas tenures in the absence of addressing essential land use issues, and has itself designed a workable solution. The actual issues to be addressed in pre-tenure planning will of course vary according to the geography, ecological values, community values and complexity of competing land uses in the area.

3.2 Environmental assessment

Another related, major flaw in the current tenure process is its failure to assess the environmental impacts of oil and gas developments prior to the award of tenure. Properly designed pre-tenure planning could fill this role to a certain extent, and effective regulations could address site-specific operational details. But presently, a considerable amount of oil and gas activity escapes environmental assessment altogether. This is especially true of exploratory work, seismic lines and industrial access roads.

The B.C. *Environmental Assessment Act* only requires assessment of large storage facilities, processing plants and pipelines.[43] This project-level assessment focus not only leaves out significant amounts of industrial activity that has real environmental impact, it also fails to address numerous higher order issues, such as:

- The cumulative effects of numerous industrial operations in a larger area or region (e.g. Horn River Basin, or range of caribou herds or groupings);
- The consequences and effectiveness of on-the-ground practice requirements, such as those set out in the recent *Environmental Management and Protection Regulation* and other regulations under the *Oil and Gas Activities Act*;[44]

[41] Muskwa-Kechika Management Area, *Pre-tenure Plans for Oil and Gas Development in the Muskwa-Kechika Management Area*. May 2004. http://www.muskwa-kechika.com/pdf/lsp_pretenure-may-04.pdf

[42] Ibid.

[43] *Reviewable Projects Regulation*, B.C. Reg. 370/2002.

[44] BC Reg. 274/2010 and S.B.C. 2008, c. 36.

- The consequences and effectiveness of land use designations, such as ungulate winter range and wildlife habitat areas under the regulations;
- Strategic level decision-making, such as the B.C. Energy Plan, climate change, species at risk, land use, cultural and treaty rights of First Nations.[45]

By failing to address these issues either prior to or concurrently with the award of oil and gas tenures, B.C. is arguably following an ad hoc and reactive "issues management" model approach to environmental sustainability rather than a more proactive, precautionary, planning-based approach. Once tenures have already been granted, these issues are very difficult to resolve.

[45] See *Environmental Assessment in British Columbia*, Environmental Law Centre, November 2010, pp.22-27. www.elc.uvic.ca

4. Revenue from tenure sales

The area of land under active tenure in B.C. increased by 40% between 1997 and 2007.[46] Similarly, the total amount of land sold annually, and the price per unit of land, have both significantly increased in the last few years. The gas industry plays an important role in the provincial economy as it contributes significantly to provincial coffers. In 2009/10, the B.C. government secured approximately $1.35 billion in revenue through lease sales and royalties, amounting to about 4% of total provincial revenues.[47]

Figure 2 illustrates both the total revenues from land sales and the average price per hectare of land from 1978 to 2009.

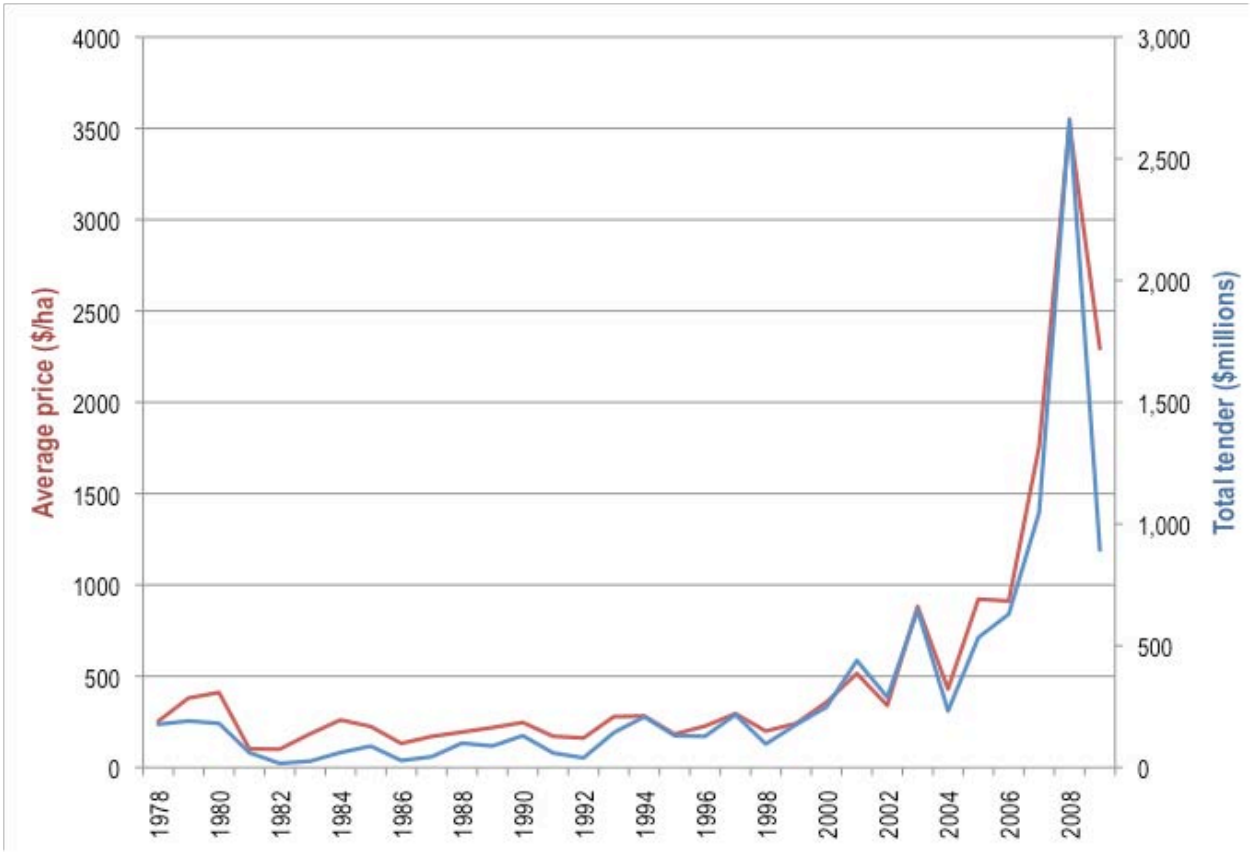

Figure 2. Total revenues from land sales and average price per hectare of land (1978-2009)

