

Internet Case Study #18:

The Tulsequah Chief Court Decision

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(The following is based on a court hearing and legal decision. We are not lawyers, so the following should not be taken as a legal opinion or interpretation, but just our understanding of the outcome. We are interested in such non-technical issues in mining as a change from our typical technical focus.)

The Tulsequah Chief Minesite is located in the Canadian Province of British Columbia and is a polymetallic underground mine that operated under Cominco in the 1950's. Redfern Resources purchased the property in the early 1990's, conducted exploratory work, and decided to reopen the mine.

Since the mine closed in 1957, there has been ARD (acid rock drainage) flowing from the underground workings and waste rock. A Pollution Abatement Order was issued by the government in the late 1980's, but was suspended because Redfern Resources intended to reopen the mine and assume responsibility for controlling and treating the ARD.

Through the mid-1990's, the application for a Mine Certificate (the first step in opening a mine in British Columbia), the corresponding environmental and engineering studies, and the formal Project Report underwent several years of review, requests for additional work, and revisions. The Project Report was formally accepted for review in the late 1990's by the Project Committee which consisted of government staff, local people, and First Nations. Under the mine-review process, formal acceptance for review meant there were formal time lines for the final review and decision. Deadlines were, however, missed, but eventually a decision was made to government ministers to issue a Mine Certificate.

The local First Nation (Taku River Tlingat First Nation) appealed the decision to the Supreme Court of British Columbia. The judge, Madam Justice Kirkpatrick, decided in 2000 that the Mine Certificate was withdrawn because of problems during the final review and approval. Here is a summary of the reasoning.

The provincial government ministers have the power to agree or disagree with the recommendation of a Project Committee, but the ministers apparently based on their decision primarily on the recommendation of the Tulsequah Chief Project Committee. Because of this, any fault in the Committee's actions could lead to an incorrect decision by a minister. For example, if the procedures used by the Committee could be shown to be unreasonable, then a minister's decision could also be unreasonable. The Tlingat were able to demonstrate several procedures were

unreasonable.

For example, the provincial government's Environmental Assessment Office (EAO), as part of a Project Committee, must consider the issue of sustainability in a Project Review. In this case, sustainability of the local Tlingat people is closely tied to land use. Because the Tlingat did not yet have a treaty or regional land-use plan, there was no way to assess the effect of the mine road on the Tlingat. In fact, the Committee's report apparently did not even mention sustainability. Therefore, the court concluded that the Committee and the EAO failed in one of its duties. The court suspected that there may be some ambiguous, unexplained way to consider Tlingat sustainability without a treaty, but could not elucidate further.

Although the concerns of the Tlingat had been expressed many times and Redfern Resources did more work to address them, the Tlingat were not pleased with the additional work. The Tlingat were also not satisfied that the Project Committee properly emphasized each of their concerns. However, the majority of the Committee felt it was not required to do so, since its job was to determine that all significant impacts had been identified and addressed to the majority's satisfaction. The court disagreed, and said all Tlingat's concerns would have to be addressed and resolved to their satisfaction, and documented in detail, even if this exceeded the time line mandated by provincial legislation. This was not done. As a result, the Committee's termination of the reportedly fruitless discussions with the Tlingat, and the rush to the recommendation to issue a Mine Certificate, were unacceptable to the court. This meant that the ministers did not have full information on all substantial concerns of the Tlingat on which to make a proper decision about the project.

As a result, the Mine Certificate was withdrawn. There is now an appeal by the provincial government and Redfern Resources before the court.

Reference

2000 BCSC 1001 Citation: Taku River Tlingit et al.

V Ringstad et al. Date: 20000628

2000 BCSC 1001 Docket No.: A990300

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE TAKU RIVER TLINGIT FIRST NATION AND MELVIN JACK, ON BEHALF OF HIMSELF

AND ALL OTHER MEMBERS OF THE TAKU RIVER TLINGIT FIRST NATION

PETITIONERS

AND:

NORM RINGSTAD, IN HIS CAPACITY AS THE PROJECT ASSESSMENT DIRECTOR FOR THE

TULSEQUAH CHIEF MINE PROJECT, SHEILA WYNN, IN HER CAPACITY AS THE

EXECUTIVE DIRECTOR, ENVIRONMENTAL ASSESSMENT OFFICE, THE MINISTER OF

ENVIRONMENT, LANDS AND PARKS AND THE MINISTER OF ENERGY AND MINES

AND MINISTER RESPONSIBLE FOR NORTHERN DEVELOPMENT

AND REDFERN RESOURCES LTD.

RESPONDENTS

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE KIRKPATRICK

(IN CHAMBERS)