More Than the Sum of Our Parks

People, Places and a Protected Areas System for British Columbia

December 1997

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420, 1122 Mainland Street
Vancouver, BC
Canada V6B 5L1
Tel: 604 682.4141
Fax: 604 682.1944
e-mail: info@ecotrustcan.org
www.ecotrustcan.org

Ecotrust
1200 NW Naito Parkway
Suite 470
Portland, OR
USA 97209
Tel: 503 227.6225
Fax: 503 222.1517
e-mail: info@ecotrust.org

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Foreword

BY IAN GILL AND ERIN KELLOGG

What place do people have in parks? This question has remained at the centre of debate in British Columbia in recent years. Visits to B.C.'s parks are rapidly increasing, while park staff and the amount of time they spend in provincial parks is decreasing at an equal or greater rate. Originally created for the "use and enjoyment" of British Columbians, provincial parks have become an important means of protecting the fabric of life in the region. To avoid the problems besetting areas like Banff National Park, which has seen $500 million of commercial development in the park since 1992,[1] conservationists have sought to protect places apart from people. As more remote areas are set aside, though, we are coming to understand that not even the farthest reaches of the province are truly separate from people: First Nations have or have had some connection to virtually every corner of British Columbia's land and seascape. From Vancouver to the Cassiar, First Nations are prompting all of us to reevaluate our notions of "pristine" and "wilderness" and the policy and legal frameworks we use to "set them aside."

In the course of our work, we have had many opportunities to witness this first-hand, the most significant being when Ecotrust Canada and Ecotrust worked closely with the Haisla Nation to protect what is possibly the largest coastal temperate rain forest watershed in the world – the Kitlope ecosystem, known to the Haisla as Huchsduwachsdu. On August 16, 1994, B.C. Premier Mike Harcourt and leaders of the Haisla Nation announced the permanent protection of this portion of Haisla territory: 317,291 hectares of the Kitlope Valley.

Although they were committed to full protection of Huchsduwachsdu, the Haisla did not agree to having the Kitlope declared a park. It took a further 18 months until the Haisla Nation and the province finalized an agreement concerning designation and joint management of the area, declaring the Huchsduwachsdu Nuyem Jees (Kitlope Heritage Conservancy) Protected Area. The Haisla Nation had many legitimate grounds for resisting designation of Huchsduwachsdu under the *Park Act*. As we worked with the Haisla Nation, we learned more about other First Nations who shared their concerns regarding protected areas legislation in British Columbia. When we began exploring ways to address these concerns, we also realized that many others were beginning to advocate changes to the protected areas system, including the legislative framework, to meet new demands for safeguarding B.C.'s land and seascape and people's connection to it.

It is Ecotrust Canada and Ecotrust's intention that this report provide a platform for discussion for a target audience of policy-makers, First Nations, conservationists and others concerned with the future of protected areas in British Columbia. Existing protected areas legislation is not up to the task of addressing society's new demands for protected areas or First Nations' rights and interests. Revisions on the scale we are proposing require much more work, and a much broader collaborative effort on the part of many organizations and individuals across the province. In that spirit, we offer the following analysis and recommendations as a starting point for this discussion.

[1] Senate of Canada Committee on Energy, the Environment and Natural Resources, *Protecting Places and People: Conserving Canada's Natural Heritage* (February 1996).

I. Introduction

Protected areas are at a crossroads in British Columbia. By many standards, British Columbia has one of the most progressive and ambitious protected areas systems in the world. It ranks close to the top of the list for percentage of the landbase in strict protection worldwide, and, in Canada, only Alberta comes close to its record. In 1991, the British Columbia government made a commitment to protect 12 percent of the province's landbase by the year 2000.[2] To date, the total land protected in British Columbia has increased from 6 percent in 1991 to 8.6 percent in 1997 and includes 645 provincial parks, ecological reserves and recreation areas.[3] In addition to creating new protected areas under the *Park Act*, British Columbia recently upgraded the legal designation of many areas to ensure they are protected from industrial development. The government also increased the penalties for violations of the *Park Act*.

Despite rapid and significant gains in both the size and number of protected areas, there is room for improvement in B.C.'s protected areas system. The government's enthusiasm for park-making has outstripped the capacity of existing provincial legislation and management systems to meet the myriad demands placed upon it. Many of today's protected areas are much larger than in the past; there are important questions about the protection of natural areas and the possible prejudice to aboriginal rights; there is a higher public expectation of a local community role in how these areas are designated and managed; and there is an evolving understanding of the primary purpose of protected areas and of what activities are appropriate in and around them. At the same time that public expectations have increased, government funding and support to ensure the proper stewardship of these areas have fallen. Park visitation burgeoned by 67 percent between 1985 and 1995, while BC Parks staff fell 7 percent in just the latter half of the same period.[4] Protected areas legislation in British Columbia involves several ministries, outdated Acts, and a variety of designations. In some ways, managing B.C.'s protected areas system with the current legislation can be likened to "buying a Canadian Tire home security system for the Louvre Museum."[5]

The current approach of separating out ecological, cultural, and recreational values in protected areas also belies a growing recognition of their intersection. Wilderness is as much a construct of people's imaginations as it is part of the physical landscape. In fact, "the exclusion of human activities from protected areas is a Western concept, alien to indigenous societies."[6] In First Nations' view, people are an integral part of the environment. Protection of indigenous peoples' homelands is often fundamental to their efforts to maintain cultural

[2] The government anticipates adding 200 more protected areas between now and the year 2000 in order to meet this target.

[3] BC Parks, Ministry of Environment, Lands and Parks. "Management Planning For Protected Areas in British Columbia" (Proposed Program Guidelines Working Draft, BC Parks, Victoria, March 1997).

[4] BC Parks. "Achieving Viability" (Draft, BC Parks, Victoria, June 18, 1996).

[5] David Boyd, Sierra Legal Defence Fund, Personal communication (1996).

[6] Dasmann (1984) in Tricia de Macedo, "First Nations and the Establishment of Protected Areas in British Columbia: A Case Study of the Campaign to Protect the Kitlope Watershed" (Masters Thesis, Simon Fraser University, 1995), 23.

continuity.[7] The International Convention on Biodiversity holds that where indigenous people are living on or from the land in a protected area by traditional means, conservation of their culture, knowledge and way of life should also be an objective for the area. Even the International Union for the Conservation of Nature (IUCN) recognizes indigenous settlement in all six categories of protected areas; and only in one subcategory, "strict nature reserves," is it considered inappropriate. In British Columbia there is a new awareness that First Nations should play an equal role in the design and implementation of management plans for protected areas.[8] Local communities as well as First Nations seek greater responsibility and authority for the stewardship of nearby protected areas.

Similarly, protected areas can no longer be seen as preserving ecological integrity in isolation. To be effective they must be integrated into the larger landscape, and land use in surrounding areas must support the conservation goals of the protected area. Rather than treating protected areas as the last isolated refuge of functioning natural systems that must be "buffered," they should be treated as constant sources of renewal and revitalization for the surrounding area, and be tied to the larger landscape in order to provide it these ecological benefits.

British Columbia is not alone in facing many of these challenges. According to a 1993 IUCN report on protected areas, there are very few examples of protected areas legislation that deal with the complexities of accomodating human occupation and activities in a protected area reserve. The authors of the report also suggest that the integration of a reserve into its socio-economic environment may require new regulatory or management tools, which we have yet to invent.[9] This paper points out some of the issues surrounding B.C.'s protected areas system that are most worthy of attention, and offers possible new paths to their resolution.

For years protected areas advocates have acknowledged the need to reform British Columbia's protected areas legislation.[10] Some of their primary concerns include the lack of a legislated public consultation[11] and public reporting process, the need for a mechanism which allows shared decision-making with those who are affected by such decisions,[12] the inflexibility of the *Park Act* in responding to areas which encompass many different values and the need for a more comprehensive legislative approach.[13] Existing legislation does not reflect the spirit and intent of the *Protected Areas Strategy*, which signals the major change in orientation from parks for people and recreation to parks serving a vital ecological function that ultimately underpins the health of human communities. The current legal framework does not include clear guiding principles for maintaining natural ecosystems.[14] To date, efforts under the *Protected Areas Strategy* have focused solely on gap analysis and protected areas recommendations, and not on reducing jurisdictional complexity or renewing protected areas legislation.

For all of these reasons, both the provincial government and protected areas advocates have focused not only on the establishment of new parks, but on the development of a comprehensive and representative protected areas **system** for British Columbia. The main purpose of such a protected areas system would be the conservation of biological diversity and ecological processes, not public recreation and spectacular scenery as was often the motivation for park creation in the past.

To fulfill the purpose of protecting ecological integrity, a protected areas system must satisfy two conditions: the protection offered to natural ecosystems must be **long-lasting** and as **comprehensive** as possible. Legislation is therefore an essential component of any protected areas system since a legal framework is required for the establishment and management of these areas. Legal guidelines outlining the role of protected

[7] Stan Stevens, ed., *Conservation Through Cultural Survival: Indigenous Peoples and Protected Areas.* (Washington, DC & Covelo, California: Island Press, 1997).

[8] Davis and Wali (1994) in de Macedo. (Masters Thesis 1995), 23.

[9] Cyrille de Klemm and Clare Shine, *Biological Diversity Conservation and the Law: Legal Mechanisms for Conserving Species and Ecosystems,* Environmental Policy and Law Paper, No. 29 (IUCN 1993).

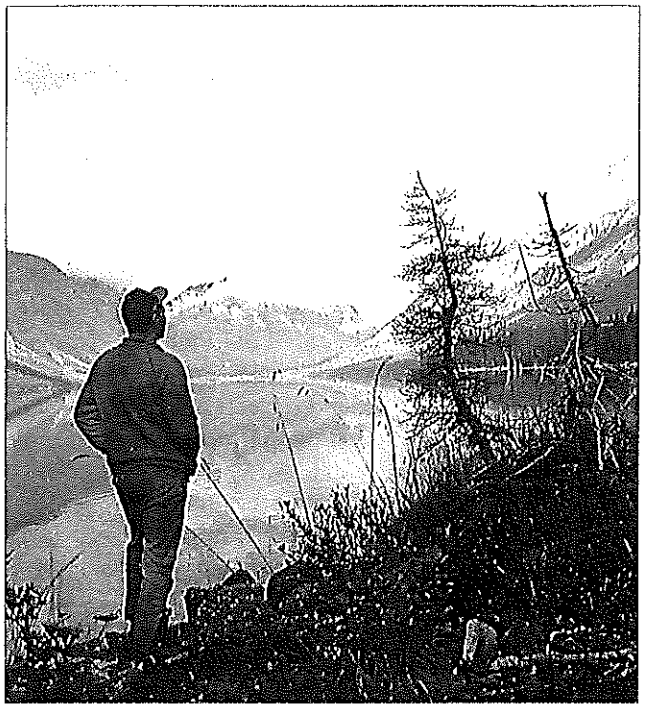
[10] David Loukidelis, "Toward Coherent Wilderness Protection Legislation in B.C" (Speaking notes for a presentation to Canadian Parks and Wilderness Society, The Wilderness Vision Colloquium, Legal Reform Workshop, March 12, 1994).

[11] Mark Haddock, Untitled (Paper presented to Canadian Parks and Wilderness Society, The Wilderness Vision Colloquium, Legal Reform Workshop, March 12, 1994).

[12] World Wildlife Fund, *Making Choices: A Submission to the Government of British Columbia Regarding Protected Areas and Forest Land Use* (November 1993), 36.

[13] David Loukidelis, "Toward Coherent Wilderness Protection Legislation in BC" (March 12, 1994).

[14] Colin Rankin and Michael M'Gonigle, "Legislation for Biological Diversity: A Review and Proposal for British Columbia," *University of British Columbia Law Review* 25, No. 1 (1991): 277.



Redfern-Keily Protected Area PHOTO: WAYNE SAWCHUK

areas and the process for establishing and managing them are needed, as are laws and regulations to govern what activities can take place within a park and to set out incentives to promote compliance.

In addition to legislative reform, there is an urgent need to develop strong policy guidelines. While comprehensive legislation is central to designating protected areas and ensuring security of protection, strong policy guidelines are key to the actual stewardship of these areas. In other words, "putting the 'protection' into protected areas" has not yet been achieved in B.C.[15] The province has taken a step in the right direction with the set of protected area management principles approved by cabinet in 1995. This paper builds on many of these principles, and goes one step further by suggesting ways to implement them through changes to legislation and policy.

A comprehensive provincial protected areas system would address four critical issues: First Nations' rights and interests, ecological integrity, security of protection, and stewardship. The purpose of the first part of this report is to describe these issues and some of the main concerns associated with them. The second part of this report addresses the key question of "where do we go from here?" and proposes a range of solutions to the issues raised in the first section. These include recommendations for legislative and non-legislative reform. The final section offers specific elements that should be incorporated in any protected areas legislation. Following the conclusion are two appendices. The first is a draft *Protected Areas Act;* and the second, a chart outlining current arrangements in several large protected areas in British Columbia.

The problems we identify in this paper are not the only issues surrounding B.C.'s protected areas. However, together they address many of the major concerns raised by those interested in protected areas. Despite these concerns, British Columbia is on the road to developing one of the most progressive protected areas systems in the world. To maintain this momentum, it is time to evaluate and update protected areas legislation, planning and management with the paramount goal of sustaining ecological integrity.

This paper is not intended to be an exhaustive review or an empirical evaluation of existing approaches to the planning and management of protected areas in British Columbia. Rather, our emphasis is on outlining the basic elements and options for an improved protected areas system. It is our hope that the information contained in this paper will help First Nations, government and protected areas advocates move closer to achieving the goals of the *Protected Areas Strategy*, and to conserving ecological integrity while respecting First Nations' rights. Some of the issues and the recommendations for addressing them may seem mutually exclusive. Where appropriate, the paper prioritizes one goal over another, and in other cases recommends new processes and mechanisms for making decisions about protected areas.

[15] Pamela Wright, Personal communication (August 1996).

II. *Critical Issues*

What Warrants Improvement in British Columbia's Protected Areas System?

[A] First Nations' Rights and Interests

This section of the paper examines First Nations' rights and interests with respect to protected areas. It begins with a discussion of First Nations' experiences with protected areas, then sets out a summary of the law concerning First Nations' rights in protected areas. Finally, the section describes the impact of provincial protected areas legislation and policy on First Nations' rights and interests.

