FIRST NATIONS SUMMIT

November 23, 2006

Carol Jones, Chair
Kemess North Joint Review Panel
PO Box 8856
Victoria, BC
V8W 3Z1

Dear Ms. Jones,

Re: First Nations Summit Submission for the Kemess North Environmental Assessment Review Joint Panel

On behalf of the First Nations Summit, we provide this submission for the Panel's consideration and deliberations in the Kemess North Joint Review Panel process.

Yours sincerely,

FIRST NATIONS SUMMIT TASK GROUP

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First Nations Summit

Say "NO" to the Total Destruction of Amazay Lake

Submission to the Kemess North Joint Review Panel

November 23, 2006

Smithers, BC

First Nations Summit
1200 – 100 Park Royal South
West Vancouver BC V7T 1A2
www.fns.bc.ca

Contents

Amazay Lake

Executive Summary

(i) This fundamentally flawed review process is a collaboration between the federal and provincial governments and the mining proponent to:

- completely destroy Amazay Lake (also known as Duncan Lake) as a viable freshwater ecosystem by turning it into a mine waste disposal site;

- solely to for the sake of economic convenience, provide rationale to the mining proponent and its shareholders for their preferred option for mine waste management (and the only alternative presented);

- run roughshod over the First Nations peoples' constitutionally recognized and affirmed Aboriginal title and rights to Amazay Lake and the surrounding area, including downstream.

(ii) As a result of the predetermined positions of the senior officials within both governments supporting the proponent and the development of the mine and as a result of the closed door discussions and negotiations between the federal and provincial governments and the proponent, of which the Panel is aware of and to which it is a facilitating party, this environmental review process is fundamentally and totally flawed.

(iii) Based on the marginalization of the local First Nations and based on the recent Federal Court decision in *Dena Tha'*[1], and supported by various Supreme Court of Canada decisions, the Kemess North Review Panel should immediately halt its work until both the federal and provincial governments, in their roles as fiduciaries and in good faith, enter into discussions with the local First Nations to determine and develop an appropriate approach and process to address and safeguard their constitutionally recognized and affirmed Aboriginal title and rights to Amazay Lake and the surrounding area.

(iv) Based on the jurisprudence, and recent political Accords, it is imperative that the governments work collaboratively with First Nations to design new frameworks for consultation, accommodation, and shared decision-making, based on the recognition of Aboriginal title and rights, and treaty rights.

[1] *Dena Tha' First Nation* v. *Minister of Environment et al*. 2006 FC 1354.

A. Introduction

(1) The First Nations Summit is the representative organization of the majority of First Nations and Tribal Councils in BC and provides to address issues fundamental to treaty negotiations as well as other issues of common concern.

(2) The Kwadacha, Takla, and Tsay Keh Dene First Nations ("Tse Keh Nay") and the Gitxsan House of Nii Kyap, as part of the Gitxsan Nation (collectively the "First Nations"), have taken issue with both the Northgate Minerals' ("proponent") Kemess North Expansion Project ("Project') with respect to its implications on Aboriginal title, rights and interests, as well as with the environmental assessment review process. (The Tse Keh Nay are the three First Nations in whose traditional territory the lake is situated. They have Aboriginal rights and title to the immediate area around the lake and to the lake itself. The Gitxsan House of Nii Kyap also have expressed an interest in the area and to the lake due to their proximity to the lake).

(3) The First Nations Summit presents this submission to carry out its mandate under the Chiefs in Assembly Resolutions #0304.06 and #0604.09, whereby the First Nations Summit Chiefs:

- support the position and efforts of the Takla Lake First Nation and other First Nations to: a) prevent the dumping of acidic mine tailings into Amazay Lake (a.k.a. Duncan Lake), b) prevent the construction of a dam along Finlay River, and c) address their concerns around the Omenica-Stewart connector road,
- call on the BC Government and Northgate Exploration Ltd. both to meaningfully consult with and accommodate all affected First Nations with respect to all of their concerns about the opening of the Kemess North mine,
- call on the BC Government to convene such consultations with affected First Nations on a government-to-government basis,

- direct the Task Group to assist the First Nations to convene a meeting with federal and provincial ministers to discuss a process for meaningful consultation and accommodation regarding the proposed Kemess North Mine, and

- support the above First Nations' position that the provincial Environmental Assessment Office must halt the Kemess North Pre-Application phase and any other environmental assessments until First Nations are fully consulted and their interests are meaningfully accommodated.

(4) On May 19, 2005, the federal and provincial governments appointed a three-person review panel ("Panel") to examine aspects of the Project, including:

i. alternative means of carrying out the Project that are technically and economically feasible and the environmental effects of any such alternative means;

ii. the environmental impacts of the Project, including the environmental effects of malfunctions or accidents that may occur in connection with the Project and any cumulative environmental effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out, and the significance of those effects;

iii. economic, social, heritage and health effects;

iv. measures that are technically and economically feasible and that would mitigate any significant adverse environmental, economic, social, heritage or health effects of the Project, including such effects on First Nations;

(5) The agreement establishing the independent Panel is published on the Canadian Environmental Assessment Agency website: www.ceaa.gc.ca, Reference No. 04-07-3394. To our knowledge it is the first environmental assessment public panel review of a mine in B.C.'s history.[2]

(6) First Nations are not a party to the federal-provincial environmental assessment process, notwithstanding that First Nations have Aboriginal title and rights to the area in question, which title is a legal interest in the land and over which they have the collective right to make decisions.

[2] "Crisis Looming: The Permitting and Regulation of New Mining Projects" – MABC, March 2006

B. Crown's Honourable Duty to Consult

(7) The First Nations have consistently held that Amazay Lake and the surrounding area have economic, cultural, spiritual and traditional significance to them. It is a living and productive ecosystem within an area that has been traditionally used, and continues to be used, by the First Nations, in exercise of their Aboriginal rights, including Aboriginal title.