[46] Ministry of Energy, Mines and Petroleum Resources. Presentation, "P and NG Tenure Information Exchange". April 24, 2008. http://www.empr.gov.bc.ca/Titles/OGTitles/Documents/Information_Sharing_2008.ppt

[47] Information provided by Ministry of Environment officials, December 14, 2010.

This figure demonstrates that between 2000 and 2008, there was a large increase to the B.C. government in total tenders, due to both an increase in the amount of land put up for auction, and an increase in price of each land unit. Perhaps most notably, the price per hectare of land has increased dramatically in the past few years, although it has dipped again since the recession. While there was a sharp decline in revenues in 2009 due to the global economic downturn, the government has not slowed the pace of auctioning land tenures.

Several years ago, prices were generally between $200/hectare and $800/hectare. However, shale gas plays in northeast B.C. have significantly increased this price, which are now in excess of $20,000/hectare. In 2008, one company paid $33,500 per hectare for drilling rights.[48] As of October 2010, the B.C. government had secured $801 million in lease and licence revenues.[49]

These increases are noteworthy as they provide a sense of just how strong the market for gas was. In 2008 B.C. made a record-breaking $2.66 billion from oil and gas tenure[50], with 90% of this value coming from shale gas exploration.[51] In 2009 there was a sharp downward trend in revenue possibly in part due to large gas reserve finds in the U.S. and a forecasted drop in the price of gas.

[48] Personal Communication with Kieran Broderick, Treaty 8 Tribal Association, December 2010. See also http://www.canada.com/calgaryherald/news/calgarybusiness/story.html?id=8d7f4041-e9da-4e36-83d8-35d7790ff7cc, accessed December 20, 2010.

[49] $20 Million October Natural Gas and Petroleum Sale, Information Bulletin, Ministry of Energy, Mines and Petroleum Resources, 2010EMPR0043-001303.

[50] Ministry of Energy, Mines and Petroleum Resources, Oil and Gas Titles. Sale Results and Statistics- Calendar Year Statistics (1978 to Present) http://www.empr.gov.bc.ca/Titles/OGTitles/SaleResults/Pages/default.aspx (accessed May 20, 2010).

[51] "BC Tenure Regulations" Presentation to CAPL, October 20, 2009 http://www.empr.gov.bc.ca/Titles/OGTitles/OtherPublications/Pages/default.aspx

5. Tenure case studies

While the public auction process is standard practice, there are other means of allocating tenures, some of which appear to have caused challenges for both companies and the public. In certain cases, the government can decide to distribute oil and gas rights without following the procedure described above. This is authorized by section 72 of the *Petroleum and Natural Gas Act.* The Minister of Energy can take oil and gas rights out of general availability by posting a Ministerial Order (which is a decision by the Minister and does not require the approval of the Lieutenant Governor in Council or the legislature). Once rights have been taken from general availability, they can be distributed with an Order in Council (which requires the approval of the Lieutenant Governor in Council but not of the legislature).[52]

Figure 3. Location of case studies

The fact that efforts to expand oil and gas activity outside the northeast are being met with increasing community concern raises questions about whether the process by which companies are getting rights to explore and develop is as responsive and effective as it needs to be. This concern is exacerbated by the fact that these rights are being offered for sale in areas where land use plans do not contemplate the current potential scale of oil and gas activity and where no environmental assessments of oil and gas development will be conducted. The following three case studies examine the outcomes of poorly conducted tenure processes.

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[52] Government of British Columbia Queen's Printer. *About the Order in Council and Ministerial Order Resumes* http://www.qp.gov.bc.ca/statreg/oic/aboutoic.htm.

5.1 Shell and the Sacred Headwaters

Meaningful consultation early on could have stopped a show down

In June 2004 Shell Canada was awarded an eight-year exploratory tenure for coalbed methane in the Klappan-Groundhog region of northwestern B.C.[53] This area is the birthplace of three major rivers; the Skeena, the Nass and the Stikine. Known as the Sacred Headwaters, this area is relatively pristine and part of one of North America's largest remaining intact predator-prey systems (see Figure 3). It is the territory of the Tahltan First Nations who have hunted and trapped there for millennia.[54] All three rivers are salmon bearing, and these salmon play an integral role in the culture and economy of the local people and northern communities.

In 2001, the Ministry of Energy put out a request for proposals to develop oil and gas in the region, but no developers registered any bids. These rights were posted for a second time in December 2003, and Shell Canada registered a bid.[55] The Ministry of Energy then removed these rights from general availability[56] to sell them directly to Shell Canada using section 72 of the *Petroleum and Natural Gas Act*.[57]

In 2004, Shell signed a memorandum of understanding with the Chair of the Tahltan Central Council, the Chief of the Tahltan Band and the Chief of the Iskut First Nation.[58] However, concern existed that the tenure had been granted without consideration of the interests and concerns of affected communities downstream, nor had there been broad consultation throughout the communities. Significant opposition arose, including from subsequent Tahltan leadership, community representatives and downstream communities.[59]

In 2004, exploration began and three wells were drilled.[60] Plans were in place to drill an additional 14 wells by 2008,[61] but when Shell began building access roads, members in the nearby community of Iskut joined with elders from nearby Telegraph Creek to blockade the access road, stating that Shell had not adequately consulted these communities prior to the tenure

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[53] Shell Canada . Klappan Coalbed Methane Exploration Program. http://www.shell.ca/home/content/can-en/aboutshell/our_business/e_and_p/e_and_p_canada/klappan/.