[i] First Nations' Experiences with Protected Areas

While not currently involved in every protected area in the province, First Nations have an increasingly significant influence in many existing or proposed protected areas. No national park has been created in Canada in the last 15 years without some degree of First Nations' involvement. As First Nations' traditional territories cover all or most of British Columbia, any large protected area will fall within the traditional territory of one or more First Nations. (See map in back pocket: First Nations' Territories and Protected Areas in B.C.)

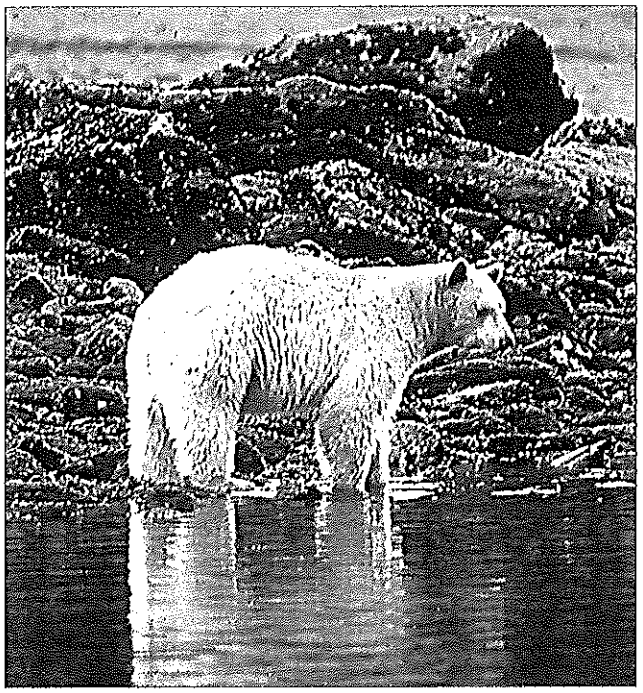
Reactions to protected area designation have varied widely among First Nations. Some, such as the Haisla Nation, see protected areas as a way of safeguarding their cultural and natural heritage and increasing their influence in the management of their traditional territory before settlement of their treaties. Others, although supportive of conservation efforts, consider parks – or, more accurately, the park-making process – an infringement of their rights. For example, the Tseil-Waututh Nation (Burrard Band) in North Vancouver launched a suit against the provincial government over the creation of Indian Arm Park. As well, when the Musqueam Nation learned that the provincial government intended to transfer lands to the Greater Vancouver Regional District to create a regional park, Pacific Spirit Park, it sought an injunction to prevent the transfer. The Musqueam were concerned that such a transfer would prejudice their aboriginal title to these lands.[16] On the other hand, in Pacific Rim National Park Reserve on the West Coast of Vancouver Island, the Ditidaht have leased their reserve lands which fall within the boundary of the park back to the Federal government and have entered into numerous business agreements with Parks Canada.

For the most part, First Nations feel that they have been largely left out of the protected areas process, and have expressed profound concern about the impact of the creation of new protected areas on their constitutionally-protected aboriginal rights and on the treaty-making process. Similarly, few First Nations participated in the recent land-use planning exercise spearheaded by the provincial government's Commission on Resources and the Environment (CORE) for fear that it would jeopardize their position in treaty negotiations.[17] Others refused to participate because they felt that land-use planning should take place after treaties are settled, not before.

Many First Nations, however, are eager to set land

[16] *Grant v. British Columbia*, [1990] 2 C.N.L.R. 21 (B.C.C.A.).

[17] Bob Peart, "Nexus—Linking the British Columbia Treaty and Land Use Processes," (Paper presented to the Third International Conference of Science and the Management of Protected Areas, May 1997), 2.



Spirit Bear, Princess Royal Island.

aside in order to protect it from development,[18] but their reasons for wanting to do so often differ from those of environmentalists. Environmentalists are primarily focused on protecting land to preserve ecosystems and promote sustainability. While First Nations share these concerns, they are also interested in protecting land pending the settlement of treaties to ensure that there is something left to negotiate in the treaty process. Many First Nations who oppose the establishment of provincial or national parks have nevertheless indicated that they want to protect certain areas within their traditional territories as their own tribal parks, including areas proposed for national or provincial parks. Other First Nations support the establishment of provincial or national parks or reserves in their traditional territories, sometimes through the concurrent designation of the area as a tribal park,[19] as a way of protecting land from development.

While a number of First Nations have called for a moratorium on development in their traditional territories, many of these same First Nations voice strong opposition to the protection of those territories through their designation as parks. In the past, the establishment of parks generally resulted in the exclusion of First Nations from their traditional territories and the prohibition of their traditional activities.

First Nations' objections to the establishment of protected areas, particularly those that restrict their access to these areas, is rooted in their concept of natural ecosystems, which generally differs from that of many environmentalists. First Nations have always seen themselves as part of the ecosystem or natural environment in which they live. To many First Nations, wilderness areas "untouched by humans" do not exist.[20] In fact, the very term "wilderness" is meaningless to them.[21] This idea contrasts with the views of some wilderness proponents who see humans as intruders and seek to protect certain areas from all interaction with humans. This notion ignores the fact that over the past 5-10,000 years, aboriginal people have been an essential part of the natural ecosystem of British Columbia.

[ii] First Nations' Rights in Protected Areas

Recent case law supports First Nations' rights to carry out activities that are integral to their distinctive cultures, even in protected areas. Such rights are constitutionally protected under section 35(1) of the *Constitution Act, 1982*, the supreme law of Canada, which states that existing aboriginal and treaty rights are recognized and affirmed. The Supreme Court has interpreted this section to mean that aboriginal rights must be protected from unjustified infringement.

In the 1990 landmark *Sparrow*[22] case, the Supreme Court of Canada confirmed that aboriginal people have a constitutionally-protected right to fish for food, social and ceremonial purposes, which must be given top priority in allocation after valid conservation measures have been implemented. The court made it clear that aboriginal rights are not frozen in time, but left open the question of whether there is an aboriginal right to fish for commercial purposes. This case also established that government regulation infringing upon or denying aboriginal rights must be justified. This justification test requires that a government prove its actions have a valid legislative objective and that the interference with

[18] First Nations Education Steering Committee, the B.C. Teachers' Federation and the Tripartite Public Education Committee, *Understanding the B.C. Treaty Process: An Opportunity for Dialogue* (Prepared for the First Nations Education Steering Committee, the B.C. Teachers' Federation and the Tripartite Public Education Committee, September 1997).

[19] An example of a concurrent designation is the Gwaii Haanas "National Park Reserve" and "Haida Heritage Site."

[20] Jim Morrison, *Protected Areas and Aboriginal Interests in Canada* (A World Wildlife Fund Discussion Paper, July 1993), 3.

[21] Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*, Vol. 4, (Canada Communications Group - Publishing, 1996), Chapter 6, 387.

[22] *Sparrow v. R.*, [1990] 4 W.W.R. 410 (S.C.C.).

aboriginal rights can be justified in light of the crown's fiduciary duty to First Nations.

While *Sparrow* addressed the issue of the aboriginal right to fish, the *Delgamuukw*[23] case addressed the broader issue of aboriginal rights and title within First Nations' traditional territories. In that case, the British Columbia Court of Appeal held that there had never been, as previous B.C. governments had maintained, a blanket extinguishment of aboriginal rights in British Columbia. Consequently, First Nations retain aboriginal rights and title in their traditional territories. The Court described aboriginal rights as non-exclusive rights, and held that aboriginal title is not equivalent to fee simple ownership.[24] It further explained that aboriginal rights are derived from activities which were practiced prior to contact and were integral to the distinctive culture of First Nations. While it held that First Nations did not have "jurisdiction" over their traditional territories, they could still continue to "self-regulate." The appeal of this decision was heard by the Supreme Court of Canada in June of 1997.

The issue of the extension of aboriginal rights to commercial harvesting, which had been left open in Sparrow, was addressed in three August 1996 decisions of the Supreme Court of Canada (*Van der Peet*,[25] *Gladstone*[26] and *NTC Smokehouse*[27]). In these three cases, the Court adopted and elaborated upon the "integral to the distinctive culture" test that the Court of Appeal had developed in *Delgamuukw* in order to determine the definition and scope of "aboriginal rights." Under this test, an activity will only qualify as an aboriginal right if the First Nation can demonstrate that the activity is an element of a practice, custom or tradition that is integral to its distinctive culture and can satisfy certain criteria, such as continuity with pre-contact times.[28] In considering the application of this test to the exercise of aboriginal rights in protected areas, it is our view that harvesting activities, such as hunting and fishing, would likely meet that test. In relation to the right to fish salmon for food, social and ceremonial purposes, the Court in *Sparrow* stated that the existence of that right was "not the subject of serious dispute." However, a cautionary note would indicate that First Nations may have difficulties, in some cases, demonstrating that a particular activity is "integral" to its distinctive culture.

The exercise of aboriginal and treaty rights within protected areas was dealt with directly in *Sioui*.[29] In that case, the Supreme Court of Canada considered the issue of whether treaty rights, which were set out in a 1760 treaty, to carry on customary and religious practices could be exercised in a Quebec provincial park. The Court held that Huron customary activities could be exercised over the entire territory frequented by the Huron in the 1760s so long as such activities were not incompatible with the particular use the crown has made of the territory. As such, the Huron's right to cut down trees, camp and make fires in a provincial park was protected by the treaty. The Court held that in order for a Huron activity to be incompatible, it had to conflict with the underlying purpose of the crown's occupancy and to prevent that purpose from being realized. In this regard, the Court concluded that the use of the park by the Huron did not seriously compromise the crown's objectives in occupying the park – conservation, education and cross country recreation.

In order to meet the legal requirements established by recent court cases, the British Columbia government could negotiate agreements with First Nations respecting aboriginal rights, including the right to fish, hunt and gather within protected areas, as well as the right to use natural resources such as water and timber. First Nations' harvesting rights extend to the protection of, and access to, the location where the harvesting takes place.[30] The courts have made it clear that aboriginal rights are not frozen in time and may not be interfered with by government unless such interference meets the justificatory test in *Sparrow*. In order to do so, the government must show that it is furthering an objective that is compelling and substantive enough to warrant usurping aboriginal rights. Thus, the government's

[23] *Delgamuukw v. R.* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.).

[24] A very recent British Columbia Court of Appeal decision regarding the issuance of a Tree Farm Licence within the traditional territory of the Haida Nation indicates that if First Nations can prove aboriginal rights and title over certain lands, this interest constitutes an "encumbrance" on these lands within the meaning of the *Forest Act*. [*Council of the Haida Nation v. Minister of Forests*, Vancouver Registry Docket No. CA021277, November 7, 1997]

[25] *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

[26] *R. v. Gladstone*, [1996] 2 S.C.R. 723.

[27] *R. v. NTC Smokehouse Ltd.*, [1996] 2 S.C.R. 672.

[28] In *Gladstone*, the appellants were able to meet this test on appeal to the Supreme Court of Canada by demonstrating that the sale of herring roe on kelp was an integral part of the Heiltsuk culture. This was the only case of the trilogy of cases that satisfied the test formulated by the Court.

[29] *Sioui v. Quebec*, [1990] 1 S.C.R. 1025, [1990] 3 C.N.L.R. 127.

[30] *Saanichton Marina Ltd. v. Tsawout Indian Band* (1989), 57 D.L.R. (4th) 161 (B.C.C.A.).

Huchsduwachsdu Nuyem Jees/Kitlope Heritage Conservancy Protected Area.

ability to restrict the exercise of aboriginal rights may be limited to situations where conservation of certain species of wildlife, fish or vegetation is at risk.

First Nations also have a legally enforceable right to be consulted with respect to the planning and management of protected areas within their traditional territories.[31] Despite the existence of this right and the commitment by the provincial government to recognizing self-government and negotiating interim measures, the provincial government has not supported full First Nation management of protected areas, and has only recently agreed to joint management of certain protected areas.

Finally, it must be kept in mind that the British Columbia treaty process is underway. Through this process, the federal government, the provincial government and First Nations are negotiating both the scope and content of rights which will be set out in modern treaties. Once treaties are in force, these negotiated rights, which may differ from court-defined rights, will enjoy constitutional protection.

[iii] Existing Provincial Legislation and Policy

First Nations have expressed many concerns regarding existing provincial protected areas policy and legislation. Their key concern with the legislation is that it ignores their rights and hinders their efforts to play a more significant role in the management of protected areas. First Nations are also concerned that the government's policy, although it "recognizes" their aboriginal rights, nevertheless seriously undermines their position in future treaty negotiations and all but ignores their role in management.

The *Park Act*, which covers about 85 percent of protected areas in British Columbia, does not explicitly allow for continued traditional use of an area by First Nations. Although some agreements have been reached

[31] *R. v. Jack, John and John* (1995), 131 D.L.R. (4th) 165 (B.C.C.A.). See also *Metecheah v. Ministry of Forests et al.*, Vancouver Registry Docket No. A963993, June 24, 1997 (B.C.S.C.).

between the B.C. government and First Nations, the *Park Act* has been a major barrier to the negotiation of shared management arrangements. This is, in part, because the Act states in section 3 that:

> Except as otherwise provided in this Act, the Minister has jurisdiction over, and shall manage and administer, all matters concerning parks and recreation areas and public and private use and conduct in and on them...

While the Minister has authority to delegate his or her powers, he or she also has the power to withdraw the delegation. This leaves little room for a secure sharing of power with First Nations or recognition of the government-to-government relationship between First Nations and the British Columbia government.

A second statute which relates to protected areas is the *Environment and Land Use Act*. This very short statute allows the provincial cabinet to make orders respecting the environment or land use, notwithstanding any other act or regulation. Like the *Park Act*, the *Environment and Land Use Act* does not recognize aboriginal rights or title. Neither does it explicitly provide for joint management regimes or a government-to-government relationship. However, this Act has been used to establish one jointly-managed protected area (Huchsduwachsdu Nuyem Jees/Kitlope Heritage Conservancy) and to establish a joint management structure for an area already designated as a Class A Park under the *Park Act* (the Tatshenshini-Alsek Wilderness Park). This statute offers a short-term solution because it can enable the establishment of innovative structures; however, it does not even set out the basic parameters of a relationship with First Nations, and there are already indications that the government is unwilling to establish future joint management arrangements in the same way.