(8) Northgate intends to use Amazay Lake to store mine waste and the company is of the view that this is the best environmental option and the only economically feasible option. However, the company's and the governments' assessments and analysis diverge fundamentally from those of the First Nations.

(9) This situation is a matter of considering the local First Nations use and reliance on Amazay Lake and its surrounding lands and resources for present and future cultural uses, pursuant to their Aboriginal title and rights, against the profit-motivated interests of the company and far away shareholders who do not live in the area. The First Nations interests are to protect the lake as a living ecosystem, and their connection to it, against irreversible environmental impacts for future generations, while the company seeks to destroy it for economic interests.

(10) The First Nations have stated they do not oppose economic development, but they do oppose the destruction of the lake as proposed by the company and that there are no mitigating factors in destroying a lake. They seek proper and meaningful consultation by the Crown to ensure their legitimate, legal interests and concerns are respected. To date, the First Nations maintain that no such consultation has taken place; instead, they have been directed to the federal and provincial environmental assessment process.

(11) The Supreme Court of Canada in *Delgamuukw* held that Aboriginal title in BC has not been extinguished, it continues to exist and that it is a right to the land itself. The Court has further held that the governments must uphold the honour of the Crown and engage in meaningful processes of reconciliation with First Nations. An aspect of this is the Crown's duty to consult with First Nations. Both the federal and provincial governments must act honourably when they make decisions within their legislative spheres affecting First Nations Aboriginal title and rights. The Court held that Canada's Aboriginal people were here when Europeans came, and were never conquered. The duty arose when the Crown asserted sovereignty and, with this assertion, arose an obligation to treat Aboriginal people fairly and honourably and to protect them from exploitation.[3] When the Province joined Confederation in 1871, it acquired lands subject to the duty to consult and accommodate.[4]

(12) The purpose of the Crown's duty is to protect the land prior to the achievement of reconciliation – reconciliation is the purpose of s. 35 of the *Constitution Act, 1982,* which recognizes and affirms Aboriginal title and rights. Practically, the Court recognized that it is not acceptable if, when reconciliation is finally reached, Aboriginal peoples "find their land and resources changed and denuded."[5] Therefore, prior to reconciliation, the Crown is not entitled to use the resources as it pleases; and, "acting honourably, the Crown cannot cavalierly run roughshod over aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof."[6] While the Crown may continue to manage the resource, it would not be honourable for the Crown to unilaterally exploit the resource during the process of reconciliation.[7] The Courts

[3] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 at para 32 (hereinafter *Haida*).
[4] *Haida* at para 59.
[5] *Haida* at para 33.
[6] *Haida* at para 26.
[7] *Haida* at para 27.

have clarified that responsiveness is a key requirement of both consultation and accommodation.[8]

(13) The Court has provided the following guidance:

> the controlling question in all situations is what is required to maintain the honour of the Crown and to affect reconciliations between the Crown and aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and aboriginal interests in making decisions that may affect aboriginal claims.[9]

(14) The Court held that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s.35 of the *Constitution Act, 1982*, demands.[10]

(15) The First Nations affected by the proposed Project have provided more than enough evidence of their Aboriginal title and rights to trigger the Crown's duty to consult and accommodate. This evidence has been provided through a number of sources, including the treaty negotiation process and affidavits and documents prepared when the First Nations began (but were unable to complete) a legal challenge of the Kemess South mine. The First Nations have consistently declared that the Crown has not yet fulfilled its honourable duty to consult with them regarding any potential impacts to their Aboriginal title, rights and interests. They have raised concerns that the Crown has not been sufficiently responsive to the First Nations' requests to be consulted and fully included in the environmental

[8] *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)* 2004 SCC 74.
[9] *Haida*, para 45.
[10] *Haida*, paras 35, 38. See also *Dena Tha* v. *Minister of Environment et al.* 2006 FC 1354 at para 109.

review process. Instead, the Crown's actions to date have had the effect of marginalizing the First Nations' role in the review process, such that they have been relegated to the level of a third-party stakeholder, rather than holders of constitutional rights who are owed a duty of consultation by the Crown. The First Nations have repeatedly expressed the view that the Crown's actions could be interpreted as being both narrow and technical with respect to its honourable obligations to fully involve First Nations whose rights would be impacted by Kemess North.

(16) The First Nations are in the treaty negotiation process and the Crown has had knowledge of their interests generally, and in relation to the proposed project. In fact, in 1983, the federal government, after review of claims filed by the Carrier Sekani Tribal Council, concluded there was a legitimate claim and offered to negotiate. The Crown and the First Nations have not yet reached any reconciliation and the Crown has a continuing duty to consult with the First Nations when it contemplates making decisions that may affect them, as it the case with this project.

(17) In terms of public interests, this matter speaks to a broader public policy issue: will the mining industry be permitted to destroy lakes and other natural water bodies for mine waste? If this proposal is permitted to proceed, every citizen in BC and Canada should be concerned that it sets a precedent that puts at risk all lakes and waterways to this developing public policy to use lakes for mining waste. Recent proposed amendments to the federal *Metal Mining Effluent Regulations* allow fish-bearing lakes to be designated as tailings ponds. The amendments are contrary to earlier political commitments that this would not become a conventional approach to managing mine waste.

C. BC Treaty Negotiations, the *New Relationship*, and the *Transformative Change Accord*

(18) In 1993, Canada and British Columbia and a number of First Nations entered into the BC treaty negotiation process in order to reconcile the prior existing sovereignty of First Nations with the assertion of the sovereignty of the Crown through negotiations. It is imperative that the Crown conclude negotiations with the First Nations on matters relating to land use and, if this cannot be undertaken swiftly through a formal treaty, then it must be through other negotiated agreements. No treaties have yet been concluded though the First Nations continue to engage in negotiations with the Crown.