[54] Sacred Headwaters website. http://www.sacredheadwaters.com/.

[55] Ministry of Energy, Mines and Petroleum Resources, Titles division. Titles-04-02- "Response to call for proposals to develop provincial petroleum and natural gas rights within the Tuya River, Klappan-Groundhog and Telkwa coalfield regions" 2004. http://www.empr.gov.bc.ca/Titles/OGTitles/InfoLetters/IssueDate/Pages/TITLES-04-02.aspx

[56] Government of British Columbia Queens Printer, *Ministerial Order 278*. 2004. http://www.qp.gov.bc.ca/statreg/oic/2004/resume22.htm

[57] Government of British Columbia Queens Printer, *Order in Council 777*. 2004. http://www.qp.gov.bc.ca/statreg/oic/2004/resume22.htm

[58] Shell Canada, "Klappan Coalbed Methane Exploration Program," http://www.shell.ca/home/content/can-en/aboutshell/our_business/business_in_canada/e_and_p/e_and_p_canada/klappan/

[59] See for example, Affidavit of Sarah Hoy, 2007, File No S075718 Vancouver Registry, which directly references concerns raised by the Iskut First Nation about the project.

[60] Shell Canada, "Klappan Coalbed Methane Exploration Program."

[61] Tam Wu, Karen. 2010. B.C. needs permanent solution for threatened Sacred Headwaters, The Georgia Straight, May 7. Accessed online May 31, 2010 at: http://skeenawatershed.com/news/article/and_stay_the_shell_out/

purchase and that they would not allow them to operate on Tahltan land.[62] In July 2005, blockades were established at the same access road to prohibit development activities in the Sacred Headwaters by Shell and by mining companies.[63]

The Sacred Headwaters is the birthplace of the Skeena, the Nass and the Stikine rivers. Coalbed methane tenures have been granted for this area.

Photo: Brian Huntington

These blockades continued for several summers and were supported by other First Nations, communities and individuals throughout the region, who generally support economic development but have particular concerns about industrial activity in the Sacred Headwaters region.[64] The situation was tense. Legal proceedings were commenced by Shell at one point, and at the request of one of the mining companies, the RCMP removed several elders from the road access site in 2008.

In December 2008, the B.C. government placed a four-year moratorium on coalbed methane development in the Sacred Headwaters. This moratorium could be lifted earlier if First Nations and other communities in the area are provided with sufficient information regarding coalbed methane development, and regional water quality data is available "sufficient to determine the potential impacts of the coalbed gas development on regional water quality over time."[65] This moratorium was welcomed by the Tahltan Central Council,[66] and remains in effect today.

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[62] Morgan, Ellen. 2010. *Contesting Development: Neoliberalism, Indigenous Rights and Environmental Governance in the Sacred Headwaters*, Draft. Chapter 2.

[63] An account of this story can be found at: Monte Paulsen, "A Gentle Revolution," *The Walrus*, December/January 2006, http://www.walrusmagazine.com/articles/2006.01-politics-tahltan/

[64] Morgan, Ellen. 2010.*Contesting Development* .

[65] B.C. Order In Council 890/08, section 2(2).

[66] Tahltan Central Council. 2008. Tahltan Nation Applauds Government Decision to Suspend CBM Development in the Sacred Headwaters, media release, December 5.

Concerns about Shell's development plans are shared by a broad spectrum of people, including environmental organizations, which would like to see the tenure withdrawn on the basis that the ecosystem values of this region are too significant to be put at risk for coalbed methane development.

Summary

This situation is a clear example of the difficulties that can occur when oil and gas tenures are sold without a public auction. Shell Canada purchased the tenure with limited, if any, input, and failed to consult and accommodate the First Nations, as is evidenced by the chain of events following its sale. It is debatable whether the First Nations were broadly informed of the tenure. While the company made efforts to ensure communities and concerned stakeholders were aware of environmental studies being undertaken, comprehensive studies were not completed in advance of the tenure being sold, and were instead being conducted concurrent with exploratory well drilling, not in advance of any well drilling.

The conflict has contributed to skepticism about the industry in the region and, even if the environmental issues could be adequately addressed, questions have been raised about whether social licence or deep community support is possible given the nature and intensity of the conflict to date.

Wild Salmon in the Skeena River worth more than $110 million

In 2006, the Northwest Institute commissioned IBM Business Consulting to conduct a valuation of the wild salmon economy of the Skeena River Watershed. Their report estimates that the wild salmon economy of the Skeena River can be valued at approximately $110 million, including revenue from recreational tourism, sport fishing, commercial harvesting, wholesale values, added-value processing, retailing, values to First nations and values to Alaska.[67] Coalbed methane development in the Sacred Headwaters could impact this value if negative environmental effects of CBM development were to be experienced downstream.

5.2 Outrider Energy and Telkwa

Community voices must be heard

In 2003, the B.C. government posted a request for expressions of interest in a coalbed methane tenure in the Bulkley River valley near the communities of Smithers and Telkwa and on the traditional territory of the Wet'suwet'en First Nation (see Figure 3). One company expressed an interest in the tenure, and the B.C. government then determined it would invite the proponents (Norwest Corporation in partnership with Outrider Energy) to apply for the tenure rather than undergo a competitive bidding process.