A third statute, the *Ecological Reserve Act*, applies to the 139 ecological reserves in British Columbia. Ecological reserves are principally established for research and education purposes. Nothing in the *Ecological Reserve Act* recognizes First Nations' rights or interests. The *Ecological Reserve Regulations* specifically forbid anyone from trapping or molesting animals and removing plants. This provision, if enforced, would infringe the aboriginal right to hunt and gather.

The provincial government's policy on protected areas is set out in its *Protected Areas Strategy*. This strategy commits the government to "respect the treaty rights and Aboriginal rights and interests that exist in British Columbia." It also states that "the province will involve First Nations in protected areas planning" and offers assurance that "participation of First Nations in land and resource use planning will not limit their subsequent treaty negotiations with the crown." It then goes on to state that "Aboriginal peoples may use protected areas for sustenance activities (including hunting and fishing), subject to conservation objectives, and for ceremonial and spiritual practices."[32] Though a positive step forward, this statement of aboriginal rights and the relationship of First Nations to protected areas, which is reiterated in the cabinet-approved protected area management principles, still ignores First Nations' role in managing the areas.

While provincial protected areas may be established "without prejudice" to the positions of the parties in treaty negotiations, the establishment of these areas will likely have an impact on treaty negotiations. Although it may not be intended, the description of "protected areas" set out in the *Protected Areas Strategy* prejudices First Nations' interests. It states that: "protected areas are inalienable...[they] may not be sold...they are also areas in which no industrial extraction or development is permitted." If these lands are inalienable, they cannot be transferred to First Nations in treaty negotiations. This is particularly problematic if the land designated as a protected area is the only un-tenured crown land left in the region. This prejudice is compounded by the position taken by the British Columbia government in treaty negotiations that it will "maintain parks and protected areas for the use and benefit of all British Columbians." As a result, even if First Nations were acknowledged as the owners of these areas under their treaties, they would face tremendous opposition if they proposed to limit access to these lands or to use these lands for any form of economic development.

These statements suggest that the British Columbia government has made irreconcilable commitments by assuring First Nations on one hand that parks would be created without prejudice to their rights or treaty negotiations, and on the other hand by assuring British Columbians that parks are protected for the use and benefit of all British Columbians forever. In so doing, the B.C. government may have hindered its ability to meet its constitutional obligation to First Nations.

Until relatively recently, the B.C. government and the public did not acknowledge the conflicts between the protected areas system and aboriginal rights. This situation has somewhat improved recently, and the government has signed several joint management agreements for protected areas. The problem now is not so much a lack of acknowledgment of the conflict, but an

[32] Province of British Columbia, *A Protected Areas Strategy for British Columbia* (June 1993).

inconsistency in the approach that the government is taking to its resolution. For instance, arrangements made with certain First Nations have not been available to other First Nations facing similar situations. As well, while the provincial government has worked closely with some First Nations on the establishment of protected areas in their traditional territories, it failed to provide other First Nations with notice that it intended to designate a protected area in their traditional territory until days before it was established.

Increased control over planning and management of lands and resources is of critical importance to First Nations communities as an interim measure between the status quo and the treaty process. As treaties are settled and land-use planning processes such as the Land and Resource Management Plans (LRMP) proceed, it is anticipated that further co-management or joint management agreements between provincial, federal and First Nations governments will be signed. First Nations are poised to play a large role in shaping the provincial protected areas system. It is imperative that they be able to protect their interests, as well as the land that has always been their home, through a meaningful role in the designation, management and governance of protected areas.

[B] ECOLOGICAL INTEGRITY

It is not surprising that First Nations' cultural survival is tied to the health of their territories. Neither is it coincidental that British Columbia, home to a tremendous diversity of indigenous peoples, is one of the most ecologically complex regions in the world and certainly the most diverse of any Canadian province or territory.

Four hundred and forty eight species of birds, 19 species of reptiles, 20 species of amphibians, 143 species of mammals and over 6,555 species of marine invertebrates make their home in the province.[33] This diversity is a direct result of the climate, which ranges from maritime to desert to sub-arctic, and the topography which extends from over 27,000 kilometres of coastline to mountain peaks thousands of metres high. Biodiversity is not measured in numbers alone, but also in uniqueness.[34] By this yardstick, British Columbia also scores quite high (it harbors the largest remaining extent of the globally rare coastal temperate rain forest, the northernmost extent of coastal Douglas fir, bunch grass ecosystems and unique species like the Spirit or Kermode bear. British Columbia's landbase is divided into 14 distinct biogeoclimatic zones which are further classified into over 79 sub-zones. Variants of 41 of these subzones are recognized, resulting in a total of 134 classified ecosystems. Many more have yet to be described.

Maintenance of ecological integrity in British Columbia is contingent on preservation of the structure and function of all its ecosystem types. With four of the 14 biogeoclimatic zones over 90 percent fragmented and less than one percent of each of these four zones protected, time is running out to make important protected areas decisions.[35] British Columbia has six extirpated (i.e. those no longer in a particular location but found elsewhere) and four extinct species. The development of a comprehensive protected areas system and management structure for British Columbia is therefore essential to safeguard ecological integrity and to preserve this natural heritage for future generations.[36] This entails designating large protected areas representative of the province's rich biological diversity, and developing an ecosystem approach that will integrate these protected areas into the larger landscape to protect major ecological processes. The LRMP process, which is following up on the work of the CORE, is attempting this kind of landscape-level planning across the province.

The B.C. government released its *Protected Areas Strategy* in 1993 to build on the work of the *Ecological Reserve Act* and the *Park Act*. Designed to protect "viable, representative examples of the natural diversity of the province" and the "special natural, cultural heritage, and recreational features of the province," the *Protected Areas Strategy* explicitly recognizes the role that protected areas play not just in recreation and tourism but as an "aesthetic and cultural resource; they are places of spiritual renewal and inspiration." BC Parks' guiding conservation management principles closely follow the goals of the *Protected Areas Strategy*.

Despite notable progress, there remain many obstacles to the long-term protection of ecological integrity in British Columbia. The legacy of protected areas policies focused on individual species, often high-profile ones like bears and ungulates, rather than on the ecosystems and communities of organisms as a whole that support these "charismatic megafauna" species, is a fragmented protected areas system. Seventy five percent

[33] Lee Harding and Emily McCallum, eds., *Biodiversity in British Columbia: Our Changing Environment* (Environment Canada, Canadian Wildlife Service, 1994).

[34] Richard Hebda (1997) in Peter Schoonmaker et al., eds., *The Rain Forests of Home: Profile of a North American Bioregion* (Washington, DC & Covelo, California: Island Press, 1997).

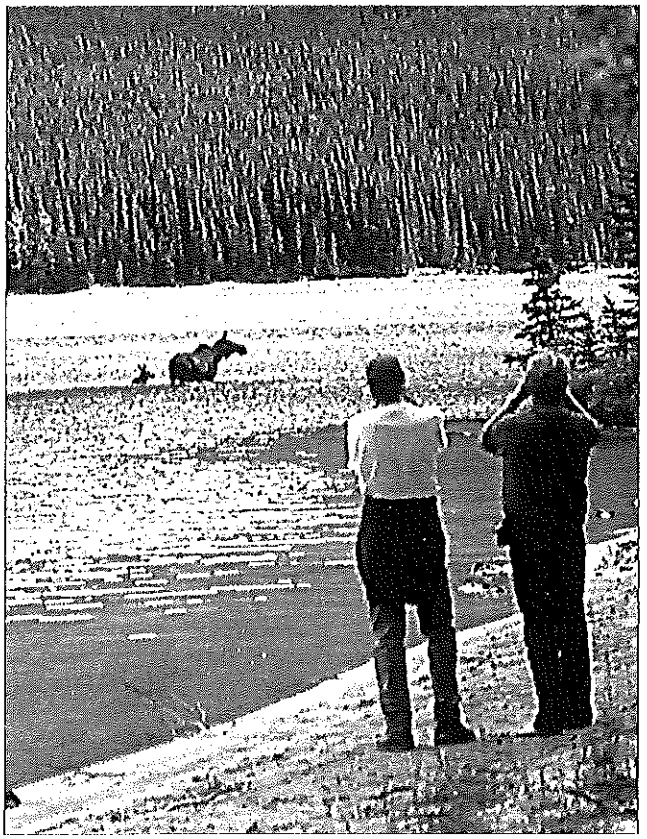
[35] Harding and McCallum eds., *Biodiversity in British Columbia* (1994); Province of British Columbia, *A Protected Areas Strategy for British Columbia* (1993); Monte Hummel, ed., *Protecting Canada's Endangered Spaces: An Owner's Manual* (Toronto: Key Porter Books, 1995).

[36] Harding and McCallum eds., *Biodiversity in British Columbia* (1994).

of the protected areas in British Columbia are less than 1,000 hectares in size,[37] whereas 5,000 hectares is commonly used as a minimum ecological threshold.[38] One to ten million hectares are necessary to support some of B.C.'s large carnivores and the ecosystems they depend on, yet only four out of 645 protected areas are larger than 500,000 hectares.[39] The government's goal of protecting 12 percent of the province brings its own problems. Having a fixed target can help to motivate people, but recent evidence shows that important scientific criteria have been overlooked in an attempt to simply meet the target.[40] The last analysis of progress toward this milestone showed quite clearly that even ecoregions with close to 12 percent protection were still a long way from meeting the *Protected Areas Strategy*'s criteria for representativeness and uniqueness.[41] Under this scenario, it is quite possible that British Columbia can achieve the 12 percent goal, and still run the risk of losing critical components of its biodiversity and ecological integrity.

The failure to designate and manage protected areas on an ecosystem-level has also led to parks increasingly becoming islands in a sea of development. Adjacent land uses now threaten Pacific Rim National Park on Vancouver Island where "maintaining the ecological and cultural integrity of the West Coast Trail is becoming increasingly difficult."[42] Protection of ecological integrity does not mean immediately ceasing all human activities in and around protected areas and allowing the land to return to its "natural" state. This approach is not practical or feasible on a large scale given today's reality of increased public demand for access to these areas, nor is this even desirable for groups such as First Nations who view themselves as an integral and connected part of the natural landscape.

What is needed instead is a set of protected areas that are integrated with the larger landscape through linked corridors and comprehensive land-use planning. The rapidly emerging science of conservation biology provides a compelling and credible basis for protecting ecosystem function and evolutionary processes through a system of large, interconnected protected areas.[43] Some



Tuchodi Lakes, Northern Rockies Protected Area.
PHOTO: WAYNE SAWCHUK

of these areas might not allow any human use due to conservation requirements, while others might encourage recreation opportunities. In addition to designating a system of protected areas that are ecologically linked, innovative management planning and zoning within protected areas are needed to actively protect and maintain ecological integrity.

The scientific rationale behind protected areas as an integral part of a larger, connected landscape is that they provide a balance to more developed lands, a hedge against future ecological disturbance, and a template for restoration of similar degraded ecosystems. By protecting representative or unique ecological areas,

[37] Kaaren Lewis and Susan Westmacott, *A Protected Areas Strategy for British Columbia: Provincial Overview and Status Report* (Land Use Coordination Office, Government of British Columbia, April 1996). See also M.A. Sanjayan and M.E. Soulé, *Moving Beyond Brundtland: The Conservation Value of British Columbia's 12 Percent Protected Area Strategy* (Preliminary report to Greenpeace, June 1997).

[38] Wilderness Advisory Committee, *The Wilderness Mosaic* (Report of the Wilderness Advisory Committee to the Minister of Environment, Victoria, 1986).

[39] Lewis and Westmacott, *A Protected Areas Strategy for British Columbia* (1996).

[40] Sanjayan and Soulé, *Moving Beyond Brundtland* (June 1997).

[41] Sanjayan and Soulé, *Moving Beyond Brundtland* (June 1997). Lewis and Westmacott, *A Protected Areas Strategy for British Columbia* (1996).

[42] BC Economic Development, *A Five Year West Coast Trail Business Prospectus* (January 1994).

[43] M.E. Soulé and D. Simberloff, "What do Genetics and Ecology Tell us about the Design of Nature Reserves?" *Biological Conservation* 35 (1996):19-40.

then linking them through compatible land-use practices to the surrounding region, essential ecological processes and biological diversity can be maintained across the landscape. Scientists are now looking even farther out on the horizon and recommending that we design reserve systems along latitudinal and longitudinal gradients in the face of impending climate change.

Many of the examples above underline the need for legislation and management that deals with protected areas on an ecosystem-level basis. Preservation and maintenance of ecological integrity can be achieved through several channels. In this paper, we propose that legislative and policy reform should acknowledge the fundamental goal of ecological integrity, and that this goal serve as the guiding principle in any protected areas legislation. We also recommend innovative management arrangements and agreements with First Nations and other communities through which this goal can be met.

[C] Security of Protection

Security of protection is a key and often overlooked element in protected areas planning and management. There are three components to security of protection: fiscal, institutional and legal. Fiscal refers to security of dependable, adequate funding for key activities such as management and compliance. Institutional refers to the oversight and accountability of the governing bodies involved. The discussion here addresses the third element – legal mechanisms to attain security of protection.

"Security of protection" refers to the strength and durability of a particular designation, i.e. how easily can a protected area designation be changed in the future? For instance, where an agreement has been made to establish a protected area, the parties involved (First Nations, a local community or the general public) will not want to have the designation changed at a later date without their input and consent. Why work to protect an area if a future government can easily change its status? What is the use of designating an area as "protected" when this designation doesn't stop potentially harmful activities like clearcut logging and mining in the area?

Public information materials prepared by British Columbia regarding protected areas imply that in setting areas aside as "protected areas," they are being protected forever. This is not the case. Even where a park is established by legislation, it can still be deleted from a Schedule to the *Park Act* or have its boundaries altered at a later date. For example, land has been taken out of both Strathcona and Garibaldi Parks, and in the 1950s and 1960s the total amount of protected land in British Columbia *decreased* by one million hectares, or 22 percent.[44] In order to delete a park from a Schedule to the *Park Act*, the Legislature merely needs to pass an amendment by majority vote. A park established by order-in-council (a regulatory designation) is even easier to cancel, as a new order-in-council passed by the provincial cabinet alone can generally rescind an earlier one, unless the legislation specifically provides otherwise. A change in government policy is sufficient to revoke the protection of an area which has been set aside by a policy statement alone. Therefore, among legislation, orders-in-council and policy, legislation clearly provides the greatest security of protection. The goal of security of protection needs, however, to be balanced with other goals such as flexibility and the need to address First Nations issues.