(19) In 2005, the First Nations Summit, as a member of the First Nations Leadership Council with the Union of BC Indian Chiefs and the BC Assembly of First Nations, agreed with the provincial government to a *New Relationship* with the following vision:

> We are all here to stay. **We agree to a new government-to-government relationship based on respect, recognition and accommodation of aboriginal title and rights.** Our shared vision includes respect for our respective laws and responsibilities. Through this new relationship, we commit to reconciliation of Aboriginal and Crown titles and jurisdictions.
>
> We agree to establish processes and institutions for shared decision-making about the land and resources and for revenue and benefit sharing, **recognizing, as has been determined in court decisions, that the right to aboriginal title "in its full form", including the inherent right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is constitutionally guaranteed by Section 35**. These inherent rights flow from First Nations' historical and sacred relationship with their territories.
>
> The historical Aboriginal-Crown relationship in British Columbia has given rise to the present socio-economic disparity between First Nations and other British Columbians. We agree to work together in this new relationship to achieve strong governments, social justice and economic self-sufficiency for First Nations which will be of benefit to all British Columbians and will lead to long-term economic viability. (emphasis added)

(20) The *New Relationship* forms a basis of the subsequent tripartite *Transformative Change Accord* signed on November 25, 2005 by First Nations of BC as represented by the First Nations Leadership Council, the Government of British Columbia and the Government of Canada. This agreement's opening passage acknowledged:

> The Government of British Columbia, First Nations and the Government of Canada agree that new approaches for addressing the rights and title interests of First Nations are required if First Nations are to be full partners in the success and opportunity of the province.

(21) The parties committed to "strengthening relations on a government-to-government basis" and formally endorsed *The New Relationship* document, which is described as "vision document setting out an initial work plan to move toward reconciliation of Aboriginal and Crown Titles and Jurisdictions with British Columbia." It stated the goal "of reconciling aboriginal rights and title with those of the Crown, and of establishing a new relationship based upon mutual respect and recognition." In that regard, subsequent "actions and processes" would be guided by these principles:

i. Recognition that aboriginal and treaty rights exist in British Columbia.

ii. Belief that negotiations are the chosen means for reconciling rights.

iii. Requirement that consultation and accommodation obligations are met and fulfilled.

iv. Ensure that First Nations engage in consultation and accommodation, and provide consent when required, freely and with full information.

v. Understanding that a new relationship must be based on mutual respect and responsibility.

(22) Prior to this was a long history of the Province of BC where the colonial governments denied the existence of Aboriginal title and rights and denied that the First inhabitants of this land did not live in organized societies or not occupy the lands. Government policies and practices have remained rooted in the doctrine of

denial. However, after the *New Relationship*, at the June 16, 2005 Cabinet Swearing-In Ceremony, Government House, Victoria, Premier Campbell underscored the Province's commitment to "forge new relationships with First Nations, founded on reconciliation, recognition and respect of Aboriginal rights and title…In every ministry and every sector we will foster new working partnerships with First Nations that will move us beyond the barriers of the past to new horizons of hope for every British Columbian." The New Relationship and Transformative Change Accord represent a political commitment to turn the page on the history of denial of Aboriginal title and rights in BC.

(23) To achieve its goals, the parties agreed to undertake immediate action to improve relationships, one of which was "supporting a tripartite negotiation forum to address issues having to do with the reconciliation of Aboriginal rights and title." An indicator of success in this area would see "concluded Treaties and other agreements." The First Nations impacted by this Project proposal have been seeking from BC and Canada an agreement to address the implications of this project proposal all along and still do. Therefore, we strongly urge the governments to revisit the rulings, values, principles, and commitments outlined above in order to effectively, meaningfully, and immediately reconcile the various interests of the parties involved in this case.

(24) These accords represent a political commitment to doing things differently. Specifically, the Parties agree to advance reconciliation on **the basis of respect, recognition and accommodation of Aboriginal title and rights.**

(25) The Kemess project is an example of the status quo, where the governments proceed to make decisions which impact First Nations' Aboriginal title and rights without ensuring that there are first meaningful consultations with the First Nations to address and accommodate their concerns. This must be done through honourable negotiations, not through unilateral actions of the governments. Continued unilateral actions of the government with regard to large-scale resource

developments alienate lands that are otherwise the subject of treaty negotiations with the First Nations and threaten the ways of life of the First Nations. If the project proceeds as proposed, and Amazay Lake is used for mine waste, the First Nations will be forced to live with new unknown risks and impacts. Not only will they no longer be able to exercise their Aboriginal rights and cultural use of the lake and the surrounding areas, but they will also be condemned to forever worry about seepage and run-off that would permanently contaminate a headwater watershed and potential for dam failure. This is not honourable and represents an impoverished view of consultation.

D. Environmental Assessment Processes – Not Adequate Consultation

(26) The federal and provincial environmental assessment processes are not the proper processes for determining and addressing potential impacts to Aboriginal title and rights and are.

(27) The governments' environmental assessment processes were originally designed to technically assess the environmental integrity of a proposed development project; they were not designed to fulfill the Crown's duty to consult with First Nations. As such, the processes are unable to meaningfully engage First Nations with regard to identifying potential impacts and determining appropriate accommodation measures, for reasons such as the following:

i. The processes engage First Nations late in the process, after a project has been deemed subject to review. This late engagement is contrary to the jurisprudence that requires the Crown to engage First Nations at the strategic planning level.[11]

ii. The processes ignore the fact that there have been past infringements of Aboriginal title and rights and the cumulative impacts of those infringements with new ones.