In this case, a series of pre-tenure open houses were held in the communities to share information about the project. These open houses were co-hosted by the Ministry of Energy. Given that this was the first experience these communities had with oil and gas development,

[67] IBM Business Consulting Services, 2006. Valuation of the Wild Salmon Economy of the Skeena River Watershed. Available at: http://northwestinstitute.ca/work/

they sought to better understand the impacts of coalbed methane. As the potential landscape and water impacts became clear, concern about the project increased. Community members were concerned to learn about how little input they had in the allocation of subsurface rights on either public or private land, and decisions about whether and how the potential project could proceed.

To share perspectives on the project, a public forum was organized by community members in Smithers in mid- 2006, which brought together government, industry, First Nations, community representatives and environmental organizations to share perspectives on the proposed project. However, community confidence in the B.C. government's ability to protect the environment and watersheds with coalbed methane development remained low.

In addition to community issues, the Wet'suwet'en First Nation had similar concerns about baseline studies, adequacy of consultation and appropriate regulatory regime and oversight, and had shared these concerns directly with the companies.

Figure 4. Community members concerned about coalbed methane march in Smithers, 2007.

Photo: Pat Moss

By January 2007, Outrider Energy announced that it was withdrawing its participation in the tenure application for the project, citing delays associated with responding to community concerns as one of the reasons for their withdrawal. Since that time, the project has not proceeded.

> "These are hard-working folk, in touch with the land, who are the epitome of the heartlands with which this government likes to identify. And when they get mad enough to spill out into the streets, you can bet something has gone wrong with government outreach."
>
> — Mark Hume, Globe and Mail, November 6, 2006 from article "Proposed drilling sets off deep unrest"

Summary

The Telkwa situation provides a clear example of how community concerns and values are relevant, and must be addressed where the oil and gas industry seeks to develop resources outside of areas where it has traditionally operated in B.C.'s Northeast. In the end, community concerns remained unresolved, and concerns about the adequacy of the regulatory framework for coalbed methane made clear that the government was unlikely to persuade the community this activity could be conducted safely. This is an example of a situation where it is beneficial for all that the tenure was not granted, as it likely saved additional hassles and concern for both government and investors.

5.3 Chevron/Shell/BP/Apache and Crowsnest Coalfield[68]

Cumulative effects of multiple tenures on the landscape must be considered in tenure process, particularly where drilling on private land is an option.

Interest in oil and gas development has also been increasing in the East Kootenays, creating challenges for those who live in the region and who are concerned about the impacts of multiple industrial developments. This region, which has seen extensive forestry and coal mining, also contains coalbed methane, and has seen several gas companies express interest in recent years. The East Kootenay coalfields in the Elk and Flathead Valleys contain two main areas that have seen some development — the Crowsnest coalfield, which essentially lies between Fernie and Sparwood south and east of Highway 3, and the Elk Valley coalfield, which runs north from Sparwood on the east side of the Elk Valley to its upper (see Figure 3).

The East Kootenay coalfields are found in the heart of B.C.'s southern Rockies. This area is part of the Crown of the Continent eco-region. The Crown of the Continent is one of the most intact temperate ecosystems on the planet according to National Geographic. The B.C. portion of the Crown of the Continent holds the highest diversity of vascular plants in Canada. The Elk and Flathead Valleys contain the greatest diversity of carnivores in North America, and are one of the most important wildlife corridors in the world.

The main area where concerns have arisen is in the Crowsnest coalfield. The majority of gas in the Crowsnest coalfield is provincial, although some parts of it are federal land (the Dominion coal blocks, which had been set aside as coal stock for railways), and logging and mining companies privately own some parts in a mix of surface and sub-surface titles.

[68] This section was written based upon conversations with Casey Brennan and Ted Ralfe, concerned citizens and residents in the region, December 2010.

Residents in the region first became aware that Chevron had drilled three exploratory gas wells in the Crowsnest coalfield in the late 1990s, but were not aware of any consultation having occurred in advance of these wells being drilled. Community concern became more heightened in 2004 when the B.C. government posted a notice of auction for tenure rights to two large blocks in the Crowsnest coalfield.

Figure 5. Elk Valley in the East Kootenays

Photo: David Thomas

By this time, public concern was high. Many were concerned about the environmental impacts of the activity that had taken place by companies operating a pilot project in the Elk Valley coalfield north of Elkford, and wanted a better understanding of the plans. Residents also wanted a better understanding of the impacts of coalbed methane and the regulatory regime that would oversee it. The City of Fernie hosted a public forum to share more information about the impacts and benefits of the project. At the time, the B.C. government sought community input. The Oil and Gas Commission opened offices in Fernie and Sparwood, hosted open houses and met with local government representatives.

The B.C. government proposed certain caveats on the tenure that it thought would create public support for the activity. Some of the terms on the proposed tenure included:

- Establishing an open collaborative process with community, resource managers, First Nations and local interest groups to access community knowledge and share information,

- Requiring the Oil and Gas Commission to allow for community input during the evaluation planning, feasibility planning and production planning phases of the project,
- Requiring the Oil and Gas Commission to be guided by the southern Rocky Mountain Management Plan, where applicable,
- Requiring the tenure holder to undertake necessary investigations where gaps in essential known provincial baseline data are identified to ensure that applications to the regulator reflect information appropriate to the phase of the program,
- Allowing the regulator to impose terms and conditions on each phase of the program including seeking input through consultation and a list of identified community concerns, and expecting the tenure holder to demonstrate reliance on scientific knowledge, community knowledge and best management practices from other jurisdictions.[69]

However, community concern about the potential impacts from coalbed methane was significant, and, in the end, no bid was entered by any of the potential companies who expressed interest in the drilling rights.

Perhaps because the prospects of securing social licence for additional activity on crown land appeared limited, Shell arranged with Elk Valley Coal Corporation to drill for coalbed methane under private land. When this agreement expired, BP did the same thing, and has conducted some exploratory drilling on private land as well. There has been no coalbed methane drilling on crown land in the Crowsnest coalfield since the Chevron tenure in 2003.