One of the major concerns of British Columbia environmentalists is that certain statutes, including the *Park Act*, allow continued industrial extraction or development to take place. Environmentalists argue that this defeats the very purpose of protecting an area. The 1995 amendments to the *Park Act* prevent logging, mining and hydroelectric development in the 106 newly designated parks. However, this amendment does not apply to parks that were previously established or to areas protected under certain other acts, such as wilderness areas protected under the *Forest Act*. Later in this paper we offer suggestions for tightening legislative language to address these issues.

[D] Stewardship

[i] Management Systems

Designating an area as protected and ensuring the perpetuity and integrity of this protection is only the first step in preserving ecological integrity of protected areas. Of equal, if not greater, importance is the development of effective management systems. These systems should not only protect the biodiversity of these lands but also "connect" them biologically to the surrounding landscape and other protected areas in a way that preserves larger ecological processes. As with the overarching legislation, the paramount goal of management systems for protected areas should be the maintenance of ecological integrity.

Recent trends show a rapid increase in the amount of land that is protected in British Columbia at the same time that government funding for protected areas has

[44] Land Use Coordination Office, "Protected Areas in British Columbia," (World Wide Web Site http://www.luco.gov.bc.ca/pas/painbc/home.htm, August 28, 1997).

decreased. While the area of land in the provincial park system increased by almost 50 percent from 1990 to 1996, BC Parks' budget decreased by 6 percent in the same period. Its staff has dropped almost 40 percent over the last 13 years.[45] Another telling statistic shows that BC Parks has one full-time equivalent (FTE) per 2,000 square kilometres of area, compared to an average of one FTE per 50 square kilometres for other B.C. resource agencies such as the Ministry of Forests.[46]

Environment, Lands and Parks is not the only ministry with jurisdiction over protected areas. Several others, including the Ministry of Forests and the Ministry of Energy, Mines and Petroleum Resources, have some form of authority over protected areas, and their mandates often conflict.[47] Simplifying the legislative process through wholesale amendment or consolidation of authority is therefore integral to ensuring that all protected areas are managed under the same framework.

Until recently, efforts have focused primarily on setting aside specific, often contentious areas. Unfortunately, little emphasis has gone into planning how these areas are to be properly managed for the future. Since 1992, 246 protected areas have been created in British Columbia, bringing the total to 645. The provincial government intends to increase this number to more than 800 within three years. To date, of the 645 existing protected areas, 406 have no management plans.[48] BC Parks has launched a program called "Securing the Legacy," to address many of these problems, including the backlog of management plans. This program is discussed later in this paper.

In British Columbia, protected areas exist alongside other, often intensive uses such as industrial resource extraction and rapidly expanding urban areas. This complex situation necessitates a landscape-level approach to protected areas planning, zoning and management to effectively protect the functional integrity of ecosystems. "Ecosystem-based management" recognizes that people, the economy and the environment are all dependent upon and connected to each other for survival. For example, the ecosystem-based management goals outlined in the draft Gwaii Haanas National Park Reserve Master Plan include "viewing Gwaii Haanas as a valuable part of larger regional ecosystems" with the goal of making the park a key contributor to the sustainability of these ecosystems, considering the impact of people in all decisions related to Gwaii Haanas, and monitoring the state of the environment as well as the quality of the wilderness experience.[49]

Even within protected areas, there is little to guide an integrated management approach. While the ecosystem-based management philosophy recognizes people and their cultural traditions, both past and present, current park designation categories and zoning categories do not. Two zoning categories in the current BC Parks master planning zoning system contain the word and concept of "wilderness," as does a proposed protected area management category contained in the *Protected Areas Strategy* documents. This phrase "wilderness" is typically interpreted as an area that has certain characteristics – a large size, a prohibition on industrial activities, the absence of permanent human presence, no physical infrastructure, and a ban on motorized vehicles. Legal descriptions of the term wilderness, as in the US *Wilderness Act*, define wilderness as a place that appears to have been affected primarily by the forces of nature, with the impact of human work substantially unnoticeable. As currently interpreted, the term wilderness denies the presence of cultural landscapes, ignores thousands of years of aboriginal presence in some areas, and is directly in conflict with aboriginal rights and interests.

If we retain the definition of "wilderness" as untouched by human influence, we will be limited in our ability to provide suitable protection to a significant part of British Columbia's land base. Protected area designation and zoning categories should either avoid use of the term "wilderness" or carefully define it to include recognition of First Nations' place in the natural landscape and of their constitutionally protected rights. This recognition should be extended to protecting areas of spiritual significance. A revised zoning system should be based on the ecological and cultural sensitivity and importance of landscapes. Then, appropriate activities and uses should be overlaid on these zones with specific recognition of aboriginal rights and activities.

Finally, it has been suggested that one of the barriers to development of an effective management system for

[45] BC Parks, "BC Parks: Achieving Viability," (Draft Table of Contents, June 1996).

[46] BC Parks, "BC Parks: Achieving Viability," (June 1996).

[47] Aside from the previously discussed *Park Act*, *Ecological Reserve Act* and *Environment and Land Use Act*, several other statutes address matters related to protected areas. These include the *Heritage Conservation Act*, the *Greenbelt Act*, the *Forest Act*, and the *Wildlife Act*.

[48] BC Parks, Ministry of Environment, Lands and Parks, "Management Planning for Protected Areas in British Columbia," (Proposed Program Guidelines Working Draft, March 1997). C. Kissinger, "Memo to Protected Areas Public Focus Group Members re: Project Foresight," (December Draft, January 14, 1997).

[49] Archipelago Management Board, "Gwaii Haanas National Park Reserve & Haida Heritage Site. Draft Strategic Management Plan for the Terrestrial Area," *Public Planning Program, Newsletter* No. 3 (February 1996): 10.

British Columbia's protected areas is internal resistance. Civil servants are unaccustomed to and often fear change in jurisdiction or responsibility that cedes any power to the local level.

In a recently published report, Pamela Wright described the weaknesses of current zoning systems as:[50]

1) the process is more focused on activities and recreation capabilities rather than on strict ecological criteria, and to date, very little ecological information has been collected and used to determine zoning in protected areas;
2) zoning is based on the status quo – on the existing conditions at the site, at the time of Park designation, or at the time of management planning;
3) zoning categories are often poorly defined in terms of resource protection and the special designations of environmentally or culturally sensitive sites are used infrequently;
4) zoning is usually linear in nature; natural features are only used as zoning boundaries on a macro-scale, and temporal sub-zones (changing zoning categories with the seasons, for example) are rarely considered;
5) zoning is done at only a coarse level, either missing smaller significant resources or zoning a general area to the lowest common denominator;
6) zoning criteria are usually land based and do not focus on the water resources themselves.

[ii] Public Participation and Accountability

Some of the most acrimonious debates in British Columbia in the last decade have centred on conservation and the establishment of protected areas. Some of this rancor might have been avoided had all the interested parties been part of the decision-making process. As noted in the introduction to this paper, the public is no longer content to leave the designation and management of protected areas up to government. Many communities, particularly single resource towns facing economic transition and uncertainty, wish to play a greater role in the management and control of their local resources, including protected areas. Mainstream society is also beginning to realize that managers and management systems have not done enough to protect biodiversity and conserve representative samples of British Columbia's "natural legacy" for future generations. People recognize that a degree of public involvement and supervision in management regimes is required to maintain a sense of accountability to the greater public interest. All of IUCN's recent publications stress that international experience overwhelmingly supports the premise that local people must be involved in the design and management of protected areas in order for them to succeed.

The provincial government responded in 1992 to the call for increased public participation and accountability of government by establishing the CORE process to bring British Columbians together to reach consensus on land use. At the same time, the government launched the *Protected Areas Strategy* to present "an opportunity for the public to review, debate and comment on appropriate protected areas legislation and management."[51] While significant energy was expended courting and considering public input regarding protected areas in these processes, some groups were not satisfied with either the process or the outcome.

Grassroots initiatives led by environmental non-governmental organizations (ENGOs), local "Friends" groups and volunteer programs also have a considerable amount to contribute to this process. These groups have traditionally played a critical role in not only bringing environmental concerns into the political mainstream and raising public awareness about them, but in encouraging public participation in environmental issues and ensuring a degree of accountability in government to manage protected areas in the public's best interest. An example of an initiative to assure greater public participation in park management is the Canadian Parks and Wilderness Society's (CPAWS) Park Stewardship Program.

[50] Pamela Wright, et al., *Jasper River Use Study*. School of Resource and Environmental Management, Simon Fraser University (1996).

[51] Province of British Columbia, *A Protected Areas Strategy for British Columbia* (1993): ix

III. *Proposed Solutions*
Where Do We Go From Here?

In the previous section, we identified four critical issues: First Nations' rights and interests, ecological integrity, security of protection and stewardship. The next step is to ask ourselves "where do we go from here?" Effective protection of designated areas requires three things: a secure legislative foundation, excellent management to ensure ongoing protection on the ground, and public oversight to ensure that protected areas management lives up to the goals of the legislation. A wide variety of groups from government to First Nations and ENGOs recognize the critical point that protected areas planning and management have reached in the province. As part of an ongoing dialogue and search for pragmatic and effective solutions to the many problems raised, the following section explores legislative and non-legislative means for protected areas reform.

[A] First Nations' Rights and Interests

There are significant limitations to dealing with First Nations issues in provincial legislation. This makes the resolution of the problems described in the earlier section of this paper difficult. From a constitutional perspective, the provincial Legislature is limited as to how it can address First Nations issues. This is because the federal government, under section 91(24) of the *Constitution Act, 1867*, has responsibility for "Indians, and lands reserved for the Indians." Consequently, it is our view that it would probably be unconstitutional for provincial legislation to define First Nations' rights in protected areas.

However, the province is able to enact legislation that is primarily focused on protected areas land management and only affects aboriginal people incidentally. New or revised protected areas legislation could include provisions:

- enabling the provincial government to enter into agreements with First Nations respecting the establishment and management of protected areas
- acknowledging that aboriginal rights are recognized and affirmed under section 35(1) of the *Constitution Act, 1982*
- recognizing the government-to-government relationship between First Nations and the provincial government and
- designating protected area reserves.

An effective way for the British Columbia government and First Nations to implement an enabling legislative provision would be to establish "government-to-government negotiating tables" on protected areas. This could be done under the First Nation Summit's "Protocol Respecting the Government-to-Government Relationship" and under the Union of British Columbia Indian Chiefs' "Memorandum of Understanding." First Nations and the province would be represented at the negotiating tables by senior officials. These negotiating tables could be mandated to develop the essential framework principles upon which government-to-government protected areas agreements could be founded. The framework principles could then be ratified by the provincial cabinet, the First Nations Summit and/or the Union of British Columbia Indian Chiefs. First Nations that want to negotiate agreements following these principles would then be encouraged to do so. These protected areas agreements would essentially be interim measures and could be incorporated into First Nations' treaties at a later date. These agreements could establish joint management boards, dispute resolution processes, funding mechanisms and processes for developing management plans.

Pending the finalization of treaties, it is important

for the provincial government and First Nations to develop successful working examples of joint management on the ground. This is already being done to some extent through an increasing number of protected areas co-management arrangements in British Columbia. These are referred to interchangeably as "co-management," "joint management," "cooperative management" and "joint stewardship" agreements. All of the co-management agreements in protected areas in British Columbia are too recent to truly gauge how they are translating into practice. Even in Gwaii Haanas, which has had a co-management agreement in place for several years, a management plan is only now being finalized. In accordance with the Gwaii Haanas Agreement, the Council of the Haida Nation and the federal government share management through the Archipelago Management Board (AMB). The AMB is composed of an equal number of Haida and federal government representatives. Decisions of the Board are made by consensus. Haida Watchmen carry out most of the day-to-day monitoring and interpretation in the area. As well, a significant proportion of the other "park" staff are Haida. The Haisla Nation has a similar program for monitoring the Kitlope. The real challenge for joint management is ensuring that it is truly "joint" management, and combines the best of First Nations' stewardship and traditional knowledge with western science and management. The power of example is often the best way to inspire action, so successful joint stewardship on the ground is critical to encouraging more of these arrangements.

Although these sorts of arrangements are relatively new to British Columbia, successful co-management regimes elsewhere in Canada[52] and abroad in countries such as Australia and New Zealand are changing the way in which protected areas are planned and managed.[53] These shared management regimes range from real power sharing, where joint decision-making is institutionalized in a partnership of equals,[54] to simple advisory roles, where local resource users are consulted as to their opinions with no guarantee that they will have any input into the decisions that affect them.

Experience in Canada and abroad has shown that co-management agreements can be effective tools in protected areas planning and management. These agreements provide a means to bring together local community involvement, First Nations' concerns and government's need to find long-term, stable and cost-effective management regimes.

Co-management agreements offer an alternative approach to the creation and management of protected areas. If BC Parks proceeds with its master planning processes at the present rate, it is estimated the majority of the province's parks will be without management guidelines for another 30 years.[55] Co-management has the potential to accelerate this process by bringing more focused attention and resources to bear.

The most popular use of co-management agreements for protected areas in British Columbia is as an interim measure pending final treaty settlements. Co-management is an attractive option since many of the current arrangements allow for increased First Nations' involvement in protected areas management while ensuring the protection of ecological integrity. A general overview of a number of current arrangements is contained in Appendix 2.