[11] See *Haida* at para 76 and *Dena Tha'* at paras 106-108.

iii. The processes allow First Nations to submit comments, but the governments interpret that input and summarize them into final reports. First Nations are not able to submit their own formal reports to be considered in their entirety in the final decision-making processes to issue tenures and other Crown authorizations.

iv. While the processes allow for First Nations to provide comments, there is no substantive consultation with the aim of ensuring avoidance or minimal impairment of Aboriginal title and rights and, working with First Nations to determine appropriate accommodation for the full range of anticipated impacts.

v. Insufficient funding is provided under the processes to enable First Nations to undertake comprehensive assessments of potential impacts and to prepare submissions in a timely manner.

(28) The recent case of *Dena Tha* illustrates that government processes, including the environmental assessment and regulatory processes, that do not engage First Nations early on, at the strategic planning levels, are at best legally tenuous, if not illegal. In that case, the court found that depriving the Dene Tha First Nation of the opportunity to be a participant at the outset, concerns specific to the Dene Tha were not incorporated into the environmental and regulatory process.[12] As such, it found the Crown had clearly not fulfilled the content of its duty to consult.[13]

(29) The issues arising in this particular review regarding First Nations interests serve to support First Nations across this province who are calling for the entire federal and provincial environmental assessment processes to be overhauled and updated to reflect the Crown's constitutional duty to consult with and accommodate First Nations. The current processes do not properly, or even adequately, involve First Nations and, as a result, they foster fear, mistrust and apprehension on the

[12] *Dena Tha'* at para 114.
[13] *Dena Tha'* at para 115.

part of First Nations. First Nations are often compelled to participate out of fear that their position will be undermined if they do not and, so, they participate under duress. The provincial environmental assessment and permitting processes need to be addressed, especially given there are 19 mining projects[14] at various stages in the province's environmental assessment process. As stated by the Court in *Mikisew*:

> Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving [First Nations] an opportunity to blow off steam before the Minister proceeds to do what [he or she] intended to do all along.[15]

(30) Further, the federal and provincial environmental assessment processes are inconsistent with one another and there is no streamlined consultation process undertaken by the governments or among their respective departments. For example, at the Prince George Kemess North Joint Panel Review hearings, the following government representatives provided various interpretations of the Crown's duty to consult with First Nations:

- Ministry of Tourism, Sports and Arts, responsible for the Archaeology Branch, has stated: "I don't believe there's an obligation to consult [First Nations] in determining the Archaeology Branch's satisfaction with a [proponent's] report prepared for it."

- BC Ministry of Energy, Mines and Petroleum Resources: "during the environmental assessment process, the requirements for consultation are managed through the environmental assessment process…the Ministry will consult in accordance with the consultation guidelines and policy during the permitting and other phases of the mine development process. For the purpose of providing the technical briefs and submissions, we don't feel it's necessary to consult at this particular point."

[14] BC EAO website, October 25, 2006
[15] *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)* 2005 SCC 69 at para 54.

- BC Ministry of Environment: "recognize and respect our obligation to consult with First Nations prior to undertaking decisions that may affect a First Nation community."

- Department of Fisheries and Oceans: "we recognize that DFO has an obligation to consult here. How that will play out at this phase, we're not sure, whether DFO would do that as part of a Crown initiative with other federal government departments. As this point, I'm not sure on how that will play out."

(31) Each of the government ministries and departments appear to have a different articulation of when consultation must occur with First Nations and they lack a consistent, clear approach. The court in *Dena Tha* found that lack of coordination contributed to the failure of the Ministers to fulfill their duty. The court also found that the so-called Crown Consultation Unit (CCU) unilaterally established by the federal government to coordinate consultation was nothing more than a group set up to arrange meetings. It was not a consulting body but, rather, for all intents a purposes, it was a mere "traffic cop". The court commented that "Despite its name, one thing it had not authority to do was consult – at least not with any native group as to its rights, interest or other issues in respect of the very matters of concern to the Dena Tha."[16] This resonates deeply with regard to the role of the BC Environmental Assessment Office and the Canadian Environmental Assessment Agency in Kemess North Review. Despite any best intentions of their representatives, they are merely traffic cops on a path that is currently not leading to meaningful consultation. The court in *Dena Tha'* also stated: "a striking feature of this present case is that while many government departments, agencies, entities and boards were involved, no one seemed to be in charge or at least responsible for consultation with First Nations. Clearly that was the case with Dene Tha. As a part of any remedy, it is necessary to fix some Minister or person with

[16] *Dena Tha'* at paras 39-41.

responsibility, whose actions are subject to accountability in meeting the duty to consult which has been breached.[17]

(32) Similar circumstances appear to exist in this situation, evidenced by a Tse Key Nay representative who, at the Prince George Kemess North Joint Review Panel hearings, expressed with some frustration: "we're faced continually with not even knowing the timing, the identity, and the particulars of the process of the so-called consultation that will take place, that we're assured that it will, so we're just asking for really basic information." In this particular process, the provincial ministries and federal departments clearly have different views of the nature and timing of their duty to consult; the federal departments have not even contemplated how they will consult, as illustrated by a Justice Canada representative who said at the same hearings: "the Crown is aware of its legal obligations with respect to First Nations with regard to regulatory decisions that it needs to make, and of course it will be attempting to develop a consultation process that allows for that to take place. We're just not at that point yet where there's been a finalization of what that is…" This is the situation despite repeated attempts by the First Nations Leadership Council to engage the federal government to implement various Supreme Court of Canada decisions, including *Delgamuukw, Haida and Taku*.

(33) The Courts have held that the governments must engage First Nations early on, at the strategic planning stages, as decisions made at those stages that will impact on Aboriginal title and rights. In *Dena Tha'*, the court held that the development of the environmental assessment and regulatory processes to be followed regarding the review of the Mackenzie Gas Pipeline project constituted strategic planning that the Dena Tha' ought to have been consulted on. As a result, the court found that the federal ministers in that case failed to consult and meet their duty.