Several years later, another company expressed interest in the same area, and began another round of consultations with the communities. It is notable that in this case, the public engagement process was undertaken almost exclusively by the company, BP, and not by the B.C. government. In 2008, BP was awarded an approximately 300,000-hectare tenure, with no auction, likely through the withdrawal and cabinet disposition provisions of Section 72 of the Petroleum and Natural Gas Act. However, again community concern remained high and there is no commercial production to date. BP has collected "baseline" data for several years, and drilled one well on Teck Coal's private land. During the summer of 2010, while the drilling operation was ongoing, BP sold all of its assets in the area to Apache Energy Corporation, which has now taken over the tenure and is expected to continue to develop coalbed methane deposits.

Similar concern exists with regard to the Elk Valley Coalfield, located north of Teck Coal's Elkview mine, near Sparwood and two provincial parks. In 1999, Alberta Energy Corporation (later Encana) purchased this roughly 300,000-hectare tenure, and drilled 20 exploratory and evaluation wells. Encana has partnered with a smaller company, Stormcat Energy Corporation, which manages the project. At some point, this tenure will have been renewed to ensure its continuance.

As activities have increased in the area, Stormcat has held open houses to describe their plans and activities. Currently, between six and 10 pilot wells are producing gas and waste water. This water has been shown to be toxic to fish in Encana's own laboratory assay tests and it continues

[69] Ministry of Energy, Mines and Petroleum Resources, Draft Terms and Caveats for Crowsnest Posting Requests: Spring 2004.

to be disposed of into local waterways.[70] There is not yet any commercial production from these wells, likely because if Stormcat goes to commercial production they will be required to re-inject all produced water as per current legal requirements. Residents in the region are concerned that activity may increase in the near future without consideration by government or industry of cumulative impacts of a field of gas wells on land and water.

Summary

The experience in the East Kootenays differs from the other two cases in that this region has sustained steady interest by a variety of companies who have continued exploration activities for several years. Vocal community concern, demonstrated by numerous public protests and three successive resolutions from Fernie City Council, about impacts on land and water from multiple tenures remains strong. It is likely opposition will continue until a process whereby "no-go zones" are identified and established is done.

When communities are not provided with adequate information about impacts, particularly in regions where other attributes are important, it becomes more difficult for companies to secure social licence to undertake gas development projects. In the case of the Crowsnest coalfield, there have now been three companies that have come and gone with no success in securing a viable project.

[70] For a general discussion of these issues see Ric Hauer and Erin Sexton, "Compelling Science Saves a River Valley," *Science* 26 March 2010: 1576.

6. Treaty and aboriginal rights

Any model of sustainability that is driven solely by an economic engine is deficient if it is incapable of taking into account social values. This is particularly true where the model of sustainability affects Aboriginal people whose social values are so intricately connected to the land.

Mr. Justice Vickers, B.C. Supreme Court[71]

It is important to consider aboriginal and treaty rights because of the unique legal status of First Nations peoples. Oil and gas tenures granted by the province on the treaty lands or traditional territories of First Nations raise real issues, both where there is treaty and where aboriginal title is unresolved.

Outstanding Aboriginal title claims are particularly an issue in B.C., because the Province historically refused to cooperate with the federal government's negotiation of treaties with First Nations as occurred elsewhere in Canada between 1871 and 1921. There are some early pre-Confederation treaties for southern Vancouver Island, northeastern B.C. (Treaty 8, signed in 1899) and more recently the Nisga'a territory (2000), but First Nations have not ceded their Aboriginal title in most of the province, including areas such as the Sacred Headwaters.

To date most oil and gas tenures have been sold in the northeastern British Columbia on lands subject to Treaty 8. First Nations under Treaty 8 have negotiated "consultation process agreements" concerning oil and gas tenures and development activities approved by the Oil and Gas Commission.[72] These agreements set out detailed consultation procedures and time frames (such as requiring First Nations to respond to referrals within 20 days), but do not address the larger, more substantive issues concerning land use and cumulative impacts.

6.1 Overview of Aboriginal rights and title

Since 1982, Aboriginal rights (which can include title to land) have been protected by Canada's constitution, making them very strong legal rights that courts have said should not be treated lightly. Outstanding title claims remain a significant cloud over resource development in much of B.C., and most of the Canadian litigation over land claims comes from this province.

In the 1997 *Delgamuuk'w* decision, the leading case on Aboriginal title involving the Gitxsan Nation and Wet'suwet'en Nation in northern B.C., the Supreme Court of Canada held that Aboriginal title "encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes." It follows that when the Province grants oil and gas

[71] Tsilhqot'in Nation v. British Columbia, 2007 BCSC 1700, ¶1301.

[72] Ministry of Energy, Agreements and Initiatives: Treaty 8 Frist Nations, http://www.empr.gov.bc.ca/Titles/firstNations/Pages/Agreements.aspx

tenures prior to resolving outstanding issues of title, it is depriving First Nations of the right to have a say in the use of land and resources. Unfortunately, the track record on resolving title claims has been very weak since the *Delgamuuk'w* case was decided.

Despite the strong signals from courts to solve these issues through negotiation, the B.C. government often takes a narrow view of Aboriginal rights and titles,[73] expecting a considerable degree of specificity as to exactly which areas, whether it is a fishing rock or particular grouping of trees, were utilized historically and when, before acknowledging these rights. This approach was rejected by the B.C. Supreme Court in the *Tsilhqot'in Nation* decision, where the court stated that, "There is no evidence to support a conclusion that Aboriginal people ever lived this kind of postage stamp existence."[74] Future cases can expect that Aboriginal rights will be considered more broadly. Even where treaties exist, some First Nations feel that the B.C. government takes an overly restrictive view of recognizing historic hunting, fishing and trapping rights rather than the broader spirit and intent of the treaty.