[B] Ecological Integrity

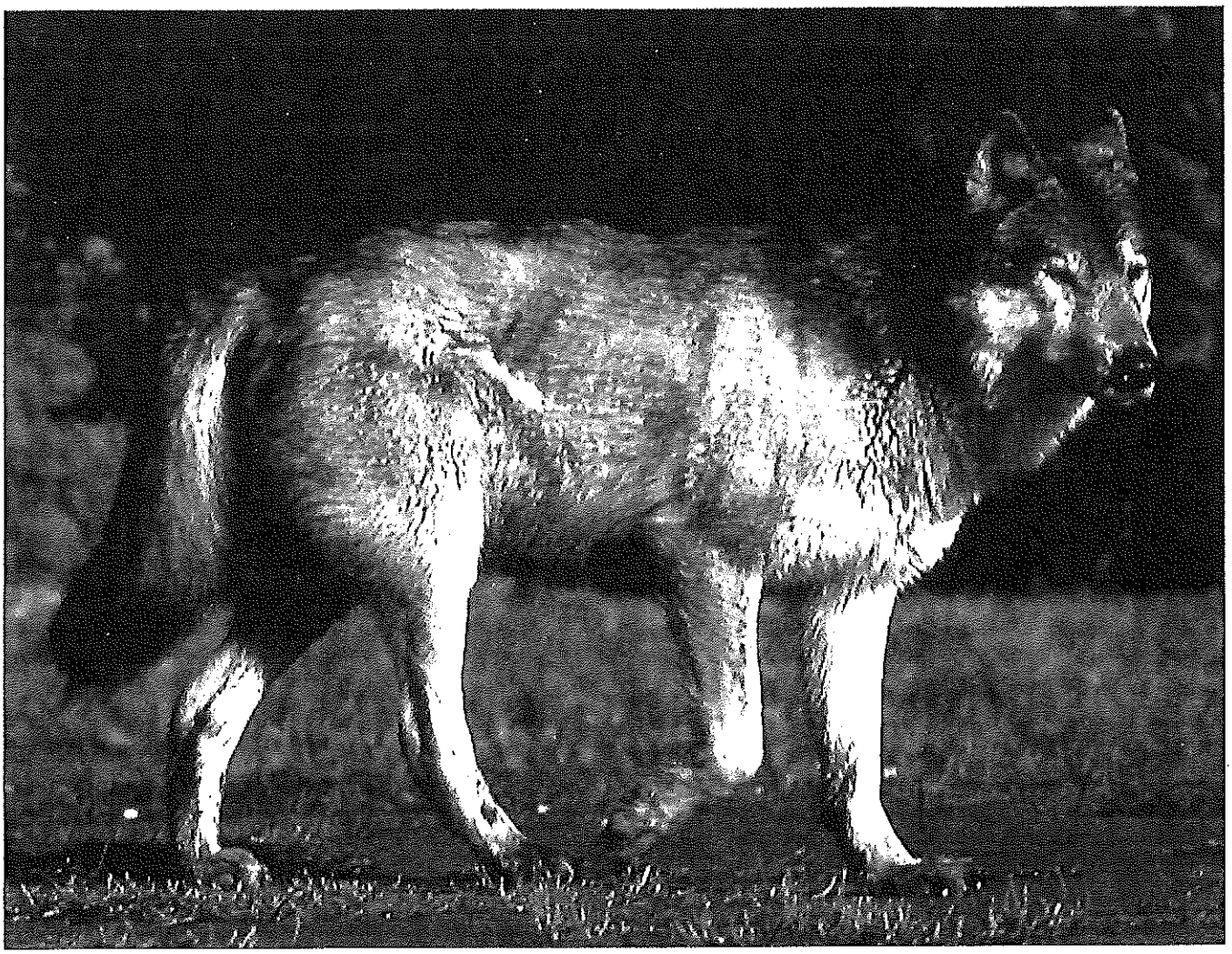
Just as First Nations' rights are safeguarded through constitutional protection, one of the most important things that can be done legislatively to safeguard ecological integrity is to enshrine it in protected areas legislation. Ecological integrity should be an inviolable principle and the yardstick by which all management action and human use are measured. For this reason, we suggest that the overarching goal of any provincial protected areas legislation be the promotion of ecological integrity and the conservation of biological diversity, with other goals to be recognized subject to this overarching goal. This has already been done in other jurisdictions in Canada. Canada's *National Parks Act* was amended in 1988 to include a strong ecological protection mandate, which was reinforced in a 1994 policy document, *Parks Canada: Guiding Principles and Operational Guidelines.* A strong preamble to the Park or Protected Areas Act which states its conservation purpose in unambiguous terms, describes why protection of ecological integrity is so important, and elicits the connection between ecological and cultural integrity and the relationship between people and protected areas would help to underscore the fundamental change in the role of protected areas described earlier. The Act

[52] The Inuvialuit Final Agreement, signed in 1984, provides for numerous co-management arrangements, many of which have over 10 years of experience. See also Karen Roberts, *Co-management: Learning from the Experience of the Wildlife Management Advisory Council,* (Calgary, Alberta: Faculty of Environmental Design, University of Calgary, 1994).

[53] Stevens, *Conservation Through Cultural Survival* (1997).

[54] An example of this is the Archipelago Management Board established under the Gwaii Haanas Agreement.

[55] Dovetail Consulting, "Parks Stewardship Program: A Draft Proposal for Discussion," (Dovetail Consulting for the Canadian Parks and Wilderness Society B.C. Chapter, November 14, 1995).



Wolf in Clayoquot Sound. PHOTO: ADRIAN DORST

should also state that the protected areas system is being established as a public trust obligation on the government to create a legacy and a natural endowment for future generations.[56] The legal consequence of stipulating that protected areas are established as a public trust is not entirely clear as there are no Canadian cases which directly address this issue. However, it is possible that a court would interpret such a provision as: 1) recognizing a substantive right and therefore that members of the public have standing to bring public trust issues before the courts; 2) imposing an affirmative fiduciary obligation on government with respect to protected areas; and 3) imposing an administrative process on government with respect to the management of protected areas.[57]

As discussed earlier in this paper, protected areas will not be able to maintain ecosystem functions and processes alone. The protection of ecological integrity in these areas requires compatible legislation for surrounding lands. As biologists Sanjayan and Soulé point out, the province has relied on areas outside existing protected areas to support species populations and overall ecosystem integrity, but the legislative framework for lands outside protected areas, including statutes such as the *Forest Practices Code Act*, do not recognize the same conservation goals.[58] The B.C. Sustainability Act was

[56] For a discussion on using the public trust doctrine in legal challenges see Harvey Locke and Stewart Elgie, "Using the Law to Protect Wild Places." *Protecting Canada's Endangered Spaces: An Owner's Manual*, (Toronto: Key Porter Books, 1995).

[57] These ideas are adapted from a Masters Thesis on the public trust doctrine. Kate Penelope Smallwood, "Coming Out of Hibernation: The Canadian Public Trust Doctrine, " (Masters Thesis, University of British Columbia, September 1993).

[58] Sanjayan and Soulé. *Moving Beyond Brundtland* (1997): 15.

proposed by CORE in 1994 in part to put all land-use management under one statutory umbrella with the explicit aim of ensuring that adjacent land uses support one another. The four regional CORE planning processes that were completed have attempted to reflect a more integrated approach to land-use planning on the ground with varying success. To ensure that the ecological benefits of protected areas are shared by the surrounding landscape, we propose that the application of protected areas legislation be extended to lands adjacent to designated protected areas in some cases. Conservation biologists agree that the 12 percent goal for protection recommended in the Brundtland Report in 1987 was politically rather than scientifically-based, and calculate that an average of 50 percent is more accurate ecologically.[59] Some experts also acknowledge that not all of this habitat need fall under the strictest protection. We therefore advocate that British Columbia cement the gains already made in the *Protected Areas Strategy* and move forward in a more comprehensive way by: 1) continuing to strive for a protected areas system that truly conserves ecosystem integrity regardless of the actual percentage of the landbase, and 2) enabling the application of protected areas legislation to designated crown lands adjacent to a protected area that are critical to maintaining connectivity and ecological integrity. In a practical sense, intensive recreational tourism development might be allowed on adjacent lands while more environmentally damaging development such as a large scale mining project might not. The test in each case would be whether the proposed development would compromise ecological integrity and connectivity.

Some jurisdictions outside Canada have gone so far as to include a "buffer zone" as part of the protected area in the law designating and describing its boundaries. The town of Pincher Creek, outside a Canadian national park, passed a by-law in the late 1970s establishing a Park Vicinity Protection Zone to maintain the surrounding ranches in a way that enhanced the park. Conservation easements afford another means of managing adjacent lands in ways that support the integrity of the protected area. Connectivity cannot necessarily be legislated, but a goal of a province-wide protected areas system should be to create a network of reserves, with periodic review by conservation biologists to ensure that the network does foster ecological viability at the species and ecosystem levels.

Another important part of connectivity is ensuring that marine and terrestrial systems are linked through such mechanisms as land/sea protected areas. This applies to freshwater systems and their contiguous land area as well. It is also important to keep an eye on creative ways to protect whole communities of organisms. For example, a moving salmon protected area may be the best way to protect a threatened salmon population. As mentioned earlier in this paper, it may also make sense to think in terms of temporal as well as spatial scales when designing a protected areas system. Ecosystems are dynamic – the one constant over time in natural systems is change – and a protected areas system should be designed to embrace and adapt to change, and to allow natural evolutionary processes to occur.

Many of the reforms outside of legislation offered as solutions to the two other critical issues that follow also contribute to ensuring the protection of ecological integrity. One, however, bears mention here since it is so fundamental to the health of the protected areas network – the sometimes overlooked fiscal component. It is clear that the protected areas system as a whole requires more resources than it is currently allocated. BC Parks has undertaken an aggressive project to develop a business plan for the agency that will allow it to maintain its conservation and financial bottom-lines. For the past five years, the Parks branch has been out-sourcing more and more park services. This may be an effective way to manage costs, but it should not be done at the expense of ecological integrity of the parks or of public accessibility – fees for park use should not become so high as to be out of the reach of British Columbians. Corporate sponsorship of parks should also be approached very cautiously, if at all. Without strong safeguards, this could be an invitation for commercialization and inappropriate development.

BC Parks does have some other, largely untapped potential revenue sources. The permit fees for commercial recreational services do not even cover BC Parks' issuance costs. It would be worthwhile for the Ministry to look into the feasibility of collecting a percentage of the gross revenues of these commercial recreational service providers. Forest Renewal BC (FRBC) funds have been available to the ministry, but not for routine maintenance or conservation activities. A greater portion should be used for these purposes, and the government should explore other options for creating a dedicated fund to support protected areas. (The FRBC fund should only be viewed as a short-term solution, however, since it has been mired in political controversy.) Other jurisdictions around the world have used mining fees, construction taxes, and a tax on quarried rock and gravel to support protected areas, and a bill pending in the United States Legislature may allow taxpayers to direct

[59] Sanjayan and Soulé. *Moving Beyond Brundtland* (1997): 10.

a portion of their tax refund to the National Park Service. Since such a high percentage of park visitors come from outside the province, a percentage of tourism related taxes and fees could also legitimately be used to support parks and protected areas.

[c] Security of Protection

Two major goals of protected areas advocates have been to set aside as many areas as possible and to give them the maximum security of protection. Protected areas, except as we will explain below, can generally only be undone by the same procedure through which they were established. Consequently, one of the most effective ways to provide security of protection to protected areas under the current legislative regime is to classify them as Class A parks under Schedule D of the *Park Act* (which was introduced in the *Park Amendment Act, 1995*). Parks listed in Schedule D have two advantages over certain other protected areas. Unlike protected areas that are established by government policy, parks that are listed along with their boundaries in schedules to the *Park Act* can only be un-designated as parks or have their boundaries amended by an act of the Legislature. Unlike all other protected areas, Schedule D parks are explicitly protected from industrial development. However, even the security of protection enjoyed by Schedule D parks could be withdrawn by future legislation.

The 1995 amendment to the *Park Act* prohibits logging, mining, and hydroelectric development in the 106 new parks created at that time. This legislative prohibition should be expanded to preclude all activities with potentially significant adverse environmental impacts including logging, mining, hydroelectric development, as well as oil and gas development and high-impact tourism in protected areas. This expanded prohibition should be extended to all protected areas including previously established parks and wilderness areas under the *Forest Act*. Another way to guard against activities that would compromise the ecological integrity of protected areas is to require an environmental impact assessment for all activities except First Nations' traditional ones. BC Parks has already taken some initiative in this regard, and in August of 1996 released a draft of "BC Parks Environmental Assessment Process" and "Guidelines for Review of Environmental Impact Assessment."

Future legislation could also require that all protected areas be designated through schedules to the *Park Act* or its successor. It would be particularly helpful if the legislation explicitly provided for protected areas to be established either by amendment of the statute or by order-in-council. In either case, the protected area in question and its boundaries should be set out in a schedule to the statute. The statute should also explicitly provide that the schedule listing the protected areas and their boundaries may only be amended by the Legislature (even where a protected area was established by order-in-council). It is important to appreciate that legislative reform which favours security of protection could hinder the government's ability to react swiftly to protected areas issues. For this reason, we are proposing a mechanism to allow the government to retain flexibility at least over the short term in order to work out the details, such as boundaries or the specifics of a joint management arrangement, after it has made a preliminary decision to set aside an area as protected.

The utmost security of protection is attained if a protected area is designated in a treaty or land claims agreement which is protected under section 35 of the *Constitution Act, 1982*. Such agreements are said to be "constitutionally entrenched." However, it is unlikely that an agreement between the British Columbia government and a First Nation alone could ever be section 35-protected. This protection may only be achievable if Canada is also a party to the agreement.

It is expected that many of the treaties reached in British Columbia will contain provisions on protected areas setting out who owns and has jurisdiction over the areas, their boundaries, their management and the exercise of aboriginal rights within them. In the meantime, any agreements signed between British Columbia and First Nations respecting protected areas may form the basis for agreements which eventually become part of these First Nations' treaties. If the provisions regarding a protected area are contained in treaties, it will be very difficult for future federal, provincial or First Nation governments to unilaterally rescind the arrangement since they will be constitutionally protected.

There are, as alluded to earlier on, several non-legislative ways to establish protected areas including memoranda of understanding (MOUs) and legally binding agreements. The least protection is afforded if an area is established merely by a policy statement of government or through a memorandum of understanding. An MOU is ordinarily nothing more than a shared statement of policy between two governments. For this reason, MOUs and government policy are not generally legally binding, although they can be. In some cases, First Nations prefer this less "secure" approach to one which might require a First Nation to endorse crown ownership of land within its traditional territory which it views as its own, not as the crown's. The advantage of a non-binding MOU is that it can allow two governments to agree to a joint management approach without foreclosing any legal options for either government in the future.

A higher degree of protection against unilateral

Tla-o-qui-aht people paddle traditional dugout canoe, Clayoquot Sound. PHOTO: ADRIAN DORST

changes to a protected area designation is provided by a legally binding agreement. Because an agreement can be broken, this will not mean that the designation can never be changed. But, if one party unilaterally breaks the agreement, they will have to suffer legal and political consequences.

In summary, the greatest security of protection is available through inclusion of a protected area in a treaty. Legislation generally provides the next highest level of security. However, a legally binding agreement may, in some cases, offer greater protection than legislation as it may provide one party with legal recourse if the other party breaches the agreement. Finally, policy statements and MOUs which are usually non-binding offer the least protection from a legal perspective, although they may incorporate political commitments which the government is not inclined to break.