[17] *Dena Tha';* at paras 127-8.

(34) The parties to the *New Relationship* and *Transformative Change Accord* have committed to developing a new framework for consultation and accommodation, based on the recognition of Aboriginal title and rights. The First Nations Leadership Council has identified that a necessary component of this will be to address the environmental assessment process, which is currently a significant legislative and policy obstacle to meaningful consultation and must be amended to be recognition-based and include a decision-making role for First Nations. Given these political commitments, and the Crown's legal obligations, the governments must halt the environmental assessment processes for Kemess North and establish a meaningful consultation process with the First Nations to ensure their interests and concerns are substantively identified and addressed.

E. A Tainted Review Process Is No Process At All

(35) In January 2004, the provincial Minister of State for Mines, Pat Bell, claimed publicly that using Amazay Lake as a tailings dump was "definitely the logical choice."[18] Two months later, the provincial Minister Responsible for Energy, Mines and Petroleum Resources, Richard Neufeld, met with the DFO in Ottawa and lobbied for the Project's approval during a "two hour" meeting.[19] **For First Nations, these two events damaged the integrity of the pending review process**. It is clear the decisions about the mine have been made and this review process just becomes window dressing, particularly given that the Panel's final recommendation will be forwarded to the provincial government for final consideration and decision. First Nations are left without any confidence that they would receive fair and just treatment during the review process.

(36) Another significant issue which affects the integrity of the review process is the fact that the First Nations do not have proper financial resources to become full and meaningful participants in the process. Instead, they have been offered insufficient

[18] "Kemess runs into fight over dump site in lake for proposed new mine" – Prince George Citizen, January 17, 2004
[19] "Minister pitches mine plan" – Prince George Citizen, March 17, 2004

resources by the regulators of the process[20] and have had to contend with unilateral declarations by ministers as to what will constitute their meaningful involvement, evident by the statement by Minister Abbott:

> ...the panel review process as defined in the draft Panel Agreement and my section 14 order, and further consultations that may be carried after the panel review, and during any future permitting and project monitoring, will meet the provincial Crown's legal obligations, as they would be applied in the context of this Project.[21]

(37) There were also statements made by the regulators on whether the review was going to examine one or two waste disposal methods. In a letter to the First Nations on May 16, 2005 Anne Currie, Project Assessment Director, BCEAO, and Susan Toller, Project Manager, CEAA, wrote:

> During the panel review, First Nations will have an opportunity to express their views on Northgate Minerals Corporation's (Northgate) assessment of alternatives for waste rock and tailings storage, including Northgate's preferred option to use Duncan Lake for waste rock and tailings disposal.[22]

(38) We understand that this was confirmed in the May 19, 2005 version of the agreement to establish the review panel, where the associated project description suggests that more than one waste disposal method will be considered. While these assurances were made, it nevertheless appears that this is not the case. In a December 13, 2004 letter from Northgate's CEO, Ken Stowe, to the Canadian Environmental Assessment Agency, he said that the lake was the "only feasible alternative for the project." Therefore, the company would "not enter into a costly permitting process in which one of the options being considered is something that Northgate would never agree to build." He confirmed: "the project description should clearly lay out the single alternative being put forward by Northgate, that

[20] Letter to Scott Streiner, CEAA, and Joan Hesketh, BCEAO, from 3 Nations, February 16, 2006 (CEAA Public Registry)
[21] Letter to 4 Nations from Minister Abbott, May 4, 2005 (CEAA Public Registry)
[22] Letter to 4 Nations from Anne Currie, BCEAO, and Susan Toller, CEAA, May 16 2005 (CEAA Public Registry)

being disposal of waste rock and tailings material in Duncan Lake."[23] It seems clear that Northgate will not discuss alternatives to using Amazay Lake for its disposal option. First Nations cannot review and assess alternatives if no meaningful alternatives are presented for consideration.

(39) It is unclear why the regulators would attempt to mislead the First Nations by indicating that there would be more than one genuine waste disposal option in which to "express their views on." In previous dealings with the company, it became increasingly clear to First Nations that there was really only one waste disposal option on the table and Northgate's letter confirmed this.

(40) Another questionable issue hangs over this review that affects the integrity of the process. Earlier this year, DFO, after consulting with environmental groups only, proposed to amend the *Metal Mining Effluent Regulations*. As part of the amendments, the department intends to unduly utilize Schedule 2 of the regulations to have a fish-bearing lake in Newfoundland designated as a tailings pond. Since the proposed amendments contemplated would adversely affect First Nations interests through upstream changes in the regulations, both the First Nations Leadership Council and our office sent letters to the federal government requesting that it not proceed with the amendments as it had not consulted with First Nations. However, we learned on October 24, 2006 that the federal government ratified those amendments. This raises huge concerns about the federal Crown's failure to fulfill its honourable duty to consult with First Nations regarding this significant amendment and is a very problematic on it own. In regard to Amazay Lake, the question is: How could DFO negotiate and conclude, behind closed doors, that a compensation plan for Amazay Lake was possible when at that time there was no viable means to legitimize or authorize it becoming a tailings pond? It is clear that the amendments and the destruction of Amazay Lake

[23] Letter to CEAA, from Northgate Minerals, CEO, Ken Stowe, December 13, 2004 (CEAA Public Registry)

are, in the eyes of DFO, a *fait accompli* and that the government has been implementing an unstructured decision-making process.

(41) Given the foregoing, the First Nations have deep misgivings about engaging in this review process. The integrity of the process is called into question around the Panel's engagement through secret negotiations between the federal and provincial governments and the proponent about compensation measures for the destruction of a lake. It is essentially a "hollow" process. This approach fails to fulfill the Crown's duty to honorably deal with First Nations and to consult with them and accommodate their interests.