6.2 Duty to consult, accommodate and uphold the "honour of the Crown"

Recognizing the complexity of these issues and the need for extended negotiations to resolve title claims, the courts have also held that the Province must deal honourably with First Nations during the interim period preceding the resolution of Aboriginal title claims. Numerous court decisions have struck down resource management decisions because the Province has not lived up to its consultation duties (and in some cases upheld them). The extent of the duty to consult and accommodate Aboriginal interests varies according to the circumstances, taking into account the relative strength of the First Nations' claim to rights or title and the harm that the resource extraction activity would have on those rights.

There are numerous legal cases in which courts have found that British Columbia was not living up to the standard of fair dealing required to "maintain the honour of the Crown" and most of these decisions involve resource tenure rights of one type or another.

For example, in the 2004 leading case known as the *Haida Decision*, the issue was the legality of the Province's renewal of a tree farm licence without consulting the Haida Nation. The Supreme Court of Canada held that the Province "cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued." The court noted that the tenure decision was a strategic planning decision for utilization of the resource that "may have potentially serious impacts on Aboriginal rights and titles." It held that "if consultation is to be meaningful, it must take place at the stage of granting or renewing" the licences. "The duty to consult and accommodate is part of a process of fair dealing and reconciliation."[75]

Since *Haida*, there have been many decisions that reiterate this point and apply it to other tenure decisions that impact First Nations. For example, the B.C. Supreme Court suspended coal mining

[73] For example the B.C. government narrowly interprets Treaty 8 rights to hunting, trapping and fishing, whereas the wording of the Treaty is more expansive.

[74] *Tsilhqot'in Nation v. British Columbia,* 2007 BCSC 1700, ¶610.

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

and forestry permits because it was not satisfied that "the Crown consulted meaningfully, nor that the Crown reasonably accommodated West Moberly's concerns about their traditional seasonal round of hunting caribou for food, for cultural reasons, and for the manufacture of practical items."[76]

The duty to consult with First Nations and accommodate their interests belongs to the Crown (i.e. provincial and federal governments) rather than resource industries. However, governments also encourage companies to engage with First Nations where they hold tenure or are seeking to become tenure holders. There is an obvious conflict of interest inherent in this process, which is even greater than the conflict that arises due to the Province's desire for oil and gas royalty revenues. Negotiations may result in acceptable benefit sharing agreements to some First Nations depending on their specific interests and community needs, and particularly if they incorporate more than a share in the revenue generated from exploration and drilling operations and adequately address the larger strategic land use vision issues.[77] The problem is, once the "foot is in the door" through the development of roads into wilderness portions of traditional territory, the environmental and cultural impacts can be very difficult to undo. While many First Nations have expressed the desire for co-management agreements that would give them a greater role in decision-making, the Province has been highly reluctant to agree to this.[78]

6.3 First Nations and oil and gas tenures

The B.C. government's dependence on oil and gas development revenues has meant that there is a real focus on reconciling aboriginal title and rights. While this appears to have substantially occurred in northeast B.C., where tenure sales are a regular occurrence, it may not be the case in other parts of the province. In both the Shell case and the Outrider case studies, the concern of the First Nations was significant, and undoubtedly contributed to the challenges faced by the companies in accessing their tenures.

Ideally, reconciliation of Aboriginal rights and title preferably should occur through negotiations between the Province and First Nations *before* oil and gas tenures are advertised and sold. If First Nations' rights are to be addressed honourably and meaningfully, their land use vision should not be unduly compromised or prejudiced by the granting of legally binding tenures to oil and gas companies before rights and titles are dealt with.

However, it would appear that a pattern seems to have developed in which oil and gas exploration rights are sold either without meaningful consultation with First Nations or with certain "caveats" referencing First Nations interests and in some cases related environmental issues. For example, a common notice to bidders for exploration rights has the following stipulation:

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[76] West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2010 BCSC 359.

[77] For best practices and model agreements see Benefit Sharing Agreements in British Columbia: A Guide for First Nations, Businesses and Governments, Woodward and Company, online: http://www.woodwardandcompany.com/media/pdfs/4487_benefit_sharing_final_report_-_updated.pdf.

[78] An exception is co-management agreements between BC Parks and First Nations for some protected areas.

> "The (___) First Nation has requested engagement prior to on-the-ground activities. Traditional, archaeological or wildlife assessments and mitigation plans may be requested prior to on-the-ground activities."[79]

Implicit in this notice is the Province's assumptions: 1) that First Nations interests can be accommodated in a piece-meal fashion that might only affect *where* or *how* (not *whether*) the seismic lines are cut or wells are drilled; and 2) that this is in fact a legally effective way of reconciling the newly granted third party (i.e. oil company) interests with longstanding Aboriginal title and rights.

This somewhat casual practice has led to conflicts between oil companies, First Nations and the Province, resulting in litigation. In 2009 Alberta-based Hunt Oil sued British Columbia after it learned that the Province had not consulted with the Halfway River First Nation, which vigorously opposed industrial development in the Chowade Valley, after Hunt paid more than $4 million for drilling rights to the area. The company claimed that the Province breached its contract and owed it a "duty of care to accurately convey … all adverse interest concerning industrial activity" in or around the drilling licence area.[80] In its Statement of Defence, the Province relied on a caveat similar to that cited above as providing adequate notice of the First Nations' interests.

These tenure practices are unsatisfactory for both the oil and gas industry and First Nations. It neither encourages investment in the resource sector nor satisfies legal and moral obligations to First Nations. Some First Nations have expressed frustration particularly with the inability of the current regulatory model to address the cumulative impacts that numerous developments have on a traditional territory. In some cases, a First Nation will send letters identifying concerns to the Ministry of Energy, and depending on the concern, it may become a tenure caveat or a condition of sale.