[D] STEWARDSHIP

[i] Management Systems

Once the role of protected areas is clearly defined through strong protected areas legislation and policy, effective management systems should flow from these guiding objectives. Although legislation has dealt with certain aspects of protected areas management in the past (permitting procedures, zoning and classification, for example), it has not outlined the management planning processes which lead to effective management systems. For this reason we recommend that B.C.'s protected areas legislation include a clause stipulating that management plans be developed for each area within specific timelines and subject to mandatory public consultation. The objectives in the plans should be based on research and ongoing monitoring to ensure that they are scientifically sound and stand the test of time.

Management systems for protected areas in British Columbia must respond to multiple ecological, cultural and recreational values. Important management questions centre around how legitimate user groups can be satisfied while preserving the ecological and cultural integrity of the area. Protected areas classification and zoning is one means for achieving this. However, the current classification and zoning system in the *Park Act* needs revision. The classification system in the *Protected Areas Strategy* improves on that in the *Park Act*, but the treatment of First Nations and cultural values is still weak. The classification system can be differ-

ent from, but ought to be compatible with, the internationally respected IUCN system and the federal system.[60]

Zoning is increasingly considered an essential management tool as it allows for the fine tuning of regulations to meet the particular and increasingly complex requirements of the various types of landscapes included in protected areas. Used in conjunction with classification, it affords greater opportunities and flexibility in achieving conservation goals.[61] Zoning has long been the tool of choice among protected areas managers for conservation and planning purposes. It is a system that is designed to allocate lands within a protected areas system, recognizing that all resources and habitats are not alike.[62] Protected areas no longer appear as "monolithic entities where all land [is] subject to the same prohibitions or restrictions, but rather as mosaics of individual smaller protected areas..." each with a different management and legal regime.[63] For example, zoning inside a single park might range from strict preservation, where no human activities are allowed, to a recreation site that permits overnight camping.

Thus far zoning has not been used very creatively, and in many cases has imposed a rigid system over natural systems that are inherently dynamic. In envisioning new forms of zoning, we can be much more innovative, tying zoning to natural contours of the landscape rather than linear boundaries, and thinking about temporal as well as spatial zones to mimic natural seasons and cycles. Rather than legislating specific zones, the IUCN recommends that protected areas legislation grant the power to zone an area and to determine in each case whether the area should be zoned, and if so what should be the function of each zone and the rules applied therein. Here again, the maintenance of ecological integrity should be the highest priority when considering park zoning and visitor use in a management plan. There are emerging examples of different, more innovative zoning systems from around the world that may hold lessons for British Columbia. The Annapurna Conservation Area in Nepal has five zones that reflect current land use and resource management patterns as well as tourism development planning. One of Italy's marine parks includes a "strict nature reserve," a "general reserve" and a "partial reserve." These are relatively new approaches so it is still too early to judge their success, but they bear watching.[64]

Another important focus of an effective management system for British Columbia's protected areas is going to have to be using limited resources much more strategically, particularly to encourage support from other sources. The rapid increase in the size and number of protected areas, the calls for greater public involvement, shrinking government staff and budgets, and increasing recognition of First Nations' rights have led those involved in protected areas management to consider alternatives to traditional top-down management. New arrangements in protected areas could include co-management regimes with First Nations or stewardship and restoration agreements with municipalities, local communities or ENGOs. These agreements can help to pool public and private resources for stewardship, and to foster greater public support for protected areas.

A number of groups are currently working to develop such initiatives. Locally-based management arrangements such as park stewardship agreements are developing "in response to a growing recognition of changing demands both on the parks system and on those responsible for the management of these areas."[65] The Canadian Parks and Wilderness Society has recently initiated a Park Stewardship Program to facilitate local stewardship of protected areas. Through a series of regional workshops, the first of which was held in April of 1997, CPAWS is assessing local needs and supporting pilot programs to foster community involvement in planning, management and monitoring of specific parks around the province. CPAWS will provide capacity building assistance to these local groups. The Stewardship Program is being undertaken in conjunction with BC Parks and other local and provincial ENGOs, and is designed to encourage new public/private partnerships for park stewardship. While public/private partnerships should be encouraged, the government should retain primary responsibility for providing funding. While the Haisla Nation has been very successful in taking over management functions, it has become a victim of its own success and contributes much more to the stewardship of the Kitlope than the province.

[60] Pamela Wright, Presentation to Provincial Organizations Public Focus Group (1996)

[61] Wright (1996).

[62] Wright (1996).

[63] de Klemm and Shine, *Biological Diversity Conservation and the Law* (1993).

[64] For more information about the Annapurna Conservation Area see Stevens, *Conservation Through Cultural Survival* (1997). For a discussion of zoning in Italy's marine parks and other protected areas around the world see de Klemm and Shine, *Biological Diversity Conservation and the Law* (1993).

[65] Dovetail Consulting, "Park Stewardship Program Draft Proposal for Discussion" (November 14, 1995): 1.

The provincial government has launched an initiative called "Securing the Legacy" or the BC Parks Legacy Project. A program within this initiative, "Project Foresight," has been organized to establish a Management Planning Process for protected areas that reflects the need to create high-quality plans for a large number of areas in a reasonable time frame. The objectives of this process are to create a system of protected areas that reflects the protected area management principles, and to develop a collaborative management planning process that will establish a management planning policy and plans for protected areas. As part of this initiative, the Parks branch has convened an interagency team to develop mechanisms for better cross-jurisdictional coordination of protected areas, and more recently, announced the formation of a panel to facilitate public consultation throughout the province. The panel will be soliciting "innovative ideas for improving the management of our parks."[66]

[ii] Public Participation and Accountability

We are proposing several legislative changes to promote more public participation in park management and greater accountability to the public. Joint management boards and local community councils should be established wherever requested. This is not uncommon in many other parts of the world. In Spain, for example, authorities appoint a management board for each park composed of representatives of the government, local authorities, scientific institutions, local interests and conservation NGOs. The functions of the board are to oversee compliance with the park regulations, promote and implement management measures and give advice on the management plan and work program. The boards play an integral role in park management since their recommendations and advice are required by law before many decisions can be taken, including the adoption of the management plan.[67]

At the provincial level, a protected areas council could serve as a public advisory committee to the Ministry of Environment, Lands and Parks. The council, through its oversight responsibilities and by publishing annual reports and a more detailed and strategic tri-annual "State of British Columbia Protected Areas" report, would assure accountability and service to the public as BC Parks loses funding and personnel.

Outside legislative reform, the stewardship agreements mentioned above offer the best mechanisms for the public to become more involved, and thus more invested, in parks and protected areas.

[66] Ministry of Environment, Lands and Parks, "McGregor Announces BC's Parks Legacy Project" (News Release, July 31, 1997).

[67] de Klemm and Shine, *Biological Diversity Conservation and the Law* (1993).

IV. Specific Recommendations for Legislative Reform

Effective legislation, although only one part of what must be an integrated approach to developing and managing a comprehensive protected areas system, is nevertheless a critical foundation of such a system. In May of 1992, the British Columbia government made a commitment, in its document *Towards a Protected Areas Strategy*, to review and amend existing provincial protected areas legislation. In June of 1993, A *Protected Areas Strategy for British Columbia* was released outlining eight principles for legislative reform which can be summarized as follows:

- formulate a clear statement of objectives
- establish an integrated set of protected area designations to provide the necessary flexibility for protecting diverse values
- recognize a wide spectrum of acceptable uses and benefits that flow from protected area designation
- ensure compatible management of adjacent areas
- build in accountability to the public to ensure that both designation and management are in the public interest and are undertaken as a trust for future generations
- give specific consideration to the rights and entitlement of aboriginal peoples
- recognize pre-existing tenures and design methods to manage them within the objectives of the legislation as a transitional step or as a non-conforming use, or to compensate them in a fair manner
- share responsibility for protecting natural, cultural heritage and recreation resources by involving a number of agencies and sectors.

We are supportive of the overall thrust of the government's *Protected Areas Strategy* but wish to see the relevant legislation overhauled to better reflect these principles as soon as practically and politically feasible. Legislative language must be revised to respond to the multiple values of large protected areas, which include ecological, cultural, spiritual, research and recreational values. Legislative reform can be achieved in two ways: through amendments to or a wholesale revision of the *Park Act*, or by developing new legislation that embraces the entire range of contemporary expectations of protected areas, and how they should be managed. Comprehensive legislation creating a "family" of protected areas and incorporating all categories of designation under the same statute and within a single ministry would go a long way towards resolving many of the problems described in the earlier section of this report. Protected areas legislation could also link the protected areas system to goals for overall land-use planning and decision-making, and provide critical connection between protected areas and the larger landscape.[68] The overall goal of legislation should be to create a coherent and secure protected areas system with flexibility at the local or individual area level.

Regardless of the approach, there are a number of substantive provisions that we believe will build on the principles of the *Protected Areas Strategy* and help to address the four critical issues outlined above.

We propose that new protected areas legislation incorporate the following substantive elements:

[68] For example, protected areas legislation could be drafted in light of an overarching Sustainability Act, such as the one proposed by CORE. [Commission on Resources and the Environment, *A Sustainability Act for British Columbia* (The Provincial Land Use Strategy, Volume 1, November 1994).]

Seven Sisters, Proposed Protected Area.

[A] Clear Statement of Purpose and Goals

The new protected areas legislation must be unambiguous as to its principal purpose and goals. It should therefore include provisions that address the following matters:

- the overarching goal of protected areas – to promote and maintain ecological integrity, including the conservation of biodiversity
- subject to the overarching goal, the recognition (where appropriate) of other goals such as protecting cultural heritage including spiritual sites, scientific research, and providing for appropriate recreation
- the conferring of a public trust obligation on the provincial government by referring to the protected areas system as creating a legacy and natural endowment for future generations.

[B] Protected Areas Council

A Protected Areas Council should be established to strengthen the link between the public and large protected areas that are intended to benefit the public. The Protected Areas Council would:

- have a significant decision-making and advisory role
- be made up of ten members: three nominated by the British Columbia government, three nominated by British Columbia First Nations, three nominated by non-governmental conservation organizations and a chair who is selected by all nine council members and appointed by order-in-council
- review proposals for the establishment of new protected areas and make recommendations to the Minister
- be required to consult with joint management boards, First Nations and local community councils on issues that affect them
- act as an ombudsman for protected areas and a mediator on issues where joint management boards are unable to reach consensus
- be responsible for providing annual reports, and a more comprehensive "State of British Columbia Protected Areas" report every three years.

[C] Joint Decision-Making Management Board for Individual Protected Areas

The new protected areas legislation should allow a joint First Nation/British Columbia decision-making management board to be established, where requested by a First Nation, to develop and implement a management plan for a protected area, make decisions on permits, and oversee the implementation of the management plan and compliance. These boards should be funded, at least in part, by the provincial government.

The joint management boards should make decisions on the granting of permits. Where representatives of British Columbia and a First Nation do not agree, a permit should not be issued.

[D] Local Community Council for Individual Protected Areas

The legislation should allow for the establishment of a local community council made up of local community representatives, where requested by a local community, to advise the joint management board or, if there is no joint management board, the protected area managers. This council should be funded, at least in part, by the provincial government.

[E] Recognition of Aboriginal Rights and Title and the Government-to-Government Relationship

The new protected areas legislation should depart from other protected areas statutes by acknowledging that aboriginal rights are recognized and affirmed under section 35(1) of the *Constitution Act, 1982*. It should also recognize the government-to-government relationship between First Nations and the provincial government.

[F] PROTECTED AREA RESERVE DESIGNATION AND PRELIMINARY DESIGNATION

The new legislation should provide a mechanism to enable a designation similar to a national park reserve[69] in order to protect the land while serving notice to the public that one or more First Nations assert an interest in the land, and that the final ownership and status of the land may only be resolved through the negotiation of a treaty or by the courts.

In order to be able to set aside a parcel of land rapidly, there should be a provision that allows land to be set aside on a preliminary basis pending a final decision with respect to its exact boundaries and how it will be protected and managed.

[G] MANAGEMENT PLANS

The new legislation would stipulate that a management plan has to be developed for each area with specific timelines and a requirement for public input.

The management plan should divide a protected area into different management zones using scientific research, traditional knowledge, and monitoring to provide the ecological and cultural information needed to determine proper zoning.

[H] PROHIBITED ACTIVITIES

The legislation should explicitly prohibit activities with a potentially significant adverse environmental impact, including mining, hydroelectric development, oil and gas development, logging and high impact tourism in protected areas.

[I] ADJACENT LANDS

The legislation should allow for the designation of an area that is adjacent to a protected area as "adjacent lands." These lands would be treated differently than protected areas, but would be subject to certain provisions of the *Protected Areas Act*. For example, the management plan for a protected area might be extended to the adjacent lands and the joint management board overseeing the protected area would have responsibility for the adjacent lands as well. Adjacent lands would not be subject to the outright prohibition on industrial development. However, the management plan would only allow development which is consistent with the goal of maintaining connectivity and ecological integrity.

[J] ENVIRONMENTAL ASSESSMENT

The new legislation would require that all proposed activities, with the exception of the exercise of aboriginal rights, be subject to an environmental assessment.

[K] COMPLIANCE MECHANISMS

The legislation should create incentives for compliance. The legislation must also provide for the enforcement of the legislation and permits through monitoring, fines and sentences.

[69] Under section 8.5 of the *National Parks Act*, the Governor in Council is authorized to set aside the Gwaii Haanas Archipelago as a reserve for a National Park. This allows Parks Canada to manage the area jointly with the Council of the Haida Nation and to receive Parks Canada funding for their operations. By designating the area as a park reserve rather than as a park, effective notice is given to the public that the Haida have an unresolved dispute with the Government of Canada.

V. Conclusion and Summary of Recommendations

British Columbia has a unique opportunity to create a protected areas system that is much more than the sum of its parks. The groundwork has already been laid by the *Protected Areas Strategy*. It is time now to solidify the progress made thus far, and rebuild a legislative framework that recognizes and addresses First Nations' rights and interests, promotes ecological integrity as the paramount goal of a protected areas system, balances the goal of security of protection with the need for flexibility, and fosters stewardship on the part of government and the public.