(42) While we recognize that the Panel does not have the expertise or authority to determine whether the Crown (federal or provincial) has fulfilled its obligations, we would nevertheless, welcome an acknowledgment from the Panel that the Crown owes the First Nations meaningful and timely consultation and that the Panel itself does not make a recommendation that would contemplate adversely impacting First Nations Aboriginal rights, title and interests by providing the Crown decision makers with the rationale to approve the destruction of Amazay Lake.

F. DFO 'No Net Loss' Policy is Inadequate to Protect Aboriginal Rights

(43) The Panel's *Information Adequacy Determination Document* (June 30, 2006), requested from the proponent more information and analysis on "compensation measures" to address the loss of fish habitat for Amazay Lake consistent with the No Net Loss policy as per the Department of Fisheries and Oceans' (DFO) *Policy for the Management of Fish Habitat*. The Panel also sought clarification on the interpretation of that policy from DFO itself:

> It will be helpful for DFO to clarify its habitat compensation policies as they relate to fish transplants, so that the Panel will have a good understanding of the extent to which the proposed transplants are deemed to contribute to satisfying DFO's "No Net Loss" policy.

(44) The proponent replied in a July 28, 2006 letter to the Panel that it was working toward "finalization of an agreement with DFO on an acceptable Fish Compensation proposal."[24]

(45) In a July 24 letter to the Panel, Paul Sprout, Regional Director General, Pacific Region, DFO, provided the requested clarification, elaborating on habitat compensation and fish transplant targets under the department's *No Net Loss* policy. Sprout indicated discussions with the proponent on June 28th factored into the "departmental position with respect to habitat compensation for the Kemess North Mine Project."[25]

(46) It appears that DFO came to its conclusion on a Fish Compensation Plan based on discussions with the proponent prior to and on June 28th, despite the fact that the Panel had not yet issued its report on the adequacy of the proponent's information. This raises a number of questions and concerns:

i. DFO recognized early in the process that the proponent's proposal to turn Amazay Lake into a Tailings Impoundment Area would mean that the "loss of lake habitat and the fisheries resources dependent on this habitat would constitute a "catastrophic" event under any definition."[26]

ii. DFO defined the lake as "an entire ecosystem and so can not be compensated in a piece meal fashion. DFO is not aware of a technically feasible way to effectively compensate for Duncan Lake. There is a high risk that Duncan Lake can not be used for mine waste storage."[27]

iii. Given that DFO knew transforming Amazay Lake into a waste dump would entail losing an entire ecosystem, it must have known that this would significantly impact the interests of the First Nations, in particular it would: 1)

[24] Letter to Carol Jones from Peter MacPhail, July 28, 2006 (CEAA Public Registry)
[25] Letter to Kemees North Copper Gold Mine Project Joint Panel Review from Paul Sprout, Regional Director General, Pacific Region, Fisheries and Oceans Canada, July 24, 2006
[26] EAO Kemess North Project Meeting, April 23, 2004, Final Notes
[27] Kemess North Project Waste Management Options Workshop, January 12-13, 2004, Final Meeting Notes

effectively extinguish their Aboriginal right to fish that lake; 2) it would effectively extinguish their Aboriginal right to hunt and gather in and around that particular watershed; 3) it would diminish the value of the lake and the surrounding lands and resources; and 4) it would have significant impacts on other interests to the same area, for instance, spiritual, heritage, and economic development opportunities (e.g. eco-tourism).

iv. In this particular case, the Crown, as represented by DFO, made decisions which will adversely affect the First Nations' rights. In our estimation it went further than that when it decided it was "**confident**" it could work with the proponent on a plan that would ultimately have "catastrophic" consequences for the Amazay Lake ecosystem. It appears DFO has already made its determination in advance of any consultation with the First Nations; therefore, in our opinion it has already pre-judged and prejudiced the outcome of those talks.

v. From the First Nations stewardship perspective, DFO's *No Net Loss* policy is an inappropriate and ineffective approach to fisheries management. It fails to meet the Crown's obligations to First Nations in that:

a) Administrators of the *Policy for the Management of Fish Habitat*, from which *No Net Loss* is derived, exercise discretionary powers through an interpretative planning exercise in conjunction with a project proponent. At no point in this process are First Nations involved in the planning even though decisions would have a profound impact on their interests, and

b) The Crown's 1986 *Policy for the Management of Fish Habitat* stems from a time when government did not allow First Nations to provide input on pending legislation and policy amendments. This is inconsistent with the constitutional recognition and affirmation of Aboriginal rights, including title, and with recent Court rulings which provide that input on upstream regulations should be sought from First Nations through meaningful

consultations. Moreover, decisions or conduct contemplated by the federal and provincial governments, including their implementation, which may adversely affect Aboriginal rights and title, including treaty rights, must now conform to the following standard:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies.[28]

vi. The First Nations are equally concerned that DFO is taking an opposite position on Amazay Lake from that of Fish Lake, a lake located in the central BC that is also threatened by mining development. This is creating inconsistencies in the Department's approach:

a) In 1997, DFO Minister Mifflin wrote BC Environment Minister McGregor and said that the department's participation in a joint review of Taseko Mines' Prosperity mine was "dependent on there being the potential to preserve Fish Lake" and its fish habitat. [29]

b) In 1998, DFO Minister Anderson wrote Taseko Mines to reiterate that from the earliest stages of the department's involvement in the review of the proposed project it has "expressed concerns about the potential impacts to fish and fish habitat that may result from the development as originally proposed."[30]

c) In 2000, DFO Minister Dhaliwal wrote Taseko Mines to remind the company of its original position, that "DFO remains committed to