6.4 Tenure deferrals as interim step

Granting oil and gas tenures is a significant decision that has legal consequences. When British Columbia awards tenures to industry before properly addressing key land use issues, protection for threatened species such as caribou, or First Nations rights, it incurs obligations to tenure holders that are difficult to regulate under existing laws. There is also a lack of political will to correct mistakes once rights have been granted.

Part 9 of the *Petroleum and Natural Gas Act* allows the responsible minister to withdraw oil and gas areas from disposition or to require criteria relating to First Nations considerations, environmental values and community interests. This provision was used in August 2010 to withdraw a parcel of land located in the West Moberly Treaty 8 First Nations administrative area from disposition through the tenure process[81] due to First Nations concerns.[82] On a broader scale

[79] This is the exact wording of a public notice of competition dated December 16, 2009 published by the Minister of Energy, Mines and Petroleum Resources.

[80] Statement of Claim filed in Hunt Oil Company of Canada Ltd. v. British Columbia, BC Supreme Court, No.092725, Vancouver Registry.

[81] Ministry of Energy, Mines and Petroleum Resources. Amendment (Withdrawal) to the Notice of Public Tender for disposition of Crown Petroleum and Natural Gas Rights for Drilling License parcel 63084. August 25th, 2010.

they can result in "Resource Review Areas" in which tenure decisions are deferred for a specified amount of time while certain issues and values are evaluated. However, the provision does not allow for suspension or cancellation of tenures already granted.

There are examples in B.C.'s regulation of other resource industries that point to a better interim solution where tenure rights have already been granted. Following years of conflict and litigation with First Nations over industrial forestry, the Province inserted clauses into forest tenure agreements to make it clear that the interest being granted is subject to constitutionally protected Aboriginal rights and title.

Since the *Haida Decision,* forest tenures now specifically authorize the district manager to impose conditions in a cutting permit to protect the interests of Aboriginal people who may be carrying out traditional aboriginal activities or where, in the opinion of the district manager, the issuance of a cutting permit would result in an infringement of an Aboriginal right.

In addition to modifying the tenure agreements, the *Forest Act* allows Cabinet to designate certain areas as being off-limits to logging approvals for periods of up to 10 years, to buy time so that issues such as Aboriginal rights may be resolved.[83] These are called "Designated Areas." Once designated, the Minister of Forests and Range has the authority to "suspend in whole or in part or vary" any existing permits, licences or plans and to direct that no new ones be approved by agency staff. No compensation is payable by the Province for the first four years of tenure suspension or cancellation under these provisions.

From the viewpoint of Aboriginal title and rights, there is little or no difference between the types of infringements caused by forestry versus oil and gas developments that would justify a separate regulatory enclave for oil and gas. In terms of legal analysis, the rationale for changes to the *Forest Act* and forestry tenures necessitated by court decisions applies equally to oil and gas tenures.

Part 9 of the *Petroleum and Natural Gas Act* should be improved to better address Aboriginal rights and compensation issues in a manner similar to the *Forest Act.* A recent study by the Ministry of Environment has concluded that Boreal Caribou in northeast British Columbia are severely threatened, in large part by oil and gas development. The report concluded that without significant change in footprint management or deferring areas from oil and gas tenure sales the boreal caribou will be extirpated from all but one range.[84]

Provisions to allow tenure deferrals are no substitute for proper pre-tenure planning and assessment of environmental impacts, but they are a necessary tool that should be explicitly incorporated into oil and gas legislation, just as they are for forestry.

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http://www.empr.gov.bc.ca/Titles/OGTitles/SalesNotices/2010Notices/Pages/August2010Amendment%28Withdrawal%29.aspx

[82] Personal communication, Ministry of Energy, Mines and Petroleum Resources. August 20th 2010.

[83] *Forest Act*, R.S.B.C. 1996, c.157, Part 13.

[84] Projected Boreal Caribou Habitat Conditions and Range Populations for Future Management Options in British Columbia, Steven F. Wilson, EcoLogic Research; Chris Pasztor, Ecosystems Branch, Ministry of Environment, Sara Dickinson, Land Use Coordination Branch, Ministry of Energy, Mines and Petroleum Resources, 22 April 2010, Executive Summary.

7. Recommendations to improve the tenure process

7.1 Implications of a poor tenure process

The oil and gas tenure process in B.C. was designed in an era when the main issue was how to grant subsurface rights to stimulate the economy, jobs and reap the benefits of resource use. It has operated for many years with little public scrutiny, and in some areas developments have happened so quickly that the consequences and impacts appear surprising. In recent years the tenure system has been coming into conflict with communities, strongly held public environmental values and First Nations legal rights. Government is conflicted because it relies on the resource revenues from auctioning tenures, but at the same time is under pressure to respond to environmental and wildlife impacts.

The essential problem is that the current system is backwards. Instead of planning for and dealing with community, First Nations and environmental values up front, it advertises and awards tenures and then belatedly attempts to patch up the problems by weak legal means such as caveats and highly compromised measures designed to mitigate liability for, or industry displeasure with, limiting the rights government has already granted. The end result is that continued community concern will be bad for everyone — companies, government and the public.

Some of these issues include:

Limited or no social licence to operate. While regulatory approvals and requirements are a significant part of the process, it is rare for a company to gain broad acceptance, or social licence, for a major project, without meaningfully addressing community interest and concern in a project. There are many examples of companies experiencing challenges developing resource projects where community concern is significant. Some current examples in B.C. include the proposed Enbridge Northern Gateway pipeline project, which would run across northern B.C.; the proposed Prosperity Mine by Taseko, which would have turned a fish-bearing lake into a tailings lake and was fiercely opposed by affected First Nations; and the examples cited in Part 5 of this report.