A protected areas system that also maintains vital links between people and places must go beyond legislation. Joint stewardship arrangements should be encouraged and supported wherever possible and a Protected Areas Council should be created to provide greater accountability and public oversight. More importantly, several years have gone by since a few First Nations and the B.C. government signed some of the first joint management agreements. It is time to begin a process of evaluation to ensure that these arrangements are living up to their objectives and the expectations of both First Nations and the province. Nothing would be more helpful than examples of successful joint stewardship on the ground.

Summary of Recommendations

We address the following recommendations primarily to the provincial government, but also to First Nations, and the many individuals and groups who play a role in the policy-making process.

First Recommendation

Cement the gains already made in the *Protected Areas Strategy* and move forward in a more comprehensive way by:

a) Continuing to strive for an expanded protected areas system that conserves ecosystem integrity and bases the percentage of the landbase that is protected on scientific criteria.
b) Applying protected areas legislation to designated crown lands that are adjacent to a protected area and critical to maintaining connectivity and ecological integrity.

Second Recommendation

Amend policy and legislation to meaningfully respect First Nations' rights and interests by:

a) Enacting a legislative provision that enables government to enter into joint management agreements with First Nations, acknowledges that aboriginal rights are constitutionally protected, designates protected area reserves, and recognizes a government-to-government relationship.
b) Establishing government-to-government negotiating tables to develop framework principles for joint management agreements.
c) Developing successful working examples of joint stewardship on the ground.

Third Recommendation

Make it clear in protected areas legislation that ecological integrity, including the conservation of biological diversity, supersedes recreational use and enjoyment as the primary goal of protected areas in British Columbia by:

a) Enacting a legislative provision stating that the overarching goal of protected areas is to promote and

maintain ecological integrity.

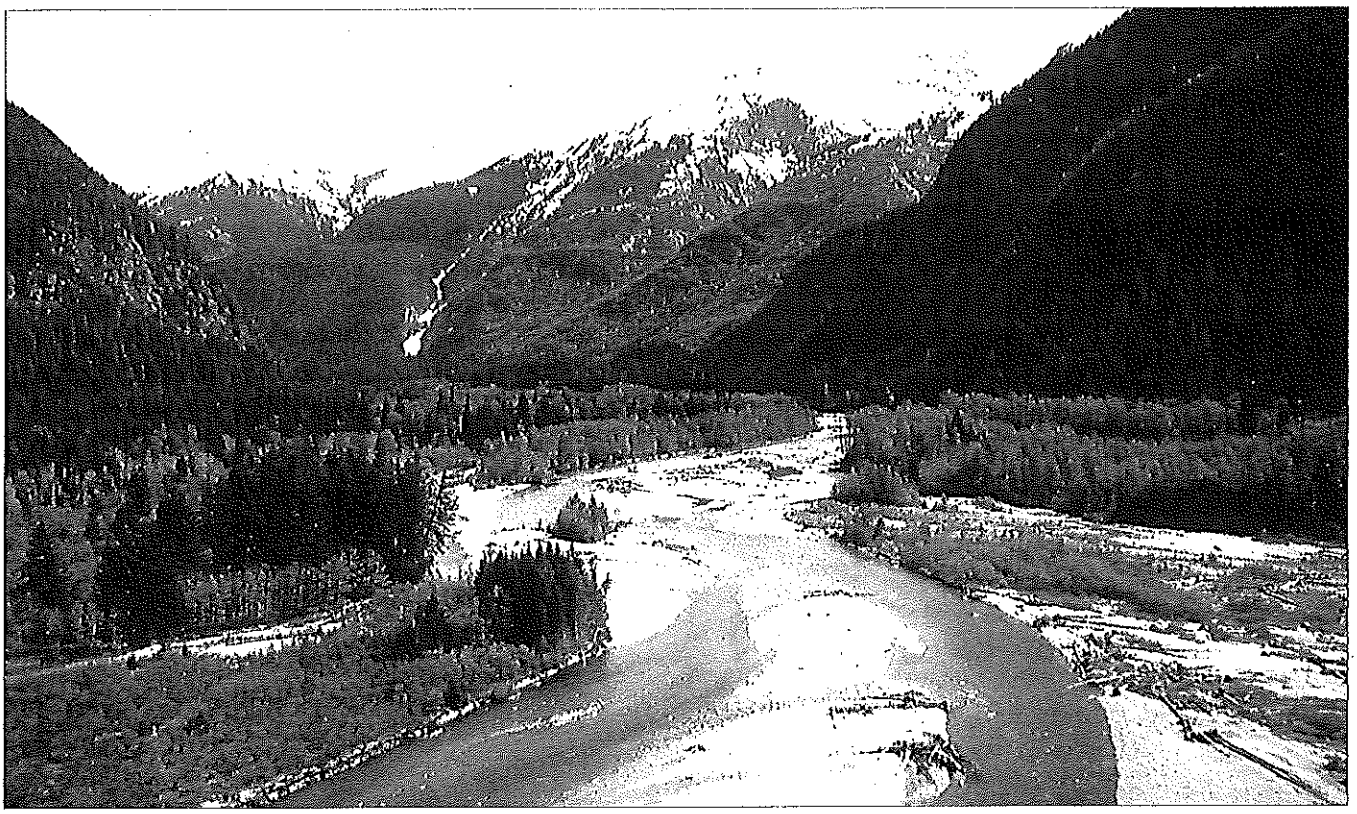
b) Expanding the list of prohibited activities to cover those activities that have a potentially significant adverse environmental impact such as mining, hydroelectric development, oil and gas development, logging and high-impact tourism.
c) Extending this expanded prohibition to protected areas established prior to the 1995 amendment to the *Park Act*.

Fourth Recommendation

Devise creative ways to encourage stewardship of B.C.'s protected areas system on the part of the government and the public by:

a) Establishing a Protected Areas Council to serve as a public advisory board to the Ministry of Environment, Lands and Parks and to ensure greater public accountability.
b) Creating joint management boards and local community councils wherever requested by the involved parties.
c) Allowing the Minister of Environment, Lands and Parks to enter into innovative joint stewardship agreements with First Nations, local communities, environmental non-governmental organizations or municipalities.
d) Exploring new funding mechanisms for BC Parks such as collecting a percentage of the gross revenues of commercial recreational service providers, making a greater portion of Forest Renewal BC funds available for routine maintenance and conservation activities or creating a dedicated fund for protected areas.
e) Enacting a legislative provision stipulating that management plans be developed for each protected area within specific timelines and subject to mandatory consultation. The objectives in the plans should be based on research and ongoing monitoring to ensure that they are scientifically sound and stand the test of time.

By implementing these key recommendations, British Columbians will enter the next century with one of the world's best designed and implemented protected areas systems. We hope that this paper will contribute to efforts to improve British Columbia's protected areas system. It touches on the key components of any comprehensive attempt to protect ecological integrity in a region as productive and diverse as British Columbia. Now is the time to ensure that this rich natural endowment is left to future generations of British Columbians.



Kawesas Valley, proposed for protected status by the Haisla Nation and Ecotrust Canada. PHOTO: IAN GILL

Appendix I
PROPOSED PROTECTED AREAS ACT

The following proposed *Protected Areas Act* combines the substantive elements mentioned in section IV. It is not intended to thoroughly address all the components of a statute. Instead, it provides a very general conceptual framework and shows what a comprehensive protected areas act might look like. Wording in italics is intended to explain the provision.

PROTECTED AREAS ACT

Interpretation

1. In this Act, "protected area" includes a preliminary protected area designated under section 5, a protected area reserve designated under section 6 and a permanent protected area designated under section 7, but does not include adjacent lands designated under section 15.

Purpose

2. The purpose of this Act is to establish a comprehensive framework for designating and managing protected areas and certain lands adjacent to protected areas.

Goals for Protected Areas

3. (1) The primary goal for all protected areas is to maintain and promote ecological integrity, including the conservation of biodiversity.
   (2) Subject to the overriding goal of ecological integrity, other goals for protected areas are to protect cultural heritage including spiritual sites, promote scientific research and provide for appropriate recreation.
   (3) Protected areas are established as a public trust to create a legacy for future generations. As such, they shall be maintained and made use of so as to leave them unimpaired for future generations.

Delegation, sharing and transfer of Minister's powers

4. The Minister may delegate or otherwise transfer or share his/her powers and responsibilities.

Preliminary Designation of Protected Area

5. The Minister may, by order, designate a parcel of crown land as a protected area for a preliminary period specified by the Minister, but not to exceed twelve months, subject to section 11. This preliminary protected designation shall expire after the specified period or sooner if the land has been designated by order-in-council or by act of the Legislature as a permanent protected area or protected area reserve.

Designation of Protected Area Reserve

6. The Minister may, by order, designate a parcel of crown land as a protected area reserve. At a later date, a protected area reserve may, by order-in-council or by act of the Legislature, be designated as a permanent protected area or transferred to a First Nation. An area which was previously designated as a park may also be re-designated as a protected area reserve.

   Designating protected area reserves would allow the area to be protected, but would also serve notice to

the general public that a First Nation has an interest in the land and that the final ownership and designation of the land may be subject to the outcome of treaty negotiations.

Permanent Designation of Protected Area

7. (1) The Lieutenant-Governor in Council may designate a parcel of crown land as a permanent protected area, including a parcel that has previously been denied such designation.

The Act could allow new protected areas to be added as schedules to the Act. Although the intention of designating an area as permanently protected would be reflected in the language, a future Legislature could amend this statute and undo a designation.

(2) The Lieutenant-Governor in Council may, by order, add lands to any protected area.

(3) Subject to subsection (2), the boundaries of a permanent protected area may only be amended by an act of the Legislature.

Existing Protected Areas

8. The areas formerly protected in schedules to the *Park Act* or other legislation are named and described in Schedule A to this Act. Schedule B lists the protected areas which were previously designated by order-in-council. The protected areas set out in Schedules A and B may only be amended or deleted by a further act of the Legislature.

No Derogation of Aboriginal or Treaty Rights

9. (1) The aboriginal and treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982* are hereby acknowledged. For greater certainty, no provision of this Act and no provision in an agreement with a First Nation entered into under section 18 abrogates or derogates from aboriginal or treaty rights.

The latter sentence is based on the wording in section 3.4 of the Heritage Conservation Act. *This language is intended to both recognize the existence of aboriginal and treaty rights and protect them.*

(2) The government-to-government relationship of First Nations and the provincial government is hereby recognized.

Preliminary Investigations

10. (1) During the period of preliminary designation of an area, the Minister shall decide whether or not to recommend to the Lieutenant-Governor in Council that the area be designated as a permanent protected area or a protected area reserve under this Act.

(2) For the purpose of making a decision under subsection (1), the Minister, in consultation with the Protected Areas Council, may carry out and complete investigations and studies, conduct public consultation with affected regions and communities, and negotiate with affected First Nations.

Extension of Time

11. On the recommendation of the Minister, the Lieutenant-Governor in Council may extend the time specified in this Act for the designation of a permanent protected area or a protected area reserve beyond the twelve month period specified in section 5.

Interim Protection

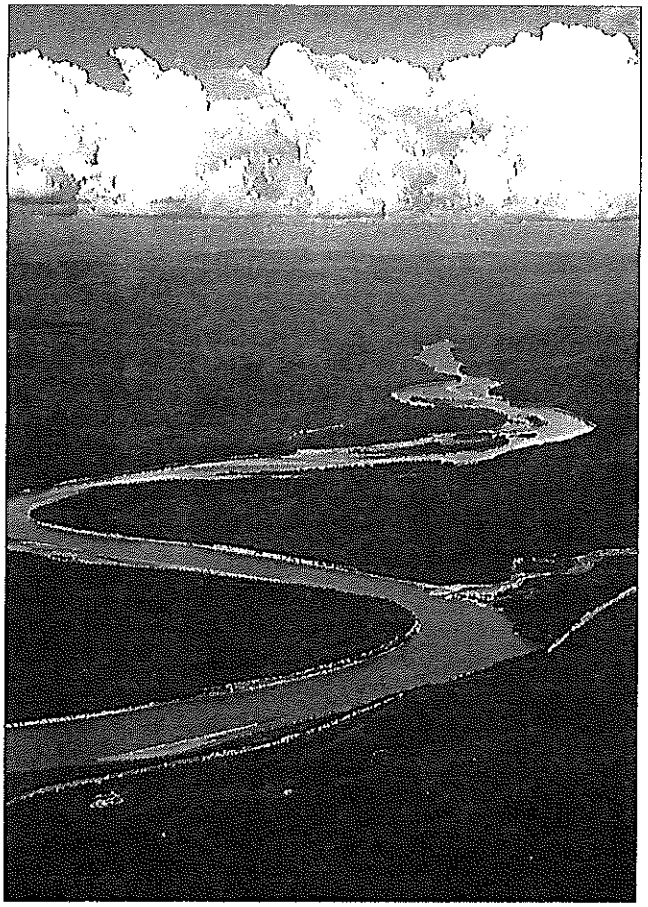
12. During the twelve month period of preliminary protection, or such longer period of preliminary protection as the Lieutenant-Governor in Council may specify under section 11, there shall be no entry on the lands for any purpose pursuant to: *the Land Act, Forest Act, Range Act, Water Act, Coal Act, Petroleum and Natural Gas Act, Mining Right of Way Act* and *Mineral Tenure Act*. As well, the area protected by a preliminary designation shall be shown to be a map reserve in the records of crown lands.

Classification of Permanent Protected Areas

13. Permanent protected areas shall be classified according to the categories of protection set out in the regulations under this Act. Until such regulations are made, permanent protected areas shall be classified in accordance with the categories of protection provided for in the statute or regulations under which they were originally designated.

Management of Permanent Protected Areas

14. Permanent protected areas shall be managed in accordance with goals and objectives established for each classification of permanent protected



Liard Protected Area. PHOTO: WAYNE SAWCHUK

areas and in accordance with the goals and objectives set out in agreements made pursuant to section 18.

Adjacent lands

15.(1) The Minister may, by order, designate a parcel of crown land which is located next to a protected area as "adjacent lands" for the same period that the protected area has been designated.

(2) Section 23 does not apply to adjacent lands.

(3) Activities which would otherwise be permitted on adjacent lands may be restricted by the management plan for the protected area and adjacent lands, where such activities are inconsistent with the goal of maintaining connectivity and ecological integrity.