[28] *Mikisew* at para 1.
[29] Letter from DFO Minister Mifflin to BC Environment Minister McGregor, June 6, 1997
[30] Letter from DFO Minister Anderson to Bruce Jenkins, Taseko Mines, January 13, 1998

> preserving much or all of Fish Lake." He elaborated that this position was "consistent with the *Policy for the Management of Fish Habitat* (1986) and the existing *Habitat Conservation and Protection Guidelines* that are used to guide DFO staff in administering the habitat provisions of the Fisheries Act."[31]

(47) In each instance, the Ministers stressed there was need for the company to consider other options apart from destroying lakes. This raises questions and concerns regarding Amazay Lake. DFO appears to be changing its principles and direction from one which negatively regards potential impacts to Fish Lake to being "confident" the impacts to Amazay Lake can be compensated for. In both cases, the proposed mining development would have significant, irreversible and destructive impacts to the lakes; yet, DFO is reaching different conclusions and being inconsistent in its approach to these situations. Of course this only adds to further mistrust of government regulatory and decision-making processes.

G. Mountain Pine Beetle – Implications for Land Stewardship Planning

(48) The mountain pine beetle epidemic currently devastating the pine forests of First Nations in BC will have equally devastating consequences to their peoples' unique standard of living due to loss of the critical habitats that continue to provide them traditional foods, medicines and ways of life. Over the longer term, the loss of economic activity resulting from the fall-down in the Annual Cut will also affect these First Nations. The epidemic will bring immeasurable consequences upon First Nations' physical, cultural, spiritual and psychological well-being when the landscapes where they have lived for millennia are simultaneously altered by clear-cuts, fire, or dead-graying forests.

[31] Letter from DFO Minister Dhaliwal to Bruce Jenkins, Taseko Mines, June 20, 2000

(49) The parties to the *New Relationship* (First Nations in BC and the Government of British Columbia) commit to establish processes and institutions for shared decision-making about the land and resources and for revenue and benefit sharing, recognizing, as has been determined in court decisions, that the right to aboriginal title "in its full form", including the inherent right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is constitutionally guaranteed by Section 35. These inherent rights flow from First Nations' historical and sacred relationship with their territories.

(50) As a result of this vision the Carrier Sekani Tribal Council and First Nations Leadership Council, with the support of the provincial government, hosted an emergency forum in Prince George, September 19 and 20, 2005, to deal the issues arising from the mountain pine beetle epidemic. First Nations leaders from over 75 Bands and organizations attended. The result from this forum was the BC First Nations Mountain Pine Beetle Action Plan.

(51) In that plan First Nations joined voices and affirmed they are "inextricably linked in spirit and culture to our sacred lands and to which we have inescapable legal and economic interest." They recognized that the mountain pine beetle "emergency creates multi-faceted challenges for us to address forest management issues and to develop forest based economies over the short and long-term." The delegates further recognized that "this epidemic will pose a major threat to the future well-being of our communities and will affect all First Nations-Crown negotiations and other processes underway or those proposed that are intended to give substance to our Aboriginal Title and Rights." Therefore, the delegates responded with this key objective:

> Given this time of crisis and the ever-increasing need to establish sustainable forest management practices, measures must be implemented immediately to facilitate joint action with all other affected parties – federal and provincial governments, municipalities, industry, and other relevant bodies – so that the

broad challenges associated with the epidemic's destructive impact on the forest ecology can be met head on.

(52) First Nations are meeting this epidemic's impacts with respect to increased pressure on the land with their political will to engage in joint land stewardship planning with the provincial government. First Nations were generally not involved in the provincial government's initial land use planning process and their subsequent outcomes for a number of reasons. However, with some funding, First Nations have started to prepare themselves to participate in land stewardship planning activities. It is expected that this joint planning process will incorporate First Nations' traditional and present relationship to the land and resources into current land stewardship plans and those ones that need to be re-vamped because of the epidemic.

(53) The Panel has asked provincial representatives if the proposed Kemess North mine is consistent with the Mackenzie LRMP. Anne Currie, of the provincial Environmental Assessment Office, has provided an undertaking to provide this information.[32] However, the real issue is that the First Nations were not meaningfully involved in the LRMP process. The LRMPs in the area need to be replaced with shared stewardship plans of the First Nations and government.

(54) With regard to mining generally and the Kemess North Project, it would be presumptuous of anyone group to proclaim, in advance of a completed land stewardship planning process between First Nations and the Province, that wholesale mining is the way to go to off-set the economic impacts of the mountain pine beetle epidemic. First Nations have obvious and legitimate concerns about mining and their efforts to engage in shared planning with the Province under the *New Relationship* must not be undermined by major developments, such as mining, which pose significant adverse impacts to the First Nations' Aboriginal title and rights. These concerns cannot be cavalierly swept aside in a rush for an economic fix. That being said, First Nations are not as a matter of principle against mining

[32] Joint Review Panel Transcript, Prince George, November 3, 2006 at p.20 (CEAA Website)

either. Therefore, it is important to maintain a similar case-by-case examination of each project, lest costly and irreparable mistakes become the burden of future generations.

(55) Presently, activity due to the uplift in the annual allowable cut stemming from the mountain pine beetle epidemic is creating a boom in forestry. This rush is expected to last approximately a decade as the provincial government, industry and some participating First Nations make arrangements to harvest the economically valuable stands before they deteriorate. In the context of the Kemess North Project, because this boom is expected run concurrent to most of the expected life of that mine, the Panel should not view it as a panacea to the anticipated fall-down in the forestry sector as some individuals have suggested. Rather, another more timely and favourable mine project will in all likelihood fill that need by then.