Pushing development on a region, or operating without what is perceived as due process, can quickly polarize a community, raising suspicion and mistrust with proponents and splintering communities. Where community groups organize in response to proposals, it can have lasting implications for a company's profitability and ability to operate in a region, amplifying calls for regulatory reform and slowing future public and regulatory processes.

Potential cost to companies and investors. Companies attempting to develop projects while lacking a social licence to operate are exposed to real financial risk — both in terms of their balance sheet and in terms of their corporate reputation. Costs to the balance sheet include stranded capital and invested time and resources that ultimately yield no return on investment. For example, when a company yields to public pressure (either directly or indirectly) and withdraws development plans, as occurred with Outrider in the Bulkley Valley, company resources were expended on a project that ultimately didn't generate a profit. Similarly, in the case of Shell's exploration and development in the Klappan, a development moratorium was instituted after the fact, stranding investments and making development potential in the region highly uncertain.

Corporate issues include brand image and reputation, and in recent decades, corporate valuations have shifted from primarily tangible, financial value to a heavy weighting on the intangible, nonfinancial value of a company.[85] Companies that continue to promote projects that do not have social licence likely incur these soft costs.

Potential expense to taxpayers in the form of compensation. The issue of compensation has been examined elsewhere in the mining context, and is beyond the scope of this paper, but it is notable that in past, courts have held that mining companies are entitled to compensation where mineral tenures have been withdrawn, particularly for park creation.[86] In the event that a permanent solution is developed for the Sacred Headwaters and the situation remains unresolved, it is possible that in addition to seeking the return of its purchase price for the tenure, the company may also seek compensation for the loss of the ability to develop coalbed methane in the Sacred Headwaters.

7.2 Recommendations for tenure reform

The oil and gas tenure system in B.C. warrants review. There are an increasing number of situations where tenures are problematic, particularly in the areas of the province found in the case studies. Some of these issues also raise questions about whether tenures sold in northeast B.C. are truly meeting the needs of these communities.

If implemented, the following recommendations would go a long way toward strengthening the tenure system, and would ensure that environmental and social considerations are more adequately addressed in advance of tenures being sold. While these recommendations would strengthen the tenure system overall, it should be kept in mind that they may need to be adapted to be implemented in the context of landscapes that have already been impacted by oil and gas development, planning processes that may have already been undertaken and where tenures may already exist.

[85] Little, Arthur D., "The Business Case for Corporate Citizenship" 2002.

[86] Campbell, Karen. "Undermining our Future: How Mining's Privileged Access to Land Harms People and the Environment", West Coast Environmental Law, January, 2004, p. 25.

1. Pre-tenure planning processes should be instituted, including baseline studies and a formal community engagement process, before tenures are issued.

Pre-tenure planning should be required by legislation before tenures may be issued. Planning should incorporate baseline studies, impact assessment, species recovery planning and formal opportunities for engaging communities and First Nations in advance of tenures being sold. Baseline studies should include all environmental indicators including species, watersheds and waterways. A system should be developed whereby potential tenure holders would contribute to or pay for the costs of these studies as they would stand to benefit directly from access to resources in a particular area.

2. Region-wide cumulative effects assessments should be conducted.

Given that a tenure sale represents the beginning of a significant industrial impact to the landscape and waterways, cumulative effects assessments should be conducted in advance of any tenure sale occurring to better understand the existing impacts to the land base. This is particularly the case where tenures are being sold in areas where activity has previously occurred, or where multiple different tenures are awarded in the same area.

3. Environmental assessments should be conducted in advance of tenure sales.

Given that the impacts of oil and gas development are varied and potentially extensive, environmental assessments should be conducted of oil and gas development activities. Where cumulative impact assessments are conducted, this recommendation could be diminished to ensure no duplication, but some assessment of the environmental effects of these projects should be undertaken in advance of tenure sales.

4. Free, prior and informed consent for First Nations should be required.

Projects should not proceed without consulting First Nations in a meaningful way. Free, prior and informed consent is an emerging international standard and should be implemented before tenure sales are completed.

5. Caveats need to be legally effective and publicly available in advance.

The current caveat process is too weak and ineffective. Proper pre-tenure planning may replace the caveat process, particularly if coupled with explicit provisions for tenures to comply with pre-tenure plans (as in Muskwa-Kechika) and Oil and Gas Commission authority to deny certain operational approvals. If caveats are still considered to be a useful tool after these measures are taken, they should be legislatively supported and drafted in clearer, legally enforceable language. Caveats along the lines of those recommended for the Crowsnest coalfield should be standard practice.

6. Repeal Section 72(2)(b) of the *Petroleum and Natural Gas Act.*

Section 72(2)(b) authorizes Cabinet to grant oil and gas tenures outside of the public auction process on any terms it chooses. The competitive public bidding process should ensure that the public purse captures the full resource rents and does not amount to a discount or giveaway of public resources. This section does not operate to the long-term benefit of British Columbians.

7. Establish more effective tenure deferral areas, perhaps using the designated area provisions of the *Forest Act* as a model.

The current mechanisms for withdrawing areas from tenure disposition need to be more legally effective and supported, particularly where there are a number of outstanding First Nations issues, baseline research and impact assessment studies required before approving development activity. This could include improving upon Section 72 of the *Petroleum and Natural Gas Act* to make it more consistent with the designated areas provisions under the *Forest Act*, and establish explicit authority for the Minister of Energy and Oil and Gas Commission to withhold approval of operations until issues are satisfactorily resolved. There should also be explicit authority to cancel tenures in the public interest and specific provisions for compensation, as is done in the *Forest Act*.