While this means the blanket prohibition against industrial development in section 23 does not apply, development can nevertheless be significantly curtailed on adjacent lands if it is inconsistent with the goal of maintaining connectivity and ecological integrity.

Protected Areas Agency

16. The Minister of Environment, Lands and Parks shall establish a Protected Areas Agency to administer and carry out the purpose of this Act and the goals of protected areas. Unless otherwise designated by order-in-council, this agency shall be the Parks Branch of the Ministry of Environment, Lands and Parks.

Protected Areas Council

17.(1) A Protected Areas Council is hereby established comprised of ten members, three of whom shall be nominees of the government of British Columbia, three of whom shall be nominees of First Nations governments, three of whom shall be nominees of non-government environmental organizations, and one member selected by the nine other members and appointed by order-in-council to be chair of the Council.

(2) Proposed designations of protected areas under sections 5, 6 and 7 of this Act shall be referred to the Protected Areas Council for the purpose of review and for recommendations to the Minister or to the Lieutenant-Governor in Council as to whether the proposed designation should be made.

(3) The functions of the Protected Areas Council are:

(a) to consult with joint management boards, First Nations and local community councils on issues that affect them;

(b) to receive complaints regarding issues related to protected areas and act as an ombudsman for protected areas;

(c) to oversee the Protected Areas Agency in the carrying out of its management duties by consulting with the Agency and giving it directions as required to ensure that the goals and objectives of this Act are being carried out; and

(d) to prepare an annual report to the Legislature and, every three years, provide a more comprehensive report on the state of protected areas, and progress towards establishing new protected areas and meeting the goals of protected areas.

(4) Directives of the Protected Areas Agency pursuant to subsection (3)(c) are binding on the Agency, subject only to further directions given by the Minister.

(5) To carry out its management or other decision-making duties, the chair of the Council may establish panels of no less than three members of the Council and delegate to those panels the

decision-making responsibilities of the Council in particular cases. These panels shall, so far as possible, be representative of the composition of the Council.

Agreements

18.(1) The Minister may, with the approval of the Lieutenant-Governor in Council, enter into agreements in furtherance of the goals and objectives of this Act with First Nations, other governments, local communities, or non-government organizations that are legally binding on the parties with respect to permanent protected areas or protected area reserves.

(2) Joint management boards may be established under agreements with First Nations pursuant to this section. These joint management boards may:

(a) develop and implement a management plan for the protected area and any designated adjacent lands;

(b) issue permits for proposed activities within the protected area and any designated adjacent lands where the representatives of both First Nations and the Protected Areas Agency agree that a permit should be issued; and

(c) oversee the implementation of the management plan and compliance.

(3) Where provisions of an agreement with a First Nation made pursuant to this Act conflict with the provisions of this Act, the agreement shall prevail to the extent of the inconsistency.

This provision would allow the government to negotiate agreements that contain provisions which are inconsistent with the Protected Areas Act. *In such cases, the agreement would be protected from challenge on the basis that it was inconsistent with the legislation. This provision could be used to allow the exercise of the aboriginal right to hunt in areas where hunting would be otherwise prohibited under the Act.*

(4) In cases considered appropriate by the Protected Areas Council, the Council shall act as a mediator to facilitate the making of such agreements or the resolution of any disputes under them.

Amendment of Permanent Protected Areas Classification

19. With the approval of the Protected Areas Council, the Minister may amend the classification of a permanent protected area.

Local community councils

20. Local community councils may be established by the Minister for the purpose of consulting with the Protected Areas Council, the Protected Areas Agency and with other individuals and governments with respect to matters of designation, classification and management of protected areas which affect such communities.

Public consultation

21. Members of the public and local community councils have the right to be consulted by the Protected Areas Council, the Protected Areas Agency and joint management boards on decisions respecting protected areas. Where such decisions may have a significant impact on a person's interests, that person has the right of public access to relevant information, notice, a fair hearing and reasons for decisions.

This language is adapted from CORE's recommendation on public consultation in A Sustainability Act for British Columbia *(November 1994).*

Management Plans

22.(1) The joint management board or, where there is no joint management board, the Protected Areas Agency, must complete a management plan within a prescribed time period after the protected area is designated under sections 6 or 7. The joint management board or the Protected Areas Agency, as the case may be, must consult with the public on a draft management plan prior to finalizing the management plan.

(2) Management plans may divide protected areas into different management zones using traditional knowledge, scientific research, and information gathered through the monitoring process.

(3) Management plans may also apply to land designated as adjacent lands under section 15.

Prohibited Activities

23. Activities with a potentially significant adverse environmental impact including mining, hydroelectric development, oil and gas development, logging and high-impact tourism are prohibited in protected areas.

Permits

24.(1) Decisions on the issuance of permits respecting a protected area shall be made by the joint

management board or, where there is no joint management board, by the Protected Areas Agency. Where the members of a joint management board do not agree as to whether to issue a permit, a permit shall not be issued.

(2) Aboriginal people do not require a permit under this Act to carry out their traditional activities in a protected area.

Environmental Assessment

25.(1) A joint management board or the Protected Areas Agency, as the case may be, may not issue a permit under section 24 until an environmental assessment of the proposed activity for which the permit is being sought has been conducted. Where an environmental assessment is not required under the *Environmental Assessment Act*, the joint management board or the Protected Areas Agency, as the case may be, shall conduct an environmental assessment of the proposed activity which conforms to the extent possible to the principles and procedures outlined in the *Environmental Assessment Act*.

(2) *The* British Columbia Environmental Assessment Act *requires that certain designated activites undergo an environmetal assessment prior to being approved.*

Monitoring

26. The Protected Areas Agency and any joint management board have the authority to conduct monitoring to ensure compliance with this Act and any permits issued under this Act.

Offences and Penalties

27. A person who contravenes any provision of this Act or regulations under this Act commits an offence and is liable to a fine of up to $1,000,000 or a term of imprisonment of not more than one year or both.

Funding

29. The British Columbia government shall have primary responsibility for providing the funding necessary to allow the Protected Areas Council, the Protected Areas Agency, the joint management boards and local community councils to perform their duties under this Act or an agreement pursuant to this Act.

Power to Make Regulations

30. The Lieutenant-Governor in Council has the power to make regulations in respect of the classification of protected areas, prohibited activities, activities that require permits, minimum requirements for protected area management plans, and minimum penalties for violation of the Act.

Appendix 2

First Nations and Protected Areas in British Columbia —Current Arrangements in Large Protected Areas

Protected Area Name	Type of Protection	Geographical Location
Clayoquot Sound	Certain areas designated Class A provincial parks by legislation	West Coast of Vancouver Island
Gwaii Haanas National Park Reserve & Heritage Site	National Park Reserve designated under National Parks Act	Gwaii Haanas/South Moresby Island, Haida Gwaii
Khutzeymateen Park aka Khutzeymateen/ K'tzim-a-deen Grizzly Sanctuary	Class A provincial park designated by legislation	North Coast BC
Ḥuchsduwachsdu Nuyem Jees/ Kitlope Heritage Conservancy	Designated by order-in-council under the Environment and Land Use Act	BC Central Coast
Stein Valley Nlaka'pamux Heritage Park	Class A provincial park designated by legislation	BC Interior
Tatshenshini-Alsek Park	Class A provincial park designated by legislation, World Heritage Site	Northwest BC
Ts'il?os Provincial Park	Class A provincial park designated by legislation	Chilcotin Region, Central BC

Area (ha)	First Nation	Agreement, Date
48,500	Tla-o-qui-aht First Nations, Ahousaht First Nation, Hesquiaht First Nation, Toquaht First Nation and Ucluelet First Nation	Interim Measures Agreement March 19, 1994, Extended 1997
147,000	Council of the Haida Nation	Gwaii Haanas Agreement January 30, 1993
44,902	Gitsi'is Tribe (Tsimshian)	Memorandum of Understanding August 17, 1994
317,291	Haisla Nation	Joint Management Agreement February 21, 1996, authorized by order-in-council under the Environment and Land Use Act
107,000	Lytton First Nation	Cooperative Management Agreement, sub agreements on Fish & Wildlife, Cultural Heritage, November 23, 1995
958,000	Champagne and Aishihik First Nations	Park Management Agreement April 29, 1996, authorized by order-in-council under the Environment and Land Use Act
233,240	Nemiah Valley Indian Band (Tsilhqot'in People of Xeni)	Memorandum of Understanding January 13, 1994

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Contributors

DAVID A. CARRUTHERS, Director of Information Systems for Ecotrust Canada, has a MS degree in resource management from the University of Edinburgh, where he was invited to research the habitat distribution of bighorn sheep in Wyoming. David has consulted in GIS and spatial analysis for Parks Canada, State of the Environment Reporting, American Wildlands, Ducks Unlimited and other public and private environmental organizations. He has complemented his practical work experience with teaching experience in GIS and statistics at the University of Edinburgh. His work with Ecotrust Canada includes having completed a detailed mapping analysis of the Clayoquot Sound scientific panel's forestry recommendations, published in *Seeing The Ocean Through The Trees* (1997), and the coordination and execution of highly successful geographical information systems training programs for First Nations in coastal B.C.

FIONA GRACE CHAMBERS is currently working on a Masters of Science in Environmental Change at Oxford University. She also holds a Masters degree in Environmental Design from the University of Calgary, and a BA in French and Environmental Studies from the University of Victoria. Fiona's work experience includes many activities from working for a camel trekking company in Australia, to being Assistant to the Chair of the Sierra Club of B.C. Fiona grew up in Pacific Rim National Park Reserve, just south of Nitinat Lake.

IAN GILL is the founding executive director of Ecotrust Canada. Prior to joining Ecotrust Canada, Ian was a writer-broadcaster with the Canadian Broadcasting Corporation, specializing in land-use, environment and resource issues. His television documentaries won numerous local and international awards. Ian also spent seven years as a senior reporter and editor with *The Vancouver Sun*. He is a fellow of Journalistes en Europe (1986-87), and contributes frequent articles and commentary to magazines, newspapers, television and radio programs. Ian is a director of the Clayoquot Biosphere Project, and the Nanakila Institute. He is a member of the advisory board of the *Cascadia Times* newspaper, and of the Forestry Advisory Council at the University of BC. Ian is also a vice-president of Ecotrust, based in Portland, Oregon. He is the author of *Hiking on the Edge: Canada's West Coast Trail,* and *Haida Gwaii: Journeys Through the Queen Charlotte Islands.*

ERIN KELLOGG was director of policy at Ecotrust from 1991 to 1997. She has a Masters degree from Yale's School of Forestry and Environmental Studies. She also earned her BA from Yale College in Russian and Eastern European Studies. Before moving to Portland, Oregon, she worked for a number of government and nonprofit organizations, focusing on environmental policy and sustainability. Erin coordinated Ecotrust's programs in public policy, where most of her work centred on finding ways to translate lessons learned at the community level into recommendations for policy reform. She co-chaired the board of The Food Alliance from 1995 to 1997 and has served on the board of the Prince William Sound Science Centre in Cordova, Alaska since 1995. Erin is now the director of operations for Sustainable Northwest in Portland, Oregon.

NANCY MORGAN is a Vancouver lawyer specializing in aboriginal, administrative and environmental law. Her practice is focused on advising First Nations and aboriginal organizations on matters related to the treaty process, aboriginal rights, environmental law and resource development. From 1988 until 1991, she

worked at the Vancouver law firm of Ferguson Gifford along with Dr. Thompson.

She obtained her law degree from the University of Windsor in 1987 and her B.A. in Political Science from the University of British Columbia in 1983. Between her degrees, she worked as a legislative intern in the British Columbia Legislature.

She has been a member of the Board of Directors of West Coast Environmental Law Association since 1992 and has served as Vice-President since 1996. From 1995 to 1997, she was Co-Chair of the Environment Section of the Canadian Bar Association – B.C. Branch.

DR. ANDREW R. THOMPSON was born in Winnipeg in 1925 where he first practised law after graduating from the University of Manitoba Law School. Subsequently, he received the degrees of Master of Law from the University of Toronto and Doctor of Juridical Science from Columbia University in New York.

In 1950, Dr. Thompson began a 20-year teaching career at the University of Alberta where he became a specialist in petroleum and natural gas law. In 1969, he accepted an appointment as Professor of Law at the University of British Columbia.

Dr. Thompson was a founding member of the Canadian Petroleum Law Foundation and an honorary director of the West Coast Environmental Law Association. He was a founder and past Chair of the Canadian Arctic Resources Committee. In 1988-89, he chaired the Special Committee of the Canadian Bar Association on Aboriginal Rights in Canada. In 1990 he received Environment Canada's Award for Outstanding Lifetime Contribution to the Environment.

On leave from UBC in 1973, he served as Chair of the British Columbia Energy Commission for four years and later as sole commissioner of the federal West Coast Oil Ports Inquiry. On his return to university duties in 1978, he was appointed Director of the Westwater Research Centre at UBC, a position he held until 1985. While he retains his association as adjunct professor at Simon Fraser University and with the University of British Columbia as Professor Emeritus, Dr. Thompson is now Associate Counsel with the Vancouver law firm Ferguson Gifford and chair of the firm's Native Law Group.

In his professional work, Dr. Thompson advises clients concerning native land claims and compliance with environmental laws and regulations. Currently, he is an adviser to the Council of Yukon First Nations in relation to their comprehensive land claim settlement. He has acted as counsel to the Rivers Defence Coalition in federal court litigation and before the special inquiry of the B.C. Public Utilities Commission examining the environmental, economic and social impacts of the Kemano Completion Project.

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Ecotrust Canada
MAIN OFFICE
Suite 420
1122 Mainland Street
Vancouver, BC
Canada V6B 5L1
Phone 604. 682.4141
Fax 604. 682.1944
e-mail info@ecotrustcan.org
www.ecotrustcan.org

COMMUNITY PROJECTS OFFICE
Ecotrust Canada
100 First Avenue East
Prince Rupert, BC
Canada V8J 1A6
Phone 250. 627.7798
Fax 250. 627.8493
e-mail katrinak@ecotrustcan.org

MAPPING OFFICE
Ecotrust Canada
2nd Floor, 1216 Broad Street
Victoria, BC
Canada V8W 2A5
Phone 250. 480.1854
Fax 250. 480.1375
e-mail dcarruthers@pacificcoast.net

Ecotrust
1200 NW Naito Parkway
Suite 470
Portland, OR
USA 97209
Tel: 503 227.6225
Fax: 503 222.1517
e-mail: info@ecotrust.org