H. Northgate to 'Forge Ahead' Against Own Philosophy

(56) The Crown has yet to fulfill its duty to consult with, and accommodate, the First Nations with respect to potential impacts of the proposed project on their Aboriginal title, rights and interests. Until the Crown has fulfilled this duty in a manner that upholds the honour of the Crown, any permits issued to the proponent will be legally tenuous and subject to challenge.

(57) Similar to the concerns regarding the veracity of the Crown's intentions leading up to the review process, and the decisions of its regulators, the First Nations are also unclear about the intentions of Northgate Minerals Corporation. In 2004, Ken Stowe, CEO, said at a Prince George Chamber of Commerce meeting that the Project would not go ahead with the project, as proposed, without First Nations support:

> **We told the First Nations we won't do this project unless they support it**. We're not going to be doing it over their objections, I think, for a couple of reasons. For one, it's what we truly believe. It's our philosophy. And second, the

> time-line would never work by having lots of vocal opposition.[33] (emphasis added)

(58) At that time, First Nations were attempting to negotiate a protocol with the company that would guide consultation between the two parties. However, those negotiations slowed when the company insisted on defining the project in terms that made it quite clear Amazay lake was the only option for tailings impoundment. Meanwhile, the company was intimating to environmental assessment regulators that it had the support of First Nations to continue to pursue the lake as an option. Once First Nations were made aware of this at a November 2004 meeting with those same regulators, they felt compelled to clarify their position to Mr. Stowe on what they thought constituted acceptable sustainable development. In that letter they wrote:

> The 5 Nations have made a final decision to oppose the use of Duncan/Amazay Lake as a site for mine tailings and waste rock because of the enormous and irreversible damage it will cause to the lake and surrounding environment. The use of this lake as a waste area for proposed Kemess North mining project was unanimously rejected. This decision was directed by the Chiefs and grassroots membership.[34]

(59) In spite of the explicit rejection given to it by the First Nations, and representations made that it would not proceed against the objections of First Nations, Northgate has nevertheless pursued its application vigorously. Further, the company's stance has taken on a resolute tone, evident by Operations Vice-President Peter McPhail's recent public comment where he stated that the company will "absolutely forge ahead" should the Panel rule in its favour.[35] How can anyone

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[33] "Mine plan needs support from First Nations: CEO" - Prince George Citizen, October 21, 2004. We think Mr. Stowe is referring to a July 30, 2004, meeting in Prince George, when a delegation from Northgate Minerals came from Toronto to meet with Elders and Chiefs to discuss the lack of dialogue between the company and First Nations. Ken Stowe and Peter MacPhail of Northgate Minerals were present. At this meeting Mr. Stowe said: "I am not here for legal reasons and we will not have a legal fight over this project. If someone tells us to stop this project, we will" and "If we can't do this project cooperatively, we won't."

[34] Letter to Ken Stowe, CEO, Northgate Minerals, from Justa Monk, 5 Nations Spokesperson, November 9, 2004

[35] "Debate surfaces over fate of lake" – Prince George Free Press, October 6, 2006

trust a company president who says one thing to First Nation leaders and proceeds down the opposite path?

(60) The company's approach in pursuit of its project has always been and remains an all-out full court press[36] on government officials, the environmental assessment agencies, the review Panel, the workers and contractors, the public, and the First Nations. They repeatedly emphasize that the existing Kemess South deposit will run out of recoverable minerals by 2009 and, so, the Kemess North Mine project must proceed.

I. Conclusion – Say No to the Destruction of Amazay Lake

(61) The First Nations are faced with an affront to, and effective extinguishment of, their Aboriginal title, rights and interests. As they have said on many occasions with respect to development, they are not opposed to the Project outright. However, they are opposed to:

i. Being disrespected in their own homeland;

ii. Not being recognized as a government with Aboriginal title to their own homeland and being pressured into a marginal role in a tainted review process that could realistically result in the approval of irrevocable damage to their land;

iii. Having yet another situation where their Aboriginal title, rights and interests and future compromised in favour of approving larger profits for one company and increased revenues to the provincial government derived from First Nations' lands and resources;

[36] For example, see Northgate's letter from CEO, Ken Stowe, to the Panel, April 25, 2006

iv. Having their historic, cultural, spiritual and sacred connections to Amazay Lake and the surrounding lands and resources desecrated and utterly destroyed; and

v. The Crown not fulfilling its legal duty to consult by providing a distinct and fair process that ensures the First Nations have the opportunity of meaningful engagement to identify their interests and concerns and to identify appropriate accommodation measures.

(62) It is incumbent on the part of the federal and provincial governments, in light of their constitutional obligation to consult and accommodate and their political commitments to a new relationship based on the respect, recognition and accommodation of Aboriginal title and rights, to halt this particular review process and establish and implement a meaningful consultation process with the First Nations. As it stands now, this review process is essentially being conducted solely for the benefit of the proponent and the government and is not being conducted in a manner that ensures the First Nations concerns and interests will be meaningfully responded to. This situation has come about because both governments have been unwilling to work with the First Nations from the very outset in order to determine acceptable procedures for the review process. Because of the Crown's haste to expedite the review process, it failed to fulfill its duty to consult with the First Nations. Steps must be taken to rectify this immediately and to negotiate and implement an appropriate process with the First Nations.

J. Recommendations

(63) We recommend:

- **That, pending the federal and provincial governments fulfilling their duty to consult with and accommodate the First Nations, this review process be halted; and**
- **In the alternative, this review process recommend the destruction of Amazay Lake is not an acceptable public policy to support the short-term economic conveniences of a mining company and its shareholders.**

/Encl.

A. First Nations Summit Resolutions #0304.06 and #0604.09

B. The *New Relationship*

C. The *Transformative Change Accord*

D. *Premier Gordon Campbell Swearing-In Ceremony for new B.C. Cabinet, Government House, Victoria, BC June 16, 2005*

E. References